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alert

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Court Rules No Apportionment Under Connecticut Transfer Act

Related practice areas:
Environmental and Land Use Litigation

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Entities that have signed as the Certifying Party pursuant to the Connecticut Transfer Act take note – for Transfer Act sites with multiple Certifying Parties on file with the Department of Environmental Protection ("DEP"), DEP can opt to enforce Transfer Act obligations against only one Certifying Party. Although a Certifying Party may have other avenues to recover cleanup costs from other responsible parties, a Connecticut superior court has ruled that asserting the special defense of apportionment in a DEP enforcement action is not one of those avenues. In *Commissioner of Environmental Protection v. Sergy Company, LLC et al.*, No. X0684018262S, 2010 Conn. Super. LEXIS 615 (Conn. Super. Ct. March 10, 2010), the court (Stevens, J.) ruled that the harm at issue was solely caused by the defendant's failure to meet its own statutory obligations when it signed as the Certifying Party pursuant to the Transfer Act. Thus, there was no harm to apportion.

Transfer Act Liability Scheme

The underlying goals of the Transfer Act are to protect transferees of contaminated properties and to promote cleanup of properties by requiring a person associated with the transfer to assume certain investigation and cleanup obligations. Upon the transfer of a business or real property involved in the generation of hazardous waste (referred to as an "establishment"), the Transfer Act requires a party (the "Certifying Party") to that transfer to certify to DEP that it will be responsible for undertaking necessary investigation and cleanup work. DEP may seek penalties against a Certifying Party that fails to fulfill its obligations.

Underlying Facts

In the *Sergy* case, DEP sued Sergy Company, LLC ("Sergy"), the current owner of the contaminated property, and Magnetek, Inc. ("Magnetek"). In 2001, Magnetek signed a Form III under the Transfer Act as the Certifying Party when it sold the property to Sergy. In 2002, DEP informed Magnetek that it was required to submit a proposed schedule to investigate and remediate the property as required by the

Transfer Act as a result of its Form III filing. Magnetek failed to file this schedule. Further, Sergy and Magnetek disputed which entity was responsible for costs to operate a groundwater PCB treatment system for the property. The system ceased to operate and, as a result, caused PCB contamination.

DEP filed suit seeking an order requiring Magnetek to comply with the Transfer Act and an order to pay a civil penalty not to exceed $25,000 per day pursuant to Connecticut General Statutes ("C.G.S.") § 22a-134b. DEP's complaint alleges that Magnetek filed a Form III certification but failed to comply with the subsequent Transfer Act requirements. Magnetek answered that a previous party had filed a Form III in 1986 and that party had performed a cleanup under DEP's supervision. Based on its understanding of the cleanup history, Magnetek originally filed a Form II with DEP. Magnetek asserted that DEP staff later informed Magnetek that a Form III was required for the 2001 transfer and that DEP would continue to look to the 1986 Certifying Party to complete the outstanding obligations to complete the Transfer Act remediation. In its answer to DEP's complaint, Magnetek asserted a special defense of common-law apportionment to DEP's claim, which defense was struck by the trial court.

The Court's Reasoning

The court granted DEP's motion to strike Magnetek's special defense of apportionment on the grounds that the harm giving rise to DEP's action was Magnetek's own failure to comply with the Transfer Act and this harm cannot be apportioned since it was caused by only one entity. The court concluded that "in an enforcement action seeking civil penalties and injunctive relief under the Transfer Act, the statutory scheme does not recognize or accommodate any 'apportionment' of these responsibilities as purportedly asserted in Magnetek's special defense." *Commissioner of Environmental Protection v. Sergy Company, LLC et al.*, X0684018262S, 2010 Conn. Super. LEXIS 615, p. *12 (Conn. Super. Ct. March 10, 2010). The court noted that DEP's allegations of wrongdoing involved Magnetek's own failure to submit the required schedule to comply with Magnetek's Transfer Act duties.

Magnetek relied on *Connecticut Building and Wrecking Co. v. Carothers,* 218 Conn. 580 (1991). However, the court distinguished *Carothers* on the basis that *Carothers* concerned cleanup costs incurred in complying with an environmental order, versus civil penalties sought by DEP under the Transfer Act. The court did indicate that apportionment is available to a defendant "who may be liable for damages in an underlying action where the fault of other parties may have contributed to a plaintiff's injury." *Commissioner of Environmental Protection v. Sergy Company, LLC et al.*, at p. *12.

Implications for Certifying Parties

In a situation where there has been more than one Certifying Party in a chain of transfers, DEP may elect to seek enforcement against any one of the Certifying Parties rather than choose to enforce against the entity that caused the contamination. Although this decision seems to unfairly penalize one party for the fault of prior parties, it does not rule out the possibility that another superior court judge could disagree and distinguish this decision. For example, in a case where DEP sues a Certifying Party that is not the sole cause of the harm alleged by DEP, the situation may involve facts permitting a judge to consider apportionment.

Even though the *Sergy* decision denied Magnetek the special defense of apportionment, there are other remedies available to similarly situated parties. The Transfer Act permits a transferee to recover damages from the transferor and "renders the transferor of the establishment strictly liable, without regard to fault, for all remediation costs and for all direct and indirect damages." C.G.S. § 22a-134b. However, this cause of action is limited and does not provide remedies against previous transferors in the chain of title. A defendant could sue prior parties pursuant to C.G.S. § 22a-452 to recover costs; however, a party such as Magnetek would have the burden of proving negligence on the part of the prior transferors. Such a lawsuit could prove costly.

The *Sergy* decision underscores the importance of proceeding with caution when transferring a property subject to the Transfer Act. Transferees should obtain as much information as is available relative to previous filings made by Certifying Parties prior to agreeing to sign the filing as a Certifying Party and thereby exposing themselves to DEP enforcement, regardless of their factual culpability.

Bar Admissions: Connecticut [CT] Maine [ME] Massachusetts [MA]