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Two Worlds In One – General Litigator And Environmental Attorney

The Editor interviews Hal Segall, Principal, Beveridge & Diamond, P.C.

Editor: Please share your background with our readers.

Segall: I graduated from Yale University and received my law degree from the University of Chicago Law School. Having practiced law for 20 years, I have spent most of my career as a litigator of environmental, commercial and construction matters in courts throughout the country. At one point, one of my clients, for whom I litigated a contaminated property matter, asked me to assist with the sale of that property and with the management of the associated environmental liabilities. That led to more work in the transactional area. Ever since then I have had a stream of transactional matters involving environmental problems in real estate transactions, although the majority of my practice remains in litigation. Most of my career has been spent at Beveridge & Diamond, and I now have the privilege of serving on its Management Committee.

Editor: What types of clients do you represent on environmental issues?

Segall: Primarily two types of clients. One is industrial clients, such as petroleum companies and chemical companies. I also do a substantial amount of environmental work for real estate developers, other owners of commercial property and building management firms.

Editor: What areas of litigation involving environmental issues does your practice cover?

Segall: To begin with, I have a broad litigation practice that includes a range of commercial and construction issues, which may or may not overlap with environmental



Hal Segall

issues. The environmental issues tend to involve subsurface contamination, water issues and toxic tort litigation involving allegations of chemical exposure.

Editor: How have the laws shifted in changing the liabilities of PRPs under CERCLA, Brownfields and other federal regulations relating to real estate?

Segall: There was a period in the 1970s and 1980s when both federal and state laws became very stringent, and owners of property became responsible for environmental contamination just because they owned the property even if they had not introduced the contamination. This impacted developers and other owners of contaminated property. In more recent years, while the strict laws remain in effect, there has been some effort legislatively to ease the sometimes draconian burdens imposed by some of the laws, particularly with respect to subsurface contamination. For example, there are federal and state Brownfields laws designed to pro-

vide a way for purchasers of property and property owners to limit their liability when they did not cause a release of contamination. In addition, businesses have become more sophisticated in allocating environmental liabilities by contract, and environmental insurance, although often expensive, has become more available. While the federal government has been perhaps less aggressive in its pursuit of federal environmental regulation in recent years, a number of state governments have actually become more aggressive.

Editor: In the context of property claims, do statutes of limitation provide some protection?

Segall: There are a variety of statutes of limitation that may apply, depending on the statute, and whether claims are made under common law. These statutes may be, for example, three, five or six years in duration, or another period. A catch, and one reason that environmental issues can be so difficult, is that if there is an ongoing migration of contamination, a court may say that the statute of limitations has not run yet because there is an ongoing problem. Under the federal Superfund statute, the statute of limitations, depending on the circumstance, may not run until the beginning of a remedy by the government or a private party. As a result, even if the contamination happened 20 or 30 years ago or even more, the statute of limitations may well not have run. It is often the case that for subsurface contamination a party may be liable and responsible for many years and even decades after the contamination was originally released. In one instance, I defended against allegations of releases that occurred over a century ago. Environmental problems can be particularly difficult because they may haunt a party many years after some of the activities that gave rise to them occurred.

Please email the interviewee at hsegall@bdlaw.com with questions about this interview.

Editor: There has been case law or legislation that exempts some of the responsible parties from being liable when they sell the property.

Segall: There are different ways in which that might occur. A party may literally not be liable under the environmental laws if the discharge happened at a time when the party was not an owner. There is also Brownfields legislation which allows parties to gain recognition from a state or federal regulatory agency that they are not responsible for contamination. Typically, that recognition is contingent upon a number of steps, including the cleanup of the property by either the buyer or seller. There is some protection in the Brownfields laws, but it is often conditional or limited. Compliance with a Brownfields statute may, however, allow greater risk minimization by making environmental insurance more available, or convincing a purchaser to acquire the property and take on any remaining liabilities.

Editor: So, it is possible for a seller to obtain insurance to protect him from having to indemnify the buyer.

