

**BROKERS NOTE:
PURCHASER OR SUCCESSOR LIABILITY FOR CONTAMINATION
CLEANUP UNDER CERCLA LIMITED**

Since the mid-80s, some of the most hotly contested clauses in property sale documents are the successor liability and indemnity clauses. This is so because of the real risk for a purchaser to assume, inadvertently, clean up liabilities for undiscovered contamination to the property under CERCLA (Comprehensive Environmental Response, Compensation and Liability Act). Attempts to avoid transfers of liability have sometimes reached epistemological levels, where attorneys will recommend that clients treat each property purchased as potentially tainted property, form a separately maintained corporation or limited liability company to hold the property, such that the corporation's assets can be transferred to the purchaser, and dissolve the corporation, thereby allowing the purchaser to "continue" the business of the corporation by purchasing corporate assets, but avoiding corporate liabilities under California law.

The 9th Circuit has upheld the theory behind this method of voiding successor liability for cleanup costs under CERCLA in *AT&SF Railway Co. v. Brown and Bryant, Inc.*, 97 Daily Journal D.A.R. 15645 (9th Cir. 1997). Brown and Bryant, Inc. ("B&B") contaminated property it leased from plaintiff AT&SF Railway Co. ("Railroad"). B&B could not successfully complete the cleanup, and sold its equipment and assets to PureGro, a competitor. The EPA ordered Railroad to clean up the contamination, which it did; then Railroad sued PureGro to recover its losses. PureGro defended, claiming it purchased hard assets and equipment only, not liability for prior corporate activities. Railroad claimed that because PureGro "substantially continued" the business of the seller (B&B), PureGro was "substantially the same as the seller, and PureGro should be liable for the cleanup under federal law." California state law does not permit successor liability under this theory.

The 9th Circuit agreed with PureGro that California law should be applied to the transfer of business assets, and refused to expand and apply the federal "substantial continuation" theory to require PureGro to reimburse Railroad.

Setting aside the basic unfairness of Railroad getting stiffed for environmental cleanup of contamination it did not create, the holding of this case can be of significant assistance to developers, brokers, title insurers and transactional attorneys. The issue of whether state or federal law applies to a given transaction also comes up frequently in land title and boundary cases. However, various federal circuits have applied federal law over state law in CERCLA litigation. If the theory of B&B is sustained by the Supreme Court, sales of industrial and farm property will regularly become stepped transactions, where the corporate entity is formed, takes title and uses property, then transfers corporate assets instead of real property to its purchaser.