

*Chemicals Distribution:
An American Legal Perspective
Liability and Risk Management in an Evolving
Regulatory Environment*

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Robert W. Curry, Chair

Environmental Practice Group

Chemical Leasing and Chemicals Management

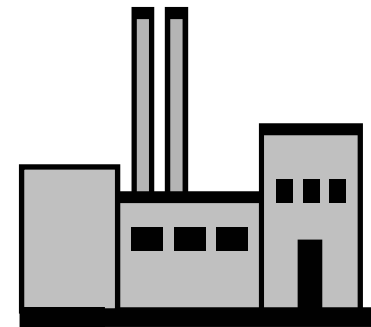
- Assumes that the chemical is not consumed or emitted in the first process use
- The leading variant assumes that realizing the value of what is left requires significant intellectual as well as financial capital
- How does the law respond to this possibility?

Critical Legal Concepts: Environmental Liability

- “Polluter [Should] Pay” – a goal, rather than an enforceable standard.
- In the U.S., the *owner* of a facility is chief among those who are responsible for damages arising from environmental risks.
- *Strict liability* – without regard to fault – is the operative concept.

Chemical Products and Their Significant Environmental Risks

- Contamination of property
- Operations not in compliance with regulatory requirements/permits
- Third party exposures (workers, users, abutters)



Private Party Liabilities Associated with the Identified Risks:

- Damages for cleanup on and off-site
- Natural resource damages (“NRD”)
- Governmental fines and penalties
- Damages in “tort” for property damage, to extent not covered above, and for personal injuries

Key U.S. Laws in Managing and Accounting for Environmental Risks

- CERCLA (Federal “Superfund”)
- RCRA (Waste management)
- Other Laws, e.g.
 - TSCA
 - EPCRA
 - Securities disclosure laws

CERCLA (Superfund)

- Italia's Seveso TCP Release; the Galicia Oil Spill
- America's Love Canal; the *Exxon Valdez* Oil Spill
- Liability for Costs of *Response Actions* and for *NRD*

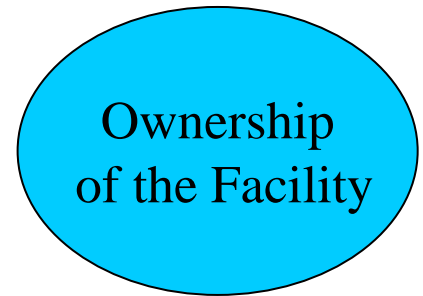


CERCLA and EU Liability Schemes

- CERCLA is directed to the federal government's authority (U.S. EPA) to cleanup and capture costs from responsible parties
- Does not cover personal injury (health) or private party property damages

CERCLA “PRPs”

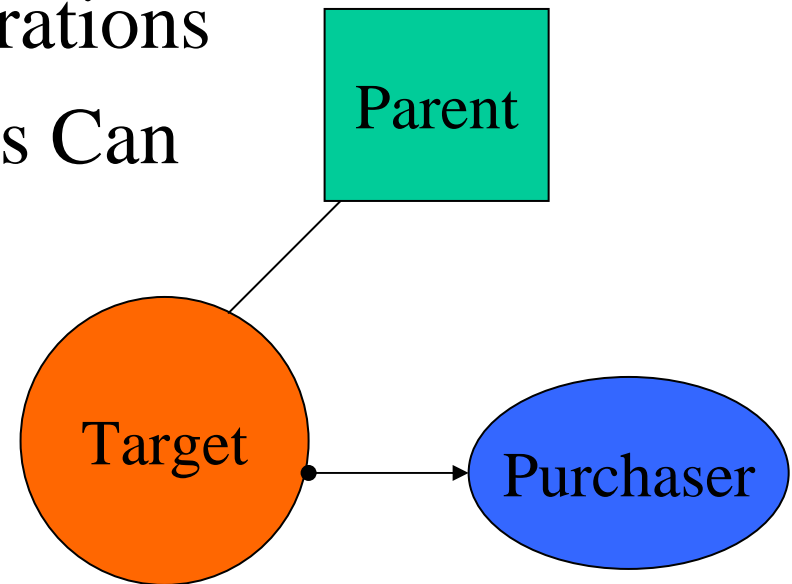
- Current Facility Owners/Operators
- Past Owners/Operators “At Time of Disposal”
- Those Who “Arrange” Disposal
- Transporters Selecting Site of Disposal



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Upstream/Downstream CERCLA “PRPs”

- Parents of Subsidiary Corporations
- Shareholders of Corporations Can Be Liable (“Veil Piercing”)
- Successor Liability
- Other Contractual Parties



CERCLA's Useful Product "Defense"

- “Any person who by contract . . . *arranged* for disposal”
- So, if a Monsanto *merely sells* a chemical to its user, and user or user's downstream handler spills it, user is liable but not Monsanto.

