

ARRANGER LIABILITY AFTER *BNSF*: A MOMENT OF CLARITY?

David Meezan

Kazmarek Mowrey Cloud Laseter LLP

August 27, 2015



KAZMAREK MOWREY
CLOUD LASETER LLP
ENVIRONMENTAL & ENERGY LAW



BNSF Overview

Clear CERCLA Arranger Liability Scenarios

- A transaction between parties for the sole purpose of discarding a used and no longer useful hazardous substance.
- A transaction between parties involving the sale of a new and useful product that ultimately results in the disposal of the product.



Murky CERCLA Arranger Liability Scenarios

➤ Transactions that involve elements of a sale and disposal.

☞ For example, sales to recyclers of production byproducts containing hazardous substances when disposal is an inherent and known element of the recycling process.



BNSF v. United States,
556 U.S. 599 (2009)

- Sale of a new and useful pesticide to a distributor.
- Knowledge that spills of the pesticide product would inevitably occur when it was transferred to the distributor.



Facts Matter

- *BNSF* “third category” cases require a “fact-intensive inquiry” to determine the true “nature of the transaction.”
- *BNSF* district court –
 - ❖ 27-day bench trial.
 - ❖ “exceedingly detailed” factual findings.



Key *BNSF* Facts

- Steps taken by the Shell to encourage the safe handling of the products to reduce the likelihood of such spills.
- Nevertheless, “delivery spills, equipment failures, and the rinsing of tanks and trucks” allowed the pesticide product to contaminate soil and groundwater at the distributor’s facility.



Key *BNSF* Facts

The district court found it “undisputed” that “spills were *inherent* in the delivery process that Shell arranged, and always occurred in differing degrees of magnitude.”

Am. Findings of Fact & Conclusions of Law at 41 ¶ 142, *United States v. Atchison, Topeka & Santa Fe Railway Co.*, Nos. CV-F-92-5068, CV-F-96-6226, CV-F-96-6228 (E.D. Cal, Jul. 15, 2003) (No. 1419) (emphasis added).



Key *BNSF* Facts

Shell “controlled the process of deliveries” and “retained title” to the pesticides at the time of such deliveries to the distributor, Brown & Bryant, who only exercised “stewardship” at delivery.

Am. Findings of Fact & Conclusions of Law at 46 ¶ 160; at 135 ¶ 398.



Key *BNSF* Facts

Shell compensated [the distributor] for product spilled during the transfer process: “However characterized, there was a monetary allowance to [the distributor] for product Shell expected to be lost in the process of delivery and storage.”

Am. Findings of Fact & Conclusions of Law at 44 ¶ 154.

BNSF Holding

- CERCLA arranger liability may only attach when the nature of the transaction between the defendant and the operator of the receiving facility evidences that the defendant took “intentional steps to dispose of a hazardous substance.”
- The ordinary meaning of the term “‘arrange’” implies action directed to a specific purpose.”

BNSF Holding

Knowledge that disposal may occur as a collateral consequence of a sale, standing alone, is “insufficient to prove that an entity ‘planned for’ the disposal [of hazardous substances], particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.”



BNSF Holding

Efforts to reduce the likelihood of product spills – even if unsuccessful – evidence an intent that an entity did not plan for the disposal of a hazardous substance.

BNSF Holding

- The facts did not show that Shell entered into the transaction “with the intention that at least a portion of the product be disposed of during the transfer process.”
- Therefore, Shell had not “arranged for the disposal” of such product within the meaning of CERCLA § 107(a)(3).



BNSF Arranger Liability Cheat Sheet

- *Team Enter., LLC v. W. Inv. Real Estate Trust*, 647 F.3d 901 (9th Cir. 2011).
- *United States v. Gen. Elec. Co.*, 670 F.3d 377 (1st Cir. 2012).
- *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682 (7th Cir. 2014).
- *Vine Street LLC v. Borg Warner Corp.*, 76 F.3d 312 (5th Cir. 2015).
- *Consolidation Coal Co. v. Georgia Power Co.*, 2015 U.S. App. LEXIS 4574 (4th Cir. Mar. 20, 2015).



