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An "As Is" Clause in a Deed of Conveyance Does Not Protect Responsible Parties Against Strict Liability for Cleanup Costs Under CERCLA

Rosemary G. Milew

Board Game Liability
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without fault, to words or pictures. Thus, Watters could not recover damages without proof that TSR violated its duty to exercise ordinary care to prevent foreseeable injury.

The court first addressed Watters' argument that TSR was at fault for putting Dungeons and Dragons on the market without attempting to ascertain the mental conditions of prospective players. The court held that TSR did not fail to exercise ordinary care since the only method of guaranteeing that Dungeons and Dragons would not reach "mentally fragile" individuals would be to stop its sales of the game entirely.

Next the court of appeals addressed Watters' contention that TSR breached a duty to warn of the possible consequences of playing the game, including a player's loss of control of mental processes. Under Kentucky law, manufacturers and suppliers have a general duty to warn of dangers known to them but not known to anticipated users of the product. Though it determined that Johnny was one of the class of persons whose use of the game could have been reasonably anticipated, the court found Watters failed to prove TSR could have foreseen Johnny's suicide.

According to the court, TSR's motion for summary judgment required Watters to cite specific facts showing that TSR possessed knowledge of a danger which made Johnny's death foreseeable. In her affidavit, however, Watters admitted only to reading publications which discussed the dangerous propensities of the game. She described her son as well-behaved throughout the period when he regularly played Dungeons and Dragons with his friends. The court reasoned that if Johnny's mother could not foresee the suicide, TSR could not be expected to foresee the boy's death either.

In addition, the court concluded that, based on the content of the materials which accompanied the game, TSR would not have been able to foresee that players of the game would be more susceptible to suicide than non-players. The court compared the violence and depravity of television and movies to which children are exposed with the "let's pretend" nature of Dungeons and Dragons. The court found that Dungeons and Dragons only required a player to imagine a fanciful world; this mythological world was not based on suicide or cruelty. The court noted that no Kentucky case law existed which placed a duty to warn on television networks and book publishers with respect to creative works which might be linked to anti-social behavior. Furthermore, the only case law on point supported TSR's first amendment argument. Moreover, there had never been a similar claim against producers and publishers for the actions of persons allegedly prompted by watching television shows and reading magazines where there was no direct incitement to act. In the absence of specific facts indicating that TSR's game was in fact dangerous or that TSR had knowledge of any danger with respect to the game and its effect on players, Watters failed to sustain her cause of action.

Lastly, the court of appeals considered Watters' assertion that TSR's manufacturing and sale of Dungeons and Dragons proximately caused her son's death. According to the court, there cannot be liability in a negligence action if the negligence did not cause the injury. The court recognized that under Kentucky law, unforeseeable, extraordinary actions may interrupt the chain of causation. In this case, the court held that Johnny's suicide was an unforeseeable and intervening act.

Although exceptions to the general rule that suicide constitutes an independent and intervening act do exist, such as in the area of worker's compensation or in a situation where someone with suicidal tendencies is placed in the care of a custodian, the court found that Watters failed to present facts suggesting Johnny's suicide fit into either exception. There was no evidence that Johnny suffered from psychosis or had suicidal tendencies. Thus, the court concluded that whether Johnny would not have shot himself had he not constantly played Dungeons and Dragons was open to speculation.

The Sixth Circuit held that Watters had failed to establish there was a genuine issue for trial under the standards of Kentucky negligence law. Therefore, the court of appeals affirmed the district court's decision to grant TSR's motion for summary judgment.

Elizabeth Barnes

AN "AS IS" CLAUSE IN A DEED OF CONVEYANCE DOES NOT PROTECT RESPONSIBLE PARTIES AGAINST STRICT LIABILITY FOR CLEANUP COSTS UNDER CERCLA

In ***Wiegmann & Rose Int'l Corp. v. NL Indus.,*** 735 F. Supp. 957 (N.D.Cal. 1990), the United States District Court for the Northern District of California held that a former property owner who disposed of hazardous wastes on property sold could not rely upon an "as is" provision in the deed to the contaminated property to escape strict liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1982 & Supp. 1988).

Background

On May 23, 1975, NL Industries, Inc. ("NL") sold twenty-three acres of property in California to Wiegmann & Rose Machine Works ("Wiegmann"). In September 1985, Wiegmann sold all of its stock to Wiegmann & Rose International Corporation ("W & R"). NL alleged that the deed conveyed

the described property as well as the buildings and appurtenances thereon in an "as is" condition. At no time did NL disclose that a portion of the land contained hazardous wastes.

