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THE IMPORTANCE OF IDENTIFYING AND ALLOCATING ENVIRONMENTAL LIABILITIES IN THE SALE OR PURCHASE OF ASSETS

I. INTRODUCTION

The potential environmental liabilities that can be exchanged in the purchase or sale of assets are enormous.¹ In fact, these liabilities can be so large, they play a major role in the overall structure of sales transactions.² For example, the threat of liability based on the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)³ may cause buyers to structure the deal as a cash-for-assets acquisition, rather than a stock-for-assets acquisition. Such a decision may prevent the liabilities of the corporate seller from being transferred to the buyer.⁴

In addition to influencing the structure of the deal, environmental risks have a tremendous impact on the drafting of specific contractual provisions included in the purchase agreement.⁵ The precise language incorporated in the provisions relating to environmental liability is of critical importance to both the buyer and the

1. See JOEL S. MOSKOWITZ, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS: LAW AND PRACTICE 4 (1989) (stating that costs associated with Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) may be as much as \$100 million to remediate).

2. See ALLAN J. TOPOL AND REBECCA SNOW, SUPERFUND LAW AND PROCEDURE § 13.1 (1992) (noting that "potential Superfund liabilities that are exchanged in some [sale of assets transactions] are large enough relative to the size of the overall deal that they must be specifically factored into the [terms and structure of the deal]").

3. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-75 (1994)) [hereinafter CERCLA]. CERCLA was reauthorized and substantially amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986). See John C. Cruden, *CERCLA Overview*, SB91 ALI-ABA 1557, 1559 (1997) (explaining amendments made to CERCLA in 1986 by SARA).

4. See TOPOL & SNOW, *supra* note 2, at § 13.2 (noting that environmental risks may cause purchaser to structure acquisition in way that minimizes potential for environmental liabilities). For a discussion on structuring the deal, see *infra* notes 30-40 and accompanying text.

5. See Ronald E. Cardwell & Jack D. Todd, *Buying, Selling or Closing a Facility: A Summary of Environmental Issues*, 9 S.C. LAW., Sept. - Oct. 1997, at 14, 17 (noting that certain provisions in purchase agreement "should specify who will absorb the liability for any discovered contamination with provisions covering due diligence, cleanup, representations and warranties, indemnification, cost sharing, permit transfer, facility access and, if appropriate, carve outs.").

seller because courts rely significantly on the language of the contract in allocating the environmental liabilities between the parties.⁶ Thus, the threat of potentially devastating cleanup costs associated with environmental liability serves as a strong incentive for the parties to draft carefully-worded contract provisions.⁷

While the structure and contractual language of the transaction determine the allocation of environmental liabilities between the parties, the first step in an asset acquisition is to identify any environmental liabilities that have attached to the property, as well as any environmental liabilities that have the potential to surface in the future.⁸ To accomplish this, corporate purchasers must conduct a due diligence investigation to ascertain the environmental risks and liabilities associated with the property.⁹

This Comment addresses several methods by which a corporate buyer or seller can minimize its environmental liability. Part II of this Comment provides an overview of CERCLA liability.¹⁰ Part III offers a general discussion regarding the significance of the structure of the transaction.¹¹ Part IV discusses environmental due diligence in corporate transactions.¹² Part V explains the contractual tools available to the buyer and seller to protect against environmental liability.¹³ Part V also analyzes recent CERCLA cases and examines their impact on both the buyer's and the seller's perspective.¹⁴ Finally, Part VI summarizes the importance of due diligence,

6. For a further discussion on the importance of contractual language where CERCLA liability is involved, see *infra* notes 83-170 and accompanying text.

7. For a discussion of the buyer's and seller's perspectives regarding the drafting of contractual provisions, see *infra* notes 89-93 and accompanying text.

8. See David F. Goossen, *Contractual Allocation of Environmental Liabilities in Real Estate Transactions*, COLO. LAW., March 1996, at 79 (1996) (noting that "[t]he first step in allocating environmental liabilities is to identify as many such liabilities as possible").

9. See Carol R. Boman, *Seeking a Standard for Environmental Due Diligence*, 797 PLI/CORP 173, 175 (1992) (stating that "severe repercussions" have often resulted when parties fail to recognize environmental liabilities). For a discussion of due diligence, see *infra* notes 41-72 and accompanying text.

10. For a discussion of CERCLA liability, see *infra* notes 16-29 and accompanying text.

11. For a discussion regarding the structure of the transaction, see *infra* notes 30-40 and accompanying text.

12. For a discussion of due diligence, see *infra* notes 41-72 and accompanying text.

13. For a discussion of the various contractual drafting mechanisms available to the buyer and seller, see *infra* notes 86-170 and accompanying text.

14. For a discussion of how recent cases have impacted the buyer's and seller's perspective regarding environmentally-related contractual provisions, see *infra* notes 128-148 and accompanying text.

the structure of the deal, and the language of the sale agreement in allocating environmental liability.¹⁵

II. CERCLA OVERVIEW

Congress enacted CERCLA in 1980 to provide a framework for the prompt cleanup of uncontrolled and abandoned hazardous waste sites and to ensure that those responsible for the creation of these sites bear the costs of cleanup.¹⁶ CERCLA liability is triggered when there is a release or threatened release of hazardous substances into the environment.¹⁷ Under section 107(a) of CERCLA, there are four broad categories of potentially responsible parties (PRPs) that are strictly liable for the costs of hazardous waste cleanup:¹⁸ (1) current owners and operators of facilities containing

15. For a summary of the importance of due diligence, structure of the deal and language of the contract, see *infra* notes 171-176 and accompanying text.

16. See Cruden, *supra* note 3, at 1559. One commentator, explaining the history of CERCLA, stated:

CERCLA was passed in 1980 at the end of the ninety-sixth Congress to cleanup leaking, inactive or abandoned sites and provide emergency response to spills The statute was initiated as a response to severe environmental and health problems at abandoned toxic waste sites such as Love Canal in New York and Times Beach in Missouri.

Id. (footnote omitted). In explaining the statutory goals of CERCLA, the commentator further stated:

CERCLA was enacted to provide a framework for cleanup of the nation's worst hazardous waste sites. The primary goal of CERCLA is to protect and preserve public health and the environment from the effects of releases of hazardous substances to the environment Congress intended that those responsible for creation of hazardous conditions bear the burden of cleaning up those conditions.

Id. (citations omitted).

17. See *id.* at 1568 (explaining elements of CERCLA liability). One commentator suggests, "[w]hen there is a release or threatened release of hazardous substances from a facility that causes the incurrence of response costs, and the costs are not inconsistent with the National Contingency Plan ("NCP"), all government costs are recoverable." *Id.* There are four basic elements of CERCLA liability: (1) the release or substantial threat of release; (2) of a hazardous substance; (3) from a vessel or at a facility; and (4) caused by a potentially responsible party (PRP). See *id.* at 1568-69. For a discussion of the four categories of PRPs, see *infra* notes 18-22 and accompanying text. See also CERCLA § 107(a), 42 U.S.C. § 9607(a) (listing categories of PRPs under CERCLA).

18. See CERCLA § 107(a), 42 U.S.C. § 9607(a) (explaining categories of PRPs under CERCLA). Section 107(a) of CERCLA states:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport

hazardous substances;¹⁹ (2) owners and operators of hazardous waste facilities at the time of the hazardous waste disposal;²⁰ (3) those who arranged for the disposal or treatment of hazardous substances;²¹ and (4) transporters of the hazardous substances who selected the waste disposal site.²²

In a sale of assets, the categories of CERCLA liability can be summarized as follows: (1) the seller's liability for the cleanup of its currently-owned sites; (2) the seller's liability for hazardous waste

for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —
 - (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
 - (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
 - (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
 - (D) the costs of any health assessment or health effects study carried out [consistent with] this title.

Id.

19. See Cruden, *supra* note 3, at 1569 (defining "current owners and operators" category of PRPs as those who own property when complaint was filed). "The plaintiff does not have to prove that disposal of hazardous substances occurred at the time of ownership or operation Ownership status is usually determined when the plaintiff files complaint." *Id.* at 1569-70.

20. See *id.* at 1570 (explaining "[s]ection 107(a)(2) imposes liability on 'any person who at the time of disposal of any hazardous substance owned or operated' the facility") (quoting CERCLA § 107(a), 42 U.S.C. § 9607(a)). The government does not need to prove a release or threat of a release at the time the facility was owned or operated. See *id.* Rather, the government only needs to show a release of hazardous waste occurred during that time. See *id.*

21. See *id.* at 1571 (describing "generators" category of PRPs). Section 107(a)(3) imposes liability on anyone who "arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . ." *Id.* (quoting CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3)). A generator is liable if: (1) it owned hazardous substances; (2) hazardous substances were shipped to its property; and (3) similar substances were found on the property. See *id.*

22. See *id.* at 1573 (describing "transporters" category of PRPs). "Section 107(a)(4) imposes liability on 'any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person.'" *Id.* (quoting CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4)).

disposal that occurred during its ownership at sites that it later sold; and (3) the seller's liability for the cleanup of offsite disposal facilities that were utilized by the seller to dump hazardous waste.²³ To offset the vast liabilities that CERCLA may impose, there are three defenses available to a PRP.²⁴ The PRP must show that the release or threatened release of hazardous waste was caused solely by one of the following: (1) an act of God;²⁵ (2) an act of war;²⁶ or (3) an act by a third-party.²⁷ CERCLA's provisions apply retroactively, therefore, parties cannot avoid liability by proving that the release or threatened release occurred before the date of CERCLA's enactment or that the release was legal at the time it occurred.²⁸ A party's ignorance about the consequences of its actions is no defense in CERCLA cases.²⁹

III. STRUCTURING THE TYPE OF TRANSACTION

It is well settled that "when two corporations merge pursuant to statutory provisions, liabilities become the responsibility of the

23. See *TOPOL & SNOW*, *supra* note 2, § 13.1. There are three primary types of liability under [CERCLA] about which the parties to a transaction concerning the sale of assets must be aware:

(1) the seller's liability for cleanup of sites which it owns ("current owner liability"); (2) the seller's continuing liability for disposal that occurred during its period of ownership at sites which it sold in the past ("past owner liability"); and (3) the seller's liability for cleanup of offsite waste disposal facilities to which materials from the seller's facilities were sent for disposal ("arranger liability"). For real estate transactions, the parties generally, though not always, focus on the property involved in the transaction and the seller's liability for any adverse environmental conditions existing on the property at the time of closing.

Id.

24. See CERCLA § 107(b), 42 U.S.C. § 9607(b).

25. See *Cruden*, *supra* note 3, at 1575 (explaining that act of God means "unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight").

26. See *id.* (explaining that act of war "connotes a sudden hostile action," such as "the sinking of ships belonging to a belligerent nation by submarines of another nation, or torpedoing a destroyer").

27. See *id.* (explaining that third-party defense "applies to an act or omission of a third party (other than an employee or agent of the defendant), or one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant").

28. See Deborah A. Hottel & Michael R. Jeffcoat, *Caught in the Web: CERCLA Owner or Operator Liability of Lenders, Shareholders, Parent Corporations, and Attorneys*, 6 S.C. ENVTL. L.J. 161, 163 (1997) (explaining that "CERCLA also applies retroactively even if one's conduct was legal and acceptable at the time") (footnote omitted).

29. See Judith S. Kavanaugh & William L. Earl, *CERCLA Investor Liability: "Don't Ask, Don't Tell" Won't Work*, 71 FLA. B.J., Aug. 1997, at 56, 57 (1997) ("CERCLA makes passive ignorance a liability . . .") (footnote omitted).

surviving company.”³⁰ When a corporation purchases assets of another corporation, however, it may take precautionary measures to ensure that it does not inherit previously existing environmental liabilities under CERCLA or at least to limit the amount of liability it will inherit.³¹ To protect itself from liability, a corporation buying assets must make sure that all of the following instances do *not* occur: (1) that its purchase amounts to a de facto merger;³² (2) that its purchase is merely a continuation of the seller’s business;³³ or (3) that the parties fraudulently tried to avoid liability.³⁴ If any of the above circumstances occurred, a buyer would face complete liability.³⁵

30. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988) (holding that corporate successor liability doctrine applies to CERCLA contribution claims); *see also* *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245 (6th Cir. 1991) (pointing to Third Circuit’s *Smith Land* decision with approval and noting that successor is automatically liable if merger occurs); *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1262-63 (9th Cir. 1990) (holding that after merger, successor is liable for predecessor’s obligations).

