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Melissa Thrailkill

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The Third Circuit Clarifies Arranger Liability Under CERCLA

In *Morton International, Inc. v. A.E. Staley Manufacturing Co.* the Third Circuit Court of Appeals heeded the District Court for the District of New Jersey's request that it "definitively address" the standard for "arranger liability" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Third Circuit surveyed other circuits' rulings in the process, finally holding that, in establishing "arranger liability," the plaintiff must show that the defendant had (1) ownership or possession of the material at issue; and (2) knowledge that the processing of that material could or would result in the release of hazardous waste; or (3) control over the production process. The court then applied its newly-crafted standard and concluded that the lower court wrongly granted the defendant's summary judgment motion.

In 1974, Morton International, Inc. (Morton) acquired a mercury processing plant located in Wood Ridge, New Jersey, that had changed owners frequently in the 1960s and 1970s. The plant was the largest domestic producer of intermediate organic mercury compounds and also cleaned and converted "dirty mercury" into intermediate compounds. The New Jersey Department of Environmental Protection brought an action against Morton and Velsicol Chemical Corporation, a company that owned the site prior to Morton. Both companies were ultimately held "strictly liable, jointly and severally, for the cleanup of the Site." Upon enactment of CERCLA in 1980, the EPA listed the site on the National Priorities List and required Morton and several others to undertake a remedial investigation and feasibility study of the site.

In 1996, Morton sought contributions from numerous parties, including defendant Tennessee Gas Pipeline Co. (Tenneco), to the cost of
cleaning up the site, claiming that those parties qualified as "arrangers" under CERCLA.  A party may be liable as an "arranger" if it "by contract, agreement, or otherwise arranged for disposal or treatment, of hazardous substances owned or possessed by such person... at any facility." Morton argued that its plant, under "conversion" or "toll" agreements, processed the defendants' prime virgin mercury (PVM) into red and yellow oxides of mercury (ROM and YOM), and cleaned and converted contaminated mercury (dirty mercury) into intermediate compounds. Therefore, it argued, these customers should bear some of the costs Morton had incurred and would continue to incur while cleaning up the site.

Tenneco claimed that Morton inaccurately described its business with them. It argued that it had simply purchased ROM and YOM, but had not sent PVM to be treated by Morton. After the district court refused to grant all defendants summary judgment because of various material factual disputes regarding each, Tenneco filed a renewed summary judgment motion on its own behalf.

The district court granted Tenneco's motion for summary judgment. On appeal, the Third Circuit took this opportunity to develop a definitive standard for evaluating third-parties' involvement in environmentally harmful activities. This standard will help guide the Third Circuit in Morton's claims against the other parties, as well as in future CERCLA arranger liability claims.

In arriving at this standard, the court first evaluated the legislative history of CERCLA, relying on interpretations by other circuits and the Supreme Court. The court concluded that CERCLA was a "comprehensive statute" and that Congress passed the Superfund Amendments and Reauthorization Act (SARA) in 1986 to establish the right of those held liable under CERCLA to seek contribution from other potentially liable parties. Because it found that CERCLA's primary purpose was to facilitate the prompt cleanup of hazardous waste sites and to impose the cleanup costs on "everyone who is potentially responsible for hazardous-waste contamination," the court concluded that its standard for "arranger liability" should allow for broad application.

After evaluating other circuit courts' standards, the court determined that "arranger liability" is a "fact-sensitive inquiry that requires a multi-

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10. Morton, 343 F.3d at 673-74.
11. Id. at 674.
12. Id.
14. See Morton, 343 F.3d at 676 (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 21 (1989) (emphasis in original)).
factor analysis” and that courts “must look beyond the defendant’s characterization of the transaction at issue” in determining whether it involves an arrangement for the disposal or treatment of hazardous waste. The Third Circuit found that conclusions were virtually universal with regard to those two assertions across a variety of circumstances, but that the most important factors in determining “arranger liability” varied between courts. Some courts required a showing of intent to dispose of or treat hazardous waste, while others held that the party could be liable as an “arranger” even if it merely owned and/or controlled the hazardous substances at issue. The Third Circuit decided that the “most important factors” in the standard for “arranger liability” were “ownership or possession” and “knowledge[]; or control.”

