

Manufacturer-Arranger Liability Under State and Federal Superfund Laws

***An update on strategies for maintaining private contribution
and cost-recovery actions against manufacturers
of dry cleaning materials and equipment***

By Ken Lederman

In 2010, a number of decisions from the U.S. District Courts in California highlighted the difficulty in bringing private contribution/cost-recovery actions against the manufacturers of dry cleaning materials and equipment under state and federal Superfund laws. We focused on one particular case, *Hinds Investments L.P. vs. Team Enterprises Inc.*, 2010 WL 922416 (E.D. Cal. March 12, 2010) in a [May 2010 Newsletter](#). The *Hinds Investments* case represented an emerging line of precedent involving dry cleaning manufacturers and suppliers, and the evaluation of “arranger” liability and “intent to dispose” following the U.S. Supreme Court’s decision in *BNSF v. United States*, 129 S.Ct. 1870 (2009).

Another recent U.S. District Court case from the Northern District of California, *Wells Fargo Bank v. Renz*, 2011 WL 97649 (N.D. Cal. Jan. 12, 2011), emphasizes many of the impediments that parties may face in pursuing cleanup claims against dry cleaning manufacturers after *BNSF*. However, the decision in *Renz* also highlights several new opportunities for private contribution/cost-recovery actions against dry cleaning manufacturers in the post-*BNSF* world.

I. The *Renz* Decision

In *Renz*, the plaintiff filed statutory and common law cleanup claims against Hoyt Corporation (“Hoyt”), which had allegedly “designed, manufactured, distributed, sold, and/or installed dry cleaning equipment” used by Renz for dry cleaning business operations. The plaintiff asserted that Hoyt “represented, asserted, claimed, and warranted that its product was safe and could be operated without causing injury or damage,” and that Hoyt “knew or should have known that its product, when operated as intended, caused contamination to the environment.”¹ Other parties added allegations that Hoyt provided instructions on the disposal of related waste materials. The various claims against Hoyt were brought under CERCLA and California’s State Superfund law (the Hazardous Substance Account Act or HSAA), as well as common law theories of private and public nuisance, negligence and negligence per se, and trespass.²

A. FRCP 12(b)(6) and BNSF Can Preclude CERCLA Claims Against Dry Cleaning Manufacturers Based on Failure to Establish “Intent to Dispose”

Hoyt moved to dismiss all claims under FRCP 12(b)(6). The Court began its analysis by citing to two recent U.S. Supreme Court prohibitions on the standard of review in 12(b)(6) claims: (1) allegations must be enough to “raise a right to relief above the speculative level,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); and (2) allegations of the “mere possibility of misconduct” do not establish a right to relief, *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).³ The Court in

Renz noted that a party must provide more than labels and conclusions, and that a “formulaic recitation of the elements of a cause of action” is no longer sufficient to survive a 12(b)(6) motion. *Twombly*, 550 U.S. at 555.

Applying the heightened FRCP 12(b)(6) standard and the *BNSF* and *Hinds Investments* precedents, the Court quickly disposed of the CERCLA claims against Hoyt as pled.⁴ Following closely the logic and reasoning provided in *Hinds Investments*, the Court concluded that the parties had failed to provide sufficient facts to show that Hoyt sold its products with the “intention of disposing of PCE.” The Court dismissed the allegations as “vague and conclusory,” finding that the parties failed to allege any specific facts that would show that the sale of equipment evidenced an intent to dispose.⁵ The Court further pointed out that Hoyt only sold the machinery, and not the actual PCE, to dry cleaning operators.⁶

B. The Court Not Only Granted a Lifeline to Plaintiffs on its CERCLA Claims, But Also Refused to Dismiss the Common Law Claims

After dismissing the CERCLA claims, the Court granted all parties leave to amend the deficiencies in their pleadings and to, in effect, try again.⁷ Hoyt had attempted to block any opportunity for the plaintiffs to amend their pleadings, arguing that the parties had ample time to develop the facts previously and that the parties had not established that they could ever allege facts that could support their CERCLA-based claims.⁸ The Court rejected Hoyt’s entreaties, relying on the liberal standard for allowing parties to amend pleadings and pointing out that the parties “could allege other facts to cure the deficiencies described herein.”⁹

