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

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Part II of this article will appear in the June issue of *The Metropolitan Corporate Counsel* and will deal with the prospective purchaser and contiguous property protections under Superfund. Part III, which discusses the Amendments' provisions relating to small businesses, will appear in the July issue.

Introduction

On January 11, 2002, President George W. Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act[1] (the "Amendments") – the latest milestone in a long-sought quest to reform the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA" or "Superfund"). After 12 years of largely unsuccessful efforts to make CERCLA more "user-friendly" for real estate transactions involving known or potentially contaminated real estate, Congress' enactment of the Amendments finally provides statutory relief for parties who previously faced uncertain, virtually open-ended liability risks under CERCLA when contemplating the purchase of "brownfields" properties. However, this relief does not come without strings attached. In fact, so significant are these "strings" that they raise serious questions about the ability of the Amendments to achieve their intended purpose.

Some of the key liability provisions of the Amendments designed to better integrate CERCLA's liability provisions with the practical realities of brownfields transactions are: (1) clarification of the "innocent purchaser" defense to CERCLA liability; (2) liability relief for "bona fide" prospective purchasers who purchase property known to be contaminated; (3) liability relief for owners of property that become contaminated by releases on contiguous property; and (4) a qualified bar to federal enforcement at eligible response sites given state

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1 Public Law 107-118.

regulatory sign-offs. The Amendments also provide additional grants and loans aimed at spurring redevelopment of "brownfields" sites.

How We Got Here

When Congress first enacted CERCLA in 1980, little thought was given at the time to the effect it would have on transactions involving brownfields sites and other contaminated properties. The statute's broadly worded liability provisions were often applied to ensnare many classes of parties involved in real estate transactions in the web of CERCLA liability. In the first decade following CERCLA's enactment, this web of liability gradually expanded as courts generally accepted various arguments advanced by the U.S. Environmental Protection Agency that sought to impose liability against a widening circle of deep-pocketed parties involved with contaminated sites. As an example of this expansion, a number of early court rulings interpreted CERCLA's liability provisions as applying not only to site owners and operators, as well as transporters and generators, but also to lenders. Some courts had even suggested that a lender's mere authority to control its borrower's activities in its loan documents may be sufficient to impose liability.

Commercial and industrial real estate markets responded to the trend of broadening CERCLA liability by steering investment away from urban, industrialized areas and toward less-developed suburban areas. This in turn contributed to problems of urban blight and sprawl, as many otherwise useful commercial and industrial sites were abandoned in the face of uncertainties about the scope of liability and cleanup costs associated with their development.

Although Congress and EPA in recent years have attempted to address some of these concerns through statutory lender liability reform and administrative initiatives, the majority of reforms has taken place at the state level under analogous state statutes. These state reforms have included various economic incentives like grants, loans and tax breaks, liability relief for prospective purchasers, and the use of risk-based cleanup criteria that take into account real-world exposure scenarios and local land use preferences in determining "how clean is clean." Nonetheless, for many sites, these state reforms have not provided sufficient incentives to offset the liability risk presented by the ever-present spectre of CERCLA liability.

Although the new Amendments were intended to counter the unintended adverse effects CERCLA has had on brownfields redevelopment, and in fact, do provide greater certainty in many respects for parties involved in brownfields transactions, they also contain a number of provisions that create a number of new uncertainties. In fact, the Amendments could actually serve to *increase* liability risks or other problems for parties involved in brownfields transactions by creating a new *due care* standard that may be used to impose Superfund liability where it could not have been imposed previously. This due care standard applies to all three provisions in the statute designed to modify or clarify the circumstances under which Superfund liability may be imposed – the "innocent landowner" defense, the bona fide prospective purchaser exemption, and the contiguous property exemption.

Innocent Landowner Defense

Designed to shield parties from liability when they acquire property containing environmental problems not discovered despite the exercise of "all appropriate inquiry," the "innocent landowner" defense has had little practical application in part because of Congress'

failure to define what constitutes "all appropriate inquiry." Given the inherent ambiguity in how a court may apply the defense under the particular circumstances of a given transaction, the defense has provided little assurance against the prospect of incurring liability for conditions not discovered through the due diligence process. Furthermore, the defense provided no substantive liability relief as to contamination identified through due diligence activities.

