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CERCLA Arranger Liability Requires Knowledge Waste Is Hazardous, New York District Court Says

Publication:

Riker Danzig Environmental Update October 2017

In Town of Islip v. Datre, --- F. Supp. 3d ----, 2017 WL 1157188 (E.D.N.Y. Mar. 28, 2017), the Eastern District of New York held that a defendant alleged to have "arranged for disposal or treatment … of a hazardous substance" must have had actual or constructive knowledge that the substance was hazardous in order to be liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). 42 U.S.C. § 9607(a)(3). While the Supreme Court's seminal case on arranger liability, Burlington Northern & Santa Fe Railway v. U.S., carved out an exception to liability based on the defendant's intent in entering the transaction (i.e., to sell a useful product vs. to dispose of a waste), Datre expands the exception to CERCLA liability based on the defendant's knowledge of the nature of the waste. Datre holds that there can be no intent to dispose under Burlington Northern unless the alleged arranger knew, or should have known, that the substance was hazardous. Critics of this decision have noted that Datre's inquiry into the defendant's knowledge sits uneasily with CERCLA's strict liability structure and could be vulnerable if appealed. Nevertheless, Datre and a few similar cases may offer relief to defendants who can plausibly claim that they did not know that the waste was hazardous.

Datre arose from a project to improve a park in the Long Island town of Islip. The Town of Islip alleged that during site development, various unauthorized actors disposed of construction and demolition debris containing hazardous substances in the park, which Islip then had to remove at a cost of $4 million. The arranger defendants are the waste brokers who procured the debris for the trucking firms that dumped it in the park.

The arranger defendants argued that they lacked Burlington Northern's requisite intent, contending that they could not be held liable because Islip did not allege that they (1) knew that the material would be deposited in the park,

or (2) knew that the material was hazardous. Islip countered that the arranger defendants intended that the material be disposed as waste, rather than sold as a useful product, and that this intent to dispose was sufficient for arranger liability.

The Court disagreed with the arranger defendants' first argument, holding that whether the arranger defendants knew that the waste would be disposed in Islip's park is irrelevant. The Court, however, agreed with the arranger defendants' second argument and dismissed the complaint because Islip failed to allege that the arranger defendants knew, or should have known, that the construction and demolition debris contained hazardous substances.

The Court found support for its conclusion from a Wisconsin case, Appleton Papers Inc. v. George A. Whiting Paper Co., 2012 WL 270490 (E.D. Wis. July 3, 2012), aff'd sub nom., NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682 (7th Cir. 2014). The Wisconsin District Court wrote that "it seems doubtful that a defendant can ever be found to be an arranger if he did not know the substance in question is hazardous." Notably, Appleton Papers' discussion of knowledge was not essential to that court's decision and, therefore, can be considered non-binding dicta. Nonetheless, the Court in Datre was persuaded and found that knowledge that a substance was hazardous is a required element of the intent to dispose under Burlington Northern.

As noted above, initial commentary has been critical of Datre. Courts long have interpreted CERCLA to impose strict liability; that is, a party that disposed of a hazardous substance must pay to clean it up regardless of fault. Datre , however, seems to engraft principles of fault onto the determination of arranger liability, particularly with its invitation to inquire whether a defendant should have known that a substance was hazardous. Datre also focuses on culpability. The Court notes that a defendant that did not know it was disposing of a hazardous substance is less culpable than a defendant selling a useful but hazardous product with knowledge that it would be spilled. Burlington Northern holds that the defendant in the latter scenario would not be liable, so the Court reasoned that the less culpable defendant that did not even know it was dealing with a hazardous substance should not be liable either. Typically, courts address these questions of fault and relative culpability when allocating CERCLA cleanup costs among multiple liable parties, not, as in Datre, when deciding whether a party is liable at all. In the typical case, a party that did not know the substance was hazardous might be required to pay less than another party that knew of the hazards, but the ignorant party still would have to pay something.

Although Datre contradicts the usual interpretations of CERCLA, a few other courts have been similarly lenient toward alleged arrangers that disposed of substances that an ordinary person might not expect to be hazardous. In Appleton Papers, the Wisconsin case relied on in Datre, Appleton Papers sold its unwanted PCB-containing paper scraps to other nearby paper mills before 1970. These recycling mills turned the scraps into marketable paper and in the process discharged PCB-laden effluent into the Fox River, which was subject to a multi-million dollar environmental cleanup of PCBs decades later. Although the Appleton Papers Court did not require that the

defendant must have known of the exact hazard that eventually arises for liability to attach, selling apparently innocuous bales of paper containing PCBs before PCBs were known to be dangerous is quite different from the typical CERCLA case involving drums of flammable waste chemicals that self-evidently are hazardous. Appleton Papers Inc., 2012 WL 270490, at *11. In a New Jersey case, a developer that spread soils contaminated by pesticides from the land's prior use as an orchard throughout its new residential development did not intend to dispose of a hazardous substance because the developer "was unaware of the contamination of the soils at the time it developed the Residential Lots." Bonnieview Homeowners Ass'n v. Woodmont Builders, LLC, 655 F. Supp. 2d 473, 493 (D.N.J. 2009).

Although drawing a distinction between typical CERCLA waste—drums of discarded chemicals—and other unexpectedly hazardous waste generally is helpful to defendants, a narrow interpretation of Datre could provide cold comfort. For example, arguably both the arranger defendants in Datre and the developer in Bonnieviewshould have known that the substances disposed of could be hazardous, as urban construction and demolition debris often is contaminated and certain pesticides historically applied at farms and orchards now are regulated as hazardous substances. Nonetheless, Datre and other cases discussed herein indicate that some courts are inclined to relieve "unknowing" arrangers from liability, at least in cases where the hazardousness of the waste is not readily apparent.

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