COVID-19 WEBINAR SERIES

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Financial Impacts of COVID-19:
Environmental Issues in Bankruptcy (Part 1)

David Buente, *Partner*
Environmental

Laurence Kirsch, *Partner*
Environmental

Maureen Crough, *Counsel*
Environmental

Genevieve Weiner, *Counsel*
Restructuring

SIDLEY

Today's Speakers

David Buente

Partner, Environmental
Sidley

Maureen Crough

Counsel, Environmental
Sidley

Laurence Kirsch

Partner, Environmental
Sidley

Genevieve Weiner

Counsel, Restructuring
Sidley

Agenda

- Filing a Bankruptcy Petition
- Automatic Stay and Police and Regulatory Powers Exception
- Rejection of Executory Contracts
- Priority of Claims
- Estimation of Environmental Claims
- Fraudulent Transfer

Commencing a Bankruptcy Case — Early Considerations

- **Why do companies file for bankruptcy?**
  - Not enough liquidity
  - Too much debt
  - Industry/company decline
  - Mismanagement and fraud
  - Catastrophic event
  - Address significant litigation
  - Preservation/maximization of value
  - Effectuate a transaction — sale or restructure
  - Reject above-market contracts and lease

- ***Insolvency is not a requirement***
- ***Need a valid purpose – reorganization or liquidation***
- ***Good faith***

Commencing a Bankruptcy Case — Filing the Petition

- **Title 11 of the United States Code**
  - Various chapters

- **Voluntary Petition**
  - Company files with Bankruptcy Court
  - Individual petition filed for each debtor entity
  - Includes basic information about the debtor entity, plus financial information about the entity: the number of creditors, amount of assets and debt, etc.

- **Involuntary Petition**
  - A case can also be commenced by a company's creditors
  - Technical requirements for filing

The Bankruptcy Estate

- Once the petition is filed, the bankruptcy court takes jurisdiction over all things that constitute “property of the estate”
- This concept is very broadly defined
  - Property of the estate = “All legal or equitable interests of the debtor in property as of the commencement of the case”
- After a bankruptcy case has commenced, it must be determined who has rights relating to the property of the estate
- Creditors file proofs of claim
- Broadly speaking, there are three types of rights
  - Secured claims
  - Unsecured claims (including pre-petition priority claims and post-petition administrative claims)
  - Interests
- The Bankruptcy Code establishes the priority scheme/waterfall for payment

Automatic Stay — Police or Regulatory Powers Exception

- **Generally** – Once a petition for relief under the Bankruptcy Code has been filed, an automatic stay is imposed. It essentially prohibits actions to collect debts owed by the debtor or secured by its property.

- **Exception to Automatic Stay with Environmental Implications**
  - Governmental Exercise of Police or Regulatory Powers (11 U.S.C. § 362(b)(4))
    - Applicable only to actions instituted by the government
    - With regard to environmental law, includes*:*
      - commencement or continuation of an action for enforcement of regulatory or police powers
      - enforcement of a non-monetary judgment obtained in a governmental action to enforce police or regulatory power
    - Does not include action to collect a monetary judgment

Automatic Stay — Police or Regulatory Powers Exception (cont'd)

- Key question is whether the government is actually taking a police or regulatory action rather than protecting a financial interest.
- Exception encompasses a wide range of governmental actions under environmental law:
  - Compliance obligations requiring expenditures – Government can compel the expenditure of funds to prevent future harm or allow compliance with environmental law:
    - *Safety-Kleen v. South Carolina Board of Health and Environmental,* 274 F.3d 846 (4th Cir. 2001) (order requiring an operator of a hazardous waste landfill in bankruptcy to obtain required financial assurances or cease operating was not subject to an automatic stay; purpose of financial assurance regulations was "to deter environmental misconduct and to encourage the safe design and operation of hazardous waste facilities").
    - *New York v. Mirant,* 300 B.R. 174 (S.D.N.Y. 2003) (automatic stay did not preclude court from entering a Clean Air Act consent decree requiring debtor to expend over US$100 million because the funds would be used to comply with environmental law).
  - Pre-bankruptcy environmental remediation obligations to prevent harm – A debtor operating in bankruptcy can be required to remediate environmental harm that occurred pre-petition to prevent future harm, even though such remediation requires expenditure of funds. *See Penn Terra Ltd. v. Department of Envtl. Resources,* 733 F.2d 267 (3d Cir. 1984).

