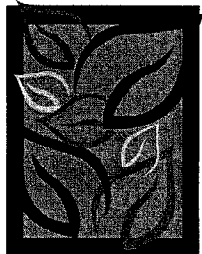


'As Is' isn't always what it seems

By Richard S. Baron and Michael D. Eberth



In today's regulated and litigated world, the selling and purchasing of real estate requires careful planning. The Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Michigan Environmental Response Act (MERA) distribute responsibility for the cleanup of environmental contamination among a broadly defined group—frequently including prior property owners. With cleanup costs often exceeding market value, many real estate deals fail or, if completed, promote litigation over the meaning of liability allocating provisions. This may be avoided by carefully drafting the contract to account for environmental liabilities and the allocation of responsibilities.

**"Our deeds determine us, as much as we determine our deeds."—
George Eliot,
Adam Bede,
1859**

with relief from all future liabilities and allowed the purchaser to have its objections cured. Despite a willing buyer, the transaction stalled when the cure was not completely done.

- What legitimate objections may a purchaser make?
- Can the purchaser demand the cure that satisfies a specific Michigan

Department of Natural Resources cleanup criteria, or can the seller determine a proper cure?

- What are the purchaser's rights given the "as is" language in the contract if, at a later time, the purchaser learns an earlier cure was incomplete?

Many sellers insist on an all-encompassing "as is" clause to eliminate potential future environmental claims from the buyer. With careful drafting of the sale contract, both parties can proceed with a clear understanding of their responsibilities and account for their potential environmental liabilities in the bargained-for price of the real estate.

An "as is" clause does not necessarily shift liability for environmental cleanup costs. Courts have allowed a well-drafted "as is" clause as a defense, while others as an equitable consideration in allocating response costs.

When drafting a contract containing an "as is" clause, there are a number of precautions that can be taken to address the concerns of the transacting parties and enforce the intent of the contract.

Consider the following:

1. Use a specific provision to distribute environmental liability and clear, unequivocal language to show the parties intended to resolve all their disputes of any type of claim.
2. Courts are more likely to enforce an "as is" clause that also contains a purchaser's signed statement indicating the seller made no warranties to the soil condition, the purchaser inspected the property and the purchaser assumes responsibilities for damages to the property.
3. Allow reasonable time for the purchaser to inspect, survey and conduct environmental studies, to determine whether there are any ob-

jections over environmental concerns.

4. Limit the purchaser's right to void the contract for objections which have appropriate corrective action readily available.
5. Provide the seller with a reasonable amount of time to cure objections and define a "satisfactory cure" within the contract.
6. Make the "as is" clause contingent on the representations made by the seller. If the representations are later proven false, provide for a shifting of the non-disclosed environmental liability to the seller.
7. Understand whether statutory as well as contractual remedies are being waived under the buy-sell agreement.

Successful completion of the real estate transaction depends upon addressing contingencies that might arise as part of the environmental inspection of the property. A clear understanding among all parties of their rights, responsibilities and, particularly, the method and manner in which defects may be cured increases the chances of closing the deal. However, as the courts have not consistently held an "as is" clause is legally enforceable, it is essential both parties understand the rights they are retaining and waiving under the buy/sell agreement. Such an understanding may avoid "11th hour" disputes and derailment of the contract. ☺

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