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The Voice

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This Week's Feature

Status of the Brownfields Amendments' Landowner Liability Protections

By Irving W. Jones Jr.

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"Thanksgiving is a very important holiday. Ours was the first country in the world to make a national holiday to give thanks."

–Linus van Pelt, *A Charlie Brown Thanksgiving*.

This Week's Feature

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Facing growing concern that the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) statutory scheme stifled the purchase, financing, and redevelopment of property that was either contaminated or potentially contaminated, Congress enacted the Brownfields Amendments. *See* Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. No. 107-118, 115 Stat. 2355 (2002). The Brownfields Amendments seek to provide three defenses under which certain potentially responsible parties can avoid CERCLA liability.

First, the amendments created the bona fide prospective purchaser (BFPP) defense for potentially responsible parties (PRPs) who knowingly purchase previously contaminated property, as long as certain requirements are met. 42 U.S.C. §9607(r). Second, the amendments created the contiguous property owner (CPO) defense that protects PRPs from liability for hazardous substance contamination originating from neighboring properties without a PRP's knowledge. 42 U.S.C. §9607(q). Last, the amendments clarified the existing innocent landowner (ILO) defense, which protects PRPs whose property was contaminated solely by a third party and without a PRP's knowledge. 42 U.S.C. §9607(b)(3). These three defenses are collectively known as the "landowner liability protections" (LLPs).

Nearly two decades since the Brownfields Amendments were enacted, courts have worked to interpret the breadth of the LLPs. In so doing, courts appear reluctant to leave disinterested parties who cover remediation costs "holding the bag," often citing case law that predates the amendments to show the intended broadness of CERCLA's reach and Congress's intent to narrowly apply these three defenses. *See, e.g., U.S. v. Puerto Rico Indus. Dev. Co.* (*PRIDCO*), 368 F. Supp. 3d 326, 336 (D.P.R. 2019); *Consolidation Coal Co. v. Ga. Power Co.*, 781 F.3d 129, 156 (4th Cir. 2015). This is particularly true when those costs are fronted by government entities funded by tax dollars. *See, e.g., Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000). Although there are a wide range of niche issues that occasionally arise in adjudicating these defenses, there are some recurring themes in the last decade worth highlighting.

Bona Fide Prospective Purchaser

The BFPP defense applies to purchasers who knowingly purchase contaminated property, unlike CPOs and ILOs, who must have no knowledge or reason to know of any contamination on their property. Aside from the requirement that a BFPP must have purchased the property after the amendments were enacted (January 11, 2002), the amendments state:

> a bona fide prospective purchaser whose potential liability for a release or threatened release is solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

42 U.S.C. §9607(r)(1). To qualify as a BFPP, the party must meet eight separate criteria found at §9601(40)(B)(i)–(viii).

A significant portion of the BFPP litigation in recent years has addressed whether the PRP has exercised "appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance." *Id.* at §9601(40)(B)(iv)(I)–(III). The gravamen of most defendants is that §9601 does not clearly articulate what constitutes "reasonable steps," making it difficult to discern what level of remedial effort is actually "appropriate." One such case is the frequently cited PCS Nitrogen, which involved a cleanup of hazardous substances from a former fertilizer manufacturing site in Charleston, South Carolina. *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 167 (4th Cir. 2013). In that case, the court reached two critical holdings: (1) the standard of due care is higher for BFPPs because they purchase the property on notice of contamination, unlike the other defenses, and (2) "due care" (i.e., appropriate care) asks whether a party "took all precautions with

respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances." *Id.* at 180–81. Although this holding did little to provide the clarity that the term "appropriate care" so desperately needed, it established that dilatory efforts, as a baseline, will not suffice.

Contiguous Property Owner

The CPO defense excludes from the definition of "owner" or "operator" a party who owns property that is contiguous to a facility that is the only source of contamination located on his property. 42 U.S.C. §9607(q). The statute states that if certain conditions are met,

> [a] person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility…solely by reason of the contamination.

