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Intermediate Landowner Liability Under CERCLA

Are You Liable for Cleanup Costs as a Past Owner of Contaminated Property Even if You Did Not Actively Dispose of Hazardous Substances?

Since Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to facilitate the cleanup of the nation's hazardous waste sites, Congress and the Federal Courts have been busy addressing the many issues that have emerged regarding the scope of liability under that act. One issue that remains to be resolved by Congress or the U.S. Supreme Court is the liability of certain past owners of contaminated property known as intermediate landowners.

Intermediate landowners are past owners of contaminated property who did not "actively" dispose of hazardous substances while they owned the property and did nothing to remediate the contamination prior to transferring the property. In essence, intermediate landowners permit contamination to spread by their failure to act in cleaning it up. Presently, federal courts are split on whether to hold intermediate landowners liable under CERCLA for cleanup costs, thus leaving some past property owners of contaminated property uncertain as to their liability regarding these sites.

Determination of the liability of an intermediate landowner is important for two reasons. First, if one is an intermediate landowner, one may potentially be held liable with other Potentially Responsible Parties (PRPs) for the costs of cleaning up the contamination. As such, parties that may not have considered themselves liable for the costs associated with cleaning up contamination from hazardous substances may find themselves potentially liable for millions of dollars.

Second, if one is a PRP who has already cleaned up a site and is seeking to recoup his or her costs from the other parties responsible for the contamination, intermediate landowners may provide an important class of parties from which to seek recovery. However, if intermediate landowners are not liable parties under CERCLA, and the parties who actually disposed of the hazardous substances are insolvent or no longer exist, then one seeking to recover costs may be forced to shoulder the entire expense of the cleanup under principles of joint and several liability.

This article will briefly review the issue of liability of the intermediate landowner, discuss some of the major court decisions addressing such liability and the bases for the courts' conclusions, and close by identifying some of the methods that intermediate landowners can use to limit the extent of their liability if they are in a jurisdiction holding intermediate landowners liable under CERCLA.

"Passive" vs. "Active" Interpretation of "Disposal"

CERCLA imposes liability without any showing of fault on four categories of parties for the costs of cleaning up hazardous substances from a site. The four parties include:

- the present owners or operators of a site where there has been a release or threat of release of hazardous substances,
- the past owners or operators of the site at the time of disposing the hazardous substance,
- persons who arrange for the disposal of hazardous substances and
- any transporter of hazardous substances to the site.

As past owners, intermediate landowners will only qualify as liable parties under CERCLA if they owned the property "at the time of [hazardous substance] disposal." Therefore, determining what constitutes a "disposal" is critical in establishing an intermediate landowner.

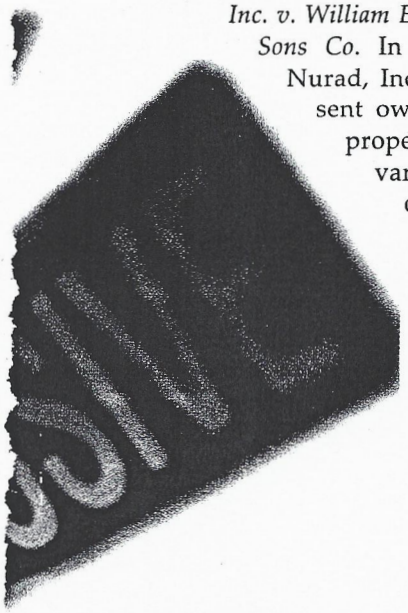
Under CERCLA, the term "disposal" takes its definition from the Resource Conservation and Recovery Act (RCRA). RCRA defines "disposal" as the "discharge, deposit, injection, dumping, spilling, leaking, or placing of hazardous waste into or on any land or water."

Because intermediate landowners

merely permit hazardous substances to passively migrate through the soil during their ownership or control of the property, the question centers on whether passive migration constitutes a "leaking" or "spilling" such that these intermediate landowners are "past owners at the time of disposal." Courts applying a "passive" interpretation of "disposal" find that intermediate landowners are liable for cleanup costs because the terms "leaking" and "spilling" are intended to include the passive leaching and migration of hazardous substances. On the other hand, courts applying an "active" interpretation of "disposal" find that intermediate landowners are not liable because the passive migration of hazardous substances is insufficient to constitute a "leaking" or "spilling." Rather, these courts conclude that past owners must "actively" cause the "spilling" or "leaking" of hazardous substances.

Recent Court Cases Defining "Disposal"

One of the leading cases in support of a "passive" interpretation of "disposal" is the Fourth Circuit Court of Appeal's decision in *Nurad, Inc. v. William E. Hooper & Sons Co.* In this case, Nurad, Inc., the present owner of the property, sued various past owners of its property to recover the cleanup costs it had incurred in removing several underground storage tanks and remediating the contamination. Several of the past owners had never used the underground storage tanks that caused the contamination, nor had they done anything to affirmatively cause the contamination. As such, they asserted that they were not "past owners at the time of disposal," and therefore were not responsible parties liable for cleanup costs under CERCLA.



In rejecting the arguments of various past owners, the court reasoned that because CERCLA adopts the same definition of "disposal" that the term has under RCRA, it should also carry with it the same judicial interpretations that it has under RCRA. Under RCRA, the term "disposal" has been interpreted to "have a range of meanings, including not only active human conduct, but also the reposing of hazardous waste and its subsequent movement through the environment." Therefore, the court held that all of the past owners were liable because their ownership of the property while hazardous substances passively migrated through the soil qualified them as "past owners at the time of [hazardous substance] disposal."

