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Enforceability of Sale Contracts When Environmental Contamination is Found: Legal Breach of Contract? Contract Freighters, Inc. v. J.B. Hunt Transport, Inc.

M. Katherine Freed

CASENOTE

ENFORCEABILITY OF SALE CONTRACTS WHEN ENVIRONMENTAL CONTAMINATION IS FOUND: LEGAL BREACH OF CONTRACT?

Contract Freighters, Inc. v. J.B. Hunt Transport, Inc.[1]

I. INTRODUCTION

With the increasing number of environmental protection laws, owners of real estate may be faced with staggering liabilities if contamination is found on the property, or if the owner decides to sell the property. Courts have begun to impose strict liability on owners of property to remedy contamination, without regard to who actually caused the contamination. The costs of cleaning contaminated property can become significant very quickly. This has lead to an increase in the number of real estate sales contracts that include environmental provisions. The focus of this casenote is on the potential approaches that may be used to provide both buyers and sellers with some type of assurance in contract formation when contamination of the property is a consideration. The Eighth Circuit recently decided a case involving a contract that dealt with such considerations, and found that contracts may adequately provide for the rights and obligations of both parties.

II. FACTS AND HOLDING

Contract Freighters, Inc. ("CFI") is a trucking company organized as a corporation in the state of Missouri.[2] J.B. Hunt Transport, Inc. ("Hunt") is also a trucking company, though it is organized as a corporation in the state of Georgia.[3] CFI and Hunt entered into an agreement and executed a written contract on March 5, 1997, which stated that Hunt would purchase CFI's Kansas City, Missouri, trucking terminal facility for $2,625,000.[4]

According to paragraph 6 of the contract, Hunt was entitled to conduct an environmental audit.[5] Paragraph 6 also stipulated that if the audit revealed anything that was in violation of CFI's environmental representations, then two options would be available to CFI.[6] First, CFI had the option to remedy the violations in accordance with the law and the closing date would be adjusted.[7] Second, CFI could elect to terminate the agreement and refund any portion of the purchase price that Hunt had already paid.[8] Also, according to paragraph 5(C) of the contract, Hunt's obligation to purchase the property was contingent on CFI's "pre-[c]losing remedial action, if any, pursuant to Paragraph 6."[9] Finally, paragraph 11 of the agreement set the closing date for June 1, 1997, which was then extended to September 30, 1997, by agreement of the parties.[10]

Hunt chose to conduct an environmental audit, which showed the presence of diesel fuel constituents at the site.[11] Hunt then informed CFI that it was not interested in proceeding unless CFI took the necessary steps to remedy the situation.[12] Therefore, in June of 1997, CFI reported the contamination to the Missouri Department of Natural Resources

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[1] *Contract Freighters, Inc. v. J.B. Hunt Transport, Inc.*, 245 F.3d 660 (8th Cir. 2001).
[2] *Id.* at 662.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* The contract stated that "[if] the Environmental Audit reveals any matters which would be in violation of [CFI's environmental] representations contained in this Paragraph 6, then at [CFI's] sole option: (a) [CFI] shall remedy such items in accordance with applicable federal, state and local governmental directives, and the Closing Date shall be adjusted accordingly, or (b) [CFI] may elect to terminate this Agreement and [CFI] shall completely refund any portion of the Purchase Price previously paid to [CFI].
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

("MDNR") for investigation.[13] CFI also submitted an application for review through the MDNR voluntary cleanup program.[14] MDNR sampled the soil and in a letter dated September 11, 1997, stated that no additional action was required of CFI.[15] MDNR also noted that it would issue a "No Further Action" letter.[16] CFI notified Hunt of the statement of the MDNR, yet Hunt responded that it would not close the sale since CFI had "refused to clean up the contamination or take other alleviative action, such as providing an environmental insurance policy."[17] MDNR then issued a "Certificate of Completion, Hazardous Substance Environment Remediation" on October 27, 1997, stating that the soil sampled at the site indicated contamination below the cleanup objective so that no further action was required.[18]

