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Brownfield Redevelopment

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The Origins of Brownfields

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The Second Decade of Environmental Statutes
1980-1990

Comprehensive Environmental Response, Compensation & Liability Act (Superfund)
Emergency Planning and Community Right to Know Act
Alaska National Interest Lands Conservation Act
Hazardous and Solid Waste Act Amendments of 1984
Safe Drinking Water Act Amendments of 1986
Superfund Amendments and Reauthorization Act of 1986
Water Quality Act of 1987
Medical Waste Tracking Act of 1988
Oil Spill, Pollution, Prevention Act of 1990
Clean Air Act Amendments of 1990

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- CERCLA was enacted "in response to the serious environmental and health risks posed by industrial pollution." *Burlington Northern & Sante Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009).

- The intent of CERCLA is to "promote the 'timely cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Id*.

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- Unintended Barrier to Redevelopment
  - CERCLA's liability scheme posed a barrier to redevelopment because "parties can be held liable for the entire costs of cleanup, even if they purchased the property after the contamination occurred or were otherwise innocent parties." Robert C. Smith, Brownfields Revitalization and Environmental Restoration Act of 2001, S. Rep. No. 107-2, at 2 (2001).
- Why?
  - Because liability under CERCLA is draconian.
  - I do mean "draconian" – harsh, severe, extreme, stringent, drastic, tough.

- Why do I mean draconian?
  - Because CERCLA's liability scheme is (1) wide in scope (it ensnares parties who had nothing whatsoever to do with the release of the contamination), (2) strict (it is not based on fault), and (3) joint and several.

- Wide in scope – CERCLA imposes liability for environmental contamination upon four broad classes of parties, two of which are pertinent here:
  - The owner and operator of any site where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.
  - Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

- CERCLA's liability scheme is wide in scope, and it is also strict.
  - CERCLA liability does not require proof of negligence or wrongdoing. *Harley-Davidson, Inc. v. Minstar, Inc*., 41 F.3d 341, 343 (7th Cir. 1994).
  - Indeed, CERCLA liability is not dependent upon any showing of causation or fault. *Farmland Indus., Inc. v. Morrison-Quirk Grain Corp*., 987 F.2d 1335, 1339 (8th Cir. 1993).

- And, courts recognize the draconian nature of CERCLA liability:

  - "Often, liability is imposed upon entities for conduct predating the enactment of CERCLA, and even for conduct that was not illegal, unethical, or immoral at the time it occurred. We recognize . . . that CERCLA, as a strict liability statute that will not listen to pleas of 'no fault,' can be terribly unfair in certain instances in which parties may be required to pay huge amounts for damages to which their acts did not contribute." *Matter of Bell Petroleum Services, Inc.* 3 F.3d 889, 897 (5th Cir. 1993).

- Joint and Several
  - Responsible parties are jointly and severally liable . . . . *Burlington N. & Santa Fe Ry. Co. v. United States,* 556 U.S. 599, 1881 (2009).
  - When two or more parties are jointly and severally liable, each party is independently liable for the full extent of the damages.
  - Joint and several liability reduces plaintiff's risk that one or more defendants are judgment-proof by shifting that risk onto the other defendants. However, this system can cause inequities, particularly where a relatively blameless defendant is forced to bear the financial burden of an incredibly guilty co-defendant's insolvency.

- So, as I said, liability under CERCLA is draconian.

- Indeed, when CERCLA was enacted, Congress recognized that "parties can be held liable for the entire costs of cleanup, even if they purchased the property after the contamination occurred or were otherwise innocent parties." Robert C. Smith, Brownfields Revitalization and Environmental Restoration Act of 2001, S. Rep. No. 107-2, at 2 (2001).

