The Unstated Liability Rule For the Sale Of Usable Wastes

March 1, 2012 by Robert S. Sanoff

Arguments about liability for the sale of "usable wastes" are as old as Superfund. The fact patterns involving the sale of usable wastes can be varied; however, the cases seem to be governed by the following simple but never explicitly stated rule: a party will be held liable if it sells a waste that cannot be used or won't be used as delivered without first causing the release of a hazardous substance.

This unstated rule explains why parties selling spent solvents to recycling facilities have always been found to have arranged for disposal (the spent solvents can't be used without distillation which causes waste).

The rule likewise explains the product formulation line of cases after Aceto (a party asking a formulator to make a product will be found liable where the party supplies the raw materials with knowledge that the product cannot be formulated without generating hazardous waste).

The rule also explains the Supreme Court's decision in Burlington Northern. Shell Oil was found not to be an arranger because it had sold product that could be used without additional processing. Although there had been incidental leaks from the shipping containers, those leaks could be avoided and Shell sought to stop the leaks after learning of them.

The First Circuit offered yesterday the latest confirmation of the unstated rule in United States v. General Electric Company. There, GE sold scrap pyranol (which contains PCBs) for use as a plasticizer in paints but over time delivered ever increasing quantities of the scrap pyranol that had not been requested and was of a quality that was not fit for use as a plasticizer for paint. Consistent with the unstated rule, the court noted that GE would not have been liable as an arranger when it was actually selling the scrap pyranol but GE could be deemed an arranger when it knowingly delivered unusable product that had not been requested.

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