Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 1
Issue 2 *Fall 1993*

Article 7

1993

To Tell or Not to Tell: Latent Environmental Defects and the Doctrine of Caveat Emptor in Real Property Sales

Lisa J. Hamm Winnenauer

To Tell Or Not To Tell: Latent Environmental Defects and the Doctrine of Caveat Emptor in Real Property Sales

by Lisa J. Hamm Winnenauer

Greenwood Mills, Inc. v. Russell Corp. is a case arising from an aborted real estate transaction.[2] Its primary significance lies in the court's application of the caveat emptor doctrine (doctrine) to the purchase of commercial property possessing latent environmental defects.[3]

The use of the doctrine in this case is important for several reasons. First, it controverts a growing trend abandoning the doctrine in favor of an emphasis on good faith and ethical dealing.[4] Second, by finding that information concerning the existence of environmental defects was reasonably available to the buyer in this case, the court may be requiring buyers to do much more than physically inspect a property prior to making an offer in order to avoid a finding that they failed to meet their duty to investigate as it relates to latent environmental defects. Finally, this court's holding may impact the usefulness and value of option contracts for the purchase of commercial property.

I. Facts and Holding

In September 1988, Greenwood Mills (Greenwood) decided to sell its Liner textile plant located in Orangeburg County, South Carolina.[5] At that time, the property had a history of environmental problems,[6] including wastewater treatment violations which had led to a consent order with the South Carolina Department of Health and Environmental Control (DHEC).[7]

Russell Corporation (Russell) contacted Greenwood in August 1989 concerning its potential interest in acquiring the property and arranged a site visit.[8] Prior to its first site visit, Russell's Director of Environmental Affairs contacted the DHEC to inquire about the plant and was informed that while there had been violations in the past, Greenwood's wastewater treatment facilities now met DHEC standards.[9] Russell representatives then made two site visits to the plant in early September.[10]

After the first site visit on September 6, 1989, Greenwood informed Russell that Sara Lee, Russell's major competitor, was seriously interested in the property.[11] Greenwood representatives made a second site visit on September 11, and on September 12 wired Greenwood $600,000 to hold the property.[12] In a letter dated September 18, Greenwood acknowledged receipt of the deposit, describing it within the letter as "non-refundable."[13] The letter also included information on nine items Russell might wish to investigate and a general invitation to "'kick the tires' yourselves."[14] Greenwood also enclosed with the letter a draft purchase agreement, which Russell did not sign.[15]

Russell then hired a consultant to perform a full environmental audit of the property.[16] While the environmental audit proceeded, Russell's Director of Environmental Affairs had an opportunity to view some of Greenwood's environmental records during a third site visit on October 23, 1989.[17] In addition, the DHEC granted Russell access to its Greenwood files after receiving a Free-

1 981 F.2d 148 (4th Cir. 1992).

2 *Id.* at 148.

3 *Id.* at 150-51. Few cases have been decided to date involving a seller's duty to disclose environmental defects; the trend indicates "a seller has certain common law disclosure obligations, as well as federal and state statutory disclosure duties." Robin E. Phelan, Bryan D. Perkins & Catherine W. Cralle, *Dancing the Toxic Two-Step: Environmental Problems in Bankruptcy Cases*, Com. L. & Prac. Course Handbook Series, Practicing L. Inst., Advanced Bankr. Workshop n.1 (Feb. 13-14, 1992), *available in* Westlaw, 601 PLI/Comm 445 at 158.

4 *See, e.g.*, Hill v. Jones, 725 P.2d 1115, 1118 (Ariz. Ct. App. 1986) (The "vitality [of the doctrine of caveat emptor] has waned during the latter half of the 20th century."); Wilhite v. Mays, 232 S.E.2d 141, 143 (Ga. Ct. App. 1976) ("The ancient rule . . . is no longer an expression of American mores."); Tobin v. Paparone Constr. Co., 349 A.2d 574, 578 (N.J. Super. Ct. Law Div. 1975) ("Our courts have come a long way since the days when the judicial emphasis was on formal rules and ancient precedents rather than on modern concepts of justice and fair dealing."); Holcombe v. Zinke, 365 N.W.2d 507, 512 (N.D. 1985) ("The duty to speak imposes no undue hardship on the seller and it accords with our basic notions of fair dealing and fair play."); Beavers v. Lamplighters Realty, Inc., 556 P.2d. 1328, 1331 (Okla. Ct. App. 1976) (Caveat emptor is "a doctrine that exalts deceit, condemns fair dealing, and scorns the credulous."). *See also* W. Page Keeton, et al., Prosser & Keeton on the Law of Torts § 108, at 751-52 (5th ed. 1984).

