

Buying and Selling Contaminated Property

The Legal Framework

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Real Estate Fall Update

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KAPLAN KIRSCH ROCKWELL

The Legal Framework: Sources of Liability

- **CERCLA**
- **Other Federal Statutes**
 - RCRA
 - Clean Water Act
 - TSCA
- **State Statutes**
 - RCRA
 - CERCLA analogues
 - Disclosure statutes
 - Other transfer, reporting and cleanup requirements
- **State Common Law**

The Legal Framework: Federal Liability Protections

- **CERCLA and the BFPP Defense**
- **Establishing the Defense**
 - **Phase I ESA**
 - Purchaser has exercised appropriate care
 - **No affiliation with the responsible parties**
- **Not available to “operators” or lessees unless the lessor maintains the defense or lessee has sufficient “indicia of ownership”**
- **Department of Defense sites and other federal facilities are conveyed with statutory protections**

The Legal Framework: State Programs

- **Voluntary Cleanup Programs**
- **Orders**
 - **Mandatory cleanup**
 - **Covenants not to sue**

Other Legal Options: Private Protections

- **Private Contractual Protections**
 - **Seller releases and indemnities**
 - **Insurance or other financial assurances for costs of cleanup and indemnities of Seller**
 - **As-is sales and buyer releases at the time of resale**
 - **Good disclosure to buyers/lessees**
- **Best defense: good cleanup and good project management**

Questions?

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