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ARTICLES

Allocation of Environmental Risk as Between Landlords and Tenants: The New York View

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Introduction

Legal publications have recently devoted extensive coverage to the statutory framework of, and the interpretative gloss that the courts have afforded to, the major environmental remediation statutes applicable to real property. But while the commentators have discussed at length environmental liability issues that arise between seller and purchaser and borrower and lender,¹ they have

1. See generally J. Murray, *Asbestos Legislation and Litigation Affecting Commercial Buildings*, 6 THE ACREL PAPERS, ENVIRONMENTAL LIABILITY IN COMMERCIAL PROPERTY TRANSACTIONS (Alan J. Robin, et al. eds., 1994), available at <http://www.firstam.com/faf/html/cust/jm-asbestos.html> (last visited Mar. 10, 2002); J. Witkin, *Environmental Aspects of Real Estate Transactions*, 1995 A.B.A. SEC. NAT. RESOURCES ENERGY & ENVTL. L. AND SEC. REAL PROP. PROB. & TR. L.; G. Rodenhausen, *Negotiating the Environmental Provisions of the Transaction from the Seller's, Buyer's and Lender's Prospective*, 1999 N.Y. ST. B.A. ENVTL. L. PRAC. SKILLS; D. Riesel et al., *Recent Developments in CERCLA and Toxic Tort Litigation—Private-Party Hazardous Material Litigation*, 2000 N.Y. ST. B.A. ENVTL. L. PRAC.; D. Sommer, *Recent Developments in CERCLA and Toxic Tort Litigation—Contribution Claims After Bedford Affiliates v. Sills*, 2000 N.Y. ST. B.A. ENVTL. L. PRAC.; F. Amoroso, *Recent Developments in CERCLA and Toxic Tort Litigation—Protection Available to Potential Purchasers and Developers*, 2000 N.Y. ST. B.A. ENVTL. L. PRAC.; R. Koegel, *Recent Developments in CERCLA Litigation—Cost Recovery Actions and Third-Party Defense*, 2000 N.Y. ST. B.A. ENVTL. L. PRAC.; R. Herman, *Recent Developments in CERCLA Litigation—Due and Don't Care Under CERCLA: An Emerging Standard for Current Owners*, 2000 N.Y. ST. B.A. ENVTL. L. PRAC.; L. Schnapf, *Recent Developments in CERCLA Litigation—Identifying and Allocating Environmental Issues in Corporate and Real Estate Transactions*, 2000 N.Y. ST. B.A. ENVTL. LAW PRAC.; R. Hull, *Recent Developments in CERCLA Litigation—Purchaser' Liability Under CERCLA: Has Lashins Made Due Diligence a Detriment?* 2000 N.Y. ST. B.A. ENVTL. L. PRAC.

barely touched upon environmental liability in the context of the relationship of lessor and lessee.

This article will fill the gap and analyze those decisions of the New York state courts and the federal courts sitting in New York that have allocated environmental risk in the context of the landlord-tenant-subtenant relationship. It surveys decisions that have arisen under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),² New York Navigation Law³ and New York City Local Law 76.⁴ It concludes that while all three statutory regimes place on the polluter ultimate liability, each regime requires, with only very limited exception, the property owner—here, the landlord—to bear initial liability for the cost of the pollution remediation, irrespective of fault.

The landlord's bearing initial liability is not the end of the story. Although liable, the landlord may have remedies against the party at fault, whether a tenant, a subtenant, or another party, either based upon the statute itself or pursuant to contract (e.g., the lease). If the owner is "innocent," that is, cast in primary liability only because of its status as an owner, it will have a statutory action against the actual polluter for contribution, but not indemnification.⁵ And, if the lease sufficiently provides for the complete transfer of liability to the tenant, the landlord will have a contractual indemnity claim.⁶

In some respects a landlord-tenant relationship is similar to that between sellers and buyers of real property. Both the buyer and the tenant take possession of the property; however, in contrast to an acquisition, a real property lease affords the tenant only temporary, and potentially restricted, control over the property. Thus, in the majority of the environmental cases arising in the context of a landlord-tenant relationship, courts put special emphasis on determining who during the term of the lease has power to control the leased property.⁷ Is it the landlord? The tenant? Or even the subtenant? Ultimately, liability flows from control. The analysis that follows assumes that the reader has

2. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2001) amended by Pub. L. No. 107-118, 115 Stat. 2356 (2002).

3. N.Y. NAV. LAW § 1-204 (2001).

4. N.Y. CITY LOCAL LAW NO. 76 (1985).

5. See 42 U.S.C. § 9607(e) (2001).

6. *Id.*

7. See, e.g., *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321 (2d Cir. 2000), *cert. denied*, 531 U.S. 979 (2000).

general familiarity with each of the three statutory frameworks discussed.

CERCLA

Under CERCLA section 107(a),⁸ an owner/landlord is strictly liable for response costs with only very limited exceptions. Status alone—that is, mere ownership of property on which the release occurs—triggers liability, regardless of any control over the disposal activities.⁹ Thus, CERCLA section 107(a)(1)¹⁰ makes the current owner liable and section 107(a)(2)¹¹ makes the owner at the time of the release of pollutants liable. CERCLA does not, however, impose absolute liability on an owner; it provides owners with two narrow, limited exemptions from liability—one styled the third-party defense, and the other the “innocent purchaser” defense.¹² The first exemption provides that there shall be no liability for a person otherwise liable where the release and resulting damages:

[W]ere caused solely by . . . an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of evidence that (a) he exercised due care with respect to the hazardous substance . . . in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.¹³

The second exemption, the innocent purchaser defense, requires proof of all the elements applicable to the third-party defense and proof that the owner bought the property after the release, as well as requiring that the owner did not know and had no reason to know that any hazardous substance had been released.¹⁴ The questions pertinent here are: (i) whether a *tenant*

8. 42 U.S.C. § 9607(a) (2001).

