

Customers Found Not Liable for Electroplater's Waste

The U.S. Court of Appeals for the Eleventh Circuit has affirmed a district court's decision holding that two companies that contracted for a third company's electroplating services did not "arrange for" the disposal of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Briggs & Stratton Corporation (B&S) filed a complaint in this action to recover costs incurred in the cleanup of hazardous waste at a closed electroplating facility site (the Site). B&S sought contribution from several others connected to the Site, including several members of the McCord family, who had conveyed the property to a trust (the McCord Trust); Concrete Sales and Services, Inc. (Concrete Sales), a corporation owned by the McCord Trust that also held title to the Site; and Alvin E. DeGraw, Jr., the president of the company that ran the electroplating facility (DeGraw).

The McCords, in turn, sought contribution from Peach Metal Industries, Inc. (PMI), the company that did the electroplating, and customers of PMI, including Blue Bird Body Company (Blue Bird) and Simplex Nails (Simplex).

From approximately 1971 to 1987, PMI operated an electroplating and galvanizing facility on the Site. PMI generated hazardous waste as a regular part of its electroplating process, and disposed of the waste by dumping it onto the ground and storing it in unlined lagoons and drums on the Site. PMI eventually sought bankruptcy protection.

Blue Bird, a bus and motor-home manufacturer, and Simplex, a nail manufacturer, both outsourced their electroplating to PMI. Both companies set certain electroplating standards. Blue Bird, PMI's biggest customer, outsourced all of its electroplating to PMI. Blue Bird's blueprints and purchase orders were specific as to the type of electroplating necessary for its parts. Blue Bird required in its invoices that PMI comply with all federal, state and local laws, regulations and orders. Additionally, both Blue Bird and Simplex at one time or another provided financial support to PMI. Simplex once loaned money to PMI, and Blue Bird did so twice.

Both companies were aware of the possibility of a waste disposal problem at PMI. However, although both companies knew that the electroplating process produced hazardous waste, neither company ever inquired about PMI's waste disposal practices, despite Blue Bird's contractual authority to require compliance with environmental laws. The McCords maintained that the relationships between PMI and Simplex and between PMI and Blue Bird presented a question of material fact as to Simplex's and Blue Bird's liability for PMI's disposal of hazardous wastes.

The McCords based their claims against Simplex and Blue Bird on Sections 107(a) and 113(f) of CERCLA. Section 113(f) allows someone to seek contribution from anyone who is or may be liable under Section 107(a). Section 107(a)(3) imposes liability on:

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

The McCords asserted that Simplex and Blue Bird were liable under Section 107(a) because they “arranged for” the disposal of hazardous substances by PMI. The district court granted judgment before trial to Blue Bird and Simplex, and the McCords appealed.

Because CERCLA does not define “arranged for,” the court of appeals considered several factors in determining whether Simplex and Bluebird were responsible as “arrangers”. These factors included:

(1) whether a sale involved that transfer of a “useful” [product] or [a] “waste” product; (2) whether the party intended to dispose of a substance at the time of the transaction; (3) whether the party made the “crucial decision” to place hazardous substances in the hands of a particular facility; (4) whether the party had knowledge of the disposal; and (5) whether the party owned the hazardous substances.

Therefore, the McCords were required to present evidence that would allow a reasonable jury to conclude, based on all the facts, that Simplex or Blue Bird arranged for PMI’s disposal of hazardous substances owned or possessed by Simplex or Blue Bird.

The McCords argued that Simplex’s contracting with PMI amounted to “willful blindness,” because Simplex controlled the parts that PMI electroplated for Simplex, knew that hazardous waste was a by-product of the electroplating process, and loaned money to PMI. In response, Simplex claimed that it never owned or possessed the hazardous substances which PMI disposed of, did not have any authority or obligation to control how the hazardous substances were disposed of, and was not aware that PMI disposed of the waste improperly. The court of appeals held that the McCords failed to show that Simplex arranged for the disposal of hazardous wastes at PMI. Though Simplex loaned money to PMI on one occasion, the McCord’s presented no evidence that that money was to be used for a specified purpose, such as the disposal of hazardous waste. Additionally, even though Simplex knew that hazardous waste would be generated by PMI’s electroplating, the court of appeals held that the McCords failed to show that Simplex’s president either knew about or had the power to control PMI’s disposal practices. Therefore, the court of appeals concluded that no reasonable person could find that Simplex arranged for the disposal of hazardous substances under CERCLA, and affirmed the district court’s grant of judgment before trial to Simplex.

The court of appeals considered the question of Blue Bird’s liability to be a closer call. The McCords contended that Blue Bird had control over PMI and could have exercised control over PMI’s hazardous waste disposal practices. The McCords argued that the following facts

would permit a jury to conclude that Blue Bird controlled PMI. A former Blue Bird employee founded PMI. Blue Bird was PMI's biggest customer. Blue Bird kept PMI in business by loaning money to PMI to facilitate PMI's purchase of hazardous substances. Blue Bird's invoices required PMI to comply with all applicable laws, including one specific environmental law. Finally, Blue Bird dictated the electroplating services to be performed on its parts by PMI. For these reasons, the McCords argued that Blue Bird "arranged for" disposal of PMI's hazardous substances.

In response, Blue Bird argued that it neither controlled nor had any duty to control PMI. Blue Bird argued that even though PMI was founded by a former PMI employee, PMI was a separate and distinct corporate entity. Next, even if Blue Bird's loans somehow facilitated PMI's purchase of hazardous electroplating substances, the McCords did not show that Blue Bird owned or controlled these substances. In addition, although Blue Bird's purchase orders required PMI to comply with all applicable regulations, the McCords did not show that those requirements implied any duty to monitor PMI's compliance. And finally, Blue Bird argued that their electroplating instructions dictated the desired result, but not the process to be used.

The McCords responded that Blue Bird was aware that PMI was not properly disposing of its hazardous wastes because Blue Bird knew that hazardous waste was being generated in the electroplating process, because PMI's facilities were rundown, and because PMI was having financial problems. Blue Bird responded that it had no knowledge of PMI's disposal practices, and that just because PMI's facility was run down and PMI was experiencing financial difficulties does not indicate that Blue Bird should have known that PMI was not properly disposing of its wastes. Blue Bird also argued that requiring a vendor to comply with applicable laws does not imply a duty to police that vendor's compliance.

The court of appeals held that the McCords had not produced sufficient evidence to allow a jury to conclude that Blue Bird intended to dispose of hazardous substances through PMI. The majority of Blue Bird's interactions with PMI involved a simple contract for services. The court stated that even though Blue Bird's loans to PMI could have facilitated PMI's purchase of hazardous substances, the fact that Blue Bird lent money to PMI did not show that Blue Bird owned, possessed or even had the ability to control the hazardous substances.

Therefore, the court of appeals held that even though "arranger liability should be liberally construed to promote CERCLA's remedial scheme," there was not enough evidence to create an issue of material fact as to whether Blue Bird used PMI to "arrange for" the disposal of Blue Bird's wastes, and affirmed the district court's decision of judgment before trial in favor of Blue Bird. The court noted that its opinion is limited to the facts of this particular case, and that CERCLA liability might have been proper if the facts were different.

Concrete Sales and Services, Inc. v. Blue Bird Body Co., 2000 WL 622430 (11th Cir.)

This article was prepared by Christopher J. Dunsky, a partner in our Environmental Department, and previously appeared in the September, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.