Commercial Liability Issues

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The objective of this document is to increase the your awareness of the tremendous responsibilities facing commercial real estate practitioners.

The test in the beginning of this document is to gauge your knowledge – how much you know (or do not know) about issues you may encounter.

This document is not meant to be an all inclusive explanation of all potential liability issues facing commercial real estate practitioners today. As laws change frequently, contact your legal counsel for any questions regarding liability issues referenced in this document or those that are not. Only then can you be assured you are up to date on legal issues affecting commercial real estate properties and commercial real estate practitioners.

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COMMERCIAL INVESTMENT LIABILITIES – 20 QUESTIONS

1. The number of lawsuits filed against licensed real estate professionals has increased dramatically in the past few years.

   ☐ True ☐ False

2. Real estate brokers may think that if they conduct their business in an honest and straightforward manner, they will win any lawsuit filed against them.

   ☐ True ☐ False

3. In key urban centers such as San Francisco, Los Angeles, New York and Chicago, it is uncommon for lawsuits to go for eight years before being resolved.

   ☐ True ☐ False

4. The provider of services for products finds that the burden of the law is on the consumer, "Caveat Emptor" – Latin for "Let the buyer beware," rather than the provider.

   ☐ True ☐ False

5. The concepts and techniques of successful salesmanship are often in conflict with the duties and obligations of a fiduciary, which is truly the capacity of a real estate sales person.

   ☐ True ☐ False

6. Another reason for increased litigation is that there are more lawyers today than ever before. Thousands of new attorneys are sworn in every year.

   ☐ True ☐ False

7. The CERCLA Act (Comprehensive Environmental Response, Compensation and Liability Act), makes property owners who had no part in contaminating their land or water, responsible for cleanup cost even if those costs far exceed the value of a property.

   ☐ True ☐ False

8. It is safe to assume that contamination problems only exist on the sites of old chemical plants, oil refineries and the like.

   ☐ True ☐ False

9. Land sites that have been vacant for 50, 60, or 70 years may still contain the toxic materials.

   ☐ True ☐ False

10. It is advisable for a purchaser of commercial investment property to identify and quantify environmental risk before closing on any real estate transaction.

    ☐ True ☐ False

11. It is not practical for the initial environmental screening of a property to be conducted by a layman.

    ☐ True ☐ False

12. The Superfund Amendments and Reauthorization Act (SARA) eliminated the legal defense formerly used by buyers to defend themselves against claims resulting from previous contamination from newly acquired properties.

    ☐ True ☐ False

13. Without reasonable proof that an effort had been made to inspect a new property for environmental problems, new owners may easily incur the entire liability for its subsequent cleanup.

    ☐ True ☐ False

14. A professional environmental appraisal identifies actual and potential sources of contamination and assesses regulatory compliance requirements.

    ☐ True ☐ False

15. Environmental appraisals will not add any value to properties.

    ☐ True ☐ False

16. Is it possible for lessee to be held liable as an owner under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)?

    ☐ True ☐ False

17. Can the lender of a property be deemed an owner under CERCLA?

    ☐ True ☐ False

18. At any time, can a purchaser avoid successor liability (in which the acquiring company assumes the liabilities of the acquired company) by purchasing the assets rather than the stock of a corporation or business?

    ☐ True ☐ False

19. You cannot avoid, allocate, or minimize liability through documentation.

    ☐ True ☐ False

20. In any transaction we need to be guided by the philosophy that in no way can any action on our part be regarded as not giving the buyer equal care and treatment.

    ☐ True ☐ False

INTRODUCTION

Consider this as a starting point for the development of a continuing sensitivity to the legal risk and problems faced by the licensed real estate professional.

There is no substitute for the advise of local counsel in the early stages of the problem. Further, there is no substitute for a continuing knowledge of laws in your particular state. This knowledge should be acquired from continuing education classes, reading of real estate oriented publications or news articles online and a close working relationship with your local attorney. Use this material as a starting point in your efforts to render the best possible service to your clients and customers while always protecting yourself from litigation and its consequences.

