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Taming The Superfund Juggernaut: Impacts Of The Small Business Liability Relief And Brownfields Revitalization Act — Part II

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Prospective Purchaser Liability Relief

In addition to clarifying the scope of the "innocent purchaser" defense, the Amendments for the first time create a liability exemption for "bona fide prospective purchasers" ("BFPP") that applies with regard to contamination identified prior to the BFPP's purchase of a property. Prior to the Amendments, a party who was aware of contamination at a property - or who failed to exercise "all appropriate inquiry" in order to determine whether the property was contaminated - was deemed liable under Section 107(a) of CERCLA as a current owner of a CERCLA facility. Thus, the new liability exemption represents a significant improvement over the prior strict liability provisions of the statute by providing prospective purchasers with the first opportunity to avoid CERCLA liability for known contaminated property.

However, like the revised "innocent landowner" defense, the new BFPP exemption from liability is conditioned on the purchaser's continued exercise of due care and compliance with a detailed list of statutory criteria throughout the period of its ownership. The Amendments define a BFPP as a person (or a tenant of a person) who: (1) establishes that all disposals of hazardous substances took place before it acquired the facility; (2) made all appropriate inquiry into the previous ownership and uses of the facility; (3) provides all legally required notices regarding releases of hazardous substances at the facility; (4) exercises appropriate care with respect to any releases of hazardous substances at the facility by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human or environmental exposure to the hazardous substances; (5) provides full cooperation, assistance, and access to persons authorized to undertake response actions or natural resource restoration; (6) complies with land use restrictions and does not impede the effectiveness of institutional controls; (7) complies with all information requests; and (8) is not potentially liable, or is not affiliated with any person that is potentially liable for response costs at a facility. In addition, the Amendments provide that if the federal government conducts a response action at the property, it may attach a lien (referred to in the Amendments as a "windfall lien") on the property in an amount equal to the government's unrecovered response costs or the increase in fair market value of the property due to the government's response action, whichever is lower.

The criteria listed above for maintaining the BFPP exemption raise a number of significant challenges for purchasers of known contaminated property. First, the burden of proof is on the BFPP to establish that all "disposal" of hazardous substances occurred prior to its purchase. This burden may be difficult to overcome in some cases, given the broad definition of "disposal" under the statute and its interpretation by at least one federal appeals court as including, like "release," the mere migration of hazardous substances through media. *See, e.g., Nurad, Inc. v. William Hooper & Sons Co.*, 966 F.2d 837, 844-46 (4th Cir. 1992). Thus, unless the property in question is located in a federal circuit appellate jurisdiction that has ruled to the contrary, parties may be required to affirmatively prove that the contamination is in stasis as a pre-requisite to obtaining the benefit of the exemption. Practically speaking, at least until some regulatory or additional judicial guidance is provided on this issue, this means that in order for a prospective purchaser of property located in the 1st, 4th, 5th. or 10th or 11th federal circuit appellate jurisdictions to ensure that it will not be subject to CERCLA liability for any ongoing "disposal" of known hazardous substances at the property, it may be necessary for that party to perform intrusive (and expensive) environmental investigations prior to its purchase in order to affirmatively demonstrate that the known contamination is at least in a condition of stasis. In the absence of such evidence, the prospective purchaser should at least be fully aware of the potential cost of remediating the site in the event that it is deemed not entitled to the exemption.

Another problematic aspect of the BFPP exemption is the requirement that the purchaser provide all legally required notices regarding releases of hazardous substances at the property in order to maintain the exemption. Determining whether a legal reporting obligation exists under a given set of circumstances can present a significant challenge in and of itself, as reporting obligations vary tremendously among different states, environmental statutes, and regulations. For example, New Jersey's Spill Compensation and Control Act requires parties to report contamination only if they caused it or are otherwise liable for it. By contrast, the New York Department of Environmental Conservation (NYDEC) imposes a much broader reporting obligation - requiring anyone who discovers contamination to report it to the DEC within two hours of its discovery.

Aside from the complexity of spill notification requirements, the notice compliance requirement also will raise new issues that contracting parties will have to factor into risk allocation decisions in the context of particular transactions. Under the prevailing practice as it evolved over two decades of experience with CERCLA, contracting parties were often careful to avoid any actions that would trigger a reporting obligation, as sellers were generally wary of opening a "Pandora's Box" of remedial requirements only to have the buyer walk away from the deal if the problem proved too costly. Moreover, in cases where there was no clear reporting obligation and human health or the environment was not at risk, contracting parties had the flexibility to avoid reporting contamination problems.

This practice will probably change under the Amendments. While regulators may not place a high enforcement priority on technical violations of reporting requirements, compliance with these requirements could become the focus of intense scrutiny in private party litigation or even governmental cost recovery actions. Purchasers who seek to take advantage of the BFPP exemption therefore will want to make sure that they understand the particular mix of reporting requirements that may apply under the circumstances of a given property and that those obligations have been complied with, even where their obligation to do so is less than clear.

