

HG&G UPDATE

Hofheimer Garlir & Gross, LLP

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NEW EPA ALL APPROPRIATE INQUIRIES RULE

The Federal Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) imposes potential liability upon an owner of real property when that property is contaminated by hazardous material. The statutory scheme also provides certain good faith based defenses against such liability including: (1) the protection of innocent purchasers who buy the property without knowledge of contamination; (2) purchasers who intend to buy and clean up a contaminated site; (3) acts of other property owners adjoining the property; as well as (4) property owners whose property is contaminated through the independent acts of unrelated third parties; and (5) an exemption for secured creditors. Defenses 1-3 primarily require that the owner conduct appropriate inquiries into the property to determine the status of hazardous material at the site.

What constitutes a purchaser’s appropriate inquiry is now more detailed and clear. Recently, the Federal Environmental Protection Agency (“EPA”) passed a rule specifically outlining what a potential property purchaser needs to do in order to satisfy the pre-acquisition All Appropriate Inquires (“AAI”)

requirement necessary to avail himself of some of the statutory defenses (the most relevant of which for most being the innocent purchaser defense). Previously, the inquiry standard consisted mainly of obtaining a clean Phase 1 Environmental Report (if not clean, a Phase 2 Report and possible clean up would be necessary). The AAI rule now requires further steps and presumably expense. See Exhibit “A” on page 3 for a comparison.

The new AAI rule requires that purchasers have an Environmental Professional (“EP”) perform and document the following: (1) take into account commonly known or reasonably ascertainable information about the property; (2) interview past and present owners, operators, and occupants to determine past uses of the property and identify historical conditions that may have led to the release of hazardous material; (3) review historical sources of information dating back to the first time that the property contained structures or was used for agricultural or commercial purposes, looking for indicators of hazardous materials; (4) search for recorded environmental cleanup liens; (5) review federal, state, tribal, and local government records; and (6) visually inspect the facility and adjoining properties.

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The EPA recommends that the purchaser provide the EP with any specialized knowledge of the property as well as the purchase price in relation to the value of the property and requires the purchaser to consider (and have a good explanation for) the difference in market value to purchase price on a presumably uncontaminated property.

The EP is required to include in his final report: (1) an opinion regarding whether he has identified conditions indicative to the release or threatened release of hazardous materials; (2) the identification of any gaps in his information; (3) his qualifications; and (4) a statement that the report was conducted in conformity with the EPA AAI rule .

Most likely, to try and claim a defense, a property purchaser will then need to take any further steps or inquiries that the EP deems necessary to rule out the presence of hazardous material.

It should be noted that if AAI's are made but hazardous material is still discovered post acquisition, if the property owner takes remedial measures to limit any negative impact of the hazardous material, the defenses will theoretically still be available.

While the satisfaction of the rule requirements would logically lead to an exemption, there are still gray areas, such as when is further investigation required and at what cost and extent. Unfortunately, most courts, under

prior similar rules have basically held that if a prospective property owner did not find the existing contamination then he must have not have conducted a proper AAI. Also, satisfaction of the AAI requirements does not necessarily avoid state imposed environmental liability, a state being the more likely party to bring an action regarding contaminated property.

Notwithstanding, the EPA has provided an intelligent guideline to be considered when evaluating the environmental risks of a potential property purchase. It also serves as another reminder that environmental issues can cause financial ruin in the form of drastically reduced property values, exorbitant cleanup costs as well as potential lawsuits should such contamination lead to personal injury. As such, regardless of statutory requirements, environmental hazards need to be guarded against through preliminary and ongoing investigation as well as liability shifting through contractual agreement where possible. To what extent and expense environmental hazards should be hedged against continues to be an important business decision required to be made by almost anyone whose livelihood involves transactions in real property.

Please note that this is a brief summary of a complex issue for property owners and should not be relied on except to remind you to raise questions and seek professional legal and environmental advice.

EXHIBIT A

Main Difference	Final AAI Standard	Prior Standard
Definition of EP	Specific certification/license, education, and experience requirements	No specific certification, licensing, education, or experience requirements
Interview with /current Owner and Occupants of the Subject Property	Mandatory	A reasonable attempt must be made
Interview with Past Owner and Occupants	Interviews with past owners and occupants must be conducted as necessary	Not required
Interview with Neighbors	Mandatory at abandoned properties	Discretionary
Review of Historical Sources: period to be covered	From the present back to when the property first contained structures	All obvious uses from the present back to the property's first obvious develop use or 1940, whichever is earlier
Records of Activity and Use Limitations (e.g., Engineering and Institutional Controls) and Environmental Cleanup Liens	No requirements as to who is responsible for the search; Scope of environmental cleanup lien search includes those liens filed or recorded under federal, state, tribal or local law	User's responsibility; The search results must be reported to the EP Scope of environmental cleanup lien search is limited to reasonably ascertainable land title records.
Government Records Review	Federal, state, tribal, and local records	Federal and state records; local records/ sources at the discretion of the EP
Site Inspection	Visual inspection of subject property and adjoining properties required; Limited exemptions	Visual inspection of subject property required. No exemption.
Contaminants of Concern	CERCLA hazardous substances (add'l requirements for Brown-field grants)	CERCLA hazardous substances and petroleum products
Data Gaps	Must comment on its significance	Generally discretionary; Sources that revealed no findings must be documented.
Shelf Life of the Written Report	One year, with some updates required after 180 days	Updates of specific activities recommended after 180 days

