Monday, June 16, 2014

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Environmental LAW

Rare relief for defendants under hazardous waste statutes

Environmental statutes are almost always liberally construed to protect the environment, even when the allocation of blame on defendants is harsh under the circumstances. Thus, it is worth taking note that when deciding issues of first impression, two New York appellate courts — one federal and one state — construe hazardous waste statutes strictly to relieve the defendants from liability.

In *Price Trucking Corp. v. Norampac Ind.*, 2014 U.S. App. LEXIS 5093 (2d Cir. 2014), Price Trucking, the trucking subcontractor, sued Norampac, the contaminated property owner, for the balance of funds paid by Norampac to its cleanup contractor, but not remitted to Price Trucking. Unable to recover sufficient funds in its state court lien law action, Price Trucking resorted to a creative use of CERCLA to make up the difference.

By ROBERT B. KOEGEL
Daily Record Columnist

Price Trucking alleged that Norampac was an owner of a facility where hazardous substances had been released and that Price Trucking had incurred costs responding to the release. Since the statutory elements of recovery had been met, Price Trucking argued that Norampac was liable to Price Trucking, even though Norampac had already paid the contractor for the response costs.

The Second Circuit found that while all of the requirements for holding Norampac liable had been met, the issue became how and when the owner's liability could be discharged under the law. Here, Norampac had done what CERCLA requires; it paid for cleanup that actually got done. CERCLA, the court reasoned, asks for no more. CERCLA is designed to force responsible parties such as Norampac to pay for remediation, and that purpose was fulfilled here. CERCLA is not designed to create an additional system of insurance for all people who work on a cleanup project. Hence, Price Trucking's case against Norampac was dismissed.

In *Thompson Corners, LLC v. N.Y.S. Dept. of Env. Conserv.*, 2014 N.Y. App. Div. LEXIS 3497 (3d Dept. 2014), the issue was whether the subsequent owner of property formerly used as a permitted hazardous waste treatment, storage or disposal (TSD) facility was required by state statute to provide financial assurance for the ongoing performance of corrective action on the property.

The former owner, who had originally obtained the permit to operate the TSD, later entered into a consent decree with DEC to perform corrective action and provide financial assurance, and Thompson Corners, subsequent owner, was aware of the consent decree, which stated it was binding on successors and assigns. Thompson Corners assumed responsibility for monitoring the corrective action management unit, but refused to provide financial assurance, arguing that the statute expressly required such assurance only from the owner or operator of a facility seeking a permit.

The DEC asserted that the statutory requirement extended to current owners of former TSD facilities, such as Thompson Corners, and sought to have Thompson Corners comply with the requirement, and pay civil penalties for failing to do so.

The Third Department looked at the plain language of the statute and found that it applied only to those who applied for a TSD permit, not all subsequent owners of former TSD facilities. Had the legislature wanted to extend such liability to subsequent owners, the court explained, it could have easily done so, as it had in several other environmental statutes.

While the imposition of the statutory requirement on all sub-

Continued ...

Monday, June 16, 2014

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

sequent owners would be consistent with the laudatory environmental purpose of remediating contaminated sites, the statute simply was not written that way. The court also observed that the DEC could seek redress from those obligated to provide financial assurance or against Thompson Corners under the State Superfund Law, though the DEC had not claimed that the property presented a significant threat to public health or the environment. Accordingly, Thompson Corners did not have to provide financial assurance or pay civil penalties.

These cases certainly do not establish any trend of judicial leniency toward the defendants sued under environmental statutes. However, they may signal a willingness to reach a common sense decision under the facts at hand.

Robert B. Koegel is senior counsel in Underberg & Kessler's Litigation, Environmental and Municipal practice group. He concentrates his practice in the areas of environmental law, business litigation, land use and municipal law.