5 *Greenwood*, 981 F.2d at 149.

6 *Id.* at 149. Greenwood was aware of environmental problems as early as 1979, when the South Carolina Department of Health and Environmental Control discovered that Greenwood had improperly sprayed sludge in a pine forest. Appellant's Brief at 7-8; *Greenwood*, 981 F.2d 148 (on file with author) (hereinafter Appellant's Brief).

7 *Greenwood*, 981 F.2d at 149. *See also* Appellant's Brief at 7-13.

8 *Greenwood*, 981 F.2d at 149.

9 *Id.*

10 *Id.* Conflicting testimony was presented by the parties concerning whether Greenwood affirmatively misrepresented the severity of its environmental problems during these site visits. Appellant's Brief at 16.

11 *Greenwood*, 981 F.2d at 149. Charles Nichols, Greenwood's sales agent, advised Gerald McGill, Russell's Group Vice President of Textile Operations, that he expected an offer from Sara Lee, and that a ten percent deposit would be adequate to hold the property. Appellant's Brief at 15.

12 *Id.* at 149. *See also*, Appellant's Brief at 15.

13 *Greenwood*, 981 F.2d at 149. For purposes of its appeal, Russell did not contest the issue of non-refundability, but did note in its brief that Nichols assured them that the money could be returned if any problems came up. Appellant's Brief at 15, n.3. Greenwood's letter describing the deposit was drafted by its outside counsel, who had participated in an environmental review of the plant earlier in 1989 and, therefore, was knowledgeable about the extent of Greenwood's environmental problems. Appellant's Brief at 17-18.

14 *Greenwood*, 981 F.2d at 149. The letter acknowledged the existence of PCB's, a landfill and the consent order from DHEC, but did not mention the much more serious problem of groundwater contamination, a construction debris landfill, a soil dump contaminated with diesel fuel, and plant's inclusion on the Environmental Protection Agency's listing of Superfund cleanup sites. Appellant's Brief at 18.

15 *Greenwood*, 981 F.2d at 149.

16 *Id.* Russell also informed Greenwood "that it would want the plant by February 1, 1990." *Id.*

17 *Id.*

dom of Information Act request from Russell.[18] From the DHEC files, Russell learned for the first time that groundwater on the property was contaminated.[19]

On November 2, 1989, Russell faxed to Greenwood a copy of the documents it had uncovered and indicated it would probably want its deposit back.[20] Greenwood's sales agent requested Russell wait until it received the final results from its environmental audit prior to reaching a decision concerning purchase of the property.[21]

The environmental report was received on December 14, 1989.[22] The report indicated that substantial contamination existed, the cleanup cost of which could not be accurately predicted.[23] By letter dated December 19, 1989, Russell informed Greenwood that the deal was off.[24]

Greenwood brought a diversity suit against Russell in South Carolina federal district court to obtain a declaratory judgment confirming its right to retain the $600,000 deposit paid by Russell.[25] Russell asserted counterclaims of fraud, misrepresentation and rescission of contract based on mutual mistake.[26] After trial, the jury found for Greenwood.[27] After the court denied Russell's motions for JNOV or a new trial,[28] Russell appealed.[29]

The Fourth Circuit affirmed the lower court's decision, holding that under South Carolina law "[a] seller does have a duty to disclose 'an artificially created, and concealed, unstable condition,'"[30] but only if "the seller . . . know[s] that the material facts are beyond 'the reach of the diligent attention, observation and judgment of the purchaser.'"[31]

II. Legal Background

Caveat emptor or "[l]et the buyer beware... summarizes the rule that a purchaser must examine, judge, and test for himself."[32] The Restatement (Second) of Torts imposes liability for physical harm on a seller when the seller knows or should know of the existence of a latent, dangerous condition which involves an unreasonable risk of harm; the seller does not disclose the condition to the buyer; and the seller has reason to believe the buyer will not discover the harm.[33] The rule is applied ". . . when there exists in the property which is the subject of a sale latent defects or hidden conditions not discoverable on a reasonable examination of the property."[34] In such situations, "the seller, if he has knowledge thereof, is bound to disclose such latent defects or conditions to the buyer, and his failure to do so may be made the basis of a charge of fraud."[35] Liability will be imposed, however, only if the buyer has satisfied his duty to inspect the property.[36]

18 *Id.* South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4 (Law. Co-op. 1991).

