

Lessons Learned from Due Care/Appropriate Care Caselaw

Lawrence Schnapf

Schnapf LLC

New York, NY 10128

Larry@SchnapfLaw.com

www.SchnapfLaw.com

212-756-2205

Elements for CERCLA Liability

- Release
 - Includes “disposal”
 - Passive migration vs active disposal
- Hazardous Substance
- Facility
- Response Costs
 - Remedial or Removal
 - Consistency with NCP

CERCLA Liable Parties

- Current and Former Owners
 - Former “at time of disposal”
- Current and Former Operators
 - Control (moving dirt)
 - Former at “time of disposal”
- Generators
- Transporters

CERCLA Defenses

- Third Party
- Innocent Landowner (ILO)
- Bona Fide Prospective Purchaser (BFPP)
- Contiguous Property Owner (CPO)

Third Party Defense

- Release Solely Caused by TP
- No direct and indirect contractual relationship
 - ILO Exception to this element
- Due care
- Precaution against foreseeable acts or omissions

Innocent Landowner

- Did not know or have reason to know
- Exercise appropriate inquiry into past use and ownership
- Due Care
- Precautions
- Continuing Obligations

BFPP

- Applies to transactions after January 11, 2002
- Applies to Purchasers and Tenants
- Applies to brownfield and NPL sites

BFPP

- **Threshold Criteria**
 - Conducted AAI
 - Not PRP or affiliated with PRP by:
 - direct or indirect familial relationship
 - contractual or corporate relationship
 - Corporate Reorganization
 - Disposal took place prior to acquisition
- **Post-Closing Continuing Obligations**
 - Appropriate Care
 - Cooperation with RPs
 - Compliance with AULs
 - Notification
 - Information Requests and Subpoeas

Allocation

- Exercise of Due Care Element of “Gore” Factors

Recent Due Care Caselaw

- *500 Associates, Inc v Vt American Corp.*, 2011 U.S. Dist. LEXIS 11724 (W.D.KY 2/4/11)
- *New York v Adamowicz*, 2011 U.S. Dist. LEXIS 102988 (E.D.N.Y. 9/13/11)
- *NYSEG v First Energy Corp*, 2011 U.S. Dist. LEXIS 74216 (N.D.N.Y. 7/11/11)
- *Sisters of Notre Dame De Namur v. Garnett-Murray*, 2012 U.S. Dist. LEXIS 78747 (N.D. Cal. 6/6/12)

500 Assoc v Vermont American Corp

- 1986 Purchase- Cursory ESA detects metals (chromium)
- 1991 ESA detects metals and VOCs
 - No disclosure
 - Sale falls through
- 1998 Enforcement Action
- 2002 KY ALJ Finds Joint Liability
- 2006 Ky Ct Appeal Holds No Due Care
 - no precautions when demolishing buildings
 - Left exposed soils
 - Failure to secure property
 - No disclosure to state

New York v Adamowicz

- 1985 County orders discharges to leaching pools to cease
- managing partnership spends \$1MM to clean-out pools and investigate
- 1990- prtship takes title after T files bankruptcy
- 1994- declines DEC request to remediate site
- DEC \$4MM response costs
- Ct finds no due care. LL had rt to access pty and not new owner

NYSEG

- Two MGP Sites
- Cortland site- No due care
 - Owner engages in protracted negotiations with NYSEG to sell property to remove gas holders.
 - Delays PRAP and cleanup
 - allows contamination to migrate.
 - \$179K in past costs and pay 6.72% of future costs
- Elmira-satisfied due care
 - Protracted negotiations but provided access to NYSEG and cooperated

Recent Appropriate Care Caselaw

- *Ashley II of Charleston V PCS Nitrogen*, 2013 U.S. App. LEXIS 6815 (4th Cir. 4/4/13)
- *3000 E. Imperial, LLC v Robertshaw Controls*, 2010 U.S. Dist. LEXIS 138661 (C.D. Cal. 12/29/10)
- *Saline River Properties v Johnson Controls*, 2011 U.S. Dis. Lexis 119516 (E.D. Mi. 10/17/11)
- *Voggenthaler v Maryland Square LLC*, 2012 U.S. Dist. LEXIS 69395 (D.Nev. 5/17/12)

The Cast

- Planter Fertilizer & Phosphate Company/ Ross Development (1906 to 1966)
- Columbia Nitrogen Corp/PCS (1966 to 1972)
- Holcombe and Fair (1987-2002)
- Robin Hood II (1992 to present)
- Allwaste Tank Cleaning (1989-2008)-2.99 acres
- Ashley II (2003- 27.62 acres)
- Ashley II(2008-2.99 acres)

