Special Report

On the Cutting Edge: An Insider's Perspective

Ruling on Prospective Purchaser Defense Throws Into Doubt Liability Protection

In what might be considered one of the most important superfund cases of the year, a federal district court for the first time has interpreted the requirements for the bona fide prospective purchaser defense and found several were not met, a New York City attorney told BNA Dec. 7.

Referring to the decision in *Ashley II of Charleston LLC v. PCS Nitrogen Inc.* (D.S.C., No. 2:05-cv-2782, 9/30/10), Lawrence Schnapf, principal of Schnapf Environmental Law Offices, said the decision, which for the first time scrutinized the appropriate care requirement, has widespread implications for whether the self-implementing nature of the bona fide prospective purchaser (BFPP) defense is sufficient for liability protection under the federal superfund law.

"After the 2002 amendments to CERCLA, EPA basically took the position that it was getting out of the prospective purchaser agreement business because the BFPP was self-implementing. This case raises questions about the reliability of the statute's landowner protections," Schnapf said.

The case stems from a Comprehensive Environmental Response, Compensation, and Liability Act action to recover costs incurred to remediate approximately 34 acres of land in Charleston, S.C., with contamination related to the historic operations of a fertilizer manufacturing plant.

BFPP Defense. Ashley II had purchased the site for redevelopment. It argued it was not liable for the contamination because it was protected by CERCLA's BFPP defense. The court disagreed and found Ashley responsible for 5 percent of the allocated cleanup costs.

To assert the defense successfully, a party must show by a preponderance of the evidence that no disposal occurred after acquisition of the property and it conducted "all appropriate inquiries," filed all legally required notices, exercised "appropriate care," provided full cooperation and assistance in accessing the site, complied with and did not impede the implementation of institutional controls, and was not a potentially responsible party and had no affiliation with parties potentially liable for response costs.

The court found three of these elements were not met. The fact that Ashley removed the outside structures of the building but left in place sumps and pads and did not conduct soil testing was troublesome for the court. Because the sumps would fill with water and overflow during rain events, the court held that it was likely some disposal had occurred post-purchase.

Appropriate Care. Perhaps more significantly, for the first time a court interpreted the appropriate care requirement and found it was not met. "The court might have had a heightened concern about these releases because the discharges were getting into the water supply," Schnapf said. This may be a signal that continuing obligations and appropriate care determinations "are not susceptible to a one-size-fits-all approach but instead may require a site-specific analysis," he added.

"Of particular interest to the court was the fact that the Phase I identified the floor drains and sumps as recognized environmental conditions that should be cleaned up and filled in to prevent discharges. Ashley did not act on those recommendations quickly enough, according to the court, noting they did not act within 30 days," Schnapf explained.

"Lawyers have always warned clients that if a Phase I has recommendations in it, they better comply with them," Schnapf said. "If you aren't going to comply with recommendations in a report, make sure they aren't in there. In *Ashley II*, it appears the recommendations caused the plaintiffs to lose its BFPP defense." There is ongoing discussion within the ASTM E-50 committee about whether recommendations are required as part of a Phase I site assessment, he said.

The court also found that Ashley II did not satisfy the "no affiliation" requirement because its indemnification of other parties at the site "reveals just the sort of affiliation Congress intended to discourage."

On this point, Schnapf believes the court must have been looking beyond the straight indemnification agreement between Ashley and the seller of the property because that is a routine contractual arrangement in real estate transactions.

Discouraging Regulators. "It's hard to believe that a court would find that simply indemnifying a party is an unlawful affiliation," Schnapf said. More problematic, Schnapf believes, is that "when EPA wanted to pursue response cost actions, Ashley apparently had discouraged the agency from pursuing the seller." He believes the court was looking at this behavior when it said indemnity and actions of discouragement were the kind of affiliation Congress was talking about when it considered the BFPP defense.

"Depending on how this ruling is interpreted with respect to indemnity, you don't want to have communications with an agency and discourage them from pursuing other parties," he added. Instead, a better strategy would be to have a settlement or voluntary cleanup agreement where other entities are relieved of liability in exchange for the work being done, he explained.

This ruling "also illustrates the point that sometimes when you are giving indemnities it might come back to bite you," Schnapf said. "Parties must realize they may have to pay out on the indemnity nd should try not to directly or indirectly discourage regulators from taking actions that would trigger the indemnity obligations," which may put their liability protection at risk.