In *United States v. Distler*, the Third Circuit stated that the purpose of CERCLA would be frustrated if corporate successor liability was not applicable in claims involving the statute. *See United States v. Distler*, 741 F. Supp. 637, 640 (W.D. Ky. 1990). Likewise, in *Anspec*, the Sixth Circuit used the language of CERCLA to explain why the doctrine of successor liability applies to CERCLA claims. *See Anspec*, 922 F.2d at 1240. The court noted that section 107(a)(2) of CERCLA states that a “person” who owned or operated a facility when hazardous waste disposal took place is liable. *See id.* at 1242-43. CERCLA’s definition of a “person” includes corporations. *See id.* (citing CERCLA § 101(21), 42 U.S.C. § 9601(21)). The court bolstered its opinion with other sections of the United States Code which refer to corporation as including “successors and assigns.” *Id.* at 1247. In addition, the court stated that “Congress would have failed to carry out its purpose of reaching all such entities if successor corporations were exempted from liability.” *Id.*

31. For a discussion of how a corporation can take precautionary measures to ensure that environmental liability does not transfer, *see infra* notes 31-40 and accompanying text.

32. For a discussion of a de facto merger, *see infra* notes 36-40 and accompanying text.

33. For a discussion of the mere continuation of the seller’s business, *see infra* notes 37-40 and accompanying text.

34. *See Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 812 F. Supp. 124, 127 (N.D. Ill. 1993) (discussing “traditional rules of successor liability”), rejected by *United States v. Peirce*, NO 83-CV-1623, 1995 WL 356017 (N.D.N.Y. Feb. 21, 1995).

35. *See Allied Corp.*, 812 F. Supp. at 127 (holding that when de facto merger occurs, successor corporation is liable for any claims against its predecessor). *But see* *SmithKline Beecham Corp. v. Rohm & Haas Co.*, 89 F.3d 154, 163 (3d Cir. 1996) (refusing to apply de facto merger doctrine because if it were applied it would alter effect of indemnification agreement). In *SmithKline Beecham*, the recital of the sale agreement contained a definition of “business” which did not include the seller’s predecessor. *See id.* at 160. The definition stated:

WHEREAS, Seller manufactures and sells, and conducts research relating to, a line of animal health products . . . and such business is conducted primarily by Whitmoyer Laboratories, Inc., a Delaware corporation . . . and certain foreign subsidiaries and distributors The world wide

A de facto merger exists when a corporation purchases another corporation's assets and, although all the statutory merger requirements are not met, the transaction has the effect of a merger.³⁶ A

operations of such business, together with all the assets relating thereto . . . are referred to herein as "Business."

Id. Since the definition of business excluded the seller's predecessor, the court held that the indemnification agreement which used the term could not have included the predecessors either. *See id.*

36. *See Allied Corp.*, 812 F. Supp. at 128 ("A de facto merger occurs where one corporation is absorbed by another but without compliance with the statutory requirements for a merger.") (quoting *Arnold Graphics Indus., Inc. v. Independent Agent Ctr., Inc.*, 775 F.2d 38, 42 (2d Cir. 1985)).

For example, in *In re Acushnet River*, the Massachusetts district court found that a de facto merger occurred when, in a purchase agreement, the successor agreed to perform all the predecessor's contracts and assume its balance sheet liabilities. *See In re Acushnet River*, 712 F. Supp. 1010, 1015-16 (D. Mass. 1989). The only liability excluded in the purchase agreement was that arising from the predecessor's use or disposal of polychlorinated biphenyls (PCBs). *See id.* The successor purchased the predecessor's assets by transferring the stock of the successor's parent corporation and by demanding the predecessor to distribute the stock to its stockholders upon immediate dissolution. *See id.* *See also North Shore Gas Co. v. Salomon, Inc.*, 963 F. Supp. 694, 703 (N.D. Ill. 1997) (citing *Gould v. Alter Metal Co.*, No. 91C20371, 1994 WL 406576, at *2 (N.D. Ill. Aug. 1, 1994); *Interstate Power Co. v. Kansas City Power & Light Co.*, 909 F. Supp. 1241, 1278 (N.D. Iowa 1993) (stating that "[w]hen a de facto merger is alleged, . . . [the] Court must determine the reality of the transaction") (N.D. Iowa 1993); *Savini v. Kent Mach. Works, Inc.*, 525 F. Supp. 711, 716 (E.D. Pa. 1981) (citing *Knapp v. North Am. Rockwell Corp.*, 506 F.2d 361, 365 (3d Cir. 1974) (stating that "[a] merger is found when the seller corporation is absorbed into the purchasing corporation and the seller corporation thereby loses its identity as a separate corporate entity"))).

In determining whether a de facto merger has occurred, courts consider four factors: (1) whether the transaction is a continuation of the seller's corporation, (2) whether "there is a continuity of shareholders," (3) whether "the seller ceases operations, liquidates, and dissolves as soon as legally and practically possible," and (4) whether "the purchasing corporation assumes the obligation of the seller necessary for uninterrupted continuation of business operations." *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1264 (9th Cir. 1990).

In determining whether the first factor exists, the courts consider whether there is "continuity of management, personnel, physical location, assets, and general business operations." 121 A.L.R. Fed. 173, § 2 (1994). It is important to note that a purchaser may not avoid liability by purchasing assets of another corporation with stock of a wholly owned subsidiary. *See Acushnet*, 712 F. Supp. at 1016. In *Acushnet*, the district court found that even though the predecessor revived itself due to the suit brought against it, the fact that it had previously dissolved fulfilled the third requirement. *See id.* at 1011. The court also took into account the fact that the corporation had no assets and no business operations. *See id.* *See also Widerman v. Mayflower Transit, Inc.*, No. CIV. A96-2036, 1997 WL 539684, *1, *4-5 (E.D. Pa. Aug. 6, 1997) (using four factors and determining that de facto merger did not occur because there was no shareholder continuity); *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 310 (3d Cir. 1985) (explaining use of four factors to determine whether de facto merger occurred).

The majority of courts find shareholder continuity to be the most important factor in determining whether a de facto merger occurred. *See Travis v. Harris Corp.*, 565 F.2d 443, 447 (7th Cir. 1977). *See also Widerman*, 1997 WL 539684, at *4 (stating that lack of shareholder continuity is "one of the most important factors in

mere continuation of the seller's business occurs when the purchaser carries on the same business as the previous owner.³⁷ In making this determination, the court considers whether the identity of stock, stockholders and corporate employees remain the same.³⁸ Finally, a court will find that a transaction is fraudulent if there is a showing that the parties lacked good faith.³⁹ In essence, a court will analyze the "true nature of the transaction [to ensure] . . .

proving that a de facto merger took place"). No one factor, however, is determinative. See *Kleen Laundry & Dry Cleaning v. Total Waste Mgt. Corp.*, 817 F. Supp. 225, 231 (D.N.H. 1993) (holding that other factors should also be considered); *Acushnet*, 712 F. Supp. at 1015 (holding same).

37. See *Ninth Ave. Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 724 (N.D. Ind. 1996) (explaining that under mere continuation "a corporate successor is the continuation of the predecessor if only one corporation remains after the transfer of assets and there is identity of stockholders and directors between the two corporations").

38. See *id.* Specifically, the court looks at whether the same employees, supervisory personnel and facilities are used in the successor company. See *id.* at 724. The court also considers whether the successor produces the same product, uses the same corporate name, holds itself out as a continuation of the predecessor, and maintains continuity in assets and business operations. See *id.*

Circuit courts have applied this doctrine differently; some courts apply the test broadly while other courts apply it narrowly. A narrow application of the test would not find a purchaser liable unless there was knowledge of the prospective liability. See *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 489-90 (8th Cir. 1992) (finding no liability under substantial continuity test because of "lack of notice or ties between the successor and predecessor corporation"). A broader application of the test would find a purchaser liable despite the lack of knowledge of environmental liabilities. See *Hunt's Generator Committee v. Babcock & Wilcox Co.*, 863 F. Supp. 879, 884 (E.D. Wis. 1994) (acknowledging possibility of liability under CERCLA without notice of possible environmental liabilities); *Peirce*, 1995 WL 356017, at *3 (holding substantial continuity test applicable regardless of whether successor has knowledge); *Kleen Laundry*, 867 F. Supp. at 1144 (holding substantial continuity test applicable irrespective of lack of knowledge that predecessor undertook activities that created possible CERCLA liabilities).

Other courts have completely rejected the application of the substantial continuity test for CERCLA claims altogether or for claims against a successor who had lack of notice concerning the potential CERCLA liability. See *Louisiana-Pacific*, 909 F.2d at 1265-66 (refraining to apply substantial continuity test when successor did not have notice of possible CERCLA liabilities and because it did not continue predecessor's business); *Allied Corp.*, 812 F. Supp. at 129 (holding that substantial continuity test is inapplicable where successor has no knowledge of possible liability); *United States v. Atlas Minerals & Chem., Inc.*, 824 F. Supp. 46, 51 (E.D. Pa. 1993) (holding substantial continuity test inapplicable when successor has no knowledge or was not responsible for dumping of waste).

In addition, courts also use the mere continuity test to hold a successor liable. See *Ninth Ave.*, 195 B.R. at 726. This test considers whether "there is identity of stocks, stockholders, and directors between the asset seller and the purchaser." *Id.*

39. See *Mexico Feed*, 980 F.2d at 487 (stating that "[t]he purpose of corporate successor liability . . . is to prevent corporations from evading their liabilities through changes in ownership when there is a buy out merger"); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992) (noting that "[i]f the transfer to a new corporation was part of an effort to continue the business of the former corporation yet avoid its existing or potential state or federal environmen-

that a company who purchases and continues the business enterprise of its predecessor cannot walk away from liability for pollution when its predecessor is unable to pay its fair share."⁴⁰

IV. DUE DILIGENCE

While the structure of the deal is an important mechanism for minimizing the risks of environmental liabilities, it is by no means the only mechanism. Due diligence is another effective method that should be used in conjunction with carefully structuring the deal.⁴¹ Due diligence involves "investigatory activities conducted by parties in an effort to determine the existence of contamination."⁴² The importance of examining the facility to determine environ-

tal liability . . . [it] should be considered" in determining whether that corporation will be liable for cleanup costs).

40. Envirobiz, International Env't Info. Network, <<http://www.envirobiz.com/newsdaily/pr09165.htm>>.

41. See Martin B. Robins, *The Lawyer's Guide to Acquiring a Medium-Sized Business*, 85 ILL. B.J. 428, 429 (1997) (noting that "[b]uyers who prefer a supposedly 'tightly drafted' acquisition agreement to business-level due diligence are mistaken").

42. Debra L. Baker, *Conducting the Due Diligence Inquiry*, 342 PRACTICING L. INST./REAL 89, 93 (1989) (stating that due diligence may establish that purchaser "had no reason to know of the contamination and had undertaken all appropriate inquiries required by CERCLA"); see also Moskowitz, *supra* note 1, at 206 (noting that "due diligence" means that "the transaction will be diligent, rather than casual [and] . . . adequate, but not excessive").

Environmental due diligence "involves both risk assessment and risk management." Rolf R. Von Oppenfeld, *Environmental Due Diligence: Risk Assessment and Management*, ARIZ. ATT'Y, April 1990, at 24. Its purpose is to minimize or manage environmental risks so they may be maintained at an appropriate level or corrected all together. See *id.* at 25. One commentator states:

The greater the client's financial commitment to the proper risk management process, the less likely it is that the client later will encounter an unwelcome environmental "surprise." Regardless of the degree of the client's environmental consciousness, however, it is always inevitable that cost and timing play a factor in the selection of actions to minimize identified risks.

