



Setting a limit on environmental law suits

The Supreme Court will hear oral arguments in April and a decision is expected to be delivered in late in 2004 on limiting environmental recovery costs.

By James D. Brusslan

It is common during negotiations for the sale of industrial property for the parties to assure that the site meets environmental standards. The seller or buyer often agrees to expend funds to obtain a No Further Remediation (NFR) letter from the Illinois EPA. The NFR letter provides peace of mind that the property will never be a Superfund site.

To ease the financial burden of a voluntary cleanup, buyers and sellers have a potent mechanism to recover these costs from those who contributed to the contamination. They can sue under the federal CERCLA law.

CERCLA is a strict liability statute that puts the onus on polluters.

As long as the buyer or seller can prove that another party contributed to the contamination, CERCLA provides the right to recover some, or all, of the remediation costs, even for voluntary cleanups. Federal judges in Illinois have been particularly generous in awarding cleanup costs to

polluters. Given the relative ease of recovering their costs under CERCLA, buyers or sellers are more likely to clean sites, which encourages the transfer of relatively clean industrial property.

This may all change.

On January 9, 2004, the U.S. Supreme Court agreed to decide a case from Dallas. The Court's ruling could sharply curtail the rights of those who have cleaned sites to share their cleanup costs. In a worst-case scenario, it could prevent a company from recovering from polluters its remediation costs necessary to obtain an NFR from the Illinois EPA.

In *Aviall Services Inc. v. Cooper Industries Inc.*, after being prodded by Texas officials, the buyer voluntarily expended millions of dollars to clean a site. The buyer sued the alleged polluter under CERCLA. The polluter argued that under CERCLA, the buyer could sue for contribution *only if* the buyer had itself been subject to a federal CERCLA action. As the buyer cleaned the site under state supervision the defendant asked the court to dismiss the suit. The Court of Appeals rejected this claim. It ruled that the buyer could sue for contribution under CERCLA, whether or not the buyer initially cleaned the site as a result of a CERCLA action. The court based its decision, in large part, on the policy of encouraging voluntary or state-led cleanup of contaminated sites. Without CERCLA contribution, the court believed that buyers or sellers would be reluctant to voluntarily clean property

Without the ability to employ CERCLA to recover their costs, parties to industrial transactions will be less likely to clean sites voluntarily. Buyers will be more reluctant to buy contaminated industrial property, and the property may sit unproductively.

The Bush Administration has asked the Supreme Court to overrule the decision, and prevent CERCLA suits for contribution for voluntary or state-led cleanups.

Solicitor General Ted Olson opines that CERCLA should not allow companies to sue "whenever they please," and clog the federal court system. By contrast, environmental groups point out that if the Supreme Court stops these lawsuits, there will be more contamination and fewer sales.

Without the ability to employ CERCLA to recover their costs, parties to industrial transactions will be less likely to clean sites voluntarily. Buyers will be more reluctant to buy contaminated industrial property, and the property may sit unproductively.

Illinois real estate companies can protect themselves pending the Court's review. Companies that are in the midst of, or have completed, voluntary or state-led cleanups should pursue those who caused the contamination now, before the law may change. Companies considering cleanups may

also want to approach the U.S. EPA. Though the federal EPA generally defers to state authorities, it may, at certain sites, enter into a consent order for remediation.

If the U.S. EPA gets involved, a party cleaning a site will retain its CERCLA action regardless of the outcome of the Supreme Court ruling. Finally, companies should recognize that even if the Supreme Court changes the law, they still might have actions against polluters. Under current Illinois federal law, which the Supreme Court decision should not impact, if an owner "did not pollute the site in any way," it retains a direct CERCLA action. Companies may also have state-law actions against polluters. Though state law is not as potent as CERCLA, it provides potential damage claims to those who have initiated voluntary or state-led cleanups.

James D. Brusslan is an environmental lawyer and is Of Counsel at Levenfeld Pearlstein LLC.