

Allen Matkins



Getting Ahead of the Deals Coming Your Way in 2012:
Avoiding Pitfalls in Real Property Acquisitions and Dispositions

Key Issues

in:

**Real Property Purchase
and Sale Agreements**

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Key Issues in Real Property Purchase and Sale Agreements

Lee F. Gotshall-Maxon

Allen Matkins Leck Gamble Mallory & Natsis LLP

1. Letters of Intent.

- a. Binding or Non-Binding? – The key question in drafting a Letter of Intent is whether or not the parties intend the letter to be binding, in whole or in part. If the parties intend to be bound, then courts are receptive to enforcing letters of intent as enforceable contracts.
 - i. Partially Binding Letters of Intent. Many Letters of Intent are binding as to some provisions, such as provisions concerning confidentiality, exclusive negotiations, etc.
- b. Strong Disclaimer Language Should Be Included if a Letter of Intent is Intended to be Non-binding. Sample language follows:

"Except as provided in Paragraphs [40] entitled "Confidentiality" and Paragraph [39] entitled "Exclusive Negotiating Period", neither AAA nor BBB shall have any legal obligation or liability to the other with respect to the matters set forth in this letter of intent unless and until a purchase agreement is fully negotiated, executed and delivered by both parties. The parties agree that this letter of intent is non-binding, except as provided in Paragraphs [39] [and [40]], and that any acts or omissions undertaken or any costs or expenses incurred by AAA or BBB following the execution of this letter of intent are made or incurred at such party's sole risk and expense. Either party may discontinue negotiations with or without cause. BBB hereby acknowledges that, [except as provided in Paragraph [39]], the execution of this letter of intent by AAA does not, in any way, prohibit or limit AAA's right to market the Property or a portion thereof or to negotiate and/or

consummate a purchase and sale transaction with third parties with respect to all or a portion of the Property."

Alternative Disclaimer Language:

"Except as described in Paragraph [11] above, this Letter of Intent is intended only as a preliminary outline for discussion purposes and is subject to conclusion of fact gathering by Prospective Buyer and negotiation of other documents by all parties concerned. Either party may discontinue negotiations at any time, with or without cause, and without liability to the other, by giving notice to the other party. Neither you nor Prospective Buyer shall have any obligation in connection with this Letter of Intent, except as set forth in Paragraph [11]. Since this letter is not intended to create any binding obligations, except as set forth in Paragraph [11], you should not take any action or refrain from taking any action in reliance on this non-binding outline or any oral or written statements made in connection herewith."

Disclaimer Language for Ongoing Communications. Short disclaimer language should be included with other communications during the negotiation of the deal, especially those which deliver drafts of the proposed contract. Sample e-mail disclaimers follow:

This communication shall not create, waive or modify any right, obligation, claim or liability.

This communication and its attachments, if any, are each subject to review and further modification. Neither this communication nor its attachments constitute an offer which can be accepted.

- c. The *Copeland v. Baskin Robbins U.S.A.* Problem – The Obligation to Negotiate.
- i. The Story. Copeland wanted to purchase an ice cream plant from Baskin Robbins in the City of Vernon. To afford the plant, Copeland needed a co-packing agreement – an agreement under which Baskin Robbins would agree to purchase ice cream from Copeland. The parties signed a letter which set the agreed price for the manufacturing equipment and stated that the deal was "subject to a separate co-packing agreement and negotiated pricing, to provide [Copeland] a three year co-packing agreement for 3,000,000 gallons per year..." Copeland signed a statement at the bottom of the letter that the "above terms are acceptable". The parties negotiated for two months, and then Baskin Robbins broke off negotiations with a letter which stated that, due to recent strategic decisions, the Co-Packing Agreement was no longer in alignment with Baskin Robbins' strategy.

- ii. The Dilemma for the Jilted Buyer in a "Copeland" Situation. The Buyer could attempt to sue to enforce the letter on the basis that the letter was a complete contract. The Buyer may have little chance of success because material terms are missing. Alternately, the Buyer could sue on the basis that Baskin Robbins breached the obligation to negotiate in good faith.
 - iii. Reasoning. "gone are the days when our ancestors sat around a fire and bargained for the exchange of stone axes for bear hides." The days of simple offer and acceptance are over. Contracts result from a flow of events, communications and compromises that evolve into contract terms.
 - iv. Holding. A party will be permitted to recover reliance damages for breach of an agreement to negotiate. Examples of reliance damages: time spent, expenses incurred and opportunities missed.
- d. Use Anti-Copeland Clauses. If letters of intent are not intended to be binding they must now state that neither party has agreed to negotiate in good faith. Well drafted clauses now provide that either party may discontinue negotiations with or without cause and that neither party may rely for any purpose on the non-binding letter of intent.
- e. What to Avoid. Avoid language of offer and acceptance: such as "offer", "acceptance", or "agreed" and avoid terms like "good faith" or "terms to be negotiated". Avoid any communications which lead the other party to a letter of intent to believe that you have a final "deal" or that you will negotiate in good faith.
2. **Timing of Transaction.** It is important to be specific as to when time periods, such as due diligence periods, start. It is generally inadvisable to have time periods start to run when due diligence materials are delivered, since it is difficult to ascertain when *all* of the materials have been delivered. If any of the materials are late, the Buyer may have an argument that the Buyer is entitled to more time (or to have time periods start to run again). Time periods should end on days which are convenient to the parties. Thus time periods should not end on weekends or holidays, the day following a major holiday, or, in the case of closings, on any Friday or Monday, especially if the acquisition is financed or if funds from the closing will be used by the Seller to pay off existing loans.
3. **Deposits.**
- a. Release or Retention of Deposits. An important question is whether or not deposits should be released or retained in escrow and, if they are to be released to the Seller, when will they be released?
 - i. Deposits are never entirely "non-refundable" and should, at minimum, be returned if a condition to Buyer's obligations is not satisfied or waived by the Buyer or if the agreement is terminated due to Seller's default or any casualty or condemnation. Since deposits are always somewhat "refundable," Buyers are often reluctant to agree to release a deposit to the

Seller before the closing. In some transactions, however, Sellers insist on the release of some or all of the deposits after due diligence is complete.

- b. Securing the Return of Released Deposits.
 - i. Letters of Credit.
 - ii. Deeds of Trust – Problems with the one form of action rule.
 - c. Quick Arbitration to Secure the Release of Deposits from Escrow.
 - i. Sample Clause: See Attachment 2.c
4. **Independent Consideration.** A purchase contract that allows the Buyer to terminate for any or no reason in the Buyer's sole and absolute discretion during a specified period (such as an inspection, due diligence or contingency period) may be characterized as a unilateral option contract. Until the option is exercised, an option contract is enforceable only if consideration is given for the option (thereby rendering the option irrevocable).
- a. Suggested Solution. Parties entering into a purchase contract should specify sufficient, bargained-for consideration to be conferred upon the seller in exchange for any "free look" or due diligence period granted to the buyer.
 - b. The Story. In September 2003, Paul Thexton, as seller, and Martin Steiner, as buyer, entered into a written agreement under which Mr. Thexton agreed to sell Mr. Steiner a 10-acre parcel of real property for \$500,000.00. County approvals for a parcel split and development permits were required. The agreement provided that Mr. Steiner, at his own expense, could pursue the necessary approvals and permits; however, like many purchase contracts that grant the buyer a "free look", Mr. Steiner was not obligated to do anything and could terminate the agreement at any time in his sole and absolute discretion. After entering into the agreement, Mr. Steiner did pursue the approvals and permits, spending up to \$60,000.00. In October 2004, Mr. Thexton decided that he no longer wished to sell the property and instructed the title company to terminate the escrow. Mr. Steiner sued for specific performance to enforce the agreement.
 - c. What Happened? The trial court ruled in favor of the Seller, Mr. Thexton, finding that the agreement was an unenforceable option that was not supported by consideration, and the California Court of Appeals agreed. Although the California Supreme Court reversed, it held that the agreement between Mr. Thexton and Mr. Steiner *did* constitute an option; however, it found that Mr. Steiner's efforts in seeking a lot split (which would benefit both Mr. Steiner and Mr. Thexton) constituted sufficient consideration, so the option was irrevocable by Mr. Thexton. *Steiner v. Thexton* (2010) 48 Cal.4th 411, 84 Cal.Rptr.3d 37.
 - d. Sample Clause.

"Independent Consideration. Notwithstanding any term or provision set forth in

this Agreement to the contrary, if (a) this Agreement is terminated prior to the Close of Escrow and (b) Buyer is entitled to a return of the Deposit as a result of such termination, Seller shall receive \$100.00 of the Deposit, which amount has been bargained for and agreed to as independent consideration for having entered into this Agreement and for having granted Buyer the exclusive right or option to purchase the Property as provided in this Agreement. Seller acknowledges that Buyer has and/or will soon incur considerable expense in connection with this transaction, which may include, without limitation, investigating the Property, pursuing entitlements for the Property and/or taking other actions in connection with its prospective purchase of the Property, some of which may benefit the Property and/or Seller and which may facilitate any future sale to others should Buyer elect not to proceed with the transaction contemplated by this Agreement."

5. **Title Insurance Commitments.** In many Purchase and Sale Agreements for real property, the Buyer's deposits are increased and such deposits often become "non-refundable" if the Buyer does not terminate the agreement at the end of a specified due diligence period. To give the Buyer comfort that Buyer will be able to get an appropriate title insurance policy if the Buyer proceeds with a transaction after the due diligence period is over and deposits are "hard," Buyer should attempt to get a commitment from the title insurance company that commits the title insurance company to issue coverage if Buyer wishes to close.

a. **Standard Title Commitments.** Title insurance companies, until recently, were willing to commit to insure by issuing a commitment. Sometimes these commitments said that they were not enforceable unless the insured was identified and the amount of insurance completed. Each of these requirements was easily addressed with the title insurance company.

b. **Trend.** Title companies will issue a commitment letter that states that the title company will issue coverage if a number of conditions are satisfied first. These letters are evolving and some contain conditions which are inappropriate. With some negotiating it is possible to get an appropriate commitment letter for a commercial transaction. If possible, Buyers should obtain a commitment not only that the title insurance company will issue a particular policy, but that the title company will issue the form of the policy and the endorsements the Buyer will want.

