

This article was downloaded by: [Lawrence Schnapf]

On: 15 November 2013, At: 14:54

Publisher: Routledge

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



Environmental Claims Journal

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/becj20>

CERCLA BFPP Proves Elusive after Court of Appeals Decisions

Larry Schnapf

Published online: 15 Nov 2013.

To cite this article: Larry Schnapf (2013) CERCLA BFPP Proves Elusive after Court of Appeals Decisions, Environmental Claims Journal, 25:4, 346-361, DOI: [10.1080/10406026.2013.839839](https://doi.org/10.1080/10406026.2013.839839)

To link to this article: <http://dx.doi.org/10.1080/10406026.2013.839839>

PLEASE SCROLL DOWN FOR ARTICLE

Taylor & Francis makes every effort to ensure the accuracy of all the information (the "Content") contained in the publications on our platform. However, Taylor & Francis, our agents, and our licensors make no representations or warranties whatsoever as to the accuracy, completeness, or suitability for any purpose of the Content. Any opinions and views expressed in this publication are the opinions and views of the authors, and are not the views of or endorsed by Taylor & Francis. The accuracy of the Content should not be relied upon and should be independently verified with primary sources of information. Taylor and Francis shall not be liable for any losses, actions, claims, proceedings, demands, costs, expenses, damages, and other liabilities whatsoever or howsoever caused arising directly or indirectly in connection with, in relation to or arising out of the use of the Content.

This article may be used for research, teaching, and private study purposes. Any substantial or systematic reproduction, redistribution, reselling, loan, sub-licensing, systematic supply, or distribution in any form to anyone is expressly forbidden. Terms & Conditions of access and use can be found at <http://www.tandfonline.com/page/terms-and-conditions>

CERCLA BFPP Proves Elusive after Court of Appeals Decisions

LARRY SCHNAPF*

INTRODUCTION

A little more than decade after Congress added the Bona Fide Prospective Purchaser (BFPP)¹ liability protection to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA),² two federal appeals courts finally had the opportunity to interpret the scope of this provision. Unfortunately, it appears that the BFPP is beginning to resemble the car reservation in the famous Seinfeld episode “The Alternate Side”: The BFPP may be easy to achieve but hard to maintain.³

This article will only discuss the aspects of the rulings in *PCS Nitrogen v Ashley II of Charleston*⁴ (*Ashley*) and *Voggenthaler v. Md. Square LLC*⁵ (*Voggenthaler*) that pertain to the BFPP. These opinions also addressed successor liability, apportionment (*Ashley*) along with other contractual issues unique to those cases. Readers interested in those issues should review those decisions.

*Larry Schnapf is the principal of Schnapf LLC and an adjunct professor at New York Law School where he teaches “Environmental Issues in Real Estate and Business Transaction” and “Brownfield Redevelopment Law and Policy.” He is the general editor/contributing author of *Environmental Issues in Business Transactions*, co-chair of the New York State Bar Association’s Hazardous Site Remediation Committee, co-chair of the NYSBA brownfield task force and immediate past Chair of the ABA Section of Business Law Committee on Environmental, Energy and Natural Resources Law.

Address correspondence to Larry Schnapf, Schnapf LLC, 55 East 87th Street #8B, New York, NY 10128. E-mail: Larry@SchnapfLaw.com

¹ 42 U.S.C. 9601(40).

² 42 U.S.C. 9601 et seq.

³ In this episode, Jerry Seinfeld walks up to a car rental counter to and is informed by the rental car agent that the mid-sized car he reserved is not available:

Jerry: “I don’t understand. Do you have my reservation?”

Rental Car Agent: “We have your reservation, we just ran out of cars.”

Jerry: “But the reservation keeps the car here. That’s why you have the reservation.”

Rental Car Agent: “I think I know why we have reservations.”

Jerry: “I don’t think you do. You see, you know how to take the reservation, you just don’t know how to hold the reservation. And that’s really the most important part of the reservation: the holding. Anybody can just take them.”

⁴ 2013 U.S. App. LEXIS 6815 (4th Cir. 4/4/13).

⁵ 2013 U.S. App. LEXIS 15307 (9th Cir. 7/26/13).

OVERVIEW

CERCLA imposes strict liability on four categories of responsible parties including current owners or operators of property for the cleanup of releases of hazardous substances even if the contamination occurred prior to the time the owner acquired title or the operator came into possession of the property.⁶ Past owners or operators may also be liable if they owned or occupied the property at the time of disposal of the hazardous substances.⁷

CERCLA does have a number of affirmative defenses for property owners or operators including:

- The third-party defense;⁸
- The innocent landowner (ILO) defense;⁹
- The BFPP;¹⁰ and
- The contiguous property owner (CPO);¹¹

To qualify for the BFPP, a property owner or operator must establish the following pre-acquisition requirements:

- All disposal of hazardous substances occurred before the purchaser acquired the facility;¹²
- The purchaser is not a potentially responsible party (PRP) or affiliated with any other PRP for the property through any direct or indirect familial relationship, any contractual or corporate relationship, or as a result of a reorganization of a business entity that was a PRP;¹³
- The purchaser conducted “all appropriate inquiries” into the past use and ownership of the site;¹⁴

After taking title, a purchaser must comply with number of “continuing obligations” to maintain its BFPP status. The “continuing obligation” relevant to the BFPP cases is the requirement to exercise “appropriate care” by “taking reasonable steps” to:

⁶ 42 U.S.C. §9607(a)(1).

⁷ 42 U.S.C. §9607(a)(2).

