BROWNFIELDS REVITALIZATION LAW: INCENTIVES, EXCEPTIONS, AND CONCERNS

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On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (the Act) into law. The Act amends the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[1] also known as the "Superfund Law," in a number of significant ways that may affect purchasers in certain real property transactions. This article will highlight certain aspects of the Act and will discuss how some of the Act's provisions may raise new issues of concern about which purchasers of real property should be aware.

CERCLA LIABILITY

A brief overview of the liability scheme under CERCLA is necessary for an understanding of how the Act may have an impact on purchasers of real property.

CERCLA authorizes the United States Environmental Protection Agency (EPA) to require cleanup of contaminated sites consistent with the National Contingency Plan.[2] Under CERCLA, potential responsible parties (PRPs) are liable for removal or remedial action by the government, response costs of any other person and damages for the destruction of natural resources. [3]

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There are four categories of PRPs under CERCLA, as follows: (i) the current owners or operators of the facility, who are liable for their own disposal practices and that of past owners; (ii) the past owner or operator at the time of the disposal of a hazardous substance at the facility; (iii) generators of hazardous substances, who, by contract, agreement, or otherwise, arrange for the disposal or treatment of such substances; and (iv) transporters of hazardous substances who select the disposal site from which there is a release of hazardous substances (i.e., the selected site subsequently requires remediation).

CERCLA has been broadly interpreted since its inception in 1980 and, in the view of many, the results have been quite harsh. Liability under CERCLA has been held to be strict, so that a PRP may incur liability regardless of whether the harm was intended. Because liability under CERCLA is joint and several, one of many PRPs may be held responsible for the entire cleanup. Moreover, CERCLA has been imposed retroactively with the end result being that prior owners and operators may be held liable for the disposal of a hazardous substance during their ownership or use of the site even if it was performed in accordance with the applicable laws existing prior to the enactment of CERCLA.

Importantly, there are a very limited number of defenses under CERCLA. A PRP can escape liability only if that party can establish that the release of the hazardous substance was caused solely by (1) an act of God; (2) an act of war; or (3) act or omission of a third party other than employee or agent of the PRP, or other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the PRP (as long as the party exercised due care and took precautions against foreseeable acts of the third party).[4]

In addition, CERCLA also provides for the "innocent landowner defense," which absolves a party from liability when certain conditions are met. [5]

In order to jump-start brownfield redevelopment, the Act, among other things, clarified the "innocent landowner defense" and added an additional defense referred to as the "bona fide purchaser defense." These defenses are discussed in greater detail below.

OVERVIEW OF THE ACT

One of the prominent features of the Act is that it provides incentives for brownfield revitalization. By some counts, more than 500,000 abandoned brownfields sites are scattered throughout the country. The Act provides for financial assistance in the form of grants or loans to eligible entities for the purpose of promoting the cleanup and reuse of brownfields by authorizing $250 million to fund the cleanup of such sites for each of fiscal years 2002 through 2006. Individual sites may qualify for up to $250,000 in funding for investigation activities and $1,000,000 in funding for remediation work. Notably, these financial incentives are available for petroleum-contaminated properties otherwise normally excluded from the CERCLA liability scheme. Another brownfields incentive contained in the Act is that, subject to certain requirements, final listing of a site on the EPA National Priorities List will be deferred at the request of a State if the site is the subject of a State voluntary cleanup program.

CHANGES TO INNOCENT LANDOWNER DEFENSE

The "innocent landowner defense," one of the few defenses available under CERCLA, provides purchasers that acquire contaminated property after the disposal of hazardous substances with a shield against CERCLA liability.[6] However, in order to claim this defense, the purchaser has to demonstrate that it did not know and had no reason to know that any hazardous substances had been released at the site when the property was acquired. The purchaser must also demonstrate that it took all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial practice in an effort to minimize liability. The "all appropriate inquiry" standard has now been clarified under the Act.

Under the amended innocent landowner defense, the purchaser must now demonstrate that it carried out "all appropriate inquiries" into the previous ownership and uses of the site in accordance with certain phased-in criteria.

The Act specifies that, for transactions occurring prior to May 31, 1997, a claim of an innocent landowner defense will be judged by general criteria regarding the level of experience of the defendant, the purchase price, commonly known information about the site, and the ability of the defendant to detect contamination. For transactions after May 31, 1997, but prior to the time EPA promulgates a new rule concerning due diligence, the Act provides that following ASTM Standard E1527—97 will entitle a defendant to the protection. Finally, EPA must, by January 11, 2004, establish regulatory standards for satisfying the innocent landowner requirement to carry out all appropriate inquiries. At the same time, the Act also adds new prerequisites that must be met in order to qualify for an innocent landowner purchaser defense. These include providing "full cooperation, assistance, and facility access" to persons conducting cleanup work, complying with land use restrictions relied upon in connection with cleanup work, and not impeding the effectiveness or integrity of institutional controls applied as part of the cleanup. This provision suggests an innocent purchaser may have no choice but to accept cleanup actions that leave contamination in place and permanently impose use restrictions on the property.