6. **Limitations on Remedies and Liability.**

a. **Liquidated Damages.** It is common to include liquidated damage provisions which protect the Buyer from significant liability if escrow doesn't close due to Buyer's default. Sellers like to provide that the liquidated amounts, (i.e., the deposits), do not include the cost of enforcement of remedies, such as attorneys' fees and costs.

b. **Remedies Against Seller if Escrow Doesn't Close Due to Seller's Default.**

i. All remedies available at law.

- ii. Specific performance, if suit is filed in a relatively short period of time.
 - iii. *Lis pendens* versus injunction.
 - iv. Damages limited to the return of deposits and Buyer's out-of-pocket costs to some stated maximum. This limit on damages should not apply to enforcement costs.
 - v. No recovery for pre-closing breaches if Buyer knows of the breach and closes.
- c. Post Closing Remedies.
- i. Time limit for making claims.
 - ii. Limited recovery for breaches of certain representations discovered after closing.
 - iii. Basket provisions – no remedy until damages are above a meaningful threshold and then no recovery in excess of some maximum.
- d. AS IS Provisions. AS IS provisions offer no protection from fraud or fraudulent concealment. AS IS clauses should not release claims for breach of representations and warranties, claims for personal injury or property damage which occur during the Seller's ownership (at least to the extent of insurance) and, as more fully described below, claims for design and construction defects when the improvements are still relatively new (i.e., less than ten years old as measured from the date of Substantial Completion or longer if residential).
- i. Disclosure problems for institutions which have owned property for a long time.
 1. Locate all files, including those in storage and those with your consultants, and provide meaningful access. The test of what is disclosable: "If you would rather not disclose, you probably should."
 2. What not to disclose – attorney client materials, appraisals, prior contracts and offers, confidential information not pertaining to the condition of the property.
 3. Require that the Buyer maintain the information in confidence until closing and possibly thereafter. Buyers should be able to disclose to consultants, attorneys, accountants, and to current and prospective lenders and investors.
 4. One Possible Approach – include a provision in the contract which says that full disclosure is not practical and have the Buyer assume

the risk that there may be something there. Require that the Buyer agree to conduct a thorough investigation to protect itself.

- ii. If you are purchasing property which is still "under warranty" be careful not to waive claims for construction defects against the developer/seller or its affiliated contractors.
 1. At the very least, preserve claims against the Seller and its affiliates to the extent of insurance and all insured and non-insured claims against all third parties.
 2. Consider an assignment of rights under design and construction contracts.
 - a. Many construction contracts, such as the standard AIA documents, provide that assignment is allowed only with the consent of the contractor/architect/engineer.
 - b. If taking an assignment of rights, don't assume obligations to the contractor/architect/engineer. In fact, to avoid the inference that an assignment of rights includes a delegation of duties, expressly say that the assignee is not responsible for any obligations of the assignor under the contracts being assigned.
 3. Obtain copies of all construction contracts, subcontracts, material supply contracts, equipment sales and leasing contracts, warranties and maintenance manuals.
 4. Obtain copies of all insurance policies which were in place during construction. Ask the Seller to have you added as named insured.

7. **Limits on the Enforceability of Exculpatory Clauses.** Clauses that attempt to limit a party's liability through a release or other device are sometimes referred to as exculpatory clauses. In California, however, Section 1668 of the California Civil Code places some significant limits on the enforceability of contract terms which attempt to protect a party from liability. Section 1668 reads as follows:

"All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

- a. Exculpatory Clauses Don't Protect against Claims for Activity "Affected with the Public Interest". In *Tunkl v. Regents of University of California*, 60 Cal. 2d 92, 32 Cal. Rptr. 33 (1963), the California Supreme court held invalid a clause in a hospital admission agreement which released the hospital from liability for

future negligence. In interpreting Section 1668 of the California Civil Code, the court laid down the general rule that all exculpatory clauses "affecting the public interest" are invalid. 60 Cal. 2d at 94-98. The court established six criteria to use in identifying the kind of agreement in which an exculpatory clause is invalid as "affecting the public interest:"

"[1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." (citations and footnotes omitted)."

- b. Cases Holding that Exculpatory Clauses Were Invalid. The cases which have interpreted *Tunkl* show an increasing willingness to void exculpatory clauses, at least in the tort context, where defendants have sought to defend against a tort claim of damages for negligence on the basis of a contractual limitation of liability. *Akin v. Business Title Corp.*, 264 Cal. App. 2d 153, 70 Cal. Rptr. 287 (1968) (exculpatory clauses seeking to excuse from negligence in escrow agreement invalid as affecting the public interest); *Henriouille v. Marin Ventures, Inc.*, 20 Cal. 3d 512, 143 Cal. Rptr. 247 (1978) (exculpatory clause purporting to excuse from liability for negligence in residential lease violated public policy); *Vilner v. Crocker Nat'l Bank*, 89 Cal. App. 3d 732, 152 Cal. Rptr. 850 (1979) (exculpatory clause seeking to excuse from liability from negligence in bank's night depository agreement held violative of public policy); *Gardiner v. Downtown Porsche Audi*, 180 Cal. App. 3d 713, 716-717, 225 Cal. Rptr. 757 (1986) (exculpatory clause in a car repair receipt not effective to protect against negligence because the repair of automobiles is a service affected by the public interest).
- c. Cases Upholding Exculpatory Clauses for Ordinary Negligence. A contract exempting from liability for ordinary negligence is valid where no public interest is involved and where no statute expressly prohibits the activity in question. *Gardiner v. Downtown Porsche Audi*, 180 Cal. App. 3d 713, 716-717, 225 Cal.

Rptr. 757 (1986). Because no public interest was involved, the court upheld an exculpatory clause in *Cregg v. Ministor Ventures*, 148 Cal. App. 3d 1107, 196 Cal. Rptr. 724 (1983) (exculpatory clause in lease of storage space was voluntary, for a consideration, and not adhesionary). In *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc.*, 200 Cal. App. 3d 1518, 246 Cal. Rptr. 823 (1988) the court upheld a clause limiting damages for defective seed to the price of the seed.

- d. Make the Clause Negotiable. The inclusion of language indicating that the exculpatory clause is negotiable and that additional liability will be assumed for an additional price has been a decisive factor in several cases which have considered the enforceability of exculpatory clauses in contexts where the business seeking the protection of an exculpatory clause was one which would otherwise have met most of the factors set forth in *Tunkl* indicating that the activity for which exculpation was sought was one affected by the public interest. Thus in *McCarn v. Pacific Bell Directory*, 3 Cal. App. 4th 173, 4 Cal. Rptr. 2d 109 (1992) the court refused to allow recovery against Pacific Bell for negligently failing to include a business in its directory. In considering whether the Pacific Bell's exculpatory clause should be enforced to prevent a suit against Pacific Bell for negligence, the court stated that "[t]he existence of an offer to negotiate the limits of liability in the preprinted contract is fatal to the plaintiff's public policy claim." *Id.* at 182. To similar effect was *Cregg v. Ministor Ventures*, 148 Cal. App. 3d 1107, 196 Cal. Rptr. 724 (1983) which upheld an exculpatory clause in a lease for storage space where the clause offered each lessee optional insurance for an additional fee. In contrast is the case of *Pelletier v. Alameda Yacht Harbor*, 188 Cal. App. 3d 1551, 1556, 230 Cal Rptr. 253 (1986) which held that a yacht harbor is an enterprise "affected with the public interest" under *Tunkl* so that the marina's exculpatory clause in its standard lease was not enforceable. In *Pelletier*, there was no provision which allowed the tenant to pay for more protection than that afforded by the standard exculpatory clause.
- e. Points to Consider in Making Exculpatory Clauses in Transactions More Enforceable.
1. Make the clauses clear and understandable.
 2. Have some of the key exculpation clauses in larger type, and have them separately initialed. At least one court has stated that it is not necessary to have these clauses separately initialed, but if they are separately initialed, it makes it more difficult to argue that the clause surprised the claimant.
 3. Include a savings clause, such as "to the extent allowed by law," in each exculpation clause.
 4. State, in key exculpatory clauses, that the clause has been specially negotiated and that the language in the clause is a material part of the consideration for the transaction in question.

5. Do not attempt to insulate a party from liability for violations of law or for willful misconduct. The cases and the statutes are clear that clauses attempting to insulate a party from liability for willful acts or for violations of law are not enforceable.
6. Provide that the exculpation will apply to active and passive negligence. Some California cases have held that a general waiver clause will not relieve a landlord of liability for "active" negligence.
7. Specify that the exculpatory language is intended to apply to unknown claims and liabilities and include a waiver of any applicable statute which may make the waiver of unknown claims unenforceable if the statute is not waived. In California, for example, Section 1542 of the Civil Code states that:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

8. Back Up Offers

- a. No Shop Provisions. Buyers should protect against any "shopping" to preserve leverage in making changes based on due diligence.
- b. Modifying the Primary Contract. Seller's should preserve the ability to modify the primary contract without breaching the terms of the back-up offer.

