

CONTAMINATION: THE KISS OF DEATH FOR REAL ESTATE DEALS?

Buying and Selling Dirty Property



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“HAZARDOUS WASTE”

- **These words can spook buyers, sellers, banks, investors, landlords, tenants, and brokers**
- **Developers disappear when they see signs of hazardous waste or hear rumors**
- **Business expansions are cancelled for the fear of discovering or disturbing past contamination**
- **Government agencies acquiring property by purchase, eminent domain, condemnation, tax title, gift, or otherwise, get cold feet when waste is found**
- **Fear of liability is natural considering that some innocent landowners can be liable for acquiring contaminated land even if unaware of contamination**

CONTAMINATION IS MANAGEABLE

- The presence of contamination need not render property unusable or unsellable
- Someone needs to take charge and manage the problems
- Parties to a transaction can find many ways to “hold the deal together”
- Contaminated real estate can be bought and sold without unreasonable fear of liability
- It is very possible to make money buying and selling dirty property

UNDERSTAND SUPERFUND LIABILITY

- **Nature of the liability**
 - **Liability may attach to any contaminated real estate, not just “federal Superfund sites”**
 - **Strict, joint, and several, and retroactive liability**
 - **CERCLA (Comprehensive Environmental Response Compensation Liability Act) 42 U.S.C. §§ 9601-9675**
- **All “Potential Responsible Parties” (PRPs)**
 - **Generators**
 - **Transporters**
 - **“Arrangers” of transport, treatment, or disposal**
 - **Disposers**
 - **Owners**
 - **Operators**

MEET STATE REQUIREMENTS

- Massachusetts Superfund Statute, M.G.L. ch. 21E, §§ 1-18



- States can implement stricter standards
 - MA → petroleum products
 - MA, NH, CT → Superliens against land or business revenues
 - NJ & CT → Site assessments are required prior to transactions involving industrial property ⁶

Accept Contamination is Routine

Almost every piece of municipal, industrial, agricultural or commercial real estate has some contamination

Commercial buildings

Factories

Vacant lands

Farmland

Warehouses



TRY TO FIND THE CONTAMINATION

- **It is naïve to buy a cheap assessment in the hope that it will be “clean”**
- **ASTM standards set a framework for conducting Phase I and Phase II environmental site assessments**



DO CAREFUL SITE ASSESSMENTS

A properly done site assessment should include:

| | | |
|-----------------------------------|----------------------------------|--|
| Permit and enforcement history | | Prior waste disposal |
| Topography | Surface and groundwater flows | |
| Geologic setting | | Conditions of all buildings and structures |
| Building and utility layouts | Presence of tanks and piping | Prior uses, industrial, commercial or agriculture |

STRUCTURE THE TRANSACTION TO REDUCE THE RISK

Decisions to purchase or develop should be based on nature and scope of contamination, anticipated cleanup costs, activity and use limitations, and potential future liability

- **Control liability**
 - **Delay the closing or acquisition until cleanup is complete**
 - **Deposit purchase money in escrow until the property is clean**
 - **Personally do the cleanup, deducting costs from the purchase price**
 - **Contract cleanup duties between buyer and seller, using a formula**
- **Carve off contaminated areas**
 - **Do not own or operate the dirty site, buy only the clean portion**
 - **Purchase or lease less than fee interest in property, such as only building, upper floors, front 40 , easement, or air rights**
 - **Loan operating funds, taking back principal and interest**

DISTANCE THE BUYER FROM THE CONTAMINATION

- **Utilizing different business entities may enable sophisticated purchasers to minimize liability**
- **Limited partnerships may allow limited partners to avoid liability by staying out of day-to-day management activities**
- **Subsidiaries may provide liability protection**
 - **Generally parent corporations will not be held liable for the actions of subsidiary corporations financially independent making unconstrained business decisions**
 - **Liability chiefly arises from ownership and management**
- **Corporate officers and employees engaged in illegal toxic waste disposal may be personally liable, even when acting on behalf of the business**

