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Recent Cases

Veteran's Administration Not Liable for Failing to Warn Purchasers of Foreclosed Residence About Asbestos

In *Kane v. United States*, 15 F.3d 87 (8th Cir. 1994), the Court of Appeals for the Eighth Circuit held that the Veteran's Administration (VA) was not negligent in failing to warn the purchasers of a foreclosed residence about the presence of asbestos under the Federal Tort Claim Act (FTCA), 28 U.S.C. Sections 2674 and 2680(a). The Eighth Circuit also determined that the VA was not strictly liable for releasing a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. Sections 9601-9657. The court found no statutory or regulatory requirements mandating the VA or its assignees to inspect for asbestos in residences acquired through foreclosure.

House Sold in "As Is" Condition

In June of 1989, Bradley and Cynthia Kane purchased a residence from the VA. The VA had acquired the property at a foreclosure sale in February 1989. The VA contracted with a private management broker to maintain and market the property for sale. The property had been advertised in the local newspaper as having electrical and plumbing problems. The notice also informed potential buyers that the property was to be sold in "as is" condition.

Prior to purchasing the property, the Kanes had their lender inspect and appraise the property. The lender's report noted that the property was in average condition. In January of 1990, six months after the Kanes purchased their home,

they discovered asbestos in the residence.

The Kanes brought suit under both the FTCA and CERCLA to recover damages associated with the discovery of asbestos in the home they had purchased from the VA. They claimed the VA, as owner and operator of the residence, was strictly liable under CERCLA for releasing a hazardous substance. The Kanes further asserted that the VA was liable for the costs they incurred as a result of having to remove the asbestos. In addition, the Kanes contended that the VA was negligent in failing to inform them of the property's true condition.

The district court granted the government's motion to dismiss both the FTCA and CERCLA claims. In doing so, the court noted that the FTCA, under its discretionary function exception, allowed the VA a policymaking prerogative to create a list of items for which VA property management brokers were to look. Thus, the discretionary function exception gave the VA the option to exclude asbestos inspections from its list.

As to the CERCLA claim, the district court agreed with the government that the Kanes' house was not a "facility" as defined by the statute. The asbestos installed and used in the Kanes' residence was not "disposal" of a hazardous substance within the meaning of CERCLA. Instead, the asbestos was a "consumer product in consumer use," and was therefore excluded from statutory regulation. The Eighth Circuit affirmed the district court's dismissal of both claims.

VA's Discretionary Decision-Making Policies Considered an Exception from the FTCA

On appeal, the Kanes first argued that the district court erred in dismissing the FTCA claim because the government did not prove that the VA's actions involved an element of judg-

ment grounded in social, economic, and political policy. The Eighth Circuit disagreed, looking to the language of the FTCA and the United States Supreme Court's interpretation of this language.

The FTCA provides for the waiver of sovereign immunity in tort claims against the United States government. The FTCA, however, also excepts from tort claims government actions that are discretionary in nature. This exception includes those actions which involve an element of judgment or choice. 28 U.S.C. Section 2680(a).

In determining whether the VA's actions were discretionary, the Eighth Circuit noted that the Supreme Court has upheld FTCA causes of action predicated on situations where a statute, regulation, or policy specifically prescribes a course of action to be followed by federal employees. Where a federal mandate has removed the elements of judgment or choice from government action, claimants may file suit under the FTCA.

The Eighth Circuit found no statute, regulation, or policy specifically mandating the VA to inspect for asbestos. The court examined the regulations which authorize the VA to contract with private brokers to manage and market property for sale. The court found that these regulations do not require the VA to supervise or inspect for asbestos.

Even if the government conduct involves an element of judgment, the exception from tort claims will protect only those government actions and decisions based on considerations of public policy. The Supreme Court has guided courts in discerning whether a challenged government action is grounded in public policy. *Berkovitz by Berkovitz v. United States*, 486 U.S. 531 (1988) and *United States v. Gaubert*, 449 U.S. 315 (1991).

