

Speaker 1: [inaudible]

Speaker 2: Welcome to legal environmental insects, a Greenberg current podcast. You're listening to getting through a mini series focused on environmental concerns during the COVID 19 pandemic.

Speaker 3: Well, greetings and welcome to the next episode of getting through the Greenberg Traurig mini series on environmental concerns during the pandemic. I'm your host, Bernadette rappelled. And joining me here today [00:00:30] is my friend and colleague David Mandelbaum, who joins us by phone from Philadelphia. Hello, David. I'm doing well as well as can be expected under these crazy times. How about you?

Speaker 4: I'm doing great. Love to go to the office. I miss baseball, but otherwise do

Speaker 3: It well, glad to hear it. So you recently wrote an article, that's gotten some interest about what comes next for environmental legal practice. [00:01:00] And I wanted to ask you first, what made you decide to write this article now?

Speaker 4: Well, people are focused very much on, uh, what the various legal problems are that our clients are facing during this period where we have, um, an extraordinary response, uh, to the novel coronavirus now where we're shutting down the economy. And, you know, I've, I've done a little bit of, uh, uh, plugging away on, on LinkedIn about that. But, [00:01:30] um, in my mind, it's a lot more optimistic to think about what, uh, we're all going to be doing afterwards because it implies that there is an Astor words in Walden to be doing something. So that's what this, uh, articles about.

Speaker 3: Great. Well, I know that one of the topics you discussed was what you see as the future for conventional compliance and enforcement counseling. Can you say a few words about that?

Speaker 4: Yeah. I mean, this is the topic that people have [00:02:00] focused on most, which is, uh, what, yes. During the time that you were closed down or otherwise modified, uh, during that is a client is, uh, during, uh, this pandemic. What if you cannot strictly comply with your environmental obligations and agencies have issue guidance memoranda that describe how they will exercise enforcement discretion. [00:02:30] If you don't comply strictly with monitoring and reporting, uh, obligations and maybe some other obligations that, and, and those all have conditions. And you could imagine that afterwards, someone's going to try to test whether or not you've met those conditions. And the question is, the question I'm asking you is, is that, is that real? And I think it is real, [00:03:00] there will be cases. Um, but I think you can identify the cases, uh, by the incidents, if there is a real problem that arises, you're likely to see, uh, some investigation into the problem that is a catastrophic release, say systematic violation of a permit, which causes pollution that somebody notices, uh, were something even worse. Um, people are gonna look and see why did [00:03:30] that happen? And did the, that the regulated entity, uh, comply strictly with its obligations and if it didn't, and it wants to justify that because it sells within these, uh, exercises of, uh, uh, of enforcement discretion, uh, the regulated entity is going to have to prove up that it

really satisfied every jot and tittle of those memoranda. And I'm sure there'll be litigation,

Speaker 3: [00:04:00] Right. Well, and in related to that, you know, that that really talks about that topic really relates to what will be the regulators response to these kinds of acts and omissions. But you've also given some thought to what happens when private party agreements fall through where we're a people, one party or a counterparty cannot [00:04:30] fulfill its obligations under an agreement to indemnify another entity, or to perform some task for that entity. What do you think, or what do you expect will happen with these private lapses?

Speaker 4: Yeah, well, there, there are two levels of response. Uh, one is, um, when there actually is a lapse and the other is when you anticipate a lapse. So we [00:05:00] have this, we achieve environmental compliance, not by one regulated entity, agreeing to do everything it's obligated to do quite awesome. We have the obligations to perform divided up contractually and they could be divided up, um, uh, can, you know, consensually, if you will, you know, I hire a contractor to take care of this side of the other thing, or, uh, the division can be enforced on me. [00:05:30] Uh, I have a, uh, a joint and several obligation to clean up or to do something else. And, um, uh, and there's somebody else who's got the, the other half of that obligation. And we somehow agree to divide who is responsible to pay for water, to do what, and when the other guy doesn't have the capacity to, or just chooses not to perform, you end [00:06:00] up with, uh, everyone having a lapse.

Speaker 4: Um, if there's an entity left, uh, uh, after that lapse to Sue, there'll be lawsuits. If there isn't such an entity, there will be demands by regulators, uh, calling on, on the surviving parties, uh, to step in. Uh, and then the interesting question is if you get noticed that the, that the party you're relying on to do something, [00:06:30] uh, is beginning to Teeter, because know, this is, this is a time when some business entities are going to have real problems. Um, are there steps you can take now to avoid a bigger problem later? Can you, uh, can you tie the party over? Can you secure an obligation? Can you also wait the worst of the non-compliance so that, uh, you at least keep the problem private, you don't hurt anybody and you don't [00:07:00] induce any serious enforcement.

Speaker 3: So that kind of brings up an ancillary concern. Doesn't it? Because obviously parties engaged in a lot of negotiations and ordinary commerce right up until the time that this pandemic struck. And so now bargains, that looked really good. Pre pandemic are looking [00:07:30] pretty poor right now for certain folks. What do you expect in terms of backend price negotiation

Speaker 4: That has happened in my practice, uh, in every one of the downturns that I lived through and that we've had an expansion for so long, we've had an expansion, uh, for 12 years now, um, that, uh, many people now in practice who, who feel like they're reasonably [00:08:00] senior have never actually watched a crash app, but I've watched a few. And after each one, there are some deals that, uh, worked great when I, you were near the peak and then you sell over the top and now they're cruddy. And the

disappointed party wants to, um, wants to, to redistribute some of those losses. And one of the places to redistribute the losses is back on to the person who sold you something or brokered [00:08:30] something for you. Um, and, uh, you know, the basic form of this is you sold me this, you told me that it was clean.

