



## Commonwealth Court Bars Private Party Property Damage Claims Under HSCA

On September 13, the Commonwealth Court ruled that damages for diminution of property value was not a remedy available to a private party under the Hazardous Sites Cleanup Act (“HSCA”), Pennsylvania’s state-law analogue to CERCLA. *Diess et al. v. PennDOT et al* (No. 563 M.D. 2006). This is a significant ruling. Private plaintiffs frequently assert claims under HSCA for the injury they claim their property values have suffered as a result of whatever contamination they allege. Until the *Diess* case (in which the defendant seeking to strike the property damages claim was represented by BCCZ), there was no definitive Pennsylvania authority on this issue. Now future defendants have a straightforward basis to eliminate these claims at the beginning of a case.

HSCA makes a party responsible for a release of a hazardous substance strictly liable for “costs of response” incurred by any person. 35 P.S. § 6020.702(a)(3). The plaintiffs in *Diess* were owners of residential property. They claimed their neighborhood had increased levels of arsenic due to deposits of fly ash that resulted from the collapse of a road embankment. The plaintiffs asserted a claim under HSCA seeking, among other things, “property damage including the diminution of property values.”

BCCZ filed papers asking the court to strike the plaintiffs’ claim, arguing that private party remedies under HSCA are limited to response costs and that damages for diminution of value could not qualify because HSCA expressly defines “response” in terms of an “action” taken “in the event of a release.” 35 P.S. § 6020.103(5). The Commonwealth Court agreed.

The Commonwealth Court rejected the plaintiffs’ effort to salvage their HSCA claim by invoking the Pennsylvania Supreme Court’s decisions in *Redland Soccer Club v. Dep’t of the Army*, 696 A.2d 137 (1997) (holding that establishment of a medical monitoring trust fund was a HSCA response cost), and *Centolanza v. Lehigh Valley Dairies*, 658 A.2d 336 (1995) (holding that damages for diminution of property values was a remedy available under the Storage Tank and Spill Prevention Act (“STSPA”). The Commonwealth Court noted that the *Redland* decision was based on the language of HSCA, which includes the “cost of a health assessment or health effects study” as an available remedy and also defines the term “response” to encompass “actions necessary

to assess, prevent, minimize or mitigate damage to the public health.” By contrast, the Commonwealth Court observed, the *Diess* plaintiffs’ claims for property damages were not included in the statutory definition of the term “response.” Moreover, allowing such a remedy, the court said, “would do nothing to ‘assess, prevent, minimize or mitigate damage to the public health.’” As for *Centolanza*, the Commonwealth Court pointed out that the state Supreme Court concluded that damages were available under the STSPA only after first determining that the General Assembly had failed to “fully describe” the nature of damages available under that statute. The Commonwealth Court saw no such ambiguity in HSCA.

By maintaining fidelity to the statute’s plain language, the Commonwealth Court interpreted HSCA in a way that advanced its manifest intent, namely, to provide a more certain basis for those who have incurred costs to respond to a release of a hazardous substance to be reimbursed for *those* costs. This result also places HSCA claims on a similar footing with CERCLA claims, since it is broadly accepted that private property diminution claims are not cognizable under CERCLA.

If you have any questions regarding the Commonwealth Court’s ruling on private party property damage claims under HSCA, please contact Steven Baicker-McKee at (412) 394-5499 or [sbaicker@bccz.com](mailto:sbaicker@bccz.com), or C. Shawn Dryer at (412) 394-5432 or [sdryer@bccz.com](mailto:sdryer@bccz.com), or Joseph K. Reinhart at (412) 394-5452 or [jreinhart@bccz.com](mailto:jreinhart@bccz.com).