Sellers are Not
“Disposers”

Should this “Defense” Impede Leasing?

- Courts are divided regarding cases where residual value of used chemical at issue.
- Some focus on “intent” of parties.
- Others focus the transaction and ask: is it a subterfuge for disposal?

CERCLA and Leasing

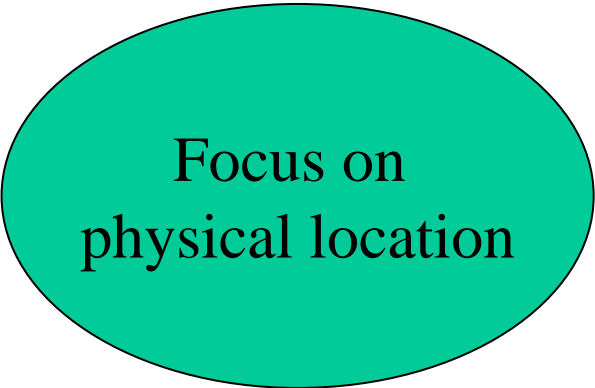
- Facility Owners/Operators Remain Strictly Liable for Releases Whether or Not Chemicals Leased
- Chemical Manufacturers Merely Selling Product Can Avoid Liability
- Leasing as “Arranging” for Disposal

EU's Emerging Liability Regime

- Focus on “Operator” rather than “Owner”
- Activity-focused, differentiating among types of activities based on dangerousness with regard to causation and proof of negligence
- Directive's impact on leasing problematic in context of uncertainties in its implementation by the Member States and in its judicial interpretation through litigation

RCRA

- Regulates sites that treat, store or dispose of “hazardous wastes” (including USTs)
- Waste tracking from “generation” to “disposal”
- Imposes significant requirements for cleanup of sites where improper waste disposal occurs



Focus on
physical location

RCRA's Complex Waste-Management Continuum

- Waste generally not regulated as *Hazardous* (HW) if not also a “*Solid Waste*” (SW)
- Complex rules for ascertaining both, with multiple exceptions, whose logic and scope not transparent
- Complexity alone a disincentive to undertaking leasing

Certain Commercial Chemical Products

- Unused or off-specification products not SW if reclaimed
- But recaptured as SW if:
 - Otherwise used in a manner constituting “disposal”
 - Burned or used to produce fuel (unless the discarded product was itself a fuel)
 - Accumulated speculatively

Recycled Materials under RCRA

- Generally, reused or reclaimed materials
- May be SW or HW depending on methods
- Types of recycling:
 - Closed loop
 - Off-line
 - Off-site

RCRA's Regulatory Incentives and P2

- Requirements scaled to volumes generated, but very difficult to avoid most stringent requirements imposed on LQGs
- RCRA's 1990 Pollution Prevention Act amendments (P2) encourages waste minimization and recycling is a key element, but the latter is not effectively regulated and incentives afforded often lost in the “noise”

Leasing as One Response to RCRA

- RCRA's regulatory focus on physical location and duration of storage should not *discourage* leasing.
- If chemical developer/supplier is willing to apply know-how and seeks to reduce “one off” transactions, RCRA affords at least *some* incentives to leasing through the recycling rules.

A Word About Those “Other Laws”

- TSCA and REACH
- Securities laws disclosures in the U.S.
- Chemical toxicity and product liability
- Know-how protection (especially if not patented)

Shifting the Paradigm Towards Leasing

- U.S. laws neither promote nor rule out
- Judicial review of a joint venture/lease concept will be required
- Major stakeholders may seek legislative clarifications
- Similar concerns likely within EU framework