19 *Greenwood*, 981 F.2d at 150. *See also* Appellant's Brief at 18.

20 *Id.*

21 *Id.* Interestingly enough, Greenwood did not at this time assert its claim that the deposit was non-refundable. In addition, Greenwood conducted an auction on December 6, 1989 to sell its equipment housed at the plant so that the property would be available for Russell's use by the February 1 date indicated by Russell. *Greenwood*, 981 F.2d at 149.

22 *Greenwood*, 981 F.2d at 150.

23 *Id.* Aquaterra, Russell's consultant, estimated it would take five to eight years to clean up the contamination and approximately $1.2 million. Appellant's Brief at 20.

24 *Greenwood*, 981 F.2d at 150.

25 *Id.* Greenwood also brought a claim to recover $1.5 million in losses it allegedly sustained by hurriedly selling its equipment at auction so that the plant could be available by the February 1 dated requested by Russell. *Id.* In addition, Greenwood's original complaint requested specific performance, but this claim was later dropped. Appellant's Brief at 39.

26 *Greenwood*, 981 F.2d at 150.

27 *Id.* In addition, the jury awarded Greenwood $1.5 million in damages resulting from Russell's negligent failure to inform Greenwood it was not proceeding with the purchase prior to Greenwood's auctioning of its equipment. *Id.*

28 *Id.*

29 *Id.*

30 *Id.* (quoting Lawson v. Citizens & Southern Nat'l Bank, 180 S.E.2d 206, 208 [S.C. 1971]).

31 *Id.* at 150-51 (quoting Lawson v. Citizens & Southern Nat'l Bank, 193 S.E.2d 124, 128 [S.C. 1972]). The Fourth Circuit, however, reversed the trial court's award of damages to Greenwood for losses sustained in its plant equipment auction, holding that the trial court's decision on this claim under tort theory directly conflicted with Greenwood's claim under contract theory. *Id.* at 151.

In reversing the damages award, the court also relied on *Winburn v. Insurance Co. of N. Am.*, which requires a claimant to provide evidence that the statement relied upon was false when made, 339 S.E. 2d. 142, 147 (S.C. Ct. App. 1985); and *Gruber v. Santee Frozen Foods, Inc.*, which requires the claimant to show justifiable reliance in order to recover. 419 S.E.2d 795, 799 (S.C. Ct. App. 1992) The Court determined that "Russell's statement that it wanted the plant by February 1 was a mere statement of future intention, insufficient to support a claim for negligent misrepresentation, absent evidence that the statement was false when made." *Greenwood*, 981 F.2d at 152. The court went on to note that, since an actual purchase agreement had not been signed by the parties, and since Russell had notified Greenwood as early as November 2, 1989 of its concerns regarding environmental problems, Greenwood's reliance under the circumstances was "plainly unjustifiable." *Greenwood*, 981 F.2d at 151-52.

32 Black's Law Dictionary 222 (6th ed. 1990).

33 Restatement (Second) of Torts § 353 (1965). § 353 is set forth below:

§ 353. Undisclosed Dangerous Conditions Known to Vendor

(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if

(a) the vendee does not know or have reason to know of the condition or the risk involved, and

(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

(2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

34 37 Am. Jur. 2d *Fraud and Deceit* § 158 (1968).

35 *Id.*

36 Restatement (Second) of Torts § 353 cmt. d (1965). Comment d provides, in part:

d. Vendee's duty to inspect. A vendor, innocent of conscious deception, is entitled to expect, and therefore has reason to believe, that his vendee will discover a condition which would be disclosed by such an inspection as the vendee should make before buying the land and taking possession of it or before throwing it open to the entry of others. A vendor, therefore, is not required to exercise care to disclose dangerous conditions or to have an ordinarily retentive memory as to their existence, unless the condition is one which such an inspection by the vendee would not discover or, although the condition would be so discovered, the vendor realizes the risk involved therein and has reason to believe that his vendee will not realize it.

