

September 2, 2010

If you have questions regarding the information in this alert or would like to receive further information regarding our environmental law department, please contact:

**Richard A. Barr**  
313.465.7308  
[rbarr@honigman.com](mailto:rbarr@honigman.com)

**Naeha Dixit**  
313.465.7682  
[ndixit@honigman.com](mailto:ndixit@honigman.com)

**Kenneth C. Gold**  
313.465.7394  
[kgold@honigman.com](mailto:kgold@honigman.com)

**S. Lee Johnson**  
313.465.7432  
[sjohnson@honigman.com](mailto:sjohnson@honigman.com)

**Megan Conlon  
McCulloch**  
313.465.7444  
[mmcculloch@honigman.com](mailto:mmcculloch@honigman.com)

**H. Kirk Meadows**  
517.377.0739  
[hkmeadows@honigman.com](mailto:hkmeadows@honigman.com)

**Steven C. Nadeau  
Chair**  
313.465.7492  
[snadeau@honigman.com](mailto:snadeau@honigman.com)

**Joseph M. Polito**  
313.465.7514  
[jpolito@honigman.com](mailto:jpolito@honigman.com)

**Jeffrey L. Woolstrum**  
313.465.7612  
[jwoolstrum@honigman.com](mailto:jwoolstrum@honigman.com)

### **Michigan Court of Appeals Affirms Voiding of Lease Because of Landlord's Failure to Disclose Property's Status as a Part 201 Facility**

On August 5, 2010, the Michigan Court of Appeals, in *1031 Lapeer LLC v. Rice*, No. 290995 (Mich. Ct. App. Aug. 5, 2010), issued an unpublished decision interpreting Section 20116(1) of Part 201 of the Michigan Natural Resources and Environmental Protection Act of 1994, as amended ("Part 201"), which provides that "a person who has knowledge or information or is on notice through a recorded instrument that a parcel of his or her real property is a facility shall not transfer an interest in that real property unless he or she provides written notice" to the transferee disclosing the property's status as a facility and the general nature and extent of the release. (Emphasis added). The decision has the potential to affect the sale or lease of any Part 201 facility (a "facility" generally means any property with hazardous substances above the Part 201 generic residential clean-up standards, regardless of the use of the property).

The Court of Appeals affirmed the trial court's decision to void the lease because of the landlord's failure to disclose the property's status as a Part 201 facility in accordance with Section 20116(1). The plaintiff lessees and defendant landlord had entered into a 10-year lease for a gas station in May 2006. At the time the lease was executed, the landlord had been aware for approximately 10 years that the gas station property was a facility under Part 201. However, the landlord did not disclose this fact to the plaintiffs. Instead, the plaintiffs were made aware of the gas station's status as a Part 201 facility when they contacted the Michigan Department of Environmental Quality in late 2007. The plaintiffs filed suit against the defendant for violating its statutory duty under Section 20116(1) to inform the plaintiffs of the property's status as a facility. The plaintiffs sought rescission of the lease and further alleged fraud, fraudulent misrepresentation, and breach of lease.

The Court of Appeals noted that, while Part 201 provides for certain penalties for violations of specific provisions of the Act, there is no express remedy for a violation of Section 20116(1)'s disclosure provision. However, the court found that, because the disclosure provision is mandatory, any transfer of property that fails to comply with its mandate is a violation of Section 20116(1) and is contrary to public policy.

The Court of Appeals rejected the defendant's argument that the plaintiffs had notice of the pre-existing contamination at the gas station through contractual language absolving the plaintiffs of any liability for the landlord's acts or omissions for failure to comply with laws, including provisions indemnifying the plaintiffs for any cleanup costs incurred. The court emphasized that the defendant had actual notice of the existing contamination and had failed to notify the plaintiffs in accordance with the statute. The court also affirmed an award of damages to the plaintiffs in the amount of \$83,000.

The *1031 Lapeer LLC* decision serves as a reminder that any lease, purchase agreement, option, deed, or other instrument transferring an interest in a Part 201 facility must include a written disclosure, in conformance with Section 20116(1)'s requirements, explicitly notifying the transferee of the property's Part 201 facility status and a general description of the nature and extent of the release. Other common law and statutory disclosure and due care obligations should also be considered and may apply.

Please contact Joseph Polito, Richard Barr, or any member of the Honigman Environmental Law Department for further guidance in these situations.