A Pollution Liability and Legislation Primer

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In view of the ever-increasing interest in this area…I thought it would be helpful to identify the genesis of this coverage. This will enable many people to better understand this topic and the growing importance it plays in the insurance arena.

I would like to give a little background on the history of Pollution Legislation. I am not sure how many of you readers are familiar with this topic and I think it will be helpful to understand how we arrived where we are today.

Congress is the ultimate source of all Federal Environmental Legislation and it does this in order to accomplish several desired goals. The main regulator of Federal Legislation is the Environmental Protection Agency, AKA the EPA. The EPA develops and issues regulations and enforces these regulations nationwide.

The vast majority of Federal Environmental issues are handled at the EPA level, but critical cases usually end up in Federal Courts. The courts can sanction criminal prosecutions and force or mandate remedial action/clean-ups and disposal and listens to appeals of EPA requirements.

For the sake of convenience, the principal Federal Environmental Legislation may be divided into four major categories. These categories will describe the purpose or goals of this legislation:

1. **REDUCE TOXIC SUBSTANCES**
2. **IMPROVE AIR QUALITY**
3. **IMPROVE WATER QUALITY**
4. **REDUCE HAZARDOUS WASTE**

Let's review a few of the major pieces of pollution legislation briefly that are pertinent:

THE RESOURCE CONSERVATION AND RECOVERY ACT OF 1976 (RCRA):
The legislation marks the beginning of what has become the EPA's most far reaching and complex regulatory program. **RCRA** tracks hazardous waste from cradle to grave, retroactively and prospectively. It is applicable to **ARRANGERS, GENERATORS, TRANSPORTERS AND STORAGE FACILITIES** of any type of waste which is applicable to this law. There are permitting requirements that must be met and violation of any of these regulations can impose substantial fines and/or imprisonment if not handles properly. Remember…waste remains the insured's responsibility even after disposal.

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1990 (CERCLA or SUPERFUND):
This legislation brought environmental concurs to the forfeit for virtually every segment of American industry. This Act authorizes the EPA to mandate clean-up and disposal of abandoned dumps and other contamination waste disposal sites. This law does have some very stringent standards, e.g…Retroactive, joint and generally unlimited liability. Hence, it is next to impossible not to be subject to these onerous standards. **SUPERFUND** is not primarily a regulatory statute…its principal obligation imposes liability for

remedial action/clean-up, transportation and storage costs. Please do not forget that the successor to **CERCLA** is **SARA** and this acronym stands for Superfund Amendment and Reauthorization Act of 1986.

THE CLEAN WATER ACT:
Congress established the basic framework of this program in 1972 and the statute provides heavy funding for the **CONSTRUCTION OF MUNICIPAL SEWAGE TREATMENT WORKS**. However, its main emphasis is on the control of discharges from industrial plants and it mandates a **NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM** which requires every industry which discharges any type of waste into public waters to obtain an **NPDES** permit. These permits specify numerical discharge limitations for a wide range of individual substances and requires self-monitoring.

THE SAFE DRINKING WATER ACT:
This act mandates minimum drinking water standards and the **EPA** establishes maximum contamination levels which are allowed for various substances which may be in drinking water. In addition to identifying safe levels for drinking, this statute authorizes the **EPA** to establish a regulatory program to prevent contamination of underground drinking water sources.

THE CLEAN AIR ACT:
This legislation was passed in 1970 and modifications were made in 1991. The law allows **EPA** to set a basic set of national ambient air quality standards for selected contaminants which provide the foundation for our national air pollution control problem program. This legislation has always provided for the establishment of the National Emission Standards for Hazardous Pollutants and it was the first standards of its kind. With the implementation of the revised statute in 1991, it is estimated that it will cost American business approximately 50 billion dollars a year to comply with the 1991 Clean Air Act, alone.

