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H.B. 168
133rd General Assembly

Final Analysis

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Helena Volzer, Attorney

UPDATED VERSION*

SUMMARY

BFPP immunity

- Establishes an affirmative defense that allows a bona fide prospective purchaser (BFPP) to claim immunity from liability for the costs associated with the state's performance of investigational and remedial activities to address a release or threatened release of a hazardous substance from the BFPP's facility.
- Specifies that a BFPP is a purchaser of a facility, where hazardous substances were disposed of before the purchaser acquired it, who can demonstrate specific factors relating to that facility.
- Specifies that the affirmative defense is available to a BFPP in any pending civil action as of the act's effective date or any new civil action initiated thereafter.
- Makes conforming changes to the law governing the Voluntary Action Program (VAP) consistent with the new affirmative defense.

Covenant not to sue

- Eliminates the law that automatically voids a covenant not to sue under the VAP when a property subject to institutional controls or activity and use limitations is not in compliance with those controls or limitations.
- Instead, authorizes (but does not require) the Director of Environmental Protection to issue an order voiding the covenant in that circumstance.
- Specifies that the order voiding the covenant not to sue is an appealable action.

* This version updates the effective date.

DETAILED ANALYSIS

BFPP immunity

Overview

Generally, when there is a release or threatened release of a hazardous substance at a facility, the state can investigate and conduct remedial activities to remedy the release or threatened release. The state then may recover those costs in a civil action against a responsible party.

The act specifies that a bona fide prospective purchaser (BFPP) of a facility (that was previously contaminated by a hazardous substance) who can demonstrate certain factors relating to that facility is immune from liability to the state in a civil action. This immunity is limited in scope to the costs incurred by the state for the state's performance of investigational and remedial activities to address the release or threatened release of a hazardous substance from the facility. The affirmative defense is available to a BFPP in any pending civil action as of the act's effective date (September 15, 2020) or any new civil action initiated thereafter (see **COMMENT**). This type of immunity was not previously available under Ohio law.¹

Immunity for BFPPs is available at the federal level under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) but is somewhat broader than the immunity established by the act. The federal immunity extends to all response costs in a federal civil action, regardless of whether the party bringing the action is the federal government or a private citizen.²

BFPP immunity: federal

Under CERCLA, a BFPP is a person who acquires ownership of a facility (any property where a hazardous substance was disposed of) after January 11, 2002, and who establishes several factors relating to that facility. These factors include:

1. All disposal of hazardous substances at the facility occurred before the person acquired it;
2. The person made all appropriate inquiries into previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with federal law;
3. The person provides all legally required notices for the discovery or release of any hazardous substances at the facility;
4. The person exercises appropriate care with respect to any hazardous substances at the facility by taking reasonable steps to:

¹ R.C. 3746.122(B).

² See, e.g., *Saline River Props., LLC v. Johnson Controls, Inc.*, 823 F. Supp.2d 670 (2011) (in which a facility owner claiming BFPP immunity sued a previous facility owner).

- Stop any continuing release;
 - Prevent any threatened future release; and
 - Prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.
5. The person provides full cooperation, assistance, and access to those authorized to conduct response actions or natural resource restorations;
 6. The person is in compliance with any land use restrictions established or relied on in connection with the response action at the facility;
 7. The person does not impede any institutional control employed at the facility in connection with the response action;
 8. The person complies with any request for information or administrative subpoena; and
 9. The person is not either of the following:
 - Potentially liable, or affiliated with any other person who is potentially liable, for response costs at the facility through any direct or indirect familial relationship, or, any contractual, corporate, or financial relationship (other than the relationship created for conveyance of title for the facility); or
 - The result of a reorganization of a business entity that was potentially liable for the facility.³

If a person can establish all of these factors in court by a preponderance of the evidence, the person is considered a BFPP and is immune from liability for response costs for a release or threatened release of hazardous substances based solely on the person's status as a facility owner or operator.⁴ As mentioned above, response costs generally include any costs incurred to remedy a release or threatened release of a hazardous substance to ensure that the substance does not migrate and cause danger to public health, welfare, or the environment. To maintain BFPP immunity under CERCLA, the BFPP has an ongoing obligation not to impede the performance of a response action or natural resource restoration.⁵

BFPP immunity: the act

The act adopts the federal definition of BFPP and establishes an affirmative defense that allows a person to claim immunity from liability in a civil action **brought by the state** (but not by a private citizen). The person is not responsible for the cost of the state's investigational and remedial activities to address a release or threatened release of hazardous substances from the person's facility if all of the following apply:

³ 42 U.S.C. § 9601(40).

