CONTRACTUAL ALLOCATION OF ENVIRONMENTAL RISK IN TRANSACTIONS: CASE LAW DEVELOPMENTS UNDER CERCLA

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I. Case Law as to Caveat Emptor:

1. Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049 (D.Ariz. 1984), aff'd, 804 F.2d 1454 (9th Cir. 1986).

   - "As is" clause only precludes breach of warranty action.

2. Sunnen Prod. Co. v. Chemtech Indus., Inc., 658 F. Supp. 276 (E.D.Mo. 1987).

   - Party which owned property at time of release cannot shift liability to purchaser by claiming caveat emptor.

3. Smith Land & Improvement Co. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989).

   - Doctrine of caveat emptor is not a defense to CERCLA claims and cannot be invoked to transfer liability to purchaser.

4. Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988).

   - Caveat emptor doctrine inapplicable in CERCLA action.

   - "As is" clause inapplicable in action not based on breach of warranty.

5. International Clinical Lab. v. Stevens, 710 F. Supp. 466 (E.D.N.Y. 1989).

   - "As is" clause does not bar CERCLA lawsuit; only precludes breach of warranty action.

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6. Allied Corp. v. Frola, 730 F. Supp. 626 (D.N.J. 1990)

- "As is" clause precludes action for breach of implied representations as to condition of property, but does not preclude either CERCLA or New Jersey common law claims, which cannot be precluded by contract unless buyer knowingly accepts responsibility.

7. Westwood Pharm., Inc. v. National Fuel Gas Distrib. Corp., 737 F. Supp. 1272 (W.D.N.Y. 1990), aff'd on reconsideration, 767 F. Supp. 456 (W.D.N.Y. 1991), aff'd, 964 F.2d 85 (2d Cir. 1992).

- In rejecting caveat emptor argument, court notes that it is difficult to imagine how buyer could have bargained away CERCLA liability eight years before the statute was passed.

8. Alcan-Toyo America v. Northern Ill. Gas Co., 881 F. Supp 342 (N.D.Ill. 1995).

- Court considers doctrine of caveat emptor as one element to be considered in equitable allocation, and concludes that buyer should bear "some" responsibility for response costs.

9. New West Urban Renewal Co. v. Westinghouse Electric Corp., 909 F. Supp. 219 (D.N.J. 1995).

- In 1983 real estate transaction between two sophisticated entities, "as is" clause found insufficient to contractually allocate CERCLA liability.

- See case 89 below, under "Case Law as to Contract," for decision on subsequent litigation.

10. M & M Realty Company v. Eberton Terminal Corporation, 977 F. Supp. 683 (M.D.Pa. 1997).

- 1994 sale agreement includes "Environmental Contingency" clause providing that buyer's obligation to purchase is subject to buyer's satisfaction with its own environmental audit, and specifying that if buyer closes it accepts the property "as is," based on its own investigation, with no reliance on any statements or representations by seller.

- Seller argues that the clause allocated all environmental liability to the buyer.

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- Finding no Pennsylvania law considering the effect of an "as is" provision on CERCLA liability, court follows majority of federal courts in determining that the clause does not bar buyer's CERCLA claims, but does bar buyer's claims of breach of warranty, fraud, and implied warranty of good faith and fair dealing.

11. Foster v. U.S., 130 F. Supp. 2d 68 (D.D.C. 2001).

    - A buyer's 1985 acquisition of property in "as is" condition was not tantamount to assumption of risk for contaminants of which buyer had no knowledge.

    - Nor did "as is" clause inure to the benefit of a non-party to the 1985 transaction, who was not an intended third party beneficiary of the terms of the deal.

12. New York v. Westwood-Squibb Pharmaceutical, 2004 WL 1570261 (W.D.N.Y. May 25, 2004).

    - Non-jury trial proceeds on litigation that was the subject of the Westwood Pharmaceutical case (see case 7 above), and court renders findings of fact on allocation.

    - Court finds no compelling reason to shift any portion of the responsibility for the cleanup from the polluter-seller to the buyer under the doctrine of caveat emptor.

    - Considering all facts and circumstances, court finds it fair and equitable for polluter to bear 90% of past and future costs, and for the buyer to bear the remaining 10%.

13. XDP, Inc v. Watmull Properties Corp., 2004 WL 1103023 (D. Or. May 14, 2004).

    - In multi-party dispute over cleanup of historical contamination at manufacturing site, a former owner-operator seeks summary judgment against the buyer on issues of defense and indemnity based on a 1989 agreement.

    - Agreement was in lieu of foreclosure that settled claims of the buyer on a series of defaulted loans previously made by the seller. As part of the agreement, the seller was released from further liability on the loans in exchange for the transfer of assets, including the property that is the subject of the contamination dispute.

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- In the agreement, the buyer agreed to take the property "as is, where is, subject to all liens, encumbrances thereon, or other obligations related thereto which [buyer] shall pay."

- Seller asserts that this assumption compels defense and indemnity on the environmental dispute.

- Buyer asserts that the assumption language refers to the seller's monetary obligations.

- Court finds contract terms ambiguous, requiring determination of intent. Thus, summary judgment is denied.

14. Stimson Lumber Co. v. International Paper Co., 2011 WL 1532411 (D. Mont. – Magistrate Findings & Recommendation, February 28, 2011, 2011 WL 1549305 (D. Mont. – Dist. Ct. Decision, April 22, 2011).

- In November 1993, Stimson Lumber acquires a sawmill and plywood manufacturing plant in Bonner, Montana from International Paper predecessor.

- In asset purchase agreement, seller agrees to indemnify buyer for environmental liabilities for a period of ten years, and base price clause provides that buyer "... shall not assume or be responsible for any [of the seller's] liabilities or obligations."

- Agreement also provides that aside from express warranties, buyer accepts assets "as is."

- Warranties include express warranty that seller has conducted business in compliance with environmental laws including CERCLA.

- Seller also agrees to indemnify buyer for environmental matters including CERCLA, subject to ten year notice provision.

- Base price clause of agreement also provides that Buyer "... shall not assume or be responsible for any [of the Seller's] liabilities or obligations."

- Stimson operates mill until it is shuts down in 2008.

- In 2002 and 2003, Stimson places International Paper on notice of indemnification claims for costs incurred in cleaning up identified contamination, and parties resolve claims by way of settlement agreement in 2005.

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- In 2006, additional contamination is found, Stimson enters into agreement with state regulators to cleanup, and Stimson commences suit against International Paper, including CERCLA claims. International Paper counterclaims, including CERCLA contribution claim.

- International Paper moves for summary judgment; grounds include claims that Stimson's claims are barred by the 1993 agreement.

- International Paper contends that terms of 1993 agreement include Stimson's assumption of all environmental liabilities at the subject mill as of ten years following the closing date, and International Paper points both to "as is" clause and indemnification provisions.

- Magistrate Judge finds that "as is" provision was explicitly limited by express terms of warranty and indemnification provisions.

- Magistrate Judge further finds that while there was an applicable ten year limitation to International Paper's warranties and contractual indemnification obligations, the contract verbiage on Stimson's non-assumption of liability, and a reading of the contract as a whole, do not lead to a conclusion that the parties "clearly intended for Stimson to assume International Paper's statutory environmental liabilities when the contractual indemnification provisions... expired."

- Thus, Magistrate Judge recommends that International Paper summary judgment motion on 1993 agreement be denied.

- District court agrees, and denies motion on 1993 agreement.

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II. Case Law as to Contract

1. Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049 (D.Ariz. 1984), aff'd, 804 F.2d 1454 (9th Cir. 1986).

    - Release of liability executed by the parties prevents plaintiff from asserting cause of action it might otherwise have under CERCLA.

2. FMC Corp. v. Northern Pump Co., 668 F. Supp. 1285 (D.Minn. 1987), appeal dismissed, 871 F.2d 1091 (8th Cir. 1988).

    - CERCLA's provision for private party actions is not a sufficient basis for recovery of costs between parties where one party has released the other from CERCLA liability.

3. Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988).

    - CERCLA does not abrogate contractual rights.

    - To preclude recovery there must be an express provision which allocates risk to one of the parties.

    - In pre-CERCLA agreement parties cannot be expected to have been prescient in referring to CERCLA; but some clear transfer or release of future "CERCLA-like" liabilities is required.

4. AM Int'l, Inc. v. International Forging Equip. Corp., 743 F. Supp. 525 (N.D.Ohio 1990), rev'd in part and remanded, 982 F.2d 989 (6th Cir. 1993).

    - 1984 transaction includes a release of "any and all [claims] of every kind and description, known or unknown, in law or in equity," which one party "now has or may hereafter have against" the other.

    - Party which gave release claims that it was not intended to encompass unforeseen environmental claims.

    - District court reviews Congressional record and prior case law, and concludes that releases are ineffective as between parties in CERCLA contribution actions.

    - District court then finds release effective as to state law claims.

    - Nearly three years later, Sixth Circuit reviews development of case law since District court opinion, and reverses ruling that release could not be effective under CERCLA.

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- Sixth Circuit remands for determination whether under state law, including law of mutual mistake, release is effective.

5. Brockton Wholesale Beverages Co. v. Chevron, 1990 WL 110265 (W.D.Mass. July 26, 1990).

   - Former owner/operator of gas station sold station to purchaser in 1973 pursuant to agreement in which purchaser agreed to hold seller harmless "from any and all liability in connection" with certain property, including all underground storage tanks. The property was transferred "as is," with no warranties, and the contract noted that the underground tanks may still hold product.

   - At the time of the purchase the buyer tested six tanks, and then used them.

   - Later, previously unidentified tanks were unearthed, as were crushed and buried leaking drums and a leaking catch basin full of waste.

   - On seller's motion for summary judgment based on contract, the court found that the hold harmless clause protected the seller as to property identified in the contract (including all of the tanks, and not just those of which the purchaser was aware), but did not protect the seller as to the drums and catch basin.

6. U.S. v. Chrysler Corp., 31 ERC 1997 (D.Del. 1990).

   - Former co-owners of a business parted company in 1977 and provided that "from the date of this agreement ... any cause of action ... arising prior to the settlement shall be divided on a ratio of 53-47." One of the parties continues to run the business.

   - Court finds that the parties agreed to split liability based on "conduct occurring before the Agreement," and on that basis imposes CERCLA liability on the party no longer involved in the business.

7. Jones-Hamilton Co. v. Kop-Coat, Inc., 750 F. Supp. 1022 (N.D.Cal. 1990), aff'd, 973 F.2d 688 (9th Cir. 1992).

   - In a 1970 agreement, an indemnification as to compliance with all laws and against all losses and damages is sufficient to allocate CERCLA liability.

   - In interpreting the indemnification clause, district court applies California law, since the outcome is not "hostile to federal interests."

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- Ninth Circuit affirms.

8. CPC Int'l, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269 (W.D.Mich. 1991), reconsid. denied 21 Envt'l Rptr. 20, 805 (W.D. Mich. 1991).

   - District court follows minority rule as expressed in AM Int'l, finding that CERCLA §107(e)(1) forbids the application of releases to bar CERCLA liability.

9. In re Hemingway Transp., Inc., 126 B.R. 650 (D.Mass. 1991), aff'd 954 F.2d 1 (1st Cir. 1992).

   - District court affirms ruling of bankruptcy court below, finding that where a lease agreement contains "inclusive and unequivocal language" demonstrating "a clear intent to transfer all liability" from a landlord to a tenant concerning activities on the leased premises, then the lease effectively transfers CERCLA liability to the tenant notwithstanding the absence of specific language referencing the environment or CERCLA.

   - District court advocates an approach which allows "broad, unambiguous transfers of liability to stand in those cases where the intent of the parties is clear," rather than a stricter approach which may lead to results which frustrate the parties' intent.

10. Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345 (D.N.J. 1991).

    - 1977 agreement provided that the buyer would indemnify the seller from all liabilities and claims concerning pre-transaction property damage, including damage resulting from existing conditions and substances discharged.

    - Court finds that in order for a contract to preclude recovery of CERCLA response costs, there must be "clear provision which allocates these risks to one of the parties," and at the very least a "mention that one party is assuming environmental-type liabilities."

    - Since the agreement contained no such specific provision, court finds that it did not transfer CERCLA liability.

    - Court declares that federal common law should be developed on the issue.

11. Niecko v. Emro Mktg. Co., 769 F. Supp. 973 (E.D.Mich. 1991), aff'd, 973 F.2d 1296 (6th Cir. 1992).

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- While "as is" clause alone is insufficient to transfer CERCLA liability, additional contract language, providing that buyer "assumes all responsibility for any damages caused by the conditions on the property upon transfer of title," is found to be legally effective insulation of seller from CERCLA liability.

12. Purolator Prod. Corp. v. Allied-Signal, Inc., 772 F. Supp. 124 (W.D.N.Y. 1991).

    - Where pre-CERCLA contract provided in broad and clear terms that buyer assumed all liabilities, then the indemnity provisions were sufficient to encompass CERCLA liability notwithstanding absence of any language referencing CERCLA or the environment.

13. Gopher Oil Co., Inc. v. Union Oil Co., 955 F.2d 519 (8th Cir. 1992).

    - Court finds that seller's fraudulent misrepresentations as to the absence of site contamination render "as is" clause ineffective to transfer any CERCLA liability to purchaser.

14. Hatco Corp. v. W.R. Grace & Co., 801 F. Supp. 1309 (D.N.J. 1992), vacated and remanded 59 F.3d 400 (3d Cir. 1995).

    - In pre-CERCLA setting, indemnification or hold harmless from CERCLA-type liability must be based on unmistakable intent either through unambiguous terms or clear implication.

    - To effect release of any CERCLA claim, contract must either contain a broad, all-inclusive waiver of any and all claims, or a specific provision that expressly or by clear implication waives any claim.

    - District Court, applying federal common law, finds that contract in question does not contain any such provisions.

    - On appeal, Third Circuit applies state law on contract interpretation (the laws of New York as provided in the contract in question), finds ambiguities and remands for consideration of extrinsic evidence.

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15. Stychno v. Ohio Edison Co., 806 F. Supp. 663 (N.D.Ohio 1992).

- Landlord seeks CERCLA indemnification and defense from tenant pursuant to standard lease provision where tenant agreed to defend, indemnify and save landlord harmless from claims, damages and actions related to, among other things, property damage.

- Court denies tenant's motion for summary judgment on failure to state a claim, analogizing to insurance cases which hold that a demand for CERCLA response costs is tantamount to a claim for damages.

16. John S. Boyd Co., Inc. v. Boston Gas Co., 35 ERC 1672 (D.Mass. 1992), aff'd, 992 F.2d 401 (1st Cir. 1993).

- General assumption of liabilities in 1973 agreement found by district court to be insufficient to contractually allocate CERCLA liability.

- District court does not determine whether to apply proposed federal rule of decision or Massachusetts rule, since result under either rule would be the same.

- On appeal, First Circuit affirms allocation by district court, finding as well that the Circuit should follow the majority of courts and turn to state law for the substantive rule of contract interpretation so long as it "is not hostile to the federal interests animating CERCLA."

- Looking to Massachusetts law, Circuit Court finds that language was not broad enough to transfer liability.

- See Case 91 below, Scott v. NG U.S. 1, Inc., for 2004 state court decision on same transaction.

17. U.S. Steel Supply Inc. v. Alco Standard Corp., 1992 WL 229252 (N.D.Ill. Sept. 9, 1992).

- Where seller's disclaimer of representations and warranties in 1988 asset sale specifically excluded the environmental condition of real property, there was a clear intent not to shift CERCLA liability.

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18. Bowen Eng'g v. Estate of Reeve, 799 F. Supp. 467 (D.N.J. 1992), aff'd, 19 F.3d 642 (3rd Cir. 1994).

- Reference in corporate agent's pre-CERCLA indemnification from corporation to "any claim, action, suit or proceeding" found broad enough to include CERCLA-like claims.

19. GNB Inc. v. Gould, Inc., 1992 WL 277027 (N.D.Ill. Sept. 28, 1992).

- Where seller's summary judgment motion is based on 1983 contract language providing that buyer must "assume... all... liabilities of any nature... relating to the businesses and operations...," court finds sufficient ambiguities between contractual language and extrinsic evidence to preclude summary judgment.

20. Village of Fox River Grove v. Grayhill, Inc., 806 F. Supp. 785 (N.D.Ill. 1993).

- Court looks to state law to provide content of federal law on validity of releases.

- 1974 general release found sufficient to bar later CERCLA claim.

- While environmental matters were not mentioned in release, court found significant the fact that the releasor was well aware of potential contamination of the site when it settled its claims.

21. Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc., 844 P.2d 428 (1993).

- In state court proceedings, generator seeks indemnification from transporter for CERCLA liability based upon terms of Hazardous Waste Agreement prepared by transporter.

- Trial court awards summary judgment to generator based upon indemnification provision in Agreement, and appellate court affirms, but state Supreme Court reverses and remands, finding ambiguity and requiring further fact-finding.

22. U.S. v. Hardage, 985 F.2d 1427 (10th Cir. 1993).

- Court applies Oklahoma law to 1972 waste disposal agreement between generator and transporter and finds that indemnification provisions were sufficient to support district courts' summary judgment in favor of generator.

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23. Fisher Dev. Co. v. Boise Cascade Corp., No. 91-275 (JBS) (D.N.J. 1993), aff'd, 37 F.3d 104 (3rd Cir. 1994).

- Where resolution of commercial dispute in 1980 between property owner and tenant included release in favor of tenant, district court finds that tenant was relieved of CERCLA liability to owner.

- While district court initially leans toward development of federal rule on issue, court ultimately avoids holding on the point since, court concludes, result would be the same under New Jersey law and developing Federal rule.

- Third Circuit affirms, adopting district court analysis on federal rule issue.

24. Zoufal v. Amoco Oil Co., 1993 WL 208812 (E.D.Mich. Mar. 19, 1993).

- In 1982, gasoline service station property, and all fixtures and equipment, sold pursuant to contract which specifically included release and indemnification language pursuant to which buyer assumed all liability, but made no express mention of environmental claims.

- Court looks to both Michigan and federal cases and holds that the release was unambiguous and sufficiently broad to defeat buyer's subsequent contamination claims against seller.

25. Commander Oil Corp. v. Advance Food Serv. Equip., 991 F.2d 49 (2d Cir. 1993).

- Second Circuit, reviewing summary judgment motion on defense and indemnification in favor of buyer under Asset Purchase Agreement and related lease agreement, looks to New York law to determine whether contract language was adequately scrutinized.

- Court finds that the two related agreements, read together, leave reasonable basis for difference of opinion, and remands for consideration of extrinsic evidence.

26. Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10 (2d Cir. 1993).

- Where 1973 contract provided for separate agreement on assumption of liabilities by buyer, and was followed first by a wide-ranging assignment and assumption agreement and then by a general release in exchange for substantial consideration, court finds provisions sufficiently broad to encompass CERCLA liability.

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- Court follows principle that while federal law governs the validity of releases of federal causes of action, state law is to provide the "content" of federal law.

27. Joslyn Mfg. Co. v. T.L. James & Co., Inc. 836 F. Supp. 1264 (W.D.La. 1993).

- Assignee of 1942 lease provisions with wide-ranging indemnity found liable to landlord for assignor's environmental damage (though indemnity made no reference to environmental issues) as well as its own misdeeds.

28. New York v. SCA Serv., Inc., 38 ERC 1283 (S.D.N.Y. 1993), rev'd, 38 ERC 1764 (S.D.N.Y. 1994), appeal denied, 1994 WL 171165 (S.D.N.Y. Apr. 28, 1994).

- Transporter's written indemnification of generator for removal, storage and disposition of generator's waste found, in 1993 district court ruling, not to encompass generator's CERCLA liability as party that "arranged" for disposal.

- On motion for reconsideration, district court reverses its earlier decision and determines that the written indemnification does apply to CERCLA liability.

29. CP Chem. Inc. v. Exide Corp., Inc., 14 F.3d 594 (4th Cir. 1993).

- In 1976 chemical plant acquisition, contract specifically addressed indemnification on environmental contamination issues.

