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Landowner Liability Under CERCLA: Is Innocence a Defense?

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LANDOWNER LIABILITY UNDER CERCLA: IS INNOCENCE A DEFENSE?

Protection of the environment is in the forefront of American politics and national attention.[1] An important means to achieve this goal is by cleanup and regulation of hazardous waste sites.[2] The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)[3] is the primary vehicle for cleanup action. CERCLA was originally premised on the theory that the "polluter must pay,"[4] which was the basis for the taxing

[1] *See* Bush, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10293, 10298 (Aug. 1988); Dukakis, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10296 (Aug. 1988) (candidates for the presidential election promised that environmental issues would be given high priority). One candidate promised to aggressively enforce environmental laws, "putting the responsibility for cleanup where it belongs, on those who caused the problem in the first place . . . ." Bush, at 10294. *See also* Adams and McSlarrow, *Seizing 1989 as a Window of Opportunity: An Environmental Challenge to the Next Administration*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10419 (Oct. 1988) (EPA challenging new administration to confront serious environmental issues). Political attention is primarily a response to widespread public concern about threats to the environment and human life from abandoned hazardous waste sites. *See* King, *Lenders' Liability for Cleanup Costs*, 18 Envt. L. 241, 242 (1988) (growing concern over inadequate disposal of hazardous waste prompted laws to be enacted). *See also* Note, *Generator Liability Under Superfund For Clean-up of Abandoned Hazardous Waste Dumpsites*, 130 U. PA. L. REV. 1229, 1231 (1982) (national attention to hazardous waste disasters during late 1970's provided political impetus for response).

[2] *See generally* 2 F. GRAD, TREATISE ON ENVIRONMENTAL LAW (1987 & Supp. 1988) (overview of environmental protection laws). In addition to statutes which provide for cleanup, there are many environmental statutes which provide other vehicles for effecting protection of the environment and health. *See, e.g.*, Occupational Safety and Health Act (OSHA), 29 U.S.C.A. §§ 651-78 (West 1985 & Supp. 1988) (employees required to provide a workplace free from "recognized hazards"); Toxic Substances Control Act (TOSCA), 15 U.S.C.A. §§ 2601-54 (West 1982 & Supp. 1988) (regulation and testing of potentially toxic chemicals); Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C.A. § 136 (West 1980 & Supp. 1988) (regulation of pesticides).

[3] The Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C.A. §§ 9601 - 9675) (West 1983 & Supp. 1988) [hereinafter CERCLA].

[4] *See* Violet v. Picillo, 613 F. Supp. 1563, 1571 (D.C.R.I. 1985). The court summarized CERCLA's legislative intent: "Calling waste generators to account for the consequences flowing from the disposal of their toxic waste products . . . represents a congressional decision to look for compensation to those economic actors who have participated in, and benefited from, an industry historically pervaded by irresponsible practices at various levels in the chain of disposal . . . ." *Id. See also Administration's Reluctance to Sue Helps Make Superfund Public Works Program, Kaufman Says*, [17 Current Developments] Env't Rep. (BNA) 1020 (Oct. 31, 1986). Kaufman, former chief investigator of EPA's Hazardous Waste Division, stated: "Congress hoped the original law would force major polluters to

scheme created to finance the Superfund.[5] However, this rationale was put in question by the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA);[6] which significantly increased the Superfund[7] and correspondingly recognized the "societal nature" of the cleanup problem.[8] While the possible change in CERCLA's theory is consistent with the policy to protect the environment and human life, it conflicts with the rights of innocent landowners who may be held liable for cleanup under CERCLA.[9]

change their waste management practices and that the threat of strict, joint and several liability would make [them] move to clean up their own sites voluntarily . . . ." *Id.*

The original intent of Congress to impose liability on those who profited from or created the hazardous waste is manifested by CERCLA's taxing system. CERCLA imposes a tax on oil, petrochemical feed stocks, chemicals and hazardous waste thereby shifting the burden to the industries and consumers who benefit directly from products and services related to the waste. *See* 126 CONG. REC. 14964 (daily ed. Nov. 24, 1980). *See also* Marzulla, *Keynote Address* 18 Envtl. L. Rep. (Envtl. L. Inst.) 103501 (Sept., 1988). CERCLA is a sophisticated taxing system, wherein Congress made the choice that the responsibility for cleaning up hazardous waste rests upon those who profited from or created those sites. *Id.* at 10351.