Id.

A due diligence team should be set up by the purchaser as soon as possible to start the environmental investigation. See Ram Sundar & Bea Grossman, *The Importance of Due Diligence in Commercial Transactions: Avoiding CERCLA Liability*, 7 FORDHAM ENVTL. L.J. 351, 377 (1996). The team should consist of a technical staff acquainted with the property, legal counsel and an environmental consulting firm. See *id.* (footnote omitted).

Unfortunately, potential purchasers practicing due diligence are uncertain as to the extent of investigation that needs to take place to show that the "appropriate inquiry" requirement under CERCLA was fulfilled. See *id.* See also Von Oppenfeld, *supra*, at 27 (stating that "[t]he vagueness of the 'all appropriate inquiry' standard to qualify for the 'innocent landowner' defense led to repeated requests that EPA further clarify the subject"). In June 1989, Congress attempted to clarify the appropriate inquiry, and in August 1989, the EPA tried to provide further guidance by describing due diligence, although it did not define the term. See 54 C.F.R.

mental liabilities⁴³ is two-fold: (1) the buyer may discover that environmental cleanup costs may exceed the value of the property;⁴⁴ and (2) the seriousness of the type of risks associated with hazardous waste may be discovered, namely, the degradation of the environment and human health.⁴⁵ Due diligence benefits both the buyer and the seller because it allows the buyer to know the nature and extent of contamination caused by the seller,⁴⁶ and it gives the

§ 34,235 (1989); see also Von Oppenfeld, *supra*, at 27 (stating that EPA's "guidance is not very helpful"). EPA categorized landowners into four different classes:

First, there is a landowner who can make a "thoroughly convincing demonstration" so that the government agrees there is a "very high probability" that the innocent landowner defense could be established at trial. In such a case, EPA only will require that the landowner provide *access and a commitment to due care* during the EPA-directed response action. Second, there is a landowner who can demonstrate that it is "likely" that the innocent landowner defense can be established, although the demonstration is not "thoroughly convincing." That second-level landowner *must negotiate a level of cash consideration to be provided to EPA, along with access and due care assurances*. Third, there is a landowner who cannot demonstrate eligibility for a *de minimis* landowner settlement, but who may be eligible for a *de minimis* settlement using the same criteria that apply to generators and other defendants. This third category of settlement *depends upon the amount and toxicity of the hazardous substances* contributed by the settler to the facility, and is discussed in a separate guidance document. The fourth category of landowner is one who simply does not qualify for any form of *de minimis* settlement.

Id. (emphasis added) (footnotes omitted).

43. See Sundar & Grossman, *supra* note 42, at 363 (stating that "allocation between the parties of the risks and responsibilities associated with environmental liability is an issue that must be addressed in every commercial transaction involving the transfer of real estate"). See also Moskowitz, *supra* note 1, at 205 (stating that transactional risks in environmental context are best minimized through due diligence and careful contract drafting); Von Oppenfeld, *supra* note 42, at 24 (stating that "[t]he key to avoiding liability or other losses is the exercise of what is appropriately known as environmental due diligence"); Boman, *supra* note 9, at 175 ("Those who have failed to recognize the potential impact of these laws and to provide for this impact when structuring an acquisition or financing transactions have often experienced severe repercussions."). Due diligence should be performed in all types of acquisitions regardless of the present facility's operations. See Kenneth H. Mack, *Environmental Due Diligence, Site Audits and Dealing with Consultants*, 373 PRACTICING L. INST./REAL 473, 476-77 (1991) (discussing need for due diligence in various contexts).

44. See Moskowitz, *supra* note 1, at 4 (stating that "individual sites may cost more than \$100 million to remediate").

45. See Moskowitz, *supra* note 1, at 205 (describing dangerous risks involved with hazardous waste disposal).

46. See Cardwell & Todd, *supra* note 5, at 17 (noting that information from due diligence allows buyer "to make an informed decision about whether to purchase the [asset], what price to offer, the anticipated cost of bringing the [asset] into environmental compliance, the expected cost of cleaning up the [asset] and potential claims by third parties").

seller a basis for denying environmental liability caused by the buyer after closing.⁴⁷

Due diligence requires examination of the property, the property's air emissions, waste management and the extent of discharge into waters, including wastewater, surface waters, groundwater, sewers and storm water.⁴⁸ In addition, tanks and site conditions should be examined in the due diligence investigation.⁴⁹ This process enables parties to remediate environmental liabilities if they so choose,⁵⁰ but most importantly, it gives both parties better knowledge concerning the risks involved in the transaction.⁵¹ Later, the parties can allocate these risks contractually with both parties being fully informed as to the nature and extent of environmental liability.⁵² Due diligence investigations not only enable the buyer and

47. See *id.* at 15 (explaining that due diligence allows a seller to learn about "the facility's raw materials, processing, goods, compliance equipment, wastes generated, waste disposal, environmental permits, and soil, surface water and ground water conditions").

48. See Manko, Gold & Katcher, *Environmental Due Diligence in Real Estate Transactions* [pamphlet]. Frequently, due diligence is completed in phases. See Baker, *supra* note 42, at 97. A Phase I investigation involves less examination than a Phase II investigation. See *id.* A Phase I investigation is used to determine the existence of hazardous substances. See Mack, *supra* note 43, at 477 (stating that Phase I investigation "normally means an historical and current document review . . . and at least one site inspection (which may include minimal sampling)").

If hazardous waste is found, then a more complete investigation will take place in the form of a Phase II investigation. See Baker, *supra* note 42, at 97 (explaining that "[d]epending upon the results of an initial investigation, a Phase II or more full-blown investigation . . . may be instituted"); see also Mack, *supra* note 43, at 478 (stating that Phase II investigation "entails some (usually non-intrusive) sampling of areas of possible environmental concern identified in Phase I"). If a more complex situation occurs then a Phase III or IV investigation may be warranted. See Von Oppenfeld, *supra* note 42, at 27 (stating that Phase III or IV investigations "generally involve further definition or resolutions of previously identified problems and are oriented toward management of identified risks"); see also Mack, *supra* note 43, at 478 (noting that Phase III audits "normally involve extensive sampling of surface and subsurface of soils (on a grid basis) and of groundwater, through the use of monitoring wells" and "[b]ecause of the intrusive nature of such sampling, it nearly always entails some remediation activity").

49. See Baker, *supra* note 42, at 98-100 (listing general areas of inquiry to be investigated).

50. See Sundar & Grossman, *supra* note 42, at 378 (stating that "many of the problems that are identified in the course of the due diligence investigation can be managed and solved in creative ways").

51. See Moskowitz, *supra* note 1, at 206 (stating that "allocation will then be made with reference to a body of knowledge and subject to informed judgment"); see also Mack, *supra* note 43, at 480-81 (noting that "many due diligence investigations which disclose some areas of environmental concern will result in either [a future] allocation of expense for remediating presently unquantifiable risks, or some payment or indemnity by the seller which . . . may span a period of some years").

52. See Mack, *supra* note 43, at 480 (discussing allocation of risks by parties through contract). Due diligence, however, will not necessarily discover all envi-

seller to more accurately establish the property to be acquired,⁵³ but also help to “establish an ‘innocent purchaser defense’^[54]

ronmental risks because many of the risks are “hidden by time, nature, or both.” *Id.*

53. See Robins, *supra* note 41, at 429 (stating that due diligence provides “the best opportunity for the parties to see whether they are getting what they are bargaining for”).

54. See Mack, *supra* note 43, at 476 (discussing elements and availability of “innocent landowner defense”). Because CERCLA holds current owners and operators liable for contaminated facilities, “[m]ere ownership, whether legal or equitable, of a facility . . . may be sufficient to create liability.” Von Oppenfeld, *supra* note 42, at 25. One defense against CERCLA liability that is available to an owner of a hazardous waste site is the third party defense, which requires an owner to prove two elements:

[1] that he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and [2] that he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3)(1994). This third party defense completely discharges a party from liability. See Sundar & Grossman, *supra* note 42, at 355 (discussing impact of third party defense). This defense, however, is limited to circumstances where there is no “contractual relationship.” *M & M Realty Co. v. Eberton Terminal Corp.*, 977 F. Supp. 683, 686 (M.D. Pa. 1997). Congress addressed this problem by adding “a definition of ‘contractual relationship’ in the Superfund Amendments and Reauthorization Act of 1986 (SARA) to create what has come to be known [sic] as the ‘innocent landowner’ defense.” *Id.*

In many cases this defense is not available because the contamination on property was transferred by a land contract, deed or transfer instrument. See Von Oppenfeld, *supra* note 42, at 25 (stating that this defense is generally unavailable if “the act or omission of the third party occurred in connection with ‘a contractual relationship existing directly or indirectly with’ the defendant”) (footnote omitted); see also Baker, *supra* note 42, at 94 (stating that party is prevented from asserting innocent landowner defense if “contamination existed upon property acquired pursuant to a land contract, deed or transfer instrument except if certain limited circumstances . . . can be established”) (citation omitted).

Where there are contractual relations the owner must prove that “[a]t the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in or at the facility.” CERCLA § 101(35)(A)(i), 42 U.S.C. § 9601(35)(A)(i)(1994). To prove this defense, the owner must show that he undertook “all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.” *Id.* § 101(35)(B), 42 U.S.C. § 9601(35)(B) (emphasis added). To determine whether “all appropriate inquiry” has taken place, a court will consider four factors which the defendant must prove by a preponderance of the evidence:

1. Another party was the “sole cause” of the release of hazardous substances and the damages caused thereby;
2. The purchasing landowner did not actually know of the presence of the hazardous substance at the time of the acquisition;
3. The purchasing landowner undertook appropriate inquiry at time of acquisition, in order to minimize its liability; and
4. The purchasing landowner exercised due care once the hazardous substance was discovered.

or qualify the owner for a settlement under CERCLA.”⁵⁵

Due diligence also requires investigation into the site’s history of operations.⁵⁶ Some environmental consultants believe that in-house facility records provide enough information about the facility’s operational history, while other consultants suggest that a more comprehensive investigation is necessary.⁵⁷ If in-house records are inadequate or an environmental consultant suggests a more comprehensive investigation, a title search may be a useful device to discover prior ownership.⁵⁸ A title search, however, “will only note the chain of ownership and will not necessarily identify the actual operators and actual usages of the property.”⁵⁹ Nevertheless, the title search may uncover deeds with survey maps attached that highlight structures no longer in existence.⁶⁰

M & M Realty, 977 F. Supp. at 687 (citing 42 U.S.C. §§ 9607(b)(3), 9601(35)(A)); see also *Westfarm Assoc. Ltd. Partnership v. Washington Suburban Sanitary Comm’n*, 66 F.3d 669, 682 (4th Cir. 1995); *Hemingway Transp., Inc. v. Kahn*, 993 F.2d 915, 932 (1st Cir. 1993).

55. *Von Oppenfeld*, *supra* note 44, at 27. CERCLA allows settlements with de minimis landowners when the defendant:

- (i) is the owner of the real property on or in which the facility is located;
- (ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, and
- (iii) did not contribute to the release or threat of release of hazardous substance at the facility through any action or omission.

CERCLA § 122(g)(1)(B), 42 U.S.C. § 9622(g)(1)(B)(1994). Thus, if an owner does not qualify for the “innocent landowner defense,” he may be able to satisfy the requirements for de minimis settlement. See *Von Oppenfeld*, *supra* note 44, at 27. To fulfill the requirements for de minimis settlement, the defendant must show evidence proving lack of actual or constructive knowledge of hazardous waste disposal previously on property. See *id.*

56. See *MOSKOWITZ*, *supra* note 1, at 207 (discussing process of obtaining site history); see also *Mack*, *supra* note 43, at 485 (noting difficulty of gathering historical data).

57. See *MOSKOWITZ*, *supra* note 1, at 207 (noting that in-house records usually contain enough information for initial background investigation). In-house records tend to contain more information where there has been no change of ownership or no change in the business operations. See *id.* at 207-08. If there have been frequent changes in ownership and/or changes in business operations it is difficult to predict the records’ thoroughness. See *id.*

58. See *id.* at 208 (stating that title search “may provide beneficial starting point if no prior ownership or operation details can be established”).

