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State Liability Reforms for Third Party/Toxic Tort Liability Protection – *A Conversation Starter*

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Are third party and toxic tort protections the next wave of brownfields reforms? Gerald Pouncey, an attorney who has been involved in over 250 brownfield projects nationally, believes that state and federal reforms are going to have to go that direction if the brownfields gains of the last 15 years are going to be maintained. The problem, as Pouncy sees it, is that brownfields financing has been severely and possibly permanently impacted by the financial crisis – that lenders have become risk averse, and brownfields financing will be more difficult, even when some semblance of normalcy returns. He maintains that lenders and innocent purchaser/developers will need comprehensive third party liability protection, much like the measures that were adopted by Mr. Pouncey's home state, Georgia, in 2002.

Many brownfields professionals bifurcate environmental liability into two aspects that involve two entirely different solutions. First, there is liability relative to governmental enforcement actions, which is generally addressed through entering properties in state voluntary cleanup programs and by following the procedures prescribed to obtain federal "Bona Fide Prospective Purchaser" status. Second, there is third party and toxic tort (personal injury) liability which is generally assumed to be addressed only through private environmental insurance or "liability transfer."[1]

This article points out that some states offer third party liability protection through their voluntary cleanup programs (VCP) – these are generally divided into the following categories:

- States that offer general third party liability protection for innocent purchasers who are cleaning up under a state sanctioned plan – Connecticut, Georgia, and South Carolina;
- States that offer limited third party liability protection for a specific period of time or for particular activities – California, Missouri, and Massachusetts;
- States that offer some form of third party liability protection for public agencies and/or lenders – Wisconsin, Pennsylvania, New York, and New Jersey.

Given that third party liability is generally regarded as one of the primary obstacles to brownfields investments, it is surprising that there has been no research on the efficacy of the programs in the states that are pioneers in third party liability. Little is known, for example, about how the private sector has responded to these changes or whether the policies have been tested and upheld in court. This paper is intended to start that conversation.

Third Party Liability as a Priority

[1] One aspect of third party liability - contribution actions by responsible persons – is sometimes addressed in voluntary cleanup release language.

Third party liability protection is not a trifling matter. One analysis rated third party liability as the highest ranking impediment to brownfield investments. By employing a survey of 300 developers, analysts were able to rank the relative importance of various factors that impact project success, and "Eliminating 3rd party liability risk" was the top ranked (although somewhat theoretical) factor.[2]

The private sector has responded to fill this gap, providing a variety of environmental insurance and risk transfer services. Needless to say, these private services come with a significant price tag. The governmental response that most brownfields professionals are aware of is state-subsidized and pooled environmental insurance programs. Massachusetts has been the leader in the former, and Ohio is one of a number of states trying the pooling approach.[3] However, less recognized have been the efforts of a number of states to provide third party protection through their voluntary cleanup program liability releases. If states can lower liability barriers with the stroke of a pen rather than with major environmental insurance subsidies, then many states should be considering this area where only a few pioneers have gone, so far.

Definitions Needed. When one examines the language of these various efforts to redefine liability one finds a confusing array of terms. To start with there could be confusion over what is meant by the terms "third party liability" and "toxic tort." The author is not an attorney, but will advance a layman's understanding. "Toxic tort" lawsuits are personal injury lawsuits related to exposure to contamination. "Third party liability" encompasses toxic tort but also includes contribution actions by responsible persons, property damage or property value diminution lawsuits, citizen suits challenging cleanup decisions, and any other legal actions brought by entities that are not party to the agreement between the state and the entity that is being granted the immunity.

Another term sometimes cited in liability release language is "common law" or "common law equivalents." References to liability protections will sometimes refer to "liability under state statutes and the common law equivalents." Common law refers to law that is not based in statute, but rather is based on court case precedents going back to the English courts. Because third party/toxic tort actions are often brought under common law, these references are thought to confer toxic tort protection. However, attorneys have advised the author that legislative history would have to be reviewed in each state to determine legislative intent.

States with Broad Third Party Protection

Three states – Georgia, Connecticut, and South Carolina - appear to have broad third party liability protections, that is, if the party is innocent, unconnected to the responsible person (RP), and can demonstrate that the contamination occurred before their ownership, they are given broad third party liability protection.