Id. at §9607(q)(1)(A). Those conditions are enumerated in §9607(q)(1)(A)(i)–(viii), and most of them, similar to many of those enumerated below for ILOs, are common elements among the LLPs.

The CPO defense is not frequently litigated. Of the limited case law available, the tallest hurdle appears to be the same as that for the innocent landowner defense discussed below—proving that another party is solely responsible for the release or threatened release of the hazardous substance. For example, in one of the few cases with any meaningful analysis, *Diamond X Ranch LLC v. Atlantic Richfield Company* involved a plaintiff who owned a 1,700-acre ranch adjacent to a mine where the defendant's predecessor conducted open-pit sulfur mining. 2017 WL 4349223, at *1 (D. Nev. Sept. 29, 2017). When water came in contact with the waste rock at the mine, it created acid mine drainage, which contains elevated concentrations of arsenic, which flowed into a creek the ranch used for irrigation purposes. *Id.* at *4, 16. When the ranch caught the Environmental Protection Agency's attention, it asserted the ILO and CPO defenses and argued that the contamination was not a foreseeable consequence of its actions because it did not know that the irrigated water caused the release of contamination until long after the contamination had occurred. *Id.* at *18. The court disagreed, reasoning that the release must not only be unforeseeable, but the party's conduct must also be "indirect and insubstantial" in the chain of events leading to the release. *Id.* "[O]pening the irrigation system's headgates and displacing sediment from the irrigation ditches onto other parts of the property over the course of four years," the court held, was not "indirect" or "insubstantial." *Id.*

Innocent Landowner

Often referred to as the "third-party defense," to qualify as an ILO, the party must satisfy the requirements of §9607(b)(3) and §9601(35). Those requirements dictate that the ILO must establish that the release or threatened release of hazardous substances was caused solely by an act or omission of a third party other than the ILO's employee or agent, or a party whose act or omission occurs as a result of a contractual relationship. 42 U.S.C. §9607(b)(3). The ILO must also establish that he or she exercised due care with respect to the hazardous substance concerned (using the standard discussed in *PCS Nitrogen*) and took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from them. *Id.* The criteria enumerated in §9601(35) also require the ILO to carry out all appropriate inquiries into the previous ownership and uses of the property.

Chief among the litigated issues related to the ILO defense is whether the release or threatened release was caused solely by a third party. In *PRIDCO*, for example, the linchpin of the defendant's third-party defense was that the source of the contamination was "unknown" and that the United States "lacks any physical or hard evidence to demonstrate that [PRIDCO's] property is the source of contamination [of] the cis-1, 2-DCE plume." *PRIDCO*, 386 F. Supp. 3d 326 at 335. In response, the court reminded the defendant that "[t]he third party defense is triggered only by proving that the sole cause of contamination originated with an unrelated third-party, not that a third-party likely caused or contributed to the contamination." *Id.* at 336.

Aside from the burden issue, courts have generally found no shortage of avenues through which to attach liability to a PRP asserting the ILO defense, even when causal links appear severed.

Perhaps one of the most interesting cases highlighting this point, at least as far as the facts are concerned, is *City of Banning v. Dureau*, in which the Central District of California decided that the ILO defense did not apply to an absent landlord whose property was unlawfully accessed and contaminated by transients. 2013 WL 6063344 (C.D. Cal. Nov. 18, 2013). In *Dureau*, a landowner leased her property to an automotive shop that left behind 55-gallon drums of used motor oil. *Id.* at *1. During the two years after the automotive shop moved on, the property became overrun with transients who the property owner occa-