59. *Id.* at 209. A title search may not expose the fact that a property was leased to another company using hazardous waste. See *id.*

60. See *Mack*, *supra* note 43, at 485-86 (commenting that survey maps and aerial photographs may contain structures that operated in past and could cause future environmental problems); see also *Baker*, *supra* note 42, at 98 (noting that use of “historical air photos, USGS topographical maps and other historical maps and surveys to determine prior uses and visible abnormalities” may indicate present or potential environmental liabilities). In addition, a title search may find deeds that contain documents attached to them which were previously filed by the

The extent of the examination into the facility's past operations depends on the age of the facility, the location of the facility and the type of operations the facility maintains.⁶¹ EPA records, as well as state and local board of health records, can also be helpful because they may show the facility's previous environmental problems in more detail than in-house records.⁶² Additionally, environmental permits may provide an indication of the type of environmental factors associated with the property.⁶³ Records concerning the location, storage and usage of hazardous waste at the facility should also be examined.⁶⁴

Physical inspection of the facility is often helpful in understanding the equipment and/or chemicals that have been used at the site.⁶⁵ The inspection should start with a meeting of relevant

prior owner. See Mack, *supra* note 43, at 486. These documents, such as a grant of an easement, may help an investigator analyze potential problems. See *id.* In determining prior uses, it may also be helpful to interview former employees. See Baker, *supra* note 42, at 98.

61. See Moskowitz, *supra* note 1, at 208 (asserting that site specific factors may determine extent of investigation into property's history). Although age, location and operations may guide the focus of investigations, a purchaser should always examine a description of past operations and investigate the presence of past environmental problems. See *id.* Nevertheless, the extent of due diligence depends on "the time available for investigation before the transaction closes, the amount of money that the client is willing to expend, and the nature of environmental problems themselves." Mack, *supra* note 43, at 479.

62. See *id.* (stating that federal, state and local records may prove beneficial in investigation). The investigation should include an examination of the Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS), which is an EPA database containing potentially hazardous waste sites. See Sundar & Grossman, *supra* note 42, at 356 (describing advantages of examining CERCLIS as part of investigation); see also Baker, *supra* note 42, at 98 (suggesting that one should review CERCLIS to find out if surrounding properties are listed in its database).

63. See Moskowitz, *supra* note 1, at 210 (stating that environmental permits provide helpful information about environmental condition of site or asset). Knowledge of the environmental factors connected with the facility will help determine whether certain areas of the facility's operations should be viewed in a more thorough manner. See *id.*

64. See *id.* at 211 (stating that "[e]ach operation should be reviewed so that the handling of raw materials can be traced from delivery to storage to transport into the process area and through production"). One must also examine points at which hazardous waste is emitted during operations. See *id.*

65. See Moskowitz, *supra* note 1, at 209 (noting advantages of physical inspection as opposed to solely reviewing papers concerning facility). This commentator noted that paper review may misrepresent the extent of potential environmental liability:

For example, a facility may be described to the investor as being engaged in the evaporation of sea water for the extraction, packaging, and distribution of dried magnesium and other sea salts. This gives no indication of extensive chemical usage, hazardous waste generation or related concerns. Initially, this superficial review may entice the potential investor who perceives a low environmental concern associated with the opera-

employees who can explain the site's operations, followed by a physical examination noting the site location,⁶⁶ conditions of both the inside⁶⁷ and outside of the facility,⁶⁸ and the land surrounding the facility.⁶⁹

Due diligence must take place before the sale agreement is drafted, otherwise the parties will lack the requisite knowledge to draft a contract that properly allocates environmental liabilities.⁷⁰ Due diligence may enable the buyer to use the innocent landowner defense or qualify the buyer for a settlement under CERCLA.⁷¹ In addition, due diligence heightens the parties' awareness of current and potential environmental conditions associated with the property, and therefore allows the option of remediation before closing the sale.⁷²

tion. Unfortunately, the written process description also gives no indication that ancillary equipment and installations related to the main process consist of the storage, pumping, piping, and general usage of hundreds of thousands of gallons of fuel to pump and heat millions of gallons of sea water.

Id.

66. See Moskowitz, *supra* note 1, at 209. The setting of the site "plays an important role in evaluating the potential liability posed by any environmental impairment that site operations may have caused." *Id.* The examiner should make note of whether the facility is located in a rural, suburban or industrial area. See *id.* Further, the proximity to water bodies and other environmentally sensitive areas should be documented. See *id.*

67. See *id.* Inside the facility, the examination should follow the same route as the facilities operations. See *id.* Because "[t]here can be many possible migration pathways, transport media, and receptors," an investigator should determine the actual path of the migrants. *Id.* In addition, "[c]areful attention must be given to areas whereby products or wastes containing hazardous constituents are potentially released and transported to receptors." *Id.* Before the inside investigation begins and during its investigation, a review of the blueprints may help to identify "sanitary or storm sewers, leach fields, dry wells, process lines, sumps, floor drains, building vents, and transformers." *Id.*

68. See *id.* (explaining that outside facility, examination should focus on physical condition and purpose of "piping, conduits, vent pipes, and related items").

69. See *id.* (noting that evaluation of land surrounding facility should include areas of land that are infrequently used). Surrounding facilities should be observed for contaminants which may have traveled to neighboring facilities. See *id.*

70. For a discussion of the benefit of due diligence, see *supra* notes 43-47 and accompanying text.

71. For a discussion of CERCLA defenses, see *supra* notes 54-55 and accompanying text.

72. See Sundar & Grossman, *supra* note 42, at 385 (stating that seller can facilitate sale of property "by providing in purchase agreement, that the seller would remediate the site post-closing").

V. DRAFTING CONSIDERATIONS:
THE BUYER'S AND SELLER'S PERSPECTIVES

After the environmental liabilities are identified through due diligence, the parties can begin drafting the contractual provisions that will allocate those liabilities. There are many contractual tools available to shift the risks of environmental liabilities in CERCLA-related transactions.⁷³ The most essential tools are representations, warranties clauses,⁷⁴ and indemnification provisions.⁷⁵ Other protective provisions include: (1) releases;⁷⁶ (2) "as is" clauses;⁷⁷ (3) property access provisions;⁷⁸ and (4) pre-conditions.⁷⁹

Since courts scrutinize the actual words of the contract provisions, careful drafting of those provisions is critical.⁸⁰ Courts generally will enforce negotiated contract terms, provided that at least one party is able to fund the waste cleanup.⁸¹ If the indemnifying party is unable to fund the cleanup, the indemnified party will be required to meet the costs of the cleanup, regardless of the contractual terms.⁸²

Both the buyer's and the seller's objective in drafting CERCLA-related contractual provisions is to minimize their respective potential environmental liabilities.⁸³ Specifically, the buyer's goal is to

73. See Manko, *supra* note 48, at 15.

There are many types of contractual provisions that serve to shift or assign risks of environmental liabilities. Parties use representations, covenants, indemnifications, releases, as well as various mechanisms to enforce those obligations, such as escrows, hold backs, set-offs, and various limitations on the obligations, such as limitations in time, baskets, caps, sharing arrangements, etc. There are in fact as many options as there are creative lawyers and business persons.

Id.

74. For a discussion of representations and warranties clauses, see *infra* notes 86-105 and accompanying text.

75. For a discussion of indemnification provisions, see *infra* notes 106-48 and accompanying text.

76. For a discussion of release clauses, see *infra* notes 153-56 and accompanying text.

77. For a discussion of "as is" clauses, see *infra* notes 157-62 and accompanying text.

78. For a discussion of property access provisions, see *infra* note 163 and accompanying text.

79. For a discussion of pre-condition clauses, see *infra* notes 164-66 and accompanying text.

80. See Manko [pamphlet], *supra* note 48, at 15 (noting that "both the environmental provisions and the defined terms" must be carefully crafted).

81. See *id.*

82. See *id.*

83. See Cardwell & Todd, *supra* note 5, at 15 (explaining objectives of buyers and sellers).

eliminate or indemnify itself against environmental liabilities from hazardous waste releases that may have occurred before the purchase.⁸⁴ The seller's goal is to eliminate its potential responsibility for future cleanup costs resulting from hazardous waste releases that occurred prior to the sale.⁸⁵ This section examines the drafting tools that may be used by the purchaser and seller to minimize their respective liabilities.

A. Representations and Warranties

The "representations and warranties" made by the seller are significant to both the buyer and the seller.⁸⁶ The representations and warranties section of the purchase agreement confirms the existence of material conditions which the buyer was aware of and subsequently relied on when it entered into the transaction.⁸⁷

84. See *TOPOL & SNOW*, *supra* note 2, at § 13.3. Two commentators state: "[t]he purchaser's objective in negotiating for the inclusion of specific contractual provisions is to eliminate or to obtain an indemnity against its potential liability for all activities that occurred prior to the time it made its acquisition and that may have caused or contributed to adverse environmental conditions." *Id.*

85. See *id.* at § 13.4. One author explained:

The seller's objective in negotiating specific contractual provisions relating to environmental liabilities is clear: it seeks to minimize any future obligation it might have to pay the cost of remedying damages resulting from its pre-closing activities. Any liabilities that it retains may operate to reduce the seller's purchase price, and in the case of Superfund liabilities, that reduction is likely to be significant.

Id.

86. See *id.* at § 13.3. One author explained:

Of critical concern to the parties are the seller's "representations and warranties" that are found in the purchase agreement, in which the seller states that certain facts relating to the company or assets being sold are true as of the date of the agreement and will be true as of the date of the closing of the transaction.

Id.

87. See *Robins*, *supra* note 41, at 432 (explaining purpose of representations and warranties section). *Robins* stated:

Numerous disclosure schedules are typically attached to the agreement to spell out pertinent details — i.e. lease facilities, bank accounts, owned real estate, employee benefit plans, customer bad debts, pending tax audits, lawsuits or administrative proceedings, etc. In addition, this section usually addresses each party's authority to proceed with the transaction, including required third party consents and internal obligations such as stockholder and board-of-directors approval.

Id. See also *Manko*, *supra* note 48, at 15-16 (explaining goal of representations). The goal of representations can be explained as follows:

[The purposes of representations are] to identify and describe the environmental problems, demonstrate due diligence, and focus the seller's attention on environmental matters as well as to provide a measure against which the information gained during due diligence may be compared and the basis for a remedy if the representations and warranties are not true. Representations generally cover past and present site condi-

The buyer has a strong incentive to influence the structure of the representations and warranties section.⁸⁸ Unless the buyer obtains an indemnification provision from the seller,⁸⁹ the representations and warranties section will serve as the buyer's "primary source of protection."⁹⁰ Most importantly, if any representations or

tions and features, site activities, compliance with law, off-site known and contingent liabilities, and all other relevant information.

Id. See also *Lilly Indus., Inc. v. Health-Chem Corp.*, 974 F. Supp. 702, 711 (S.D. Ind. 1997) (explaining significance of warranties in CERCLA-related sales agreements). The *Lilly Industries* court stated:

Warranties backed by promises of indemnification are important elements of business transactions These contract terms give the buyer of a property or business some protection against the risks that the property or business has some unknown defect, danger, or contingent liability. They can also save the buyer the expense of a thorough and independent evaluation of a particular aspect of the transaction. A warranty is "an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee of any duty to ascertain the fact for himself; it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past."

Id. (citing *Shambaugh v. Lindsay*, 445 N.E.2d 124, 127 (Ind. App. 1983) (quoting *Metropolitan Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946))).