- Buyer later seeks cleanup cost recovery under CERCLA and state law.

- Fourth Circuit finds that contract bars indemnity claim, and remands for determination as to whether action is one for indemnity.

30. Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321 (7th Cir. 1994), reh'g denied, 1994 U.S. App. Lexis 2602 (7th Cir. 1994).

- Seventh Circuit finds that in 1972 sale agreement for real property, wide-ranging indemnity provided by buyer to seller was sufficiently broad to allocate CERCLA cleanup liability to buyer.

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31. 55 Motor Ave. Co. v. Liberty Indus. Finishing Corp., 1994 WL 241104 (E.D.N.Y. Feb. 2, 1994).

- Indemnity clause in 1981 Assumption and Assignment agreement between landlord and tenant is found too limited to unequivocally allocate CERCLA liability to one party.

32. CBS Inc. v. Hasbro, Inc., 1994 WL 421365 (E.D.Pa. Aug. 9, 1994).

- Allocation of environmental liability in 1985 sale agreement is found specific enough to accord full CERCLA liability to one party.

33. U.S. v. Lowe, 29 F.3d 1005 (5th Cir. 1994).

- Where a corporate officer is the target of a CERCLA claim due to actions or non-actions in his capacity as an officer, and the corporate bylaws provide that the officer is to be indemnified by the corporation in connection with any claim against him by reason of being an officer, CERCLA liability does not preclude indemnification.

34. Keywell Corp. v. Weinstein, 33 F.3d 159 (2d Cir. 1994).

- In 1987 property sale between two corporations, and subsequent release from buyer to seller's shareholders for any claims, liabilities, actions and causes of action under the sale agreement, release is found sufficient to shield former shareholders from indemnity obligations for CERCLA liabilities.

- Court notes, though, that state common law fraud claims may proceed.

35. Beazer East, Inc. v. Mead Corp., 34 F.3d 206 (3d Cir. 1994), cert. denied, 115 S. Ct. 1696 (1995).

- Third Circuit holds that agreements, whether pre-CERCLA or post-CERCLA, may require one party to indemnify another against CERCLA liability, so long as the indemnification is either specific enough to include CERCLA liability or general enough to include any and all environmental liability.

- The court further holds that no uniform federal rule on the issue is necessary, and that the federal courts should look to the law of the relevant state concerning construction or interpretation of contracts of indemnity.

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- As the contract in question provided that Alabama law would govern, the court applies the state law, which requires "clear and unequivocal language," and finds that the contract language was not sufficiently unambiguous as to warrant summary judgment on a contribution claim.

- Court remands for further proceedings.

- See case number 73 below for March 2000 decision on remand, and case number 100 for subsequent proceedings.

36. Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d 341 (7th Cir. 1994), reh'g denied, 1994 U.S. App. Lexis 36521 (7th Cir. 1994), cert. denied, 115 S. Ct. 1401 (1995).

- Seventh Circuit finds that broadly worded indemnification agreement is sufficient to allocate CERCLA cleanup liability to buyer.

- Court interprets agreement in light of applicable state law.

37. Joslyn Mfg. Co. v. Koppers Co., Inc., 40 F.3d 750 (5th Cir. 1994), reh'g denied, 1995 U.S. App. Lexis 3436 (5th Cir. 1995).

- Fifth Circuit holds that broad indemnification provisions in 1942 and 1949 leases were intended to cover all forms of liability including CERCLA, even though the Superfund law was not contemplated at time of agreement.

- Court then examines assignment of lease to determine whether 1950 assignment resulted in assignee's assumption of all of tenant's obligations under the leases, or only those arising after date of assignment.

- Applying Louisiana law, court concludes that assignee inherited all of tenant's obligations under the indemnity clause.

38. Elf Altochem v. U.S., 866 F. Supp. 868 (E.D.Pa. 1994).

- Provision from 1944 lease found to be unambiguous as to tenant's particular responsibilities in the case of specific accidents and injuries, and court rejects argument that tenant's responsibilities included indemnity for CERCLA contribution claim.

39. LaSalle National Trust v. ECM Motor Co., 41 ERC 1375 (N.D. Ill. 1995), rev'd, 76 F.3d 140 (7th Cir. 1996).

- 1991 supplemental agreement to earlier sale agreement acknowledges the existence of contamination, requires that the seller is to clean it up, and provides that the buyer's remedies are "exclusive and in lieu of, and not in addition to, any remedies or rights which it may have ... ."
- Buyer alleges breach of the cleanup obligations and sues seller, asserting a variety of causes of action, including a CERCLA count.
- Seller moves for summary judgment on CERCLA, arguing that buyer's exclusive remedies are those in the supplemental agreement.
- District court agrees, incorporating state law in interpreting contract, dismisses CERCLA count, and consequently dismisses the balance of the counts for lack of federal subject matter jurisdiction.
- Seventh Circuit reverses, finding that the CERCLA cause of action was not so patently without merit as to justify dismissal for want of jurisdiction.
- Appeals court notes that while the seller's agreement constitutes a compelling affirmative defense, the district court will have to consider the two agreements as a whole in interpreting the meaning of the limitation of remedies.
- Consequently, the Seventh Circuit reinstates state claims as well, so that the case as a whole would be before the district court.

40. Bedwell & Sons v. Geppert Bros., 280 N.J. Super. 391 (App. Div. 1995), appeal dismissed, 143 N.J. 481 (1996).

- Building contractor obtains broad indemnification from subcontractor concerning disposal of materials by subcontractor at GEMS landfill.
- Both parties are subsequently named in GEMS litigation, and contractor seeks indemnification.
- New Jersey appeals court rejects subcontractor's argument that CERCLA bars enforcement of the private indemnification agreement, and concludes that contractor is entitled to indemnification for full amount of its contribution to GEMS trust fund.

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41. Hatco v. W. R. Grace & Co., 59 F.3d 400 (3rd Cir. 1995), reh'g denied, 1995 U.S. App. Lexis 21625 (3d Cir. 1995).

- Third Circuit looks to state law to govern interpretation of contract as to allocation of CERCLA liability, and finds that under New York law consideration of extrinsic evidence is necessary to resolve ambiguities in release.

- Vacating judgment, Third Circuit remands to district court for further fact findings under New York law, rejecting district court's application of federal common law.

- Court notes that the trial court and parties used the terms "release" and "indemnity" interchangeably, specifies that the effects of each are different, and compares the differences in burden of proof under New York law.

42. Smithkline Beecham Corp. v. Rohm & Haas Co., 1995 WL 117671 (E.D.Pa. Mar. 17, 1995), rev'd, 89 F.3d 154 (3d Cir. 1996).

- Interpreting indemnification provisions of 1978 sale agreement, district court finds that seller of business retained liability for environmental contamination that predated seller's acquisition of the business.

- District court concludes that: (a) buyer agreed to assume cleanup liability for its own misdeeds; (b) seller retained all liabilities not specifically assumed by the buyer; and (c) under the doctrine of de facto merger applicable to the specific facts of the case, seller was responsible for the contamination that predated its acquisition of the business.

- Third Circuit agrees that the indemnity provisions of the pre-CERCLA agreement were broad enough to evidence the intent of the parties to include CERCLA-type liabilities of the business, but not liabilities of the prior owner of the business.

- Further, appeals court rejects application of the de facto merger doctrine, and thus refuses to find seller responsible as a matter of law for contamination pre-dating its acquisition of the business.

- Third Circuit reverses the judgment, and remands for district court to determine the litigants' relative responsibilities for older contamination in line with CERCLA's apportionment provisions.

43. GNB Battery Technologies, Inc. v. Gould, Inc., 65 F.3d 615 (7th Cir. 1995).

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- Seventh Circuit finds unambiguous transfer of CERCLA liability in 1984 stock sale and assumption agreement.

44. Cordova Chemical Company v. Michigan Dept. of Natural Resources, 536 N.W.2d 860 (Mich. Ct. App. 1995), appeal denied, 554 N.W. 2d 319 (Mich. 1996).

- State, aware of major environmental problems at site owned and operated by bankrupt chemical company, seeks buyer willing to share extensive cleanup obligations.

- Buyer and state Department of Natural Resources (DNR) enter into 1977 consent order pursuant to which buyer agrees to undertake certain removal activities, DNR agrees to complete other remedial actions, buyer pays DNR substantial sum to defray DNR costs, and DNR agrees that buyer will not have further cleanup obligations to DNR or other governmental agencies.

- Years later, CERCLA cleanup involves same property, and when EPA and others pursue buyer and DNR, buyer seeks indemnification from DNR.

- State Court of Appeals finds that 1977 consent order terms amounted to indemnification and release in favor of buyer, constituting valid transfer of liability to DNR.

45. Amoco Chemical Co. v. Tex Tin Corp., 902 F. Supp. 730 (S.D.Tex. 1995).

- Plaintiff brings suit in state court claiming breach of a cost-sharing agreement that allocated private party expenditures to be made pursuant to a CERCLA AOC.

- Defendant removes case to federal district court on basis that cost-sharing agreement arose under federal law, thus leading to original federal jurisdiction.

- Plaintiff moves to remand to state court for lack of subject matter jurisdiction, since right to relief for breach of contract arises under state law.

- On motion to remand, federal district court agrees that right to relief is created by state law, but denies motion on basis that Plaintiff's right to relief requires resolution of a substantial question of federal law in dispute between the parties, namely the CERCLA AOC.

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46. Taracorp, Inc. v. NL Industries, Inc., 73 F.3d 738 (7th Cir. 1996), reh'g en banc denied, (7th Cir. Feb. 13, 1996), entry of judgment on remand, 1996 WL 501721 (N.D. Ill. Sep. 3, 1996).

- Applying Illinois indemnity agreement law to a 1985 contract in which the indemnitor agreed to indemnify the indemnitee "for all obligations, responsibilities and liabilities, costs and expenses asserted against [the indemnitee] related to environmental hazards associated with the Facility," Seventh Circuit finds an unambiguous allocation of CERCLA liability.

- Seventh Circuit finds the provision sufficiently clear that extrinsic evidence is not considered by the court.

47. U.S. v. Hardy, 916 F. Supp. 1385 (W.D. Ky. 1996).

- At issue was a January 1964 indemnity agreement, supplementing a December 1963 waste disposal services contract, that provided that the waste disposal company would "indemnify and save [its customer] free and harmless from and against any and all loss, damage, injury, liability, and any claim or claims therefor, including claims for injury or death to any and all persons or property... resulting directly or indirectly by the collection, transportation and disposal by [the disposal company]."

- Court finds language sufficiently broad to encompass CERCLA liability.

48. Gopher Oil Co. v. Bunker, 84 F.3d 1047 (8th Cir. 1996).

- In 1973 transaction, seller agreed to indemnify buyer for liabilities "existing at closing."

- In state court litigation involving the parties, Minnesota Court of Appeals finds that the limiting phrase "existing at closing" precludes liability under later enacted environmental laws such as the Minnesota Environmental Response and Liability Act (MERLA), a CERCLA analog.

- Now, in federal proceedings involving the same parties and interpretation of the same transactional documents in a CERCLA setting, federal district court holds that the doctrine of collateral estoppel prohibits relitigation of the indemnity claim.

- Eighth Circuit agrees, finding that although CERCLA liability was not raised in the state court proceedings, the key issue -- applicability of the indemnity agreement to later-enacted

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environmental laws -- was finally determined on its merits adversely to the buyer, and could not be relitigated.

49. Lion Oil Co., Inc. v. Tosco Corp., 90 F.3d 268 (8th Cir. 1996).

- 1985 asset purchase agreement, in which seller gave buyer a broad-ranging indemnity for potential liabilities specifically including CERCLA, is then altered by a 1986 Amendment and Release: In return for a discount on remaining payments, buyer releases seller from its indemnification obligations.

- Buyer is subsequently embroiled in CERCLA liabilities, and seeks contribution.

- District court concludes that the 1986 amendment constituted a release, and Eighth Circuit affirms, following Arkansas law in finding no ambiguity and thus no need to consider extrinsic evidence to supplement the plain meaning of the contract language.

50. Amoco Chemical Co. v. Tex Tin Corp., 925 F. Supp. 1192 (S.D.Tex. 1996).

- Applying Texas law to cost-sharing agreement that allocated private party expenditures to be made pursuant to a CERCLA AOC, court finds no ambiguity in contract provision, construes it in accordance with its plain meaning, and refuses to dismiss breach of contract claim.

51. PMC, Inc. v. Sherwin-Williams Co., 1996 WL 546869 (N.D. Ill. Sep. 24, 1996), aff'd in part, vacated in part and remanded [on other grounds], 151 F.3d 610 (7th Cir. 1998), cert. denied, 119 S. Ct. 871 (1999).

- Applying Ohio law to a 1985 transaction, district court finds contract clear and unambiguous as to buyer's assumption of only those liabilities expressly set forth in the contract, which included certain specifically-described environmental conditions.

- Buyer is subsequently compelled by EPA to remediate contamination found after closing, and seeks recovery from seller.

- District court determines that since the newly-found contamination was not one of the conditions described and specifically assumed by buyer in the contract, seller retained liability.

- Summary judgment granted to buyer.

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- On appeal, Seventh Circuit rejects attempt by seller to introduce extrinsic evidence, finding proposed evidence to be non-objective and self-serving.

- Seventh Circuit affirms on contract issues; vacates and remands on other points.

52. Toledo v. Beazer East Inc., 103 F.3d 128 (6th Cir. 1996).

- Applying Ohio law to indemnification provisions of a 1978 asset purchase agreement, Sixth Circuit finds ambiguities, and thus reverses and remands district court determination requiring indemnification.

- Circuit instructs district court to consider extrinsic evidence, including purchase price, the parties' awareness of environmental problems at the plant, and their awareness of the "environmental regulatory horizon."

53. North Shore Gas Co. v. Salomon, Inc., 963 F.Supp. 694 (N.D.Ill. 1997), aff'd in part, rev'd in part and remanded, 152 F.3d 642 (7th Cir. 1998).

- Applying Illinois law, district court looks to terms of 1941 Plan of Reorganization to determine whether asset transferee contractually assumed all of transferor's liabilities, including current CERCLA liability.

- Finding extrinsic ambiguities in the Plan, district court considers substantial extrinsic evidence, including hundreds of documents.

- District court concludes that based on the Plan and the extrinsic evidence, transferee neither explicitly nor implicitly succeeded to CERCLA liabilities resulting from the transferor's business.

- Finding for asset transferee on issues of contract and successor liability, district court grants summary judgment to transferee.

- On appeal, Seventh Circuit agrees with district court's analysis on contract, but reverses and remands on issue of successor liability.

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54. A-C Reorganization Trust v. E.I. DuPont de Nemours & Co., 968 F.Supp. 423 (E.D.Wis. 1997).

- Court considers 1973 sale agreement and assumption agreement for chemical company division, pursuant to which buyer agreed to assume all liabilities of the division "of any kind, character or description, whether accrued, absolute, contingent or otherwise," other than known but undisclosed liabilities.

- Applying New York law, court finds that agreements show a clear and unambiguous intent to cover liabilities that would later accrue for the seller's prior acts, including CERCLA liabilities.

55. Paramount Communications, Inc. v. Horsehead Industries, Inc., 660 N.Y.S.2d 718 (N.Y. App. Div. 1997), appeal denied, 668 N.Y.S. 2d 562 (1997).

- State appellate court applies New York law to 1981 asset sale, including indemnification clause in contract pursuant to which buyer agreed to indemnify seller for all requirements later imposed concerning the assets, specifically including environmental actions or proceedings.

- Court finds that clause clearly and unambiguously encompassed all environmental laws and regulations without exclusion, and that therefore CERCLA liabilities were subject to indemnification by buyer.

- See case 81 below, where buyer subsequently seeks relief in federal court.

56. Keystone Chemical Co. v. Mayer Pollock Steel Corp., 1997 WL 401587 (E.D.Pa. Jul. 10, 1997).

- Applying Pennsylvania law, court considers summary judgment motions on two indemnification agreements, one between landlord and tenant, and a second between tenant and one of its customers.

- As to 1979 lease agreement, court finds pre-CERCLA indemnification of landlord sufficiently broad-ranging to encompass environmental harm, and grants summary judgment to landlord.

- As to waste disposal agreements between tenant and customer, due to limitations in indemnification, and undeveloped factual record, summary judgment motions of both parties are denied.

57. Cadillac Fairview/California, Inc. v. Dow Chemical Co., 1997 WL 149196 (C.D.Cal. Feb. 21, 1997), aff'd 299 F.3d 1019 (9th Cir. 2002).

- After trial concerning contamination from World War II rubber production operations directed and coordinated by U.S., district court engages in equitable allocation of cleanup costs among responsible parties, and allocates 100% of costs on U.S., based in part on government's contractual obligation to indemnify rubber manufacturing companies that were required to produce products for the war effort.

- Ninth Circuit affirms 100% allocation.

58. Diversified Services, Inc. v. Simkins Industries, Inc., 974 F. Supp. 1448 (S.D.Fla. 1997).

- Tenant spends nearly $1.2 million cleaning up pre-existing contamination, then pursues landlord for cost-recovery and contribution.

- Both parties seek summary judgment concerning landlord's contention that tenant assumed all environmental liabilities pursuant to the 1987 lease agreement.

- Applying Florida law, which strictly construes indemnification agreements, court finds that tenant's contractual obligations relate only to its own obligation to conduct its business in compliance with law, and do not oblige tenant to indemnify landlord for pre-existing environmental liabilities.

- Summary judgment on lease obligations granted to tenant.

59. Lentz v. Mason, 961 F. Supp. 709 (D.N.J. 1997).

- Listing agreement between property owner and broker for sale and lease of property did not render broker "equitable owner" of property, and could not confer CERCLA owner liability due to contamination caused by tenant/contract purchaser who broker introduced to owner.

60. American National Bank & Trust Co. v. Harcros Chemicals, Inc., 1997 WL 281295 (N.D. Ill. May 20, 1997).

- Brownfields development company acquires beneficial interest in Illinois land trust, then, finding land contaminated, pursues former tenant/operators on lease agreement and other bases.

- On summary judgment motions, court finds certain broad indemnification language in 1969 lease sufficient to allocate CERCLA liabilities to tenants, but also limits the bases upon which plaintiffs may proceed due to specific nature of Illinois land trusts and the rights of beneficiaries and their successors and assigns.

61. Dent v. Beazer Materials & Services, Inc., 156 F.3d 523 (4th Cir. 1998).

- Fourth Circuit finds that 1963 lease provision, obligating tenant to hold landlord harmless from all claims arising out of use of the leasehold, was sufficient to cover CERCLA claims.

62. Nestle USA Beverage Division, Inc. v. D.H. Overmyer Co., Inc., 1998 WL 321450 (N.D.Cal. Mar. 27, 1998), rev'd and remanded, 173 F.3d 861 (9th Cir. 1999), on remand, 2000 WL 335889 (N.D. Cal. Mar. 20, 2000).

- District court finds that in sale/long-term leaseback transaction, where tenant is not operator but solely sub-lessor, tenant's position is so akin to ownership that tenant must be considered a property owner for CERCLA purposes.

- However, in contribution dispute between tenant and subtenant, district court then finds that indemnification provisions of 1967 lease unambiguously allocated CERCLA-like liabilities to subtenant.

- Summary judgment granted by district court in favor of tenant and against sub-tenant.

- Sub-tenant appeals, asserting that certain phrases of the indemnification provisions are ambiguous and require interpretation.

- Ninth Circuit agrees that one of the phrases is ambiguous.

- Noting that ambiguities are ordinarily construed against the drafter, appeals court remands to district court since the evidence was inconclusive as to which party drafted the indemnification provision.

- After engaging in further discovery following Ninth Circuit remand order, parties move for summary judgment on remand before district court.

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- Finding no evidence presented by tenant to contradict subtenant's evidence demonstrating that tenant drafted the indemnification provision, district court finds that tenant drafted provision, follows Ninth Circuit's direction that the provision should be construed against the drafter, and enters summary judgment in favor of subtenant as a matter of law.