Automatic Stay — Police or Regulatory Powers Exception (cont'd)

- Exception also encompasses an action by the government *to reduce to judgment* costs incurred or to *assess* penalties:
  - *Cumberland Farms, Inc. v. Florida Dept. of Envtl. Protection,* 116 F.3d 16 (1st Cir. 1997) (affirmed imposition of penalties for environmental violations during bankruptcy; contrary result would be fundamentally unfair);
  - *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1024 (2d Cir. 1991) (action by municipality to recover its cleanup costs not stayed);
  - *United States v. LTV Steel Company,* 269 B.R. 576 (W.D. Pa. 2001) (action for penalties under the Clean Air Act for pre-bankruptcy violations was not stayed because key purpose of penalty action was to deter noncompliance); and
  - *United States v. Sugarhouse Realty, Inc.,* 162 B.R. 113 (E.D. Pa. 1993) (regulatory and police powers exception to automatic stay in bankruptcy was applicable to government's action for civil penalties for non-compliance with a consent decree).

- Exception does *not* encompass actual collection of penalties or other monetary awards. Collection must be pursued through the bankruptcy; *see, e.g., In re Commonwealth Companies, Inc.*, 913 F.2d 518 (8th Cir. 1990) (police power exception may permit the entry of a money-related judgment, but does not extend to its enforcement).

Executory Contracts and Unexpired Leases

- Subject to court approval, the Bankruptcy Code provides debtors with the ability to reject, assume, or assume and assign executory contracts and unexpired leases
  - A powerful tool for debtors
  - Rejection allows the debtor to convert burdensome, i.e., above-market, contract and lease obligations into unsecured claims against the estate
  - Leverage to consensually renegotiate
- What is an executory contract?
  - Not defined in the Bankruptcy Code
  - Most courts have adopted the “Countryman” definition:
    - A contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other
  - *So:*
    - There must be material obligations owing on both sides
    - A mere payment obligation is not executory

Executory Contracts and Unexpired Leases (cont'd)

- Debtor can pick and choose which contracts and leases to assume or reject
  - BUT: if a contract is assumed, the debtor must take the contract as a whole, i.e., cannot modify or leave behind undesirable terms
- Assumption requires that the debtor first cure any monetary breaches and provide adequate assurance that it can perform in the future
- If a contract or lease is rejected, the counterparty will have a claim for damages against the debtor's estate
- If the business is being sold through the bankruptcy, the debtor can generally assume and assign contracts and leases to a buyer
  - Certain restrictions apply for intellectual property and other specific types of agreements

Executory Contracts and Unexpired Leases (cont'd)

- Environmental-specific concerns
  - Environmental indemnification
    - Many contracts and leases contain environmental indemnification provisions
    - If the contract/lease is rejected, the counterparty is left with a general unsecured claim for damages resulting from the rejection
    - General unsecured claims are often entitled to pennies on the dollar, if anything
    - As such, any indemnification provisions would be essentially worthless
    - Instead of an indemnity, a holdback or escrow could provide more protection
  - PRP or other remedial agreements
    - Generally, these types of contractual claims do not receive any meaningful payments in bankruptcy

Leases — Other Bankruptcy Considerations

- When the debtor is the landlord/lessor and rejects an unexpired lease, section 365(h) of the Bankruptcy Code provides the tenant/lessee with the option of either:
  - (a) treating the lease as terminated (and asserting a claim for damages that flow from that breach), or
  - (b) remaining in possession of the lease for the duration of the lease term (under the same rental terms) and for any renewal or extension of such term that is enforceable by such lessee under nonbankruptcy law
- If the lessee elects to remain in possession of the property, lessee must continue to perform under the lease including paying rent.
- Aside from allowing the lessee to remain in possession, the debtor does not otherwise have to perform under the lease, for example by paying property taxes or utilities.
- Lessee can offset damages from the debtor's failure to perform its contractual obligations against the rent due under the lease.
- Complex issues can arise if the debtor seeks to sell leased property