⁸ 42 U.S.C. §9607(b)(3). To satisfy the third-party defense, an owner or operator has to demonstrate by a preponderance of the evidence that (i) the release was solely caused by a third party;(ii) whom the defendant did not have a direct or indirect contractual relationship; (iii) the defendant exercised due care with respect to the contamination; and (iv) took steps against foreseeable acts or omissions of third parties.

⁹ 42 U.S.C. §9601(35)(A).

¹⁰ 42 U.S.C. §9601(40).

¹¹ 42 U.S.C. §9607(q).

¹² 42 U.S.C. §9601(40)(A).

¹³ 42 U.S.C. §9601(40)(H).

¹⁴ 42 U.S.C. §9601(40)(B). EPA promulgated its “all appropriate inquiries” (AAI) rule at 40 C.F.R. 312.

- stop any continuing release,
- prevent any threatened future release; and
- prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.¹⁵

As an affirmative defense, the party seeking liability protection has the burden that it meets all of the elements of the BFPP. The BFPP is self-implementing meaning a property owner can assert the liability protection without formal determination by EPA. Of course, the downside of the self-implementing nature of the BFPP is that a party that thinks it may have achieved BFPP status may later learn that a court holds otherwise which is what happened in the *Ashley* case.¹⁶

ASHLEY¹⁷

In this case, Planters Fertilizer and Phosphate Company (Planters) manufactured phosphate fertilizer at the site from 1906 to 1966 by reacting sulfuric acid with phosphate rock. Planters produced the sulfuric acid for the process on-site, and stored the acid in lead-lined tanks. Prior to the 1930s, Planters used pyrite ore as the primary fuel for its sulfuric acid production. The burning of pyrite ore generated a pyrite slag byproduct containing high concentrations of arsenic and lead. Planters spread the slag byproduct to stabilize roads on the site. The vast majority of the arsenic and lead contamination found at the site was attributable to the slag by-product.

At some point, Ross Development (Ross) became the successor to Planters. Columbia Nitrogen Corporation (Old CNC) acquired the site in 1966 and terminated production at the acid plant in 1970. Between 1971 and

¹⁵ 42 U.S.C. §9601(40)(D). The other continuing obligations are complying with all release reporting requirements; cooperating, assisting, and providing access to persons authorized to conduct response actions or natural resource restoration at the property; complying with any land use restrictions established as part of a response action and not impeding the effectiveness or integrity of any institutional control used at the site; provide access to persons authorized to operate, maintain, or otherwise ensure the integrity of land use controls at the site; and comply with any the EPA request for information or administrative subpoena issued under CERCLA. See 42 U.S.C. §9601(40)(C), (E)-(G).

¹⁶ EPA has authority under CERCLA to issue an assurance letter take it will not take enforcement action against the CPO. While there is no equivalent BFPP assurance provision, EPA has indicated that there are limited circumstances when EPA may consider using site-specific tools to provide clarification on EPA's enforcement intentions for BFPPs. These tools include comfort/status letters, BFPP-doing-work-agreements, or prospective purchaser agreements. See "Bona Fide Prospective Purchasers and the New Amendments to CERCLA," May 31, 2002, <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bonf-pp-cercla-mem.pdf>.

¹⁷ This is a complex case with dense facts because of the numerous parties that have owned or operated the site. We have streamlined the facts and have focused on the rulings involving Ashley and the BFPP liability protection. Readers who are interested in a more comprehensive analysis the other parties in this case along with the other rulings may review the author's blog post at: <http://www.environmental-law.net/2013/04/fourth-circuit-affirms-ashley-rulings/>.

1981, Old CNC demolished all the structures at the site. The demolition activities disturbed the subsurface soil to a depth of at least two feet. Old CNC sold the vacant Charleston property to Henry Fair, Jr., James H. Holcombe, and J. Holcombe Enterprises LP (collectively, H&F) in 1985.¹⁸

H&F sold three acres to an intermediary who, in turn, sold the parcels to Allwaste 1989. In 1991, H&F leased two additional acres to Allwaste, and sold a portion of the property for a road to the City of Charleston. In 1992, H&F sold two acres to the president of Robin Hood II (Robin Hood) who leased the parcels to Robin Hood Container Express, Inc. (RHCE). Allwaste used its land to clean tanker trucks and shipping containers that stored hazardous and non-hazardous materials. Robin Hood used its parcel to store shipping containers.

EPA performed a preliminary assessment and site inspection between 1995–98. Following the site inspection, EPA advised H&F that remedial measures would have to be implemented to manage surface water runoff to protect human health and the environment. To avoid EPA performing a removal action, H&F agreed to develop and implement a comprehensive surface water management plan acceptable to EPA. Apparently, H&F proceeded with the construction of stormwater retention ponds without obtaining EPA approval. From 1999–2001, EPA conducted a remedial investigation that identified elevated levels of lead and arsenic in soils, groundwater and surface water at the Site. In October 2002, EPA completed a feasibility study and authorized a removal action in 2005.

Meanwhile, Ashley, an entity owned by the brownfield developer Cherokee Investment Partners, entered into a contract to purchase the 27.62 acre H&F Parcel in December 2002. The purchase was part of a larger acquisition of over 200 acres along the Ashley River in the Neck area of Charleston and North Charleston that was to developed into a mixed use project known as the “Magnolia.” Ashley performed a phase 1 in October 2003 that incorporated the results of the EPA feasibility study and acquired title in November 2003.