Many courts do not recognize the doctrine, preferring to impose upon the seller the duty to act in good faith.[37] A large number of states, however, still adhere to its basic tenets.[38] The instant case was decided under South Carolina law, which provides that "[a] seller does have a duty to disclose 'an artificially created, and concealed, unstable condition,'"[39] but only when "the material facts are beyond "'the reach of the diligent attention, observation and judgment of the purchaser.'"[40]

There is little case law available specifically on the subject of the duty to disclose defects relating to environmental issues.[41] The few opinions that can be found suggest the law in this area is nowhere near settled.[42] Some states have permitted buyers to seek relief for latent environmental defects under a variety of common law theories, "including nondisclosure of latent defects, negligence, strict liability, breach of warranty or contract, and breach of indemnity agreements."[43]

Other states, including Missouri, have enacted statutory provisions requiring sellers to disclose the presence of contamination or other latent environmental defects on property.[44] Even so, requirements from state to state vary significantly.[45] In those states where statutory provisions do exist, generally the buyer is not permitted to void the sale and, as a result, ends up owning the contaminated land.[46]

III. The Instant Decision

In determining that Greenwood was entitled to retain the $600,000 deposit paid by Russell, the court emphasized the fact that "Russell got exactly what it bargained for here: an option contract."[47] The court went on to recognize that "[p]lacing the deposit allowed Russell to conduct a thorough environmental investigation and avoid the losses it might well have sustained if it had prematurely entered into a purchase agreement."[48]

The court rejected Russell's argument that Greenwood had a duty to disclose its environmental problems and that its failure to disclose rendered the transaction unenforceable.[49] The court held that under South Carolina law "[a] seller does have a duty to disclose 'an artificially created, and concealed, unstable condition'"[50] but only when "the material facts are beyond 'the reach of the diligent attention, observation and judgment of the purchaser.'"[51]

The court noted the fact that Russell, like Greenwood, was a textile manufacturer and emphasized that "Russell could not have been surprised to learn that textile production involves substances which can lead to environmental hazards if not handled properly"[52] and that Russell knew "such hazards would not be discernible through mere visual inspection."[53] The court went on to suggest that a review of Greenwood's files and other public records would have revealed "the full extent of the problems,"[54] thereby satisfying the requirement that such facts were "reasonably available to Russell."[55]

IV. Critical Analysis[56]

The Fourth Circuit based its holding that Greenwood had no duty to disclose latent environmental defects to Russell on the fact that the transaction did not involve a contract for purchase of real estate, but rather an option contract in which "Russell got exactly

37 *See supra*, note 4.

38 *See, e.g.*, Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 312 (3rd Cir. 1985) ("As to sales of land this rule has retained much of its original force."); Adler v. Parkerson, 581 So.2d 1073, 1075 (5th Cir. 1991) ("Louisiana courts appear reluctant to vitiate agreements when the complaining party is, either through education or experience, in a position which renders his claim of error particularly difficult to rationalize, accept or condone."); Futura Realty v. Lone Star Bldg. Ctrs. (Eastern), Inc., 578 So.2d 363, 364 (Fla. Dist. Ct. App. 1991) ("[C]aveat emptor [is] the rule in the sale of commercial property.").

39 *Lawson*, 180 S.E.2d at 208.

40 *Lawson*, 193 S.E.2d at 128.

41 *See* Phelan, note 3, *supra*.

42 *See generally*, Phelan, *supra*, note 3, and Tracy, *infra*, note 43.

43 Judith G. Tracy, *Beyond Caveat Emptor: Disclosure to Buyers of Contaminated Land*, 10 Stan. Envtl. L.J. 169 (1991), *available in* Westlaw, 10 STENVLJ 169 at 30.

44 *Id.* at n.118, *available in* Westlaw, 10 STENVLJ 169 at 31. States include Colorado, Illinois, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, Pennsylvania, Tennessee, West Virginia and Wisconsin. *Id. Available in* Westlaw, 10 STENVLJ 169 at 107-08. Missouri's disclosure requirements are set forth in Mo. Rev. Stat. § 260.465(1986) (*See* Appendix).

45 *See* Tracy, note 43, at n.108, *supra, available in* Westlaw, 10 STENVLJ 169.

46 *Id.* at n.134. New Jersey and Illinois do permit the buyer to rescind the transaction. *Id.* at n.133.

