

To: Our Clients and Friends

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When All Appropriate Inquiry Isn't Enough: Court Highlights the Significance of Other Factors in the Bone Fide Prospective Purchaser Defense

Anyone who has been involved in a real estate transaction relating to commercial or industrial property has likely dealt with conducting "All Appropriate Inquiry" into the site, which generally includes the preparation of a Phase I Environmental Site Assessment and may include Phase II sampling work. All Appropriate Inquiry ("AAI") is one necessary component of the "bona fide prospective purchaser" ("BFPP") defense established under the 2002 Brownfields amendments to Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The BFPP defense is intended to protect property owners from liability for contamination that clearly occurred prior to their period of ownership. However, conducting AAI is not the only prerequisite to establishing a BFPP defense. The BFPP requirements beyond AAI are highlighted in , Ashley II of Charleston, LLC v. PCS Nitrogen, et al., 2010 U.S. Dist. LEXIS 104772 (D.S.C. Sep. 30, 2010), one of the first cases to address in detail the BFPP defense.

In this case, Ashley purchased property that had a long history of industrial use. In conjunction with that purchase, Ashley's environmental consultant performed Phase I and Phase II work. After the purchase, Ashley demolished many of the above-ground improvements on the property. When liability for contamination at the property was addressed, a significant battle between several potentially responsible parties arose. Ashley sought to take advantage of the BFPP defense to avoid liability. The elements of the BFPP defense are, in summary: (a) disposal of hazardous substance occurred prior to acquisition; (b) the purchaser conducted AAI; (c) the purchaser provided all required notices with respect to the discovery or release of any hazardous substance; (d) the purchaser exercises appropriate care with respect to hazardous substances found; (e) the purchaser cooperates with agencies; (f) the purchaser complies with institutional controls; (g) the purchaser complies with information requests or administrative subpoena; (h) the purchaser is not affiliated with a potentially responsible party. In the end, the court closely scrutinized each element of the test and determined that Ashley was not a BFPP.

All Appropriate Inquiry

Significantly, this is one of the first cases to address the proper conduct of AAI. The court found that although there were “inconsistencies” between the Phase I reports and the relevant ASTM standard, those inconsistencies lacked significance. The Court stated that “[w]hat is important is that Ashley acted reasonably; it hired an expert to conduct AAI and relied on that expert to perform its job properly.” Because the Court did not explain what the “inconsistencies” are, it is difficult to determine how strictly a Phase I must comply with ASTM. Interestingly, no federal agencies were involved in this case. EPA has stated that they will insist on very strict compliance with the ASTM standards in order to find that AAI was conducted. This case may (or may not) take some wind out of that sail. While strict compliance with the ASTM standards is still highly recommended, this case provides some potential relief for past transactions where the acquiring party is trying to mount a BFPP defense but the adequacy of its AAI is called into question due to the absence of strict compliance with the ASTM.

Appropriate Care

The court did find that Ashley failed to prove that it exercised appropriate care with respect to known contamination when it did its demolition work. In doing this work, Ashley did not clean out and fill in known underground sumps and concrete pads, which failure could have exacerbated known releases and contamination. Ashley also failed to prevent debris piles from accumulating, and failed to investigate and remove the debris piles on a timely basis. Ashley also failed to maintain runoff controls.

This finding highlights the need for post-closing attention to known environmental issues. The BFPP defense requires that a purchaser stop continuing releases, prevent threatened future releases and prevent or limit human, environmental and natural resource exposure to previous releases. Prior to demolition, Ashley knew that the underground sumps contained hazardous substances, were cracked, and often filled with rainwater. Ashley never conducted testing during its period of ownership to determine if the soil below the underground structures was contaminated. Accordingly, Ashley “did not prove that no disposals occurred on the Site after its acquisition of the Site.” Notice the burden imposed by the court to prove a negative; the primary issue, however, appears to be that Ashley did not even make even a limited effort with respect to the underground structures.

No Affiliation with a PRP

This final issue is important for contract drafting and negotiation purposes. Here, the court found that Ashley was affiliated with a PRP because, when Ashley purchased the property, Ashley agreed to indemnify prior owners from all environmental liability at the site, even if such liability was the result of a release that occurred prior to Ashley’s ownership. There was no apparent relationship between Ashley and the indemnitees other than this indemnity provision of the purchase agreement. Ashley then attempted to persuade EPA not to name the indemnitees as PRPs, even though they were prior owners and operators during the time of releases. The Court found that Ashley and the indemnitees were “affiliated” by operation of the indemnity, and that Ashley’s conduct “reveal[ed] just the sort of affiliation Congress intended to discourage.” We believe there is some serious question regarding the

Court's interpretation of Congressional intent. Nevertheless, this holding suggests that those negotiating the acquisition of property need to be concerned that, according to the Ashley Court, a purchaser's indemnity of the seller for pre-closing releases to the environment could eliminate the ability of the purchaser to later mount a BFPP defense.

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