IN RE TAMPOSI FAMILY INVESTMENTS

CERCLA §106(b) Petition No. 94-6

FINAL DECISION

Decided July 6, 1995

Syllabus

Tamposi Family Investments (TFI) petitions the Board for reimbursement of costs it incurred in responding to a Unilateral Administrative Order (UAO) issued to TFI pursuant to § 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.* The UAO required TFI to remediate contamination caused by a release of asbestos disposed on property owned by TFI. TFI contends that it is entitled to reimbursement of its response costs pursuant to CERCLA § 106(b)(2)(C), because it is not liable for the response costs under CERCLA § 107(a). Specifically, TFI contends that it has a complete "third party" defense to CERCLA liability under § 107(b), because the release of asbestos was caused solely by Johns-Manville Corporation, a third party with whom TFI has no contractual relationship, before TFI acquired the land. TFI thus claims that it is an "innocent landowner" as defined in CERCLA § 101(35)(A). TFI also contends that it acquired the property by "inheritance or bequest" within the meaning of CERCLA § 101(35)(A), and is also therefore entitled to claim "innocent landowner" status.

Held: TFI's petition for reimbursement is denied, because TFI has failed to establish all elements of the "third party" defense by a preponderance of the evidence. First, TFI has presented no evidence that its predecessors in the property's chain of title, with whom TFI has an indirect contractual relationship, did not cause the release of asbestos on the property; therefore TFI has not shown that Johns Manville "solely" caused the release. Second, TFI has not demonstrated that it is entitled to "innocent landowner" status, because TFI has not shown that it made an appropriate inquiry into the past ownership and uses of the property, as required by CERCLA § 101(35)(B). Finally, TFI's receipt of the property as an *inter vivos* gift from the father of TFI's partners is not an "inheritance or bequest" within the meaning of CERCLA § 101(35)(A), and therefore TFI cannot claim "innocent landowner" status on that basis.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

U.S. EPA Region I issued a Unilateral Administrative Order (UAO) on October 6, 1987, under § 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, requiring Tamposi Family Investments (TFI) to abate a threat of harm to the public health or welfare or the environ-

ment caused by various forms of asbestos waste deposited on property owned by TFI at the Russell Avenue Asbestos Area (the Site), located in a residential area of Nashua, New Hampshire.[1] The UAO required TFI to perform cleanup and administrative activities on its property, including retaining a contractor to stabilize friable waste asbestos, submission of a post-response monitoring plan, and submission of a report following completion of response activities.

On February 8, 1988, TFI filed a petition with EPA's Office of Waste Programs Enforcement (OWPE) pursuant to § 106(b)(2)(A) of CERCLA, seeking reimbursement of response costs totalling $93,277.95.[2] TFI submitted additional information concerning its petition on March 27, 1989, and submitted supplemental cost documentation on October 26, 1990, adding an additional $6015.11 to its reimbursement request. On October 29, 1991, OWPE issued a Preliminary Decision denying TFI's petition for reimbursement. TFI filed a response to the Preliminary Decision on February 28, 1992. By order dated November 9, 1994, the Board requested briefing by Region I on the matters raised in TFI's petition and response to the Preliminary Decision, and allowed TFI an opportunity to reply to the Region's brief. Region I submitted its memorandum of law in opposition to TFI's petition on February 10, 1995. TFI has not submitted a reply to the Region's memorandum.

There is no dispute that TFI has satisfied the statutory threshold prerequisites for obtaining review of its petition for reimbursement.[3] The sole basis of TFI's petition is that TFI is not liable under CERCLA for the response costs it incurred in complying with the UAO. Specifically, TFI alleges that it has a "third party" defense to CERCLA

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[1] CERCLA § 106(a) authorizes the President to issue orders "necessary to protect public health and welfare and the environment" when "an actual or threatened release of a hazardous substance from a facility" poses "an imminent and substantial endangerment to the public health or welfare or the environment." The President has delegated the authority to issue such orders to EPA. *See* Executive Order No. 12580 (Jan. 23, 1987), 52 Fed. Reg. 2923 (Jan. 29, 1987).

[2] The authority to make determinations on petitions for reimbursement under CERCLA § 106 was delegated by the President of the United States to the Administrator of EPA in 1987, and re-delegated to the Director of the Office of Waste Programs Enforcement. In June 1994 such authority was transferred to the Environmental Appeals Board. *See* Executive Order No. 12580 (Jan. 23, 1987), 52 Fed. Reg. 2923 (Jan. 29, 1987), and EPA Delegation of Authority 14-27 ("Petitions for Reimbursement"), June 1994.

[3] Preliminary Decision at 6. The prerequisites for obtaining review on the merits of a petition for reimbursement are that the petitioner received an administrative order issued by EPA under CERCLA § 106(a); the petitioner complied with the order and completed the required action; the petitioner submitted a petition for reimbursement to EPA within 60 days after completing the required action; and the petitioner incurred costs. CERCLA § 106(b).

liability under § 107(b)(3), because the release of asbestos on the Site was caused by an act or omission of a third party unrelated to TFI, and thus TFI is an "innocent landowner." For the reasons explained below, we conclude that TFI has not established its entitlement to a § 107(b)(3) defense by a preponderance of the evidence, and that its petition for reimbursement of response costs must therefore be denied.

