Court Confirms That Sale of Spent Car Batteries to Battery Recycler Results In Superfund Liability

The United States District Court for the Southern District of Ohio recently held that a company that sold whole spent car batteries to a battery-breaking and recycling site can be held liable under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), even though the company's vice-president swore that he intended only to recycle the lead contained in the batteries and not to "dispose" of them.

Facts

The United States Environmental Protection Agency (EPA) sued Livingston & Co., Inc. (Livingston) and nine other companies that had sent lead-acid batteries to a battery-breaking and recycling yard operated by United Scrap Lead Company (USLC) in Troy, Ohio, to recover costs that EPA had incurred in cleaning up the USLC site. Under CERCLA, any person who "arranged to dispose" of hazardous substances at a site may be held liable for response costs incurred by EPA in cleaning up the site. Livingston admitted that it had sold whole, spent car batteries to USLC, but argued that its sales did not constitute an "arrangement to dispose" of the lead contained in the batteries, but were simply sales of "useful products." Livingston, therefore, asked the court to dismiss the case against it before trial. Livingston supported its motion with an affidavit by its vice-president, Roger Livingston, who swore that he and his company intended only "to sell these batteries to USLC for its recycling of the lead," and that "it was never my intention to send the batteries to USLC to dispose of them." Livingston also relied on a statement by a former USLC employee that the prices which USLC paid Livingston for its batteries were based on the prices of new lead, as reported in the Wall Street Journal from time to time. Livingston argued that USEPA failed to present even "one shred" of evidence that Livingston had intended to dispose of hazardous waste, rather than intending to recycle lead.

Because Ohio, like Michigan, is under the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the court based its ruling on the Sixth Circuit decision in *United States v. Cello Foil Products, Inc.*, 100 F.3d 1227 (6th Cir. 1996). In that case, the Sixth Circuit held that liability as an "arranger" under CERCLA depends on whether the party intended to enter into a transaction that included an arrangement for disposal, and that the intent needed to establish liability can be inferred from the totality of the circumstances, not just the subjective intent of the party. The court noted that Livingston admitted that it knew that USLC would remove and recycle the lead plates from the batteries by a process known as "battery breaking," which involves breaking open the batteries, removing the lead plates, and disposing of the battery acid and useless plastic battery cases. In this case, as at many battery-breaking sites, USLC had dumped the battery acid into a pit, and collected broken battery cases, some of which contained lead particles, into piles. The court held that it was irrelevant that Livingston did not intend that USLC release hazardous substances. The court stated that if Livingston itself had removed the lead from its own batteries, it could have recycled the lead without incurring

CERCLA liability, provided that it disposed of the acid and battery casings in a proper manner. However, by selling whole, spent batteries to another party who would inevitably have to dispose of the useless acid and battery casings, Livingston risked incurring CERCLA liability if its batteries were not disposed of properly.

The court also rejected Livingston's argument that it had sold a "useful product," rather than a waste, because the spent batteries were no longer useful for their "original intended purpose" as car batteries. The fact that they had some commercial value based on their lead content did not make the spent batteries a "useful product." The court distinguished a recent decision in *Pneumo Abex Corp. v. Highpoint Thomasville & Denton Railroad Co*., 142 F.3d 769 (4th Cir. 1998) in which the United States Court of Appeals for the Fourth Circuit had held that the sale of broken and worn out wheel bearings to a foundry did not constitute an "arrangement to dispose" under CERCLA. In that case, the foundry melted the worn out wheel bearings and re-cast them into new bearings. During the melting process, impurities were skimmed off and then dumped on the foundry's property. The court distinguished the *Pneumo* decision on the grounds that impurities would have been skimmed off during the melting process even if the foundry had used virgin materials, and because the parties in that case intended to reuse the wheel bearings "in their entirety" to re-cast new wheel bearings.

For all these reasons, the court refused to grant Livingston's motion for judgment before trial, and held that the case should proceed to trial. This decision is consistent with other decisions have held parties liable for selling spent lead acid batteries to battery-breaking sites.

Ironically, Congress enacted the Superfund Recycling Equity Act (SREA) on November 29, 1999. SREA exempts parties who arrange to recycle certain materials, including whole batteries, from CERCLA liability. However, SREA provides that the exemption from liability does not apply to any case in which the United States had filed a complaint before November 29, 1999. On January 4, 2000, Livingston filed another motion asking the court to dismiss the case against it based on SREA. The court held that SREA did not apply to Livingston, because USEPA had filed its case against Livingston and the other parties at the USLC site in 1991. The court also held that the exemption did not apply to any claims by original defendants against third parties, because such claims are part of the action that the government initiated in 1991.

United States v. Atlas Lederer Co., et al., 2000 WL 248633 (S.D. Ohio), orders issued February 16, 2000.

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