Transactional Purpose is Key

Disposal considerations must predominate over the financial considerations underlying the transaction.





Team Enterprises Decision

Team Enter., LLC v. W. Inv. Real Estate Trust, 647 F.
3d 901 (9th Cir. 2011)

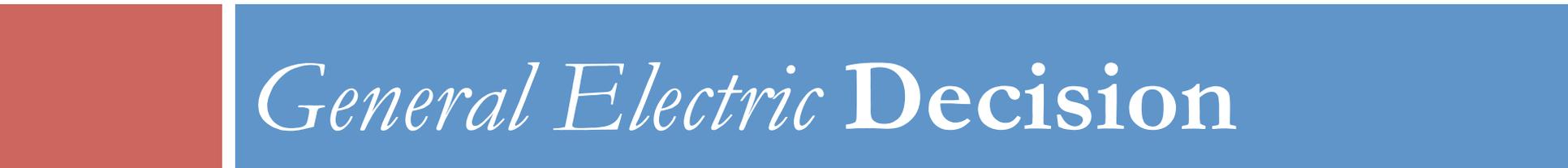
- Does CERCLA liability attach to the manufacturer of a dry cleaning machine whose design allegedly rendered the disposal of PCE “inevitable”?
- The sale of a product that uses and/or generates a hazardous substance does not give rise to arranger liability unless the seller “entered into the relevant transaction with the *specific purpose* of disposing of a hazardous substance.”



Team Enter., LLC v. W. Inv. Real Estate Trust, 647 F.
3d 901 (9th Cir. 2011)

- Indifference to the generation and disposal of hazardous substances is insufficient to demonstrate intent under CERCLA § 107(a)(3).
- The alleged arranger must exercise actual control over the disposal process.



A horizontal bar at the top of the slide, divided into a red section on the left and a blue section on the right.

General Electric Decision

United States v. Gen. Elec. Co.,
670 F.3d 377 (1st Cir. 2012)

- “Mixed Motives” case.
- Sales of scrap, PCB-containing Pyranol over a 10-year period.
- Pyranol used by buyer as a paint additive.



United States v. Gen. Elec. Co.,
670 F.3d 377 (1st Cir. 2012)

Disposal considerations predominated over the financial considerations underlying the Pyranol transactions.

- Byproduct labeled “scrap Pyranol,” “waste Pyranol,” and “scrap oil.”
- Pyranol also disposed of at local landfills.
- Pyranol subjected to “minimal or non-existent quality control.”



United States v. Gen. Elec. Co.,
670 F.3d 377 (1st Cir. 2012)

- Steps taken to ensure that the buyer would dispose of scrap Pyranol.
 - ❖ Scrap Pyranol was of such poor quality that it was useless as a paint additive.
 - ❖ Buyer stranded with the disposal of unusable scrap; no efforts to retrieve the scrap or otherwise assist buyer with its disposal.



A horizontal bar at the top of the slide, divided into a red section on the left and a blue section on the right.

Vine Street Decision

Vine Street LLC v. Borg Warner Corp.,
76 F.3d 312 (5th Cir. 2015)

- Significant post-*BNSF* CERCLA arranger liability decision.
- Primarily important because of the level of the alleged arranger's involvement in facility operations.



Vine Street Fact Scenario

- Private party CERCLA cost-recovery case.
- Cleanup costs for a PCE plume resulting from operations of a former dry cleaning facility.
- Alleged arranger is Norge – a former subsidiary of Borg Warner Corporation.



Vine Street – Key Facts

- Norge sold dry cleaning machines to the facility.
- Norge provided the initial supply of PERC.
- Norge designed the facility's draining system and connected the machines to the drains and sewer system.
- Norge installed the machines, tested them, and assisted customers with initial operations.



Vine Street – District Court Decision

- Bench trial in 2006.
- Court finds Borg Warner responsible as a CERCLA arranger for 75% of the past, present, and future cleanup costs.
- Appeal filed in 2007, but case stayed due to a co-defendant's bankruptcy.
- Appeal resumed in 2014.