THE EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT:
This act was enacted in 1986 and it substantially modified SUPERFUND and was a result of the Bhopal, India disaster. This act requires industrial plants to work with local community leaders and state officials to prepare coordinated plans for responding to emergency releases of hazardous chemicals. Included in this legislation was the **EMPLOYEE RIGHT TO KNOW LEGISLATION**. This law mandates that employers must notify all of **THEIR EMPLOYEES** and **OTHERS** who may be working with them of any type of hazardous waste or materials which may have an adverse effect upon them. Remember that violation of these pollution laws may require remedial action/clean-up and disposal activities that can be extremely expensive. The **EPA** will usually mandate stringent requirements and I can assure you that their activities are going to be the "fail safe" variety. They are going to be redundant and expensive. One usually finds out they have a problem with the **EPA** when they receive a notice from them that a designated site or their own property or organization has violated one or more **EPA** requirement. Such notice then makes one known as a **POTENTIALLY RESPONSIBLE PARTY (PRP)**. Once this happens, it is a long drawn out and expensive legal proposition one will never forget. Examples of **EPA** mandated activities will be given later on in this article.

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1970:
This act did mandate that each person, party or organization that was going to engage in activities that may impact on the **ENVIRONMENT** must come up with an **ENVIRONMENTAL IMPACT STUDY**. This may sound like a **VERY** simple endeavor, but it has created gargantuan nightmares for many companies when trying to comply with each and every type of Pollution Legislation that may be affected by their activities. It's doubtful that the originators of this legislation could envision that this short document would

require the extensive reporting and studies necessary prior to beginning of a project. This act also regulates federal government projects such as dams, highways, etc.

POLLUTION PROSECUTION ACT OF 1990:
This is the newest legislation on the horizon as Congress authorized the EPA to hire as many as 200 **CRIMINAL INVESTIGATORS AND FEDERAL CRIMINAL PROSECUTORS** by 1995 in order to prosecute those people who they feel are "environmental criminals". By the end of 1994, the prosecution of individuals under the criminal statutes had increased 300% and it totals over 260 million dollars in fines and 446 years in prison for those who are convicted.

What makes the prospect of criminal prosecution for any environmental crime so daunting is that more and more frequently the targets are **CORPORATE OFFICERS** or **LINE MANAGERS**. Unfortunately, many times their crime involved someone else's bad act or merely failure to file proper paperwork required under one of the many environmental statutes and regulations. The plethora of rules virtually guarantees that no company or individual can always be completely in compliance with these laws. Worst of all, if the **VIOLATION OF** an environmental statute or regulation has occurred, there is no absolute defense to criminal liabilities.

The nations consciousness of environmental issues has increased tremendously and this is one of the reasons that Congress apparently enacted environmental statutes criminalizing some types of conduct without regard to intent. There are a number of environmental statutes that provide for conviction of a defendant upon showing mere negligence whether or not the defendant had **actual knowledge of this violation**. Again, such targeted individuals include not only environmental managers and engineers, but also Corporate Officers with broad responsibilities for development of corporate policies and the capacity to follow-up on it's compliance as mandated by company procedures, policies and environmental laws.

In targeting upper management such as Corporate Officers, for criminal prosecution, the government relies upon the responsibility Corporate Office doctrine. Some of the proposed guidelines that are set forth as aggravating factors:

1. **MANAGEMENT INVOLVEMENT IN THIS AREA**
2. **PRIOR CRIMINAL COMPLIANCE HISTORY**
3. **PRIOR CIVIL COMPLIANCE HISTORY**
4. **VIOLATION OF JUDICIAL OR ADMINISTRATIVE ORDERS**
5. **CONCEALMENT OF VIOLATIONS**
6. **ABSENCE OF COMPLIANCE**

Any of these, if proven, will substantially enhance the base level fine. It should also be noted that although the prosecution is required to prove the aggravating factors, it is relatively easy to do so since the standard of proof for sentencing matters only to the **PREPONDERANCE OF EVIDENCE** rather than **BEYOND A REASONABLE DOUBT**.

This is not a complete discussion of all Pollution Legislation. Other Legislation to be concerned with includes **STATES, MUNICIPALITIES AND LOCAL GOVERNMENTS**. Generally their requirements are at least as comprehensive and as restrictive as the Federal Acts, and the Federal Laws are to be considered **MINIMUM STANDARDS**. This will then require business owners to check all local and state laws for compliance as well as be in compliance with the Federal Legislation.