Ashley retained an environmental consultant to help it qualify with the BFPP.¹⁹ Prior to the closing, Ashley notified EPA that it had acquired a portion of the Site and explicitly requested that EPA inform Ashley if EPA desired

¹⁸In 1986, CNC Corp. (New CNC) purchased the assets and business of Old CNC for \$50 million. In exchange for a significant discount from book value, New CNC accepted the acquired business and assets “as is.” By virtue of a series of mergers and acquisitions, PCS Nitrogen, Inc. (PCS), eventually became a successor to New CNC. Neither New CNC nor PCS ever owned or operated any portion of the Charleston Site.

¹⁹Hiring an environmental consultant to assist with qualifying for a legal defense was an interesting decision. The absence of environmental legal counsel likely contributed to the numerous missteps that Ashley committed after closing that led to it losing its BFPP status. Moreover, it appears that Ashley did not seek advice of environmental counsel before commencing its cost recovery action to ensure that it could successfully withstand the inevitable counterclaim that was filed by PCS.

“specific cooperation, assistance, access or the undertaking of any reasonable steps with respect to the Site.”

When Ashley acquired title, portions of the limestone run of crusher (ROC) had degraded. In February 2004, Ashley responded to a request for information from EPA. Ashley’s consultant subsequently conducted a pre-design site characterization study for Ashley, collecting 452 soil samples from 159 soil boring locations on the Site at depths of one to five feet for the purpose of more fully characterizing and delineating the areas of elevated arsenic and lead at the Site.

Ashley’s troubles began when it acquired the 2.7-acre Allwaste parcel in 2008. Ashley had leased this parcel from Allwaste from 2003 to 2008 to store trucks. This parcel was not covered with ROC. Ashley performed a pre-acquisition phase 1 in November 2007 that identified a number of recognized environmental conditions (RECs) including sumps, concrete pads, a debris pile and the ROC cover as RECs. The phase 1 recommended that the sumps be cleaned out and filled, the cracks in the concrete pad and debris pile be investigated and that the ROC be maintained subsequently acquired this parcel in 2008. However, after demolishing the structures on the Allwaste parcel in June 2008, Ashley left in place the cement pads, sumps, trench, and underground pipes. Because the pumping equipment that had removed water from the sumps was also removed, surface runoff accumulated in the exposed sumps and trenches. Ashley had a protocol that required it to demolish concrete slabs and to evaluate sub-slab conditions but this protocol was not implemented on the Allwaste parcel. Ashley did not remove the debris pile from the main portion of the Site until 2008.

District Court Ruling

Ashley filed its lawsuit in 2005, seeking recovery of \$195K in response costs and a declaratory judgment that PCS was responsible for the estimated \$8MM remediation. PCS counterclaimed and also brought third-party contribution actions against past and current owners and operators of the Site, including Ashley. The district court bifurcated the case for trial with the first phase addressing liability and the second phase allocating response costs. After ruling that PCS was liable as a successor corporation, the court held a 16-day trial to allocate liability among the various parties. In its 2010 ruling, the district found that Ashley had failed to establish BFPP status and was therefore a PRP as the current owner of the Site.

On the pre-acquisition elements of the BFPP defense, the court held that Ashley had failed to meet its burden that all “disposals” had occurred prior to its ownership. Instead, the court said it was likely that disposals had occurred on the Allwaste property after Ashley tore down the structures because the

sumps contained hazardous substances, were cracked, and were allowed to fill with rainwater. The court rejected Ashley's argument that mere passive migration of previously-deposited hazardous substances did not qualify as "disposals" because Fourth Circuit precedent considered passive migration as "disposal." The court also noted that Ashley could not disprove the existence of "disposals" since Ashley had not sampled beneath the concrete pads, sumps or trench to determine if the soils under those structures was contaminated.

More problematic was the court's ruling on the BFPP pre-acquisition requirement that the purchaser not have an "affiliation" with a PRP. In its purchase agreement, Ashley had agreed to indemnify H&F for existing environmental conditions. The court noted that after EPA had sent a notice of potential liability to H&F, Ashley contacted EPA "to persuade EPA not to take enforcement action to recover for any harm at the Site" that could be attributable to H&F. The court observed that Ashley told EPA that if the agency pursued H&F, Ashley would ultimately be responsible costs that EPA recovered from H&F and that if EPA insisted on pursuing a claim against H&F, such action would discourage Ashley's future development efforts. The court also pointed out that Ashley had suggested to EPA that its lawsuit against PCS "to secure an alternative source of repayment of past costs should provide adequate consideration to secure a release of Ashley's indemnitees." The court then held that the indemnity and these actions to discourage EPA from pursuing H&F for cost recovery was the kind of prohibited affiliation that Congress had envisioned.

The court also concluded the Ashley did not comply with its post-acquisition continuing obligations by failing to exercise appropriate care regarding the hazardous substances at the Allwaste parcel. The court was influenced by the fact that Ashley had failed to implement the phase 1 recommendation to clean out and fill in the sumps. Instead, Ashley waited a year to address these structures. Indeed, the court noted that even Ashley's expert admitted that the structures should have been promptly cleaned and filled. The court also ruled that Ashley's failure to investigate the contents of the debris pile and removing the debris pile nearly two years was also evidence of lack of appropriate care.

