



ALI-ABA Telephone Seminar / Audio Webcast
**Allocating Environmental Risk in Transactions:
*Case Law and Drafting Tips***

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**Contractual Allocation of Environmental Risk in Transactions:
Recent Case Law Developments under CERCLA**

By

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1. Pharmacia Corp. v. Motor Carrier Services Corp., 2007 WL 1816044 (D.N.J. Jun. 22, 2007), motion for reconsideration denied, 2007 WL 2705160 (D.N.J. Sept. 17, 2007), stay pending appeal with proviso granted, contempt motion denied, 2008 WL 852255 (D.N.J. Mar. 28, 2008), affirmed in part, reversed in part, 309 Fed. Appx. 666, 2009 WL 323154 (3d Cir. 2009).
 - Pharmacia manufactures chemicals at Kearny, N.J. site from 1956 to 1991.
 - In 1989, Pharmacia enters Administrative Consent Order ("ACO") with New Jersey DEP to investigate contamination found at site and assess remedial strategies.
 - ACO mandates soil investigation and remediation, and institutional controls, but no groundwater remediation is required.
 - In 1993, Pharmacia submits work plan to DEP for soil remediation, capping and monitoring, particularly as to PCBs; and for groundwater monitoring but not cleanup in order to assess effectiveness of soil remediation.
 - Pharmacia subsequently submits report confirming that soil remediation has been undertaken, asphalt capping is to proceed, and that five years of post-remediation groundwater monitoring is to proceed.
 - In August 1994, Pharmacia commences groundwater monitoring required by plan.
 - In December 1994, Pharmacia agrees to sell Kearny site to Motor Carrier, and closing subsequently takes place.
 - In January 1995, U.S. EPA issues a Request for Information to Pharmacia concerning the Passaic River Study Area. Pharmacia responds to this and subsequent notices concerning the nearby Passaic River, which is a federal Superfund site.
 - In December 1995, DEP issues a No Further Action Letter ("NFA") to Pharmacia for soils at Kearny, also indicating that groundwater monitoring is continuing.
 - In December 2001, Pharmacia submits final report indicating that no PCBs have been found in groundwater through the five year period, but that chlorobenzene and benzene had been detected.
 - DEP concludes that chlorobenzene and benzene are from an off-site source, does not require further remedial actions, and requires that Pharmacia either conduct further groundwater investigation for benzene or establish a Classification Exception Area for groundwater.
 - In September 2003, Pharmacia and Motor Carrier receive a directive from DEP concerning investigations of the Passaic River, and in 2004 EPA issues a final draft order concerning the River due to contamination found in a long stretch of the River.
 - Pharmacia notifies Motor Carrier of the DEP and EPA actions, and Pharmacia demands indemnification. Motor Carrier rejects the demand. Pharmacia commences suit against Motor Carrier and others, and a non-jury bench trial proceeds in 2007.
 - Pharmacia contends that the 1994 Agreement of Sale, and the trial testimony, establish that Pharmacia specifically carved out limited environmental responsibilities that it retained, that it expressly transferred all other environmental responsibilities and liabilities to the purchaser, and that liability for the Passaic River matter and related costs should be found to have been assigned to Motor Carrier.
 - Trial court analyzes the sections of the Agreement of Sale at issue (see contract excerpts in following section of these materials), applies trial testimony and law, and makes specific findings.

