

Federal District Court Clarifies Innocent Landowner Defense and Contribution Protection Under CERCLA

On a motion for reconsideration of a prior ruling, the United States District Court for the Northern District of Ohio has held that (1) a person who unknowingly exacerbates environmental contamination may qualify as an innocent landowner under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and (2) CERCLA's contribution protection does not cut off a claim for contribution by a prior settlor, unless the settlement agreement clearly indicates that it was the government's intention to provide such protection.

From 1902 until 1980, Eliskim, Inc. (Eliskim) owned a parcel of land known as the "True Temper Site." During this period of ownership, Eliskim released hazardous materials, including lead, into the soil at the site. Advanced Technology Corporation (ATC) subsequently acquired a portion of the True Temper Site and proceeded to demolish a structure that had been constructed there. Fearing that this demolition activity would cause the lead-contaminated soil to become airborne, the United States Environmental Protection Agency (EPA) entered into an administrative order of consent with ATC (the ATC-AOC) which required ATC to remove any soil containing lead above a 300 parts per million from the property pursuant to CERCLA. Although ATC claimed that it was unaware of the lead contamination at the time it acquired the property and demolished the structure, ATC complied with the ATC-AOC and, in 1995, EPA notified ATC that the removal action had abated the inhalation risk associated with airborne soil. EPA's approval of ATC-AOC close-out report, however, stated that "the remaining contaminated soils would be addressed in a non-time critical removal action."

In 1997, EPA entered into a second administrative order of consent with Eliskim (the Eliskim-AOC), which required Eliskim to clean up the remaining contaminated soils on the True Temper Site, including the property owned by ATC. The Eliskim-AOC made no reference to the ATC-AOC or the soil removal action already conducted by ATC.

ATC sued Eliskim for cost recovery under CERCLA Section 107, and contribution under CERCLA Section 113 regarding the initial removal action conducted by ATC. Both parties moved for summary judgment regarding two issues of ATC's claim. The first issue was whether ATC was not a potentially responsible person (PRP) under CERCLA because it was an "innocent landowner" and, therefore, could recover 100 percent of its costs from Eliskim under a cost recovery claim, rather than merely Eliskim's proportional share of responsibility under a contribution claim. The second issue was whether ATC's claims were barred by the Eliskim-AOC. Following a hearing on the motions, the court held that there were disputed issues of fact regarding ATC's status as an innocent landowner and, therefore, denied both parties' motions for summary judgment on that issue. With respect to the Eliskim-AOC, the court held that this settlement agreement did not protect Eliskim from ATC's claims and, accordingly, granted ATC's motion to dismiss this defense. Eliskim then filed a motion for reconsideration of these rulings.

On reconsideration, the court first noted that ATC fit within CERCLA's definition of "PRP" because it was a current owner of the True Temper Site. The court further noted that "[g]enerally one PRP may not sue another PRP for cost recovery under CERCLA § 107(a); PRPs are instead limited to contribution claims under § 113(f)(1)." The court recognized, however, that if a "PRP qualifies as an innocent landowner under § 107(b), then that PRP may pursue a cost recovery action." The court set forth the following five factors that ATC was required to demonstrate in order to qualify as an "innocent landowner:"

1. A party other than ATC was the sole cause of the release of the hazardous substances;
2. Eliskim is a liable party under § 107(a);
3. ATC did not actually know about the presence of the hazardous substance at the time of the acquisition;
4. ATC undertook appropriate inquiry when ATC acquired the property, in order to minimize its liability; and
5. ATC exercised due care once the hazardous substance was discovered.

In its initial ruling on the motions, the court found that ATC had met its burden of proof with respect to the first three factors, but that there were disputed issues of fact regarding the remaining requirements. Accordingly, the court denied both parties' motions on this issue. In its request for reconsideration, Eliskim argued that, because ATC had exposed contaminated soil to the air when it demolished the building on the site, the court should have ruled that ATC could not have been an innocent landowner because ATC could not demonstrate that all of the releases at the True Temper Site were caused by parties other than ATC.

The court disagreed with Eliskim's interpretation of the innocent landowner defense under CERCLA, noting that "Eliskim has not cited a single case to this Court wherein a court has held that a release occurs when [an innocent landowner] unknowingly commits an action which exposes hazardous substances that had previously been released onto the property by a third party." The court noted that the parties disputed whether ATC knew or should have known of the contamination prior to demolishing the structure on the property. For purposes of Eliskim's motion, however, the court assumed that "ATC had no reason to believe that its reasonable use of its property would expose hazardous materials" and, accordingly, held that ATC "is not precluded from asserting a cost recovery action via the innocent landowner defense." The court

cautioned, however, that “ATC will be precluded from claiming status as an innocent landowner if, in light of all available evidence, ATC had reason to suspect that tearing down the [structure] might have adverse environmental effects.”

With respect to the second issue regarding whether the Eliskim-AOC precluded ATC’s claim for contribution, the court noted that CERCLA Section 113(f)(2) provides that a “person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement agreement shall not be liable for claims for contribution regarding matters addressed in the settlement.” In its motion for reconsideration, Eliskim argued that the court had erred in holding that the contribution protection provided in the Eliskim-AOC was only “forward looking” and did provide contribution protection against prior settlers, such as ATC. The court, however, rejected this argument, stating that “an Administrative Consent Order will not provide contribution protection against a prior settlor, unless the Administrative Consent Order clearly indicates that it was the government’s intention to provide such protection.” In this case, the court held that ATC’s cleanup costs were not clearly indicated as “matters addressed” in the Eliskim-AOC and, accordingly, denied Eliskim’s motion for reconsideration of this issue.

***Advanced Tech. Corp. v. Eliskim, Inc.*, __ F. Supp. 2d __, No. 1:96CV755 (N.D. Ohio May 3, 2000)**

This article was prepared by Jeffrey L. Woolstrum, a partner in our Environmental Department, and previously appeared in the August, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.