63. AMB Properties II, L.P. v. Redevelopment Agency of City and County of San Francisco, 1998 WL 184283 (N.D.Cal. Apr. 7, 1998).

- In 1995 property sale, contract specifically transfers environmental liability to buyer.

- Following closing, buyer discovers lead contamination, cleans it up and then sues seller, claiming, among other things, that private parties cannot allocate CERCLA liabilities.

- While court notes that there is "some indication that [California] state law is hostile to agreements to apportion strict liability," court concludes that clear federal public policy interest allows such allocation in the CERCLA context.

- Court also rejects buyer's attempt to present parol evidence to establish misrepresentation, since under California law parol evidence may not be introduced if it contradicts language of an integrated contract.

- Court grants summary judgment motion for seller.

64. Truck Components Inc. v. Beatrice Co., 143 F.3d 1057 (7th Cir. 1998), reh'g denied, No. 96-3018 (7th Cir. June 1, 1998).

- Seventh Circuit determines that in 1983 reorganization of manufacturing division into wholly-owned subsidiary (later spun off to third party), subsidiary contractually assumed all of the parent's liabilities of that business, and cannot later seek contribution from the parent for CERCLA liabilities.

- Court also rejects subsidiary's claim against former company president and shareholder, finding that while former president may have been subject to operator liability under CERCLA, subsidiary's promise to indemnify him, for damages arising out of any acts that he took as president, protected him against the claim.

65. Olin Corp. v. Yeargin Inc., 146 F.3d 398 (6th Cir. 1998), reh'g denied, No. 97-5606 (6th Cir. Aug. 13, 1998).

- In 1988 construction and maintenance contract between factory owner and contractor, contractor agreed to indemnify owner against any claims "of any nature whatsoever" arising out of or incidental to the contract.

- Sixth Circuit finds language sufficiently broad to encompass CERCLA claims resulting from spill that occurred during contractor's operations at the factory.

66. Waste Management, Inc. v. Aerospace America, Inc., 156 F.3d 1234 (6th Cir. 1998).

- Broad-ranging indemnification language in 1981 and 1988 asset purchase agreements does not mention CERCLA or environmental liabilities, but provides that buyers assume all liabilities, known or unknown, incurred in the ordinary course of business.

- Seller is subsequently named in CERCLA landfill cleanup suit based on seller's disposal of wastes at landfill from 1971 to 1978.

- Applying Ohio law to 1981 asset purchase agreement, and New York law to 1988 agreement (pursuant to choice of law provisions in each of the contracts), court finds buyers' indemnification obligations to seller to be unambiguous and enforceable, and finds disposal to have occurred in ordinary course of business.

- Summary judgment for seller affirmed.

67. Fina, Inc. v. ARCO, 16 F. Supp. 2d 716 (E.D.Tex. 1998), rev'd and remanded, 200 F.3d 266 (5th Cir. 2000), reh'g en banc denied, 210 F.3d 365 (5th Cir. 2000).

- In 1973 refinery sale agreement, buyer agreed to indemnify seller for all claims or liabilities concerning the refinery "accruing from and after closing."

- Seller had provided similar indemnity to prior owner/operator when seller acquired site in 1969.

- Buyer's 1990 site assessment uncovers contamination resulting in substantial cleanup, and buyer pursues seller under CERCLA and other causes of action.

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- Seller seeks summary judgment under the indemnity, asserting that since the CERCLA action could not have accrued before 1980, buyer was bound by its obligation to indemnify.

- Applying Delaware law, under Texas choice of law rules, district court notes that the indemnity provisions were carefully drafted by sophisticated parties, were unambiguous, and clearly allocated liability to the buyer.

- District Court grants summary judgment to the seller, since the CERCLA cause of action accrued after the closing.

- On appeal, Fifth Circuit notes that in the 1968 transaction, parties had excepted out liability for the prior owner's gross negligence, but that in the 1973 deal, the indemnity included no such limitation.

- Analyzing Delaware law, appeals court then concludes that to be enforceable a broad indemnity must at a minimum describe "on its face `that the subject of negligence of the indemnitee was expressly considered' by the parties in the drafting of the agreement."

- Fifth Circuit finds that since the 1973 indemnity made no mention of negligence, it is unenforceable as to the prospective CERCLA liability at issue.

- Appeals court reverses and remands, since the indemnity did not bar the buyer's claim under Delaware law.

- As to the 1968 indemnity, the district court had noted that the parties had stipulated that the obligation to indemnify the prior owner was that of the 1968 buyer (the seller in the 1973 transaction), and went on briefly to conclude that the indemnity was a "circuitous obligation" that then passed to the 1973 buyer.

- Fifth Circuit also analyzes the 1968 indemnity, applying Texas law pursuant to which, the court concludes, an indemnification is not enforceable as to strict liability claims unless the provision expressly states the indemnitor's intent to cover such claims.

- Since the 1968 provision included no such statement, the Fifth Circuit finds that the indemnity is not enforceable as to the strict liability CERCLA claim, and holds that on remand, the prior owner may not seek indemnification from its buyer for any amounts recovered against it by the current owner based on strict liability.

68. Hartz Mountain Corp. v. General Motors, Civ. No. 94-4814 (WHW) (D.N.J. Aug. 26, 1998).

- 1970 sale agreement is amended, following buyer's property inspection and before closing, to provide $75,000 price reduction due to buyer's concerns on site conditions. In amendment, buyer agrees to accept property "as is."

- In 1993, buyer's anticipated cessation of operations at the property triggers the environmental investigation and cleanup requirements of ECRA (now ISRA), and buyer discovers extensive contamination problems alleged to have been caused by seller.

- Buyer pursues seller for contribution under CERCLA and New Jersey Spill Act; seller asserts that buyer assumed any potential environmental liabilities by accepting property "as is."

- Buyer seeks summary judgment on liability, and asks court to strike seller's affirmative defense on the "as is" clause.

- Court grants buyer's motion under CERCLA and Spill Act, and strikes seller's defense on assumption of risk.

69. White Consolidated Industries, Inc. v. Westinghouse Electric Corp., 179 F.3d 403 (6th Cir. 1999).

- Fifteen years after 1975 property sale, buyer finds TCE contamination attributable to 1970 spill by seller, and buyer subsequently proceeds with cleanup.

- In sale agreement, seller had represented that it had no knowledge of conditions that could give rise to proceedings or investigations, or that violated any anti-pollution laws .

- Buyer seeks indemnity and contribution from seller, asserting -- among other things -- that seller's failure to disclose the 1970 spill constituted a misrepresentation giving rise to indemnity obligations.

- Seller acknowledges spill, but asserts that at time of sale, it had no knowledge -- or reason to believe -- that the spill would give rise to an environmental liability, and that buyer had assumed risk for all unknown liabilities.

- Federal district court agrees, and Sixth Circuit affirms, finding that seller had not breached any warranty and that the assumption of liability by the buyer was sufficiently broad to encompass CERCLA-type claims.

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70. Velsicol Chemical Corp. v. Reilly Industries, Inc., 67 F. Supp. 2d 893 (E.D. Tenn. 1999), aff'd, 229 F.3d 1155 (6th Cir. 2000).

- Following protracted negotiations and multiple drafts of sale agreement, chemical manufacturer acquires neighboring property from coal tar manufacturer.
- Seller rejects draft language that contains broad warranties as to compliance with laws and regulations.
- 1975 contract provides that "land and improvements are being sold on an `as is' condition at the time of sale," and seller's warranty is limited to representation that property is not in violation of governmental notices or orders affecting use of the property.
- Years later, buyer is required by EPA to proceed with investigation and cleanup of contamination at the property.
- Buyer pursues seller for cost-recovery/contribution; seller argues, among other things, that intent of the parties was to contractually transfer environmental liability to buyer.
- Following trial, court reviews extensive history of negotiations and drafting, makes detailed findings of fact and concludes that the parties intended to transfer all future liability, including environmental liability, to buyer.

71. Black Horse Lane Assoc. v. Dow Chemical Corp., Civ. No.97-1250 (NHP) (D.N.J. August 9, 1999), aff'd, 228 F.3d 275 (3d Cir. 2000).

- In 1985 sale agreement, seller agrees to clean up contaminated property "in accordance with and to the approval of the [New Jersey] DEP." No completion date is specified.
- Twelve years later, with cleanup still in progress, buyer sues seller, alleging that seller has breached its implied obligation to complete cleanup within a reasonable time.
- Two years into suit, buyer seeks summary judgment on breach of contract claim.
- While noting that under New Jersey law, courts imply contractual terms such as reasonable timeliness where necessary to give business efficacy to an agreement, the District Court rejects such implication here, since the parties had contractually agreed that only an independent regulatory agency -- DEP in this case -- could declare the cleanup process complete.

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- District Court further finds that even if reasonable timeliness were implicit in the contract, buyers had failed to adduce sufficient evidence of a breach.

- Thus, District Court denies buyer's summary judgment motion.

- On appeal, Third Circuit rejects District Court's conclusion that reasonable time period was not implicit in the contract terms, but affirms District Court's alternative finding that a reasonable time period has yet to expire.

- Third Circuit further finds that seller has not breached its implied obligations of good faith and fair dealing.

72. Canadyne-Georgia Corporation v. Cleveland, 72 F. Supp. 2d 1373 (M.D.Ga. 1999).

- 1972 bill of sale for assets including old pesticide factory provides that seller "desires to transfer all of its assets, subject to all of its liabilities..." to buyer.

- Later, the factory becomes the site of a multi-million dollar cleanup, and buyer sues seller and others for contribution.

- Seller seeks summary judgment, relying on the bill of sale language in support of its argument that the 1972 agreement transferred all liabilities, including CERCLA-like obligations, to buyer.

- Buyer argues to the contrary, noting, among other things, that while the bill of sale refers to all liabilities, those liabilities are later described on a schedule that makes no reference to contingent or environmental liabilities.

- Applying Georgia law, court finds that while such liabilities may be assumed under a sufficient agreement to do so, the contract at hand did not suffice, and failed to transfer environmental liabilities from seller to buyer.

- Summary judgment denied.

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73. Beazer East, Inc. v. Mead Corp., 2000 U.S. Dist. Lexis 4282 (W.D.Pa. 2000).

- See case number 35 above for 1994 decision by Third Circuit in this case as to propriety of allocating CERCLA obligations by contract, application of state law for indemnity interpretation, the ambiguity of the contractual language before the court, and remand for further proceedings consistent with the opinion.

- On remand, magistrate judge divides liability among pre-and post-sale owner/operators based on his factual findings.

- Magistrate accords certain weight to his factual findings that the buyer purchased property "as is" with knowledge of contamination and that the seller was entitled to a reduction in its allocation due to its reasonable expectation that the buyer was accepting responsibility for cleanup, and magistrate allocates 15% of the seller's liability to buyer based on contract considerations.

- In considering magistrate's report and parties' objections, district court increases buyer's contractual percentage of responsibility from 15% to 20%, and then considers other factors that increase buyer's share to 32.5%.

- See case number 100 below for 2005 decision by Third Circuit, reversing and remanding again following further cost allocation proceedings.

74. Two Rivers Terminals, L.P. v. Chevron U.S.A., Inc., 96 F. Supp. 2d 432 (M.D.Pa. 2000)

- Original builder and owner/operator of petroleum distribution terminal (referred to here as "initial owner") sells facility in 1986.

- Interim owner, who never operates terminal, sells to third party in 1991.

- 1991 buyer agrees to purchase property in "as is, where is" condition and agrees to indemnify interim owner from "all claims, demands or actions brought by any party in connection with the condition of the Premises including... those brought pursuant to any federal, state or local environmental law."

- Prior to closing of 1991 transaction, parties further agree to reduction in purchase price by way of addendum that states: "This price reduction is given expressly with the mutual understanding of the parties that Buyer will be responsible for ALL necessary

environmental remediation of any type, kind, and character which may be found necessary at the... Premises... ."

- Following closing, buyer finds that the environmental problems are worse than anticipated.

- Buyer sues initial owner based on federal and state statutory actions including CERCLA, as well as pursuing common law claims.

- Initial owner seeks summary judgment against buyer, asserting -- among other things -- that it is a third party beneficiary of the 1991 sale agreement between the interim owner and the buyer, pursuant to which buyer took on all cleanup responsibility. Buyer cross-moves.

- Court looks to Pennsylvania law, which provides that a party becomes a third party beneficiary only when: (1) the parties to the contract express an intention to benefit the third party in the contract itself; or (2) the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

- Applying state law to the facts of the case, the court finds neither express language nor intent, and concludes that the parties to the 1991 sale did not intend the initial owner to be a third party beneficiary of their agreement.

- Summary judgment entered in favor of buyer.

75. Bardon Trimount, Inc. v. Guyott, 732 N.E. 2d 916 (Mass. App. Ct. 2000).

- In 1988 $100 million stock sale of all shares of company, selling shareholders agreed to pay half of all environmental cleanup costs exceeding $1 million at a group of identified properties.

- Sellers' contribution obligations were subject to buyer's obligation to provide prescribed forms of notice within specific time limits.

- Buyer notifies sellers of certain cleanup costs and anticipated future costs, including CERCLA cleanup costs, at particular sites, and demands cost-sharing.

- Sellers refuse to contribute, asserting improper notice, and buyer commences suit.

- Trial court enters judgment for sellers, finding that buyer failed to comport with notice provisions.

- Appeals court affirms in part and reverses in part, addressing each of the notices and remanding for trial on particular aspects of buyer's claims where appeals court finds notice adequate.

76. Southdown v. Allen, 119 F. Supp. 2d 1223 (N.D.Ala. 2000).

- Contribution litigation involves, among others, several successive owners of a hazardous waste recycling facility as well as customers of the facility.

- In cross-motions for summary judgment, at issue is the meaning of language in two 1995 agreements: a Stock Purchase Agreement pursuant to which the current owner ("buyer") acquired the stock of the facility operator, and a companion Remediation Agreement pursuant to which the parties to the stock Purchase Agreement allocated certain responsibilities concerning identified contamination at the property.

- Remediation Agreement provided that seller (the most recent prior owner) would "at its sole expense" perform all necessary cleanup, and also that seller would indemnify, defend and hold the buyer harmless from and against liabilities, claims, damages and the like concerning the seller's obligations. Stock Purchase Agreement also contained a broad indemnity, as well as a non-compete clause.

- Seller subsequently commences litigation against others, including party from which it had acquired the facility in 1990 ("1990 owner") as well as facility customers.

- Buyer, customers, and 1990 owner all assert in their summary judgment motions that by agreeing in 1995 to clean up "at its sole expense," seller agreed to take all cleanup liability upon itself to the exclusion of others.

- Seller maintains that "sole expense" provision was meant to apply only as between seller and buyer, and not to bar contribution claims as to third parties, and in that regard submits two affidavits from its lawyers contending that the term "sole expense" was meant to refer only to the rights and obligations between the parties to the Remediation Agreement.

- Applying Texas law on contract, court finds that the affidavits were submitted to create an ambiguity where none exists based on the clear wording of the contracts, and refuses to consider them.

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- Court proceeds to find that the use of the term "sole expense" placed responsibility for the cleanup upon seller alone, and notes that seller could have included language in the agreements to explicitly preserve its contribution rights under CERCLA.

- Looking at the agreements as a whole, including seller's agreement not to interfere with buyer's business relationship with the facility's customers, court grants summary judgment motions on the contract and contribution issues in favor of buyer, 1990 owner and customers.

77. The Sherwin-Williams Co. v. ARTRA Group, Inc., 125 F. Supp. 2d 739 (D.Md. 2001).

- Buyer acquires Maryland paint factory by way of 1980 asset purchase agreement pursuant to which seller agrees to retain all liabilities -- known, unknown or contingent -- not specifically assumed by buyer.

- Environmental liabilities not mentioned in the agreement; liabilities assumed by buyer related to leases, mortgages, employee matters and a number of other specific issues.

- Starting in early 1980s state environmental authorities begin to direct buyer to commence cleanup due to long history of spills.

- After cleanup work proceeds for some years, buyer commences suit against seller, claiming, among other things, that seller retained environmental liabilities.

- Buyer seeks summary judgment on contract, and seller cross-moves for summary judgment on grounds that buyer's claim is barred by statute of limitations.

- Applying Ohio law pursuant to the choice of law provision in the agreement, court finds that contract unambiguously provided for retention of unassumed liabilities by seller, and that environmental liabilities were not assumed by buyer.

- However, looking to statute of limitations issue, court applies law of the forum (Maryland), which provides that a claim accrues when payment is made by party seeking indemnification.

- Applying Maryland's three year limitation period, court finds that buyer's contract claims for costs are limited to those incurred within three years of commencement of suit.

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78. State of New York v. Panex Industries, Inc., 2001 WL 241791 (W.D.N.Y. March 8, 2001), aff'd 2002 WL 1839206 (2nd Cir. Aug. 13, 2002).

- In 1984 business sale, contract includes representation and warranty that except as specifically disclosed there are no claims or litigations concerning the business entities; and also includes a two year indemnity for breach of representation or warranty, and for inaccurate representations.

- Disclosure schedule to the representations provision includes specific reference to notice from New York state environmental regulators as to intended environmental investigation of a landfill near one of the seller's facilities, and seller's contribution of funds to assist local governmental authorities in paying for the investigation.

- Years later, in litigation among the state and numerous PRPs concerning the landfill, buyer asserts indemnity claims against seller, asserting that the two year indemnity limitation period does not apply since the landfill was a disclosed potential liability.

- In cross-motions for summary judgment, court rejects buyer's arguments, finding that the two-year indemnity -- long-expired -- would only have applied to undisclosed or inaccurately disclosed conditions, and that the landfill matter was disclosed and thus not subject to the indemnity.

- Summary judgment granted to seller.

79. Waste Management of Alameda County, Inc. v. East Bay Regional Park Dist., 135 F. Supp. 2d 1071 (N.D.Cal. 2001).

- In 1979, after 37 years of operating site as a landfill, scavenger company agrees to sell property to regional park district for redevelopment into shoreline park, with transfers occurring in successive parcels concluding in 1990.

- While park district was aware in 1979 of the potential environmental contamination issues, including leachate problems, the agreement was silent as to allocation of environmental risks.

- Extrinsic evidence demonstrates that the scavenger company flatly refused to contractually accept long-term environmental responsibility. At the same time, at no point did the park district expressly or affirmatively agree to accept liability for environmental costs.

- Court concludes that "the contract avoided rather than squarely faced this contentious issue, and thus failed to clearly and unequivocally shift CERCLA liability to the park district."

- Thus, contract does not provide basis for allocating environmental liabilities at hand.

80. Buffalo Color Corp. v. AlliedSignal Inc., 139 F. Supp. 2d 409 (W.D.N.Y. 2001).

- In 1977, buyer acquires certain portions of a century-old dye plant.

- Subsequently, investigations compelled by federal and state authorities reveal soil and groundwater contamination that require corrective actions, the cost of which is alleged to potentially exceed $10 million.

- Buyer pursues seller for contribution and indemnity, and parties make cross-motions for summary judgment based on the terms of the 1977 sale agreement.

- Court considers two relevant provisions of the pre-CERCLA contract in addressing the assumption of liability and indemnification issues: (a) an assumption of liability clause in which the buyer agreed to assume, and indemnify seller against, liabilities relating to "claims made, or suits brought by employees or third parties for injury... or any damage to any property... which resulted from... fault or defect, patent or latent, in the physical assets... "; and (b) an indemnity from seller to buyer as to any other liability or obligation of the seller not assumed by the buyer.

- Court concludes that the pre-CERCLA assumption of liability did not contain such broad language as would reveal the intent of the parties for the buyer to assume environmental liabilities.

- As for seller's indemnification, court finds that seller's indemnity would have provided relief to buyer, except that another provision of the agreement provided that "... no claim with respect to any... representations, warranties and agreements shall be asserted after the second anniversary of the Closing Date." Thus, court finds that two year limitation precludes relief to buyer.