NEW BONA FIDE PURCHASER DEFENSE

Based on the conditions that had to be satisfied under the innocent landowner defense, the purchaser of a brownfield[7] site would, in all likelihood, not be able to successfully claim this defense since contamination at the site was likely to be suspected, or, in fact, confirmed prior to the acquisition (i.e., the innocent landowner defense would only be available where the purchaser's due diligence disclosed no contamination). As noted above, in order to encourage brownfield investments, the Act added a "bona fide prospective purchaser" defense to CERCLA, which now provides a brownfield purchaser with protection against CERCLA liability where known contamination requiring cleanup exists, so long as the purchaser does not impede any site response actions.

To qualify as a bona fide prospective purchaser, the disposal of the hazardous substances must have occurred prior to the acquisition of the site and the purchaser must, among other things, perform appropriate inquiries and due care in dealing with hazardous substances. Importantly, this defense is not limited to brownfield sites that are the subject of brownfield grants or loans or otherwise are in any formal brownfields program, nor does it require any EPA approval to take effect. Prospective buyers of potentially contaminated properties should carefully consider the protections contained in these provisions, but should also be aware of a number of possible pitfalls and nuances in the Act that may limit the applicability of the defense and, in certain cases, even increase the buyer's exposure to liability (e.g., the windfall lien and contiguous property owner provisions, discussed in greater detail below). Also, purchasers must be aware of the lack of any protection against state law liabilities.

Moreover, bona fide prospective purchasers should be aware that the Act creates a "windfall lien" up to the amount of unrecovered response costs incurred by EPA at a facility for which the owner is not liable as a bona fide prospective purchaser, and where the response action increases the fair market value of the facility. The Act provides that the windfall lien may not exceed the increase in fair market value attributable to the response action at the time of sale or other disposition of the property. The windfall lien arises at the time response costs at the facility are incurred by the government and continue until the earlier of satisfaction of the lien by sale or other disposition of the facility, or recovery of all response costs incurred at the facility.

PROSPECTIVE PURCHASER AGREEMENTS

EPA has been negotiating "prospective purchaser agreements" since 1989. These agreements provide a covenant not to sue for certain prospective purchasers of contaminated property. The goal of these agreements was to resolve the prospective purchaser's potential liability due to the ownership of the property prior to its acquisition. On May 31, 2002, EPA issued a memorandum addressing the availability of prospective purchaser agreements in light of the bona fide prospective purchaser provisions now contained in the Act (the EPA Memo). The EPA Memo states that given the protection provided under the Act, prospective purchaser agreements will, in most cases, not be necessary. It goes on to describe certain limited situations in which EPA will consider providing a prospective

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purchaser with a covenant not to sue following passage of the Act.

One situation in which EPA would consider entering into a prospective purchaser agreement is where there is likely to be a significant windfall lien. EPA recognizes that the prospective purchaser will need to resolve windfall lien issues prior to the acquisition, especially in situations where outside financing is required.

The EPA Memo also cites a number of other circumstances in which a prospective purchaser agreement may be necessary to ensure that the transaction is completed because the project is expected to provide substantial public benefits to the environment, a local community (where the project is expected to create jobs or revitalize a long blighted, under-utilized property) or where it will result in the promotion of environmental justice. The EPA Memo offers the following guidelines and examples on when EPA will consider execution of a prospective purchaser agreement, as follows:

- Where significant benefits will be derived from the transaction as a result of cleanup, reimbursement of response costs to EPA, or new use and there is a significant need for a prospective purchaser agreement in order to accomplish these goals. The EPA Memo provides two examples of situations under this category, as follows:
  - Where the purchaser is committing to perform a significant cleanup as the site is developed for a new use and the purchaser has concerns about facility "owner or operator" PRP liability; where there has been no facility cleanup, no viable PRP exists who can be required to timely perform the cleanup; and no potential developer is willing to undertake the entire cleanup in order to develop and use the facility so that, without the prospective purchaser agreement, the facility will sit idle for years.
  - Where the facility is involved in CERCLA litigation and a very real possibility exists that the person who acquires the site will be sued by a third party. The example offered in the EPA Memo under this category is a situation where the U.S. has an enforcement action under CERCLA pending against PRPs, and the primary defendants have sued an additional number of third party defendants, and/or where there is an ongoing private party contribution action and a prospective purchaser has been threatened with contribution litigation.
- EPA will also consider entering into a prospective purchaser agreement or other settlement in unique, site-specific circumstances when a significant public interest would be served by consummation of the transaction and the transaction would not be completed without the issuance of the prospective purchaser agreement.