9. See *Barlo Equip.*, 215 F.3d at 326-27; see also *Bedford Affiliates v. Sills*, 156 F.3d 416, 423 (2d Cir. 1998).

10. 42 U.S.C. § 9607(a)(1) (2001).

11. *Id.* § 9607(a)(2).

12. *Id.* § 9607(b).

13. *Id.* § 9607(b)(3).

14. *Id.* § 9601(35)(A). CERCLA contains two other exemptions: act of God, § 9607(b)(1) and act of war, § 9607(b)(2), neither of which is relevant to this article.

may be subjected to "owner" liability as an "owner" within the meaning of the statute; (ii) what makes an "owner" innocent under the statute; and (iii) whether a party made statutorily liable may receive indemnification or contribution from other parties.

I. Ownership Status: Can A Tenant Be An "Owner" Within The Meaning Of The Statute?

Ownership is sufficient to trigger CERCLA liability, this even though the statute provides limited exceptions. But, what about CERCLA liability of a lessee? Can the lessee be liable just because it is the lessee? The answer is yes. When the lessee exercises those rights that normally vest an "owner." This situation typically occurs in the net lease context, where the owner holds bare title and all other rights and responsibilities for the property fall to the lessee.

In *Commander Oil Corp. v. Barlo Equipment Corp.*,¹⁵ the issue was whether owner-landlord liability automatically attaches to a lessee-sublessor where the sublessee causes contamination. The action arose in the following factual context: In 1963, Commander bought two adjoining parcels.¹⁶ The first parcel housed an office and warehouse; the second housed twelve above ground petroleum storage tanks.¹⁷ In 1964, Commander leased the office and warehouse to Barlo; five years later, Commander leased the petroleum tank parcel to Pasley Solvents. In 1972, under a single new lease, Commander leased both parcels to Barlo, which in turn subleased the petroleum tank parcel to Pasley.¹⁸ Under the new arrangement, Barlo, the tenant, was responsible for basic maintenance and taxes for both parcels.¹⁹ The outcome of the action turned on who, among the landlord, tenant and subtenant, maintained control over the contaminated first parcel and to what degree.²⁰

In analyzing that issue, the Second Circuit revisited the CERCLA definitions of an "owner" and "operator" of a contaminated facility and the interpretive gloss that the case law had given those definitions. Relying on one of its own recent decisions, the court observed, "[o]wner and operator liability should be treated

15. 215 F.3d 321 (2d Cir. 2000).

16. *Id.* at 324.

17. *Id.*

18. *Id.*

19. *Id.* at 324-25.

20. *Id.* at 326.

separately.”²¹ The court also relied on *United States v. Bestfoods*,²² where the Supreme Court had held, “an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.”²³ In holding that Barlo, the lessee-sublessor, was not an “owner” within the meaning of the statute, the court reasoned that a lessee-sublessor’s concern about environmental hazards on a site is usually limited to ensuring “[t]hat the property is adequate for the tenant’s purposes and that there are no on-site environmental conditions or features which would impair the tenant’s ability to operate.”²⁴

A prime example, said the Second Circuit, of a situation where a lessee-sublessor could be found strictly liable as an “owner” for contamination of a leased site, is the long term, net lease.²⁵ The court proposed the following non-exclusive list of factors that might transform a lessee into an owner:

- (1) whether the lease is for an extensive term and admits of no rights in the owner/lessor to determine how the property is used;
- (2) whether the lease cannot be terminated by the owner before it expires by its terms;
- (3) whether the lessee has the right to sublet all or some of the property without notifying the owner;
- (4) whether the lessee is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and
- (5) whether the lessee is responsible for making all structural and other repairs.²⁶

The court stressed that the key question is whether the lessee’s status is that of a de facto owner and not whether it exercises control over the polluting facility.²⁷ In other words, the criti-

21. *Barlo Equip.*, 215 F.3d at 328. See also *Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir. 1996) (observing that “‘owner’ liability and ‘operator’ liability denote two separate concepts, courts stress the disjunctive character of CERCLA liability.” (quoting *Lansford-Coaldale Joint Water Auth. v. Tonolli*, 4 F.3d 1209, 1220 (3d Cir. 1993))).

22. 524 U.S. 51 (1998).

23. *Id.* at 66-67.

24. *Barlo Equip.*, 215 F.3d at 330 (quoting Richard D. Jones & Ivan S. DeVoren, *Managing Environmental Risks in Commercial Real Estate Leases*, SA81 A.L.I.-A.B.A. 121, 126 (1996)).

25. *Id.*

26. *Id.* at 330-31. See also *United States v. A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317, 1332-34 (S.D.N.Y. 1992) (discussing factors characteristic of ownership).

27. *Barlo Equip.*, 215 F.3d at 331.

cal relationship is that between the owner/lessor and the lessee/sublessor, not that between the lessee/sublessor and the sublessee.²⁸ In the court's view, for example, a sale-leaseback arrangement does not insulate the seller/lessee from owner's liability if the seller/lessee actually retains most rights of ownership with respect to the buyer/lessor.²⁹ Likewise, extremely long-term leases may invest owners' liability in the lessee if the lease strips all rights from the owner except bare title and confers on the lessee all other indicia of ownership.³⁰ A tenant in that class is a *de facto* owner.³¹ An owner's liability might also lie where a lessee/sublessor has impermissibly exploited—by his own use or through a sublease—more rights than he originally acquired through the lease, effectively expropriating from the owner the right to benefit from the activity on the property.³² Applying all of these criteria to the facts, the court held that Commander retained significant control and that therefore Barlo, the tenant-sublessor, was not an "owner" and therefore not liable.³³

II. The Third-Party and Innocent Purchaser Defenses

Landlords invariably seek to escape CERCLA liability, claiming that their tenants or subtenants actually caused the release of hazardous substances and that, accordingly, the landlords are innocent of any wrongdoing, and should therefore escape liability. But, as one court has noted:

To be innocent in a CERCLA response cost suit, one must be innocent in the eyes of the law. To be ignorant of the contaminated condition of one's property may be a generic form of innocence, but not the kind that will escape liability under the statute.³⁴

However, CERCLA does not impose absolute liability on a landlord simply because it owns the property. The landlord is a potentially responsible party because of its very ownership of the polluted property,³⁵ but that same statutory section provides the

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Barlo*, 215 F.3d at 331.