- And, liability is not limited to private parties. Governmental entities can be liable as "owners" under CERCLA. *Pennsylvania v. Union Gas Co*., 491 U.S. 1, 8 (1989) ("Congress intended that States be liable along with everyone else for cleanup costs recoverable under CERCLA."); *City of Wichita v. Aero Holdings, Inc*., 177 F. Supp. 2d 1153, 1167 (D. Kan. 2000) ("[T]the statute clearly states that as a general matter State and local governments are not to be distinguished from private entities.").

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- Insurance agency in former dry cleaners.
- Flower shop in former gas station.

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- Between 1990 and 2040, the cost required to clean up property contaminated with hazardous substances is predicted to be between $500 billion and $1 trillion. *Mandating Environmental Liability Insurance*, 12 Duke Envtl. L. & Pol'y F. 293, 305 (2002).

- And, the average cost for an individual hazardous waste cleanup site is in excess of $20 million. *Taking It Personally: Shareholder Liability for Corporate Environmental Hazards*, 27 J. Corp. L. 29, 30 n.2 (2001).

- Barrier to Redevelopment
  - CERCLA's liability scheme posed a barrier to redevelopment because, as we have seen, "parties can be held liable for the entire costs of cleanup, even if they purchased the property after the contamination occurred or were otherwise innocent parties." Robert C. Smith, Brownfields Revitalization and Environmental Restoration Act of 2001, S. Rep. No. 107-2, at 2 (2001).
  - So, in 2001, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act (the "Brownfields Amendments").
  - Under the Brownfields Amendments, persons who qualify as bona fide prospective purchasers are excluded from liability under CERCLA.

Bona Fide Prospective Purchaser

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- So, how do you qualify as a bona fide prospective purchaser?
- To qualify as a bona fide prospective purchaser, you must acquire ownership of the property in question after January 11, 2002.
- And you must satisfy the eight criteria.

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1) The disposal of contamination must have occurred prior to acquisition;

2) You must conduct “all appropriate inquiry” into the condition of the property prior to title transfer;

3) You must provide all legally required notices with respect to the discovery or release of any hazardous substances at the property;

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4) You must exercise appropriate care with respect to hazardous substances found at the property;

5) You must provide full cooperation, support, assistance, and access to persons authorized to conduct response actions at the property;

6) You must be in compliance with land use restrictions and you must not impeded the effectiveness or integrity of any institutional controls;

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7) You must comply with any request for information or administrative subpoena; and

8) You must not be affiliated with any potentially responsible party.

- (1), (2), and (8) are initial obligations, and (3) through (7) are continuing obligations.

Bona Fide Prospective Purchaser

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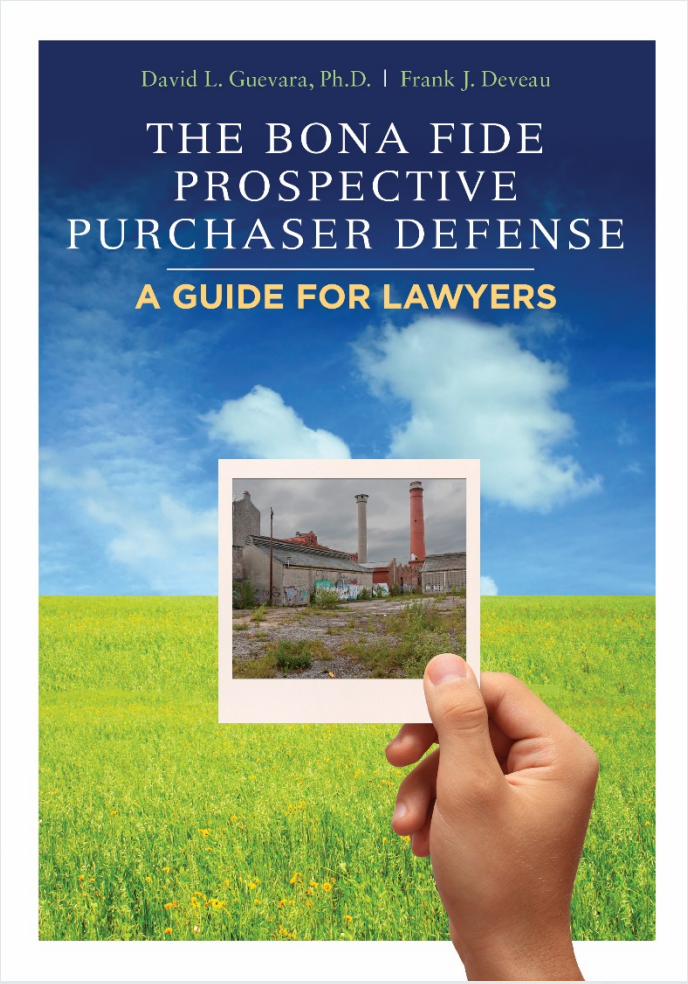