Ashley had used the Allwaste parcel to store trucks. Ashley discounted the importance of maintaining the ROC, asserting it was not necessary for ROC to cover the entire parcel to protect human health and the environment. However, tire tracks seemed to suggest that the trucks were spreading contaminated soil. As a result, the court said that Ashley failed to adequately maintain the ROC cover on the Site.²⁰

²⁰ The court did find H&F liable as a past owner because it had engaged in site-wide earth-moving activities, including the construction of a street extension, the addition of water and sewer lines, excavation and grading, and the construction of several detention ponds. However, the district court noted that H&F

The court allocated 5% of the response costs to Ashley. PCS was assigned 30% of the liability and required to reimburse Ashley \$58.3K while Ross Development was allocated 45% of the liability and ordered to reimburse \$87.4K to Ashley.

Appellate Opinion

On appeal, Ashley argued that the court had erroneously rejected its BFPP defense and that its allocation should be reduced to zero. PCS responded that Ashley had ample notice of environmental risks after it bought the Site but had turned a blind eye to those risks and did nothing to care for the property.²¹

At the heart of Ashley's appeal was the meaning of the statutory phrase "appropriate care." The Third Party defense requires that parties exercise "due care" while the BFPP liability protection refers to "appropriate care." Ashley claimed that Congress had established a lower level of care when it used the phrase "appropriate care" in the elements of the BFPP liability exemption instead of the phrase "due care" requirement of the innocent landowner/third party defense.²² Conventional wisdom has been that the different wording was simply a drafting error and many commentators felt that Ashley's argument did not pass the "red face" test.

The Fourth Circuit agreed, saying that Ashley had failed to provide a "persuasive rationale" for requiring a lower level of care for a BFPP than for an "innocent landowner." The court said that both the BFPP exemption and the innocent landowner defense require a demonstration of "reasonable steps." Moreover, the court held:

mitigated the risks somewhat by adding a four- to six-inch ROC cover over the majority of the site. Likewise, RHCE was found liable because it arranged for the excavation of a 1380-cubic-foot pond, two asphalt driveways, and extended sewer and water lines that disturbed contaminated soil. Moreover, its contractors stripped six inches of topsoil and graded the land. The court determined that RHCE failed to exercise the requisite due care for the third party defense. Finally, Allwaste utilized an underground sump system to capture wastewater generated by the container-cleaning process and pumped the wastewater into a treatment system. The district court determined that Allwaste allowed the sumps to deteriorate during its ownership of the parcel to the extent that the sumps presented a threat of a release of hazardous substances.

²¹ The brief filed by PCS was full of pithy observations on Ashley's business model. Perhaps the most biting was the statement that Ashley "pursues a business model in which it acquires brownfields but does little or no remediation itself, instead suing a deep pocket and aligning itself with others who should bear responsibility for the harm."

²² In advancing this theory, Ashley cited comments by President George W. Bush when he signed the 2002 law adding the BFPP to CERCLA where he stated the legislation was intended to aid potential brownfields developers deterred by "excessive regulation or because of the fear of endless litigation." Ashley also pointed to comments of Senator Boxer that the Amendments were intended to reduce "the fear of developers and real estate interests," and they should "lead to more cleanups."

Logic seems to suggest that the standard of “appropriate care” required of a BFPP, who by definition knew of the presence of hazardous substances at a facility, should be higher than the standard of “due care” required of an innocent landowner, who by definition “did not know and had no reason to know” of the presence of hazardous substances when it acquired a facility.

Nevertheless, the appeals court said it did not have to determine if the BFPP “appropriate care” standard was higher than the standard of “due care” mandated elsewhere in CERCLA because “appropriate care” was at least as stringent as “due care.” Following the suggestion of EPA in its 2003 “Common Elements Guidance,”²³ the appellate panel then examined Ashley’s actions through the prism of CERCLA’s “due care” case law.²⁴ The Fourth Circuit said the “due care” inquiry asks whether a party “took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances.” Under this standard, the appeals court concluded that Ashley’s inactions clearly show that it failed to exercise “appropriate care.”²⁵

Ashley deserved what it received. It ignored recommendations in a phase 1 and its own parent’s internal policy, and failed to take any action for nearly two years to stabilize a known contaminated site that was located within proximity to sensitive receptors (wetlands and the Ashley River). Several circuit courts have held that doing nothing is not “due care.” Ashley also retained an environmental consultant instead of an environmental lawyer to help it comply with a legal defense.

Unfortunately, the appeals court did not reach the improper “affiliation” holding of the district court. It was unclear from the trial court opinion if the indemnity from Ashley to H&F was the improper affiliation, if it was the efforts of Ashley to convince EPA not to seek cost recovery from H&F since this would trigger Ashley’s indemnity or a combination of both of these facts that caused Ashley to have violate the “no affiliation” element

²³ “Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Common Elements),” March 6, 2003, <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>.

²⁴ EPA’s common elements guidance states, *inter alia*, that “doing nothing in the face of a known or suspected environmental hazard” does not likely constitute “taking reasonable steps.” It also states that “Knowledge of contamination and the opportunity to plan prior to purchase should be factors in evaluating what are reasonable steps, and could result in greater reasonable steps obligations for a bona fide prospective purchaser.”