[5] *See* 42 U.S.C.A. § 9631 (1983), *repealed by* SARA, § 517(c)(1), 42 U.S.C.A. § 9631 (West Supp. 1988). The taxing system is financed the Hazardous Substance Response Trust Fund ("Superfund"), which was designed to subsidize cleanup costs when responsible parties were unknown, unable or unwilling to reimburse the government for expenses. *Id.* The tax dollars which comprise the Superfund were not derived from the general public, but rather from those industries that are related to the creation of waste. *See* S. REP. No. 73, 99th Cong., 1st Sess. 12 (1985). *See supra* note 4. *See also* D. Hayes & C. MacKerron, *Superfund II: A New Mandate*, 17 Env't Rep. (BNA Special Report) No. 42, at 84-85 (Feb. 13, 1987) (fund was created by special tax levied on chemical and petroleum industries).

[6] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C.A. §§ 9601-9675) (West Supp. 1988) [hereinafter SARA].

[7] *See* New York v. General Elec. Co., 592 F. Supp. 291, 302 (N.D.N.Y. 1984) (original fund not sufficient to rectify existing problem). *See also* D. Hayes & C. MacKerron, *supra* note 5, at 9. The initial $1.6 billion Superfund monies were inadequate; SARA increased the Superfund to $8.5 billion over five years. *Id.* Congress financed the increase by imposing a $2.5 billion dollar tax on business income and sharply increasing the tax on petroleum. *Id.*

[8] *See* S. REP. No. 73, 99th Cong., 1st Sess. 13 (1985) (fund is now financed by taxing general fund subsidies). *See also* D. Hayes & C. MacKerron, *supra* note 5, at 84-85; Schwenke, *Environmental Liabilities Imposed on Landowners, Tenants, and Lenders - How Far Can And Should They Extend?*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10361, 10362 (Sept. 1988) (arguing that SARA made policy change by broadening tax base).

[9] *See* CERCLA § 107(a), 42 U.S.C.A. § 9607(a). This conflict was noted in CERCLA's legislative history:

> At the heart of the Superfund . . . are many complex legal and judicial issues that reflect the tensions inherent in the Act itself: first, the need for the effective and speedy clean-up of hazardous waste sites in order to protect human life and the environment; second, the need to protect the interests and rights of those affected by these sites in obtaining effective and speedy clean-ups; and third, *the need to protect*

This Note examines CERCLA's scope of landowner liability, the innocent landowner defense and the effect of the defense on real estate transactions. Part I explores the circumstances that led to the enactment of CERCLA. Part II provides an overview of CERCLA. Part III examines the broad realm of landowner liability for cleanup and Part IV considers whether the landowner may qualify for the third party defense and thereby escape liability. Finally, Part V highlights the impact of the innocent landowner defense on real estate transactions. This Note concludes that, if courts continue to expand owner liability, the third party defense should be interpreted so as to render innocence a defense. In this way, the conflicting policies of the Act will be reconciled by precepts of fairness.

I. BACKGROUND

Congress first addressed the hazardous waste problem by enacting the Resource Conservation and Recovery Act of 1976 (RCRA).[10] RCRA regulates the movement of hazardous waste from its inception to disposal, "cradle-to-grave".[11] While RCRA provides a management scheme for hazardous waste, its major weakness is that it applies prospectively and fails to address the problem of existing hazardous waste sites.[12]

the interests and rights of those who may be held liable for such cleanups.
H.R. REP. No. 253, 99th Cong., 1st Sess., pt.3, at 15, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038 (emphasis added). *See* Moskowitz & Hoyt, *Enforcement of CERCLA Against Innocent Owners of Property*, 19 LOY. L.A.L. REV. 1171, 1187-88 (1986) (suggesting congressional intent supports the view that innocent owners are exempt from liability under CERCLA, but "knowing" owners are liable). *See generally* Note, *Hazardous Waste and the Innocent Purchaser*, 38 U. FLA. L. REV. 253 (1986) (analysis of landowner liability).

[10] Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C.A. §§ 6901-6991(i) (West 1983 and Supp. 1988) [hereinafter RCRA].

[11] *See* 1 D. STEVER, LAW OF CHEMICAL REGULATION AND HAZARDOUS WASTE, § 5.01, 5-6 (1988). RCRA is designed for the following purposes: 1) to provide a system for tracking and preserving a record of hazardous waste movement from its inception to disposal ("cradle-to-grave"); 2) to ensure disposal is accomplished so as to prevent escape of hazardous waste into the environment; and 3) to provide an enforcement mechanism to ensure compliance with the regulations. *Id.* at 5-7. *See generally* 2 S. COOKE, THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION, § 9.01 (1987) (overview of RCRA).

