

# MARKS & WEINBERG, P.C.

## DISPATCHES FROM THE TRENCHES

### Here we go again: Strict Liability (but this time blame CERCLA)

Many lessors have breathed a sign of relief as the Graves Amendment generally appears to have addressed various state laws which previously held lessors of motor vehicles strictly liable for damage caused by their lessees,.

However, the recent case of *U.S. v Saporito*, 2010 U.S. Dist. LEXIS 11033 (U.S. Dist., N. Dist. Ill., February 22, 2010), reminds strict liability laws are still out there. In that case, the United States Government sued Saporito (the "Defendant") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), in an attempt to recover approximately \$1.5 million worth of costs that the Government incurred cleaning up hazardous substances that were generated by Crescent Plating Works (the "Company") while plating steel and brass objects.

Although, the Defendant was arguably involved in the management of the Company at various times, the Court found the Defendant liable by relying instead on the fact that the Defendant leased certain equipment to the Company. As part of a settlement to a prior dispute between the Defendant and the Company, the Company had sold certain equipment (including several "rectifiers") to the Defendant and agreed to lease them back from the Defendant for an extended term. The rectifiers converted alternative current into direct current, have many uses aside from electroplating (they are found in every laptop computer) and are not capable of producing hazardous waste on their own. Nonetheless, the Court held that it was undisputable that the rectifiers were necessary components to the electroplating process, which required the steel and brass objects to be dipped into a series of chemical baths through which an electrical current was run. This connection proved to be enough for this Court to hold the Defendant liable under CERCLA.

According to the Court, a defendant is liable under CERCLA if the plaintiff shows that "(1) the site in question is a 'facility' as defined by CERCLA; (2) the defendant is a responsible party; (3) there has been a release or there is a threatened release of hazardous substances; and (4) the plaintiff has incurred costs in response to the release or threatened release." *Sycamore Indus. Park Associates v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008).

This case focused on whether or not the Defendant was a responsible party. CERCLA defines four categories of responsible parties, but the Government alleged only two—first, that the Defendant was a past operator and, second, that the Defendant was a current owner at the time of the clean-up. Although there was ample evidence in the record to establish that the Defendant was a past operator, the Court held for purposes of the summary judgment motions that it was a disputed question of fact.

However, the Court held as a matter of law that the Defendant was a current owner. CERCLA defines an owner as vaguely as “any person owning” a facility. According to the Court, “[t]he circularity of this definition suggests applying *ordinary meaning and its generality suggests relying on the common law*.” *Id.* at \*21 (emphasis added). The Court relied in part on a case in which a pesticide manufacturer sought contribution from the Government for the costs of cleanup at a DDT factory. *Elf Atochem North American, Inc. v. United States*, 868 F.Supp. 707, 709 (E.D. Pa. 1994). In that case, the Government conceded that because it “owned and leased the components most important to” the operator’s process, it was an owner under CERCLA. *Id.* at \*29. The Court also relied on Black’s Law Dictionary which defines an “owner” as “one who has the right to possess, use and convey something.”

The Court further ruled that, since the leased equipment was necessary to operate the plating line, an owner of that equipment constitutes an owner for purposes of liability under CERCLA, stating:

[A]n owner of equipment necessary to the operation of the plating line is no less an “owner” than a part-owner of land. Just as CERCLA extends liability to a landowner who may not even be aware of pollution-producing activities by a lessee, it also extends liability to an equipment owner like Defendant whose lessee is using the equipment in a similar manner. In fact, the equipment owner is arguably more culpable: a landowner might not inquire into how her land is being used, but an equipment owner is likely to know exactly what her equipment can do. *Id.* at \*29 (citations omitted).

The Court rejected the Defendant’s argument that the Government had failed to offer any evidence connecting the leased equipment itself to the release or cleanup costs, relying on the dreaded incantation . . . Strict Liability . . . Strict Liability. In particular, the Court stated:

[T]he CERCLA statute requires no such connection [since] CERCLA is a strict liability statute. Liability is imposed when a party is found to have a statutorily defined “connection” with the facility; that connection makes the party responsible regardless of causation. . . . Thus, if Defendant is an “owner” within the terms of CERCLA, he is liable. The government need not present evidence showing that any specific piece of equipment he owned was responsible for specific releases of hazardous chemicals or specific cleanup costs. *Id.* at \*28. (citations omitted).

The Court also rejected the Defendant's attempt to rely on an exception to the CERCLA definition of "owner" (hereinafter referred to as the "Secured Creditor Exception"). That exception expressly excludes from the definition of owner any "person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." *Id.* at \*31-32 (Citing CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A)).

In particular, the Court noted that the Defendant had not produced any evidence from which a jury could possibly find that he owned the equipment "*primarily to protect*" a security interest. The fact that the Court focused on the quoted language is a warning to lessors who lease equipment under true leases.

Amendments to CERCLA in 1996 (the "Amendments") further refined the concepts of the Secured Creditor Exception. In particular, the Amendments make clear that various actions by lessors and lenders do not constitute "participating in the management of a facility" including, among others (a) holding, abandoning or releasing a security interest; (b) including in the terms of [a loan, lease or other extension of credit], a covenant, warranty, or other term or condition that relates to environmental compliance; and (c) monitoring or enforcing the terms and conditions of [a loan, lease or other extension of credit].

The Amendments define the term "security interest" to include "a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person."

This language is quite useful with respect to dollar-out leases or other leases intended as security. However, there has been some debate as to whether true leases qualify for this exception. This debate stems from two main issues.

The first reason for debate is the ambiguous wording of the "clarifying" definition of security interest. Those readers who are not attorneys, poets, grammar teachers or otherwise interested in syntax might want to take my word for it with respect to the ambiguous drafting and skip to the next paragraph. For those still reading, the ambiguity stems from the following language: "a security interest includes a right under . . . [list of examples, including a lease] and any other right accruing to a person *to secure . . . obligations.*" The italicized language could be read as modifying only the immediately preceding part of the definition (in other words, only the words "any other right"). If so, any lease would be deemed to be a security interest under the applicable CERCLA provision, including a true lease. However, the italicized language could also be read as describing the "right" common to all of the examples, including the term "lease". If that were the case, a true lease may not be available for protection under the Secured Creditor Exception since the lessor's interest in the leased equipment doesn't technically "secure" anything.

The second reason for debate stems from the requirement that the lessor or lender "holds indicia of ownership *primarily* to protect his security interest." Most lessors under true

leases would freely admit that their interest in the leased equipment includes a variety of other important benefits— in particular, the tax benefits of ownership and the potential upside that the residual interest sometimes holds. The *Saporito* Court's quotation of the phrase "primarily to protect" therefore strikes a sour note.

Hopefully this case will be overturned. In any event, lessors under true leases should be careful if their equipment is a necessary component in a process that may generate hazardous waste. Even if a lessor was able to prove in court that the Secured Creditor Exception exempted it from liability under CERCLA, it would probably feel like a loser when it received its legal bill from its defense lawyers or the rate increase from its insurance company if it were fortunate enough to have insurance covering such an environmental liability claim.

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