866.502.9814 | 115 Sansome Street, Suite 700 San Francisco, California 94104

Ninth Circuit Holds That Dry Cleaning Equipment Manufacturer Is Not Liable as an Arranger under CERCLA or on State Law Nuisance and Trespass Claims

Posted by Michael Einhorn, Esq. in CERCLA, Environmental Litigation on August 11, 2011

In Team Enterprises, LLC v. Western Investment Real Estate Trust, No. 10-16916, 2011 U.S. App. LEXIS 15383 (9th Cir., Cal. July 26, 2011), the Ninth Circuit held that the manufacturer of a machine used in the dry cleaning process may not be held liable for contribution to environmental cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or on State law nuisance and trespass claims.

The plaintiff-appellant Team Enterprises, LLC ("Team") operated a dry cleaning store and used PCE as part of the dry cleaning process, which generated wastewater containing PCE. Team used the Puritan Rescue 800 filter-and-still combination equipment ("Rescue 800"), designed and manufactured by defendant-appellee R.R. Street & Co. ("Street"), to separate the PCE from the wastewater, and then filter and reuse it. The Rescue 800 returned the distilled PCE to Team's machines and deposited the wastewater into a bucket. In the bucket, the wastewater would sit and more PCE would separate from the water, allowing Team to reuse that separated PCE as well. However, the remaining wastewater in the bucket still contained some dissolved PCE, and Team disposed of this wastewater by pouring it down the sewer drain, allowing the PCE to leak out of the drain pipes and into the soil. The California Regional Water Quality Control Board found that the soil needed cleanup, which Team performed at its expense.

To recover costs of this cleanup, Team sued Street and several other defendants for contribution under CERCLA. In addition, Team alleged State law nuisance and trespass claims. Street moved for summary judgment on all three claims, which was granted by the District Court, and Team appealed.

With regard to its CERCLA claim, Team argued that Street is liable under CERCLA as a party that "arranged for disposal" of hazardous substances, one of the strict liability categories under CERCLA. 42 U.S.C. § 9607(a). CERCLA's section regarding arranger liability provides:

> *(3) any person who by contract, agreement or otherwise arranged for disposal . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances . . .*

42 USC § 9607(a)(3). As noted by the court, arranger liability ensures that owners of hazardous substances may not free themselves from liability by selling or transferring a hazardous substance to another party for disposal, which is a fact-intensive inquiry. Team Enterprises, at *5, citing Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1879, 173 L. Ed. 2d 812 (2009); Cal. Dep't of Toxic Substances v. Alco Pac., Inc., 508 F.3d 930, 938 (9th Cir. 2007). The court also cited Burlington Northern in stating that "an entity may qualify as an arranger . . . when it takes intentional steps to dispose of a hazardous substance." Team Enterprises, at *6, citing Burlington Northern, at 1879. Arranger liability therefore contains an intent requirement, but the Ninth Circuit distinguished *intent* to dispose from mere *knowledge* of future disposal. Team Enterprises, at *6-7.

With regard to Street's intent and CERCLA liability, the Ninth Circuit found that there was no showing that Street intended for its sale of the Rescue 800 to result in disposal of PCE, and therefore found Street lacked the requisite intent for arranger liability. Id., at *9. Rather, Street met the requirements of the so-called "useful product defense," which prevents a seller of a useful product from being subject to arranger liability. Id. This defense is available even where the product itself qualifies as a hazardous substance that requires future disposal; the court provided the example of an auto parts store selling motor oil to car owners without incurring such liability because it would be odd to describe that sale of motor oil as being *for the purpose* of disposing of hazardous waste. Id., at *7-8. The fact that Street may be indifferent to the possibility that residual PCE would be poured down the drain was insufficient to meet the intent requirement. Id., at 10.

Team also argued that the district court erred in dismissing Team's nuisance claim. The Ninth Circuit stated that such a claim depends on whether Street created or assisted in creating and maintaining the nuisance. Id., at *18, quoting Selma Pressure Treating Co. v. Osmose Wood Preserving, 221 Cal. App. 3d 1601, 1620 (Cal. App. 5th Dist. 1990) (overruled on other grounds). "A defendant may be liable for assisting in the creation of a nuisance if he either (1) affirmatively instructs the polluting entity to dispose of hazardous substances in an improper or unlawful manner, . . . or (2) manufactures or installs the disposal system." Team Enterprises, at 18. Mere "but-for" causation, however, does not give rise to nuisance liability. Id., at *18. The Ninth Circuit found no evidence in the record that Street instructed Team or other dry cleaners to set up their equipment to discharge solvent-containing wastewater into drains or sewers, and also found that Street's Rescue 800 is not a disposal system. Id., at 19. Accordingly, the Ninth Circuit affirmed the district court's grant of summary judgment on Team's nuisance claim.

Similarly, the Ninth Circuit affirmed the district court's grant of summary judgment to Street on Team's trespass claim.

CATEGORIES

Select category

RECENT POSTS

Denied CEQA Challenge Remanded for Failure to Attach Corrective Action Plan to Negative Declaration

Ninth Circuit Holds That Dry Cleaning Equipment Manufacturer Is Not Liable as an Arranger under CERCLA or on State Law Nuisance and Trespass Claims

Court of Appeal Requires Strict Compliance with CEQA 30-Day Public Notice Requirements

RSS FEED

Subscribe to our RSS Feed

SIGN UP FOR E-MAIL NEWS & ARTICLES:

Email Address:

Join Now

Under California state law, "a trespass is an 'invasion of the interest in the exclusive possession of land.'" Id., at *20, quoting Capogeannis v. Superior Court, 12 Cal. App. 4th 668, 674 (Cal. App. 6th Dist. 1993). Team did not present any evidence that either Street's Rescue 800 or the PCE entered Team's property without Team's consent. The court noted that Team's employees contaminated the soil by pouring wastewater down the drain, and such contamination was not a trespass against itself because one cannot commit an actionable interference with one's own possessory right. Team Enterprises, at *21. Therefore the Ninth Circuit found that Team failed to present evidence creating a genuine dispute as to any material fact with respect to its trespass claim.

Comments are closed.