Following the Supreme Court, the Eighth Circuit maintained that to determine whether an action is grounded

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in public policy, the focus is not on the government agency's subjective intent in exercising the discretion conferred by statute or regulation. Rather, the focus is on the nature of the actions taken and on whether these actions are susceptible to policy analysis.

The Eighth Circuit declared that a government agency's day-to-day decisions made in furtherance of policy will be protected under the exception from tort claims, especially when the decisions relate to the extent to which the agency must supervise the safety procedures of private individuals. Such supervision is neither feasible nor practical in light of an agency's staffing or funding. The Eighth Circuit affirmed the district court's conclusions on the FTCA tort claim exception.

The district court concluded that the VA's policy under its housing loan program was to sell acquired property quickly and at the best attainable price. To further this policy, the VA hired a management broker who would clean the grounds and building and minimize the risk of loss from theft, vandalism, and the elements. The district court found the VA's actions as a seller of property to be discretionary and not subject to statutory or regulatory requirements mandating it or its assignees to inspect for asbestos. Thus, the district court determined that the VA fell within the FTCA tort claim exception. The Eighth Circuit agreed with the district court's decision.

CERCLA Does Not Apply to a "Consumer Product in Consumer Use"

The Eighth Circuit next considered the Kanes' CERCLA claim. The district court stated that, under CERCLA: (1) those persons who owned or operated facilities when the hazardous substance disposal occurred, and (2) owners of the hazardous substances who arranged for disposal or treatment of those substances at a facility are liable for costs incurred in response to the

release of hazardous substances. 42 U.S.C. Sections 9607(2) and 9607(3). Both CERCLA sections require the release or the disposal of a hazardous substance at a "facility."

The Eighth Circuit interpreted the meaning of "facility" under CERCLA. The definition of 42 U.S.C. Section 9607 (a)(9) includes any building, structure, installation, equipment, or any site where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located. The definition, however, does not include any "consumer product in consumer use."

The Eighth Circuit noted that while other courts have held that a "facility" could include building materials into which the asbestos was disposed, as well as asbestos-filled buildings, Congress intended to provide recovery under CERCLA only for releases or threatened releases from inactive and abandoned waste sites, not releases from useful consumer products contained in the structure of buildings. Applying this reasoning, the Eighth Circuit held that the asbestos in the Kanes' residence was a consumer product in consumer use and therefore exempt under CERCLA.

Thus, the Eighth Circuit, in affirming the district court's dismissal of claims based on the FTCA and CERCLA, held that the VA was not liable for damages resulting from the presence of asbestos in property acquired and sold under the administration of its housing loan program. ❖

Rosaire M. Hall

City of Lansing May Not Allow Cable Television Franchisee Mandatory Access to Private Property

In *City of Lansing v. Edward Rose Realty, Inc.*, 502 N.W.2d 638 (Mich. 1993), the Supreme Court of Michigan invalidated a Lansing city ordinance allowing mandatory access to private property by a cable provider that had been granted a city franchise. The court held that the claimed public purpose of the ordinance was subject to heightened scrutiny because the ordinance benefitted a private interest, and this private interest predominated over the public interest. After applying heightened scrutiny, the court concluded that the ordinance was unreasonable. The Michigan Supreme Court also determined that the mandatory access granted by the ordinance exceeded Lansing's authority to exercise its power of eminent domain. Although the state law authorized Lansing to condemn private property for any public use within the scope of its powers, no state statute identified mandatory access to private property by a city-franchised cable operator as a public use or purpose. The court found the "public purposes" that Lansing asserted were insufficient to overcome a property owner's right to exclude others from her property.

Ordinance 753

In 1974, the city of Lansing entered into a franchise agreement with Continental Cablevision. The agreement gave Continental the nonexclusive right to operate its cable system in Lansing. Continental agreed to provide nine designated access channels, universal service, and an emergency override system. It also agreed to pay 3 percent of its gross franchise revenues to Lansing.