Detailed Background on the Kiddie Kollege case

In this case, Accutherm, Inc. (Accutherm) manufactured laboratory-grade thermometers from 1984 and 1992 at a one-story building located at property in Franklin Township in Gloucester County. The property had originally been developed with a septic system and on-site drinking water well. In 1987 elevated levels TCE were detected in the onsite well but metals were below the maximum contaminant levels (MCLs). The sampling appears to have been prompted by a complaint filed with the Gloucester County Department of Health (GCDOH) by a doctor treating one of the Accutherm employees. The doctor notified the GCDOH because Franklin Township did not have its own health department.

Approximately a month after the sampling results, the GCDOH notified the federal Occupational Safety and Health Administration (OSHA) that elevated mercury levels had been detected in the blood of an Accutherm employee. The GCDOH concluded that;

> *"Based upon the sample results, it appears that the employees are being exposed to excessive levels of mercury. Due to the high hazard risk involved with mercury this department requests that you investigate this matter in a timely manner."*

The GCDOH sent a copy of the letter to the state DOH but not the township.

In April 1988, NJDEP issued a telegram order to the President of Accutherm ordering Accutherm to immediately cease the discharge of all industrial pollutants to its septic system. Strangely, the order focused on petroleum discharges to the septic system and did not mention any mercury discharges.

After OSHA conducted a site inspection, the agency notified GCDOH in June 1988 that the matter could be consider "closed." Later that month, though, the NJDEP Division of Water Resources sent a letter to Accutherm advising that mercury and petroleum hydrocarbons had discharged into the septic system, requested Accutherm to perform waste characterization of the contents of the septic system, pump out and properly dispose of the contents and provide the sampling results to the NJDEP Bureau of Hazardous Waste.

In August, 1989, OSHA assessed Accutherm approximately $27K in civil penalties for failing to provide a safe work environment for employees. The notice of violation was provided to the township police department who transmitted the letter to the GCDOH. The police department also provided a copy of the letter the local emergency response authority established under the Environmental Planning and Community Right-To-Know Act (EPCRA).

In 1990, OSHA conducted two investigations in response to employee complaints and discovered mercury vapor levels site that exceeded the OSHA permissible exposure limits (PELs). Accutherm attempted to address this problem by renovating its ventilation

system but was unable to achieve the PELs. OSHA sent a letter to the township mayor and building inspector alerting then of

> *"… a serious health threat at a company in your Township" disclosed that inspections indicated employee exposures to mercury vapor above the OSHA PELs and that the firm president has told OSHA that he intended to sell the building and possibly move out of state. "*

The OSHA letter went on to state that the agency had contact the NJDEP RCRA unit who reportedly advised OSHA that it would not inspect Accutherm until they were informed of the sale. As a result, OSHA was concerned that there was a possibility that

> *"...an unsuspecting buyer or Franklin Township becomes saddled with the burden of this contaminated building, while the current owner escapes cleaning up a problem he created. . . ."*

Accutherm ceased operating in 1992 without complying with ISRA. In 1994, Accutherm filed a bankruptcy petition and stopped paying real estate taxes. Franklin Township then sold two tax sale certificates in separate transactions to National Midlantic Bank (Midlantic), who held a mortgage holder to the site. Midlantic retained a consultant to perform pre-foreclosure diligence. The consultant determined that

> *"Any person entering the building should be equipped in level C personal protection equipment" due to toxic levels of mercury vapor."*

Midlantic declined to foreclose on the tax certificates based on recommendation of counsel. Instead, in September 1994, Midlantic's counsel sent a letter to Accutherm and its counsel enclosing the report and stating:

> *"The bank believes that as owner of the property, it is your client's responsibility to immediately notify the Gloucester County Health Department….In addition, your client should immediately put warning signs on the property."*

Accutherm counsel forwarded the report to the GCDOH but not the township. Neither Accutherm nor the GCDOH posted the warning sign recommended by Midlantic's counsel.

In December 1994, Midlantic's counsel sent another letter to Accutherm's counsel providing a copy of a sign that had been created by the bank and stated:

> *"Since the bank is not the owner of the property nor a mortgagee in possession, it is not proper for it or its consultants to be placing the signs. For that reason, I ask that you urge your clients to post the enclosed signs as soon as possible and confirm to us in writing that the signs have been posted."*

The text of the sign stated: “Danger! Inhalation Hazard Do Not Breathe Vapors”.

When Accutherm failed to respond to the GCDOH, the NJDEP issued a Directive Accutherm under the state Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. (Spill Act) along with a notice to Accutherm’s insurer requiring the firm to enter into an administrative order on consent (ACO) to remediate the property. When Accutherm failed to enter into an ACO, the NJDEP requested EPA to inspect the site to determine if it was eligible for a federally-funded removal action.

