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Fourth Circuit Restricts "Bona Fide Prospective Purchaser" Defense

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On April 4, 2013, the Fourth Circuit issued a ruling in *PCS Nitrogen Inc. v. Ashley II of Charleston* that, among other things, may limit the availability of the "bona fide prospective purchaser" ("BFPP") defense that Congress added to CERCLA in the 2002 Brownfields Act. This is the first time that a federal appellate court has ruled on the limits and boundaries of the BFPP defense. Congress added the BFPP exception "to promote the cleanup and reuse of brownfields . . . ." Pub. L. No. 107-118, 115 Stat. 2356 (2002) (the "Brownfields Act"). The BFPP defense applies only to federal claims under CERCLA. As such, to properly manage environmental liability exposure, purchasers of contaminated property often couple the BFPP defense with other legal protections (such as covenants not to sue from state environmental agencies in exchange for voluntary cleanup activities). As the Fourth Circuit's decision shows, qualifying for the BFPP defense requires affirmative - and considered - action on the purchaser's part. Fortunately, the applicability of the defense typically only arises when EPA pursues a party for cleanup or when litigation over the site ensues. In this latest ruling, the Fourth Circuit has narrowly construed one of the elements of the BFPP defense, thereby underscoring the importance of strict compliance with all requirements of the defense.

Explanation of the BFPP Defense

CERCLA imposes joint and several liability on all potentially responsible parties ("PRPs"). The current owner or operator of a site is always a PRP under CERCLA, regardless of whether he actually contributed in any way to the site's contamination. Prior to the Brownfields Act, one of the few defenses available to a PRP was the "innocent owner" defense, which applied only to an owner who "did not know and had no reason to know" about the contamination when the property was acquired. 42 U.S.C. § 9601(35)(A)(i). The Brownfields Act added the BFPP defense, which - for the first time - made it possible for a purchaser of contaminated property to avoid liability *even when the purchaser knew* the site was contaminated. To qualify for this defense, a BFPP (1) must acquire the property after January 11, 2002, (ii) cannot impede the performance of a response action or natural resource restoration, and (iii) must prove eight criteria by a preponderance of the evidence, which demonstrate that the BFPP has:

1. Shown all hazardous waste disposals at the facility predate the BFPP's ownership;
2. Made all appropriate inquiries into the site's history;
3. Provided all appropriate notices regarding any discovered contamination;
4. Exercised "appropriate care" with respect to hazardous substances found at the facility by taking reasonable steps to contain and prevent contamination;
5. Fully cooperated with all authorized remediation personnel;
6. Complied with all required institutional controls;
7. Responded to all subpoenas and information requests; and

8. No affiliation with any prior owner or operator.

42 U.S.C. § 9601(40)(A)-(H). Failure to prove by a preponderance of the evidence even one of these criteria prevents a purchaser from successfully asserting the BFPP defense.

Background of *PCS Nitrogen Inc. v. Ashley II of Charleston*

The lawsuit concerned a former fertilizer manufacturing facility outside Charleston, SC (the "Site"), which is contaminated. Ashley II of Charleston ("Ashley") owned a portion of the Site and incurred certain response costs. Ashley brought a cost recovery action under CERCLA against PCS Nitrogen Inc. ("PCS"),[1] and PCS in turn counterclaimed for contribution against Ashley and also brought third party claims against a number of other prior owners and operators. As a defense to PCS's contribution counterclaim, Ashley claimed status as a BFPP. The trial court rejected Ashley's defense because it failed to establish a number of the eight criteria required by the Brownfields Act, including Ashley's failure to prove the fourth criterion: that it exercised appropriate care and took reasonable steps regarding the Site's contamination. Ashley appealed the district court's finding. The Court's appellate ruling focused *only* on whether Ashley exercised appropriate care. The Court noted that "[b]ecause a party must establish all eight factors . . . to qualify for the BFPP exemption from liability, [Ashley's failure to prove that it exercised appropriate care] mandates denial of Ashley's claim to BFPP exemption and affirmance of the district court's holding that Ashley is a PRP for the site as a current owner . . . ." *PCS Nitrogen Inc. v. Ashley II of Charleston*, No. 11-1662, slip op. at 32 (4th Cir. April 4, 2013). The Fourth Circuit did not discuss any of the other BFPP defense criteria or whether Ashley satisfied them.

The Fourth Circuit's Ruling

On appeal, Ashley argued that "the purposes of the Brownfields Act necessitate that courts apply a less-stringent standard of 'appropriate care' and 'reasonable steps' than that applied by the district court." *PCS Nitrogen*, slip op. at 30. Ashley further argued that, under the district court's interpretation, "landowners will not undertake voluntary brownfields redevelopment for fear of becoming fully liable for cleanup costs as a result of minor mistakes that may not even contribute to harm at the facility." *PCS Nitrogen*, slip op. at 30. Therefore, Ashley argued, the trial court's ruling would undermine the intent of the BFPP defense - to encourage the safe reuse of contaminated property.