- First, court finds that Motor Carrier failed to meet its burden of establishing under Section 9.12 of the Agreement that it was prejudiced as a result of untimely notice from Pharmacia concerning the Passaic River matter.
 - Second, court finds that under section 2.2 of the Agreement, Pharmacia specifically undertook to complete the soils work plan under the ACO with DEP, that it received its NFA and met the ACO and work plan undertakings of section 2.2, and that section 2.2 cannot be the source of Pharmacia cleanup liability for the Passaic River matter.
 - Third, court finds that under section 2.3 of the Agreement, Motor Carrier agreed to assume certain cleanup costs other than those retained by Pharmacia under section 2.2, with the only ambiguity being the application of the phrase "any time after the Effective Time" (defined as the December 1994 date of the Agreement) within the section. Court finds that the phrase pertains to costs voluntarily undertaken by Motor Carrier following the December 2004 Agreement of Sale, and not, as argued by Motor Carrier, to a limitation of Motor Carrier's liability to substances emitted from the site after December 2004. Thus, court finds that Motor Carrier assumed cleanup costs concerning the Passaic River matter.
 - Fourth, court finds that section 2.4 of the Agreement constitutes a narrow indemnity from Pharmacia to Motor Carrier relating to the specific undertakings of the work plan under the ACO and under administrative proceedings relating to New Jersey's ISRA program, and not to Passaic River costs.
 - Fifth, court finds that section 2.5 of the Agreement constitutes an indemnity obligation from Motor Carrier to Pharmacia which applies to the Passaic River matter.
 - Sixth, court rejects Motor Carrier's arguments on equitable estoppel.
 - Seventh, court finds that due to Motor Carrier's breaches of the Agreement, Section 1.5(b) of the Agreement allows Pharmacia to terminate Motor Carrier's estate granted to Motor Carrier under the Agreement, and to reenter the Kearny site, provided it complies with certain additional requirements of section 1.5(b).
 - Additionally, court finds in favor of Pharmacia and its motion for summary judgment to pierce the corporate veil and hold liable Motor Carrier's corporate parent, (SX Intermodal, Inc. ("Intermodal")).
 - Motion by Motor Carrier for reconsideration denied.
 - Motor Carrier moves for stay pending appeal, and court allows stay of monetary judgments provided Motor Carrier submits a \$3 million bond.
 - Pharmacia's motion for contempt against Motor Carrier, for failure to abide by damages award, is denied.
 - Motor Carrier posts the requisite bond, and the appeal proceeds.
 - On appeal, Third Circuit finds language of Agreement of Sale to be unambiguous, and reviews District Court's interpretation de novo.
 - Third Circuit affirms District Court's interpretation of the Agreement and findings as to Motor Carrier's contractual indemnity obligations, and also affirms veil-piercing to Motor Carrier's parent, Intermodal.
 - Third Circuit reverses District Court on a collateral determination by the District Court that a second tier parent became a guarantor of Motor Carrier's obligations under the Agreement.
2. Shell Oil Co. v. U.S., 80 Fed. Cl. 411 (March 31, 2008).
- During World War II, U.S. government enters into contracts with Shell Oil and other producers of aviation gas ("avgas") to supply massive quantities of avgas for use in the war effort.

- From 1942 to 1943, Shell enters into ten avgas contracts with the U.S., and they provide, among other things, that the U.S. would pay Shell "any new or additional taxes, fees, or charges, other than income, excess profits, or corporate franchise taxes, which Seller may be required to pay by any municipal, state, or federal law in the United States or any foreign country to collect or pay by reason of the production, manufacture sale or delivery of the [avgas]."
 - The avgas process produces large quantities of acid wastes, and Shell disposes of the wastes at a hazardous material dump – the McColl Site – that is specifically chosen because waste transport to other disposal sites is unfeasible during the war and the U.S. denies Shell requested resources to construct new reprocessing plants to eliminate the wastes.
 - In 1991, the U.S. and California sue Shell pursuant to CERCLA for costs incurred in cleaning up the acid waste at the McColl site, and Shell counterclaims against the U.S. on CERCLA liability.
 - Following proceedings in the district court and Ninth Circuit on CERCLA issues other than contract (including determination of Shell's CERCLA liability), Shell's counterclaims for breach of contract are transferred to the federal Claims Court.
 - Shell moves for summary judgment on liability; U.S. moves to dismiss.
 - Shell claims that the contract language about the responsibility of the U.S. to pay taxes, fees, charges and the like requires the U.S. to reimburse Shell for the McColl cleanup costs, since the CERCLA costs are "charges."
 - U.S. argues that the so-called "taxes" clause is about supplemental pricing, not indemnification, and that there should be a temporal limitation to the time of the contracts.
 - Claims court looks to legal dictionaries and plain meaning, finds that "charges" include "price, cost or expense," and concludes that CERCLA costs are covered "charges."
 - Court further finds no temporal limitation.
 - Court grants summary judgment in favor of Shell on U.S. liability, and denies U.S. motion to dismiss.
 - See Case 4 below on Claims Court's subsequent decision on damages.
3. Sentry Paint Technologies, Inc. v. Tophth, Inc., 2008 WL 4787579 (E.D.Pa. Oct. 31, 2008).
- In January 2008, Sentry Paint Technologies contracts to sell an industrial property in Darby, Pa. to Tophth.
 - Prior to entering contract, Sentry provides Tophth with a Phase I report that documents a series of environmental concerns and conditions at the site, including soil and groundwater contamination.
 - Contract provides that Tophth has the right to conduct an environmental investigation of the site within a time certain and that if the investigation shows non-compliance or contamination conditions affecting the property or Tophth's intended use, and the cost to remediate would exceed \$10,000, then Sentry Paint would have the option to remediate the non-complying condition at its own cost, offer Tophth a price reduction, or terminate the agreement.
 - Contract also provides that where litigation arises over the agreement, the prevailing party is to recover all costs including reasonable attorney's fees.
 - Tophth's consultant does not perform any soil or groundwater testing, but its review of Pa. DEP files shows – consistent with the Sentry Phase I -- a history of environmental violations and the results of a soil and groundwater investigation that documents an array of contaminants above state standards and sets forth remediation options that have apparently not been implemented.