9. Rights of First Refusal and Rights of First Offer

- a. Right of First Offer. A right of first offer requires that the property be offered to the holder of the right before it is marketed to others.
- b. Right of First Refusal. A right of first refusal requires that the holder of the right be given the opportunity to match the terms of a bona fide offer that the Seller is willing to accept.
- c. Which Type of Right is Right? A right of first offer is often preferred since the right can be eliminated before a lot of costs, time and expense is incurred to secure a bona fide third party offer. A right of first refusal can force would-be buyers of truly "unique" property to bid more than the fair market value to secure the property.

10. Indemnity

- a. General. Indemnity is a contract in which one engages to save another from the legal consequences of the conduct of one of the parties or some other person Cal. Civil Code Section 2772 et seq.

- b. Key Provisions of Section 2772 of the California Civil Code.
- i. Indemnity for Future Wrongful Acts – An indemnity against the consequences of future wrongful acts which the indemnitor wishes to have the indemnitee perform is not enforceable.
 - ii. Indemnity Against Acts Already Done – enforceable.
 - iii. Indemnity Against "Claims" – An indemnity against "claims", "demands" or "damages" only entitles the indemnified person to recover after payment of the claim.
 - iv. Indemnity Against "Liability"-- An indemnity against "liability" entitles the indemnified person to recover upon becoming liable.
 - v. Defense Is Covered – An indemnity against claims or liabilities includes the right to a defense. The indemnitor is bound to defend, but the Indemnitee may conduct its own defense if the Indemnitee chooses to do so.
- c. General Indemnities. An indemnity provision which does not expressly indemnify the indemnified party for the indemnified party's own negligence is referred to as a general indemnity and does not entitle the indemnified party to any protection for its own active negligence. The indemnity provision will protect the indemnified party against its own passive negligence.
- d. Active vs. Passive Negligence. Generally the distinction between active and passive negligence is one of fact. Passive negligence is generally the type of negligence which is imposed by law. The crux of the inquiry is whether there is some participation by the person seeking indemnity in the conduct or omission which caused the injury, beyond that merely imposed by law. Examples of passive negligence include the following: failure to discover a dangerous condition on one's property created by others; and, failure to inspect certain work and specify changes. Active negligence has been found when a party dug a hole which caused injury, supplied scaffolding which did not meet the requirements of a safety order, or failed to install safety nets in violation of a contract.
- e. Practice Tip. If your client is the party being protected by an indemnity, be sure that the indemnity specifies that your client is protected from its own negligence, whether active or passive.
- f. Strict Liability. Courts have stated that indemnity against claims or liability for strict liability is governed by the same rules. Since strict liability is so common a basis for imposing liability, as in the case of environmental claims and liabilities, a well-drafted indemnity clause should protect the Indemnitee against claims and liability for strict liability. See *Widson v. International Harvester* (1984) 153 Cal. App. 3d 45.

- g. Attorneys' Fees; Costs of Appeal. There is some confusion whether a court will permit a party to recover attorneys fees incurred in enforcing an indemnity if the indemnity provision does not expressly provide for such recovery. Another issue is whether the costs of defending the indemnity on appeal is covered. A well drafted indemnity provision should, therefore, include language that the cost of enforcing the indemnity, including any costs on appeal, are included in the indemnitor's obligations under the indemnity.
- h. Construction Indemnity.
 - i. Indemnity for Sole Negligence or Willful Misconduct Void. Indemnity for loss damage or expense due to the sole negligence or willful misconduct of the indemnitee or of the agents, servants or independent contractors of the Indemnitee is void. Cal. Civ. Code Section 2782.
 - ii. Exception – Accommodating Neighbors. A neighbor who accommodates a contractor by allowing entry onto the neighbor's property can get an indemnity which includes claims and liabilities for the neighbors sole negligence or willful misconduct. Cal. Civ. Code Section 2782.1
 - iii. Exception for Inspection Services. Cal. Civ. Code Section 2782.2
 - iv. Exception – Limitation of Liability or Allocation of Liability Between Owner and Contractor, Subcontractor and other parties. Allocation, release, liquidation, exclusion or limitation of liability is permitted.
 - v. AB 758 -- Defects in Residential Construction Agreements After January 1, 2006: For new residential construction agreements, a subcontracts cannot indemnify a Builder, as defined in SB 800, or that builders other agents, servants, independent contractors who are directly responsible to the Builder, against liability for claims for construction defects.
 - vi. Subcontractor and Contractors who are not Builders cannot protect the Owner by way of indemnity for claims for construction defects which result from the negligence of the Indemnitee or any other party.
 - vii. Indemnity for Personal Injury, Property Damage or other claims not involving construction "defects" is still allowed.
- i. Practical Issues In Indemnities.
 - i. Indemnity from Buyer should only cover the period of its ownership.
 - ii. Use Care When Naming the Indemnitors and Indemnitees. Name the Indemnitors and the Indemnitees with precision. If there is a string of different parties, define the string as the "Indemnified Parties."
 - iii. If Representing the Indemnitor, Limit Claims and Liabilities to "Personal Injury" or "Property Damage." This is the AIA approach. Such

limitations track the scope of coverage provided by Commercial General Liability policies of insurance and they avoid claims for economic losses, lost profits, diminution in value, etc.

- iv. First Party Claims vs. Third Party Claims. There is some authority that a generally worded indemnity will only protect against third party liability and will not serve to compensate the Indemnitee for losses it suffers where no third party brings a claim.
- v. Multiple Indemnitors. If the interests of multiple indemnitors differ, then their indemnification obligations should reflect those differences. For example, where several tenants in common sell a property, the 1% owner should not be exposed to the same liability as the 99% owner. Indemnitees may insist on joint and several liability of all indemnitors. If so, enter into a side agreement allocating liability among the indemnitors.
- vi. Limit Liability With a Threshold or Cushion. Include a threshold to avoid nickel and dime claims. If the threshold is surpassed, consider whether or not the first dollar of losses is then recoverable or whether the threshold should really be a cushion with no recover for the losses incurred until the Indemnitee absorbs losses equal to the cushion.
- vii. Limit Liability for Known Claims. If the Indemnitee knows of a claim or liability and closes, the Indemnitee should not be allowed to sue.
- viii. Make the Indemnity Agreement the Exclusive Remedy. Doing so will avoid potentially more costly liability for tort claims which include damages proximately caused, even if not foreseeable.
- ix. Create a Time Limit for Bringing Claims. If no time limit is expressed, the indemnity can last forever.
- x. Make the Indemnity Net of Tax Benefits Realized by the Indemnitee Due to the Loss.
- xi. Make the Indemnity Net of Insurance Collectable by the Indemnitee.
- xii. If Your Client is the Indemnitor, Have the Indemnitees Waive the Right of the Indemnitee's Insurer's Right to Subrogation and Recovery.
- xiii. Fight Against Indemnifying any Architect or Design Professional Against Claims Brought Against Them.
- xiv. Include in Each Indemnity a Clause that Provides that the Indemnity is Available "to the extent allowed by law."
- xv. Make it Clear That the Indemnity is Not Limited by Insurance or by Worker's Compensation Laws.

11. 6. **Covenants and Equitable Servitudes**

- a. **Definition.** A covenant is an agreement between two parties to do or refrain from doing some act. As such, a covenant is a contract and is enforceable between the original parties. If a covenant runs with the land, then it is enforceable against the transferees or successors of the original parties to the covenant but only for breaches of the covenant which occur during the transferee's ownership of the property. In addition, unless the parties otherwise intend, a transferor is not liable for any breach of a covenant which runs with the land after the transferor transfers his interest in the property. Civ. Code Section 1466.
- b. **Requirements for Running Covenants.** In the context of any purchase and sale transaction, for a covenant to run with the land the following are required: (i) the parties must intend that the covenant run, (ii) the covenant must "touch and concern" the land which means that it must affect the parties as owners of particular interest in the land or must relate to the use of the land, (iii) the burdened and benefited land must be described; (iv) the instrument must be recorded. Note that there must be some land, described in the instrument, that is benefited if the burden of a covenant is to run.
- c. **Environmental Restrictions.** Covenants which protect health or human safety as a result of the presence of hazardous materials may be recorded against a property and they will be enforceable even if they do not benefit the land of the party seeking to enforce the covenant. Such covenants should include in their title "Environmental Restriction." Cal. Civ. Code Section 1471.
- d. **Equitable Servitudes.** A promise which does not "run with the land" may be enforced if a court determines that it is equitable to enforce the covenant. The usual remedy is injunction not damages and the usual plaintiff is a nearby owner.

ATTACHMENT 2.c

Earnest Money Arbitration

- (a) Arbitration of Disputes Regarding Return of Earnest Money. If there is a dispute between Buyer and Seller concerning whether or not Buyer or Seller is entitled to the Earnest Money following a termination of this Agreement, then either party may have such dispute, claim or controversy determined by arbitration (the "Arbitration") in the JAMS office nearest the Property, before a single arbitrator (the "Arbitrator"). The party requesting arbitration shall advance any initial administrative fees and costs of JAMS necessary for JAMS immediately to commence the arbitration, but shall be reimbursed for the same if determined to be the prevailing party. The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules and Procedures except that the parties shall use commercially reasonable efforts to cause the Arbitration to be concluded and the award (the "Award") given to the parties in writing within twenty (20) days after either party requests Arbitration (the "Outside Date"). JAMS shall choose the Arbitrator from its real property panel of Arbitrators, on the first (1st) business day after the Arbitration is requested and the parties waive the right to select the Arbitrator. If the Arbitrator so selected is not acceptable to either of the parties, for good cause, the party to whom the Arbitrator is not acceptable shall have one (1) business day, after the selection is made by JAMS, to reject the Arbitrator and to state the cause for rejection. The parties waive any provision of law which would give the parties a longer period to reject the Arbitrator selected by JAMS. If either party rejects the first Arbitrator selected by JAMS, then JAMS shall, within one (1) business day after the rejection, select another Arbitrator and the process outlined above shall be repeated until an Arbitrator is selected and not rejected. If Seller rejects an Arbitrator selected by JAMS, then the Outside Date shall be extended two (2) business days for each instance that an Arbitrator selected by JAMS is rejected by Seller. The parties shall cooperate in taking commercially reasonable actions required to cause the arbitration to be concluded within such twenty (20) day period but not later than the Outside Date. The arbitration shall be concluded even if it is not completed by the Outside Date. Judgment on the Award may be entered in any court having jurisdiction. The Arbitrator may, in the Award, allocate all or part of the costs of the Arbitration, including the fees of the Arbitrator and the reasonable attorneys' fees of the prevailing party.