[12] *See* H.R. REP. No. 1016, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120. "Since enactment of [RCRA], a major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and reck-

The threat of release of hazardous substances from abandoned waste sites and the Environmental Protection Agency's (EPA) corresponding inability to force cleanup under RCRA was exemplified by the Love Canal catastrophe.[13] Congress was prompted to address the gaps in the regulatory scheme as a result of heightened public consciousness of the harm to human health and environment.[14] In 1980, CERCLA was enacted[15] to establish a federal program for addressing cleanup of inactive hazardous waste sites.[16] In particular, CERCLA grants the EPA emergency response authority and imposes liability on potentially responsible

lessly hazardous waste disposal practices known as the 'inactive hazardous waste site problem'. . . . Existing law is clearly inadequate to deal with this massive problem." *Id. See also* United States v. Price, 523 F. Supp. 1055, 1071 (D.N.J. 1981) (RCRA was intended to prevent future harm, not cure past ills), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

[13] *See* United States v. Hooker Chem. & Plastics Corp., 680 F. Supp. 546, 549 (W.D.N.Y. 1988). Over a period of 11 years, more than 21,000 tons of various wastes were deposited into the Love Canal. *Id.* Hazardous substances were found in homes in the Love Canal area in upstate New York, resulting in myriad health effects. *See* [16 Current Developments] Env't Rep. (BNA) at 7 (May 3, 1985). *See also* Comment, *The Threat to Investment in the Hazardous Waste Industry: An Analysis of Individual and Corporate Shareholder Liability under CERCLA*, 1987 UTAH L. REV. 585, 586 n.5 (1987); Glass, *The Modern Snake in the Grass: An Examination of Real Estate and Commercial Liability Under Superfund and Sara and Suggested Guidelines for the Practitioner*, 14 B.C. ENVTL. AFF. L. REV. 381, 383 (1987) (residents of Love Canal were unable to force cleanup of the toxic site or to recover damages for personal and property injury). *See* S. REP. No. 848, 96th Cong., 2d Sess. 8-10 (1980) (legislative interpretation of events at Love Canal). The victims of Love Canal are still afflicted by the tragedy ten years later. *See* Wall St. Journal, March 9, 1989, at 1 col. 1.

Love Canal was not, however, an isolated tragedy. *See* New York v. General Elec. Co., 592 F. Supp. 291, 296 (N.D.N.Y. 1984). *See also* S. COOKE, *supra* note 11, at § 12.02(2) (discussion of abandoned hazardous waste site problem).

[14] *See* H.R. REP. No. 1016, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6125. *See also supra* note 12 (RCRA did not deal with inactive hazardous waste sites).

[15] CERCLA, 42 U.S.C.A. § 9601 (West 1983 & Supp. 1988). CERCLA's intent is to protect the environment and public health from the dangers of hazardous waste sites. *See* S. REP. No. 848, 96th Cong., 2d Sess. 56 (1980). *See generally* Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. (1982) (examination of CERCLA's legislative history). *Accord* N.Y. ENVT'L CONSERV. LAW (McKinney 1984 & Supp. 1989) § 27-1301 (New York's version of "Superfund").

[16] *See* H.R. REP. No. 1016, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119. The Act provides authority to respond to releases of hazardous waste; establishes a fund to pay for cleanup; provides guidelines to impose liability; and establishes prohibitions and requirements concerning inactive hazardous waste sites. *Id. See* New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985) (CERCLA applies primarily to abandoned sites and emergency responses to spills). *See also* Comment, *supra* note 13; Glass, *supra* note 13, at 386-88.

persons for the costs of its activities.[17] Due to CERCLA's hasty enactment, which caused many statutory ambiguities[18], and the termination of the funding of the Superfund,[19] Congress reauthorized CERCLA in 1986 by the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA).[20] While SARA preserved CERCLA's basic liability scheme[21] it substantially amended and expanded the Act.[22]

[17] *See* H.R. REP. No. 1016, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6131. It is stated that: "[E]mergency action will often be required prior to the receipt of evidence which conclusively establishes an emergency. Because delay will often exacerbate an already serious situation, [CERCLA] authorizes [the EPA] to take action when an imminent and substantial endangerment [to public health or the environment] *may* exist." *Id.* (emphasis in original). *See generally* D. STEVER, *supra* note 11, § 6.04[1], at 6-41; S. COOKE, *supra* note 11, § 12.02[4], at 12-17.