Priority of Claims

- General Unsecured Claims
  - Entitled to distribution on pro rata basis with other general unsecured creditors after payment of secured and priority administrative claims
  - Includes monetary claims for pre-petition cleanup costs (past costs); *see, e.g., In re G-I Holdings, Inc.,* 308 B.R. 196 (D.N.J. 2004) (pre-petition indemnification obligation for remediation costs treated as general unsecured claim)
- Secured Claims
  - Afforded priority to the extent of collateral coverage
  - Example: debt secured by mortgage on real estate

Priority of Claims (cont'd)

- Priority Administrative Expenses
  - Expenses that:
    - are incurred post-petition by debtor or trustee; and
    - benefit or preserve the bankruptcy estate
  - Paid in full before distributions to general unsecured creditors or equity holders
  - Generally includes monetary claims for environmental costs incurred post-petition to:
    - address non-compliance of debtor's operations with environmental law; *see, e.g., Cumberland Farms, Inc. v. Florida Dept. of Envtl. Protection,* 116 F.3d 16 (1st Cir. 1997) (finding penalties imposed for environmental violations occurring during the bankruptcy an administrative expense)
    - address imminent danger to public health or the environment presented by contamination on debtor's property or to comply with a legal obligation requiring remediation on such property; *see, e.g., In re Coal Stripping, Inc.,* 222 B.R. 78 (Bankr. W.D. Pa. 1998) (administrative priority granted for mining reclamation costs because debtor had ongoing reclamation duty)
      - but costs to address pre-petition contamination may not receive administrative priority; *see, e.g., In re Hanna,* 168 B.R. 386 (B.A.P. 9th Cir. 1994) (no administrative priority for remediating petroleum contamination that occurred pre-petition)

Estimation of Claims in Bankruptcy

- One of the main functions of a bankruptcy proceeding is to resolve the demands that various creditors have against the bankruptcy estate – "claims."
- A "claim" under the Bankruptcy Code is defined very broadly, and includes any "right to payment, ***whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent,*** matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecure" (and including equitable relief as well).
- The Bankruptcy Code does not define the term "unliquidated," but court decisions define it as claims that are not subject to "ready determination and precision in computation of the amount due."
  - That is the case with most Superfund/cleanup liabilities for sites not yet cleaned up.
- How do the courts deal with claims that are contingent or unliquidated?
- Section 502(c) permits courts to ***estimate*** contingent or unliquidated claims where resolution of those claims outside of bankruptcy will "unduly delay" the bankruptcy proceedings.

Estimation of Claims in Bankruptcy (cont'd)

- KEY DISTINCTION – DIRECT CLAIMS BY THE GOVERNMENT VERSUS CONTRIBUTION CLAIMS BY ANOTHER PRP
  - Unliquidated claims may be estimated under Section 502(c)
    - For example: Superfund claims by the government against companies under Section 107(a) of CERCLA can be estimated where the government has not yet selected or implemented a remedy, quantified natural resource damages, or quantified its costs and damages for a site
    - Estimation often serves to place a value on the claim both for evaluating the feasibility of a reorganization plan and as a cap on the debtor's liability (case law varies)

  BUT

  - Contingent and unliquidated claims for "***contribution*** of an entity that is liable with the debtor" are generally ***disallowed*** under Section 502(e)(1)(B)
    - For example: A contribution claim by one CERCLA PRP liable for a site against another PRP that is liable "with the debtor" for that same site
    - Such claims may not be allowed and are not subjected to estimation proceedings

Why Estimation Can Be a Valuable Tool in Addressing Environmental Claims in Bankruptcy

Estimation can eliminate or ameliorate some of the key challenges PRPs have in dealing with EPA on Superfund remedies, creating a more even playing field

Challenges Facing PRPs in CERCLA	
PRP cannot obtain pre-enforcement review of any EPA remedy decision	
Deferential “arbitrary and capricious” standard of review of a remedy decision made by EPA	
Review of EPA decision is only based on the “administrative record”	
Bottom Line: Independent review often too limited, too late or too constrained to make a difference	

Why Estimation Can Be a Valuable Tool in Addressing Environmental Claims in Bankruptcy (cont'd)

Estimation can eliminate or ameliorate some of the key challenges PRPs have in dealing with EPA on Superfund remedies, creating a more even playing field

