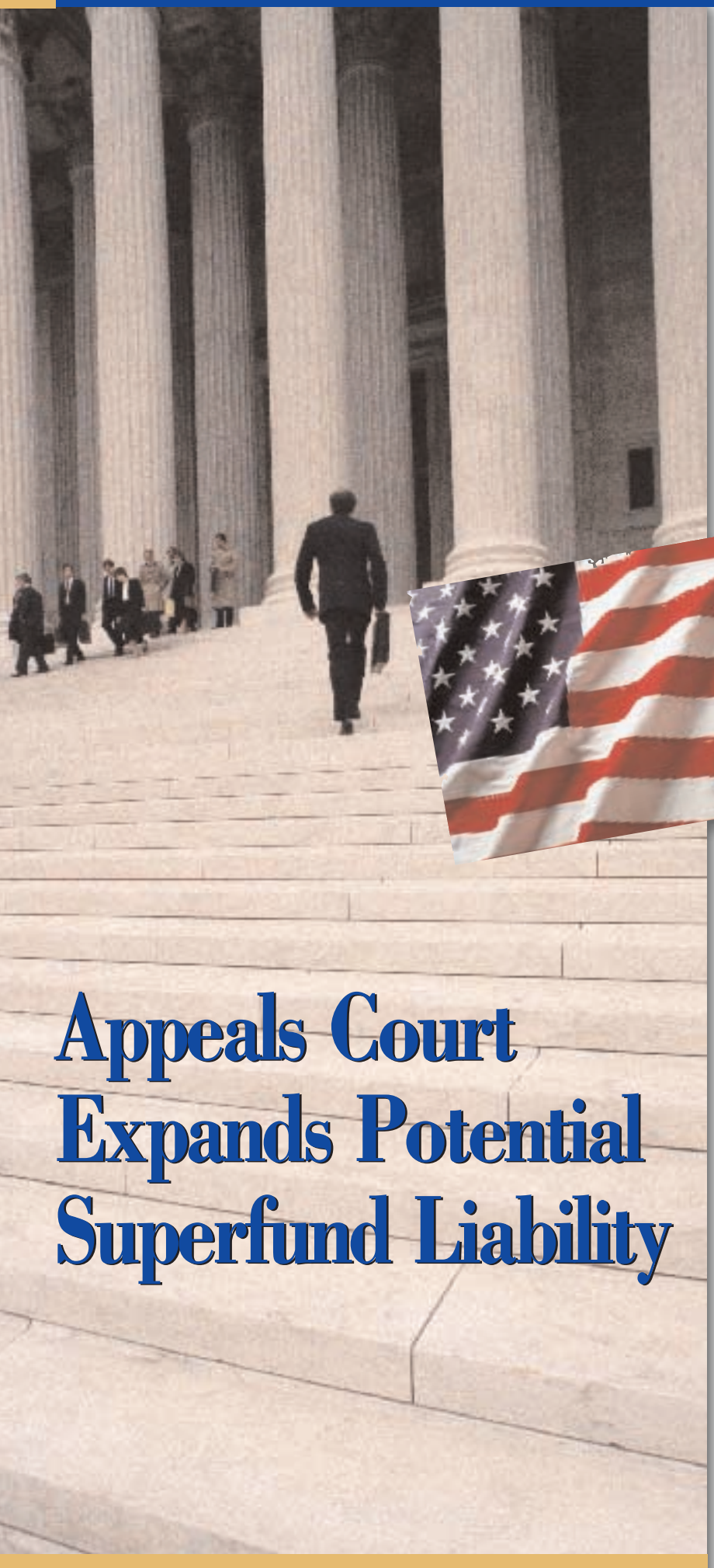

Appeals Court Expands Potential Superfund Liability

In an important and potentially far reaching decision on September 14, 2000, the United States Court of Appeals for the Ninth Circuit ruled that: (1) a private party can be liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for cleanup costs regardless of whether a public agency required the party seeking recovery to incur those costs and (2) under the federal Superfund law (CERCLA), "passive" migration of hazardous wastes constitutes an actionable disposal of contaminants. *Carson Harbor Village v. Unocal Corp.*, No. 98-55056 (9th Cir., Sept. 14, 2000).

By Kenneth A. Ehrlich and Dan Hanket

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The case involves a mobile home park owned by the Carson Harbor Village, Ltd. (plaintiff). Between about 1945 and 1983, Unocal leased the property for petroleum production. From about 1977 through 1983, Carson Harbor Mobile Home Park (partnership defendants) owned the property. Wetlands occupy a portion of the property, which received storm drainage from several surrounding municipalities. While seeking refinancing for the property in 1993, the Village's lender completed an environmental assessment, which revealed slag, tar-like material in the wetlands. Subsequent investigation revealed that the material contained petroleum hydrocarbons and lead, and had been present for decades. Soil samples upgradient of the material also contained elevated levels of petroleum substances and lead.