- Cross-motions for summary judgment denied.

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81. Horsehead Industries, Inc. v. Paramount Communications, Inc., 258 F.3d 132 (3d Cir. 2001).

- See case 55 above, where New York state appellate court found that 1981 asset sale included indemnification from buyer to seller that clearly and unambiguously encompassed all environmental liabilities.

- Now buyer seeks CERCLA contribution in federal court on same underlying environmental liability.

- Federal District Court dismisses case, finding that New York state judgment was preclusive.

- Applying New York's principles of collateral estoppel, Third Circuit affirms: "[W]e find that the scope of the indemnity provision is sufficiently broad to encompass the identical issues in the federal CERCLA contribution case, and that the parties had a full and fair opportunity to litigate the issue before the New York courts."

82. Coastline Terminals of Connecticut, Inc. v. USX Corp., 156 F. Supp. 2d 203 (D.Conn. 2001).

- In 1996 acquisition of Connecticut real property, buyer agreed to undertake compliance with Connecticut Transfer Act, and bought property "as is."

- Buyer then pursued prior property owner based on claims including CERCLA contribution.

- Prior owner moves to dismiss claims, asserting, among other things, that buyer waived right to private party CERCLA claims by accepting property "as is" and by accepting responsibility to comply with state transaction-triggered environmental law.

- Court denies motion, rejecting assertion that acceptance of Transfer Act responsibility waives federal claims, and finding no indication in the 1996 transactional documents that buyer expected to absorb all remedial costs alone.

- No discussion of fact that buyer was not in privity of contract with prior owner.

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83. Burlington Northern & Santa Fe Railway Co. v. Phillips Petroleum Co., 164 F. Supp. 2d 1272 (N.D.Okla. 2001).

- Tenant leases facility from 1994 to 1998. Lease terms include Tenant obligation to comply with all federal and state laws, to keep the property in safe condition, to restore property upon lease termination, and to indemnify and hold Landlord harmless for property damage caused by Tenant.
- In 1997, state environmental agency requires that Tenant remedy contamination caused by Tenant.
- Upon Tenant's failure to act, state requires that Landlord undertake remedial actions.
- Landlord complies, and then pursues Tenant for damages based on CERCLA, contract and related causes of action.
- Landlord seeks summary judgment on contract claims.
- Court grants summary judgment for liability based on lease terms, reserving damages determination for trial.

84. B.P. Amoco Chemical Co. v. Sun Oil Co., 166 F. Supp. 2d 984 (D.Del. 2001), motion for reconsid. granted in part, 200 F. Supp. 2d 429 (D.Del. 2002).

- In 1967 sale of 100% stock interest in corporation that operated facilities in Delaware, Sellers represent and warrant that other than specifically disclosed liabilities listed in schedules to the agreement, the corporation had no "liabilities of any nature, whether absolute, accrued, contingent, or otherwise, and whether due or to become due," and that "since June 30, 1967, there has not been... any damage... or loss... materially or adversely affecting the property or business... or any item carried in the property account... at more than $50,000."
- In 1990, Buyer is named in CERCLA suit concerning cleanup of a Delaware waste disposal facility that was active from 1957 through 1976 and that allegedly received wastes generated by the corporation.
- Buyer enters a Consent Decree agreeing to reimburse the government for response costs, pays the costs, and then seeks contribution from Sellers on claims including contractual indemnification and breach of representation and warranty, and breach of contract based on an alleged breach of a Voluntary Cleanup Agreement with state.

- Sellers move to dismiss complaint on a number of grounds, including failure to state a claim for relief for breach of warranty and breach of state cleanup agreement.

- Court grants motion to dismiss for failure to state a substantive claim for breach of warranty, finding that in a pre-CERCLA setting, the contract language is neither specific enough to encompass CERCLA liability, nor broad enough to include any future environmental liability.

- Court also grants motion to dismiss on the breach of contract claim involving state Voluntary Cleanup Agreement, since it was not a contract obligation as between Sellers and Buyer.

- Motion for reconsideration on other issues later granted in part.

85. Calabrese v. McHugh, 170 F. Supp. 2d 243 (D.Conn. 2001).

- Manufacturer uses thirty acre tract as landfill starting in 1911, and then starts to sell off portions in 1941.

- In 1972, manufacturer conveys final tract to a foundation set up by the manufacturer, and the foundation then sells the property to a third party, consummated by the filing of a warranty deed in which the third party acknowledged the longtime use of the property for dumping, and agreed, for himself, his heirs and assigns that no claims would be made against the manufacturer or foundation for loss or damage based on the longstanding landfill use.

- Third party subsequently conveys property to a buyer in a series of transactions through 1986.

- Buyer is then prevented from developing site when contamination is found, and state and federal authorities proceed with investigative and remedial activities, with site being placed on the NPL.

- Buyer sues prior owners and operators.

- Manufacturer and foundation seek summary judgment, arguing -- among other things -- that claims are barred by the release in the 1972 warranty deed, and that deed is a real covenant running with the land that binds successors to the 1972 purchaser.

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- Applying Connecticut law, court notes that the critical issue is whether the covenant runs with the land, and in that regard whether requisite intent can be found as expressed by the parties to the written agreement "read in the light of the circumstances attending the transaction and the object of the grant." (Quote is to Connecticut precedent.) If so, notes the court, it binds subsequent owners whether they have actual knowledge or not; if not, a subsequent owner is bound only if it acquires land with notice of the covenant.

- Applying Connecticut standards in this regard, court finds that the release language does not "touch or concern the land," and is not "appurtenant" to the land, and notes by example that no burdens or restrictions are applied to the property itself, such as prohibition of certain types of businesses or uses, or height or other limitations on development.

- Finding that the covenant does not run with the land, court then looks for evidence of actual knowledge by the current owner as to the release language.

- Finding no such evidence in the record, court holds that the release is only enforceable among the original contracting parties.

- However, other arguments of various defendants succeed, and summary judgment is granted to all defendants on all counts in the action.

86. Servco Pacific Inc. v. Walter Dods, Jr., 106 F. Supp. 2d 1034 (D.Haw. 2000), amended and superseded, 193 F. Supp. 2d 1183 (D.Haw. 2002).

- Tenant, proceeding with multi-million dollar cleanup, seeks contribution from landlord and others due to contamination that allegedly occurred prior to tenant's lease term. Landlord and tenant make cross-motions for summary judgment on liability, each asserting that contract language requires indemnity by the other.

- In 2000 motions, Court considers a complex series of leases, subleases and assignments among the parties, starting with 1961 lease and concluding with a 1983 "Triparty Lease" that included leases, subleases and assignments.

- Court finds in 2000 that the critical language being relied on by both parties in the 1983 agreements speaks of indemnity in prospective terms, and applying Hawaii contract law, finds that there were no clear and unequivocal transfers of CERCLA-like pre-existing liabilities as to either party.

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- Motions reheard in 2002, and court makes similar determinations on the contract issues.

87. Cytec Industries, Inc. v. B.F. Goodrich Co., 196 F. Supp. 2d 644 (S.D.Ohio 2002).

- Plaintiff, the owner/operator of an Ohio industrial facility from 1946 forward, having expended over $20 million in environmental investigation and cleanup costs, pursues another party for contribution on claims that include contractual assumption of liability for pre-1946 contamination.

- Plaintiff seeks summary judgment on liability based on arguments including contract.

- Argument on contractual assumption is based on 1952 Plan of Liquidation ("Plan") pursuant to which Defendant dissolved stock of a subsidiary and acquired its assets. Plaintiff claims that the former subsidiary ("Subsidiary") of Defendant had retained pre-1946 liabilities at the Ohio site based on earlier transactions, and that the 1952 Plan then contractually shifted that liability to Defendant.

- Plaintiff claims that express assumption was articulated by clause in Plan that stated: "[Subsidiary]... will distribute, subject to its liabilities, all of its property and assets of every kind, including its goodwill and business as a going concern, to [Defendant]... ."

- Applying Ohio law, court notes that in the case of a clear and unambiguous contract, interpretation is a matter of law with no issue of fact for a jury.

- Finding the clause in the Plan clear and unambiguous, court holds that the Plan does not provide an assumption of liability, and that there is no language in the Plan evidencing such intent as could shift CERCLA liability to Defendant.

- Summary judgment denied on contract claim, but Plaintiff prevails on alternative arguments.

88. RJE Corp. v. Northville Industries Corp., 198 F. Supp. 2d 249 (E.D.N.Y. 2002), aff'd, 329 F.3d 310 (2d Cir. 2003).

- In non-CERCLA setting involving dispute over fair market value of petroleum pipeline subject to environmental liabilities, court addresses a number of Second Circuit, New York federal district court and New York state cases on contract interpretation and application in environmental cleanup context.

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89. New West Urban Renewal Co. v. Viacom, Inc., 230 F. Supp. 2d 568 (D.N.J. 2002).

- See case number 9 under Caveat Emptor above for 1995 decision by New Jersey District Court in earlier litigation concerning this matter, where the court found that in a 1983 real estate transaction, an "as is" clause was insufficient to allocate CERCLA liability.

- In subsequent proceedings in reinstituted litigation, buyer seeks damages under CERCLA and under an array of state statutory and common law causes of action including ECRA, Spill Act, strict liability, fraudulent non-disclosure, and breach of the covenant of good faith and fair dealing.

- On motion by seller, court grants summary judgment on all state law claims other than Spill Act, finding that: (a) buyer was aware of environmental problems at the property by as early as 1985, (b) suit was not filed in the initial litigation until 1994, (c) application of the discovery rule requires conclusion that six-year New Jersey statute of limitations for torts and contract claims began to run in 1985, and (d) therefore the claims are time barred. (The court dismissed the ECRA claim as time barred, noting that the issue had already been addressed by the 1995 decision.)

90. County of Delaware v. J.P. Mascaro & Sons, Inc., 2003 Pa. Super. 284 (2003), appeal to state Supreme Court docketed, 2004 WL 1514383 (Pa. 2004), aff'd, 873 A.2d 1285 (Pa. 2005).

- In 1975, hauler wins contract to dispose of incinerator waste of Delaware County, Pa.

- Hauler's bid offered "full and complete removal and disposal" of incinerator residue.

- Contract provides that hauler is to choose the method of hauling and disposing of waste, subject to County's approval of disposal site, and also provides that hauler "shall defend, indemnify and save harmless [Delaware County] from and against all suits for claims that may be based on any alleged injury (including death) to any person or property that may be alleged to have occurred in the course of the performance of this Contract… ."

- Hauler chooses GEMS landfill in New Jersey, and disposes of incinerator residue there from 1975 to 1976.

- In 1987, Delaware County is joined as a third-party defendant in federal suit commenced by N.J. DEP concerning GEMS landfill cleanup. Litigation includes CERCLA claims. In 1995, County is

joined in New Jersey state court suit by homeowners in vicinity of GEMS landfill. Both cases settle.

- In state court, Delaware County seeks indemnification from hauler. As to CERCLA indemnity claim, hauler maintains that: (a) the parties did not intend for hauler to assume liability for disposal, but only for collection and transportation; and (b) the indemnification does not contain any language indicating that the hauler agreed to assume any liability for CERCLA, which had not been enacted at the time of the contract.

- Trial court enters judgment for County in full amount of claim. Hauler appeals.

- State appeals court affirms, finding: (a) the contract clearly and unambiguously included disposal as the responsibility of the hauler, and (b) in matter of first impression in Pa. state court, court should follow persuasive logic of federal court decisions that pre-CERCLA indemnification can include CERCLA liability where, as here, the indemnification is broad enough to cover any and all claims, and contains no limiting language.

- State Supreme Court affirms without opinion.

91. Scott v. NG U.S. 1, Inc, 16 Mass. L. Rptr. 666, 2003 WL 22133177 (Mass. Super. 2003); aff'd [with respect to contractual assumption of liability issue], rev'd in part, 67 Mass. App. Ct. 474 (2006); review granted, 448 Mass. 1101 (S.J.C. 2006); aff'd in part and remanded [on issues other than contractual assumption of liability], 450 Mass. 760 (S.J.C. 2008).

- 1973 assumption of liabilities, previously the subject of the 1993 First Circuit decision in John S. Boyd Co. v. Boston Gas Co. case (see case 16 above), is again considered, this time in state court action concerning state strict environmental liability statute.

- Trial court notes that it is not bound by federal court decisions, but that the state's Supreme Judicial Court has directed Massachusetts trial judges to consider federal court decisions under CERCLA when reviewing state strict liability environmental law.

- Finding federal court's decision well-reasoned, trial court determines that 1973 contractual provisions do not evidence the necessary intent to transfer contingent environmental liabilities to the 1973 buyer.

- State appeals court affirms, also looking back to federal court decision and adopting its analysis.

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- Massachusetts Supreme Judicial Court affirms, though contract issues are not addressed.

92. Dana Corp. v. Colfax Corp., 2004 U.S. Dist. Lexis 3973, 2004 WL 503742 (S.D.N.Y. Mar. 12, 2004).

- In November 1999, buyer purchases auto parts manufacturing facilities from seller.

- Terms include forum selection clause that any claim concerning the agreement be brought in the Southern District of New York, and a representation by the seller that to its knowledge, the business is not in material violation of any environmental laws.

- In August 2003, the buyer commences an action in Illinois state court alleging fraud by the seller concerning substantial environmental contamination at an Illinois facility.

- In September 2003, the seller files an action in the Southern District of New York, seeking a declaration of non-liability under CERCLA. The seller also moves in state court to dismiss the Illinois case.

- In January 2004, the Illinois state court reserves on the motion to dismiss pending action by the federal court in New York.

- In March 2004, the federal district court determines that it must reject jurisdiction over the dispute concerning contractual allocation of CERCLA liability, since no CERCLA claim has been made.

93. E.I. DuPont de Nemours & Co. v. United States, 365 F.3d 1367 (Fed. Cir. 2004), reh'g denied (August 31, 2004).

- Terms of 1940 contract between the U.S. and DuPont required DuPont to build, staff and operate an ordinance plant for the U.S. during World War II.

- Contract included wide-ranging indemnity and reimbursement clauses, providing that the government would hold DuPont harmless against any loss or expense, including litigation costs, "because of death, bodily injury or property damage or destruction or otherwise… arising out of or in connection with the performance of the work under this contract… ."

- In 1946, the parties enter a supplemental agreement, terminating the contract but preserving DuPont's indemnification protections.

- In 1984, EPA lists the site on the NPL, and in 1985, EPA seeks cleanup by DuPont and others.

- After expending substantial costs, DuPont files suit against the U.S. under the terms of the 1940 contract.

- In 2002, the federal claims court reluctantly grants summary judgment for the government. Claims court finds that while the pre-CERCLA indemnity was broadly enough written to allocate all of the risk to the government, the terms violated the Anti-Deficiency Act ("ADA"), pursuant to which the government could not incur an obligation to pay such costs without specific prior authority.

- In 2004, Federal Court hears appeal.

- Circuit Court agrees that the contract clauses should properly cover DuPont's CERCLA-related costs, and finds alternate authority, under the Contract Settlement Act of 1944, for the validity of the indemnity pursuant to the 1946 contract supplement.

- Federal Circuit reverses, and remands for determination of damages and entry of judgment in favor of DuPont.

94. Norfolk Southern Corp. v. Chevron, U.S.A. Inc., 371 F.3d 1285 (11th Cir. 2004) reh'g denied, 116 Fed. Appx. 255 (11th Cir. 2004).

- Tenant leases property from 1906 to 1961 for use as an oil terminal.

- In 1977, U.S. Coast Guard notifies landlord that oil is leaking from the site, and requires remediation.

- Landlord cleans up, and sues former tenant for reimbursement. Parties settle prior to trial; former tenant agrees to pay landlord $163,000 toward cleanup, and parties execute a Settlement Agreement.

- Settlement Agreement includes a release which provides that landlord would "release and forever discharge [tenant], its successors and assigns, from any and all actions… claims and demands… arising out of any contamination by oil of the [oil terminal] which is alleged to have occurred during [tenant's] use and occupancy… and all those matters alleged in [the lawsuit]."

- Release further provides that the release extends to "… all unknown, unforeseen, unanticipated and unsuspected injuries, damages, loss and liability… arising out of the alleged oil contamination… ."

- In 1999, landlord's successors discover that contamination from the tanks; namely, tank bottoms; had also leaked into an adjacent salt march.

- Successors sue former tenant under CERCLA and state law. Former tenant's successors move for summary judgment, arguing that the suit is barred given the events of 1977.

- District court grants summary judgment, concluding that the claims are barred by the res judicata effect of the 1977 dismissal.

- Eleventh Circuit disagrees, noting that while the 1977 dismissal does have a res judicata effect, the effect is "controlled by the Settlement Agreement into which the parties entered," which must be considered in order to determine what claims are precluded.

- Circuit Court then examines the Settlement Agreement and release, noting that it specifies contamination by oil. The court finds that by implication the settlement and release do not cover damage from contaminants other than oil, or damage arising due to contamination of an area other than the terminal.

- Finding that the current owner's claims are predicated upon leakage of "non oil contaminants;" that is, tank bottoms; and on off-site contamination, the Circuit Court determines that the suit may proceed.

95. Ford Motor Co. v. United States, 378 F.3d 1314 (Fed. Cir. 2004).

- In situation similar to DuPont v. U.S. case number 93 above, Ford and other entities are pursued by EPA and Michigan Department of Natural Resources, commencing in 1988, to clean up contamination that occurred during World War II when Ford produced bomber airplanes and parts pursuant to a 1941 contract (the "War Contract") with the U.S. Army Air Force.

- Having spent $7.2 million in addressing the state and federal claims, Ford seeks reimbursement from the U.S. pursuant to the terms of the War Contract and a 1946 Termination Agreement that reserved to Ford: "claims of the Contractor against the Government which are based upon the responsibility of the Contractor to Third parties... and which involve costs reimbursable under the Contract... but which are not now known... ."

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- U.S. rejects claim, and Ford proceeds in Court of Federal Claims. Court of Federal Claims dismisses Ford's action, and Ford appeals.

- Federal Circuit Court, referring to principles discussed in the DuPont case, notes that the indemnity provision in the War Contract provided that allowable costs to Ford would include "loss or destruction of or damage to property as may arise out of or in connection with the performance of the work under this contract;" that the Termination Agreement referred to all claims "not now known" resulting from performance of the War Contract; and that "there is no temporal limit as to when the claims would become known, provided their origin is performance of the War Contract."

- Circuit Court concludes that the "passage of time did not negate Ford's liability, and does not defeat the government's obligation of reimbursement."

- Circuit Court reverses and remands for entry of judgment in favor of Ford, including determination of amount of recovery.

96. Ferguson v. Arcata Redwood Co., 2004 WL 2600471, 2004 U.S. Dist. LEXIS 23613 (N.D. Ca. Nov. 12, 2004).

- Plaintiff, who is the current owner of property acquired in 1993, is proceeding with soil and groundwater cleanup required by state due to pre-existing contamination.

- Owner pursues others for contribution, including prior owners and operators.

- One defendant, ARC-LLC, owned the property for a brief period in 1988, after purchasing certain assets, including the property, from the former owner.

- Aside from plaintiff's claim of successor liability, which fails, and certain other state law claims such as nuisance, plaintiff asserts that ARC-LLC "expressly and implicitly" agreed to assume all of the predecessor's liabilities in the 1988 Asset Purchase Agreement.

- ARC-LLC moves to dismiss on the contract claim, and points to the definition of "Assumed Liabilities" under the Asset Purchase Agreement.

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- Court notes that the Agreement specifically defined and limited the assumed liabilities, and that environmental liabilities were not among them.

- Court further notes that as the Agreement expressly defined the assumed liabilities, it could not be argued that ARC-LLC implicitly agreed to assume environmental liabilities.

- Court grants ARC-LLC's motion to dismiss on the contract claim.

- See case 101 below for further proceedings in this litigation.

