

Legal Briefs

Transfer Request

Buyers should seek claims rights when purchasing property.

by Joel W. Reese, JD

Bundle of sticks is the idiom commonly used to describe the rights that constitute fee simple property ownership. The common-law right to receive compensation for injury to real property can be the most important “stick” within that bundle. It may permit an owner to recover damages for environmental contamination without first incurring the cost of remediating the property. However, this valuable right can be unknowingly left with a prior owner when the property is transferred.

The absence of this stick and its value may not be known until contamination is discovered years or decades after a property changes hands. To avoid having to retrieve this right through a later assignment, property purchasers should insist that deeds include a transfer of all claims for environmental injury.

Common-Law Origins

Common-law real property rights in the U.S. originated at a time when injuries to land frequently involved the construction of new railroad lines. Starting with these early disputes, courts recognized

a distinction between permanent and temporary injuries to land. Permanent injuries constituted a taking of a landowner’s property and permitted the landowner to recover the lost value. Temporary injuries to land limited landowners to recovering the cost to repair the injury.

Common law permits only the property owner at the time of

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the injury to seek compensation, regardless of whether the injury to land is permanent or temporary. An owner who purchases property after it has been injured cannot pursue any common-law claims such as negligence, trespass, or nuisance, regardless of when the injury was first discovered.

Consequently, a property owner who discovers contamination that damaged the property prior to the

date of purchase has no standing to bring common-law claims arising from the contamination. Further, in almost all states, the right to seek damages for injury to land does not transfer by deed unless the deed expressly conveys the right.

The Missing Stick

The early common-law principles pertaining to land injuries worked well when injuries were detected by the senses of sight, sound, smell, or touch. The landowner whose peace and enjoyment was disturbed by a new railroad line could assess the severity of the injury and decide whether the injury warranted legal action. Subsequent owners presumably would take the permanent injury into account by reducing the purchase price for the property.

But today’s most common land injuries — environmental problems — are not always detectable by sensory perception. Instead they are measured in the parts per billion and governed by complex regulatory and statutory requirements. Applying the archaic common-law rules to a modern environmental problem may leave landowners wondering why the right to seek compensation for a newly discovered environmental problem is missing from the bundle of sticks.

Statutory Remedies

An owner who unknowingly receives contaminated property is not without a remedy. If the seller caused the contamination or was aware of the contamination, the owner may have the right to pursue the seller for damages, depending upon the representations and war-

ranties provided by the seller. If a tenant caused the contamination, the assignment of the seller's rights under the lease may permit the landowner to seek compensation from the tenant for breaching the lease.

If the owner is willing to pay for the cost of remediating the contamination, the owner also may have certain statutory remedies. State and federal laws allow a person to recover costs incurred in removing or remediating environmental contamination from the parties responsible for causing or contributing to the contamination. The cost recovery provisions are intended to ensure that those responsible for the hazardous substances pay for their actions. Unlike the common-law claims, prior or current ownership of the contaminated property is not a prerequisite for bringing a statutory cost recovery action.

Assigning Rights

To avoid separating a claim for property injury from the remaining bundle of property rights, property owners should insist that the deed include a provision transferring all claims for injury to the property or, at least, all claims for any environmental injuries. The following is an example of language that could be used to transfer common-law claims for environmental injuries:

Grantor hereby assigns and transfers to grantee all claims, demands, and causes of action arising from or related to any environmental injury to the property that may have occurred or originated prior to the date of this instrument. Environmental injury means any injury, damage, or loss in value to the property arising from or related to any spill, leak, or release of any hazardous or toxic substance (solid or otherwise), hazardous waste, pollutant, oil or petroleum product, or other solid, liquid, or gaseous substance or product that is currently or hereinafter listed, regulated, or designated by any state or federal governmental agency as toxic, hazardous, or harmful. Grantor makes no representations

or warranties to grantee as to the existence or viability of any such claims, demands, or causes of action. This assignment and transfer does not include any claims, demands, or causes of action against the grantor.

This language only transfers the causes of action of the grantor, or seller. If the property was damaged prior to the seller's ownership or if the statute of limitations already has expired on any common-law claims, then the seller would have nothing to assign.

A landowner whose deed does not expressly transfer all claims for injury to the property still can acquire the rights by assignment. In most states, causes of action are freely assignable. If possible, the landowner should seek to acquire the common-law rights prior to filing suit to avoid any issue of standing.

Within the bundle of property rights, one normally would expect to find the right to seek compensation from persons who have injured the property. However, the right to recover compensation for injury to real property is not necessarily a natural incident of real property ownership. In almost all states, the common-law right to seek compensation for injury to land is a personal right that accrues in the owner of the property at the time the injury commences. To receive all property rights, buyers should insist that the transfer deed expressly includes an assignment of all causes of action and claims for injury to the property.

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