As the lead concentrations exceeded reporting limits, the Village notified appropriate governmental agencies, including the Regional Water Quality Control Board (RWQCB), of the contamination. The RWQCB assumed the role as lead agency. While some dispute existed as to whether the RWQCB "ordered" remedial action, the Village admitted that its consultant requested a "no further action" letter before proposing a remedial action plan (RAP). Apparently, after the RWQCB rejected this request, the Village's consultant submitted a RAP to remove the tar, slag material, and impacted soils. The RWQCB approved the RAP and set appropriate cleanup levels. The Village then implemented the cleanup in 1995, and the RWQCB subsequently issued a closure letter.

After obtaining closure, the Village filed suit under a CERCLA claim and other claims against various entities including Unocal and the Mobile Home Park seeking to recover the costs of its remedial action as well as damages arising from its inability to refinance the property. Under CERCLA, the Village claimed that the Mobile Home Park was liable for its assessment and cleanup costs; and was also liable as owners, in that during the time of their ownership of the property, contamination from the tar and slag material spread onto the surrounding soil.

The District Court ruled that the Village could not prevail against any of the defendants because it could not establish that the remedial action was "necessary" under the provisions of 42 U.S.C. §9607(a)(4)(B) of CERCLA. The Court reasoned that since the RWQCB would not have required remedial action but for the Village's taking the initiative

to conduct the cleanup, the costs incurred were not recoverable. The Court observed that CERCLA was not designed to permit property owners to clean up their property voluntarily for business reasons, and then attempt to shift the costs to prior owners. With respect to the Village's claims against the Mobile Home Park, the District Court found that these defendants were not responsible parties under CERCLA since they were not owners or operators of a facility at the time of "disposal" of hazardous substances. The District Court, rejecting the "passive migration theory," defined "disposal" as "active disposal." Since the defendants only used the property as a mobile home park, the District Court concluded that they were not liable.

The Ninth Circuit reversed both rulings. First, the Court held that, in order to determine whether costs were "necessary" under CERCLA, the analysis must focus on (1) the nature of the threat presented by the contamination at issue and (2) whether the plaintiff addressed the response action to that threat. According to the Ninth Circuit, these remaining factual questions require attention to objective circumstances of each case, and not a party's subjective intent. Thus, the issue of whether the RWQCB ordered that the work be done or that a party had a business reason to conduct the cleanup is not dispositive. Response costs can be "necessary" even though the agency that required cleanup never approved the actual response actions undertaken. Further, whether a public agency fails or refuses to recognize an actionable threat should not control because the agency faces "institutional and financial constraints" (assumably heavy caseload and budget constraints) which may prevent the agency from focusing on sites constituting relatively minor threats to public health or the environment. The Court ruled that such minor sites nonetheless merit attention and cleanup.

Second, the Ninth Circuit ruled that the term "disposal" encompasses passive migration. While recognizing that there is a circuit split on the question, the Court found that including as PRP's (potentially responsible parties) owners who have held property while waste passively has migrated through it is entirely consistent with the structure and purpose of CERCLA's liability provisions. The Court rejected the reasoning that because Section 42 U.S.C. §9607(a)(2) imposes liability upon a person who owned or operated a site at the time of disposal, it must follow that only those who owned and operated the site during active disposal are liable. The Ninth Circuit observed that this provision simply serves as a temporal trigger for prior owner liability. Those who owned the

property prior to the time of disposal, the Court notes, are not covered by the Act. Even in the situation where the prior owner is aware that selling of the property to a certain buyer may result in contamination given the type of activity that is planned to be conducted on the property, the Court stated that such owner would not be covered under CERCLA. Moreover, the Court asserted that the Mobile Home park should be treated identically to the current owners because: (1) neither of them actively caused a release of hazardous substances by using the parcel as a mobile home park, (2) both acquired the property after the disposal of hazardous substances by others occurred, and (3) both owned the parcel during the discharge of lead and petroleum onto the wetland portion of the site.

The decision has noteworthy consequences. First, landowners that are compelled to undertake remedial work without an agency directive or order, as in the situation where they are involved in a sale or refinance transaction, may now have support in their quest to seek reimbursement for the costs they incur against prior owners or operators. However, the decision to go forward remains a difficult one in that any work that is commenced must still be demonstrated as "necessary." Despite the Court's articulation of an objective standard, determining if a cleanup is "necessary" may be problematic especially in those situations where agency officials appear uninterested in the site. Defendants will still argue that, since no agency was involved, none of the response work was necessary.

Second, prior landowners who previously believed that they were not subject to liability since their activities on the property did not involve active disposal may now have cause for concern. While such parties may argue that CERCLA's "innocent landowner" defense applies to them (they did not know and had no reason to know of contamination at the time of their purchase), this defense can be difficult to prove since the party must establish that it exercised appropriate due diligence before acquiring the property. Furthermore, if a landowner cannot establish the innocent landowner defense, it can never rid itself of liability, even by selling the property. Under the *Carson Harbor Village v. Unocal Corp* case, if you appear in the chain of title and the contamination occurred before you purchased the property, you remain susceptible to liability under the "passive" disposal theory. ■

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