

Do Your Environmental Due Diligence Before Buying Real Estate

Anyone who purchases real estate (other than single-family homes) needs to be aware of the federal and state Superfund statutes. Both the federal act, known as CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act), and the State of Arizona statute, known as WQARF (Water Quality Assurance Revolving Fund), provide that the owner of contaminated property is strictly liable for the costs of cleanup of the contamination on the property. This means that simply by being in the chain of title, the current or previous owner of the property can be required to pay for the cleanup of contamination *even if the owner did not contribute to the contamination*.

CERCLA is more severe than WQARF because, under CERCLA, the liability for the cost of cleanup is not only strict, it is also joint and several. This means that the owner of the contaminated property can be forced by the United States Environmental Protection Agency (EPA) to pay for the entire cost of the cleanup even though some other person or entity can be proven to be responsible for the contamination. While the property owner has a right of contribution from the person who actually caused the contamination under CERCLA, the right may be limited to contribution only after the owner has already paid for the cleanup and then will likely involve the property owner in protracted and expensive litigation. Under WQARF, the Arizona Department of Environmental Quality (ADEQ) is required to allocate the costs of the cleanup among the various potentially responsible parties, but the owner of the property is still likely to receive a significant share and can become embroiled in litigation over ADEQ's allocation of responsibility.

Prior to 2002, there were only three defenses available to the owner of contaminated property that would allow the owner to avoid liability under CERCLA. The defenses were (1) act of God, (2) act of war, and (3) innocent owner. The first two defenses are rarely available. To prove themselves an innocent owner, the owners of the property had to show, among other things, that they had completed an "all appropriate inquiry" prior to the purchase of the property and that there was no reason to suspect the contamination prior to purchase.

The "all appropriate inquiry" defense was completed by having a Phase I Environmental Site Assessment prepared by a knowledgeable environmental consultant.

In 2002, Congress adopted amendments to CERCLA, which created two new defenses to CERCLA liability for the property owner. Now "bona fide prospective purchasers" and "contiguous property owners" have possible defenses as

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NEW FACES

Mark L. Collins

With more than 30 years of experience, Mark Collins focuses his practice on complex commercial litigation and real estate and business transactions, including mergers and acquisitions. He represents clients in state and federal courts and in alternative dispute resolution proceedings. His clients include construction contractors, developers, title companies, agricultural growers and distributors, and other major U.S. companies. Mark received his B.A. from the University of California, Berkeley and his J.D. from the University of Arizona College of Law. He is admitted to practice in Arizona, the U.S. District Court for the District of Arizona and the U.S. Court of Appeals for the Ninth Circuit. Phone: 520-628-4780 E-mail: mcollins@gustlaw.com



MARK L. COLLINS

Blaine M. Searle

Mr. Searle's practice includes general corporate and commercial law for small- and medium-sized businesses. He regularly works on



BLAINE M. SEARLE

federal, state and local tax matters as well as estate planning for individuals. Prior to joining Gust Rosenfeld, he worked for an international public accounting firm where he advised clients on state and local tax issues. Blaine graduated from Brigham Young University with a B.A. in Political Science and a B.S. in Russian. He earned his J.D. from the University of Oregon School of Law and an LL.M. in Taxation from Georgetown University Law Center. Blaine is admitted to practice in Arizona. Phone: 602-257-7437 E-mail: bsearle@gustlaw.com

Frank S. Tomkins

Mr. Tomkins practices in the areas of real estate and corporate law, with an emphasis on commercial real estate development, including the preparation and negotiation of agreements for purchase and sale of real estate, development agreements, CC&Rs (covenants, conditions & restrictions), construction contracts, leases, loan documents, security agreements, license agreements, and corporate documents. Prior to joining Gust Rosenfeld, Mr. Tomkins was general counsel for Phoenix Title & Escrow Agency and was previously associate counsel for Transnation Title Insurance Company. He investigated, analyzed and resolved claims on title insurance policies; underwrote a variety of title issues; provided legal advice and support to escrow officers and on underwriting issues to title officers; supervised conduct of litigation by outside counsel; and drafted endorsements to title policies. Frank graduated *cum laude* from Kalamazoo College with a B.A. in History. He earned his J.D. with honors from Duke University School of Law. Frank is admitted to practice in Arizona, Illinois and the U.S. District Court for the District of Arizona. Phone: 602-257-7476 E-mail: ftomkins@gustlaw.com



FRANK S. TOMKINS

“Here We Grow Again...”