The court reasoned that these factors were the most important in establishing “arranger liability” because: (1) the plain language of the statute required that the defendants own or possess the hazardous material, and (2) the court would go beyond the scope of the legislation if it imposed liability on those who did not have control over the process or any knowledge that hazardous waste would be released. The plaintiff can meet the burden of proving the defendant’s knowledge by submitting evidence demonstrating either that the defendant actually knew of the harm, or that such knowledge could be presumed based on the defendant’s familiarity with industry custom.

In applying this test to Morton, the court determined that Morton had provided sufficient evidence to defeat the summary judgment motion. The court found that there were genuine issues of material fact as to Tenneco’s ownership of the PVM and its knowledge that harmful substances would be released during the mercury processing, and its control over the process that resulted in the release of hazardous waste. The court therefore reversed the district court’s decision.

First, the court held that genuine issues of material fact remained regarding the question of ownership or possession. Morton’s evidence indicated that the plant’s customers could either supply their own PVM or buy it directly from the plant, and also included inventories recording the number of pounds of mercury Tenneco stored at the plant from 1963-1973. The court held that just because the mercury processed by the plant was homogeneous and the plant never segregated or labeled the PVM according to specific owners, Tenneco never stopped owning its mercury, even if the mercury it supplied or bought was mixed with...
mercury owned by others. In addition, the court corrected the district court's ruling that it did not matter whether Tenneco had directly shipped PVM to the plant because Tenneco's involvement with events at the plant was at issue in the determination of Tenneco's role as an arranger. Thus, on remand, the district court was to consider the evidence that Tenneco directly shipped PVM to the plant when determining whether or not Tenneco had ownership, or at least possession, of the PVM.

Next, the court evaluated whether a genuine issue of fact remained regarding Tenneco's control over the mercury processing and cleaning that resulted in the release of hazardous waste, or the company's knowledge that hazardous waste would be released during these processes. The court concluded that, first, it could properly infer that Tenneco had some knowledge that mercury processing resulted in the release of hazardous waste based on its involvement with mercury at its own facilities. The court further explained that it could rely on Morton's evidence regarding its customers' monitoring of mercury losses because, for summary judgment purposes, it could properly assume that Tenneco had the same type of relationship with Morton. Furthermore, the court determined that Morton had raised factual issues that could survive summary judgment on both prongs of its "arranger liability" test based on the evidence regarding Tenneco's shipping of dirty mercury to the plant for conversion and the fact that the plant informed such customers that "a certain percentage of mercury would be lost" in the conversion.

Not only did the court find that the facts revealed that Tenneco possibly had knowledge that hazardous materials would be released, but that Tenneco may also have had control over how Morton processed the mercury at its plant based on evidence demonstrating that customers in the late 1960s had approved a new production process. The court clarified that this evidence alone might not be sufficient to establish that Tenneco had some control over the processing at the plant, but that it was a factor that the lower court and jury could consider when determining whether the company may have had control over the process. The court held that this evidence collectively sufficed to create a disputed fact in relation to each of the factors - ownership or possession; and knowledge; or control.

With its ruling, the Third Circuit Court of Appeals established a comprehensive standard that will help direct lower courts in arranger liability suits brought under CERCLA. The court correctly interpreted the purpose of CERCLA and its analysis and conclusions adhere to this

21. Id. at 681.
22. Id.
23. Id. at 685.
24. Id.
25. Id.
purpose by limiting the burden faced by those parties held liable for the cleanup of Superfund sites when seeking assistance from all others that may have contributed to the release of hazardous waste. For the most part, the test is comprehensive, incorporating much of what other circuits had already formulated. It is more lenient than those in other circuits requiring proof of intent and stricter than those only requiring a showing of ownership or control. In all, it is a fair test that Third Circuit courts will be able to broadly apply to diverse fact scenarios.

As Morton demonstrated, alleged arrangers do not quickly concede their possible liability, preferring not to pay for their own contributions to pollution. The Third Circuit’s ruling provides the jurisdiction with a definitive test that can be applied to ensure that CERCLA’s guidelines and purposes are met, thus ensuring that all parties contributing to contamination will be held accountable for the cleanup of some of the nation’s most polluted sites.

Melissa Thrailkill