Commentary

Court Allows Parties to Exclude CERCLA Remedies as Part of Real Estate Purchase Contract

*by McCutchen, Doyle, Brown & Enerson**

In a decision that confirms the ability to employ a real estate purchase contract to structure environmental liabilities, a federal district court has enforced a contract that excluded the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. S 9601 *et seq.,* as a remedy to recover environmental cleanup costs. *LaSalle National Trust, N.A. v. ECM Motor Co.,* No. 94 C 4401, 1995 U.S. Dist. WL 65158 (N.D. Ill. Feb. 14, 1995). This decision provides that the purchaser and seller of real property may allocate environmental remediation costs by agreement and may further agree to exclude certain remedies, including private cost recovery under CERCLA, by limiting the available remedies to those provided in the contract.

In LaSalle National Trust, Narco Tower Road, Associates, acting on behalf of LaSalle, executed a contract to purchase contaminated real property from the seller, ECM Motor Company. ECM agreed to remove all hazardous substances prior to closing, but it was unable to complete the remediation before the closing date. Narco and ECM then entered into another agreement whereby ECM agreed to complete the remedial action after closing. In addition, the agreement provided that the remedies it specified were exclusive:

> Purchaser's remedies under this Agreement shall be exclusive and in lieu of, and not in addition to, any remedies or rights which it may have, pertaining to the presence of Hazardous Material on the property, in the Real Estate Sales Contract dated September 1, 1991.

More than two years after the closing, Narco and LaSalle filed a complaint against ECM in federal court, seeking damages for ECM's alleged failure to take remedial action pursuant to the agreement. To support federal jurisdiction, the first count of the complaint sought cost recovery against ECM pursuant to CERCLA. Plaintiffs' second, third and fourth counts were for breach of contract, negligence and negligent misrepresentation.

ECM moved to dismiss, asserting that the parties had "voluntarily elected... to make the remedies provided in the (Agreement] the exclusive remedy for the resolution of any environmental contamination problem, forgoing any remedies under CERCLA." Id. at 3. The District Court agreed. The Court focused on Section 107(e)(1) of CERCLA, 42 U.S.C. 5 9607(e)(1), holding that a responsible party may not divest itself of its CERCLA liability to the government, but may enter into an agreement to indemnify or hold another party harmless.

Next, applying state law, the Court determined that the agreement unambiguously provided that the exclusive remedies available to the plaintiffs are to be found in the agreement. Id. at 4. While the agreement did not specifically exclude CERCLA cost recovery, the Court concluded that it limited the scope of available remedies and that plaintiffs were therefore precluded from asserting a CERCLA cost-recovery claim. Finding no other basis for federal jurisdiction, the Court also dismissed plaintiffs' remaining claims.

In decisions leading to *LaSalle,* the courts have generally agreed that Section 107(e)(1) of CERCLA does not prevent parties from entering into enforceable agreements to allocate CERCLA costs among themselves. Those courts have considered a variety of contract provisions, including indemnity agreements, hold harmless clauses and general releases, and broadly enforced those agreements to allocate CERCLA response costs even where they were not explicitly identified in the agreement. The competing view, that public policy concerns require such agreements to refer expressly to CERCLA in order to avoid the possibility that parties may waive such claims by mistake or inadvertence, appears to have

fallen out of favor. *See, e.g., Mardan Corp. v. CG.C. Music,* 804 F.2d 1454, 1464 (9th Cir. 1986) (Reinhardt, J., dissenting).

The LaSalle decision is the logical extension of this trend. It would allow parties to a real estate purchase contract to limit the remedies available for non-performance to those provided by the contract and thereby exclude CERCLA remedies. Significantly, the inclusive language of the agreement in *LaSalle* was found to preclude a CERCLA action and the availability of a federal forum despite no mention of the statute and no other express release or indemnity provision to allocate CERCLA costs.

While parties to real estate purchase and sale agreements may wish to provide specifically for a release of CERCLA claims or for some express allocation of the risk of CERCLA claims, in order to avoid later disputes, this decision suggests that the use of broadly worded remedy limitation clauses may be effective to foreclose subsequent CERCLA claims between the purchaser and seller. Moreover, because many existing real estate contracts include a remedy limitation clause, the parties to those agreements may have already, and perhaps unwittingly, waived their CERCLA claims and a federal forum to seek cost recovery against the other party for environmental problems discovered at the property.

**Prepared by Patricia L. Shanks and Peter Hsiao in Los Angeles; Ed Strohbehn and Karen Nardi in San Francisco; and George Weiner in Washington D.C.*

McCutchen, Doyle, Brown & Enerson is a multi-disciplinary, real estate oriented law firm with offices in San Francisco (415) 393-2000; Los Angeles, (213) 680-6400; San Jose (408) 947-8400; Walnut Creek (510) 937-8000; Menlo Park (415) 233-4000 plus offices in Washington D.C. and Taipei. The firm deals with a wide range of transactional, environmental, procedural and entitlement matters.

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