Vine Street – Fifth Circuit’s Decision

- The business relationship as a whole centered around the successful operation of a dry-cleaning business – not around the disposal of waste.
- ❖ Separators designed to recover PERC, even though some waste disposal was inevitable.
- ❖ Norge developed remedial measures when it learned that the separators were not completely efficient.



Vine Street – Fifth Circuit’s Decision

- Court was not persuaded by the fact that Norge was “integrally involved in installing the dry cleaning machines and connected them to the drains and sewer line.”
- Norge “did not intend to *dispose* of PERC, and thus Borg Warner is not liable as an arranger.”



Vine Street – Operator Liability?

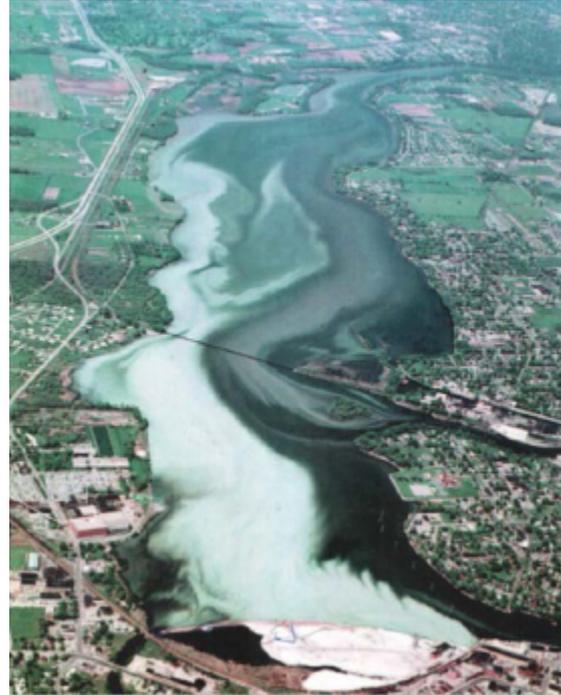
United States v. Bestfoods, 524 U.S. 51, 66-67 (1998)

“To sharpen the definition for purposes of CERCLA’s concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.”



Lower Fox River Decision

Lower Fox River Wisconsin (Circa 1970)



NCR Corp. v. George A. Whiting Paper Co.,
768 F.3d 682 (7th Cir. 2014)

- Important post-*BNSF* CERCLA arranger liability decision.
- *BNSF* – CERCLA arranger liability may only attach when the nature of the transaction between the defendant and the operator of the receiving facility evidences that the defendant took “intentional steps to dispose of a hazardous substance.”



The Lower Fox River Recycling Scenario

- NCR manufactured the PCB-containing emulsion for carbonless copy paper.
- An NCR subsidiary, Appleton Coated Paper Company (ACPC), coated carbonless copy paper with the emulsion.
- ACPC sold scrap paper resulting from its production process – “broke” – to recycling mills.



District Court's Decision

No CERCLA arrangement:

- ❖ Financial considerations predominated over disposal considerations.
- ❖ ACPC's "indifference" to what happened to the broke after it was sold would not result in CERCLA liability.



The Argument on Appeal

ACPC knew that recycling mills would separate paper fibers from PCBs, and that the mills would discharge PCBs to the river.

☞ This general knowledge was sufficient to show that ACPC took “intentional steps” to dispose of a hazardous substance under CERCLA.

The Seventh Circuit's Decision

“Even selling with perfect knowledge that the buyer will dispose of the materials at some point in the future cannot on its own qualify as arranging for disposal.”



The Seventh Circuit's Decision

The product sold need not be “new and useful” to avoid arranger liability.

☞ Other sales can still qualify, particularly when they are for more than token amounts and take place on a competitive market.

☞ ACPC's “product” also was not the harmful chemicals themselves, but a useful input that also contained the hazardous material.



THANK YOU!

David Meezan

Kazmarek Mowrey Cloud Laseter
LLP

August 27, 2015



KAZMAREK MOWREY
CLOUD LASETER LLP
ENVIRONMENTAL & ENERGY LAW