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PCBs

Two rulings by the Seventh Circuit place new limits on EPA's enforcement authority and CERCLA liability, attorneys Douglas S. Arnold, Jonathan E. Wells and Ronnie A. Gosselin say in this BNA Insight. The authors say *U. S. v. P.H. Glatfelter* (2014 BL 266978) confirms that CERCLA doesn't permit EPA to make an ''end-run around the legal requirements for permanent injunctive relief,'' and *NCR v. George A. Whiting Paper* (2014 BL 266977) provides ''persuasive precedent for PRPs who engaged in commercial transactions where disposal of a hazardous substance was not the 'intent' of the transaction.''

BNA Insight

The Seventh Circuit Addresses UAO Enforcement And CERCLA Arranger Liability in Fox River PCB Litigation



By Douglas S. Arnold, Jonathan E. Wells and Ronnie A. Gosselin

The Seventh Circuit recently addressed several contested CERCLA issues in a pair of decisions relating to the on-going cleanup of PCBs in Wisconsin's Lower Fox River.

These rulings include a question of first impression at the appellate level as to whether the U.S. EPA may seek permanent injunctive relief to enforce a unilateral administrative order (UAO).

The Seventh Circuit also addressed the ''intent to dispose'' standard necessary to establish a valid claim for arranger liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Both decisions place new limits on EPA's enforcement authority and CERCLA liability generally.

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PCB Releases Allegedly Spanned Two Decades

For nearly two decades, paper mills and coating facilities allegedly released PCBs into Wisconsin's Lower Fox River, impacting 39 miles of waterway. The source was a PCB-based emulsion produced by NCR Corporation and sold to Appleton Coated Paper Company and Combined Paper Mills, among others, for use in the production of carbonless copy paper. According to the government, PCBs from the carbonless copy paper produced with NCR's emulsion were released into the Lower Fox River in two stages: first during the production of the copy paper and then during the recycling of ''broke''—a paper production byproduct consisting of waste paper, scraps, and undersized paper rolls. Paper recyclers such as defendant Glatfelter used the broke to make additional paper, separating out the usable fibers from the coating during the recycling process. PCBs attached to the coating were allegedly discarded via wastewater that was discharged into the river.

In 1998, EPA listed a portion of the Lower Fox River as a Superfund Site. EPA divided the river into five operable units for purposes of remediation. Glatfelter and other PRPs took the lead on cleanup work for Operable Unit 1, and NCR took the lead on remediation of Operable Units 2 through 5. In 2007, EPA issued a UAO requiring certain PRPs, including NCR and Glatfelter, to implement a revised remedy for Operable Units 2 through 5. As a result of these changes, the estimated cost of the remedy has increased from $330 million in 2007 to $1.5 billion today.

In 2008, NCR filed suit seeking contribution from other PRPs. *Appleton Papers Inc. v. George A. Whiting Paper Co.*, No. 2:08-cv-00016 (E.D. Wis. 2008). The district court ultimately rejected NCR's claims. According to the court, NCR produced nearly all of the PCBs impacting the Lower Fox River. Moreover, the court concluded that, unlike the other PRPs, NCR knew or should have known about the potential impacts of PCBs. As a consequence, Glatfelter and the other named defendants were found to be responsible for zero percent of the sought-after costs.

United States v. P.H. Glatfelter and UAO Enforcement

In 2010, the government filed a complaint seeking to enforce the 2007 UAO against each of the UAO recipients. In 2012, NCR ceased performance of the work for Operable Units 2 through 5. In response, the district court granted the government's motion seeking a preliminary injunction against NCR to enforce the UAO, which the Seventh Circuit affirmed. *United States v. NCR Corp.*, 688 F.3d 833 (7th Cir. 2012). NCR subsequently resumed the UAO work, but the government nonetheless proceeded with seeking a permanent injunction. Following an 11-day bench trial in late 2012, the district court granted judgment in the government's favor and issued a permanent injunction against NCR, as well as Glatfelter, to complete all of the remaining UAO work.

On appeal, Glatfelter attacked the district court's final judgment on numerous grounds, particularly its reliance on CERCLA § 106(b). The traditional mechanism for UAO enforcement, CERCLA § 106(b), provides that a party who ''without sufficient cause, willfully violates, or fails or refuses to comply with [a UAO] may be subject to fines of up to [$37,500] per day.'' 40 C.F.R. § 19.4. Here, argued Glatfelter, the government had failed to provide evidence of non-compliance, which is required to trigger the CERCLA § 106(b) provision. Accordingly, Glatfelter contended that an injunction could only be issued under CERCLA § 106(a).