Georgia. The state's third party protections, adopted in a comprehensive 2002 reform bill, come into play upon the state's acceptance of the applicant's corrective action plan.

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[2] Kris Wernstedt, Lauren Heberle, Anna Alberini, and Peter Meyer, "The Brownfields Phenomenon: Much Ado about Something or the Timing of the Shrewd?" November 2004 • Discussion Paper 04–46, Resources for the Future. http://www.rff.org/rff/Documents/RFF-DP-04-46.pdf
http://www.rff.org/rff/Documents/RFF-DP-04-46.pdf

[3] add links

> *(a) Upon the director's approval of the prospective purchaser corrective action plan or concurrence with the certification of compliance described in this Code section, whichever first occurs, a prospective purchaser shall not be liable to the state or any third party for costs incurred in the remediation of, equitable relief relating to, or damages resultant from the preexisting release, nor shall the prospective purchaser be required to certify compliance with risk reduction standards for ground water, perform corrective action, or otherwise be liable for any preexisting releases to ground water associated with the qualifying property.*[4] *(Emphasis added)*

Madeleine Kellam, Brownfields Coordinator for the Georgia Dept. of Natural Resources, Environmental Protection Division, confirmed that legislative intent was to provide broad third party liability protections. She indicated that private sector interest in brownfields and the regulatory relief available through the voluntary cleanup program increased fairly dramatically following the implementation of the law in 2002; however, she also indicated that the pre-2002 program was deficient in numerous ways, aside from the lack of third party protection. She commented that the third party liability protections generally make developers more comfortable with brownfields investments, noting that the enhanced protections are of particular interest when the reuse is going to be residential.

Gerald Pouncy, an attorney with the firm Morris, Manning, and Martin, was involved in the reform bill and with numerous subsequent brownfield redevelopment projects, both in Georgia and elsewhere. With this multi-state perspective, Pouncy asserts that the more aggressive protections in Georgia make a very significant difference for both developers and lenders. He also indicated that Georgia developers often forego environmental insurance because of the stronger state protections, a factor that helps level the playing field between brownfield and greenfield sites. He adds that the Georgia protections are linked to high soil cleanup standards (Superfund-equivalent), but developers regard the extra protections as worth the extra cost.

Pouncy also notes that some of the problems noted below in the Connecticut program were avoided in Georgia by making the protections effective upon reaching a cleanup agreement with the state, rather than upon *completing* the cleanup, as is the case in Connecticut. Lastly, and most importantly for the brownfields industry, Pouncy believes that it will be critical for other states and, hopefully the federal government, to strengthen liability protections, because, as he explains, "lenders have become permanently risk averse and brownfields policy-makers are going to have to look at more protective liability provisions."

South Carolina. A 2005 amendment offers broad third party liability protection. The protection is offered at the point of execution of a cleanup contract with a non-responsible party, and the protections also extend to "nonresponsible party's lenders, signatories, parents, subsidiaries, and successors" that are connected to the site, as follows:

> Section 44-56-750 of the 1976 Code, SECTION 1:
> *"(H)(1) A nonresponsible party is not liable to any third-party for contribution, equitable relief, or claims for damages arising from a release of contaminants which is*

[4] See: **§ 128207** - http://www.gaepd.org/Files_PDF/outreach/BFGALeg.pdf

> *the subject of a response action included in the nonresponsible party voluntary cleanup contract provided for in this section.*[5] *(Emphasis added)*

Ben Hagood, an attorney and a state legislator at the time that the amendments were adopted, confirmed that legislative intent was to adopt broad third party liability protections, similar to those adopted in Georgia. He adds "the third party protections add real value for clients, and create a strong incentive to use the state VCP vehicle," even though following the federal bona fide prospective purchaser guidelines is a less arduous route. Hagood also indicated that the state law provides a strong inducement even though there is no parallel in federal law because most toxic tort or property damage lawsuits are brought under state statutes or common law, both of which would normally come under the jurisdiction of state courts.[6]

Robert Hodges, Brownfields Coordinator, for the South Carolina Department of Health and Environmental Control, indicated that, for applicants to the state voluntary cleanup program, the third party liability protection "is often times the driving factor." He cited the fact that most VCP applicants want the third party liability language added to the contract (the legal document that governs the response plan) as one indication of the significance of the protections for the private sector.[7]

Connecticut. The state adopted a 2005 amendment, the intent of which was made exceptionally clear by the title. The Connecticut third party protections begin after the completion and certification of the cleanup; unlike the Georgia and South Carolina statutes, which grant the protection upon state acceptance of a remedial plan.