CFI then put the property back on the market in November 1997 and executed a sale contract with Crete Carrier Corp ("Crete") in May 1998.[19] CFI and Crete closed on the sale on August 24, 1998, for $2.2 million. After closing, CFI brought an action against Hunt for breach of contract.[20] Hunt argued that CFI did not meet the condition precedent to the contract since CFI failed to remedy the contamination.[21] The District Court[22] rejected Hunt's argument since paragraph 6 of the contract provided that CFI was only obligated to remedy the contamination in accordance with applicable government directives, which the Court found that CFI had done when it obtained a "no further action" letter from the MDNR.[23] With this argument, the District Court granted CFI's motion for summary judgment as to liability.[24] However, since there were disputed facts as to the property's fair market value on the closing date, the District Court ordered a trial as to damages.[25]

At the trial, CFI presented evidence as to the $2.2 million sales price, as well as expert testimony as to the fair market value of the property.[26] The District Court found the fair market value of the property was $2.2 million and awarded CFI the difference between the fair market value and contract price of $2,625,000.[27] The District Court also awarded prejudgment interest on the unpaid contract price to compensate CFI for the loss of investment income.[28] After all the calculations, the District Court awarded CFI $626,431, plus costs and interest from the date of trial to the date of judgment.[29]

Hunt appealed the award to the United States Court of Appeals, arguing that the District Court erred in granting summary judgment as to liability and erred in its calculation of damages.[30] The Court of Appeals affirmed the decision of the District Court.[31] The Court found that CFI had performed its duty as provided in the contract and was not subject to further action.[32] The Court also determined that the damages award was correct in that it examined the fair market value of the property and calculated prejudgment interest to compensate for the loss of investment income to CFI.[33]

III. LEGAL BACKGROUND

Many problems may result if contamination is discovered after a buyer and seller have signed a contract. Under Missouri law, the court "must enforce a contract as written and according to the plain meaning of the words in the contract

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[13] *Id.*
[14] *Id.* The voluntary cleanup program is a set of provisions adopted in Missouri to define the actions required of property owners that voluntarily decide to clean up contamination of their property. Mo. Rev. Stat. §260.567 (2000).
[15] *Id.*
[16] *Id.*
[17] *Id.* Hunt notified CFI of its intention not to close on the day before the agreed closing date.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] The United States District Court for the Western District of Missouri.
[23] *Contract Freighters*, 245 F.3d at 662.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 662-63.
[27] *Id.* at 663.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 661.
[31] *Id.* at 664.
[32] *Id.* at 663.
[33] *Id.* at 664.

when the contract is clear and unambiguous."[34] Therefore, it is better for both sides that they initiate a clear contract and provide for all the uncertainties. When dealing with transactions involving real property, there are a number of approaches that sellers and buyers should be aware of in order to minimize the expenses and controversies. The following section will consider some of the approaches used to deal with environmental concerns. In addition, the section will discuss what might occur after a breach of contract for the sale of property, namely what damages might result.

A. Approaches to Deal with Environmental Concerns in Contracts

Environmental provisions in real estate negotiations have become heavily contested issues after the implementation of CERCLA[35] in late 1980.[36] This situation has developed because courts impose strict liability on the owners of property for the costs incurred in removing hazardous substances from the property, whether or not the present owner caused the contamination or even had knowledge of the problem.[37] The costs of cleaning up hazardous substances can become significant quickly with the inclusion of costs for attorneys, sampling, transportation, contractors, treatment, and disposal of the contamination.[38] Faced with the liabilities of cleaning contaminated property, buyers and sellers will make environmental issues a top priority.[39] There are three primary approaches that can be used when encountering environmental issues in selling and buying property.[40] The three approaches are (1) pre-purchase audits with specified rights, (2) representations, warranties, and indemnities, and (3) performing remedial work as specified in the contract.[41]