Meanwhile, in July 1995, Midlantic’s counsel forwarded the prior correspondence with Accutherm’s counsel and a copy of its report to the GCDOH. Midlantic’s counsel also advised the GCDOH that the bank had learned a real estate broker was showing the property to prospective purchasers without informing them of the potential risks or taking proper precautions. The letter went on to say:

> *“While Midlantic holds a mortgage on the property, it does not now have, nor has it ever had, possession or control of the property. As a result, Midlantic does not have any right to go onto the property to place the signs. For that reason, I felt it prudent to alert the Gloucester County Health Department of the status of this matter.”*

Shortly thereafter, the GCDOH wrote Accutherm’s counsel indicating that it was not aware of any regulations

> “directly regulating or requiring posting of the site for the general public, however, I suspect strongly that this was what was envisioned in the “general duty” clauses in the OSHA regulations regarding proving for a safe workplace.”

The GCDOH strongly urged Accutherm to immediately post a statement of the hazards at the site and recommended restricting access to the site persons who were properly trained so they could protect themselves against the risks posed by the building. The GCDOH also reiterated that “The best method of control would remain to clean up the facility of any remaining mercury and after a thorough decontamination, recheck vapor levels.”

In a January 1996 report, EPA inspectors noted that they had observed 500 to 1000 thermometers in boxes and on shelves that appeared to be intact and found small amounts of mercury on the floor, on a countertop, and in a vial. The report also disclosed that two of 14 wipe samples exceeded the NJDEP's mercury limits. Based on air monitoring results, the report concluded that was not a potential for exposure to mercury vapor outside the building. Since the building was not in active use and was structurally, “EPA concluded that "the site does not present an immediate threat to human health or the environment."

NJDEP placed the site on its Known Contaminated Site List (KCS List) in 1996 but based on the EPA report, determined that the Accutherm site was not a priority for cleanup. The site was designated on the KCS List as "pending assignment".

In 1997, Franklin Township sold a second tax sale certificate to Midlantic and sold a third tax sale certificate in 1999 to plaintiff Navillus, a partnership consisting of members of the Sullivan family. The tax sale notice that led to Navillus purchasing the third tax sale certificate included the following disclaimer:

> *"Purchasers are herewith advised, pursuant to N.J.S.A. 13:1K-6, THAT INDUSTRIAL PROPERTY MAY BE SUBJECT TO THE "Environmental Clean Up Responsibility Act," the "Spill Compensation and Control Act" or the "Water Pollution Control Act"*

In addition, the Franklin Township Zoning Code Official provided Jim Sullivan, an experienced real estate broker and one of Navillus principals, with the summary section of the 1996 EPA report prior to the tax sale.

After acquiring the two tax sale certificates from Midlantic by assignment, Navillus brought an action for foreclosure under the Tax Sale Law. A state court entered a final tax foreclosure judgment in June 2011 which vested title to the Accutherm site to Navillus. Shortly thereafter, Navillus transferred title to James Sullivan, Inc. (JSI), a corporation owned by James Sullivan, Jr., for the nominal sum of one dollar.

Navillus or JSI commenced renovation of the building but received a stop order for failing to obtain the required building permits. After correcting the violation, the GCDOH received a request for authorization to alter the septic system. Even though the GCDOH was aware of the environmental conditions at the property and the permit application specifically referenced that the property would be used for a daycare facility, the license to operate the septic system was approved in July 2002.

In September 2003, an internal NJDEP memo indicated that a representative of the township code office contacted the NJDEP after learning that the property owner wanted to convert the building to a daycare. The NJDEP memo indicated that the code officer was advised that NJDEP had not issued an NFA letter and it was recommended that the site not be converted at that time. In October 2003, an environmental consultant filed an Open Public Records Act (OPRA) stating that the reason for the request was that the consultant had been retained by a real estate firm to determine the environmental status of the site to facilitate a real estate transaction. In November 2003, a zoning permit was submitted to the code office and the permit was not issued until the zoning office was provided with a copy of the 1996 EPA report. A certificate of occupancy was eventually issued in February 2004

JSI initially leased the building to the first owners of the Kiddie Kollege daycare, Matthew and Julie Lawlor. In December 2005, Becky and Stephen Baughman who had relocated from Texas and had a daughter that attended Kiddie Kollege purchased the

business in December 2005. There is no evidence that the Baughmans' performed any pre-acquisition environmental due diligence. In connection with the closing, the Baughman's also purchased a CL policy from the United States Liability Insurance Company.

