



# Howard B. Epstein

*Of Counsel*

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## Contact

+1 212.756.2596

howard.epstein@srz.com

919 Third Avenue

New York, NY 10022

**Chair of the firm's Environmental Group. Focuses on environmental advice with transactional, compliance counseling and litigation aspects, including assisting with documentation and due diligence in M&A, financing and other transactions; advising on regulatory and compliance issues; counseling on litigation avoidance; and defending clients against criminal, civil and regulatory actions.**

In the insurance area, Howard counsels clients on the adequacy of their coverage, recommends coverage enhancements and litigates coverage disputes across a range of insurance products.

He also advises regarding land use issues, specialized financial insurance products, the use of insurance products to resolve legacy liability concerns in business transactions, and insurance issues specific to investment fund managers and corporate directors and officers.

A court-certified mediator, Howard has successfully mediated many complex insurance and environmental matters.

He brings to all his representations an in-depth understanding of the business needs of lenders, fiduciaries, buyers and sellers and, particularly, how those needs relate to environmental liability.

Also, his deep experience in drafting and negotiating environmental insurance products benefit from insights gained as a legal counsel to a number of insurance companies whose environmental products he helped draft.

Before joining Schulte, Howard served in the Office of the Deputy Attorney General, first as counsel to the New Jersey Department of Transportation, and later as Deputy Attorney General and Counsel to the New Jersey Department of Environmental Protection.

He is co-author of the *New York Law Journals* corporate insurance law column, and in 2014, he received the Burton Award for Distinguished Legal Writing.

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## Practices

**ENVIRONMENTAL**

**SPECIAL SITUATIONS AND BANKRUPTCY LITIGATION**

**CYBERSECURITY AND DATA PRIVACY**

**COMPLEX COMMERCIAL LITIGATION**

**LITIGATION**

**INSURANCE**

**REAL ESTATE**

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## Bar Admissions

New Jersey

New York

Pennsylvania

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## Education

Loyola University School of Law, J.D.

American University, B.S.

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# Representations

## Selected Current Matters

- Defense of a private company against alleged legacy groundwater contamination by the New York Department of Environmental Conservation.
- *United States v. Westvaco, et al.* Defense of a multinational paper company in a Clean Air Act, New Source Review enforcement action pending in the Federal District Court, Eastern District of Maryland.
- Representation of a confidential entity in claims against British Petroleum arising out of the Deepwater Horizon, Gulf of Mexico oil spill.

## Selected Reported Decisions

- *New York State Assemblyman Adam Clayton Powell, IV, et al. v. City of New York, et al.*, Index No. 108220/2006 (New York County). On appeal to the First Department.
- *In re Lenox*. Representation of Lenox Inc. in bankruptcy regarding legacy environmental liabilities.
- *Cinergy Corporation, Duke Energy Indiana, Inc. and Duke Energy of Ohio, Inc. v. Associated Electric Gas Insurance Services, LTD*, *Indiana Supreme Court*, 915 N.E.2d 524 (Ind. Ct. App. 2009); 873 N.E.2d 105 (Ind. Ct. App. 2007); 865 N.E.2d 571 (Ind. 2007).
- *Friends of Van Cortlandt Park et.al. vs. The City of New York*, 95 NY 2nd. 623, Feb. 8, 2001.
- *United States v. Pitney Bowes, Inc. et al.*, 25 F. 3d 66 (2nd Cir. 1994).
- *Olin Corp. v. INA et al.*, 762 F. Supp 548 (N.Y. Dist. 1991).
- *Kessler v. Tarrats*, 194 N.J. Super 136 (1984).
- *Springfield v. Lewis et al.*, 702 F. 2d. 426 (2nd Cir. 1983).

- *Gloucester County Concerned Citizens v. Goldschmidt et al.*, 533 F. Supp. 222 (N.J. Dist. 1982).

## Significant Business Transactions

- Representing Purchasers
- Steward Health Care
- Chrysler Corporation from DaimlerChrysler
- GMAC from General Motors
- NewPage Corporation from MeadWestvaco
- BlueLinx from Georgia Pacific
- Albertsons Companies
- National Car Rental
- Ames True Temper
- Americast Technologies
- Formica
- DynCorp
- General environmental counsel to a number of large real estate lenders specializing in commercial mortgage backed securities.

