REASONS FOR DUE DILIGENCE: LIABILITIES FOR CONTAMINATED PROPERTIES IN NEW YORK

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Environmental due diligence is necessary to avoid environmental liabilities for contaminated properties in New York. Further, "innocent purchaser" and other defenses may not be available unless an owner exercises due diligence prior to acquisition. This process can also be a tool to identify whether additional opportunities are available for funding brownfield transactions through potential cost recovery actions for the buyer.

I. Effect of a Real Estate Closing

A. Merger

Where a landowner is suing the prior owner for selling contaminated property, the doctrine of merger is generally a bar to claims arising out of the purchase and sale contract. *White v. Long*, 204 A.D.2d 892, 612 N.Y.S.2d 482 (3d Dep't 1994), *rev. on other grounds*, 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995). Thus, it is in the buyer's interest to be sure that his or her purchase contract includes provisions such as representations and indemnifications with regard to environmental conditions that survive closing. *See, e.g. Avalon Realty, Inc. v. Baumrind*, 203 A.D.2d 185, 610 N.Y.S.2d 269 (1st Dep't 1994), *app. dis'd* 84 N.Y.2d 864, 618 N.Y.S.2d 8 (1994) (buyer justified in canceling contract based upon false representation regarding lack of tidal wetlands).

It is certainly not uncommon for sophisticated parties to negotiate contract terms where one party accepts responsibility to indemnify the other for environmental contamination occurring prior to their acquisition of a property. *See Olin Corp. v. Consol. Aluminum Corp.*, 5 F.3d 10 (2nd Cir. 1993) (indemnification clause in contract purchasing operations of seller provided that buyer

Indemnify seller for environmental contamination caused by seller in CERCLA matter); *Horsehead Indus., Inc. v. Paramount Communication, Inc.*, 258 F.3d 132 (3rd Cir. 2001). While an indemnity provision may be enforceable to require a buyer or seller to reimburse the other for cleanup costs, the court in *State v. Tartan Oil Corp.*, 219 A.D.2d 111, 638 N.Y.S.2d 989 (3d Dep't 1996) strictly construed indemnity language in a purchase contract, and allowed the present owner to sue past owners for oil discharges. *See also Gettner v. Getty Oil Co.*, 226 A.D.2d 502, 641 N.Y.S.2d 73 (2d Dep't 1996) (release strictly construed so as to not bar environmental cleanup costs).

However, the merger doctrine neither bars a claim of fraud, *Lawlor v. Engley*, 166 A.D.2d 799, 563 N.Y.S.2d 160 (3d Dep't 1990), nor mutual mistake, *Larsen v. Potter*, 174 A.D.2d 801, 571 N.Y.S.2d 121 (3d Dep't 1991); *Copland v. Nathaniel*, 164 Misc.2d 507, 624 N.Y.S. 514 (Sup. Ct. Westchester Co. 1995). Nor is it a bar to a claim based upon an indemnification, representation or other provision intended to survive closing or outside the contract. *See, e.g., Irmer v. Autohaus*, Civ. No. 92-CV-6553L (W.D.N.Y. 6/11/93), *Daily Record* July 1-2, 1993 (indemnification agreement in separation agreement). Furthermore, it does not bar a claim based upon an environmental statute, such as the Oil Spill Law. *White v. Long*, 204 A.D.2d 892, 612 N.Y.S.2d 482 (3d Dep't 1994), *rev'd on other grounds*, 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995).

B. "As Is" Clause

An "as is" clause is probably only a bar to warranty claims, and is not a complete defense to a statutory claim for environmental contamination, "leaving the burden of environmental hazards with the seller." 51 *U. Pitts. L. Rev.* 995, 1019, *An 'As Is' Provision in a Commercial Property Contract: Should It Be Left As Is When Assessing Liability For Environmental Torts?* (1990); *International Paper Co. v. GAF Corp.*, 1995 WL 760641 (N.D.N.Y. 1995); *Channel Master Satellite Systems, Inc., JFD Electronics Corp.*, 702 F. Supp. 1229 (E.D.N.C. 1988); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994 (D.N.J. 1988).

Thus, the "as is" cause does not bar a claim under the New York Oil Spill Law. *Umbra U.S.A., Inc. v. Niagara Frontier Transportation Authority*, 262 A.D.2d 980, 981, 693 N.Y.S.2d 371, 372 (4th Dep't 1999). However, a former owner is generally not liable for pollution that happened after they sold. Thus, where documentary evidence established that tanks were not leaking prior to transfer, a claim under the Oil Spill was dismissed. *Kozemko v. Griffith Oil*, 256 A.D.2d 1199, 682 N.Y.S.2d 503 (4th Dep't 1998).

C. Assignment of Rights to Buyer

As provided by Real Property Law §223, for leased properties, "an owner's rights and remedies run with the land and may be assumed by a new owner," *815 Park Owners, Inc. v. West LB Admin., Inc.*, 119 Misc.2d 671, 673, 463 N.Y.S.2d 1015, 1017 (Sup. Ct. N.Y. Co. 1983), so a new owner might be able to pursue claims of prior owners. However, it would be prudent to specifically provide for an assignment of claims at closing, rather than rely upon the deed.

A cost recovery or other environmental claim may be assigned to the new owner of a property. CPLR §1018 provides that "[u]pon any transfer of interest, the action may be continued

by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." Similarly, FRCP Rule 25(c) provides that '[i]n the case of any transfer of interest, the action may continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

II. CERCLA

In the aftermath of Love Canal and other revelations of the improper disposal of hazardous substances, the federal and state governments enacted the "Superfund" laws to address these problems. Generally these laws address remediation of spills and dumps, rather than regulation of current conduct, and hold parties liable to cleanup contamination resulting from activities that may have been legal. They have resulted in extensive litigation, widespread concerns about environmental liabilities, and expensive cleanups.

The federal Superfund law is entitled the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9601, *et seq.* It was extensively amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), and further amendments were made in 2002 by the Small Business Liability Relief and Brownfields Revitalization Act.

A. Basic Scheme

CERCLA provides a framework for the cleanup of the "release" or threatened release" of hazardous substances into the environment. EPA can take action to clean up hazardous substances using funds from the multi-billion dollar "Superfund" (raised by excise taxes on certain chemical feedstocks and crude oil), and then seek reimbursement from "responsible parties." Alternatively, it can require responsible parties to clean up a site.

"Hazardous substances" are defined to include hazardous wastes under RCRA, hazardous substances and toxic pollutants under Clean Water Act §§311(b)(2)(A) and 307(a), 33 U.S.C. §§1321(b)(2)(A) and 1317(a), hazardous air pollutants under Clean Air Act §112, 42 U.S.C. §7412(a), any "imminently hazardous chemical substance or mixture" designated under Toxic Substances Control Act §7, 15 U.S.C. §2606, and substances specifically designated under CERCLA §102, 42 U.S.C. §9602 (relating to release reporting). CERCLA §101(14), 42 U.S.C. §9601(14). The courts have refused to make a *de minimis* exception, so that even minute quantities of hazardous substances can be subjected to CERCLA action. CERCLA also applies to "pollutants or contaminants," which are defined at §101(33), 42 U.S.C. §9601(33), to parallel the definition of hazardous substances.

Petroleum is specifically excluded from these definitions of "hazardous substances" and "pollutants or contaminants." CERCLA §101(14), 42 U.S.C. §9601(14). However, the petroleum exclusion has been held by the courts not to exclude petroleum contaminated with other substances that are deemed hazardous.

"Release" is defined to include, among other things, any spill, leak, abandonment, disposal, or other discharge of hazardous substances. CERCLA §101(22), 42 U.S.C. §9601(22). Specific exceptions from this definition include certain exposures "solely within a workplace," certain releases allowed under the Atomic Energy Act of 1954, motor vehicle exhaust, and "the normal application of fertilizer."

B. Cleanups

CERCLA §104, 42 U.S.C. §9604 authorizes the federal government, whenever there is a "release" or a "substantial threat of such a release into the environment" to:

> act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substances, pollutants, or contaminants at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan . . .

CERCLA §104(a)(1), 42 U.S.C. §9604(a)(1). As required by CERCLA §105, EPA has revised the National Contingency Plan ("NCP"), 40 C.F.R. Part 300, originally promulgated to address the cleanup of spills of hazardous substances into the navigable waters under Clean Water Act §311, 33 U.S.C. §§1321, to provide a blueprint for the cleanup of hazardous substances under CERCLA.

Under the NCP and CERCLA §104, 42 U.S.C. §9604, EPA can either take immediate "removal action" to eliminate immediate risks to health and the environment, or conduct a longer term "remedial action" to fully cleanup a site. Before remedial action is undertaken, a remedial investigation/feasibility study ("RI/FS") must be completed. This work is done with moneys supplied by the federal Superfund. CERCLA §111, 42 U.S.C. §9611. However, EPA can later recover its response costs from responsible parties in federal district court. CERCLA §107, 42 U.S.C. §9607.

CERCLA §121, 42 U.S.C. §9621, added by SARA in 1986, requires that cleanups be "cost effective," and should prefer "remedial action in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element," while least favored is "offsite transport and disposal." CERCLA §121(b), 42 U.S.C. §9621(b). Further, the degree of cleanup" should attain "relevant and appropriate" standards under other federal and state environmental laws. CERCLA §121(d), 42 U.S.C. §9621(d). Generally, a specific remedial action is selected by EPA upon filing a formal "record of decision."

CERCLA §104(d)(1), 42 U.S.C. §9604(d)(1) allows states to enter into cooperative agreements to carry out a Superfund cleanup on behalf of EPA. A responsible party may also be allowed to carry out an RI/FS and cleanup. CERCLA §104(a)(1), 42 U.S.C. §9604(a)(1).

CERCLA requires EPA to develop a "National Priorities List" ("NPL") of sites slated for cleanup, using a "hazard ranking system." CERCLA §105(c), 42 U.S.C. §9605(c). However, listing on the NPL is not a prerequisite to action or liability under CERCLA.

CERCLA §106(a), 42 U.S.C. §9606(a), permits the United States to make an administrative order directing a responsible party to take "abatement action," or to seek an injunction in federal district court to require such action. Further, CERCLA §104(e), 42 U.S.C. §9604(e) grants EPA access to sites and necessary information, as well as the authority to enter administrative orders directing such access. Any person who fails to comply with such an administrative order is subject to a fine of $25,000 per day. CERCLA §§104(c)(5), 106(b), 42 U.S.C. §9604(c)(5), 9606(b). Further, if EPA then completes the cleanup and sues the responsible party, it can recover triple its costs as punitive damages, unless there was "sufficient cause" for the failure to comply with the administrative order. §107(c)(3), 42 U.S.C. §9607(c)(3).

CERCLA also contains numerous other provisions, including public participation requirements, §117, 42 U.S.C. §9617, application of CERCLA to federal facilities, CERCLA §120, 42 U.S.C. §9620, civil penalties and awards, CERCLA §109, 42 U.S.C. §9609, and requirements for the Agency for Toxic Substances and Disease Registry ("ATSDR") to investigate hazardous substances, prepare toxicological profiles, and conduct health assessment and health effects studies. CERCLA §104(i), 42 U.S.C. §9604(i).

C. Liability

Given this comprehensive statutory scheme, the key question often is who is responsible for CERCLA cleanup costs. CERCLA §107(a), 42 U.S.C. §9607(a), specifically provides that the following persons are liable:

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is

> a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

These "potentially responsible parties" ("PRPs") are liable for (A) "all costs of removal or remedial action" incurred by the federal or state government "not inconsistent with" the NCP, (B) "other necessary costs of response incurred by any other persons consistent with" the NCP, (C) natural resource damages, and (D) costs of health assessments or health effects studies conducted pursuant to §104(i), 42 U.S.C. §9604(i). CERCLA §107(a), 42 U.S.C. §9607(a). The courts have allowed CERCLA actions to be brought by all levels of governments, as well as private persons with sufficient standing. However, liability has generally not been found to include responsibility for personal injuries, property damages, or medical monitoring costs.

A cleanup is consistent with the National Contingency Plan, so that costs may be recovered, if it is carried out under supervision by a state environmental agency, even if the public notice provisions in the NCP are not strictly satisfied. *Bedford Affiliates v. Sills,* 156 F.3d 416 (2d Cir. 1998). Generally, attorney's fees are not response costs, except when incurred to identify other responsible parties, *Keytronic Corp. v. United States*, 511 U.S. 809, 114 S.Ct. 1960 (1994), or as a part of cleanup efforts. *Bedford Affiliates v. Sills,* 156 F.3d 416 (2d Cir. 1998).

Natural resource damages are only recoverable by the United States or a state, and do not include "irreversible and irretrievable commitments of natural resources" identified in an environmental impact statement, if allowed pursuant to a federal permit or license. §107(f)(1), 42 U.S.C. §9607(f)(1). The determination of natural resource damages by the appropriate federal or state official designated as trustee for the public pursuant to CERCLA and Clean Water Act §311, 33 U.S.C. §§1321, is a rebuttable presumption of the damages assessed.

Persons who incur "response costs" may also file administrative claims which may be paid by the Superfund, §112(a), 42 U.S.C. §9612(a), provided they do so within 6 years of the completion of all response actions, §112(d)(1), 42 U.S.C. §9612(d)(1). However, they can only make a claim if they first present the claim to the owner or operator, and it is not satisfied within 60 days.

Liability applies retroactively, so that pre-1980 releases which were legal at the time are covered, as well as pre-1980 response costs. *See, e.g., U.S. v. Hooker Chemicals & Plastics Corp.,* 680 F.Supp. 546 (W.D.N.Y. 1988). CERCLA can be applied retroactively, *U.S. v. Olin Corp.,* 107 F.3d 1506 (11th Cir. 1997). Liability is strict, so that it does not matter whether a responsible party exercised all due care in his dealing with hazardous substances. *Id.*

Liability is generally considered "joint and several," so that each responsible party is liable for the entire cost of a response, even if he only bears a small percentage of relative responsibility. *See, e.g., U.S. v. Hooker Chemicals & Plastics Corp.,* 680 F. Supp. 546 (W.D.N.Y. 1988). However, the courts have been willing to entertain arguments that liability for response costs might not be joint in cases where a reasonable basis for allocation can be found. *United States v. Alcan Aluminum Corp.,* 964 F.2d 252 (3d Cir. 1992).

Furthermore, CERCLA §113(f)(1), 42 U.S.C.§9613(f)(1) allows responsible parties to sue other responsible parties for contribution based upon their relative responsibility. However, in *Cooper Industries v. Aviall Services, Inc*., 543 U.S. 157, 125 S.Ct. 577 (2004), the Supreme Court held that a contribution claim under this provision only lies in the limited circumstances set forth in the statute, including "during or following" an initial cost recovery action under CERCLA §106 or §107, or after an "administratively or judicially approved settlement." CERCLA §113(f)(1) has been held to preempt common law claims for restitution and indemnification for costs recoverable under the contribution provisions of CERCLA. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998).

