

# 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