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3S

Structuring the Deal and Environmental Issues in the Real Estate Contract

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II. Initial Steps

- A. [3S.2] Understanding the Deal
- B. [3S.3] Seller's Pre-Transaction Investigation
- C. Buyer's Due Diligence
 - 1. [3S.4] Buyer's Scope of Investigation

III. Context of Contractual Negotiations — Liability Allocation

- B. [3S.9] Noncontractual Remedies Available to Buyer

II. INITIAL STEPS

A. [3S.2] Understanding the Deal

The first sentence in the second paragraph is revised:

In an asset transaction, CERCLA imposes liability on the current owner of the property unless the buyer can avail itself of the “innocent landowner” defenses (42 U.S.C. §§9601(35), 9607(b)(3)), or other limitations on CERCLA liability such as “bona fide prospective purchaser” (42 U.S.C. §§9601(40), 9607(r)) found in the brownfields amendments to CERCLA that Congress enacted in 2002.

B. [3S.3] Seller’s Pre-Transaction Investigation

The N.J.Stat.Ann. citation sentence in the carryover paragraph at the top of p. 3-6 is replaced:

See New Jersey Industrial Site Recovery Act (ISRA), N.J.Stat.Ann. 13:1K-6, *et seq.*, 13:1D-1, *et seq.*, 58:10B-1, *et seq.*, and 58:10-23.11a, *et seq.*; as implemented at N.J.Admin.Code 7:26B (ISRA Rules available at www.state.nj.us/dep/srp/regs/isra/israrule.pdf). Other examples include the Indiana Responsible Property Transfer Law (RPTL), Ind. Code 13-25-3, *et seq.*, and Connecticut’s Property Transfer Act, Conn.Gen.Stat. 22a-134, *et seq.*

C. Buyer’s Due Diligence

1. [3S.4] Buyer’s Scope of Investigation

Add at the end of the second paragraph on p. 3-7:

ASTM International also developed ASTM E2247-08, “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland and Rural Property,” to be in compliance with the AAI rule. The EPA recognizes both standards as compliant with the AAI rule and, as a result, both standards can be used to satisfy the requirements for conducting all appropriate inquiry in the CERCLA context.

III. CONTEXT OF CONTRACTUAL NEGOTIATIONS — LIABILITY ALLOCATION

B. [3S.9] Noncontractual Remedies Available to Buyer

The Atlantic Research citation sentence in the carryover paragraph at the top of p. 3-11 is revised:

See United States v. Atlantic Research Corp., 551 U.S. 128, 168 L.E.2d 28, 127 S.Ct. 2331 (2007).

The second full paragraph on p. 3-11 is replaced:

Under CERCLA, any potentially responsible party can be held jointly and severally liable for environmental contamination. Moreover, CERCLA contains an express provision that parties cannot escape their liability to the government through agreement. 42 U.S.C. §9607(e). However, CERCLA does not foreclose the ability of parties to enter into agreements to allocate responsibility for environmental contamination amongst themselves, and courts have generally upheld the enforceability of contractual provisions allocating responsibility among parties. *Id. See, e.g., Harley-Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341, 342 (7th Cir. 1994); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 15 – 16 (2d Cir. 1993); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1461 – 1463 (9th Cir. 1986). In doing so, these courts have looked to the express language of the contract and applied the basic principles of contract interpretation. In order to ensure that contractual provisions regarding allocation of environmental liability are interpreted as intended, the parties should explicitly and clearly address the environmental contamination issues in the transaction, and any ambiguities should be resolved during the negotiation stage of the transaction.

Add at the end of the section:

In addition to remedies against the former owner, the buyer of a business may want to consider taking advantage of the EPA’s “Interim Approach to Applying the Audit Policy to New Owners” (Interim Approach) to mitigate potential penalties associated with any operational compliance problems associated with the newly acquired business. See www.epa.gov/oecaerth/incentives/auditing/newowners-incentivessummary.html. The purpose of the Interim Approach is to adapt the EPA’s audit policy to the unique situation of new owners and, as a result, encourage new owners to audit newly acquired facilities to identify and correct any potential violations and ensure environmental compliance in the future. Notice of the Interim Approach was provided in the Federal Register on August 1, 2008, and the policy became effective on that date. 73 Fed.Reg. 44,991 (Aug. 1, 2008). A copy of the policy can be found at <http://edocket.access.gpo.gov/2008/pdf/E8-17715.pdf>.