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Spiller, but Not Shipper of Spilled Chemical, Liable for Environmental Cleanup under CERCLA

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consumers benefit when a business follows the law, it is insufficient to infer congressional intent in order to give those consumers a private cause of action. As the court noted, "Statland cannot bootstrap consumers' rights into a law that does not mention them."

The Seventh Circuit then examined Section 411(b)'s position within the Aviation Act. In the original Aviation Act, Section 411 appeared as a single paragraph granting the Civil Aeronautics Board (CAB) express power to regulate deceptive practices or unfair methods of competition in the airline industry. The Airline Deregulation Act amended the Aviation Act, transferring CAB's duties to other agencies. Section 411(b), as amended, contains two provisions, 411(a) (411 as originally written) and 411(b). Both provisions deal with the CAB's authority over commercial practices of the airline industry.

In *Polansky v. Trans World Airlines, Inc.*, 523 F.2d 332, 338-40 (3rd Cir. 1975), the Third Circuit determined that Section 411(a) does not create a private right to sue. The Seventh Circuit, finding nothing suggesting Section 411(b) should be read differently, also interpreted Section 411(a) as failing to create a private right to sue.

Finally, the Seventh Circuit read the legislative history of Section 411(b) as indicating Congress' intent to give the DOT, not private parties, the right to enforce its provisions. Pointing to statements in the House Report highlighting the importance of consumer protection and the DOT's regulatory role in this area, the court concluded that the DOT, not private parties, will enforce consumer protection rules against airlines.

In affirming the district court's decision regarding Statland's federal claim, the Seventh Circuit held that Section 411(b)'s language, structure, and legislative history all indicate Congress' intent to establish the DOT's regulatory power over airlines without implying a private right of action for consumers. Since a private right of action need not be implied to further this intent, the court held that Section 411(b) does not create one.

State Claims Pre-empted

The Seventh Circuit also addressed Statland's state law claims. Having held that Section 411(b) did not give Statland a federal cause of action, the court retained jurisdiction over Statland's state law claims to conserve state court resources.

Turning to the state claims, the court noted that the Airline Deregulation Act added an express pre-emption clause to the Aviation Act, providing that states shall not "enact or enforce any law, rule, regulation, stand, or other provision having the force and effect of law relating to rates, rules or services of any carrier." 49 U.S.C. App. Section 1305(a). These words "express a broad preemptive purpose," *Morales v. Trans World Airlines, Inc.*, ___ U.S. ___, ____, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157 (1992), whereby canceled ticket refunds relate to rates. Thus, Statland's state law claims, falling within this ambit, were pre-empted. ❖

— Judith Gorske

Spiller, but Not Shipper of Spilled Chemical, Liable for Environmental Cleanup Under CERCLA

In ***Amcast Indus. Corp. v. Detrex Corp.***, 2 F.3d 746 (7th Cir. 1993), the United States Court of Appeals for the Seventh Circuit held that a chemical manufacturer is a "responsible person" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. Section 9601, et. seq. (1980). As a consequence, the Seventh Circuit extended liability under CERCLA to a manufacturer for chemicals spilled from its own trucks, but not for chemicals spilled from trucks owned by a common carrier the manufacturer hired for delivery of the chemicals.

Chemical Spill Harms Environment

Plaintiff, Elkhart Products Corporation (Elkhart), a subsidiary of Amcast Industrial Corporation, manufactures copper fittings at its Indiana plant. It uses the solvent trichloroethylene (TCE) in the manufacturing process. Elkhart purchased TCE from a number of chemical manufacturers, including defendant Detrex Corporation (Detrex). Detrex often delivered TCE to Elkhart in its own tanker trucks. However, Detrex also frequently hired a common carrier, Transport Services, to deliver the solvent to Elkhart.

In 1984, the groundwater beneath a pharmaceutical plant adjacent to Elkhart's facility was contaminated with TCE. An investigation revealed that both Detrex's and Transport Services' drivers spilled TCE accidentally on Elkhart's premises while filling Elkhart's storage tanks. Some of this spillage seeped into the groundwater beneath the pharmaceutical plant.

Elkhart spent more than $1 million to clean up the TCE contamination. Elkhart later sued Detrex in order to recover from the cost of eliminating the TCE contamination to Detrex. The trial court granted partial summary judgment for each party and entered judgment against Detrex for the entire cleanup cost Elkhart had incurred. Detrex appealed the trial court's decision to the United States Court of Appeals for the Seventh Circuit. Detrex also filed a separate action in district court for contribution against Elkhart.