CN Senate Bill No. 795, Public Act No. 05-90, "*An Act Concerning Third-Party Liability for Contaminated Property.*

> *Section 1. … (a). No owner of real property shall be liable for any costs or damages to any person other than this state, any other state or the federal government, with respect to any pollution or source of pollution on or emanating from such owner's real property that occurred or existed prior to such owner taking title to such property, provided:*
>
> *(1) The owner did not (cause or exacerbate the pollution)*
>
> *(2) The owner is not affiliated with any person responsible for such pollution… and*
>
> *(3) The Commissioner of Environmental Protection has approved in writing: (A) An investigation report …; and (B) a final remedial action report… "*[8] *(Emphasis added)*

Graham Stevens, Brownfields Coordinator for the Connecticut Department of Environmental Protection, confirmed that legislative intent was to offer broad third party liability protections. Stevens indicated that the liability provisions may be particularly useful in helping attract out-of-state brownfield developers and end-users because these parties are focused on the big picture of how liability affects the bottom line. He also indicated that the 2005 liability reforms have met with some skepticism within the legal community and have not been tested in court.

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[5] S.C. Code Ann. § 44-56-750 (2005): http://www.epa.gov/region4/brownfieldstoolkit/state/southcarolina.pdf
[6] Personal conversation February 16, 2010.
[7] Personal conversation, February 16, 2010
[8] See: http://www.cga.ct.gov/2005/ACT/PA/2005PA-00090-R00SB-00795-PA.htm

Environmental and real estate attorneys in Connecticut generally term the liability protections as helpful but a series of largely unforeseen issues have lessened the anticipated impact. Barry Trilling, an environmental attorney with Wiggin and Dana, co-wrote an article about the groundbreaking amendments in 2005;[9] however, he now indicates that poor legal construction may have led to the third party liability provisions being largely ignored in the development community. He points out that the statute was not tied to Connecticut's covenant-not-to-sue (CNTS) program. Al Smith, an attorney with Murtha Cullina, points out that most Connecticut brownfield developers are using the state's Licensed Environmental Professional (LEP) program[10] as the primary means of creating liability defenses; however, the third party liability protections require more direct state oversight, and the development community has generally declined the extra protections in favor of the more streamlined process.

Nancy Mendel, an attorney with Caplan Hecht & Mendel, adds that third party liability protections also face two practical difficulties. First, the protections are only available after the cleanup is completed and the state has signed off – "by that time the original developer is out of the picture," she points out. Second, the third party liability protections require notice to all potentially affected parties, and developers are reluctant to raise the awareness of the potential for lawsuits. Because the notice requirement is earlier (when the cleanup plan is filed), that leaves the developer vulnerable for third party claims for a potentially lengthy period of time, until the State sign off on the cleanup.

States with Limited Third Party Protection

Another group of states offer limited third party protection for certain activities or for a specified period of time.

Massachusetts. The Massachusetts 1998 brownfields reforms provided liability protections for innocent parties (those that did not own the property at the time of the contamination), and the liability protection extends to property damage claims (one piece of third party/toxic tort). Liability protection granted by the Commonwealth confers protection *"from claims by third parties for contribution, response action costs and property damage under (statute)… and property damage under common law."*[11] These extra liability protections are available statewide for properties that achieve a permanent cleanup or remedy, and they are available for projects that do not qualify vis-à-vis the permanent cleanup standard, if the project is located in certain distressed areas and meets certain job, affordable housing, or preservation criteria.

