"All Appropriate Inquiry" Standard Established

General Background

Purchasers of real estate are generally aware of the potential environmental liabilities that may attend taking title to contaminated property. Under the federal Superfund law or CERCLA, an owner of contaminated property may be liable for the full cost of responding to contamination on their property, no matter who caused it.

Since 1986, federal law has provided for an "innocent purchaser" defense, which may protect new owners from CERCLA liability for pre-existing contamination if "all due inquiry" was conducted prior to taking title and the results of the inquiry did not reveal the contamination.

To be covered by this defense, the purchaser must demonstrate that it took "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." In determining whether there was an "appropriate inquiry," the law requires that any specialized knowledge or experience of the purchaser be taken into account as well as the relationship of the purchase price to the contaminated property and whether the presence of contamination was obvious or could be detected by an appropriate site inspection. This "innocent purchaser" provision is one of the key reasons that purchasers and their lenders commonly conduct environmental site assessments as part of real estate transactions.

The CERCLA "innocent purchaser" provision, however, does not include details or a specific standard outlining the steps that must be taken in completing "all appropriate inquiry." Purchasers should be aware that, where their environmental assessment activities are later determined not to fulfill the requirement for "all due inquiry", the purchaser could be found liable for contamination later discovered on the property.

For example, in the case of *In Re Hemingway Transport, Inc.*[1] the United States Court of Appeals for the First Circuit held a purchaser liable for contamination, even though the purchaser had conducted an environmental site assessment, because the persons conducting the assessment failed to detect drums of contaminants that were submerged in a snow-covered wetlands.

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Designating a Standard

On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (the "Brownfields Law"). The law requires the EPA to develop a standard practice for conducting "all appropriate inquiry" under CERCLA and provides that, until then, prospective purchasers of real estate should apply the "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process (E1527-97)" issued by the American Society for Testing and Materials" ("ASTM").

This requirement caused some confusion within the environmental community because, by the time the Brownfields Law was enacted, ASTM had updated the 1997 Standard with a newer standard in 2000 (the "2000 Standard"), which was already commonly in use.

Therefore, on January 24, 2003, the EPA published a proposed rule stating that a prospective purchaser could use either ASTM's 1997 Standard or 2000 Standard to comply with the "all appropriate inquiry" requirements. This rule became final on March 25, 2003.

The EPA has indicated that it intends to publish standards for "all appropriate inquiry" by January 2004.

Significance of the New Rule

By adopting ASTM's 2000 Standard, the EPA has provided a relatively detailed definition of "all appropriate inquiry." Therefore, if contamination is discovered and it is determined that the purchaser's environmental site assessment did not fully comply with the 2000 Standard, then it is likely that the purchaser will not be able to take advantage of the CERCLA "innocent purchaser" defense.

As a result, prior to taking title to real estate, prospective purchasers should take the following steps:

1. Require, by contract, that the environmental firm providing the site assessment services certify that the assessment will comply fully with the ASTM 2000 Standard.

2. Confirm that the selected environmental firm has adequate resources or insurance, as evidenced by current insurance certificates, to stand behind its work.

3. Require that the environmental firm provide the purchaser or the purchaser's legal counsel an opportunity to review the Draft Phase I Environmental Site Assessment Report to examine whether the scope of the site assessment meets the 2000 Standard, and address any deficiencies in the assessment before the report is published for review by the parties or lenders.

Purchasers of real estate should not assume that they are protected just because an assessment report does not identify contamination. Purchasers may be subject to very significant environmental exposures under federal law if an assessment is not complete and contamination is later found. Purchasers should also follow up on any "recognized environmental conditions" reported in the assessment and should conduct Phase II assessment activities if there are any reported indications of significant hazardous substance discharges. More importantly, by taking title, purchasers may incur environmental liability under State law, whether they conducted "all appropriate inquiry" or not.

State Law

Many states have enacted "innocent purchaser" statutes comparable to the federal law under CERCLA. Wisconsin has not. Section 292.11, Wis. Stats., known as the "Wisconsin Spills Law," requires a person who possesses or controls a hazardous substance discharged to the environment to take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.

The Wisconsin Supreme Court has ruled that the owner of a contaminated property has "possession and control" of the hazardous substances discharged on that property and is responsible to take remedial action, regardless of whether that person caused the discharge. The Court has determined that, by virtue of holding title, a property owner possesses the soils at a property and the hazardous substances contained in the soils, and has actual and physical control of the hazardous substances. Therefore, while an adequate environmental site assessment provides an "innocent purchaser" defense against federal Superfund liability, it has no effect on a property owner's environmental liability under State law. Some environmental risk management and liability protections are available under Wisconsin law through the Voluntary Party Liability Exemption program, provided at Section 292.15, Wis. Stats. Under this program, a prospective purchaser willing to complete a comprehensive investigation and remediation of

contaminated property can reduce the risks for latent environmental conditions. Persons contemplating the acquisition of contaminated property in Wisconsin should evaluate the costs and benefits of this program, to determine if it offers advantages for that particular transaction.

Conclusion

With few exceptions, a purchaser of real estate in Wisconsin will be responsible for addressing any contamination found on the property, and there is no "innocent purchaser" provision under State law. Purchasers who conduct assessments merely to satisfy a lender's request, or who otherwise complete a bare minimum of assessment activities just to step through an internal procedural requirement, are missing the point entirely. The chief reason for conducting a thorough environmental site assessment is to avoid stepping into liability for an environmental nightmare. A prudent purchaser will select a qualified professional to complete a thorough environmental site assessment. In Wisconsin, it may be the only meaningful defense.

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[1] *In Re Hemingway Transport, Inc.*, 993 F.2d 915 (1st Cir. 1993).