- Neither party's Phase I discusses remediation options or estimates the costs of investigation or remediation, but in subsequent communications Toph's consultant estimates remediation costs substantially in excess of \$10,000.
 - Further negotiations proceed, but the parties cannot reach agreement on next steps.
 - Ultimately, Toph notifies Sentry that it intends to terminate the agreement; Sentry responds that Toph has failed to reasonably establish that remediation would cost more than \$10,000, that the option provision has thus not been triggered, and that Toph must take the property "as is;" and further communications lead to commencement of litigation by Sentry claiming breach of contract by Toph, as well as bad faith and promissory estoppel.
 - Court applies Pennsylvania law, as called for in the contract.
 - Parties agree that the contract requires Toph to establish that its investigation reasonably indicates that cost to remediate will exceed \$10,000.
 - Court notes that neither party has raised the question of who has the burden of proving whether Toph has complied with the contractual requirements.
 - Court concludes that Toph has shown that the condition called for in the contract has been met, that Toph's burden was not to prove that the cost of remediation would exceed \$10,000 but only to show that the investigation reasonable "indicates" that the costs of remediation will exceed that sum, a "very low threshold to meet."
 - Court finds that Toph is entitled to termination of the contract and is not liable for breach, and also rejects the bad faith and promissory estoppel claims by Sentry.
 - Court further finds that Toph is entitled to award of counsel fees under the contract, but in the absence of a sufficient itemization of costs incurred, time expended by and qualifications of specific attorneys, court requires further submissions by Toph of specifics in order for Toph to carry its burden of proof on costs incurred.
4. Shell Oil Co. v. U.S., 2009 WL 877714 (Fed. Cl. March 31, 2009).
- Following Claims Court's 2008 decision granting summary judgment in favor of Shell on U.S. liability to indemnify Shell for cleanup of contamination resulting from avgas production during World War II (see Case 2 above), Shell seeks summary judgment on over \$84.5 million in cleanup costs and statutory interest.
 - Court rejects government's attempt to reopen its argument that not all of Shell's damages resulted from avgas production.
 - Court awards Shell full amount of costs and interest.
5. Celanese Ltd. v. Essex County Improvement Authority, 404 N.J. Super. 514 (App. Div. 2009).
- In 1998, Celanese agrees to sell a large industrial parcel of land on Doremus Avenue in Newark to the Essex County Improvement Authority (the "County").
 - The site has a long history of bulk storage and manufacturing of hazardous substances, and well before the sale the County receives extensive reports on contamination at and around the parcel.
 - Among the Celanese disclosures to the County, including a specific scheduling in the sale agreement, is the fact that EPA has declared contaminated sediments in the nearby Passaic River to be a Superfund site, that a party already subject to an EPA order had asked many parties including Celanese to participate in an investigation of the Site, and that Celanese declined to participate.

- In the sale agreement, the parties set out a highly detailed description and allocation of environmental liabilities in what is articulated at length is an "as is" transaction subject to specific exceptions.
 - One of the provisions states that the County is to indemnify, defend and hold Celanese harmless for claims concerning "... the presence of Contaminants on or emanating from the Property without regard to the date such Contaminants were first placed or discharged on or about the Property... ."
 - In October 2003, five years after closing of title, Celanese receives a notice letter from EPA naming it as a potentially responsible party for the Passaic River contamination due to EPA's belief that Celanese contributed to the contamination due to discharges from the Doremus Avenue parcel, describing EPA's decision to expand its study of the contamination, and recommending that Celanese participate in the PRP group to finance the next phase of the study.
 - Celanese forwards the notice to the County, invokes the indemnification provision, and asks the County to arrange for defense and indemnification of Celanese.
 - In the absence of a response from the County, and after further notices to the County, Celanese files suit and seeks declaratory judgment that the County is obligated to indemnify and defend Celanese in the Passaic River matter.
 - Following certain discovery, both parties move for summary judgment.
 - Trial court finds ambiguity as to whether the phrase "emanating from" was intended as a "geographical description, i.e., referring to the source of the contamination, or a temporal descriptor, i.e., referring to when the contamination migrated from the property, either before the contract was executed or after it was executed."
 - Trial court acknowledges that at other points in the agreement, the parties had used the term "emanating from" as a geographical, not temporal, descriptor, but rejects Celanese's argument that its use elsewhere in the agreement indicated its meaning in the indemnification clause.
 - Having found an ambiguity, trial court then strictly construes the clause against Celanese as indemnitee, and finds in favor of the County, noting that "a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms."
 - On appeal, Appellate Division rejects trial court's "apparent ease in attributing different meanings to the same phrase used at different places in the same contract," questions the trial court's reference to negligence principles when the laws in question are strict liability, no fault environmental statutes, acknowledges that parties may contractually allocate Superfund liability, and concludes that "if the agreement was ambiguous, as the trial court twice concluded it was," then the trial court should not have resolved the ambiguity from a "dry, paper record," but rather should have allowed Celanese to "probe and challenge the credibility of the [County] witnesses in the presence of the factfinder."
 - Appellate Court reverses and remands for further proceedings.
6. Ceramicas Industriales, S.A. v. Metropolitan Life Insurance Company, 2009 WL 331262 (S.D.N.Y. Feb. 11, 2009).
- In a 1997 Share Purchase Agreement concerning a ceramic bathroom product manufacturer, seller represents that it has no knowledge of actions or events that could form the basis of environmental claims.
 - Seller also agrees to indemnify and hold buyer harmless against damages due to breach of representations, with the proviso that representations will remain in effect "until sixty (60) days after expiration of the applicable statute of limitations (including any extensions thereof)... ."