The firm recently completed the build out of an additional 9,016 square feet of space on the ninth floor in the Phoenix Collier Center. This is the second expansion project completed by the firm since moving to the Collier Center in July 2002. The firm now occupies all of the eighth floor and approximately two thirds of the ninth floor.



ET·Y·MOL·O·GY COR·NER

Our Environment

The surroundings or conditions in which we exist is our environment. The term is an adaptation of the French word “environs” meaning “surrounds.” It first appeared in the ecology sense in the 1950s. For those of us around at the time, in the early 1970s, a protector of our environment became known as an environmentalist.

Richard B. Hood 602.257.7470 rhoo@gustlaw.com
Rick, our etymologist, practices in the areas of commercial law and commercial litigation.

New Federal Rules Affecting Electronic Discovery

In the discovery stage of litigation, both sides must disclose all information they may use to support their claims or defenses. The parties in the litigation are required to produce all relevant data (including electronic data) and must do so in a manner that is both complete and avoids inadvertent disclosure of privileged information. Electronic information that may be stored on home or personal computers, as well as information on computers that access company computer systems, are subject to disclosure or discovery under the the Federal Rules of Civil Procedure (Rules). If inadvertent disclosure of privileged information does occur, the Rules allow for the return of the data. On December 1, 2006, new Rules become effective. The new Rules require both sides to specifically discuss electronic discovery issues, including the electronic discovery exchange, its production and

the manner of its production early in the litigation. Companies and their employees will be affected because counsel will now need to discuss electronic data in detail. It is likely that information that may have previously been overlooked will now be at issue. Important considerations include litigation hold policies, document retention policies and accessibility of electronic information.

Companies that have not yet done so will need to create litigation hold policies and procedures to allow for the retention of electronic data when it is reasonably expected that information may be relevant to current or future litigation. The litigation hold must be broad enough to avoid claims of the destruction of evidence, which could significantly hinder valid claims or defenses in the litigation.

In addition, document and electronic data retention policies should interact with litigation hold policies to provide proce-

dures to cease any routine destruction in the event of a pending or expected claim. Companies and individuals may want to review policies allowing the use of employees' home computers for work-related tasks. Companies should assure, to the extent possible, that electronic information is accessible in a reasonable manner and at a reasonable cost.

The Rules are generally structured to apply to companies with complex computer systems; individuals involved in a federal litigation also will be affected. While information stored on home or personal computers has always been subject to discovery, the new Rules focus directly on this sometimes overlooked source of information.

Steven M. Guttell 602.257.7499

sguttell@gustlaw.com

Steve practices in the areas of employment and labor law and litigation.

PERSONAL NOTES

Tim Barton serves as President of La Salas, Inc., an Arizona nonprofit corporation, which owns and operates 70 apartment units that provide housing for low-income individuals.

Kent Cammack and **Chris McNichol** presented "The AB-Z's of Trustees' Sales: The Sequel — Redux" at the Arizona Trustee Association's Annual Convention and Education Seminar.

Peter Collins, Jr., is Chair of the Arizona State Bar Association Trial Practice Section and Chair of the Arizona College of Trial Advocacy. The Arizona College of Trial Advocacy is a nationally recognized program that teaches young trial lawyers how to present their cases to juries. He also serves as judge pro tem of the Arizona Superior Court, handling mediations and settlement conferences for the Judges. He spoke at the Arizona State Bar Convention on a discussion panel that included Kenneth Feinberg, the Administrator of Congress' 9/11 compensation program on mediation. He also hosted Mr. Feinberg for a speech at the Arizona Bar Foundation's luncheon. In addition, he spoke on Morris and

Damron and Peaton Agreements at the State Bar Association's CLE by the Sea in July 2006.

Steve Guttell was named Vice Chair of the Executive Council and a member of the Board of Governors for the Arizona Foundation for Eye Health (AFEH), an Arizona-based 501(c)(3) nonprofit organization dedicated to preventing blindness and vision loss caused by complications of diabetes and other eye diseases.