The **STANDARDS OF CARE** are another area of concern as respects pollution legislation. Under this legislation, the general and usual standards of care are:

1. **RETROACTIVE LIABILITY**
2. **JOINT AND SEVERAL LIABILITY**
3. **REQUIRES STRICT LIABILITY COMPLIANCE**
4. **REQUIRES IMMEDIATE REPORTING**
5. **INCLUDES POTENTIAL PERSONAL LIABILITY**
6. **INCLUDES CRIMINAL PROSECUTION IMPRISONMENT, FINE AND PENALTIES**
7. **NO STATUTES OF LIMITATIONS**

This makes nearly impossible for a **PRP (POTENTIAL RESPONSIBLE PARTY)** to claim innocence with any degree of success. These laws are not subject to any apparent statute of limitation so liability theoretically may extend ad infinitum. Some of the laws have provisions that basically state if your activities created 10% of the total problem, your firm and it's designated officers may be 100% responsible for the remedial action, clean-up, transportation and disposal costs. If your firm is a **PRP** and other persons were responsible for the contamination, your only recourse against them will be the standard of care based on **NEGLIGENCE**. It will be required to prove that the other party(ies) did not act in a prudent manner under similar circumstances. The EPA does not function by this requirement. The EPA's doctrine is **STRICT LIABILITY** with the other caveats previously mentioned.

A quick review of these laws by title is as follows:

1. **THE RESOURCE CONSERVATION AND RECOVERY ACT OF 1976 (RCRA)**
2. **THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1990 (CERCLA OR SUPERFUND)**
3. **THE CLEAN WATER ACT OF 1972**
4. **THE SAFE DRINKING WATER ACT**
5. **THE CLEAN AIR ACT OF 1970**
6. **THE EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT OF 1986 (BHOPAL, INDIA DISASTER)**
7. **THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1970**
8. **THE POLLUTION PROSECUTION ACT OF 1990**

As if all of this isn't enough to remember, Employers have the additional responsibility of communicating employees' exposure to Hazardous Substances. As a result, Employees are strongly recommended to establish a **HAZARD COMMUNICATION PROGRAM** commonly known as **"HAZCOM"**. To make sure that employers have the safety measures in place, a proper **HAZARD COMMUNICATION PROGRAM** should be comprised of five (5) interrelated responsibilities. They are:

1. **PREPARATION OF A HAZARDOUS MATERIALS LIST OF INVENTORY SPECIFIC TO THE EMPLOYER'S ACTIVITIES**
2. **MAINTENANCE OF A MATERIAL, SAFETY DATA SHEET (MSDS)**
3. **PROPER LABELING OF HAZARDOUS MATERIALS**
4. **EMPLOYEE/INDEPENDENT CONTRACTOR INFORMATION AND TRAINING**
5. **DEVELOPMENT OF A WRITTEN HAZARD COMMUNICATION PROGRAM**

These responsibilities are defined in the **OSHA HAZARD COMMUNICATION STANDARD**. Let's review each one of these in more detail as it will help in better understanding the **HAZARDOUS COMMUNICATION PROGRAM**. The Federal Hazard Communication Standard applies to all hazardous chemicals in the workplace which employees or others may be exposed under normal conditions or in a foreseeable emergency such as an accidental spill. Hazardous chemicals fall into two (2) groups: Physical hazards and health hazards. The standard specifies precise scientific criteria to define each of these groups, but the distinction between the two can be summarized as follows:

PHYSICAL HAZARDS - As substances that are flammable or combustible or explosive or subject to potentially dangerous or physical reactions.

HEALTH HAZARDS - This includes chemicals with statistically significant evidence of being toxic, carcinogenic, corrosive or capable of damaging skin, eyes, mucous membrane or any of several internal organs or bodily functions or systems.

INDEMNIFICATION OF RISK AND INVENTORY - This can be accomplished by having the employer request MSDS Sheets from anyone who he purchases materials and supplies. This will give the employer a good view of what he is dealing with in their operations.

MATERIAL SAFETY DATA SHEETS - Every hazardous material identified in the risk management/inventory process described above mandates a Material Safety Data Sheet. The MSDS as it is known, contains information on the nature of the hazard created by the presence of any material in the work place. It also identifies precautions that must be taken while using or handling the material and proper response action in the event that employees are exposed to any of these materials through some accident.