- Following the sale, state and federal environmental authorities take actions against the manufacturer due to contamination conditions at certain of its facilities, and buyer subsequently commences suit against seller to recover costs incurred to investigate and respond to the environmental conditions, with causes of action including indemnification for breach of representation under contract, and CERCLA private party claims.
 - Seller moves to dismiss, arguing among other things that buyer's contract claim for indemnification is time-barred.
 - On the indemnification claim, court concludes that it is unclear what limitations the parties intended to impose.
 - Finding the contractual language ambiguous, court denies the motion to dismiss the contract claim.
7. Hinds Investments, L.P. v. Ryan, 2009 WL 951155 (C.D.Cal. April 6, 2009).
- Landlord sues long-time dry cleaner tenants under CERCLA and for breach of contract due to PCE contamination in soil and groundwater.
 - Landlord seeks summary judgment on several counts, including breach of contract and express indemnity.
 - Landlord points to lease clauses that provide that tenants must "comply with all of the requirements of all municipal, state and federal authorities... and shall faithfully observe in said use all municipal ordinances and state and federal statutes...;" that the judgment of a court is to be conclusive on this issue; and that tenants "will hold [Landlord] exempt and harmless from any damage or injury to any person... ."
 - Based on the court's finding that sufficient evidence has been provided to show the absence of a genuine issue as to whether tenants are liable for breach of the lease or express indemnity, court grants summary judgment to landlord on the contract claims.
8. U.S. Bank National Assoc. v. U.S. Environmental Protection Agency, 563 F.3d 199 (6th Cir. 2009).
- In 1998, Eagle-Pitcher Technologies ("EP Tech") is formed, and it then acquires an electronics manufacturing business of the former EaglePitcher Company ("EP Inc.") known as the Technologies Division, including all real property, leaseholds and contracts relating to the business.
 - The Agreement and Assignment document provides that EP Tech, as "Assignee," agrees that "it will accept such assignment and will assume all of the liabilities and obligations of the Assignor with respect to the Business (collectively, the 'Obligations')... ."
 - The contract further provides that EP Tech "assumes and agrees to perform, pay, discharge and comply with all of the covenants, conditions, agreements, terms, obligations and restrictions to be performed or complied with on the part of the Assignor under or in connection with the Business or the Obligations arising from and after the date hereof... ."
 - Thirty-seven real property interests are transferred in the deal, one of which is a leasehold in Socorro, New Mexico.
 - The Socorro facility has operated on and off since 1963, and has included battery, circuit board and cable connector manufacturing that involved use of TCE as a cleaner.
 - In 1987, TCE had been found in a municipal well at the manufacturing site, and in 1990 TCE was found in a municipal well a mile and a half away. Subsequent investigations in the 1990s and early 2000s had not established a specific connection with the facility's operations.
 - In 2005, EP Tech files Chapter 11 bankruptcy proceedings, and under the reorganization plan its assets are transferred to a trust with U.S. Bank as trustee.