34. *Bedford Affiliates v. Sills*, 156 F.3d 416, 419 (2d Cir. 1998).

35. See 42 U.S.C. § 9607(a)(1), (a)(2).

landlord with defenses. The two principal ones are, as noted above, the third-party defense³⁶ and the innocent purchaser defense.³⁷ However, the courts have narrowly construed these defenses, meaning that very few "owners" fall within their parameters and thereby benefit from them.³⁸

New York v. Lashins Arcade Co.,³⁹ represents a rare instance in which a landlord received asylum under the third-party defense. The main defendant, owned a shopping center located in Bedford, New York which it had purchased from one Baygell, who had in turn purchased from one Cushman.⁴⁰ Cushman had leased one of the stores in the center to a dry cleaning establishment.⁴¹ That tenancy, and the site's use as a dry cleaning store, ceased while Cushman still owned the property.⁴²

During Baygell's ownership, New York State began an investigation of the site because of high levels of chemicals, associated with dry cleaning, in the ground water surrounding the property.⁴³ Baygell, aware of the State's activities, placed the property on the market, and sold it to Lashins, but never told the latter about the environmental problems facing the center.⁴⁴ Before acquiring title, Lashins contacted the shopping center's water service contractor, the Town of Bedford, and the center's tenants, none of whom informed Lashins of the pendency of a State investigation into the quality of the water.⁴⁵ After Lashins acquired title, the State, now joined by the United States Environmental Protection Agency, sued Lashins, among others, under CERCLA.⁴⁶ Lashins sought to avoid liability by raising the third-party defense.⁴⁷ The court analyzed each of the elements of that defense and agreed with Lashins that, in fact, he was not responsible for the contamination.⁴⁸

36. *See id.* § 9607(b)(3).

37. *Id.* § 9601(35)(A).

38. *See, e.g., New York v. Lashins Arcade Co.*, 91 F.3d 353 (2d Cir. 1996); *United States v. A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317 (S.D.N.Y. 1992).

39. 91 F.3d 353 (2d Cir. 1996).

40. *Id.* at 356.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 356-57.

45. *Lashins Arcade*, 91 F.3d at 357.

46. *Id.* at 358.

47. *Id.* at 359.

48. *Id.*

First, the court concluded that Lashins had no contractual relationship, either directly or indirectly, with the dry cleaning tenants, the ones who had actually caused the release of the hazardous substances, since the dry cleaning tenants had departed from the center more than a decade before Lashins bought it.⁴⁹

The court found Lashins' contractual relationship with Baygell unavailing to deprive Lashins of the third-party defense.⁵⁰ The court cited its own prior holding in *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*⁵¹ for the proposition that the contract must relate to the hazardous activity.⁵² Thus, a contract between an owner and a tenant—a lease—for a dry cleaning premises would relate to hazardous activity because of the very nature of the dry cleaning business.⁵³ But, a mere contract to buy and sell real property, without more, was insufficient as a contractual relationship under CERCLA to bar the use of the third-party defense.⁵⁴

Next, the court turned to the second element of the third-party defense—namely, that the “owner” has “taken adequate precautions against the third party that would lead to a release of hazardous waste.”⁵⁵ It noted that the last release had occurred more than fifteen years before Lashins' purchase of the shopping center and that therefore, Lashins could have done nothing to prevent that release.⁵⁶

The court then focused on the third element—that is, “whether Lashins had exercised due care with respect to the hazardous substance considered in light of all relevant facts and circumstances.”⁵⁷ The court found that Lashins had acted properly, because Lashins had made proper and substantial inquiry before acquiring title.⁵⁸

49. *Id.*

50. *Id.* at 360.

51. 964 F.2d 85 (2d Cir. 1992).

52. *Lashins Arcade*, 91 F.3d at 360.

53. It is of some interest that a substantial percentage of the reported cases concern dry cleaning establishments.

54. *Lashins Arcade*, 91 F.3d at 360.

55. *Id.*

56. *Id.*

57. *Id.* at 360-61.

58. *Id.* at 362.

Finally, the court rejected the State's argument that Lashins had acted improperly because it had failed to pay a portion of the investigation costs. Said the court:

This is surely an anomalous proposal. Response costs are assessed when there is liability under § 9607(a). It is counterintuitive to suppose that defendant is required to pay some or all of those response costs in order to establish the affirmative defenses provided by § 9607(b)(3) to liability under § 9607(a), thereby rendering the affirmative defense partly or entirely academic.⁵⁹

The result in *Lashins* warrants comparison to that in *United States v. A & N Cleaners & Launderers, Inc.*⁶⁰ In *A & N Cleaners*, the court held that the lessee of a shopping center bore "owner" liability under CERCLA because of the substantial control over the center that the lessee maintained.⁶¹ The lessee's sublessee, a dry cleaning operation, had released hazardous chemicals into the groundwater surrounding the shopping center.⁶² The court barred the sublessor from taking refuge in the third-party defense because it had a contract, for example, a lease, with a dry cleaning establishment.⁶³ In addition, the court barred the lessee from invoking the innocent purchaser defense because it had purchased the property before the release of the hazardous substances had ceased.⁶⁴

III. Indemnification and Contribution.

1. Statutory

CERCLA provides a party cast in primary liability with a means to obtain compensation from other potentially responsible parties.⁶⁵ Indemnity arises from 42 U.S.C. § 9607(a)(4)(B), under which a party expending funds to respond to a release may recover its expenditures from the owner or operator of the real property. Contribution arises from 42 U.S.C. § 9613(f), which allows a person liable for response cost liability to recover contribution from

59. *Id.* at 361.