More recently, however, two Federal Circuit Courts of Appeal have adopted the "active" interpretation of "disposal" and held that intermediate landowners are not liable for cleanup costs. In 1996, the Third Circuit Court of Appeals in *United States v. CDMG Realty Co.* held that the past owners of a site that did not actively dispose of hazardous substances — but nevertheless knew that hazardous substances had been disposed of by prior owners and that these hazardous substances remained in the soil and groundwater — did not constitute responsible parties under CERCLA. In this case, HMAT Associates, Inc., the current owner of the property that was sued by the United States for costs the U.S. government had incurred in cleaning up the site, sought to recoup some of those costs under a contribution action against Dowel Corp., the party from whom it had purchased the property.

Dowel had not "actively" disposed of any hazardous substances while it owned and controlled the property. However, at the time Dowel purchased the property in 1981, it knew that the property had been used as a municipal landfill for over 25 years. Dowel also knew that the property was contaminated with hazardous substances when it purchased the property, and it knew that the property was under investigation by the U.S. Environmental Protection Agency at the time it sold the property in 1987 to HMAT. Despite Dowel's knowledge that the hazardous wastes remained in the soil and groundwater, and despite Dowel's failure to take any action to remove that contamination, the court held that Dowel was not liable as a responsible party because it did not "actively" dispose of any hazardous substances while it owned the property.

Likewise, in 1997, the Second Circuit Court of Appeals in *ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, relied on the Third Circuit's decision to come to the same conclusion. In that case, ABB Industrial brought a contribution action against past property owners to recover response costs it had incurred in remediating hazardous substances from its property. Among other claims, the plaintiff, ABB Industrial, argued that the presence of hazardous substances and their migration during the time that these past owners owned the property was sufficient to constitute a "disposal." The Second Circuit rejected this argument and held that

an "active" interpretation must be applied when defining the term "disposal," and, therefore, the passive migration of hazardous substances is not a "disposal." As such, the entities that ABB Industrial sued were not "responsible parties" under CERCLA because they were not "past owners at the time of disposal."

Critical to the conclusions in ABB Industrial and CDMG Realty is the distinction in the language that is used between the liability provisions for present owners and past owners. While past owners are liable for cleanup costs if they owned the property at the time of "disposal" of a hazardous substance, present owners are liable if there has been a "release" or "threat of release" of hazardous substances. CERCLA defines a "release" more broadly than it does "disposal."

Under the statute, a "release" includes "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, *leaching*, dumping or disposing into the environment." (Emphasis added.) The courts reasoned that because the term "release" is defined to include "leaching," a term generally used to refer to the passive migration of hazardous substances, and the term "disposal" is not defined that way, then Congress must have intended that only present owners be liable for the passive migration of hazardous substances and not past owners.

Moreover, as further support that intermediate landowners are not liable under CERCLA, the Second and Third Circuits reasoned that the judicial interpretations of "disposal" under RCRA, which the Fourth Circuit in the Nurad case relied upon, have no application in the CERCLA context. Because RCRA does not use the term "release" anywhere within its provisions, the definition of "disposal" needed to be broad under RCRA to cover the passive migration of hazardous substances.

However, "release" does appear within the provisions of CERCLA. Therefore, a broad construction of "disposal" under CERCLA is unnecessary because "release" specifically refers to passive migration through the term "leaching." As such, under this argument, it appears that Congress intended to hold only present owners liable for the passive migration of hazardous substances, not past owners.

Limiting the Liability of the Intermediate Landowner

If one is an intermediate landowner and is in a jurisdiction that holds intermediate landowners liable for cleanup costs, there are measures available in which one can limit the extent of his or her liability. After liability has been established, the apportionment phase of the trial begins. Under this phase, the liable parties seek to establish the portion of the judgment for which they are responsible (i.e., their proportionate share). In determining each party's proportionate share, courts generally apply what are known as the Six Gore Factors, in reference to Vice President Al Gore. However, courts are not limited to the Gore Factors, but may consider any other relevant factors, as well. Included in the Six Gore Factors are:

- The ability of the parties to demonstrate that their contribution to a discharge, release or disposal of hazardous waste can be distinguished;
- the amount of hazardous waste involved;
- the degree of toxicity of the hazardous waste involved;
- the degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste;
- the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous substance waste; and
- the degree of cooperation of the parties with federal, state or local officials to prevent any harm to the public health or environment.

In addition to the Six Gore Factors, courts may use principles of fairness and equity when apportioning the costs of clean-up among liable parties. This may include considerations of how long a party owned the particular site, the amount that the various parties profited from the activities causing the contamination and the degree in culpability of the parties. In reviewing these factors, an intermediate landowner who may be liable for cleanup costs under CERCLA may nevertheless be able to substantially limit the extent of his or her liability by illustrating the limited role he or she played in actually causing and profiting from the contamination compared with the other responsible parties.

A Lack of Consensus

There is a lack of consensus regarding whether intermediate landowners are liable under CERCLA. Both past and present owners may face this issue when subjected to a cost-recovery action brought by the government or another responsible party, or when seeking to recover their own costs from the other responsible parties involved with the site. However, by understanding the rationale on both sides of this issue and the measures available for limiting the extent of liability of intermediate landowners, one may be able to better ensure that his or her interests will be protected. ●ASI

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