



Selling Property "As Is" Won't Protect Seller From Superfund Liability

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Everyone is familiar with the two little words - "as is" - that pop up in real estate contracts. The "as is" clause is a means of allocating risk between seller and buyer. Generally, a seller who sells property "as is" will not be liable to the buyer for the condition of the real estate at the time of transfer. There are limitations, however, on the degree of protection the "as is" clause provides, and these limitations are particularly important when the property being transferred is contaminated.

Section 107(e)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, commonly known as Superfund) addresses the issue of contractual allocation of environmental liabilities by buyers and sellers of real estate:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any facility ... to any other person the liability imposed under [CERCLA]. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under [CERCLA].

Courts have interpreted this section as precluding a responsible party from divesting itself of liability. In other words, a seller who is liable under CERCLA remains fully liable to third parties, such as the federal government, regardless of language to the contrary in the contract between the buyer and seller. The seller, however, can shift the cost of that liability to the buyer by having the buyer agree to reimburse it for any environmental costs incurred in connection with the property after closing.

How is that best done? Many believe an "as is" clause is an effective way to shift CERCLA liability from seller to buyer, but that's not always the case. This point is illustrated by *M & M Realty Company v. Eberton Terminal Corporation*, a case decided years ago by a federal court in Pennsylvania.

The case concerned a 7-acre parcel of industrial property that M & M Realty purchased from Eberton after receiving a favorable environmental report for the site. Five months later, M & M Realty discovered the soil and groundwater at the property were contaminated with petroleum and various hazardous chemicals. M & M Realty then sued Eberton under CERCLA to recover its cleanup costs..

The property was transferred pursuant to a purchase agreement that contained an "environmental contingency" clause. This clause provided that the buyer would be allowed the opportunity to perform a Phase I environmental site assessment and other appropriate investigations to determine the condition of the property. If contamination was detected, M & M Realty would have the right to walk away from the deal. If, however, M & M Realty decided to purchase the property, the clause stated that M & M Realty was accepting the property "as is."

Eberton moved to dismiss M & M Realty's lawsuit because, among other reasons, the property was sold "as is." Eberton took the position that the buyer had assumed the risk of environmental liability and could not use CERCLA to circumvent the "as is" clause.

The court disagreed. Following the reasoning of the majority of federal courts to consider this question, it concluded that there can be no allocation of CERCLA liability between a buyer and seller without explicit language of indemnification clearly manifesting the parties' intent to transfer environmental liability. In the absence of clear and explicit language stating that the buyer agreed to indemnify the seller, the "as is" clause was held ineffective to bar a lawsuit for cleanup costs.

M & M Realty highlights the need to consult environmental counsel in real estate and corporate transactions when parties define their future responsibilities for environmental liabilities. Each transaction is different and requires well-designed environmental provisions that anticipate unknown environmental liabilities.

M & M Realty Co. V. Eberton Terminal Corp., 1997 WL 580591 (M.D. Pa. Sept. 11, 1997).

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