The first approach is to provide for a pre-purchase audit with specified rights. It is wise to specify in the contract that an environmental audit be performed prior to the closing of the transaction.[42] Adequate assessment of a piece of property is very important for all concerned so that the buyer and the seller can better determine whether the transaction is financially viable, or whether some modifications will be necessary.[43] While environmental audits may take a number of forms, the two most common types of audits are compliance audits and management audits.[44] A compliance audit consists of "an investigation by internal or external environmental specialists of a facility's compliance with applicable environmental laws and regulations and the identification of non-regulatory environmental liability risks."[45] A management audit deals with "reviewing the managerial risk control systems and procedures used by the corporation or facility to detect and remedy possible violations and potentially problematic environmental conditions."[46] When not contemplating a sale of property, there may be disincentives to conducting environmental audits, such as the potential that government agencies may learn of the contamination and impose substantial burdens on the property.[47]

After determining that an environmental audit is appropriate, the next question in the first approach is "what happens if the audit reveals environmental problems."[48] One possibility is to provide for termination of the real estate contract, either by the seller or the buyer.[49] The right of termination can be broadly defined to allow for termination at any time after contamination is found, or the right can be narrowly defined such that termination is only allowed if the cost to rectify the contamination is above a certain dollar amount or the contaminant is a certain substance.[50] A more complicated option gives the non-terminating party the ability to remedy the contamination and keep the contract in

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[34] *Farmland Indus., Inc. v. Frazier-Parrott Commodities*, 111 F.3d 588, 590 (8th Cir. 1997).
[35] 42 U.S.C. §9601 (1994). CERCLA is an abbreviation for the Comprehensive Environmental Response. Compensation and Liability Act.
[36] Alan Chesler, *Environmental Provisions in Real Estate Contracts* (PLI Real Estate Law & Prac. Course Handbook Series No. 286, 1986).
[37] *Id.* at 313.
[38] *Id.*
[39] *Id.* at 315.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 316.
[43] I. Leo Motiuk, *Due Diligence and Environmental Negotiations* (PLI Corporate Law & Prac. Course Handbook Series No. 991, 1997).
[44] Keith M. Castro & Tiffany Billingsley Potter, *Environmental Audits: Barriers, Opportunities and a Recommendation*, 5 Hastings W -N W. J. Envtl. L. & Policy 233, 233 (1999).
[45] *Id.*
[46] *Id.*
[47] *Id.* at 234.
[48] Chesler, *supra* n. 36, at 317.
[49] *Id*
[50] *Id.*

force.[51] There are a number of termination provisions that allow for this option.[52] The buyer-oriented option allows the buyer to perform the audit, and then the seller can choose to remedy the contamination or terminate the contract.[53] If the seller terminates the contract, the buyer can then choose to rectify the contamination and keep the contract in place.[54] The seller-oriented option requires the buyer to either remedy the conditions or terminate the contract.[55] If the buyer chooses to terminate, the seller can then remedy the contamination at its own cost and enforce the contract.[56]

The second approach is to provide for representations, warranties, and indemnities. The buyer will want to contract for protection against liabilities and environmental claims on the property regardless of who caused the contamination, or who had knowledge of it.[57] The seller will want to use more caution than the buyer.[58] A seller may face a number of financial responsibilities by providing representations on the environmental condition of property, even if the seller has no knowledge of any type of contamination.[59] The seller will want to consider a number of limitations if he or she decides to provide any representations or warranties.[60] Some of the possible limitations include a time limit on the life of the representation, a floor and ceiling on liability for violating a representation, and a limitation on the types of the damages that may be recovered by the buyer.[61]

The final approach that may be utilized in dealing with an environmental concern is to allow for performing remedial work as provided in the contract. This approach is based on the belief that both parties want a high level of confidence in the transaction and would rather not have to face the possibility of litigation.[62] With this approach, both parties will be involved in the environmental audit process and will specify beforehand, in the contract, which percentage of liability for the costs of the cleanup effort each party will absorb.[63] This allows both sides greater assurance that the contract will be performed.[64]

