Overview of Liability

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What You Should Know About CERCLA’s Liability Scheme

• How CERCLA liability works
  – Who is liable?
  – Defenses, limitations, and exemptions
  – EPA’s enforcement discretion policies
CERCLA Liability (§ 107)

- Release or threatened release
  - Of a hazardous substance
  - From a facility
  - Which causes response costs to be incurred

- PRPs = Potentially Responsible Parties, as defined in section 107
Liability Is Retroactive

• PRPs can be held liable for the present effects of acts which occurred prior to CERCLA’s enactment (1980)
Liability Is Joint and Several

- Any one PRP can be held liable for the cost or performance of the site cleanup
- Divisibility of harm can be a factor
Liability Is Strict

- No regard to fault or culpability
- PRPs cannot defend actions based on acting in accordance with industry standards, or claiming no negligence
Liability Overview

- Four classes of PRPs
- Three statutory defenses to liability
- Several exemptions
Current Owners and Operators

(§ 107 (a)(1))

• Actual ownership/operation

• Parent corporations: articulated in *U.S. v. Bestfoods*
  – Derivative liability
  – Direct liability

• Individual liability of corporate officers, directors, managers, etc: “exercised control”
Past Owners and Operators (§ 107 (a)(2))

- O/O at the time of disposal
- Interim owners: “passive migration” issue
Generators (§ 107(a)(3))

• Arranged for treatment or disposal, or transport for treatment or disposal, of hazardous substances
• Constructive possession
• Knowledge of disposal location not relevant
• “Aceto” liability
Transporters (§ 107(a)(4))

- Accepted hazardous substances for transport and selected the disposal/treatment site
Successor Liability

• General Rule: asset purchasers do not acquire the liabilities of the seller corporation
• Fact specific determination
• Appeals courts are divided on the issue of a federal rule of successor liability
Successor Liability

• 5 Exemptions:
  – Fraud
  – *De Facto* merger
  – Express or implied assumption
  – Purchaser is a mere continuation of the seller
  – Substantial continuity or continuity of enterprise; DOJ’s brief in the *Exide* case
Extent of Liability

• All costs of removal or remedial actions taken by the U.S., State or Indian Tribe, that are not inconsistent with the NCP
  – Scope of costs included
  – “Not inconsistent with NCP” standard
Extent of Liability

• Damages to natural resources in an action brought by a Federal, State or Tribal natural resources trustee
  – Early involvement of trustees
  – SOL issues

• Costs of health assessments under §104(i)
Defenses to Liability (§ 107(b)(3))

• Three defenses
  – Acts of God
  – Acts of war
  – Acts/omissions of a third party (“third party defense”)
Third Party Defense

- No contractual or other relationship with the third party
- Exercised due care with respect to the hazardous substances
- Took precautions against foreseeable acts or omissions of the third party
Third Party Defense: Innocent Landowners (§ 101(35))

• Three types
  – At the time the party acquired the property, the party did not know and had no reason to know of hazardous substances
  – Government acquired facility through “involuntary” acquisitions
  – Party acquired the facility by inheritance or bequest
Third Party Defense: Innocent Landowners (Cont.)

- Elements of defense
  - No contractual relationship
  - Due care
  - Precautions against foreseeable acts or omissions
  - Cooperation, assistance, access; compliance with land use restrictions and institutional controls
Third Party Defense: Innocent Landowners (Cont.)

- Elements of defense
  - Purchasers did not know or had no reason to know of contamination after “all appropriate inquiry”
  - Purchasers must take “reasonable steps” during ownership with respect to hazardous substance contamination on the property
  - Governments and inheritors may have different obligations
All Appropriate Inquiry

• For purchases before May 31, 1997, apply 5 statutory factors:
  – Specialized knowledge or experience
  – Relationship of purchase price to property value
  – Commonly known or reasonably ascertainable information
  – Obviousness of contamination
  – Ability of defendant to detect the contamination by appropriate inspection

• For purchases between May 31, 1997 and date of new regs, apply ASTM Phase 1 requirements
AAI Proposed Rule

• “Standards and Practices for All Appropriate Inquiries,” 8-26-04
• Requirements for investigation/inquiry
  – History of property use, obvious or likely contamination
  – Enforcement history, environmental liens, ICs, engineering controls
  – Purchase price/fair market value
AAI Proposed Rule

• Requirements (cont.)
  – Commonly known, reasonable ascertainable information
  – Interviews and visual inspections
  – Description of data gaps
  – Environmental professional’s opinion and signature
All Appropriate Inquiry for Residential Property

- Facility inspection
- Title search
- Results reveal no basis for further inspection
Reasonable Steps

- Stop any continuing release
- Prevent any threatened future release
- Prevent or limit any human, environmental or natural resource exposure
Prospective Purchaser Agreements

- Negotiated agreement used at EPA’s discretion
- May 31, 2002, Guidance: statutory liability protection makes PPAs unnecessary in most cases, but will consider where necessary for transaction and:
  - Significant windfall lien
  - Substantial public benefits from transaction (e.g., significant cleanup, reduced threat of litigation)
- Covenant not to sue purchaser
Bona Fide Prospective Purchasers Exemption (§ 107(r))

• Elements
  – Acquired ownership after 1/11/02
  – Owner not a PRP or affiliated with a PRP
  – Disposal occurred before purchase
  – Conduct “all appropriate inquiry” (can have knowledge of contamination and still have liability protection)
BFPP Exemption (Cont.)