Site Operations

- sulfuric acid manufactured in acid chambers and piped to southern portion of facility to react with phosphate rock
- Pyrite ore used as fuel stock for sulfuric acid
- Acid chambers lined with lead with hole in bottom for cleanouts

Site Operations Cont'd

- Pyrite slag used for road stabilization
- Lead sludge from acid chambers rinsed onto land and washed into ditches and marsh
- Sulfuric acid leaks from piping
- Fluorosilic acid and lead effluent discharged to ditches
- 1963 fire destroyed portion of acid plant
- 1971 storm damaged roof of new acid plant
- Allwaste rinse water from cleaning bays held in sumps and trenches prior to treatment and discharge

Environmental Conditions

- Widespread lead and arsenic
- Carcinogenic PAHs
- Low pH conditions throughout site that mobilized metals
- Site covered with limestone run of crusher (ROC) in phases

Environmental Investigations

- GEL 1990 Report detects metals in test pits and potential for contaminated stormwater. Disclosed to RHCE but not DHEC
- 1992 H&F design detention plans w/o DHEC approval
- 1993-98 EPA PA/SI identifies need for remedial actions
- 1996-2000 Ross begins selling assets and distributes proceeds to shareholders

Environmental Cont'd

- 1999 H&F implement surface water management plan to avoid removal action. Not submitted to EPA for approval but EPA says improved conditions
- 1999-2001 EPA RI
- 2002 EPA FS
- 8/2003 GEL Phase 1 incorporates FS
- 11/2003 Ashley notifies EPA of pending sale and requests if EPA desires any cooperation

Environmental Cont'd

- 2004 GEL pre-design and characterization
- 2004 Responds to EPA Information Request
- 2006 Scott Freeman walks Allwaste site and observes staining and debris piles
- 2007 Ashley grants EPA access
- 2007 GEL Investigation of Allwaste parcel
- 2008 GEL “update”
- 2008 PCS expert observes eroded ROC
- 2008 Ashley demolishes structures at Allwaste parcel

Environmental Cont'd

- 2008 Ashley does not follow its protocols for concrete slabs
- 2008- Ashley removes debris piles
- 2008- Ashley sends letter to EPA on Cherokee letterhead that:
 - pursuing claim agst H&F would discourage future development
 - Emphasized its resources
 - Cost recovery action by Ashley should provide adequate consideration to secure release of H&F

Environmental Cont'd

- 2009 evaluation of sumps and cracks of concrete pads is later found to be insufficient by court
- 2009 Ashley removal action estimate is \$8.021MM

Ashley is PRP

- Ashley did not prove that “no disposals” occurred after its acquisition
- Effort to discourage EPA from pursuing H & F was improper “affiliation”
- Ashley did not exercise appropriate care for
 - sumps,
 - debris pile
 - maintenance of ROC
 - Removal of pumps exacerbated conditions

Allocation

- Ross 45% (\$87.4K to Ashley)
- PCS 30% (\$58.3K to Ashley)
 - H & F 16%
 - RHCE 1% (\$2K to Ashley)
 - Allwaste 3%
 - Ashley 5%

Robertshaw Controls

- Nov 2006-acquired site
- May 2007-Enter VCP and UST Sampled
- Sept 2007-TCE Detected
- Oct 2007- UST drained and drums removed
- 2009- 9 USTs excavated
- Ct Says took reasonable steps by draining USTs. Not unreasonable to leave in ground

Saline River Properties

- Predecessor to D operated 22-acre cast auto parts plant
- Washtenaw Industrial Facility, LLC acquired title after plant shut down and defaults on loan when tenant vacates
- Lender contacts EPA who enters into 3008 order with D in 2002
- SRP takes title in 2006 for \$20MM condo project

SRP Cont'd

- Performed BEA
 - no AAI-relied
 - database update of 4yr old phase 1
- Uses part of MI brownfield grant to demolish bldg and implement state due care but initially leaves foundation
- EPA tells D must remediate to residential
- Site no longer eligible brownfield site
- SRP breaks up slab and exacerbates contamination

Voggenthaler v Maryland

- Acquired shopping center from County
- No AAI b/c contamination was in “public records”
- failed to exercise appropriate care b/c it demolished the dry cleaner, thereby exposing contaminants to the elements

Lessons

- LLPs are legal defenses
- State VCPs
- Recommendations in Phase 1 Reports
- Disclosure
- Self-Implementing Nature of BFPP
- Look For Sensitive Receptors
- Exercise Extreme Care For Grading Actions
- Discuss Remedial Schedule With Lender
- Impact of Due Care on Apportionment

Phase 1 Recommendations

- ASTM E1527
 - Opinion and Conclusion On RECs
 - RECs vs BERs
 - Sensitive Receptors
- Recommendations
 - Not Required
 - Make Sure Implement Recommendations
- Coordinate Schedule With Lender