[18] *See* United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984) ("CERCLA is . . . a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions . . . . [N]umerous important features were deleted during the closing hours of the Congressional session . . . . The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation."), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied* 108 S. Ct. 146 (1987); United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983) ("Because of the haste with which CERCLA was enacted, Congress was not able to provide a clarifying committee report, thereby making it extremely difficult to pinpoint the intended scope of the legislation."); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (CERCLA is a reflection of the hasty compromises which were reached). *See also* D. Hayes & C. MacKerron, *supra* note 5, at 23 (CERCLA did not address standard of liability, causal link or relative liability of the parties).

Congress affirmed many of the judicial interpretations when it reauthorized CERCLA in 1986. *See* H.R. REP. No. 253, 99th Cong., 1st Sess, pt. 3, at 15, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038 (congressional acknowledgement of criticism of CERCLA and the resulting litigation to define CERCLA's ambiguous provisions). *See also* D. Hayes & C. MacKerron, *supra* note 5, at 26.

[19] See CERCLA 42 U.S.C.A. § 9633(c)(2)(D)(1983). CERCLA was scheduled to expire on September 30, 1985.

[20] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C.A. §§ 9601-9675) (West Supp. 1988).

[21] *See* D. Hayes & C. MacKerron, *supra* note 5, at 26 Congress did not expressly incorporate liability concepts in SARA, but reaffirmed the court-confirmed rules of strict, joint and several liability. *Id. See also* 132 CONG. REC. H. 9563 (daily ed. Oct. 8, 1986). Representative Dingell stated: "The courts have established, as a matter of federal common law, that the liability of potentially responsible parties at Superfund sites is strict, joint and several, unless the responsible parties can demonstrate that the harm is divisible." *Id.*

[22] *See* D. Hayes & C. MacKerron, *supra* note 5. The statute gives the EPA broader power and seeks to accelerate cleanup and encourage settlements. *Id.* Some of the major modifications are: 1) increased funding to $8.5 billion over five years; 2) establishment of cleanup schedules and standards; 3) creation of mechanisms to encourage settlements, including "covenant not to sue" from the government for settling parties and "mixed funding" solutions; 4) creation of an innocent landowner defense; 5) definition of statute of limitations; 6) creation of right to know provisions establishing reporting obligations; 7) increased state role, and others. This list is not exhaustive and is only intended to illustrate some of the

II. Statutory Overview - CERCLA

A. The Mechanics of CERCLA

To implement CERCLA's goal of protecting the environment and human health, CERCLA establishes standards and procedures for cleanup of hazardous waste and authorizes the EPA to organize and conduct CERCLA cleanup.[23] Cleanup is governed by the National Contingency Plan, which sets forth the standards and procedures for responding to releases of hazardous substances,[24]

major revisions. *See generally* D. Stever, *supra* note 11, § 6.04[2], at 6-44.1 to 6-46 (summary of SARA provisions); S. Cooke, *supra* note 11, § 12.05[2], at 12-97 to 12-106 (overview of significant changes by SARA).

These amendments were intended to accelerate cleanup. *See* [17 Current Developments] Env't Rep. (BNA) No. 32, 1294 (Dec. 5, 1986). However, a recent report by the Congressional Office of Technology Assessment concluded that EPA's cleanup program is "largely ineffective and inefficient." *See also Update*, 18 Envtl. L. Rep. (Envtl. L. Inst.) No. 17 (BNA) (June 20, 1988).

[23] CERCLA § 104(a), 42 U.S.C.A. § 9604(a) (West Supp. 1988). CERCLA expressly authorizes the President with cleanup responsibility and to take removal or remedial action:

> (1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title. No remedial investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only if the President contracts with or arranges for a qualified person to assist the President in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any cost incurred by the President under, or in connection with, the oversight contract or arrangement. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question. The President shall give primary attention to those releases which the President deems may present a public health threat.

Id.

The President's authority was delegated to the EPA. *See* Exec. Order No. 12,316, 3 C.F.R. 169 (1982), *reprinted in* 42 U.S.C. § 9615.