I. *BACKGROUND*

A. *Statutory Background*

CERCLA was enacted "'to accomplish the dual purpose of ensuring the prompt cleanup of hazardous waste sites and imposing the costs of such cleanups on responsible parties.'" *In re Findley Adhesives, Inc.*, 5 E.A.D. 710, 711 (EAB 1995) (quoting *Dico, Inc. v. Diamond*, 35 F.3d 348 (8th Cir. 1994)). CERCLA requires responsible parties to conduct, or contribute to the cost of, cleanup at sites where a release or potential release of a hazardous substance threatens public health or welfare or the environment.[4] *Id.* Under CERCLA, the federal government may itself respond to a release or threatened release of hazardous substances and then seek reimbursement from the responsible parties pursuant to §§ 104 and 107, or, when the release poses an immediate and substantial threat of harm, the federal government may order the responsible parties to undertake abatement of the release pursuant to § 106(a). *Id.*[5]

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[4] The term "hazardous substance" includes any substance identified as a hazardous substance under CERCLA § 101(14) and any other substance identified as a hazardous substance by Agency regulation. *See* CERCLA § 102. There is no dispute that asbestos is a CERCLA hazardous substance.

[5] CERCLA § 107 includes the following list of "responsible parties" who are liable under CERCLA, although other parties may also be recipients of § 106(a) orders:

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances * * * and
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> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities * * * from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance * * *.

CERCLA § 107(a).

CERCLA authorizes the recipients of § 106(a) abatement orders to petition for reimbursement of reasonable response costs from the Hazardous Substance Superfund. CERCLA § 106(b) provides that:

> Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest.

CERCLA § 106(b)(2)(A). In order to obtain reimbursement:

> [A] petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 107(a) and that the costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

Id. § 106(b)(2)(C). In addition, a petitioner who is liable under § 107(a) may nevertheless recover its costs to the extent that it can demonstrate that the Agency's decision in selecting the response action was arbitrary and capricious or otherwise not in accordance with law. *Id.* § 106(b)(2)(D).

As noted *supra*, note 5, CERCLA imposes strict liability for cleanup of hazardous substances on, among others, current owners of contaminated property, as well as persons who owned the contaminated property at the time of the disposal of the hazardous material. *Id.* § 107(a)(1) & (2). Defenses to CERCLA liability are limited to the statutory defenses set forth under CERCLA § 107(b). *Id.* § 107(a) (enumerated persons are liable "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section[.]"). CERCLA § 107(b) provides that:

> (b) There shall be no liability * * * for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:
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> (1) an act of God;
> (2) an act of war;
> (3) an act or omission of a third party other than * * * one whose act or omission

> occurs in connection with a contractual relationship, existing directly or indirectly, with the [liable party] if [he] establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance * * * and (b) he took precautions against foreseeable acts or omissions of any such third party * * *.

Id. § 107(b).

The "innocent landowner" defense is an application of the "third party" defense of CERCLA § 107(b)(3), and is defined by CERCLA § 101(35)(A). That section defines "contractual relationship" to include "land contracts, deeds or other instruments transferring title or possession." *Id.* § 101(35)(A). Because of this broad definition, a landowner can have a "contractual relationship" with former owners in the property's chain of title, because the chain of deeds or other instruments transferring title creates an indirect contractual relationship between the owner and its predecessors in ownership. *See HRW Systems, Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318, 347 (D. Md. 1993) (owners of property contaminated by past owner in the chain of title were liable under CERCLA, subject to establishing at trial the elements of the "innocent landowner" defense); *U.S. v. Hooker Chemicals & Plastics Corp.*, 680 F. Supp. 546, 557 (W.D.N.Y. 1988) ("innocent landowner" defense included in SARA because definition of "contractual relationship" otherwise precludes land purchasers from predicating a third-party defense on acts of predecessors in title).

CERCLA § 101(35)(A) creates an important exception to the existence of a "contractual relationship" between an owner and its predecessors in title, and it is this exception that forms the core of the "innocent landowner" defense. The exception was added to CERCLA expressly "to eliminate liability which might exist under [§ 107(a)] for landowners who acquired title to real property after the time hazardous substances, pollutants or contaminants had come to be located thereon and who, although they had exercised due care with respect to discovering such materials, were nonetheless ignorant of their presence." H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess., at 187 (1986). The exception provides that a deed or other instrument transferring title or possession is not a "contractual relationship" under CERCLA if the contaminated property was acquired *after* the disposal of the hazardous substance *and* if the landowner establishes one or more of the following by a preponderance of the evidence:

> (i) At the time the [landowner] acquired the [contaminated property] the [landowner] did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the [property].
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> * * * * * * *
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> (iii) The [landowner] acquired the [property] by inheritance or bequest.

CERCLA § 101(35)(A)(i) & (iii).[6] To establish that a landowner had "no reason to know" of the contamination prior to the acquisition, the landowner must show by a preponderance of the evidence that at the time of acquisition he undertook:

> [A]ll appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

Id. § 101(35)(B).

The extent of the inquiry required to establish the defense is judged as of the time the person claiming "innocent landowner" status acquired the property, and is evaluated on a sliding scale, depending upon the nature of the acquisition:

> The duty to inquire under this provision shall be judged as of the time of acquisition. [Purchasers] shall be held to a higher standard as public awareness of the hazards associated with hazardous substance releases has grown * * *.