97. Occidental Chemical Corp. v. Maxus Energy Corp., 2004 WL 2861025 (Ohio Ct. App. Dec. 10, 2004).

- In 1986, Occidental acquired Diamond Shamrock from Maxus pursuant to a Stock Purchase Agreement that included provisions dealing with the manner in which environmental liabilities would be allocated between the parties.

- Three separate categories of liabilities were established: (1) Superfund sites, (2) federal Superfund litigation, and (3) active plant sites. Allocation percentages differed in the two provisions at issue. In one (Article IX), Maxus was responsible for 100% of specified liabilities including those at Superfund sites; in the other (Article X), costs would be shared equally.

- Contract suits have ensued, including litigation in Texas and Ohio.

- In the Ohio declaratory judgment suit, the site at issue is a Superfund site in Ohio for which Occidental seeks 100% coverage under Article IX of the Stock Purchase Agreement. Occidental seeks summary judgment.

- Maxus notes that Article IX contains the limiting language "but excluding matters expressly covered by Article X hereof," points out that the Ohio Superfund site receives pollution from an active site that Occidental has continued to operate, and contends that the contract language creates an ambiguity in this situation requiring submission of extrinsic evidence.

- Trial court enters summary judgment for Occidental, but appellate court reverses, finding the allocation language ambiguous, and providing for consideration of extrinsic evidence to determine the intent of the parties in a situation where a site appears to fit in two categories of allocation.

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98. Muniz v. Rexnord Corp., 2004 WL 2921873, 2004 U.S. Dist. LEXIS 25362 (N.D. Ill. Dec. 15, 2004).

- In 1993, RHI and Fairchild – two buyers of an interest in an operating entity ("Rexnord") -- agree to jointly and severally indemnify and safe Rexnord harmless "from and against all losses, liabilities, claims, damages,… costs and expenses (including… expenses and fees of outside attorneys… for investigating, preparing, or defending against any liability…), relating to Rexnord's… ownership, operation, possession or control of… businesses, properties or facilities on or prior to August 19, 1998… arising out of or in any way connected to an Environmental Law… as a result of the generation, use, handling, storage, transport, disposal, release, or threatened release of any Materials of Environmental Concern."

- In 2004, suit is commenced against Rexnord and others in U.S. District Court in Illinois, under CERCLA, RCRA and common law causes of action, based on allegations that Rexnord and others have caused groundwater contamination that has damaged the plaintiffs.

- In addition, U.S. EPA has alleged that Rexnord is liable for property damage and groundwater contamination, and under an AOC with EPA Rexnord has become obligated to provide an alternative water supply to local residents.

- In turn, Rexnord seeks indemnity from RHI and Fairchild.

- RHI and Fairchild seek dismissal of the Rexnord claim, asserting that Rexnord has not suffered a "recoverable loss," and contending that the Illinois district court is an improper venue based on the choice of law and forum selection provision of the purchase agreement.

- District court finds that under the indemnity and defense provision of the purchase agreement, eligible defense costs have been incurred, and that the alternative water supply costs are eligible as well.

- As to choice of law and venue, purchase agreement states that rights and obligations of parties "shall be… construed and interpreted in accordance with, the law of the State of Delaware. …Any legal action or proceeding with respect to this Purchase Agreement may be brought in the courts of the State of Delaware or of the United States of America for the Southern District of New York… . Nothing… shall affect the right of the other parties to…

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commence legal proceedings or otherwise proceed against the other parties in any other jurisdiction."

- District court concludes that while the purchase agreement contains a choice of law requirement, there is no limit on Rexnord's right to bring suit in any other jurisdiction than those specifically named in the agreement.

- Motion by RHI and Fairchild to strike or sever the Rexnord claims is denied.

99. St. Charles Mfg. Partnership v. Whirlpool, 398 F.3d 593 (7th Cir. 2005).

- In 1989, Whirlpool sells contaminated manufacturing facility to buyer, undertaking that "[as] soon as reasonably practicable, Seller will undertake, in accordance with applicable law and regulations, such remedial action as is necessary to bring... [the property] into compliance with... environmental laws and regulations."

- Subsequent dispute between the parties over the cleanup is settled in 2000 by an agreement requiring Whirlpool to clean up the property and obtain a "comprehensive 'No Further Remediation' letter (NFR) from the Illinois Environmental Protection Agency (IEPA)."

- Buyer, in turn, releases Whirlpool from all claims concerning preexisting conditions at the facility.

- Whirlpool obtains NFR; Buyer sells property to third party.

- Then buyer pursues Whirlpool on breach of contract claim, asserting that NFR was inadequate in that it was "voidable," and that buyer had to sell to third party at discount due to nature of NFR letter.

- Buyer also asserts that Whirlpool's submission to IEPA was incomplete, inaccurate and misleading.

- Whirlpool counterclaims for damages under the second contract and moves for summary judgment.

- District court grants summary judgment to Whirlpool; buyer appeals.

- Circuit Court notes that under Illinois law, all NFRs are voidable if site activities are not undertaken in full compliance with Illinois law, and that Whirlpool could not have obtained anything more than it did.

- Court declines to second guess decisions of IEPA, and affirms district court decision.

100. Beazer East, Inc. v. Mead Corp., 412 F.3d 429 (3d Cir. 2005), cert. denied, 126 S.Ct. 1040 (2006).

- See case summaries 35 and 73 above for prior history of this allocation case, including district court's adoption of magistrate's report that 67.5% of costs are to be allocated to seller, and 32.5% to buyer.

- In 2002, district court conducts trial to determine which of buyer's costs incurred through 1999 are recoverable CERCLA response costs. Court finds approximately $4.8 million in recoverable costs, and allocates in the percentages set forth above.

- District court subsequently orders seller to pay approximately $1.5 million in pre-judgment interest, and then orders seller to pay 67.5% of buyer's ongoing costs.

- Seller appeals.

- Third Circuit finds that district court's referral of matter to magistrate was flawed, in that referral was over seller's objection and that magistrate played an adjudicatory role that is impermissible in the absence of consent of the parties; namely, magistrate determined the parties' equitable share of response costs: one of the ultimate issues to be tried.

- Circuit Court stresses that magistrate judge did not facilitate the district court's ultimate adjudicatory function, as is the magistrate's appropriate role, but rather assumed that function without the parties' consent, resulting in an abuse of discretion.

- Third Circuit remands for new equitable allocation before district court.

- Appeals court also finds that district court did not properly evaluate the contractual intentions of the parties, and inappropriately prioritized the "polluter pays" principle over other equitable factors.

- Third Circuit also directs district court to provide, in judgment, a provision authorizing parties to re-litigate allocation if new evidence or events would reasonably bear on the equity of the allocation of future costs.

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101. Ferguson v. Arcata Redwood Co., 2005 U.S. Dist. LEXIS 18015, 2005 WL 1869445 (N.D. Ca. Aug. 5, 2005).

- See case 96 above for prior decision, where court grants a former owner's motion to dismiss plaintiff's contract claims.

- Now, the same former owner, ARC-LLC, seeks summary judgment on plaintiff's state claims, and on ARC-LLC's equitable indemnity claim against Quebecor, the seller in the 1988 Asset Purchase Agreement (the "APA") pursuant to which ARC-LLC acquired the subject property.

- The court grants summary judgment for ARC-LLC on the plaintiff's state claims.

- As to the ARC-LLC/Quebecor APA, the court notes that ARC-LLC had initially asserted a claim for contractual indemnity under a paragraph of the APA that provided for a "general cross indemnity" brought within two years of the closing, but that the claim could not be asserted as to litigation that began many years after that.

- ARC-LLC further argues, however, that it is nonetheless entitled to equitable indemnity, and that the claim, without time bar, had been preserved by another paragraph of the APA that stated that "the parties shall have and retain all statutory, regulatory and common law rights of indemnity, contribution or other recourse against each other with respect to third party claims… and resulting liabilities and expenses which arise out of… such other party's ownership, use, misuse, or operation of the [assets or business]."

- Court notes that ARC-LLC may bring a claim for equitable indemnity under the Cal. Code of Civil Procedure section 1021.6, and that the state Supreme Court has recognized that a potential indemnitee may be eligible to recover attorney fees under that section even if the indemnitee has been absolved of all liability for a plaintiff's alleged injuries.

- The court notes, though, that to prevail ARC-LLC would have to demonstrate that it was required to act due to the indemnitor's tort, and in the absence of such proofs summary judgment is denied.

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102. Caldwell Trucking v. Rexon, 421 F.3d 234 (3rd Cir. 2005).

- For decades, Rexon manufactures electronics components at two factories in New Jersey.
- Starting in 1969, Rexon uses the services of Caldwell Trucking Company in Fairfield, New Jersey, for disposal of certain of its liquid wastes.
- Pullman Corporation owns the stock of Rexon from 1984 to 1989.
- In 1989, Pullman Corporation sells the stock of Rexon to a new parent corporation.
- In the stock purchase agreement, Pullman agrees to "assume and become liable for, and pay, perform and discharge and to indemnify [Rexon] and to hold [Rexon] harmless from and against any and all liabilities and obligations with respect to… any actual or alleged violation of any non-compliance by [Rexon] with any Environmental Laws of or prior to the Closing Date (including without limitation, Superfund liabilities or similar liabilities for other sites…)."
- In 1983, the Caldwell Trucking facility is placed on the Superfund NPL, and in 1986 and 1989 EPA issued Records of Decision requiring cleanup of contamination there.
- In 1994, Caldwell Trucking and others (the "group") enter a consent decree agreeing to remediate the site and to reimburse the federal and state governments, and in 1995 the group sues Pullman, Rexon and others.
- The group seeks summary judgment on liability against Pullman and Rexon. The District Court grants summary judgment, with its decision as to Pullman based on contractual obligation. Then, in the following damages trial, the court accords Pullman an 8.05% share of liability, amounting to close to $2 million.
- Pullman and others appeal, with Pullman arguing, among other things, that the District Court erroneously interpreted the stock purchase agreement as providing for indemnity and assumption of liabilities in the circumstances at hand.
- On appeal, the Third Circuit focuses on the retention of liabilities provision of the stock purchase agreement, noting that under the agreement, New Jersey law applies.

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- Court notes that Pullman appears to be arguing that the retention of liabilities clause would apply if Rexon itself paid its own share of remediation expenses, but not if others, such as the PRP group, incurred the costs themselves. Alternatively, Pullman argues that the retention of liabilities applies only to Rexon's own facilities, and not to third party sites such as Caldwell Trucking. Pullman also argues that as an indemnitor only, it cannot be sued directly by the third parties.

- As to the site-specific argument of Pullman, the appeals court points to the specific language extending responsibility to "Superfund liabilities or similar liabilities for other sites…," and finds the language broad enough to cover all of Rexon's environmental liabilities.

- As to the degree of liability that Pullman took on, and whether it constituted only an indemnity and not an assumption of liability, the appeals court also finds the language sufficiently broad to cover both, but, noting that the district court had found some ambiguity that it resolved in the group's favor, and given that no objection had been raised to introduction of extrinsic evidence, the appeals court addresses it.

- The Third Circuit finds that the extrinsic evidence strongly supports the district court's conclusion that the agreement covered all of Rexon's environmental liabilities on-site and off-site.

- The Third Circuit finds that the liability retention language was more expansive than a mere indemnification and that it encompassed an assumption of liabilities.

- The court further finds that even as to the indemnity alone, the language was sufficiently broad-ranging, and that given Pullman's involvement and participation in the case from the beginning, and its financing of Rexon's defense, the two-step process that would ordinarily apply through third party practice was "in effect" accomplished.

- District court judgment is affirmed.

103. The Coy/Superior Team v. BNFL, Inc., 174 Fed. Appx. 901 (6th Cir. 2006), cert. denied 127 S.Ct. 983 (2007).

- In 1997, BNFL enters a contract with the Department of Energy to decommission three former uranium processing buildings at DOE's East Tennessee Technology Park near Oak Ridge, Tennessee. BNFL then subcontracts out certain demolition and disposal work to specialty contractors.

- In 2000, Coy/Superior successfully bids for a demolition and scrapping contract covering four large condensers, and the parties enter a subcontract.

- During the bid process, BNFL discloses the possibility that asbestos would be encountered.

- The subcontract provides that "BNFL has removed all known asbestos-containing materials," and that if Coy/Superior "encounters any suspect materials in the execution of its work, it shall notify the BNFL STR [Subcontract Technical Advisor] immediately."

- BNFL also acknowledges that it is responsible for wastes generated and for asbestos abatement while the condensers remain at the work site.

- The subcontract also provides that Coy/Superior "shall assume total regulatory responsibility, liability, and title to the wastes and recyclable material upon loading onto the Subcontractor's vehicle at the [technology park] site," and that "wastes and/or by-products generated during shipment, storage, disposal and/or other management of the waste shall be the responsibility of [Coy/Superior] and shall be disposed via approved disposal methods and procedures."

- Following execution of the subcontract, Coy/Superior learns of potential remaining asbestos, and so informs BNFL. BNFL arranges for testing at locations suggested by Coy/Superior, finds asbestos, and arranges for its abatement. Coy/Superior then requests further sampling in other areas and BNFL also complies, though no asbestos is found in the second round.

- In May 2000 Coy/Superior loads the dismantled condenser pieces onto its vehicles at the work site and moves them to another location at DOE's technology park.

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- Coy/Superior then becomes aware of more asbestos in the condenser parts, and so notifies BNFL, but BNFL declines to accept further responsibility.

- Litigation ensues, including cross-summary judgment motions. The district court grants Coy/Superior's motion for an order declaring BNFL responsible for the remaining asbestos abatement, and denies in part BNFL's motion for declaratory judgment on liability. A bench trial is then conducted on a remaining contract claim and on damages.

- In part, the district court's decision is based on its finding that the liability transfer provision was ambiguous as to when the environmental liability transfers to Coy/Superior, and its conclusion that title to the materials, and liability for the materials, did not shift until the condensers left the technology park.

- On appeal, the Sixth Circuit reverses the lower court's summary judgment determinations, and remands with instructions to enter summary judgment in favor of BNFL on its motion for declaratory judgment. .

- Noting that Coy/Superior offered no evidence to support a claim that it relied on any interpretation of the liability assumption paragraph of the subcontract, and that Coy/Superior instead argued that waste liability could not be transferred no matter what the language, the appellate court reviews the history of Sixth Circuit cases allowing contractual allocation of environmental risk – even by way of a simple "as is" clause – and concludes that the liability transfer was proper, that no ambiguity was established, and that title to the materials was not a relevant issue.

104. Vine Street, LLC v. Keeling, 460 F.Supp. 2d. 728 (E.D.Tex. 2006).

- Property owner, whose site in Tyler, Texas was used by a laundromat/dry cleaner from 1961 to 1975, commences suit against a number of parties in 2003 due to discovery that the dry cleaning solvent perchloroethylene ("perc") has impacted the site and requires cleanup.

- Among the parties sued are Maytag, Fedders and Borg-Warner, each of which exerted ownership, during the 1961-1975 period, over Norge, the dry cleaning equipment manufacturer whose dry cleaning machines were used by the laundromat/dry cleaner.

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- Property owner contends that defective design of dry cleaning equipment led to perc discharges, and court has allowed CERCLA claim against manufacturers to proceed based on potential "arranger" liability.

- Among the issues at trial is whether the 1968 purchase agreement, by which Borg-Warner transferred its interests in Norge to Fedders, reflects express or implied contractual assumption by Fedders of Borg-Warner's pre-1968 liabilities concerning the Norge Division.

- Court considers three sentences in the 1968 agreement that Borg-Warner contends to be broad enough to show that Fedders had assumed Borg-Warner's CERCLA liabilities: "Sentence 1" refers to pre-1968 contractual obligations being assumed by Fedders; "Sentence 2" refers to warranties, guarantees, indemnification agreements or the like concerning Norge products being assumed by Fedders; and "Sentence 3" recites Fedder's agreement to indemnify Borg-Warner and hold it harmless from liability arising out of suits, demands, proceedings or the like for Fedder's failure "to pay, perform and discharge such obligations and liabilities of Seller or injury or loss suffered or alleged to have been suffered by any customer of products sold by [Norge] arising out of the sale to Buyer of the business, properties and assets contemplated by this Agreement or by any person out of any action taken by Buyer on or after the Closing Date."

- Court does not find any of them reflective of express or implied assumption of liability by Fedders.

105. City of Chicago v. Arvinmeritor, Inc. 2006 WL 3431910 (N.D. Ill. Nov. 28, 2006).

- Nailite and other companies have been sued by City of Chicago under CERCLA, with Nailite's involvement based on a predecessor company's former ownership of property that is the subject of the lawsuit.

- In turn, Nailite sues shareholders of predecessor company based on 1988 stock purchase agreement, and seeks declaratory judgment that sellers are obligated to indemnify, defend and hold Nailite harmless, and to pay, perform and discharge any obligations Nailite may have based on its former interest in the Chicago site.

- Sellers seek to dismiss complaint based on assertions that, among other things, the claims are not ripe for adjudication and the stock purchase agreement does not impose a duty to defend.

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- Court looks to the 1988 stock purchase agreement, noting that in the absence of a governing law provision, the court will apply Illinois law since the buyer and the entity whose stock was being sold were Illinois corporations.

- Stock purchase agreement, section 7.2(i), provides that "... Sellers... jointly and severally agree to indemnify, defend, and hold harmless Buyer... from and against all demands, claims, actions or causes of action, assessments, losses, damages, liabilities, costs and reasonable expenses, including without limitation, interest, penalties and reasonable attorneys' fees and expenses (collectively, “Claims”), asserted against or imposed upon or incurred by Buyer... ."

- Agreement also provides, in section 7.2(v), that within 30 days of receiving notice of a claim for which it seeks indemnity and defense and to be held harmless, Buyer would in turn have to so notify the Sellers, and that "[f]ollowing such notice, the Indemnifying Party shall have the right, after acknowledging in writing to the Claiming Party that the Indemnifying Party is indemnifying the Claiming Party, at its sole cost and expense, to contest or defend such action, claim or demand, through attorneys... of its own choosing, and satisfactory to the Claiming Party, and in the event it elects to do so, it shall promptly notify the Claiming Party of its intent to contest or defend such action, claim or demand."

- Court finds that language of section 7.2(i) is explicit and unambiguous in imposing a duty upon Sellers to defend Nailite against all claims and actions concerning the Chicago site.

- Court further rejects Sellers assertions that section 7.2(v) gives them the option, rather than the obligation, to defend Nailite, finding that a fair reading of the provision, at this early stage of litigation, is that once Sellers have acknowledged their indemnity obligation, they may choose to minimize their indemnity obligation either by defending the claim or demand, or alternatively by stepping in and settling the claim, thus reducing litigation expenses.

- Motion to dismiss is denied.

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106. OXY USA, Inc. v. Borden, Inc., 208 Fed.Appx. 443, 2007 WL 62529 (6th Cir. 2007).

- In 1974, Borden enters into an Asset Purchase Agreement to acquire the Levey Division of Cities Service Company (predecessor of OXY USA), which operated an ink manufacturing plant in Ohio.

- In 1997, OXY and others are named in a CERCLA section 107 private party cost recovery action concerning the Skinner Landfill in Ohio, and the claim against OXY is based on alleged disposal of wastes at the landfill by the Levey Division prior to the 1974 closing of the Cities/Borden asset deal.

- OXY later claims against Borden, asserting that Borden assumed liability for the landfill cleanup costs under the Agreement

- Agreement provides that " ... Borden hereby assumes all the obligations of Cities, arising out of events occurring after the Closing Date relating to the business or assets of the Levey Division transferred hereunder, except to the extent that any such obligation arises from a breach by Cities of a warranty or covenant. Cities will continue to be responsible for all obligations arising out of events occurring prior to and on the Closing Date relating to the business or assets of the Levey Division."

- Borden moves for summary judgment, and district court denies, finding that the clause is ambiguous, that both parties have proposed plausible interpretations, and that it will be necessary to consider extrinsic evidence.