## Environmental Insurance

- After entering private practice in 1985, Howard acted as a legal counsel to a number of insurance companies under-writing pollution liability insurance, advised on the drafting of the policies, pollution risk and new environmental products. Virtually all environmental products trace their origins to the forms developed in 1985.
- In addition to specific expertise drafting and negotiating environmental insurance products, Howard has represented lenders and other financial institutions in hundreds of transactions, including being responsible for documentation and environmental

due diligence. He has represented purchasers and sellers in mergers and acquisitions and has an in-depth, working familiarity with the business needs of lenders and fiduciaries as they relate to environmental liability.

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## Publications

- “Novolex Holdings: A Rare Look at an RWI Claim Dispute,” *New York Law Journal*, April 10, 2024
- “Insured Capacity and Outside Capacity: Status Matters,” *New York Law Journal*, Jan. 25, 2024
- “Judgment Preservation Insurance Emerges as a Valuable Risk Management Option,” *New York Law Journal*, Nov. 15, 2023
- “Eastern District Holds That Exclusion Bars Defense Obligation,” *New York Law Journal*, Sept. 29, 2023
- “Second Circuit Weighs In on Other Insurance and Additional Insured Dispute,” *New York Law Journal*, June 29, 2023
- “Prior or Pending Litigation Exclusion Bars Coverage for Natural Resource Damages Claim,” *New York Law Journal*, March 29, 2023
- “Second Circuit Clarifies Justiciability Standard for Declaratory Judgment Actions Concerning the Duty to Defend,” *New York Law Journal*, Feb. 7, 2023
- “Southern District Finds That Final Adjudication Limitation in Conduct Exclusion Does Not Require Exhaustion of All Appeals,” *New York Law Journal*, Nov. 10, 2022
- “Delaware Ruling Underscores Significance of Warranty Statements,” *New York Law Journal*, Sept. 26, 2022
- “R&W Insurance and Public Company Transactions,” *New York Law Journal*, June 16, 2022
- “Amendments to CPLR Impose New Insurance Disclosure Requirements on Defendants,” *New York Law Journal*, March 29, 2022
- “Court of Appeals Reverses First Department, Holding Bear Stearns’ Disgorgement Payments Are Not Excluded From Coverage,” *New York Law Journal*, Jan. 27, 2022

- “Court Narrowly Construes Bump-Up Exclusion in Willis Towers Watson Case,” *New York Law Journal*, Nov. 2021
- “SPAC Litigation and Insurance Implications,” *New York Law Journal*, June 28, 2021
- “Delaware Courts Continue To Issue Insured-Friendly D&O Insurance Rulings,” *New York Law Journal*, March 31, 2021
- “Delaware Supreme Court Rules That Appraisal Actions Are Not Covered by Public Company D&O Insurance,” *New York Law Journal*, Nov. 16, 2020
- “PPP Loan Insurance: An Introduction and Overview,” *New York Law Journal*, Sept. 18, 2020
- “Southern District Denies Insured’s Request for Preliminary Injunction Seeking Payment of COVID-19 Related Loss,” *New York Law Journal*, June 15, 2020
- “Global M&A Insurance: Considerations for Cross-Border Transactions,” *New York Law Journal*, April 9, 2020
- “Practical Insurance Advice in the Wake of COVID-19,” *Schulte Alert*, April 1, 2020
- “Business Interruption and Related Insurance for Losses from COVID-19,” *Schulte Alert*, March 17, 2020
- “Securing Insurer Advancement of Defense Costs Under D&O Policies,” *New York Law Journal*, Jan. 31, 2020
- “California Courts May Not Apply New York Choice of Law Clauses,” *New York Law Journal*, Nov. 29, 2019
- “Delaware Courts Take Narrower View of Related Claims Than NY Courts,” *New York Law Journal*, Sept. 17, 2019
- “Representations and Warranties Insurance: A Real World Claims Discussion,” *New York Law Journal*, June 27, 2019
- “Court: Joint Venture Clauses Doesn’t Limit Insurers’ Exposure for Defense Costs,” *New York Law Journal*, March 29, 2019