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[6] CERCLA § 101(35)(A)(ii) concerns government entities, and is not applicable to this case.

> Moreover, good commercial or customary practice with respect to inquiry in an effort to minimize liability shall mean that a reasonable inquiry must have been made in all circumstances, in light of best business and land transfer principles.
>
> *Those engaged in commercial transactions should, however, be held to a higher standard than those who are engaged in private residential transactions. Similarly, those who acquire property through inheritance or bequest without actual knowledge may rely upon this section if they engage in a reasonable inquiry, but they need not be held to the same standard as those who acquire property as part of a commercial or private transaction, and those who acquire property by inheritance without knowing of the inheritance shall not be liable, if they satisfy the remaining requirements of section 107(b)(3).*

H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess., at 187 (1986) (emphasis added); *see also HRW Systems, Inc.*, 823 F. Supp. at 347 ("It is clear that the standards which the Court must apply to an analysis of the appropriateness of the owner's conduct must be those which were in effect at the time of the purchase."); *U.S. v. Serafini*, 791 F. Supp. 107, 108 (M.D. Pa. 1990) (applying 1969 standards to owner's "innocent landowner" claim); *U.S. v. Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. 1341, 1348 (D. Idaho 1989) (discussing degree of inquiry required of commercial versus private transactions or inheritances).

To summarize, a current owner of contaminated property is liable for response costs under CERCLA, unless he proves that the damage was caused solely by an act of God, an act of war, or by someone with whom he has no direct or indirect contractual relationship. The absence of a contractual relationship with predecessors in the property's chain of title is established by showing that the landowner had "no reason to know" of the contamination; that showing is made by the owner having undertaken "all appropriate inquiry" prior to the acquisition or by acquiring the property by "inheritance or bequest." The degree of "appropriate inquiry" required depends upon when the property was acquired, and the circumstances under which it was acquired. Finally, the landowner must fulfill the remaining requirements of § 107(b)(3) by exercising "due care" with respect to the hazardous substance and taking "precautions" against the foreseeable acts of third parties with respect to the hazardous substance. CERCLA §§ 101(35)(A) & (B), and 107(b)(3). The statute makes clear that the

landowner bears the burden of establishing all requisite elements of the "third party" defense by a preponderance of the evidence, including the factors determining whether the landowner is "innocent." *Id.*; *Washington v. Time Oil Co.*, 687 F. Supp 529, 531 (W.D. Wash. 1988) (defense under CERCLA § 107(b)(3) is affirmative defense, and landowner has the burden of establishing by a preponderance of the evidence that it is entitled to the defense).

B. *Factual Background*

The facts underlying TFI's petition for reimbursement are largely uncontroverted and are set forth in detail in the Preliminary Decision.[7] TFI is a real estate investment partnership consisting of six children of Samuel A. Tamposi, Sr. The Site is a two-acre tract located in a residential area of Nashua, New Hampshire. TFI owned a parcel of land in the tract.[8] The remaining land was owned by individuals unrelated to TFI. TFI's parcel was undeveloped, and featured, in petitioner's words, "rough terrain, numerous trees and heavy scrub and brush growth." TFI's Response to Region's Request for Additional Information (hereafter Supplemental Response), at ¶ 53. The property was zoned for residential use, and was held by TFI for "investment purposes." *Id.* ¶ 4.

TFI acquired the property from Samuel Tamposi by gift in December 1983. TFI paid no consideration for the property, but Samuel Tamposi valued the property at $20,000 for gift tax purposes. TFI's Response to Preliminary Decision at 17. The petition alleges that Samuel Tamposi acquired the property in 1978 by quitclaim deed from Broadacres, Inc., a New Hampshire corporation in which Tamposi was the sole shareholder.[9] Broadacres, Inc., acquired the property in 1963 from Thomas Leonard. Leonard acquired the property in 1962 from his predecessor in the chain of title, Ken Spaulding. TFI presented no evidence concerning earlier owners.

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[7] TFI did not dispute the facts set forth in the Preliminary Decision, but offered what it termed "additional" and "pertinent" facts in its response to the Preliminary Decision. Response to Preliminary Decision at 1-5. We have incorporated these "additional" and "pertinent" facts where relevant.

[8] TFI owned three lots in the neighborhood: lots 8, 63, and 65. The record is somewhat confusing with respect to whether lot 8 is included in the Site. It was included in Site descriptions contained in EPA's Preliminary Assessment, but the UAO required remediation only on lot 65 and a portion of lot 63. NUS Corporation, Preliminary Assessment of Russell Avenue Asbestos Area, at 1 (Mar. 21, 1988); UAO at 2.

[9] Samuel Tamposi testified by affidavit that he owned the property from "1968 until 1983," S. Tamposi Aff. at ¶ 1 (emphasis added), but the title documents obtained by the Agency show that the transfer from Broadacres occurred in 1978. Preliminary Decision at 3.

TFI acknowledges that it has been involved in "hundreds of real estate transactions." Supplemental Response, ¶ 21. Its sole business is real estate development, and it began doing business in 1979. *Id.* ¶ 23. All but two of the partners "were in the real estate business, had licenses as sales people or brokers and had taken the necessary courses." *Id.* ¶ 42. Samuel Tamposi, Sr., the grantor of the property and father of the petitioner's partners, worked as a real estate developer for approximately 30 years. *Id.* ¶ 24.