Jim Kaucher was selected to receive the 2006 Common Ground Award from the Metropolitan Pima Alliance. Jim was selected to receive this award because of his work with the Tucson Meth-Free Alliance's Neighborhood Project. Jim serves on the steering committee of the Meth-Free Alliance, chairs the Neighborhood/Community Task Force and serves on the Legislative Task Force. He was also elected president of Winterhaven Water and Development Company, a cooperative water company for the neighborhood of Winterhaven. He is an Elder on Session, President of the Board of Trustees, and President and CEO of Northminster Presbyterian Church.

Brandon Kavanagh was elected at the State Bar Convention as Co-Vice Chair of the Executive Committee for the State Bar of Arizona Business Law Section for a one-year term.

Marty Jones became a member of the Board of Directors for South Mountain Chamber of Commerce. He also presented "Environmental Considerations for Developers" at the National

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Business Institute seminar entitled *Land Use Law: Current Issues in Subdivision, Annexation and Zoning*.

The Governor appointed **Scott Malm** to the Electronic Recording Commission. The commission oversees the use of the Internet to record real estate documents. Scott presented "Boundary Law" to other attorneys and real estate professionals for the National Business Institute.

Craig McCarthy, Scott Ruby, Fred Rosenfeld and Madeleine Wanslee spoke at the Public Practice Legal Seminar in Prescott put on by Arizona Counties Insurance Pool & Arizona Counties Civil Deputies Association. Craig, Scott and Fred presented "Formation, Financing & Defending Special Districts." Madeleine presented "New Bankruptcy Code and Its Impact on Governmental Entities" with another attorney from Tucson.

Chris McNichol spoke at the Annual Convention of the Land Title Association of Arizona on the topic of new statutory changes affecting trustee's sales. He also jointly conducted a roundtable discussion on arbitration at the International Council of Shopping Centers U.S. Law Conference and spoke at the Land Title Agency Underwriting Conference. In addition, he was recently elected to the Board of Directors of the Boys & Girls Clubs of Metropolitan Phoenix.

Christina Noyes is a member of the American Bar Association Forum on Franchising Community Service Event Committee.

Séan O'Brien recently presented "Bankruptcy ADR Program" to the Maricopa County Association of Family Mediators (MCAFM).

Gerry O'Meara addressed the Arizona Insurance Claims Association regarding a case for the Associated Aviation Underwriters and its impact on insurance companies when they seek to defend cases under reservations of right. He also addressed the Western Diocesan Attorneys Association about the restructuring of dioceses under state law, while making sure that the new structure is consistent with canon law.

Margaret Robertson joined the Greater Phoenix Black Chamber of Commerce.

The Phoenix Mayor and City Council appointed **Valerie Todorovich** to the Phoenix Women's Commission for a three-year term.

The President of the State Bar of Arizona appointed **Madeleine Wanslee** to the State Bar of Arizona Bankruptcy Advisory Commission for a three-year term. She spoke at the University of Arizona James E. Rogers College of Law Bankruptcy Clinic concerning bankruptcy litigation and presented at the Ninth Annual Public Practice Legal Seminar on the New Bankruptcy Code and its impact on governmental entities. She was elected Chair of the State Bar of Arizona's Bankruptcy Law Section for 2007-2008.

Richard Whitney was elected to the board of the Grand Canyon National Park Foundation.

Charles "Chas" Wirken was appointed to chair the Civil Practice and Procedures Committee of the State Bar of Arizona. He presented "What I Would Like to Tell a Beginning Lawyer" to new law students at the University of Arizona James E. Rogers College of Law orientation.

REAL ESTATE

FROM PAGE 1

"innocent landowners," if they meet the requirements set out in the statute.

The "bona fide prospective purchaser" provisions apply to property acquired after January 11, 2002, and cover hazardous substances (not including petroleum and petroleum products) identified on a site prior to acquisition. The "contiguous property owner" defense applies when hazardous substances migrate onto one's property and the property owner had no reason to know of any source of such off-site contamination prior to purchase. The "innocent landowner" defense is available when hazardous substances are found on a property after purchase and the purchaser had no knowledge of or reason to know of on-site contamination and performed "all appropriate inquiries," prior to purchase. "Innocent landowners" fall into three types of categories: (1) those who acquire property without knowledge of the contamination, (2) those who are governments acquiring through escheat (unclaimed property), other involuntary transfers or eminent domain, and (3) inheritors of contaminated property.

