



E-Scrap Management Liability

The issue of liability associated with electronics has recently become an important concern. Since most electronic equipment contains at least some hazardous materials, such as lead, mercury or cadmium, there is a growing awareness that individuals, companies, agencies and institutions need to make sure that electronic equipment is handled responsibly at the end of its life. In addition, computers and other electronics often hold confidential or sensitive data and must be handled even more carefully and responsibly. Laws, such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA) have been passed to ensure that a person's medical records are kept confidential. However, time and time again we see cases where sensitive medical or other personal or restricted information is not managed properly and can fall into the wrong hands. Section 5 addresses the real concerns about liability of both the electronic equipment and the information it contains. This section provides two examples where organizations disregarded laws for disposal and data security. This section also provides a lawyer's interpretation of the "cradle to grave" liability that generators of e-scrap hold even after the generator no longer physically possesses the equipment.

The University of Illinois - Chicago Medical School Story

On February 13, 2004, television station CBS-2 in Chicago did an exposé on the University of Illinois - Chicago Medical School (UIC) that illegally dumped hundreds of pieces of computer equipment into their trash dumpster. An anonymous caller tipped off the television station. When they arrived, they found dozens of monitors, computers, printers and more, all with government tags and all destined for disposal. Some were marked bad or broken, others simply surplus. All were property of the State of Illinois.

When the news crew arrived, scavengers were going through the piles and one scavenger loaded an entire pick-up truck bed full and drove away. A local not-for-profit, Computers for Schools, protested because of the amount of still usable items in the trash. In fact, the television reporter went back to the Computer for Schools offices with a selection of items to see if they worked. In addition to being completely functional, they also found that none of the computers' hard drives had been wiped before throwing them away. As a result, confidential patient files, along with many other files, were still easily pulled up on the computer and read. Even the warning about the user being responsible for confidential information inside was still there. Within minutes they were able to boot it up and access all the data inside.

Not only did the university break state law in management of surplus equipment that is paid for by tax dollars, it also broke hazardous waste rules by trying to dispose of well over the allowable 220 pounds of hazardous waste in a single month. Beyond environmental and state laws, the UIC also broke federal HIPAA laws requiring that confidential patient data be managed to protect the patient.

The final HIPAA rule to protect the confidentiality of individually identifiable health information was issued in December 2002 and took effect April 2003. The rule limits the use and disclosure of certain individually identifiable health information; gives patients the right to access their medical records; restricts most disclosure of health information to the minimum needed for the intended purpose; and establishes safeguards and restrictions regarding the use and disclosure of records for certain public responsibilities, such as public health, research and law enforcement. Improper uses or disclosures under the rule are subject to criminal or civil sanctions.

In February 2003, the federal government adopted final regulations for security standards to protect electronic health information systems from improper access or alteration. Under the security standards, covered entities must protect the confidentiality, integrity and availability of electronic "protected health information." The rule requires covered entities to implement administrative, physical and technical safeguards to secure electronic protected health information in their care. The standards use many of the same terms and definitions as the privacy rule to make it easier for covered entities to comply. Most covered entities must comply with the security standards by April 21, 2005, while small health plans will have an additional year to come into compliance.

In addition to HIPAA concerns, in the instance of UIC's disposal of confidential data, it would have been easy for anyone who picked up one of the computers to steal personal identity information of those patients whose files were on the computers.

Manhattan College Story - EPA Filed \$111,199 Complaint

The U.S. Environmental Protection Agency (EPA), as part of its ongoing efforts to ensure environmental compliance by institutions of higher learning, issued an enforcement action against the Bronx, New York's Manhattan College in July 2002. The action alleged violations of federal and New York State laws that provide for identification, storage, treatment and disposal of hazardous wastes. The action also includes an order that requires Manhattan College to comply with these laws. The hazardous waste that is the subject of the complaint includes used computer monitors, along with materials such as mercury, arsenic, spent solvents and paint, used fluorescent light bulbs, and other wastes generated by or used in the Manhattan College print shop, labs and maintenance facilities at its two Bronx facilities.

