UST LINE

Issue 8

UST LINE IS A NEWSLETTER WRITTEN BY MARK ANNIS, PRESIDENT OF ANCO ENVIRONMENTAL SERVICES, INC., BERKELEY HEIGHTS, NJ, A FULL SERVICE PROFESSIONAL CONTRACTING AND CONSULTING UNDERGROUND STORAGE TANK (UST) REMEDIATOR. (908) 464-9200

Question of the month: If a property has an underground tank, how can the buyer minimize his future liability?

Answer: As reported almost weekly, hidden contamination from abandoned oil tanks has jeopardized many transactions. When an undisclosed tank is later discovered, it can shatter a buyer's dreams of peaceful home ownership. Therefore, sales contracts often contain language protecting the buyer, but its usefulness if often too late. The contract must be litigated for enforcement.

The bottom line is that future discovery of contamination is still the buyer's problem. This travesty has been propelled by a series of ever stricter environmental regulations that, until recently, offered buyers little relief from leaking UST risks.

If we look at the history of environmental regulations, the foundation was the 1977 Clean Water Act. This legislation focused on industrial polluters. In 1984 with the passage of the Environmental Cleanup Responsibility Act (ECRA), regulation-driven liability headache for every industrial property owner. This was the distant thunder of today's UST debacle. Stricter industrial environmental regulations have trickled down to residential situations.

In June of 1993 ECRA was amended and renamed ISRA, Industrial Site Recovery Act. Many positive changes made the regulations more "user friendly," and even compassionate, with the creation of a spill fund. Virtually unnoticed in these amendments, however, was a companion change to the Spill Compensation and Control Act (Spill Act), introducing a principle significantly affecting all current and future owners of real property in New Jersey. This new principle promulgates that ***future owners of polluted property are liable for contamination they did not cause.*** The potentially devastating language of this amendment makes buyers responsible for any discharge of a hazardous substance unless they can satisfy certain criteria:

1. That they acquired the property through an inheritance;

2. That they acquired the property after the discharge occurred;

3. Lack of knowledge at the time of acquisition that any hazardous materials had leaked;

4. Lack of involvement in the management of the leaked hazardous substances before acquisition;

5. Notice to the NJDEPE upon actual discovery of the discharge.

In order to demonstrate that a new owner did not know and had no reason to know of the discharge of hazardous substances at the property, the acquiring party "must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property." "All appropriate inquiry" requires the performance of a preliminary assessment and, if necessary, a site investigation. In the case of an underground storage tank, nothing short of soil testing meets the "appropriate inquiry" threshold, qualifying a damaged buyer as an "innocent purchaser." This concept is the cornerstone of the "innocent purchaser offense" used by buyers in pursuit of responsible or contributory negligent parties to the property transaction.

To answer the question of the month, ***if buyers want to qualify as innocent purchasers and escape possible future liability, they must conduct a site investigation to discover hidden contamination.*** For more information on the innocent purchaser defence, see Section 44.d of the ISRA code aka Section 8d of the Spill Act, NJSA 58:10-23,11g(d).