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION (I.E., THIS SECTION ___) DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING

UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

SELLER'S INITIALS

BUYER'S INITIALS



Avoiding and Allocating Environmental Liabilities in Non-Residential Purchase and Sale Transactions An Overview

Sandi L. Nichols
Allen Matkins Leck Gamble Mallory & Natsis LLP

I. INTRODUCTION AND OVERVIEW

A. The Issues

Environmental issues are a key focus of due diligence in non-residential real property purchase and sale transactions, particularly in areas of current or historical manufacturing, dry cleaning, gasoline station, auto body and repair shops, and landfill uses. Such uses commonly result in the discharge, release, or disposal of "pollutants" or "contaminants" that cause soil, groundwater, surface water, and indoor air contamination which can create significant economic, environmental, and public health risks that can impact the viability and terms of a deal. Some key toxic contaminants from such uses include chlorinated solvents (such as tetrachloroethylene (aka perchlorethylene) (PCE or PERC), 1-1-2-2-tetrachloroethane (TCE), constituents in petroleum hydrocarbons (TPH), polychlorinated biphenyls (PCBs), and methane gases. In addition, older structures may also contain asbestos-containing materials (ACM), and lead-based paint (LBP). Mold can be found in older and newer buildings where there have been plumbing or roof leaks, or in areas of high moisture content where ventilation has been inadequate, and naturally-occurring radon can also be found in buildings.

B. The Laws

Federal, state, local and common laws impose liability on current and former owners and operators of real property (among others). These liabilities include liability for the investigation, remediation, removal and monitoring (short- and long-term) of the contamination on- and off-site, as well as for property damages and damages for bodily injuries associated with the contamination. While a discussion of the various statutes and regulations that impose liability is beyond the scope of this overview, for reference, some of these include the following federal

laws: Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA) (42 USC §§ 9601-9675), the Resource Conservation and Recovery Act of 1976, as amended (RCRA) (42 USC §§ 6901-6992k), the Clean Water Act (33 USC §§ 1251 *et seq.*); and the following California state statutes: the Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA) (Health & Safety Code §§ 25300-25395.45), also known as the California Superfund, the California underground storage tank statutes (Health & Safety Code §§ 25280-25299.206) and the Porter-Cologne Water Quality Control Act (Water Code §§ 13000, *et seq.*). In addition, common laws such as nuisance, trespass, negligence, premises liability, fraud and deceit also provide bases for the imposition of liability on the owners and operators of contaminated real property.

C. The Upshot for the Deal

In order to identify and minimize the potential risks associated with the purchase and sale of environmentally-impaired real property, it is essential that sellers make certain disclosures, and that buyers conduct their own due diligence regarding the existence of contamination, prior to consummating the deal. This is true not only to allocate liability and risk between the transacting parties and to satisfy lenders financing the deal, but also to potentially insulate the buyer from CERCLA liability to the government and third parties under available landowner liability protection defenses, and to minimize the likelihood of other tort liability to third parties for environmental conditions. "Phase I" and "Phase II" environmental site assessments, compliance with certain ASTM standards, and the negotiation of environmental disclosures, environmental indemnities, and "escrow holdbacks," or new cleanup escrows, as well as the potential use of pollution legal liability, cleanup cost cap, or property transfer insurance policies, should be part of the toolbox of those responsible for negotiating non-residential real property purchases and sales.

II. SELLER'S DISCLOSURE OBLIGATIONS

A. California's Health & Safety Code Section 25359.7

1. California's statutory disclosure requirements provide a starting point for a buyer's due diligence with respect to contamination. Health & Safety Code section 25359.7(a) provides that:

a) An owner of non-residential real property who knows, or has reasonable cause to believe, that any release of hazardous substance has come to be located on or beneath that real property shall, *prior to the sale* (or lease) of the real property, give *written notice* of that condition to the buyer;

b) failure of the owner to provide the required disclosure subjects the owner to responsibility for actual damages and any other remedies provided by law;

c) where the owner has *actual knowledge* of the presence of any release of a material amount of a hazardous substance and knowingly and

willfully fails to provide the required written notice to the buyer or lessee, the seller is liable for a civil penalty not to exceed five thousand dollars (\$5,000) for each separate violation.

2. The Section 25359.7 disclosure can either be in the purchase and sale agreement or in a separate written disclosure. If based upon an environmental report or reports, it is prudent to identify the report(s) by reference or attach a copy or copies.

B. The Purchase and Sale Agreement (PSA)

1. Disclosure obligations may be imposed depending upon the scope of the representations and warranties required under the PSA as to the environmental conditions existing at the real property. Negotiated provisions may include:

- a) No representations and warranties--"as is, where is" (except seller will still be obligated to make any required disclosures under Health & Safety Code § 25359.7(a))
- b) Representations and warranties as to seller's actual knowledge, without independent investigation
- c) Representations and warranties as to specific individuals' actual knowledge, without independent investigation
- d) Representations and warranties to best of seller's knowledge based upon referenced environmental reports

III. BUYER'S DUE DILIGENCE

A. Phase I/II Environmental Assessment Reports (ESA)

In a Phase I ESA, the environmental consultant inspects property, reviews available historical governmental records and aerial photographs; may conduct interviews with agency personnel and property owners or occupants; identifies and reports any "recognized environmental condition" (REC); and may recommend a Phase II ESA, which may include taking samples from soil, groundwater, soil gas, and/or indoor air in Areas of Concern.

B. "All Appropriate Inquiries" (AAI) Required To Establish CERCLA Landowner Liability Protections

1. CERCLA allows the government and private parties to recover costs incurred for cleanup of contaminated sites from "potentially responsible parties" (PRPs), including current owners and operators, and former owners and operators during the time of disposal of hazardous substances from a "facility" (a site where "a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located...") (*See* 42 U.S.C. §§ 9607(a); 9601(9)(B));

2. Affirmative Defenses to CERCLA's strict liability include the:
- a) **Third-Party Defense** (42 U.S.C. § 9607(b)(3)): Owner must show by a preponderance of the evidence that a third party is the sole cause of contamination; no contractual, agency or employment relationship with PRP; "due care" exercised as to the subject hazardous substances in light of all relevant facts and circumstances; and precautions were taken against foreseeable acts or omissions of such third party.
 - b) **Innocent Landowner (ILO) Defense** (42 U.S.C. § 9601(35)(A)): Subset of Third-Party Defense. Owner must show by a preponderance of the evidence that due care exercised and owner did not know and had no reason to know at the time title acquired that hazardous substances had been disposed of on its land. If contamination was detected before property acquired, then the defense is not valid. [CAUTION: owner may lose ILO status by exacerbating contamination (e.g., by spreading contaminated soil) even if it had no prior knowledge of contamination (*see Lewis Operating Corp. v. U.S.*, 533 F. Supp. 2d 1041, 1047 (C.D. Cal. 2007))].
 - c) **Contiguous Property Owner (CPO) Defense** (42 U.S.C. § 9607(q)): Owner must show by a preponderance of the evidence that owner did not cause, contribute or consent to contamination; no contractual (except site purchase-related documents), corporate, or familial relationship with PRP; reasonable steps taken to stop continuing release, prevent threatened release, and limit exposure to hazardous substances released from contiguous parcel (but no obligation to conduct groundwater investigation or cleanup (except under very limited circumstances)); full cooperation, assistance, and access provided for cleanup; property in compliance with any land use restrictions; in compliance with EPA information requests and subpoenas; provided all legally-required notices; and conducted AAI at time of purchase and no knowledge of contamination). Like ILO Defense, if contamination was detected before property acquired, then the defense is not valid.
 - d) **Bona Fide Prospective Purchaser (BFPP) Defense** (42 U.S.C. § 9601(40)): Differs from ILO and CPO Defenses as it applies even if contamination was detected before purchase as part of AAI or otherwise. Owner must show by a preponderance of the evidence that *all* disposal of hazardous substances occurred before property acquired by owner; other factors the same as CPO Defense. Note, however, that, unlike the CPO Defense, the BFPP statute does not expressly relieve owners of the obligation to address groundwater, leaving room for an argument that a BFPP *may* be required to take such action.
3. Any party seeking protection as an ILO, BFPP and CPO must meet the AAI requirement under 42 U.S.C. § 9601(35)(B). AAI must be conducted or updated within one year before the date of acquisition of a property. (40 C.F.R.

§ 312.20(a).) If AAI conducted more than 180 days before the acquisition date, certain aspects of the inquiries must be updated. (40 C.F.R. § 312.20(b).)

4. AAI factors to be considered include: (a) any specialized knowledge or experience that the buyer may have; (b) the relationship of the purchase price to the value of the property if uncontaminated; (c) commonly known or reasonably ascertainable information about the property; (d) the obviousness of the presence or likely presence of contamination at the property; and (e) the ability to detect the contamination by appropriate inspection. (42 U.S.C. § 9601(35)(B).)

5. Courts have held persons engaged in commercial transactions to the highest and "strictest" standard of inquiry. (*See U.S. v. Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. 1341, 1348 (D. Idaho 1989).)