- DOJ files claims for EPA and the Department of the Interior to recover costs for responding to the TCE contamination at and around the Socorro facility
 - U.S. Bank objects, asserting that EP Tech has not assumed pre-1998 liabilities of the Technologies Division.
 - The government moves for partial summary judgment as to EP Tech's liability for response costs.
 - By the time of the government's motion, further investigations solicited by the U.S. Army Corps have resulted in reports concluding that the Socorro site is the source of TCE groundwater contamination in the area, and in September 2007 EPA has placed the Socorro site on the NPL.
 - Bankruptcy court grants EPA's motion.
 - EPA establishes past costs of over \$965,000, and at an estimation hearing on EPA's future costs the bankruptcy court finds in the amount of \$23.6 million.
 - Bankruptcy court reduces both figures to 37% of established past and future costs (down to \$357,246 and \$8,735,434 respectively) based on a 1996 bankruptcy settlement agreement resulting from 1991 bankruptcy of EP Inc.
 - U.S. Bank appeals to the District Court, which affirms, and then to the Sixth Circuit, arguing that the bankruptcy court erred in finding that EP Tech expressly assumed all of EP Inc.'s environmental liabilities.
 - Court of Appeals notes that under Ohio law (the law of the agreement), a buyer of corporate assets is not liable for the debts and obligations of the seller unless it has expressly or impliedly assumed such liability.
 - Appellate court then addresses the language of the agreement, and the Trustee's argument that EP Tech only assumed liabilities arising from 1998 forward.
 - As Court notes, the Trustee focuses on the phrase "Obligations arising from and after the date hereof," in the second of the quoted paragraphs above, as establishing assumption of post-transaction liabilities only.
 - However, the Court then refers to the broad, unlimited, language of the first of the paragraphs ("... will assume all of the liabilities and obligations... with respect to the Business..."), finds that language unambiguous in scope, and concludes that the word "or" that appears in the second paragraph – before the phrase "Obligations arising from and after the date hereof" – is a disjunctive that leads to a separately identified obligation for liabilities "arising from and after" the deal.
 - Thus, while noting that the agreement is "not a model of good draftsmanship," the Court holds nonetheless that it is plain and unambiguous, and that it has transferred liabilities that existed as of the transaction, as well as those arising afterward, including the CERCLA liability determined by the bankruptcy court and confirmed by the District Court.
9. Silgan White Cap Americas, LLC v. Alcoa Closure Systems, 2009 WL 1177090 (W.D.Pa. April 29, 2009).
- After owning and operating a Richmond, Indiana manufacturing facility for approximately fifty years, Alcoa sells the facility to Silgan pursuant to a 1997 Acquisition Agreement that spells out allocation of environmental risks in substantial detail.
 - In general, Alcoa agrees to indemnify and save Silgan harmless from "Pre-Closing Environmental Liabilities," and Silgan agrees to indemnify and save Alcoa harmless from "Post-Closing Environmental Liabilities."
 - Alcoa also agrees to complete certain specific remedial actions set forth in the agreement, and to indemnify Silgan for liabilities in that regard.

- Following the transaction, a dispute arises as to Alcoa's investigation and cleanup of certain soil and groundwater contamination at the site under Indiana's Voluntary Remediation Program.
- Silgan contends that Alcoa is not undertaking appropriate and timely actions, and Silgan enters its own agreement with Indiana environmental authorities to proceed with specific investigatory and remedial activities.
- Alcoa commences a lawsuit in Pennsylvania state court seeking declaratory judgment or specific performance, and damages and indemnification under the agreement.
- Alcoa contends, among other things, that Silgan breached Alcoa's right to participate in remediation and to access to the facility, that Alcoa should be released from its indemnification obligations under the agreement, that any violations of law caused by Silgan's denial of access constitute post-closing liabilities, and that Alcoa should be indemnified for the alleged breaches.
- Silgan answers and counterclaims, and discovery commences.
- Silgan then files a complaint against Alcoa, in U.S. District Court of the Southern District of Indiana, for cost recovery and contribution under CERCLA.
- Alcoa files a series of motions in response, including a motion to dismiss for improper venue or to transfer the case to the Western District of Pennsylvania, and a motion to dismiss Silgan's claims as barred by the Acquisition Agreement.
- District Court in Indiana grants the motion to transfer venue to Western District of Pennsylvania.
- Upon transfer, District Court in Pennsylvania considers further briefings and oral argument on Alcoa's motion to dismiss Silgan's claims as barred by the Acquisition Agreement.
- Alcoa contends that Silgan's sole remedies are based in contract, and that the CERCLA claims are barred by the Acquisition Agreement.
- Alcoa's argument is centered on verbiage in the indemnification provision of Article 14 of the contract stating that "all claims for indemnification arising out of or related to environmental matters shall be solely covered by and subject to Article XII and the limitations set forth therein," and additional verbiage in Article 16 that "[i]f any dispute cannot be... resolved [through consultation], the parties shall be entitled to pursue any remedies available to them, in law or in equity, but only to the extent permitted under, and subject to the limitations set forth in, Articles XII and XIV." (Article 12 describes types of liabilities covered.)
- Court notes that the agreement calls for application of Delaware law, and that while Delaware law allows for parties to specify remedies in contracts, "[a]n agreement to limit remedies must be clearly expressed in the contract."
- Court finds that the language of the agreement is "insufficient to create an exclusive remedy of indemnification under Delaware law and to preclude Silgan's CERCLA claims in this action."
- Thus, Alcoa's motion to dismiss is denied.
- At oral argument, court also directed parties to submit briefs addressing whether court should abstain from exercising jurisdiction over the case, or stay proceedings, pending the state suit.
- The parties responded that the court should do neither.
- Noting that the federal court has exclusive jurisdiction over the CERCLA claims, and that the state litigation is in discovery with no motions pending, the court agrees that it would be improper to either abstain or stay the matter at this juncture, though the court notes that a stay may be proper at a future point.