[24] *See* CERCLA § 105(a), 42 U.S.C.A. § 9605(a) (West 1983 and Supp. 1988). The Na-

and which requires the EPA to prioritize cleanup sites on the National Priorities List, based upon their risk to the public health and environment.[25] CERCLA provides two methods to accomplish cleanup. If the President determines that there is "an imminent and substantial endangerment to the public health or welfare of the environment," he is authorized to order an abatement[26] or use the Superfund to clean up the site to remedy the problem [27] and later sue responsible parties to recover expenses.[28]

B. Standard of Liability

CERCLA as originally enacted did not specify the standard of liability applicable to potentially responsible persons (PRPs), the causal link that must be established between the site and the PRP or the relative liability of PRPs.[29] However, courts have uniformly ruled that CERCLA establishes strict liability,[30] subject only to the

tional Contingency Plan is codified at 40 C.F.R. Pt. 300 (1985). *See also* Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181 (1986) (explanation of the mechanisms of National Contingency Plan). *See generally* Brown, *Superfund and the National Contingency Plan: How Dirty is "Dirty"? How Clean is "Clean"?*, 12 ECOLOGY L.Q. 89 (1984) (standards of "clean" under CERCLA).

[25] CERCLA § 105(a)(8)(B), 42 U.S.C.A. § 9605(a)(8)(B) (West Supp. 1988). *See* S. COOKE, *supra* note 11, § 12.02[4] at 12-17 (1987) (National Priorities List initially contained 400 sites and was expected to include over 2500 sites in 1988).

[26] CERCLA § 106(a), 42 U.S.C.A. § 9606(a) (1983). This authority has been delegated by the President to the EPA. *See supra* note 23 for statutory text.

[27] CERCLA § 104, 42 U.S.C.A. § 9604 (West 1983 & Supp. 1988). *See supra* note 23 for part of statutory text.

[28] CERCLA § 107(a), 42 U.S.C.A. § 9607(a) (West Supp. 1988). *See infra* note 38 for statutory text.

In addition, a state may voluntarily agree to assume the role of the EPA within the state and be entitled to reimbursement of response costs. *See* CERCLA § 107(a)(4)(A), 42 U.S.C.A. § 9607(a)(4)(A) (West Supp. 1988).

CERCLA also encourages private parties to clean up by allowing recovery of response costs against "potentially responsible parties" (PRPs) or Superfund. *See* CERCLA § 107(a)(4)(B), 42 U.S.C.A. § 9607(a)(4)(B) (West Supp. 1988). The private party need not obtain federal or state approval of the party's response actions or cost recovery suit. *See* Wickland Oil Terminals v. Asarco, Inc. ("Wickland II"), 792 F.2d 887, 892 (9th Cir. 1986); NL Industries v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

[29] *See* United States v. A & F Materials Co., 578 F. Supp. 1249, 1255 (S.D. Ill. 1984) ("CERCLA does no more than declare who is liable . . . . [It] gives no guidance on how to solve the problem of comingling, or whether liability should be apportioned based on the volume or toxicity of the waste, or how liability is to be apportioned between owners, operators, transporters and generators.").

[30] *See* Clean Water Act, 33 U.S.C. § 1321 (1982). Courts have construed § 311 of the Clean Water Act to impose strict liability. *See, e.g.*, United States v. LeBeouf Bros. Towing Co., 621 F.2d 787, 789 (5th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981); Burgess v. M/V

narrow defenses of §107(b).[31] Courts have also imposed CERCLA liability without proof of causation for owners of the contaminated site.[32] Moreover, courts on their own initiative[33] have gen-

Tomano, 564 F.2d 964, 982 (1st Cir. 1977), *cert. denied*, 435 U.S. 941 (1978). Section 101(32) of CERCLA provides that liability under CERCLA is subject to the same standard as liability arising under Section 311 of the Clean Water Act. Therefore, strict liability has been applied to CERCLA. *See* New York v. Shore Realty Corp., 759 F.2d, 1032, 1042 (2d Cir. 1985) ("Section 9601(32) provides that 'liability' under CERCLA 'shall be construed to be the standard of liability under Section 311 of the Clean Water Act, which courts have held to be strict liability.' "); Vermont v. Staco Inc., 684 F. Supp. 822, 831 (D.Vt. 1988) (Section 107 imposes strict liability on owners); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 844 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied* 108 S. Ct. 146 (1987); United States v. Price, 577 F. Supp. 1103, 1114 (D.N.J. 1983); United States v. Chem-Dyne Corp. 572 F. Supp. 802, 805 (S.D. Ohio 1983) (intent of Congress was to impose strict liability); United States v. Wade, 546 F. Supp. 785, 793 n.21 (E.D. Pa. 1982); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982).