88. See *TOPOL & SNOW*, *supra* note 2, at § 13.3 (explaining that "there are three major reasons for seeking to obtain from the seller a combination of broad, unqualified representations and certain detailed, specific representations pertaining to particular environmental matters of concern"). These commentators have noted the following reasons the buyer may seek to influence the seller when drafting the representations and warranties section:

First, in the event that any of the environmental representations or warranties proves to be false and results in financial injury to the purchaser, not only might the purchaser have a private cause of action against the seller under [CERCLA], but he also may sue the seller for damages due to the breach of contract. Second, many transactional documents contain indemnities specifically requiring the seller to reimburse, or to pay in the first instance, the purchaser's expenses that are incurred as a result of the seller's false representations or warranties. Thus, the purchaser might be able to avoid even having to pay the initial outlay for costs incurred due to the false representations. Third, highly conscientious, responsible sellers who have carefully monitored their operations may be unwilling to give blanket representations and warranties, but the exceptions that they carve out usually help the buyer more accurately to identify and to assess the areas of true environmental concern.

Id. See *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994 (D.N.J. 1988) (plaintiff brought CERCLA suit against defendant to pay cleanup costs of dumping that occurred during time defendant owned site); see *Nunn v. Chemical Waste Management, Inc.*, 27 Env't Rep. Cas. (BNA) 1655 (D. Kan. 1988) (seller represented that company was in compliance with all applicable laws and court found that site was leaking at time of sale; therefore, purchase agreement had been breached).

89. For a discussion of indemnification provisions, see *infra* notes 106-48 and accompanying text.

90. See Alan S. Levine, *Negotiating Environmental Provisions in Real Estate Transaction*, C266 ALI-ABA 421, 423 (February 11, 1988) (explaining importance of representations and warranties for buyer). One author noted: "Properly drafted, [representations and warranties] can protect the purchaser from known problems

warranties prove to be false, the buyer may be able to bring a CERCLA cause of action or a breach of contract suit against the seller.⁹¹

The buyer's goal in influencing the representations and warranties provisions of the purchase agreement is to have the seller represent and warrant the environmental facts and conditions that the buyer has relied upon in structuring its offer.⁹² Ideally, the buyer of a business would like the representations section to include the following: (1) detailed and absolute representations that are unlimited by materiality or knowledge;⁹³ (2) representations that apply equally to all properties and companies currently or previously owned;⁹⁴ and (3) representations that apply throughout the historical life of the business property.⁹⁵

The seller's perspective on the representations and warranties section is the opposite of the buyer's.⁹⁶ For the seller, the representations and warranties section is a significant area of potential liability.⁹⁷ The seller, therefore, must be extremely careful in drafting its representations and warranties section so it is not vulnerable to fu-

currently existing as well as unknown complications which may arise in the future." *Id.*

91. See TOPOL & SNOW, *supra* note 2, at § 13.3 (discussing CERCLA implications where representations and warranties made by seller are proven false).

92. See *id.* (explaining that "[a]s an opening position in the negotiations, the purchaser typically asks the seller to represent and to warrant to the accuracy of any environmental facts that purchaser has assumed or relied upon in making its offer of acquisition") One commentator stated:

In this regard, some purchasers go so far as to seek representations and warranties that there are no facts or conditions relating to the site (i) that might give rise to future liability in connection with environmental problems or (ii) that would restrict the purchaser from operating the company or assets after the closing in the manner that it intends.

Id.

93. See Manko, *supra* note 48, at 16 (explaining various concerns of buyer in drafting representations clause). One commentator, in describing what the buyer wanted included in the representations clause, stated:

The buyer wants detailed, absolute representations, unlimited by knowledge or materiality and applying equally to properties now or previously owned, operated, or leased by the seller, and to any and all companies now or previously owned or operated by the seller. The buyer also wants the representations to apply throughout the history of the business or property, whether or not the seller owned or controlled the business or property during the entire time.

Id.

94. See *id.* (discussing buyer's desire for representations to cover entire property or business).

95. See *id.* at 31-32 (listing examples of environmental representations and warranties provision drafted by seller for buyer of real property).

96. See *id.* (noting that, with respect to representations and warranties, "seller usually takes a very different view [than the purchaser]").

97. See Levine, *supra* note 90, at 423 (discussing liability seller may encounter as result of representations and warranties section).

ture CERCLA liabilities.⁹⁸ The seller's ideal representations section would include: (1) representations that are limited to its knowledge;⁹⁹ (2) representations regarding only material issues;¹⁰⁰ (3) representations regarding issues that would not be discovered in an audit;¹⁰¹ and (4) representations limited to the time during which the seller owned the property.¹⁰² The final result of a negotiated

98. *See id.* at 424 (noting that "seller must exercise great care in determining the scope, breadth and content of representations and warranties which may be given to a prospective purchaser"). One commentator states:

If, for example, the seller warrants that "there is no environmental contamination existing on the property," and environmental contamination is later discovered, the seller may become liable for the full cost of any clean up. Such consequences can spell disaster for the innocent and unwitting seller. As a result, it is imperative that the seller attempt to negotiate narrowly tailored representations and warranties covering only those matters within the actual knowledge of the seller.

Id.

99. *See* Manko, *supra* note 48, at 16 (explaining seller's concerns regarding representations and warranties). Manko stated:

The seller will want to represent only to its knowledge (and then limit the individual or corporate level whose knowledge must be considered), only as to material issues, to information that would not be uncovered in an audit (or, alternatively, to be allowed to incorporate the audit results in its response), and only to the time during which it owned and/or operated the business or real property. In addition, the seller will want the right to schedule exceptions to the statements in the representations The seller may be concerned that if accuracy of the representations is a condition to closing, too expansive representations amount to a purchaser option for the buyer. For example, a flat representation to full compliance with all environmental laws is almost never possible — few companies have not missed a filing deadline or had the wrong individual sign a form or had a minor exceedence of a permit limit at some time in their existence. If a buyer could back out of the transaction based on an undisclosed exception to such a representation, this might be tantamount to an option.

Id.

100. *See id.* (noting that representations regarding only material issues reduces chances of liability).

101. *See id.* (discussing significance of audit and how issues that would not be discovered in audit are of particular concern to seller).

102. *See id.* The following is an example of an environmental representations and warranties provision drafted for the seller of real property:

Environmental Matters: To the knowledge of Seller, no reportable quantities of hazardous substances as defined in Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA") have been released on the Property by Seller. Seller has not received from any federal, state, or local environmental regulatory entity any written request for information, notice of claim, demand letter, or other notification that in connection with the Property, Seller is or may be potentially responsible with respect to any investigation or cleanup of hazardous substance releases at the Property. No notification of release of hazardous substances pursuant to any state or local environmental law, regulation, or ordinance has been filed by Seller as to the property.

See id. at 34.

representations and warranties provision is clearly a “compromise, with some flat representations, some to knowledge, some limited by materiality, and most with appropriate schedules.”¹⁰³

Finally, while both the buyer and seller each will attempt to draft the representations and warranties provision of the purchase agreement to its own advantage, no representation or warranty will fully protect a buyer from CERCLA liability if hazardous waste is later found on the property.¹⁰⁴ In order to adequately protect themselves, it is essential that buyers perform environmental due diligence prior to drafting the representations and warranties provision.¹⁰⁵

B. Indemnification Provisions

While representations and warranties provide the groundwork for allocating environmental liability between the buyer and seller, it is the indemnification provisions that generally become the focus

103. *Id.* at 16 (explaining compromises made by parties when negotiating content of representations and warranties clauses).

Sometimes the same topic (e.g., the presence of underground tanks) may be handled differently, at present and past facilities or from times prior to this seller's ownership of the business or real property. In addition, where there is no materiality, the condition to closing may be that the representations must be true in all material respects or that environmental liabilities will not exceed a certain dollar amount.

Id.

104. *See* Levine, *supra* note 90, at 424 (discussing buyer's CERCLA liability despite attempt to eliminate or reduce liability through representations and warranties provisions).

105. *See id.* (noting that “a purchaser will not be adequately protected unless, in addition to the representations and warranties . . . , the purchaser also conducts a sufficient environmental inspection of the property”). Commentators have noted:

[I]n order to draft language that adequately protects both parties, the lawyers must have information about the nature and condition of the assets that are to change hands, the disposal practices of the seller, and the nature and condition of off-site disposal locations and former facilities used by the seller. On rare occasions, courts have allowed a party to rescind land sales contracts on mutual mistake grounds because neither party was aware of nearby waste dumps. More frequently, however, the parties are forced to assume the risks of their mistakes. Thus it is important to obtain site information and, in order to do so, it is generally necessary to hire competent lawyers and technical consultants who can conduct a thorough investigation centered on the potential Superfund liabilities of the seller.

TOPOL & SNOW, *supra* note 2, § 13.1. (footnotes omitted). For a discussion of the environmental inspection which should occur prior to the date of closing, see *supra* notes 42-69 and accompanying text.

of negotiations among the parties.¹⁰⁶ Indemnification clauses “reflect a reasonable allocation of risks and duties” between parties to a transaction.¹⁰⁷ Parties may use an indemnification clause to shift financial liability attached to a certain asset in the event of a future CERCLA cleanup.¹⁰⁸

Courts assert, however, that “[n]otwithstanding [the] existence of indemnification agreements, all [PRPs] under CERCLA are jointly and severally liable to government for cleanup and closure costs.”¹⁰⁹ Thus, all parties are liable to the government for cleanup costs, yet one party can seek indemnification from another party if a previous contractual agreement exists.¹¹⁰ Usually, if parties draft an indemnity clause where all or some financial liability is shifted, it will be reflected in the price of the asset or property.¹¹¹

A court may enforce indemnification agreements pursuant to section 107(e)(1) of CERCLA.¹¹² While this section of the Act prevents the “transfer” of CERCLA liability from the seller to the buyer, it allows the seller to completely indemnify the buyer, or to share CERCLA financial liability through contractual agreement.¹¹³ Section 107(e)(1) of CERCLA states:

106. See TOPOL & SNOW, *supra* note 2, at § 13.3 (explaining that “[d]ue to the significance of environmental liabilities, [indemnification provisions] frequently become the focus of negotiations”).

107. *Hayes v. Mobil Oil Corp.*, 736 F. Supp. 387, 392 (D. Mass. 1990) (holding that indemnification provision defeats plaintiff’s claim for contribution and noting that indemnification clauses should not be construed against drafter).

108. See CERCLA § 107(e), 42 U.S.C. § 9607(e) (1994). See also *Fisher Dev. Co. v. Boise Cascade Corp.*, 37 F.3d 104, 107 (3d Cir. 1994) (holding that parties may allocate among themselves costs of cleaning up hazardous waste site under CERCLA).

109. William B. Johnson, Annotation, *Liability of Parent or Successor Corporation Shareholders in Action Pursuant to Comprehensive Environmental Response, Compensation, and Liability Act*, 121 A.L.R. FED. 173 (1994).

110. See *Olin Corp. v. Consolidated Aluminum Corp.*, 807 F. Supp. 1133, 1138 (S.D.N.Y. 1992) (noting that if government was prevented from seeking recovery cost, CERCLA’s goals would be contravened); see also *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 355 (D.N.J. 1991) (stating that “parties remain liable for response costs in a government-initiated cleanup”).

111. See *City of Toledo v. Beazer East, Inc.*, 103 F.3d 128, n.5 (6th Cir. 1996) (stating “the ‘polluter-seller essentially pays’ for its pollution by accepting an arguably lower purchase price in exchange for releases from liability”).

112. See *Purolator Prods. Corp. v. Allied-Signal, Inc.*, 772 F. Supp. 124, 130 (W.D.N.Y. 1991) (stating that parties have right to bring action to enforce their contractual arrangements); see also *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1000 (D.N.J. 1988) (noting that CERCLA’s liability provisions do not abolish parties’ contractual rights).

