

## Q&A With Reed Smith's Todd Maiden

*Law360, New York (February 22, 2013, 2:19 PM ET)* -- Todd Maiden's practice covers a broad array of environmental and energy services, including litigation, regulatory counseling and negotiating corporate and real estate transactions with complex environmental issues. He regularly represents clients before federal and state agencies on a variety of hazardous waste, water, air and environmental impact/land use issues.

Maiden counsels on obtaining permitting and approvals to build, remodel and/or operate various types of electricity generating facilities; provides compliance strategies for California's Green Chemistry Initiative and the European Union's Registration, Evaluation and Authorization of Chemicals (REACH) program and has extensive Prop. 65 experience both in litigation and counseling. He also provides climate change advice on California's Global Warming Solutions Act ( AB 32), cap and trade options and strategies and related federal legislative and regulatory developments

### **Q. What is the most challenging case you have worked on and what made it challenging?**

A: While there are many cases that have been "challenging" (in every sense of that word), I look back on my role as one of several counsel to the general unsecured creditors' committee in the American Smelting and Refining Company (Asarco ) bankruptcy proceedings (circa 2007-2009) as among the most challenging.

The sheer size of it: This was the largest environmentally driven bankruptcy in the history of the United States. I recall roughly \$6 billion in collective environmental claims at over 80 old mining and smelting sites around the United States.

The pitting of two important public policies: under traditional environmental laws, there is a public policy that the "polluter should pay." Under bankruptcy law, the policy is geared toward allowing the debtor to wipe away its debts and get a clean start. In this case, the debtor was alleged to be the polluter, and desired to wipe away its environmental liabilities, creating tension for a variety of public and private creditors and stakeholders in local communities.

The unique role of counselor to the general unsecured creditors: Everyone is (at least secretly) rooting for you when you are policing someone else's claim against the bankrupt estate. Everyone is actively rooting against you when you are policing their particular claim.

The quality of counsel: The stakeholders were generally represented by smart and extremely hardworking counsel, particularly debtor's counsel, but also representatives of federal and state government, as well as the various private creditors. They set a very high threshold for quality of work, whether it was on purely environmental issues or in bankruptcy reorganization strategies.

The quality of the presiding judge: Judge Richard Schmidt was not only a savvy bankruptcy judge, but also turned out to be a former math major with a keen appreciation for statistical analysis. As much of the claims estimation processes turned on risk assessments and Monte Carlo modeling, Judge Schmidt's ability to grasp advanced statistical analysis issues was crucial to getting reasonable decisions in a timely fashion.

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

A: For the field of environmental law, I see a need for reform in terms of how the chemical industry is regulated. I perceive relatively widespread agreement among stakeholders that the Toxic Substances Control Act is in need of updating, although for starkly different reasons, depending upon whether you are asking someone in industry or representing nongovernmental public interest or conservation organizations.

Europe has developed its own system for regulating chemicals, known as the Registration, Evaluation, Authorization and Restriction of Chemical substances (REACH) regulation. It is in large part based upon the "precautionary principle," which shifts the burden of proving that a chemical is safe enough for particular uses to the manufacturer or importer of the chemical. It also places a great emphasis on transparency and community right to know principles, all compelling public policies. California has recently developed its own approach to regulating certain chemicals in consumer products which shares some REACH-like attributes. California's program is known as the Green Chemistry Initiative.

These programs all have value but do come at some costs and create some headwinds for themselves, particularly in regard to how they intend to incentivize the private sector to reformulate safe products. The research and development needed to produce environmentally friendlier chemicals often comes at great cost and over time. The invention of such a new product constitutes valuable intellectual property — something that most businesses will not want to easily share with competitors after they have taken the risks and incurred the costs to develop them. These new laws are struggling somewhat with trying to find the right balance of making important health information known to end-users while still protecting the intellectual property rights of those entities who were in essence forced to create such new products.

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

A: The most important issue I am currently involved in is the relatively recent auctioning of carbon credits in California, as well as the development of a viable carbon "offsets" program in the state.

The state has made a decision that a key component of its attempts to mitigate the generation of greenhouse gases involves the auctioning of carbon credits between regulated entities (large GHG sources) and speculators. This is a large scale social experiment that will have significant repercussions on the California economy — and there is still a healthy debate over whether these repercussions will be positive or negative.

The projected dollar values associated with these transactions between now and 2020 (a key milestone date for the AB32 program) will likely go into the billions of dollars. To the extent the state receives money from these transactions, it will have the power and ability to shift significant resources to different groups of people, different geographic areas or to support various causes, ostensibly all for the common good.

However, the auction program is under attack from several angles: some groups representing economically stressed or disadvantaged neighborhoods or populations argue that the entire auction program is flawed and should be replaced — possibly with a carbon tax. Other groups oppose the carbon trading system for how it treats out of state sources, alleging interstate commerce violations, etc. Finally, there is viable data that supports an argument that the projected increase in the artificial floor price of carbon in California will simply result in businesses leaving the state to operate elsewhere — otherwise known as “leakage.” In short, this is an exciting time to be practicing environmental law, particularly in California.

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

A: Over the last 10 years or so, I have had the opportunity to work with John Benjamin (as well as his colleague, Jon Epperson) at the Farella Braun firm. While we represent different PRP’s at a contaminated site (and therefore have arguably adverse interests), we share the goal of remediating the site in the most cost effective manner possible.

This case has been complicated by the fact that the contamination has allegedly spread offsite to some environmentally sensitive areas. While there have been numerous occasions where this train could have fallen off the tracks, I have been continually impressed with John’s substantive knowledge, strategic planning and relationship (patience) with regulators, and possibly of greatest importance, his sense of humor.

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

A: I don’t know if I would call this a “mistake,” but I have learned from numerous mentors, including the judges for whom I clerked and the senior attorneys for whom I worked, on numerous occasions, the value of paying attention to detail. While there have been many times I have quickly identified an answer that seems right, there have been so many times that digging a bit deeper has uncovered an exception, or an exemption, or conflicting precedent, that I learned not to trust the easy route. Clients generally pay us for the right answer — if they want the 90 percent confidence level, you better make sure you both understand the difference.

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