In 1980, five years after the sale, Congress enacted CERCLA to facilitate the cleanup of property contaminated with hazardous wastes. That same year, the California Department of Health and Human Services ("CDHS") notified W & R that it had discovered hazardous wastes on the property. Used foundry sands that had been dumped on the property in the early 1970's had contaminated the land with heavy metals. In response to CDHS's request for remedial action, W & R installed groundwater monitoring wells, analyzed soil borings and prepared proposals and reports regarding the cleanup of the site.

In August of 1988, in response to CDHS's request for investigation, W & R excavated a portion of the property and discovered buried metal drums that had leaked and contaminated the land with used industrial solvents. There was evidence that the drums were buried on the site in 1973 or 1974. Subsequently, W & R planned remedial action to clean up the property.

In December of 1988, W & R sued NL and Esselte Pendaflex Corporation ("EP") for over $500,000 to recover costs already incurred as well as those costs which W & R anticipated incurring in the future with respect to the contaminated property. In its complaint, W & R alleged two causes of action under the CERCLA statute and two causes of action under the state law of equitable indemnity. NL moved for summary judgment only with respect to the issue of CERCLA liability. EP joined in W & R's opposition to the motion.

CERCLA Cause of Action

CERCLA requires parties responsible for disposing hazardous wastes to bear the cleanup costs of the conditions they created. 42 U.S.C. §§ 9601-9675 (1982 & Supp. 1988). Congress created a private cause of action for recovery of response costs against the owner or operator of a facility at the time hazardous substances were disposed or against any other contributor to the dumping of wastes under § 9607(a) of CERCLA. To establish liability under § 9607(a) of CERCLA, the plaintiff must show: (1) that the defendant falls within one of the classes of potentially liable parties including anyone who owned or operated a facility at which hazardous wastes were disposed of, (2) that there was a release or threatened release of the hazardous substance, (3) from the facility, and (4) that the release caused the plaintiff to incur some amount of response costs. W & R alleged that NL owned the property in question during the time the hazardous wastes were dumped on the property and that EP was the successor to the corporation that buried the metal drums.

Notwithstanding any other provision of law, such responsible persons are strictly liable for response costs under CERCLA. However, a person may escape liability pursuant to § 9607(b) of CERCLA if he can prove by a preponderance of the evidence that the release of a hazardous substance and related damages were caused by (1) an act of God, (2) an act of war, or (3) an act or omission of a third party, if the defendant proves he exercised due care with respect to the hazardous substance and took precautions against foreseeable acts or omissions of the third party and the resulting consequences of the acts or omissions. Assuming W & R could prove the necessary elements of a CERCLA cause of action and NL and EP could not prove the third party defense mentioned above, NL and EP would be strictly liable to W & R for all response costs. Nevertheless, NL moved for summary judgment based upon an "as is" clause in the deed of conveyance.

"As Is" Clause

In NL's motion for summary judgment, NL argued that W & R released NL from all CERCLA liability with respect to costs of removing hazardous wastes from the property because NL conveyed the property to W & R in an "as is" condition. First, NL argued that state law rather than federal law should be applied in interpreting the clause. Second, NL contended that under California law the "as is" clause in the deed released NL from all possible claims, including CERCLA liability, with respect to the contaminated property.

NL cited *Marden v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986) in support of its argument that state law should govern the interpretation of the clause. In that case, the Ninth Circuit applied New York law to interpret the scope of a release clause. The purchaser in *Marden* bought a manufacturing plant and a settling pond. The parties entered into a comprehensive settlement and release agreement subsequent to the purchase agreement. Under the settlement agreement, the seller paid the purchaser $995,000 in settlement of all claims arising out of the purchase agreement. The purchaser later brought suit against the seller for hazardous waste cleanup costs under CERCLA.

Applying New York law, the Ninth Circuit found that the parties intended the agreement to include a release of CERCLA liability. The court upheld the release because the purchaser intentionally waived his right to response cost recovery. At the time of the sale, both parties knew that the property contained hazardous wastes and appreciated the possibility of administrative enforcement action. Furthermore, the parties could have anticipated the possibility of liability from response costs since CERCLA was enacted one year prior to the execution of the settlement agreement.

District Court's Analysis

The district court declined to apply California law in interpreting the "as is" clause in the deed from NL to W & R. As a general rule, federal law governs the validi-

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ty of releases of federal causes of action. However, in interpreting the meaning and scope of the releases as intended by the parties, state law may determine the content of federal law. If the application of state law would frustrate the objectives of CERCLA, federal law should be applied to interpret the "as is" clause.