BFPP—Comfort Letters

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- Self-Executing Defense
- Comfort Letters
  - Prospective purchaser and lenders like them.
  - Courts will likely give deference to agency's determination that purchaser is a BFPP.
  - Continuing Obligations Assessment Letter.

- A general liability policy responds to legal liability on account of property damage due to environmental contamination.

- The purpose of insurance is to protect the insured from the risk of certain unpredictable events.

  - life insurance protects against premature death;
  - automobile insurance protects against automobile-related injuries; and
  - property insurance protects against damage to property caused by a covered peril, such as fire.

- The unpredictable event against which general liability insurance provides protection is a lawsuit or the threat of a lawsuit.
  - Under Indiana law, the term "suit," as used in a general liability policy, is interpreted to include coercive and adversarial environmental administrative proceedings. *Employers Ins. of Wausau v. Recticel Foam Corp*., 716 N.E.2d 1015, 1026 (Ind. Ct. App. 1999).
- Therefore, a general liability policy responds to legal liability on account of property damage due to environmental contamination.

- In a general liability policy, the insuring agreement generally states:
  - We will pay those sums the insured becomes legally obligated to pay as damages because of “property damage” or “bodily injury” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages.
- So, to what type of property damage does the insurance apply?
  - It applies to property damage that is not otherwise excluded.

- An exclusion is a specific exception to the general scope of coverage created by the insuring agreement.

- For example, the insuring agreement is a promise by the insurer to pay money that the insured becomes legally obligated to pay as damages because of property damage.

  - But, that promise does not extend to liability for property damage due to war.

  - So, while the insuring agreement would otherwise be broad enough to apply, it will not apply because of the exclusion.

Pollution Exclusion—Breadth Principle

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- Indiana law has handed down to us the well-established principle that where the definition of "pollutants" in a liability policy is overbroad, the pollution exclusion is ambiguous and unenforceable—therefore, the exclusion does not preclude coverage for environmental cleanup claims.

  - *State Auto Mut. Ins. Co. v. Flexdar*, 964 N.E.2d 845 (Ind. 2012); *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996); *Seymour Mfg. Co. v. Commercial Union Ins. Co.*, 665 N.E.2d 891 (Ind. 1996); *State Auto Ins. Co. v. DMY Realty Co.*, 977 N.E.2d 411 (Ind. Ct. App. 2012); *Ind. Farm Bureau Ins. Co. v. Harleysville Ins. Co.*, 965 N.E.2d 62 (Ind. Ct. App. 2012); *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37 (Ind. 2002); *Travelers Indemn. Co. v. Summit Corp. of America*, 715 N.E.2d 926 (Ind. Ct. App. 1999).

Pollution Exclusion—Scope Problem

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- The fatal flaw that the pollution exclusions in the aforementioned cases shared was an overly broad definition of “pollutants” like or identical to the following:

  - *Pollutants mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.*

- In other words, the definition essentially includes all types of matter found in nearly any condition or state—its scope is too broad.

Pollution Exclusion—Reductio ad Absurdum

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- In *Kiger*, the Indiana Supreme Court made the following observation:

  > "Clearly, this clause cannot be read literally as it would negate virtually all coverage. For example, if a visitor slips on a grease spill then, since grease is a 'chemical,' there would be no insurance coverage. Accordingly, this clause requires interpretation." *Kiger*, 662 N.E.2d at 948.

