



Environmental Newsletter

May 19, 2010

Manufacturer-Arranger Liability Under State and Federal Superfund Laws

*Strategies for maintaining private contribution and
cost-recovery actions against manufacturers
of dry cleaning materials and equipment*

By Ken Lederman

A recent decision from the U.S. District Court for the Eastern District of California highlights the complexities involved with private contribution and cost-recovery actions under state and federal Superfund laws against the manufacturers of dry cleaning materials and equipment, particularly in light of U.S. Supreme Court precedent on "arranger" liability in *BNSF v. United States*, 129 S. Ct. 1870 (2009).

Mere allegations and anecdotal evidence designed to establish that a manufacturer "arranged" for disposal of a hazardous substance are insufficient to survive a motion to dismiss.

In *Hinds Investments, L.P. v. Team Enterprises, Inc.*, 2010 WL 922416 (E.D. Cal. March 12, 2010), the Kirrberg Corporation and Multimatic LLC ("Kirrberg/Multimatic") were sued by the plaintiffs under federal and state hazardous waste laws for cleanup liability associated with a property contaminated with perchloroethylene (or "PCE" or "PERC"). The plaintiffs had used dry cleaning machines manufactured by Kirrberg/Multimatic, and had utilized instruction manuals which directed the discharge of PCE-wastewater into drains. The plaintiffs alleged that the dry cleaning machines were, in effect, designed and built for the "disposal" of PCE, and that Kirrberg/Multimatic were therefore liable as "arrangers" of the disposal of a hazardous substance (i.e., PCE-wastewater).

Kirrberg/Multimatic moved to dismiss under Rule 12(b)(6), arguing that the plaintiffs' claims could not be sustained based on mere allegations of "likely leaks or spills" following the sale of their dry cleaning machines. Kirrberg/Multimatic relied heavily on the *BNSF* decision, and its precedent, which established: (1) that "arranger" liability requires proof of "intentional" steps for the disposal of a hazardous substance; and (2) that knowledge alone is insufficient to prove that a manufacturer "planned" to dispose of a hazardous substance, particularly when the disposal occurs as a peripheral result of the legitimate sale of a useful product. *BNSF*, 129 S. Ct. at 1880.

The court in *Hinds Investments* granted the motion to dismiss and rejected the plaintiffs' assumption that Kirrberg/Multimatic's knowledge that the dry cleaning machine would generate PCE-wastewater necessarily established "intent" to dispose of the PCE-wastewater. The court also ruled in favor of Kirrberg/Multimatic's

assertion of the "useful product" defense, whereby the vendor of a useful product which, through its normal course of operation, produces a hazardous substance is not an arranger under CERCLA. See *Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562, 566 (9th Cir. 1994). The court went on to dismiss all of plaintiffs' claims against Kirrberg/Multimatic, including common law claims of nuisance and trespass.

The *Hinds Investments* decision creates an interesting dichotomy in federal and state precedents involving manufacturers of dry cleaning materials and machinery.

Courts have applied the useful product defense in several decisions which exonerated manufacturers of PCE, and manufacturers of dry cleaning machinery and equipment which utilized PCE. *California Dep't. of Toxic Substances Control v. Payless Cleaners*, 368 F.Supp.2d 1069 (E.D. Cal. 2005) (manufacturer of PCE cannot be held liable as a CERCLA arranger where it has done nothing more than sell a useful chemical); *Adobe Lumber v. Hellman*, 415 F.Supp.2d 1070 (E.D. Cal. 2006) (manufacturer of dry cleaning equipment who only provides the machines and operating instructions is not an "arranger" of waste disposal under CERCLA). These decisions regarding manufacturers of PCE were consistent with federal court decisions establishing "that a manufacturer who does nothing more than sell a useful, albeit hazardous product to an end user has...[not] arranged for the disposal of hazardous waste for the purposes of 42 U.S.C. §9607(a)." *City of Merced v. Fields*, 997 F. Supp. 1326, 1332 (E.D. Cal. 1998) (citing *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1335, 1361-62 (9th Cir. 1990) (a seller of asbestos is not a liable party under CERCLA)).