Missouri has promulgated statutes and regulations, defining the actions to be taken when a property owner voluntarily decides to cleanup their contaminated property.[65] In 1994, Missouri adopted a comprehensive set of provisions for a voluntary cleanup program.[66] The statute provides that "any person, including but not limited to a person acquiring, disposing of or possessing a lienholder interest on real property or other circumstances ... that is known to be or suspected to be contaminated by hazardous substances, may apply to remediate the real property with oversight by the department of natural resources [MDNR]."[67] If the applicant completes all the work, as required, the MDNR is required by law to provide a letter stating that "no further action need be taken at the site related to any contamination identified in the environmental assessments and for which remedial action has been taken in accordance with the approved remedial action plan."[68]

B. Breach of Contract—Damages

There are a number of ways that a breach of contract can occur. Many times, the breach of contract occurs due to some promise or statement about a property's condition that is subsequently found to be untrue.[69] Another common type of contractual breach arises when one party fails to perform an agreed task.[70] In these instances, some type of adverse

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[51] *Id.*
[52] *Id* at 318.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 320.
[58] *Id.*
[59] *Id.* at 321.
[60] *Id.* at 322.
[61] *Id.* at 322-23.
[62] *Id.* at 327.
[63] *Id.*
[64] *Id.*
[65] Mo. Rev. Stat. §§ 260.567, 260.573 (2001); Mo. Code Regs. Ann. tit. 10, 25-15-010 (1998).
[66] Mo. Rev. Stat. § 260.567 (2000).
[67] *Id.*
[68] Mo. Rev. Stat. § 260.573 (2000).
[69] Patrick D. Shaw, *Contractual Remedies*, 12 Envtl. L. for Transactional Attorneys 1, 11 (Illinois Institute for Continuing Legal Education, 2001).
[70] *Id.* at 12.

environmental condition is discovered and the parties agree on how to handle the situation, but then the party responsible for the remediation does not fulfill the obligation.[71]

After liability is established, the next step is to examine the amount of damages. If the buyer breaches a contract for the sale of land, the seller is usually entitled to retain the money already deposited by the buyer as liquidated damages.[72] The seller can also seek actual damages, which in Missouri is generally defined as the difference between the contract price and the fair market value of the property as of the date that the purchaser's performance was due.[73] Furthermore, upon breach by the buyer, the seller has the choice to resell the property or retain the property, but with either choice, the seller is still entitled to recover the difference between the contract price and the fair market value of the property.[74]

If the seller chooses to resell the property within a reasonable time after the buyer's breach, the price obtained by the seller will be considered some evidence of the market value of the property.[75] Since the seller has the choice of whether to try to resell the property or not, there is no obligation on the seller to mitigate the damages.[76] An anomaly may occur if the contractual price is equal to or less than the fair market value of the property, because then the seller may not have actual damages by reason of the breach.[77] The only time that the standard measure of actual damages may provide for recovery by the seller is when the contract price calls for an amount greater than the fair market value of the property.[78]

If the seller breaches the contract for the sale of property, the buyer is generally entitled to recover the difference between the unpaid balance due on the purchase price and the fair market value of the property.[79] A buyer that seeks to maximize damages after a seller's breach of contract will argue a loss of a bargain opportunity.[80] A buyer will be allowed greater damages when he can show that the fair market value of the property exceeded the contract price.[81]

Another type of damage that may result from a breach of contract is consequential damages when a party suffers special damages beyond those measured by the difference between the contract price and the fair market value of the property.[82] In Missouri, the general rule is that consequential damages must be pled and are only recoverable when the damages are reasonably foreseeable by the party against whom the damages are sought.[83]

