



Liability Can Take Its Toll on Manufacturers

A company that uses a toller may face legal action unless it understands the law (8/5/2004)

- Lynn Bergeson, regulatory editor



Toll manufacturing is an important component of the domestic manufacturing sector, but the parties involved are not always aware of who bears the burden of liability when things go awry. Federal case law makes it clear that the toll manufacturer is not solely responsible for contamination in all cases; the company contracting with the toll manufacturer also may be liable. Therefore, it is crucial for a company using a toller to clearly understand its potential liability for any contamination that might arise during the toll manufacturing process.

Consult CERCLA

The federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) establishes a liability regime that identifies several classes of entities that are strictly, jointly and separately, and retroactively liable for the damage that arises from contaminated industrial sites. The classes of entities include the current owner of the contaminated property; the owner of the contaminated property at the time the hazardous substance was disposed of; persons who arranged for the disposal of the hazardous substance at the property; and transporters who selected the site to which the hazardous substance was transported. State laws that are similar to CERCLA are interpreted in the same manner.

It might appear that the toll manufacturer is the responsible party, according to CERCLA. After all, contamination at the toll manufacturing site arguably would be the responsibility of the current owner of the contaminated property, which is the toll manufacturer. Case law, however, has determined that under certain circumstances, both the toll manufacturer and the manufacturer for whom the tolling services are being provided may be liable.

Make your case

The seminal case in this area is *United States v. Aceto Agricultural Chemicals Corp.* In *Aceto*, the government claimed that the company that retained a toll manufacturer to blend a technical-grade pesticide ingredient with inert materials and then packaged the commercial-grade product was responsible for the contamination at the toll manufacturer's site because it "otherwise arranged" for the disposal of a hazardous substance (the pesticide) at the toll manufacturer's site within the meaning of CERCLA Section 107 (a)(3).

The defendant argued that it had merely provided a useful substance (the pesticide) to the toll manufacturer and that it did not "arrange for" the disposal of a hazardous substance at the toll manufacturer's site. The court disagreed and held the defendant responsible for "otherwise arranging" for the disposal of waste. The decision was based upon two factors: The defendant owned the technical-grade active ingredient, and waste generation was inherent to the pesticide formulation activities subject to the toll manufacturing agreement.

Aceto and more recent cases like it do not mean that liability is attached to all contract manufacturing activities. Several factors will determine whether the contract manufacturer, the entity contracting with the toll manufacturer, or both should be held liable, including ownership of the hazardous substance, the knowledge (or lack) of the practices yielding the harm, the manufacturing process under the tolling agreement, and the intent of the parties.

Read the fine print

When negotiating a toll services agreement, find out how manufacturing wastes will be managed, especially if the process generates waste that the government says must be managed to avoid CERCLA costs. If the toll manufacturer is responsible for the waste under the terms of the agreement, make sure it knows how to manage the wastes and that the contract price reflects waste disposal costs. Some contracts contain indemnification provisions that hold one party harmless from costs incurred in connection with waste management. However, indemnification provisions are only as good as the financial bona fides of the entity giving them, so be certain

there is sufficient financial strength to support the indemnification.

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