113. See *SmithKline Beecham Corp. v. Rohm & Haas Co.*, 89 F.3d 154, 158 (3d Cir. 1996) (recognizing that parties may “lawfully allocate CERCLA response costs among themselves while remaining jointly and severally liable to the government for the entire cleanup”); see also *Harley-Davidson, Inc. v. Minstar, Inc.*, 41

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. *Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.*¹¹⁴

Additionally, section 107(e)(2) of CERCLA states that “[n]othing in [CERCLA] . . . shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against a person.”¹¹⁵ Courts have interpreted the above provisions to mean that a party faced with a CERCLA claim has a right to bring an action seeking indemnification from another party and

F.3d 341, 342 (7th Cir. 1994) (stating that CERCLA “does not outlaw indemnification agreements, but merely precludes efforts to divest a responsible party of his liability”); *John S. Boyd Co., Inc. v. Boston Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993) (stating that “[t]wo or more parties, however, can allocate ultimate responsibility among themselves by contract”); *Commander Oil Corp. v. Advance Food Serv. Equip.*, 991 F.2d 49, 51 (2d Cir. 1993) (noting that CERCLA preserves right to enter into indemnification agreements); *United States v. Hardage*, 985 F.2d 1427, 1433-36 (10th Cir. 1993) (explaining that parties have right to obtain indemnification); *Teleflex Inc. v. Collins & Aikman Prods. Co., Inc.*, 961 F. Supp. 368, 372 (D. Conn. 1996) (stating that “private parties may contractually allocate among themselves any loss they may suffer by the imposition of CERCLA liability”); *Interstate Power*, 909 F. Supp. at 1264 (asserting that CERCLA does not preclude parties from transferring liability); *Purolator Prods. Corp. v. Allied-Signal, Inc.*, 772 F. Supp. 124, 129 (W.D.N.Y. 1991) (stating that “liable parties can contractually shift responsibility for their response costs among each other, but they may not thereby escape their underlying liability to the Government or another third party”); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1000 (D.N.J. 1988) (stating “CERCLA expressly preserves the right of private parties to contractually transfer to or release another from the financial responsibility arising out of CERCLA liability”); *Chemical Waste Mgmt., Inc. v. Armstrong World Indus., Inc.*, 669 F. Supp. 1285, 1295 (E.D. Pa. 1987) (asserting that CERCLA “authorizes indemnity agreements”).

CERCLA’s legislative history also bolsters the proposition that the Act allows parties to shift financial responsibility through indemnification agreements. *See* H.R. Rep. No. 96-1016, Pt. I, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119. Congress intended CERCLA to provide quick financial recovery for environmental cleanups. *See id.* Since a distribution of financial liability between a buyer and seller would not hinder Congress’ goal of remediating environmentally contaminated areas, there is no reason to prohibit indemnification agreements. *See Purolator*, 772 F. Supp. at 129-30. Therefore, CERCLA’s focus is remediation, not retribution. *See Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996).

114. CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1) (1994) (emphasis added).

115. *Id.* § 107(e)(2), 42 U.S.C. § 9607(e)(2).

the court will enforce it, provided the agreement meets certain requirements under state law.¹¹⁶

Although federal law allows a buyer and seller to include an indemnification clause in a sale agreement,¹¹⁷ state law will be used to settle any contractual disputes.¹¹⁸ If a court finds under state law that the intention of the parties was to allocate CERCLA liability as expressed in its indemnification agreement, indemnification will be enforced.¹¹⁹

There are two situations where courts have held that indemnification agreements release the buyer from liability and therefore leave the seller responsible for cleanup costs: (1) where the terms of the indemnification clause are broad, so as to include all liabili-

116. See *Purolator*, 772 F. Supp. at 130 (stating that “[s]ection 107(e)(1) will not be interpreted to abrogate such contractual agreements”); *Nieko v. Emro Mktg. Co.*, 769 F. Supp. 973, 989 (E.D. Mich. 1991) (asserting that Congress’ intention in enacting CERCLA was not to invalidate private agreements), *aff’d*, 973 F.2d 1296 (6th Cir. 1992); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1573 (E.D. Pa. 1988) (stating that “[a] person that is liable under the terms of [CERCLA] may by agreement be held harmless or indemnified by another party”); *Southland Corp.*, 696 F. Supp. at 1000 (asserting that CERCLA does not invalidate contractual arrangements); *Chemical Waste*, 669 F. Supp. at 1293 (asserting that “CERCLA’s liability provisions do not abrogate the parties’ contractual rights”).

117. See *SmithKline Beecham*, 89 F.3d at 158 (applying federal law to determine that parties may allocate CERCLA cleanup costs).

118. See *id.* The court, in applying New Jersey law, found that as long as the result would not frustrate the purposes of CERCLA, the majority of courts use state contract law to ascertain the parties’ intentions and interpret contractual language. See *id.*; see also *Hatco Corp. v. W.R. Grace & Co.*, 59 F.3d 400, 404-05 (3d Cir. 1995) (applying New York law); *Beazer East Inc. v. Mead Corp.*, 34 F.3d 206, 215 (3d Cir. 1994) (applying Alabama law); *Olin Corp. v. Consolidated Aluminum*, 807 F. Supp. 1133, 1139 (S.D.N.Y. 1992) (applying New York law); *John S. Boyd Co.*, 992 F.2d at 406 (applying Massachusetts law); *United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993) (applying Oklahoma law); *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 692-93 (9th Cir. 1992) (applying Oklahoma law).

Recently, the Eastern District Court of Michigan decided whether the law of the state of incorporation or the state with the greatest interest in the lawsuit should govern when a case involves an alleged successor corporation. See *Chrysler Corp. v. Ford Motor Co.*, 972 F. Supp. 1097, 1101 (E.D. Mich. 1997). In *Chrysler Corp.*, the district court noted that matters of internal corporate governance are generally governed by the state of incorporation, while matters outside the corporation are governed by “more general choice of law rules.” *Id.* at 1102. The court held that the case concerned matters outside the corporation because CERCLA lawsuits affect a “large number of actors, including the federal and state government and a variety of [PRPs].” *Id.* at 1103. Thus, the court concluded, in accordance with modern choice of law rules, that the law of the state where the relevant injury and conduct causing the injury took place is the governing law. See *id.*

119. See *Teleflex Inc. v. Collins & Aikman Prods. Co., Inc.*, 961 F. Supp. 368, 372 (D. Conn. 1996) (stating that “although parties may, under federal law, contractually allocate CERCLA liability, the breadth of clauses purporting to do so, and the intent of the parties, will be interpreted under state law”).

ties;¹²⁰ or, (2) where the terms of the indemnification clause are specific, so as to explicitly include CERCLA liability.¹²¹ In either situation, courts hold that the intent to transfer environmental liability must be unequivocal in order for the transfer to take place.¹²² Courts, therefore, generally enforce such indemnification clauses only when the provisions of the contract “evinced a clear and unmistakable intent of the parties to do so.”¹²³

Courts look to the plain language of the contract to determine the parties’ intent.¹²⁴ If the plain language is unambiguous, courts

120. For a discussion of the courts’ interpretation of broadly written indemnification provisions, see *infra* notes 128-45 and accompanying text.

121. See Gene A. Lucero et al., *CERCLA Rights and Liabilities*, SC18 ALI-ABA 1, 121 (1997) (citing *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345 (D.N.J. 1991)). One commentator has suggested that “to interpret a contract as transferring CERCLA liability, the agreement must at least mention that one party is assuming environmental-type liabilities” or contain a broad relief provision that waives liabilities of any type. *Id.*

122. See *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 15 (2d Cir. 1993). The court must find “clear and unmistakable intent” before it will enforce an indemnification agreement. See *id.*; see also *Hemingway Transp. Inc. v. Kahn*, 126 B.R. 650, 653 (D. Mass. 1991) (holding that indemnification clause clearly transfers CERCLA liability because of “inclusive and unequivocal language demonstrat[ing] a clear intent to transfer *all liability*”) (emphasis added).

123. *Lion Oil Co., Inc. v. Tosco Corp.*, 90 F.3d 268, 270 (8th Cir. 1996) (explaining requirements for enforceable CERCLA indemnification clause); see also *Ekotek Site PRP Comm. v. Self*, 948 F. Supp. 994, 1002 (D. Utah 1996) (holding that indemnity provision, which provided that purchaser did not assume any liabilities other than those explicitly stated, does not in itself give rise to inference that purchaser assumed CERCLA liabilities of seller).

124. See *Lion Oil*, 90 F.3d at 268, 270 (holding that plain language of contract was “clear, unequivocal and unambiguous” in its allocation of CERCLA liability). *Lion Oil* purchased an oil refinery from Tosco in 1985. See *id.* at 269. Section 2.8(d) of the purchase agreement included the following provision:

Tosco hereby agrees to indemnify and hold harmless [Lion Oil] . . . for any and all (1) civil, legal and administrative costs; (2) fines and penalties; (3) response, remedial and cleanup costs, and (4) other costs or liability arising from any sudden or non-sudden harm to the environment or public health resulting from actions of Tosco prior to the Closing Date Costs which result from harm inflicted or discovered after the Closing Date, but which are the consequence of actions taken by Tosco prior to this date, shall be indemnified by Tosco.

The cleanup costs which Tosco agrees to indemnify include, but are not limited to, all studies, site assessments, and any and all other efforts taken to determine the extent of harm to public health or the environment and/or to identify possible remedial alternatives that could ameliorate such harm. Cleanup costs include costs incurred directly by [Lion Oil] or by employees, agents, or contractors hired by [Lion Oil].

. . . .

Under this clause, [Lion Oil] shall be indemnified for all liability and costs incurred under common law (federal and state) or existing local, state or federal statutes that protect public health and/or the environment, including but not limited to, the following federal statutes: the

will not consider extrinsic evidence.¹²⁵ Although an indemnity clause may prove to be a “bad business decision” by the seller, a court will not factor that into its analysis where the contract language is unambiguous.¹²⁶ If the contract is ambiguous, however, courts will infer that indemnification was not intended.¹²⁷

Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Sec. 9601-9657[]

The liability of Tosco pursuant to this Section 2.8(d) shall expire at the end of four (4) years after Date of Closing and shall not exceed a total of \$1,000,000 in the aggregate

Id. In 1986, the following release amendment was made to the purchase agreement in exchange for Tosco’s agreement to accept a discounted prepayment by Lion Oil of Lion Oil’s remaining purchase price obligation:

Lion [Oil] hereby extinguishes, discharges, releases and abandons any and all rights and claims against Tosco which it has or may have pursuant to the provisions of subsection 2.8(d) of the [purchase agreement], or to the extent any such claims would be covered by the provisions of said subsection 2.8(d) even though also potentially covered within the general indemnification provisions of subsection 2.8(a), . . . whether now existing or arising in the future, at common law, or in equity, or created by any rule of law, regulatory order, statute or otherwise, and whether known or unknown.

Id.

125. *See id.* at 270 (explaining that extrinsic evidence is not to be admitted when contractual language is unambiguous). The court concluded:

The [purchase agreement] contained a broad indemnity provision that encompassed environmental harm caused by Tosco. Indeed, Section 2.8(d) [*supra* note 124], specifically referred to CERCLA. The [release amendment] absolves Tosco from all obligations under Section 2.8(d). In these circumstances, the [purchase agreement and release amendment] unequivocally combine to allocate to Lion Oil any potential liability arising under CERCLA. The parol evidence rule prohibits the admission of extrinsic evidence to alter these otherwise ambiguous contracts.

Id.

126. *Id.* at 271 (“The fact that hindsight may have proven the [purchase agreement] to be a bad business decision for Lion Oil does not negate its validity.”). The court noted that “this is not a case in which an unsophisticated party hastily entered into a contract. It is clear that Lion Oil was aware that the purchase of an oil refinery involved a risk of significant potential environmental liability, as exhibited in the detailed provisions of the [purchase agreement].” *Id.* at 270-71.

