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Law Offices of
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This is one of a series of occasional newsletters published by our firm. We focus on recent developments in environmental law that may affect your business. We hope you find our newsletter helpful, and welcome your comments and questions.

This photo of Illinois prairie, "Goldenrod at Sunrise," was taken in Moraine Hills State Park by noted photographer, Ray Mathis.

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Advertising Material

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Court Scrutinizes the Bona Fide Prospective Purchaser Defense to Superfund Liability

A federal court has analyzed the "Bona Fide Prospective Purchaser" (BFPP) defense, added to the Superfund statute in 2002 by the Small Business Liability Relief and Brownfields Revitalization Act (Act). *Ashley II v. PCS Nitrogen*, No. 2:05cv2782, 2010 WL 4025885 (D.S.C. Oct. 13, 2010). This appears to be the first court in the nation to fully examine the requirements of the BFPP defense, which may protect those who purchase property – even if they know it is contaminated – from Superfund liability.

The BFPP defense only applies to persons who purchased property after January 11, 2002 (the date of the Act). To successfully assert it, the new owner must satisfy eight criteria.

The purchaser must be prepared to demonstrate that it:

- Acquired the property after the hazardous substances were disposed on the property;
- Conducted "all appropriate inquiry" into the environmental condition of the property before purchase (the term, "all appropriate inquiry," is itself defined in the statute and regulations);
- Provided all legally required notices concerning the hazardous substances on the property;
- Took "appropriate care" to prevent releases of, and limit exposure to, the hazardous substances;
- Fully cooperated with the government;
- Maintained any applicable institutional controls (for example, those prohibiting use of groundwater);
- Complied with valid information requests and subpoenas;
- Had no prior relationship (familial or business) with any person who was potentially liable for the hazardous substances on the property.

In *Ashley*, a developer retained an environmental consultant to investigate two parcels. The court ruled that this review met the "all appropriate inquiry" requirement. However, the investigation identified several sumps and concrete pads that contained hazardous substances from prior operations on the property. Ashley, the developer, may not have paid adequate attention to this revelation.

After acquiring the property, Ashley installed fences and "no trespassing" signs, and tested and monitored the property. But it left the sumps and concrete pads exposed to the elements after demolishing the above-ground structures. It also accumulated debris piles on the site, and otherwise did not sufficiently guard against the release of hazardous substances. As a result, the court found that disposal of hazardous substances occurred after Ashley acquired the property, and that Ashley did not exercise "appropriate care" with respect to the hazardous substances – the first and fourth criteria were violated.

Ashley provides a rather dramatic example of a relatively common mistake. In our experience, parties tend to focus on acquiring a valid "all appropriate inquiry" study. But they may tend to "check off the environmental box" after the document is delivered. Instead, the findings of the study must be analyzed, and as necessary, folded into the development plans.

Our firm offers a free one-hour seminar on the BFPP defense to Superfund. Purchasing contaminated property can be treacherous, but on the other hand, proper planning, including the use of the BFPP defense, can help parties take advantage of business opportunities they might otherwise pass up. Please call us if you would like to receive more information about our seminar.

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Exposure to Private Suit Remains Despite Settlement With State

A recent case decided by the Ninth Circuit provides yet another illustration of how multiple suits may result from the same contamination. In *Montana v. BNSF Railway Co.*, No. 08-35667, 2010 WL 4273361 (9th Cir. Nov. 1, 2010) a federal district court held that the settlement of a prior suit between the state and a railroad did not provide a basis to block a private suit against the railroad.

In *Montana*, BNSF operated a rail yard for many years, and allegedly caused diesel fuel and other chemicals to contaminate the groundwater and soil. The State of Montana sued BNSF in federal court under various laws, including the state equivalent to the federal Superfund law. In 1990, the State and BNSF settled the Superfund part of the case to investigate and eventually cleanup the site (which is still ongoing). But in 2007, numerous property owners in the area sued BNSF in state court, seeking "investigation and restoration of real property." *Id.* at *1. BNSF moved the federal court to enjoin the property owners' state court suit, arguing it would somehow interfere with the investigation under the 1990 settlement.

The district court denied the motion and the Ninth Circuit affirmed. At issue was the application of the federal Anti-Injunction Act, which prohibits federal courts from enjoining state court actions. 28 U.S.C. § 2283. BNSF argued that the statute's "relitigation exception" allowed the court to grant the injunction because a conflict could exist between a state court judgment and the prior federal judgment (approving the settlement). But the court compared the State's Superfund claim and the homeowners' common law claim and found no conflict, despite some similarities. It concluded that the State's supervisory role overseeing the cleanup under the state Superfund law was distinct from the restoration of damages available in the common law. Furthermore, the court found nothing in the state Superfund law that would preempt the common law claim.

The court's ruling required BNSF to defend against a suit from numerous homeowners while continuing to comply with the 1990 settlement. It demonstrates that parties may do well to broadly consider the limits of the protections provided by certain settlement agreements prior to signing.

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Fiber Optics Company Potentially Liable for Reuse of Pipeline

Recently, a federal court in Missouri held that a communications company using a former petroleum pipeline for fiber optic cables could be held liable in trespass for damages resulting from leaks in the pipeline. *Henke v. Arco*, No. 4:10CV86, 2010 WL 4513301 (E.D. Mo. Nov. 2, 2010). The case was decided under state common law.

In *Henke*, several companies owned and operated the pipeline and associated easement from the early 1900s to the 1990s. During this time, the pipeline deteriorated and underground leaks migrated onto neighboring properties. In the

1990s, a communications company bought the pipeline and easement for fiber optic cables and continued to use them at the time of suit. Prior to purchase, the company reviewed records of prior spills and leaks, but there were no records of cleanups.

When the residents discovered the contamination, they sued the former and current owners. The communications company moved to dismiss, arguing that the transportation of petroleum in the pipeline ceased prior to its ownership. But the court adhered to the Restatement (Second) of Torts, which states that a new owner may be held liable in trespass if he takes the property with knowledge that the prior owner tortiously placed "structures, chattels or other things" on another's property and fails to remove them.

The United States is webbed with old petroleum pipelines. *Henke* shows that before re-using them (or before purchasing property on which they were installed) it may be prudent to investigate their condition.

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