Fourth Circuit Brownfields Decision Stops Short of Worst-Case Outcome

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In a closely watched Superfund case decided April 4, 2013, the Fourth Circuit Court of Appeals interpreted the scope of landowner liability protections Congress put in place in 2002 to "promote the cleanup and reuse of brownfields," that is, previously contaminated properties. Under those provisions of the Small Business Liability Relief and Brownfields Revitalization Act, landowners of contaminated property that meet eight statutory criteria qualify as “bona fide prospective purchasers” (BFPP), protecting them against Superfund liability stemming solely from current property ownership. Without BFPP protection, redevelopment of contaminated properties would be a far riskier proposition and financing these projects would be problematic.

Issues litigated in the case below, Ashley II of Charleston v. PCS Nitrogen, (Dist. Ct. South Carolina) 2011 U.S. Dist. LEXIS 57441 brought to the fore key questions about the scope of this liability relief.

The case involved a complicated sequence of ownership transfers of a property used since the late 1800s for phosphate fertilizer production, resulting in arsenic, lead and other hazardous substance contamination. Ashley, a developer at the end of the chain of owners, sued PCS Nitrogen to recover response costs Ashley had incurred, asserting that it was protected from liability as a BFPP. The court found that Ashley had failed to satisfy three of the eight required BFPP criteria. The most significant finding involved an improper affiliation with a potentially responsible party (PRP) because, the court found, Ashley had indemnified another PRP (Holcomb and Fair), and also attempted to persuade EPA not to enforce against Holcomb and Fair. The other two criteria related to post-acquisition failures to (a) exercise appropriate care with respect to hazardous substances found at the facility and (b) prove that no disposal of hazardous substances occurred at the site after Ashley acquired it.

The Fourth Circuit declined to rule on improper affiliation, the issue that had the brownfield community on alert. Rather, the court said that Ashley's failure to exercise appropriate care with respect to hazardous substances found at the site was enough to conclude that it was ineligible for BFPP status. Because a BFPP must demonstrate that it has met all eight criteria, a failure as to even one is fatal. Had the Fourth Circuit affirmed the lower court's finding that Ashley's indemnification of a prior owner constituted an improper affiliation with a PRP, an enormous chilling effect would have resulted, since many brownfield redevelopment projects are feasible only through use of this kind of indemnification.

Even the district court's ruling leaves open the possibility that it was both the indemnification and the attempts to persuade EPA not to enforce against another PRP that led to the finding of Ashley's improper affiliation with a PRP. The Fourth Circuit's lack of endorsement of even this two-pronged conclusion goes further in avoiding the worst-case scenario that could have significantly altered the scope or shut down the availability of indemnifications. However, parties seeking to rely on BFPP protection must proceed very carefully and make sure they have scrupulously met the statutory criteria to obtain liability relief.