In short, while the Act does explicitly provide protection to bona fide prospective purchasers, as discussed above, there are certain circumstances under which EPA would entertain the execution of a prospective purchaser agreement. If the proposed transaction falls within one of the categories noted in the EPA Memo, consideration should be given as to whether this additional comfort should be obtained, keeping in mind that additional resources are likely to be incurred in obtaining the agreement (i.e., the negotiation of the prospective purchaser agreement with EPA may be a time consuming proposition, thereby increasing the purchaser's legal fees).

CONTIGUOUS PROPERTY OWNER PROVISIONS

The Act provides an apparent double-edged sword with respect to owners of property contiguous to and affected by a property that is the source of a release of hazardous substances. Previously, such an owner implicitly had potential recourse to a defense that the contamination was caused solely by an act or omission of a third party. The Act explicitly provides a CERCLA defense for such a

contiguous property owner, but in so doing also imposes new burdens.

In particular, the Act specifies that to qualify for the defense, among other things, the person must take reasonable steps to (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit exposures to hazardous substances on the contiguous property. Furthermore, of potentially great significance, through the incorporation by reference of a 1995 EPA policy, the Act provides that in certain circumstances, a contiguous owner can have liability imposed with respect to groundwater contamination beneath its property, particularly if the property contains a groundwater well.

Additionally, the contiguous owner must make a due diligence showing with regard to the purchase of the property, must comply with EPA information requests to qualify for the defense, must provide access to the property, and may have to comply with land use restrictions relied upon in the cleanup. Thus, an innocent contiguous owner may be put in the position of having to agree to the imposition of permanent limitations on his property use in order to avoid CERCLA liability. In short, under the guise of providing new protection to a contiguous owner, these provisions may impose a whole new range of requirements and risks.

CERCLA EXEMPTION

The Act also creates two exemptions from CERCLA liability that apply only under very specific circumstances. These exemptions are referred to as the "de micromis exemption" and the "municipal solid waste exemption."

Under the de micromis exemption, liability under CERCLA will not attach if it can be demonstrated that the (1) total amount of the material containing hazardous substances sent to the site in question was less than 110 gallons of liquid materials or less than 200 pounds of solid material; and (2) all or part of the disposal, treatment or transport to the site occurred before April 1, 2001.

There are certain exceptions to de micromis exemption. Among other things, the exemption will not apply in a case where (1) it is determined that the hazardous substances in question contributed significantly, either individually or in the aggregate, to the cost of the response action or natural resource action or restoration with respect to the site; (2) the party in question has failed to comply with an information request or administrative subpoena with respect to the site or has impeded the performance of a response action or natural resource restoration with respect to the site; or (3) the party has been convicted of a criminal violation for the conduct to which the exemption would apply.

Under the municipal solid waste exemption, liability under CERCLA will not attach for municipal waste (as specifically defined in the Act) disposed of at a facility if the party can demonstrate that it is (1) an owner, operator, or lessee of residential property from which all of the party's municipal solid waste was generated; or (2) a business entity that employed on average not more than 100 full-time individuals and that is a small business concern during the three taxable years preceding the date of notification of potential liability under CERCLA; or (3) an organization exempt from tax under Section 501(c)(3) of the Internal Revenue Code during the taxable year preceding the date of potential liability under CERCLA that employed not more than 100 paid individuals at the location which generated the municipal solid waste. There are certain exceptions to the municipal solid waste exemption, which are similar to those applicable to the de micromis exemption.

The Act also added a new section to the already existing Section 9622(g) that addresses the use of expedited de minimis settlement agreements with certain PRPs whose activities involve only a minor portion of the response costs at the site. The new section provides for a reduction in the settlement amount based on a limited ability to pay. The factors considered in this determination include the ability of the person to pay response costs and still maintain its basic operations, including consideration of the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues.

PROJECTED IMPACT

The Small Business Liability Relief and Brownfields Revitalization Act may provide meaningful liability relief in the case of brownfields purchasers who carefully scrutinize its provisions. The Act's revisions to the innocent landowner defense and provisions on contiguous property owners should provide refuge to liability but also contain pitfalls that warrant careful analysis. Finally, the Act may allow a limited number of parties to avoid being subjected to the CERCLA process where their contributions were de micromis or where

small businesses have disposed of municipal solid waste. Given the financial incentives and liability reduction provisions in the Act, we should see an increased interest in brownfield sites. As a result, we should begin to see a rise in real estate and corporate transactions that include such sites.

REFERENCES

1. 42 U.S.C.A. §9601 et seq.
2. 42 U.S.C.A. §9604(a)(1).
3. 42 U.S.C.A. §9607(a).
4. 42 U.S.C.A. §9607(b)(1)-(3).
5. Id.
6. 42 U.S.C.A. §9601(35).
7. The Act defines a brownfield site as real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant, with certain exceptions (e.g., among the exceptions are facilities that are listed on the National Priorities List).