Response Costs, Facilities, and Responsible Persons

CERCLA Section 9607(a)(1) imposes response costs, the costs of eliminating an environmental hazard, on the "owner and operator of a . . . facility" from which a hazardous substance has been released. CERCLA Section 9607(a)(3) also places liabil-

ity on "any person who by contract ... arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person." Furthermore, "facility" is defined under CERCLA Section 9601(9) as: "(A) any building, structure, installation, equipment, pipe or pipeline . . ., well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."

In the instant case, Elkhart was a "responsible person" under CERCLA because the TCE spilled from its facility. CERCLA, however, under Section 9607(a)(4)(B), allows one responsible person to recover all or part of its response costs from another responsible person. As a result, Elkhart claimed that Detrex was also a responsible person because Detrex was an owner of a facility and an arranger for disposal or treatment of TCE.

Contribution from Responsible Persons

Detrex initially argued that the court should apportion responsibility for the TCE cleanup costs between it and Elkhart. The Seventh Circuit determined that Detrex could have counterclaimed to seek contribution for the response costs fairly attributable to Elkhart without conceding responsibility for the contamination. Instead, Detrex chose to wait and file a separate action for contribution against Elkhart in district court. Thus, the Seventh Circuit concluded that Detrex's first argument made no sense and quickly rejected the claim.

In rejecting Detrex's claim, the court affirmed CERCLA's provisions regarding contribution among responsible persons. The Seventh Circuit interpreted CERCLA to mean that whoever incurs the costs of cleaning up a contaminated site may proceed to recover those costs from another responsible person. The responsible person may then promptly counterclaim for a percentage of the costs it thinks were due to the plaintiff's own conduct.

Court Interprets "Facility" Exception

In addition, Detrex asserted that it was not within CERCLA's grasp because it did not own a "facility." Elkhart responded to Detrex's argument by claiming that Detrex failed to raise this "facility" issue in district court and, as a consequence, forfeited the argument on appeal.

The Seventh Circuit acknowledged that an issue not raised in district court cannot be used to reverse that court. Nonetheless, case law has established that where failure to preserve an issue for appeal in district court constitutes harmless error, the appellate court possesses the power and the right to permit the issue to be raised on appeal. Accordingly, the Seventh Circuit concluded that the issue of whether or not Detrex's carrier trucks composed a "facility" under CERCLA was ripe for a decision, and that no harm would be caused by Detrex raising the "facility" issue for the first time at the appellate level.

The court initially determined that the tanker trucks owned by Detrex constituted a "facility" under the language of the statute. CERCLA also defines disposal to include spilling. Therefore, the Seventh Circuit found that the trucks contained a hazardous substance, TCE, and "disposed" of it when they spilled it.

Next, the court recognized that "facility" under CERCLA excludes a "consumer product in consumer use." The court stated that the term "consumer product" applies equally to products used by consumers, business firms, and other institutions. The court then addressed the question of whether this reference to consumer product in the definition of facility should be read literally.

The Seventh Circuit held that the consumer product exception should be read literally. If the exemption were not taken literally, Elkhart would not be a responsible person, even though it used TCE in its ordinary course of production. Rather, Elkhart would become responsible once TCE was discarded into a waste-disposal pit on its premises. Furthermore, TCE in Detrex's trucks would not be a consumer product in consumer use until it spilled. The TCE would also cease to be in consumer use after the spillage occurred. As a result, the court concluded that a literal interpretation of the consumer product exception best furthered CERCLA's purpose.

Based on this literal interpretation of the consumer product exception, Detrex constituted a responsible person when the TCE its trucks were carrying spilled and was no longer in the trucks or any other property owned by Detrex. Consequently, Detrex was responsible for the environmental damage resulting from the spillage by its trucks.

Court Finds Chemical Manufacturer, but Not Common Carrier, Liable

Although Detrex was responsible for the environmental damage caused by the TCE spilled from its own trucks, the Seventh Circuit determined that Detrex was not responsible for the TCE spillage from Transport Services' trucks. According to the court, Detrex would be responsible for spillage by the common carrier's trucks under CERCLA Section 9607(a)(3) only if Detrex "arranged with a transporter for transport for disposal or treatment" of TCE. The court's critical analysis revolved around the words "arranged for" in the statute. While CERCLA does not expressly define the terms "arrange for," the court concluded that these words imply intentional action. Since Detrex only arranged for Transport Services to deliver the TCE to Elkhart and did not arrange for the carrier to spill it, Detrex could not be held liable under CERCLA for Transport Services' spillage.