While some courts had held that a PRP cannot bring a cost recovery action, the Second Circuit has held that if a contribution claim is not available, a claim may still lie for even a PRP liable under CERCLA §107(a), 42 U.S.C.§9607(a). *Consolidated Edison Co. of NY, Inc. v. UGI Utilities*, 423 F.3d 90 (2d Cir. 2005). In *United States v. Atlantic Research Corp.*, 551 U.S. 128, 127 S. Ct. 2331 (2007), the U.S. Supreme Court resolved the issue, and held that "the plain terms of §107(a)(4)(B) allow a PRP to recover costs from other PRPs." The Supreme Court distinguished between contribution under CERCLA §113, and cost recovery under CERCLA §107:

> Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under §106 or §107(a). And §107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs. Hence, a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue §113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under §107(a). As a result, though eligible to seek contribution under §113(f)(1), the PRP cannot simultaneously seek to recover the same expenses under §107(a).

United States v. Atlantic Research Corp., 551 U.S. 128, 1127 S. Ct. 2331, 2338 (2007).

CERCLA §113(g)(2) provides that actions under CERCLA §107 to recover costs of a removal action must be brought "within 3 years after completion of the removal action," while for remedial actions, suit must be filed "within 6 years after initiation of physical on-site construction of the remedial action." 42 U.S.C. §9613(g)(2). Further, CERCLA §113(g)(3), 42 U.S.C. §9613(g)(3) provides that no contribution action may be brought more than three years after either "(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages."

CERCLA §122, 42 U.S.C. §9622, encourages EPA to enter into settlements to allocate responsibility and release responsible parties from further liability, and provides special incentives for settlements with "*de minimis*" contributors.

Both the present "owner" or "operator," as well as the "owner" or "operator" at the time of disposal, are responsible parties. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985). However, an owner or operator probably will not be held liable for mere "passive migration" of hazardous chemicals disposed of or released by prior owners or operators, and which the later owner or operator did not contribute to. *ABB Industrial v. Prime Technology*, 120 F.3d 351 (2d Cir. 1997).

A stockholder or responsible corporate officer could be deemed to be an "owner or operator" subject to liability under §107(a)(1,2), 42 U.S.C. §9607(a)(1,2), provided he or she exercised sufficient control over a corporation's operations. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985). Similarly, in some circumstances, parent corporations, as well as their officers and directors, may be liable for actions at their subsidiaries' facilities despite the traditional common law tradition of immunity of corporate officers to corporate liability. However, the Supreme Court has held that directors and officers of a parent corporation may be liable only if they "made policy decisions and supervised activities" at the subsidiary facility. *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876 (1998).

D. Defenses

CERCLA allows very limited affirmative defenses, which include:

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

CERCLA §107, 42 U.S.C. §9607.

Further, government officials acting pursuant to the NCP, §107(d), 42 U.S.C. §9607(d), and cleanup contractors, §119, 42 U.S.C. §9619, are not liable provided they were not negligent. An

"indemnification, hold harmless or similar agreement" is not effective to absolve a responsible party from liability, although such arrangements are still enforceable between the parties. §107(e), 42 U.S.C. §9607(e); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10 (2d Cir. 1993). Moreover, even bankruptcy may not provide complete discharge from CERCLA liability.

An exception from liability is provided under §101(20)(A), 42 U.S.C. §9601(20)(A), for persons who hold "indicia of ownership principally to protect his security interest." Furthermore, a lender who does not "participate in management" of the facility is not even considered an owner. CERCLA §101(20)(E)(i), 42 U.S.C. §9601(20)(E)(I). Moreover, lenders who take title after foreclosure may also be protected if they seek to sell "at the earliest practicable, commercially reasonable time." CERCLA §101(20)(E)(ii), 42 U.S.C. §9601(20)(E)(ii).vv). CERCLA §101(20)(D), 42 U.S.C. §9601(20)(D), also provides relief for governments which acquire title involuntarily by "bankruptcy, tax delinquency, abandonment, or other circumstances," provided they did not cause or contribute to the problem.

The courts have sparingly allowed the "third party" defense. For example, the purchaser of contaminated property has been held to have a contractual relationship with the wrongdoer that bars the defense. However, in *New York v. Lashins Arcade Co.*, 91 F.3d 353 (2d Cir. 1996), a purchaser was able to use the defense when the contamination was caused by a prior owner's tenant.

While the courts generally found that purchasers were not eligible for the "third party" defense because they had a "contractual relationship" with the prior owner, in 1996 Congress made "innocent purchasers" eligible for the defense if they acquired a facility "by inheritance or bequest," government entities which acquired property by involuntary transfer or condemnation, and persons who "did not know and had no reason to know" about hazardous substances at the site, as long as such persons do not cause or contribute to the release or threatened release. CERCLA §101(35)(A,D), 42 U.S.C. §9601(35)(A,D).

In 2002, the Small Business Liability Relief and Brownfields Revitalization Act amended CERCLA §101(35), 42 U.S.C. §9601(35), to provide the following standards to determine whether a purchaser made "all appropriate inquiry" in order to qualify under the innocent purchaser defense, which generally requires at least a Phase I environmental site assessment ("ESA") for non-residential properties:

- For residential properties "purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation."

- For purchases prior to May 31, 1997, the following must be considered: "any specialized knowledge or experience on the part of the defendant," "the relationship of the purchase price to the value of the property, if the property was not contaminated," "commonly known or reasonably ascertainable information about the property," "the obviousness of the presence or likely presence of contamination at the property," and "the ability of the defendant to detect the contamination by appropriate inspection."

- For purchases between May 31, 1997 and November 1, 2005, when EPA promulgated a new standard, ASTM Standard E1527-97, entitled "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process," is sufficient to meet due diligence requirements under the defense.

- EPA promulgated a new standard on November 1, 2005, effective November 1, 2006, which is set forth at 40 CFR Part 312 setting standards for Phase 1 ESAs. Until November 1, 2006, either ASTM Standard E1527-00 or ASTM Standard E1527-05 can be utilized. Beginning on November 1, 2006, either ASTM Standard E1527-05, or the new "All Appropriate Inquiry" standards set forth in the regulations, must be used.

In addition, four new CERCLA defenses were added by Congress in 2002. They are as follows:

- **De Micromis Exemption.** A PRP that is otherwise liable for contamination at a NPL site as a generator or transporter can qualify for this defense if it contributed hazardous substances that were "less than 110 gallons of liquid materials or less than 200 pounds of solid materials," and the disposal, treatment or transport that it arranged for occurred before April 1, 2001. CERCLA §107(o), 42 U.S.C. §9607(o).

- **Municipal Solid Waste Exemption.** This new exception may apply for municipal solid waste at National Priority List sites if the PRP is a "an owner, operator, or lessee of residential property" from which the waste came, and is either a small business concern that employs less than 100 persons, or a charitable organization qualified under Internal Revenue Code §501(c)(3). CERCLA §107(p), 42 U.S.C. §9607(p).

- **Contiguous Property Defense.** Under this exemption, a landowner is not liable if its land is contaminated by another property that is "contiguous to or otherwise similarly situated with respect to" the property, and they (1) "did not cause, contribute, or consent to the release or threatened release," (2) are not related to or affiliated with the owner of the source property; (3) "take reasonable steps" to respond to the release, including stopping any "continuing release" or "threatened future release" and limit "human, environmental or natural resource" exposure, which for properties above contaminated aquifers need not include "ground water investigations" or installation of "ground water remediation systems"; (4) fully cooperate with response efforts; (5) comply with land use and institutional controls; (6) make all required spill or release reports or notices; (7) qualified as an "innocent purchaser" to the extent it conducted "all appropriate inquiry" under CERCLA §101(35)(B), 42 U.S.C. §9601(35)(B), and did not know the property was contaminated from an off-site source. CERCLA §107(q), 42 U.S.C. §9607(q). However, if the owner did know the property was contaminated, the owner can still qualify for the bona fide prospective purchaser defense described below. CERCLA §107(q)(1)(C), 42 U.S.C. §9607(q)(1)(C).

- **Bona Fide Prospective Purchasers.** This defense applies to purchasers or their tenants who acquired a facility after the law was enacted on January 11, 2002, and they meet the following requirements: (A) all disposal of hazardous substances occurred prior to

acquisition; (B) conduct "all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards" prior to acquisition under CERCLA §101(35)(B)(ii,iv), 42 U.S.C. §9601(35)(B)(ii, iv), or in the case of residential property "a facility inspection and title search that reveal no basis for further investigation," (C) make all required spill or release reports or notices; (D) "take reasonable steps" to respond to the release, including stopping any "continuing release" or "threatened future release" and limit "human, environmental or natural resource" exposure; (E) fully cooperate with response efforts; (F) comply with land use and institutional controls; (G) comply with any EPA "request for information or administrative subpoena"; and (H) are not related to or affiliated with a PRP. CERCLA §107(r), 42 U.S.C. §9607(r). There is no requirement that the bona fide purchaser not know about the contamination. However, a bona fide purchaser maybe subject to a "windfall lien" for "unrecovered response costs" of the United States that increase the property value, which is payable at the time of eventual sale by the purchaser, but cannot "exceed the increase in fair market value of the property attributable to the response action." *Id.*

III. State Superfund

New York's "Inactive Hazardous Waste Disposal Sites" laws, commonly referred to as "State Superfund," are set forth at ECL Article 27, Title 13 and Public Health Law §§1389-a, *et seq*. Many other states have similar statutes. Significant changes were made to the law in 2003, including inclusion of "hazardous substances" defined pursuant to ECL Article 37 within the definition of "hazardous waste" subject to the program. ECL §27-1301(1).

Under the New York State Superfund Law, if DEC finds, after a hearing, that an inactive hazardous waste disposal site presents a "significant threat to the environment," it can order and implement cleanup efforts at the site, using money from the State Superfund, and later seek recovery of its costs from responsible parties. ECL §27-1313(3,4,5). Regulations set forth at 6 N.Y.C.R.R Part 375 govern this program, and were amended in late 2006. The regulations provide guidance for determination of what poses a significant threat, 6 N.Y.C.R.R §375-2.7, and remedial measures, 6 N.Y.C.R.R §§375-1.8, 375-2.8, and soil cleanup objectives. 6 N.Y.C.R.R Subpart 375-6.

Generally, if it believes a site may pose a "significant threat," DEC will require a Preliminary Site Assessment. If this indicates the need for further investigation, a further investigation may be done, and if necessary, an RI/FS and remedial work. While this work may be accomplished by DEC, often it enters into consent order by which a responsible party promises to do the work.

DEC annually publishes a Registry of Inactive Hazardous Waste Disposal Sites. *See* ECL §27-1305. By law, sites are ranked from 1 (imminent danger) to 5 (no further action required), ECL §27-1305(4)(b). The New York State Department of Health is also involved in the program, and has primary authority for sites that present "a condition dangerous to life or health." Public Health Law §1389-b(2). There is a process for filing petitions to delist or reclassify a site. 6 N.Y.C.R.R. §375-2.7(f).

While the statute does not define "responsible parties," 6 N.Y.C.R.R. §375-2.2(i) identifies the following persons:

(1) Any person who currently owns or operates a site or any portion thereof;

(2) Any person who owned or operated a site or any portion thereof at the time of disposal of the contaminant;

(3) Any person who generated any contaminants disposed at a site;

(4) Any person who transported any contaminants to a site selected by such person;

(5) Any person who disposed of any contaminants at a site;

(6) Any person who arranged for:

(i) the transportation of any contaminants to a site; or,

(ii) the disposal of any contaminants at a site; and

(7) Any other person who is responsible according to the applicable principles of statutory or common-law liability pursuant to ECL 27-1313(4) and/or CERCLA.

While there is no provision for a private right of action under the State Superfund Law, indemnification and contribution claims may be available under common law theories. *Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000).

ECL §27-1313(4) allows "statutory or common law defenses." ECL §27-1323, added in 2003, provides defenses that generally parallel the pre-2002 CERCLA defenses, including defenses for acts of God or war, acts of third parties, and innocent purchasers, and exemptions for lenders, fiduciaries, and municipalities that involuntarily acquire ownership or control and do not participate in development unless they caused or contributed to the release.

The 2003 amendments to the ECL also added the Brownfield Cleanup Program, set forth in Title 14 to ECL Article 27. The law provides a process for voluntary cleanup of sites contaminated with hazardous waste or petroleum, rewarding the volunteer with a liability release and tax credits. Furthermore, extensive funding through the Clean Air/Clean Water Bond Act of 1996 and liability releases are available for municipal "environmental restoration projects," pursuant to Title 5 of ECL Article 56.

IV. Citizen's Suits

Many federal environmental statutes allow a citizen to bring an enforcement action for violations and recover their attorneys' fees. *See, e.g.*, Clean Air Act §304, 42 U.S.C. §7604; RCRA §7002(a), 42 U.S.C. §6972(a); Clean Water Act §505(a), 33 U.S.C. §1365(a). While generally a citizen may only sue if the polluter is "in violation," §501(a), 33 U.S.C. §1365(a), meaning that the violation must be continuing, or at least intermittent, and not wholly past, *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S.Ct. 376 (1987), action may be brought under the Clean Air Act for past repeated violations. *Patton v. General Signal*, 984 F.Supp. 666 (W.D.N.Y. 1997). Such a suit can be used to put tort claims within the supplemental (pendent) jurisdiction of federal court. 28 U.S.C. §1367. *See, e.g., CARE v. Southview Farm*, 834 F. Supp. 1422 (W.D.N.Y. 1993), *rev'd on other grounds*, 34 F.3d 114 (2d Cir. 1994), *cert. den'd* 514 U.S. 1082, 115 S.Ct. 1793 (1995).

Under the federal Resource Conversation and Recovery Act ("RCRA"), 42 U.S.C. §6901, *et seq.*, a citizen can bring a suit against any person, including past or present generators, transporters or treatment, storage or disposal facility owners or operators, who contributed to "an imminent and substantial endangerment to health or the environment" caused by using solid or hazardous waste, in order to abate the hazard. §7002(a)(1)(B), 42 U.S.C. §6972(a)(1)(B). For example, in *Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000), the court allowed a RCRA citizen's suit complaining of spills of petroleum and hazardous wastes to proceed where the plaintiff "sufficiently alleged that toxic contamination is present on the site and is creating the threat of serious harm to the ecology though migration into the deep bedrock and possibly groundwater."

Action under the RCRA citizens' suit provision requires a 90-day notice, and is barred if certain cleanup or enforcement actions have been undertaken by EPA or the state. RCRA §7002(b)(2), 42 U.S.C. §6972(b)(2). *See, e.g., Dague v. Burlington*, 935 F.2d 1343 (2d Cir. 1991); *Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000).

