

WRITING SAMPLE FOR THOMAS CHOW
Excerpt From A Motion To Dismiss Involving CERCLA Liability

I. ARGUMENT

The standard of decision on a motion to dismiss under Rule 12(b)(6) is whether the plaintiff can prove any set of facts in support of the complaint that would entitle him to relief. *Everest & Jennings v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). The court may dismiss a complaint on two grounds: (1) lack of a cognizable legal theory, or (2) pleading of insufficient facts to support a cognizable legal theory. *SmileCare Dental Group v. Delta Dental Plan*, 88 F.3d 780, 783 (9th Cir. 1996). If it is beyond doubt that plaintiff cannot prove facts that would entitle him to relief, the court should grant the motion to dismiss. *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997). The court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

1. Weasley Cannot Sufficiently Allege That the New Product Defendants Fit Within Any of the Four Classes of Defendants Who May Be Liable Under CERCLA.

Weasley's cross-claims allege that the New Product Defendants are liable for response costs under CERCLA and the HSAA. In the Fifth and Ninth cross-claims, Weasley seeks contribution and indemnity for response costs incurred, and in the Tenth cross-claim, Weasley seeks a declaratory judgment for future response costs.

To state a claim for cost recovery claims under CERCLA or HSAA, plaintiff must allege facts demonstrating that defendants are "responsible parties" or "liable persons" under CERCLA. Weasley cannot state such a cross-claim against the New Product Defendants because these defendants do not fall within the definition of any possible responsible party under CERCLA. (42 U.S.C. §9607, subd. (a).)

CERCLA (and, by adoption, the HSAA) imposes liability on only four specific classes of defendants. Those classes are:

- (1) current owners and operators of a vessel or facility,
- (2) past owners or operators of a facility who owned or operated at a time when hazardous substances were disposed,
- (3) persons who “arranged for disposal or treatment” of “hazardous substances owned or possessed by such person” (“arrangers”), and
- (4) persons who accept hazardous substances for transport to disposal or treatment facilities (“transporters”).

(42 U.S.C. §9607, subds. (a)(1)-(4).) The New Product Defendants do not fit within any of these classes.

The New Product Defendants are not responsible parties under CERCLA because:

(A) they are not owners or operators of a waste facility, nor does Weasley allege that they are;

(B) arranger liability does not attach where defendants did not arrange to dispose of their hazardous waste; and

(C) Weasley’s conclusory allegation that the New Product Defendants transported PCE (as a useful product) is legally insufficient under Section 9607(a)(4), to plead “transporter” liability, which requires that defendants have accepted hazardous waste for transport to disposal or treatment facilities.

As to the New Product Defendants, Weasley alleges only that they supplied (or distributed in the case of Occidental), arranged for the transport of, or transported PCE to the Site. FACC at pp. 4:27-5:1 (¶11), p. 5:2-5 (¶12), p. 5:16-18 (¶16). Weasley does not, and cannot, allege that New Product Defendants are owners or operators of the Site at 1200 Greenacre Road. As to the remaining two classes of responsible parties -- arrangers and transporters -- Weasley’s allegations fail to state a claim under CERCLA or HSAA

as a matter of law. Defendants merely sold a useful product, which does not give rise to liability under CERCLA.

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B. Arranger Liability Does Not Apply Because Defendants Did Not Arrange for the Disposal of Hazardous Waste, but Manufactured a Useful Chemical Product

Weasley alleges that the New Product Defendants “arranged for the transport of . . . PCE to the Site.” (FACC, ¶¶ 11, 12, 16.) The alleged arrangement for transportation of PCE to the Site for use or resale does not create arranger liability under CERCLA.

Section 9607(a)(3) imposes arranger liability on:

any person who by contract, agreement, or otherwise . . . arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances

42 U.S.C. § 9607(a)(3) (emphasis added).

When a party merely arranges for delivery of a useful product it sells, without additional evidence that “the transaction includes ‘arrangement’ for the ultimate disposal of a hazardous substance,” CERCLA liability cannot be imposed pursuant to section 9607(a)(3). *Santa Fe Pacific Realty Corp. v. United States*, 780 F. Supp. 687, 697 (E.D. Cal. 1991) (citing *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990)). The sale and distribution of a product does not impose arranger liability upon a party.