A final element to consider is prejudgment interest. Without an agreement, the right to prejudgment interest is governed by statute.[84] In Missouri, there are two applicable statutes; one dealing with contracts,[85] and the other dealing with torts.[86] The commonly stated general rule "is that interest is not recoverable on an unliquidated demand."[87] Using this rule, the argument has been made that if the obligation of a party is not for a specified amount, but rather for an amount to be fixed by a court, then that party cannot be liable for prejudgment interest.[88] This argument has been rejected by the courts, as there are numerous exceptions to the general rule.[89] The Missouri Supreme Court stated that prejudgment interest "has traditionally been used to compensate for the use of or loss of use of money to which a person is

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[71] *Id.*
[72] *See Ours v. City of Rolla*, 14 S.W.3d 627 (Mo. App. W.D. 2000).
[73] *Gilmartin Bros., Inc. v. Kern*, 916 S.W.2d 324, 332 (Mo. App. E.D. 1995).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *See Gilomen v. Southwest Missouri Truck Center, Inc.*, 737 S.W.2d 499, 501-502 (Mo. App. W.D. 1987).
[78] *Id.*
[79] *Kelsey v. Nathey*, 869 S.W.2d 213, 218 (Mo. App. 1993).
[80] *Id.*
[81] *Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp.*, 756 F.2d 629, 630 (8th Cir. 1985).
[82] Theodore H. Hellmuth, *Missouri Practice, Real Estate Law—Disputes* vol. 18A. §1063, ¶1 (2d ed., West 1998).
[83] *Allen v. Foster*, 668 S.W.2d 277, 280 (Mo. App. 1984).
[84] Judge Almon H. Maus, *Missouri Practice, Insurance Law & Practice* vol. 30. §5.16, ¶1 (West 1997).
[85] Mo. Rev. Stat. § 408.020 (2000).
[86] Mo. Rev. Stat. § 408.040.2 (2000).
[87] *Catron v. Columbia Mutual Ins. Co.*, 723 S.W.2d 5, 6 (Mo. 1987)(en banc).
[88] Maus, *supra* n. 84, at ¶3.
[89] *Catron*, 723 S.W.2d at 6.

entitled."[90] Also, the courts may "consider equitable principles of fairness and justice when awarding prejudgment interest."[91]

IV. INSTANT DECISION

In the instant decision, the Eighth Circuit began by examining the District Court's grant of summary judgment as to liability.[92] Since Hunt's argument dealt with paragraph 6 of the sales contract between CFI and Hunt, the court stated preliminarily that the "interpretation of an unambiguous contract provision is a question of law suitable for summary judgment."[93] While Hunt agreed that Missouri law applied and the MDNR was the applicable governmental agency, it argued that CFI's contractual obligation to remedy the contamination was not relieved by the issuance of a "no further action" letter by the MDNR.[94] Hunt argued that paragraph 6 required CFI to remedy any contamination as long as the MDNR would approve of the remedy.[95] Hunt also argued alternatively that summary judgment was not appropriate since paragraph 6 was ambiguous as to the contractual obligation of CFI.[96]

The court found Hunt's arguments to be without merit.[97] It noted that "[u]nder Missouri law [a court] must enforce a contract as written and according to the plain meaning of the words in the contract when the contract is clear and unambiguous."[98] The court held that paragraph 6 was unambiguous and that CFI's contractual obligation was only to remedy a contamination "in accordance with" a "directive"[99] from the MDNR.[100] The court found that as of September 30, 1997, the MDNR had not issued an order or instruction to remediate the site, and that the MDNR had found that no remediation was required at all; therefore, CFI had no more contractual obligations.[101] The court also found Hunt's interpretation of paragraph 6 to be unreasonable since the paragraph did not give Hunt the right to approve any remedy to be performed by CFI, but rather left the "sole option" of whether to remediate or refund any money due Hunt in CFI's hands.[102]

The court also rejected Hunt's argument that the contract between CFI and Hunt expired before the MDNR had formally issued the "no further action" letter in October 1997.[103] In fact, the court said that Hunt had actually repudiated the contract before the closing date in September 1997.[104] Also, the court noted that paragraph 6 only required CFI to remedy the contamination in accordance with a governmental directive, not that CFI had to secure a no further action" letter.[105] The court held that Hunt breached the contract by failing to close, and thus, the District Court's granting of summary judgment as to liability of Hunt was affirmed.