The Supreme Court has ruled that the RCRA citizen's suit provision cannot be used to recover past costs of a spill that was cleaned up. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S.Ct. 1251 (1996); *see also Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995). Nonetheless, *Meghrig* clearly contemplates RCRA citizen's suits to address continued contamination, indicated that there is no statute of limitations for suits for such suits, and left the door open for possibly recovering costs of cleanups that are completed after suit is filed.

Petroleum-contaminated soil is "solid waste" to which this provision applies. *Bologna v. Kerr-McGee Corp.*, 95 F.Supp.2d 197 (S.D.N.Y. 2000); *Zands v. Nelson*, 779 F.Supp. 1254 (S.D. Cal. 1991). Owners of the source property, and not just neighbors, may be able to sue past owners and tenants for contamination under the RCRA citizen's suit provision, *Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000); *Bologna v. Kerr-McGee Corp.*, 95 F.Supp.2d 197 (S.D.N.Y. 2000), and obtain an order directing investigation of the site. *See, e.g., Lincoln Properties v. Higgins*, 24 E.L.R. 21068 (E.D. Cal. 1993). Under the federal Resource Conversation and Recovery Act ("RCRA"), 42 U.S.C. §§6901, *et seq.*, a citizen can bring a suit against past or present generators, transporters or TSDF owners or operators to abate "an imminent

and substantial endangerment to health or the environment" caused by using solid or hazardous waste. §7002(a)(1)(B), 42 U.S.C. §6972(a)(1)(B). For example, in *Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000), the court allowed a RCRA citizen's suite to proceed where the plaintiff "sufficiently alleged that toxic contamination is present on the site and is creating the threat of serious harm to the ecology though migration into the deep bedrock and possibly groundwater."

V. New York Oil Spill Law

New York Navigation Law Article 12 (the "Oil Spill Law") is the primary mechanism to deal with liability and cleanup for oil spills on land and water in New York State. The Oil Spill Law, enacted in 1977, prohibits the unpermitted discharge of petroleum. It follows the same basic pattern as the Superfund statutes, creating strict liability for "[a]ny person who has discharged petroleum," Navigation Law §181, and providing for cleanup financed by a government fund. The statute is "liberally construed to effect its purposes." *Henning v. Rando Machine Corp.*, 207 A.D.2d 106, 620 N.Y.S.2d 867 (4th Dep't 1994); Navigation Law §195. The Oil Spill Law applies to spills which occurred before the statute was enacted in 1977. *State v. Cities Service Co.*, 180 A.D.2d 940, 580 N.Y.S.2d 512 (3d Dep't 1992); Navigation Law §190-a.

A. Liability

Under Navigation Law §181(1), "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained...." Liability may be imposed on a "blameless" party. *Merrill Transport Co. v. State*, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dep't 1983), *mot. den'd* 60 N.Y.2d 555, 467 N.Y.S.2d 1030 (1983). While the statute specifically provides that the "owner or operator of a major facility or vessel which has discharged petroleum" is strictly liable, the statute establishes a cap on the liability of such major facilities (*e.g.* refineries) and vessels. Navigation Law §181(3).

"Discharge" is defined to include all "intentional and unintentional... releasing, spilling, leaking,... of petroleum "into the waters of the state or onto lands from which it might flow or drain into said waters...." Navigation Law §172(8). Those "waters" include "all lakes, springs, streams and bodies of surface or ground water." §172(18). Accordingly, even spills on the land that "might flow or drain" into "ground water" are covered. Unless an oil spill is totally enclosed indoors, it is generally considered to be a "discharge" encompassed by the statute, and "judicial notice can be taken of the common knowledge that oil can seep through the ground into surface and groundwater... and thereby cause ecological damage." *Merrill Transport Co. v. State*, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dep't 1983), *mot. den'd* 60 N.Y.2d 555, 467 N.Y.S.2d 1030 (1983). However, in *State v. Arthur L. Moon, Inc.*, 228 A.D.2d 826, 643 N.Y.S.2d 760, 761 (3d Dep't 1996), *mot. for leave to appeal den'd.* 87 N.Y.2d 861, 653 N.Y.S.2d 282 (1996), a question of fact was raised as to whether an oil spill "did not actually reach the groundwater or threaten to do so."

"Petroleum" is defined to include "oil or petroleum of any kind and in any form including, but not limited to, oil, petroleum, fuel oil, oil sludge, oil refuse, oil mixed with other wastes and

crude oils, gasoline and kerosene." Navigation Law §172(15). Thus, "'hydrocarbons which are commonly associated with petroleum waste,' broadly construed," are encompassed within the definition of "petroleum." *Henning v. Rando Machine Corp.*, 207 A.D.2d 106, 620 N.Y.S.2d 867 (4th Dep't 1994).

B. Oil Spill Fund

Cleanups by DEC are funded by the New York Environmental Protection and Spill Compensation Fund (the "Oil Spill Fund"), Navigation Law §179, which is administered by the State Comptroller. Navigation Law §180. Disbursements from the Oil Spill Fund are allowed for specified cleanup costs and damages. Navigation Law §186; 2 N.Y.C.R.R. Part 404. The state can sue "the person responsible for causing a discharge for reimbursement of its costs." Navigation Law §187. Injured third parties are allowed to file claims with the Oil Spill Fund for their damages, Navigation Law §182, 2 N.Y.C.R.R. Part 402, and if paid, the Comptroller acquires the claimant's claims against the discharger by subrogation. Navigation Law §188. Claims generally must be filed "not later than three years after the date of discovery of damage" and "not later than ten years after the date of the incident which caused the damage." Navigation Law §182; *Z & H Realty, Inc. v. Office of State Comptroller*, 259 A.D.2d 928, 686 N.Y.S.2d 900 (3d Dep't 1999). While the statute states that the Oil Spill Fund "shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained," Navigation Law §181(2), the term "claim" is defined to only include "claims of the fund or any claim by an injured person, who is not responsible for the discharge." Navigation Law §172(3). Thus, the courts have held that a discharger liable under the Oil Spill Law is not entitled to payment of such a claim. *Merrill Transport Co. v. State*, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dep't 1983), *mot. den'd* 60 N.Y.2d 555, 467 N.Y.S.2d 1030 (1983); *White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dep't 1991), *app. den'd* 79 N.Y.2d 754, 581 N.Y.S.2d 282 (1992). The State Comptroller can arrange for settlements between the discharger, the injured party, and/or the Oil Spill Fund. Navigation Law §§183, 184, or hold hearings on disputed claims. Navigation Law §185. *See also* 2 N.Y.C.R.R. Part 403.

C. Liens

If, within 90 days after a demand, a landowner fails to reimburse the state "for the costs incurred by the fund for the cleanup and removal of a discharge and for the payment of claims for direct and indirect damages as a result of a discharge," the state may file a lien on land "upon which the discharge occurred." Navigation Law §181-a. The environmental lien is "subject to the rights of any other person, including an owner, purchaser, holder of a mortgage or security interest, or judgment lien creditor, whose interest is perfected before a lien notice has been filed." Navigation Law §181-a(4). The notice of lien is indexed in the same manner as a lien under Lien Law §10. Navigation Law §181-c. An action to vacate an environmental lien is governed by Lien Law §59, and should not be brought as an Article 78 proceeding. *Art–Tex Petroleum, Inc. v. New York State Department of Audit and Control*, 93 N.Y.2d 830, 1999 WL 72981 (1999).

D. Dischargers

The statute does not define "person who discharged petroleum" or "discharger," and in fact the term "discharger" does not even appear in Navigation Law §181, which governs liability under the law. However, the courts have broadly construed liability under the Oil Spill Law applies to encompass "any party discharging oil." *State v. Stewart's Ice Cream Co., Inc*., 64 N.Y.2d 83, 86, 484 N.Y.S.2d 810, 811 (1984). While it may be helpful to consider case law under the Clean Water Act and CERCLA, *see Merrill Transport Co. v. State*, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dep't 1983), *mot. den'd* 60 N.Y.2d 555, 467 N.Y.S.2d 1030 (1983), the term "discharger" is not equivalent to an "owner" or "operator" under federal environmental laws.

1. Operators. The operator of a facility which leaked gas, oil, or other forms of petroleum into the ground will generally be strictly liable for cleanup costs under the Oil Spill Law. *State v. King Service*, 167 A.D.2d 777, 563 N.Y.S.2d 331 (3d Dep't 1990); *Roosa v. Campbell*, 291 A.D.2d 901, 737 N.Y.S.2d 461 (4th Dep't 2002). This may include both the operator of a service station, and an oil company that owns the tanks. *Leone v. Leewood Service Station, Inc*., 212 A.D.2d 669, 624 N.Y.S.2d 610 (2d Dep't 1995), *mot. den'd* 86 N.Y.2d 709, 634 N.Y.S.2d 443 (1995); *State v. Tartan Oil Corp.*, 219 A.D.2d 111, 638 N.Y.S.2d 989 (3d Dep't 1996). A truck driver may be liable for a discharge from his truck resulting from an accident he did not cause. *Merrill Transport Co. v. State*, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dep't 1983), *mot. den'd* 60 N.Y.2d 555, 467 N.Y.S.2d 1030 (1983). A residential homeowner may be liable as a discharger. *State v. New York Central Mutual Fire Co.*, 147 A.D.2d 77, 542 N.Y.S.2d 402 (3d Dep't 1989); *State v. Arthur L. Moon, Inc.*, 228 A.D.2d 826, 643 N.Y.S.2d 760 (3d Dep't 1996), *app. dis'd* 89 N.Y.2d 861, 653 N.Y.S.2d 282 (1997). *See also* Navigation Law §172(14) (defining "operator").

In *State v. Griffith Oil Co., Inc.*, 299 A.D.2d 894, 750 N.Y.S.2d 685 (4th Dep't 2002), the Fourth Department considered liability for a leak from a storage tank on a property leased to an oil company. The lease placed responsibility for maintenance on the landlord, with costs to be shared, except for damage caused by the tenant's negligence, and there was evidence that the leak might have originated before the tenant took possession. The court held that there was "an issue of fact whether the petroleum leak was caused by the negligence of [the oil company] and thus whether they are liable under the Navigation Law."

2. Non-Operators. Any person who "set in motion the events which resulted in the discharge" is liable, even if there is "no proof is required of a specific wrongful act or omission which directly caused the spill." *Domermuth Petroleum Equipment & Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 A.D.2d 957, 490 N.Y.S.2d 54, 56 (3d Dep't 1985); *see also State v. Green*, 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2001). Thus, liable "dischargers" have included a company that delivered oil and repaired the tank, *Id.*, a general contractor responsible for "oversight and management of the construction project, including the design, specification and installation of the UST system," *Huntington Hospital v. Andron Heating and Air Conditioning, Inc.*, 250 A.D.2d 814, 673 N.Y.S.2d 456 (2d Dep't 1998), the seller and installer of an oil tank, *Mendler v. Federal Ins. Co.*, 159 Misc.2d 1099, 607 N.Y.S.2d 1000 (Sup. Ct. N.Y. Co. 1993), the supplier of a leaking home heating oil tank or hose, *Snyder v. Jessie*, 145 Misc.2d 293, 546 N.Y.S.2d 777 (Sup. Ct. Monroe Co. 1989), *rev. in part on other grounds*, 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot.*

den'd 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991); *Lowenthal v. Perkins*, 164 Misc.2d 922, 626 N.Y.S.2d 358 (Sup. Ct. Tompkins Co. 1995); *Premier National Bank v. Effron Fuel Oil Co.*, 182 Misc.2d 169 (1999), 698 N.Y.S.2d 434 (Sup. Ct. Dutchess Co. 1999), an oil broker, *State v. Montayne*, 199 A.D.2d 674, 604 N.Y.S.2d 978 (3d Dep't 1993), and the owner of a facility served by a pipeline that leaked off-site. *Steuben Contracting, Inc. v. Griffith Oil Co., Inc*., 283 A.D.2d 1008, 726 N.Y.S.2d 308 (4th Dep't 2001).

In *State of New York v. Speonk Fuel Inc.*, 3 N.Y.3d 720, 724, 786 N.Y.S.2d 375, 378 (2004), the Court of Appeals reaffirmed that liability may be imposed not just for active conduct, but rather the "capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill." Thus, Speonk was liable since it knew about the spill, but failed to clean it up.

The failure to install a tank liner may result in liability as a discharger. *Barclay's Bank of New York, N.A. v. Tank Specialists, Inc.*, 236 A.D.2d 570, 654 N.Y.S.2d 673 (2d Dep't 1997). Likewise, the failure of an oil company to provide corrosion protection when a pipeline was installed may give rise to liability. *Steuben Contracting, Inc. v. Griffith Oil Co., Inc*., 283 A.D.2d 1008, 726 N.Y.S.2d 308 (4th Dep't 2001). A fire company that caused a discharge while fighting a fire was held liable (although today it might qualify under defense for fire departments set forth in Navigation Law §181(6)). *Nicol v. D.W. Jenkins Fire Co., Inc.*, 192 A.D.2d 164, 600 N.Y.S.2d 519 (3d Dep't 1993).

An environmental consultant can face liability as a discharger. An environmental contractor who caused a release when removing a tank may also be a discharger. *Hilltop Nyack Corp. v. TRMI Holdings*, 264 A.D.2d 503, 694 N.Y.S.2d 717 (2d Dep't 1999). Likewise, an architect who designed and supervised installation of a waste oil system could also be a discharger. *Irmer v. Dewolff Partnership Architects,* Index No. 1344/96 (Sup. Ct. Monroe Co. 2001, Frazee, J.).

However, a "non-operator" co-tenant in a lease for an oil well was held not to be a discharger. *Whitesell v. Richardson-Walchli Corp.*, 237 A.D.2d 953, 654 N.Y.S.2d 541 (4th Dep't 1997), *mot. dis'd* 92 N.Y.2d 876, 677 N.Y.S.2d 782 (1998). Where a defendant only owned the property in question prior to the discharges, it was not liable. *Hilltop Nyack Corp. v. TRMI Holdings, Inc.*, 272 A.D.2d 521, 708 N.Y.S.2d 138 (2d Dep't 2000). An oil company will not be liable for discharges unless the discharge "occurred during delivery or... was in a position to 'halt [the] discharge, to effect an immediate cleanup or to prevent the discharge in the first place.'" *State v. Avery–Hall Corp.* 279 A.D.2d 199, 719 N.Y.S.2d 735 (3d Dep't 2001); *State v. Cronin*, 186 Misc.2d 809, 717 N.Y.S.2d
828 (Sup. Ct. Albany Co. 2000).