- “Climate Change-Related Losses and Other Event-Driven Litigation Risks,” *New York Law Journal*, Jan. 29, 2019
- “First Department Relies on ‘Kokesh’ to Rule That SEC Disgorgement Is Barred From Coverage,” *New York Law Journal*, Dec. 4, 2018
- “Defense Costs Coverage 101,” *New York Law Journal*, Sept. 19, 2018
- “Court of Appeals Rejects Unavailability of Insurance Exception,” *New York Law Journal*, June 15, 2018
- “Insurance for the Costs of Defending Regulatory Investigations,” *New York Law Journal*, March 28, 2018
- “Second Circuit Affirms Sandy-Related Negligence Claim Against Broker,” *New York Law Journal*, Jan. 30, 2018
- “Court Denies Coverage Under Reps and Warranties Policy,” *New York Law Journal*, Nov. 27, 2017
- “SDNY Finds Coverage for Payment Instruction Fraud Loss,” *New York Law Journal*, Sept. 19, 2017
- “SEC Disgorgement: Is It Insurable?,” *New York Law Journal*, July 24, 2017
- “Court of Appeals Clarifies Anti-Subrogation Rule,” *New York Law Journal*, March 31, 2017
- “Case Law Suggests Counsel Should Advise Clients About Available Insurance,” *New York Law Journal*, Jan. 30, 2017
- “‘Viking Pump’: Changing the Allocation Landscape,” *New York Law Journal*, Aug. 30, 2016
- “New Jersey Supreme Court Surprises With Late Notice Ruling,” *New York Law Journal*, June 30, 2016
- “Should Schools Test Their Drinking Water?,” *Schulte Alert*, April 25, 2016
- “Representations and Warranty Insurance Comes of Age,” *New York Law Journal*, March 31, 2016

- “Revisiting Non-Assignment Clauses: California Returns to the Majority Rule,” *New York Law Journal*, Jan. 12, 2016
- “Insurance Implications of New Justice Department Policy Directive,” *New York Law Journal*, Oct. 21, 2015
- “Cyber-Risk Insurance Update,” *New York Law Journal*, July 27, 2015
- “Subrogation: Primer and Recent Environmental Cleanup Cases,” *New York Law Journal*, May 19, 2015
- “Return to the Bear Stearns’ D&O Insurance Dispute,” *New York Law Journal*, March 3, 2015
- “Direct Loss Requirement in Fidelity Insurance Bonds,” *New York Law Journal*, Dec. 29, 2014
- “Hurricane Sandy: Courts Begin Issuing Insurance Rulings,” *New York Law Journal*, Sept. 29, 2014
- “Related Claims Are in the Eye of the Beholder,” *New York Law Journal*, July 15, 2014
- “Supreme Court Issues Divided Ruling on EPA’s Tailoring Rule,” *Schulte Alert*, June 27, 2014
- “Management Liability Insurance Policy Pitfalls — SEC and Market Changes Demand Special Attention,” *The Hedge Fund Journal*, April/May 2014
- “‘K2’ and Consequences of Insurers’ Breach of Duty to Defend,” *New York Law Journal*, May 6, 2014
- “Are Private Companies’ Liability Risks Adequately Insured?,” *New York Law Journal*, March 4, 2014
- “Key Rulings Concerning Cleanup of Former Grumman Sites,” *New York Law Journal*, Dec. 11, 2013
- “Courts of Appeal Issue Rulings on D&O Insurance Disputes,” *New York Law Journal*, Oct. 2, 2013
- “Privilege and Insured-Insurer Communications,” *New York Law Journal*, Aug. 7, 2013

