Sale of Building/Superfund: Federal Appellate Court (Eighth Circuit) Addresses Arranger Liability Issue

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The United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") addressed in an April 11th opinion a Section 107(a) (3) Comprehensive Response, Compensation, and Liability Act ("CERCLA") arranger issue. See *U.S. v. Dico, Inc.; Titan Tire Corporation,* No. 17-3462, April 11, 2019.

The CERCLA liability issue arose in the context of the sale of various buildings that were contaminated with polychlorinated biphenyls ("PCBs").

Dico, Inc., sold through its corporate affiliate, Titan Tire Corporation (collectively ["DICO"]) several buildings in Des Moines, Iowa, contaminated with PCBs (in the insulation). The United States Environmental Protection Agency ("EPA ") issued an Administrative Order requiring that DICO remove some of the PCB contamination and undertake other activities.

DICO sold the buildings to Southern Iowa Mechanical in 2007. They did not inform Southern Iowa Mechanical that the buildings were contaminated with the PCB and subject to an EPA Administrative Order.

Southern Iowa Mechanical tore the buildings down and stored them in an open field. EPA discovered the PCBs and sued DICO to recover its cleanup cost.

EPA's cost recovery action alleged that DICO arranged to dispose of hazardous substances pursuant to Section 107 (a)(3) of Superfund. A failure to abide by the 1994 EPA Order was also alleged.

The United States District Court granted summary judgment finding CERCLA arranger liability and a violation of the 1994 Administrative Order. Civil penalties and punitive damages were assessed.

Both of the companies collectively referred to as DICO were held jointly and severally liable for over $5 million in response costs.

The Eighth Circuit states that the determination of whether an entity is an arranger requires a fact-intensive inquiry. DICO argued that the lower court gave insufficient weight to evidence that the transaction was legitimate citing the fact that the 2007 sale was similar to a previous building sale. This argument was discounted by the lower court.

DICO also argued that the usefulness of a part of the building was evidence of a legitimate transaction. The fact that structural-beams of the buildings were reusable if sampled and decontaminated was referenced.

The Eighth Circuit stated that the Southern Iowa Mechanical disposal of contaminated insulation was not "unbeknownst to the seller." It noted that the lower court had determined that DICO knew the buildings would be dismantled once they were sold. It further coccluded that the buildings were sold with the intention they would be dismantled and removed from the real property on which they were located. Citing the United States Supreme Court Burlington Northern case it stated:

Knowledge alone is insufficient to prove arranger liability, an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of hazardous waste.

Despite the fact that the sale of the building may have involved a useful product, the Eighth Circuit stated that this may be negated by the fact that the cost of disposal or contamination remediation greatly exceeds its purchase price. This was the case with DICO's sale. The fact the buildings condition was not conveyed to the purchaser was also cited.

The Eighth Circuit concluded that 107(a)(3) was applicable to the transaction.

A copy of the opinion can be downloaded here.