3. Owners. Unlike CERCLA, the Oil Spill Law does not provide that a landowner is liable. The courts have struggled with the question of whether a landowner who does not actively operate the source of the spill is strictly liable under the statute. In a series of decisions, the Third Department held owners automatically liable, no matter if they knew tanks were even present on their property. *White v. Regan*, 171 A.D.2d 197, 575 N.Y.S.2d 375 (3d Dep't 1991), *app. den'd* 79 N.Y.2d 754, 581 N.Y.S.2d 282 (1992) (owner "unwittingly" purchased land which contained petroleum underground storage tanks that had previously leaked); *State v. King Service Inc.*, 167 A.D.2d 777, 563 N.Y.S.2d 331 (3d Dep't 1991) (purchaser of leaking tanks); *State v. Tartan Oil*

Corp., 219 A.D.2d 111, 638 N.Y.S.2d 989 (3d Dep't 1996) (purchaser of service station with leaking tanks).

In contrast, the Fourth Department held that a landowner who did not own leaking tanks was not automatically liable for activities of his tenant, because "[t]he statutory scheme makes clear that liability as a 'discharger' is based upon conduct, not status," and rejected broader rulings of the Third Department, stating that "to the extent that those cases can be read as establishing landowner liability *per se*, they find no support in the statute and cannot be reconciled with other cases." *Drouin v. Ridge Lumber, Inc.*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep't 1994); *see also Whitesell v. Richardson-Walchli Corp.*, 237 A.D.2d 953, 654 N.Y.S.2d 541 (4th Dep't 1997), *mot. dis'd* 92 N.Y.2d 876, 677 N.Y.S.2d 782 (1998) (owner of an oil well lease who did not control operations was not a discharger).

By 2000, the Appellate Divisions seemed to come into agreement with *Drouin*, holding that "the owner of the system" that caused the discharges is liable, and where there is no "unity of ownership," so that the tanks or other petroleum system were owned by a tenant, the landowner was not automatically liable. *State v. Green*, 272 A.D.2d 214, 707 N.Y.S.2d 704 (3d Dept 2000), *rev.* 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2001); *State v. Markowitz*, 273 A.D.2d 636, 710 N.Y.S.2d 407 (3rd Dep't 2000), *lv. den'd* 95 N.Y.2d 770, 722 N.Y.S.2d 473 (2000); *Four Star Oil & Gas Company v. Kalish*, 272 A.D.2d 292; 707 N.Y.S.2d 189 (2nd Dep't. 2000); *310 South Broadway Corp. v. McCall*, 275 A.D.2d 549, 712 N.Y.S.2d 206 (2d Dep't 2000), *lv. den'd* 96 N.Y.2d 701, 722 N.Y.S.2d 793 (2001). After repeatedly ducking the issue, *see, e.g., Art-Tex Petroleum, Inc. v. New York State Department of Audit and Control*, 93 N.Y.2d 830, 687 N.Y.S.2d 61 (1999), the Court of Appeals finally tackled the issue when it reviewed *Green*.

In *State v. Green*, 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2001), the Court of Appeals reversed the Third Department, and held that the statutory "language is sufficiently broad to include landowners, like Lakeside, who have both control over activities occurring on their property and reason to believe that their tenants will be using petroleum products." 96 N.Y.2d at 407, 729 N.Y.S.2d at 423. Thus, defendant Lakeside, the owner of a trailer park was held to be liable as a discharger, since it "had the ability to control potential sources of contamination on its property, including Green's maintenance of a 275-gallon kerosene tank." *Id.* Its "failure, unintentional or otherwise, to take any action in controlling the events that led to the spill or to effect an immediate cleanup renders it liable as a discharger." *Id.* However, the Court held that not all landowners will be liable:

> By predicating liability on a landowner's control over the contaminated premises, we ensure that landowners are not in all instances liable for spills occurring on their property. A landowner, for example, who falls victim to a "midnight dumper," or an errant oil truck that spills fuel, would not be liable as a "discharger" because, in those cases, the landowner could not control the events resulting in the discharge. Here, however, Lakeside, as owner of the property, was in a position to control the site and source of the discharge. As Green's lessor, moreover, Lakeside could have reasonably expected

> Green to use fuel to heat her home; and it received the benefit of the lease as well as the cleanup. In these circumstances, Lakeside is liable for the discharge.

96 N.Y.2d at 407, 729 N.Y.S.2d at 423-4.

In *Roosa v. Campbell*, 291 A.D.2d 901, 737 N.Y.S.2d 461 (4th Dep't 2002), the Fourth Department followed *Green*, and held a landowner leased property to a service station, it was liable.

4. Corporate Veil. Broad interpretations of the definitions of "owner" and "operator" under federal environmental laws can result in liability, in limited situations, for responsible corporate officers, parent corporations, and even lenders who were actively involved in operation of a facility that resulted in pollution. *See, e.g., New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); Monachino, *Courts May Find Individuals Liable for Environmental Offenses Without Piercing Corporate Shield*, 72 *New York State Bar Journal*, May 2000 at 22. In *State v. Markowitz*, 273 A.D.2d 637, 710 N.Y.S.2d 407, 412 (3rd Dep't 2000), *lv. den'd* 95 N.Y.2d 770, 722 N.Y.S.2d 473 (2000), the Third Department adopted a similar rule, and under the facts of the case refused to find individual liability:

> Consistent with the relevant Federal and State statutes and developing case law, we hold that in order to hold a corporate stockholder, officer or employee personally liable under the Navigation Law for a discharge occurring at a site owned or operated by the corporation, that individual must, at a minimum, have been directly, actively and knowingly involved in the culpable activities or inaction which led to a spill or which allowed a spill to continue unabated.

See also Allen v. W.W. Griffith Oil Company, Inc., Index No. 25554 (Sup. Ct. Wyoming Co. 1992, Dadd, J.) (president and CEO of oil company could not be held liable as a discharger where the "allegations...do not show that [he] participated in the wrongful conduct"); *Malin v. Bill Wolf Petroleum Corp.*, Index No. 21438/96 (Sup. Ct. Nassau Co. 1999) (defendant who controlled corporate discharger liable); *State v. Amicucci*, Index No. 629/94 (Sup. Ct. Putnam Co. 1995) (corporate officer may be personally liable).

5. "Victim" Properties. While there is no definitive case law on the issue, it would seem that a nearby owner whose land is contaminated by a spill from another property could not be liable under the Oil Spill Law, since he would not be a "person who discharged petroleum," especially in light of the Court of Appeals holding in *Green*. Furthermore, under analogous case law under CERCLA, a property owner cannot be held liable for "passive migration." *See ABB Industrial v. Prime Technology*, 120 F.3d 351 (2d Cir.1997).

The extent to which an on-site petroleum discharge has migrated off-site will dictate the level of cleanup required. DEC generally requires a discharger to completely remediate off-site contamination, to the extent feasible, in order to avoid claims by victim property owners against the Oil Spill Fund.

E. Private Right of Action

1. Right of Action By Injured Party Against Discharger. Previously, the Appellate Division, Fourth Department had held that private parties had no private cause of action against a discharger under the Oil Spill Law. *Snyder v. Jessie*, 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991). In reaction to *Snyder*, the Legislature amended Navigation Law §181 in 1991 to add a new subsection 5, which now explicitly provides:

> Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who discharged the petroleum.

This provision has also been held to apply retroactively to spills that occurred before its enactment. *Snyder v. Newcomb*, 194 A.D.2d 53, 603 N.Y.S.2d 1010 (4th Dep't 1993); *Wheeler v. National School Bus Service*, 193 A.D.2d 998, 598 N.Y.S.2d 109 (3d Dep't 1993). Thus, landowners whose property is contaminated, and innocent persons who are exposed, clearly have a right to sue a discharger under the Oil Spill Law. *Id. Cf. Scheg v. Agway, Inc.*, 229 A.D.2d 963, 645 N.Y.S.2d 687 (4th Dep't 1996) (damages may be allowable for continuing nuisance based upon mere proximity of uncontaminated property to landfill). This remedy does not preempt other available common law and equitable remedies. Navigation Law §193; *Calabro v. Sun Oil Co.*, 276 A.D.2d 858, 714 N.Y.S.2d 781 (3rd Dep't 2000).

2. Right of Discharger to Sue Another Discharger. There has been much confusion over whether a "discharger" has recourse under the Oil Spill Law against another discharger. *See* Koegel, *Dischargers v. Dischargers Under the Navigation Law*, 214 N.Y.L.J. 1 (July 25, 1995). In *Busy Bee Food Stores v. WCC Tank Lining Technology, Inc.*, 202 A.D.2d 898, 609 N.Y.S.2d 118 (3d Dep't 1994), *mot. den'd* 83 N.Y.2d 953, 615 N.Y.S.2d 877 (1994), the Third Department held that a discharger "has no remedy under the statute against another discharger." *Contra Mendler v. Federal Ins. Co.*, 159 Misc.2d 1099, 607 N.Y.S.2d 1000 (Sup. Ct. N.Y. Co. 1993).

In *White v. Long*, 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995), the Court of Appeals resolved this issue, and decided that "faultless" owners can sue other dischargers under section 181(5):

> Although even faultless owners of contaminated lands have been deemed "dischargers" for purposes of their own section 181(1) liability, where they have not caused or contributed to (and thus are not "responsible for") the discharge, they should not be precluded from suing those who have actually caused or contributed to such damage.

The Court of Appeals rejected the Third Department's holding in *Busy Bee*, and further distinguished *New York v. King Service*, 167 A.D.2d 777, 563 N.Y.S.2d 331 (3d Dep't 1993), because the latter case properly rejected a discharger's claim against the state's Oil Spill Fund, rather than against another discharger under the relatively new private right of action under §181(5). Thus, in *State v.*

Tartan Oil Corp., 219 A.D.2d 111, 638 N.Y.S.2d 989 (3d Dep't 1996), the present owner/operator of a service station could sue prior owners for liability as dischargers. In *White*, defendant Long could only be held liable if he was a "guilty" discharger, which would preclude his claim under §181(5), pursuant to Navigation Law §172(3); *see also Hjerpe v. Globerman*, 280 A.D.2d 646, 721 N.Y.S.2d 367 (2d Dep't 2001); *Calabro v. Sun Oil Co.*, 276 A.D.2d 858, 714 N.Y.S.2d 781 (3rd Dep't 2000).

Accordingly, under *White*, apparently there are two classes of dischargers who can be held liable to the state for a cleanup under §181(1) - "guilty" dischargers and "innocent" ("faultless") landowners. *See also White v. Long*, 229 A.D.2d 178, 655 N.Y.S.2d 176 (3d Dep't 1997). While an innocent landowner can sue "guilty" dischargers, it is unlikely that a claim could be made against a prior "innocent" owner.

In *State v. Green*, 96 N.Y.2d 403, 408, 729 N.Y.S.2d 420, 424 (2001), the Court of Appeals reaffirmed this interpretation, noting that where a landowner who had the ability to control a tenant's activities was liable as a discharger, it was "not, however, without redress," and might "seek contribution from the actual discharger" under Navigation Law §181(5). The Court inexplicably failed to cite the right to contribution under section 176(8), discussed *infra*. Presumably, "contribution" under section 176(8) is limited to liabilities to third parties or responsibility for cleanup costs, while the right to sue under section 181(5) goes a step further to allow first-party damages to be recovered by an "innocent" discharger.

3. Indemnification or Contribution. Navigation Law §176(8) provides that "every person providing cleanup, removal of discharge of petroleum or relocation of persons" pursuant to Navigation Law §176 (which authorizes cleanup activities by DEC and dischargers) "shall be entitled to contribution from any other responsible party." Whether based directly upon this provision, or common law principles, a discharger who conducts a cleanup or other response activities may have a cause of action for some or all of his response costs under the Oil Spill Law under an indemnification or contribution theory. *Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000); *145 Kisco Ave. Corp. v. Dufner Enterprises, Inc.*,198 A.D.2d 482, 604 N.Y.S.2d 963 (2d Dep't 1993); *State v. King Service Inc.*, 167 A.D.2d 777, 563 N.Y.S.2d 331 (3d Dep't 1991); *AL Tech Specialty Steel Corp. v. Allegheny International Credit Corp.*, 104 F.3d 601 (3d Cir. 1997); *Barclays Bank of New York, N.A. v. Tank Specialists, Inc.*, 236 A.D.2d 570, 654 N.Y.S.2d 673 (2d Dep't 1997); *Oliver Chevrolet, Inc. v. Mobil Oil Corp.*, 249 A.D.2d 793, 671 N.Y.S.2d 850 (3rd Dep't 1998); However, no contribution claim is available for a party that has not incurred response costs or other damages. *FCA Associates v. Texaco, Inc.*, 2005 U.S. Dist. LEXIS 6348 (W.D.N.Y. 2005).

When considering the question of contribution, the court must make a determination of "comparative fault." *State v. Griffith Oil Co., Inc.*, 299 A.D.2d 894, 750 N.Y.S.2d 685 (4th Dep't 2002). A contractual allocation between the parties may be determinative. *101 Fleet Place Associates v. New York Telephone Co.*, 197 A.D.2d 27, 609 N.Y.S.2d 896 (1st Dep't 1994); *State v. Griffith Oil Co., Inc.*, 299 A.D.2d 894, 750 N.Y.S.2d 685 (4th Dep't 2002).

VI. ECL Article 37

ECL §37-0701 provides that "[n]o person shall store or release to the environment substances hazardous or acutely hazardous to public health, safety or the environment in contravention of rules and regulations promulgated pursuant hereto." This covers petroleum, and various other "hazardous substances" identified by DEC. In *Berens v. Cook*, 263 A.D.2d 521, 694 N.Y.S.2d 684 (2d Dep't 1999), the plaintiff sought property damages arising out of an oil spill, and the Second Department recognized a private cause of action under this statute. *See also Emerson Enterprises v. Kenneth Crosby*, 2004 U.S. Dist. LEXIS 12245 (W.D.N.Y. 2004).

VII. Common Law/Equitable Causes of Action

An owner or occupant of contaminated property may proceed on numerous tort and other common law and equitable theories to seek relief due to contamination. Duty and foreseeability are necessary elements of a tort claim. While certain hazards, such as the possibility that an underground tank may leak, may be foreseeable, *N.Y. Telephone Co. v. Mobil Oil Corp.*, 99 A.D.2d 185, 473 N.Y.S.2d 172 (1st Dep't 1984), that may not always be the case. *Nodine v. Tarpening Trucking Co., Inc.* 64 A.D.2d 808, 407 N.Y.S.2d 277 (4th Dep't 1978). A buyer may have a claim against an environmental inspector hired by the seller, especially if recommendations are made with respect to corrective action. *Benz v. Burrows*, 191 A.D.2d 1021, 594 N.Y.S.2d 929 (4th Dep't 1993).