NJDEP apparently learned that the property had been converted to a daycare following an April 2006 inspection. In May 2006, NJDEP sent a letter to JSI advising that "several environment issues exist at the [Accutherm] site," including the presence of mercury at levels above NJDEP limits, and asked JSI to provide documentation outlining what measures, if any, had been undertaken to remediate the environmental concerns. In response, JSI hired an environmental consultant to collect indoor air quality samples which revealed the elevated mercury vapor concentrations. Immediately thereafter, NJDEP notified the Baughmans' that the building was uninhabitable and the daycare was closed. JSI entered into an ACO in August 2006 to remediate the site in accordance with the Spill Act. Multiple lawsuits were filed in October 2006 and a state judge consolidated the lawsuits into a class action in 2007.

JSI subsequently refused to perform any remediation. In 2009, Navillus and JSI filed an action in Chancery Court seeking to void the judgment in the tax foreclosure action (but not the sale of the tax certificates) on the grounds that the prior owner of the mercury thermometer plant had failed to comply with ISRA. The township filed a counterclaim that the final judgment in the tax foreclosure action had vested title to the property to Navillus and extinguished the interest of prior title holders. The NJDEP also moved to dismiss the complaint on the ground that plaintiffs' action was a preemptive attempt to avoid possible liability under the Spill Act.

Since rescission is an equitable remedy, much of the evidence and testimony introduced at the trial centered on focused on the extent that JSI and Navillus were aware of the contamination at the time of the sale of the tax certificates as well as the foreclosure judgment. The court ultimately ruled that Navillus Group did not have appropriate knowledge of the condition of the property at the time it purchased the tax lien certificate. The opinion had the following interesting passage:

> *"Much has been made of the Plaintiffs proposed "sophistication" and his being a realtor and/or appraiser. If, in fact, the Plaintiff or the individuals involved with the Plaintiff entities were sophisticated real estate purchasers, they would have clearly avoided purchasing the tax lien and completing the foreclosure. There is a strong argument that the Plaintiffs were negligent in purchasing the tax lien. Arguably, appropriate due diligence was lacking. Certainly, in today's world, prior to becoming involved with any real estate, sophisticated and knowledgeable buyers are extremely concerned about environmental contamination. Perhaps if counsel were consulted prior to the purchase of the tax lien, an appropriate investigation could have been completed and appropriate environmental testing could have been performed prior to the purchase of the lien. The Plaintiffs did not do this. Was this due diligence? Arguably*

> *it was not. Did the Plaintiffs, however, have knowledge of the extent of any contamination to this property and particularly the consequences of acquiring and foreclosing a tax lien certificate? This Court concludes based on the testimony and all the evidence presented that they did not. It was definitely a mistake."*

The court acknowledged that the township provided a copy of the 1996 EPA report to the plaintiffs but found the report was confusing. The court noted the report's conclusion was debatable and that the report contained numerous scientific terms that would not be understood by a layperson. More importantly, the court said, the last sentence stated that there is no immediate threat to human health or environment.

The court also found that not only did the newspaper notice indicating that some properties, among several hundred, might be subject to ISRA notice did not conform to this statutory requirement but that the township also failed to comply with its obligation under ISRA to notify NJDEP. Because NJDEP was not provided the required notice, the court continued, the agency was unable to assert its interest and provide the Plaintiff with detailed notice of the contamination.

As a result, the court concluded that the foreclosure judgment obtained by the plaintiff was the result of a material mistake, and that the actions and inactions of the township and the NJDEP were a contributing factor to the mistake. The court found there would be no prejudice to any party as a result of the voiding of the foreclosure judgment because title to the real estate would revert back to the responsible party, Accutherm. In ruling that the plaintiffs were entitled to vacate the foreclosure judgment, the chancery court did not discuss and appears not to have taken into account the requirements of the Spill Act innocent purchaser defense where a mistake due to the lack of diligent inquiry is not a defense to liability.

The appellate division reversed in *Navillus Group v. Accutherm Inc*., 422 N.J. Super. 169 (App. Div. 2011), holding that Tax Sale Law provided the exclusive grounds for vacating a tax foreclosure judgment. The appeals court noted that the plaintiff property owners did not seek that relief until more than five years after entry of the tax foreclosure judgment, which was far beyond the three-month limit established by the Tax Sale law.

The court also ruled that ISRA obligations were first triggered when the Accutherm closed its operations and not based solely the sale of the tax sale certificate. Consequently, the court held, there was no basis under ISRA or treating a tax foreclosure judgment as a "transfer or sale" that triggered ISRA for purposes of exercising the transaction voiding remedy. The appeals court held that the Tax Sale Law was the exclusive grounds upon which a tax foreclosure judgment may be vacated and that the Tax Sale Law places "the risk of facts discovered after the tax sale which have an impact on the value of the property" on the purchaser of the tax sale certificate.