²⁵ Ashley sought to rebut the allegations that it failed to exercise appropriate care by relying on a letter from its consultant that the sumps would be cleaned (though not filled in) when the occupant (Allwaste) vacated the parcel, and that Ashley’s environmental manager later “walked the Site” and saw only “windblown dirt in the trenches.” Ashley also introduced expert testimony that contaminants in the sumps would not be mobilized which was disputed by PCS’ expert. Both courts were unimpressed with Ashley’s mitigating evidence.

of the BFPP. Indemnities are important tools in real estate transactions and if merely granting an indemnity is enough for a buyer to lose BFPP status, this will have a particularly chilling effect on brownfield projects. Such an interpretation does not seem reasonable but the Court of Appeals missed an opportunity to clarify this important issue.²⁶

Contrast Ashley's actions with those of the plaintiff in *3000 E. Imperial v. Robertshaw Controls*²⁷ where the purchaser acquired property in November 2006 that had been formerly used to manufacture aircraft and missile valves as well as furniture manufacturing. The plaintiff learned the site had been contaminated during its pre-acquisition diligence. After acquiring title, plaintiff demolished the manufacturing building which occupied 90% of the site and completed additional investigations.

A September 2007 report identified two areas of concern: AOC 1 was the location of former USTs and a former maintenance shed. AOC 2 was the former manufacturing building and was impacted from TCE. Plaintiff drained the USTs which had residual TCE. The USTs were excavated in 2009. Plaintiff incurred approximately \$1.7MM in response costs and sought reimbursement under CERCLA and the California superfund law.

The defendant argued that plaintiff did not qualify for the federal and state BFPP Defenses because it failed to exercise appropriate care. In particular, the defendant asserted that plaintiff unreasonably delayed excavating the USTs until 2009.

The court said that under the California BFPP (codified at Health & Safety Code 25395.69), "appropriate care" is defined as the performance of response actions directed by the Department of Toxic Substances (DTSC). Since the plaintiff was working under DTSC supervision, the court ruled that the plaintiff satisfied the state "appropriate care" standard.

For the CERCLA BFPP, the court noted that the plaintiff sampled the contents of the USTs in May 2007, six months after it acquired title. In September 2007, the plaintiff received its report from its consultants and then drained the USTs in October 2007, placing the contents into 20 drums that were then properly disposed. The court held that the plaintiff had taken "reasonable steps" because it emptied the USTs "soon after learning that they contained a hazardous substances." The court rejected the notion that the plaintiff acted unreasonably when it waited until 2009 to excavate the USTs, noting that there was no evidence the delay allowed additional TCE to

²⁶ Following the district court ruling, EPA issued a guidance document on the "no affiliation" requirement of the BFPP. See "Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections," September 21, 2011, <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/affiliation-bfpp-cpo.pdf>. Ashley referenced this guidance in its appeal but the appeals court did not consider this document since it was issued after the district court ruling.

²⁷ 2010 U.S. Dist. LEXIS 138661 (C.D. Ca. 12/29/10)

discharge into the environment. Moreover, the defendant did not produce any evidence to suggest that plaintiff should have suspected that TCE remained in the USTs. Indeed, when the USTs were removed, the court said, the contents consisted almost entirely of water. Accordingly, the court found that the plaintiff had satisfied the CERCLA BFPP defense by taking reasonable steps to prevent further releases of hazardous substances.

VOGGENTHALER

In what may also be the most important vapor intrusion case decided to date, the United States Court of Appeals for the Ninth Circuit affirmed the summary judgment in favor of the Nevada Department of Environmental Protection (NDEP) for past response costs. However, the appeals panel vacated the grant of summary judgment against the current owner and remanded that aspect of the case back to the district court for further proceedings on the BFPP landowner protection.²⁸

In this case, the Herman Kishner Trust (Trust) owned the shopping center between 1968 and 2002 when the releases from the dry the cleaner occurred. The documented spills consisted of an approximately 100-gallon spill in 1982 during a filter change. There were also occasional spills from clogged button traps from 1969 to 1984 that flowed into a trench drain that was connected to sewer pipes beneath the shopping center.

During the period when the spills occurred, Shapiro Bros. Investment Co. (SBIC) operated the dry cleaner pursuant to a lease where SBIC agreed to indemnify the Trust for all claims arising from SBIC's actions, omissions, or negligence. SBIC signed a replacement lease in 1982 where it agreed to indemnify the Trust for violations of law. In 1984, Johnson Group, Inc., a predecessor of DCI USA, Inc., (collectively, DCI) purchased the dry cleaning business and operated it until 2000. While DCI used PCE, no confirmed spills have been documented. When SBIC sold the dry cleaning business to DCI in 1984, the SBIC controlling shareholder, Melvin Shapiro, personally guaranteed DCI's performance of the lease obligations, including the indemnity obligation.

²⁸ The district court had also issued an order of injunctive relief under the imminent and substantial endangerment section of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6972(b)(1)(B). The Ninth Circuit reversed on procedural grounds the grant of summary judgment under RCRA against the current owner and the operators because those defendants did not have an adequate opportunity to respond to plaintiffs' claims. Finally, the panel reversed the grant of summary judgment against a guarantor because there was no evidence of spills during the term of the guaranty. The court also ruled on various state law issues. These issues are not covered in this article since they do not involve the BFPP defense. For a more detailed discussion of those rulings, see <http://www.environmental-law.net/2013/07/9th-circuit-finds-shopping-center-owner-did-not-establish-bfpp-status-for-dry-cleaner-contamination/>.

PCE contamination was first reported to the NDEP in November 2000 during a pre-purchase investigation by Clark County School District. The NDEP commenced an investigation that identified PCE in the soil and groundwater with the highest concentrations around the floor drain and drain pipes beneath the former dry cleaning facility. In late 2002, the NDEP determined that PCE had migrated off site. Groundwater wells installed in the adjacent the Boulevard Mall property in 2003 and 2004 showed that the PCE plume had traveled due east beneath the property. A July 2005 report indicated that the PCE plume had extended nearly a mile east under a high end residential neighborhood. In October 2006, the NDEP directed DCI to prepare complete a remedial investigation of the dry cleaner, prepare a groundwater corrective action plan and characterize the extent of the off-site plume. In 2007, DCI also completed an off-site soil gas survey that revealed that there was a potential for PCE vapor intrusion in the residential neighborhood.