Source EPA-560-F-05-242, October 2005, Comparison of the Final All Appropriate Inquires Standard and the ASTM E1527-00 Environmental Assessment Standard

INVESTOR-INITIATED LIFE INSURANCE ON THE RISE

Investor-initiated life insurance refers to the ever increasing occurrence of “investors” approaching wealthy, elderly people, and asking them to purchase a life insurance policy with the intention of then selling the policy to the investor. The investor assures the person that he or she will have minimal or zero out of pocket expenses, since the investor will pay the premiums for the first two years of the policy. The person insured signs a non-recourse loan for the amount of the insurance premiums. At the end of two years the investor purchases the policy by canceling the loan and paying additional cash to the insured. At that time, the insured also has the option to pay back the premiums paid and keep the policy. This is unlikely to happen since the premiums are quite large. In fact, what usually happens is that the policy is sold to a third party investor or group of investors. This means that an unknown individual or group now owns a policy on your life. Is there something unsettling about this?

There are many disadvantages to the insured, including negative income tax consequences, and the insured’s loss of insurance capacity to buy another policy. But, the most troubling aspect is that these policies ignore the clearly defined requirement that a policy owner must have an insurable interest on the life of the

insured. The New York State Attorney General’s Office has issued an opinion stating that these policies are not permitted in New York because they ultimately benefit disinterested third parties, and as such, there is no insurable interest.

The insurable interest requirement is mandatory in every state for good reason. Most individuals would be uncomfortable with a stranger taking out a policy on his or her life. The investor-initiated life insurance is the same concept because the investor has the financial incentive of benefiting from the earlier death of the insured. The longer the insured lives, the greater amount in premiums that must be paid by the investor. Conversely, the sooner the insured dies, the larger the payout for the investor.

Regardless of the impermissibility of these policies in New York State, the brochures containing promises of insurance without premiums and no money down continue to reach the homes of the elderly. We should remember the adage that if it is too good to be true, it probably is.

TREES AFFECT RETAIL SALES, STUDY FINDS

Trees don't make just shopping centers greener. They make the bottom lines of landlords greener too. A study from the University of Washington's College of Forest Resources found a correlation between the level of landscaping at a given retail center and the amount of money shoppers are willing to spend there. Consumers in various cities were shown photos of tree-lined marketplaces and of centers with few trees or none at all, and they indicated they would spend between 9 percent and 12 percent more cash at the former locations. "We found there

were distinct perceptions in places with quality streetscapes," said Kathleen Wolf, who oversaw the study. "There is a belief that merchants would be more helpful, more knowledgeable, and the products of greater quality, which people are willing to spend more on." They gave the highest marks to centers with canopies of large, well-maintained shade trees. Wolf says.

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OLD POWERS OF ATTORNEY

Powers of attorney can be quite useful. However, many people forget about them not realizing they continue to be effective until revoked. Often, over time you may no longer want the person to whom you gave the power (your attorney-in-fact) to have power to act on your behalf. You should know how to revoke the power in such event.

If you have maintained a good relationship, but need to make a change, you can notify the attorney-in-fact of revocation of the power, asking him to return the original power to you. As lawyers we recommend that the notice be in writing. Also, request a list of the people and entities to which a copy of the power was given. You or your former attorney-in-fact should give notice to all on

that list of the revocation of the power.

If you cannot discuss the revocation with your attorney-in-fact, then you will have to decide which entities might have received the power (or could receive it in the near future) and notify them of the revocation. This list would usually consist of banking and securities institutions where you have accounts. In these circumstances you would then notify your attorney-in-fact of the revocation.

There is one more step you can take if you own real property. A signed and acknowledged revocation can be recorded with respect to each property you own. An HG&G partner can discuss with you if this is warranted and practical and can draft revocations and see that they are recorded.

CALL YOUR LAWYER FIRST

We are a great resource for service professionals. Before hiring an accountant, real estate, mortgage, insurance or securities broker, architect or financial planner, talk to an HGG partner.

We will generally recommend two or three appropriate persons you can meet who we think will satisfy your needs and with whom you will be comfortable. For example, clients often sign an exclusive brokerage agreement and then realize they chose a broker who does not really know their market or who does not stay personally involved. In addition, the form agreement signed should have been modified to better protect the client. We can help, so don't wait. Call us before hiring a service provider or signing a binding agreement.

RECENT TRANSACTIONS OF INTEREST

Partner Jerry Morganstern represented The Ronin Gallery in the leasing of a new space at 425 Madison Avenue at 49th Street. The gallery which has the largest collection of fine 17th-20th century Japanese prints in the United States is having a pre-moving sale in May and June at 605 Madison Avenue and on line at www.roningallery.com

Partner Jerry Rosenthal recently closed a \$50,000,000.00 loan for the The Guardian Life Insurance Company of America covering an upscale shopping center, including an office building, in Boynton, Florida.

THANKS TO OUR ATTORNEYS Adam Hochhauser, Suzanne O'Malley and Gerald H. Morganstern, our managing partner, for their contributions to this issue.
David L. Birch.—Editor

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The firm conducts a general commercial practice. Our principal practice areas are:

- real estate
- corporate and securities law
- general business and commercial law
- cooperative and condominium matters
- financial institutions (loan transactions, leasing, acquisitions, credit restructuring, workouts, foreclosures)
- estate planning
- trust and estate administration
- general litigation and alternate dispute resolution
- matrimonial and family law
- taxation
- bankruptcy and creditors' rights

Clients of the firm range from major financial institutions and public corporations to closely-held businesses, individuals and families