The Amendments' so-called "windfall lien" provision also creates a new challenge for parties involved in transactions dealing with contaminated or potentially contaminated real estate. Under Section 107(l) of CERCLA, EPA has long had the right to impose a lien on property at which it had incurred response costs in order to secure repayment of the costs paid out of the Superfund. However, Section l07(l)(3) specifically provided that the lien was "subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed. . ." Under the Amendment's "windfall lien" provision, it is not clear whether the lien likewise will be subordinate to other lien interests - including the interests of lenders who hold liens to securitize commercial loans. Thus, until additional guidance is provided on this issue, lenders will now have to consider the impact of a potential federal "windfall lien" that could be deemed to supersede their own liens on the property.

Contiguous Property Exemption

The Amendments also incorporate the first-ever exemption from CERCLA liability for owners/operators of properties that become contaminated from releases of hazardous substances on contiguous properties. While this provision addresses a much-debated issue concerning the fairness of imposing CERCLA liability on innocent downgradient property owners, it likewise falls short of laying the issue to rest. Although the legislative history suggests that the purpose of this provision was to recognize that owners/operators of properties that become contaminated by releases at contiguous properties are themselves "victims" and therefore should not be the subject of CERCLA's onerous liability regime, Congress nonetheless created a number of onerous requirements for these parties that treats them on a par with purchasers of contaminated property.

In order to be eligible for the exemption, the contiguous property owner/operator must demonstrate that he or she generally qualifies as an "innocent purchaser," provided full cooperation, assistance, and access to persons who are authorized to conduct response actions, complied with any land use restrictions established in connection with the response action, and did not impede the effectiveness or integrity of any institutional control employed in connection with a response action. The Amendments further provide that in order to show that it has conducted "all appropriate inquiry," the person seeking the exemption is not required to investigate the groundwater or install groundwater remediation systems.

While giving the first opportunity for contiguous property owners to avoid liability altogether, the qualifying requirements set forth in the Amendments now appear to provide at least some basis for allocating responsibility to the contiguous property owner if it does not comply with those requirements. Combined with the potentially onerous effects of these qualifying requirements, it is questionable whether contiguous property owners will fare better under the approach adopted in the Amendments as compared with prior practice. For example, the Amendments' requirements that the contiguous property owner cooperate with parties undertaking response actions on their property and comply with any land use restrictions may require that the contiguous property owner accept the use of institutional controls that negatively impair the value of his property. Failure to do so may risk having a share of responsibility allocated to that party for the additional costs of performing a remediation without the use of such controls.

Another potentially onerous provision is the due care requirement, which effectively treats contiguous property owners/operators the same as purchasers of contaminated property by requiring them to undertake measures to eliminate continuing releases, future releases, and any human or environmental exposure to hazardous substances that have migrated onto their property. However, the Amendments specifically provide that for purposes of the contiguous property exemption, the contiguous property owner/operator will not be required to conduct any groundwater investigations or to install any groundwater remediation system, except as in accordance with EPA's policy pertaining to the liability of property owners for contamination that has migrated onto their property via a contaminated aquifer.

In what may be the one silver lining in the contiguous property provision, the Amendments also provide EPA with the authority for the first time to grant prospective contribution protection to contiguous property owners, as well as assurances that EPA will not initiate enforcement action under CERCLA against a contiguous property owner. It remains to be seen, however, whether EPA will be willing to provide any such protections without the contiguous property owner's acceptance of institutional controls or compliance with due care requirements, as interpreted by EPA. If not, depending on the extent of pre-conditions that EPA's regional headquarters place on the issuance of these protections, they could effectively undermine the practical value of obtaining any such protections.

Federal Enforcement Bar

The final statutory change wrought under the Amendments in order to encourage the redevelopment of brownfields properties is the state response program provision, which among other things, provides for a qualified bar to EPA enforcement actions under CERCLA in cases where a state with a qualifying response program has issued a release from further response actions at an eligible response site. However, the practical value of the enforcement bar is questionable, given that it does not apply if EPA determines that the site presents an imminent and substantial endangerment, which the courts have generally interpreted as to require a relatively minimal showing by EPA.

Conclusion

Congress has attempted through the Amendments to clarify certain provisions in CERCLA that have created long-standing problems and impediments to redevelopment of brownfields and other contaminated or potentially contaminated properties. However, the Amendments raise a number of concerns and new challenges that could serve to undermine their stated objective of making CERCLA more "user-friendly" in the context of real estate transactions involving such properties. As a consequence, the ultimate utility of the new Amendments in overcoming impediments to brownfields redevelopment remains an open question for the time being and parties involved in these transactions will have to watch closely for future guidance from EPA and the courts.

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