Section 106(a) authorizes a district court to ''grant such relief as the public interest and the equities of the case may require'' should there be ''an imminent and substantial endangerment'' to the environment. Alternatively, the district court can proceed under the traditional four-factor test for an injunction: (1) no adequate remedy at law; (2) irreparable harm; (3) a balance of harms in favor of an injunction; and (4) no harm to the public interest. According to Glatfelter, the equities required under both tests were not properly addressed by the district court. Glatfelter further argued that the injunction itself failed to meet the requirements of Rule 65(d)(1)(C) of the Federal Rules of Civil Procedure. This rule ''requires that every injunction 'describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.' '' Fed. R. Civ. P. 65(d)(1)(C).

Upon review, the Seventh Circuit ruled in Glatfelter's favor, holding, in essence, that a permanent injunction was inappropriate and unnecessary. *United States v. P.H. Glatfelter Co.*, 2014 BL 266978 (7th Cir. 2014). In so holding, the appeals court took care to distinguish its prior approval of the preliminary injunction compelling NCR to resume the UAO cleanup work. The Seventh Circuit clarified that preliminary injunctive relief may be appropriate to enforce a cleanup order under review, following a consideration of equitable principles. The court also observed that it may be appropriate for EPA to seek an injunction in an ''emergency situation'' where the agency does not have sufficient time to produce a record and issue an order.

Here, on the other hand, EPA *had* issued an order, as well as compiled an administrative record. In such instance, the Seventh Circuit explained that CERCLA § 106(b) provides the means by which EPA may pursue noncompliant parties, if needed. Under § 106(b), a court's review must be limited to EPA's selected remedy based on the administrative record, and the remedy must be affirmed unless found to be arbitrary and capricious. Equitable considerations play no part. Any attempt to obtain a permanent injunction to enforce such an order, concluded the court, would insert these considerations where they do not belong. Further, permanent injunctive relief in this context might, acknowl-

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edged the Seventh Circuit, run afoul of the ''reasonable detail'' requirement of Rule 65.

Finally, the Seventh Circuit emphasized that permanent injunctive relief is unnecessary given that EPA still has other potential recourse, including declaratory relief and civil penalties.

NCR v. George A. Whiting Paper and CERCLA Arranger Liability

While Glatfelter succeeded in overturning EPA's permanent injunction, it met with less success pursuing its CERCLA ''arranger'' claim against NCR in *NCR Corp. v. George A. Whiting Paper Co.*, 2014 BL 266977 (7th Cir. 2014).

Under CERCLA, a potentially responsible party includes any person who ''arranges for'' the disposal or treatment of a hazardous substance. 42 U.S.C. § 9607(a)(3). In this case, Appleton Coated sorted and sold its broke to Glatfelter and others. PCBs in the broke coating were then released during the recycling process into Operable Unit 1. According to Glatfelter, Appleton Coated acted as an arranger when it sold the broke to the recyclers. Because NCR is the successor-in-interest to Appleton Coated, NCR should, according to Glatfelter, be responsible for the cleanup costs of Operable Unit 1.

In *Burlington Northern,* the U.S. Supreme Court clarified the scope of arranger liability under CERCLA. 556 U.S. 599 (2009). Specifically, the Court held that defendants engaged in the sale of useful products must have an ''intent'' to dispose of hazardous substances. In explaining this intent, the Supreme Court provided two endpoints for liability and non-liability. At one end, the Court explained that liability 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.'' *Burlington Northern*, 556 U.S. at 610. At the other, the Court explained that 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. *Id.*

As noted by the Seventh Circuit in its application of the above standard to the present circumstances, ''intent'' for the purposes of arranger liability under CERCLA after *Burlington Northern* remains ''clear at the margins but murky in the middle.'' *Whiting*, slip op. at 39. As such, a ''fact-intensive inquiry'' is necessary to establish liability where particular circumstances do not fit neatly into the two endpoints established by the Supreme Court. In this case, the district court had ruled against Glatfelter at trial and determined that arranger liability did not attach to NCR. The district court emphasized that Appleton Coated expended significant resources to recapture any broke that could not be minimized in production. Even though the ultimate sale of the broke did not cover the costs of its production, the broke's sale was recorded as an asset on the company's balance sheet. Further, the broke—which is not inherently hazardous and is sometimes PCB-free—had value to the recycling mill purchasers, and there was no evidence that Appleton Coated knew specifically what was done with the broke following sale. *Whiting*, slip op. at 41. In consideration of all of these factors, the district court determined that arranger liability did not apply.