Yet there are separate precedents where liability was extended to a dry cleaning manufacturer -- specifically Norge Dry Cleaners, which was later purchased by Maytag and is now a part of Whirlpool Corporation -- based on its status as a "franchisor." In these separate Norge cases, plaintiffs were able to argue successfully that Norge had not only designed and installed the dry cleaning machinery, but also instructed franchisees on how to dispose of the PCE-wastewater. Because of the actual involvement in the decision and manner of waste disposal, Norge has been held to be a liable party under state and federal Superfund laws. *Berg v. Popham*, 113 P.3d 604, 610 (Alaska 2005); *Payless Cleaners*, 368 F.Supp.2d at 1077 (rejecting claim of exemption from liability as a manufacturer of a useful product because Maytag, i.e., Norge, offered training and services, designed and provided instructions about its equipment, installed the machinery and the wastewater outlets, and told franchisees where to direct the wastewater for disposal); *Vine Street LLC v Keeling*, 361 F.Supp.2d 600 (E.D. Tex. 2005) (Norge, as Maytag's predecessor, controlled waste disposal by instructing franchisees to dispose of PCE-wastewater directly into a public sewer). In essence, the court found that Norge dry cleaner franchisees had "no choice" as to how to dispose of the PCE-wastewater -- they were, in effect, required to follow the direction of the franchisor.

Analysis of the *Hinds Investments* case and other precedents related to manufacturers of dry cleaning materials and equipment offers some insights and practice tips:

- **It's Not About What You Know -- It's About What You Control.** The plaintiffs in *Hinds Investments* failed to convince the court that Kirrberg/Multimatic's "knowledge of disposal" was equivalent to an "intent to dispose." The court pointed out the Kirrberg/Multimatic never owned or possessed the PCE-wastewater, and that Kirrberg/Multimatic never ordered or controlled the exact manner in which the plaintiffs (who did own and possess the PCE-wastewater) would dispose of leftover material. Allegations against dry cleaning manufacturers which involve only knowledge of a potential future disposal may not survive Rule 12(b)(6) challenges in light of the *BNSF* precedent, which requires "intent" as an element of arranger liability.
- **Look for the Franchise Player.** A dry cleaner who simply purchased dry cleaning materials or machinery and then used the materials or machinery according to written manuals will face significant obstacles (including the "useful product" defense) in establishing that the manufacturer "intended" for the disposal of PCE-wastewater. In contrast, a dry cleaner who operated a "franchise" and who took explicit direction from a franchisor who installed the equipment and directed the exact manner of disposal of PCE-wastewater has a much stronger factual and legal basis to argue that the franchisor qualifies for "arranger" liability. Norge provides perhaps the best-established example of a "franchisor" who did more than just sell the product.
- **Know Your Target.** Many cases don't allow for an easy determination of what kind of dry cleaning materials or equipment were utilized, or whether the dry cleaning business operated as a "franchise." The *Hinds Investments* case provides a stern warning to litigants who have not done their homework, and have

instead relied on "over-simplified" allegations and anecdotal evidence designed to establish that a manufacturer "arranged" for disposal of PCE-wastewater.

To avoid similar mistakes, meticulous and detailed historical research is critical -- interviews with key personnel, landlords, property owners, and neighboring business owners, as well as review and analysis of old leases, ledgers, municipal permits and government records (state and local), insurance documentation, contract documents, phone listings and advertising information, city and county assessor files, historical photographs, check registers, bookkeeping materials, and even UCC-filings can provide critical information which will help confirm whether a claim against a dry cleaning manufacturer can withstand either a Rule 12(b)(6) motion or a summary judgment motion.

- **BNSF is Not the Final Word on "Arranger" Liability Under State Superfund Law.** In Washington State, for example, the state Superfund statute (the Model Toxics Control Act) provides arranger liability for "intentional and unintentional" disposal of hazardous substances. No state case has yet analyzed the interplay between the *BNSF* decision (and its requirement of "intent") and the Washington State provision for arranger liability. Kirrberg/Multimatic might not have received a favorable ruling from a Washington State court interpreting arranger liability under Washington State law. Additionally, each state maintains separate legal precedent related to state hazardous waste management law, and regarding common law claims such as nuisance, trespass, and negligence.
- **Product Liability is an Option.** The plaintiffs in *Hinds Investments* did not file a claim based on a theory of product liability -- essentially, arguing that the dry cleaning materials or equipment were not reasonably safe as designed or because adequate warnings and instructions were not provided. The plaintiffs' reliance on allegations rather than direct evidence in the *Hinds Investments* case casts doubt as to whether the claim could have succeeded. And, the plaintiffs might have also faced difficulty in surviving a motion to dismiss based on the applicable statute of limitations. But product liability claims remain a viable option.

In conclusion, the *BNSF* and *Hinds Investments* decisions make it more difficult to develop and maintain contribution and cost-recovery claims against the manufacturers of dry cleaning materials and equipment. Such claims are not impossible though -- careful strategic planning combined with thorough research and due diligence are critical steps that must be undertaken before any decision is made as to whether legal action is a viable option.

If you have any questions about this Newsletter, please contact the author listed above or the Riddell attorney with whom you normally consult.

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