sionally witnessed leaving the property with scrap metal and materials. *Id.* at *2–3. The owner also observed a hole in the fence, broken windows, metal roofing pulled away from the building, loose wires hanging down, and gaps in the building's foundation. *Id.* After some remedial efforts, including fixing all the defects, posting a "No Trespassing" sign, and giving a spare fence key to the police, a transient gained access to the property and spilled four of the oil drums on the property "because he was 'just being stupid.'" *Id.* at *3–4. The spill dumped 220 gallons of spent motor oil, which seeped into a storm drain. *Id.* at *3. When the city sought to collect its $592,665 in remediation costs, the property owner asserted the ILO defense. *Id.* at *8. The court reasoned that the ILO defense was not available to the property owner because she permitted the oil drums to remain on "vacant, inadequately secured, property for a lengthy period of time." *Id.* The court also held that "[i] t was reasonably foreseeable that an inadequately secured property would invite transients to occupy it, and that transients may cause the waste materials in the drums thereon to be spilled, with the waste material flowing into the storm drain." *Id.*

Conclusion

In light of Diamond X Ranch's fate and the *Dureau* court's three-step causation analysis, to name just a couple, some may reason that courts' faithfulness to the CERCLA of old renders the LLPs at best illusory. After all, even when supported by objectively good facts, landowners are still grappling with how courts have interpreted the term "reasonable steps." Likewise, those asserting the CPO and ILO defenses are still struggling with how far removed they must be from the contaminating party, even when the contamination is caused by the kind of unlawful act that would typically sever a causal link under a tort theory of liability. Notwithstanding these difficulties, though, at least two things have come into focus. First, a party who is or becomes aware of a release or threatened release of hazardous substances must establish that he or she swiftly and meaningfully acted to reduce the exposure or threat of exposure. Second, to the extent that a landowner's defense relies on proving that a third party was solely responsible for the contamination, the proof must absolve the landowner, in an absolute sense, of any potential responsibility for the release. The latter has proved the more challenging of the two, given courts' willingness to accept causal link sequences that might cause even the most prudent landowner to shudder.

Irving W. Jones Jr. is an attorney with **Balch & Bingham LLP** in Birmingham, Alabama. His practice encompasses environmental, commercial, and product litigation. His practice often involves resolving complex legal issues that require dynamic litigation strategies. Mr. Jones litigates on behalf of a variety of corporations and utilities across the southeast in both federal and state courts. Before practicing law, he was a counterintelligence agent for the National Security Agency. Mr. Jones serves as the DRI Toxic Torts and Environmental Law Committee publications vice chair.

Keep The Defense Wins Coming!

Please send 250–500 word summaries of your "wins," including the case name, your firm name, your firm position, city of practice, and e-mail address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in "And the Defense Wins," and it may take several weeks for *The Voice* to publish your win.

Christopher B. Turney and Kristen Wagner Durant

In November 2019, DRI members Christopher B. (Chris) Turney, a shareholder in **Van Osdol PC** in Kansas City, Missouri, and Kristen Wagner Durant, a **Van Osdol PC** associate, also in Kansas City, achieved a "no liability" verdict for a leading drill-rig manufacturer.

In *Ormsby v. Central Mine Equipment Company*, the plaintiff suffered an amputation when performing maintenance on the rig's running power unit. In his closing argument, the plaintiff asked the jury to award $3.1 million for his amputations, PTSD, and injuries to his shoulder, neck, and back.

Missouri law allows comparative fault in strict liability cases when the evidence supports such a submission. In such cases, the jury is asked to apportion fault only among the parties who are at trial. In this case, the jury was asked to allocate a percentage of fault between Central Mine Equipment Company (CME) and the plaintiff. The jury's verdict assigned zero percent fault to CME and 100 percent fault to the plaintiff.

The trial lasted six days and included several interesting legal issues, such as liability for pre-owned equipment, impact of government contracts and specifications in the product's design, and admissibility of the absence of prior similar incidents.

ADTA Supports Coats for Colorado

The executive council of the **Association of Defense Trial Attorneys** (ADTA) held its mid-year meeting in Denver, November 14–17, 2019. In carrying out the ADTA's plan to incorporate public service projects into its mid-year meetings and annual meeting, the members of the executive council brought with them new and gently used coats to donate to Coats for Colorado, an organization that provides warm winter coats at no cost to Coloradoans of all ages. Coats for Colorado is the state's largest coat drive and possibly the biggest in the United States. Coats for Colorado has provided well over 2,000,000 coats to Colorado citizens. This organization assists more than 120 nonprofit health and human service agencies in meeting the needs of their clients, and they also provide winter coats to thousands of individuals and families.