- At non-jury trial, court considers evidence and finds in favor of Borden, concluding that OXY failed to sustain its burden of demonstrating that the Agreement showed a "clear and unmistakable intent" to transfer liability to Borden for environmental hazards at the landfill, and that the most reasonable interpretation of the Agreement is that the closing date is the demarcation line for determining liabilities, with Cities retaining responsibility for liabilities from activities that took place at or before the transfer date, and Borden assuming liability for activities occurring thereafter.

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- On appeal, Sixth Circuit affirms.

- Applying New York law, as called for in the Agreement, Court notes that pre-CERCLA indemnity can transfer unknown future liabilities based on sufficiently broad contract language.

- Court finds temporal demarcation as clear based on when underlying event occurred, and that in this case the event was pre-closing dumping of wastes at the landfill.

107. AmeriPride Services, Inc. v. Valley Industrial Service, Inc., 2007 WL 656850 (E.D.Cal. Feb. 28, 2007).

- Property in Sacramento, California is developed in 1965 as dry cleaning and uniform-washing facility by Valley Industrial.

- Dry cleaning process, which used perchloroethylene ("perc"), is discontinued in 1981 or 1982.

- In 1983, Mission Linen enters agreement to buy five industrial laundry facilities, including Sacramento site, from Valley Industrial.

- Due to FTC concerns, Mission is only allowed to operate two of the five facilities, and to comply with FTC mandate Mission buys and sells the other three, including Sacramento, to Welch's Overall Cleaning Co., a subsidiary of American Linen Supply Co.

- Fourteen years later, in 1997, perc contamination found at Sacramento site.

- In 1998, American Linen Supply and Welch's merge, becoming AmeriPride.

- In 2000, AmeriPride sues Mission and others, asserting, among other things, that Mission had agreed to indemnify AmeriPride for environmental liabilities.

- Parties cross-move for summary judgment on the contract issues.

- AmeriPride's claim is premised on section 18 of the contract, which provides that "… [w]ith respect to claims and items of litigation resulting from operations of the Rental Business prior to Closing Date, Seller shall continue to defend such matters without regard to the limitations on survival of representations and warranties set forth herein and will be liable for all liabilities and expenses resulting therefrom."

- Mission asserts that section 18 does not provide an environmental indemnification, and that the parties did not reach any explicit or implied agreement concerning liability or indemnity for environmental issues.

- Mission notes that several other provisions of the agreement contain explicit indemnity provisions, including section 13(b), which provides that "Seller shall indemnify and hold the Purchaser harmless against and in respect of any liabilities, claims, damages or deficiencies asserted against or suffered by Purchaser… arising from any misrepresentation, breach of warranty or a non-fulfillment of any agreement on the part of Seller under this Agreement, or any misrepresentation in or omission from any certificate or other instrument to be furnished to Purchaser… and any and all actions, suits, proceedings, demands… costs and expenses incident to any of the foregoing, subject, however, to the twelve (12) month limitation provided… ."

- Court remarks that given that the indemnity provision is "of no use to AmeriPride," it is seeking indemnity elsewhere.

- Court finds that the plain meaning of section 18 is that Mission is to continue to defend ongoing litigation that pertains to the rental business, that it cannot be read to cover prospective environmental liability, that it is not broad enough to encompass any and all claims, and that to find otherwise would frustrate other parts of the agreement.

- Summary judgment entered in favor of Mission, and against AmeriPride, on the contract issues.

108. DeAngelo Brothers, Inc. v. Horne, 2007 WL 1028870 (W.D.Mo. Mar. 29, 2007), order amended on reconsid., 2007 WL 1125706 (W.D.Mo. April 16, 2007).

- In 1997, the DeAngelos buy the stock of Habco from Horne and Jensen.

- The DeAngelos had learned, prior to the acquisition, of ongoing litigation concerning alleged contamination at a Kansas City, Missouri site previously owned by Horne or entities he controlled.

- Thus, the DeAngelos negotiate an indemnification from Horne and Jensen for damages or liability relating directly or indirectly to the ongoing litigation and its specific civil case number, known as the "K.C. 1986 Limited Partnership Litigation."

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- The indemnification provisions of the deal are made subject to a survival clause providing that the indemnification obligations of the sellers survive fifteen months from closing, except for specific obligations, including the K.C. 1986 Limited Partnership Litigation undertakings, which "shall survive the Closing until the expiration of the applicable statute of limitations related to the subject matter thereof."

- Subsequently, Habco is named as a third party defendant in the K.C. 1986 Limited Partnership Litigation.

- That litigation is dismissed in December 1998 by stipulation of the parties, and refiled in 2002 with a new name and civil case number. In June 2002, the DeAngelos receive a general notice letter from U.S. EPA concerning the Kansas City site and the new litigation, and the DeAngelos's counsel writes to counsel for Horne and Jensen to notify them of an indemnifiable claim, and to demand they "undertake, conduct and control, at [their] expense, the settlement on defense of the Indemnifiable Claim… ."

- In May 2005, DOJ commences a separate cost-recovery action against several parties in the K.C. 1986 Limited Partnership Litigation, including the DeAngelos. Notice to Horne and Jensen was again made; neither Horne nor Jensen defend nor indemnify the DeAngelos. Another action is also commenced in Minnesota state court.

- While the DeAngelos are ultimately absolved of liability in the later actions, they have incurred substantial defense costs, and proceed against Horne and Jensen on those claims.

- DeAngelos seek summary judgment on, among other things, declaratory relief and breach of contract.

- Court finds that the DOJ cost-recovery action and the Minnesota state court action were subject to the fifteen month indemnification limitation, and that the claims on those suits are therefore barred since they did not arise until well after the fifteen month cutoff.

- As to the refiled action, the Court finds that while the action bears a new name and case number, it is not a separate claim or action to which the fifteen month limitation applies, but is rather a continuation of the prior K.C. 1986 Limited Partnership Litigation that was dismissed by stipulation the parties, and thus subject to the longer limitations period.

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- However, since the DeAngelos have not segregated the attorneys fees and costs for the one lawsuit, the court cannot grant summary judgment as to the amount of damages on that claim.

- In March 29, 2007 decision and earlier decision on liability, court reserves on whether liability of Horne and Jensen is joint and several or several only.

- On subsequent Motion to Reconsider, court addresses indemnification provision which provides that "[e]ach of the Shareholders, covenants and agrees at his sole cost and expense to severally indemnify, defend... and hold harmless" the DeAngelos.

- The court finds this language unambiguous, holding Horne and Jensen each liable as though each had executed a separate agreement, and ordering that their liability is several only.

109. Master Lock Company v. Hawn, 2007 WL 1141788 (N.D.Ill. Apr. 16, 2007).

- Hawn and Israel, the shareholders of American Lock Company, agree to sell their shares and merge their company with a subsidiary of Master Lock, with the subsidiary being the surviving entity.

- For about fifty years, American Lock has manufactured padlocks, keys and lock parts at a factory in Crete, Illinois.

- In the 2003 Merger Agreement, Hawn and Israel agree to indemnify, defend, reimburse and hold Master Lock harmless from any losses for any breach of representations and warranties, as well as for any defined cleanup costs for hazardous substances.

- Sellers had undertaken certain environmental investigative and related activities resulting from their own acquisition of the Crete facility in 1998, and Master Lock was aware of this information as well as certain information that its own consultant had gathered in an expedited due diligence period.

- Following the merger, Master Lock proceeds with further investigation and then voluntarily enters the Illinois Site Remediation Program ("SRP") to proceed with such cleanup activities as would result in issuance of a No Further Remediation ("NFR") determination from Illinois EPA ("IEPA").

- IEPA approves Master Lock's plan, but also requires additional work to be undertaken.

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- Master Lock also applies for and obtains necessary wastewater permits involving construction of a pretreatment system, and prepares and implements a requisite Storm Water Pollution Prevention Plan.

- Master Lock also identifies and removes hazardous substances from underground storage tanks that had leaked and require remediation, undertakes soil remediation and pays invoices submitted by the consultant that had addressed environmental issues for American Lock prior to the merger.

- Master Lock presents several claims for indemnification to the sellers' representatives, including claims concerning the environmental work.

- This breach of contract action follows, and both parties move for summary judgment on all counts of the complaint.

- Court finds in favor of Master Lock on most of the claims, finding only in favor of sellers so far as concluding that there are issues of material fact remaining on the payments to the prior American Lock consultant, the contractor invoices concerning certain cleanup work to obtain the NFR, the costs associated with the storm water plan, and the general compliance costs allegedly incurred.

- Court rejects sellers' arguments that, among other things, a third-party claim is a prerequisite for an indemnification claim under the Merger Agreement terms, and that Master Lock's voluntary entry into the SRP was fatal to its claim.

110. Pharmacia Corp. v. Motor Carrier Services Corp., 2007 WL 1816044 (D.N.J. Jun. 22, 2007), motion for reconsid. 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

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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.

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- 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.

111. Rhodia, Inc. v. Bayer Cropscience, Inc., 2007 WL 3349453 (D.N.J. Nov. 7, 2007).

- In 1997, Rhone-Poulenc, Inc. ("RPI") ceases operations at an 800 acre phosphorous production site in Montana.

- In 1998, RPI sells the site to Rhodia pursuant to an Asset Contribution Agreement ("ACA").

- In 1999, the company that had controlled both RPI and Rhodia is succeeded by Aventis, a French corporation.

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- An Environmental Indemnity Agreement (EIA) is entered, as well as a Termination Agreement to which Rhodia and Aventis are parties.

- In 2004, Aventis merges into another French corporation, Sanofi.

- Following acquisition of the site, Rhodia expends substantial sums on environmental investigation and cleanup of the site.

- EPA issues orders that Rhodia stop leakage of phosphorous at the site and proceed with further cleanup, and the Montana DEQ also demands remedial activities.

- Rhodia also pleads guilty to criminal charges and pays over $16 million in criminal fines concerning environmental violations at the site.

- Rhodia sues RPI's successor, Bayer Cropscience ("Bayer"), as well as Aventis and Sanofi, including claims under CERCLA for contribution, under federal common law for contribution, and under common law negligence and indemnity theories.

- Several motions follow, including Bayer's motion to dismiss based on the ACA.

- Bayer argues that Rhodia's assumptions of liabilities under the ACA, together with Rhodia's indemnity, are so wide-ranging as to effectively constitute a release from all liability, including all of the claims that Rhodia has made.

- Rhodia argues, among other things, that its indemnifications and assumptions did not constitute a release, that the language of the ACA does not suggest a release, and that the word "release" does not even appear in the ACA.

- Court applies New York law, as called for in the ACA.

- Court notes that under New York law, indemnities and releases must be manifested by a "clear and unmistakable intent," and that general releases are to be construed strongly against the releasor.

- Addressing the language of the ACA, court finds that it provides not only for a broad and unambiguous indemnification, but also that the separate, broad-ranging assumption language is unambiguous and expressly constitutes an assumption of liabilities "without limitation."

- Court further finds that Rhodia's intention to "renounce claims" constitutes a release.

- Applying its conclusions to Rhodia's claims against Bayer, court grants Bayer's motion to dismiss Rhodia's CERCLA and federal common law contribution claims.

- However, court also concludes that under New York law, releases from "any and all responsibility or liability of any nature whatsoever" do not bar negligence claims, and thus denies Bayer's motion to dismiss the negligence claim.

- Court also denies dismissal of common law negligence and indemnification claims based on certain non-contract issues that require further development of facts.

- As to Rhodia's claims against the successors of its former corporate parent, Aventis and Sanofi move to compel arbitration pursuant to the EIA, which provides for an arbitration procedure.

- Court concludes that arbitration agreement exists among Rhodia, Aventis and Sanofi, orders the issues among them to proceed to arbitration as specified by the EIA, and administratively terminates the relevant Rhodia claims before the court.

112. Del Monte Fresh Produce v. Fireman's Fund, 117 Hawai'i 357 (Sup. Ct. 2007), motion for reconsid. denied, 2008 Haw. LEXIS 38 (Haw. Feb. 20, 2008).

- In 1989, Del Monte Corp. sells certain of its assets, including its Hawaii pineapple plantation operations (the "Hawaiian Business"), to a newly formed company called Del Monte Fresh.

- Seller conveys all of its right, title and interest to all of its assets in the Hawaiian Business, subject to existing liabilities, and specifically provides that the sale includes: "without limitation,… any… insurance policies of the Hawaiian Business, any causes of action, judgments, claims, and demands of whatever nature of the Hawaiian Business [.]"

- In 1977, an EPA investigation had found that significant releases of fumigants at the Del Monte plantation, including a major 1977 accident, had occurred near a drinking water well.

- In 1980, EPA found fumigants and other contaminants in the drinking water well in excess of state and federal standards.

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- In 1995, EPA issues special notice letters to Del Monte Corp. and Del Monte Fresh naming them PRPs liable for cleanup of the site and for reimbursement of EPA costs.

- Del Monte Fresh tenders the defense of the EPA claim to all of the Hawaiian Business liability insurers from the 1940s on, and most deny coverage.

- Del Monte Fresh responds to EPA and enters an ACO with EPA and the State of Hawaii.

- Among other things, the insurers who deny coverage argue that the insurance policies contained "no assignment" clauses that required the consent of the insurers to bind them to any assignment of the policies by Del Monte Corp., the named insured, and that the policies in question had been issued prior to the 1989 transaction.

- Del Monte Fresh files a declaratory judgment action on the insurers' duties to defend and indemnify in the EPA investigation.

- Cross motions for summary judgment follow.

- The trial court finds in favor of Del Monte Fresh and against the insurers, concluding, among other things, that the policies had been assigned as a matter of law, and further that coverage in a situation like this should be extended to a successor.

- On appeal, the Supreme Court of Hawaii vacates the trial court's decision and remands the case, for the reasons set forth below.

- In the absence of a choice of law provision in the policies in question, the Court applies Hawaii law, as the pollution occurred in Hawaii, the state's Department of Health is overseeing the matter, and the state has expressed an interest in favor of protecting the environment.

- Court finds that there was no valid assignment of the insurance policies by operation of law.

- Court acknowledges that while insurance policies are recognized to be contracts of adhesion, liability insurers have the same rights as others to limit their liability and to impose conditions on their obligations provided they are not in contravention of “statutory inhibitions or public policy,” and notes that under Hawaii law a policy may be "assignable or not assignable, as provided by its terms."

- Noting no dispute that the policies in question required the consent of the insurers for assignment, and that no such consent was obtained, Court finds that since the policies were assigned without the insurers' consent, the assignment is not effective and Del Monte Fresh is not insured under any of the defendant insurers' policies.

113. In re Safety-Kleen Corp., 380 B.R. 716 (Bkrtcy. D. Del. 2008).

- In 2000, Safety-Kleen Corp. and certain subsidiaries, including Safety-Kleen Bridgeport ("SK Bridgeport), file bankruptcy petitions, and Safety-Kleen looks to sell off assets.

- In 2001, Safety-Kleen signs letter of intent to sell certain assets to Clean Harbors, including SK Bridgeport.

- Among the matters reviewed by Clean Harbors during due diligence is SK Bridgeport's involvement at the Kramer Superfund Site in New Jersey, concerning which SK Bridgeport is a third-party defendant that has entered consent decrees and settlement agreements.

- In February 2002, Safety-Kleen and Clean Harbors sign a sale agreement including SK Bridgeport, and after addressing EPA concerns upon bankruptcy court motion to approve sale, sale order is entered in June 2002, and deal closes in September 2002.

- Acquisition Agreement includes specific provision on assumption of environmental liabilities. Sale Motion includes description of Clean Harbor's assumption of an estimated $265 million of assumed liabilities. Clean Harbors press release states that Clean Harbors "will assume certain environmental liabilities valued at approximately $265 million," which figure was derived from Safety-Kleen's reserve for the subsidiaries' environmental liabilities, specifically including $13 million for Superfund liabilities.

- In 2003, Clean Harbor advises Safety-Kleen that it has no liability concerning the Kramer Superfund Site.

- The parties then seek declaratory relief from the bankruptcy court.

- Bankruptcy Court finds no ambiguity in the assumption of liability and concludes that the Kramer Superfund Site liabilities are "specifically" assumed under the plain language of the Acquisition Agreement.

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- Nor does court find any support for Clean Harbors's claims that the Kramer site liabilities were excluded by the terms of the Acquisition Agreement, or that reference to the state of title of the assets to be acquired could be read to exclude the Kramer site liability.

- Court further reviews the extensive record on due diligence and full disclosure, and further concludes that even if the language could be found to be ambiguous, the record demonstrates the intent of the parties that Clean Harbors assume the Kramer site liabilities.

114. American Int'l Specialty Lines Ins. Co. v. U.S., 2008 WL 1990859 (Fed. Cl. Jan. 31, 2008).

- Following closure of the Naval Air Station in Alameda, California, County and City of Alameda form Alameda Reuse and Redevelopment Authority ("Authority") to plan and proceed with reuse of the site, and Navy proceeds with Environmental Impact Statement ("EIS") under NEPA.

- EIS shows historical use of pesticides, and companion study concludes that concentrations of detected pesticides, including chlordane, do not suggest improper use or application practices.

- In June 2000, the Navy and the Authority enter a Memorandum of Agreement for conveyance of portions of the air station. The MOA provides that the Authority does not assume any liability for environmental impacts due to the Navy's use of toxic or hazardous substances or wastes, or have any obligation to conduct remediation of any such impacts.

- Prior to the transfer of title, the Authority acquires a Pollution Legal Liability ("PLL") insurance policy from American International ("American Int'l"), pursuant to which the insurer is subrogated to the Authority's rights of recovery against others in the event the insurer pays on a claim.

- In July 2000, the property is conveyed pursuant to a deed that also contains specific provisions as to environmental conditions, setting forth an "as is, where is" provision and general disclaimer, as well as specific provisions required by CERCLA including a covenant that all necessary remedial actions have been taken and that the Navy would retain responsibility to conduct any further necessary remediation concerning conditions existing as of the transfer.

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- Prior to building demolition, the Authority discovers chlordane at levels above regulatory standards, and the California regulators require remediation to residential use standards.

- The Authority proceeds with soil remediation with notice to the insurer, and incurs cleanup costs of over $3.76 million.

- American Int'l reimburses the Authority under the PLL policy.

- The Authority makes written claims for indemnification to the U.S.; the U.S. does not respond.

- American Int'l files action in federal district court including claims under CERCLA, the MOA and the Deed. The district court dismisses the CERCLA claims as unripe and transfers the indemnity and breach of contract claims to the federal claims court.

- American Int'l's complaint contains seven claims for breach of contract and one for express indemnification.

- U.S. moves to dismiss all claims.

- Court reviews the law of sovereign immunity, as well as the exception to such immunity, including the proviso under the Tucker Act (governing jurisdiction of the Court of Federal Claims) that sovereign immunity can be waived by express or implied contract.

- Court also reviews the surety/subrogation exception to the requirement for privity of contract in immunity waivers, and holds that the Tucker Act waives sovereign immunity for equitable subrogation claims of subrogees.

- Court finds that American Int'l's claims are ripe, and allows most of the contract claims to proceed.

- However, court does not accept insurer's argument that the MOA created an affirmative obligation for the Navy to clean up. Court notes that while the MOA relieved the Authority from assumption of liability, that release from liability did not create a corresponding obligation on the Navy.

- Court denies U.S. motion for summary judgment on useful product defense in absence of factual basis for such a determination.

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115. Shell Oil Co. v. U.S., 80 Fed. Cl. 411 (March 31, 2008); vacated and then reinstated as to Shell, 93 Fed. Cl. 153 (2010) and 93 Fed. Cl. 439 (2010); vacated and remanded, 672 F.3d 1283 (D.C. Cir. 2012).

- 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 121 below on Claims Court's subsequent decision on damages.

- Court later vacates judgment due to discovery of family financial interest in one of the parties, and reinstates judgment as to Shell.

- Court of Appeals finds that judge should have recused himself, vacates judge's decision and remands case to different judge.

- See Case 149 below on subsequent decision by different judge.