Even where a party knows of potential spills that could happen in the process of transporting a useful product, liability is not imposed for arranging transportation. In *E S Robbins Corp v. Eastman Chem. Co.*, 912 F. Supp. 1476 (N.D. Ala. 1995), the defendant sold chemicals to the plaintiff and contracted with third party carriers to transport the

chemicals. *Id.* at 1487. Defendant had knowledge that spills had occurred in the past and took active steps to prevent them. *Id.* The court concluded that the fact that defendant Eastman “was aware of the risks involved in transporting the chemicals . . . does not lead to the conclusion that Eastman arranged for their disposal.” *Id.* When Eastman “sold Robbins the chemical product *and contracted for its delivery,*” it could not be deemed to have been arranging for the disposal of chemicals. *Id.* at 1488 (emphasis added).

While the court in *Transportation Leasing Co. v. California*, 861 F. Supp. 931, (C.D. Cal. 1992), found that the defendant cities were liable for arranging transport pursuant to section 9607(a)(3), there each defendant contracted with waste disposal companies to haul waste from within the city. *Id.* at 941-942. Unlike *Transportation Leasing*, Weasley cannot allege that the New Product Defendants contracted for the transport of any waste to the Greenacre Road Site. Transportation of new and useful chemical products by the New Product Defendants does not constitute arranging for transportation for the disposal of hazardous materials.

C. Transporter Liability Does Not Apply Because Weasley Does Not, and Cannot in Good Faith, Allege That Defendants Accepted Hazardous Waste for Transport to Disposal or Treatment Facilities.

Weasley alternatively alleges that the New Product Defendants “transported” PCE. FACC ¶¶ 11, 12, 16. That allegation is legally insufficient to impose liability under Section 9607, subdivision (a)(4). For transporters, the relevant part of CERCLA subjects to liability

any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance

42 U.S.C. § 9607(a)(4). No published decision has held that a transporter of a useful product can be liable under this section.

Weasley fails to allege three critical elements for transporter liability:

- (1) that any PCE the New Product Defendants transported was a waste,
- (2) that the New Product Defendants “accepted” PCE as waste for transport, or
- (3) that the New Product Defendants transported PCE as waste to a “disposal or treatment facility” or an “incineration” vessel or site.

Each of these allegations is essential to a claim for “transporter” liability. Weasley has not and cannot in good faith state a cause of action against defendants as “transporters” under CERCLA.

Furthermore, transporter liability under section 9607(a)(4) is not imposed unless the alleged transporter selects the disposal site. *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 520-521 (2d Cir. 1996), *overruled on other grounds*, *N.Y. v. Nat’l Servs. Indus.*, 352 F.3d 682, 683 (2d Cir. 2003); *Alcatel Info. Sys., Inc. v. Ariz.*, 778 F.Supp. 1092, 1096 (D. Ariz. 1996) (“only transporters who selected the deposit site . . . would be liable”). For transporters that have a limited role in the activity surrounding hazardous substances, it makes “little sense in holding the transporter liable for deliveries made to facilities designated by others.” *United States v. Western Processing Co., Inc.*, 756 F.Supp. 1416, 1420 (W.D. Wash. 1991). Pursuant to this rationale, in *Western Processing*, the court granted summary judgment in favor of all transporter defendants who did not select the site in question as the destination for disposal of waste. *Western Processing*, 756 F.Supp. at 1418-1419; *see also Ascon Properties, Inc. v. Mobil Oil Co.*, 34 Env’t Rep. Cas. (BNA) 1176 (C.D. Cal. 1991) (defendants not liable for transporting wastes because there was no evidence that they had “discretion in choosing dumping sites”). Similarly, in *Hassayampa Steering Comm. v. State*, 32 Env’t Rep. Cas. (BNA) 1396 (D. Ariz. 1990), the court held that transporters who pressured the state to open an alternative landfill did not actually select the site, and thus, were not liable under CERCLA.

On the other hand, transporters may be found liable only when they select the disposal site. For example, in *United States v. Hardage*, 750 F. Supp. 1444, 1459 (W.D. Okla. 1990) the court found liability where the transporter proposed the site to its

customers as a location for hazardous waste disposal. *See also Tippins v. USX Corp.*, 37 F.3d 87, 92-94 (3d Cir. 1994) (transporter identified landfills that would allow hazardous waste); *United States v. Bliss*, 667 F. Supp. 1298, 1303 (E.D. Mo. 1987) (defendant contracted to dispose of chemical waste, hauled the waste and placed it in storage tanks at the defendant's facility).

Weasley's allegation that the New Product Defendants "transported" PCE to the Greenacre Road Site does not state a claim under CERCLA. Without the necessary allegations that the place of delivery was a "disposal or treatment facility" that defendants selected, Weasley cannot state a cause of action for transporter liability.