Challenges Facing PRPs in CERCLA	Effect of Estimation
PRP cannot obtain pre-enforcement review of any EPA remedy decision	Estimation provides an opportunity for pre-enforcement review of EPA remedy decisions by a neutral third party
Deferential "arbitrary and capricious" standard of review of a remedy decision made by EPA	EPA remedy decision may not have been made yet, so there is no EPA decision to be deferred to
Review of EPA decision is only based on the "administrative record"	There either is no administrative record or an incomplete administrative record, so review must be more far-reaching
Bottom Line: Independent review often too limited, too late or too constrained to make a difference	**Bottom Line:** More opportunity for meaningful review by a neutral third party at a time when it can really matter

Estimation — How Estimation Proceedings Work

- Estimation proceedings
  - Government typically takes aggressive positions in estimations, especially where it knows that it will receive only a general unsecured claim from which it will recover only cents on the dollar.
    - E.g., for multi-party sites, EPA often pursues the full amount of its costs from a debtor based on joint and several liability
  - Courts have broad discretion to set procedures for the estimation proceeding
  - Generally, estimation proceedings look like a mini-trial with expert witnesses
  - Rules of evidence may be much more relaxed. For example:
    - Often have fact testimony submitted in advance in writing
    - Expert testimony may be through the expert reports
    - Court time may be used for cross-examination and argument only
  - In the *National Gypsum* bankruptcy, the court tried liability for three Superfund sites in three days of court time
  - In *ASARCO* bankruptcy, bankruptcy court held estimation hearings for three sites for which EPA sought US$6 billion. The hearings lasted 13 days and involved 50 witnesses and 1,400 exhibits

Examples of Impact of Estimation Proceedings

- *National Gypsum* case
  - For one site, for which EPA claimed US$80 million, the court ruled that the debtor had no liability whatsoever; for two other sites for which liability was admitted, the court estimated EPA's liability at a fraction of the amount sought by EPA.
  - The court found that the company's proposed remedy was ***more consistent*** with the NCP than the remedy argued for by EPA.
- *ASARCO* case
  - The *ASARCO* bankruptcy involved claims for numerous sites. For the three largest sites, EPA had claimed US$6 billion.
  - After the estimation hearings, ASARCO and the government settled. For the three large sites, the agreed claims were US$736 million in general unsecured claims and a US$14 million administrative claim (as compared to the US$6 billion demanded by EPA).

Fraudulent Transfer — Overview

- Recovery Actions
- Potential Causes of Action
- Actual Fraud
  - Definition
  - Cases
- Constructive Fraud
  - Definition
  - Cases

Fraudulent Transfer — Recovery Actions

- EPA uses both the Federal Debt Collection Procedures Act (FDCPA) and State Uniform Fraudulent Transfer Acts (UFTA) (known as Uniform Voidable Transactions Act in some states) to recover cleanup costs; states and private creditors can use UFTA.
- EPA frequently relies on both causes of action.
- Examples:
  - FDCPA: *U.S. v. Barrier Indus., Inc.*, 991 F. Supp. 678 (S.D.N.Y. 1998); in re Tronox 09-10156 (Bky S.D.N.Y.) (Dec. 12, 2013).
  - UFTA: *U.S. v. Vertac Chem. Corp.*, 671 F. Supp. 595 (E.D. Ark. 1987) (Arkansas and Tennessee law) (vacated on other grounds); *U.S. v. Dickerson*, 790 F. Supp. 1583 (M.D.Ga. 1992) (Georgia law and FDCPA); in re Tronox.
- In some instances, the Bankruptcy Code can provide an independent basis for a fraudulent transfer claim involving environmental liability.

Fraudulent Transfer (Generally)

- Two theories of fraudulent transfer:
  - Actual Fraud: transfer made with intent to hinder creditors
  - Constructive Fraud: transfer made/obligation incurred without ability to pay
- The theories implicate two avenues of proof:
  - Transferor's intent
  - Reasonableness of the consideration transferee received and transferee's ability to pay

Federal Debt Collection Procedures Act
28 U.S.C. § 3304(b)(1)

- [A] transfer made or obligation incurred by a debtor is fraudulent as to a debt to the United States, whether such debt arises before or after the transfer is made or the obligation is incurred, if the debtor makes the transfer . . .