127. *See* International Paper Co. v. GAF Corp., No. 95-CV-0322, 1995 WL 760641 at *2 (N.D.N.Y. Nov. 27, 1995) (concluding that if parties want to include an indemnification provision for CERCLA liabilities, such provision must be explicit). The court held that the following indemnification provision did not indemnify the purchaser for CERCLA liabilities:

Purchaser shall indemnify and save harmless Seller from and against: . . . any liabilities or obligations or alleged liabilities or obligations of the Purchaser arising from the operation of the Graphic Arts Business by Purchaser subsequent to the Closing Date, or any of the liabilities specifically assumed by Purchaser pursuant to this Agreement or to which any of the real property to be transferred hereunder is subject as set forth in Exhibit 2

Id. The court concluded:

For example, in *SmithKline Beecham Corp. v. Rohm & Haas*,¹²⁸ the Third Circuit held that an indemnification agreement was broad enough to cover CERCLA cleanup costs, even though the parties could not have contemplated such costs in structuring the agreement because CERCLA was not enacted at that time.¹²⁹ The agreement stated that the buyer would be indemnified by the seller for “[a]ll material relating to the conduct of the Business prior to the First Closing Date” and “[a]ll losses, liabilities, damages or deficiencies to Seller resulting from the operation of the Business by the Buyer after the First Closing Date.”¹³⁰ This language was interpreted by the court to allocate to the seller “all present and future liabilities,” including CERCLA cleanup costs.¹³¹

Likewise, in *American National Can Co. v. Kerr Glass Manufacturing Corp.*,¹³² the Northern District Court of Illinois, applying Illinois

Stripped to its essential core, this agreement was an arms-length contract between two sophisticated business entities in which no clear and unmistakable intent was evinced regarding CERCLA. In light of the enormous liability that may arise under CERCLA, which was in effect at the time the parties entered into this agreement, the Court believes that *specific and detailed terms* would have been included if release and indemnification was indeed intended by the parties. Because of CERCLA’s potential significance, the lack of reference to the Act leads the Court to believe that the parties did not reach a “meeting of the minds” on this issue. Although this analysis is not essential to the decision at hand, it does serve to corroborate the correctness of the Court’s previous decision.

Id. (emphasis added). For a discussion of the courts’ interpretation of ambiguous language in a contract, see *infra* notes 141-145 and accompanying text.

128. 89 F.3d 154 (3d Cir. 1996). In *SmithKline*, Whitmoyer Laboratories, Inc. (Old Whitmoyer) was bought by W-L, Inc., a Rohm and Haas (R & H) wholly owned subsidiary. See *id.* at 156-57. This purchase was in exchange for shares of R & H stock. See *id.* at 157. Old Whitmoyer dissolved and W-L took the name of Whitmoyer Laboratories (New Whitmoyer) and continued to operate the same business. See *id.* Later, R & H sold assets to SmithKline Beecham Corp. (SKB) which included all of the New Whitmoyer stock. See *id.*

129. See *id.* at 160.

130. *Id.* at 159. Relying on *Olin Corp. v. Consolidated Aluminum Corp.*, the court, applying New Jersey law, held that the language in the indemnification agreement was “sufficiently broad” to encompass CERCLA cleanup costs. *Id.*

131. See *id.* at 160.

132. No. 89-C-0168, 1990 WL 125368 (N.D. Ill. Aug. 22, 1990). In *American National*, the plaintiff (purchaser) sought contribution from the defendant (seller) for CERCLA cleanup cost of a glass manufacturing plant purchased in 1983. See *id.* at *1. The defendant, in turn, sought partial indemnification, pursuant to a 1969 sale agreement with a third party (previous owner). See *id.* Applying Pennsylvania law, the Northern District Court of Illinois stated that “[a]n indemnification clause is valid if (i) the clause regulates only private conduct between parties with some degree of parity in bargaining power, (ii) both parties were aware of the clause and (iii) enforcement would not violate public policy.” *Id.* at *2 (citing *Lackie v. Niagara Mach. & Tool Works*, 559 F. Supp. 377 (E.D. Pa. 1983)). Thus, the district court held the third party liable for the CERCLA cleanup cost attributed to actions during his ownership. See *id.*

law, held that an indemnification agreement included a CERCLA claim, because the parties used broad language.¹³³ The relevant provision provided that the buyer would be indemnified for “any claim of any kind or nature whatsoever with respect to the business carried on by [the buyer] arising out of facts or events occurring prior to the Closing Time.”¹³⁴ The district court held that the language expressed that the parties intended for the buyer to be indemnified for both *anticipated* and *unanticipated* claims.¹³⁵ Consequently, the district court disregarded the argument that the seller was not liable because CERCLA had not been enacted at the time of the agreement and therefore could not have been contemplated.¹³⁶

Similarly, in *Purolator Products Corp. v. Allied-Signal, Inc.*,¹³⁷ the Western District Court of New York, applying New York law, held that the contractual language was broad enough to include CERCLA liability.¹³⁸ Specifically, the relevant provision stated that the

133. *See id.* Courts have held that in order to bring a CERCLA action, there must be:

an “agreement which shows that the parties intended to resolve all their disputes involving any type of claim including CERCLA claims, even if the agreement is framed in general terms and does not specifically refer to CERCLA or to environmental liability. However, if the agreement appears to be limited to specific disputes or particular types of liability, CERCLA liability will be excluded unless the agreement contains a clear, unambiguous reference to such liability.”

Interstate Power Co. v. Kansas City Power & Light Co., 909 F. Supp. 1241, 1265 (N.D. Iowa 1993) (quoting *Purolator Prods. Corp. v. Allied-Signal, Inc.*, 772 F. Supp. 124, 130 (W.D.N.Y. 1991)); *see also* *M & M Realty Co. v. Eberton Terminal Corp.*, 977 F. Supp. 683, 688 (M.D. Pa. 1997) (stating that “the majority of federal courts . . . conclude that there can be no allocation of CERCLA liability without explicit language of indemnification, clearly manifesting the parties’ intent to transfer environmental liability”); *Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1309, 1317-18 (D.N.J. 1992) (holding that indemnification agreement must either transfer all liability or expressly mention environmental liabilities); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 357 (D.N.J. 1991) (stating that some “clear transfer or release of future ‘CERCLA-like’ liabilities” is required) (quoting *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1002 (D.N.J. 1988)).

134. *American National*, 1990 WL 125368, at *2.

135. *See id.* at *4. The court found that the contractual language created a distinction between environmental liability caused by the seller’s past actions and the purchaser’s future actions, whereby each party is liable for its own contribution. *See id.*

136. *See id.* It was asserted that the sale agreement in 1969 could not have contemplated CERCLA liability because the statute was enacted over a decade after the agreement was drafted. *See id.* Nevertheless, the court rejected this argument because the language in the contract implied that unanticipated claims would be indemnified if they resulted from the seller’s practices. *See id.*

137. 772 F. Supp. 124 (W.D.N.Y. 1991).

138. *See id.* In *Purolator*, *Purolator* sought a judgment declaring that it was not liable to indemnify *Allied* which acquired one of *Purolator*’s wholly-owned subsidiaries. *See id.* at 126-27. The court held that the sale agreement entered into by *Purolator*’s subsidiary and *Allied* was broad enough to encompass CERCLA liabil-

buyer “agrees to satisfy *all liabilities and obligations* of Bendix *secured and unsecured* (whether accrued, absolute, contingent or otherwise) relating or arising out of the Assets (which are transferred hereby subject to such liabilities and obligations).”¹³⁹ The court found that this language showed no intent by the parties to limit the buyer’s liability.¹⁴⁰

Courts have held that ambiguous language regarding CERCLA liability in indemnification clauses is not enforceable.¹⁴¹ Courts have found ambiguity when the terms of the agreement are not clear “from the four corners of the agreement.”¹⁴² For example, in *Scott Galvanizing, Inc. v. Northwaste Enviroservices, Inc.*,¹⁴³ the Supreme Court of Washington, applying Washington law, refused to enforce an indemnification agreement between a generator and a waste hauler because the parties’ intent was unclear.¹⁴⁴ The indemnification provision stated that the hauler would indemnify the generator for:

ity. *See id.* at 131-32. The court noted, however, that a purchaser may seek contribution from the previous owner to the extent that the purchaser did not agree to indemnify the previous owner. *See id.* at 128. Thus, the purchaser could seek the amount equivalent to the cost attributed by the previous owner. *See id.* Because only some assets were transferred to Purolator, the court had to determine “what assets were transferred to [Purolator] . . . and on the degree to which those costs arise out of the assets.” *Id.* at 132.

139. *Id.* at 133 (emphasis added). *See also* Taracorp, Inc. v. NL Indus. Inc., 73 F.3d 738, 741 (7th Cir. 1996) (holding provision stating indemnification “for all obligations, responsibilities, and liabilities, costs, and expenses . . . related to environmental hazards associated with [the] facility,” transferred CERCLA liability to seller). In making its determination, the *Purolator* court held that a prior agreement between the purchaser and seller also alluded to indemnification against any CERCLA claims because it covered “all liabilities arising out of or connected with the assets and businesses of [the purchaser] . . . transferred to [the buyer].” *Purolator*, 772 F. Supp. at 128. Also, the court pointed out that there was evidence that both the seller and purchaser knew that the site contained hazardous waste. *See id.* at 135.

140. *See id.* at 131 (stating that “[t]here is no suggestion in this language, or anywhere else in the agreement, that the effect of this clause was limited to particular claims or types of liability”).

141. *See* North Shore Gas Co. v. Salomon, Inc., 963 F. Supp. 694 (N.D. Ill. 1997) (noting that extrinsic ambiguity may also be grounds for holding indemnification agreement invalid), *aff’d in part, rev’d in part*, No. 97-2485, 1998 WL 446572 (7th Cir. Aug. 5, 1998).

142. *City of Toledo v. Beazer East, Inc.*, No. 96-3500, 1996 WL 683505, at *2 (6th Cir. Nov. 22, 1996); *see also* Wells v. American Elec. Power Co., 548 N.E.2d 995 (Ohio Ct. App. 1988) (stating that contract language should evince parties’ true intent).

143. 844 P.2d 428 (Wash. 1993).

144. *See id.* at 434 (finding summary judgment inappropriate because parties’ intent could not be discerned).

any and all liability, damages, costs, claims, demands and expenses (including reasonable attorney's fees), including but not limited to pollution or other damages, as and to the extent that such liability, damages . . . are caused by or in any manner result from the performance by [the waste hauler] of its services under this agreement or arise out of the negligence of [the waste hauler]¹⁴⁵

Defining terms within a contract helps eliminate ambiguity. For example, in *City of Toledo v. Beazer East, Inc.*, the Sixth Circuit held that there was no indemnification agreement because the word "discharge" was undefined and therefore the parties' intent was unclear.¹⁴⁶ In addition, defining the length of the indemnification period is essential.¹⁴⁷ Courts have held that in order for indemnification provisions to survive the closing date, the parties must clearly state such an intention.¹⁴⁸

C. Other Protective Provisions

The other types of environmental provisions that parties to a sale of assets should consider incorporating into their sales agree-

145. *Id.* at 430; *see also* 55 Motor Ave. Co. v. Liberty Indus. Finishing Corp., 38 Env't Rep. Cas. (BNA) 1336 (E.D.N.Y. 1994) (holding that "as is" clause in lease is too ambiguous to warrant indemnification for CERCLA liabilities).

146. *Beazer*, No. 96-3500, 1996 WL 683505 at *1. The agreement stated: Upon the terms and subject to the conditions set forth herein, Seller shall assign to Buyer and Buyer shall assume at the Closing by an appropriate instrument of assignment and assumption . . . all debts, obligations, duties, undertakings, agreements, contracts and liabilities of Seller of any kind or nature whatever, whether direct or indirect, absolute or contingent, which consist of, arise out of, or in any way relate to, any of the following . . . : Any law, statute, . . . or commitment whether arising prior to, on or subsequent to the Closing and relating to . . . the *discharge* at or by the Toledo Coke Plant of industrial products, waste or other materials into the air, streams, lakes, rivers or otherwise, . . . provided however, that Buyer shall not assume any liability for, or obligation to pay, any fine or penalty arising out of Seller's operation of the Toledo Coke Plant prior to Closing.

Id. at *1 (emphasis added). The court held that it was unclear whether the word "discharge" includes discharge onto the land, or whether it included only discharge into the air and water. *See id.* As a result, the court remanded the case and stated that the parties could introduce extrinsic evidence. *See id.*

147. *See* GERARD A. CARON, STRUCTURING THE TRANSACTION TO ALLOCATE ENVIRONMENTAL LIABILITY IN ENVIRONMENTAL ASPECTS OF REAL ESTATE TRANSACTIONS, 243, 249-50 (1995) (explaining importance of defining indemnification provision's survival period).

