CERCLA/Superfund: Federal Appellate Court Considers Whether Imposition of Arranger Liability Requires Knowledge Waste is Hazardous

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The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") addressed in a June 25th Opinion an issue involving arranger liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). *See 68th St. Site Work Grp. v. Alban Tractor Co. Incorporated*, 105 F.4th 222 (4th Cir. 2024).

The question addressed was whether imposition of arranger liability requires knowledge that disposed-of waste is hazardous in order to impose liability.

The 68th Street Group was formed by entities who incurred substantial costs associated with hazardous substances released at the 68th Street Dump Superfund Alternative Site ("Superfund Site").

The 68th Street Group filed a CERCLA contribution action.

The Superfund Site is an aggregate of seven landfills in Maryland that received a variety of wastes. This included hazardous substances.

The United States Environmental Protection Agency ("EPA") subsequently pursued various entities under CERCLA liability provisions to fund or reimburse it for remediation efforts.

The 68th Street Group commenced a CERCLA contribution action against 156 entities. Thirty-one defendants filed a motion to dismiss and/or a motion for summary judgment.

The question addressed was whether the Defendants were liable under the CERCLA arranger potentially responsible party category. Section 107(a)(3) imposes liability upon:

> …any person who by contract, agreement, or otherwise arranged for disposal or treatment… of hazardous substances owned or possessed by such person, by ant other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

The United States District Court for the District of Maryland dismissed all 31 claims in a single order. It held that the Complaint (among other defects) did not allege that the Defendants knew the waste being disposed of was hazardous. *See 68th St. Site Work Grp. v. 7-Eleven, Inc.*, No. CV SAG-20-3385, 2022 WL

227966 (D. Md. Jan. 26, 2022), vacated and remanded sub nom. *68th St. Site Work Grp. v. Alban Tractor Co., Incorporated*, 105 F.4th 222 (4th Cir. 2024).

The 68th Street Group moved to amend its Complaint. It attempted to cure some of the defects found by the Court. However, it did not allege the Defendants had knowledge the disposed of waste was hazardous.

The District Court denied the motion to amend because the Complaint did not allege scienter. It interpreted CERCLA arranger liability as requiring that the 68th Street Group allege the Defendants had knowledge the waste disposed of at the Superfund Site was hazardous.

The 68th Street Group filed a motion to certify an interlocutory appeal. It challenged the District Court's interpretation that knowledge is required.

The Fourth Circuit explained there are four elements that must be established for a Plaintiff to succeed on a CERCLA arranger claim. Element three was the relevant issue.

42 U.S.C. § 9607(a) provides four methods that can be used to satisfy the third element of Arranger liability. See 42 U.S.C. § 9607(a)(1)-(4). The Fourth Circuit analyzed whether the phrase "arranged for disposal… of hazardous substances" in § 9607(a)(3) requires the Defendant knew or should have known the waste was hazardous.

The Fourth Circuit stated that CERCLA is ordinarily interpreted as imposing strict liability. An exception is where Congress explicitly imposed a knowledge requirement.

Congress was noted to have placed "knowledge" in certain sections of the statute. The absence of "knowledge" in 107(a)(3) was noted. Congress was therefore presumed to have not intentionally included the language.

The Fourth Circuit held that Defendants are strictly liable under CERCLA even if they were unaware the waste being disposed of or arranged to be disposed of was hazardous.

Congress's goal in enacting CERCLA was held to be the prompt and effective cleanup of waste sites and ensure those liable bear the cost of remedying the conditions they created. To require knowledge was deemed to work against these goals by creating evidentiary issues and encouraging litigation on the issue of liability.

The Fourth Circuit found that a Plaintiff must allege a Defendant disposed of waste which is hazardous. Whether Defendant knew the waste was hazardous isn't required.

The District Court's order denying the 68th Street Group's motion to amend and order granting the appellees motion for judgment on the pleadings were both vacated and the case remanded.

A copy of the Opinion can be downloaded here.