  A. with actual intent to hinder, delay, or defraud a creditor; or

  B. without receiving a reasonably equivalent value in exchange for the transfer or obligation if the debtor:

     i. was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small . . . ; or

     ii. intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

Federal Debt Collection Procedures Act
28 U.S.C. § 3306

- In an action or proceeding under this subchapter for relief against a transfer or obligation, the United States . . . may obtain:
  1. avoidance of the transfer or obligation to the extent necessary to satisfy the debt to the United States;
  2. a remedy under this chapter against the asset transferred or other property of the transferee; or
  3. any other relief the circumstances may require.

Uniform Fraudulent Transfer Act

- A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
  1. with actual intent to hinder, delay, or defraud any creditor of the debtor; or
  2. without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
     a. was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or
     b. intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

Uniform Fraudulent Transfer Act (cont'd)

- In an action for relief against a transfer or obligation . . . , a creditor . . . may obtain:
  1. avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim; or
  2. [remedies against property of the transferee]; or
  3. subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
     a. an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property, or
     b. appointment of a receiver to take charge of the asset transferred or of other property of the transferee, or
     c. any other relief the circumstances may require.

Fraudulent Transfer — Timing

- The debt need not have been reduced to judgment at the time of the transfer:
  - Both statutes apply *"whether the creditor's claim arose before or after the transfer was made"*
- A suit would be timely:
  - FDCPA SOL: six years after the transfer was made or obligation was incurred (28 U.S.C. § 3306(b)).
  - State SOLs: typically three or four years after the transfer was made or obligation was incurred.
  - Bankruptcy Code: typically two years after the transfer was made or obligation was incurred.

Fraudulent Transfer — Definition and Proof

- Definition
  - A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, including the United States, if the debtor made the transfer or incurred the obligation *with actual intent to hinder, delay or defraud a creditor of the debtor.*

- Proof
  - Direct evidence of fraudulent intent or intent to hinder or delay.
    - Circumstantial evidence ("badges of fraud")
      - Non-exclusive list codified at 28 U.S.C. § 3304(b)(2)
      - One badge of fraud is enough. *U.S. v. Teeven*, 862 F. Supp. 1200, 1215 (D.Del. 1992); *Payne v. Gilmore,* 382 P.2d 140, 143 (Okla. 1963)
  - Proof of insolvency is not required. *Teeven*, 862 F. Supp. at 1215 (D. Del. 1992) (FDCPA); *Land O'Lakes, Inc. v. Schaefer*, 3 Fed. Appx. 769, at *3 (10th Cir. 2001) (Okla. UFTA).

Badges of Fraud

1. The transfer or obligation was to an insider;
2. The debtor retained possession or control of the property transferred after the transfer;
3. The transfer or obligation was not disclosed or was concealed;
4. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with a suit;
5. The transfer was of substantially all the debtor's assets;
6. The debtor absconded;
7. The debtor removed or concealed assets; (cont'd)

Badges of Fraud (cont'd)

8. The value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
9. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
10. The transfer occurred shortly before or shortly after a substantial debt was incurred; and
11. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Cases: Fraudulent Transfer

- Direct evidence of actual intent:
  - There is actual fraudulent intent when one reason a business creates a spinoff is to avoid environmental liabilities against the business. *Kelly v. Thomas Solvent Co.,* 725 F. Supp. 1446, 1455 (W.D. Mich. 1988) (Michigan law); in re Tronox.
- Badges of Fraud — Circumstantial evidence: "insider" transaction
  - Subsidiaries/spinoffs are insiders. *Cannon v. Whitman Corp.,* 569 N.W. 2d 1114, 1117 (Ill. App. 5 Dist. 1991).
  - Where parent structures the terms of the transaction, courts may deem it an insider transaction. *In re Xyan.com, Inc.,* 299 B.R. 357, 368 (Bankr. E.D. Pa. 2003) (Pennsylvania UFTA).

Cases: Badges of Fraud

- Plaintiff can attempt to show (but need not show) that the value of the consideration was not reasonably equivalent to the value of the asset transferred or the amount of obligation incurred:
  - Courts look to substance of all stages of the transaction. *Orr v. Kindhill, Corp*., 991 F.2d 31, 35-36 (2d Cir. 1994).
  - "The mere claim that 'fair value' was given in exchange for the transferred assets does not insulate the transfer from a charge of fraud." *Vertac Chemical*, 671 F. Supp. at 617.

