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DykemaGossett PLLC

Environmental Law Update

Superfund Amendment Signed into Law

President Bush recently signed into law the Small Business Liability Relief and Brownfields Revitalization Act. The Act makes a number of changes to the Superfund statute, which is also known as CERCLA. Enacted in 1980, CERCLA imposed liability on those entities that either generated or transported waste to a site of environmental contamination, or those who owned or operated a contaminated site. The purpose of the new amendment is two-fold. First, it exempts from liability those entities that contributed very little waste to a contaminated site. Second, the amendment facilitates the redevelopment of contaminated properties by providing additional funding for existing brownfield programs and by making it easier for someone to purchase property without fear of getting caught up in a potentially costly clean up.

Liability Exemption

Under the new amendments, a transporter or generator of waste will not be liable at an EPA-designated Superfund Site if they contributed less than 110 gallons of liquid waste, or less than 200 pounds of solid waste to the site, provided that all or part of that waste was brought to the site prior to April 1, 2001. The amendment also exempts from liability generators (but not transporters) of municipal solid waste, so long as the generator is either a residence, a small business having fewer that 100 employees, or a recognized non-profit organization. Both exemptions apply only to those sites included on EPA's National Priority List.

Of course, there is always a catch. Here the catch is that, even if an entity falls squarely within one of liability exemptions, they may still be liable if EPA determines that the entity's waste, either individually or in the aggregate, could contribute significantly to the cleanup cost.

Brownfield Redevelopment

The amendment covers several topics of interest regarding brownfield redevelopment and the liability that may face purchasers of contaminated property.

First, the amendment provides additional funding for existing programs aimed at encouraging brownfield redevelopment. The funding is initially provided to "eligible entities" (usually a state or municipality) and then it can be passed on to developers or other users in the form of loans or grants.

The new law also exempts from liability owners and operators of contaminated property if the contamination is due solely to migration from an adjacent property. It also addresses the level of inquiry an entity must exercise when purchasing contaminated property, essentially adopting the ASTM standard that has been used for years by environmental professionals for Phase I environmental assessments.

Finally, the amendment provides a potential defense to liability for those parties who knowingly purchase contaminated property. A "bona fide prospective purchaser" may now buy property with known contamination without incurring liability if certain conditions are met, including: 1) all disposal of hazardous substances occurred prior to purchase, 2) the buyer has made all appropriate inquiry into the past uses of the property, 3) the buyer provides all legally required notices and cooperates with the

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government, and 4) the purchaser must exercise "appropriate care" with respect to contamination found on the property. Unfortunately, many of these criteria are not well defined, and the new law has been criticized as being too open-ended. When it comes to purchasing contaminated property, it appears that the old adage "buyer beware" still applies.

Explosion in Mold Litigation (The Fungus Among Us)

Why the Increase in Mold Claims?

The general public seems to have a heightened awareness of the potential health effects of mold and other indoor air pollutants—there are a number of reasons for this. Statistics from state health departments show that people spend nearly 90% of their time indoors. Simply put, the exposure of people to pollutants indoors can be greater than outdoors. Medical experts are beginning to establish connections between certain types of mold species exposures and specific manifestations of illness such as respiratory/pulmonary illness, immune system dysfunction, and cognitive disorders. However, misinformation and a certain level of hysteria have caused the public to misunderstand the nature of the risk and their potential exposure.

What Types of Mold/Fungi Affect Indoor Air Quality?

There are a number of different fungi/molds that affect indoor air quality; however, only a few are truly dangerous to health. Those that produce spores that can become airborne are of primary concern (bioaerosols). Even among the bioaerosols, only a very few produce toxins (mycotoxins). Other bioaerosols can be allergens that affect different people in different ways. The most notorious bioaerosols are *Aspergillus flavus* and *Stachybotrys chartarum*. Although their occurrence is relatively rare, these bioaerosols can be found in buildings with a moisture source, constant temperatures above 45°F and an organic food source (something as simple as wall paper paste).

The effects of these mycotoxins can be severe, causing lung hemorrhage, and possibly death, if the fungi take root in the lungs. Some human allergic reactions to bioaerosols include chronic bronchitis, eczema, and asthma.

Some of the more notable cases related to mold contamination are connected to *Stachybotrys chartarum*. In 1994, a doctor from Cleveland attributed 37 cases of pulmonary hemorrhage and hemosiderosis in young infants to *Stachybotrys*.

A Texas jury recently awarded $32 million to a homeowner against an insurance company that failed to act to remove mold from a home affected with *Stachybotrys*. This was an extreme case where plaintiff alleged that the insurance company's investigator had been overcome, even coughing up blood, after being exposed to the fungus in the home for less than one hour. In 1992, a Florida jury awarded more than $40 million in personal injury claims related to a moldy courthouse. In another case, a California jury awarded $2.7 million for personal injuries caused by toxic mold.