The key to establishing any of the described defenses is the completion of "all appropriate inquiry" prior to purchase. When Congress adopted the amendments to CERCLA in 2002, it directed the EPA to come up with standards for completing "all appropriate inquiry." Congress provided that until the EPA adopted rules for completing "all appropriate inquiry," the ASTM International standards could be relied upon by those purchasing property. The EPA then spent nearly three years working with stakeholders and environmental professionals to come up with standards that could be universally applied and finally adopted new rules for completing "all appropriate inquiry." Those rules became effective November 1, 2006.

Everyone planning to purchase real estate for any purpose other than single-family occupancy should have a Phase I Environmental Site Assessment completed by an environmental professional and reviewed by an environmental attorney prior to closing to assure the defenses to CERCLA liability will be available to that buyer in the event contamination is ever found at the property.

The new rules for completing an "all appropriate inquiry" can be reviewed at <http://www.epa.gov/swerosps/bf/regneg.htm>.

Martin T. Jones 602-257-7674 mjones@gustlaw.com
Marty practices in the areas of environmental, real estate and land use laws.

A MODERN DAY SWORD OF DAMOCLES: Protecting Yourself When Using E-mail

The story of Damocles dates back to the time of Cicero. In short, Damocles openly envied a tyrant king's life of wealth. The tyrant let Damocles take his place on the throne for a day to enjoy all the benefits of his power and wealth; however, a sword was suspended above the throne by a single horsehair to demonstrate the danger that the tyrant lived with on a constant basis.

Today, one of our core societal concepts of progress is technology and how it gives us the ability to do things faster with less effort. We live in a world that simply moves much faster than it used to, and e-mail is one of the main accelerators. By clicking the "Send" button, we send messages and exchange drafts of documents. Each of us now has our own Sword of Damocles: our progress has put us in danger of making mistakes with each e-mail sent.

Most of us have heard stories of how the use of e-mail has gone wrong. Some of the stories are simply reminders of how embarrassing it can be to share private information or thoughts with unintended people. Some of the stories have cost businesses immense sums of money. E-mail is still increasing in usage in the legal and business worlds. No matter what area of law we discuss, whether real estate or employment law regarding transactions or litigation, e-mail is constantly at issue today.

How can you best protect yourself from the imminent danger of e-mail mistakes? Follow these simple steps: (1) watch your words, (2) watch your contacts, and (3) watch your threads.

1. Watch your words.

There are many theories that modern psychology is researching about how differently people act when using e-mail.

Generally, people seem to write more casually in e-mail, even when they use it in formal situations. Many people see too many e-mails in a day, causing them to not think twice about dashing off a quick response. This approach can cause many problems, especially when the recipient is not familiar with the sender. There is no tone of voice, facial expression, or body language that accompanies an e-mail, leaving your reader to interpret your words without valuable cues.

To avoid such problems, read every e-mail you send and see if it can be taken any other way besides how you mean it. If so, revise it. Make it simple and clear so that the receiver cannot misinterpret your meaning. Taking time to double check an e-mail before sending it may sound like the antithesis of e-mail itself; however, it can save you much more time in not having to explain yourself or repair relationships after an e-mail is misread. More importantly, consider picking up the phone and calling so that there is even less chance of miscommunication and there is more human interaction.

In addition to being misunderstood, people also seem to be willing to say things in e-mail that they would not say in a face-to-face conversation, whether casual or formal. Problems often arise when people say unkind things about others, whether true or not. If you think about saying something in an e-mail but you would not say it in front of people, then do not write the e-mail. Only you are in control of what you say in your e-mail; therefore, care should always be taken before clicking "Send."

2. Watch your contacts.

You may have a very well written e-mail that says what you mean, but the same e-mail may still cause problems if you send it to the wrong person. In fact, it may

be a waiver of the attorney-client privilege. Make sure your recipients' e-mail addresses are correct. A misspelling or other mistake in the address may send your e-mail to a completely different person than you intended. Including extra addresses unintentionally, such as clicking "Reply All" instead of just "Reply," can cause irreparable damage. Depending upon the situation, you can expose trade secrets, litigation strategies, or even waive the attorney-client privilege, all in one mistaken click.

Watching your contacts has another meaning. Even if you send your e-mail to the correct person, do you know if they will be careful themselves? Will your contacts accidentally, carelessly, or even intentionally forward e-mails to others that you would not have included? Will people respect the confidentiality of your communication? Knowing your recipients is no less important than the text of the e-mail itself.