Missouri. Missouri law offers extra protections for projects determined to be eligible for the Missouri Remediation Tax Credit. The law protects the owner (tax credit recipient) from toxic tort while carrying out the remedial action, but the protection ceases upon completion of the state

[9] See: http://www.wiggin.com/db30/cgi-bin/pubs/Statutory%20Relief%20BFN%20Aug%2005%20Trilling.pdf
[10] The Connecticut LEP program operates under two authorities – the Voluntary Remediation Program and the Transfer Act.
[11] See: http://www.mass.gov/dep/cleanup/bfhdout2.htm

certified cleanup. The question would be whether actions taken during the protected period have any continuing protection.[12]

California. California's brownfields/voluntary cleanup statute adds a reference to liability protection under "common law." The definition of common law refers to "contribution, nuisance, trespass, and equitable indemnity." Again, the disclaimer is that the author is not an attorney, but the term "equitable indemnity" could be interpreted as including many elements of third party and toxic tort protection. However, a more in-depth legal analysis, as well as legislative history, would need to be undertaken before any definitive conclusions could be reached.[13]

States that Single Out Public Agencies or Lenders for Third Party Liability Protections

The following states do not offer third party liability protections for private VCP applicants but do offer particular protection for public agencies and/or lenders.

Wisconsin. The State "Remedial action" statute provides local government with "*civil immunity*" relative to cleanup liabilities both before and after, but not during, the period of time that the entity owns the property[14] (emphasis added). Wisconsin officials confirm that the intent of this language is to confer toxic tort protection to local government.[15]

Pennsylvania. Pennsylvania offers added protection for lenders and public agencies by stating that these entities shall not be liable under the environmental acts and the "common law equivalents." However, the lack of definition of "common law equivalents" leaves uncertainty as to legislative intent.[16]

New Jersey also makes reference to *"common law"* protections for public agencies that acquire property; however, the lack of definition of the term, similar to Pennsylvania, leaves uncertainty as to legislative intent.[17]

New York. Under the Environmental Restoration Program (which provides financial assistance to publicly owned brownfields), localities are granted broad third party protections and the protections apply to successors and lenders. Going one step further, the state indemnifies localities and mandates that the State Attorney General defend localities in any legal challenge:[18]

Issues and Questions

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[12] See: http://www.ded.mo.gov/bcs/upload/BrownfieldApplication032309.pdf
[13] See: http://www.nga.org/cda/files/0412BROWNFIELDSLAW.pdf
[14] Wisconsin Statute 292.26. See:http://www.dnr.state.wi.us/org/aw/rr/liability/muni_1.html#8; and Godfrey & Kahn, S.C, "Environmental Liability Mitigation Strategies for Local Public Agencies," 2005, http://www.glc.org/wiconference/PDF/mw_913100_1.pdf.
[15] See: http://www.legis.state.wi.us/statutes/Stat0292.pdf; 292.26 Civil immunity. Legislative intent confirmed in an E-mail from Darci Foss, Chief, Brownfields and Outreach, Wisconsin Department of Natural Resources, Bureau for Remediation and Redevelopment, to Evans Paull.
[16] Pennsylvania Act 3, 1995 – See: http://www.palrb.us/pamphletlaws/19001999/1995/0/act/0003.pdf
[17] NJ PL 1997, chapter 278 (S39) page 39
[18] New York ECL 56-0509.

A number of questions remain. First, there is the fundamental legal and constitutional question of limiting legal courses action to seek damages. The defenders of the liability limitations cited here point out that the responsible persons can still be sued; the limitations only provide protections for the innocent volunteer that has a state-approved cleanup plan. Still there is a concern that, if these liability provisions were challenged (which apparently none have been), they could be overturned.

Some analysts also point out that these statutes may limit access to state courts, but the protections are far less than ironclad because federal law grants no such immunity. The defenders respond that most legal actions related to third party/toxic tort are under the jurisdiction of state courts.

Lastly, there is the lack of data related to the efficacy of this approach. There should be more in-depth analysis of impacts on developers and investment – anecdotal evidence assembled for this article is generally positive, but the author has only brushed the surface.

Conclusion

Above the author identified the states that have various elements of third party liability protections. Of the three states that offer broad third party protections, the impact is believed to be very positive in Georgia and South Carolina, while the Connecticut statute has been largely ignored because of a series of issues, including poor legal construction.

With most states facing severe budget difficulties, there may be widespread interest in reform measures, such as third party liability protections, that could have a significant benefit without impacting state budgets. Further, if lenders have become permanently risk averse, policy makers are going to have to pay attention to liability issues that impede new brownfields investments, and third party/toxic tort is at the top of the list.

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