47 *Greenwood*, 981 F.2d at 150. The court does not explain how it arrived at the conclusion that the $600,000 deposit constituted an option contract rather than a deposit for purchase of land. It is assumed the court's finding is based on the fact that Greenwood described it as such in its complaint in order to increase the likelihood it would be able to retain the $600,000. Appellant's Brief at 39.

48 *Greenwood*, 981 F.2d at 150.

49 *Id.* at 150.

50 *Id.* at 150 (quoting *Lawson*, 180 S.E.2d at 208).

51 *Id.* at 150-51 (quoting *Lawson*, 193 S.E.2d at 128).

52 *Id.* at 151.

53 *Id.*

54 *Id.*

55 *Id.*

56 The court's holding that Greenwood's tort claim for auction losses is superseded by its contract claim for retaining Russell's deposit is not particularly controversial, and, therefore, is not discussed in the text of this note. Some scholars have suggested that, in the struggle between tort and contract law, the law of contract is losing; *see* Grant Gilmore, The Death of Contract 55-103 (1974); William L. Prosser, *The Borderland of Tort and Contract*, *in* Selected Topics on the Law of Torts 380, 427-428 (1954); Elizabeth Cumming, *Balancing the Buyer's Right to Recover Precontractual Misstatements and the Seller's Ability to Disclaim Express Warranties*, 76 Minn. L. Rev. 1189 (1992).

Nonetheless, the result in the instant case is consistent with justice and equity. Notwithstanding the inherent conflict within its complaint, the court rejected Greenwood's claim of negligent misrepresentation, and held Greenwood's reliance on Russell's February 1, 1990 target date for moving in was "plainly unjustifiable." *Greenwood*, 981 F.2d at 152. Greenwood knew at least a month before the auction that Russell had serious concerns about environmental problems. *Greenwood*, 981 F.2d at 149. On November 2, 1990, Greenwood's sales agent requested Russell refrain from making a final decision until the final results of its environmental audit were received. *Greenwood*, 981 F.2d at 150. The final report was not received until December 14, 1989, more than a week after the auction. *Greenwood*, 981 F.2d at 150. In addition, some significance should be placed on the fact that the contract drafted by Greenwood and forwarded to Russell along with a letter confirming receipt of Russell's deposit on September 18, 1989, almost three months prior to the auction, was never signed and returned. *Greenwood*, 981 F.2d at 149.

what it bargained for."[57] An equally strong argument, however, can be made that Russell did *not* get what it bargained for. It paid $600,000 to hold what it presumed was a piece of property it was interested in purchasing.[58] It can be inferred from Russell's decision not to proceed with the purchase after it received the environmental report that it was never interested in buying contaminated property.[59]

The court also suggests that, through the option contract, Russell avoided losses it might otherwise have sustained by prematurely entering into a purchase agreement.[60] The court does not address the $600,000 Russell lost by entering into an option contract it presumably never would have entered into had it known about the latent environmental problems, nor does it mention the funds spent by Russell on the environmental audit which revealed the serious nature of problems at the plant indisputably already known by Greenwood.[61]

It should be remembered that Greenwood had revealed to Russell that Sara Lee was seriously interested in the property, obviously intending to apply pressure on Russell to move quickly or risk losing the property to a competitor.[62] In fact, Russell made its deposit in response to a recommendation to do so by Greenwood's sales agent.[63] The court rightfully noted that South Carolina law limits a seller's duty to disclose material facts beyond "the reach of the diligent attention, observation and judgment of the purchaser,"[64] but in the midst of pressure from Greenwood to act quickly, it is unclear what more Russell could have done prior to making the deposit to satisfy its obligation to exercise "diligent attention, observation and judgment."[65]

The court noted that Russell contacted the DHEC before it made its first site visit to the plant on September 6, 1989,[66] and DHEC indicated "that Greenwood had some violations in the past, but that the wastewater treatment facilities then met DHEC standards and that Greenwood was operating the plant within the parameters of the consent order."[67] While the court does not reveal the deliberations underlying its conclusions, it may have concluded that Russell's contacting the DHEC prior to its first site visit and DHEC's disclosure of Greenwood's past violations supported an assumption that Russell considered the risk of environmental problems before agreeing to the $600,000 deposit. It could also be argued, however, that Russell reasonably interpreted the DHEC's disclosure of Greenwood's "violations in the past"[68] and current compliance with DHEC standards[69] to mean that Greenwood's environmental problems were operational in nature and did not involve conditions permanently affecting the land itself.