Whether past landowners and occupants have a duty to protect remote future owners or occupants from pollution, if the impact upon these potential plaintiffs is foreseeable is not well-settled. *See, e.g.*, 79 N.Y.Jur.2d *Negligence* §71; *55 Motor Ave. Co. v. Liberty Industrial Finishing Corp*, 885 F.Supp. 410 (E.D.N.Y. 1994); *Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.*, 640 A.2d 950 (R.I.1994) (R.I. 1994); *Rosenblatt v. Exxon Co. U.S.A.*, 642 A.2d 180 (Md. 1994); *T & E Industries, Inc. v. Safety Light Corp.*, 123 N.J. 371, 587 A.2d 1249 (1991).

The concept of "duty" has been construed fairly widely with respect to environmental issues. While generally the owner/operator of a facility that causes pollution is responsible, even a non-landowner can be held liable for creating environmental conditions causing a nuisance. *State v. Fermenta Asc Corp.*, 160 Misc.2d 187, 608 N.Y.S.2d 980 (Sup. Ct. Suffolk Co. 1994), *aff'd* 238 A.D.2d 400, 656 N.Y.S.2d 342 (2nd Dep't 1997), *app. den'd* 90 N.Y.2d 810, 664 N.Y.S.2d 271 (1997). A landowner may be liable for actions of his tenant if he has been made aware of contamination, but has failed to fully abate the situation, since he has "control over the premises." *State v. Monarch Chemicals, Inc.*, 90 A.D.2d 907, 456 N.Y.S.2d 867, 868 (3d Dep't 1982).

A purchaser of contaminated property may be liable for cleanup of environmental contamination, even if he did not cause the situation, if "upon learning of the nuisance and having a reasonable opportunity to abate it" the purchaser fails to do so. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985); *see also N.Y. Telephone Co. v. Mobil Oil Corp.*, 99 A.D.2d 185, 473 N.Y.S.2d 172 (1st Dep't 1984); *Restatement (Second) of Torts* §839, comment d (1979) ("liability is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it...."). Conversely, a seller's liability may shift to the buyer if, after a reasonable time after the transfer of title, the new owner fails

to take steps necessary to remediate the continuing environmental problem. *N.Y. Telephone Co. v. Mobil Oil Corp.*, 99 A.D.2d 185, 473 N.Y.S.2d 172 (1st Dep't 1984).

There are several different categories of torts and other legal theories which can be used to complain of harm caused by others. Sometimes, offensive action might fit into more than one category, *e.g.* negligent conduct might also produce a nuisance. A plaintiff is free to plead numerous alternative claims. We will focus on several of the numerous theories of tort liability, particularly as they relate to environmental pollution.

A. Trespass

Trespass is the intentional invasion of another's property. A trespasser is liable for property damages caused by his or her action. In *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331 (1954), the New York Court of Appeals held:

> [W]hile the trespasser, to be liable, need not intend or expect the damaging consequences of his intrusion, he must intend the act which amounts to or produces his unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or he does so negligently as to amount to willfulness.

However, trespass may include the unintentional (but inevitable) consequences of an intentional act. *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996). Thus, a landowner who dumps wastes on his or her own land has been held liable for the inevitable migration of the contamination to the adjacent property. *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996). *See also Serotta v. M&M Utilities, Inc.*, 55 Misc.2d 286, 285 N.Y.S.2d 121 (Sup. Ct. Nassau Co. 1967) (spill caused by unauthorized oil delivery); *Dunlop Tire v. FMC*, 53 A.D.2d 150, 385 N.Y.S.2d 971 (4th Dep't 1976) (unintended explosion resulting in trespass on nearby property); *CARE v. Southview Farm*, 834 F. Supp. 1422 (W.D.N.Y. 1993), *rev'd on other grounds* 34 F.3d 114 (2d Cir. 1994), *cert. den'd* 514 U.S. 1082, 115 S.Ct. 1793 (1995) (overspreading of cow manure resulted in trespass); *State v. Fermenta ASC Corp.*, 238 A.D.2d 400, 656 N.Y.S.2d 342 (2d Dep't 1997), *mot. den'd* 90 N.Y.2d 810, 664 N.Y.S.2d 271 (1997) (use of pesticide resulted in trespass).

It is quite likely that a leaking oil tank or other petroleum spill will be unintentional, and thus not actionable as a trespass. *See, e.g., Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331 (1954); *Snyder v. Jessie*, 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991); *Drouin v. Ridge Lumber, Inc.*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep't 1994). However, in *Hilltop Nyack Corp. v. TRMI Holdings*, 264 A.D.2d 503, 694 N.Y.S.2d 717 (2d Dep't 1999), a trespass claim was allowed to proceed where there was "'good reason to know or expect' that the contaminants would pass from the gasoline service station to the plaintiffs' property." Furthermore, a defendant cannot trespass on his or her own property. *55 Motor Ave. Co. v. Liberty Industrial Finishing Corp*, 885 F.Supp. 410 (E.D.N.Y. 1994); *Metzger v. Agway*, Index No. 81362 (Sup. Ct. Ontario Co. 1994, Harvey, J.).

B. Negligence

A landowner is held to the standard of a "reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." *Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564 (1976). Thus, a landlord owes a duty to his or her tenant to maintain safe premises, and to avoid environmental hazards such as flaking lead paint. *Morales v. Felice Properties Corp.*, 221 A.D.2d 181, 633 N.Y.S.2d 305 (1st Dep't 1995).

A landowner cannot have a duty with regard to tanks or other conditions that he or she does not know exist. *White v. Long*, 204 A.D.2d 892, 612 N.Y.S.2d 482 (3d Dep't 1994), *rev. on other grounds* 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995); *Strand v. Neglia*, 232 A.D.2d 907, 649 N.Y.S.2d 729 (3d Dep't 1996), *app. dis'd* 89 N.Y.2d 1086, 659 N.Y.S.2d 859 (1997). "[F]or negligence liability to ensue in cases involving the pollution of underground waters, the plaintiff must demonstrate that the defendant failed to exercise due care in conducting the allegedly polluting activity or in installing the allegedly polluting device, and that he knew or should have known that such conduct could result in the contamination of the plaintiff's well." *Fetter v. DeCamp*, 195 A.D.2d 771, 773, 600 N.Y.S.2d 340 (3d Dep't 1993).

Negligence can often be demonstrated in cases involving a leaking tank or other discharge of pollutants. *See, e.g., N.Y. Telephone Co. v. Mobil Oil Corp.*, 99 A.D.2d 185, 473 N.Y.S.2d 172 (1st Dep't 1984) (negligence due to leaking tanks); *Snyder v. Jessie*, 145 Misc.2d 293, 546 N.Y.S.2d 777 (Sup. Ct. Monroe Co. 1989), *mod.* 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991) (unusually frequent deliveries to tank later found to be leaking may be negligence). Further, a landowner can be liable for pollution resulting from a failure "to use reasonable care to maintain" underground tanks or other facilities "in a reasonably safe condition." *Leone v. Leewood Service Station, Inc.*, 212 A.D.2d 669, 670, 624 N.Y.S.2d 610, 612 (2d Dep't 1995), *mot. den'd* 86 N.Y.2d 709, 634 N.Y.S.2d 443 (1995). An environmental consultant may be liable for negligence for failing to discover or properly address contamination. *Benz v. Burrows*, 191 A.D.2d 1021, 594 N.Y.S.2d 929 (4th Dep't 1993); *Hilltop Nyack Corp. v. TRMI Holdings*, 264 A.D.2d 503, 694 N.Y.S.2d 717 (2d Dep't 1999).

An environmental law or regulation may create a duty, so that violation of the law will constitute negligence. *Leone v. Leewood Service Station, Inc.*, 212 A.D.2d 669, 624 N.Y.S.2d 610 (2d Dep't 1995), *mot. den'd* 86 N.Y.2d 709, 634 N.Y.S.2d 443 (1995) (negligent failure to test gasoline tanks). Nonetheless, violation of a regulation is merely evidence of negligence, and does not automatically create tort liability. *Juarez v. Wavecrest Mgt. Team Ltd.*, 88 N.Y.2d 628, 649 N.Y.S.2d 115 (1996) (violation of New York City Administrative Code requirements to abate lead paint hazards did not result in absolute liability).

C. Private Nuisance

In the seminal case, *Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 172 (1977), the New York Court of Appeals explained the nature of a private nuisance:

> A private nuisance threatens one person or a relatively few (*McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 344), an essential feature being an interference with the use or enjoyment of land (*Blessington v. McCrory Stores Corp.*, 198 Misc. 291, 299, 95 N.Y.S.2d 414, 421, *affd.* 279 App. Div. 807, 110 N.Y.S.2d 456, *affd.* 305 N.Y. 140). It is actionable by the individual person or persons whose rights have been disturbed (*Restatement, Torts*, notes preceding § 822, p. 217).

The necessary elements are of a private nuisance are as follows:

> one is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities (Restatement, Torts 2d (Tent Draft No. 16), s 822; Prosser, Torts (4th ed.), p. 574; 2 N.Y.P.J.I. 563-654; *see Spano v. Perini Corp.*, 25 N.Y.2d 11, 15, 302 N.Y.S.2d 527, 529, 250 N.E.2d 31, 33; *Kingsland v. Erie Co. Agric. Soc.*, 298 N.Y. 409, 426-427, 84 N.E.2d 38, 46-47; *Wright v. Masonite Corp., D.C.*, 237 F.Supp. 129, 138, *affd.* 4th Cir., 368 F.2d 661, *cert. den.* 386 U.S. 934, 87 S.Ct. 957, 17 L.Ed.2d 806.

Copart at 569, 394 N.Y.S.2d at 172-173.

Pollution may be actionable as a private nuisance. *See, e.g., Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996) (neighboring property contaminated by hazardous waste); *Snyder v. Jessie*, 145 Misc.2d 293, 546 N.Y.S.2d 777 (Sup. Ct. Monroe Co. 1989), *mod.* 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991) (oil spill); *CARE v. Southview Farm*, 834 F. Supp. 1410 (W.D.N.Y. 1993) (spreading of cow manure). However, a private nuisance claim generally does not lie with regard to conditions created by a landowner or tenant on its own property where there is no off-site impact. *Rose v. Grumman Aerospace Corp.*, 196 A.D.2d 861, 602 N.Y.S.2d 34 (2d Dep't 1993); *Drouin v. Ridge Lumber, Inc.*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep't 1994); *Nashua Corp. v. Norton Company*, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. 1997).

In order to bring their private nuisance claim, plaintiffs must show an interference with their property that is "substantial in nature" and "unreasonable in character." *Scribner v. Summers*, 84 F.3d 554, 559 (2d Cir. 1996); *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 71 F.Supp.2d 179, 188 (W.D.N.Y. 1999), *vacated on other grounds* 216 F.3d 391 (2d Cir. 2000). This may require exceedance of an applicable regulatory or cleanup standard. *State of New York v. Fermenta ASC Corp.*, 166 Misc.2d 524, 630 N.Y.S.2d 884 (Sup. Ct. Suffolk Co 1995), *aff'd* 238 A.D.2d 400, 656 N.Y.S.2d 342 (2d Dep't 1997), *app. den'd* 90 N.Y.2d 810, 664 N.Y.S.2d 271 (1997); *Suffolk Co.*

Water Authority v. Union Carbide Corp., N.Y.L.J., May 2, 1991, p. 28, col. 1 (Sup. Ct. Suffolk Co. 1991); *Lessord v. General Electric Co.*, 2002 U.S. Dist. LEXIS 24839 (W.D.N.Y. Aug. 29, 2002).

The courts in New York and around the country have generally held that a property owner may not sue for nuisance caused by a nearby environmental problem if there is no physical invasion of the plaintiff's property. *See Adkins v. Thomas Solvent Co.*, 440 Mich. 293 (1992); *Adams v. Star Enterprise*, 51 F.3d 417 (4th Cir.1995); *Bradley v. Armstrong Rubber Company*, 989 F.2d 822 (5th Cir. 1993), *cert. denied* 114 S.Ct. 1067 (1994); *Golen v. Union Corp.*, 718 A.2d 298 (Pa. Super. 1998). In *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 71 F.Supp.2d 179 (W.D.N.Y. 1999), *vac'd on other grounds* 216 F.3d 391 (2d Cir. 2000), Judge Larimer held that "[i]n order to recover damages for diminution in value, property owners must show... that their property has been physically damaged." 71 F.Supp.2d 188. Likewise, in *Halliday v. Norton Company*, 265 A.D.2d 614, 696 N.Y.S.2d 549 (3d Dep't 1999), *mot. den'd* 94 N.Y.2d 894, 706 N.Y.S.2d 696 (2000), the court dismissed a claim for stigma where there was no actual contamination of the plaintiff's property by a nearby landfill. *See also Nalley v. General Electric Company*, 165 Misc.2d 803, 630 N.Y.S.2d 452 (Sup. Ct. Rensselaer Co. 1995).

There may, however, be a claim for injunctive relief arising out of an anticipatory nuisance claim. *See* 81 N.Y. Jur. 2d *Nuisances* §64. Furthermore, in *Scheg v. Agway, Inc.*, 229 A.D.2d 963, 645 N.Y.S.2d 687, 688 (4th Dep't 1996), where the plaintiffs' properties were near a landfill, but had never actually been contaminated, the court held that the "complaint, insofar as it alleges that the value of their property was diminished as a result of its proximity to the landfill, does state a cause of action."

D. Public Nuisance

In *Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 172 (1977), the New York Court of Appeals also explained the nature of a public nuisance:

> A public, or as sometimes termed a common, nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency (*Restatement, Torts*, notes preceding § 822, p. 217; *see* Penal Law, § 240.45). It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all (*New York Trap Rock Corp. v. Town of Clarkston*, 299 N.Y. 77, 80, 85), in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons (*Melker v. City of New York*, 190 N.Y. 481, 488; *Restatement, Torts*, notes preceding §822, p. 217).

* * * *

> although an individual cannot institute an action for public nuisance as such, he may maintain an action when he suffers special damage from a public nuisance (*Restatement, Torts*, notes preceding § 822, p. 217; *Wakeman v. Wilbur*, 147 N.Y. 657, 663-664).

Clearly, pollution may be actionable as a public nuisance. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *Drouin v. Ridge Lumber, Inc.*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep't 1994). In *Drouin*, the Fourth Department allowed a landowner to make a claim for public (as opposed to private) nuisance for leaking oil tanks maintained by a tenant on his or her own property. Similarly, in *Nashua Corp. v. Norton Company*, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. 1997), response costs were sufficient "special damages" to enable a landowner to sue the prior owner for hazardous waste contamination. In *Booth v. Hanson Aggregates of New York, Inc.*, 16 A.D.2d 1137, 791 N.Y.S.2d 766 (4th Dep't 2005), homeowners were entitled to proceed with a public nuisance claim against a quarry that allegedly pumped their wells dry.