Segall: Yes. Insurance may be included in addition to indemnification as part of a deal or it may eliminate the need for indemnification. There are different types of insurance and risk minimization packages offered by the private sector. There are some companies that will clean up a property for a certain amount of money and provide indemnification for future liabilities as well as insurance as part of the package. That can be attractive in making a deal work, but one has to be careful to scrutinize the adequacy of the protection. For example, if there is an indemnity, it is important to determine that the entity giving the protection has the money to back it up for a long period of time. Environmental insurance is an option, and there are some reputable companies selling environmental insurance, but policies often have important exclusions. The exclusions can often be negotiated but as one negotiates away the problematic exclusions, the policies can become very expensive. So insurance or companies that will take on the risk are mechanisms that help facilitate the sale and purchase of contaminated properties. They can be useful but they are not a panacea. Whether they will be appropriate from a cost and protection standpoint for any deal requires careful scrutiny of the details.

Editor: To what extent is a parent or holding company able to protect itself

from the potential liability of one of its subsidiaries?

Segall: In its 1998 decision in *U.S. v. Bestfoods*, the Supreme Court provided important rulings on when a parent company would be liable for the environmental liabilities of the subsidiary. I have done extensive litigation on issues arising under the *Bestfoods* case. It really boils down to the extent to which the parent company controls the mechanisms generating the "pollution" or "waste disposal" of the subsidiary. The presumption is that the parent company as a shareholder is not liable for the environmental liabilities of the subsidiaries. The Supreme Court found two ways to get around that presumption. One way is through traditional corporate veil piercing under common law. Courts are reluctant to pierce the corporate veil, and the analysis is dependant on an evaluation of whether the parent and subsidiary in reality were not separate corporations, that the separation was a fraud. A parent can be heavily involved in the subsidiary's operations without piercing the corporate veil. For example, the parent and subsidiary can have the same board members, buy and sell from each other, provide services to one another, and have extensive dealings, without providing grounds to pierce the corporate veil. The Supreme Court also recognized a less strenuous basis for holding the parent liable under the federal Superfund statute. Under the Superfund statute, if the parent becomes an operator and exercises control over the subsidiary's waste disposal and that relationship is not consistent with corporate norms, then the parent could be subject to environmental liability. Even under Superfund, however, a party seeking to have the parent found liable bears a heavy burden. Under *Bestfoods*, a parent could supply its own environmental manager to help the subsidiary understand environmental regulations, obtain all permits, and set up the waste disposal system without triggering Superfund liability on the parent's part if the relationship was consistent with corporate norms. The issue of corporate norms is key. The cases are very fact specific. I had the good fortune to prevail in a recent case in Delaware where our client, the parent company, had supplied its own environmental coordinator to the subsidiary to help it get permits and provide advice, and had supplied engineering services (for a price) to set up the subsidiary's waste water disposal mechanisms. The parent had a lot of intensive involvement with environmental issues but we were able to prevail on the ground that what the parent did was consistent with corporate norms at the time, in the 1960s, and our corporate parent client was not held liable.

Editor: What trends do you see in terms of regulation with respect to property contamination on both the federal and state level?

Segall: It is a checkered picture. At the federal level, and in many states, the regulation has become less aggressive in recent years. In addition, at both the federal and state levels, there has been more of a willingness to consider actual environmental risk in determining what clean up is appropriate. Instead of requiring cleanup automatically when contamination is at certain levels, there has been an increasing trend among the states and in the federal programs to look at risk. If the contamination is not going to harm anyone, a much lesser cleanup may be acceptable. This often greatly reduces the amount and cost of clean up, and many states are requiring fewer cleanups of underground contamination than they did 10 years ago. However, some states are a lot more aggressive than in the past in pursuing cost recovery, and, in a few states, natural resource damages, which may include claims for environmental damages in addition to direct clean up costs. Natural resource damages claims can be enormous.

Editor: You are the firm's Pro Bono Chair. Would you care to comment on how pro bono work helps a law firm and their clients when it comes to going into court?

Segall: It is very helpful. Our firm believes very strongly that lawyers have an obligation to take on pro bono work, and for as long as I have been there, has always had a very strong pro bono program. Our associates get full billable credit for their hours, there is substantial participation by both directors and associates, and we give pro bono cases the same level of care that we give to our paying clients. We have substantial participation not only from attorneys, but also paralegals and staff. We get a lot back from doing the pro bono work because associates and principals get trial experience that is harder to come by in our other cases. There is also a satisfaction in working with clients who are individuals, often with urgent needs that would not be met absent the availability of pro bono representation. Pro bono participation boosts the morale of our entire firm and most of us take a special pride in our pro bono accomplishments. Our pro bono work helps everyone to feel good about the firm and engenders loyalty and a recognition that the firm does not see its members and employees merely from a financial perspective but rather as part of a shared enterprise and set of values.