

## **Seller's Potential Liability During Due Diligence Period Reduced**

Here is the seller's nightmare, particularly in a commercial or industrial setting: A buyer's purchase offer is subject to due diligence including the right to inspect the property and perform environmental testing. While doing their tests, the buyer's consultants encounter or release hazardous materials. The buyer then backs out of the deal and fails to pay its consultants. The seller is concerned about its environmental liability and whether it might be at risk to a mechanic's lien in favor of the consultants.

Some of the seller's worries have now been eliminated. Washington courts have recently ruled the buyer's consultants in this scenario would have no mechanic's lien rights under state law. The consultants have a contractual claim against the buyer, but no recourse against either the seller or its property.

For years, prudent sellers have had buyers enter into a separate contract if the buyer intended to do on-site testing. The contract bound the buyer to pay its consultants, keep the property free from lien claims, indemnify the seller for environmental and other claims arising from the work performed by the buyer's consultants, and provide insurance benefiting the seller. Washington sellers can now relax somewhat knowing their properties are not at risk for mechanic's liens in favor of the buyer's consultants. However, wise sellers should still insist upon a contract that indemnifies and insures them with respect to environmental hazards and other liabilities which might expose sellers to claims as a consequence of a buyer's actions.

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