E. Strict Liability

Under the doctrine of "strict liability," certain activities are so dangerous that the common law imposes liability regardless of whether or not a person acts reasonably. *Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 440, 448, 398 N.Y.S.2d 401, 404 (1977). This principle has historically applied to activities such as blasting or storage of explosives, and may apply to "generation and disposal of chemical wastes." *State v. Schenectady Chemical, Inc.*, 117 Misc.2d 960, 459 N.Y.S.2d 971 (Sup. Ct. Rensselaer Co. 1983), *mod.* 103 A.D.2d 33, 37, 479 N.Y.S.2d 1010, 1013 (3d Dep't 1989); *State v. Monarch Chemicals*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (3d Dep't 1982); *see also New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985). Thus, a person who uses all due care in the storage of a hazardous chemicals, and complies with all applicable regulations, may still be liable for damages arising from an accidental spill under the theory of strict liability. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *State v. Schenectady Chemical, Inc.*, 103 A.D.2d 33, 37, 479 N.Y.S.2d 1010, 1013 (3d Dep't 1989).

However, home heating oil has been held not to give rise to common law strict liability. *Snyder v. Jessie*, 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991). Likewise, storage of gasoline is not an ultrahazardous activity. *750 Old Country Road Realty Corp. v. Exxon Corp.*, 229 A.D.2d 1034, 645 N.Y.S.2d 186 (4th Dep't 1996); *Hilltop Nyack Corp. v. TRMI Holdings*, 264 A.D.2d 503, 694 N.Y.S.2d 717 (2d Dep't 1999).

F. Fraud

Fraud is an intentional misrepresentation. If a seller intentionally deceives a buyer with respect to property conditions, the seller may be liable for fraud. *Keywell v. Weinstein*, 33 F.3d 159 (2d Cir. 1994) (misrepresentation with regard to the extent of TCE disposal); *Kaddo v. King Service Inc.*, 250 A.D.2d 948, 673 N.Y.S.2d 235 (3d Dep't 1998) (misrepresentation of condition of underground storage tanks which had leaked onto neighboring properties and subsequently led to the closing of gas station); *Scharf v. Tiegerman*, 166 A.D.2d 697, 561 N.Y.S.2d 271 (2d Dep't 1990) (seller knew city was considering revoking status as legal three-family dwelling).

Under the doctrine of *caveat emptor* ("buyer beware"), silence is not fraud, so that unless a seller intentionally gives false information about the property, there is no fraud:

> It is settled law… that the seller of real property is under no duty to speak when the parties deal at arms length. The mere silence of the seller, without some act or conduct which deceived the purchaser, does not amount to a concealment that is actionable as a fraud (*see, Perin v. Mardine Realty Co.*, 5 A.D.2d 685, 168 N.Y.S.2d 647, *affd.* 6 N.Y.2d 920, 190 N.Y.S.2d 995; *Moser v. Spizzirro*, 31 A.D.2d 537, 295 N.Y.S.2d 188, *affd.* 25 N.Y.2d 941, 305 N.Y.S.2d 153). The buyer has the duty to satisfy himself as to the quality of his bargain pursuant to the doctrine *caveat emptor*, which in New York State still applies to real estate transactions.

London v. Courduff, 141 A.D.2d 803, 804, 529 N.Y.S.2d 874 (2d Dep't 1988), *lv. dis'd* 73 N.Y.2d 809, 537 N.Y.S.2d 494 (1988).

Nonetheless, the courts have eroded this doctrine *caveat emptor*, especially with regard to environmental matters, and may imply a duty to disclose defects to a buyer, even if no inquiry is made. *Stambovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 674 (1st Dep't 1991) (duty to disclose haunted nature of house); *Young v. Keith*, 112 A.D.2d 625, 492 N.Y.S.2d 489 (3d Dep't 1985) (duty to disclose faulty water and sewer systems).

Thus, in spite of *caveat emptor*, a seller who knowingly fails to disclose the presence of environmental contamination or other hidden defects on a property may be liable to the buyer for fraud even if no inquiry or representations were made with regard to environmental contamination. *See Roth v. Leach*, 1990 N.Y. Misc. LEXIS 761 (Sup. Ct. Wayne Co. 1990) (duty to notify buyer of presence of buried hazardous wastes); *195 Broadway Co. v. 195 Broadway Corp.* N.Y.L.J., April 15, 1988, p. 6, col. 4 (Sup. Ct. N.Y. Co. 1988) (duty to notify buyer of presence of asbestos in building); *Tahini Investments, Ltd. v. Bobrowsky*, 99 A.D.2d 489, 470 N.Y.S.2d 431 (2d Dep't 1984) (buried drums). Furthermore, in New York, disclosure of environmental problems is required by the Property Condition Disclosure Act (Real Property Law Article 14) upon sale of most residential properties.

However, no fraud claim can be made if the buyer is on notice to the potential defect. For example, in *Banker North Salem Associates v. Haight*, 204 A.D.2d 949, 612 N.Y.S.2d 281 (3d Dep't 1994), no fraud claim could be made against the seller of an apple orchard who had no knowledge of the use of hazardous chemicals. In *Vandervort v. Higginbotham*, 222 A.D.2d 831, 634 N.Y.S.2d 800 (3d Dep't 1995), a buyer could not make a fraud claim when he was on notice of a possible oil spill, since he knew that the property had been used as a motor vehicle repair shop, and floor drains were obvious.

There may also be a duty to give a buyer correct information about nearby environmental problems that may have an effect on value. *Diggins v. Amato*, Index No. 66839 (Sup. Ct. Steuben Co. 1994, Purple, J.), *aff'd* 214 A.D.2d 1056, 627 N.Y.S.2d 507 (4th Dep't 1995); *see also Strawn*

v. Canuso, 271 N.J. Super. 88, 638 A.2d 141 (N.J. App. Div. 1994) (real estate broker may have obligation to investigate and disclose potential contamination on or near property).

Neither the statement that no representations are made, 60 N.Y. Jur.2d *Fraud and Deceit* §218; *DeBell v. Nothnagle Florida Realty Corp.*, 24 A.D.2d 825, 264 N.Y.S.2d 190 (4th Dep't 1965), nor even an "as is" clause, 60 N.Y. Jur.2d *Fraud and Deceit* §207; *George v. Lumbrazo*, 184 A.D.2d 1050, 584 N.Y.S.2d 704 (4th Dep't 1992), *app. dis'd* 81 N.Y.2d 759, 594 N.Y.S.2d 719 (1992); *Haney v. Castle Meadows, Inc.*, 839 F.Supp. 753 (D. Colo. 1993), necessarily bars a fraud claim.

G. Mistake

If defective property is sold, but there is no intentional fraud (perhaps because the seller did not know), there might be a mutual mistake. In *Rekis v. Lake Minnewaska Mountain Houses, Inc.*, 170 A.D.2d 124, 130, 573 N.Y.S.2d 331, 335 (3d Dep't 1991), *app. dis'd* 79 N.Y.2d 851, 580 N.Y.S.2d 201, *mot. to reargue den'd* 79 N.Y.2d 978, 583 N.Y.S.2d 196 (1992), the court held that:

> a contract is voidable under the equitable remedy of rescission if the parties entered into the contract under a mutual mistake of fact which is substantial and existed at the time the contract was entered into.

In *U.S. Postal Service v. Phelps*, 950 F. Supp. 504 (E.D.N.Y. 1997), a land sale was rescinded due to mutual mistake after the seller failed to complete cleanup promised to be completed after the 1986 closing. However, in *Copland v. Nathaniel*, 164 Misc.2d 507, 624 N.Y.S.2d 514 (Sup. Ct. Westchester Co. 1995), no mistake claim could be made for chlordane found in a house, where the buyers were on notice to a termite problem. *See also Vandervort v. Higginbotham*, 222 A.D.2d 831, 634 N.Y.S.2d 800 (3d Dep't 1995) (no mistake claim when buyer on notice to possible contamination).

Relief for unilateral mistake is more restrictive. A "contract may be voided for unilateral mistake of fact only where enforcement of the contract would be unconscionable, the mistake is material and was made despite the exercise of ordinary care." *Landes v. Sullivan*, 240 A.D.2d 971, 974, 659 N.Y.S.2d 544, 547 (3d Dep't 1997). A unilateral mistake may be grounds for equitable relief, particularly "where the mistake is, or should be, known to the other party, or where it is induced by that party," *Eastern Freightways, Inc. v. U.S.*, 257 F.2d 703, 707 (2d Cir. 1958), or there is "overreaching or inequitable conduct." *Schiavone Construction Company, Inc. v. McGough*, 112 A.D.2d 81, 82, 492 N.Y.S.2d 364, 365 (1st Dep't 1985).

H. Waste

A tenant who damages property either through neglect or unreasonable voluntary acts, may be liable for "waste." Accordingly, a tenant may "waste" property by leaving behind environmental contamination. *See P.B.N. Associates v. Xerox Corp.*, 141 A.D.2d 807, 529 N.Y.S.2d 877 (2d Dep't 1988), *mod.* 176 A.D.2d 861, 575 N.Y.S.2d 451 (2d Dep't 1991).

I. Restitution

A claim for restitution arises where "it would be against equity and good conscience to permit the defendant to retain what is sought to be recovered." 22 N.Y.Jur.2d *Contracts* §445. Restitution must be made for "unjust enrichment" for "property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefore." *Id.* §447. The "essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Id*. §448. There is no need to prove any wrongdoing by the defendant. *Id.*

Thus, some courts have recognized claims for restitution where a defendant should, in fairness, be held accountable for the cleanup of environmental contamination. *New York v. SCA Services*, 754 F. Supp. 995 (S.D.N.Y. 1991); *State of New York v. Almy Brothers, Inc*., 866 F.Supp. 668 (N.D.N.Y. 1994); *State v. Schenectady Chemicals, Inc.*, 117 Misc.2d 960, 966-67, 459 N.Y.S.2d 971, 977 (Sup. Ct. Rensselaer Co. 1983), *mod.* 103 A.D.2d 33, 479 N.Y.S.2d 1010 (3d Dep't 1984); *City of New York v. Lead Industries Association, Inc.*, 222 A.D.2d 119, 644 N.Y.S.2d 919 (1st Dep't 1996), *later opn.* 241 A.D.2d 387, 660 N.Y.S.2d 422 (1997); *City of New York v. Keene Corp.*, 132 Misc. 2d 745, 505 N.Y.S.2d 782 (Sup. Ct., NY Co. 1986), *aff'd* 129 A.D.2d 504, 513 N.Y.S.2d 1004 (1st Dep't 1987); *see also Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000) (restitution claim brought for oil spill). However, if a contribution claim can be brought under CERCLA §113, 42 U.S.C. §9613, a restitution claim is preempted. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998).

J. Indemnification or Contribution

Where two parties are both under a duty to clean up environmental contamination, and the duty, as between the two parties, should have been discharged by the defendant, the plaintiff may recover cleanup costs under a theory of "implied indemnification" or contribution. *City of New York v. Lead Industries Association, Inc.*, 222 A.D.2d 119, 644 N.Y.S.2d 919 (1st Dep't 1996), *later opn.* 241 A.D.2d 387, 660 N.Y.S.2d 422 (1997); *City of New York v. Keene Corp.*, 132 Misc. 2d 745, 505 N.Y.S.2d 782 (Sup. Ct., N.Y. Co. 1986), *aff'd* 129 A.D.2d 504, 513 N.Y.S.2d 1004 (1st Dep't 1987); *State v. Stewart's Ice Cream Co., Inc*., 64 N.Y.2d 83, 86, 484 N.Y.S.2d 810, 811 (1984). In *City of New York v. Lead Industries*, the City alleged that it had a non-delegable duty to its tenants to remediate lead contamination, and it stated a claim against lead manufacturers to reimburse it for its costs.

If a contribution action is available under CERCLA §113, 42 U.S.C. §9613, such a claim may be preempted. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998). Thus, in *Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000), the plaintiff could pursue contribution claims for expenses it was required to incur under the State Superfund Law or the New York Oil Spill Law, but not those available under a CERCLA contribution claim.

K. Quasi-Contract

"'Quasi contracts are not contracts at all,' but are 'imposed by law where there has been no agreement... to assure a just and equitable result.'" *Wood Realty Trust v. N. Storonske Cooperage Co., Inc.*, 229 A.D.2d 821, 646 N.Y.S.2d 410 (3d Dep't 1996). In *Wood Trust*, the owner of an apartment building stated a quasi-contract claim when the defendant owner of nearby land that had contaminated the plaintiff's property stopped providing bottled water to residents after the statute of limitations to sue in tort had expired.

L. Contract

A breach of contract—which is not a tort claim—may also form the basis for an environmental claim. For example, a landlord may have a cause of action for breach of lease if his or her tenant contaminates the landlord's property. *P.B.N. Associates v. Xerox Corp.*, 141 A.D.2d 807, 529 N.Y.S.2d 877 (2d Dep't 1988), *mod.* 176 A.D.2d 861, 575 N.Y.S.2d 451 (2d Dep't 1991). However, environmental contamination does not make the title to property unmarketable, or result in breach of the warranties of title. *Vandervort v. Higginbotham*, 222 A.D.2d 831, 634 N.Y.S.2d 800 (3d Dep't 1995); *Roth v. Leach*, 1990 N.Y. Misc. LEXIS 761 (Sup. Ct. Wayne Co. 1990). Thus, in *John Hancock Mutual Life Insurance Co. v. 491-499 Seventh Avenue Associates*, 169 Misc.2d 493, 644 N.Y.S.2d 953 (Sup. Ct. N.Y. Co. 1996), *app. wdrwn.* 232 A.D.2d 966, 648 N.Y.S.2d 490 (2d Dep't 1996), where the notice of sale disclosed oil contamination, a foreclosure sale could proceed.

M. Inverse Condemnation

The doctrine of inverse condemnation has long been recognized by the courts of New York "as a procedural vehicle for granting damages where an entity clothed with the power of eminent domain has interfered with the property rights of a landowner to the extent that it amounts to a compensable taking." *Knapp v. County of Livingston*, 175 Misc.2d 112, 667 N.Y.S.2d 662, 666 (Sup. Ct. Livingston Co. 1997), *aff'd* 262 A.D.2d 936, 701 N.Y.S.2d 534(4th Dep't 1999) (*citing* 51 N.Y.Jur.2d *Eminent Domain* §464 at 679). If the government pollutes property, it may be subject to an inverse condemnation claim. *See, e.g., Town of Harrison v. National Union Fire Ins. Co.*, 219 A.D.2d 640, 631 N.Y.S.2d 420 (2d Dep't 1995).

VIII. Defenses

A. Statute of Limitations

Torts (and most other legal claims) are subject to statutes of limitations. Once the period prescribed by law has run, a plaintiff is barred from bringing a lawsuit. Under New York CPLR §214, most actions for personal injury and property damage must be brought within three years of the date of the tort, while an action for fraud or breach of contract must be brought within six years under CPLR §213.

