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Federal Cable Act

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service is not limited to cable programming, the Cable Act preempted only laws regarding the provision of cable services, not all cable services generally.

Judy Koehler

Eighth Circuit Imposes Full CERCLA Liability On Seller Who Hid Contamination From Purchaser

In *Gopher Oil Company, Inc. v. Union Oil Company of California*, 955 F.2d 519 (8th Cir. 1992), the United States Court of Appeals for the Eighth Circuit held that the seller of a chemical plant site was 100 percent responsible for the environmental cleanup costs incurred by the purchaser because the seller caused the pollution and misrepresented the condition of the site when selling the property.

Background

A subsidiary of Union Oil Company of California ("Union") operated a petroleum product treatment facility on a five-acre site in Minneapolis, Minnesota from the early 1960's until 1980. The subsidiary's normal operating procedures resulted in leaks, spills, and the dumping of oil and industrial chemicals. When Union decided to sell the property in 1980, it removed some of the contaminated soil but covered other contaminated areas with landscaping gravel.

When Gopher Oil Company ("Gopher") expressed an interest in purchasing the site, Union representatives told Gopher of two previous chemical spills but did not inform Gopher that past operating procedures caused continual leaks and dumping on the site. During the site inspection conducted by Gopher representatives, some soil discoloration was visible, but much of the contaminated ground was hidden beneath the gravel. Although Gopher had access to Union's records, it did not examine them.

The president of Gopher con-

tacted the Minnesota Department of Inspections and the Minnesota Pollution Control Authority ("the Authority"). The Authority told Gopher about the two major chemical spills but had no information about other pollution problems at that site.

Gopher purchased the site from Union in November, 1980. The purchase agreement stated that the land and facilities were transferred in an "as is" condition and that none of the warranties made in the agreement misstated or omitted any material facts. After the purchase, Gopher repaired the plant and claims to have controlled and cleaned up any leaks or spills.

Three years after the purchase, the Authority ordered an investigation, which revealed that the site still contained substantial pollution. Under a compliance agreement with the Authority, Gopher spent \$423,272.81 in cleanup costs.

In January, 1988, Gopher sued Union in the United States District Court for the District of Minnesota, seeking damages for fraud and recovery of its cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9607, 9613 (1992), and the Minnesota Environmental Response and Liability Act ("MERLA"), Minn. Stat. 115B.04, 115B.08 (1991).

Under CERCLA, a federal statute, the costs of cleaning up a polluted site are allocated among the responsible parties. If a party pays more than its fair share, it can sue other responsible parties for the difference. CERCLA also authorizes the award of attorney fees to the winning party in such an action. MERLA provides for essentially the same actions under Minnesota state law.

District Court Awards Full Cleanup Costs

The jury found that Union had made material misrepresentations about the condition of the site in order to induce Gopher to purchase it. The jury also found Union 100 percent responsible for the cleanup costs imposed under CERCLA. The district court awarded

Gopher the amount of its past cleanup costs, plus interest and more than \$500,000 in attorney fees.

Under Minnesota law, out-of-pocket loss is the difference between the actual value of the property Gopher received and the purchase price Gopher paid for it, in addition to any damages caused by the fraud. The district court reasoned that the cleanup activities would increase the value of the property. Therefore, the district court judge decided to determine out-of-pocket damages by calculating the difference between the purchase price and the value of the property after the cleanup. The judge decided to wait until the site was cleaned and revalued before determining Gopher's out-of-pocket loss.

Union moved for a new trial which the district court denied. Union appealed to the Court of Appeals for the Eighth Circuit both the denial of a new trial as well as the judgment imposing CERCLA liability and the award of attorney fees. Gopher appealed the district court's decision to defer calculation of the damages under the fraud claim until after completion of the cleanup.

Fraudulent Misrepresentation Occurred

Union argued that the "as is" clause in the purchase agreement and Gopher's experience in the industry conferred upon Gopher a duty to investigate the property before purchasing it. Therefore, Gopher's evidence of fraud, which consisted of testimony that Union had assured Gopher the site was pollution free, was not substantial enough to support the jury's verdict. The appellate court upheld the district court's decision because the evidence showed that Union knew of the pollution and had tried to conceal it from Gopher. Additionally, Gopher had relied upon these misrepresentations when purchasing the property.

With regard to the common law fraud claim, Union argued that no law allows for recovery of attorney fees in this type of common law action. The court of appeals

agreed, stating that the fraud claim was separate from the CERCLA claim. The court therefore remanded the attorney fee award for reduction by the amount apportioned to the fraud claim.