In choosing not to apply state law, the district court did not imply that the result under California law would be different from the result under federal law. The district court merely found it unnecessary to draw upon any provisions of California law since the application of federal law would always yield results consistent with the objectives of the federal statute. Therefore, the district court held that it could rely solely upon federal law to interpret the "as is" clause of the deed.

Applying federal law to NL's claim, the district court distinguished the *Marden* decision. Unlike the purchaser in *Marden,* W & R had no knowledge of the contamination at the time of purchase. Because the conveyance between NL and W & R occurred five years prior to the enactment of CERCLA, the parties could not have anticipated the possibility of response costs. In contrast to the *Marden* parties who negotiated a comprehensive settlement agreement with respect to the contaminated property, NL included a standard "as is" clause in its conveyance of the property to W & R without negotiating its specific terms. Accordingly, the district court found that NL originally intended the "as is " clause only to protect itself from any breach of warranty claims typically covered by such clauses and not from CERCLA liability.

The district court noted that permitting a responsible party to avoid liability through a standard "as is" clause would frustrate the language and intent of CERCLA. The sale of property subject to an "as is" provision is not one of the three defenses to strict liability defined in § 9607(b) of CERCLA. Furthermore, § 9607(e) of CERCLA explicitly states that no hold harmless conveyance is effective to transfer liability away from a strictly liable party. Most importantly, the district court noted that one of the primary goals of CERCLA is to require responsible parties to bear the cleanup costs of the hazardous conditions they created.

In accordance with the objectives of the CERCLA statute, the district court held that NL could not rely upon an "as is" clause of the deed as a release from strict liability under CERCLA. Therefore, the district court denied NL's motion for summary judgment.

Rosemary G. Milew

DEBTOR ENTITLED TO RESCIND CONSUMER CREDIT TRANSACTION FOR CREDITOR'S FAILURE TO DISCLOSE DEBTOR'S RIGHT TO CHOOSE INSURANCE CARRIER

The United States Bankruptcy Court for the Eastern District of Pennsylvania held that a creditor's failure to inform the debtor of his right to choose a home insurer under a consumer credit transaction constituted a material violation of the Truth In Lending Act. ***In re Moore,*** 117 B.R. 135 (Bankr.E.D.Pa. 1990). In *Moore,* the creditor's error, although merely a technicality, made the debtor's subsequent rescission of the loan valid, and allowed him to collect statutory damages, costs and attorneys' fees for the creditor's failure to acknowledge properly the rescission.

Background

Russell L. Moore ("the Debtor"), an elderly widower, applied for a loan from Mid-Penn Consumer Discount Co. ("Mid-Penn"). As a condition of its loans, Mid-Penn requires that borrowers use their homes as collateral and that the homes be insured. When no mortgage is outstanding, Mid-Penn requires the borrower to prove that the home is adequately insured or to allow Mid-Penn to obtain insurance. Because the Debtor had paid off the original mortgage on his home the year before his loan application, Mid-Penn asked him to prove he had insurance.

The Debtor told Mid-Penn that he had insurance coverage from the American Bankers Insurance Company of Florida ("Bankers"), but Mid-Penn later discovered that the policy had lapsed. Mid-Penn then attempted to renew the policy for the Debtor and added the amount of the renewal fee to the balance of the principal borrowed. Mid-Penn excluded the amount of Mid-Penn's insurance renewal payment in computing the finance charge. When Bankers refused to renew the Debtor's policy, Mid-Penn obtained alternative coverage through an insurance company of its own choice, without asking the Debtor whether he preferred a specific company. This new policy cost less than the Bankers policy, so Mid-Penn refunded the difference to the Debtor. Mid-Penn then gave the Debtor a Truth In Lending Act ("TILA"), 15 U.S.C. §§ 1601-1700 (1988), disclosure statement which showed the payment of the renewal fee as part of the principal. Neither the TILA statement nor any other document Mid-Penn gave to the Debtor, however, mentioned that the Debtor could choose any company as provider of the required insurance coverage.

Approximately eighteen months after obtaining the loan, the Debtor filed a Chapter 13 bankruptcy case. Mid-Penn filed a secured Proof of Claim with the bankruptcy court, seeking the amount of the principal, legal charges and additional interest. The Debtor attacked Mid-Penn's Proof of Claim, alleging that prior to the bankrupt-