Manufacturers and importers of hazardous chemicals must develop MSDS for their products and provide them to all of their customers. No substance defined in the hazard communication standard as a hazardous chemical may be used unless the employer maintains a MSDS for it.

The Federal Hazard Communication standard prescribes conditions under which MSDS sheets must be made available to employees and others. This information must be assessable to workers while they are in their work areas where they are exposed to these substances. Federal regulations regarding hazard communication pertain to hazardous materials which are ACTUALLY PRESENT IN THE WORK PLACE.

LABELING - The basic labeling requirement of the Federal Hazard Communication standard is that each container of hazardous chemicals must be labeled with the identity of the chemical and the appropriate warnings concerning the hazards posed by it.

There are few exceptions to this rule and a standard labeling requirement must be established and maintained on an ongoing basis. The manufacturers of hazardous chemicals are required to label their products with the same information as that which employers are responsible for putting on the individual container. Required hazard warnings can be converted by words and - where possible - pictures or symbols. All verbal warnings must be in English and it would be prudent to add a warning in whatever language an employer's workers or others understand best…In addition to the mandated English language warning statute or requirement.

EMPLOYEE AND THIRD PARTY INFORMATION AND TRAINING - The Federal Hazard Communication standard requires employers to provide their workers and others with certain categories of information. Everyone must be informed of:

- THE PROVISIONS OF THE HAZARD COMMUNICATION STANDARD ITSELF;
- THE PRESENCE OF ALL HAZARDOUS CHEMICALS IN THEIR WORK AREA and;
- THE ACCESSIBILITY OF THE MATERIAL SAFETY DATA SHEETS AND THE EMPLOYEE WRITTEN HAZARD COMMUNICATION PROGRAM.

Training must be conducted in at least the following areas…where

- THE PHYSICAL AND HEALTH HAZARDS OF ALL CHEMICALS ARE PRESENT IN THE WORK AREA and should include the
- USE OF MATERIAL SAFETY DATA SHEETS TO OBTAIN INFORMATION ABOUT CHEMICAL HAZARDS.
- EMPLOYERS LABELING SYSTEM FOR HAZARDOUS SUBSTANCES.
- TECHNIQUES FOR IDENTIFYING EXPOSURE TO HAZARDOUS CHEMICALS IN THE WORK PLACE.
- USE OF SAFETY AND PROTECTIVE EQUIPMENT INTENDED TO PREVENT HARMFUL EXPOSURE TO HAZARDOUS MATERIALS.
- EMERGENCY PROCEDURES IN THE EVENT OF A LEAK OR SPILL OF HAZARDOUS MATERIALS.

Information and training must be provided to employees and others at the time they are first assigned to work with hazardous chemicals and whenever there is a change in the nature of the hazards to which they are exposed. The employer should maintain permanent records of all training sessions and devise an acknowledgment form to be signed by an employee as documentation of their attendance…documentation is a must.

WRITTEN HAZARD COMMUNICATION PROGRAM - Employers must develop a written program explaining how the hazard communication standard regarding labeling, Material Safety Data Sheets and training is to be implemented and maintained. The written program must be available to employees or others who request it; if practical, the program should simply be distributed to all employees and others who may be exposed to hazardous chemicals in the course of their work and document what is given to everyone.

The written program must incorporate a list of all hazardous chemicals known to be present in the work place. The written program must also address the existence of hazards associated with non-routine tasks; i.e., those tasks that employees might be called on to perform occasionally, but which are outside the scope of their regular duties and not addressed by the basic employee information and training procedures.

HAZARD COMMUNICATIONS TO INDEPENDENT CONTRACTORS - A specifically required feature of the written hazard communication program is the inclusion of procedures for advising other employers

whose workers may be on the premises or the job site, etc. or the hazard their employees may be exposed to. The written hazard communication program is basically the same as that for the primary program and it is important to notify all independent contractors or third parties that may be exposed to substances which may be detrimental to their health.

COMPLIANCE - Please understand that most of this legislation may apply to **PAST, PRESENT AND FUTURE** activities and great care must be taken in order to comply with the statutes. One of the most important requirements is **RECORD-KEEPING AND DOCUMENTATION**, as this will save a great deal of grief should allegation of injury be brought by employees of each tile business owner or of independent contractors.