#GoldenCoatDrive: The Need for Warmth

#DRICares is hosting its second annual **SLDO Golden Coat Drive Competition**! From December 1 to December 31, SLDOs are encourage to collect coats to donate to a local shelter, elder care center, veterans' center, or women's center. Collecting coats saves lives, as the health effects of extreme cold can be life threatening, ranging from heart attacks to pneumonia. In 2018, the SLDOs collected over 2,000 coats, with **Washington Defense Trial Lawyers** collecting over 1,200 coats! Which SLDO will win this year? The Golden Coat trophy will be announced and presented at the 2020 leadership meeting in Chicago. Let the collecting and race for bragging rights begin!

Professional Liability, December 5–6, 2019

The life of a professional can be hard. Client demands, complex and ever-evolving technology, and the stress of maintaining current relationships while developing new ones can strain most professionals. Add a lawsuit against the professional, and the strain can rise to a potential danger. The 2019 DRI Professional Liability Seminar addresses these stressors, offering solutions for handling current claims and practical tips to avoid the next one. Join our preeminent faculty for two days of stress relief, claims mitigation, and networking with clients and colleagues. Professional Growth and Litigation Skills workshops are also available prior to the seminar. Click here to view the brochure and to register for the program.

Women in the Law, January 22–24, 2020

This is a seminar unlike any other. It is the best networking event for women lawyers. We gather outstanding women from law firms and corporate legal departments around the country to provide you with practical advice, excellent programming on aspects of the law that span all substantive areas, and the opportunity to build lasting relationships with the women you encounter. If you have attended this seminar in the past, you know this to be true. If you have never attended, we encourage you to join this amazing group of women as we strive to inspire and support each other. We sincerely hope that you will consider attending this year's DRI Women in the Law Seminar as we celebrate our history and look forward to our very bright future. Click here to view the brochure and to register for the program.

Civil Rights and Governmental Tort Liability, January 30–31, 2020

DRI's 33rd annual Civil Rights and Governmental Tort Liability Seminar will provide you with the tools to represent governmental entities from pre-claim through trial. Among this year's faculty are a renowned Supreme Court advocate, experts on municipal issues, insurance claims professionals, in-house counsel, defense attorneys, and risk management professionals. The speakers will cover trends from across the country and address timely topics relevant to your practice, including matters related to prison intake, the First Amendment, and Title IX. Attendees will also learn practical tips for addressing issues in the areas of qualified immunity, *Monell* claims, Rule 68 offers of judgment, and more. Attendees will be offered opportunities to network and exchange ideas on the topics and techniques presented with experienced litigators and claims professionals. Click here to view the brochure and to register for the program.

Product Liability, February 5–7, 2020

Join us for Products 2020 in New Orleans, a city known for food, more food, music, and fun! Once again, we will have lots of opportunities for networking in great spots throughout this wonderful city. Combined with presentations on the development and use of virtual reality, improving your PowerPoint presentations, and the usual diverse and interesting sessions from our specialized litigation groups, this is a program that you will not want to miss! Click here to view the brochure and to register for the program.

Toxic Torts and Environmental Law, February 19–21, 2020

DRI heads west with the latest in toxic torts and environmental law to keep your practice on the cutting edge. Come to Phoenix to learn about the latest updates and changes in toxic torts and environmental law with the best lawyers, judges, and experts across the country. This is the premier gathering for the defense bar, focusing on litigation strategies and regulatory updates, presented in beautiful Arizona. Click here to view the brochure and to register for the program.