"Manhattan College handles a range of hazardous substances in its educational and maintenance facilities and has failed to follow regulations written to protect the public health and the environment from the potential dangers of hazardous wastes

that result from these everyday activities,” said Jane M. Kenny, EPA Regional Administrator.

The civil complaint, the basis for a proposed \$111,199 penalty, charges Manhattan College with three violations of the federal Resource Conservation and Recovery Act, which ensures that hazardous waste is managed from “**cradle to grave**” in an environmentally sound manner. The complaint alleged that Manhattan College: failed to determine whether certain solid waste it generated constituted hazardous waste; stored hazardous waste without obtaining permits or interim status; and failed to respond as directed to two information request letters sent by EPA.

The compliance order required Manhattan College to determine the extent of hazardous waste generation on its campuses, resolve its hazardous waste permit violations, and comply with all pertinent regulations, including development of practices that ensure the safety and protection of students and staff.

Within 30 days of the compliance order, Manhattan College was required to comply with applicable federal and state requirements, and to submit a written notice of such compliance.

When Manhattan College did not notify EPA of its intention to conduct any self-auditing of its facilities, it became subject to an investigation and inspection in December 2000 that revealed the violations cited in the complaint.

Liability - Cradle to Grave Concerns

The following information, provided by Barnes & Thornburg law firm, should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and readers are urged to consult their own attorney on any specific legal questions they may have concerning their situation.

Potential CERCLA Liability

- U.S. EPA states that e-wastes can contain such hazardous materials as lead, mercury, and hexavalent chromium. If improperly handled, these materials can be released into the environment. U.S. EPA notes that mercury from electronics has been cited as a leading source in municipal waste. According to Dell, flat-panel displays have eliminated the use of lead, however, they include a small amount of mercury as part of the backlighting. A typical 17-inch computer monitor contains approximately 2 lbs. of lead; larger monitors may contain up to 10 lbs. For more information, see Exporting Harm – The High-Tech Trashing of Asia (Feb. 2002) at <www.svtc.org/cleancc/pubs/technotrash.pdf>
- Who should be concerned? State and local governments.
- Elements of a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Claim:

- The site is a “facility” within the meaning of CERCLA;
- A release of a hazardous substance for the site has occurred;
- The release or threatened release has resulted in response costs being incurred consistent with the “national contingency plan”; and
- Defendant is a “covered person” under § 107(a) of CERCLA.

42 U.S.C. § 9607 (a); Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 325 (7th Cir. 1994); Environmental Trans. Sys. Inc. v. Ensco, Inc., 969 F.2d 503, 506 (7th Cir. 1992).

- “Facility” means:
 - Any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, OR
 - Any building, structure, installation, equipment, pipe or
 - Any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(a).

- “Hazardous substance” = “RCRA hazardous waste”
 - Defined at 42 U.S.C. § 9601(14).
 - Covers a staggering array of substances.
 - Only substances specifically excluded are natural gas and oil.
 - Pursuant to 9601 (14)(B), EPA has designated over 700 hazardous substances (See 40 C.F.R. § 302.4).
 - Does not impose any quantitative requirement or concentration level – instead substance must simply fall within one of the designated categories.
 - Includes municipal solid waste if that waste contains a hazardous substance, found in any amount, that is listed in any of the subsections of this definition.

(Goodrich Corp. v. Town of Middlesbury, 311 F.3d 154 (2nd Cir. 2002).

- CERCLA § 113(f) provides: “Any person may seek contribution from any other person who is liable or potentially liable under § 9607(a) ... In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” (The successful) Contribution claims against the municipalities were posited on the presence of hazardous substances, as constituent parts of consumer and industrial products, in the municipal solid waste that the municipalities dumped into the landfills.

CERCLA defines a “covered person” as:

(1) the owner or operator of a facility;

- (2) any person who at the time of the disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
 - (3) any person, who by contract, agreement or otherwise arranged for the disposal or treatment of hazardous substances at the facility; and
 - (4) persons who transported hazardous substances to the facility.
- 42 U.S.C. 9607(a)(1)-(4); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1497 (11th Cir. 1996).

For additional information on federal and state rules and regulations for e-scrap, see Section 2 – Navigating the Regulatory Maze.