CLIENT ALERTS & INSIGHTS

Superfund Defenses That The Government Hopes You Don't Know About, Part 1

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With its imposition of strict, joint and several, and retroactive liability, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"),[1] also known as the Superfund statute, has raised billions of dollars from "potentially responsible parties" or "PRPs" for the cleanup of contaminated sites across the United States. Much of this funding has been obtained via settlements between the government and PRPs who concluded, in light of how heavily the CERCLA case law favored plaintiffs, there was little point in litigating over their alleged liability. Although the CERCLA playing field is indeed far from level, companies should not dismiss the possibility that they may have a dispositive defense. This piece and two forthcoming installments will summarize three often-overlooked defenses to Superfund liability.

A Thumb on the Scale for a "Remedial" Statute

When CERCLA was enacted in 1980, it was unlike any federal environmental statute that had come before. The Clean Water Act, Clean Air Act and Solid Waste Disposal Act primarily sought to regulate discharges of pollutants to air, water and land from ongoing industrial operations. In contrast, CERCLA sought primarily to address the historic contamination left behind by past industrial operations. Many CERCLA sites had been contaminated decades in the past by long-defunct companies. Even where sites had been contaminated more recently, the parties that had owned, operated and disposed of waste at the site, particularly dump sites, were often individuals or small companies with meager resources to fund a cleanup.

Given the practical difficulties of locating, much less imposing substantial cleanup liability on, the parties most directly involved in contaminating some sites, the Department of Justice advanced the broadest possible legal interpretations of the statute to establish the broadest possible scope of liability. Citing the difficulty of establishing liability for actions that had occurred years or decades before, DOJ advocated for the most lenient evidentiary requirements and causation standards.

Most federal courts proved receptive to DOJ's efforts, particularly in the critical early cases that defined the outer legal limits of the CERCLA liability scheme. Indeed, many judicial opinions began with the proposition that as a "remedial statute" designed to protect public health and the environment, the courts were "obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes." *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). This served as justification for deferential courts to further expand CERCLA's broad statutory liability scheme by giving plaintiffs, especially governmental plaintiffs, the benefit of the doubt on almost all of the close factual and interpretative calls.[2] Indeed, the outcomes of some cases seemed to embody a mindset that failing to impose liability on a defendant would unreasonably frustrate CERCLA's remedial purposes.

Little-Known CERCLA Liability Defenses

Over time, many companies and their legal counsel justifiably concluded that fighting the government in court was almost certainly a doomed strategy and, therefore, that litigation resources were better allocated to settlement. The concept of a "CERCLA defense" is probably considered an oxymoron by some. While the CERCLA case law is indeed very plaintiff-friendly, the scope of liability is not as limitless as the government would like PRPs to believe. There are certain types of activity that may, in fact, contribute to the contamination of a site, but nevertheless do not give rise to CERCLA liability.

This piece and two forthcoming installments will focus on legal defenses to CERCLA allegations that a defendant "arranged for the disposal or treatment" of a hazardous substance at a site, 42 U.S.C. §9607(a)(3), that may be available in three situations:

(1) Legitimate recycling transactions;

(2) Wastewater discharges through permitted outfalls, even if those discharges violate permit requirements; and

(3) Airborne emissions of hazardous substances.

"Recycling is not disposal"

As early CERCLA cases began to define the boundaries of "arranger" liability, some courts had to determine the legal status of companies' transactions with third parties seeking to reuse or reclaim hazardous substances from spent materials (such as used auto batteries or scrap metal) that would otherwise be disposed of as wastes. Many recycling processes generate their own hazardous by-products, often contaminating the recycling facility or the off-site locations at which such by-products are disposed of. Despite the generally positive view of recycling as an alternative to disposal, the courts almost universally held that companies supplying spent materials to a recycler had "arranged for" the disposal or treatment of hazardous substances contained in those materials. [3]

After a couple of decades of unfavorable case law, two developments breathed life into the argument that arranging for recycling is not arranging for disposal or treatment under CERCLA. First, Congress explicitly affirmed that "recycling is not disposal," amending the statute to expressly exempt certain explicitly categories of recycling from liability. Second, the U.S. Supreme Court held that intent is an implicit element of "arranging for" and a defendant does not arrange for disposal unless it intends for some disposal to occur.

