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Does a Negligent Phase I Result in Loss of the CERCLA Innocent Purchaser Defense?

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Someone who buys contaminated real estate can sometimes avoid liability under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. Sections 9601-75, if that purchaser conducts "all appropriate inquiry" before the purchase. If the inquiry does not uncover a reason to believe that the site is contaminated, then the purchaser may be "innocent." See 42 U.S.C. Section 9601(35). If the inquiry does uncover contamination and the purchaser takes certain other steps, the buyer may be a "bona fide prospective purchaser." See Section 9601(40). A "Phase I environmental site assessment" is the colloquial term for the inquiry that constitutes "all appropriate inquiry." A similar defense exists under the Pennsylvania Hazardous Sites Cleanup Act, 35 Pa. Stat. Ann. Section 6020.701(b).

A regulation and an industry standard govern a Phase I for federal purposes. See 40 C.F.R. pt. 312; ASTM Standard E1527-21. Among other things, a Phase I must be conducted by an "environmental professional." If that environmental professional commits professional negligence in the performance of the site assessment, does that negligence mean that the purchaser—the professional's client—can not assert either the innocent purchaser or BFPP defense?

Superfund lawyers would generally consider the answer to that question to be obvious: of course a negligent Phase I cannot support a defense. However, some weeks ago I came across the report of a decision in a professional negligence case against an environmental professional that performed a Phase I and failed to uncover evidence of a contamination problem. See *District of Columbia Water & Sewer Authority v. Samaha Associates,* No. 23-cv-1328 (D. Md. Mar. 9, 2026). That particular ruling had to do whether *Berk v. Choy*, 146 S. Ct. 546 (2026), means that a federal court should not require a professional negligence complaint to be supported by a "certificate of qualified expert," as required in Maryland. Pennsylvania has a similar requirement under Pennsylvania Rule of Civil Procedure 1042.3. *Berk* holds that those sorts of malpractice claim screening devices conflict with Federal Rule of Civil Procedure 8 and do not apply in federal court.

In the course of discussing that Maryland case, I observed off-handedly that a professional negligence claim against a Phase I contractor was the opposite of trying to establish either the innocent purchaser or BFPP defense because negligence would disqualify the Phase I. To my surprise, some of our real estate lawyer colleagues expressed the view that negligence of the environmental site professional should not disqualify the purchaser—the professional's client—from asserting a defense to liability under CERCLA.

Resolving that disagreement over whether negligence disqualifies the Phase I might affect assessments of risk, contracting practices and litigation. And, as mentioned, few Superfund lawyers would have even thought it was an issue.

A call to fairness seems to motivate the position that negligence in conducting a Phase I environmental site assessment does *not* disqualify the environmental professional's client—the purchaser—from claiming the innocent purchaser defense. As mentioned above, not just anyone can conduct a Phase I. "All appropriate inquiry" requires an "inquiry by an environmental professional." See 40 C.F.R. Section 312.20(a)(1). An "environmental professional" has to have certain degrees, licenses, or experience. That professional's report—the Phase I report—must contain a certification to the professional's qualifications and a certification that he or she has "developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312." See Section 312.21(d).

Failure to certify disqualifies the report. See, e.g., *Von Duprin v. Major Holdings,* 12 F.4th 751 (7th Cir. 2021).

Most buyers are not themselves environmental professionals. They must hire someone. If that someone certifies that he or she has done what was required, it would be unfair—so the argument goes—to make a buyer jointly and severally responsible for all costs of responding to contamination on the property when the *buyer* did everything right.

Moreover, allowing negligence by the environmental professional to defeat the defense would create practical problems, so this argument continues. A purchaser does not require a defense to CERCLA liability unless the United States, a state, a tribe, or some private plaintiff asserts a CERCLA claim against that purchaser. That claim only arises if the plaintiff has incurred costs to respond to contamination or, in the case of the United States, seeks to compel the purchaser to conduct the cleanup. That only happens if the contamination is sufficiently serious that it warrants response actions that are consistent (or not inconsistent) with the National Contingency Plan, 40 C.F.R. pt. 300. The NCP calls for "CERCLA quality" cleanups that are often more cumbersome and expensive than what might be commercially reasonable. The Land Recycling and Environmental Remediation Standards Act (Act 2), 35 Pa. Stat. Ann. 6026.101 to .908, offers an alternative to the NCP to achieve a "clean" site often with less process and cost.

If a Phase I misses a problem significant enough to give rise to a CERCLA claim, that fact alone may suggest that the Phase I was negligent. The real estate market would like to be able to use a Phase I report in proper form as sufficient to establish that prong of the defense, and to do so on summary judgment. If every assertion of the innocent purchaser defense has to go to trial, the defense has constrained utility.

The argument concludes that nothing in the regulations or the ASTM standard specifically requires an environmental site investigation to be conducted non-negligently.

All of that has some logic to it. But it misses the whole point of the innocent purchaser and bona fide prospective purchaser provisions of CERCLA and, indeed, the whole point of the environmental site assessment. One does not conduct a Phase I to *miss* contamination and thereby to erect a defense. One does a Phase I to *find* any contamination present. By finding the contamination, a purchaser can negotiate to protect itself and the parties can take steps to address the problem so that land can be bought and sold.

CERCLA acknowledges and codifies this self-protective behavior. The Phase I investigation must be performed "in accordance with generally accepted good commercial and customary standards and practices." See 42 U.S.C. Section 9601(35)(B)(i)(I). Before the adoption of Section 101(35) in 1986, the commercial practice developed for the purpose of transactional diligence, not establishing a defense. Those generally accepted standards arguably should be understood to call for finding—or at least trying without negligence to find—contamination.

Moreover, with the addition of the BFPP defense, Congress allowed for land to transact even if the Phase I uncovers contamination. The BFPP avoids liability provided it "exercises appropriate care" to stop releases of hazardous substances. See 42 U.S.C. Section 9601(40)(B)(iv). The whole point here is to incentivize proper investigation so that sites will be secured and then cleaned up. The defense is just the incentive.

But research has not uncovered a case in which a court has decided explicitly that negligence of the environmental professional precludes or does not preclude assertion of the defense. Maybe our real estate friends are correct.

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