

Q&A With Dechert's Abbi Cohen

Law360, New York (March 06, 2013, 2:01 PM ET) -- At Dechert LLP, Abbi L. Cohen focuses her practice on evaluating environmental liabilities associated with corporate, real estate and financing transactions — including with respect to renewable energy — and providing state and federal permitting and regulatory compliance advice.

Cohen's experience also includes assisting clients in siting and permitting industrial facilities, including resource recovery and cogeneration facilities, as well as power plants. She also advises clients on structuring transactions to minimize environmental liabilities, negotiating strategies and in preparing relevant provisions in transaction documents in connection with acquisitions, divestitures and financing.

Q: What is the most challenging matter you have worked on and what made it challenging?

A: I represented the Mortgage Bankers Association in the U.S. Environmental Protection Agency's negotiated rule-making process to set the environmental due diligence standards necessary to establish a defense to Superfund liability, known as "all appropriate inquiry." To that end, the EPA established a federal advisory committee consisting of 25 stakeholders, including my client, representing organizations spanning the real estate, lending, environmental consulting, public interest and government sectors.

At the time the committee was formed, there were more than 250,000 phase I environmental site assessments being performed each year, based on an industry standard generally accepted by the lending community; the ASTM phase I environmental site assessment standard. However, instead of starting with the existing ASTM Standard, the committee elected to develop its own standards. Representing the Mortgage Bankers Association, my job was to ensure that the final regulation minimized disruptions to the commercial real estate market while achieving a high standard for the environmental assessment of real property.

Each of the stakeholders was passionate about their particular points of view regarding the nature and scope of preacquisition due diligence. Nevertheless, many had not participated in the due diligence process in commercial real estate transactions and were not familiar with the existing due diligence process. Some of the participants also appeared not to trust lawyers or lenders to appreciate the environmental concerns of their constituents. I was mindful throughout the process that it was important to be respectful of the positions taken by each of the stakeholders if I wanted them to consider the lender's perspective on due diligence in commercial real estate transactions.

Working together, and with exceptional leadership by the EPA, the committee achieved consensus on a new due diligence standard. Moreover, although the committee did not start with the existing ASTM standard, the EPA's final regulation acknowledged that the ASTM phase I standard also constituted all appropriate inquiry for purposes of the defense to Superfund liability.

Q: What aspects of your practice area are in need of reform and why.

A: Due diligence is at the heart of what I do. In recent years, there have been significant improvements in the way due diligence is performed in mergers and acquisitions. A majority of transactions today depend upon electronic data sites for the dissemination of information about a particular target in a transaction. However, too often, the environmental information has not been reviewed by environmental counsel to the target or has it been organized in a fashion that makes it easy to digest. Yet, frequently, the environmental information included in the data site is the only source of environmental due diligence that is made available for the purpose of assessing environmental risk.

As most experienced environmental transactional lawyers can attest, there is generally a relationship between the quality of the environmental due diligence information provided and the level of risk acceptance that parties to a transaction may have. Potential buyers who have access to information that fairly describes environmental liabilities may be able to factor those environmental liabilities into the purchase price or use other risk mitigation in lieu of asking for full indemnification. Including environmental lawyers early in the process of formulating, assembling and organizing the environmental due diligence materials would facilitate much more orderly transactions.

Q: What is an important issue or case relevant to your practice area and why.

A: There has been an explosion in natural gas production in the United States through the development of new technologies that have made hydraulic fracking economically feasible. The increase in gas production has been accompanied by a very public debate over environmental, health and safety considerations associated with using the technology. Although certain states have well-developed laws and regulations applicable to oil and gas exploration and production, on the federal level and in many states, regulators are in the process of studying the process and defining their programs.

We do not yet know the full extent of the regulatory framework that will affect fracking. However, it is clear that environmental lawyers have a significant role to play in helping clients understand the potential environmental, health and safety issues, as well as in getting clients ready for new regulations in whatever form they ultimately take.

Product stewardship is already having a significant effect on many transactions whether involving domestic or international businesses. Product stewardship encompasses rules, regulations and directives such as Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), the regulation of hazardous substances in electrical and electronic equipment, waste product take-back rules, green chemistry rules and packaging and labeling requirements.

In many deals, environmental lawyers can no longer focus just on the laws in the jurisdiction where the manufacturing facilities are located but must now have a global perspective, considering the laws in jurisdictions in which the products are being distributed, imported, exported or otherwise placed into commerce.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: There are relatively few lawyers around the country who focus their practices upon the environmental issues in mergers and acquisitions and real estate transactions. The environmental lawyers who practice in this area tend to encounter each other in deal after deal and conference after conference. Although many environmental transactional lawyers have impressed me with their practicality, creativity and integrity and have honored me with their friendship, Brian Land and Walt Lohmann from Kirkland deserve special mention for having established the first Environmental Transactional Roundtable. The Environmental Transactional Roundtable has helped foster the exceptional good will and cordiality shown by those who practice in this area.

Q: What is a mistake you made early in your career and what did you learn from it?

A: I suspect I made my share of mistakes in my early career, and I hope I have learned from each of them. On one of my first legal assignments, I accompanied a client to a meeting with a state regulator to discuss whether a landfill that had been closed decades before needed to be regraded at a cost of several million dollars. I foolishly did not ask the client whether we would be conducting a site visit and if I needed to be prepared to walk the landfill. Of course, that is precisely what we did; notwithstanding that my attire consisted of a skirt suit and high-heels.

I came to the meeting well-armed with the knowledge of environmental regulations and the law. However, we avoided the expensive grading, not because of the legal arguments that I made but because of the practical contributions made by the client. After an extended, fruitless discussion regarding what the law required, the client focused on the reasons that the regulator concluded that the grading was needed. Apparently, the regulator thought the sloping looked unsafe and was concerned about his having to walk on the surface. The client made me show my two-inch heels and explained to the regulator that, in fact, I had safely walked the landfill and that clearly grading was not necessary.

The lesson I learned that day was not only to ask more questions before the meeting but also that not all legal problems can be solved by focusing on the law. In other words, don't ignore the context.

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