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US V. Dico: A Guide To Avoiding CERCLA Arranger Liability?

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If a defendant sells a product containing hazardous waste to a buyer that later disposes of the product, and if the product has commercial value and was part of a "legitimate sale," the defendant may avoid so-called "arranger liability" under the Comprehensive Environmental Response, Compensation and Liability Act of 1980,[1] even if the seller knows that the buyer intends to dispose of the hazardous product. That was the holding in United States v. Dico Inc.,[2] in which the U.S. Court of Appeals for the Eighth Circuit partly reversed summary judgment that had been entered in favor of the government and against defendant tire manufacturer Dico. The court also affirmed $1.6 million in civil damages based on Dico's inability to prove that it had sufficient cause for violating a related Environmental Protection Agency order, but declined to impose punitive damages against Dico for its violation of that order.

Background

Several decades ago, the EPA identified polychlorinated biphenyls (PCBs) in insulation adhesive in several buildings on Dico's property in Iowa. In 1994, the EPA issued an order requiring Dico to remove or otherwise encapsulate the contaminated insulation. Dico removed some of the insulation and encapsulated what remained. Dico had a continuing obligation under the 1994 order to inspect and maintain the encapsulated surfaces, as well as to notify the EPA of any change in site conditions. By 2002, Dico no longer occupied or used the buildings, and the EPA agreed that Dico could discontinue testing on the condition that Dico alert the EPA should the buildings come back into use.

In 2007, acting through an affiliate, Dico paid Southern Iowa Mechanical (SIM) to remove parts of certain contaminated buildings and sold SIM several other buildings. After learning of the dismantling and sale, the EPA took the position that Dico was responsible for related cleanup costs. In addition, the EPA tracked insulated steel beams from the disassembled buildings to SIM's facility elsewhere in Iowa, where the beams were in direct contact with the ground. Samples from the surrounding soil confirmed

that PCBs resided in the beams and had contaminated nearby soil at SIM's facility. The government subsequently incurred costs related to cleanup of the SIM site.

Arranger Liability

The government sued Dico for recovery of cleanup costs under Section 107(a)(3) of CERCLA, which creates liability for any person who "arranged for disposal or treatment ... of hazardous substances owned or possessed by such person."[3] The district court granted the government's motion for partial summary judgment on its claim that Dico was liable as an arranger of the disposal of hazardous waste.[4] After a bench trial on damages, the district court imposed $1,620,000 in civil penalties — $10,000 for each of the 162 days the court deemed Dico to be in violation of the EPA order — and punitive damages of $1,477,787.[5] Dico then appealed.

Relying on the U.S. Supreme Court's decision in Burlington Northern & Santa Fe Railway v. United States,[6] the Eighth Circuit noted that liability was not immediately apparent because Dico's motives in selling the buildings were unclear, thus requiring a "fact-intensive inquiry" to determine liability. Mere knowledge on the part of the seller that the buyer would dispose of the items in the future is not enough for CERCLA liability. According to the Eighth Circuit, a plaintiff must show that the seller intended for those items to be disposed of when selling them.

Under these principles, the Eighth Circuit held that Dico could not be liable as a matter of law for selling its buildings to SIM. The court criticized the district court for focusing too intently on the buyer's motive for purchasing the buildings and explained that the "relevant question" boils down to "the seller's intent with respect to the transaction."[7] The court then stated that if "the sale product has some commercial value and was part of a legitimate sale, even if the seller knows disposal will result," the question whether "the seller did not actually intend to sell the product but intended to discard the hazardous substance" is ordinarily one for a jury to decide.

The court concluded that a dispute of fact regarding Dico's intent precluded summary judgment, as there was evidence that Dico manifested its intent to derive more from the sale than simply the disposal of hazardous materials. The court held that Dico's expectation of commercial value from the sale was reasonable. There was no evidence that the buildings were "merely waste" or "commercially useless" and the buildings were not hazardous products themselves. Further, Dico solicited bids, and other entities beyond SIM were interested in buying. In sum, the court held that the government had not shown that Dico "was merely trying to get rid of a hazardous substance" by selling the buildings.[8]

Judge Jane Kelly dissented from this conclusion. She maintained that the record indicated both parties' intent that the buildings would not be reused and that the price for which Dico sold the buildings was far lower than the probable cost of remediating them. Furthermore, Judge Kelly noted that SIM was unaware that the buildings contained PCBs, that the steel beams were useless with the insulation still attached and that the hazardous material was discarded at the time of the transfer of ownership. For Judge Kelly, these factors supported the conclusion that Dico intended through its sale of the buildings to dispose of contaminated materials. (Because of this reasoning, Judge Kelly also dissented from the court's reversal of the district court's imposition of punitive damages, discussed below.)

