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Superfund

Lawyers Say Court Failed to Provide Clarity on Bona Fide Prospective Purchasers

A federal appeals court decision in a case involving a former fertilizer manufacturing site in South Carolina failed to clarify the uncertainty surrounding the liability of parties involved in the purchase and redevelopment of contaminated sites, lawyers told BNA.

The *Ashley II* decision ''was much ado about nothing'' because it did not shed light on the bona fide prospective purchaser (BFPP) defense under the federal superfund law, Larry Schnapf of Schnapf LLC told BNA.

However, Pam Marks, an attorney with Beveridge & Diamond, had a different take on the appeals court's ruling. ''I wouldn't say it's much ado about nothing,'' she said. ''It doesn't change the rules; it interprets the rules.''

The ruling is significant, Marks said, because there is not much case law on the BFPP defense under the Comprehensive Environmental Response, Compensation, and Liability Act, and the decisions at least gives a benchmark to compare against, and ''we can start to figure out what things mean.'' Marks said she believes the ruling will be cited in other cases in the future.

April 4 Ruling

In the April 4 decision, the U.S. Court of Appeals for the Fourth Circuit ruled that Ashley II of Charleston LLC, the current owner of the site, could recover response costs from other potentially responsible parties, but that Ashley itself is partially responsible for contamination of the site (*PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 4th Cir., No. 11-1662, 4/4/13) (22 EDDG 25, 4/18/13).

Ashley had argued it was not a potentially responsible party because it qualified for the BFPP defense under the CERCLA Brownfields Amendments of 2002.

The law allows a prospective buyer to purchase property without knowledge of contamination and without incurring liability, providing the buyer meets certain conditions under the law.

2010 Decision Affirmed

The appeals court affirmed a 2010 decision by the U.S. District Court for the District of South Carolina, which found that Ashley did not meet at least one element of the BFPP defense, that of exercising appropriate care.

The lower court said Ashley did not exercise appropriate care because it waited two years to clean up hazardous materials in underground sumps intended to capture contaminated wastewater on the property. When Ashley bought the property, the sumps had deteriorated and were in danger of releasing contaminated material.

The district court's ruling came as a shock to many parties because Ashley had taken title of the site and had never disposed of contaminants there, Schnapf said.

Many brownfields developers had been hoping the Fourth Circuit would clarify the bona fide prospective purchaser defense.

The appeals court did not look at the appropriate care defense de novo but affirmed the factual findings of the lower court—that Ashley did not take appropriate care of the contaminants it found, David J. Freeman, an attorney with Gibbons Law, told BNA.

Ashley's ''own expert said it should have filled the sumps,'' he said.

Failure to exercise appropriate care was enough to make Ashley liable, the appeals court said, and it did not consider the other finding of the lower court—that Ashley was not a responsible party and had no affiliation with other PRPs, Freeman said.

Improper Affiliation

However, the appropriate care defense was the noncontroversial part of the ruling, both Schnapf and Freeman said.

The issue of most concern to brownfields developers was whether Ashley had improper affiliation with parties potentially liable to response costs, and the court did not take this up, Schnapf said.

Freeman said, ''I think you can never read too much into a court's decision—it clearly did not endorse the lower court's rationale.''

''The implicit message the court sent was that it wasn't completely comfortable with the district court's view and didn't feel it was necessary to deal with [the improper affiliation issue] to affirm the district court's decision,'' Freeman said.

Schnapf said, ''The main lesson on the ruling is that developers must look holistically at sites, since they could be liable for potential ongoing releases that migrate.''

The *Ashley II* case ''shows that if someone is relying on the BFPP defense and suing other people for cost recovery, anything you did or did not do could come under attack,'' Marks said.

''If you're going to take an action, it's helpful to have some support,'' she said. The ruling heightens awareness of the need to develop proof and evidence to meet the burden of proof, she said.

Marks said documentation showing compliance with each element of the BFPP defense should be prepared in advance. ''It's important to

be able to defend each of the eight elements for entitlement,'' she said.

Appropriate Standard of Care

Marianne Horinko, president of the Horinko Group and former EPA acting administrator, told BNA she does not believe *Ashley II* sheds any additional light on the BFPP defense.

''The question is what's the appropriate standard of care? Is it appropriate care under the language of the brownfields law, or is it due care, which is the general standard you have to apply under CERCLA for an innocent landowner? And the judge basically said it doesn't matter. Any way you look at it, the fact that Ashley failed to exercise the care it should have exercised by draining the sumps at the site means it doesn't qualify,'' she said.

''I think there's still going to be some uncertainty about what qualifies for the bona fide prospective purchaser,'' Horinko said.

ASTM Standard

Horinko advised parties to look to a voluntary standard under development by ASTM for determining all appropriate inquiries. The standard, called ASTM E1527, is developing consensus language (22 EDDG 27, 4/18/13).

''That will be helpful as far as shedding some light from an expert standpoint. I think we should look to that, really, rather than other cases at the moment, as the next milepost in defining these terms,'' she said.

The revised E1527-13 is expected in September or October.

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