COMMERCIAL INVESTMENT LIABILITIES

1. The number of lawsuits filed against licensed real estate professionals has increased dramatically over the past few years. *(True)*

   This increase in litigation is a reflection of a continuing trend in our society to seek redress in our court system for every wrong, both real and imagined. Real estate brokers are vulnerable to lawsuits because they are highly visible and literally in the middle of every real estate transaction. The general public believes that they are able to respond to damages either personally or through their insurance. Real estate brokers are classed as "deep pockets."

2. Real estate brokers may think that if they conduct their business in an honest and straightforward manner, their business will win any lawsuit filed against them. *(False)*

   The object is to avoid litigation all together. The cost of litigation is attorney's fees, time lost from one's business and the ill will caused both internally and with the public, should make the thought of litigation anathema to any reasonable real estate broker.

3. In key urban centers such as San Francisco, Los Angeles, New York and Chicago, it is not uncommon for lawsuits to go for eight years before being resolved. *(True)*

   Litigation is on the rise throughout the U.S. Never before have the courts been so crowded with lawsuits. In major metropolitan areas throughout the U.S., it takes approximately five years to get to trial. Not only does it take a long time to get to trial, but often the appellate process takes several more years, in which case it's not uncommon for a case to go on for at least eight years before it's finally resolved. Frankly, lawsuits are time consuming and counter productive. Nobody really wins.

4. The provider of services for products finds that the burden of the law is on the consumer, "Caveat Emptor" – Latin for "Let the buyer beware," rather than the provider. *(False)*

   Aggrieved consumers find that the law has began providing its favors to them. This is not only true among the courts but well-organized and well-funded consumer groups as well. More often than not, courts and juries appear to be concerned with compensating the victim for a loss from those who are better able to absorb the loss, whether or not there is any fault. Any party who has sustained a substantial loss can file a lawsuit and usually get something out of it based on the concept that the consumer is not able to absorb the loss as well as the defendants more financially sound than where defendants find themselves to a standard of care that gives rise to nearly complete liability based on

the practicalities of litigation and the cost.

5. The concepts and techniques of successful salesmanship are often in conflict with the duties and obligations of a fiduciary, which is truly the capacity of a real estate sales person. *(True)*

   A real estate person is a professional operating in a fiduciary capacity. This means that you are held in the highest ethical standard of care that the law provides. The real estate professional is no different than an attorney, an accountant, a doctor or any other type of professional acting within a confidential environment. However, a unique aspect of the real estate industry separates the real estate profession from these other professions.

   When a consumer retains an attorney or an accountant or doctor, they are retaining this professional for services, time, experience and knowledge. Although this is true when one retains a real estate professional, the difference is that the consumer retains a real estate professional to sell. The problem is that the concepts and techniques of successful salesmanship are often in conflict with the duties and obligations of a fiduciary. When you consider that a real estate professional is only paid when he/she successfully consummates a sale, it becomes obvious that the real estate professional's main motivation is to sell property in order to get paid, which means that your own interest could be and often is, adverse to your clients.

6. Another reason for increased litigation is that there are more lawyers today than ever before. Thousands of new attorneys are sworn in every year. *(True)*

   In major metropolitan areas throughout the country, the per capita number of attorneys has increased substantially. The American Trial Lawyers Association has subsidiary associations in most states and holds numerous seminars throughout the year on real estate errors and omissions from the plaintiff's standpoint. Today's real estate professional must be careful to provide full and complete services to his/her clients so that there will be no problems. If a problem arises, you may rest assured that there is an attorney ready to act to his or her clients benefit.

Toxic Contamination for Real Property and the Liability It Brings

Recent legislation and regulations at all levels of government have significantly complicated the liability and regulatory issues affecting contaminated properties. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as amended by the 1986 Super Fund Amendment Reauthorization Act (SARA), significantly increased the governments authority in the area of liability provisions. The Environmental Protection Agency (EPA) and state regulatory agencies are routinely implementing new regulations pertaining to toxics; state legislators are imposing new requirements, adopting new programs and voting for increased funds for enforced actions; and the courts are issuing new opinions almost daily. Many states are devising their own schemes involving property transfer restrictions and super lien laws.

By understanding some basic principals and by taking appropriate cautions, such liability can be dealt with by what it is – simply another part of the transaction – and managed.