[31] *See* CERCLA § 107(b), 42 U.S.C.A. § 9607(b) (1983) (no liability if damages were caused solely by an act of God; an act of war; or an act or omission of a third party). *See also infra* note 104 for statutory text of § 107(b)(3).

[32] *See Shore Realty*, 759 F.2d at 1044 (court held causation is not required to establish liability of owner/operator under § 9607(a)(1)); Cadillac Fairview/California Inc. v. Dow Chem. Co., 21 Env't Rep. Cas. (BNA) 1108, 1113 (1984), (stating mere ownership of facility at the time of waste disposal renders owners/operators liable under § 9607(a)(2), *recon. denied*, 21 ERC 1584 (1984); United States v. Stringfellow, 661 F. Supp. 1053, 1060-61 (C.D. Cal. 1987) (causation not prerequisite to liability). *See also* Note, *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1520 (1986).

When the defendant is a generator, proof of causation is required, although minimal evidence will satisfy this requirement. *See* United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983). The court provided a causation test: "The statute appears to impose liability on a generator who has: 1) disposed of its hazardous substance 2) at a facility which now contains hazardous substances of the sort disposed of by the generator 3) if there is a release of that or some other type of hazardous substance 4) which causes the incurrence of response costs." *Id.* at 1333. *See also* D. Hayes & C. MacKerron, *supra* note 5, at 24 (Congress signalled its intent to apply a loose causation test when evaluating a defendant's connection with the site); Note, *supra* note 32, at 1524 (weak causation test is best compromise between imposing liability and rapid cleanup).

[33] *See, e.g.*, United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. at 845 (W.D. Mo. 1984) (substantial danger posed by site was result of defendants acting together and therefore they are jointly and severally liable); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. A & F Materials Co., 578 F. Supp. 1249, 1254 (S.D. Ill. 1984); United States v. Wade, 577 F. Supp. 1326, 1337 (E.D. Pa. 1983); 572 F. Supp. at 808 (S.D. Ohio 1983). *Chem-Dyne* is the leading case that established that joint and several liability is appropriate due to the difficulty in demonstrating "a reasonable basis for division according to the contribution of each" since wastes have comingled. *Chem-Dyne*, 572 F. Supp. at 811 (289 generators and transporters contributed waste). *See also* Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 ECOLOGY L.Q. 365, 368-70 (1987) (joint and several liability effectuates intent of Congress). *But see* Price, *Dividing the Cost of Hazardous Waste Site Cleanups Under Superfunds: Is Joint and Several Liability Appropriate?*, 52 U. MO. K.C.L. REV. 339 (1984) (author suggests apportioned liability is the better approach).

erally agreed that the relative liability of PRPs for hazardous waste cleanup may be joint and several.[34]

C. Liable Parties - Section 107

Liability under §107 of CERCLA is imposed on potentially responsible persons for releases[35] or threatened releases[36] of hazardous substances.[37]

Section 107(a) identifies four categories of potentially responsible persons: (1) current owners or operators of hazardous waste facilities; (2) past owners or operators of hazardous waste facilites at the time of disposal; (3) persons who arranged for disposal of hazardous substances; and (4) persons who accepted hazardous substances for transport.[38]

[34] *Chem-Dyne*, 572 F. Supp. at 811 (joint and several liability should be applied on a case-by-case basis when the harm is indivisible).

A significant addition to CERCLA is Section 113(f)(1) which creates a statutory right of contribution among responsible persons liable under Section 107(a) or under Section 106. *See* CERCLA § 113(f), 42 U.S.C.A. § 9613(f) (West Supp. 1988). *See also* AT&T v. Chateaugay Corp., 88 Bankr. 581 (Bankr. S.D.N.Y. 1988) (when a party's right to contribution arises). However, there are two exceptions to this right of contribution. The first is that any party that enters into an administrative or judicially approved settlement agreement cannot be subject to contribution claims. *See* CERCLA § 113(f)(2), 42 U.S.C.A. § 9613(f)(2) (West Supp. 1988). *See also* Smith Land & Improvements Corp. v. Celotex Corp., 851 F.2d 86, 87 (3d Cir. 1988), *cert. denied*, 57 U.S.L.W. 3471 (1989). Secondly, a defendant may not seek contribution when it knowingly and willfully participated in an illegal dumping of hazardous waste. *See* United States v. Ward, 618 F. Supp. 884, 910-911 (E.D. N.C. 1985).

