

Property buyers responsible for contamination cleanup

Commentary by Kellie D. Scott

Commercial property buyers beware: passing the buck on cleanup costs for petroleum or dry cleaning contamination is no longer an option.

Until a few weeks ago, parties who knowingly purchased a commercial property that contained petroleum or dry cleaning contamination had a defense to liability for the cleanup costs if they could prove the discharge was a prior act or omission of a third party and they continued to exercise due care as to the contaminants on the property. This is called the third-party defense.

But, on June 14, the First District Court of Appeal issued an opinion in *FT Investments, Inc. v Florida Department of Environmental Protection*, no. 1D11-3052, that maintains this third-party defense found in Florida statute section 376.308(2)(d) is not an independent defense but, instead, must be read together with the innocent purchaser defense found in section 376.308(1)(c).

The effect of these two defenses being read together is that a prospective purchaser in Florida can no longer knowingly purchase a property that is contaminated with petroleum or dry cleaning solvents and claim the third-party defense.

In the underlying case before the court, FT Investments purchased a

commercial property after completing all appropriate inquiry that identified contamination at the site. After failing to gain eligibility into a state-funded cleanup program, FT Investments approached the department and asserted the third-party defense by claiming the contamination existed at the property prior to its purchase, and, therefore, it was not responsible for cleanup of the contamination.

The Florida Department of Environmental Protection argued that FT Investments was not eligible for the third-party defense because it could not knowingly purchase the property and still claim the defense. And, even if FT Investments could claim the third-party defense, it failed to meet the defense's requirements because it had not exercised due care over the contamination after its purchase of the property. The department claimed FT Investments failed to exercise due care by not delineating the full extent of the contaminant plume to determine if the contamination posed an environmental threat. The court did not address the due care argument since it found that the third-party defense was not available to FT Investments.

In its decision, the First DCA specifically stated that "the legislature expressed a clear intent that a purchaser of property must establish that he or she did not have knowledge of the petroleum contamination after making an appropriate inquiry." An appropriate inquiry is a required element under the

innocent purchaser defense if the property is purchased after July 1, 1992, in the case of a petroleum contaminated property, or after July 1, 1994, in the case of a dry cleaning facility or wholesale supply facility. Until the court's decision, parties asserting the third-party defense could have, arguably, claimed that an appropriate inquiry was not a part of the third party defense and a contaminated property could be knowingly purchased and still qualify for the defense.

Prior to the court's decision, most equated Florida's third-party defense as being similar to the bona fide prospective purchaser defense for federal superfund sites, found in the Comprehensive Environmental Response, Compensation and Liability Act. Under federal law, new purchasers are protected from owner or operator liability under the superfund law as long as the purchaser meets the definition of a bona fide prospective purchaser and the property is acquired after Jan. 11, 2002.

Key elements of the federal bona fide prospective purchaser defense include demonstration by a prospective purchaser that it has no affiliation with the party that caused the contamination and that it has taken reasonable steps to manage the contamination — elements also common to Florida's third-party defense. The federal bona fide prospective purchaser defense also requires a party conduct all appropriate inquiry, in accord with the recent Florida decision. But the two defenses

deviate in their implementation as the federal bona fide prospective purchaser defense specifically allows a prospective purchaser to knowingly purchase the contaminated property and still successfully claim the defense, unlike Florida's third-party defense which — now — does not allow a knowing purchase of contaminated property.

If contamination is discovered during all appropriate inquiry, it is incumbent upon the prospective purchaser to take that discovery into consideration prior to closing. The court stated that its analysis "properly places the burden on prospective purchasers of petroleum-contaminated property to pursue reasonable options to minimize liability, such as negotiating

a lower sales price, obtaining insurance, or simply choosing not to proceed with the purchase." Consequently, any purchase price of contaminated commercial property should reflect the established conditions of the property and prospective purchasers should thoroughly investigate their options and available defenses prior to purchasing contaminated property.

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