

**Bank Liable for not Disclosing to Buyer
EPA Investigation of Bank's Real Estate**

by

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The Missouri Supreme Court just announced that a seller of real estate in Missouri must disclose to potential buyers an EPA investigation of the property of which the seller, in this case a bank, was aware. Failure to do so will subject the seller to claims for common law fraud and a violation of Missouri's Merchandising Practices Act ("MPA"). The case is *Hess v. Chase Manhattan Bank, USA*, No. SC 87691, issued on May 1.

In reaching this conclusion, the Supreme Court held that a common contract provision that disclaims any representations about the property and states the property is being sold "AS-IS" does not trump a claim by the buyer that he was fraudulently induced to enter into that contract. The high court cited trial court testimony from real estate agents who testified that even where the sale contract specifies the seller makes no warranties and the property is being sold AS-IS, the real estate industry expects a seller to disclose the EPA's involvement.

This result highlights the importance of seller disclosure of any known fact or event about the real estate that may affect a buyer's decision whether to buy and at what price. The penalty for nondisclosure can be substantial: including the recovery of the purchase price of the property under common law fraud and under some circumstances punitive damages, and additionally the recovery of attorney fees and possibly punitive damages under the MPA.

Chase Manhattan Bank had acquired the property—a four-acre plat in southwestern Platte County—through a foreclosure from Billy Stevens. The bank had held the mortgage on the property.

Stevens owned a paint company. On numerous occasions he ordered his employees to load a trailer with ten to twelve 55-gallon paint drums and dump them on the property so he could avoid the costs of proper environmental storage and disposal.

He also had his employees dump three or four pallets of old paint cans near the foundation of an old barn on the property. In 1997, Stevens' former employees informed the EPA of the illegal dumping. Stevens then

filed for bankruptcy protection and defaulted on his mortgage with Chase.

In 1998, the EPA obtained a search warrant and discovered numerous rusty, leaking containers of waste paint. Later that year Stevens pled guilty to federal environmental crimes and was sentenced to serve one year and a day in prison.

The next month Chase purchased the property through its foreclosure proceeding. At the same time Chase received a telephone call from an EPA attorney and they discussed the EPA's investigation. Chase then had an appraisal prepared of the property. The appraisal noted that "the EPA is scheduled to inspect the site."

Chase listed the property for public sale. Chase did not disclose the EPA investigation to any potential buyers, including Dennis Hess who ultimately bought the property for \$52,000.

Two of the potential buyers saw the paint cans near the barn. Hess did not see them. No potential buyer did an environmental assessment or inspection of the property. Real estate agents testified at trial that such an inspection would have been extraordinary since none of the potential buyers knew about the EPA investigation.

After purchasing the property, Hess discovered the paint cans during a clean up to prepare the place for renovations. He hired a construction company to bury the paint cans along with other waste on the property. In January 2000, the EPA issued a unilateral administrative order for Hess to exhume and dispose of the buried paint cans within ten days.

Hess then sued Chase alleging that Chase had a duty to disclose the EPA investigation prior to the sale and that its failure to do so was fraud and a violation of Missouri's MPA. After a two-week trial the jury found for Hess on his common law fraud claim, awarding him \$52,000 in actual damages but nothing for punitive damages.

The trial judge dismissed the MPA claim. The Missouri legislature expanded the MPA in 2000 to allow a private lawsuit (such as Hess' fraud claim) for the fraudulent sale of real estate. Prior to this change only the attorney general of Missouri could bring such a lawsuit. The trial court concluded that since the sale of the property to Hess occurred in 1999, the amended MPA could not be applied retroactively.

The Supreme Court disagreed with the trial court and decided that the change in the law was only a procedural change in legal rights rather than a substantive change. Amendments to statutes can apply

retroactively if they are merely procedural changes. Thus, the Supreme Court sent this part of the case back to the trial court to decide if another complete trial was necessary on the MPA count or if the new trial would just be over damages under the MPA, including the possible recovery of attorney fees.

As for the fraud count, the Supreme Court noted that a duty to disclose will be imposed only when the material facts would not have been discovered through the exercise of ordinary diligence. Hess convinced the jury that he did not know about the EPA investigation and could not have discovered it through ordinary means.

Hess wisely alleged that it was the EPA investigation—not the paint cans themselves—that Chase should have disclosed. The Supreme Court agreed that this nondisclosure was fraud.

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