Shorter limitation periods generally apply to actions against the government. For example, a claim against the federal government must be filed within two years under the Federal Tort Claims Act, 28 U.S.C. §2401, while in New York a claim must be filed against the state or a municipality within ninety days, and suit against a municipality must be filed within one year and 90 days.

1. CPLR §214-c

In New York, a special statute of limitations, CPLR §214-c, applies the "discovery rule" to toxic torts. Under this statute, the three-year limitations period under CPLR §214, as well as the limitations periods for filing claims and suits against the state and municipalities, applicable to a claim for personal or property injuries caused by "latent effects of exposure to any substance," runs "from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier." Thus, even if it takes decades after exposure to the chemical to discover the injury, a lawsuit could still be brought within three years after that discovery. The issue of when a plaintiff "should have known" is generally a question of fact, and the statute is construed liberally in a plaintiff's favor. *Cochrane v. Owens Corning*, 219 A.D.2d 557, 631 N.Y.S.2d 358, 367 (1st Dep't 1995). For example, in *Kozemko v. Griffith Oil*, 256 A.D.2d 1199, 682 N.Y.S.2d 503 (4th Dep't 1998), tank tests prior to closing should have put a buyer on notice to a leak.

Suppose an injury is discovered, but the cause of the injury is uncertain and is not discovered until much later—after a claim would be barred under this rule. New York CPLR §214-c(4) addresses this problem, and provides that a plaintiff would have one year after the time of discovery of the cause of the injury to bring suit if he or she could show that "technical, scientific or medical knowledge and information sufficient to ascertain the cause of his or her injury had not been discovered, identified or determined" prior to the expiration of the three-year period after discovery of the injures, but was discovered within five years of discovery of the injury.

2. Continuing Torts

Some jurisdictions, including New York, recognize the doctrine of "continuing torts," so that the statute of limitations for a continuing trespass (*e.g.* seeping water) recommences each day the tort continues. In *Jensen v. General Electric Co.*, 82 N.Y.2d 77, 603 N.Y.S.2d 420 (1993), the New York Court of Appeals held that the doctrine of "continuing trespass" for damage claims does not apply to damage claims governed by CPLR §214-c, the doctrine may apply to a plaintiff's request for an injunction.

3. Two–Injury Rule

Under the "two–injury" rule, "[w]here the statute of limitations has run on one exposure related medical problem, a later exposure-related medical problem that is 'separate and distinct' is still actionable." *Braune v. Abbot Labs.*, 895 F.Supp. 530, 555-6 (E.D.N.Y. 1995). New York courts have extended the two-injury rule to environmental contamination cases. *See, e.g., Bimbo Chromalloy American Corp.*, 226 A.D.2d 812, 640 N.Y.S.2d 623 (3d Dep't 1996) (well contamination did not necessarily put a landowner on notice to soil and shallow groundwater

contamination). However, the rule does not apply if the plaintiff was on notice to the second environmental problem. *Syms v. Olin Corp.*, 408 F.3d 95 (2d Cir. 2005).

4. CERCLA §309

Section 309 of CERCLA, 42 U.S.C. §9658, provides an "exception to state statutes," pursuant to which the "federally required commencement date" supersedes any date for commencement of the state statute of limitations in a case involving:

> personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

42 U.S.C. §9658(a)(1). The "federally required commencement date" is defined as" "the date plaintiff knew (or reasonably should have known) that the personal injury or property damages... were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. §9658(b)(4)(A). The definition of "hazardous substance or pollutant" will be covered in our discussion of CERCLA.

Thus, under CERCLA §309, the state statute of limitations does not begin to run until a plaintiff knows, or should know, that a hazardous substance is the cause of his or her injury. *Freier v. Westinghouse*, 303 F.3d 176 (2d Cir. 2002). Since petroleum is not a CERCLA "hazardous substance" or "pollutant or contaminant," this provision does not apply to oil spill cases that do not also involve hazardous substances.

5. Indemnification or Contribution

Claims for response costs in the nature of indemnification or contribution (as opposed to property damages to the claimant) are subject to the six-year statute of limitations under New York CPLR §213, *AL Tech Specialty Steel Corp. v. Allegheny International Credit Corp.*, 104 F.3d 601 (3d Cir. 1997); *State v. Stewart's Ice Cream Co., Inc.*, 64 N.Y.2d 83, 86, 484 N.Y.S.2d 810, 811 (1984). In *State of New York v. Speonk Fuel, Inc.*, 3 N.Y.3d 720, 724, 786 N.Y.S.2d 375 (2004), the Court of Appeals held that a new claim accrues, and the statute begins to run, each time a payment is made, on a payment-by-payment basis.

Thus, in *Oliver Chevrolet, Inc. v. Mobil Oil Corp.*, 249 A.D.2d 793, 671 N.Y.S.2d 850 (3rd Dep't 1998), the court held that while damage claims were untimely, the plaintiffs' request for reimbursement for remediation costs "was timely," since it was governed by the six-year time limit, "whether premised upon allegations that defendant was a negligent party," or was a discharger liable under the Oil Spill Law. *Id.* at 795, 671 N.Y.S.2d at 852.

In *AL Tech Specialty Steel Corp. v. Allegheny International Credit Corp.*, 104 F.3d 601 (3d Cir. 1997), the Third Circuit held that the statute has not yet even begun to run for claims for future remediation costs.

6. CERCLA

CERCLA §113(g)(2) provides that actions under CERCLA §107 to recover costs of a removal action must be brought "within 3 years after completion of the removal action," while for remedial actions, suit must be filed "within 6 years after initiation of physical on-site construction of the remedial action." 42 U.S.C. §9613(g)(2). Further, CERCLA §113(g)(3), 42 U.S.C. §9613(g)(3) provides that no contribution action may be brought more than three years after either "(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or (B) the date of an administrative order under section 9622(g) of this title (relating to *de minimis* settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages."

In *Schaefer v. Town of Victor*, 457 F.3d 188 (2d Cir. 2006), the Second Circuit held that any activity which is consistent with the ultimate remedy will trigger the statute of limitations on a CERCLA §107 cost recovery action. So, activities that "were specifically incurred in contemplation of, and were consistent with, the permanent remedy" triggered the statute of limitations. 457 F.3d at 204.

B. Preemption

The ability of a governmental agency to proceed through administrative action does not necessarily preempt the right to pursue common law remedies. *State v. Schenectady Chemicals, Inc.*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (3d Dep't 1984); *State v. Monarch Chemicals, Inc.*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (3d Dep't 1982). However, some statutes may preempt common law claims. For example, the Federal Insecticide, Fungicide and Rodenticide Act preempts claims for failure to warn due to inadequacy of pesticide labeling or fraud, since that is governed by the statute, *Bates v. Dow Agrosciences*, 544 U.S. 431, 125 S.Ct. 1788 (2005); *June v. Laris*, 205 A.D.2d 166, 618 N.Y.S.2d 138 (3d Dep't 1995), *app. dis'd* 85 N.Y.2d 955, 628 N.Y.S.2d 47 (1995), but not other claims like defective design, defective manufacture, negligent testing, and breach of express warranty. *Bates v. Dow Agrosciences*, 544 U.S. 431, 125 S.Ct. 1788 (2005); *State v. Fermenta ASC Corp.*, 238 A.D.2d 400, 656 N.Y.S.2d 342 (2d Dep't 1997), *mot. den'd* 90 N.Y.2d 810, 664 N.Y.S.2d 271 (1997).

If CERCLA covers a site, claims in the same nature as CERCLA contribution, such as restitution and contribution, may be preempted. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998). However, CERCLA does not generally preempt common law claims for damages not available under CERCLA. *Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000).

IX. State Law Remedies

A wide variety of remedies may be awarded to a successful plaintiff in a tort action. These remedies have recently been extended by application of the particular problems of "toxic tort" cases involving chemical contamination, and will also apply in other sorts of disaster cases.

Normally, a plaintiff sues for damages, *i.e.* an award of money paid by the defendant. Compensatory damages compensate a plaintiff for his or her losses due to personal injury or property damage. *Sock v. 330 Hull Realty Corp.*, 225 A.D.2d 365, 638 N.Y.S.2d 654 (1st Dep't 1996) (verdict of $2,250,000 for personal injuries, including future pain and suffering, due to lead poisoning). In general, "the defendant is liable for 'reasonably anticipated' consequential damages which may flow later from that invasion although the invasion itself is 'an injury too slight to be noticed at the time it is inflicted.'" *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 136, 477 N.Y.S.2d 242, 247 (4th Dep't 1984).

A. Property Damages

The general rule is that "[a] person whose property is taken, damaged, or destroyed by the negligent or wrongful act or omission of another is entitled to compensation for the damage sustained in such a sum as will restore him as nearly as possible to his former position." 36 N.Y. Jur.2d *Damages* §72. "[T]he proper measure of damages for permanent injury to real property is the lesser of the decline in market value and the cost of restoration." *Jenkins v. Etlinger*, 55 N.Y.2d 35, 39, 447 N.Y.S.2d 696, 698 (1982); *Scribner v. Summers*, 138 F.3d 471 (2d Cir. 1998). Permanent property damages can include loss due to stigma that remains even after a property is cleaned up. *Nashua Corp. v. Norton Company*, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. 1997); *In Re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994).

Where injury to property is temporary, damages are measured by "the reduction of the rental or usable value of the property." *Guzzardi v. Perry's Boats, Inc.*, 92 A.D.2d 250, 460 N.Y.S.2d 78, 82 (2d Dep't 1983). Even if there is a partial restoration, property damages include both damages due to the temporary loss in rental value, as well as "further damage, if any, caused." *Mead v. State*, 24 A.D.2d 1043, 265 N.Y.S.2d 302, 303 (3d Dep't 1965).

Suppose Smith Chemical Corp. pollutes Jones' property, and as a result Jones develops a lung disease, and even after a partial cleanup his $200,000 property is now only worth $150,000. A jury might award him $200,000 as compensation for his personal injuries, plus $50,000 in property damages. Note that property damages may include two elements -- the permanent loss in value, as determined by appraisal, as well as the temporary loss of value, which might be measured by the rental value of the property. In this example, Jones might also be entitled to the lost rental value of his property while he awaited the cleanup. Likewise, a personal injury award may include compensation for such items as the present value of the loss of future earnings, and pain and suffering.

B. Other Economic Damages

Other economic damages may flow from property contamination or disasters. In *Syracuse Cablesystems, Inc. v. Niagara Mohawk Power Co.*, 173 A.D.2d 138, 578 N.Y.S.2d 770 (4th Dep't 1991), the plaintiffs (including cable companies and law firms) were forced to move their businesses out of a building for a month due to PCB contamination caused by an explosion of defendant's transformer. They were allowed to make claims for damages due to interruption of their businesses, including lost profits, and additional business expenses such as "rental expense, lost subscriber

revenue, lost installation revenue, employee overtime, lost sales commission, employee wages and additional advertising expense." Under the doctrine of avoidable consequence, a plaintiff may be able to recover for the costs of such things as bottled water, testing water and installing filters in order to avoid damages from a contaminated water supply. *Leicht v. Town of Newburgh Water District*, 213 A.D.2d 604, 624 N.Y.S.2d 506 (2d Dep't 1995).

C. Injunction

A plaintiff may also be able to obtain the "equitable" remedy of injunction, if he or she can show "irreparable harm." *Poughkeepsie Gas Co. v. Citizens' Gas Company*, 89 N.Y. 493, 497-8 (1882). An injunction is, in effect, a court order prohibiting the defendant from continuing offensive conduct, or requiring the defendant to take certain action. For example, a court may require a polluter to stop polluting, or to clean up a spill.

Since an injunction is an equitable remedy, the court must balance the equities of the situation, and take into consideration whether the plaintiff has an adequate remedy "at law" by obtaining damages. For instance, a court might allow a factory to continue to emit air pollution which caused a private nuisance due to the public interest in maintaining the local economy, but still require the factory to pay damages to the injured neighbors. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312 (1970).

D. Punitive Damages

Punitive damages go beyond the amount necessary to make a plaintiff "whole," and are assessed to deter the defendant and other persons from similar conduct. Generally, punitive damages are only allowed if a defendant acted with a "conscious disregard of the rights of others or conduct so reckless as to amount to such disregard." *Welch v. Mr. Christmas Inc.*, 57 N.Y.2d 143, 454 N.Y.S.2d 971 (1982).

E. Attorney's Fees

Under the "American rule," attorney's fees are not recoverable by a successful litigant. The only exceptions are cases of "outrageous" conduct by a defendant, or where a statute specifically provides for recovery of fees by a successful party. A number of environmental statutes, as well as civil rights laws, have attorney's fee provisions that citizen plaintiffs can utilize, and federal and many state civil procedure codes provide for attorney's fees in "frivolous" cases.

F. Other Damages

A number of other types of damages are available. Obviously, personal injuries are available. *See, e.g., Hancock v. 330 Hull Realty Corp.*, 225 A.D.2d 365, 638 N.Y.S.2d 654 (1st Dep't 1996). However, damages are not available for the mere increase in risk of developing a disease due to exposure to a toxic substance, but rather the damages can only be awarded when a disease is actually manifested. *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 (4th Dep't

1984); *Gerardi v. Nuclear Utility Services*, 149 Misc.2d 657, 566 N.Y.S.2d 1002 (Sup. Ct. Westchester Co. 1991).

Exposure to a chemical may create a substantial enough risk of future disease that regular medical checkups would be warranted. In such a case, some courts in New York and other states have allowed a recovery for the cost of future "medical monitoring." This is not damages for increased risk, but merely to pay for the necessary cost of addressing the risk. Courts may allow such an award if the risk is sufficiently significant that it is reasonably necessary that a plaintiff obtain periodic medical examinations to monitor his or her health and facilitate early diagnosis and treatment of diseases which might be caused by the exposure. *See, e.g., Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 (4th Dep't 1984); *Gibbs v. E.I. DuPont De Nemours & Co., Inc.*, 1995 W.L. 60788 (W.D.N.Y. 1995); *Patton v. General Signal*, 984 F.Supp. 666 (W.D.N.Y. 1997); *cf. Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S.424, 117 S.Ct. 2113 (1997) (medical monitoring not available under the Federal Employers' Liability Act). Many courts have required that where medical surveillance is appropriate, the court should administer a trust funded by the defendant to pay out medical expenses, rather than awarding money directly to the plaintiff. *See Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987).

