New Environmental Cases That Could Affect Your Business

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Give the Notice, the Whole Notice, and Nothing but the Notice

1. Give the Notice

The first question that should cross the mind of anyone planning to purchase or lease a gas station is: have the underground gasoline storage tanks at the station ever leaked? If so, negotiating responsibility for the cost and complication of cleaning up the leak, and avoiding statutory liability to the state as a new owner or operator of the gas station, assumes critical importance. In Michigan, the owner of contaminated property has a statutory duty to tell what he knows – in writing – about such contamination before selling or leasing the property *(MCL 324.20116)*.

But what if he doesn't give the notice? A new Court of Appeals decision suggests that a sale or lease transaction of contaminated property may be nullified if the proper notice is not given, and the dissatisfied buyer (or lessee) may be able to recover damages. In *1031 Lapeer LLC v. Rice (#290995 Michigan Court of Appeals unpublished decision, August 5, 2010)*, a gas station owner leased a station without disclosing that an underground storage tank had leaked and caused subsurface gasoline contamination. Even though the lease agreement made several references to possible contamination and division of liability for any such contamination, and even though information on the leak was publicly available on a state web site *(http://www.deq.state.mi.us/sid-web)*, the Court of Appeals held that written notice of the known contamination from the landlord was mandatory. The Court set aside the lease and affirmed damages of $83,000 to the disappointed lessee.

Although the unreported decision does not bind other courts, if the decision's reasoning is followed, it could have a profound effect on real estate transactions in Michigan. The written notice required in the law is not limited to gas stations, but applies to essentially all commercial properties with known contamination. Moreover, the notice is required, not just when an owner has absolute, dead certain knowledge of pollution, but whenever a property owner has "... knowledge or information or is on notice through a recorded instrument..." that his property is contaminated. How much information is enough to trigger the notice duty? The *1031 Lapeer LLC* decision does not answer that question, but the prudent approach is clearly to err on the side of caution and tell your prospective purchaser what you know.

2. Give the Whole Notice, and Nothing but the Notice

The requirement to give a warning notice of the dangers of lead-based paint in pre-1978 residential property is by now fairly well known to landlords, who may assume that if they give their prospective tenants a copy of the federal government's warning

pamphlet on lead paint *[http://www.epa.gov/lead/pubs/leadprot.htm]* they can rest easy, confident that they have satisfied their legal obligation.

There is more to the legal duty to warn of lead paint dangers, however, and any deviation from that duty will not be considered "good enough for government work" – it may instead result in substantial fines and penalties, as the case of *Vidiksis v Environmental Protection Agency* (11th Federal Circuit Court of Appeals #09-12544 filed July 28, 2010).

John Vidiksis was a Georgia-based landlord who rented residential properties in York, Pennsylvania. As the *Vidiksis* opinion notes, Mr. Vidiksis sought the advice of Pennsylvania real estate professionals in renting the properties:

"the lease documents and [lead paint] disclosures were prepared by professional real estate agents in Pennsylvania hired by [Vidiksis]."

Although Mr. Vidiksis argued that the clause prepared by his real estate agent contained all the essential elements of the Lead Warning Statement required to appear verbatim in leases for target property (40 CFR section 745 .113 (b) (1)), the Court of Appeals upheld the EPA finding of a violation because: "Vidiksis simply did not have that precise language in his leases, as required by the regulation."

Result: $36,264 fine upheld.

The disclosure in Mr. Vidiksis' form lease stated: "Tenant acknowledges that the leased premises... **may** contain lead-based paint." Not good enough, said the EPA; a landlord must positively declare either that:

1. Lead-based paint is present on the premises, or that

2. The landlord has "no knowledge" of the presence of lead paint on the property.

Fine: $57,024. Cold comfort: the real estate professional who drafted the lease forms and disclosures for Mr. Vidiksis was also fined – $5,000.

The lesson from each of these cases is that disclosure requirements in the law must be taken very seriously, interpreted properly and followed exactly, or serious legal consequences may result.