Samuel Tamposi, Sr. testified by affidavit that he did not inspect the property for asbestos or hazardous substances at the time he acquired it, and that he was "not aware" of asbestos disposal on the property prior to being notified by State and federal authorities. S. Tamposi Aff. ¶ 2, 3. TFI acknowledges that it made no inspection of the property whatsoever prior to the transfer, and made only a "casual inspection" after the acquisition. Petition at 5, Supplemental Response, ¶ 11.

In 1985 the State of New Hampshire and EPA discovered asbestos contamination on the Russell Avenue property. According to the affidavit of EPA's On-Scene Coordinator (OSC), Paul Groulx, (hereafter "Groulx Aff."), the Tamposi parcel contained "considerable amounts of asbestos wastes" that were "plainly visible to the naked eye." Groulx Aff. ¶ 5. According to Groulx:

> This exposed asbestos included friable baghouse-type asbestos waste and friable and non-friable asbestos sheet scraps. Friable asbestos is a type of asbestos that is easily crumbled or pulverized and is considered extremely hazardous to human health, because its deterioration causes ongoing releases of asbestos fibers. The exposed asbestos was most prevalent along the surface of a steep fill slope at the end of Russell Avenue and at a terraced section at the toe of the slope.

Id. Photographs appended to the Groulx affidavit, taken at the time of the inspection, depict a light-colored crumbled material visible on the surface of the land, and strips or sheets of material partially covered with dirt, dead leaves, and vegetation. *Id.* Exh. D. EPA took samples of asbestos material from the Tamposi property, including ten samples from asbestos on the ground surface. *Id.* ¶¶ 6-7 and Exh. E, F.

TFI contends that the asbestos waste was produced by Johns-Manville Corporation, which operated a plant in Nashua, New Hampshire from the early 1900's through the early 1980's. The record

evidence supports that contention. The NUS Preliminary Assessment, prepared for EPA, provided the following summary:

> The Johns-Manville Corporation formerly of Nashua, New Hampshire, allegedly disposed of assorted forms of asbestos waste at an estimated 100 sites in the Nashua/Hudson area from [the] 1920's/1930's to the early 1970's. The major forms of asbestos waste deposited at these sites were baghouse waste, pelletized waste, and sheet scrap. Action is being taken at the asbestos-contaminated areas under the "immediate removal" provisions of CERCLA to eliminate the threat to public health. Federal enforcement action was initiated when the Johns-Manville Corporation declared bankruptcy in 1983 while facing numerous lawsuits by people claiming health injuries from exposure to asbestos.

NUS Preliminary Assessment at 1.

Documents generated by Johns-Manville and made a part of the record herein support the above summary.[10] A 1975 Johns-Manville internal memorandum described 38 known asbestos disposal sites in the Nashua/Hudson area, and stated that "[u]ndoubtedly there are as many more presently unknown[.]" Johns-Manville Memorandum (June 1975) (J-M Mem.), at 1. The Russell Avenue Site did not appear by name in the memorandum. The memorandum explains that Johns-Manville asbestos waste was made available to the public as "fill" material. Waste hauling was handled by outside contractors until 1960. At that time:

> [L]ocal management undertook the program of waste disposal as a regular plant function in order to obtain a tidy cost reduction. Many people, concerns, etc., still clamored for our inorganic "fill" as an economic means of substantially upgrading sub-standard areas to valuable properties. The plant, therefore, continued the practice that had been established by the outside contractors. There was little formality involved in the procedures. Normally, J-M agreed to haul the waste with

[10] The documents were provided to OWPE by the State of New Hampshire in 1990, and were originally obtained by the State pursuant to discovery conducted in connection with the federal litigation against Johns-Manville. *See* Letter from State of New Hampshire Attorney General, Environmental Protection Bureau, to U.S. EPA OWPE (Nov. 1, 1990).

> the proviso that property owners level and cover our material. In most cases, undesirable sites (mosquito infested swamps, gullies, etc.) were converted to fine appearing usable properties to the delight of the owners and neighbors.

J-M Mem. at 3. Due to increasing public awareness of the hazards posed by waste asbestos, use of the material as "fill" in the Nashua/Hudson area ceased in the mid-1970's. *Id.* at 4.

The affidavit of Paul Groulx, and the exhibits thereto, document that the issue of asbestos contamination in the Nashua and Hudson communities gained extensive local, as well as some national, media attention in the early 1980's. Exhibit H to the Groulx affidavit includes dozens of print and broadcast reports on asbestos contamination in Nashua and Hudson that all predate TFI's acquisition of the Site in December 1983. Many print reports appeared in the local *Nashua Telegraph* and the *Manchester Union Leader*, and described widespread asbestos disposal by Johns-Manville and EPA's efforts to locate and remediate dumpsites. Groulx Aff. Exh. H. The *Nashua Telegraph* in June 1983 announced a public meeting with EPA to answer local residents' questions about the remediation of asbestos disposal sites. *Id.* (*Nashua Telegraph*, June 29, 1983). Remediation of the first known dumpsites began in 1983, and received substantial coverage, *e.g.*:

> EPA-hired crews dumped 70 loads of packaged asbestos waste at the city landfill so far this week as part of a federally funded cleanup plan here and in Hudson.
>
> The plastic covered asbestos filled containers were hauled to the landfill from a Hudson front yard, one of seven sites earmarked for action by [EPA].