Courts have long recognized that an element of damage for nuisance is compensation for discomfort or annoyance. In toxic tort cases, this principle has been extended to allow recovery for "loss of quality of life," including damages for "'inconveniences, aggravation, and unnecessary expenditures of time and effort... as well as other disruption in their lives.'" *Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987); *see also* 42 *Proof of Facts 2d* 247 §7; *CARE v. Southview Farm*, 834 F. Supp. 1422 (W.D.N.Y. 1993), *rev'd on other grounds* 34 F.3d 114 (2d Cir. 1994), *cert. den'd* 514 U.S. 1082, 115 S.Ct. 1793 (1995). This might involve, for example, compensation for the disruption of home life due to the necessity of using bottled water, or the inability to invite a guest to visit one's home. This may be considered an element of property damages. *Scribner v. Summers*, CIV No. 6094L (W.D.N.Y. 1996), *mod. Scribner v. Summers*, 138 F.3d 471 (2d Cir. 1998).

G. Oil Spill Law

Generally, a discharger is liable for "all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained." Navigation Law §181(1); *see also* Navigation Law §181(5). "Indirect damages" include "all costs associated with the cleanup and removal of a discharge." *AMCO International, Inc. v. Long Island Railroad Co.*, 302 A.D.2d 338, 754 N.Y.S.2d 655 (2d Dep't 2003). Damages may also include natural resource damages, "[l]oss of income or impairment of earning capacity due to damage to real or personal property," loss of tax revenues to local governments, and interest on loans obtained for the purpose of "ameliorating the adverse effects" of a discharge. Navigation Law §181(2).

The Third Department has held that personal injuries are not available under the Oil Spill Law, and that an injured party's damages are limited to "economic loss." *Wever Petroleum Inc. v. Gord's Ltd.*, 225 A.D.2d 27, 649 N.Y.S.2d 726 (3d Dep't 1996); *Strand v. Neglia*, 232 A.D.2d 907, 649 N.Y.S.2d 729 (3d Dep't 1996); *cf. Snyder v. Jessie*, 145 Misc.2d 293, 546 N.Y.S.2d 777 (Sup.

Ct. 1989) *rev. in part on other grounds*, 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991) (allowing claim that sought personal injuries). Counsel fees are recoverable as an "indirect damage" under the Oil Spill Law. *Strand v. Neglia*, 232 A.D.2d 907, 649 N.Y.S.2d 729 (3d Dep't 1996); *AMCO International, Inc. v. Long Island Railroad Co.*, 302 A.D.2d 338, 754 N.Y.S.2d 655 (2d Dep't 2003); *cf. Gettner v. Getty Oil Co.* 266 A.D.2d 342, 701 N.Y.S.2d 64 (2d Dep't 1999), *lv. den'd* 95 N.Y.2d 860, 714 N.Y.S.2d 704 (2000) (lease did not allow the recovery of attorney's fees for litigation). In *AMCO International, Inc. v. Long Island Railroad Co.*, 302 A.D.2d 338, 754 N.Y.S.2d 655 (2d Dep't 2003), the Second Department awarded attorney's and expert's fees (except those connected with a collateral tax certiorari proceeding) except for "their appraiser, recovery for which is not warranted under the circumstances."

X. Insurance Claims

There are several different types of insurance that may apply to environmental problems. While many insurance policies do not cover environmental remediation and damages, insurance can be a valuable tool to address environmental issues.

A. General Liability Insurance

Liability insurance covers claims made by third parties, normally including not only lawsuits filed in court, but also claims made by environmental agencies, such as EPA. *Griffith Oil Co., Inc. v. National Union Insurance Co. of Pittsburgh, Pa.*, 15 A.D.3d 982, 789 N.Y.S.2d 352 (4th Dep't 2005); *Avondale Industries, Inc. v. Commercial Union Ins. Co.*, 887 F.2d 1200 (2d Cir. 1989). A typical general liability policy covers damages the insured is legally obligated to pay as the result of an "occurrence" taking place during the policy period that results in bodily injury or property damage. Cleanup costs incurred are normally considered "property damage" covered under a general liability policy. *Don Clark, Inc. v. U.S. Fidelity and Guaranty Co.*, 145 Misc.2d 218, 545 N.Y.S.2d 968 (Sup. Ct. Onondaga Co. 1989); *United States Aviex Co. v. Travelers Insurance Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (Mich. App. 1983).

Most policies provide that an "occurrence" must be accidental, being "neither expected nor indented from the standpoint of the insured." However, if the damage is an unexpected result of intentional act, such as groundwater pollution resulting from operation of a landfill, there may be coverage. *City of Johnstown v. Bankers Standard Insurance Co.*, 877 F.2d 1146 (2d Cir. 1989).

Normally, a liability policy only covers bodily injury or property damage that take place during the term of the policy. An exception is "claims made" policies, which cover claims made during the term of the policy. In a case involving historic pollution resulting in personal injury or property damage, states differ in their interpretation of whether a policy is triggered by (1) initial manifestation or discovery of the injury or damage; (2) first exposure to the contaminant; (3) actual injury, or "injury-in-fact"; or (4) any of the first three, or a "continuous" trigger. While states like New Jersey have adopted the "continuous" trigger theory, *Owens-Illinois v. United Insurance Co.*, 138 N.J. 437 (1994), New York recognizes the "injury-in-fact" trigger, so that the policy is triggered when injury first occurs, although successive policies in later years may also be triggered if damage

is ongoing. *Maryland Casualty Co. v. W.R. Grace & Co.*, 23 F.3d 617 (2d Cir. 1993), *cert den'd* 513 U.S. 1052 (1994). Typically, once an environmental issue is discovered, it makes sense to immediately notify any insurer whose policy might be triggered under any theory.

B. Duty to Defend

A liability policy normally includes two duties. These are the duty to defend – meaning to provide legal counsel to represent the insured to defend them from claims, including claims that may ultimately prove to be either invalid, or outside the scope of the policy, and the duty to indemnify – meaning to pay any costs or damages the insured must pay if the claim is upheld.

It is well-established that "an insurer's duty to defend... is 'exceedingly broad.'" *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 648, 593 N.Y.S.2d 966, 969 (1993), *citing Colon v. Aetna Life & Casualty Insurance Co.*, 66 N.Y.2d 6, 8, 494 N.Y.S.2d 688 (1985). "The duty is broader than the insurer's obligation to indemnify: '[t]hough policy coverage is often denominated as 'liability insurance', where the insurer has made promises to defend 'it is clear that [the coverage] is, in fact, 'litigation insurance' as well.'" *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 648, 593 N.Y.S.2d 966, 969 (1993), *citing Seaboard Surety Co. v. Gillette Co.*, 64 N.Y.2d 304, 311-312, 486 N.Y.S.2d 873, 876-877 (1984). Where the "claims arguably arise from a covered occurrence," the policyholder must be defend. *Griffith Oil Co., Inc. v. National Union Insurance Co. of Pittsburgh, Pa.*, 15 A.D.3d 982, 789 N.Y.S.2d 352 (4th Dep't 2005).

C. Pollution Exclusions

While historically many policies covered environmental spills, beginning in the early 1970's, most general liability policies included a pollution exclusion, which excluded coverage for pollution unless it was "sudden and accidental." By the late 1980's, most general liability policies included an "absolute" pollution exclusion, which excluded all or almost all pollution events.

The older policies are still very important, since often historic contamination is discovered that can be traced back to the before the time of the absolute pollution exclusion. In some states, the exclusion for "sudden and accidental" has been construed to mean that both "sudden" events and "accidental" events are covered – so only intentional events are excluded. *See, e.g., Morton International, Inc. v. General Accident Ins. Co.*, 134 N.J. 1 (1993)

However, the New York Court of Appeals has been less favorable to insureds, deciding that there is a "temporal element" to the "sudden and accidental" exception to the pollution exclusion. *Northville Industries Corp. v. National Fire Insurance Co. of Pittsburgh, Pa.*, 89 N.Y.2d 621, 635, 657 N.Y.S.2d 564, 569 (1997); *see also Ziankoski v. Boonville Oil Co., Inc.*, 241 A.D.2d 951, 661 N.Y.S.2d 322 (4th Dep't 1997).

Thus, the "sudden and accidental" exception did not cover a pinhole leak in an underground oil tank where there was no showing of "an abrupt, environmentally significant discharge of pollutants could be inferred," and "the allegations regarding the temporal aspects of the petroleum leakages actually describe them as having occurred continuously over a period of many years."

However, in other situations, the "pollution exclusion" does not bar claims arising out of contamination. *See, e.g., Petr-All Petroleum Corp. v. Fireman's Ins. Co. of Newark, N.J.*, 188 A.D.2d 139, 593 N.Y.S.2d 693 (4th Dep't 1993); *Family Service of Rochester, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 149 Misc.2d 48, 562 N.Y.S.2d 358 (Sup. Ct. Monroe Co. 1990). Further, if not "pollution" is involved, such as interior contamination from lead paint or asbestos, the pollution exclusion might not be applicable. *Westview Assocs. v. Guar. National Ins. Co.*, 95 N.Y.2d 334, 717 N.Y.S.2d 75 (2000); *Continental Casualty v. Rapid-America Corp.*, 80 N.Y.2d 640, 593 N.Y.S.2d 966 (1993).

Even if a claim may seemingly be encompassed by an exclusion, it often makes sense to make a claim on the policy anyways, since "exclusions are generally construed narrowly in exceptions to exclusions are generally construed broadly to define coverage." *Borg-Warner Corp. v. Insurance Company of North America*, 174 A.D.2d 24, 33, 577 N.Y.S.2d 953 (3d Dep't 1992); *Thomas J. Lipton, Inc. v. Liberty Mutual Insurance Company*, 34 N.Y.2d 356, 357 N.Y.S.2d 705 (1974). Any ambiguity must "be construed against the insurer, particularly when found in an exclusionary clause." *Ace Wire & Cable Co. v. Aetna Casualty & Surety Co.*, 60 N.Y.2d 390, 398, 469 N.Y.S.2d 655, 658 (1983). Furthermore, "where a particular provision is susceptible to more than one reasonable interpretation, all ambiguities must be resolved in favor of the insured." *Kula v. State Farm Fire and Casualty Co.*, 212 A.D.2d 16, 19, 628 N.Y.S.2d 988, 990 (4th Dep't 1995).

D. Other Defenses

Often, an insurance company raises "late notice" as a defense. An insured normally has a duty to notify their insurer as soon as practicable both with regard to an occurrence that may give rise to a claim, and then to a claim. In some states, like New York, late notice precludes coverage even if there is no prejudice to the insurer, *Olin Corp. v. Insurance Co. of North* America, 743 F. Supp. 1044, 1053 (S.D.N.Y. 1990), *aff'd* 929 F.2d 62 (2d Cir. 1991), while in other states prejudice must be shown. *Solvents Recovery Service of New England, Inc. v. Hartford Ins. Co.*, 218 N.J. Super. 49 (N.J. App. Div. 1987). Thus, once contamination or another environmental problem is discovered, it is critical to give notice to all insurance carriers as soon as possible, even before an actual claim is made or suit is filed.

Also, general liability policies usually do not cover damage to the insured's "own property." Nonetheless, since the groundwater is normally owned by the state, pollution of groundwater on the insured's own property may be covered. *State of N.Y. Central Mutual Fire Ins. Co.*, 147 A.D.2d 77, 542 N.Y.S.2d 402 (3d Dep't 1989); *United States Aviex Co. v. Travelers Insurance Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (Mich. App. 1983).

E. Other Types of Claims and Policies

Some statutes allow a direct claim against a polluter's insurer. For example, under Navigation Law §190 contained in the New York Oil Spill Law, not only the state, *State of N.Y. Central Mutual Fire Ins. Co.*, 147 A.D.2d 77, 542 N.Y.S.2d 402 (3d Dep't 1989), but also an injured party may bring suit directly against a discharger's insurer. *Snyder v. Newcomb Oil Co., Inc.*, 194

A.D.2d 53, 603 N.Y.S.2d 1010 (4th Dep't 1993). Late notice is not necessarily a defense to this claim. *State v. Taugco, Inc.*, 213 A.D.2d 831, 623 N.Y.S.2d 383 (3d Dep't 1995).

Besides liability coverage for third-party claims, insurance policies may include "first-party" coverage for property damages. While these policies may cover pollution if the damage resulted from a covered peril (like fire or motor vehicle accident), these policies also typically include pollution exclusions.

XI. Proof

A. Burden of Proof

The courts have recently considered whether or not "alternative liability" applies. In a California case arising under RCRA, where it was not clear which past or present owner controlled the tanks at the time they leaked, the burden of proof shifted to the defendants to show they were not responsible. *Zands v. Nelson*, 779 F.Supp. 1254 (S.D. Cal. 1991).

B. Expert Proof

The Federal Rules of Evidence ("FRE") govern the admissibility of experts' opinions in federal court. Under FRE Rule 702, an expert's opinion will only be admissible if he or she is determined to be "qualified as an expert by knowledge, skill, experience, training or education." Under FRE Rule 703, an expert may rely upon non-admissible evidence (e.g. hearsay evidence that he or she did not personally observe, such as studies by researchers) "if it is of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject." Thus, the question under Rule 703 is not whether the expert's opinion is reliable, but rather the data he or she bases his or her opinion upon is reliable.

Rule 702 also requires that the evidence be "helpful." Some courts have construed this as a test of whether or not the expert used "well-founded methodology," or whether his or her analysis is "reliable." Similarly, F.R.E Rule 403 would bar relevant evidence "if its probative value is substantially outweighed by the damages of unfair prejudice, confusion of the issues, or misleading the jury." Some courts have used these standards to exclude expert opinions characterized as "junk science" by defendants. Other courts have been more liberal in allowing novel scientific theories and methodologies, rejecting the "strict scrutiny" approach, leaving it for the jury to choose the winner of the "battle of the experts."

In *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), the U.S. Supreme Court held that "general acceptability" or "peer review" of a scientific theory, while helpful, is not necessary for it to be admissible, and that it is, in general, up to a jury whether to give credibility to scientific theories. Nonetheless, the trial judge acts as a "gate keeper," and may hold a *Daubert* hearing to screen out expert testimony from being presented to the jury. Although *Daubert* involved scientific proof, its flexible standard applies to all experts, including engineers. *Kumho Tire Co. v. Carmichael*, 526 U.S.137, 119 S.Ct. 1167 (1999). An appellate court may only reverse a trial court's decision whether to admit scientific evidence if it finds an abuse of discretion.

General Electric Co. v. Joiner, 522 U.S. 136,118 S.Ct. 512 (1997). In *Olindo Enterprises, Inc. v. City of Rochester*, 2008 WL 686259 (W.D.N.Y.2008), the district court allowed admission of the opinion of an expert in environmental forensics on the source of ash landfilled on a contaminated site.

While *Daubert* rejected the test for admissibility established in *Frye v. United States*, 293 F. 1013 (a lie detector case), finding it overruled by the Federal Rules of Evidence, the New York Court of Appeals still follows *Frye*, since FRE does not apply. Thus, under the *Frye* test in New York courts, "expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field." *People v. Wesley*, 83 N.Y.2d 417, 422, 611 N.Y.S.2d 97, 100 (1994).