

# LAW 452 – ENVIRONMENTAL ISSUES IN BUSINESS TRANSACTIONS - SPRING 2008

## COURSE MATERIALS

### Tab Topics

### Materials

Tab	Topics	Materials
A	<b>Overview</b>	Philip Newtown and David Pasquinelli, "Is the Target Really a Big Environmental Risk," <i>Mergers &amp; Acquisition</i> (Sept. 2005)
	<b>Common Law Sources of Liability for Property Contamination</b>	R. Morrison & Assocs., "Historical Waste Disposal Practices," <i>Environmental Toolbox</i> (Winter 2000)
	Causes of Action	Brian Murphy, "Environmental Forsensics," <i>Health &amp; Environment Sciences Newsletter</i> (Spring 2000)
	- Nuisance	
	- Negligence	
	- Trespass	
	- Strict Liability	<i>Manchester Terminal Corp. v. Texas Marine Transportation, Inc.</i> 781 S.W.2d 646 (Tex. App. 1989) (nuisance and trespass action succeeds despite permitted air emissions)
	Defenses	A. Bronstad, "Lead Paint Litigation Is Beginning to Fade" NATIONAL LAW JOURNAL 1 (Aug. 20, 2007)
	- Lack of Proof of Causation	
	- Statute of Limitations	
	- Preemption	
	- Caveat Emptor	<i>Smith v. Carbide and Chemicals Corp.</i> , 298 F.Supp.2d 561 (W.D. Ky. Jan. 5, 2004) (intentional trespass and private nuisance claim dismissed because plaintiffs failed to provide sufficient evidence of contamination)
	Remedies	<i>Pirtle v. Kahn</i> , 2005 Tex. App. LEXIS 6698 (Tx. Ct. Apps., 1st Dist., Aug. 18, 2005) (Texas statute of limitations on mold-related personal injury claims)
	- Stigma Damages	<i>First Virginia Banks, Inc. v. BP Exploration &amp; Oil, Inc.</i> , 50 ERC 1225 (4 <sup>th</sup> Cir. 2000) (statute of limitations)
		<i>T&amp;E Industries, Inc. v. Safety Light Corp.</i> , 587 A.2d 1249 (N.J. 1991) (caveat emptor defense)
		<i>Mederios v. Emmet Oil Co.</i> , 2005 WL 2857714 (Conn. Super. Ct., Oct. 14, 2005) (stigma damages awarded to homeowners living downhill from leaking storage tanks)
B	<b>Statutory Sources of Liability for Property Contamination</b>	CERCLA §§ 104, 106, 107, 113, 122; RCRA §§ 3008, 7002, 7003
	CERCLA & RCRA	<i>Carson Harbor Village Ltd. v. Unocal</i> , 270 F.3d 863 (9th Cir. 2001) (past owner at time of disposal)
	- Standard of Liability	
	- Parties Liable	
	- Government Enforcement Authority	<i>Cooper Industries, Inc. v. Aviall Services, Inc.</i> , 543 U.S. 157 (2004) (in order for a responsible party to bring a contribution action under CERCLA § 113(f)(1), the party must first have resolved its liability with the government under §§ 106 or 107 of the statute)
	- Private Party Rights	
	- Defenses to Liability	
		<i>U.S. v. Atlantic Research Corp.</i> , 127 S.Ct. 2331 (2007) (private parties that incur response costs but have not resolved their

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liability with the government have a right of cost recovery under CERCLA § 107)

*Interfaith Community Organization v. Honeywell International, Inc.*, 399 F.3d 248 (3d Cir. 2005), cert den'd U.S. No. 04-1560 (June 20, 2005) (affirming district court decision ordering Honeywell to clean up a contaminated site along the Hackensack River)

*Avondale Fed'l Savings Bank v. Amoco*, 170 F.3d 692 (7<sup>th</sup> Cir. 1999) (no restitution available, even where plaintiff first sought injunctive relief and only then preceded with clean up)

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**C Due Diligence I**

CERCLA §§ 101(35), 101(40), 107(a), 107(b)(3), 107(q)

Innocent Owner and  
Bona Fide Prospective  
Purchaser Defenses to  
CERCLA Liability

*New York v. Lashins Arcade, Co.*, 91 F.3d 353 (2d Cir. 1996) (purchasers of shopping center on which dry cleaner formerly operated entitled to innocent owner defense)

Privilege

*U.S. v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000) (test of appropriate inquiry and due care in family situation)

Self-Disclosure

*U.S. v. Capital Tax Corp.*, 2007 WL 54039 (N.D. Ill. 2007) (testing "due care" component of "innocent owner" defense)

All Appropriate Inquiry Rule, 70 *Fed. Reg.* 66,070 (Nov. 1, 2005)

*In the Matter of Middleton, Kontokosta Associates, Lt. and Donald J. Middleton, Jr.*, DEC Case No. RI-6039, Ruling of the DEC Commission on Appeal, 1998 WL 939495 (Dec. 31, 1998)