60. 788 F. Supp. 1317 (S.D.N.Y. 1992).

61. *Id.* at 1332-34.

62. *Id.* at 1321.

63. *Id.* at 1326-29.

64. *Id.* at 1329-30.

65. 42 U.S.C. § 9607(e)(2) (2001).

others potentially so responsible. The allocation is made "using such equitable factors as the court determines are appropriate."⁶⁶

A central issue is whether a person strictly liable as an owner may have statutory indemnification from the actual polluter, who is often a subtenant. In *Bedford Affiliates v. Sills*,⁶⁷ the court answered that question, barring a potentially responsible party from obtaining statutory indemnification, but allowing statutory contribution.⁶⁸ There, the sublessee caused the release of hazardous substances during the term of the sublease, of which release the owner was unaware until after the sublessee assigned its sublease to a third party.⁶⁹ Subsequently, the landowner terminated the lease and sublease.⁷⁰ Through its dealing with governmental agencies over the issue of remediation and clean up of the contaminated site, the landowner incurred substantial expenses and attempted to recoup some of them. The court held that CERCLA and the Reauthorization Act of 1986 ("SARA"), provide two legal avenues for a private party to recoup some or all of the costs associated with an environmental cleanup: A cost recovery action under CERCLA section 9607(a) and a contribution action under CERCLA section 9613(f)(1).⁷¹ The court held that the landowner cannot pursue section 9607(a) cost recovery, that is, indemnification, claims against the lessee and sublessee due to its very ownership of the site and, thus, its status as a potentially responsible party under CERCLA.⁷² It viewed the landlord, the tenant and the subtenant as potentially responsible parties under the act.⁷³ Thus, one of them, as a *statutory* joint tortfeasor, can never recover 100% of the response costs from other similarly situated parties and must ultimately bear its pro rata share of cleanup costs.⁷⁴ However, the court read 42 U.S.C. § 9613(f)(1) to allow a first joint tortfeasor to seek contribution from other joint tortfeasors for the share of cleanup costs exceeding that first joint tortfeasor's equitable share of the aggregate expenditure.⁷⁵

66. *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998).

67. *Id.*

68. *Id.* at 424, 432.

69. *Id.* at 420.

70. *Id.* at 421.

71. *Id.* at 423.

72. *Bedford Affiliates*, 156 F.3d at 423-25 (construing 42 U.S.C. § 9607(a)(1) (2001)).

73. *Id.* at 423.

74. *Id.* at 425.

75. *Id.* at 427.

2. Contractual

CERCLA directly, but somewhat ambiguously, addresses contractual indemnification. It recites:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.⁷⁶

The courts have interpreted this section to bar a party cast in primary liability from foisting that primary liability on another party, but courts have also interpreted it to allow the party primarily liable to recover from others.⁷⁷ Thus, no contract can stop the federal government from holding a party primarily liable, but rather, a properly drawn contract can allow a party primarily liable to recover its costs and expenses from another.

The courts, however, construe indemnification clauses strictly against the putative indemnitee.⁷⁸ The *Bedford Affiliates* court construed the contractual indemnification that the sublessee had given the lessee. In pertinent part, the sublease provided that the sublessee became obligated to “forever indemnify and save harmless [the sublessor] for and against any and all liability, penalties, damages, expenses and judgments arising from injury . . . [to the site], occasioned wholly or in part by [the sublessee].”⁷⁹ The Second Circuit found this broad indemnification language sufficient to warrant the sublessee’s indemnification of the lessee.⁸⁰ The sublessee’s activities, it should be remembered, were the actual cause of the release.

In *Commander Oil Corp. v. Advance Food Service Equipment*,⁸¹ the Second Circuit also had occasion to construe a contractual indemnity clause. Simultaneously with the closing of a sale pursuant to an asset purchase agreement, the seller and buyer

76. 42 U.S.C. § 9607 (e)(1) (2001).

77. See, e.g., *Harley Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341, 342-43 (7th Cir. 1994); *John J. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993).

78. See *Bedford Affiliates*, 156 F.3d at 431.

79. *Id.*

80. *Id.*

81. 991 F.2d 49 (2d Cir. 1993).

entered into a long-term lease of certain real property, with the seller becoming the landlord and the buyer becoming the tenant.⁸² The property had become contaminated before the date of closing, and subsequent to the sale of the business, the seller/landlord pleaded the buyer/tenant in order to seek indemnification for CERCLA environmental response costs.⁸³

Both the asset purchase agreement and the lease contained indemnification language; in pertinent part, the asset purchase agreement provided: "At the Closing, Seller shall assign and transfer to Buyer and Buyer shall assume and agree to pay, perform and discharge and indemnify Seller against . . . [certain] contingent liabilities"⁸⁴ The asset purchase agreement listed the contingent liabilities as follows: "All litigation disclosed [on an exhibit] and *all other litigations* occurring from and after the date of signing the [asset purchase] Agreement relating to the business and assets being acquired hereunder."⁸⁵

The lease provided:

Tenant hereby agrees to defend, indemnify, and hold Landlord harmless from and against any and all claims, losses, liabilities, liens, damages and expenses (including, without limitation, cleanup costs and reasonable attorneys' fees) arising directly or indirectly from, out of, or by reason of an Environmental Law or an Environmental Event affecting Tenant, its operations of the premises. Such indemnification shall only include all claims . . . [and] . . . losses . . . incurred during the Term or after the expiration or earlier termination of the Term if such claims, losses etc. are the result of Tenant's actions or omissions during the Term⁸⁶

The court concluded that the language of the two documents was insufficiently specific to demonstrate that the parties had clearly allocated environmental liabilities.⁸⁷ It was unable to say as a matter of law that the "and all other litigation" phrase of the asset purchase agreement's indemnification provision unequivocally demonstrated an "unmistakable intent to indemnify" the seller/landlord for environmental liability.⁸⁸ The court further

82. *Id.* at 50.