[35] *See* CERCLA § 101(22), 42 U.S.C.A. § 9601(22) (West Supp. 1988). CERCLA broadly defines releases to include: "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . . " *Id.*

[36] *See* CERCLA § 101, 42 U.S.C.A. § 9601 (West Supp. 1988). The term "threatened release" is not defined by the Act.

[37] *See* CERCLA § 101(14), 42 U.S.C.A. § 9601(14) (West Supp. 1988). CERCLA defines hazardous substances broadly by reference to other environmental statutes. *Id.* It specifically excludes from the definition petroleum, natural gas, natural gas liquids, liquified natural gas, synthetic gas and mixtures of natural and synthetic gas. *Id.*

[38] CERCLA § 107(a), 42 U.S.C.A. § 9607(a) (West Supp. 1988). Potentially responsible parties are defined as follows:

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or

While the list of liable persons is constantly expanded by the courts,[39] CERCLA liability has been held to reach past and present owners, operators, transporters and generators.[40]

D. Affirmative Defenses

Section 107(b) provides three limited defenses to CERCLA's broad liability scheme. A potentially responsible person may avoid liability if, by a preponderance of the evidence,[41] a party can

entity and containing such hazardous substances, and
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -
(A) all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with the national contingency plan;
(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.

New York State "Superfund" is to be distinguished because the categories of potentially responsible parties are not clear. S. M. Turner, Remarks at seminar co-sponsored by the Environmental Law Section and the Committee on Continuing Legal Education of the NYSBA (Dec. 15, 1988). *Id.* Liability seems to attach to any owner in the chain of title.

Furthermore, a "person" under CERCLA is defined as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." *See* CERCLA § 101(21), 42 U.S.C.A. § 9601(21) (West Supp. 1988).

[39] *See, e.g.*, Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (1986) (bankruptcy trustee may not abandon hazardous waste site), *reh'g denied*, 475 U.S. 1090 (1986); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986) (shareholder/corporate officer liable for arranging for disposal of waste), *cert. denied*, 108 S. Ct. 146 (1987); New York v. Shore Realty Corp. 759 F.2d 1032, 1052 (2d Cir. 1985) (shareholder/director of company owning hazardous waste site is liable); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986) (lender who foreclosed and held title to hazardous waste sites for four years liable as owner).

[40] *See, e.g., Shore Realty*, 759 F.2d 1032 (present owner); United States v. A & F Materials Co., Inc., 578 F. Supp. 1249 (S.D. Ill. 1984) (past generators); United States v. Reilly Tar and Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982) (prior owner). *Compare* United States v. Ottati & Gross, Inc., 630 F. Supp. 1361 (D.N.H. 1985) (operator of hazardous waste processing business) *with* Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651 (N.D. Ill. 1988) (chemical suppliers not owners or operators of facility without evidence of requisite control over disposal process).

[41] *See* United States v. Price, 577 F. Supp. 1103, 1114 (D.N.J. 1983) (defendants bear burden of proof for affirmative defense).

prove that the release or threatened release and the resulting damage were caused solely by an act of God, an act of war, or the act or omission of a third party unrelated to defendant.[42] Virtually no court has accepted the act of God or act of war defense[43] and, therefore, the "third party" defense seemed to be most viable. However, courts have denied the defense when the defendant has had any "contractual relationship" with the third party.[44] SARA, by defining the term "contractual relationship," created what is known as the "innocent landowner defense."[45] The definition provides that a landowner who acquires the property after disposal of hazardous substances, without knowing or having reason to know of the hazardous substances, may have a defense under §107(b)(3).[46] To be successful, the landowner must comply with the duty of care set forth in §101(35)(B), which requires the landowner to make "all appropriate inquiry" into the previous ownership and uses of the property consistent with good commercial or customary practices at the time of transfer and in light of the

[42] CERCLA § 107(b), 42 U.S.C.A. § 9607(b) (1983). *See infra* note 104 for statutory text.

[43] *See, e.g.*, Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986) (fire caused by lightning not "act of God"); United States v. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987) (heavy rains not "act of God").

[44] *See* New York v. General Elec. Co., 592 F. Supp. 291, 297 (N.D.N.Y. 1984). An informal agreement with a transporter does not relieve a generator from liability, even if a transporter delivered the waste to an unauthorized site. *Id. See also Shore Realty*, 759 F.2d 1032 (third party defense is unavailable to almost all who raise it). *But see* 42 U.S.C.A. § 9607(b)(3) (1983) (expressly excludes contractual relationships with railroads).

