

AAI: Failure of Reg-Neg Process To Comply With Law

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CERCLA Third Party Defense

- Release caused “solely” by third party
- No direct or indirect “contractual relationship” (ILO Defense)
- Exercise Due Care
- Precautions Against Foreseeable Acts of Third Parties

What is Due Care?

- “reasonable and prudent person would have taken in light of all relevant facts and circumstances”
- “failure to inquire about past environmental practices constitute a lack of due care”
- “CERCLA does not sanction willful or negligent blindness”
- “no affirmative acts... to investigate or ameliorate conditions...is no care”
- “deliberate ignorance or avoidance of knowledge of contamination” not part of defense
- “defense not available when defendant took no steps to prevent harm”
- “due care not established when PRP took no affirmative measures to clean site”

1986 “aai” Statutory Criteria

1. specialized knowledge or experience of defendant;
2. relationship of the purchase price to the value of the property if not contaminated;
3. Commonly known or reasonably ascertainable information;
4. obviousness of the presence or likely presence of contamination; and,
5. ability to detect the contamination by appropriate inspection.

“aai” caselaw

- If owner did not find contamination, it did not conduct “aai”
- Recent Examples
 - R.E. Goodson Construction v Int’l Paper
 - AMCAL Multi-Housing Inc v. Pacific Clay Oro Fund
 - U.S. v. Domenic Lombardi Realty

2002 Amendments (“AAI”)

■ “aai” and:

1. inquiry by EP;
2. interviews with past and present owners, operators, and occupants;
3. reviews of mandated historical sources since first developed;
4. searches for recorded environmental cleanup liens;
5. reviews of governmental records (vi) visual inspections of the facility and of adjoining properties;

■ Continuing Obligations

Appropriate Care/Reasonable Steps

- exercises appropriate care by taking reasonable steps to:
 - stop any continuing release;
 - prevent any threatened future releases; and
 - prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance
- “appropriate care” = “due care”

AAI Rule

- AAI completed when release identified
 - No further investigation required
 - Not consistent with preponderance of caselaw
 - Does not overrule caselaw
- Assumes further investigation or remediation will be implemented to satisfy continuing obligations
- Assumes EP will exercise good professional judgment
- Assumes property owners willing to pay for quality diligence

Marketplace Reality

- Strong Real Estate Demand Continues in Some Markets
 - Purchasers bidding on contaminated properties
 - Increased Property Values Reduce Concern for Environmental Costs
 - Lenders lowering standards to compete for loans
- Rising Construction Costs

Marketplace Realty Cont'd

- Rising Construction Costs
 - Self-Directed Cleanups
 - Contractors Rush to Avoid Liquidated Damages in Contracts
- AAI/ASTM Has Become “Commoditized”

Marketplace Reality Cont'd

- “Foreclosure” Real Estate Markets In Some Portions of Country
- Common Elements:
 - Poor lending standards
 - Inadequate environmental due diligence
 - Inadequate regulatory oversight

CERCLA Defenses

- “Standard of all appropriate inquiry was intended to evolve continuously and [defendants] shall be held to higher standards as public awareness of the hazards associated with hazardous substance releases has grown”
- “Congress intended the CERCLA liability scheme to provide incentives for private parties to investigate potential sources of contamination and to initiate remediation efforts”

Effect of AAI

- Commoditizing contamination
- “Risking-away” contamination with incomplete data and unrealistic assumptions
- Unduly raising expectations of developers and purchasers
- Facilitating irresponsible or reckless behavior on part of property owners

Effect of AAI cont'd

- Enabling dishonest and low-bid consultants to undermine professionals trying to provide competent service
- Proliferation of “shell” consulting firms consisting of inexperienced and incompetent independent contractors.
- Rewards bad behavior by conferring liability protection for conduct that might fall short of fault-based common law requirements