83. *Id.* at 51.

84. *Id.* at 52.

85. *Id.* (emphasis added).

86. *Id.*

87. *Advance Food Serv.*, 991 F.2d at 52-55.

88. *Id.* at 54-55.

held that, since under New York law, indemnification agreements are strictly construed and courts may not find a duty to indemnify absent manifestation of clear and unmistakable intent, "[t]he language of the indemnification provisions in the Asset Purchase Agreement when read in connection with the Lease is ambiguous as a matter of law."⁸⁹ Accordingly the Second Circuit remanded the case to the district court to allow the parties to offer extrinsic evidence bearing on the intent of the parties as to the tenant's obligation to defend and indemnify.⁹⁰

New York Oil Spill Litigation

A. The Statutory Background

The Oil Spill Act⁹¹ ("Act") governs soil contamination caused by leaking gasoline pumps and similar facilities for storage of petroleum and petroleum products. The Act states, "the discharge of petroleum is prohibited,"⁹² and defines "discharge" to mean: "Any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping or petroleum into the waters of the state or on to lands from which it might flow or drain into said water"⁹³ The Act also assigns liability for petroleum discharges: "Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained."⁹⁴

Until 2001, most New York courts had held that the last provision imposes strict remediation liability on the owner of the contaminated property, whether or not that owner caused or contributed to the contamination, even if the owner is wholly innocent.⁹⁵ Under that standard, a landowner was, without more, strictly liable to remediate petroleum pollution produced on or under his land. Some courts, however, focused on conduct, not

89. *Id.* at 55.

90. *See id.*

91. N.Y. NAV. LAW §§ 170-177 (McKinney 2001).

92. *Id.* § 173.

93. *Id.* § 172(8).

94. *Id.* § 181(1).

95. *See, e.g.,* *New York v. Tartan Oil Corp.*, 638 N.Y.S.2d 989 (N.Y. App. Div. 1996); *John Hancock Mut. Life Ins. Co. v. 491-499 Seventh Ave. Assocs.*, 644 N.Y.S.2d 953 (N.Y. Sup. Ct. 1996).

status.⁹⁶ In *White v. Long*,⁹⁷ the Court of Appeals faced, but declined to decide, whether mere ownership of land was sufficient to render the owner absolutely liable under the Act.⁹⁸ In *New York v. Green*,⁹⁹ the court finally answered that question, holding that land ownership alone created no liability.¹⁰⁰ However, in the process, it announced an exception to the rule so broad as to virtually swallow up the rule itself.¹⁰¹

The decision arose in a typical context: Green, the tenant, had leased a mobile home site from Lakeside, the landlord.¹⁰² Green's home used oil heat, supplied from an above ground oil tank that she maintained.¹⁰³ The tank collapsed, spilling petroleum, and the State cleaned up the discharge. Ultimately the State sued the Green, Lakeside and the company that had supplied the oil and serviced the tank.¹⁰⁴

Lakeside and the service company appeared, asserting cross-claims for indemnity against each other, and against the Green, who defaulted.¹⁰⁵ The thrust of Lakeside's defense lay in the assertion that because it did not own, maintain or install the tank, it was not a discharger under section 181(1) of the Act.¹⁰⁶ After the New York Appellate Division granted summary judgment to Lakeside, the State appealed to the Court of Appeals, which reversed and granted summary judgment to the State.¹⁰⁷

The Court of Appeals' analysis focused on the landowner's control over the activity leading to the spill. If the owner actually controls the activity, or has the right to control the activity, it is liable.¹⁰⁸ The court held:

[W]hile we refuse to impose liability based solely on ownership of contaminated land, we nonetheless conclude that where, as here, a landowner can control activities occurring on its prop-

96. See, e.g., *Drouin v. Ridge Lumber, Inc.*, 619 N.Y.S.2d 433, 435 (N.Y. App. Div. 1994) ("Nothing in the statute could be construed as making a landowner responsible solely because it is a landowner.").

97. 85 N.Y.2d 564 (N.Y. 1995).

98. *Id.* at 569-70.

99. 96 N.Y.2d 403 (N.Y. 2001).

100. *Id.* at 405.

101. *Id.* at 407-08.

102. *Id.* at 405.

103. *Id.*

104. *Id.*

105. *Green*, 96 N.Y.2d at 405.

106. *Id.* at 405-6.

107. *Id.* at 408.

108. *Id.* at 407-8.

erty and has reason to believe that petroleum products will be stored there, the landowner is liable as a discharger for the cleanup costs.¹⁰⁹

The court drew a distinction between a discharge by a tenant, on the one hand, and a spill by a “midnight dumper” or an errant oil truck, on the other.¹¹⁰ In the former case, the landlord could obviously control the tenant’s conduct via the lease, and therefore would be liable.¹¹¹ In the latter case, however, the landlord could not exert control over the actor, and therefore would not face primary liability.¹¹² Since, under the terms of the lease, the landlord, Lakeside, could exercise control over Green’s, the tenant’s, conduct, the court held the landlord responsible in the first instance as a discharger.¹¹³ We believe that the cases in which a tenant spills oil exceed exponentially those in which a errant oil truck does so. In other words, the exception—control—is really the rule.