7. The CERCLA Act as amended makes property owners who had no part in contaminating their land or water responsible for clean-up cost even if those costs far exceed the value of a property. *(True)*

   Many buyers of commercial and industrial real estate still are not aware of the huge potential liabilities involved. Only about a third of the companies are currently including the evaluation of environmental problems in potential property acquisitions as a part of real estate transactions. It is predicted that

within five years, environmental evaluations will be as standard as an appraisal or a title search.

8. It is safe to assume that contamination problems only exist in the sites of old chemical plants, oil refineries and the like? *(False)*

   Problems can arise in many other commercial real estate situations. For example, old dry cleaning sites, gas stations, car rental outlets and airports often have underground storage tanks. Virtually any vacant land could have been used as an unauthorized garbage dump.

9. Land sites that have been vacant for 50, 60 or 70 years may still contain the toxic materials. *(True)*

   Most of the companies that put the contaminants into the ground are no longer in existence. The evidence of contamination may only arise after a business has bought the property. Sites that may have been vacant for 50-70 years could still contain toxic materials. The areas with the largest number of contaminated sites are the Northeast, Midwest and Southwest.

10. It is advisable for a purchaser of commercial investment property to identify and quantify environmental risk before closing on any real estate transaction. *(True)*

11. It is not practical for the initial environmental screening of a property to be conducted by a layman. *(False)*

    The company must identify and quantify environmental risk before closing on any real estate transaction. Initial environmental screening can be conducted by a layman and usually requires little time or cost. All the prospective buyer needs is information as to what activities have taken place on the property itself, or on the adjacent land.

    Key Questions

    - Was the site ever used for any commercial or industrial activity? Many of these involve contaminating substances.
    - Have oil or gas wells been drilled on the site?
    - Is there any unexplained vegetative stress such as bald spots on the land?
    - Are there any underground storage tanks on the site? What do they contain? Are they secure?
    - Are there any landfills on the site? Does the soil appear to have been disturbed?
    - Has the sight ever been used for any type of waste disposal, treatment or storage? Besides talking to the present owner, try to find out as much as possible about the history of the property.
    - Is there any evidence of unexplained site clearing in the past? If so, why were the trees cut down?
    - Are there distinctive chemical odors that you notice as you walk around the site?
    - Is there evidence that major electrical equipment was at one time located at the site? Old transformer fluids may possibly contain dangerous PCBs.
    - Is there evidence of spills, stains or seepage? Discolored water is one obvious warning sign.
    - Are there buildings that are over 10 years old? This increases the probability that there is asbestos in the property.

    If the answer to any of the above is yes, consult with a trained environmental specialist to determine

the potential liabilities associated with the property and to alert management about capital expenditures that may be required to clean up the site or to comply with present and anticipated future regulations.

12. The Superfund Amendments and Reauthorization Act (SARA) eliminated the legal defense formerly used by buyers to defend themselves against claims resulting from previous contamination from newly acquired properties. *(True)*

    SARA eliminates the legal defense formally used by buyers to defend themselves against claims resulting from previous contamination of newly acquired properties. Formerly, buyers had argued that since they had been unaware of a properties contamination at time of purchase, they should not be held liable for clean up costs. The so called "innocent buyer defense" no longer protects buyers who, as SARA states, have not taken "appropriate inquiry into previous ownership and uses of the property in an effort to minimize liability."

    If an environmental problem surfaces after the transfer of title, the new owner must show that they have no knowledge of the pollution and that they have acquired the property after others had already polluted it. They also must prove that they had no basis to suspect possible contamination before the purchase.

13. Without reasonable proof that an effort had been made to inspect a new property for environmental problems, new owners may easily incur the entire liability for its subsequent cleaning. *(True)*

    Without reasonable proof that an effort had been made to inspect the property for environmental problems, new owners may easily incur the entire liability for its subsequent cleanup. Even if other solvent, responsible parties can be identified, considerable time and expense may be required to involve them in the cleanup.

The Environmental Appraisal

14. A professional environmental appraisal identifies actual and potential sources and assesses regulatory compliance requirements. *(True)*

    The environmental appraisal is a thorough sequential summary of a property's history where each task builds upon information previously obtained. This is called a Phase I report. The appraisal identifies actual and potential sources of contamination and assesses regulatory compliance requirements. The extent of contamination, with estimates of remedial costs, may also be included.