Id. (*Nashua Telegraph*, July 27, 1983).

The media reports also described a federal court CERCLA suit filed by EPA in 1981 against Johns-Manville as well as six owners of asbestos-contaminated land in the Nashua-Hudson area. Groulx Aff. Exh. H. Articles appearing shortly before TFI acquired the Site in 1983 discussed the potential liability local landowners faced:

> The EPA filed suit in June 1981 against Manville and the owners of six sites where asbestos waste was used as fill. Its intent was to force the firm and the owners

> to cover the potentially hazardous material. Federal officials maintain that particles from the uncovered waste could become airborne, particularly in dry summer conditions, and pose a danger to nearby residents or passersby. Asbestos particles have been found to cause lung disease if inhaled.
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> * * * * * * *
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> [EPA] is in the process of contacting [additional] landowners regarding the possible federal cleanup work on their properties.

Id. (*Nashua Telegraph*, May 31, 1983). A report in July 1983 noted that:

> [EPA], which began a $750,000 asbestos waste cleanup project yesterday in Nashua, is seeking court injunctions against two Hudson landowners who have refused to allow asbestos waste on their properties to be covered.
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> * * * * * * *
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> According to [the Justice Department], the federal government filed requests in U.S. District Court in Concord late last week to force Nashua real estate dealer Anthony Matarazzo and Hudson restaurant owner Arthur Bursey to allow the EPA access to their properties.

Id. (*Nashua Telegraph*, July 12, 1983). An editorial in the *Nashua Telegraph* articulated the questions facing local owners and purchasers of real estate:

> As for future liability * * * that's something that has been bothering us all along. * * * What if a person was unaware of the presence of asbestos when he/she purchased a piece of property? Can that person take action against the previous owner? If not, does the EPA discovery and action place liability on the heretofore unknowing property owner?

Id. (*Nashua Telegraph*, Aug. 17, 1983).

Coverage was not limited to local media. In September 1983, the *Wall Street Journal* reported on the asbestos contamination in

Nashua/Hudson, and described specifically the potential cleanup liability faced by area landowners, and the potential loss of property values caused by the contamination:

> [T]he government [by law] must recover any Superfund money it spends. Manville's bankruptcy proceedings make it an unlikely candidate to repay the government in the foreseeable future. Thus, landowners fear that federal officials may try to collect from them.
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> * * * * * * *
>
> With the [bankruptcy] proceedings likely to drag on for years, local landowners face a protracted period of financial uncertainty. Meanwhile, they have a more immediate worry. The EPA insists that the deeds of the properties it is cleaning up be amended to reflect the presence of asbestos. But landowners fear that if the EPA prevails, property values will plummet.

Id. (*Wall Street Journal*, Sept. 13, 1983).

Petitioners acknowledge familiarity with local newspapers, including the *Nashua Telegraph* and the *Manchester Union Leader*, and general awareness of media reports on asbestos contamination. Supplemental Response ¶¶ 12, 44, 45, 56.

Upon being notified of the presence of asbestos on the Site, TFI and EPA engaged in discussions with respect to the action to be taken in remediating the Site. After issuance of the UAO, TFI retained the services of Balsam Environmental Consultants, Inc., to perform the asbestos remediation required by the UAO. Balsam completed its remediation work in December 1987, although the remedy has required additional maintenance since that time. *See* TFI Response at 7; Affidavit of Daniell R. Spear.

II. *DISCUSSION*

CERCLA does not create a right to a hearing on § 106(b) reimbursement petitions; it is within the Board's discretion whether an evidentiary hearing is necessary to resolve disputed issues. *See Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions*, at 9-10 (EAB, June 9, 1994). In cases where it appears that live testimony or argument will not aid the Board in ruling on a petition, the Board will decide the issues raised on the basis of the written submissions and documents

received from the petitioner and the Region. *Id.* In this case, the Board concludes that the documents and written submissions provide ample basis for deciding the issues raised, and therefore an evidentiary hearing is not warranted.

TFI contends that it is not liable for the response costs it incurred in remediating its property because it has established a complete defense to liability under CERCLA § 107(b)(3). As noted above, that section provides a defense to liability where a release of a hazardous substance is caused "*solely* by * * * an act or omission of a third party other than * * * one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly" with the liable party. CERCLA § 107(b)(3) (emphasis added). First, TFI contends that it has established a complete "third party" defense under that section because the release of asbestos at the Site was caused solely by Johns-Manville, and TFI has no direct or indirect contractual relationship with Johns-Manville. TFI contends that it is not necessary for it to establish the elements of the "innocent landowner" defense contained in CERCLA § 101(35)(A), because "this section is inapplicable where the contamination occurred while the property was in the hands of third parties and then conveyed to yet another third party before it came to be held by the current owner, in this case the Petitioner." Petition at 6. Alternatively, TFI contends that if the requisites of the "innocent landowner" defense apply to it, it has made out such a defense because it did not know and had no reason to know of the asbestos disposal on the property, or because it acquired the property by "inheritance or bequest." *Id.* at 6-7. Finally, TFI contends that it fulfilled the remaining requirements of § 107(b)(3)(a) & (b), because it exercised "due care" with respect to the asbestos waste, and it took "precautions" against the foreseeable acts of third parties with respect to the waste.

