The Legal Intelligencer

ALM Properties, Inc.
Page printed from: *The Legal Intelligencer*

Back to Article

Managing Environmental Obligations: Tracking 'Environmental Debtors'

Many businesses that affect the environment hold what one might call "environmental debt."

David G. Mandelbaum

2012-02-28 10:00:00 AM

Many businesses that affect the environment hold what one might call "environmental debt." Someone else owes a portion of certain costs that they may incur in the future. Earlier this month, the Commonwealth Court issued an opinion that reminds "environmental creditors" how tricky collecting those debts can be. It may suggest to some that they audit their own systems for identifying environmental problems, notifying their "debtors" and pursuing collection.

MKP Enterprises Inc. v. Underground Storage Tank Indemnification Board , decided on Feb. 9, involved a leak from tanks owned by MKP. MKP discovered a problem late in 2007 and duly reported it to the Department of Environmental Protection. MKP did not have a laboratory analysis of a soil sample until April 2008, so MKP provided notice of a claim to the board at that time. The board denied the claim as untimely; MKP did not submit notice until more than 60 days after it "confirmed" a release. MKP sought an administrative hearing and was again denied. The Commonwealth Court affirmed.

The Underground Storage Tank Indemnification Board was established by the Storage Tank and Spill Prevention Act, and the fund that the board administers allows owners of underground storage tanks to provide the financial assurance required by both the Storage Tank Act and the federal Resource Conservation and Recovery Act. The board, in effect, acts as an insurer of tank owners against the costs of cleaning up tank leaks.

The board's regulations require notice of a claim within 60 days of "confirmation." They do not define "confirmation." They also do not require notice within 60 days of the release from a tank. The release could have occurred years ago. The tank owner, however, must give notice within 60 days of when he "confirms" that the release occurred.

The Commonwealth Court agreed with the board that "confirmation" does not require soil sampling and laboratory analysis. Staining and fuel odors can suffice and did in this case. Moreover, the Commonwealth Court found the 60-day notification rule to be permissible. The court did not agree that notice to the DEP could count as notice and allow the claim to be filed late.

So, all tank owners should take note. Not only do they have an obligation under the storage tank regulations to report leaks to the DEP, but if they do not make claims fairly immediately, they may lose their indemnification from the USTIF. That is true even though the rule has a certain component of arbitrariness and the loss of benefits has some feel of a forfeiture. Reporting a release to the DEP may serve some important environmental protection purposes. Reporting a claim to the board in 60 days, rather than six months or a year, has a more obscure rationale.

One can also usefully generalize this proposition — and not just in the context of insurance. Businesses that have bought or sold assets in the last few decades have probably made or received covenants from their counterparties concerning environmental compliance or maintenance of remediation measures.

Consider the relatively simple case of cleanup under the Land Recycling and Environmental Remediation Standards Act or "Act 2." The General Assembly adopted Act 2 in 1995 precisely in order to facilitate putting contaminated real estate back into productive use. In order to accomplish that goal, Act 2 allows cleanups that are less onerous than what might have been required prior to its enactment under the Clean Streams Law or the Solid Waste Management Act and what might even today be required under the federal Superfund statute — the Comprehensive Environmental Response, Compensation and Liability Act.

One can characterize Superfund cleanups as favoring "idiot-proof" remedies — the remedy will work no matter how foolish a subsequent landowner may be. Act 2, on the other hand, allows various forms of institutional controls (pavement, fencing, land use restrictions) to reduce risk to an acceptable, site-specific level. Someone needs to maintain the pavement, to repair the fencing and to enforce the land-use restrictions. Otherwise, the defense to further liability that all parties enjoy under the statute may not hold up. Typically, the obligation to maintain the remediation will be passed along contractually with the land. Few sellers have in place a mechanism to police compliance. Indeed, many buyers do not have in place a system to assure that they do what they promised to do over a long time horizon.

Similar situations arise when businesses sell facilities that require some sort of active steps to prevent an environmental problem. They may have an on-site waste disposal area that requires maintenance — mowing the grass on the cap, removing trees, fixing gopher holes — or even active operation — for example, leachate may have to be pumped and treated. Existing wells may control a groundwater plume that will contaminate the neighbors' properties if the wells are turned off. Does the seller have a system for monitoring compliance with covenants to maintain or to operate these features of the site? Does the buyer have a system for knowing what it has to do 20 years after the acquisition?

Indemnifications pose another problem. Often, a seller (or an insurer) will indemnify a person on the property for some set of costs; it may promise to hold the buyer harmless from any cleanup liability or it may just promise to pay costs of maintaining a cap or operating a well. The indemnified party has to have a system for providing notice of claims to its indemnitor and also of proving its costs if it ever has to do so.

One would think that agreement would be fairly easy because there is a stack of invoices that are the bills, and there is documentation that they were received, reviewed and paid. However, as any litigator knows, not all disputes stay reasonable and one can find oneself stymied because there is no witness who can testify that a bill was properly reviewed and paid in the past.

An environmental creditor has a decision to make each time it has control of a problem. For example, if it occupies the plant or owns the real estate, it probably has not only the opportunity but the obligation to deal with the regulators should an environmental problem come to light. Should a party that believes it has a right to recover the costs of addressing the issue undertake whatever work is required and seek reimbursement, or should it try to get its environmental creditor to step in?

Businesses may always want someone else conducting a cleanup on their operating plant or maintaining a waste disposal system on the property. On the other hand, it is much easier to get a construction job fully paid if the indemnitor pays for the work itself.

One also faces an important timing issue raised implicitly by *MKP Enterprises* . Many environmental issues are not apparent until you look for them. If one is indemnified, then one may have the opportunity to decide when to look and when to defer looking. If you look for an underground storage tank leak, you may find one, but if you don't look it is hard to say that you have confirmed a release.

If an environmental debtor has financial difficulty, one may wish to accelerate all one's claims. One may wish to look under all the rocks and to make demands on the indemnitor promptly, while there may yet be some assets. On the other hand, a distressed party can be expected to be more likely to litigate any issue. Litigation is expensive and risky, as *MKP Enterprises* shows. It tends to give no one full vindication. So, timing matters.

In my experience, businesses do not have comprehensive systems for keeping track of their environmental debt — what they hold and what they owe. They do not usually have a way to know systematically who should be notified or involved in order to preserve contractual rights. They rely on individual memories and informal mechanisms. That informality can make enforcing rights more difficult. If the rights are valuable, an audit of what the business holds and a system for tracking it may make sense. •

David G. Mandelbaum *is national co-chair of the environmental practice group of Greenberg Traurig in Philadelphia. He teaches at Temple University's Beasley School of Law and serves as vice chair of the Pennsylvania Statewide Water Resources Committee.*