*U.S. v. Torf*, 350 F.3d 1010 (9th Cir. 2003) (consultant's documents protected by work product privilege because they were created at the direction of counsel in anticipation of litigation)

EPA, "Incentives for Self-Policing, Discovery, Disclosure, Correction and Prevention of Violations," 60 *Fed. Reg.* 66,706 (Dec. 22, 1995)

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**D Due Diligence II**

ASTM E 1527-05, Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process

Environmental Site  
Assessment

Facility Compliance

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**E Corporate Law Issues**

One of the following --

Parents & Shareholders  
- Direct ("Operator")  
Liability

A - *U.S. v. Kayser Roth*, 272 F.3d 89 (1st Cir. 2001) (parent corporation found directly liable)

<b>Tab</b>	<b>Topics</b>	<b>Materials</b>
	- Derivative ("Veil Piercing") Liability	B - <i>Raytheon Constructors v. ASARCO, Inc.</i> 368 F.3d 1214 (10th Cir. 2003) (district court's finding of parent liability based on activities of one of its officers reversed)
	Successor Liability	
	- Stock and Asset Purchases	One of the following --
	- Exceptions to Asset Purchase Defense	A - <i>Carter-Jones Lumber Co. v. LTV Steel, et. al. and Dixie Distributing Company, et. al.</i> , 237 F.3d 745 (6th Cir. 2001) (sole shareholder found derivatively liable under Ohio's veil-piercing statute)
	- State or Federal Common Law	
	Dissolved Corporations	B - <i>U.S. v. Union Corp.</i> , 259 F. Supp. 2d 356 (E.D. Pa. 2003) (alter ego theory, based on Federal common law, used to pierce corporate veil)
	Officers & Directors	
		One of the following --
		A - <i>U.S. v. General Battery Corp.</i> , 423 F.3d 294 (3d Cir. 2005) (a federal rule of successor liability applies in CERCLA cases)
		B - <i>New York v. National Services Industries, Inc.</i> , 460 F.3d 201 (2d Cir. 2006) (court need not rule whether a federal or state rule governs, because plaintiff's claim would fail under either)
		Successor Liability Hypothetical
		<i>Burlington Northern &amp; Santa Fe Railway Co. v. Consolidated Fibers</i> , 7 F. Supp.2d 822 (N.D. Tex. 1998) (case may proceed against dissolved corporation, unless it is "dead and buried")
		<i>BEC Corp. v. Dept. of Env'tal Protection</i> , No. S.C. 16174 (Conn. S.Ct. July 10, 2001) (individual liability under responsible corporate officer test)

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<b>F</b>	<b>Purchase and Lease Agreements I</b>	Sample Purchase Agreement Table of Contents
		List of Representations and Warrantees
	Purchase Agreement Structure and Drafting	Sample Purchase Agreement Provisions
	- Definitions	
	- Covenants	
	- Representations and Warranties	<i>White Consolidated Industries, Inc. v. Westinghouse Electric Corp.</i> , 1999 U.S. App. LEXIS 10839, (6 <sup>th</sup> Cir. 1999) (interpretation of mid-1970's contract to address contamination encountered in 1991)
	- Scheduled Exceptions	
	Assumption, Indemnity, and "As Is" Clauses	Construing Pre-CERCLA Indemnity Clause Exercises
	- Construing Pre-CERCLA Clauses as to CERCLA Liability	A - <i>Bonnie Blue Inc. v. Reichenstein</i> , 127 S.W.3d 366 (Tex. Ct. App. 2004) (whether purchaser who took property subject to an "as is" clause can assert a statutory cause of action versus seller)
	- Interpretation Generally	
	- Effect on Contribution Rights	B - <i>Warehouse Associates Corp. Ctr. II v. Celotex Corp.</i> , 192 S.W. 3d 225 (Tex. App. 2006) (involving "fraudulent inducement" exception to enforcement of "as is" clause)

**Tab Topics**

**Materials**

One of the following --

A - *Caldwell Trucking PRP v. Rexon Technology Corp.*, 421 F.3d 234 (3d Cir. 2005) (breadth of assumed liabilities clause)

B - *Honeywell Int'l, Inc. v. Phillips Petroleum Co.*, 415 F.3d 429 (5th Cir. 2005) (breadth of assumed liabilities clause)

One of the following –

A – *Coy Superior Team v. BNFL*, 174 Fed. Appx. 901 (6th Cir. 2006) (effect of assumption of “regulatory liability” clause)

B – *Oxy USA, Inc. v. Borden, Inc.*, 2007 WL 62529 (6th Cir. 2007) (interpreting pre-/post-closing apportionment of liability scheme)

One of the following –

A - *Horsehead Industries, Inc. v. Paramount Communications, Inc.*, 258 F.3d 132 (Third Cir. 2001) (effect of assumption of liabilities clause on assuming party's contribution rights versus third parties)

B - *Southdown v. Allen*, 119 F.Supp.3d 1223 (S.D. Ala. 2000) (effect of “sole cost” claim on party's contribution rights versus third parties)

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**G Purchase and Lease Agreements II**