Things then took a turn for the worse for Hoyt with regard to the common law claims. First, Hoyt tried to argue that the negligence claims should be dismissed because the damages were pure economic losses, and that California law mandated that economic loss alone without some physical injury will not support a negligence claim. The Court rejected this contention, relying on allegations regarding damage to property.¹⁰ The Court also rejected Hoyt’s statute of limitations argument, holding that Hoyt had failed to establish that the parties knew or should have known about its injuries more than 3 years prior to filing their complaints.¹¹

The Court also rejected Hoyt’s attempts to dismiss the public and private nuisance claims, which had been dismissed successfully under *Hinds Investments* on the ground that the parties had failed to allege “causation.” The Court in *Renz*, however, held that the parties had alleged sufficient facts to establish that Hoyt was “aware of typical disposal practices” resulting from the use of its equipment, and that Hoyt designed its equipment “in a manner that would result in discharge of PCE during normal operations.”¹² The Court pointed to other allegations regarding Hoyt’s alleged failure to design mechanisms to prevent releases of contamination, and active representations that Hoyt’s equipment (when used according to established instructions) would not cause injury or damage.¹³

Notably, Hoyt’s attempt to rely on *Hinds Investments* as dispositive precedent (where the court had dismissed a nuisance claim because there were no allegations that the party had *relied* on the manufacturer’s disposal instructions) failed because the Court relied on a separate decision in which a U.S. District Court in California reached an opposite conclusion despite very similar facts.¹⁴ See *Adobe Lumber Inc. v. Hellman*, 415 F. Supp.2d 1070 (E.D. Cal. 2006). Due to the specific allegations and this seeming “split” within the federal district courts in California, the Court held that *Hinds Investments* was not dispositive, and that the parties had alleged sufficient facts to survive a motion to dismiss. The Court then used this same analysis to preserve the parties’ trespass claims.

II. Analysis

A. Claims Against Dry Cleaning Manufacturers Are Difficult, But Not Impossible

The *Renz* case does not change the fundamental holding of the *Hinds Investments* case with regard to claims against dry cleaning manufacturers after *BNSF*. Allegations against dry cleaning manufacturers under CERCLA or state Superfund laws which involve only knowledge of a potential future disposal may not survive FRCP 12(b)(6) challenges in light of *BNSF*’s requirement of “intent” as an element of arranger liability.¹⁵ Moreover, the *Renz* and *Hinds Investments* decisions, combined with the heightened standard under *Iqbal*, sets a high bar for CERCLA litigants who may have previously relied on “over-simplified” allegations and anecdotal evidence designed to establish that a manufacturer “arranged” for disposal of PCE. Potential plaintiffs should be wary of relying on vague or conclusory allegations to support claims under federal and state Superfund laws, which are often attractive causes of action due to the significant leverage provided through the prospect of attorney-fee recovery.¹⁶

But the *Renz* case offers hope for litigants who may have viewed *Hinds Investments* as an impassable barrier to legal claims against dry cleaning manufacturers. First, the Court allowed the parties to amend their CERCLA-based pleadings while simultaneously (though perhaps not intentionally) providing a “roadmap” as to which allegations could survive a 12(b)(6) motion under the new stricter standards of *Iqbal*.¹⁷ While survival of a motion to dismiss is a far cry from overall

success on a claim, careful and thoughtful pleadings may allow parties to at least move into preliminary phases of discovery, which could lead to admissible evidence in support of a claim of “intent to dispose” for purposes of “arranger” liability.

B. State Superfund Laws Change the Paradigm

The *Renz* case confirms that neither *BNSF* nor *Hinds Investments* represents binding precedent on what constitutes “arranger” liability under state Superfund law. California’s state cleanup law offers a poor parallel because it statutorily incorporates CERCLA’s exact definitions for liable parties. Other states, such as Washington, may provide arranger liability for intentional and unintentional disposal of hazardous substances. See RCW 70.105D.040(c); *Modern Sewer Corp. v. Nelson Distributing, Inc.*, 125 Wn. App. 564, 572-74 (2005) (“[t]he term ‘disposal’ as used in MTCA’s ‘arranger’ liability provision encompasses intentional as well as unintentional disposal.”).

