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Eighth Circuit Divided on Scope of Arranger Liability

By Irvin M. Freilich and Shawn M. LaTourette – February 11, 2016

On December 10, 2015, Judge Kermit E. Bye, writing for a divided Eighth Circuit panel, reversed an Iowa district court's decision on arranger liability in the case of *United States v. Dico, Inc.*, No. 14-2762, 2015 U.S. App. LEXIS 21345 (8th Cir. Dec. 10, 2015). In ruling on a motion for summary judgment, the trial court concluded that the defendant, Dico, Inc., arranged for the disposal of hazardous substances by selling buildings with insulation contaminated by polychlorinated biphenyls (PCBs). Relying on the holding in *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 599 (2009), and cases that preceded it, the Eighth Circuit reversed this conclusion, reasoning that issues of fact concerning Dico's intent to dispose of hazardous substances could not be resolved on summary judgment. Because the court could not conclude that Dico possessed an intent to dispose that led to the incurrence of response costs, the trial court's punitive damages award of $1.4 million was also reversed. However, the appellate court affirmed the finding below that that Dico violated a preexisting Environmental Protection Agency (EPA) order requiring it to ensure that the PCBs remained encapsulated. Thus, a civil penalty assessment of $1.6 million was upheld.

The court undertook a review of the factual record and determined that Dico sold several buildings with PCB-contaminated insulation to Southern Iowa Mechanical (SIM), which intended to demolish the buildings and use the steel beams contained it. After demolishing the buildings on Dico's Des Moines, Iowa, property, SIM moved the beams—with portions of the insulation still attached—to its Ottumwa, Iowa, property. Notably, Dico was subject to an EPA order that required it to maintain the encapsulation of the PCBs and to notify the EPA if the buildings, which had been idle, were returned to use. The trial court decision, *United States v. Dico*, 892 F. Supp. 2d 1139 (S.D. Iowa 2012), examined the extent to which Dico had knowledge that disposal of PCBs would result from SIM's demolition of the buildings. The trial court found that "once sold, the Dico buildings were only useful insofar as SIM could 'reclaim' and . . . reuse the steel beams." *Id.* at 1158. Where, as here, "reclaiming a material is the sole remaining useful purpose of a product and where the reclaimed material could not be reused without further processing," the trial court found there could be no legitimate business purpose for the sale. Thus, the court held that no reasonable fact finder could conclude that Dico did not intend to dispose of the remaining PCBs when it sold the buildings to SIM.

The Eighth Circuit found that the trial judge focused too closely on the value of the buildings and SIM's intent to reclaim the steel beams, as opposed to Dico's intent to dispose of a hazardous substance—the central question in determining arranger liability following the Supreme Court's decision in *Burlington Northern*. The court explained that where "the sale product has some commercial value and was part of a legitimate sale, even if the seller knows disposal will result, it is more difficult to hold that no reasonable juror could find the seller did not actually intend to sell the product but merely intended to discard the hazardous substance." The court concluded that the matter was not appropriate for summary judgment given the "heavily disputed" issues of the buildings' usefulness and the remediation costs that Dico avoided by virtue of the sale to SIM. Given the fact-sensitive nature of the intent analysis, and considering what the court viewed as conflicting evidence, it held that an alleged arranger's intent should not have been decided on summary judgment under these circumstances.

Having determined that Dico's intent to dispose was an unresolved question of fact, and because the EPA incurred response costs only at the SIM disposal site and not at the Dico building site itself, the court also overturned the trial court's punitive damage award of $1.4 million. However, the court affirmed the independent conclusion that Dico

violated the preexisting EPA order that required it to maintain and protect the integrity of the encapsulated PCB-containing insulation, resulting in a $1.6 million civil penalty assessment. The court found that Dico, by permitting the demolition of the buildings without notice to the EPA and allowing the insulation to become friable, necessarily violated the EPA's order. Unlike the punitive damage award, which was contingent on a finding that Dico was an arranger responsible for response costs at the SIM site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the civil penalty award could stand on its own because Dico could not show sufficient cause for violating the order.

Judge James B. Loken joined in the opinion on arranger liability but expressed concern that Judge Bye's opinion placed too much emphasis on pre-*Burlington Northern* cases, including a line of cases referred to as "battery cracking" cases, as well as cases concerning the "useful product" doctrine, which Judge Loken noted was not adopted by the Supreme Court in *Burlington Northern*. Judge Loken also disagreed with the majority opinion with respect to the $1.6 million in civil penalties, arguing that the lower court was incorrect to find a "continuing" violation without establishing a continued release of hazardous substances. Finally, Judge Jane Kelly dissented from the opinion on arranger liability, reciting what she believed to be sufficient evidence that Dico had demonstrated the requisite intent to dispose of the PCBs in the course of its sale to SIM.

The Eighth Circuit's ruling here, together with recent precedent from other circuits on arranger liability—*see*, *e.g.*, *Consol. Coal Co. v. Ga. Power Co.*, 781 F.3d 129 (4th Cir. 2015); *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682 (7th Cir. 2014); *United States v. Gen. Elec. Co.*, 670 F.3d 377 (1st Cir. 2012); *Team Enters., LLC v. W. Inv. Real Estate Tr.*, 647 F.3d 901 (9th Cir. 2011)—sends a clear message to parties who sell materials containing hazardous substances: Take pains to create a record that clarifies the commercial value of the material being sold. A key consideration following *Burlington Northern* and its progeny is whether there is a legitimate business end to the transaction or whether the seller is merely trying to rid itself of a hazardous substance. To combat any potential future claim of CERCLA liability, a seller would be well served by developing a record that demonstrates the commercial value of the material, whether by evidence of a competitive bid process or other reasonable means.

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