Sixth Circuit Reverses Denial Of Innocent Landowner Defense

The U.S. Court of Appeals for the Sixth Circuit recently issued a decision regarding the elements of the "innocent landowner" defense under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Facts

The land in question is approximately 150 acres in three separate parcels, located in Medina County, Ohio (the Property). It has been owned for three generations by various members of the Bohaty family, who operated a farm equipment repair business at the very western edge of the Property. Five members of the Bohaty family, including Ethel Bohaty, who owns 37/45 of the Property, acquired their interests in the Property through an inheritance in 1982 and 1984, and through the purchase of other inherited interests. Aerial photographs indicated that drums had been placed on the Property from the 1950's through the early 1970's, well before any of the current owners acquired their interest in the Property.

In 1987, the local fire department observed numerous fifty-five gallon drums on the Property, and notified the Ohio Environmental Protection Agency (OEPA). On a visit to the Property, the OEPA discovered approximately 300 abandoned drums containing paint waste, laboratory chemicals and red sludge. Toxicity tests on the waste were negative.

Upon another, unrelated inspection by OEPA in 1989, Ethel Bohaty expressed a desire to have any toxic substances found on the Property removed. The inspectors found between 200-300 drums, some of which appeared to contain toxic chemicals, and five underground storage tanks. Ethel Bohaty stated that the inspectors did not inform her that any of the wastes were hazardous, and did not suggest that she remove the drums or take any other precautions.

In September 1991, the OEPA asked the United States Environmental Protection Agency (EPA) to inspect the Property. EPA's inspectors identified approximately 400 drums. Soil samples taken from the Property revealed an ignitability hazard, as well as acidic wastes.

In December 1991, the EPA sent John and Ethel Bohaty a notice of potential liability, asking them to remove the drums or pay for an EPA removal action. The Bohatys were given five days to respond to the notice, but did not do so.

In January 1992, the EPA began a removal operation on the Property. When the removal was completed in May of 1992, approximately 1000 drums had been removed, of which approximately half contained waste, and the other half were empty. The EPA's removal actions were confined to Parcel 1 of the Property. EPA scrutinized Parcels 2 and 3 but found nothing there to remove. The district court determined EPA's costs were $854,426.87.

In May 1995, the government commenced a civil action against Glidden Company and the Bohatys' three parcels of land to recover the costs of the removal activities. The government settled the claim against Glidden for $60,000.00, leaving the Bohatys as the only remaining defendants in the action. The government and the Bohatys both moved for judgment before trial.

The government presented evidence that Ethel Bohaty's deceased husband may have known about the dumping on the property and may have even profited from it. However, the Bohatys presented unrebutted evidence that they were not aware of the drums on the property, other than any that were used in their farm equipment repair business which was confined to the very western edge of the Property. Except for this western portion of the Property, the land was heavily vegetated, particularly the areas in which the drums had been placed, supporting the Bohaty's claims that they never knew the drums were there.

The district court granted the government's motion and denied the Bohatys', entering a judgment for the government before trial. EPA recorded a notice of lien on the Property for the amount of the cleanup, and the district court ordered the land sold to satisfy the lien. The Bohatys appealed.

Appeals Court's Decision

The main issues on appeal were: (1) whether the Bohatys qualify for the "innocent landowner" defense; (2) whether Parcels 2 and 3 were part of the "facility;" and (3) whether the costs of disposing of the empty barrels were properly part of the removal costs.

On appeal, the Bohatys argued that they qualify for the "innocent landowner" defense of §§ 9607(b)(3) and 9601(35) of CERCLA. Under these sections, the current owners of a "facility" are not liable for the costs incurred in removing hazardous substances from the facility if: (1) they can establish by a preponderance of the evidence that the 'release' of the substances and the damages resulting from the release were caused solely by an act or omission of a third party who was neither (a) the present owners' employee nor (b) someone who was in a contractual relationship with the owners; and (2) the owners' (a) exercised due care with respect to the substances, in light of all relevant facts and circumstances, and (b) took precautions against the foreseeable actions and omissions of third parties.

To establish the "innocent landowner" defense, the Bohatys were required to prove that "all spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . was caused solely by the acts or omissions of third parties who were neither employees nor persons in a contractual relationship with the Bohatys."

In the absence of any evidence that there was human activity involved in whatever movement of hazardous substances occurred on the Property since the Bohatys owned it, the appeals court found that the Bohatys had not "disposed" of hazardous substance on the Property. The court also found that the Bohatys raised genuine issues of material fact as to the other important issues of CERCLA liability. For instance, the only evidence presented by the government that the Bohatys released hazardous substances were photographs of what might have been hazardous substances on the ground near rusted drums. The court found that this was not sufficient evidence to show that the release of hazardous substances had been "ongoing" or to show the absence of a genuine issue of material fact. The Bohatys presented evidence that: (1) after both the 1987 and 1989 inspections they had asked OEPA to advise them if anything needed to be done; (2) that the toxicity tests performed in 1987 were negative; and (3) the OEPA

never told them that any action on their part was necessary. The Court of Appeals held that this raises a genuine issue of material fact as to whether they exercised the required degree of care. The government showed that the Property was accessible to third parties, and argued that the Bohatys did not take precautions against the "foreseeable acts of third parties." However, the Court of Appeals found that there was no evidence in the record that any third party had ever compromised the integrity of the drums or in any way caused the release of their contents. Once again, the government did not show the absence of a genuine issue of material fact.

Consequently, the Court of Appeals found that the Bohatys showed a genuine issue of material fact as to each element of the CERCLA innocent landowner defense, and were entitled to proceed to trial in an effort to prove their defense.

The Bohatys' next argument was that the lien on the Property was appropriate for parcel 1 only, because no releases occurred on parcels 2 or 3. As defined under CERCLA, a "facility" is "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise comes to be located." The government argued that the three parcels were all "subject to or affected by" the removal. Although there was no evidence that any hazardous materials had been released on parcels 2 or 3, the evidence showed that the three parcels had historically been transferred together by the same instruments and never considered as separate parcels at any time. Therefore, the court of Appeals held that the lien properly applied to all three parcels.

The Bohatys' next argument was that they should not be held liable for certain removal costs. Specifically, the Bohatys claimed that the EPA should not have removed or disposed of the empty drums found on the Property at all, because they presented no environmental hazard. The Bohatys claimed that the empty drums could have been disposed of for less cost in a standard landfill rather than in a hazardous waste landfill. The court found that there was no evidence on record that removing the empty drums raised the removal costs significantly, nor was there any evidence showing that the empty drums would have been accepted by a standard landfill, or that it would have even been less costly to dispose of them in one. Therefore, the appeals court affirmed the decision of the district court as to cleanup costs.

Therefore, the judgment of the district court with respect to the innocent landowner defense was reversed, and the case was remanded to the district court for further proceedings. The judgment of the district court was affirmed in all other respects.

United States v. 150 Acres of Land, 2000 WL 38446 (6th Cir. Ohio) 1/20/00

This article was prepared by Christopher J. Dunsky, a partner in our Environmental Department, and previously appeared in the February, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.