# *Sixth Circuit Construes CERCLA Innocent Landowner Defense Narrowly*

A recent decision by the United States Court of Appeals for the Sixth Circuit, which has jurisdiction over Michigan, considered a wide variety of legal issues regarding the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), but may be most notable for establishing a relatively demanding standard of care with which a landowner must comply in order to qualify for the innocent landowner defense.

The case concerned property in Columbus, Ohio, which a predecessor of the Penn Central Railway (Penn Central) had used as a railroad depot from approximately 1864 to 1973, when the City of Columbus purchased the property from Penn Central for $5.5 million. Penn Central agreed in the purchase agreement to remain responsible for "claims which may a affect . . . . any portion of the premises."

In 1989, the Franklin County Convention Facility Authority (CFA) subleased the property from the city to build a convention center. While a contractor for the CFA was excavating a trench to install a sewer line in October, 1990, it struck a large buried wooden box containing a mixture of creosote and benzene. The box split open and spilled some of its contents onto the ground. The CFA immediately hired an environmental consultant to evaluate the situation, placed a dam of dirt and debris to reduce the flow of the contents from the box, and notified the Ohio Environmental Protection Agency ("OEPA") within several days.

With OEPA's approval, the CFA decided to excavate and remove the box, its contents, and most of the contaminated soil. It sent a demand letter to American Premier Underwriters (APU), the successor to Penn Central, but APU declined to assist with or participate in the cleanup project.

In October, 1991, CFA's remediation contractor began the remediation project. It discovered that creosote had migrated 45 feet through the pea gravel surrounding a sewer line. The contractor removed the heavily contaminated soil and debris around the box, replaced the dam of soil and debris with an improved barrier to avoid further migration, and covered the remaining contamination with a combination of soil and concrete. CFA paid approximately $240,000 to the remediation contractor.

In 1994, CFA sued APU under CERCLA to recover its costs. After a trial, the district court allowed CFA to recover all of its costs from APU. The court found that the box had contained creosote that

had been thinned with benzene for the purpose of treating railroad ties, and rejected APU's argument that the contents of the box might have been petroleum, which is not a hazardous substance under CERCLA. The district court held that CFA qualified for the innocent landowner defense under CERCLA. It also held that even if CFA did not qualify for the innocent landowner defense, it would be equitable for CFA to recover 100% of its costs from APU based on a contribution action under CERCLA.

APU appealed the district court's judgment on a wide variety of grounds. The Court of Appeals rejected APU's arguments that: the contents of the box were not a CERCLA hazardous substance because they were only petroleum; CFA's cleanup activities were inconsistent with the National Contingency Plan (NCP); there was insufficient evidence that the hazardous substances had been released while Penn Central owned the property; and CFA was not entitled to recover $10,000 of attorney fees incurred in searching for other liable parties. In addition, the Court of Appeals devoted a significant portion of its opinion to a discussion and rejection of APU's argument that CERCLA is unconstitutional because it retroactively imposes liability on APU in violation of the Fifth Amendment to the United States Constitution, which prohibits the taking of private property without compensation. The Court of Appeals upheld the district court's analysis of, and rejection of, each of these arguments.

However, the Court of Appeals disagreed with the district court's analysis whether CFA qualified for the innocent landowner defense under CERCLA. APU argued that CFA did not qualify for the innocent landowner defense because: 1) it was CFA's contractor that had broken open the box and released its contents into the environment; and 2) CFA's contractor did not exercise due care after breaking open the box because it did not effectively stop the contents from migrating. The Court of Appeals disagreed with the district court's decision that CFA qualified for the innocent landowner defense. The Court of Appeals held that the contractor's breaking the box and spilling the contents "was accidental and unavoidable, and cannot fairly be attributed to CFA." However, it agreed with APU's argument that CFA had failed to exercise due care after the box had been broken, because the temporary dam of dirt and debris which CFA left in place for more than a year after the box was discovered, was insufficient to prevent the creosote from migrating 45 feet through the pea gravel in which the sewer line had been placed. APU presented expert testimony that a dam of dirt and debris did not meet the standards of the environmental remediation industry. Based on the above, the Court of Appeals concluded that the actions which CFA's contractor

took to control the creosote after breaking open the box did not constitute the "due care" required to qualify for the innocent landowner defense.

The Court of Appeals held that because CFA did not qualify for the innocent landowner defense, it could not maintain a cost recovery action against APU, but could maintain only an action for contribution in which APU could be required to pay an equitable share of CFA's cost. Nonetheless, the Court of Appeals held that, considering all the circumstances, it was equitable to require APU to pay 100% of CFA's costs as its equitable share. The district court had held that APU's failure to assist with or participate in the cleanup was an equitable factor that supported allocating 100% of the costs to CFA. The Court of Appeals noted that another factor supporting this result was a provision in the purchase agreement in which Penn Central had agreed to remain liable for claims relating to the property, even though the purchase agreement preceded the enactment of CERCLA by seven years.

***Franklin County Convention Facilities Authority v. American Premier Underwriters,*** (6th Cir. Oct. 26, 2000) (2001 WL 118155.

Christopher J. Dunsky