A CONTRACT CAN PROVIDE ADDED PROTECTION

- **Contracts enable parties to share and shift financial burdens of known and unknown cleanup costs through indemnification agreements**
- **But Superfund statutes provide the fundamental legal liability remains and cannot be shifted**
- **Common liabilities can be allocated among private parties only**
- **Courts have refused to recognize and enforce indemnification agreements between parties and the government**

MAKE SURE THE CONTRACT COVERS THE ESSENTIALS

| | | |
|---------------------------|---------------------------------|---|
| Condition of property | Warranties and representations | Escrow deposits |
| Purchase money holdbacks | Purchase price adjustments | Contingencies about future claims |
| Management of the cleanup | Circulation of progress reports | Covenants not to sue |
| Government liaison | Liability releases | Cooperation on insurance claims |
| Reimbursement formulas | Government cleanup orders | Arrangements against third party claims |
| Cooperation in defense | | Cost-sharing arrangement |

MAKE CREATIVE FINANCIAL ARRANGEMENTS

- **Lenders are protected from owner/operator liability where they do not exercise decision-making control or actively manage the facility prior to foreclosure**
- **Careful banks protect against potential liability through their own requirements:**
 - **Site assessments**
 - **Conditioning loans on cleanup**
 - **Indemnity clauses**
 - **Notification requirements**



UTILIZE YOUR LEGAL CLAIMS AND DEFENSES

- **CERCLA establishes statutory defenses and limitations**
 - Act of God
 - Act of war
 - Third party acts or omissions
- **Innocent purchaser defense**
 - Prospective purchaser must make an appropriate and detailed pre-purchase environmental investigation
- **Other CERCLA exemptions**
 - Involuntary transfer exemption
 - De micromis party exemption
 - Municipal solid waste generators
 - Contiguous landowners



PRESERVE INSURANCE COVERAGE

- **Old Comprehensive General Liability (CGL) policies may provide cleanup funds and other costs due to their “long tail” coverage**
- **Household, vehicle, umbrella, or other personal insurance may also provide some coverage**
- **Contractors may have liability insurance**
- **Consultants may have errors and omissions coverage**
- **Need to submit a sophisticated statement of claim:**
 - **Dates of contamination**
 - **Nature of contamination**
 - **Response actions**
 - **Cleanup costs**
 - **Appraisals**
 - **Existence of policies**
 - **Legal basis for believing coverage exists**
 - **Amount of claims to date**

AFTER THE DEAL, MANAGE PROACTIVELY

- **Contamination problems don't "get better" after the deal**
- **Recruit a team of engineers and environmental scientists**
- **Designate a responsible manager as clerk of the works**
- **Document conduct and completion of the cleanup**
- **Do periodic environmental audits to stay in compliance**
 - **Superfund hazardous substances**
 - **Massachusetts Oil and Hazardous Materials (OHM)**
 - **Resources Conservation and Recovery Act (RCRA)**
 - **Toxic Substance Control Act (TSCA)**
 - **Federal Insecticide Fungicide and Rodenticide Act (FIFRA)**
 - **Solid wastes**
 - Asbestos
 - Radon
 - PCBs
 - LUST
 - Lead Paint
 - Ureaformaldehyde Insulation (UFFI)

SUE THE REAL RESPONSIBLE PARTIES WHEN THINGS GO WRONG

- **Federal or state Superfund, common law, or contract claims :**

- **Cleanup cost-recovery, property damage, personal injuries, contract breach, fraud, misrepresentation, or non-compliance with government regulations**

Consultants

Contractors

Generators

Disposers

Former operators

Present operators

Tenants

Former site owners

Transporters

Partners

“Arrangers”

Parent corporations

Present site owners



“HAZARDOUS WASTE” MANAGEMENT IS FUNDAMENTAL

- Private and public landowners should know their liabilities and defenses without unwarranted fear**
- Landowners should proactively manage their contamination and understand it objectively**
- Strict liability for contamination is here to stay**
- EPA and state agencies have powerful weapons**
- Cope with liabilities through practical approaches**
- Manage the legal, financial, and environmental risks**
- Hold deals together through using proven techniques**

CONTAMINATION NEED NOT BE THE KISS OF DEATH FOR REAL ESTATE