Any remedial activities which are mandated do require the expertise of professionals in all of these areas because of the stringent and catastrophic results that can occur if not handled properly. Just because third parties are allowed to assist the owner with activities, does not relieve the owner of any responsibility. Hence generators must be particularly vigilant when dealing with transporters and storage facilities who will handle and store hazardous materials. If the work is not done properly, the generator can be held responsible for the acts of the independent contractor(s) hired, and they will offer little defense in the event of violation on laws or non-compliance.

In the April 1995 Newsletter, Part two of this article discussed the requirements of the Hazard Communication Program that included five specific interrelated responsibilities. Among other things, this involved the preparation of hazardous materials list and/or inventory, the maintenance of a material safety data sheet, proper labeling of hazardous materials, employee and independent contractor information, training, and the development of a written hazard communication program. In Part three, we will continue the discussion as respects how various legislation affects property-buying, selling, building/mergers and acquisitions.

There are many factors to consider when businesses purchase or sell property. Today one of the most critical factors to consider is the environmental use to which the property has been or will be subjected. Unfortunately, in the area of environmental compliance, even the best-structured plan can come apart at the seams.

Of utmost importance in making decisions to **buy or sell property** it is most important to know all about it's past environmental use. **SUPERFUND** imposes liability for clean-up of hazardous substances on certain **POTENTIALLY RESPONSIBLE PARTIES (PRP's)** and these parties include along with others:

1. **CURRENT OWNERS AND OPERATORS OF THE SITE;**
2. **PAST OWNERS AND OPERATORS OF THE SITE;**
3. **MORTGAGEES AND POSSIBLY FACTORS AND OTHER FINANCIAL INTERMEDIARIES;**
4. **OTHERS WHO MAY HAVE INPUT INTO THE USE OR MAINTENANCE OF THE PROPERTY**

ENVIRONMENTAL AUDITING has become an important risk management tool for anyone who is going to buy or sell property because of the catastrophic potential of problems that may result. **SUPERFUND** clean-up costs are often in the range of tens of millions of dollars. Hence, to avoid unintentional acquisition of such liabilities, a thorough investigation of the current and past waste disposal practices or use of any property is an absolute requirement. Sometimes it may be required that an owner conducts off-site auditing as well. This may be required in order to make sure that the property is not polluting or being polluted from outside its boundaries. The development of full environmental information is also

necessary for evaluation of any transaction and the proper allocation of risk between the interested parties is suggested.

ENVIRONMENTAL DUE DILIGENCE - In support of mergers, acquisitions, divestments and financing transactions should also be considered in addition to the sale or purchase of property. This will typically involve additional paperwork such as a review of permits and compliance records and governmental regulatory files concerning the facility or facilities in question.

Sometimes evaluation of any off-site waste management facilities used by the previous users of the property should be undertaken. Visual inspections of the property for obvious signs of problems with past disposal practices are mandated. Additional sampling and analysis may be undertaken based on the results of this initial audit. The standard of due diligence in the environmental area is rising and increased recognition in the business community of the potential liabilities involved are required.

These concerns have been heightened by the establishment of the **SUPERFUND** amendments including the innocent purchases defense which in essence sets a floor on adequate environmental due diligence. The minimum normally would include both a records review and an on site inspection of the property. Needless to say, problems found in environmental auditing that are discovered before any activities take place, will reduce the potential for problems once construction commences or your activities are modified to meet your needs in the event new property purchases were made.

Again, whenever doing any type of environmental auditing, it is recommended that professionals be used because of the potential catastrophic liabilities that may be involved. Always consider Phase I and II Audits as a minimum. Also, when conducting environmental auditing, do not assume that it is possible to avoid action on the information found, as once knowledge is gained…it is a violation of the pollution laws not to act on the information. Also…don't assume these audits will uncover everything present.

INSURANCE - Always be mindful that the most (if not all) standard **COMMERCIAL GENERAL, AUTO & UMBRELLA LIABILITY** policies issued today do not intend to cover any of the pollution activities which may be a part of an Owner's Arranger, Generators, Transporters or Storage Facilities operations. A quick review of the new pollution liability exclusion and the definition of pollutants will establish this point very poignantly.