- Thus, while a liability policy may include a pollution exclusion, the definition of "pollutants" as used in the exclusion may render the exclusion ambiguous and unenforceable.

Pollution Exclusion—Specificity Requirement

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- In *Flexdar*, the Indiana Supreme Court made clear that basic contract principles require an insurer to specifically identify any substance that it intends to be subject to the pollution exclusion. *Flexdar*, 964 N.E.2d at 851 ("Applying basic contract principles, our decisions have consistently held that the insurer can (and should) specify what falls within its pollution exclusion.")

- The Specificity Requirement remedies the Scope Problem.

Pollution Exclusion—Specificity Requirement

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- What about the following definition of "pollutants"—does it satisfy the Specificity Requirement?

"Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. "Pollutants" includes:

a. Petroleum or petroleum derivatives, gasoline, fuels, lubricants and their respective additives and individual chemical components, including benzene and toluene;
b. Chlorinated and halogenated solvents, including tetrachloroethylene (PCE or PERC), trichloroethylene (TCE), trichloroethane (TCA) and vinyl chloride, and their degradation products;
c. Coal tar, manufactured gas plant (MGP) byproducts and polynuclear aromatic hydrocarbons (PAHs), phenols and polychlorinated biphenyls (PCBs); and
d. Organic and inorganic pesticides, and inorganic contaminants, including arsenic, barium, beryllium, lead, cadmium, chromium and mercury.

Pollution Exclusion—Specificity Requirement

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- The examination of the pollution exclusion must include an analysis of "whether the language in [the] policy is sufficiently unambiguous to identify [the substances at issue] as pollutants." *Flexdar*, 964 N.E.2d at 851.

- Importantly, this analysis is conducted from the perspective of the ordinary policyholder of average intelligence. *Id*.

- And, all doubts about coverage are construed against the insurer and in favor of coverage. *Flexdar*, 964 N.E.2d at 851-52.

Insurance Recovery

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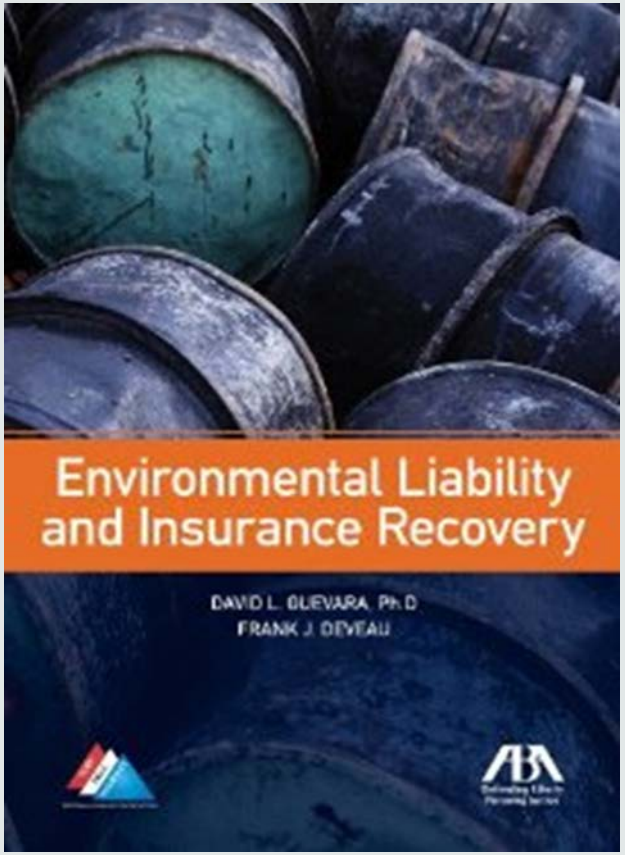

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