Environmental Issues in Commercial Transactions - Lessons Learned/Update: March 6 Presentation to the Environmental Law Section/Arkansas Bar Association



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I undertook a presentation at the Arkansas Environmental Law Section Seminar in Hot Springs titled:

Environmental Issues in Commercial Transactions: Lessons Learned/Update ("Presentation").

The Presentation was intended to both identify and provide suggestions on how to resolve environmental issues in a variety of commercial transactions.

A key point initially made in the Presentation was the fact that environmental issues in many cases are much easier to resolve today as opposed to 30 years ago. This is arguably due to a perception many years ago that such issues posed extraordinary or unquantifiable risks. This posed problems because transactions sometimes failed, or the value of the property or facility was significantly reduced.

Equally important environmental issues potentially involve a wide variety of properties or facilities. Such affected properties might include industrial, commercial, agricultural, office, and in some instances residential properties.

The players involved in a transaction might include:

- Purchasers;
- Sellers;
- Developers;
- Lessors (the tenant dry cleaners did what?);
- Lessees;
- Lenders (including the secondary market);
- Appraisers;
- Contractors (did I just spread hazardous waste?);
- Architects;
- Material suppliers:
- Subcontractors;
- Property managers;
- Brokers/agents (I had no obligation to disclose presence of asbestos…); and

- Attorneys (whether you conduct invasive sampling at that facility is a “business decision” for you to make).

It is arguable that many environmental issues that were formally deemed potential deal breakers or unquantifiable have been for a number of years addressed in the same manner as other transactional tasks such as titled searches, appraisals, etc.

This is due in part, to developments such as:

- Familiarity (i.e., asbestos, USTs, mold, lead based paint, etc. are routinely identified and addressed);
- Improved ability to quantify environmental issues (sampling, governmental action levels, etc.);
- Experience (assessment, sampling, use of action levels, are often routine);
- Revised or clarified liability principles (CERCLA secured creditor exemption/BFP, Federal guidance, etc.);
- Improved assessment techniques (targeted/streamlined sampling);
- Government records that are easily accessible (RCRA, CERCLIS, UST, etc. databases);
- Standardized assessments for various types of properties (ASTM, etc.); and
- Efforts by federal and state agencies to reduce, to the extent possible, the environmental regulatory/liability impediments to financing and/or acquiring/leasing existing facilities (policies, action levels, etc.).

The three key questions that may be relevant in determining the materiality of a particular transaction environmental issue include:

- Costs associated with permits/authorizations (addressing NPDES discharge for this facility or obtaining 404 permit for construction);
- Amount and/or likelihood of corrective action/third party property damage/bodily injury claims associated with a property or facility (Did a UST release affect adjacent property and/or cost of corrective action [covered by Tank Trust Fund?]);
- The cost (legal/technical, etc.) to determine/quantify/clarify the first two issues (Document/database review, sampling, engineering of pollution control, etc.). - Can be a particular challenge for low value Arkansas properties (why should I spend $10,000 sampling on this crummy $100,000 vacant drycleaners property?).

The balance of the Presentation included a discussion of several hypotheticals addressing a variety of issues. These included:

- Tanks/Corrective Action Issues.
- The Attorney’s Role in a Transactional Assessment (Ensure role is clarified/understood).
- Water/Future Needs.
- Purchaser Exemption/Third Party Claims.
- Permitting/Compliance Audit.
- Acquisition/Offsite – Issues.
- Loan Portfolio/Secured Creditor Exemption.
- Funding/Due Diligence.
- Environmental Assessment Role of the Attorney.
- Timing/Remediation.
- Leasing/Historical Conditions.
- Unknown Conditions/Trust Fund Transfer.

A copy of the slides from the Presentation can be downloaded here.