Violation of EPA Order

Though the Eighth Circuit rejected summary judgment against Dico on CERCLA arranger liability, it affirmed the district court's imposition of $1.62 million in civil penalties on Dico for violating the EPA's

1994 order,[9] holding that there was little question that Dico had violated the order. Although a defendant can avoid liability for such a violation under CERCLA if it shows "sufficient cause" for doing so,[10] the court held that Dico failed to make that showing.

The Eighth Circuit rejected the district court's imposition of punitive damages on Dico for the same violation. Under CERCLA, a court may impose punitive damages against a party that "fails without sufficient cause to properly provide removal or remedial action" in response to an EPA order and if the EPA incurs cleanup costs as "a result of such failure."[11] The district court had levied nearly $1.5 million in punitive damages, which was equal to the government's costs in cleaning up contamination at the SIM site. Yet the court held that these costs were not "a result of" Dico's violations of the EPA order. Those violations led to the scattering of contaminated insulation at the building teardown site, not at the SIM site, where the government performed the cleanup. Because the court had held that the government was not entitled to summary judgment with respect to Dico's liability for arranging for disposal of the beams, which went to the SIM site, the punitive damages had to be vacated pending resolution of the arranger liability issue.

Judge James Loken concurred in part and dissented in part. Of particular significance, he agreed that Dico was liable for civil penalties, but would have remanded the case for redetermination of the amount of penalties. As he saw it, although the record showed that Dico violated the EPA order on the day the buildings were demolished, there were no grounds for finding a continuing violation after that day because "there was no proof of an actual release" of hazardous substances on days subsequent to the demolition. Thus, Judge Loken wrote, a one-day fine of $10,000 may have been appropriate, but no more, given that a penalty may not be assessed under CERCLA unless the "extent and gravity of the violation" warrants it. In contrast, the majority gave no consideration to whether the seriousness of this violation warranted a penalty of $10,000 per day, instead perfunctorily holding that Dico's "failure to maintain the protection and integrity of the encapsulation continued throughout the disassembly process and constituted a continuing violation."

Implications

While the situation the Eighth Circuit considered in Dico is fairly unique — a defendant violating a standing EPA order in selling buildings containing contaminants, which the buyer then disposes of on a different property — the case's holding on arranger liability has broader applicability. To avoid arranger liability under CERCLA, entities planning to sell items containing hazardous materials would be wise, under both Dico and Burlington Northern, to substantiate the fact that the items have commercial value and are not merely "waste." In such circumstances, sellers should also consider soliciting bids for the items or having them appraised. Doing so could provide evidence that the seller is not "merely trying to get rid of a hazardous substance," in the court's words — a key consideration for determining arranger liability under CERCLA.

The division between the majority and Judge Loken regarding the calculation of the civil penalties is also significant. The determination of civil penalties under statutes that provide for daily penalties is a recurring issue that can have enormous consequences. Here, there really were two debates, both of which Dico lost.

The first was whether Dico's violation was limited to a single day or could be treated as continuing. The majority gave a very elastic interpretation to the concept of a "continuing violation." Arguably, Dico lacked fair notice that its alleged failure to maintain the integrity of the encapsulation after the buildings were demolished could be treated as a violation of the order that could continue — and be the basis for

daily penalties — ad infinitum. If a court could be persuaded that the statute does not provide fair notice that it could be applied in this way, imposing penalties based on the notion that Dico had engaged in a continuing violation would violate the U.S. Constitution's due process clause.[12]

The second question involves the reasonableness of imposing a daily fine of $10,000 under the circumstances described. Even if Dico's violation could be deemed to be a continuing one, its seriousness pales in comparison to the kinds of daily violations that Congress likely had in mind when it enacted the statute (e.g., intentional discharges of hazardous substances in defiance of an EPA order). The Supreme Court's punitive damages jurisprudence applies fully to civil penalties imposed by the government — albeit under the Eighth Amendment's excessive fines clause in addition to, or in lieu of, the due process clause. Companies confronted with governmental demands for massive daily fines should keep that in mind.

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[1] 42 U.S.C. § 9607(a)(3).

[2] No. 14-2762, (8th Cir. Dec. 10, 2015).

[3] 42 U.S.C. § 9607(a)(3).

[4] United States v. Dico, Inc., 892 F. Supp. 2d 1138 (S.D. Iowa 2012).

[5] United States v. Dico, Inc., 4 F. Supp. 3d 1047 (S.D. Iowa 2014).

[6] 556 U.S. 599 (2009).

[7] Judge Loken, concurring and dissenting in part, wrote separately to stress that cases prior to Burlington Northern that focus on a buyer's intent are now irrelevant.

[8] Judge Kelly dissented from this conclusion.

[9] Damages were calculated by multiplying $10,000 per day for 162 days of violations.

[10] 42 U.S.C. § 9606(b)(1).

[11] 42 U.S.C. § 9607(c)(3).

[12] See BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose."); see also FCC v. Fox Television Stations Inc., 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.")