In the meantime, Maryland Square LLC (Maryland Square) purchased the property from the School District in 2005. After taking title, Maryland Square demolished the building containing the former dry cleaner in 2006, leaving contaminated soil exposed.

In April 2007, the NDEP also sent PRP notices to the current and former owners and operators stating that the NDEP had expended approximately \$160,000, that it intended to incur additional response costs to address human exposure, and that it planned to seek recovery of its expenses.

The plaintiff homeowners filed their RCRA 7002 action in November 2008 seeking injunctive relief from past and former owners of a shopping center and operators of a former dry cleaner and the district court granted summary judgment on the plaintiff homeowners RCRA injunctive action claim in July 2010.²⁹ The NDEP subsequently filed a motion for

²⁹ 2010 U.S. Dist. LEXIS 74217 (D.Nv. 7/22/10). On the theory that pollution that happened in Las Vegas stayed in Las Vegas, the defendants argued on a number of occasions that the court lacked jurisdiction to hear the case because the contamination was purely intra-state and therefore did not touch upon the Commerce Clause of the U.S. Constitution. The district court judge suggested in open court that he was sympathetic to the argument but was obliged by the Ninth Circuit precedent to reject the argument. In the RCRA 7002 action, the plaintiffs had to establish that the defendants "contributed to" the past or current disposal of hazardous wastes that "may" pose an "imminent and substantial endangerment." The property owner argued that it was a passive owner and that the "contributing to" language required active human conduct. However, the court noted that the owner had received rent, was entitled to 6% of the gross sales of the dry cleaner under the lease and owned the pipes and drains below the dry cleaner. The court said the owner had participated in the financial operation of the dry cleaner and therefore had contributed to the handling and disposal of the PCE.

The defendant also argued that the plume did not present an "imminent or substantial endangerment" because the plume was stable, groundwater was not used for drinking water and was vertically isolated from potable water supplies, and that the concentrations were below levels that could result in unacceptable concentrations of vapors. However, the court said RCRA was to be broadly interpreted and the plaintiff only had to establish that the contamination "may" present a measurable but substantial potential risk of harm. The court also found it somewhat amusing that the owner/defendants had filed

summary judgment for its response costs which the district court granted in 2012.³⁰

In the district court proceedings, Maryland Square LLC filed a cross-motion that it was not liable under CERCLA because it qualified for the BFPP defense but the court said that Maryland Square LLC provided no evidence of any kind supporting its argument that it was a BFPP, and granted the NDEP's motion for summary judgment. Interestingly, Maryland Square did not do a phase 1 when it acquired title. It claimed since the contamination was already of public record, there was no need for them to do a phase 1. It seems like Maryland Square may have been conflating the post-acquisition element of the BFPP defense to comply with all required notices with the pre-acquisition element of the BFPP defense to comply with the EPA AAI rule. In any event, for the cost of a phase 1, Maryland Square blew the pre-acquisition part of the defense.

The state also argued that Maryland Square failed to exercise appropriate care because it demolished the dry cleaner, thereby exposing contaminants to the elements (does it rain in Las Vegas?). The only evidence supporting its BFPP defense was an affidavit of its manager that stated that Clark County School District had disclosed the PCE contamination during the sale negotiations, that Maryland Square had retained counsel and hired an environmental consultant to review and report on the NDEP files concerning the Site. The affidavit also stated that after purchasing the Site, Maryland Square hired an environmental contractor to demolish the building. However, the affidavit did not indicate that Maryland Square took any steps such as removing the soil after demolishing the building to prevent ongoing releases but simply stated that Maryland Square followed the remedial progress of the previous owners and that Maryland Square had some correspondence with NDEP. Because the affidavit was not notarized, the district court barred Maryland Square from introducing the affidavit into evidence. The court then held that

their own RCRA action in 2002 against the dry cleaner claiming the PCE was presenting an imminent and substantial endangerment.

Maryland Square moved for a rehearing after the entry of the RCRA summary judgment, contending that it was in a different position from the other owners because it did not acquire title until after the dry cleaning facility had closed down. The homeowners responded that Maryland Square "contributed to" the imminent and substantial endangerment because its demolition of the building in 2006 had exacerbated the situation by exposing the contamination and allowing it to spread.

In October 2010, the district court said it lacked jurisdiction to hear the motion for reconsideration because other defendants had already filed a notice of appeal of the RCRA summary judgment order. On the contractual indemnification issues, though, the court ruled that SBIC was obligated to indemnify the owners under the lease. The court also held Melvin Shapiro liable under the 1984 guaranty signed in connection with the sale of the business from SBIC to DCI. The court rejected his position that the guaranty acted only prospectively and did not take effect until after the spills occurred. In December 2010, the district court then entered a permanent injunction under RCRA, ordering the owners and operators to remediate the contamination.

³⁰ 2012 U.S. Dist. LEXIS 69395 (D.Nv. 5/17/12).

Maryland Square had failed to meet its burden of establishing that it qualified for BFPP status.