In response, the Region contends that TFI has failed to establish the elements of a third party defense by a preponderance of the evidence, because the release of asbestos was not caused "solely" by the act or omission of a third party. The Region contends that releases of asbestos fibers into the air occurred during TFI's ownership of the property, and that those releases defeat the availability of the third party defense. The Region further contends that TFI has failed to establish the requisite elements of a third party defense, because TFI has a contractual relationship with its predecessors in the property's chain of title, and TFI has presented no evidence that its predecessors did not themselves cause the release by digging or moving the asbestos waste, or did not themselves have a contract with Johns-Manville to dispose of asbestos waste on the property. The Region contends that TFI is not

entitled to the "innocent landowner" defense of § 101(35)(A) because it did not make "all appropriate inquiry" into the previous ownership and uses of the property. Finally, the Region contends that TFI did not acquire the property by "inheritance or bequest," and therefore cannot claim innocent landowner status on that basis.

We agree with the Region that TFI has not established the elements of a CERCLA § 107(b)(3) third party defense by a preponderance of the evidence. Although the evidence amply demonstrates that Johns-Manville was the likely *source* of the asbestos material that found its way to the Russell Avenue property, and that disposal occurred sometime prior to TFI's 1983 acquisition of the property, TFI has presented no evidence whatsoever that its predecessors in the chain of title to the property — with whom, as explained *supra*, TFI has a "direct or indirect contractual relationship" — did not dispose of the asbestos waste on the Site, contract for such disposal with Johns-Manville, or otherwise permit such disposal to occur. TFI has presented only the affidavit of its immediate predecessor in title, Samuel Tamposi, Sr., who declares simply that he was "unaware" of asbestos disposal on the property. TFI has made no showing with respect to earlier owners in the chain of title. Thus, TFI has not established by a preponderance of the evidence that Johns-Manville "solely" caused the release of asbestos on the Site, and therefore an essential element of the § 107(b)(3) third party defense is lacking. *Washington v. Time Oil Co.*, 687 F. Supp. at 531.[11]

In these circumstances, the only avenue available to TFI for negating the legal consequences of the contractual relationship it has with its predecessors in title (for purposes of defeating CERCLA liability) is to establish the requisite elements of the "innocent landowner" defense of CERCLA § 101(35)(A) by a preponderance of the evidence. TFI contends that § 101(35)(A) is inapplicable because the contamination occurred while the property was owned by someone other than TFI's immediate predecessor, Samuel Tamposi, Sr. Even assuming that the disposal occurred before Samuel Tamposi, Sr., acquired the property,[12] TFI's contention is incorrect. The scope of "contractual relationship" under CERCLA § 107(b)(3) is not limited to

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[11] Given our decision that TFI has failed to establish an essential element of its third party defense, we do not reach the Region's contention that TFI's third party defense fails because releases of asbestos fibers occurred during TFI's ownership.

[12] The evidence on this point is equivocal at best. TFI points to a 1985 report that 25 to 30 year old trees were rooted in the asbestos waste, and contends that this evidence demonstrates

Continued

one's immediate predecessor in title, but is broad enough to include a chain of deeds reaching to past owners. In fact, it was this breadth of liability that prompted Congress to add the "innocent landowner" defense to CERCLA in 1986. *See U.S. v. Hooker Chemicals*, 680 F. Supp. at 557; H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess., at 187 (1986). To hold otherwise would be to encourage the use of "sham" transfers in order to defeat CERCLA liability. *See U.S. v. DiBiase*, 1993 U.S. Dist. LEXIS 20031 (D. Mass. 1993), *aff'd* 45 F.3d 541 (1st Cir. 1995).

As discussed above, in order to establish that it is an "innocent landowner," TFI must prove by a preponderance of the evidence that, at the time of the transfer, TFI "did not know and had no reason to know" that asbestos waste had been disposed of on the Russell Avenue property. CERCLA § 101(35)(A). TFI can establish that it had "no reason to know" by demonstrating that it made "all appropriate inquiry" into the ownership and uses of the property "consistent with good commercial or customary practice in an effort to minimize liability." *Id.* § 101(35)(B). Further, the appropriateness of the inquiry is judged in light of the purchaser's knowledge and experience, the purchase price of the property, the obviousness of the contamination, and the ability to detect the contamination by an appropriate inspection. *Id.*

TFI admits that it made no inspection of the property prior to the transfer, and made only a cursory inspection afterward. Petition at 5, Supplemental Response ¶ 11. TFI argues, however, that the lack of pre-acquisition inspection was appropriate in light of the prevailing practices in 1983,[13] and in light of the fact that the transfer was a gift from the father of TFI's partners. TFI has presented the affidavit testimony of two real estate experts with respect to pre-acquisition property inspections in 1983. One New Hampshire real estate appraiser stated that:

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that disposal occurred prior to Samuel Tamposi, Sr.'s, ownership. Response to Preliminary Decision at 2. But TFI also acknowledges that disposal occurred "during a 70 year period beginning in the early 1900's." *Id.* The Manville documents do not elucidate when disposal may have occurred on this particular site, but it appears from the documents that most of the dumping in Nashua took place sometime during the 1960's. The preponderance of the evidence simply does not demonstrate that disposal necessarily occurred before 1963 when Mr. Tamposi's closely-held corporation acquired the property.