Upcoming Webinars

Reptile Theory in Jury Selection, December 2, 2019, 12:00 pm–1:00 pm CST

Plaintiff attorneys are implementing reptile theory in a broad range of cases, such as health care, employment, bad faith, and personal injury. This theory invokes the jurors' sense of danger and invokes their primal instincts for safety and self-preservation. Learn how to identify reptile theory strategies and questions used during voir dire and how to combat them. Click here to register.

Medicare Endgame—Applying Predictive Settlement Strategies to Mitigate MSP Exposure, December 5, 2019, 12:00 pm–1:30 pm CST

John V. Cattie Jr. and Bruce A. Cranner, expert legal scholars, will walk attendees through the process of using an arbitration (as opposed to mediation) to obtain a judicial allocation on the merits, which can be used to address MSP reimbursement obligations, as well as how to protect Medicare's interests when closing the file through adjudication on the merits before the Board/Industrial Commission. Click here to register.

Insurance Coverage Issues Arising from Hurricanes Harvey and Irma: Part 2, Hurricane Harvey, December 9, 2019, 12:00 pm–1:00 pm CST

The second half of this two-part webinar will address the insurance coverage issues that have arisen after Hurricane Harvey in Texas. The presentation will address the types of issues that insurers and coverage attorneys have dealt with following the influx of claims arising from the hurricane-related damages arising from the storm. Click here to register.

Brace Yourself—The CCPA Is Coming, December 13, 2019, 12:00 pm–1:00 pm CST

The clock is ticking! The California Consumer Privacy Act (CCPA) has a compliance date of January 1, 2020. Yet many businesses still don't know what they need to do to comply—or worse, they don't realize that they are covered by the law. But no need to panic! This webinar will prepare both in-house and outside counsel for the inevitability of this new, broad privacy law. Given the CCPA's potential penalties for noncompliance, no one wants to stumble. Click here to register.

Are You Ready for More Business? DRI Membership Directory

Are you ready for more business? If so, make it easy for another attorney, a law firm, an insurance company, or a new business connection to find you online: your experience, your particular expertise, in the right city, at the right time. Build your profile in DRI's Membership Directory and help others find you.

Did you know that DRI's Membership Directory is online, it's free, and it's what more than 10,000 attorneys and companies use every month to find someone like you? The DRI Membership Directory is searchable using several important variables.

Build your profile and keep it up to date (*most important*).

- Your firm and address
- Your practice areas
- Your professional biography
- Your DRI Committees
- DRI articles that you've authored
- Your DRI speaking engagements
- Your defense wins published in the "And The Defense Wins" section in *The Voice*, DRI's online newsletter read by thousands of members

As Mark Twain said, "The secret of getting ahead is getting started."

New Member Spotlight

Glenn Duhl, Zangari Cohn Cuthbertson Duhl & Grello PC

Glenn Duhl is a principal in the Connecticut offices of **Zangari Cohn Cuthbertson Duhl & Grello PC**, representing management in employment law and litigation. Representative matters include breach of contract, wrongful termination, discrimination, defamation, trade secret misappropriation, restrictive covenants, wage and hour, harassment, and class/collective action defense. He also advises clients on litigation avoidance strategies and techniques in complex and highly sensitive disputes.

Mr. Duhl is an author and contributing editor for numerous Bloomberg/ABA employment law publications, including *Wage and Hour Laws–A State by State Survey,* (ADEA, FMLA, FLSA, CT Wage and Hour, At Will Employment), and he teaches substantive and procedural employment law and litigation seminars to fellow lawyers and employers (disability accommodations, human resource policies and practices that prevent lawsuits, advanced employment law, ediscovery, and winning at trial). He has served as an adjunct professor at UConn Law School, teaching Trial Advocacy and Moot Court, and at the University of Hartford, teaching Advanced Employment Law.

Mr. Duhl is licensed in Connecticut, New York, Massachusetts, and Louisiana. He earned his BA from Wesleyan University and his JD from Tulane Law School.

Quote of the Week

"Thanksgiving is a very important holiday. Ours was the first country in the world to make a national holiday to give thanks."

–Linus van Pelt, *A Charlie Brown Thanksgiving*.