The Superfund Recycling Equity Act

In matters of statutory interpretation, courts sometimes downplay the finality of their interpretation by noting that if they have misconstrued the legislature's intent, Congress can effectively overrule their holding by simply amending the statute. This position conveniently ignores how difficult it is, and has been, for Congress to pass any environmental legislation. Amazingly though, Congress did exactly that in 1999: Congress expressly informed the courts that CERCLA had been misinterpreted and misapplied when liability was imposed on legitimate recycling activities.

The Superfund Recycling Equity Act ("SREA"), included as part of the 1999 Omnibus Appropriations Bill, amended CERCLA to add a new Section 127,[4] entitled "Recycling transactions." In SREA, Congress declared that the legislation's purposes were:

> (1) to promote the reuse and recycling of scrap material in furtherance of the goals of waste minimization and natural resource conservation while protecting human health and the environment;
>
> (2) to create greater equity in the statutory treatment of recycled versus virgin materials; and
>
> (3) to remove the disincentives and impediments to recycling created as an unintended consequence of the 1980 Superfund liability provisions.[5]

Former Senator Trent Lott, a Senate sponsor of SREA, explained that the courts had misconstrued CERCLA when they held that recycling was an arrangement for disposal:

> Mr. President, let me be clear, the Superfund Recycling Equity Act corrects a mistake nobody intended to make. When the Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA) was enacted in 1980, there was no suggestion that traditional recyclables-paper, plastic, glass, metal, textiles, and rubber were ever intended to be subject to Superfund liability. As a result of court interpretations, however, the sale of recyclables as manufacturing feedstock was considered to be arranging for the disposal of the material and, therefore, subject to Superfund's liability scheme. However, as we have all come to know as a matter of public policy, recycling is not disposal; it is the exact opposite of disposal.
>
> Mr. President, let me say that again-recycling is not disposal, and a law is needed to remove this confusion. Sad, but true.[6]

SREA established criteria under which the legitimate recycling of scrap paper, plastic, glass, textiles, rubber (other than whole tires), metal, and spent lead-acid, spent nickel-cadmium, and other spent batteries would be excluded from CERCLA arranger liability. *See* 42 U.S.C. §9627(c)-(e). Some criteria are applicable to all categories of recyclables, while others are tailored to the scrap metal and spent battery categories. The criteria generally seek to ensure that (i) the relevant transaction was truly designed to reclaim material that can be reused in place of virgin feedstock and was not a sham to disguise disposal, and (ii) the party providing the material to be recycled made a commercially reasonable effort to ensure that it was dealing with a reputable recycler.

Although SREA imposes on the alleged arranger the burden of demonstrating that applicable recycling criteria are met, Congress sought to strongly discourage plaintiffs from asserting such claims in the first instance by providing that "[a]ny person who commences an action in contribution against a person who is not liable by operation of this section shall be liable to that person for all reasonable costs of defending that action, including all reasonable attorney's fees and expert witness fees." 42 U.S.C. §9627(k).

What about the recycling of materials not directly addressed in SREA, such as spent solvents or used oil? Congress signaled the courts that SREA should not be construed to suggest that Congress intended for recycling activities not expressly addressed in the statute to be deemed arranging for disposal. In a provision entitled, "Limitation on statutory construction," SREA provides

that the statute's creation of express exemptions for certain categories of recyclables "shall not be construed to . . . create any presumption of liability" for persons recycling other types of materials. *See* 42 U.S.C. §9627(l)(2).[7]

In other words, SREA was not intended to provide an exclusive list of exempt recycling activities, but rather the courts should evaluate other recycling arrangements on a case-by-case basis, in light of whether the circumstances of the relevant transactions were consistent or inconsistent with SREA's criteria. This is, of course, consistent with SREA's broadly stated policy objectives and reinforces Congress' fundamental position that "recycling is not disposal."

Burlington Northern and Santa Fe Ry. Co. v. United States

A decade after SREA was enacted, the U.S. Supreme Court decided a CERCLA case that did not involve recycling or SREA, but nevertheless established a complimentary basis through which to exclude legitimate recycling transactions from CERCLA's liability scheme. In *Burlington Northern and Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009), the Court held that a bulk chemical supplier did not "arrange for disposal" of the small amounts of product that unintentionally leaked onto the ground when the supplier's tank trucks were transferring the product to a customer's storage tank.

Since CERCLA includes no specialized definition of "arrange," the Court resorted to its common meaning, finding that the term "implies action directed to a specific purpose. Consequently, under the plain language of the statute, an entity may qualify as an arranger under §9607(a)(3) when it takes intentional steps to dispose of a hazardous substance." *Id.* at 611 (citations omitted). Therefore, to be liable as an arranger, the supplier had to have had "the intention that at least a portion of the product be disposed of during the transfer process…." *Id.* at 612. Although the record indicated that the supplier was aware that incidental spills would occur, the Court found that such knowledge was insufficient to raise an inference of intent to dispose, because the record also indicated that the supplier had taken numerous steps to minimize the likelihood of such spills. *Id.* at 612-13.