10. Halliburton Energy Services, Inc. v. NL Industries, 648 F.Supp.2d 840 (S.D.Texas 2009).

- In multi-party CERCLA litigation concerning contamination at former mining and milling site in Arkansas, landlord moves for partial summary judgment, arguing, among other things, that a tenant's lease provides full indemnity for any activities that have caused contamination.
- Landlord relies on paragraph of 1972 lease agreement that provides: "Lessee agrees that it will indemnify, defend, protect, hold and save harmless the Lessor from and against any claims, loss, liability, attorney's fees, costs or any other expense arising out of or resulting from any injury, loss or damage to persons or property in, on or about the demised premises."
- Landlord also argues that indemnity is a factor weighing in favor of allocating no equitable responsibility on landlord.
- Court reviews history of case law establishing that pre-CERCLA contract clauses may be sufficiently detailed or broad as to clearly allocate all future liability of any nature to one party or another, and to thus allocate liability for subsequently enacted laws like CERCLA.
- However, court finds that the case law does not support landlord's argument that indemnity provision in question shows an intent to be indemnified for future environmental liabilities so as to relieve landlord of any equitable allocation.
- Court further finds that record on summary judgment motion weighs against allocating zero responsibility on landlord.

11. Trinity Industries, Inc. v. Greenlease Holding Co., 2010 WL 419420 (W.D.Pa. Jan. 29, 2010).

- After operating a railcar manufacturing facility in Mercer County, Pa. from the 1920s to the mid-1980s, Greenlease sells the real property to Trinity in 1986.
- Trinity operates there from 1986 to 2000 and then sells property to third party.
- In 2006, Commonwealth of Pennsylvania files criminal charges against Trinity due to contamination problems.
- Trinity enters consent order and plea agreement, proceeds with response activities, and sues Greenlease, asserting claims under CERCLA, RCRA, state environmental statutes and common law.
- Greenlease brings motion on the pleadings asserting that the 1986 Purchase and Sale Agreement provided for Trinity to indemnify Greenlease against such claims and that the Agreement allocated all environmental liabilities to Trinity.
- Court reviews series of contract provisions, including environmental cross-indemnities, and focuses particularly on survival and non-waiver clauses.
- Survival clause provides that "the foregoing indemnities shall survive and continue in force after the transfer of the Subject Assets to [Trinity] for a period ending on the third anniversary of the date of the Closing."
- Non-waiver clause provides that the "rights and remedies herein provided are cumulative and are not exclusive of any rights or remedies which the parties hereto may otherwise have at law or in equity."
- Applying Pennsylvania state law, the law of the contract, court finds that the Agreement is clear and unambiguous, that the parties intended to provide for a limited three-year indemnity, and that the parties did not intend to waive any remedies that either party might otherwise have.
- Finding that the cross-indemnities expired three years after the 1986 transaction, and thus well before the current claim, and that the parties otherwise retained their rights against each other, court denies motion by Greenlease.

12. Pateley Associates 1, LLC v. Pitney Bowes, Inc., 2010 WL 1332172 (D.Conn. March 31, 2010).

- Pitney Bowes owns and operates a facility in Stamford, CT. from 1967 to 1978.
- In 1978, Pitney Bowes then conveys an estate for years until 2004 to Pateley LP with a remainder interest to Hirey Realty Corp. and sells the buildings, structures and improvements to Pateley LP.
- Hirey and Pateley LP enter into an option agreement that allows Pateley to lease the property after its estate for years ends in 2004.
- Pateley LP leases the property back to Pitney Bowes under a 1978 lease agreement.
- Pursuant to an option agreement, Pitney Bowes may elect to continue to lease the property after expiration of the 1978 lease, pursuant to the same terms.
- In 2001, Pateley LP creates Pateley LLC and assigns its property ownership interest, subject to the lease, to Pateley LLC.
- Pateley LLC then exercises its option to lease the land from a successor of Hirey, and Pitney Bowes agrees to sub-lease the property from the LLC under the 1978 lease terms.
- In 2005, PCB contaminated sediments are discovered in a pond at a site adjacent to the property and in 2006, the neighbor sues Pitney Bowes and Pateley LLC under CERCLA.
- For a period of time, Pitney Bowes undertakes to indemnify and defend Pateley LLC, but later discontinues its defense.
- Pateley LLC then commences an action for breach of the 1978 lease agreement, including claims for indemnification based on CERCLA liability, alleging an obligation of Pitney Bowes to both indemnify and defend under the lease terms.
- Pitney Bowes moves to dismiss the complaint for several reasons and Pateley moves for partial summary judgment on Pitney Bowes's obligation to defend it in the lawsuit.
- 1978 lease provided that: " Lessee shall defend all actions against Lessor with respect to, and shall pay, protect, indemnify and save harmless Lessor from and against any and all liabilities, losses, damages, costs, expenses (including reasonable attorneys' fees and expenses) causes of action, suits, claims, demands or judgments of any nature (a) to which Lessor is subject because of its estate in the Premises or (b) arising from (i) injury to or death of any person, or damage to or loss of property, on the Premises or on adjoining sidewalks, streets or ways, or connected with the use, condition or occupancy of any thereof, (ii) violation of this Lease, (iii) any act or omission of Lessee or its agents, contractors, licensees, sublessees or invitees, and (iv) any contest referred to in paragraph 17."
- Pitney Bowes argues that the claims for indemnification based on CERCLA liability should be dismissed because CERCLA had not yet been enacted at the time of the lease and the lease was not intended to cover such costs.
- Court notes that in several cases, Second Circuit has found indemnification clauses in pre-CERCLA provisions to be enforceable if they were either "specific enough to include CERCLA liability or general enough to include any and all environmental liability."
- Court finds that 1978 lease language, given its ordinary meaning, is sufficient to require Pitney Bowes to indemnify Pateley LLC for any costs arising from Pateley's estate in the premises or for any act or omission of Pitney Bowes or its licensees, sublessees or invitees, regardless of the date or type of conduct.