Elkhart argued that because CERCLA speaks of "disposal," and "disposal" includes accidental spillage, Detrex should be held accountable for Transport Services' TCE spillage. The Seventh Circuit decided that in this particular context of a product's transportation, "disposal" excludes accidental spillage because one does not arrange for an accident. Therefore, CERCLA's words "arranged with a transporter for transport for disposal or treatment" refer to the case where an individual desires to dispose of hazardous waste and hires a transportation company to carry the waste to a disposal site.

In such a case, the shipper would be a responsible person and liable for cleanup costs. However, when the shipper arranges for the delivery of a useful hazardous product with a common carrier, it is not a responsible person under CERCLA if spillage occurs en route. Hence, under CERCLA, Detrex was only liable for the spillage of TCE from its own trucks, and not from the trucks of Transport Services. ❖

— Benjamin Malkin

Cryptic Exclusion Endorsements on Automobile Insurance Policies Are Enforceable

In ***Dungey v. Haines & Britton, Ltd.***, 614 N.E.2d 1205, (Ill. 1993), the Illinois Supreme Court held that a renewed insurance policy assumes the conditions of the original contract. Therefore, a previous exclusion endorsement becomes part of a renewed contract. In reversing the court of appeals, the supreme court affirmed the circuit court's judgment that a renewed policy was unambiguous, and a driver named in an initial exclusion endorsement was excluded from coverage under a renewed insurance policy.

Appellate Court Finds Exclusionary Clause Ambiguous

In 1981, John and Shirley Dungey obtained automobile insurance coverage through Haines & Britton, Ltd. (Haines), an insurance broker. The Economy Fire and Casualty Company (Economy) issued Shirley Dungey an insurance policy for a 1980 Plymouth Horizon she owned with her husband. As part of the policy, Shirley Dungey signed a statement, called a "named drivers exclusion endorsement," which excluded her husband, John Dungey, from coverage due to his poor driving record. At the bottom of the endorsement, appeared the notation "CE-180."

One year later, when Shirley Dungey renewed her insurance policy, she again signed a named drivers exclusion endorsement excluding John Dungey from coverage. The notation "CE-303" appeared at the bottom of this second endorsement. Shirley Dungey subsequently renewed the auto insurance policy on the Plymouth Horizon many times. Yet, Economy never again asked her to sign a named driver exclusion endorsement. Instead, she received a declaration statement from Economy each time she renewed her policy. The declaration statement contained a preprinted line entitled "Endorsement(s)," after which were a series of numbers, including "CE-303." This number correlated with the second named drivers exclusion attached to the original policy which Shirley Dungey signed to indicate that John Dungey was excluded from insurance coverage.

In 1983, the Dungeys obtained a second policy from Economy. Shirley Dungey's son was listed as the primary driver on this policy. Moreover, two cars previously insured under the first policy, although at different times, were insured under this second policy. The premiums were higher and the policy periods shorter on this policy than on the first policy. No endorsement excluding John Dungey was required under this policy and the declaration statements sent to Shirley upon renewal of this policy did not contain the notation "CE-303."

In 1985, the Dungeys purchased a 1985 Chevrolet Sportsvan. Although Shirley recalled telling her insurance broker that John would be the primary driver, the insurance company excluded her husband from the policy because the van was added to the original 1981 policy.

On the same day the Dungeys added the Chevrolet van to the first policy, they obtained a third policy from Economy for a 1984 Chrysler Laser which had previously been insured under Shirley's first policy. Both John and Shirley were listed as drivers on this policy that also had higher premiums and shorter periods than the first policy.

On March 29, 1986, while John Dungey was driving the 1985 van insured under the first policy, he had an accident. The van was destroyed and John was injured. Economy denied the Dungeys' claim for coverage because Economy claimed the first policy excluded John Dungey from coverage.

The Dungeys filed a lawsuit to recover damages for breach of contract and negligence against both Haines and Economy. The plaintiffs and Economy filed motions for summary judgment. The trial judge granted Economy's motion for summary judgment, finding as a matter of law that the named drivers exclusion contained in the policy excluded coverage and was unambiguous. The trial court also found that Haines was not an agent of Economy and that Economy would not be liable for Haines.

The plaintiffs appealed the trial court's decision. The appellate court, with one justice dissenting, reversed the trial court's judgment. The appellate court held that the exclusionary clause was ambiguous and that there was a genuine issue of material fact concerning the intent of the parties as to the exclusion clause. Economy filed a petition for leave to appeal, which the Illinois Supreme Court granted.