Cases: Fraudulent Transfer

- Definition: A transfer made or obligation incurred by a debtor is fraudulent if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange, *if* the debtor:
  - was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
  - intended to incur, or believed or reasonably should have believed that it would incur debts beyond its ability to pay as they became due.
- Cases: The debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value – fact-intensive inquiry:
  - Key Comparison: The value of the property transferred to the value of that received in exchange for the transfer. *In re Fordu*, 201 F.3d 693, 707 (6th Cir. 1999) (Ohio law); *U.S. v. Davenport*, 412 F. Supp. 2d 1201, 1208-11 (W.D.Okla. 2005) (Okla. UFTA)
  - Objective Standard: Assess fair value in light of all available information at the time of the transfer. *In re Sun Valley Products, Inc.*, 328 B.R. 147, 156-157 (D.N.D. 2005)

Cases: Fraudulent Transfer (cont'd)

- Remaining assets of the debtor were unreasonably small in relation to the business or transaction:
  - Key Examination: Requires "a general inability to generate enough cash flow to sustain operations." *In re Sheffield Steel Corp.,* 320 B.R. 423, 445 (Bankr. N.D. Okla. 2004) (interpreting Okla. UFTA).
  - Objective Standard: Factual inquiry, depending on nature of the business in which one is engaged. *Jenney v. Vining*, 415 A.2d 681, 683 (N.H. 1980).
- Debtor intended to incur debts beyond its ability to pay as they become due:
  - "A debtor is insolvent if the sum of the debtor's debts is greater than all the debtor's assets determined at a fair value or if the debtor is generally not paying all of its debts as they are due." *In re Honey Creek Entm't, Inc*., 246 B.R. 671, 687 (Bankr. E.D. Okla. 2000); *rev'd on other grounds*, 37 Fed. Appx. 442 (10th Cir. 2002) (interpreting Okla. UFTA).

Q&A

COVID-19 WEBINAR SERIES

Thank You For Joining Us

SIDLEY

David Buente

David Buente

Partner
Environmental
Sidley

dbuente@sidley.com
Washington, D.C. +1 202 736 8111

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- U.S. Court of Appeals, 4th Circuit
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- U.S. Court of Appeals, 9th Circuit
- U.S. Court of Appeals, 10th Circuit
- U.S. Court of Appeals, 11th Circuit
- U.S. Court of Appeals, D.C. Circuit
- U.S. District Court, District of Columbia
- U.S. District Court, District of Maryland
- District of Columbia

Education

- University of Pennsylvania Law School, J.D., 1975
- Lehigh University, B.S., 1968

DAVID BUENTE is a partner in Sidley's Environmental group who represents clients in complex environmental litigation and rulemaking matters, with an emphasis on Clean Air Act (CAA), Clean Water Act, CERCLA (Superfund) and RCRA, environmental criminal and toxic tort litigation. Building upon his 15 years as an environmental prosecutor, including at the Department of Justice (DOJ) where he served as Chief, Environmental Enforcement Section, corporations — including AES, American Electric Power, CSX, Duke Energy, Exxon Mobil, Ford Motors, General Electric, Harley Davidson, Honeywell, Norfolk Southern and Tyson Foods — turn to David for representation in complex federal environmental enforcement matters with DOJ and EPA and in defending toxic tort claims by states and private parties.

David has tried over 80 cases and briefed or argued over 20 appeals in federal and state courts. He has advised clients on many industrial accidents including on release reporting, emergency response management, government investigations and enforcement, and litigation both by governments and tort claimants arising out of these accidents.

Laurence Kirsch

Laurence Kirsch

Partner
Environmental
Sidley

lkirsch@sidley.com
Washington, D.C. +1 202 736 8777

Practices

- Environmental

Admissions & Certifications

- U.S. Supreme Court
- U.S. Court of Appeals, 3rd Circuit
- U.S. Court of Appeals, 5th Circuit
- U.S. Court of Appeals, 9th Circuit
- U.S. Court of Appeals, D.C. Circuit
- U.S. District Court, District of Columbia
- District of Columbia

Education

- Harvard Law School, J.D., 1982
- University of Pennsylvania, M.S., 1979
- University of Pennsylvania, B.A.S., 1979 (*summa cum laude*, Phi Beta Kappa)

LAURENCE S. KIRSCH is a partner in the Environmental practice group who focuses on environmental negotiation and litigation, emphasizing large contaminated sites, sediment sites and complex environmental enforcement proceedings. Mr. Kirsch brings his combined background in science and law to his practice which includes matters that have involved air, surface water, groundwater, hazardous waste, sediments, toxic substances regulation and indoor air quality, among other issues.