⁴ 42 U.S.C. § 9607(r).

⁵ 42 U.S.C. § 9607(r).

1. The person demonstrates that the person is a BFPP of the facility;
2. The state's cause of action rests on the person's status as an owner or operator of the facility; and
3. The person does not impede a response action or a natural resource restoration at the facility.⁶

Because the act adopts the same definition of BFPP and facility as in CERCLA, the person must demonstrate all factors necessary to be considered a BFPP under that definition by a preponderance of the evidence.⁷

Consistent with the creation of the affirmative defense, the act makes conforming changes to the law governing the Voluntary Action Program (VAP).⁸ The VAP allows a person to assume responsibility for cleaning a property contaminated by hazardous substances in exchange for a release from liability from the state.⁹

Covenant not to sue

Background

Under the VAP, the cleanup of a contaminated property must meet specific standards and requirements developed by the Ohio Environmental Protection Agency (OEPA). When those standards and requirements are met, the OEPA Director may issue a covenant not to sue. This covenant protects the property owner or operator and future owners from being legally responsible to the state for further investigation and cleanup. In order for the property to qualify for the covenant, OEPA may establish institutional controls or activity and use limitations that apply to the property.¹⁰ For example, OEPA may limit the property to commercial uses only.

Voiding the covenant

Prior law *automatically* voided a covenant not to sue when an institutional control or activity and use limitation was violated, beginning on the date of the violation. Instead, the act authorizes (but does not require) the Director to issue an order voiding the covenant not to sue in that circumstance. It clarifies that the Director's order is a final action that may be appealed.¹¹

⁶ R.C. 3746.122(B).

⁷ R.C. 3746.122(A). See also 42 U.S.C. 9601.

⁸ R.C. 3746.122(C) and R.C. 3746.02(A)(5).

⁹ See R.C. Chapter 3746.

¹⁰ See R.C. Chapter 3746.

¹¹ R.C. 3746.05(B).

COMMENT

The act specifies that it is the General Assembly's intent to extend the new affirmative defense to civil actions pending on the act's effective date that were initiated prior to that date. It also specifies that the General Assembly finds the BFPP immunity is remedial in nature.¹²

In general, the General Assembly is prohibited from establishing retroactive laws by both the Ohio Constitution and U.S. Constitution. However, retroactive laws are constitutional when necessary to remedy an omission, defect, or error in instruments or proceedings.¹³ The Ohio Supreme Court has upheld retroactive laws as constitutional where the purpose of the law is remedial. In particular:

Remedial laws are those that substitute a new or different remedy for the enforcement of an accrued right, as compared to the right itself, and generally come in the form of rules of practice, courses of procedure, or methods of review.¹⁴

Because a BFPP may assert the defense in a civil action initiated before the act's effective date, the act has a retroactive effect. It is for a court to determine whether that retroactive extension of the affirmative defense is constitutional as a remedial measure.

HISTORY

Action	Date
Introduced	03-26-19
Reported, H. Civil Justice	05-08-19
Passed House (90-0)	05-30-19
Reported, S. Agriculture & Natural Resources	12-04-19
Re-Reported, S. Agriculture & Natural Resources	05-06-20
Passed Senate (33-0)	05-06-20
House Concurred in Senate amendments (94-0)	05-13-20

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¹² R.C. 3746.122(D) and (E).

¹³ Ohio Constitution, Article II, Section 28 and United States Constitution, Article I, Sections 9 and 10.

¹⁴ *State ex rel. Kilbane v. Indus. Comm.*, 91 Ohio St.3d 258, 260 (2001).