116. Benderson Development Co. v. Neumade Products Corp., 272 Fed. Appx. 83 (2d Cir. 2008).

- In multi-count litigation between landlord and former tenant; remaining issue is whether the tenant had complied with its environmental cleanup obligations under the lease.

- Federal district court finds in favor of tenant on summary judgment, and landlord appeals.

- Lease terms (set out in a prior district court decision, 2005 U.S. Dist. Lexis 14943) provide that tenant cannot conduct operations resulting in a discharge of hazardous substances, that the tenant is liable for any such discharges, that at the end of the Lease term, tenant is to provide "any environmental clearance which may be required by any governmental authority having jurisdiction," and that until the premises is delivered back to the landlord in a "clean" condition the tenant is to continue paying monthly rent.

- On appeal, landlord argues that notwithstanding any "environmental clearance" requirement, the tenant must pay liquidated damages until it delivers the premises back in a condition that satisfies all laws, rules and regulations concerning "toxic, hazardous or similar substances."

- Appeals court considers evidence at hand, and concludes that no reasonable juror could conclude that the tenant breached its obligations: There is no evidence that the premises was not in a "clean condition" at the end of the lease term in 1997, the tenant had responded to the landlord's concerns by having a waste cleanup company clean the premises and dispose of wastes at the end of the term, the landlord re-let the property, and an April 1999

report by the landlord's consultant found no contaminants above state standards. As to a later report by the landlord's consultant finding contaminants above standard, the appeals court notes that this was after the tenant had left and the property became available to others.

- Second Circuit affirms judgment of the district court.

117. Agere Systems, Inc. v. Advanced Envt'l Technology Corp., 552 F. Supp. 2d 515 (E.D. Pa. 2008).

- Generator PRP at the Boarhead Farms Superfund Site in Pennsylvania pursues contractor that arranged for the handling and the removal of certain of the PRPs wastes, claiming, among other things, contractual indemnification.

- Contractor moves for summary judgment on the contractual indemnity claims.

- Generator is unable to produce signed copy of contract, or evidence that the parties mutually assented to indemnification terms of the purported contract.

- Court finds insufficient evidence that there was mutual assent as to either an oral or written indemnification.

- Summary judgment granted to contractor.

118. Georgia-Pacific Consumer Products v. International Paper Company, 566 F.Supp. 2d 246 (S.D.N.Y. 2008).

- In 1972, International Paper predecessor ("Federal") sells several New Jersey facilities to a Georgia-Pacific predecessor ("RPC")

- Contract provides that the consideration to be paid by RPC is the contract price plus "the assumption by RPC of the liabilities of Federal directly attributable to the New Jersey Operations on the Closing Date," including those listed on certain schedules to the contract.

- EPA has discovered hazardous substances at the New Jersey facilities, and has pursued both International Paper and Georgia-Pacific.

- Georgia-Pacific commences litigation seeking a declaration that its predecessor RPC did not assume the liabilities; International Paper moves to dismiss on the grounds that the contract unambiguously transferred the liability to RPC.

- Applying New York law to the pre-CERCLA provision, as provided in the contract, court notes that indemnification agreements are to be strictly construed and that it may not find a duty to indemnify absent manifestation of a "clear and unmistakable intent" to do so.

- Court finds that the plain meaning of the contract is that RPC's assumption of liabilities pertains only to those liabilities existing as of the closing date, and that since CERCLA was not enacted until 1980, there were no "extant CERCLA liabilities" as of the closing date.

- Summary judgment granted to Georgia-Pacific that RPC did not assume CERCLA liabilities under the 1972 Purchase Agreement, and that International Paper is not entitled to cleanup cost indemnification to the extent premised on a contract claim.

119. Ford Motor Company v. Edgewood Properties, Inc., 2008 WL 4559770 (D.N.J. October 16, 2008).

- In multi-party litigation involving off-site reuse of contaminated crushed concrete from the former Ford assembly plant in Edison, New Jersey, court considers a series of motions to dismiss, strike and amend.

- Among the parties are Edgewood Properties, which contracted with Ford to obtain, and transport off-site, crushed concrete suitable for residential reuse; and EQ Northeast, with which Edgewood contracted to test the crushed concrete for contamination before off-site shipment.

- After DEP issues an order against Ford for PCB-contaminated materials winding up off-site, Ford sues Edgewood, Edgewood third-parties EQ and others, and EQ counterclaims for contractual indemnity and breach of contract, among other things.

- Among the motions before the court are Edgewood's motion to dismiss EQ's counterclaims.

- As to EQ's contract claims, the court applies Massachusetts law as provided in the contracts between the parties.

- EQ points to a contract clause that provides: "[Edgewood]" agrees to indemnify and hold [EQ]… harmless from any loss, cost, expense, damage, claim, demand, liability or cause of action or whatever kind of [sic] nature on account of damage to or destruction of property… arising out of or resulting from any act or

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omission… caused by [Edgewood]… in the performance of the work called for by this Agreement."

- EQ also points to an addendum providing that Edgewood "shall crush… concrete material provided by EQ… on site at the Ford plant," and that Edgewood is to "remove all crushed material that has been proven to be free of contamination… for use at [Edgewood properties]."

- EQ further notes that the off-site properties at issue include certain properties of Edgewood cited in the contract, as well as properties that were not designated in the contract.

- EQ alleges that it has suffered damages in responding to the litigation, that Edgewood has an indemnity obligation to EQ concerning contamination at designated sites, and that Edgewood also breached the contract by using the concrete at non-designated sites.

- Court finds that EQ has stated valid claims for contractual indemnification and breach of contract that survive the motion to dismiss.

120. Sentry Paint Technologies, Inc. v. Topth, 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 Topth.

- Prior to entering contract, Sentry provides Topth 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 Topth 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 Topth'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 Topth 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.

- Topth's consultant does not perform any soil or groundwater testing, but its review of PADEP 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 Topth's consultant estimates remediation costs substantially in excess of $10,000.

- Further negotiations proceed, but the parties cannot reach agreement on next steps.

- Ultimately, Topth notifies Sentry that it intends to terminate the agreement; Sentry responds that Topth has failed to reasonably establish that remediation would cost more than $10,000, that the option provision has thus not been triggered, and that Topth must take the property "as is;" and further communications lead to commencement of litigation by Sentry claiming breach of contract by Topth, as well as bad faith and promissory estoppel.

- Court applies Pennsylvania law, as called for in the contract.

- Parties agree that the contract requires Topth 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 Topth has complied with the contractual requirements.

- Court concludes that Topth has shown that the condition called for in the contract has been met, that Topth'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 Topth 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 Topth 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 Topth of specifics in order for Topth to carry its burden of proof on costs incurred.

121. Shell Oil Co. v. U.S., 86 Fed. C1.470 (March 31, 2009); vacated and then reinstated as to Shell, 93 Fed. Cl. 153 (2010) and 93 Fed. Cl. 439 (2010), vacated and remanded, 672 F.3d 1283 (D.C. Cir. 2012).

- 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 115 above), Shell seeks summary judgment for 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.
- Court later vacates judgment due to discovery of family financial interest in one of the parties, and reinstates judgment as to Shell.
- Court of appeals finds that judge should have recused himself, vacates judge's decision and remands case to different judge.
- See Case 149 below on subsequent decision by different judge.

122. 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.

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- 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.

123. 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.

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124. 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.

125. 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.

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- 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.

126. 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.

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- 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.

127. 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.

- Landlord's partial summary judgment motion denied.

128. 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.

129. Pateley Associates 1, LLC v. Pitney Bowes, Inc., 704 F. Supp. 2d 140 (D.Conn. 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.

130. Textileather Corp. v. GenCorp Inc., 709 F. Supp. 2d (N.D.Ohio 2010), aff'd in part, rev'd in part and remanded, 697 F.3d 378 (6th Cir. 2012).

- 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 liabilities to third persons concerning 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."

- On appeal, Textileather argues that district court erred in interpretation of APA as to requirement for GenCorp to defend and indemnify Textileather for RCRA closure proceedings.

- Circuit court first looks to provision in section 9.1.1 in which GenCorp retained particular "liabilities, if any, to third persons" as to conditions and chemicals listed in a separate contract provision, "whenever such liabilities may arise, and by whatever third persons may assert such liabilities… ."

- Court finds that Ohio EPA fairly falls within the common meaning of "third person" (which was not defined in the APA), that the balance of the APA presents further evidence that Ohio EPA should be considered a third person, and concludes that the Ohio EPA requirement of a closure plan, which required Textileather to take action and incur costs, should appropriately be considered a demand for liability.

- Court also finds that the notices of deficiency are also liabilities covered by the APA.

- Circuit court reverses district court decision granting summary judgment to GenCorp, instructs district court to enter summary judgment for Textileather on question of whether retained liability section of APA applies, and remands for proceedings to determine appropriate allocation of costs and damages.

- However, circuit court affirms district court decision that contract language is broad enough to include all environmental liability, including CERCLA liability.

- Thus, circuit court concludes that with the exception of liabilities specifically retained by GenCorp in Sections 9.1.1 and 9.1.2, environmental liabilities including those under CERCLA were allocated to Textileather.

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131. Litgo New Jersey, Inc. v. Bob Martin, 2010 WL 2400388 (D.N.J. June 8, 2010), modified on motions for reconsideration, 2011 U.S. Dist. Lexis 2033 (D.N.J. Jan. 7, 2011).

- 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."

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- 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.

- Parties file cross-motions for reconsideration.

- On reconsideration, court finds that Goldstein's knowledge of at least some of the contamination from the outset, and decision to voluntarily accept risk that there might be additional contamination that had not yet been delineated, merits increasing the Goldstein/Litgo percentage of liability by another 5%, and reducing the Sanzari share by 5%.

- Thus, the court apportions 70% to Goldstein and Litgo, 27% to Sanzari and related defendants, and 3% to the U.S.

132. Schultz v. Ichimoto, 2010 WL 3504781 (E.D. Cal., September 7, 2010).

- Plaintiffs are former dry cleaner tenants, who were pursuing their former landlord for recovery of costs they had incurred associated with alleged contamination from several dry cleaning establishments.

- Claims included cost-recovery and contribution under CERCLA.

- Defendant moves for summary judgment on lack of subject-matter jurisdiction, plaintiffs file a statement of non-opposition, and defendant's motion is granted.

- Defendant then moves for attorneys' fees as prevailing party pursuant to the 1980s lease, which provided that "[i]n the event of litigation concerning the terms of this lease or the use of premises, the Court may award to the prevailing party such attorney's fees as it may deem reasonable."

- Defendant also points to lease clause which required that "Lessee(s) shall save the Lessors harmless from all claims, demands, actions and suits arising from the use and occupancy of the premises."

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- Defendant asserts it was the prevailing party; plaintiffs counter that the matter never got to the merits, and that a defendant is not considered to be a prevailing party when a claim is dismissed for lack of subject matter jurisdiction.

- Court finds that defendant has prevailed, and proceeds to calculation on award of fees.

133. Sanchez v. Esso Standard Oil de Puerto Rico, Inc., 2010 WL 3809990 (D.P.R. September 29, 2010).

- Gas station operators in Carolina, Puerto Rico bring claim against Standard Oil de Puerto Rico, Inc. ("Esso") for alleged RCRA violations resulting from underground storage tank system leaks.

- Esso counterclaims for cost-recovery under CERCLA, and for recovery of attorneys' fees by way of contractual indemnification.

- Court finds for Esso on CERCLA claim and then goes on to analyze contract claim.

- Esso points to 1985 and 1992 contracts with the operators, which provide that the operators agreed to assume “the risk and exclusive liability, and agree[d] to hold harmless ESSO, from any and all claims for injuries, loss, or damage of any class or kind, to person or property, by anyone who suffers or alleges the same, as a result of... [t]he condition or use of the leased station... .”

- Court concludes that the contracts provided an indemnity for third party claims against Esso, but not for costs of suit between the contracting parties.

- Court then goes on to find that Esso has an alternate means of recovering litigation costs; namely, Federal Rule 11 and the court's inherent power to sanction.

- Court makes findings of fact concerning the plaintiffs' litigation team, concludes that they engaged in frivolous, vexatious and unreasonable continuation of litigation and acted in bad faith, determines that this is the basis for an award of attorneys' fees, and directs Esso to submit a petition for fees.

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134. U.S. Home Corp. v. U.S., 2010 WL 4689883 (Fed. Cl. November 9, 2010), dismissed 2012 U.S. Claims Lexis 1589 (Fed. C1., Dec. 14, 2012).

- Plaintiffs are commercial and residential developers of a portion of the former Raritan Arsenal, a large U.S. Army facility in New Jersey.

- The U.S. General Services Administration sells the two constituent parcels of the property at issue in 1989 and 2003. The parcels are consolidated and subdivided by one of the plaintiffs, which in turn sells portions of the property to the two other plaintiffs.

- While portions of the Raritan Arsenal are known to be contaminated, the property at issue is not believed to be contaminated.

- Both before and after the 1983 sale, the U.S. represents that no contamination of the parcel is known to the government.

- As GSA prepares for sale of the tract conveyed in 2003, it prepares a certification that there is no evidence of hazardous substance activity on the parcel.

- The 2003 deed contains covenants as to the environmental condition of the property, as well as the requisite CERCLA verbiage on the government's cleanup responsibilities.

- Contamination is later found that requires remediation, and plaintiffs commence suit under CERCLA. Portion of suit is settled; complaint on balance is dismissed without prejudice, and then refiled.

- In second action, plaintiffs allege that they reasonably relied on the government's "representations, assurances and covenants" concerning the environmental condition of the property, and that they "reasonably relied on the government's numerous and express promises, to their detriment."

- U.S. moves for partial summary judgment on the allegations of express promises, at which time plaintiffs first introduce notion that U.S. had entered into and breached an "implied-in-fact contract" with plaintiffs.

- Court rejects argument on implied-in-fact contract, noting, among other things, that the express contracts between GSA and the plaintiffs largely address the same subject.

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- Court concludes that an implied-in-fact warranty cannot have been offered by the U.S. if an express contract disclaimed such warranties, and that implied-in-fact contract cannot have been formed if an express contract governs the issue.

- Court reviews record, concludes that the only meetings of the mind were reduced to writing, grants the government's motion for summary judgment and dismisses plaintiffs' implied-in-fact contract claims

- Court also rejects argument presented in plaintiffs' opposition brief that plaintiffs are third party beneficiaries of the government's promises to Congress and to the New Jersey DEP, as no factual evidence is offered by plaintiffs.

135. Kugle v. Island Cement, LLC, 2010 WL 4960009 (D. Hawai'i Nov. 30, 2010).

- Based on phased site assessments, an industrial property in Hilo, Hawaii is known by 2006 to have been the site of releases and threatened releases of hazardous substances, and contamination continues through 2009.

- 1984 lease had provided that tenant and its assigns would keep property in good order and condition and indemnify landlord for any losses and damages due to nonperformance. Lease also requires consent of landlord to assignment, and provision of financial information concerning proposed assignee for landlord's consideration in granting or withholding consent.

- In 2006, lease is assigned by tenant without landlord's consent.

- Assignee defaults on rent obligations and assignor sues.

- Assignor and assignee reach settlement in 2007, by which time site assessments have been completed and contamination identified.

- 2007 settlement terms include voiding of 2006 assignment and agreement to cooperate on obtaining landlord consent to new assignment.

- Terms also include provision that assignee would indemnify the landlord for all environmental contamination caused by the assignee, indemnify the assignor for environmental contamination that existed before the 1984 lease, and indemnify the landlord and the assignor from any environmental contamination caused by the assignor.

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- Personal guarantees of assignee's obligations are also provided.
- Landlord does not consent and sues tenant/assignor.
- Assignee subsequently abandons property.
- Assignor sues assignee and guarantors, including contract and CERCLA claims.
- Landlord substitutes as plaintiff based on agreement between landlord and assignor.
- On cross motions for summary judgment, assignee and guarantors focus their defense on a provision of the 2007 settlement agreement that provides that assignee "does hereby promise, covenant and agree to and with the Assignor and to and with the Lessor under the Lease, in consideration of the consent of the Lessor to the foregoing assignment... ."
- Assignee and guarantors argue that since the landlord never consented, a condition precedent to the assignee's obligations and the guarantors' obligations was never fulfilled.
- Court notes that landlord's consent certainly looks like a condition precedent, but concludes that it does not have to reach that determination, since "[a] party cannot, however, evade its contractual responsibilities by creating the circumstances it seeks to use as its excuse."
- Court concludes that where a party's own act makes the occurrence of a condition impossible, non-performance of the condition should not relieve the party of its responsibilities under a contract.
- Court refers to undisputed instances of landlord requesting financial information from assignee and guarantors as called for in the lease agreement, and documentation establishing that landlord was prepared to consent were information provided showing that the assignee and guarantors had the financial wherewithal.
- Settlement agreement found binding and enforceable.
- Guarantors also argue that guaranty is unenforceable as the assignment agreement was not signed by the assignor and thus violates the state Statute of Frauds.

- Court rejects argument on two grounds: (1) Statute of Frauds requires signature of parties against whom enforcement is sought in land transfers of over one year, and assignee signed; and (2) assignor signed the settlement agreement, which incorporated the assignment by reference.

- Summary judgment on contract granted to landlord.

136. Martin K. Eby Construction Co. v. One Beacon Insurance Co., 2011 WL 721545 (D.Kan. February 22, 2011), vacated in part, 2012 U.S. Dist. Lexis 131875 (D. Kan Sept 17, 2012).

- Case concerning underground water pipeline project in Harris County, Texas includes construction contract claims.

- Coastal Water Authority ("CWA") contracts with construction company, Eby, to build pipeline.

- CWA separately contracts with Kellogg, Brown & Root ("KBR") to provide construction oversight

- 1979 construction contract between CWA and Eby provides that Eby "agrees that he has sole responsibility for the protection of facilities, structures, and properties inside and outside the limits of construction and agrees to indemnify and hold harmless the Owner, the Engineer [KBR], and owners of adjoining properties from and against all damages, claims, demands, suits, and judgment costs including attorney's fees and expenses for or on account of damage to property of any person... directly or indirectly arising from or caused by or in connection with the performance or failure to perform any work provided for hereunder by the Contractor, his subcontractors, or their or the Contractor's agents, servants, or employees."

- Celanese methanol pipeline is ruptured during the period of pipeline construction, and Celanese sues Eby and KBR, alleging that pipeline was broken by backhoe during water pipeline construction. Suit includes CERCLA claim.

- KBR demands indemnity from Eby; Eby refuses. KBR files cross-claim against Eby.

- Eby found liable to Celanese in underlying suit; KBR found not liable.

- Now KBR is seeking partial summary judgment against Eby for fees and expenses incurred by KBR in defending suit.

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- Court looks to indemnity on fees and expenses incurred by KBR, finds that Eby breached the construction contract by refusing to indemnify KBR, and enters partial summary judgment in favor of KBR on attorneys' fees, expenses and costs of litigation.

- Eby seeks reconsideration by judge newly assigned to case after death of judge who issued summary judgment ruling.

- On reconsideration, newly assigned judge differs on analysis of contract language, concluding that the contract does not clearly state that its intent is to have Eby indemnity KBR from KBR's own negligence. Court further concludes that a determination that KBR did not cause the damage in question would not create a duty to indemnify, either.

- Court holds that Eby is not obligated to indemnify KBR, and sets aside earlier order to extent prior judge ruled that Eby is obligated to indemnify KBR.

137. Stimson Lumber Co. v. International Paper Co., 2011 WL 1532411 (D. Mont. – Magistrate Findings & Recommendation, February 28, 2011, 2011 WL 1549305 (D. Mont. – Dist. Ct. Decision, April 22, 2011).

- In November 1993, Stimson Lumber acquires a sawmill and plywood manufacturing plant in Bonner, Montana from International Paper predecessor.

- In asset purchase agreement, seller agrees to indemnify buyer for environmental liabilities for a period of ten years, and base price clause provides that buyer "...shall not assume or be responsible for any [of the seller's] liabilities or obligations."