Mr. Kirsch has litigated and counseled clients on matters involving the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), SARA Title III (TRI), Resource Conservation and Recovery Act, Clean Air Act, Clean Water Act, Safe Drinking Water Act, Toxic Substances Control Act, Occupational Safety and Health Act and related state statutes.

In addition, Mr. Kirsch has considerable experience on matters involving the interface between environmental laws and bankruptcy. Among other things, prior to joining Sidley, he litigated the first estimation proceeding ever conducted of a federal CERCLA claim in a bankruptcy proceeding, resulting in a no liability ruling for the debtor on an US$80 million claim by the United States. As part of that same bankruptcy proceeding, he also participated in the creation of the first environmental remediation trust used in a Chapter 11 proceeding to take and hold title to contaminated property, allowing debtors to reorganize successfully. As part of his work on environmental bankruptcies, he has litigated and negotiated a number of key issues concerning how environmental obligations are addressed in bankruptcy proceedings.

Mr. Kirsch has been selected for inclusion in *Chambers USA*: America's Leading Lawyers for Business and Best Lawyers. While attending law school, he served as Managing Editor of the *Harvard Environmental Law Review*. Mr. Kirsch has been elected to the Environmental Law Institute's Leadership Council, the Institute's group of the most prominent environment, energy and natural resource leaders in the nation.

Maureen Crough

Maureen Crough

Counsel
Environmental
Sidley

mcrough@sidley.com
New York +1 212 839 7323

Practices

- Environmental
- M&A

Admissions & Certifications

- New York

Education

- The University of Michigan Law School, J.D. (*cum laude*, Editor-in-Chief, *University of Michigan Journal of Law Reform*)
- Princeton University, A.B. (*magna cum laude*)

MAUREEN CROUGH is counsel in Sidley's New York office and represents domestic and non-U.S. purchasers, sellers, lenders, landlords and tenants in the environmental aspects of a broad range of financial transactions in the Environmental practice. Maureen is involved in numerous aspects of environmental due diligence, evaluation of environmental insurance for use in transactions, negotiation of environmental provisions in acquisition and loan agreements, resolution of environmental matters in bankruptcy and environmental counseling pertaining to financial transactions. In related matters, she represents clients in buyer/seller environmental dispute resolution, and counsels clients in the requirements of U.S. and state environmental regulatory compliance and the development and implementation of environmental management systems. Her practice also includes representing clients in Superfund matters and the performance of voluntary cleanups in state programs. Maureen has been recognized by *Chambers USA* in New York Environment: Mainly Transactional Law where one source says that she "has a business-focused approach and doesn't get caught in the weeds." Maureen was also recognized in *Who's Who Legal*: Environment (2015 – 2017) and has been recognized each year since 2010 in *The Best Lawyers in America* in Environmental Law.

Genevieve Weiner

Genevieve Weiner

Counsel
Restructuring
Sidley

gweiner@sidley.com
Los Angeles +1 213 896 6116

Practices

- Restructuring

Admissions & Certifications

- California

Education

- Pepperdine University School of Law, J.D., 2007
- University of California, Berkeley, B.A., 2004

GENEVIEVE WEINER is a member of the firm's Restructuring group and focuses her practice on representing debtors and lenders in various bankruptcy matters, general assignments, receiverships and out-of-court restructurings and work-outs. She has represented clients across multiple industries including healthcare, retail, hospitality and real estate. Genevieve has also advised financial and strategic purchasers on acquisitions of distressed companies and discrete assets through section 363 and foreclosure proceedings.

Genevieve earned her J.D. from Pepperdine, where she graduated *magna cum laude*. She served as Lead Articles Editor for the *Pepperdine Law Review*. She earned her B.A. in Rhetoric from the University of California, Berkeley with a minor in Philosophy.

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