THE POLLUTION EXCLUSION SPECIFICALLY DOES NOT COVER: ANY BODILY INJURY OR PROPERTY DAMAGE ARISING OUT OF THE DISCHARGE, DISPOSAL, RELEASE OR ESCAPE OF SMOKE, VAPORS, SOOT FUMES, ACIDS, ALKALI, TOXIC CHEMICALS, LIQUIDS OR GASSES, WASTE MATERIALS OR IRRITANTS, CONTAMINANTS OR POLLUTANTS INTO OR UPON LAND, THE ATMOSPHERE OR ANY WATER COURSE OR BODY OF WATER.

Such broad exclusionary language leaves little room for misinterpretation of the policy's intent. Common sense should be sufficient to determine that there is very little (intended) protection in the policies. Except in rare instances where there is an off-site pollution source and the owner or service provider did not place the pollutant(s) on the property or knowingly incorporate then in their products or make them a part of their completed operations. Other than this narrow potential for coverage, virtually any claim for pollution will be declined by the insurance carrier(s) covering the property or completed work in question with the possible exception of hostile fines and some products liability issues.

EPA - One final bit of information about the EPA and current legislation that may be helpful in understanding the complexity and extent of these laws. The EPA in 1986 alone published 1,700 fine print pages of preambles, notices, proposed rules, final rules and orders. These EPA actions were only one type of environmental regulations of businesses. Congress, State Governments and Town Councils also took steps to control and regulate a profusion of environmental issues.

BACKGROUND ON CLEAN-UP ACTIVITIES & COSTS - These Environmental Laws were passed in the 1980's, and their mandates have created enormous problems when the effect of the enforcement is realized in the actual process of conducting the "clean-up". It must be remembered that a conservative estimate for complying with and implementing the environmental regulations cost this nation approximately $150 billion a year. The EPA now has a staff of 18,000 and an operating budget of approximately $4.5 billion annually…the EPA staff has quadrupled since 1970. The EPA has imposed some $1.4 trillion in compliance costs (in 1990 dollars) on industries since it's founding in 1970. In 1990, the agency estimated that complying with it's pollution/ control regulations was costing Americans a remarkable 2.1% on GNP versus 0.9% on GNP in 1972.

In a recent national survey of more than 200 corporate general counsels, only 30% of those attorneys said they believe that full compliance with all states and federal environmental laws is even a possibility. Most of the problems arising from the clean-up process originate from three basic sources:

1. **THE SLOW PACE OF CLEAN-UP ACTIVITIES**…to date, only 160 of the designated 1250 most dangerous landfills and chemical dumps identified by the EPA have been cleaned up.

2. **HIGH COSTS** are a major problem. The average cost of clean-up is $30,000,000 and the estimated cost of cleaning up an NPL site is $40,000,000 at minimum.

3. **THE HIGH TRANSACTIONAL COSTS**…Since 1980, the Federal Government has spent almost $10 billion on Superfund and has forced companies and private individuals to pay another $80 billion, but unfortunately 30-40% of this entire cost has gone to pay legal fees or costs, but some people believe that the actual percentage is closer to 60-70% range.

Corporate Environmentalism is becoming big business as the worldwide market for environmental clean-up technology is $270 billion and expected to rise to the $600 billion range by the year 2000. The liability imposed by CERCLA and RCRA are echoed in 150 State and Local Government Statutes that impose similar liability. A full 80% of the liability is imposed at the State and local levels, therefore, it makes the task of avoiding liability virtually impossible.

Note that **NON-COMPLIANCE** can freeze new facility construction or shut down an existing plant. Violations can lead to criminal prosecution of a corporation, the individual corporate officers and managers. This is not a topic to be ignored because of the potentially significant penalties for violation of the regulations, regardless of the innocent intent of the parties involved. Every business should examine their individual needs in this vital area and take the proper risk management steps to protect the corporation, its officers, employees, service providers and stockholders. Insurance properly arranged will go a long way in transferring the tremendous risks and responsibilities imposed by present day legislation.

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NOTE: This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.