6. American Society for Testing and Materials ("ASTM") Standard E1527-05 ("Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process")

a) Designed to meet EPA's "All Appropriate Inquiries" standard for certain CERCLA affirmative defenses (discussed above)

b) Includes visual inspection of site and adjacent properties; review of historical records and aerial photographs; review of databases maintained by applicable governmental agencies (e.g., EPA, Regional Water Quality Control Boards, DTSC); interviews with present and past owners, operators, and occupants; identification of significant data gaps and the significance of those data gaps

c) Opinion as to whether identified conditions indicate releases or threatened releases of hazardous substances

d) Qualifications and signature of environmental professional (who must meet certain specified qualification requirements)

e) Must include in final report an opinion regarding additional appropriate investigation if the environmental professional has such an opinion

f) Buyers or lenders may request or require that any Phase I be expanded to include, for example, vapor intrusion testing, especially where there is known soil or groundwater contamination at or under site; and/or mold, asbestos, and radon inspections

7. ASTM Standard E2790-11: Standard Guide for Identifying and Complying with Continuing Obligations

a) Developed by representatives of industrial, lending, consulting and governmental entities to provide *guidance* to commercial real estate (and

forestland and rural property) buyers and owners who wish to establish and maintain BFPP, CPO, and ILO liability protection under CERCLA

(b) Suggests a four-step approach: (1) detailed review of Phase I ESA and any actual knowledge of hazardous substances on site; (2) determine if recognized environmental conditions (RECs), institutional controls (ICs), or land use restrictions exist and what cleanup activities have been undertaken; (3) if continuing obligations apply, take initial continuing obligations consistent with property-specific conditions (e.g., removal of drums, HVAC modifications, or installation of engineered barriers); (4) identify and implement "ongoing" continuing obligations (e.g., inspection, evaluation and maintenance of compliance with land use restrictions, institutional controls, etc.)

C. Even if AAI Undertaken, CERCLA Landowner Liability Protections Can Be Tough To Establish

1. Buyer still has the burden of proving by a preponderance of the evidence each other element of the BFPP defenses, including buyer's (a) post-closing exercise of "appropriate care;" (b) lack of any release, disposal, or exacerbation of hazardous substances; (c) cooperation, assistance and providing of access to conduct a response action; (d) compliance with any institutional controls and land use restrictions; (e) compliance with any subpoenas; and (f) lack of affiliation with a PRP.

2. Evaluation of whether the "appropriate care" standard for BFPP and ILO status has been met is very fact specific and has not consistently been applied by the federal courts. A few recent examples:

a) In *3000 E. Imperial, LLC v. Robertshaw Controls Co.*, 2010 U.S. Dist. LEXIS 138661 (C.D. Cal. 2010), the court found that BFPP status was met, even where USTs, identified as likely source of soil and groundwater contamination during due diligence, were left in place for about two years after tank contents (TCE) were thought to be removed; some residual TCE found in tanks upon removal. Court relied upon DTSC finding that buyer had met "appropriate care" standard under California's Health & Safety Code § 25395.69, where buyer had entered into a Voluntary Cleanup Agreement with DTSC for soil and groundwater cleanup and had emptied USTs shortly after purchase. Court rejected defendant's claim that the delayed excavation of the USTs precluded BFPP status under CERCLA, which requires a BFPP to take "reasonable steps to (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance" (42 U.S.C. § 9601(40)(D)). Court found that the buyer had taken the requisite "reasonable steps" and that defendant had not provided evidence to suggest that Plaintiff's conduct was unreasonable. The court did not discuss the "no disposal" element of the BFPP defense.

b) In *Ashley II of Charleston v. PCS Nitrogen*, 746 F. Supp. 2d 692 (D.S.C. 2010) (appeal pending 4th Cir.), the court concluded that plaintiff, the buyer of 34 acres on which a former phosphate fertilizer plant had operated and which had been contaminated and remediated for years under regulatory agency oversight, had met AAI standards, but had not exercised "appropriate care" under CERCLA to qualify for BFPP status, even though it had cooperated with EPA in connection with the removal and remediation activities. The Phase I ESA had identified sumps and concrete pads as RECs; buyer's 14-month delay in testing, cleaning and filling them with concrete was "too late to prevent possible releases;" failure to prevent accumulation of the debris pile, or to sample and remove it for over a year showed a "lack of appropriate care."

c) In *Saline River Props. v. Johnson Controls, Inc.*, 2011 U.S. Dist. LEXIS 119516 (E.D. Mich. 2011), the court held that the current owner who was renovating a Brownfields site failed to establish on summary judgment that it met either the BFPP or ILO exemptions under CERCLA where its renovation activities allegedly exacerbated pre-existing contamination. The prior owner, Johnson Controls, Inc. (JCI) had contaminated the property and groundwater with vinyl chloride. The current owner, Saline River Properties (Saline) filed a RCRA citizen suit and other claims against JCI for its alleged failure to comply with a cleanup order. JCI, in turn, counterclaimed against Saline under CERCLA, alleging that Saline's destruction of the concrete building slab allowed for rainwater to infiltrate the soil, thereby causing a release of vinyl chloride and exacerbation of the contamination. The court held that this was enough for JCI to overcome summary judgment because, even if Saline could establish the "numerous elements" of the BFPP defense, it "would still have to establish that it did not 'impede the performance of a response action.'"

3. The "lack of affiliation with PRP" requirement to establish the Landowner Liability Protections may be undermined by contractual indemnities and releases combined with conduct to discourage claims against indemnitees.

a) In *Ashley II of Charleston v. PCS Nitrogen*, 746 F. Supp. 2d 692 (D.S.C. 2010) (appeal pending 4th Cir.), discussed above, the buyer had released and indemnified certain parties for their contamination of the site in connection with its purchases of parcels from each of them. Buyer, in turn, attempted to persuade EPA not to take any enforcement action to recover for harm caused by those parties. The court found buyer's efforts to discourage EPA from recovering response costs covered by the indemnification "reveals just the sort of affiliation Congress intended to discourage," and held that such affiliation precluded the application of the BFPP defense.

b) Recent EPA Guidance implies that EPA may disagree with *Ashley II*. (See EPA, *CERCLA Enforcement Discretion Guidance Regarding the*

D. The Impacts Of Vapor Intrusion Risks on Due Diligence

1. Vapor intrusion is the phenomenon by which contaminated soil gas vapors rise through the soil column and work their way into interior spaces of buildings through foundation cracks and utility openings. They pose a risk from chronic or long-term exposure to extremely low levels of contaminants that usually are below detectable odor thresholds. Vapor intrusion issues frequently arise in areas of groundwater contaminated with chlorinated solvents (VOCs) and petroleum hydrocarbons most often associated with current or historical dry cleaner, gasoline service station, and manufacturing operations.

2. Phase I ESAs performed before 2005 did not typically evaluate vapor intrusion pathways. Consequently, most information on sites is being developed now. It is likely that vapor intrusion screening will become a routine part of Phase I reports.

3. In 2010, the American Society for Testing and Materials (ASTM) revised its Standard E2600-10: "Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions." E2600 provides a relatively objective basis for assessment of vapor intrusion risks. ASTM developed the standard for voluntary use in real estate purchase and sale, financing, and leasing. The typical user is a prospective purchaser, or lender to a purchaser, of commercial or industrial property that is not a source of contaminated soil vapors.

a) E2600 does not meet EPA's standards for AAI. As a result, E2600 would be used in conjunction with a Phase I Environmental Site Assessment (ASTM Standard E1527-05).

b) The E2600 standard guides an "environmental professional" through a two-tiered screening process for developing advice to a user, such as a prospective purchaser or lender, as to whether contaminated soil vapors do exist, are likely to exist, cannot be ruled out, or can be ruled out at the subject property.

(1) The "Tier 1 Screen" uses "Phase 1"-type information – governmental records regarding contamination of neighboring properties, a site visit, information obtained from the user (prospective purchaser or lender), etc. Records searches should include properties within 1/3 of a mile from the boundaries of the subject property if the concern is VOCs or SVOCs, and 1/10 of a mile if the concern is petroleum hydrocarbons.

(2) Only "reasonably ascertainable" information must be obtained. The standard defines "reasonably ascertainable" to mean information that is publicly available for the cost of photocopying,

"practically reviewable" (i.e., in a format that does not require excessive review time), and readily accessible (i.e., within 20 days, an approximate time period for a response to a Freedom of Information Act or Public Records Act request).

(3) The standard also lists certain standard environmental and historical record sources that must be consulted (federal and state hazardous waste disposal and generator lists, cleanup site lists, fire insurance maps, local street directories, aerial photographs, and USGS topographic maps).

c) Information is then synthesized to determine the likelihood of a risk of vapor intrusion at the subject property in light of:

(1) The hydrogeologic relationship between the subject property and the neighboring contaminated source site. If the source site is "upgradient" (i.e., upstream of the subject property), the risk is higher; if it is "downgradient" (downstream), the risk is much lower; if it is "cross-gradient" (to the side of the subject property) it depends on the distances and the width of the plume.

(2) The prospective use of the subject property. The higher the use (i.e., residential, versus industrial) the more stringent the indoor air standards, and hence the greater the risk of a problem.

(3) The type of contaminant. Some travel faster than others.

(4) The distance of the source location to the subject property boundary.

(5) The characteristics of the soil. The more porous (sandy) the soils, the easier it is for soil vapors to move.

(6) The depth to groundwater. In general, the shallower the groundwater, the shorter the distance the soil vapors have to travel to reach overlying structures.

(7) The presence of vapor conduits (natural or man-made) in the soil (such as loose gravel formations and sewer lines).