The Ninth Circuit ruled that the statements in the unnotarized affidavit were insufficient to establish the BFPP because Maryland Square failed to show that it had complied with its appropriate care/continuing obligations. Specifically, the appeals court said that Maryland Square failed to limit human and environmental exposure to the pre-existing contamination when it demolished the building but did not identify any steps that it took to remove the contaminated soil or limit the spread of PCE. The court went on to say that as a result of this failure, the NDEP was forced to remove the contaminated soil six years after the building was destroyed, thereby creating the situation contemplated by Congress when enacting CERCLA—reimbursement of a government entity forced to clean up a site because the owner refused to take action.

In addition, the appeals court said that the affidavit did not establish that Maryland Square complied with the “all appropriate inquiries” requirement of the BFPP. The court noted that affidavit merely stated that Maryland Square retained the environmental consultant to review files and prepare a report but did not indicate if the consultant qualified as environmental professional, the substance of the report, or any description of the assessment conducted. As a result, the court held that the affidavit was “woefully insufficient” to establish that Maryland Square was a BFPP under CERCLA.

Because the district court rejected the submission on the basis of its form rather than its substance, though, the appeals court vacated the district court’s grant of summary judgment against Maryland Square and remanded the issue back to the district court so that Maryland Square may have an opportunity to cure the deficiency of its prior submission and establish that it has met the statutory and regulatory requirements for qualifying for the BFPP.³¹

This case illustrates the dangers that property owners can face when moving dirt or exposing contaminated soil during demolition. Here, a hasty demolition followed by inaction contributed to CERCLA liability.³²

³¹ SBIC argued it could not be liable as an operator “at the time of disposal” because the PCE leaked onto the contaminant onto the floor and not directly onto land or water. Since there was no disposal of PCE directly onto land or water, SBIC asserted there could not be a “disposal” as that term is defined under CERCLA.

The appeals court rejected this interpretation, noting the definition of “disposal” included any discharge or spill of waste may enter the environment. Because the phrase “enter the environment” is qualified by the word “may” in the definition of “disposal,” the court ruled the statute could not be interpreted to cover only spills that go directly and immediately into the groundwater. The court also said that SBIC’s cramped interpretation conflicted with the Ninth Circuit’s jurisprudence of liberally construing CERCLA liberally to achieve the legislative goals of cleaning up hazardous waste sites promptly and ensuring that the responsible parties pay the costs of the clean up.

³² A trio of due care cases further illuminates the dangers confronting current property owners. *Saline Properties LLC v Johnson Controls, Inc.*, 2011 U.S. Dis. Lexis 119516 (E.D. Mi.

These cases provide lots of lessons for brownfield developers. Often times, developers will hold properties for a long period of time while they assemble lots and line up financing. Sometimes, they demolish structures and then leave the site exposed to the elements while project planning proceeds. In some instances, developers will phase in construction and will only expend funds on the portion of the property being developed.

10/17/11) is another example of hasty demolition exacerbating groundwater contamination. See blog post at <http://www.environmental-law.net/2011/11/confusion-over-scope-and-timing-of-rcra-cleanup-leads-to-potential-liability-for-brownfield-developer/> for case analysis. *State of New York v Adamowicz*, 2011 U.S. Dist. LEXIS 102988 (E.D.N.Y. 9/13/11) did not involve a demolition but the property owner was unable to establish that it exercised due care despite spending over \$1MM addressing environmental concerns at its site. The problem was that it waited too long to respond to the environmental concerns caused by its tenant. For a more detailed discussion of this case, see <http://www.environmental-law.net/2012/03/owner-incurs-1mm-on-cleanup-but-ct-says-no-due-care-owner-waited-too-long-to-act/>. The owner of a former manufactured gas plant (MGP) site was found not to have exercised due care in *New York State Electric & Gas Corp. v First Energy Corp.*, 2011 U.S. Dist. LEXIS 74216 (N.D.N.Y. 7/11/11). The court found that after the owner became aware of the extent of the contamination and that NYSEG, which was complying with a state order to remediate 16 MGP sites, needed to acquire portions of the property to effectuate a proper remediation, the owner engaged in protracted negotiations, failed to timely respond to offers and demanded an aggressive sales price that delayed the sale for two years. The court concluded that the delay complicated the remediation, explaining that NYSDEC had first wanted NYSEG to remove the former gasholders and purifying house located on the property, and then address the downgradient contamination. Because of the owner's negotiation posture and lack of responsiveness, the court said NYSEG was not only forced to address the downgradient contamination first but that the delay allowed coal tar and other MGP contaminants to further migrate from the source area. For more detailed discussion, see <http://www.environmental-law.net/2012/02/review-of-recent-cercla-third-party-defense-due-care-caselaw-part-1/>. Additional important recent due care caselaw includes *Ford Motor Co v Edgewood Props.*, 2012 U.S. Dist. LEXIS 125197 (D. N.J. 8/31/12); *Sisters of Notre Dame De Namur v. Garnett-Murray*, 2012 U.S. Dist. LEXIS 78747 (N.D. Cal. 6/6/12); *500 Associates, Inc v Vt American Corp.*, 2011 U.S. Dist. LEXIS 11724 (W.D.KY 2/4/11); *Bonnieview Homes Assoc v Woodmont Builders*, 655 F. Supp. 2d 473 (D. N.J. 2009); *U.S. v Honeywell*, 542 F. Supp. 2d 1188 (E.D. Ca. 2008) and *AMCAL Multi-Housing v Pacific Clay Prods*, 457 F. Supp. 2d 1016 (C.D. Ca. 2006).