Through the Amendments, Congress has attempted to cure the problems associated with the innocent landowner defense by clarifying how the defense is to be applied. The Amendments clarify the applicability of the innocent landowner defense in two ways. First, "all appropriate inquiry" is specifically defined to mean that the purchaser (1) inquired as to the previous ownership and uses of the facility, and (2) took reasonable steps to stop a release, prevent any threatened future releases, and prevent or limit human or environmental exposure to previously released hazardous substances. Second, the Amendments require EPA to promulgate regulations within two years establishing practices that will satisfy the "all appropriate inquiry" requirement. Until EPA promulgates the required regulations, the Amendments provide that the "all appropriate inquiry" standard will be satisfied if the purchaser's due diligence activities comply with a widely used industry standard known as ASTM 1527-97 for properties purchased *after* May 31, 1997. For properties purchased *prior* to May 31, 1997, courts are to consider the following factors in determining what satisfies the "all appropriate inquiry" test: (1) the specialized knowledge of the defendant; (2) the relationship of the purchase price to the value of the uncontaminated property; (3) commonly known information about the property; (4) the obviousness of contamination; and (5) the ability of the defendant to detect the contamination by appropriate inspection.

While providing more guidance than was previously the case under the old statute, the elaborate definition of "all appropriate inquiry" provided in the Amendments raises a number of new concerns of its own. The first of these concerns is that the definition's requirement that the purchaser take reasonable steps to "stop" a release or prevent any future releases has effectively transformed "all appropriate inquiry" from a duty to *inquire* at a particular point in time prior to the purchase into a duty of *care* that continues past the date of purchase and lasts for the entire period of the purchaser's ownership. Thus, the prospective purchaser can no longer be concerned solely about the condition of the property at the time it is acquired. He or she must also exercise continuing due care in maintaining the property.

Moreover, given the new duty of care adopted under the Amendments' definition of "all appropriate inquiry," the Amendments have now created a new substantive standard for the imposition of liability that did not previously exist. Previously, if a purchaser was unaware of contamination at a property after having performed sufficient inquiry, it could avail itself of the innocent purchaser defense without regard to any failure on its part to stop any release. The new definition of "all appropriate inquiry," however, now potentially renders any current owner of contaminated property into a liable party even if it conducted the sufficient inquiry prior to its purchase of the property *unless* it also affirmatively took measures to "stop" the release and prevent human or environmental exposure to the contaminants.

Another question raised by the Amendment's new definition of "all appropriate inquiry" is the scope of the purchaser's obligation to "stop" a release or prevent human or environmental exposure to contaminants at the site. Presumably, whatever it takes to "stop" a release is something less than the full extent of investigation and remediation that would be required of a responsible party. However, under the risk-based cleanup approaches now authorized by most

state response programs, demonstration that contamination is not migrating off-site is often sufficient (along with certain institutional controls to prevent human or environmental exposure) to avoid active remediation even for parties who *are* deemed responsible. Indeed, given the broad definition that courts have applied to the term "release" as including the mere *on-site* migration of contaminants through media – *See, e.g., United States v. CDMG Realty Co.*, 96 F.3d 706, 715 (3d Cir. 1996)) – the investigatory or remedial activity necessary to "stop" any continuing on-site release arguably may even be *more stringent* than what a responsible party may be required to perform in a given situation.

The only guidance provided in the Amendments as to what measures will be sufficient to "stop" continuing releases is limited to the contiguous property owner exemption provision. Under that provision (discussed next month), the Amendments specifically provide that investigation of, or installation of a remediation system for, groundwater contamination that has migrated onto the property of another is not required in order to show that the contiguous property owner has satisfied its due care requirement to "stop" any continuing release on its own property. Applying normal canons of statutory construction, it is likely that the courts will be inclined to interpret the omission of this language from the innocent purchase defense provisions in the Amendments as intentional and indicative of Congress' intent that groundwater investigation and remediation may be required in order to "stop" any continuing release for purposes of establishing that a party has exercised due care in order to avail itself of the innocent landowner defense.

In short, until some case law guidance is provided, affected parties will be faced with the uncertainty of whether this new duty of care includes the performance of extensive remedial activities to "stop" contamination from leaching through soil or groundwater or whether less-intrusive measures to limit human or environmental exposure, such as fencing or temporary covering to prevent off-site migration via airborne pathways will be sufficient. In the interim, it would be prudent for parties to assume that the use of exposure-limiting institutional controls may not be sufficient to satisfy the due care requirement, at least where subsurface groundwater contamination may be migrating toward a sensitive environmental receptor such as a surface water body.

In light of these concerns, the clarifications to the innocent purchaser defense in the Amendments can be expected to have a negligible benefit on the ability of parties to transact deals concerning contaminated or potentially contaminated real estate. Just as before, if as a result of its due diligence activities, the purchaser discovers contamination, it will need to conduct sufficient investigation in order to know prior to the purchase what it will cost to stop any continuing release, prevent any threatened future release or prevent or limit human or environmental exposure to the hazardous substances, as the purchaser will have to take all of these measures in order to maintain the protection of the defense in any event.