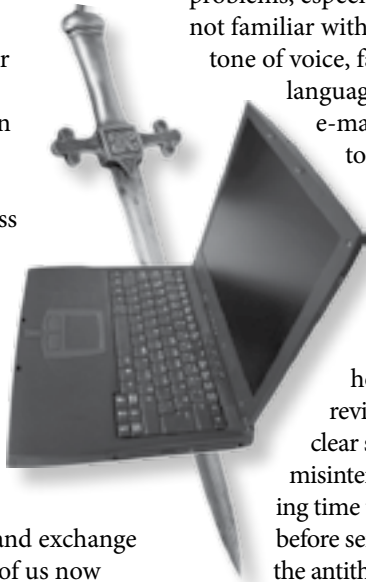
3. Watch your threads.

Many of us reply to e-mails or forward e-mails as a matter of convenience to keep from retyping e-mail addresses. Most e-mail systems include the e-mail you responded to or forwarded in the text of your e-mail, often called a "thread." It is important to remember just what else is included with your new words in the thread of an e-mail. Did someone say something in a prior e-mail to you that you should not forward to the recipient of your new e-mail? E-mail threads can become quite long after a series of replies. If you are not careful, you may share your own or someone else's confidential communication.

E-mail may be a useful tool, but it has inherent dangers. We hope that remembering the Sword of Damocles hanging from a single horsehair will make you think before clicking "Send."

Brandon J. Kavanagh 602-257-7425
bkavanagh@gustlaw.com

Brandon practices in the areas of commercial real estate and business.



Grand Canyon, Great Needs

Arizona's Grand Canyon encompasses more than 1.2 million acres of public land on the southern end of the Colorado plateau. It is a globally important natural resource

containing magnificent scenery known throughout the world. A 277-mile stretch of the Colorado River runs through the park and thousands of miles of tributary canyons are included within its boundaries. It is truly one of the world's

greatest natural wonders containing several distinct ecosystems with a diverse array of plant and animal life. The park is home to ten endangered or threatened animal species, numerous rare, specially protected plant species and 11 Native American tribes.

The Grand Canyon faces many challenges in the near future as it struggles to accommodate nearly 5 million annual visitors from all parts of the world while still preserving wildlife and wildlife habitat, archeological treasures, 606 miles of historic trails below the rim and important historic sites. The popularity of the park coupled with insufficient government funding to operate the park

has overwhelmed the aging infrastructure and diminished the ability of the National Park Service to properly care for the natural and cultural resources of the canyon. The

result has been some degradation of visitor experience and unacceptable impacts on the park's wildlife and natural and cultural resources.

In response to the needs of the Canyon, the Grand Canyon National Park Foundation, an Arizona not-for-profit organization, was formed to preserve, protect and enhance the Canyon by promoting private philanthropy and volunteer leadership. To date, more than \$15 million has been raised to support a wide variety of projects at the park.

Some of the projects that have been funded by the \$15 million raised by the Foundation include: control of invasive plant species in the park's riparian and desert scrub areas; identification of habitats of desert big horn sheep; study of mountain lions on the southern Colorado Plateau; the reintroduction of the California condor; the

improvement of trails, including making the rim trail accessible to disabled persons; and a study to explore meaningful ways to communicate with and increase the involvement of Native Americans located in or near the National Park.

Nearly 100 years ago, Teddy Roosevelt set aside the land that has become the Grand Canyon National Park with the admonition "keep this great wonder of nature as it is now...keep it for your children, your children's children and all who come after you as the one great sight, which every American should see." At a time of continuing federal funding reductions, the need for individual and corporate stewardship to protect this uniquely American treasure for our current and future generations has never been greater.

If you would like more information about the needs of the Grand Canyon National Park and the Foundation that supports it, please contact me at the number below, or visit the Web site of the Grand Canyon National Park Foundation (www.gcnpf.org).

Richard H. Whitney 602.257.7424

rwhitney@gustlaw.com

Dick practices in the area of trusts and estates.



PHOENIX OFFICE

201 E. Washington St., Ste. 800
Phoenix, Arizona 85004-2327
Telephone: 602.257.7422
Facsimile: 602.254.4878

TUCSON OFFICE

One S. Church Ave., Ste. 1900
Tucson, Arizona 85701-1627
Telephone: 520.628.7070
Facsimile: 520.624.3849

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PHOENIX, ARIZONA 85004-2327

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