Older but still relevant due "case law" include *Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc.*, 240 F.3d 534, 548 (6th Cir. 2001) (failure to promptly erect barrier that allowed migration was not due care); *United States v. DiBiase Salem Realty Trust*, 45 F.3d 541, 545 (1st Cir. 1995) (failure to investigate after becoming aware of dangerous sludge pits was factor in concluding party did not exercise due care); *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994) (party that "made no attempt to remove those substances or to take any other positive steps to reduce the threat posed" did not exercise due care); *Idylwoods Assoc. v. Mader Capital, Inc.*, 956 F. Supp. 410, 419–20 (W.D.N.Y. 1997) (property owner's decision to do nothing resulting in spread of contamination to neighboring creek was not due care); *United States v. A&N Cleaners and Launderers, Inc.*, 854 F. Supp. 229 (S.D.N.Y. 1994) (failing to assess environmental threats after discovery of disposal would be part of due care analysis). Compare these cases with *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1543–44 (E.D. Calif. 1992) (sealing sewer lines and wells and subsequently destroying wells to protect against releases helped establish party exercised due care); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1508 (11th Cir. 1996) (timely development of maintenance plan to remove tar seeps was factor in showing due care was exercised); *New York v. Lashins Arcade Co.*, 91 F.3d 353 (2nd Cir. 1996) (instructing tenants not to discharge hazardous substances into waste and septic systems, making instructions part of tenancy requirements, and inspecting to assure compliance with this obligation, helped party establish due care).

However, there is a long line of cases dating back to the mid-1980s holding parties liable under CERCLA for moving contaminated dirt. Those involved in brownfield development will need to review their site management policies and should take a holistic approach to their site. It is important to fully characterize a site so that all areas of concern can be identified and evaluated so developers can comply with their continuing obligations and demonstrate that they have exercised appropriate care. It is also important to understand the potential presence of sensitive receptors. Key problematic areas can often lead unexpected or continuing releases include former chemical and waste handling areas; sumps, pits and floor drains; separators; broken or unknown piping; PCB-contaminated building materials; and abandoned or deteriorating drums and tanks.

Vacant buildings are often targets of vandals who are usually looking for copper piping/wiring and other valuable materials. Indeed, many enforcement actions begin with police responding to reports of vandalism and then observing abandoned or deteriorating drums. Often, vacant buildings remain standing for extended periods while other parcels are assembled, financing commitments are finalized and entitlements are obtained. In such instances, it is important that the brownfield developer secure the premises with exterior lights, interior cameras and guards. Utilities should be maintained and the buildings should be winterized to prevent drums and pipes from freezing and then bursting during the spring thaw. Like vandalism, water leaks from vacant buildings are another common trigger for enforcement actions.

Prior to commencing grading operations, developers should prepare a continuing obligations plan (CO Plan) that will establish the interim measures needed to control or stabilize those portions of site that may present a risk of a release or a threatened release. The CO Plan should also address soil management, stormwater control and dewatering. A CO checklist should be developed to ensure that all tasks are properly implemented.³³ Like any construction project, the plan should be reviewed with the various project team members such as architects, civil engineer, contractor, landscaper, architect and environmental consultant.

The *Vogenthaler* case should also serve as a warning to property managers, potential purchasers and lenders considering foreclosing on shopping centers that are located near residential properties. The plume was discovered a decade ago during due diligence and the property apparently changed hands several times since the discovery of the plume. During this period the defendants did not take any action to mitigate the plume and the state DEP only started to focus on the site during the past few years when vapor intrusion became a potential concern.

³³ The ASTM E 2790–11 “Standard Guide for Identifying & Complying with Continuing Obligations” is helpful in developing a CO Plan and associated documents.

Lenders and owners often take false solace when shopping centers have dry cleaner contamination but have been assigned a low ranking in a state dry cleaner fund. These state funds tend to prioritize sites based on impacts to drinking water and ignore the vapor intrusion pathway. Thus, if groundwater is not being used, the site will receive a low ranking for cleanup funds. However, that low ranking does not mean the site does not pose a risk of vapor intrusion to nearby residences. Thus, while the borrower/owner waits five or ten years for the state funding, vapors could migrate to a residential neighborhood much like they did in *Vogenthaler*. There are other reported examples of similar long plumes from dry cleaners that ceased operating in the 1970s and 1980s, especially if the property was serviced by septic systems when the dry cleaner was in operation. Indeed, several studies have indicated that 75% to 90% of dry cleaners in operation between the 1970s and 1990s have impacted the environment. In such cases, lenders may want to consider an environmental insurance policy that will provide coverage for bodily injury or property damage claims.

Because the BFPP is a self-implementing defense and because parties will be subject to second guessing by a judge who will have the benefit of hindsight, it is important that parties seeking to assert the defense carefully evaluate the risks posed by their sites and before they decide to commence a lawsuit. It is advisable to do the work under a state voluntary cleanup agreement to cloak the work with the presumption of reasonableness and perhaps even consistency with the National Contingency Plan. Even if the state requires some additional work that a purchaser might not necessarily be required to perform to comply with the BFPP, the greater protection that would be afforded by such work will probably be worth it in terms of peace of mind and litigation costs that are avoided.

Finally, it is important to remember that most states have their own liability protections that can vary from the CERCLA defenses. Landowners should familiarize themselves with these state laws prior to acquiring title or exercising control over a property, and may have to tailor due diligence to the particular requirements of those state laws.³⁴

³⁴ For example, New York does not have a BFPP protection and the requirements for asserting the innocent purchaser defense under the New Jersey Spill Act differs from the CERCLA AAI rule. See N.J.S.A. § 58:10-23.11g(d)(5).