(8) The status of the cleanup of the source property. If soil vapors are already being extracted under a cleanup order, the risk to neighboring properties is lower.

d) Users may then decide to proceed to a "Tier 2 Screen" if vapor intrusion cannot be ruled out in Tier 1. A Tier 2 Screen may involve both non-invasive review of data collected from subsurface investigations at

source sites as well as "invasive" data collection at the subject property, at its boundary, or offsite.

e) Upon completion of the Tier 1 (and if applicable Tier 2) Screens, the vapor encroachment determination is made:

(1) The standard prescribes "critical distances" from the subject property for data analysis and/or testing: For VOCs and other non-petroleum contamination, 100 feet between the subject property boundary and the outer edge of the contaminated soil or groundwater plume; for most petroleum contamination, 30 feet between the subject property boundary and the outer edge of the contaminated soil or groundwater plume. The environmental consultant can exercise judgment to modify these distances.

(2) If the distance between the boundary of the subject property and the outer edge of the contaminant plume exceeds the applicable "critical distance," the environmental consultant may determine that a vapor intrusion condition is unlikely, subject to consideration of site-specific factors such as subsurface conduits ("preferential pathways") for migration of contaminants.

f) If the distance between the boundary of the subject property and the outer edge of the contaminant plume is less than the applicable "critical distance," then the consultant may determine that a vapor intrusion condition at the subject property exists or is likely, depending upon the relationship between the source site and the subject site (upgradient, downgradient or cross-gradient).

E. The MEW Superfund Site in Mountain View—An Example of Why Not To Rely Upon Prior Agency Decisions in Performing Due Diligence Today

1. Parties frequently look to "no further action" or "closure" letters, or to regulatory agency cleanup orders, in evaluating the potential risks, costs, and allocation of liabilities associated with the purchase and sale of real property. Vapor intrusion, however, is a game changer when it comes to environmental due diligence and liability analyses.

2. Twenty years after adopting a Record of Decision (ROD) for the remediation of a soil and groundwater plume at the MEW Superfund Site in Mountain View, California, EPA revisited its decision and, in August 2010, adopted a Supplemental Record of Decision to impose new requirements to mitigate the risk of vapor intrusion in both new and existing buildings.

3. EPA's requirements for new buildings typically include an impermeable vapor barrier installed below the building slab, frequently accompanied with a subslab system of vapor collection pipes that draw in soil gases and vent them,

passively or actively, to the atmosphere. In some cases, podium construction is utilized to provide an extra margin of safety.

4. For existing commercial buildings, the EPA is offering a choice:

a) The "Preferred" remedy is to retrofit with sub-slab or sub-membrane ventilation systems. This requires drilling through floors and foundations or installation from the perimeter of the building footprint.

b) Alternative remedy - Active Indoor Air Ventilation. Under this approach, operational adjustments would be made to HVAC systems if they are capable of increasing air exchange rates sufficiently, and if the property/building owner agrees in a recorded document running with land to use, operate and monitor the system to meet performance criteria. Sealing of all "direct and leaking conduits" – i.e., floor and foundation openings and cracks – would also be required.

(For existing residential buildings, Active Indoor Air Ventilation is not an acceptable choice, and the only remedy is active sub-slab or sub-membrane ventilation.)

5. For both commercial and residential buildings the following additional requirements apply:

a) Monitoring requirements (soil vapors and indoor air).

b) "Institutional" and related controls in the form of one or more of the following: (1) Long term management of development in the affected region through design requirements and Master Plan; (2) Adoption of planning and permitting procedures for new construction on affected properties, including referral to EPA for approval; (3) Creation of a mapping database ensuring that prospective purchasers, including developers, are informed of appropriate construction requirements; (4) Recorded agreements between property owners and responsible parties notifying potential transferees of site conditions and of obligation to operate and maintain HVAC systems if that is the remedy approved for the site; (5) Where agreements are not reached, recorded environmental covenants (deed restrictions) on affected properties that EPA can enforce as a third party beneficiary; (6) Notification of EPA and responsible parties of changes in building ownership or configuration; (7) Provision of access to affected properties by EPA and responsible parties in order to install, maintain and operate the remedy.

6. The projected costs are significant:

a) HVAC remedy – capital costs are low but operating costs are significantly higher and energy intensive; transactional costs could be very high.

- b) Retrofit remedy – capital costs calculated by EPA to be in range of \$253,000 - \$403,000 per building; much lower transactional costs.

F. DTSC "Guidance for the Evaluation and Mitigation of Subsurface Vapor Intrusion to Indoor Air" (October 2011)

1. Describes actions that can be taken and requirements that can be imposed to assess and reduce risks associated with soil vapor intrusion (VI); not a regulation and not an enforcement tool, but will be used by DTSC as guidance in evaluating VI risks at sites at which it is involved. Does not preempt other applicable guidance documents or approaches of other agencies.
2. Eleven-step approach when VOCs are found at a site: assessment of site; identification of spills and releases; identification of pathways of exposure into buildings; for existing buildings, assessment of imminent hazards of VI; screening analysis applying California Human Health Screening Levels (CHHSLs); if screening levels exceeded or cumulative risk assessment above applicable standards, then collection of additional data and site-specific VI risk analysis (e.g., soil permeability, gas diffusion rates); if VI risk, then interior building assessment (utility openings, cracks, other pathways) and indoor air sampling; if indoor air concentrations exceed applicable risk levels, then mitigation (e.g., remediation, soil vapor venting, soil vapor barriers, increased HVAC) and potential institutional controls
3. Key issues raised by Guidance: (a) public disclosure and notification; (b) cumulative impact assessment (includes evaluation of ambient air contamination in conjunction with indoor air analysis; assessment of interior exposures to ordinary consumer products and all other air contaminants); (c) unimproved real property with potential for VI issues should be remediated in advance of construction, plus assessment to determine if soil vapor venting or other controls necessary; (d) groundwater sampling and/or soil vapor sampling required and specific types of sampling allowed/disallowed; and (e) a buffer zone of 100 feet is required around buildings (i.e., sampling and risk analysis applied to contamination within 100 feet of existing or proposed building)

IV. ALLOCATION OF LIABILITY IN A PURCHASE AND SALE AGREEMENT

A. Environmental Releases

1. Once the risks are identified through the Phase I/II ESA process, the parties can then evaluate the economic implications of the risks identified, and negotiate the scope of releases and indemnities as between them, depending upon the specific facts, circumstances, and economic terms involved in the deal.
2. Such agreements are not binding upon the government or any third parties and will not relieve the contracting parties of liability to them under CERCLA or other statutory or common law. (*See, e.g.,* 42 U.S.C. § 9607; *Mardan Corp. v.*

C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986); Health & Safety Code § 25364.)

3. Any releases should be drafted to expressly preserve the releasor's rights against third parties to preclude any argument that they have been waived.

4. Boilerplate "as is" provisions generally are ineffective in apportioning liability under CERCLA. Courts have treated such provisions merely as warranty disclaimers and not releases of CERCLA or other claims. (*See, e.g., Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1055 (D. Ariz. 1984), *aff'd on other grounds*, (9th Cir. 1986) 804 F.2d 1454; *Wiegmann & Rose Intern. Corp. v. NL Industries*, 735 F. Supp. 957, 962 (N.D. Cal. 1990).) Read together, the case law suggests that responsible parties can contract for a release from CERCLA liability in an "as is" provision, even if the seller has no knowledge of the contamination before the closing of the transaction, so long as the provisions are valid under state law and clearly express the parties' intent to disclaim a seller's liability for known or unknown contamination. But because such expanded "as is" clauses have not yet been tested in the Ninth Circuit, it would still be prudent to include the release clause language that clearly covers the scope of environmental liabilities being released.

B. Environmental Indemnities

1. The scope and nature of the indemnities will depend upon various factors, including the severity of the environmental problem; the agreed-upon purchase price; the confidence the parties have on the environmental reports and remediation cost estimates; and the potential for third-party claims. Sellers may be willing to indemnify buyers for known, but not unknown, environmental conditions. Such an agreement could be based upon the "baseline" conditions identified in the available environmental reports.

2. Sellers will likely seek indemnification from buyers if the buyer will be completing the remediation, if the purchase price has been reduced, or if the buyer's operations could potentially exacerbate existing contamination or generate new environmental conditions.

3. Given the costs and risks of attempting to satisfy the Landowner Liability Protections under CERCLA, and depending upon the sophistication and risk tolerance of the buyer, as well as the financial stability of the seller, a buyer may choose instead to rely upon seller's indemnities, alone or in combination with insurance products, environmental escrow accounts (from escrow holdbacks or a separately-funded account), and/or letters of credit.

V. ENVIRONMENTAL INSURANCE

A. Pollution Legal Liability Policies

1. Generally, these policies provide coverage for on-site cleanup of the insured premises triggered by first party discovery, as well as third party claims for bodily injury, property damage, and cleanup costs (both on-site and off-site). Additional coverage is available for business interruption, mold or fungus, lead-based paints and asbestos, among other things. The policies apply to "pollution conditions," and typically provide coverage for *unknown* pollution at covered locations specified in the policies. If known environmental conditions exist at a site, the policy may be structured to provide some type of environmental coverage for that existing contamination, subject to negotiations with the carrier on the scope and cost of coverage. Coverage is based on the type and extent of the site's existing contamination.

2. Coverage usually applies on a "claims-made" basis—coverage applies to occurrences and conditions existing before the inception of the policy so long as the claim is made while the policy is in effect.

3. Premiums for these policies have been coming down in recent years making them a more attractive addition to a transaction.

B. Cleanup Cost Cap Policies

1. These policies provide coverage for cost overruns for the completion of environmental remediation projects based upon a remedial action plan and cost estimate. Coverage may include known and unknown contamination and pollutants that are discovered during the course of the remediation work.

2. Exclusions from coverage typically include: costs of legal defense, negotiations with agencies, regulatory fines and penalties, asbestos, and contractual liabilities.