In its ruling, the Fourth Circuit compared the standards required of innocent owners and those required of BFPPs, noting that the two provisions use similar - but not identical - language. The BFPP defense requires an owner to exercise "appropriate care" while the innocent owner defense requires the owner to exercise "due care." *Compare* 42 U.S.C. § 9607(r)(1) *with* 42 U.S.C. § 9607(b)(3). The Court then observed that "Ashley fails to provide a persuasive rationale for requiring a lower level of 'care' from a BFPP . . . than from an 'innocent owner' . . . ." *PCS Nitrogen*, slip op. at 31. In contrast to Ashley's arguments, the Court held that

> [l]ogic seems to suggest that the standard of "appropriate care" required of a BFPP, who by definition knew of the presence of hazardous substances at a facility, should be *higher* than the standard of "due care" required of an innocent owner

[1] PCS had acquired the business and assets of a predecessor company (CNC). CNC had owned and operated the Site, but had sold its interests in the Site prior to selling its assets and business to PCS. PCS disputed its liability as a PRP, but the trial court examined the asset purchase agreement between CNC and PCS and determined that PCS had acquired CNC's environmental liabilities, including those related to the Site. The Fourth Circuit affirmed this finding.

> who by definition "did not know and had no reason to know" of the presence of hazardous substances when it acquired the facility.

PCS Nitrogen, slip op. at 31. Fortunately for BFPPs, the Court declined to rule on whether a BFPP's standard of "appropriate care" is actually greater than an innocent owner's standard of "due care." *PCS Nitrogen*, slip op. at 31. Instead, the Court held that "'appropriate care' under [the BFPP defense] is at least as stringent as 'due care' under [the innocent owner defense]." *PCS Nitrogen*, slip op. at 31. The Court then went on to "borrow standards from CERCLA's 'due care' jurisprudence to inform [its] decision of what 'reasonable steps' must be taken to demonstrate 'appropriate care.'" *PCS Nitrogen*, slip op. at 31-32. The Court applied the Second Circuit's ruling on innocent owner "due care" to BFPP "appropriate care," noting that the "inquiry asks whether a party took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances." *PCS Nitrogen*, slip op. at 32 (citing *New York v. Lashins Arcade Co.*, 91 F.3d 353, 361 (2d Cir. 1996) (internal quotation marks omitted)).

The trial court concluded that Ashley did not exercise appropriate care because it failed to take reasonable steps. Specifically, Ashley "failed to clean out and fill in sumps that that should have been capped, filled, or removed when related aboveground structures were demolished, and that Ashley did not monitor and adequately address conditions relating to a debris pile and limestone run of crusher cover on the site." *PCS Nitrogen*, slip op. at 30. Applying the same standard of "care" and "reasonable steps" as required of innocent owners, the Fourth Circuit agreed with the trial court that Ashley's "delay in filling the sumps - which even Ashley's expert admitted should have been filled a full year before Ashley did so - demonstrates that it did not take the reasonable steps . . . to prevent any threatened future release . . . that a similarly situated reasonable and prudent person would have taken." *PCS Nitrogen*, slip op. at 32 (internal citations omitted). The Court affirmed the trial court's ruling that Ashley did not qualify for the BFPP defense and was "a PRP for the site as a current owner . . . ." *PCS Nitrogen*, slip op. at 32.

Implications of the Ruling

While the 2002 amendments certainly offer incentives to new purchasers, this ruling reaffirms CERCLA's primary goal: cleaning up contaminated sites. CERCLA does this through an onerous liability scheme. As the Court here observed, "CERCLA's joint and several liability scheme may be 'terribly unfair in certain instances.'" *PCS Nitrogen*, slip op. at 34 (internal citations omitted). The 2002 amendments may ease the burden somewhat, but only if prospective purchasers rigidly comply with the statute. This holding highlights the necessity of both pre-purchase due diligence as well as proper site management post-purchase.

Ultimately, the Fourth Circuit has made the BFPP defense more difficult to assert. Fortunately, the BFPP defense is only of concern at sites that will likely attract federal interest or result in cost recovery/contribution actions. Going forward, if a purchaser thinks a site may attract federal interest, the purchaser should strongly consider working with EPA to enter into a voluntary cleanup agreement in exchange for a liability shield. While this avenue offers more certainty than the BFPP defense, it raises some problems of its own: (1) EPA typically avoids such agreements and (2) those agreements to which EPA does agree usually require far more rigorous cleanup activities than the BFPP defense would require. For those sites where a purchaser thinks federal interest is less likely, purchasers should pursue brownfields agreements with the state agency, as those provide absolute protection from both the state agency and, in most cases, third party contribution claims. Indeed, some state brownfield programs even commit the state agency to securing covenants not to sue from EPA. In the end, a purchaser will almost always benefit from cooperating with state and federal agencies when

acquiring contaminated properties. Working with these agencies provides the best avenue both for attaining liability protection guarantees as well understanding what activities an agency would expect when asserting the BFPP defense.

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