Acquisition of Contaminated Property: Federal District Court Addresses Allocation of Cleanup Costs

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The U.S. District Court for the Eastern District of Wisconsin ("Court") addressed in a January 28th Opinion issues arising under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq., and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq., associated with the redevelopment of a contaminated industrial site in Milwaukee, Wisconsin. *See Barclay Lofts LLC v. PPG Industries, Inc., et al.*, 2025 WL 315092.

Barclay Lofts LLC ("Barclay") and Sherman Associates Inc. ("Sherman") sought in post-trial motions to alter the judgment from a prior bench trial allocating cleanup costs.

Barclay purchased property with known contamination and sued former site operators, PPG Industries ("PPG") and others, seeking to recover response costs and obtain injunctive relief. The suit was filed alleging CERCLA and RCRA causes of action. PPG counterclaimed against Barclay and Sherman for contribution and declaratory relief under CERCLA.

The Court found that although Barclay could recover certain costs under CERCLA § 107(a), those costs were entirely offset by the purchase price discount and prior settlements.

The rationale for this position included:

…Allocation of liability is based on the application of equitable factors, commonly referred to as the "Gore Factors." *Env't Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 507 (7th Cir.1992). However, the "Gore Factors" are not exhaustive and "in any given case, a court may consider several factors, a few factors, or only one determining factor ... depending on the totality of circumstances presented to the court." *Id*. At 509. In the decision, I found that because Barclay had not yet incurred costs for remediating the Properties, the Gore Factors were not entirely helpful in allocating costs here. (Docket # 333 at 40.) I considered that Barclay received a significant price reduction when purchasing the Properties (in the amount of $1.5 million) and that the evidence showed that the price reduction was directly related to the scope of contamination. (*Id*. at 40–41.)

Barclay's argument on reconsideration that allocating 100% of past costs to it is inequitable because it will never be able to sell the property is rejected.

Instead, the Court found:

…Rather, I considered the fact that of the past costs Barclay already incurred that were recoverable under CERCLA, it had already recovered an amount exceeding those costs through the substantial discount it

received on the Properties and the settlement funds. Barclay does not contend that either of these factors are legally improper to consider in the equitable allocation. That Barclay disagrees with the analysis is not a basis to alter the judgment. Thus, Barclay's motion to alter the judgment as to the allocation of past costs is denied.

Barclay's RCRA claim for injunctive relief was also rejected. The Court found that while soil and groundwater contamination remained, Barclay failed to prove the contamination presented an "imminent and substantial endangerment" to health or the environment.

The Court emphasized that speculative future risks, such as harm to hypothetical future tenants, are insufficient to meet the RCRA standard. Evidence presented by Barclay's own expert indicated risk assessment was ongoing and inconclusive, undercutting the "substantial endangerment" element. In addressing this RCRA endangerment claim, the Court sought concrete and current evidence of risk, not just contamination.

The Court also clarified CERCLA "operator" liability for Sherman which managed the environmental compliance and consultant engagement for Barclay. Relying on *United States v. Bestfoods*, the Court concluded Sherman exercised sufficient control over pollution-related activities to be deemed an operator. Therefore, it was deemed jointly and severally liable for future response costs. Equitable allocation of future costs was split 90/10 between PPG and Barclay/Sherman based on financial capability and practical control, not merely formal ownership.

The Court therefore rejected both Barclay's and Sherman's efforts to reconsider the outcome of the bench trial, affirming its prior findings on liability, cost allocation, and the absence of imminent environmental harm.

A copy of the Opinion can be downloaded here.