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ALLOCATION OF ENVIRONMENTAL LIABILITIES IN M&A TRANSACTIONS: NEW DECISION HOLDS THAT CONTRACT LANGUAGE MATTERS

A recent decision from the Southern District of New York hits home the importance of clear and unambiguous language when apportioning environmental liabilities during an M&A transaction. In Cytec Industries Inc. v. Allnex (Luxembourg) & Cy S.C.A., 14-cv-1561, NYLJ 1202791048149 at *1 (SDNY, decided June 19, 2017), the Court looked at that section of the purchase and sale agreement (the "Agreement") that described those liabilities that the buyer, Allnex, had agreed to assume. In reviewing the case, the Court noted that the Agreement in question had been negotiated "at arm's length between sophisticated parties" and that the dispute could be resolved by reviewing the "unambiguous contractual language."

The Court focused on the definition of Assumed Liabilities, a defined term within the Agreement. That language, as paraphrased by the Court, provided that Allnex assumed, " 'all Liabilities of Cytec', to the extent related to, or used or held in connection with the coating resins business and specifically all such Liabilities to the extent relating to Environmental Laws with respect to any facilities located in the United States..." The section went on to specifically exclude certain Cytec facilities that otherwise would be included under Assumed Liabilities, a fact which the Court found significant.

The dispute concerned remediation of contamination arising from former operations (which had produced sulfuric acid and liquid alum) at Cytec's Kalamazoo facility. The facility currently was being used for the manufacture of coating resins. Both parties were aware that there was contamination requiring remediation at the site. Allnex, the buyer, contended that pursuant to the language in the Assumed Liabilities clause, its obligations were limited to environmental liabilities directly caused by the manufacture of the coating resins. Cytec, citing the same language, alleged that Allnex was responsible for all remedial costs at the Kalamazoo facility, and the Court agreed. The Court parsed through various sections and definitions of the Agreement to reach its decision.

The significance of this case does not depend on whether one sides with Allnex or Cytec. It is not beyond the realm of possibilities that another judge, looking at the same language, may have sided with Allnex. What is important is that both parties believed that they had negotiated ironclad, unambiguous contract language with respect to the allocation of this environmental liability. The fact that they ended up in federal court means they both, to some extent, got it wrong, even though Cytec ultimately prevailed. What is the lesson learned? As the Court opined, if Allnex wanted to exclude specific liabilities related to the Kalamzoo facility, of which it was aware, it should have done so explicitly, as it did under other circumstances.

Language matters, and in the case of environmental liabilities, specificity protects!

2 Wall Street, New York, NY 10005 212-732-3200 Fax: 212-732-3232

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For more information concerning the matters discussed in this publication, please contact the authors **Christine Fazio** (212-238-8854, fazio@clm.com), **Julie Weisman** (212-238-8648, weisman@clm.com), or your regular Carter Ledyard attorney.

2 Wall Street, New York, NY 10005 212-732-3200 Fax: 212-732-3232