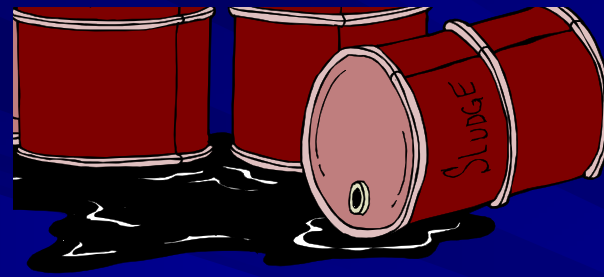


***Everything about CERCLA  
You Were Afraid to Ask:  
Superfund Basics for  
Environmental Business Lawyers***



Presented by: Environmental, Energy and Resources Law  
Committee of the Business Law Section

Cosponsored by: Young Lawyers Division, Section of Environment,  
Energy and Resources

# Federal CERCLA Authority

- Section 103 Reporting Requirements
- Section 104 Response and Information Authority
- Section 105 Listing Authority
- Section 106 Unilateral Orders
- Section 107 Cost Recovery
- Section 107 (l) and (r) Liens

# CERCLA Cause of Action

- Release
  - exclusions
- Hazardous Substances
  - exclusions
- Facility
- Response Costs
  - necessary
  - consistent with NCP
- PRP
  - ❖ beware of *Bell Atlantic v. Twombly*

# Type of Liability

- Strict
- Retroactive
- Joint and Several
  - divisibility (apportionment)
  - equitable (allocation)

# PRPs

- Owners
  - equipment lessors
  - lenders
  - corporate entities
- Operators
  - developers moving dirt
  - shopping center managers
- Generators
  - Burlington Northern
  - Tolling Agreements
  - De Micromis (pre 4/01)
  - MSW (pre-4/01)
- Transporters

# Defenses to Liability

## ■ 107(b)

- Act of God
- Act of War
- Third Party

- solely caused
- no contractual relationship
- due care
- precautions

## ■ Landowner Liability Protections

# Landowner Liability Protections (LLPS)

- Innocent Landowner (ILO)
- Bona Fide Prospective Purchaser (BFPP)
- Contiguous Property Owner (CPO)

# Elements of LLPs

## ■ Pre-Acquisition

- All Appropriate Inquiry
- Not PRP or affiliated with PRP

## ■ Post-Acquisition

- Complied with Reporting Requirements
- Undertakes “Appropriate Care”
- Cooperate and Provide Access
- Comply With LUCs
- Comply with Information Requests or Subpoenas



# Contribution Actions

- 113(f)(1)- civil action
- 113(f)(3)- administrative settlement
  - state consent orders
  - voluntary cleanup agreements
- 107(a)(4)- voluntary cleanups

# Sources of Liability

- Federal / State / Local Laws and Regulations
- State / Federal Common Law
- Violation of Representations and Warranties -  
Contract of Sale
- State Environmental Disclosure / Notification Laws
- State “Superfund” Laws
- Federal “Superfund” Laws
- Government Action Against Owner / Operator
- Private Party Cost Recovery
- Third Party Liability / Toxic Torts
- Liability of Lender as “Owner / Operator.”

Owner Liability  
Operator Liability  
Lender Liability  
Seller Liability  
Purchaser Liability  
Landlord Liability  
Tenant Liability  
Operator Liability  
Similar Standards

# Owner Liability

- By Common Law
- Be Federal Law
- By State Law
- By Contract

# Superfund Liability

- Strict
- Joint
- Several
- Retroactive

# Discussion of Hypothetical Example and Key Concepts

# Panelists:

- Moderator: David Roth, Partner

- Panelists:

- Frank H. Hackmann

- Partner, Sonnenschein Nath & Rosenthal LLP

- Charles F. “Chuck” Helsten,

- Partner, Hinshaw & Culbertson, LLP

- Lawrence Schnapf

- Principal of Schnapf Law Offices

# Hypothetical Piece of Property

- For the last 24 years – a paved surface parking lot in an urban area
- Visually Unremarkable
- But if you look further back, you find ...



- A Former Manufacturing Plant from the late 1800's which
  - Made “white lead” as a paint pigment
  - Or, handled large volumes of solvents
  - Or, was a former tannery
  - Or, a chemical plant, etc.
  - Or, old wells, etc., etc.

# Two Points of View

- Seller – Frank Hackmann
- Buyer – Charles “Chuck” Helsten

Plus Commentary From

- David Roth, Moderator
- Lawrence Schnapf, Commentator

# Typical Topics

- Representations and Warranties
- Historical Site Use
- Presence of Detected Chemical or Substance
  - Above VCP Levels
  - Below VCP Levels

- Potential for undisclosed (or unknown) subsidiaries
- Prior On Site solvent usage
- Potential vapor intrusion

# Tradeoffs Involved

- Some Risk in any Real Estate Transaction
- Assess Risk
  - Factor into Price, Terms and Conditions

# Testing Questions

- When to Test
- Type of Test
- Disclosure of Results

# Know in Advance

- Types of Tests
- Who Will Report
- Possible Deal Impact
- Other Factors

# Where possible, do the testing

- Evaluate results
- Place in context
- Exercise pathways
- Meet and confer with evaluators and, if appropriate, regulators
- Identify future actions



# Conclusions

- No “one size fits all”
- Tailor to client needs
- Assess testing issues carefully
- Include all points of view on development project

# Focus on What Is:

- Environmentally Sound
- Legally Required
- Federal, State, Local

# Disclaimer

These materials should not be considered as, or as a substitute for, legal advice and they are not intended to nor do they create an attorney-client relationship. Because the materials included here are general, they may not apply to your individual legal or factual circumstances. You should not take (or refrain from taking) any action based on the information you obtain from these materials without first obtaining professional counsel. The views expressed do not necessarily reflect those of the firms, their lawyers, or their clients.

# Questions and Answers