After examining liability, the Court examined Hunt's challenge of the District Court's calculation of damages.[106] Under Missouri law, in a breach of contract suit the seller is entitled to the difference between the contract price and the fair market value of the property on the closing date, if the seller prevails.[107] Hunt argued that the District Court erred when it relied on the contract sale price between Crete and CFI as evidence of the fair market value of the property.[108] The Court found this argument to be without merit.[109] The court noted that Missouri's court have consistently held that

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[90] *Id.* at 7.
[91] *Id.*
[92] *Contract Freighters*, 245 F.3d at 663.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* (*citing Farmland Indus., Inc. v. Frazier-Parrott Commodities*, 111 F.3d 588, 590 (8th Cir. 1997)).
[99] The Court defined a "directive" as "[a]n order or instruction, especially one issued by a central authority." *The American Heritage Dictionary of the English Language* 512 (4th ed. 2000).
[100] *Contract Freighters*, 245 F.3d at 663.
[101] *Id.*
[102] *Id.* at 663-664.
[103] *Id.* at 664.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* (*citing Gilmartin Bros., Inc. v. Kern*, 916 S.W.2d 324, 332 (Mo. App. 1995)).
[108] *Contract Freighters*, 245 F.3d at 664.
[109] *Id.*

"[i]f the seller decides to resell in a reasonable time after the breach, the price obtained is some evidence of the market value."[110] Since CFI contracted to resell the property to Crete within eight months of Hunt's breach, the court reasoned that the property was in the same condition.[111] In fact, the court stated that Crete was aware both of the contamination and the fact that no remediation was required when it contracted for the purchase of the property.[112] Also, the court examined CFI's expert's testimony as to fair market value, and noted that Hunt failed to present any evidence of valuation.[113] Therefore, the court affirmed the decision of the District Court in finding that the fair market value of the property was $2.2 million.[114]

Next, the court examined Hunt's argument that the District Court erred in awarding prejudgment interest to CFI.[115] Hunt relied on the general rule in Missouri that prejudgment interest is only awarded "when the amount due on a party's contract is liquidated, that is, fixed or certain."[116] Hunt argued that the "amount due" was not "certain" until there had been a determination of fair market value.[117] The court found that Hunt's reliance on the general rule in Missouri was misplaced since there are many exceptions to the rule.[118] The court found that the Missouri Supreme Court allowed for a specific exception for "the loss of the use of money to which the party was entitled."[119] Therefore, the court concluded that the District Court did not err in granting the prejudgment interest, since it was to compensate CFI for the loss of investment income.[120] The court also found that the same reasoning allowed the District Court to award further prejudgment interest on the damages already awarded to compensate for the time between the date of the Crete closing to the trial date.[121] The District Court had followed Missouri law when it credited Hunt with the income CFI had received through renting the property before closing with Crete.[122] Therefore, the court found the District Court's action to be correct and affirmed the entire judgment.[123]

V. COMMENT

When dealing with the sale or purchase of property that has the possibility of contamination, such as a former industrial facility, a gas station, or a chemical storage area, both sides of the sale have the responsibility to protect themselves. First, there should be full disclosure by the seller of any known contamination on the site. The seller generally has a duty to disclose any known defects or contamination of property.[124] If the seller fails to disclose a known environmental defect, the seller may be liable under common-law fraud or misrepresentation claim.[125] Generally, "if a seller knows, or should reasonably know, of the existence of a material defect regarding the property's environmental condition that could be discovered through reasonable inspection, the seller has a duty to disclose this condition to the buyer."[126]