Speaker 4: It's not, I have expenses. Uh, you sold me this, you told me that it had all the permits. I have to get a modification of this one, or that one, that one expired before you sold it to me, or I missing the other one. Um, and, and each of those things, um, uh, create the opportunity to bring [00:09:00] what's effectively a commercial lawsuit, but it's got an environmental overtone. And in order to prove the claim, you've got to prove a lot of sort of technical environmental stuffs. And, um, those are turned into negotiations are really good actions, uh, afterwards, as people try to shift the losses to others.

Speaker 3: So would you expect them to see, in terms of the shifting a lot of talks, toxic [00:09:30] tort litigation, relating to people who might be claiming that they were sick and because a business fail to take the proper precautions or didn't do the right disinfecting, what do you, what do you think we're going to see there?

Speaker 4: Well, yeah, I mean, I think there already have been one or two, uh, maybe more toxic tort cases, uh, filed, um, the toxic tort. That's more, um, [00:10:00] conventional environmental, if you will, is a, um, is a property damage claim. So, uh, I have, uh, uh, a space. You brought people into my space, they contaminated it with novel coronavirus. I lost tenants. I was whatever. And I have a loss because this isn't always, we don't believe it to be really long lasting. It's not like, um, the cases [00:10:30] where, you know, the vacating tenant leaves, the hazardous waste sitting in the, in the space. Um, we don't have the, the continuing damage to the property. Um, but you can imagine situations where, uh, people are gonna say, you messed me up for weeks and I lost a lot of money and I would like to get paid.

Speaker 3: Yeah. I think that's probably a likely outcome unless there's some sort of legislative [00:11:00] reform that happens to, to guard against that. But I think that's something we'll just have to see after the immediate mitigation measures are behind us.

Speaker 4: Yeah, no, I don't want to, uh, I don't want to downplay what I expect to be, uh, a significant amount of, uh, uh, toxic, conventional, toxic [00:11:30] tort litigation, which is for whatever reason, something that defendant did made a human beings sick. So, you know, you, you didn't set up my workplace so that I was, or whatever, I was doing, you exposed me to virus in hell, you didn't give me the right protective equipment, your protective equipment failed, your social distancing failed. You didn't screen people properly. All those kinds of claims you can expect to arise, whether they're good [00:12:00] claims or bad claims. Um, I don't know when, you know, I'm, I'm, I'm less an expert in that or less, uh, experienced in that kind of, uh, uh, legal work.

Speaker 3: Gotcha. Well, let's sort of, kind of look into your crystal ball a little bit, if you will. And instead of looking at some of these more conventional things that we've all engaged in today, what do you see as some new priorities [00:12:30] coming out of the pandemic?

Speaker 4: Well, I don't know whether it's new priorities so much as, um, people really thinking about what they care about. Um, here we have a situation where people literally can't go outside or go to their usual places without taking precautions. Things that are happening in the world can [00:13:00] make them sick. And, you know, everyone really wants to hear what the experts have to say about protecting themselves and about how, uh, they should comport themselves. Well, you know, does that mean that you're going to listen to science more and reorder more on the basis of the kinds of things that can affect [00:13:30] the way we actually live our lives day to day, uh, rather than sort of, um, uh, uh, risks, which are easy to avoid, they just are, um, uh, we can calculate that there were large if we don't avoid them. So, um, to be precise, right?

Speaker 4: We've the bright, shiny thing for the current national administration and the environmental business has been the Superfund program. [00:14:00] And that's great for me. I mostly do super fund work, but you know, the stuff that makes the super fund site has mostly been in the environment for years and years, if it had been recent and there was a solvent person to deal with it, it wouldn't be a Superfund problem. It would be a regulatory problem. And, um, often the risks are risks that are easily, um, uh, avoidable. So for example, if protecting groundwater, don't drink that groundwater. If we're protecting [00:14:30] fish, don't eat those fish. Um, whereas it's really, really hard to avoid breathing the air. It's really, really hard to avoid, um, disruptive storms, uh, exacerbated by climate change. Uh, it's really, really hard to avoid, uh, invasive species. There are other invasive microbes or, or, or, or other kinds of things, uh, which have changed where they are because the climate has changed and we be focused more on that. [00:15:00] Um, uh, to us, I don't know that people will get in their daily lives, cheers much about, uh, conventional contamination as they do about, you know, whether you can go outside.

Speaker 3: Yeah. It'll be interesting to see whether folks will pay, pay closer attention to quote science and quote and predictions about various things [00:15:30] that could really, as you say, impact us in our daily lives. Um, well, I think we've, we've, I've really enjoyed this conversation this afternoon, David, and I appreciate your time here today. I know, uh, we're all itching to get out of lockdown, but until then, I, I hope that you and your family, David continued to stay safe and for our listeners, thank you for listening. Stay safe.

Speaker 1: [inaudible].