- Agreement also provides that aside from express warranties, buyer accepts assets "as is."

- Warranties include express warranty that seller has conducted business in compliance with environmental laws including CERCLA.

- Seller also agrees to indemnify buyer for environmental matters including CERCLA, subject to ten year notice provision.

- Base price clause of agreement also provides that Buyer "...shall not assume or be responsible for any [of the seller's] liabilities or obligations."

- Stimson operates mill until it is shuts down in 2008.

- In 2002 and 2003, Stimson places International Paper on notice of indemnification claims for costs incurred in cleaning up identified contamination, and parties resolve claims by way of settlement agreement in 2005.

- In 2006, additional contamination is found, Stimson enters into agreement with state regulators to clean up, and Stimson commences suit against International Paper, including CERCLA claims. International Paper counterclaims, including CERCLA contribution claim.

- International Paper moves for summary judgment; grounds include claims that Stimson's claims are barred by the 1993 agreement.

- International Paper contends that terms of 1993 agreement include Stimson's assumption of all environmental liabilities at the subject mill as of ten years following the closing date, and International Paper points both to "as is" clause and indemnification provisions.

- Magistrate Judge finds that "as is" provision was explicitly limited by express terms of warranty and indemnification provisions.

- Magistrate Judge further finds that while there was an applicable ten year limitation to International Paper's warranties and contractual indemnification obligations, the contract verbiage on Stimson's non-assumption of liability, and a reading of the contract as a whole, do not lead to a conclusion that the parties "clearly intended for Stimson to assume International Paper's statutory environmental liabilities when the contractual indemnification provisions... expired."

- Thus, Magistrate Judge recommends that International Paper summary judgment motion on 1993 agreement be denied.

- District court agrees, and denies motion on 1993 agreement.

138. Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431 May 27, 2011), motion to amend judgment denied, 791 F. Supp. 2d 431 (D.S.C. Aug. 19, 2011).

- Case starts as CERCLA cost-recovery action by owner of Charleston, S.C. site that is the subject of remedial activities; multiple parties are involved, including former owners.

- Matter proceeds through findings of fact, conclusions of law and opinion, and motions are then filed to amend and correct judgment and for reconsideration.

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- As between a prior seller and buyer, issue is whether a 1966 indemnification agreement applies.

- Parties had entered a 1966 letter agreement providing that seller would indemnify and hold buyer harmless for acts or omissions of the seller prior to the closing date, provided prompt notice were given.

- Parties had then entered 1966 bill of sale reciting that seller intended by the bill of sale to implement its obligation to deliver the assets described in the letter, and that the letter was to survive execution and delivery of the bill of sale.

- Seller argues that 1966, pre-CERCLA agreement did not encompass CERCLA type of liability, and that deed did not incorporate indemnity.

- As to seller's argument on pre-CERCLA agreement, court finds that the indemnity obligations of the letter agreement are broad enough to encompass CERCLA, notwithstanding that CERCLA had not been contemplated at the time.

- As to argument on deed, court notes that bill of sale and deed were entered on same day, and that while deed does not incorporate letter of agreement or indemnity, the bill of sale explicitly references the letter of agreement, the sale of land and the continuing obligations of seller; and thus court finds that indemnity is continuing obligation of seller and remains in effect.

139. Wells Fargo Bank, N.A. v. Renz, 795 F.Supp. 2d 898 (N.D.Cal. 2011).

- Trust that owns site of dry cleaning establishment in Berkeley, California discovers PCE contamination and files CERCLA cost-recovery and contribution action against former dry cleaner tenants; tenants file counterclaims, cross-claims and third party claims.

- Motions before court include motion for summary judgment by tenants who leased premises in 1974, against whom Trust has claimed express contractual indemnity under lease terms.

- Trust's contract claim is based on lease clause which provides that "Lessee will hold Lessor exempt and harmless from any damage or injury to any person, or the goods, wares and merchandise and all other personal property of any person, arising from the use of the premises by Lessee, or from the failure of Lessee to keep the premises in good condition and repair as herein provided."

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- Former tenants argue that the contractual indemnity only applies to personal property, and not to damage to real property.

- Court agrees, and grants motion for summary judgment in favor of former tenant's on Trust's contractual indemnity claim.

140. JFE Steel Corp. v. ICI Americas, Inc., 797 F. Supp. 2d 452 (D. Del. 2011).

- ICI owns and operates a special compounds and recycling facility from 1984 to 1991, and in 1991 sells real property and assets to, and enters transitional agreement with, JFE predecessor, by way of three related agreements.

- In 2002, significant contamination problem found, JFE commences cleanup and notifies ICI of claim and expectation that ICI will reimburse and also take over balance of cleanup. ICI declines.

- JFE continues cleanup and commences action against ICI based on contract, CERCLA and state law claims.

- JFE seeks summary judgment on breach of contract, indemnity and CERCLA claims; ICI seeks summary judgment on all claims.

- ICI takes position that all of JFE's claims are indemnification claims, that parties carefully negotiated liability for pre-closing environmental liabilities with a ten year limitation period that ended in 1991, and that JFE's claims are thus out of time and barred by contract.

- ICI points to indemnification provision from asset purchase agreement which provided that ICI would "indemnify and defend the Purchaser against, and... hold the Purchaser harmless from, any and all damage, loss, liability and expense... related to the Retained Liabilities. ...[C]laims for indemnification based upon the Retained Liabilities described in paragraph 1 of Schedule D may be made up to ten (10) years after the Closing Date... ."

- JFE points to assumption of liabilities provision of the asset purchase agreement which provides, without temporal limitation, that "Purchaser agrees... to assume and satisfy the Assumed Liabilities, and the Seller shall retain and satisfy the Retained Liabilities."

- JFE also points to survival clause of agreement, which provides that "covenants and agreements of parties which by their terms require performance or compliance on or after the Closing Date as well as the indemnities... shall continue in force thereafter in accordance with their terms." JFE asserts that this applies both to

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the indemnity provision and separately to the assumption of liabilities provision.

- Schedule D of the asset purchase agreement refers to "damages, loss, liabilities claims or expenses... relating to the Business or the Acquired Assets and arising out of liability under any Environmental Law... ."

- Court first finds that indemnification provision and Schedule D are broad enough to encompass CERCLA, that thus the 10 year indemnification limitation applies, and that JFE's CERCLA indemnification claim is time-barred by contract.

- Court grants summary judgment on CERCLA indemnity in favor of ICI.

- However, court rejects ICI's argument that indemnity is the only remedy available.

- Delaware District Court applies Delaware law, which requires that parties intending to limit remedies to indemnity must do so expressly in the contract. Court finds no such limit, and thus concludes that JFE's breach of contract claims survive.

- Court then considers statute of limitations on breach of contract claim. As the case was initially filed in the Northern District of Ohio, and then transferred to Delaware by ICI's own motion, court concludes that it must apply the same law that transferor court would have applied.

- Court predicts that transferor court would have applied the fifteen year Ohio statute of limitations for a contract claim, rather than the three year Delaware statute of limitations for such a claim, and applies the Ohio limit, allowing the contract claim to proceed.

141. U.S. v. NCR Corp., 2011 WL 2634262 (E.D. Wis. July 5, 2011); 2011 WL 3240447 (E.D. Wis., July 28, 2011, denying injunction on separate issue), 2011 U.S. Dist. Lexis 146533 (E.D. Wis., Dec.19, 2011), 840 F. Supp. 2d 1093 (E.D. Wis., April 10, 2012).

- In case arising from PCB contamination of Fox River in Wisconsin, U.S. is seeking to establish successor liability of one of the parties by reference to private party allocation of risk in 1978 asset purchase agreement, and to use that as basis for obtaining preliminary injunction.

- Court rejects argument and denies application for preliminary injunction, noting that agreement allocates the financial risks of

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particular liabilities between the two contracting parties, which is not to be confused with the underlying CERCLA liability to the government, which cannot be contracted away.

- Appleton Papers then seeks summary judgment on issue, but court accepts argument of U.S. that Appleton Papers agreed by contract to take on CERCLA liabilities.

- On motion for reconsideration by Appleton Papers, court looks again to the contract provisions, and this time agrees with Appleton Papers to the extent of finding that the agreement in question was not in fact drafted broadly enough to encompass Appleton Paper's direct CERCLA liability.

- Court looks at a schedule to the agreement, referred to in the provision in which Appleton Papers assumed certain liabilities, which describes environmental violations of which the seller has received notice.

- Court concludes that the assumption of liability was thus limited to specific claims and notices of liability that were already of record.

- Court further determines that the agreement does not bear the type of broad, all-encompassing assumption of environmental liabilities that could be read to apply to even those liabilities, such as CERCLA, which post-dated the agreement.

- Court enters summary judgment in favor of Appleton Papers.

142. U.S. v. ARG Corp., 2011 WL 3422829 (N.D.Ind., August 4, 2011).

- ARG Corp. owns an industrial site in South Bend, Indiana from 2000 to 2006, and then sells the property to the City of South Bend.

- Within days of closing on the acquisition, City notifies EPA that it fears dangers to public health due to hazardous substances at property.

- EPA investigates, finds imminent danger to public and orders ARG Corp. to take action.

- After ARG Corp. refuses to act, EPA commences removal activities and then U.S. files suit against ARG Corp. under CERCLA.

- ARG Corp. files third-party complaint against City alleging that under contract of sale, City is financially responsible for cleanup costs being incurred by EPA.

- City moves to dismiss third-party complaint for failure to state a claim, arguing that dismissal is appropriate, since the contract provides that City is not responsible for cleaning up contamination that occurred during ARG Corp.'s ownership of the property.

- Court notes that under Indiana law, if contract language is clear and unambiguous, court is to give the language its plain and ordinary meaning as expressed within the four corners of the agreement.

- Court further notes that the mere fact that parties disagree on interpretation of language does not create an ambiguity.

- Here, neither party alleges ambiguity; rather, they disagree on meaning, and ARG Corp. alleges that pre-contract negotiations indicate intent.

- Contract provides that "Seller shall remain solely financially responsible for the Remediation Activities arising from the Seller's ownership, use or operation of the property prior to the Closing Date," but that "Purchaser covenants not to execute against any of the Seller's assets" in this regard "except for the proceeds of recoveries under the general liability insurance policies issued to the Seller prior to the closing."

- Contract further provides that "Purchaser shall be solely financially responsible for the Remediation Activities arising from the Purchaser's ownership, use and operation of the property" after the closing.

- The term "Remediation Activities" is broadly defined in the contract.

- Contract also specifies that it "embodies the entire agreement between the parties and cannot be varied except by the written agreement," and that "[n]o representation, promise, or inducement not included in this Agreement shall be binding upon the parties hereto."

- Court finds language unambiguous, and notes that its own analysis "begins and ends with the contract language."

- Court concludes that ARG Corp. is responsible for remediation of hazardous substances that arose during its ownership, that likewise

the City is responsible for hazardous substances resulting from its ownership, and that in other words, the parties had agreed that the City is not responsible for cleaning up conditions that arose during ARG Corp.'s ownership.

- ARG Corp. argues that verbiage limiting City's right to execute against ARG Corp.'s assets is evidence that the City accepted responsibility for any cleanup costs. Court disagrees, noting that the reading is contrary to the contract language.

- Court also finds that ARG Corp.'s claims on pre-contract negotiations are irrelevant, since "the clear language in the contract suggests otherwise," and the contract specified that the contract embodies the entire agreement.

- City's motion to dismiss is granted.

143. McGowan Working Partners, Inc. v. Eland Energy, Inc., 2011 U.S. Lexis 72396 (N.D. Tex., July 6, 2011).

- Direct issue before court is whether arbitration panel has exceeded its authority in determining that a purchaser of property interests in Louisiana oil field has a contractual obligation to indemnify seller for certain environmental indemnity obligations of seller to third parties from which seller had acquired the property interests some years earlier.

- 1996 Purchase and Sale Agreement between Eland Energy as seller and McGowan as buyer includes specific provisions on indemnification and assumption of liabilities concerning the oil field properties.

- About ten years later, a group of parties sues Eland, and the third parties from which Eland had acquired the oil fields interests, for damages resulting from soil and groundwater contamination at the oil field.

- Third parties cross-claim against Eland for indemnification, as each of their agreements had contained a provision requiring Eland to indemnify them against claims related to the properties.

- Eland turns to McGowan for indemnification pursuant to the 1996 PSA.

- McGowan assumes Eland's defense against the plaintiffs, but refuses to defend and indemnify Eland against the cross-claims.

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- Settlements are reached with the plaintiffs; the cross-claims remain pending.

- Eland demands arbitration pursuant to a binding arbitration clause in the PSA.

- Arbitrators find in favor of Eland.

- McGowan moves to vacate arbitration award on ground that arbitrators exceeded their authority in determining that PSA indemnity provisions apply to the "upstream" indemnity obligations of Eland to those from which Eland purchased the oil field interests. Eland moves to confirm the award.

- Court looks to the PSA language, including the obligation of McGowan to "pay, perform, fulfill and discharge all claims, costs, expenses, liabilities and obligations accruing or relating to the owning, developing, exploring, operating and maintaining of the interests conveyed to [McGowan] at the closing, including without limitation, all violations of environmental law and all obligations arising under operating agreements, product sale agreements and other agreements covering or related to the interests, regardless of the negligence of [Eland]."

- Court also notes the PSA language requires McGowan to "indemnify, defend and hold harmless [Eland] from and against any and all Loss... attributable to the Properties... including but not limited to natural resource damages, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) response costs, environmental remediation and restoration costs arising out of or attributable to... the condition or operation of the Properties... ."

- Court finds that it is unable to conclude that the arbitrators exceeded their authority, denies McGowan's motion, and grants Eland's motion to confirm the award.

144. Exxon Mobil Corp. v. United States, 101 Fed. Cl. 576 (October 31, 2011).

- In case involving same issues and contract clauses as those addressed in the Shell Oil Co. v. U.S. case (see case summaries 115 and 129 above, and case 149 below), Fed Claims court finds in favor of Exxon Mobil as it had done in favor of Shell Oil.

- However, case predates the vacating and remanding of Shell Oil by the D.C. Circuit Court of Appeals in 2012 (see case 115).

145. United States v. Sterling Centrecorp Inc., 2011 U.S. Dist. Lexis 147651 (E.D. Cal., December 22, 2011).

- Former mine in Nevada County, California is found to be polluted by arsenic and lead, leading to designation of mine as Superfund site.
- U.S. and California proceed with arsenic cleanup and pursue former mill owners and operators they deem responsible.
- Plaintiffs move for summary judgment, including argument based on contractual assumption of liability in 1952 agreement pursuant to which the predecessor of one of the defendants acquired certain assets and liabilities of a prior owner of the mill.
- Court finds triable issues of fact, looking both at the 1952 contract terms and parole evidence.
- Summary judgment on contractual assumption of liability is denied.

NOTE: DBF TO UPDATE - SEE CASE IN ARTICLES FOLDER.

146. Lockheed Martin Corp. v. Goodyear Tire & Rubber Co., 2012 U.S. Dist Lexis 115148 (N.D. Ohio, August 15, 2012).

- Lockheed Martin becomes owner of dirigible hanger site in Akron, Ohio in 1997 through merger with Loral Corporation.
- It is subsequently discovered that the site is substantially contaminated by PCBs.
- Lockheed proceeds with cleanup, and after spending tens of millions of dollars for PCB remediation, Lockheed files suit against Goodyear Tire entities, including Goodyear Aerospace Corporation (GAC), that previously owned and operated site.
- Claims include CERCLA and contract causes of action.
- Contract claims concern a 1987 Asset Purchase Agreement (APA) pursuant to which the site was transferred to Lockheed's predecessor in interest.
- Parties make cross-motions for summary judgment on the APA.
- Court looks to Ohio law, which is the law of the APA, and pursuant to which extrinsic evidence is only to be considered if the court finds the contract language ambiguous as a matter of law.

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- Court considers the central contract clauses on asset acquisition and assumption of liabilities, particularly the provision which provides that "Loral shall assume and... agrees to pay, perform and discharge when due all debts, obligations, contracts and liabilities of GAC of any kind, character or description whether accrued, absolute, contingent or otherwise, whether now or hereinafter arising, provided, however, that Loral shall not assume... any liabilities arising out of actions unrelated to the transactions contemplated hereby done or permitted to be done by Goodyear after the Closing Date... ."

- Court finds contract unambiguous and will not consider extrinsic evidence such as leases or declarations by witnesses.

- Court further finds that the APA resulted in Loral, and therefore Lockheed, assuming all GAC liabilities other than those specifically excepted, including liabilities for transferred assets.

- Summary judgment granted in favor of Goodyear.

147. United States v. ConocoPhillips Co., 2012 U.S. Dist. Lexis 147035 (W.D. Tex., Sept. 30, 2012).

- ConocoPhillips predecessor produces jet-assisted takeoff rockets at U.S. Air Force base in McGregor, Texas under 1950s contracts with the Air Force.

- Contracts provide that ConocoPhillips "shall not be liable for any loss of or damage to [designated facilities including the property at issue] or for expenses incidental to such loss or damage...," and that it "shall not be liable for any loss of or damage to the Government Property, or for expenses incidental in such loss or damage... ."

- Property had been a government-operated naval weapons plant during World War II, and following the ConocoPhillips contract, other companies operated heavy industries at the site.

- Government proceeds with investigation and cleanup of site and proceeds with cost-recovery action against ConocoPhillips under CERCLA and state law.

- ConocoPhillips moves to dismiss based on contract and statute of limitations.

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- Court finds that contract clauses are broad enough to protect ConocoPhillips against CERCLA liability, and that in any event ConocoPhillips is entitled to dismissal because the government failed to bring the action within the periods time allowed under CERCLA and Texas law.

- Court enters judgment dismissing action.

148. CTS Corp. v. Mills Gap Rd. Assoc., 2012 U.S. Lexis 183652 (W.D. N.C. - Magistrate Findings and Recommendations, Nov. 15, 2012), Recommendations adopted by Dist. Ct., 2013 U.S. Dist. Lexis 1950 (W.D. N.C., Jan. 7, 2013).

- CTS is former owner of manufacturing facility in North Carolina. Most of property is now owned by Mills.

- Contamination at site leads to the two parties entering an AOC with EPA, and then entering a Site Participation Agreement (SPA) in 2004.

- SPA provides for Mills to contribute 25% of defined costs, or to discharge its obligations by performing a set of defined tasks within a particular period of time.

- Mills commences the defined tasks.

- In 2007, North Carolina environmental authorities require that CTS perform additional site work, and CTS demands indemnity from Mills. Mills rejects demand.

- In 2011, EPA proposes adding site to NPL, and EPA requires further activities, and cost reimbursement, from CTS.

- CTS enters second AOC with EPA for RI/FS, and commences action against Mills for breach of contract in failing to share costs, and for failure to indemnify.

- Parties cross-move for summary judgment.

- Magistrate Judge finds that Mills has been proceeding with the set of defined tasks set forth in the SPA, and thus is not in breach of the agreement for failing to pay shared costs incurred to date.

- Magistrate Judge then reviews indemnity provision and finds it ambiguous.

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- Magistrate Judge issues Memorandum and Recommendation that District Court deny CTS's motions for summary judgment on both the shared cost and indemnity provision, and also deny Mill's motion for summary judgment on the indemnity provision.

- District court accepts findings and conclusions of Magistrate Judge.

149. Shell Oil Co. v. U.S., 2013 U.S. Claims Lexis 9 (Fed. Cl., January 14, 2013).

- See cases 115 and 121 above for prior history and contract language.

- Damages sought by oil companies are now in excess of $92 million plus interest and additional accruing damages.

- Oil companies and U.S. have filed cross-motions for summary judgment.

- Court considers same wartime avgas contracts analyzed by prior judge, and comes to contrary conclusion; namely, that contract clause in question deals only with taxes and is not a broad indemnification provision covering later-imposed liabilities such as CERCLA.

- Court denies motion by oil companies, and grants summary judgment for government.