3. Coverage generally applies in excess of a deductible or self-insured retention (i.e., usually the cost of the cleanup remedial action plan plus a cushion, which is a percentage of the anticipated cleanup costs, up to a fixed agreed-upon amount. Coverage typically ends after completion of the cleanup and certification that the cleanup has been completed.

C. Property Transfer Policies

1. Similar to PLL. Tailored to the real property transfer context. Designed to cover claims arising out of pollution conditions on or under the site or migrating from the location. The coverage includes claims for clean-up costs arising out of any newly discovered contamination, as well as third party toxic tort claims for bodily injury and for property damage. Business interruption could also be added to protect against delay in the completion of construction due to the

discovery of new pollution conditions. An insurer may agree to provide coverage for pre-existing contamination that is known to the insured at the inception of the policy provided that the insured disclosed such contamination to the insurer. The policy could, however, carve out coverage for remediating known contamination at the site.

2. Seller, buyer, and lender can all be named insureds.

VI. CONCLUSION

Buying and selling environmentally-impaired real property poses risks and challenges, but sophisticated parties and their consultants and attorneys can work together to minimize and allocate those risks. While CERCLA Landowner Liability Protections may provide some comfort and opportunity to argue that CERCLA's strict liability provisions do not attach, there is no certainty that, in the event of a dispute, the owner will be able to satisfy its burden of proof as to each of the requisite elements. Moreover, incurring costs and attorney's fees in an effort to do so may not prove to be the most efficient or cost-effective approach to addressing environmental liabilities. Consequently, parties to a commercial real property transaction should invest in a thorough environmental site assessment, analyze the potential risks and costs associated with the environmental conditions, attempt to allocate the risk through indemnities, releases, and reduction in purchase price, and consider whether environmental liability insurance or other security or escrow holdbacks are necessary or beneficial to make the deal work.

Allen Matkins

Getting Ahead of the Deals Coming Your Way in 2012:
Avoiding Pitfalls in Real Property Acquisitions and Dispositions



Lee F. Gotshall-Maxon

Lee is a partner in our San Francisco office whose practice focuses on the representation of developers, investors and lenders in all phases of real estate acquisition, development, financing and disposition. His experience includes the formation, management and restructuring of LLC's and partnerships and complex financing transactions. Lee's projects have included office, hotel, industrial, retail, single family, and multifamily developments throughout California and the Southwest.

Partner

415.273.7454
Lgotshallmaxon@allenmatkins.com

Focus

Real Estate Acquisition,
Development, Leasing and
Property Management

Education

J.D., Order of the Coif, Hastings
College of the Law, 1980

Hastings Law Journal
1978-1980

B.A., *cum laude*, Dartmouth
College, 1975

Lee has also been extensively involved in the representation of landlords and tenants in all aspects of office, retail and industrial leasing and property management issues. On the landlord side, he has represented institutional property management firms, asset management firms, trustees, insurance companies, major hotels, and financial institutions in reviewing, documenting, and negotiating leases and property management agreements. On the tenant side, he has represented both new and established enterprises in negotiating and renegotiating sale-leasebacks, leases, subleases, and lease assignments for premises in California and numerous other states. He has also handled numerous Building and Planning Code and disability access issues.

Lee frequently speaks and writes on real estate issues. He was recently a contributing author to *The Lease Negotiation Handbook*, published by the American Law Institute/American Bar Association and the Attorneys and Executives in Corporate Real Estate.

Lee is a member of the Urban Land Institute, the International Association of Attorneys and Executives in Corporate Real Estate, and the San Francisco Planning and Urban Research Association. He also serves on the Government Affairs Policy Advisory Committee of the Building Owners and Managers Association. Lee has been recognized as a Northern California *Super Lawyer* in 2010 and 2011. Lee is active in community affairs and has served as President of the Board of the Volunteer Center of Marin, as President of the Board of Central City Hospitality House, on the Board of Directors of the Legal Aid Society of San Francisco and on the Board of Directors of Presidio Graduate School.

Lee F. Gotshall-Maxon – continued

Representative Acquisition, Development and General Real Estate Matters:

- Developers. Have been involved on the developer side in several workouts involving mixed use commercial and residential projects in the Bay Area including modifications of LLC Operating Agreements, modifications of bank loan documents, drafting and completing complex reciprocal easement agreements, subdivision map recordations, negotiating and finalizing inclusionary housing agreements and working through issues with the Department of Real Estate to obtain Final Public Reports to allow sales of units and to protect entitlements.
- Acted as local counsel for a shopping center REIT in acquiring a portfolio of three shopping centers for a total price of \$560,000,000.
- Represented the purchaser of eight apartment projects in Colorado and Washington.
- Represented an apartment REIT in acquiring a California apartment project.
- Representation of the developer of a major retail center in Napa, California.
- Representation of the purchaser of a major retail center in San Francisco, California.
- Representation of the purchasers of the highrise office building at 180 Montgomery Street, San Francisco, California. This project included the formation of a joint venture, due diligence, acquisition of the property and assumption of an existing loan.
- Representation of the purchaser of a portfolio of 3,000 apartments in a single transaction. This project has included negotiation of a purchase and sale agreement, seller financing, negotiation of an LLC Operating Agreement, and due diligence.
- Representation of a major pharmaceutical company in selling a portion of its office campus in the Hacienda Business Park. The transaction involved the potential modification of the entitlements to permit residential development on property entitled for office use.
- Representation of a fully integrated development, construction, and property management firm, in all aspects of developing, constructing, and managing over 6,500 luxury apartment and condominium units in California, Arizona, Texas, Nevada, New Mexico, and Utah. Projects have included mixed use projects and redevelopment projects and have ranged from infill locations to new development on the urban perimeter. Lee has been involved in all stages of these developments, including acquisition of the land, financing, negotiation of disposition and development agreements, limited liability company operating agreements, construction agreements, and disposition of the completed projects.
- Representation of the owner of a 27-unit single family development site in the Hamilton Field Project in Novato, California including the completion of a joint venture for the development and negotiation and completion of improvement agreements and a partial assignment of rights under a development agreement.
- Representation of a national homebuilder in connection with the acquisition and development of properties in Northern California including negotiation of agreements for the development of infrastructure, both project-specific infrastructure and infrastructure of regional significance.
- Representation of the developer of a high rise condominium project in San Francisco.
- Representation of the ground lessor in connection with the development of a mixed use project in Kansas City, Missouri. This project includes a hotel, office and retail uses.

Lee F. Gotshall-Maxon – continued

- Representation of the purchaser in connection with the acquisition of property from the Redevelopment Agency of the City of Fairfield and the subsequent ground lease of the property to a hospital.
- Representation of a pension advisor in connection with the sale of a portfolio of ten California properties.
- Representation of the seller of an environmentally impaired development site in East Palo Alto.
- Representation of the seller in negotiating and closing the sale of an industrial site for development as a condominium project in Emeryville, California.
- Representation of the developer in connection with a mixed-use project in the Pleasanton/West Dublin area, which was proposed to include a BART station, two parking garages, a hotel, an apartment complex, and an office building.
- Representation of the developer in connection with the acquisition and development of approximately 1,200 acres within the sphere of influence of Tracy, California.
- Representation of the developer in structuring a joint venture for the entitlement and development of a residential and commercial development in Tracy, California. This development includes over 4,500 residential units.
- Representation of the developer in connection with the proposed development of 314 acres of the 880-acre St. Vincent's property in Marin County.
- Representation of the developer in connection with certain aspects of the development and leasing of Block N1 of the Mission Bay Project, San Francisco, California consisting of approximately 595 residential units, 80,000 square feet of retail, 46,000 square feet of office, and 925 parking spaces.
- Representation of the lessor in negotiating and documenting a long-term ground lease of land in San Francisco to the developer of a proposed 240-unit assisted living project. The project included a complex affordable housing component which utilized an existing structure to meet the affordability requirements for a proposed new development.
- Representation of the prospective investor in a major new hotel development in San Francisco, California.
- Representation of a major hotel chain in handling hotel management, building code, and ADA issues in several of its properties in California. The representation included the successful appeal of 13 matters to the San Francisco Access Appeals Commission.
- Represented the owners of the Golden Gateway Project, One Maritime Plaza, Embarcadero Center, the Hyatt Regency, and One Market Plaza in analyzing and dealing with land use issues involved in the redevelopment of the Mid-Embarcadero area in the vicinity of the Ferry Building.
- Represented the seller/lessee, in the sale/leaseback of a 175,000 square foot office campus on the San Francisco Peninsula.
- Represented the seller/lessee, in the sale/leaseback of an industrial printing facility.
- Represented the tenant/assignor of a long-term ground lease of a marina in San Diego, California.
- Represented a high school in negotiating an Architect/Owner Agreement and an Owner/Contractor Agreement for a new high school.

Lee F. Gotshall-Maxon – continued

- Represented a newly-chartered bank in handling the real estate issues involved in the financing and acquisition of 49 bank branches in Arizona.

