CHAPTER 11
ENVIRONMENTAL PROTECTION
By Donald B. Scaramastra and Sarah Carlin Ames

Over the past several decades, the federal and state governments in the United States have sought to carefully regulate environmental contamination. Liability under such laws has therefore been a regular concern for any business operating in the United States. Under the federal Comprehensive Environmental Response, Compensation, and Liability Act, popularly known as "Superfund," current and former "owners" and "operators" of a "facility" (which includes real property and just about anything else, including equipment, tanks, and buildings), among others, may be liable for an actual or threatened "release" of "hazardous substances" from the facility. Many states have their own versions of Superfund, but they are often different from Superfund. For example, while petroleum products are not "hazardous substances" under Superfund, they are under many states' laws.

A business should carefully examine environmental risk when it considers leasing or purchasing real estate. The business should consult with legal advisors who are knowledgeable about environmental law in any state in which the business plans on owning property or doing business at any physical facility.

Liability under Superfund

Any business found liable – that is, responsible under Superfund for hazardous substance contamination – can face significant expenses for cleanup of the contamination, for damages to natural resources (such as the loss of a fishery) caused by the contamination, and for other costs to ensure that humans and wildlife are no longer threatened by the contamination.

Liability under Superfund is "strict." This means parties are potentially liable even they handled the hazardous substances carefully or did not even know that there was a release.

Liability is also "joint and several." This means each liable person can be held responsible for *all* of the costs to clean up the contamination, even if others are also liable. A court may assign shares of liability to liable parties, but if a liable party is financially unable to pay its assigned share, other liable parties who are able to do so may be required to pay that share. Liable parties are typically under significant pressure to work out among themselves who is responsible and, hence, if money is available, who must reimburse the others found jointly liable.

Defenses to Liability under Superfund

There are very few defenses to liability under Superfund, but some exist and, although hard to prove, may be worth considering. First, a business is not liable for contamination caused solely by an act of someone else acting independently. Superfund (and many states' laws) also protect owners or operators of properties from liability for contamination caused solely by their neighbors. To take advantage of the exemption, one must take reasonable steps to prevent the spread of

contamination, must not do anything to worsen the contamination, must cooperate with cleanup efforts, and must act carefully.

Second, an "innocent purchaser" is not liable for contamination. To qualify as an innocent purchaser, a person must prove the following:

- The purchaser acquired property after hazardous substances were placed or disposed of on the property;
- Before purchase, the purchaser made "all appropriate inquiry" into past uses and owners of the property before purchase.
- At the time of purchase, the purchaser did not know and had no reason to know that any hazardous substance were disposed of on the property;
- After purchase, the purchaser exercised due care with respect to the hazardous substance; and
- At all times, the purchaser took precautions against the foreseeable acts (or omissions) of third parties and against the foreseeable consequence of those acts or omissions.

Third, a "bona fide prospective purchaser" of contaminated property is not liable for contamination *even if the purchaser discovered it before purchasing the property*. To qualify as a bona fide prospective purchaser, a person must prove the following:

- Hazardous substances were only disposed of at the facility *before* the person acquired it;
- Before purchase, the person made "all appropriate inquiry" into the previous ownership and uses of the facility, following generally accepted good commercial and customary standards and practices;
- The person provided all legally required notices to the government and neighboring properties concerning the discovery or release of hazardous substances at the property;
- The person took reasonable steps to:
    - stop any continuing release; ○ prevent any threatened future release; and
    - prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance;
- The person cooperated with, and gave access to, persons authorized to clean up the contamination and restore the environment;
- The person complied with and did not impede the long-term efforts to control any contamination left in place;
- The person complied with all requests for information from the Environmental Protection Agency; and
- The person has no potential liability in its own right.

A bona fide prospective purchaser's title to property may, however, be subject to a "windfall lien" if the Environmental Protection Agency spent money to clean up the property and was unable to

recover the cleanup costs from liable parties, and if the cleanup increases the fair market value of the property.

Both the innocent purchaser and bona fide purchaser defense require a person who acquires a facility to conduct "all appropriate inquiry" concerning the history of the facility and its surrounding properties. Superfund now identifies the several steps a purchaser must take to satisfy this requirement.
These steps, which must be taken before completing a purchase, require (at a minimum) the help of a trained environmental consultant.

Liable parties can agree how to allocate the cleanup and other costs among themselves before or after they discover hazardous substance contamination. A party who cleans up contamination at its own expense may also be able to sue and ask a court to require other liable parties to pay some or all of the costs.

To take advantage of potential exemptions from liability, and to support efforts to allocate responsibility for environmental cleanup to others, the owner or operator of a facility must investigate the condition of a property or facility before acquiring it. This investigation will typically require the help of an environmental consultant and possibly an environmental lawyer. Buyers and sellers, and owners and operators, should also try to agree in advance on how to divide responsibility for known and unknown environmental conditions on a property. This is less expensive than asking a court to divide that responsibility. Finally, the owner or operator of a facility facing an environmental claim should make sure the other party to a transaction has the financial strength to shoulder its share of the cleanup burden, if liable. If the other party cannot pay its cleanup obligations, the party to a transaction with financial wherewithal but without full responsibility may be forced to bear the entire cost.

For any questions, please feel free to contact Donald Scaramastra at dscar@gsblaw.com or at 206.816.1449, and Sarah Carlin Ames at sames@gsblaw.com or at 503.553.3208.