[13] TFI contends that because the transfer was familial, the relevant date for evaluating the reasonableness of any pre-acquisition inquiry should be 1978, when Broadacres, Inc., transferred the property to Samuel Tamposi, Sr., or even 1963 when Broadacres acquired the property. We disagree. The statute plainly indicates that the relevant time is the time when the person asserting "innocent landowner" status acquired the property. CERCLA § 101(35)(A).

> In 1983, it was not the customary or accepted practice in New Hampshire to perform an environmental assessment for asbestos on an undeveloped piece of land such as the tract in question. Customary commercial practice would have involved either a familiarity with the site or a "walk over" with check of local records with respect to known or reported contaminated sites.

Aff. of Robert G. Bramley, at 2. A professional realtor testified similarly that:

> In my opinion, in 1983, it was not the customary or accepted commercial practice to perform an environmental assessment for asbestos on an undeveloped piece of land. Customary or commercial practice would have involved either a familiarity with the site or a "site visit".

Aff. of Karl E. Norwood, at 2. Both experts testified that:

> This is particularly true under the circumstances of this matter where [TFI] was familiar with the property and with the predecessor-in-title ownership for the previous 20 years.
>
> [I]t is my opinion that [TFI] acted consistently with good commercial or customary practice in accepting as a gift, the Russell Avenue property based only upon their familiarity with the property and the ownership of the predecessor-in-title, Samuel Tamposi, Sr., and without obtaining environmental assessment.

Bramley Aff. at 2; Norwood Aff. at 2.

TFI's experts articulate a very low standard of care for local real estate transactions in 1983, particularly given the publicity surrounding asbestos contamination in the area, the fact that the federal cleanup of seven local contaminated sites began in 1983, and the fact that numerous stories concerning possible landowner liability for asbestos contamination in the area had appeared in the local press. Further, the fact that a practice is routinely followed does not necessarily mean that it is "consistent with *good* commercial or customary practice" as the statute requires, especially when immediate local events suggest that the customary standard is inadequate. CERCLA § 101(35)(B) (emphasis added); *see In re Hemingway Transport, Inc.*,

174 B.R. 148, 169 (Bankr. D. Mass. 1994) ("[J]ust because the lack of diligence may have been routine it does not follow that the customary practices were either good or commercially reasonable.").

Moreover, we agree with the Region that even if we accept these affidavits as articulating the appropriate standard of diligence for a pre-acquisition inquiry in Nashua, New Hampshire, in 1983, TFI failed to meet even that weak standard. Both of TFI's experts state that customary practice in 1983 would have involved either familiarity with the site, or a site visit. TFI does not claim that it had any actual familiarity with the property itself by having walked it in the past, and TFI acknowledges it made no visit to the property to conduct even a visual inspection before the transfer of ownership. *See U.S. v. Serafini*, 791 F. Supp. at 108 (testimony established that standard of care in 1969 required commercial real estate purchasers to at least view or inspect land before purchase; failure to do so defeats "innocent landowner" claim). TFI's "familiarity" with the Site stems only from the fact of Samuel Tamposi's ownership. TFI did nothing affirmative to familiarize itself with the land it accepted from Samuel Tamposi, let alone take steps to minimize any liability it might acquire in accepting the land, despite the fact that it intended to hold the land for investment purposes. On this record we cannot agree that TFI has met its burden of establishing that its inaction constituted "good commercial or customary practice."

Moreover, examining TFI's "inquiry" in light of the statutory factors set forth in CERCLA § 101(35)(B) confirms that TFI has not established by a preponderance of the evidence that it had "no reason to know" of asbestos contamination on the property. The evidence in fact suggests that there was reason for TFI to conduct at least a thorough walk-over of the property prior to the transfer of ownership. First, TFI acknowledges that it was a real estate investment partnership that engaged in many hundreds of real estate transactions in the Nashua, New Hampshire area; TFI thus had "specialized knowledge or experience" concerning matters affecting area real estate, including asbestos contamination. *See* CERCLA § 101(35)(B). Second, as noted above, there was ample "commonly known or reasonably ascertainable," information about the asbestos waste problem in Nashua and the surrounding area that should have alerted TFI to the potential for waste asbestos disposal on its vacant lots. *Id.* TFI admits having general knowledge about the problem based on local news coverage. While there was no specific information that the Russell Avenue property was contaminated, the notoriety of the waste problem certainly suggests that TFI's inaction was highly imprudent even for someone accepting property as a gift. *See Hemingway Transport*, 174 B.R. at

171 (notoriety of community's waste problem and proximity of contaminated wells to property imposed higher duty of care). With respect to the last factor, "the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection," CERCLA § 101(35)(B), TFI argues that the rough nature of the Site's terrain made an inspection difficult, and that asbestos might not have been visible on a walk-over. However, that contention is refuted by the affidavit of EPA's OSC Paul Groulx, who observed "considerable amounts of asbestos wastes at the Site that were plainly visible to the naked eye," and who took surface samples of asbestos waste as well as photographs of visible waste. Groulx Aff. at ¶ 5 and Exh. D. TFI has not presented any evidence to rebut this testimony and therefore we must find that the waste asbestos was plainly visible and would have been seen on an inspection of the property.[14]

In sum, we conclude based on the foregoing that TFI has not established by a preponderance of the evidence that it "did not know and had no reason to know" prior to acquisition that asbestos waste had been disposed on the Russell Avenue property. TFI cannot, therefore, claim a defense to CERCLA liability as an "innocent landowner" on that basis.