Factual Scenarios Related to Mold Claims

A. **Contractor Claims.** Claims against contractors are the most frequently brought claims. They generally arise as a result of poor moisture sealing and drainage; however, if the building is constructed too "air-tight," mold can also thrive. These scenarios can arise after winter/spring construction where the contractor began finish carpentry before building materials were thoroughly dried. Third-party claims against subcontractors are common. Many mold claims do not arise until two to five years after construction; therefore, the ability to adequately investigate the causation aspects of the claim are frequently compromised.

B. **Tenant Claims Against Landlords.** These claims are usually for personal injury and property damage, and have brought some of the highest damage awards. Many of these cases stem from chronic leaky plumbing. The $2.7 million California verdict mentioned above was a landlord/tenant case. Also, there is currently an $8 billion class action litigation pending in New York City brought by 300 tenants in a large apartment building.

C. **Architect/Engineer Claims.** These claims typically involve poor drainage design, but sometimes are related to the design/engineering of the HVAC system. The design of the system to allow for adequate air exchange is frequently at issue.

D. **Condo Developer/Condo Association Claims.** Defects in condominium "common elements" that cause mold damage can result in unit owner suits against the association and the developer. If mold grows inside wall cavities, attics and crawl spaces (common element areas), the condo association frequently has responsibility for these issues. The condominium association will typically crossclaim against the builder/developer.

Expert Testimony is Key

As with all disputes involving technical issues, effective expert advice is the key to success. At the very least, the typical case will require the use of a certified industrial hygienist (CIH)/microbiologist with significant experience in mold and mycotoxins, the likely genesis of the mold, and the required mold remediation issues. Experienced plaintiff's counsel will typically utilize: (1) a CIH to testify about the existence and species of mold present in the building; (2) an environmental medicine specialist (treating physician) to testify about plaintiff's condition and its connection to mold; and (3) toxicologist/ epidemiologist to testify about mold-related illness.

With regard to effective defense of mold claims, the science of mold and causation issues are the defendant's strongest assets. Most courts have **not** allowed expert testimony on garden-variety mold's causal links to personal injury claims. There must be documented proof that certain species of mold (short list of bioaerosols) are present in the building and have affected the plaintiff. Adequate exposure to those bioaerosols must be shown. In general, there is very little hard science in the form of epidemiological studies which will survive a legal challenge.

Defendants can attack a claim on the basis of other moisture sources in the building not caused by the client. In personal injury matters, even qualified experts can be attacked on the basis that there are likely numerous sources for a certain injury. Individuals sensitive to molds are typically allergic/sensitive to other allergens as well.

Contractors Should Document Construction Practices

To establish the proper standard of care, it is important that contractors document their construction procedures extensively. Contractors should document moisture content in construction materials before beginning finish carpentry.

Have a Plan to Address Questions Regarding Indoor Air Quality

Property owners/employers should have a plan to deal with any indoor air quality/mold issues that are raised by their employees or tenants. If raised by occupants, it is best that these concerns be addressed immediately. A delay in response can erode trust and increase tensions. If the problem is left uninvestigated, it can lead to a shift in the occupants' acceptable risk towards zero or pristine indoor air quality. The critical steps that should be taken are the following: (1) identify the level of concern raised by building occupants; (2) identify the potential mold problem with appropriate testing by a board-certified professional; and (3) develop an appropriate remedial plan and implement it.

Dykema Gossett along with technical experts can help you through these steps to help avoid claims by occupants, or can vigorously defend your interests if claims have already been brought.

Is 1,4-Dioxane in Your Future?

Interest in 1,4-Dioxane is growing among environmental professionals, including regulators. The chemical was historically added to chlorinated solvents as a stabilizer, particularly 1,1,1-Trichloroethane (1,1,1-TCA), and it is anticipated to be a human carcinogen. The interesting thing about 1,4-Dioxane is that, unlike most chlorinated solvents, its is very soluble in water, does not readily absorb to soils, and is difficult to biodegrade. The net effect is that 1,4-Dioxane is more mobile in groundwater and more persistent than the chlorinated solvents with which it is usually associated. As a result, 1,4-Dioxane contamination may extend beyond the contamination plume associated with the chlorinated solvents.

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New TRI Lead Rule Greatly Expands Reporting Threshold

U.S. EPA issued a rule that may effect manufacturers and users of lead and lead compounds. The rule requires facilities that manufacture, process, or otherwise use more than 100 pounds of lead or lead compounds per year to submit a Toxic Release Inventory (TRI) Form R. The previous reporting threshold had been 25,000 pounds for those who manufactured or processed lead, and 10,000 pounds for those who "otherwise used" lead.

The rule was promulgated on January 17, 2001 and effects TRI reports being submitted for the 2001 reporting year. The first of those reports are due by July 1, 2002.

The rule was promulgated by the U.S. EPA pursuant to the section 313 of the Emergency Planning and Community Right to Know Act (EPCRA). EPA has been targeting persistent bioaccumulative toxic chemicals such as lead, because they are not easily destroyed and can build up or accumulate in animal and human tissue.

Failure to timely submit a Form R could result in an enforcement action by EPA and potential civil penalties.