- Court finds that Pateley LLC was subject to the neighbor's suit because of its estate in the premises, noting that its estate derived first from the assignment when Pateley LP created and assigned the LLC its ownership interest in the property, and then from the LLC's exercise of the option to lease the property from the Hirey successor.
- Finding that Pateley LLC has established a claim for breach of contract, the court dismisses Pitney Bowes's motion to dismiss the breach of contract claims.
- Court further finds that Pitney Bowes has breached its lease obligation to defend Pateley LLC, and enters summary judgment in favor of Pateley LLC for over \$275,000 in defense costs incurred.
- As co-plaintiff, Pateley LP also seeks to enforce the indemnification obligation under the lease agreement.
- However, court finds that having assigned Pateley LLC all of its rights under the lease, the LP does not have standing to enforce the indemnification obligation.

13. Textileather Corp. v. GenCorp Inc., 2010 WL 1801794 (N.D.Ohio May 5, 2010).

- From mid 1950s to 1990, GenCorp owns and operates a vinyl manufacturing facility in Toledo, Ohio.
- In 1989, company employees negotiate purchase of the facility, and pursuant to a 1990 Asset Purchase Agreement ("APA") the new Textileather Corp. acquires the facility.
- Environmental condition of the facility is an issue in the negotiations, and the APA contains detailed allocation of environmental liabilities, with GenCorp retaining specific liabilities for particular chemicals and locations, and being obligated to indemnify and defend Textileather for those issues.
- Textileather assumes all liabilities not retained by GenCorp.
- Key issue is operation of RCRA units at facility that reclaim solvent wastes, and obtaining RCRA Part A and Part B permits.
- By closing, GenCorp has received Part A permit, and APA provides that GenCorp will pay up to \$250,000 for activities necessary to obtain Part B permit.
- After closing, Textileather continues to pursue Part B permits and to operate units, but in December 1990 it decides to shut down units.
- Decision to close units triggers regulatory obligation to submit closure plan to Ohio EPA.
- Ohio EPA rejects plan, and over next ten years Textileather and Ohio EPA engage in protracted negotiations and associated legal proceedings, including administrative and judicial appeals.
- In 1992, while Textileather and Ohio EPA are negotiating, GenCorp and Textileather enter a letter agreement amending the APA by providing that in substitution of GenCorp's obligations concerning the Part B permit, GenCorp will pay Textileather a lump sum payment of \$150,000 within 14 days.
- As a result of costs incurred in the process, Textileather files suit against GenCorp seeking indemnity and cost recovery, and includes CERCLA claims.
- Court reviews allocation of liabilities in APA, including section 9.1.2, which provides that "... [s]ubject to the limit of \$250,000, [GenCorp] will pay for the cost of performing those activities which are necessary to obtain the Part B RCRA permit described in [GenCorp's] prospectus," and section 9.1.3, which provides that "[Textileather]... will assume [GenCorp's] liabilities in respect of any substances or environmental conditions relating to the Business except those retained by [GenCorp] as provided in Section... 9.1.2."