B. Apportionment of Liability

Even if a landlord is liable as a discharger under the Act, may that landlord obtain contribution or indemnification for clean-up costs from other potentially responsible parties? Put another way, may a landlord, made liable solely because of its contractual right to regulate tenant conduct that results in an oil spill, seek to recover its out-of-pocket expenses from that tenant? The answer is unqualifiedly in the affirmative, whether from a statutory or a contractual viewpoint.

1. Statutory Contribution

Green addressed a second issue: May a landlord, liable as a discharger precisely because of its status as a landlord who could control its tenant’s activities, obtain contribution, under section 181(5) of the Act, from the actual discharger?¹¹⁴ Noting that it had previously held, in *White v. Long*, that the Act allowed more than one party to be deemed a discharger, the court, in *Green*, extended its earlier expressed rationale and held that the one ini-

109. *Id.* at 405.

110. *Id.* at 407.

111. *Green*, 96 N.Y.2d at 407.

112. *Id.*

113. *Id.*

114. *Id.* at 408.

tially made to pay—the landowner—may accordingly receive recompense from the others.¹¹⁵ The mere happenstance that the State chooses to pursue one discharger, or several dischargers, but not all, does not free the remaining dischargers from liability.

2. Contractual Burden-Shifting

Parties potentially responsible under the Act may shift liability by contract. The analysis begins with the language of the lease. In the contractual burden-shifting cases, courts tend to hold that a mere clause under which the tenant agrees to comply with applicable laws is insufficient to render the tenant liable. There must be more. Thus, a compliance with law clause, combined with evidence that the tenant's activity caused the contamination, will render the tenant liable. Of course, a clause containing stronger language—for example, one shifting *all* liability to the tenant (as is commonly found in a net lease)—will also render the tenant liable. As we will see, contractual burden shifting can even trump statutory contribution.

In analyzing the contractual obligations of parties to written agreements, such as leases, courts adhere to the “four corners doctrine.”¹¹⁶ When a written contract is clear and complete, the court should enforce the writing according to the terms appearing within its four corners.¹¹⁷ “Evidence outside the four corners of the document [that is, extrinsic or parol evidence] as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.”¹¹⁸ In short, whether a particular writing is ambiguous is a question of law¹¹⁹

In *Bush Terminal Associates v. Federated Department Stores*,¹²⁰ an early decision concerning the allocation of environmental risk, the New York Appellate Division had to assign, as between landlord and tenant, the financial burden of constructing sewer lines, a project made necessary by directive of the Environmental Protection Agency (“EPA”), which had found that the building was improperly discharging raw sewage into the Gowanus Canal and New York Bay.¹²¹ The landlord had net

115. See *id.* (citing *White v. Long*, 85 N.Y.2d 564, 569 (N.Y. 1995))

116. See, e.g., *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157 (N.Y. 1990).

117. *Id.* at 162.

118. *Id.*

119. *Id.*

120. 424 N.Y.S.2d 28 (N.Y. App. Div. 1980).

121. *Bush Terminal*, 424 N.Y.S.2d at 29. *Bush Terminal* did not arise in the context of the Oil Spill Act, but its rationale applies to Oil Spill Act cases by analogy.

leased the property to the tenant, meaning that the tenant was to bear all expenses associated with the property's operation. Generally, the court noted, "[t]he obligation to comply with legal requirements affecting real property is on its owner and absent an express covenant to the contrary, the tenant has no obligation to undertake significant structural alterations."¹²² Specifically, the lease in question allowed the tenant to use the building for any legal purposes and provided further in pertinent part:

Throughout the term of this Lease, Tenant, at Tenant's sole cost and expense, shall promptly remove any violation caused by Tenant and shall, with respect to the manner and use by Tenant of the Demised Premises, promptly comply with any and all present and future laws and ordinances which may affect or be applicable to the Demised Premises or any part thereof, or . . . to the use or manner of use of the Demised Premises or any part thereof, or the owners, tenants, or occupants thereof, whether or not any such violation or any such law, ordinances, order, rule, regulation or requirement shall necessitate structural changes required by reason of the manner of Tenant's use of the Demised Premises . . . and whether or not the correction or removal so necessitated shall have been foreseen or unforeseen or whether the same shall involve radical or extraordinary construction or other disposition, *provided such violation or order results from the character of the Tenant's manner of conducting its business in use of the Demised Premises, Tenant's manner of conducting its business in the Demised Premises, or Tenant's failure to maintain the Demised Premises and the equipment therein . . .* and keep in good order and condition pursuant to the terms of this Lease.¹²³

The court absolved the tenant from liability for the cost of complying with the EPA requirement. It reasoned that the pollution would have occurred no matter whether the defendant tenant or another tenant occupied the building.¹²⁴ The court noted: "Rather than resulting from the character of defendant's use of the premises, any occupancy of the premises, by any tenant, would have required the installation of a new sewer system."¹²⁵ That the lease was a "net lease" did not sway the court; instead, the court concluded that the quoted language placed the obligation on the

122. *Id.* at 29-30. (quoting 2 FRIEDMAN ON LEASES, § 11.1 (1997)).

123. *Id.* at 29 (emphasis added).

124. *Id.* at 30.