• Elements (cont.)
  – Take “reasonable steps”
  – Provide cooperation, assistance, access; comply with land use restrictions, institutional controls, info requests and administrative subpoenas; provide legally required notices
BFPP Exemption (Cont.)

- Windfall lien on BFPP property
  - For unrecovered response costs
  - Limited to the lesser of the increase in FMV attributable to EPA’s response action or the unrecovered response costs
  - Section 107(l)(3) notice/validity requirements apply to windfall lien
  - Authorizes EPA section 107(r) windfall lien settlements
  - No statute of limitations on section 107(r) windfall lien
Contiguous Property Owners (§ 107(q))

- Elements
  - Property that is or “may be” contaminated
  - Only contamination is from property that is contiguous to or “similarly situated with respect to”
  - Owner not a PRP or affiliated with a PRP
  - Did not cause, contribute to or consent to a release
Contiguous Property Owners (Cont.)

• Elements (cont.)
  – Conduct all appropriate inquiry: did not know or have reason to know property was or could be contaminated by release from other real property
  – Provide cooperation, assistance, access; comply with land use restrictions, institutional controls, info requests and administrative subpoenas; provide legally required notices
Contiguous Property Owners (Cont.)

• To maintain the liability protection, owner must take “reasonable steps” to:
  – Stop continuing releases
  – Prevent threatened future releases
  – Prevent or limit human, environmental, or natural resources exposure to hazardous substance release
Contiguous Property Owners (Cont.)

- For migration of contaminated groundwater, no remediation necessary
- EPA may provide comfort letter addressing reasonable steps at specific site, if there is significant federal involvement at site
Contiguous Property Owners (Cont.)

- EPA may issue:
  - No action assurance letter
  - Contribution protection
- Party purchasing with knowledge after conducting all appropriate inquiry does not qualify as contiguous property owner, but may still qualify for BFPP liability protections
De Micromis Exemption (§ 107(o))

- NPL sites
- Generator/Transporter
  - <110 gal. liquid
  - < 200 lbs. solid
- Disposed, treated, transported all or part prior to April 1, 2001
De Micromis Exemption (Cont.)

• Exceptions
  – Material contributed significantly to the cost of response
  – Failure to comply with CERCLA information request or administrative subpoena
  – Impedes or has impeded the performance of a response action
  – Criminal conviction for conduct for which the exemption would apply

• Burden shifting and attorney’s fees for contribution actions v. de micromis parties
Municipal Solid Waste Exemption (§ 107(p))

• NPL Sites
• Applies to MSW generated by:
  – Residential owner/operator/lessee
  – Small business <100 FTE or equivalent
  – Non-profit organizations <100 paid FTE at the location
• What is MSW?
  – Household waste
  – Commercial, industrial or institutional waste:
    › Essentially the same as household waste
    › Collected and disposed of with other MSW as part of normal municipal collection service
    › Hazardous substances are no greater in quantity than found in typical household waste
• Exceptions
  – MSW contributed significantly to the cost of response
  – Failure to comply with CERCLA information request or administrative subpoena
  – Impedes or has impeded the performance of a response action
MSW Exemption (Cont.)

• Burden of Proof
  – Private cost recovery action, burden always on plaintiff
  – Government cost recovery:
    ▶ MSW disposed before 4/1/01, burden is on government
    ▶ MSW disposed after 4/1/01, burden is on defendant

• Attorney’s fees available against non-government party bringing unsuccessful contribution action
Recycling Exemption (§ 127)

- Exempts certain generators and transporters that “arranged for recycling of recyclable materials”
- Lists covered materials: paper, plastics, glass, textiles, rubber, metal, spent batteries
- Establishes criteria for exemption (not a sham transaction)
- Identifies actions on the part of an arranger that nullify exemption
Service Station Dealers (§ 114(c))

• Dealers that manage recycled oil exempt if recycled oil was:
  – Not mixed with any other hazardous substance
  – Managed in compliance with appropriate regulations or standards

• Applicable to generator and transporter liability, but not owner/operator liability
Secured Creditors Exemption (§ 101(20))

• Legal claim of ownership to protect security interest only
• Cannot “participate in management”
Exemption for State and Local Governments (§ 107(d))

- Exempt from:
  - Costs/damages resulting from emergency response
    ‣ Except for gross negligence or intentional misconduct
  - Costs from rendering care in accordance with NCP
    ‣ Except for negligence
  - Liability if property acquired involuntarily
Exemption for Fiduciaries & Trustees (§ 107(n))

- Acts for the benefit of another party as, for example, an executor
  - Specific actions permitted without triggering personal liability
  - Fiduciary liability shall not exceed assets held in fiduciary capacity
  - Negligence pulls fiduciary into liability scheme
Other Liability Exemptions

- Contractors/ government employees in context of response action (§ 119)
  - Except for negligence, gross negligence, or intentional misconduct
- Petroleum, crude oil or natural gas (§ 101(14))
- Pesticide application (§ 107(i))
- Federally permitted releases (§ 107(j))
Enforcement Discretion

- Described in EPA policy and guidance documents
  - Non-binding
  - Case-by-case determination
- Policies may apply where new SBLRBRA exemptions do not
  - Non-exempt de micromis parties at non-NPL sites
  - MSW/MSS policies
  - Discussed further in Enforcement Options module
Enforcement Discretion: Residential Homeowner Policy

- Single-family residence
- Located on a Superfund site
- Did not cause or contribute
- Must provide access and information
Enforcement Discretion: Contaminated Aquifer Policy

- Off-site source
- Did not cause or contribute
- No contractual relationship to PRPs, an agent or employee
- Not otherwise liable
- Cooperation of landowner