Ohio Federal Court Finds Property Seller's Assurances of No Contamination May Not Obviate CERCLA "Due Care" Obligation

The United States District Court for the Northern District of Ohio has held that an "innocent landowner" could be subject to CERCLA due care obligations even when the seller of land gives assurance to the purchaser that there is no contamination on the property.

In 1980, Eliskim, Inc. sold approximately 15 acres of a 49 acre parcel of land called the "True Temper site" to a real estate developer, who then sold the property to Advanced Technology Corp. (ATC). Eliskim and its predecessors had operated the True Temper site since 1902. When the property was sold, ATC received assurances from the sellers that lead contamination on the remaining portion of the True Temper site was limited to the land not sold to ATC.

In 1993, with ATC's permission, the Ohio Environmental Protection Agency ("OEPA") tested soil on ATC property. As a result, OEPA found elevated levels of lead on the ATC's property, but did not share results of the testing with ATC. In 1994, while the United States Environmental Protection Agency ("EPA") was visiting the ATC property, EPA discovered that ATC was demolishing a building on the property, causing fugitive dust emissions that threatened nearby residents, employees of nearby businesses, and children at a neighboring elementary school. EPA immediately took enforcement action against ATC, entering into an administrative order with ATC requiring the company to remove the lead-tainted soil from the property. By 1997, EPA had also entered into an administrative order with Eliskim to conduct similar, but less stringent and less costly soil removal. Thus, by 1997, both Eliskim and ATC were found to be potentially responsible parties ("PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").

ATC sued Eliskim federal district court seeking "contribution" from Eliskim under §§ 107 and 113 of CERCLA for costs incurred in cleaning up ATC's property prior to 1997. ATC argued that, because it did not know about or cause the lead contamination on the property that it purchased, it was an "innocent landowner" under CERCLA, and responsibility for causing the contamination should, therefore, rest with Eliskim.

Eliskim moved for dismissal of the lawsuit by the court arguing that 1) ATC could not seek contribution under § 107 of CERCLA because that section does not allow a PRP to seek contribution from other PRPs; 2) ATC was not an innocent landowner because it suspected the contamination at the time it bought the property in 1980 and did not fulfill "due care" obligations of "innocent landowners" under CERCLA; 3) under CERCLA § 113(f)(2), by settling with the government, Eliskim was immune from contribution claims by other PRPs; and 4) ATC's cleanup activities did not comply with the National Contingency Plan ("NCP") because its remedial actions were not preceded by public notice and comment as required under NCP rules.

The court reviewed decisions in other jurisdictions and found that numerous courts had concluded that a PRP that could establish a defense to liability under

CERCLA § 107 is exempt from the rule that one PRP may not sue another PRP under § 107. Thus, the court decided that, if ATC could prove that it was an innocent landowner, it could recover its cleanup costs under § 107. Under CERCLA, to be considered an "innocent landowner" of a contaminated property, a party must prove:

1. A party other than the purported innocent landowner caused the contamination;

2. The other party is liable under CERCLA § 107;

3. The purported innocent landowner did not know about the contamination at the time the land was acquired;

4. The purported innocent landowner undertook "appropriate inquiry" at the time the property was acquired to determine whether there was any need to take measures to prevent releases; and

5. Once the contamination was discovered, the purported innocent landowner exercised due care to minimize the possibility of releases from the property.

The court then analyzed the evidence presented by the parties in support of their motions to determine whether these requirements were met.

Appropriate Inquiry and Due Care

The court was satisfied by the evidence that Eliskim released the lead onto the property while it was owner/operator of the True Temper site. Thus, Eliskim was a PRP, liable under CERCLA § 107. The court also found that ATC did not actually know about the lead contamination at the time the property changed ownership. However, the court was not able to determine, based on the evidence in the record of the parties' motions, whether ATC made the appropriate inquiry into the environmental conditions of the property at the time of the sale. The court was also uncertain whether, once ATC became aware of the lead contamination, ATC exercised due care to prevent worsening of the conditions.