    The first step is to examine prior uses of the property. When conducting the preliminary steps of the appraisal, investigators seek to gain background information from plant records, engineering reports, title records, discussions with owners and operators, public records, files, regulatory entities and aerial photographs.

    Investigators should visit the site early in the appraisal to evaluate the property's present condition, identify obvious liabilities and locate other areas of concern.

    Typically at this juncture, buyers are informed about the results of the document search and any potential areas of concern at the property. In some situations, buyers will make judgments based on this preliminary assessment. In other cases, buyers require site investigations to document the sites current environmental condition.

Onsite Investigations

When the decision to proceed with an onsite inspection is made, the appraiser works with the buyer to develop a cost effective plan of investigation. The level of effort and extent of testing the appraiser performs generally reflects the degree of assurance desired by the client.

The actual site investigation which typically generates a Phase II report (expensive), is designed to document conditions at the property in a progressive, systematic manner. Each property is approached on a site-specific basis to address the location's particular condition and to consider problems identified in the preliminary assessment. Many options are available in conducting a combination of the following techniques:

- Geophysical surveys
- Soil borings
- Installing monitor wells
- Soil gas surveys
- Onsite chemical analyses
- Environmental sampling
- Precision tank testing
- Laboratory analysis

The onsite assessment is designed to build upon the results of the preliminary investigation. Investigators review physical and chemical data as it is generated and adjust the program in response to indications of contamination. This flexible approach to the appraisal can be a major factor in obtaining representative results in a cost effective manner. For example, early findings of gross contamination may be sufficient to cancel a prospective sale without completing the appraisal as planned. A final report to summarize the appraisal results following completion of the site work is then prepared.

Ranges of Appraisal Costs

Environmental appraisal costs vary widely from a few thousand dollars for preliminary Phase I assessments of small sites, to tens of thousands of dollars for Phase II assessments for larger, more complex or significantly contaminated properties. The first phase of the appraisal, including the review of the property's history, the development of a site investigation plan and an estimate of further appraisal expenditures, costs from a few hundred to several thousand dollars and it helps buyers make informed decisions regarding potential liability.

If a property is found to be contaminated, the parties may still choose to continue with the purchase. In such cases, the investigator will probably continue the site appraisal to determine the extent of contamination and estimate remedial costs.

How Important Are Environmental Appraisals?

15. Environmental appraisals will not add any value to properties. *(False)*

    Environmental problems exist at many commercial and industrial facilities and the sources of contamination are wide ranging and in many cases, obscure. The environmental appraisal is expected to become a standard practice in commercial and industrial real estate transactions. Ultimately, environmental appraisals will add to the value of properties. In subsequent transactions, documentation of a prior environmental appraisal may reduce the scope of an investigation or

eliminate its need all together.

Environmental problems can adversely affect sellers, buyers, brokers and associated financial entities. Environmental appraisals identify potential liabilities and help all parties understand the fiscal exposure these problems represent. Real estate brokers can play an increasingly important role by helping buyers and sellers understand the need for environmental appraisals and appreciating the benefits.

A Case Study

This case study involves a single owner of two parcels of land. Shortly after purchasing the property, owner leased both parcels under a ground lease to a master lessor.

- Parcel A was subleased to a tenant who built and operated a platting facility.
- One Parcel B the master lessor operated a gasoline station and auto repair shop.

There were underground tanks on both parcels that held chemicals and solvents. A number of years passed and the master lessor, a corporation, found itself in significant financial trouble. As a result, the master lessor assigned the ground lease to you and sold the business on parcel B to you. Anxious to develop the property, you immediately terminate the sublease with the tenant on parcel A. After designing the proposed project and obtaining most regulatory approvals, you begin tearing down the buildings and preparing for construction. Shortly thereafter, your contractor informs you that significant contamination had been found on both parcels, work stops. The first question you have in this situation is, "What do I do now?", the second question is, "What should I have done to avoid being in this situation?" Both of these questions are examined below.

What do I do now?