125. *Id.*

landlord because nothing in the particular character of the tenant's use had created the contaminating condition.¹²⁶

In *101 Fleet Place Associates v. New York Telephone Co.*,¹²⁷ the court had to allocate the responsibility for remedying damage caused by gasoline leaking from deteriorated underground storage tanks and connected pipes used in the conduct of the tenant's business. In contrast to the usual situation in which the *tenant* agrees to comply with all laws, the landlord had assumed that obligation.¹²⁸ The long term net lease provided:

The *landlord* at his sole expense shall comply with all laws, orders and regulations of federal, state, county and with any proceeding of any public officer or officers, pursuant to law, which shall impose any violation, order or duty upon landlord or tenant with respect to demised premises or the use or occupation thereof.¹²⁹

The lease also required the *tenant* to "keep and maintain the exterior of demised garage building in a good state of preservation and repair."¹³⁰ The court held that that latter provision did not, absent an explicit inclusion of repair or replacement of underground gasoline tanks, override the specific former provision, thereby making the landlord solely financially responsible for repairs of governmental compliance and structural repairs.¹³¹

The court then turned to a second issue. Having determined that the lease placed the obligation on the landlord to pay for the repairs, would the court allow the landlord to maintain a statutory cause of action for contribution against the tenant? The court said no.¹³² Quoting from *Olin Corp. v. Consolidated Aluminum Corp.*,¹³³ a case arising out of contractual burden-shifting of CERCLA obligations between buyer and seller of real property, the court noted:

We acknowledge that this is a seemingly harsh result for a company that must pay for the cleanup of contamination that it apparently did not cause. However, we are unwilling to ignore the

126. *Id.*

127. 609 N.Y.S.2d 896 (N.Y. App. Div. 1994).

128. *Id.* at 898.

129. *Id.* at 897-98 (emphasis added).

130. *Id.* at 898.

131. *Id.*

132. *See id.*

133. 5 F.3d 10, 18-19 (2d Cir. 1993).

broad inclusive language of agreements freely entered into by two sophisticated parties. Parties should be able to rely on the terms of an agreement arrived at after arduous negotiations.¹³⁴

Thus, at least as between a landlord and tenant, statutory contribution is unavailable where their lease unambiguously places the clean up burden on one of the parties.

In *Star Nissan, Inc. v. Frishwasser*,¹³⁵ the court, as in *101 Fleet Place*, had to determine whether the lease language was broad enough to fix liability on the net lessee. In contrast to the lease clause at issue in *101 Fleet Place*, the court said the one at issue in *Star Nissan* was sufficiently specific and inclusive to warrant imposition of liability on the tenant.¹³⁶

The action had its genesis in a sale and leaseback transaction. A corporation had sold commercial property to purchasers who then leased the property back to a principal in the corporation.¹³⁷ Later, the principal's successor-in-interest subleased a portion of the property to a subtenant.¹³⁸ The seller-lessee had used the property to conduct a car dealership and its service department, and the subtenant also used the property for that purpose. When petroleum was discovered beneath the property's surface, the landlord, tenant and subtenant became embroiled in a dispute over who, among them, would bear the burden to pay for remediation.¹³⁹

The court began its analysis by reviewing the lease, and concluded that the subtenants were liable.¹⁴⁰ The court examined two paragraphs of the lease, the first of which read in pertinent part:

This lease is a net lease, . . . [which] shall be construed to impose upon the Tenant, as though it were the sole owner of the premises, all costs . . . and obligations of every kind relating to or arising out of the premises or the use thereof, including the cost and expense of interior and exterior repairs, both ordinary and

134. *101 Fleet Place Assocs.*, 609 N.Y.S.2d at 898.

135. 677 N.Y.S.2d 145 (N.Y. App. Div. 1998). This case was successfully argued before the Appellate Division by one of the authors of this article.

136. *Id.* at 147.

137. *Id.* at 146.

138. *Id.*

139. *Id.*

140. *Id.* at 147.

extraordinary, which may arise or become due during or out of the term of this lease.¹⁴¹

The second paragraph required the tenant to "comply with all present and future laws."¹⁴²

These lease provisions, the court held, shifted all burdens associated with ownership of the premises, including the obligation to remediate underground oil contamination, as mandated by the Act, to the tenant.¹⁴³ In contradistinction to *101 Fleet Place*, the language of the lease mentioned nothing about pollution caused by the character of the tenant's business operation, but instead placed on the tenant all costs and obligations, as though the tenant was the property's sole owner. Even though *Star Nissan* preceded the no-automatic-liability-for-owners standard announced in *Green*, the tenant would still have liability because of the broad burden-shifting language of the lease.¹⁴⁴ Another observation is that the tenant's peculiar use of the premises as an automobile sales and servicing site quite obviously influenced the court even though it was not specifically discussed in the decision.¹⁴⁵ Finally, the court held that "the sublease, by virtue of the language requiring the subtenant to 'bear all charges which the Prime Tenant is required to bear under the Master Lease,' imposed equivalent obligations on the subtenant."¹⁴⁶

To summarize, an owner is not automatically liable as a discharger to remediate oil pollution just because it is an owner, but the exceptions swallow up the rule. However, the owner may have statutory contribution or contractual indemnity from its tenant, in that statutory contribution is based on relative fault and contractual indemnity on the scope of the contract.

New York City Asbestos Litigation

In 1985, New York City enacted Local Law No. 76 which "requires, among other things, that the presence and condition of asbestos be ascertained before any building alteration or demolition is performed; that asbestos be removed or encapsulated if such work will cause asbestos to become airborne; and that all asbestos

141. *Star Nissan*, 677 N.Y.S.2d at 147 (emphasis added).