To challenge ATC's claim that it had conducted adequate inquiry into the conditions on its property, Eliskim argued that, because Eliskim had declined to sell part of the True Temper site to ATC due to known contamination, ATC was "on notice" that there might be contamination on the property that it acquired. Moreover, asserted Eliskim, ATC should have conducted an environmental audit on the property. ATC replied that, when it learned that Eliskim "held back" some of the property because of the known contamination, it received assurances from the seller that only contaminated land had been held back. No contamination was evident to ATC on the remainder of True Temper site; ATC had no reason to suspect that there were environmental problems on the property it was purchasing.

The court observed that ATC's awareness about the environmental problems on the unsold portion of the True Temper site should have at least raised suspicions on the

part of ATC that its property could be contaminated. However, the court found that Eliskim's assurances "may have been adequate to reasonably alleviate ATC's suspicions. Further, what might be considered 'due diligence' in checking for environmental contamination in 1981, when CERCLA was in its infancy, may be quite different from what would be required today." Thus, the court was not convinced that mere suspicions constituted knowledge sufficient to warrant either further investigation or greater due care efforts. Nor was the court satisfied under the circumstances that ATC had conducted adequate inquiry. Instead, the court found the record on the "appropriate inquiry" requirement insufficient to render a judgment that ATC was an innocent landowner without going to trial.

The court next analyzed whether ATC exercised sufficient care in demolishing the building on its property when it allowed releases of the lead contaminants to the air. Eliskim asserted that, when OEPA entered the property to take samples, ATC was on notice of the lead contamination and should have take precautions to prevent releases. However, the court found this assertion insufficient to show knowledge of the consequences of the demolition. ATC's President asserted that he had not been informed of the lead contamination by OEPA. Instead, EPA informed him only after demolition had begun. Thus, he claimed, he did not know that any special procedures were required.

The court countered that "not being 'informed' that lead is on one's property is not the same thing as not knowing the lead is there." Thus, the court could not conclude that ATC had no knowledge or suspicion of contamination until the demolition was under way. Under the circumstances, ATC had not shown that it's conduct constituted "due care" as required by CERCLA.

Settlor Immunity

The court then turned to Eliskim's assertion that it was immune from ATC's § 113 contribution claim because Eliskim had settled EPA's CERCLA claim against Eliskim. CERCLA § 113(f)(2) provides: "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." The court pointed out that ATC's response costs occurred prior to Eliskim's settlement, and "there is nothing in Eliskim's settlement agreement indicating that the government meant to provide Eliskim with protection from prior settlors." Thus, Eliskim's settlement with EPA was not a bar to a contribution claim by ATC arising from ATC's prior settlement.

NCP Compliance

Eliskim next asserted that it could not be held liable to ATC for ATC's clean-up actions because those actions did not comply with the NCP. CERCLA allows for lawsuits for contribution against PRPs only for response actions that comply with the NCP. In this case, rules promulgated under CERCLA require that prior public notice and comment precede clean-up actions. The court pointed out, however, that another provision of the NCP rules, 40 C.F.R. § 300.700(c)(3)(ii), provides that "any response

action carried out in compliance with the terms of an order issued by EPA . . . will be considered consistent with the NCP." Thus, by complying with an EPA administrative order, ATC also complied with the NCP. Therefore, no public notice and comment were required prior to ATC's cleanup action.

Conclusion

The court concluded that it would not dismiss ATC's CERCLA claim against Eliskim, and that if ATC establishes itself as an innocent landowner at trial, then it is entitled to complete cost recovery from Eliskim under CERCLA § 107.

Advanced Technology Corp. v. Eliskim, Inc., 2000 WL 268012 (N.D. Oh. Feb. 28, 2000).

This article was prepared by Stewart J. Weiss, an associate in our Environmental Department, and previously appeared in the May, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Pusblishers.