However, a reasonably diligent purchaser will not rely completely on the representations of the seller, and will provide for his own environmental assessment of the property when there is any possibility that contamination has occurred. The parties to the contract can also specify the rights and obligations associated with discovering contamination. For example, a seller can seek to limits his obligation to the actual remedial work of correcting the

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[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* Hunt argued that there should not have been prejudgment interest awarded under Rev. Mo. Stat. §408.020 on the contract price for the time between CFI's relisting of the property for sale and the contract with Crete.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* (*citing Catron v. Columbia Mut. Ins. Co.*, 723 S.W.2d 5, 7 (Mo. 1987)(en banc)).
[120] *Contract Freighters*, 245 F.3d at 665.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] Mark S. Dennison, *Buyer's Claims Against Seller Who Fails to Disclose Environmental Condition of Property*, 36 Am. Jur. Proof of Facts 3d 471 §7 (1996).
[125] *Id.* at §9.
[126] *Id.*

environmental problem. The seller can also exclude responsibility for items such as lost profits, loss of potential tenants, or interruption of buyer's business. The buyer could also take the opposite position and seek to make the seller specifically responsible for these types of losses or others.

When both parties truly want the sale of the property to go forward, they can specify in the contract who will be responsible for the remedial action in cleaning the property if contamination is found. This requires the input of both parties into the environmental audit process, and an agreement as to the remedial work to be done.[127] There are many advantages that can result from this type of agreement.

Though a buyer may not look favorably on this approach at first, there are a number of advantages that can result. First, this allows the buyer a great deal of assurance that the sale will close, which allows the buyer to go forward with other plans instead of waiting until the completion of the audit.[128] Second, it prevents the seller from terminating the transaction.[129] Third, it provides the buyer assurance that the site will be environmentally sound by the closing of the contract.[130] Finally, it facilitates financing since lenders will be provided with some assurance of the environmental condition of the property.[131]

There are also advantages to a seller in a situation like this. First, the seller can be assured that the environmental audit will not destroy the sales contract completely.[132] Second, the buyer will not be able to use the environmental audit as a reason for terminating the contract if the buyer begins to have second thoughts about the transaction.[133] Finally, the seller will not have to bear the entire cost of the remedial action, and instead will be able to share the costs with the buyer.[134] All of these advantages are easily obtainable if the parties simply specify their intentions in the contract.

The Eighth Circuit was correct in its determination in this case. The parties had contemplated the possible ramifications of finding contamination on the property, and they provided for the discovery in the actual sales contract. The contract specified the rights and responsibilities of both parties before any contamination was ever found. This allowed both parties to be neutral to the disadvantages that might occur in the future. The court realized that the parties were sophisticated enough to have contemplated the result of finding contamination; therefore, the court followed the line of the contract itself. CFI performed all its obligations under the contract, and Hunt breached when it refused to buy the property once the contract was fulfilled. The court realized that this was a pure breach, and that Hunt had no reasonable expectation that it should be allowed to withdraw from the contract since both parties' rights and obligations were specifically outlined in the contract from the beginning. Therefore, the court was correct in its assessment of damages and providing prejudgment interest, since there was an obvious breach on Hunt's part. The court's decision was the correct decision given all the facts and circumstances surrounding the making of the contract between CFI and Hunt.

VI. CONCLUSION

It appears that the Eighth Circuit interpreted the contract between CFI and Hunt appropriately. The court gave deference to the actual wording of the contract, and found that there was a breach by Hunt when it refused to finally purchase the property. The court was also correct in its valuation of the damages for CFI. As a result of the decision by the court, other parties have a clear understanding of what ramifications may result from the breach of a contract when contamination is at issue. Sellers and buyers of property will have to take more time and give greater consideration to the possibility of finding contamination on a piece of property, and provide for that possibility in the actual contract.

M. KATHERINE FREED

[127] Chesler, *supra* n. 36, at 326.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*