Gopher appealed the district court's deferral of the damages award. Gopher argued that this retention of jurisdiction was erroneous under Minnesota law and also violated its Seventh Amendment right to a jury trial on the issue of damages. The court of appeals held that the district court was correct in allowing out-of-pocket damages. However, the calculation of the damages should not have been postponed until the cleanup was substantially complete. Instead, the award should have been made promptly by using expert testimony to estimate the value of the property upon completion of cleanup.

Union Fully Responsible For CERCLA Cleanup Costs

On the CERCLA claim, Union contended that the "as is" clause of the purchase agreement transferred liability for the cleanup from Union to Gopher. Additionally, Union argued that CERCLA allows apportionment of liability among all responsible parties, therefore the apportionment of the full cleanup liability to Union was unfair.

The court of appeals upheld the district court's decision, stating that the allocation of liability under CERCLA is an equitable determination made by the district court's factual findings and legal conclusions. The evidence showed that Union knew of and was responsible for the extensive, toxic pollution. In addition, the district court had found that Gopher had not materially contributed to the pollution and had no knowledge of the pollution until an investigation was ordered by the Authority. The appellate court held that because Gopher was fraudulently induced into entering into the purchase agreement, the "as is" clause was invalid and did not serve to transfer liability to Gopher.

The court of appeals also disagreed with Union's contention that Gopher should not have re-

covered attorney fees for the CERCLA claim. Quoting the statutory language in both CERCLA and MERLA that expressly allows the awarding of attorney fees to the prevailing party, the court of appeals found the district court's decision appropriate to the extent that the attorney fees awarded to Gopher were applied to the CERCLA claim and not to the fraud claim.

Monica A. Murray

Eleventh Circuit Finds That All Relevant Circumstances Must Be Considered Before Voiding A Foreclosure Sale

In *Grissom v. Johnson*, 955 F.2d 1440 (11th Cir. 1992), the United States Court of Appeals for the Eleventh Circuit held that before a court can revoke a residential foreclosure sale, it must be persuaded that the foreclosure sale price was not the reasonably equivalent value of the property. However, in this case, the record lacked specific facts regarding the circumstances of the foreclosure sale, so the court of appeals remanded the case back to the lower court.

Background

In 1971, Johnny Grissom ("Grissom") took out an \$18,000 home loan from Citizens and Southern National Bank ("C&S") and secured the loan with his residence. Subsequently, Grissom defaulted. After C&S notified Grissom about the bank's intention to foreclose on his home, the bank advertised the foreclosure sale once a week for four weeks. On April 4, 1989, the property was sold to Birnet Johnson ("Johnson") for \$14,059, the amount Grissom owed on the note to C&S.

One day after this sale, Grissom and his wife filed for Chapter 13 bankruptcy protection. One month later, they filed a complaint in the United States Bankruptcy Court for the Southern District of Georgia seeking to revoke the foreclosure sale.

Lower Courts Void Foreclosure Sale

In bankruptcy court, Grissom argued that under federal bankruptcy law, the foreclosure sale should be nullified. The court agreed and found that the only substantial question was whether the sale price of \$14,059 was a reasonably equivalent value of the Grissom residence. The court relied upon the "Durrett 70% Rule", set forth by a prior Court of Appeals for the Fifth Circuit in *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980), which established that in order to meet the reasonable equivalency standard, a property must be sold during a foreclosure sale for at least 70 percent of its actual market price.

The bankruptcy court found that the sale price was less than \$26,000, 70 percent of the property's market value. Since the sale did not meet the Durrett Rule, the bankruptcy court ruled that the foreclosure sale was void. C&S appealed this decision to the United States District Court for the Southern District of Georgia.

The district court also relied upon the Durrett dictum and affirmed the order of the bankruptcy court. The district court mechanically analyzed the issue of reasonably equivalent value and held that the bankruptcy court correctly followed the general rule that a sale for less than 70 percent of the fair market value is less than a reasonably equivalent value. C&S appealed to the United States Court of Appeals for the Eleventh Circuit.

Eleventh Circuit Reverses, Using Totality of Circumstances Rule

On appeal, C&S argued that both the bankruptcy court and district court relied too heavily on the Durrett test while ignoring other potentially relevant factors. The Eleventh Circuit agreed and rejected the lower courts' dependence on the Durrett test. In doing so, the court relied on its recent decision that a determination of reasonable equivalency requires a consideration and analysis of the totality of the circumstances surrounding a

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