Landlord-Tenant Issues

*Bowers v. Wurzburg*, 528 S.E.2d 475 (W.Va. 1999) (operation of service station as “abnormally dangerous activity”)

*Soo Line RR Co. v. Tang Ind., Inc.*, 998 F.Supp. 889 (N.D. Ill. 1998) (whether landlord can maintain innocent owner defense to 107 action by successor tenant)

*Jaasma v. Shell Oil Co.*, No. 04-2095, 35 ELR 20137 (3d Cir. June 28, 2005) (interpretation of a “compliance with laws” lease provision)

*Joslyn Mfg. Co. v. Koppers Co., Inc.*, 40 F.2d 750 (1995) (interpreting breadth of assumption of liability clause)

*South Road Associates, LLC v. IBM*, 826 N.E.2d 806 (N.Y. App. 2005) (interpreting whether term “premises” includes exterior)

Examples of Lease Clauses

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**H Event and Transaction-Triggered Requirements**

- Waste Management Unit and Storage Tank Closures
- New Jersey Industrial

*In re: Railroad Realty Associates*, 313 N.J. Super. 225, 712 A.2d 1165 (N.J. Super. Ct. App. Div. 1998)

*Hartt v. Schwartz*, 1997 WL 625467 (Conn. Super. 1997)

Dale Desnoyers and Larry Schapf, “Environmental Remediation Process Is Undergoing Sweeping Changes Mandated by New

<b>Tab</b>	<b>Topics</b>	<b>Materials</b>
	<ul style="list-style-type: none"> <li>- Site Recovery Act</li> <li>- Connecticut Transfer Act</li> </ul>	Brownfields Law," <i>New York State Bar Association Journal</i> 10 (Oct. 2004)
	<b>Brownfield Redevelopment</b>	
	<ul style="list-style-type: none"> <li>- State Laws</li> <li>- Brownfields Revitalization Act of 2002</li> <li>- Institutional Controls</li> </ul>	

<b>I</b>	<b>Insurance</b>	Coverage for Pollution Liability Under the 1973 CGL Policy
	Seeking Coverage for Environmental Liabilities Under Comprehensive General Liability Insurance Policies	1973 Policy Jacket and Coverage Specimens Saul Goodman and Jonathan Mirsky, "What Every Corporate Counsel Should Know About Liability Insurance" (June 1997)
	New Insurance Products for Transactional Use	<i>Benjamin Moore &amp; Co. v. Aetna Casualty &amp; Surety Co.</i> , 843 A.2d 1094 (N.J. 2004) Brett McGovern, "All Appropriate Inadequacy," <i>The Environmental Forum</i> 25 (ELI Sept./Oct. 2006)

<b>J</b>	<b>Bankruptcy</b>	<p><i>Students will be assigned to read just one of the following –</i></p> <p><i>LTV Corp. v. United States (In re Chateaugay Corp.)</i>, 944 F.2d 997 (2d Cir. 1991)</p> <p><i>In re Torwico Electronics, Inc. v. the New Jersey, Department of Environmental Protection and Energy</i>, 8 F.3d 146 (3d Cir. 1993), <i>cert. denied</i>, 114 S. Ct. 1576 (1994)</p> <p><i>AM International, Inc. v. Datacard Corp.</i>, 106 F.3d 1342 (7th Cir. 1997)</p> <p><i>In re: Crystal Oil Company</i>, 158 F.3d 291 (5th Cir. 1998)</p> <p><i>In re Texaco, Inc.</i>, 182 B.R. 937 (Bankr. S.D. N.Y. 1995)</p> <p><i>In re Mahoney-Troast Construction Co.</i>, 189 B.R. 57 (Bkrtcy. D. N.J. 1995)</p> <p><i>In re CMC Heartland Partners</i>, 966 F.2d 1143 (7th Cir. 1992)</p>
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<b>K</b>	<b>Green Marketing Claims</b>	<p>FTC Guides for the Use of Environmental Marketing Claims</p> <p>FTC Companion Notices, "Guides for the Use of Environmental Marketing Claims, Carbon Offsets and Renewable Energy Certificates," 72 <i>Fed. Reg.</i> 66,091 &amp; 66,094 (Nov. 27, 2007)</p>
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**Materials**

**L Financial Disclosure and  
Contingent Liability  
Estimation**

Sample Publicly-Traded Client Request for Estimates of  
Contingent Liability

American Bar Association, *Auditor's Letter Handbook* (Dec. 1976)

Example SEC Form 10-Ks (Calpine, ConEd, DTE, Entergy)

*Kriendler v. Chemical Waste Management*, 877 F. Supp. 1140  
(N.D. Ill. 1995) (private action alleging CWM delayed taking write-  
down on incinerator to inflate stock price)

*In the Matter of Lee Pharmaceuticals*, 1998 SEC LEXIS 691 (Apr.  
9, 1998) (discrepancy between 10-K reporting of contingent  
environmental liability and claim made for insurance purposes)

ASTM E 2137-06, Standard Guide for Estimating Monetary Costs  
and Liabilities for Environmental Matters