On appeal, Glatfelter attempted to counter the lower court's findings by arguing that Appleton Coated qualified as an arranger because it knew or should have known that the recycling mills would separate the PCBs from the purchased broke during processing and discharge them into the river. According to Glatfelter, Appleton Coated's ''intentional steps'' to get rid of the broke in the face of such knowledge—even if such knowledge was only general—warranted the attachment of liability.

The Seventh Circuit disagreed. In its ruling, the Seventh Circuit affirmed the lower court's findings and rejected Glatfelter's broad characterization of Appleton Coated's knowledge for purposes of establishing arranger liability. Glatfelter's asserted definition of arranger liability, opined the appellate panel, would potentially extend arranger liability even to a product's original producer, reaching far beyond the endpoints established by the Supreme Court in *Burlington Northern*. The Seventh Circuit instead focused its inquiry on Appleton Coated's actual intent. The panel noted that a party is ''more likely to be an arranger if it was simply trying to dispose of the materials, or if it was compelled to get rid of them.'' *Whiting*, slip op. at 43. In this case, Appleton was engaged in the sale of a useful product. That the sales price for the broke did not cover the costs of its production, or that the broke itself was not a *new* product, was irrelevant. *Whiting*, slip op. at 44. Also, the ultimate fate of the PCBs was out of Appleton Coated's hands. The Seventh Circuit concluded, therefore, that arranger liability did not attach.

In weighing the impact of the Seventh Circuit's analysis on future arranger liability cases under CERCLA, the Fourth Circuit's ruling in a pending arranger liability test case should be instructive. In *Consolidation Coal v. Georgia Power,* No. 13-1603 (referred to herein as the ''Ward Litigation''), which was heard in oral argument before the Fourth Circuit on Oct. 30, 2014, 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. According to party filings, Georgia Power sold over 100 used transformers to Ward in the early 1980s. Following purchase, Ward repaired or rebuilt the used transformers and sold them to third parties. Some of these transformers still contained PCB-containing oil upon sale to Ward.

On consideration of whether or not this sale of used transformers to Ward constituted the arrangement for disposal of the PCB-containing oil under CERCLA, the district court found in favor of Georgia Power. The court ruled that specific intent to dispose of hazardous substances must be proven to meet the arranger liability standard contemplated by *Burlington Northern*. In so holding, the lower court rejected plaintiffs' arguments that Ward's repair of the transformers prior to their resale, including the removal of defective parts, demonstrated intent on the part of Georgia Power to dispose of hazardous substances. Instead, the district court found 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 repairs. The district court therefore concluded that Georgia Power could not be held liable as a CERCLA arranger as a matter of law.

Given the factual similarities that exist between the Ward Litigation and Glatfelter's appeal, the Fourth Cir-

cuit opinion in the Ward Litigation could either be an early indicator of *Whiting*'s potential application nationally, or could mark a potential circuit split.

Conclusion

More than three decades after its enactment, the breadth of CERCLA liability continues to be a moving target. This year alone, significant appellate decisions have been issued by the Second, Sixth, Eighth, and Ninth Circuits. More are still to come. The Seventh Circuit's holdings in *Glatfelter* and *Whiting* are cases in point, addressing significant, as-yet unresolved issues relating to the scope of CERCLA liability, including the government's ability to enforce UAOs and the scope of arranger liability for contribution purposes.

The most important take away from the Seventh Circuit's holding in *Glatfelter* is its confirmation that CERCLA does not permit EPA to make an end-run around the legal requirements for permanent injunctive relief. Such relief requires a careful balancing of the equities and must be sufficiently detailed to ensure fair enforcement. In our view, the grounds for the Seventh Circuit holding should apply equally in other circuits, taking EPA's threat of a permanent injunction as a means of UAO enforcement off the table.

Similarly, the Seventh Circuit's holding in *Whiting* reconfirms that CERCLA arranger liability is not limitless. It provides persuasive precedent for PRPs who engaged in commercial transactions where disposal of a hazardous substance was not the ''intent'' of the transaction, or, in many cases, even considered. Certainly, CERCLA practitioners will be watching the Fourth Circuit's upcoming decision in the Ward Transformer litigation for further developments on this issue.

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