- “Insuring Against Cyber Risks: Coverage, Exclusions, Considerations,” *New York Law Journal*, May 22, 2013
- “Second Circuit Finds an Exception to Pro Rata Allocation Rule,” *New York Law Journal*, March 4, 2013
- “Representations and Warranties Insurance as Deal Making Tool,” *New York Law Journal*, Sept. 24, 2012
- “Enforceability of Non-Assignment Clauses in Asset Purchase Deals,” *New York Law Journal*, June 29, 2012
- “Department of Financial Services Surveys Insurers on Climate Risks,” *New York Law Journal*, March 29, 2012
- “2011 Wrap-Up: New Agency, Other Noteworthy Developments,” *New York Law Journal*, Jan. 31, 2012
- “New York Courts May Be Wavering on ‘Zeig,’” *New York Law Journal*, Dec. 8, 2011 (co-author)
- “Second Circuit Upholds Coverage for Investigation-Related Costs,” *New York Law Journal*, Sept. 21, 2011 (co-author)
- “‘Zeig’ Still Governs Exhaustion of Underlying Policy Limits in New York,” *New York Law Journal*, June 30, 2011 (co-author)
- “Dispute Resolved over Overlapping GL and D&O Insurance Policies,” *New York Law Journal*, March 30, 2011 (co-author)
- “Revisiting ‘Bi-Economy’ and Consequential Damages,” *New York Law Journal*, Jan. 31, 2011 (co-author)
- “Courts Differ on Insurer’s Right to Recoupment of Defense Costs,” *New York Law Journal*, Nov. 2, 2010 (co-author)
- “BP Oil Spill: An Insurance Perspective,” *New York Law Journal*, Aug. 18, 2010 (co-author)
- “Green Building and Insurance,” *New York Law Journal*, June 2, 2010 (co-author)
- “Things to Know About Your D&O Insurance Before Investigation Begins,” *New York Law Journal*, March 16, 2010 (co-author)

- “Continuing Influence of Repealed Statutory Pollution Exclusion,” *New York Law Journal*, Jan. 5, 2010 (co-author)
- “Scope of Prior Knowledge Exclusions in Professional Liability Policies,” *New York Law Journal*, Nov. 9, 2009 (co-author)
- “Allocation of Defense Costs Among Overlapping Insurance,” *New York Law Journal*, Sept. 4, 2009 (co-author)
- “Court Finds Laches Defense Bars Coverage for Asbestos Claimants,” *New York Law Journal*, July 1, 2009 (co-author)
- “Agency Opinion Seeks to Oppose Duty to Defend on D&O Insurer,” *New York Law Journal*, March 6, 2009 (co-author)
- “New Late Notice Law Requires Insurers to Show Prejudice,” *New York Law Journal*, Jan. 2, 2009 (co-author)
- “Narrow View of Prior Knowledge Exclusion Adopted,” *New York Law Journal*, Nov. 3, 2008 (co-author)
- “Consequential Damages: Only if Foreseen at Time of Pact,” *New York Law Journal*, May 8, 2008 (co-author)
- “World Trade Center Debris: Meaning of ‘Contamination,’” *New York Law Journal*, March 6, 2008 (co-author)
- “Choice of Law Can Be the Key to an Insurance Case,” *New York Law Journal*, Jan. 4, 2008 (co-author)
- “Repudiation vs. Ordinary Breach: Insured’s Policy Duties,” *New York Law Journal*, July 2, 2007 (co-author)
- “Duty to Defend: Four Corners Rule, Duty to Look Beyond,” *New York Law Journal*, May 9, 2007 (co-author)
- “NFL Goes Back to Basics to Win ‘Clarett’ on Extra Point,” *New York Law Journal*, Jan. 5, 2007 (co-author)
- “Late Notice: Insured’s Implied Waiver of Privilege,” *New York Law Journal*, Nov. 29, 2006 (co-author)
- “Contra Proferentum: Sophisticated Entities Negotiating,” *New York Law Journal*, Aug. 30, 2006 (co-author)