When we wrote about *Hinds Investments* in our May 2010 Newsletter, few state cases had yet analyzed the interplay between the *BNSF* decision (and its requirement of “intent”) and a state Superfund provision for arranger liability. But just a few weeks ago, the Montana Supreme Court held that their state Superfund law (“CECRA”) contained a broader scope of arranger liability than CERCLA, and that there was no requirement to abide by the U.S. Supreme Court’s interpretation of arranger liability in *BNSF* which required “intent to dispose” in order for liability to attach. See *State Department of Environmental Quality v. BNSF Railway Company*, 2010 WL 5479260 (Mont. 2010). The Montana Supreme Court noted that the term “intent” was never used as an element of liability under any of the liability provisions of CECRA, and found no legislative purpose which required “intent” as an element of arranger liability. Based on this analysis and relying on the policy objectives established by the Legislature to encourage a broad liability reach to establish funding for cleanups, the Montana Supreme Court held that that an entity need not specifically intend to dispose of a hazardous substance in order to be held potentially liable as an arranger under CECRA. *Id.*

C. Common Law Claims Remain in Play

Finally, the *Renz* court dealt a significant blow to dry cleaning manufacturers who hoped that any common law claims against them would be subject to dismissal following the *BNSF* and *Hinds Investments* decisions. The Court’s reliance on *Adobe Lumber* and its ultimate decision to allow the common law claims to proceed makes it difficult, if not impossible, for dry cleaning manufacturers to feel secure in getting common law claims dismissed on a FRCP 12(b)(6) motion prior to discovery.¹⁸ And since each state maintains separate legal precedent related to common law claims such as nuisance, trespass, and negligence, the legal issues remain far from settled.

III. Conclusion

The *BNSF* and *Hinds Investment* decisions will continue to make it more difficult for parties to develop and maintain CERCLA contribution and cost-recovery claims against the manufacturers of dry cleaning materials and equipment. But the *Renz* decision re-established and re-opened some avenues of attack by potential litigants, either through common law claims or through very carefully drafted pleadings for CERCLA and state Superfund claims. It is even more important for litigants to engage in strategic planning, thorough research, and careful due diligence before moving forward with legal action against dry cleaning suppliers and manufacturers.

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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¹ *Renz*, 2011 WL 97649 at *1.

² *Id.* at *1.

³ *Id.* at *2.

⁴ *Id.* at *3-4. The HSAA claims were also dismissed because the definitions of “liable parties” under the HSAA are established by statute as the same definitions utilized under CERCLA. See Cal Health & Safety Code Sec. 25323.5.

⁵ *Id.* at *4. A separate attempt to allege that Hoyt “arranged for the treatment of PCE waste” was summarily rejected by the Court, which pointed out that this *ex post facto* recharacterization of the claims was not supported by the factual allegations in the complaints against Hoyt.

⁶ *Id.* at *4. Hoyt also presented arguments under the “useful product doctrine” that were successful in *Hinds Investments*. *Id.* at *7. Hoyt was successful, primarily because the parties did not address Hoyt’s arguments. As noted in the prior newsletter, courts have applied the useful product defense in several decisions which exonerated manufacturers of PCE, as well as manufacturers of dry cleaning machinery and equipment which utilized PCE. *California Dept. of Toxic Substances Control v. Payless Cleaners*, 368 F.Supp.2d 1069 (E.D.Cal. 2005) (A manufacturer of PCE cannot be held liable as a CERCLA arranger where it has done nothing more than sell a useful chemical). The decisions regarding PCE manufacturers were consistent with federal court decisions which established “...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)).

⁷ *Id.* at *5.

⁸ *Id.* at *5, fn. 2.

⁹ *Id.* at *5, fn. 2. The Court also rejected a separate attempt by Hoyt to disclaim liability based on the notion that they did not own or possess the PCE at issue, and had no authority or obligation to control the PCE. After reviewing the 9th Circuit’s decision in *U.S. v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002), the Court held that questions of ownership or control are relevant only when a liability claim is based on a “broad arranger” theory whereby an alleged arranger did not have direct involvement with waste disposal. In contrast, the Court noted that “direct arranger” liability (*i.e.* where a party had direct involvement with arrangements for waste disposal) is not limited to those who actually owned, disposed, or controlled the substance at issue.

¹⁰ *Id.* at *8.

¹¹ *Id.* at *8.

¹² *Id.* at *10.

¹³ *Id.* at *10.

¹⁴ *Id.* at *10.

¹⁵ The *Renz* decision did not touch on issues of whether Hoyt could be held liable as a “franchisor,” which has been used successfully against manufacturers such as Norge under state and federal Superfund laws. See *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 this case, there have not yet been factual allegations that purchasers of Hoyt dry cleaning equipment had “no choice” as to how to dispose of PCE waste.

¹⁶ As we have advised previously, 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, 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 FRCP 12(b)(6) motion or a summary judgment motion.

¹⁷ *Id.* at *5.

¹⁸ *Id.* at *10.