First, a determination of responsibility or liability needs to be made. CERCLA and the various state superfund acts require the cleanup of contaminated properties and impose and allocate liability for cleanup and related costs. From a liability perspective, there are three key things you need to remember about CERCLA.

a. Under section 107(A), four categories of persons are identified as potential responsible parties (PRP's):
    - current property owner
    - previous property owner (if he or she owned it at the time of disposal)
    - the generator of the waste who is usually the operator of the facility
    - certain transporters and brokers

    The first three PRP's are the ones usually involved in real estate situations involving contaminated properties.

b. The PRP's are liable under CERCLA for all "Response Costs" associated with the contaminated property. Response costs include costs incurred by the EPA, states or other parties involved in cleaning up property contamination in damages for the loss or destruction of natural resources, among other things.

c. Finally, the PRP's liability is retroactive, strict and joint and several. CERCLA liability is retroactive in that the PRP will be liable regardless of the fact that the contamination occurred before 1980, when CERCLA was enacted. For example, if a significant amount of

the contamination on parcel A had resulted from a leaking underground storage tank that had been removed in 1978, the PRP's will still be liable. Strict liability under CERCLA means that liability will be imposed regardless of fault or negligence. For example, the fact that the owner was not involved in, and had no knowledge of the business operating on the property is irrelevant. The term "Joint and Several" means that each PRP is potentially individually liable for all response costs. There is no requirement that these costs be allocated among the various parties.

16. Is it possible for a lessee to be held liable as an owner under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)? (True)

    In the case study, the parcel A tenant is clearly liable as the generator of the waste on parcel A and the owner is clearly liable as a current owner. The master lessor would be liable as the generator of the waste on parcel B. Is the master lessor liable for the contamination on parcel A? It is neither a current or past owner, nor is it a generator of the waste. However, at least one federal district court has held that a lessee will be held liable as an owner under CERCLA. Although the case was not particularly well reasoned it has not yet been questioned and follows the trend in these cases to find liability whenever possible. This is a key point: A lessee should approach property and real estate transactions with the same degree of caution as a prospective purchaser.

    Assuming that a lessee-sublessor is treated as an owner under CERCLA, as the new master lessor you will be subject to liability as a current owner. In the case study, the uses on the property should have put you on notice of a potential contamination problem and your failure to undertake any investigation probably would make you subject to liability.

    What rights do you have with respect to the other PRP's? Generally, under CERCLA you will have a private right of action and a right of contribution against the other PRP's. In other words, if you want to develop the property quickly or you simply want to clean up the property voluntarily, in most jurisdictions you would have the right to pursue the other PRP's in order to receive compensation or reimbursement for any response costs you incur. Alternatively, if EPA or the state brought an action against you for the clean up, you would be entitled to seek contribution of any response costs by bringing other PRP's into the action. Most real estate situations involve different parties with different relationships to each other and to the property. The courts have provided little guidance as to how liability will be allocated in such cases.

    As a practical matter, it can be assumed that the generator of the waste will be primarily responsible. In our example, the responsible party for parcel A would be the tenant; for parcel B the master lessor. The owner and you, the new master lessor, most likely would be liable to a lessor extent. However, this does not mean that you need not be concerned. For example, since you terminated the tenant's lease in order to develop the property, finding the tenant may be difficult. Even if found it is unlikely that the owner-operator of a small plating facility would have the financial resources to contribute much to a cleanup. The owner is retired and living in Mexico, and thus not easily within the jurisdiction of the United States courts. Further, the property is his only asset located in the United States, and because it was refinanced several years ago, the response cost undoubtedly will exceed his equity in the property. He is also unlikely to contribute to a cleanup.

    The previous master lessor, a corporation in serious financial trouble, has no cash or assets to contribute to the cleanup. Although the shareholders are wealthy individuals, they deny any responsibility for the acts of the corporation. Can you look to the shareholders to recover cleanup costs? There are two bases on which the courts may hold the shareholders responsible in such a

situation. The first is the standard corporate law theory of "piercing the corporate veil". In certain situations, such as when a corporation is under funded, was improperly informed, or there was insufficient record keeping, the courts will "pierce the corporate veil" and hold the shareholders liable. This is difficult to prove. The more significant way to involve the shareholders is by means of direct CERCLA liability. In recent cases, the courts have found certain shareholders, directors, and key employees directly liable under CERCLA if they were in a position to exercise control over the hazardous, waste-related activities of the corporation.

