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Environment, Land Use & Natural Resources ADVISORY ■

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Fourth Circuit to Address CERCLA's Intent to Dispose Standard

On October 30, the Fourth Circuit will hear oral argument in a closely-watched Superfund case, *Duke Energy Progress, Inc. v. Consolidation Coal Co.*[1] The appeal involves the "intent to dispose" standard for arranger liability that the Supreme Court set out in *Burlington Northern v. United States*.[2]

CERCLA Arranger Liability

Liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes any person who "arranges for" the disposal or treatment of a hazardous substance.[3] Five years ago, in *Burlington Northern*, the Supreme Court held that "an entity may qualify as an arranger . . . when it takes intentional steps to dispose of a hazardous substance."[4] In so holding, the Court established the endpoints of the arranger liability spectrum.

Liability, the Court said, would attach if "an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance." But liability would not attach if an entity sold "a new and useful product" that the purchaser later, unbeknownst to the seller, disposed of in a manner that resulted in contamination.[5]

Ward Transformer Site

This litigation involves cleanup costs for PCB impacts at the Ward Transformer Superfund Site ("Ward"), a former transformer sales and repair facility in North Carolina. Plaintiff Consolidation Coal Co. and third-party plaintiff PCS Phosphate are appealing the district court's dismissal of defendant Georgia Power on summary judgment grounds. [6]

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1 *Carolina Power & Light Co. v. Alcan Aluminum Corp.*, 921 F. Supp. 2d. 488 (E.D.N.C. 2013), *appeal docketed*, No. 13-1306 (4th Cir. May 10, 2013).

2 556 U.S. 599 (2009).

3 42 U.S.C. § 9607(a)(3).

4 *Burlington Northern*, 556 U.S. at 611.

5 *Id.* at 609–10.

6 The parties in agreed to use a test-case process "to streamline the litigation." *Carolina Power & Light Co. v. 3M Co.*, Nos. 5:08-CV-00460, 5:08-CV-00463, at *2 (E.D.N.C. Apr. 30, 2013). Georgia Power agreed to serve as the test case for the defendants that allegedly sold used transformers to Ward.

According to the parties' filings, Georgia Power sold over 100 used transformers to Ward in the early 1980s, which Ward repaired prior to reselling them to third parties. Not all of the transformers were drained prior to shipment to Ward, and some had PCB-containing oil. Therefore, the district court conducted a fact-intensive inquiry to determine Georgia Power's alleged intent for CERCLA liability purposes.

The district court held that specific intent to dispose of hazardous substances must be proven to meet the arranger liability standard contemplated by *Burlington Northern*. Applying that standard to Georgia Power's transactions, the plaintiffs argued that the fact that Ward had to repair the transformers prior their resale, including the removal of defective parts, constituted arrangement for disposal. The district court disagreed, holding that (1) the transformers were not leaking upon sale to Ward; (2) the transformers had marketable value, even if repairs were required; and (3) Georgia Power had no knowledge that Ward might spill any PCB-containing oils during the course of such repairs. The district court therefore concluded that Georgia Power could not be held liable as a CERCLA arranger as a matter of law.

The parties filed their respective briefs last spring, and the Fourth Circuit is expected to issue a decision by April 2015. If you have questions about the appeal or the Ward litigation generally, please contact Doug Arnold, Sarah Babcock or Geoff Rathgeber.

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