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# Remediation/Property Access: Federal District Court (Michigan) Considers Whether Damages Can be Obtained for Alleged Failure to Address Contamination in a Timely Manner

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A party (lessee, seller, [adjacent landowner that contaminated another property], etc.) undertaking environmental sampling or remediation pursuant to an indemnity, settlement or other agreement will often have different objectives than the other party to the arrangement. The party undertaking the work will endeavor to do so at the least cost possible. Less costly remediation may require more time or leave greater amounts of contamination in place. This may conflict with the other parties' (lessor, buyer, affected landowner, etc.) desire to have the property remediated as quickly and thoroughly as possible.

Remediation timing and thoroughness can materially affect both development timelines and the value of the property.

A recent example of this conflict can be found in *Newell Brands, Inc. v. Kirsch Lofts, LLC*, 2016 WL 4940210.

The U.S. District Court for the Western District of Michigan ("Court") in a September 15th decision held that the plaintiff Newell Brands ("Newell") must only reimburse defendant, Kirsch Lofts, LLC ("Kirsch") \$72,964 to obtain access to its property to perform certain remediation activities.

A Consent Decree required Newell to remediate both the property it owns and neighboring parcels.

Newell filed an action to obtain access Kirsch's property to conduct a portion of the remediation. The access issue was resolved. However, Kirsch counterclaimed arguing Newell was liable under Michigan Comp. Laws 324.20135 a(1)a ("the Access Statute") for damages relating to the Court's granting to Newell access so remediation could be conducted. Kirsch claimed 9.75 million dollars in damages based on alleged delay of commercial and residential development planned for its property.

Kirsch had purchased the property in Sturgis, Michigan in 2009 from a third-party. The third party had previously purchased property from Newell. It was the site of a former manufacturing facility. Kirsch intended to undertake a three-phase development of the property described by the Court as:

1. Residential,
2. commercial, and

3. more residential.

The Court noted the development:

... included building thirty to fifty condominiums on the Property and selling them for an average of \$125,000. *Id.* at Page ID.1943. Kirsch claims that, at the time of the purchase, remediation activities being conducted on the Property were consistent with, and could coexist with, its redevelopment plans (ECF No. 100, Page ID.2842). According to Kirsch, it did not anticipate remediation activities beyond the groundwater treatment that existed at the time it purchased the Property. *Id.* Moreover, Kirsch claims that some contamination at manageable levels was actually necessary for its development plans, which depended on “Brownfield” and related tax credits.

Newell had purchased a large industrial tract of land, including the property later sold to Kirsch, from Cooper Industries in 1997. Newell’s purchase from Cooper Industries included an assumption of any and all responsibility “for remediation activities under a consent decree that requires TCE cleanup to a level not greater than 100 parts per million.”

Kirsch had not anticipated the performance of any remediation activities beyond the scope of groundwater treatment that existed at the time it initially purchased the property. After Kirsch received financing to fund the condominium development, abnormally high levels of TCE were discovered in the soil on the property. The Michigan Department of Environmental Quality (“MDEQ”) requested Kirsch suspend the development.

Dr. Meiri, Newell’s environmental consultant, provided Newell with three options to remediate the contaminated soil found on the property. The options included:

1. In Situ Chemical Oxidation (“ISCO”).
2. In Situ Thermal Treatment (“Thermal”).
3. Soil Vapor Extraction (“SVE”).

Kirsch claimed that Newell purposely chose SVE because it was the most cost-effective. SVE would also require the most time to complete. Construction had ceased by September 2010. The parties had continued to negotiate access for Newell to begin SVE on the property. However, Kirsch disallowing access to perform the remediate treatment on the soil prolonged the remediation. The start date finally occurred in May 2016. Kirsch blamed the rescheduling on Newell’s attempt to get MDEQ to agree to a higher TCE cleanup threshold. This higher TCE cleanup threshold was ultimately obtained.

The parties resolved the access issue on September 8, 2015. However, the Court had to address whether Kirsch could obtain damages under the Access Statute. This required that the Court determine what is actually included in “damages related to the granting of access to the property, including compensation for the loss of use of the property.”

The Court rejected each party’s interpretation of the statute. It held that the applicable statute included neither Newell’s delay of remediation, nor did it include tax credits. Therefore, Kirsch was only entitled to \$72,964. This was the value of access activities related to the remediation of the contaminated soil.

[A copy of the decision can be downloaded here.](#)