142. *Id.*

143. *Id.*

144. See *101 Fleet Place Assocs. v. New York Telephone Co.*, 609 N.Y.S.2d 896, 898 (N.Y. App. Div. 1994).

145. See *Star Nissan*, 677 N.Y.S.2d at 147.

146. *Id.*

abatement activities be conducted in accordance with approved safety procedures”¹⁴⁷ The law does not require removal of undisturbed asbestos or asbestos that will not be disturbed by alteration or demolition.¹⁴⁸

The issue that often arises is whether the tenant or landlord must bear costs associated with asbestos removal. In general, the courts have held tenants liable where the lease squarely and unequivocally places responsibility for remediation on the tenant or, absent such explicit language, where the lease requires the tenant to comply with all laws and the tenant’s peculiar use of the premises implicates asbestos, liability will fall to the tenant.¹⁴⁹

In *Wolf v. 2539 Realty Associates*, a commercial tenant sued its landlord for a judgment declaring that the landlord bore responsibility to remedy asbestos conditions in the demised premises.¹⁵⁰ In determining the allocation of the responsibilities between the landlord and tenant, the court relied on the lease’s separate repair and compliance-with-law clauses and concluded that responsibility remained with the landlord.¹⁵¹ Based upon its review, the court held: (a) the repair clause, requiring the tenant to “keep the interior of the demised premises in good order and repair,” failed to shift to the tenant the burden of removing asbestos-containing material covering steel structural members because the asbestos hazard was not a condition in need of “repair” within the meaning of the lease, in that remedial measures were not necessitated by any damage or wear, but by a supervening change in governmental policy;¹⁵² and (b) the compliance-with-law clause, which required the tenant to comply with the laws, regulations and directions of public officer “with respect to tenant’s use and occupancy of the demised premises,” failed to shift to the tenant the burden of abating the asbestos condition because this clause was designed to protect the landlord against assumption only of those burdens which might be imposed by the necessity to comply with laws and regulations governing the tenant’s particular use of the premises.¹⁵³ Where the premises could not safely be

147. See *Kaufman v. City of New York*, 891 F.2d 446,446 (2d Cir. 1989), *cert. denied*, 495 U.S. 957 (1990) (interpreting N.Y. CITY LOCAL LAW No. 76 (1985)).

148. *Id.*

149. See, e.g., *Wolf v. 2539 Realty Assocs.*, 560 N.Y.S.2d 24 (N.Y. App. Div. 1990); *Linden Blvd., L.P. v. Elota Realty Co.*, 601 N.Y.S.2d 949 (N.Y. App. Div. 1993).

150. 560 N.Y.S.2d 24 (N.Y. App. Div. 1990).

151. *Id.* at 27-28.

152. *Id.* at 27.

153. *Id.*

put to *any* use without removal of asbestos, the need to comply with a directive to remove the asbestos simply did not arise out of the tenant's particular use of the premises and thus was not the tenant's responsibility.¹⁵⁴

Similarly, in *Linden Boulevard, L.P. v. Elota Realty Co.*,¹⁵⁵ a commercial tenant sued its landlord and former landlord to recover costs of asbestos removal. The lease contained a compliance-with-law clause placing on the tenant responsibility for the cost of complying with all governmental regulations applicable to the demised premises whether or not the regulations required structural changes and improvements, "provided that the duty to effect the necessary structural changes . . . shall only be the duty of the Tenant if the changes are required because of the use to which the Demised Premises are put by the Tenant."¹⁵⁶ The court absolved the tenant from responsibility for asbestos removal because the required removal arose out of municipal enactments and bore no relation to tenant's use of the demised premises, since the removal would have been required for use of the building by any tenant.¹⁵⁷

In *Rapid-American. Corp. v. 888 7th Ave. Associates*,¹⁵⁸ a tenant of twenty floors of an office tower sued to recover costs incurred in removal of asbestos-containing material. Under the lease, the tenant had the right to sublet portions of the demised premises to various subtenants, which it routinely did over a period of years, often renovating the sublet space to meet the given subtenant's needs.¹⁵⁹ The relevant provision of the lease recited:

Tenant . . . at its expense shall comply with all laws and requirements of public authorities which shall, with respect to the use and occupancy of the Demised Premises, or the abatement of any nuisance, impose any violation, order or duty on Landlord or Tenant, arising from (i) Tenant's use of the Demised Premises, (ii) the manner of conduct of Tenant's business or operation of its installations, equipment or other property therein, (iii) any cause or condition created by or at the instance of Tenant, other than by Landlord's performance of any work for or on behalf of

154. *Id.* at 28.

155. 601 N.Y.S.2d 949 (N.Y. App. Div. 1993).

156. *Id.* at 951-52.

157. *Id.* at 952.

158. 574 N.Y.S.2d 447 (N.Y. Sup. Ct. 1991).

159. *Id.* at 448.

Tenant, or (iv) breach of any of Tenant's obligations hereunder.¹⁶⁰

The court held that the cost of asbestos removal performed during tenant's renovation work was to be borne by the landlord, under general principles of law and the terms of the lease, even though the lease had made the tenant responsible for structural or other substantial changes required by its use of the premises.¹⁶¹ The court reasoned that where the tenant's ongoing use of the premises to sublet office space was the very use contemplated by the lease, the condition was created by use of asbestos containing material as fire proofing; the duty to remove asbestos arose out of a change in governmental policy, rather than out of tenant's use of the premises.¹⁶² Finally, it also reasoned that since the tenant had no option to purchase, nor did it occupy the entire building, the lessor would ultimately reap the reward of the asbestos removal via increased value of the building.¹⁶³

Summary

With very limited exception, the owner of contaminated real property is the primary source of funds for response costs. If the owner is cast in liability, the owner may have the right to seek statutory contribution or contractual indemnity against a party that actually caused the pollution. Indeed, if the lease is drawn properly, the landlord may receive full indemnification of from the tenant even if the tenant did not cause the contamination. Thus, potential tenants are well advised to investigate environmental issues before leasing and to negotiate indemnification lease clauses carefully, lest they assume liability for conditions that they do not cause, and of which they are unaware.

160. *Id.* at 449.

161. *Id.* at 452.

162. *Id.*

163. *Id.* at 453.