Representative Leasing and Property Management Matters:

- Representation of a pension advisor for the leasing and sale of multiple retail properties leased to grocery chains, drug store chains and big box retailers. Representation has involved negotiation of new leases, modification of existing leases and sale of several properties.
- Representation of a major retailer in acquisition, development and leasing of a major outlet center.
- Representation of a retail developer and owner in acquisition, development, financing and leasing of several retail properties in California, Texas, Louisiana and Oregon.
- Representation of Walton Street Capital LLC in leasing and property management issues for their 38-story office building at 425 Market Street, San Francisco, California.
- Representation of WSJ Properties in connection with leasing and property management issues relating to the firm's California properties.
- Representation of Prudential Real Estate Investors in connection with property management issues in a mixed-use office and condominium project in San Francisco, California.
- Represented Wells Fargo Bank in connection with the leasing of major facilities in various locations in the Western United States.
- Representation of a number of high tech companies in connection with their leases of offices and other facilities.
- Represented JMB Property Management, Inc. and Heitman Properties, Inc. for leasing and property management matters in Northern California. Representation of these firms included the negotiation and documentation of new leases, the extension and expansion of existing leases, resolution of Building Code issues, handling of issues raised by the ADA, CAL-OSHA, Proposition 65 and California's asbestos notification requirements, and the development of forms for use by property managers.
- Represented Western Federal Savings & Loan Association in connection with leasing and property management issues for office buildings in Oakland and Walnut Creek, California. Lee negotiated and documented 32 leases for over 250,000 square feet in a two-year period.
- Represented Suzuyo Kabushiki Kaisha, the owner of a business park on the San Francisco Peninsula with 456,000 rentable square feet. Lee developed lease documents and handled the leasing of approximately 200,000 square feet in the buildings in a one-year period.

Former Employment:

- Lillick & Charles (1980 to 2000)
Partner from January 1, 1988 to 2000
Head of the Real Estate Group - 1992 to 2000
Management Committee - 1998 to 2000

Lee F. Gotshall-Maxon – continued

Community:

- Past President of the Board of Directors of the Volunteer Center of Marin
- Former President of Central City Hospitality House, a non-profit organization providing emergency housing, job counseling, and related services for homeless adults and youth in the San Francisco Tenderloin
- Former member of the Board of Directors of the Legal Aid Society of San Francisco
- Member of the Government Affairs Policy Advisory Committee of the Building Owners and Managers Association. This committee addresses numerous regulatory issues of concern to building owners and managers including Building Code and disability access issues.
- Member of the Board of Directors of Presidio Graduate School, formerly Presidio School of Management. The college has a distinctive program for an MBA in Sustainable Business Management, an MPA in Sustainable Public Administration and an Executive MBA program. I was among the original Board Members of this school which has over 600 graduates and current students.

Professional and Business Associations:

- American Bar Association
- California State Bar Association
- Building Owners and Managers Association
- International Association of Attorneys and Executives in Corporate Real Estate
- Urban Land Institute



Sandi L. Nichols

Sandi Nichols is a partner in the Litigation and Land Use, Environmental and Natural Resources Departments, practicing from the firm's San Francisco and San Diego offices. Sandi's practice is primarily focused on counseling and litigation under the federal Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (and related state statutory and common law claims), and the California Environmental Quality Act (CEQA).

Sandi has served as lead counsel in complex, multi-party and citizen-suit litigation relating to contaminated soil, groundwater, surface water and marine sediments. These include litigation involving petroleum hydrocarbons and waste oil from bulk fuel terminals, truck stop and service station operations; metals, PCBs, PAHs, and VOCs from industrial operations, shipyards, energy facilities, and port-related uses; manufactured gas plant wastes; dioxin; petroleum coke; chemical use and disposal at industrial and commercial office facilities; battery reclamation; and discharges from publicly-owned treatment works and dams. She has handled all phases of litigation through trial and appeal in state and federal courts, as well as administrative enforcement proceedings.

Sandi assists clients with environmental due diligence and contract negotiations for the sale and leasing of contaminated sites and assists institutional trustees in the management of environmentally-impaired trust and estate assets. Her practice also includes eminent domain actions and title and boundary disputes.

Additionally, she assists clients in the preparation of mitigated negative declarations and environmental impact reports under CEQA and handles related litigation for industrial, commercial, retail and large-scale mixed use subdivision projects.

Prior to joining Allen Matkins in 2007, Sandi was the Managing Partner of the California Offices of Stoel Rives LLP (2001-2006). She began her legal career with Washburn, Briscoe & McCarthy in 1981 and was its Managing Shareholder from 1996 until the merger with Stoel Rives in 2001.

**Partner and Co-Chair,
Firmwide Environmental
and Natural Resources
Group**

415.273.7454
snichols@allenmatkins.com

Focus
*Land Use, Environmental and
Natural Resources
Litigation*

Education
*J.D., U.C. Hastings College of
the Law, 1981*

*B.A., University of California,
Los Angeles, 1978*

Admissions
State Bar of California

*U.S. District Courts for the
Northern, Southern, Central
and Eastern Districts of
California*

Ninth Circuit Court of Appeals

Sandi L. Nichols – *continued*

Honors and Awards:

Best Lawyers in America (2009-2012); *San Francisco Business Times* Best Lawyers in the Bay Area (2009-2011); *San Francisco Chronicle* San Francisco's Top Attorneys (2010-2011); *Super Lawyers* Northern California in Environmental Litigation (2004-2011); Martindale-Hubbell A-V Rating; Recognized in Martindale-Hubbell® Bar Register of Preeminent Women Lawyers™ as AV Preeminent; Stanford University Mediation Certificate (1994); and Who's Who in American Law; Who's Who of Emerging Leaders of America.

Educational History:

Sandi received her B.A. from the University of California, Los Angeles in 1978. She received her J.D. from U.C. Hastings College of the Law in 1981. While at U.C. Hastings, she served as the Associate Research Editor for COMM/ENT Law Journal (1980-81) and as a Teaching Assistant for Criminal Law (1979-80). Sandi was also a recipient of the U.C. Newhouse, U.C. Towne, and 1066 Foundation Scholarships.

Professional Activities/Memberships:

Member, State Bar of California, Sections on Litigation, Environment and Real Property; member, American Bar Association, Section on Natural Resources, Energy and Environment; member, Bar Association of San Francisco, Environment and Water Section; member, Queen's Bench; member, Association of Environmental Professionals; and member, Groundwater Resources Association.

Community Activities:

Attorney-coach, Menlo School, National Mock Trial Competition (2002-2008); mentor, U.C. Hastings College of the Law Mentor Program; member/chair, Crocker School Site Council, Crocker Middle School, Hillsborough, CA (1999-2001); trustee, The Carey School, San Mateo, CA (1995-98); AYSO soccer coach, Burlingame, CA (1990-97); president, Carey School Parents Association (1994-95).

Representative Matters and Cases:

- Represent private and public entities in defense of citizen-suit litigation brought for alleged discharges, effluent limitations violations, reporting, and monitoring violations under the federal Clean Water Act. Published decisions include *San Francisco BayKeeper v. Cargill Salt*, 481 F.3d 700 (9th Cir. 2007); *San Francisco BayKeeper v. Tosco Corporation*, 309 F.3d 1153 (9th Cir. 2002), cert. dismissed 539 U.S. 924 (2004); *San Francisco BayKeeper v. Tosco Corp.*, 2001 U.S. Dist. LEXIS 1164 (N.D. Cal. 2001); *Communities for a Better Env't v. Tosco Refining Company, et al.*, 2001 U.S. Dist. LEXIS 1161 (N.D. Cal. 2001); *San Francisco BayKeeper v. Cargill Salt*, 263 F.3d 963 (9th Cir. 2001); *San Francisco BayKeeper v. Vallejo Sanitation and Flood Control District*, 36 F. Supp. 2d 1214 (E.D. Cal. 1999).
- Represented investor-owned public water utility in Endangered Species Act citizen suit for the alleged "take" of South Central California Coast Steelhead in the Carmel River (*Sierra Club et al. v. California American Water Company*, 2010 WL 135183 (N.D. Cal. 2010)).

Sandi L. Nichols – *continued*

- Represent ports, oil companies, commercial landlords, property managers and large landowners in negotiations, litigation and remediation activities relating to the contamination of real property and marine sediments by hazardous substances, including metals, PCBs, chlorinated solvents and petroleum. Work closely with environmental consultants in the various phases of investigation, development of feasibility studies, work plans, remedial actions and reports. Interface with local and state regulatory agencies in investigation, clean-up and development of real property.
- Assist companies with Clean Water Act storm water permitting compliance.
- Assist commercial, multifamily residential, and retail property owners with vapor intrusion investigation and remediation, which frequently arises during purchase and sale transactions and the financing and refinancing of improved real property.
- Represented large oil company in defending cost recovery actions in Northern California relating to petroleum, hydrocarbon and other soil and groundwater contamination relating to former service station operations. Participant in many mediations of such disputes.
- Represent commercial landlords and tenants in indoor air quality matters stemming from heating, ventilation and air conditioning systems (HVACs), mold, off-gassing of new and remodeled building interiors and related problems. Work closely with certified industrial hygienists to investigate and respond to situations.
- Represent and counsel major financial institutions regarding the administration of trusts and estates that include environmentally-impaired real property, including the investigation, leasing, sale and remediation of such property.
- Represent corporate and individual insureds in obtaining insurance coverage for defense and indemnity of environmental claims and suits.

Land use and real estate matters and litigation:

- Represent residential, commercial, and industrial developers in the development and defense of environmental impact reports (EIRs) and negative declarations prepared under CEQA. Handle administrative writ trials and appeals, including *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus, et al.* (1994) 27 Cal.App.4th 713.
- Represent landowners in eminent domain proceedings, including negotiations to obtain or defend "highest and best use" value for permanent and temporary taking of real property in California. Work closely with professional appraisers.
- Filed amicus brief in support of condemnee regarding calculation of interest rates in eminent domain actions resulting in a favorable opinion from the California Supreme Court in *Redevelopment Agency of Burbank v. Gilmore* (1985) 38 Cal.3d 790.
- Represent commercial and residential landowners, purchasers, and sellers in litigation relating to claims for breach of contract, fraud, negligence and related claims concerning the condition, use and boundaries of real property.
- Represented title insurance company in actions related to title to real property and the handling of escrows and foreclosures, including *Hatch v. Collins, et al.* (1990) 225 Cal.App.3d 1104.