TFI's remaining argument that it is an "innocent landowner" is premised on its contention that it acquired the Russell Avenue property by "inheritance or bequest," within the meaning of CERCLA § 101(35)(A). TFI argues that "bequest" should be read broadly to include "any transfer to successors or posterity," including an *inter vivos* gift such as that made by Samuel Tamposi, Sr., to the real estate investment partnership comprised of his adult children.

We reject TFI's argument that under these circumstances the receipt of a gift of property confers "innocent landowner" status upon TFI. First, the usual meaning of "inheritance" is "[p]roperty which descends to [an] heir on the *intestate death* of another." *Black's Law*

[14] The third evaluation factor under § 101(35)(B) is "the relationship of the purchase price to the value of the property if uncontaminated[.]" Because the property was given to TFI, and TFI paid no consideration to Samuel Tamposi for the property, this factor is of limited relevance in evaluating whether TFI should have known the property was contaminated. TFI asserts that the $20,000 value assigned to the property by Samuel Tamposi for gift tax purposes represents fair value for the land if uncontaminated. Even if this fact were relevant to our analysis, TFI has offered no evidence of fair value for comparable properties, and therefore we cannot determine whether TFI's contention is accurate. Further, the other factors considered in evaluating TFI's pre-acquisition inquiry overwhelmingly demonstrate that it was not "appropriate" and that TFI is not entitled to claim innocent landowner status.

Dictionary (5th ed. 1979) (emphasis added). "Bequest" means "a gift *by will* of personal property; a legacy." *Id.* (emphasis added) (also noting that a "bequest" of realty is properly termed a "devise"). It is obvious that the use of the two terms in the statute is intended to confer "innocent landowner" status only on persons who acquire real property upon the death of the owner, either by the laws of intestacy or by will, and who would not necessarily have the opportunity to make any inquiry as to the status of the property. Even then the legislative history of CERCLA § 101(35)(A) makes clear that the focus is on any knowledge, or opportunity to gain knowledge, of environmental contamination that the person claiming "innocent landowner" status has before the inheritance or devise, and that persons who acquire property through inheritance or devise *with knowledge* of the acquisition must still engage in a "reasonable inquiry" into the past ownership and uses of the property. Only those "who acquire property by inheritance *without knowing of the inheritance shall not be liable.*" H.R. Conf. Rep. No. 962 at 187; *see U.S. v. Pacific Hide and Fur*, 716 F. Supp. 1341, 1347 (D. Idaho 1989) (transaction that was "like an inheritance" was nevertheless subject to some degree of inquiry, although lenient standard applied because of nature of transaction). Thus, even if "inheritance or bequest" encompasses *inter vivos* gifts in some circumstances, knowledge of the transfer triggers the obligation to make an inquiry that is reasonable under the specific circumstances.

TFI relies on *U.S. v. Pacific Hide and Fur Co.*, 716 F. Supp. 1341, as support for its argument, but that case is consistent with the analysis outlined above and does not further TFI's cause. In *Pacific Hide* the court concluded that defendants who acquired stock in a scrap metal recycling company by gift and inheritance, and later briefly became "owners" of the facility when the stock was redeemed upon dissolution of the corporation, were entitled to claim innocent landowner status despite the fact that they made no inquiry into the environmental condition of the site. The court observed that the defendants did not acquire the property as part of a commercial transaction, and that a lower standard of care should therefore be applied in evaluating the degree of inquiry required. *Pacific Hide* at 1347 ("[The SARA] legislative history establishes a three-tier system: Commercial transactions are held to the strictest standard; private transactions are given a little more leniency; and inheritances and bequests are treated the most leniently of these three situations."). The court found that "[t]he present case is actually more like an inheritance than a private transaction," and so applied a very lenient standard of inquiry. *Id.* at 1348. The court concluded that because the defendants had no involvement whatsoever in the operations of the scrap metal

company, and had acquired their interest in the company by familial gift and corporate dissolution when they were "barely out of their teenage years," it was "reasonable under all the circumstances" that they conducted no inquiry into the environmental condition of the property. *Id.* The same surely cannot be said of the circumstances surrounding TFI's acquisition of the Russell Avenue property, in which a real estate developer transferred a parcel of land for no consideration to a real estate investment partnership comprised of his adult children, who intended to hold the property for investment purposes as part of their business operations.

III. *CONCLUSION*

For all of the foregoing reasons, we find that TFI has not established by a preponderance of the evidence that it is an "innocent landowner" under CERCLA because TFI has not proven that it had "no reason to know" of the asbestos waste deposited on the Russell Avenue property. TFI has therefore not established that the release was caused solely by a third party with whom TFI had no contractual relationship.[15] The Region properly concluded that TFI was liable for the costs of remediating the hazards posed by the asbestos waste on the Russell Avenue property, because TFI was the "owner" of the property within the meaning of CERCLA § 107(a)(1). Accordingly, we deny TFI's petition for reimbursement of the costs of the cleanup.

So ordered.

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[15] Because we conclude that TFI has not established that the release of asbestos waste was caused solely by a third party with whom TFI had no contractual relationship, it is unnecessary for us to address TFI's arguments that it exercised "due care" and took "precautions" with respect to the waste. CERCLA § 107(b)(3)(a) & (b). It is also unnecessary for us to decide whether the costs incurred by TFI were "reasonable." *Id.* § 106(b)(2)(A).