U.S. SUPREME COURT DENIES REVIEW OF TRANSFER OF ENVIRONMENTAL LIABILITY CASE, REAFFIRMING THE ABILITY OF BUYERS AND SELLERS OF BUSINESSES AND REAL ESTATE TO APPORTION CERCLA LIABILITY THROUGH WRITTEN AGREEMENTS

While various environmental statutes can effect a business transaction, the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. (CERCLA) is particularly important from a liability perspective because of CERCLA's broad reach. For example, mere ownership of property on which hazardous substances have been disposed of can result in liability, even if the current owner had no connection to the hazardous substances. This is important in the context of a corporate or real estate transaction because of the potential for significant environmental liability associated with the release of hazardous substances. Fortunately, however, the BNFL case discussed below confirms the ability of parties to contractually apportion environmental liability among themselves, thus creating greater certainty with respect to potential environmental liability in business or property transactions. See The Coy/Superior Team v. BNFL, Inc., 174 Fed. Appx. 901 (6th Cir. 2006). This case affirms the ability of buyers and sellers of property or businesses to negotiate the allocation of CERCLA liability through carefully crafted agreements. Although CERCLA §107(e) allows cost allocation between parties, such agreements cannot absolve a party from CERCLA liability. In other words, a party remains liable, but can be indemnified for costs by a third party.

Background

On January 8, 2007, the U.S. Supreme Court declined to review whether § 107(e) of CERCLA prevents the transfer of liability for hazardous waste at a cleanup site from the waste's owner to another party. See The Coy/Superior Team v. BNFL Inc., U.S., No. 06-656, *cert. denied* January 8, 2007. Petitioners, Coy/Superior, sought review of the Sixth Circuit's decision to permit the contractual transfer of liability for hazardous waste from the owner (BNFL) to Coy/Superior. Petitioners argued that CERCLA § 107(e) does not permit an owner to shift liability for hazardous waste to another party. See BNFL, 174 Fed. Appx. at 906.

The U.S. Supreme Court's refusal to hear this case reaffirms the ability of parties to contractually allocate the costs of environmental cleanup liability among themselves. Id.; Harley Davidson, Inc., v. Minstar Inc., 41 F.3d 341 (7th Cir. 1994) ("[w]e agree with every other appellate court that has been called on to interpret [§ 107(e)] that it does not outlaw indemnification agreements. . . ."). Notwithstanding, § 107(e) does not allow a party that is responsible for cleanup costs to escape liability vis-à-vis the federal government or a third party; rather, CERCLA § 107(e) permits parties to apportion or allocate liability among themselves, or even shift it completely from one party to another.

Facts

BNFL entered into a contract with the Department of Energy to decontaminate, decommission, and recycle three former uranium processing buildings located in the East Tennessee Technology Park (ETTP). BNFL subcontracted the demolition and scrap work to various subcontractors, one of which was Coy/Superior. Prior to initiating any work for BNFL, Coy/Superior entered into a contract with BNFL. The contract shifted potential liability for any wastes from BNFL to Coy/Superior, once the wastes were loaded onto Coy/Superior's vehicles.

Section C.1.13 of the subcontract stated in part:

> The Subcontractor(s) shall assume total regulatory responsibility, liability, and title to the wastes and recyclable material upon loading onto the Subcontractor's vehicle at the ETTP site. Any wastes and/or by-products generated during shipment, storage, disposal and/or other management of the waste shall be the responsibility of the Subcontractor(s) and shall be disposed of via approved disposal methods and procedures.

Shortly after the execution of the subcontract, Coy/Superior loaded pieces of the condensers onto its vehicles and removed them from the BNFL site to an adjacent site. While attempting to sell some of the material salvaged from the condensers, Coy/Superior discovered the presence of asbestos. Coy/Superior alleged that BNFL was responsible for the asbestos at the adjacent site.

The district court granted Coy/Superior's motion for summary judgment and entered an order declaring that BNFL was the entity responsible for the asbestos. The district court held that Section C.1.13 was ambiguous as to when title and liability transferred. The district court applied the doctrine of *contra proferentem* and enforced the provision in Coy/Superior's favor.

The Sixth Circuit reversed. In determining that Coy/Superior was liable, the appellate court first focused on the language of § 107(e) of CERCLA to determine whether liability could be transferred. Section 107(e)(1) of CERCLA states:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

42 U.S.C. § 9607(e)(1). Coy/Superior argued that the contractual provision at issue did not fall within the permissive language of § 107(e) in that the provision was not an indemnity agreement as asserted by BNFL. Relying on case law, the appeals court rejected this argument, finding that even an "as is" clause in a contract can be sufficient to transfer liability. See BNFL, 174 Fed. Appx. at 908.

In support, the appeals court relied primarily on a Tennessee District Court case. See Velsicol Chem. Corp. v. Reilly Indus., 1999 U.S. Dist. LEXIS 14652 (E.D. Tenn. 1999). There, the court relied on two provisions in a contract to find that CERCLA liability had been transferred: (1) the "as is" clause ("it is understood that the land and improvements are being sold on an as is condition at the time of the sale,") and (2) the sellers representations and warranties provision ("it is clearly

understood by all parties that the Seller makes no representations or warranties as to the usability of the above described property under present or future Federal, State of [sic] local air and water pollution laws, ordinances, or regulations."). See id. at *16-17, *22-23.[1]

Implications

It is well established that parties may use indemnification provisions to shift financial liability among themselves in anticipation of future CERCLA cleanup obligations. As the BNFL case shows, other provisions in agreements, including as-is clauses and assumptions of risk, can have the same effect. Therefore, careful attention should be given to the provisions in a draft agreement to see whether they are drafted in a way that achieves and does not undermine the intent of the parties, particularly since these provisions can translate into liability, or savings, of millions of dollars, depending on the extent of environmental contamination and who has assumed what risks.

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[1] But see Buffalo Color Corp. v. AlliedSignal, Inc., 139 F. Supp. 2d 409, 425-425 (W.D.N.Y. 2001) (finding that one company's purchase of another company "as is" does not result in the assumption of CERCLA liability: "If the parties intended such an indemnity, they could have drafted appropriate specific language to reflect this intent, or – quite simply – they could have drafted all-encompassing broad language…." (citation omitted)).