Financial Institutions Liability

17. Can the lender of a property be deemed an owner under CERCLA? *(True)*

    In the case study, the owner had recently refinanced the property. Because the rentals from the master lessor were the primary source of the loan payments, the lender had been working fairly closely over the past year with the old master lessor to manage the property and prevent a default.

    Based upon a few recent cases, the lender may now be deemed an owner under CERCLA. The general rule under CERCLA is that a lender who merely has security interests in property, without becoming involved in management, will not have CERCLA liability. One court recently held, however, that a lender who foreclosed on a contaminated property became an owner and, therefore became liable under CERCLA. More significantly, in another case a court held that a lender who became actively involved in the business of the borrower (as opposed to merely giving financial advice) was deemed to be exercising control and therefore, assumed CERCLA liability.

    This trend will have a significant affect on you if you are involved in financing new property acquisitions or expansions as lenders become increasingly concerned about toxic contamination. Contaminated properties simply are not good security; lenders face the threat of CERCLA liability any time they try to enforce or protect their security interest. Loans are now being handled by financial institutions in much the same way that a prudent owner or a lessee approach the purchase of a property or a lease.

    There are special state statutes, such as super lien statutes, which also impose liens on property owned by PRP's to pay for cleanup costs, often superceding other liens. These statutes have a dramatic effect on property transactions and also raise interesting disclosure issues. The failure of the owner, as the master lessor in the case study, to disclose knowledge of contamination may be a basis for fraud or negligent representation, which would give the purchaser the right to rescind the transaction or to seek monetary damages.

Strategies To Avoid Toxic Tort Claims

Although it is important to know your rights in the event you are discovered to have created or contributed to a contamination problem, it is more important to know what you can do to avoid these problems. The strategy for dealing with these situations is twofold. The first step is usually termed the site assessment or audit, this is to identify and investigate the facts. The second step is to structure the transaction and prepare the applicable documents in such a way as to avoid, allocate and minimize liability.

In structuring the transaction, the buyer is trying to avoid liability, and the seller is trying to escape liability. How successful each is will depend upon the transaction, the market at the time and how badly the other party wants the transaction. The overriding consideration in a structured transaction is that there is no guarantee that you will avoid liability. The courts are just beginning to evaluate these

structured transactions, and the clear trend of the courts in this area has been to impose liability.

18. At any time, can a purchaser avoid successor liability (in which the acquiring company assumed the liabilities of the acquired company) by purchasing the assets rather than the stock of a corporation or business? *(True)*

    Although some states rules vary, you can often avoid successor liability (in such the acquiring company assumes the liabilities of the acquired company) by purchasing the assets rather than the stock of a corporation or business. In the case study, as the new master lessor, you bought the gas station and repair shop on parcel B from the old master lessor. The old master lessor was liable as a generator of waste on parcel B. The issue is whether you, as the new master lessor, assumed that liability when you purchased the business. If you bought the stock of the corporation, you clearly did assume that liability, and you are liable. If on the other hand, you bought the assets, then in many states you can structure the transaction to avoid the successor liability. Purchasing the property using a subsidiary or a sub-subsidiary is another way of trying to protect yourself from liability. The use of limited partnerships, with a corporation serving as a general partner, is another alternative.

    Bailout provisions are common in structured transactions. If the buyer discovers that an environmental problem is much larger than originally expected, he or she has the right to resell the property to the seller, or if the seller retains the responsibility for cleaning up the property during escrow and finds out it is a larger problem than anticipated, he or she should have the right to rescind the transaction without incurring liability. In each transaction you must look for innovative solutions to the existing problems.

19. You cannot avoid, allocate, or minimize liability through documentation. *(False)*

    Another way to avoid, allocate, and minimize liability is through documentation. One of the key aspects of documentation is the allocation of liability among the parties. There are various ways to allocate liability. The seller's responsibility could have a time limit, declining percentages of the liability could be assigned to the parties over time, or a baseline approach could be adopted where the seller is responsible for everything prior to the date of closing, and the buyer is responsible for everything after the closing date. Representations and warranties are good disclosure vehicles for gathering information about a property; they also help allocate liability. Covenants can restrict future uses of property. For instance, a seller may elect to restrict the use of the property to commercial and industrial uses, so that potential liability resulting from a change to residential use can be avoided. Finally, a buyer or a seller who remains responsible for dealing with a site would retain access to the site and maintain the right to do any necessary investigation work.