- “Insurers, Tort Declaratory Judgment Actions, Bad Faith Liability,” *New York Law Journal*, July 10, 2006 (co-author)
- “Identifying Late Notice as Defense in Specific Reservation of Rights,” *New York Law Journal*, April 17, 2006 (co-author)
- “State and Federal Courts of Appeal Enforce Noncumulation Clauses,” *New York Law Journal*, Feb. 28, 2006 (co-author)
- “Wind vs. Water: Insurance Coverage for Storm Damage,” *New York Law Journal*, Nov. 29, 2005 (co-author)
- “Public Policy Ruled Not a Mandate for Extended Reporting Periods,” *New York Law Journal*, Aug. 24, 2005 (co-author)
- “Misrepresentations in Insurance Application Can Void the Policy,” *New York Law Journal*, June 30, 2005 (co-author)
- “Late Notice Law: Does the Insurer Need to Show Prejudice?,” *New York Law Journal*, Feb. 22, 2005 (co-author)
- “Beware of Deemer Clauses Treating Related Claims as Single Claim,” *New York Law Journal*, Nov. 8, 2004 (co-author)
- “Directors’ and Officers’ Insurance: Allocation of Defense Costs,” *New York Law Journal*, Aug. 24, 2004 (co-author)
- “New Transactional and Government Investigation Insurance,” *New York Law Journal*, July 1, 2004 (co-author)
- “Pollution Insurance in Business and Real Estate,” *New York Law Journal*, April 21, 2004 (co-author)
- “Late Notice Law: Does the Insurer Need to Show Prejudice?,” *New York Law Journal*, Feb. 20, 2004 (co-author)
- “Proceeds of D&O Liability Insurance Property of Debtor’s Estate?,” *New York Law Journal*, Nov. 12, 2003 (co-author)
- “The Terrorism Risk Insurance Act of 2002: Analysis and Review,” *New York Law Journal*, Sept. 8, 2003 (co-author)
- “Limits of No-Assignment Clause: Assigning Rights in Asset Purchase,” *New York Law Journal*, July 9, 2003 (co-author)

- “Environmental Claims Management,” *Lloyds Environmental Risk International*, 1993
- “A Guide to EPA’s Lender Liability Regulations,” *The Review of Banking and Financial Services*, June 1992
- “Hazardous Loans: Lender Liability under Superfund,” *The Environmental Claims Journal*, 1989
- “Negotiating Settlements in Hazardous Waste Cases,” *DRI*, 1986
- “Environmental Coverage under the Claims-Made-and-Reported Form,” *Executive Enterprises, Insurance Claims for Environmental Damages*, 1984

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## Speaking Engagements

- “Insurance,” Schulte 30th Annual Private Investment Funds Seminar, Jan. 2021
- Schulte Liability Insurance Luncheon for Investment Fund Managers, March 2014
- “Resurgence Following Sandy: Insurance Options for New Jersey and Tri-State Businesses and Commercial Real Estate Operators,” Second Annual New Jersey Apartment Summit, Nov. 2012
- “Trends in D&O Coverage,” Schulte Public Company Hot Topics, Jan. 2012
- Things to Know About Your D&O Insurance Before an SEC Investigation Begins Webinar, May 2010
- “Litigation and Regulatory Implications of Environmental, Economic, Life, Health and Casualty Exposures,” The 17th Annual Insurance Insolvency & Reinsurance Roundtable, Scottsdale, AZ, March 2010
- Recent Developments in New York Corporate Insurance Law Webcast, New York, Dec. 2009
- Moderator, “Green Building Laws and Investment Opportunities,” Schulte Green Building: New Requirements and Incentives Seminar, New York, Jan. 2009
- “Vapor Intrusion,” AEGIS Insurance Services Forums, 2006
- “Environmental Diligence in Business Acquisitions and Divestitures,” ITT, 2004

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## Memberships

- American Bar Association
- New York City Bar Association
- New York Conversation Education Fund (NYCEF)
  - Board of Directors

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## Distinctions

- *2014 Burton Award for Distinguished Legal Writing*
- *New York Super Lawyers*

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## Prior Experience

- Assistant County Prosecutor, Somerset County, New Jersey
- Deputy Attorney General, New Jersey
  - Counsel to New Jersey Department of Transportation
  - Prosecuted over 50 eminent domain matters. Tried two cases to verdict.
  - Environmental - Environmental Counsel
  - Counsel to New Jersey Department of Environmental Protection
  - CERCLA, RCRA, TSCA, Spill Act, NRPA
- Lord Day & Lord, Barrett Smith
  - Partner