The court's finding that Greenwood did not have any duty to disclose its environmental problems is troubling in light of the general perception that modern law rejects the caveat emptor doctrine.[70] Many jurisdictions, including South Carolina, still adhere, in varying degrees, to the doctrine's basic theme—buyer beware.[71] A buyer, operating under the false assumption that caveat emptor no longer applies, might assume incorrectly that the seller is required to disclose hidden problems, and may not realize the significant burden the buyer assumes by failing to investigate carefully and thoroughly prior to making any commitments in the transaction.

The court's finding that information disclosing the existence of environmental defects was within Russell's "diligent attention, observation and judgment"[72] underestimates the efforts required by sellers to uncover such information.[73] Buyers typically have only limited access to information.[74] For example, absent the $600,000 good faith deposit, it is quite doubtful Russell would have been allowed the extensive access to Greenwood's premises and records necessary for conducting a thorough environmental audit. Russell's audit took three months, and even then its consultant could not predict with any reliable degree of accuracy the costs to eliminate the environmental defects.[75]

In addition, the records Russell received from DHEC were obtainable only upon initiation of a Freedom of Information Act request.[76] Certainly, such a process takes time[77] and involves some expense. Such a search of the public records also may leave the buyer empty-handed, if the contaminated property has not yet been reported to the proper authorities. This court's holding leaves unclear whether a public record search alone fulfills the buyer's inspection obliga-

57 *Greenwood*, 981 F.2d at 150.
58 *Id.* at 149.
59 Even absent the inference of intent from Russell's later termination of the transaction, common sense tells us that most buyers are not interested in purchasing contaminated land!
60 *Greenwood*, 981 F.2d at 150.
61 Requiring buyers to perform such tasks places them in the unenviable position of having to decide whether to forfeit money already spent, spend more money to investigate further, or take their chances and proceed with the deal. *See* Tracy, *supra*, note 43.
62 *Greenwood*, 981 F.2d at 149.
63 Appellant's Brief at 15.
64 *Greenwood*, 981 F.2d at 150-51 (quoting Lawson v. Citizens & Southern Nat'l Bank, 193 S.E.2d 124, 128 (S.C. 1972)).
65 *Id. Greenwood*, 981 F.2d at 150-51 (quoting *Lawson*, 193 S.E.2d at 128).
66 *Id.* at 149.
67 *Id.*
68 *Id.*
69 *Id.*
70 *See* cases cited *supra*, note 4.
71 *See* cases cited *supra*, note 38.
72 *Greenwood*, 981 F.2d at 150 (quoting Lawson v. Citizens & Southern Nat'l Bank, 193 S.E.2d 124, 128 (S.C. 1972)).
73 Information in public records is often scattered and requires persistence to obtain. *See* Tracy, *supra*, note 43. Contamination is often subsurface and not easily discoverable, even with the sophisticated environmental assessment techniques now available. *Id.* In addition, environmental audits are typically both time consuming and expensive. *See, e.g.*, Douglass F. Rohrman and Michael J. Hoffman, *Environmental Audits: Assessing Environmental Liability in Real Estate Transactions*, 77 ILL. B.J. 690 (1989).
74 *See* Tracy, *supra*, note 43.
75 Appellant's Brief at 20.
76 *Supra*, note 18.
77 Under South Carolina's Freedom of Information Act, an agency is not required to indicate whether it will make records available for fifteen working days. S.C. Code Ann. § 30-4-30(c) (Law. Co-op. 1991). Even then, there is no guarantee that records might not be strewn among various government offices and therefore time consuming to collect. *See* Tracy, *supra*, note 43.

tion, or whether an expensive, on-site, technical investigation also is required.

Nor does the court address the increased transaction costs resulting from a buyer having to pay for the acquisition of information concerning latent environmental defects. In most instances, the seller already has knowledge and adequate information available concerning the subject. If not, surely the seller is in a better position to acquire such information than the buyer,[78] because the seller typically has unlimited access to the property and is more likely to have access to information concerning the property's history.