Conclusion

We are just beginning to determine what needs to be done to protect ourselves in real estate transactions involving toxic contamination. Many issues such as asbestos and PCBs are significant issues. With an understanding of the basic legal principles, a methodical and careful approach, and some creative deal making (which is probably the key to safe real estate transactions), developers and others can make some sense of the present legislative and regulatory requirements.

Broker Take Care, Rather Than Buyer Beware

20. In any transaction, we need to be guided by the philosophy that in no way can any transaction on our part be regarded as not giving the buyer equal care and treatment. *(True)*

New laws and many recent case law decisions require a broker to assume an ever-increasing level of professionalism. We now need to reassess the premise that our first loyalty is to the seller. In any transaction, we need to be guided by the philosophy that in no way can any transaction on our part be regarded as not giving the buyer equal care and treatment. When we are involved in land or income property, there is vastly greater variety of purchase conditions that can apply to the buyer's needs. To preserve our agency position today, our key considerations should be to protect a seller from a capricious buyer AND we also need to protect a buyer from a scheming seller. So, how do you protect the buyer? The checklist below is the items a buyer should review prior to developing an offer. These are conditions that would normally require the seller to make fuller disclosures on the property than are normally given in the listing information. A good broker should readily recognize the area each provision is intended to cover. Further, the broker can develop his or her own wording to express the buyer's need or intent.

General or Basic Points

- Make valid and bonafide offers – know and complete the accepted form.
- Contingencies should have time limits within which they are to be satisfied – without time limits, this is left wide open to a later interpretation of what is "reasonable" in the eyes of the courts.
- Specifically cover the notification method and consequences of approval or disapproval of all contingencies.
- Make clear and specific the agreement or escrow cancellations circumstances.

Incoming Producing Property

1. How soon must a buyer
    - Approve the personal property list
    - Complete inspection of entire property – or complete contractor's inspection and warranty on structures such as desks, roofs, etc. or operating components
    - Approve current rental agreements or leases including tenant interview privilege. Specify that all "deposits" are to be credited to buyer unless otherwise agreed
2. Provision for buyer's option to approve and when
    - Existing management and maintenance contracts
    - Sign permit from city or county, if any, also sign rental contract
    - Unsatisfied corrective citations or notifications from any government agency (this might also include a zoning conformity verification.)
    - "As built" construction prints (In the case of apartment houses, these would be helpful for conversion – also if needed to check on any alterations, etc.)
    - Outstanding rental concessions, bonuses or similar inducements
    - New tenants/new rental or lease agreements during escrow
    - Termite inspection report
    - Repairs to be accomplished by seller

3. General
    - When financing is complex, provide time for attorney's approval - specify whose attorney, etc.
    - The Realty Bluebook for many provisions - also many other legal references and seminar books

Vacant Land

1. Preliminary Title Report time limits for
    - Seller to supply
    - Buyer to approve/disapprove
    - How (b) is to transmitted and consequences of disapproval
    - Seller to cure disapproved items and how buyer is notified
2. When purchaser intent is for development and includes governmental agency approval contingency, agreement must be clear who will pursue and pay for
    - Engineering studies, including the soil tests and survey
    - Rezoning, variance or conditional use permit if required
    - Environmental Impact Report approval, exemption, or negative finding as applicable
    - Clearance if required by any governmental agency
    - Other general provisions
    - Promptly approve all government forms
    - Approve escrow extensions when delays are beyond control of the buyer
3. Financing
    - Allow buyer time to procure financing but amount, terms, and time limits should be specified.
    - Seller's Note and Trust Deeds subordinated to construction loan must have construction loan amount, terms, lump sum payments, alienation clause, and the dates specified in order to meet recent case law decisions.
    - Limit buyer's construction loan proceeds to use ONLY on Seller's property.
    - Buyers or sellers to keep property taxes paid up during escrow.
    - Release clauses constructed clearly and carefully so that the seller's security is never impaired.
    - If needed, arbitration (if conditions change beyond control of either principle.)