- Court also refers to Section 9.1.4, which sets out the circumstances under which GenCorp is to indemnify and defend Textileather, with GenCorp's indemnification responsibility limited to liabilities retained in Sections 9.1.1 (which refers to a particular chemical list) and 9.1.2.
- Court also refers to the 1992 letter agreement amending APA, which states that "[i]n lieu of and in substitution for GenCorp's obligations described in Section 9.1.2(c) of the Agreement, GenCorp will pay to Textileather \$150,000 within... 14 days of the execution of this letter agreement."
- Court concludes that neither party contemplated GenCorp assuming RCRA closure costs, that there was no cost-shifting language for closing the RCRA units, and that the court cannot read language or terms onto a contract that the parties themselves omitted.
- Court finds that GenCorp cannot be held responsible for RCRA closure costs.
- Court further finds that Textileather's claims under CERCLA also fail, as "all environmental liability relating to the business has been allocated between the parties, leaving nothing to the imagination or to CERCLA."

14. Litgo New Jersey, Inc. v. Bob Martin, 2010 WL 2400388 (D.N.J. June 10, 2010).

- In 1985, Sheldon Goldstein negotiates the purchase of an industrial property in Somerville, NJ, known to be contaminated and subject to New Jersey's transaction-triggered law (then "ECRA"), from Alfred Sanzari.
- In the 1985 Agreement of Sale, Sanzari and Goldstein provide that "[t]he parties acknowledge that the Property is subject to the provisions of N.J.S.A. 13:1K-6 ("ECRA")... [Sanzari] agrees to comply with all of the provisions of ECRA by obtaining a Negative Declaration or a Clean-up Plan from the DEP... . In the event, however, that the net cost to [Sanzari] of obtaining and processing a Clean-up Plan exceeds the sum of... \$100,000..., [Sanzari] shall have the option of terminating this Agreement of Sale, unless [Goldstein] agrees to pay such cost in excess of... \$100,000... ."
- The Agreement also provides that Goldstein will "... accept conveyance of the Property... in [its] 'as is' condition," and that Sanzari would bear "... the risk of loss or damage to the Property beyond ordinary wear and tear until delivery of the deed to [Goldstein] at the closing of title."
- Following DEP's rejection of a cleanup plan, Sanzari expresses concern that the cleanup could exceed \$1M, and seeks to exercise his right to terminate the Agreement.
- Goldstein sues for specific performance.
- During suit, Goldstein's expert issues report concluding that actual cost could be far greater than existing estimates.
- In 1989, parties reach settlement, and the Settlement Agreement provides that "Goldstein shall elect to move forward with the transaction at issue by assuming all ECRA compliance costs in excess of \$100,000 in writing delivered within 10 days of receipt by Goldstein's counsel of a copy of test results... regarding the water samples taken from the... five monitoring wells on April 7, 1989... It is expressly understood that Goldstein's election shall be made after those test results are received and not on any subsequent testing or sampling, provided, however, that the test must give results on all five wells."
- Settlement agreement also provides that Sanzari will "... assign to Goldstein any and all of his rights to pursue reimbursement claims against tenants and others including insurance carriers, if any."
- Goldstein elects to proceed with closing, though further disputes then arise between the parties that require further court proceedings.
- Ultimately, Goldstein takes title in April 1990, with the deed specifying that Goldstein has assumed all of Sanzari's obligations under a cleanup plan that has been approved by DEP.

- Goldstein then transfers property to Litgo, a single purpose entity of which he is the sole shareholder.
- Substantial cleanup activities proceed.
- Soil issues are resolved to DEP's satisfaction but groundwater issues remain, and DEP requires further activities in that regard.
- Further legal actions ensue, including actions by the state, and by Goldstein and Litgo against third parties including Sanzari.
- Claims against Sanzari include CERCLA and breach of the settlement terms.
- Sanzari argues that the 1985 Agreement of Sale and 1989 Settlement Agreement contractually shifted liability to Goldstein.
- Court conducts 17-day bench trial, and then issues findings of fact and conclusions of law.
- Court notes that parties cannot contractually shift their CERCLA §107 liability, and that the agreements do not preclude a finding that Sanzari is a PRP under CERCLA, but that the agreements, notwithstanding that they are silent as to CERCLA, are relevant to equitable allocation.
- Then, in considering the equities, court reviews the transactional and litigation history, including Goldstein's voluntary agreement to remediate under ISRA beyond the first \$100,000 of costs, his knowledge of the significant environmental issues at the time of purchase, his decision to nonetheless compel the sale, and the substantial period of time over which Goldstein and Litgo have delayed in pursuing groundwater remediation.
- While court finds that the 1989 Settlement Agreement is not enforceable against Goldstein and Litgo due to material breach of the Agreement by Sanzari, court nonetheless weighs intent and substance of agreements in considering equitable allocation.
- Court concludes that Goldstein and Litgo are responsible for 50% of the response costs.
- Court concludes that the balance, which has been determined to be an orphan share, should also be equitably allocated among responsible parties, and apportions 65% to Goldstein and Litgo, 32% to Sanzari and related defendants, and 3% to the U.S.