148. *See* French v. Isham, 801 F. Supp. 913, 916-17 (D.R.I. 1992) (holding that because warranty clause did not define survival period, warranty did not survive closing).

ment include: (1) releases;¹⁴⁹ (2) “as is” clauses;¹⁵⁰ (3) access requirements;¹⁵¹ and (4) pre-conditions.¹⁵²

A release is typically used in conjunction with an indemnification clause to waive the right of a party to seek damages arising out of environmental conditions of the property.¹⁵³ For example, if a seller indemnifies a buyer for pre-closing environmental liabilities, and the buyer indemnifies the seller for post-closing environmental liabilities, then it is customary for the seller to release the buyer from pre-closing environmental liability claims and for the buyer to release the seller from post-closing environmental liability claims.¹⁵⁴ Courts generally construe release clauses strictly.¹⁵⁵ Therefore, parties should be careful to draft releases in a manner that clearly shows their intent.¹⁵⁶

Another contractual allocation tool is the “as is” clause, although this is not a means by which a party can avoid CERCLA

149. For a discussion of release clauses, see *infra* notes 153-56 and accompanying text.

150. For a discussion of “as is” clauses, see *infra* notes 157-62 and accompanying text.

151. For a discussion of access requirement clauses, see *infra* note 163 and accompanying text.

152. For a discussion of pre-condition clauses, see *infra* notes 164-66 and accompanying text.

153. See Goosen, *supra* note 8, at 81 (explaining that release clauses waive party’s right to seek damages arising out of environmental conditions at site).

154. See Manko, *supra* note 48, at 19 (noting customs of buyers and sellers when using releases). Commentators have noted that:

In addition to an indemnification, it is often helpful to have a specific release of liabilities under particular laws for obligations based on occurrences during particular periods of time. For example, if the seller is to indemnify buyer for all pre-closing environmental liabilities and the buyer is to indemnify seller for all post-closing environmental liabilities, then it makes sense for the seller to release the buyer from claims for the post-closing period and for the buyer to release seller from the post-closing period.

Id.

155. See Goosen, *supra* note 8, at 81 (explaining that releases should make parties’ intentions clear because “release clauses are often strictly construed”).

156. See *id.* (noting that “[c]ourts have found . . . that the intent to transfer CERCLA liability must be explicit or clearly intended as evidenced by the language of the clause”); see also *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 15 (2d Cir. 1993) (holding that language of release provision evidenced parties’ clear intent). In *Olin*, the release provision which was found to evidence the parties’ clear intent stated:

In consideration of the payment on this date by Olin to Conalco of \$3,700,000 . . . Conalco hereby releases and settles all claims of any nature which Conalco now has or hereafter could have against Olin . . . whether or not previously asserted, under or arising out of the Purchase Agreement . . . , or the transactions contemplated thereby.

Id. at 13.

liability altogether.¹⁵⁷ The “as is” clause is essentially the opposite of the representations and warranties clause because it shifts the risk of all environmental liabilities to the buyer.¹⁵⁸ The power of the “as is” clause has been weakened significantly in recent years for a number of reasons. First, courts have begun to recognize a duty to disclose environmental conditions in real estate transactions, and legislatures have passed mandatory disclosure laws.¹⁵⁹ Second, “as is” clauses may not be used to relieve a seller of CERCLA liability because CERCLA holds former owners liable for cleanup costs regardless of culpability.¹⁶⁰ “As is” clauses, therefore, should not be

157. See *Wiegmann & Rose Int'l Corp. v. NL Indus.*, 735 F. Supp. 957 (N.D. Cal. 1990) (holding that CERCLA precludes party from avoiding liability by relying on “as is” clause); *International Clinical Lab., Inc. v. Stevens*, 710 F. Supp. 466, 470 (E.D.N.Y. 1989) (stating that “the ‘as is’ clause of the contract cannot be construed to bar the present [CERCLA] action”); *Channel Master Satellite Sys., Inc. v. JFD Elecs. Corp.*, 702 F. Supp. 1229, 1231 (E.D.N.C. 1988) (stating that “as is” clause does not act to shift liability from one party to another).

158. See *Goosen*, *supra* note 8, at 81 (noting that “as is” clause “places the risk of loss for known or unknown environmental conditions entirely on the purchasing party”); see also *International Paper Co. v. GAF Corp.*, No. 95-CV-0322, 1995 WL 760641, at *2 (N.D.N.Y. 1995) (explaining when “as is” clause is enforceable). In *International Paper*, the New York District Court cited the following example of an enforceable “as is” clause:

Seller makes no representations or warranties as to the value, operating condition, state of maintenance and repair or usefulness in the operation of the Graphic Arts Business or of the Assets described in Sections 2(a) (1), 2(a) (2), 2(a) (3), or 2(a) (4) and the premises which are the subject of the leasehold interest described in Exhibit 16, and the Purchaser hereby agrees to accept the above enumerated Assets and premises in the condition they exist on the Closing Date. Subject to section 9(h), Purchaser hereby agrees to accept all the Assets “AS IS” as they exist at the Closing Date and expressly waives any claim whatsoever for any defect relating to the physical condition of the Assets.

Id.

159. See *Goosen*, *supra* note 8, at 81 (explaining declining effectiveness of “as is” clauses). One commentator states:

Although once commonplace, the use and effectiveness of as is clauses is declining. First, the doctrine of caveat emptor has been eroded in real estate transactions by the enactment of mandatory disclosure laws and the recognition by courts of a duty to disclose known environmental conditions. While caveat emptor generally still may apply in commercial real estate transactions, the usefulness of the clauses is severely limited in states with mandatory disclosure laws.

Id. (footnote omitted).

160. See *id.* (noting that “an as-is clause may not relieve a seller of direct cleanup liability, such as liability under CERCLA, which holds former owners and operators strictly, jointly and severally liable for cleanup costs regardless of culpability”) (footnotes omitted); see also Douglas A. Henderson, *Environmental Liability and the Law of Contracts*, 50 Bus. Law. 183, 215-18 (November, 1994) (explaining why “as is” clauses are prohibited from eliminating CERCLA claims). One commentator states:

For CERCLA liability to be transferred among PRPs, several courts require that the contractual provision specifically mention CERCLA or

relied upon to allocate environmental risks.¹⁶¹ Rather, in order to maximize the effectiveness of an “as is” clause, it should be used in conjunction with indemnity provisions and releases.¹⁶²

Several other environmental protective provisions are available to the parties of a sale of assets. The buyer, for instance, may consider including in the sale agreement a requirement that the seller allow the buyer access to the property prior to the closing so that the buyer can perform an environmental inquiry.¹⁶³ Other protective provisions can be used to establish pre-conditions which, if not met at closing, result in allowing one of the parties to rescind the agreement.¹⁶⁴ For example, the buyer should establish a pre-condition that allows it to terminate the agreement if it is dissatisfied with the results from its environmental investigation.¹⁶⁵ The buyer should also establish as a pre-condition that the seller obtain all of the consents as required by state and federal environmental laws.¹⁶⁶

CERCL-type liabilities. In *Southland Corp. v. Ashland Oil, Inc.*, for example, Southland sought contribution under section 113(f) for the nearly \$1 million spent in cleaning up a site purchased from Ashland in 1978. Applying New Jersey law, the New Jersey district court found that, standing alone, the “as is” provision barred only breach of contract claims based on indemnity and failure to remove hazardous waste. CERCLA contribution claims were not defeated by the “as is” provision. It has been on this basis that most courts have held that “as is” and similar contractual provisions do not absolve a seller from CERCLA liability.

Henderson, *supra* at 215-16 (footnotes omitted).

161. See *Wiegmann & Rose*, 735 F. Supp. 957 (holding that CERCLA precludes party from avoiding liability despite existence of “as is” clause). For a discussion of the reasons why “as is” clauses should not be relied upon, see *supra* notes 157-60 and accompanying text.

162. See Goosen, *supra* note 8, at 81 (explaining that by including indemnities and releases with “as is” clauses, party can more clearly show its intent to include environmental conditions).

163. See *TOPOL & SNOW*, *supra* note 2, at § 13.3 (explaining other types of environmental provisions that parties should consider). Two commentators state: [T]he agreement should require that the seller, upon reasonable request, allow the buyer and its agents access to the site prior to the closing of the transaction for the purpose of making any environmental inquiries that the buyer deems appropriate to conduct. Such an access provision, accompanied by a clause allowing the purchaser to rescind the agreement if contamination is discovered, is especially important for transactions in which the environmental investigation has not been completed by the time that the purchase agreement is signed.

Id.

164. See *id.* (explaining that pre-conditions can be utilized as protective environmental provision).

165. See *id.* (noting that “buyer should negotiate closing conditions that permit it to back out of the deal if it is not satisfied with the final results of any environmental investigation”).

166. See *id.* (“The buyer should also insist as a pre-condition that it be relieved of its obligation to complete the acquisition if the seller has not obtained all of the

Another important protective provision involves the determination of which party will be responsible for the physical cleanup that may be required after closing.¹⁶⁷ While this provision does not establish which party will be responsible for funding the cleanup, the delegation of the physical cleanup is an important issue to both parties.¹⁶⁸ The buyer, for example, would like to manage the cleanup so that the work can be scheduled in a manner that does not interfere with the ongoing operation of the business.¹⁶⁹ The seller, on the other hand, might insist on managing the cleanup to keep the costs down and to ensure that the buyer's newly acquired assets do not receive any unneeded enhancements.¹⁷⁰

VI. CONCLUSION

There are significant environmental risks associated with the purchase or sale of assets.¹⁷¹ Often, the parties' ability to identify and allocate these risks can make the difference between closing and not closing such a transaction.¹⁷² It is imperative that the buyer conduct a thorough due diligence investigation of the asset being acquired in order to identify properly the environmental risks associated with the asset.¹⁷³ Once the potential risks have

necessary approvals or consents, including those required by state environmental laws.”).

167. *See id.*

168. *See* TOPOL & SNOW, *supra* note 2, at § 13.3 (explaining that provision which states which party will conduct cleanup is “separate from the question of which party will pay the costs of the cleanup”).

169. *See id.* (explaining reasons why purchasers may want responsibility of conducting cleanup). Commentators have noted several advantages to the buyer if the buyer is the party that performs the cleanup:

Regardless of who will pay the bills, buyers generally wish to take responsibility for managing the remedial work so that they can schedule and organize the cleanup in a manner that least interferes with the ongoing operations at the site. Also, if the buyer is obligated to bear the costs of the remedial work, it may choose to manage the project in order to keep the costs down. On the other hand, for large cleanups, supervision of a remedial program can be so time-consuming that buyers actually prefer that the seller take charge.

Id.

170. *See id.* (explaining that “if the seller is obligated to pay for the cleanup, it is likely to insist on maintaining control of the work so that it can minimize costs and ensure that the work is not being performed in a way that simply enhances the current owner’s property value”).

171. *See* Goosen, *supra* note 8, at 79 (noting that it has been estimated that more than 500,000 properties nationwide have evidence of contamination, and costs of cleaning up these properties will exceed \$650 billion).

172. For a discussion of the importance of identifying the risks of a transaction, see *supra* note 2 and accompanying text.

173. For a discussion of due diligence, see *supra* notes 41-72 and accompanying text.

been identified, both the buyer and seller must consider the several drafting mechanisms available to allocate environmental liabilities.¹⁷⁴ The contractual language used in the representations and warranties clauses and indemnification provisions is critical, as courts rely significantly on the actual words used by the parties to determine environmental liability allocation.¹⁷⁵ In addition, the parties should consider several other protective provisions which, when combined with well-drafted representations and warranties clauses and indemnification provisions, will provide added protection from environmental liabilities.¹⁷⁶

Colleen E. Healy and Mark S. Hacker

174. For a discussion of the contractual drafting mechanisms available to allocate environmental risks in the sale or purchase of an asset, see *supra* notes 73-127 & 149-70 and accompanying text.

175. For a discussion of how courts construe environmental protective provisions, see *supra* notes 128-48 and accompanying text.

176. For a discussion of other protective provisions available to the purchaser and seller, see *supra* notes 149-70 and accompanying text.

