

ENVIRONS

Washington Court Gives Property Sellers and Buyers Another Reason to Beware of Cleanup Liability

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Breaking Developments In Environmental Law

The Washington Court of Appeals has raised the stakes for parties involved with a real estate transaction where a heating oil underground storage tank may have been used on the property. As a result of the ruling, property buyers, sellers and even lenders should pay much closer attention to the risks associated with heating oil tanks than they had previously.

The 3-0 published decision in *Grey v. Leach*, issued on December 13, held that a former property owner who contributed to contamination, even when such contribution occurred without intent or negligence, is not an "innocent purchaser" protected from liability under the Washington Model Toxics Control Act ("MTCA"). The court also held that a release of heating oil from a residential tank is not a "domestic purpose." This case is the first time that an appellate level court in the state of Washington has interpreted either the "innocent purchaser" or "domestic purpose" defenses.

The Greys, who were owners of a residential property, paid close to \$200,000 to clean up heating oil that leaked from an underground storage tank on the property. They sued the sellers, the Leaches, under MTCA, which makes a former property owner strictly liable for hazardous substance releases that occur during their ownership, unless a defense applies. While the Leaches admitted that a release of heating oil occurred on their property while they owned it, they asserted that they were "innocent purchasers" and that their use of heating oil was intended for a "domestic purpose."

The innocent purchaser defense shields an owner, former owner or purchaser of property from MTCA liability if they can establish that, at the time of the purchase, they had no knowledge or reason to know of any hazardous substance release. Exceptions to the defense are (1) where a person has actual knowledge of a release, (2) fails to undertake all appropriate inquiry into previous uses that might have caused releases, or (3) by any act or omission causes or contributes to a release.

The Leaches focused on the third exception and contended that they were innocent purchasers because they did not intentionally or negligently cause the release of the heating oil. The court of appeals held that the former owners did not qualify as "innocent purchasers" because the plain language of the exception does not require intent or negligence and, therefore, a past owner

would be liable for unknowingly, unintentionally and without negligence releasing hazardous substances at a property. The court said the Leaches were liable because their use of the residential heating oil system “caused or contributed to” releases of oil.

The court also ruled that a release of home heating oil does not fall within the MTCA "domestic purpose" exclusion, which applies to lawful and non-negligent uses of hazardous substances for domestic purposes in or near a residential structure. The court said the exclusion does not extend to oil leaking into the ground from defective underground pipes.

A final issue the court addressed concerned whether the purchase and sale agreement impliedly allocated MTCA liability to the current owners. The Leaches contended that the current owners assumed the risk of heating oil contamination because they had notice of possible contamination and had a right to inspect for hazardous substances, but chose not to do so. The Greys argued that their general right to inspect the property was precluded by specific terms in the purchase and sale agreement precluding detailed inspections of heating oil tanks or leaks. The inspection report noted only the presence of a tank, speculated about a second abandoned oil tank that might be present and advised getting a more detailed inspection. The Leaches confirmed that there was no second tank and, therefore, the court said the contract precluded any basis upon which the Greys could have terminated the contract or demanded further testing.

Up to now, heating oil tanks, particularly at residential properties, have not received nearly the attention as gasoline underground storage tanks at commercial properties. The *Grey* case highlights the importance of conducting due diligence even for a residential heating oil tank, and that parties should be sure they use the information from such inspections to make specific provisions for allocating the risks and obligations in the event an environmental issue arises.

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