The reasoning of *Burlington Northern* has logical application to legitimate recycling transactions in which companies provide spent or scrap material to a recycler with the expectation that the material will be used as a feedstock to create something with commercial value, rather than disposed of as a waste. Moreover, even if a company is aware that the recycling process will generate some waste, so long as such incidental losses are very small compared to the amount of material recovered and reused, the *Burlington Northern* Court's reasoning still seems to apply.

Burlington Northern's focus on the defendant's dominant intent may be especially useful in defending arrangements in which a recycler actually returns reclaimed material to the customers who supplied spent material, such as the styrene reclamation arrangement deemed disposal in the *Cadillac Fairview* case or a lead conversion agreement between a battery manufacturer and a secondary lead smelter to recover and return lead from scraps generated during the battery manufacturing process. The financial terms of such arrangements are necessarily driven by the degree of material recovery that the recycler is able to achieve. Although some spent material may be lost to waste during reclamation, as with the chemical supplier in *Burlington Northern*, both the customer's and the recycler's interests are for such losses to be as minimal as possible, so that the amount recovered and returned will be as large as possible.

Practical Considerations

Although CERCLA litigation is retrospective in its focus, companies that recycle waste streams containing hazardous substances, particularly those expressly addressed in SREA, would be well served by prospectively reviewing the relevant SREA criteria and ensuring that into their environmental management systems have mechanisms to document that their recycling arrangements are consistent with those criteria. Being able to provide such documentation to the government (or a private party threatening litigation) might short-circuit potential litigation before it begins. Even if litigation arises, the documentation will minimize the effort needed to establish a SREA defense.

Conclusion

With its cost-shifting provision, SREA provides a powerful defense for CERCLA defendants that engaged in one of the law's specified categories of transactions. For recycling activity involving materials not expressly addressed in SREA, there is substantial authority embedded in SREA and its legislative history, bolstered by *Burlington Northern*'s intent-based construction of "arrange," to support an argument that legitimate, well-managed recycling operations that generate a useful commodity should not be deemed a CERCLA arrangement for disposal.

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[1] 42 U.S.C. §9601, *et seq.*

[2] Indeed, even though the U.S. Supreme Court found in *U.S. v. Bestfoods*, 524 U.S. 51, 63 (1998), that CERCLA evidences no legislative intent to water down the traditional standards for imposing corporate liability, lower courts continue to employ the "liberal construction of a remedial statute" to justify placing a thumb on the scales of justice for the benefit of CERCLA plaintiffs. *See, e.g.*, *New York State Elec. and Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212, 220 (2d Cir. 2014).

[3] *See, e.g. Cadillac Fairview/California, Inc. v. United States*, 41 F.3d (9th Cir. 1994) (arrangement for chemical supplier to remove impurities from customer's spent chemical and return clean chemical is arrangement for disposal of impurities); *Catellus Development Corp. v. United States*, 34 F.3d 748 (9th Cir. 1994) (sale of spent lead-acid batteries to secondary lead smelter for use as feedstock to refine fresh lead is arranging); *Ekotec Site PRP Committee v. Self*, 881 F. Supp. 1516 (D. Utah 1995) (sale of used motor oil to oil recycler is arranging); *United States v. Summit Equipment & Supplies, Inc.*, 805 F. Supp. 1422 (N.D. Ohio 1992) (sale of surplus equipment to scrap dealer is arranging).

[4] 42 U.S.C. §9627

[5] Pub. L. 106-113, div. B, §1000(a)(9) [title VI, §6001(a)], Nov. 29, 1999, 113 Stat. 1536, 1501A-598.

[6] Congressional Record 145: 165 (Nov. 19, 1999) p. S15052.

[7]

Rather, the provision "clarifies that this section does not affect any rights, defenses or liabilities with respect to any transaction involving a material that is not a recyclable material, as defined in this section. A person who engages in recycling transactions not covered by new section [127] may nonetheless be able to establish a defense to CERCLA liability. Moreover, new section [127] does not relieve any plaintiff of the burden of proof that elements of liability are met in any action under this Act." 106 H. Rep. 353 at 72 (addressing identical provision in bill introduced in an earlier Congress).