In light of burgeoning legislative attempts to address environmental concerns, the inescapable liability a property owner often faces, and the astronomical costs typically involved in cleaning up contaminated property,[79] the presence of hazardous substances always should be a significant factor in a buyer's decision to purchase real property. This court distinguishes the instant case by finding that the transaction did not involve an earnest money deposit, but an option contract. By its finding, however, the court may be sending an unintended message concerning the practicality of option contracts, at least where manufacturing sites are concerned. Option contracts are designed to give the buyer a period of time to consider its decision to buy. Such a tool is useful in the commercial world because it allows the buyer adequate time to reach an informed decision free from the fear that its efforts will be wasted.

If the discovery of undisclosed latent environmental defects during the option period does not render the contract unenforceable, however, as this court holds, it certainly impacts the value of an option. Surely Russell would not have paid $600,000 for its option if, in advance, it knew it would not get its money back when it discovered the serious latent environmental defects Greenwood knew about.

This court refused to impose upon Greenwood a duty to disclose severe latent environmental defects, even though Greenwood not only knew about the environmental defects at the time it induced Russell to put down the deposit, but also created the contamination through improper operations of its plant at the site.[80] Other courts easily might have found Greenwood had a duty to disclose the defects.[81] Practitioners, however, have come to expect a certain stability in the application of property law. The recent overlapping of contract, tort and environmental issues with property law has created a dangerous and perhaps unexpected unpredictability in real estate transactions.

For practitioners, even those specializing in real estate or environmental law, deciphering the current tangle of common law and statutory interpretations may prove impossible. Imposing upon sellers a uniform duty to disclose latent environmental defects would ease the current state of confusion. Nonetheless, without unanimous adoption and consistent interpretation of uniform state statutes, achieving uniformity at the state level is idealistic at best and more likely impossible.

Practitioners are therefore advised to exercise extra caution to protect their clients from unwittingly assuming liability for latent environmental defects when buying real estate. At a minimum, buyers should be advised to question sellers concerning the presence of environmental defects. A search of available public records is also prudent. Even better protection is afforded by including specific language in the contract for purchase of real estate or option permitting the buyer to rescind if environmental defects are discovered.

Conclusion

Neither party was egregiously injured by the court's allocation of losses between the equally skilled bargainers involved in this transaction.[82] Of greater concern, however, is this holding when read in light of the current state of confusion surrounding application of the doctrine of caveat emptor and the duty to disclose latent environmental defects in real estate transactions. Until a uniform legal duty to disclose latent environmental defects is imposed on sellers, practitioners, as well as buyers, should continue to beware.

§ 260.465, RSMo — Title VXI. Conservation, Resources and Development
Chapter 260, Environmental Control
Abandoned or Uncontrolled Sites

260.465. Change of use or transfer of site property — notice to buyer — appeal — violations, penalty.

1. No person may substantially change the manner in which an abandoned or uncontrolled hazardous waste disposal site on the registry prepared and maintained by the department pursuant to § 260.440 is used without the written approval of the director.

2. No person may sell, convey or transfer title to an abandoned or uncontrolled hazardous waste disposal site which is on the registry prepared and maintained by the department pursuant to § 260.440 without disclosing to the buyer early in the negotiation process that the site is on the registry, specifying applicable use restrictions and providing all registry information for the site. The seller shall also notify the buyer that he may be assuming liability for any remedial action at the site; provided, however, the sale, conveyance or transfer of property shall not absolve any person responsible for site contamination, including the seller, of liability for any remedial action at the site. The seller shall notify the department of the transfer of ownership within thirty days after the transfer.

3. Decisions of the director concerning the use of an abandoned or uncontrolled hazardous waste site may be appealed to the commission in the manner provided in § 260.460.

4. If the department has reason to believe that the provisions of this section have been violated, or are in imminent danger of being violated, it may institute a civil action in any court of competent jurisdiction for injunctive relief to prevent such violation and for the assessment of a civil penalty not to exceed one thousand dollars per day for each day of violation.

78 *See* Tracy, *supra*, note 43.
79 Long-term clean-up costs may reach $500 billion. *See* Tracy, *supra*, note 43.
80 *See* Appellant's Brief at 7-17.
81 *See* cases cited *supra*, note 4.
82 It is noted that both parties shared some loss; Russell lost its $600,000 deposit, plus whatever it spent on its environmental audit, and Greenwood gained $600,000 to offset its alleged $1.5 million loss from the auction.