[45] CERCLA § 101(35)(A), 42 U.S.C.A. § 9601(35)(A) (West Supp. 1988). The term contractual relationship includes, but is not limited to:

> [L]and contracts, deeds, or other instruments transferring title or possession, unless the real property . . . was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii) or (iii) is also established by the defendant by a preponderance of the evidence:
>
> (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.
> (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
> (iii) The defendant acquired the facility by inheritance or bequest.
>
> In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.

Id.

[46] *Id.*

landowner's specialized knowledge or expertise.[47]

Due to the high standards of due diligence and the inquiry into the landowner's specialized knowledge or expertise, the "innocent landowner defense" is applicable to a small class of defendants.[48] Additionally, if a previous owner is liable under the Act, it cannot rely on this defense[49] and previous owners who transfer owner-

[47] CERCLA § 101(35)(B), 42 U.S.C.A. § 9601(35)(B) (West Supp. 1988) provides:

> To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

Id.

[48] *See* H.R. CONF. REP. No. 962, 99th Cong., 2d Sess., at 187, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3280 (emphasizes the limited circumstances of the availability of the third party defense). However, if the landowner fails to meet the burden of proof to qualify for the third-party defense, the "almost innocent" owner may qualify as a *de minimis* settling party. *See* CERCLA § 122(g)(1)(B), 42 U.S.C.A. § 9622(g)(1)(B) (West Supp. 1988). This provision allows settlement with owners who did not permit disposal nor contribute to a release nor have actual or constructive knowledge of the hazardous substances. *See also* D. Hayes & C. MacKerron, *supra* note 5, at 55 (expeditious settlement for party contributing small amounts of hazardous substances, or "innocent" owners that did not contribute to releases).

In addition, an innocent owner may also have remedies against prior owners and responsible parties. CERCLA, as amended, authorizes any party who has incurred response costs to recover those costs from other responsible persons. *See* SARA § 206. *See also* Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986) (governmentally authorized cleanup was not prerequisite to private action to recover response costs). *Compare* Cadillac Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691 (9th Cir. 1988) (prior federal, state or local government action is not a prerequisite to a private party's action for response costs) *with* Ohio v. United States EPA, 838 F.2d 1325 (D.C. Cir. 1988) (private claims against the Superfund for response costs requires prior EPA authorization). *But see* United States v. Freeman, 680 F. Supp. 73, 79 (W.D.N.Y. 1988) (11th Amendment bars suits by private parties against state in federal court for contribution claims under CERCLA). *See generally* Connolly, *Successor Landowner Suits For Recovery of Hazardous Waste Cleanup Costs: CERCLA § 107(a)(4)*, 33 U.C.L.A. L. REV. 1737 (1986) (recovery of cleanup costs).

[49] CERCLA § 101(35)(C), 42 U.S.C.A. § 9601(35)(C) (West Supp. 1988). The statute provides:

> (C) Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such

ship with knowledge of the release, without disclosing such information are fully liable under §107(a)(1) and precluded from asserting the landowner defense.[50]

III. Scope of Landowner Liability For Cleanup Costs

In furtherance of CERCLA's policy to protect the environment, courts have concluded that CERCLA's definition of "owner"[51] extends to: a) present owners, despite their innocence;[52] b) past owners who were owners at the time of disposal,[53] or who acted as a conduit in the transfer of title but retained control and interest;[54] and c) successor owners.[55] Judicial interpretations have made it

knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

Id.

[50] *Id.*

[51] CERCLA § 101(20)(A), 42 U.S.C.A. § 9601 (20)(A) (West Supp. 1988) defines "owner or operator" as:

(i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinqency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

Id.

It is necessary to distinguish CERCLA §101(20)(D), which excludes from the term "owner or operator," "a unit of State or local government which acquired ownership or control *involuntarily* through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government *involuntarily* acquires title by virtue of its function as sovereign." *Id.* (emphasis added). *See* United States v. Dart Indus., Inc., 847 F.2d 144 (4th Cir. 1988). South Carolina Department of Health & Environment Control was found not to be an "owner or operator" by virtue of its oversight and limited regulatory activities at the site. *Id.* at 146. There was no evidence of "hands on" activities. *Id.*

[53] *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (current owner strictly liable); United States v. Cauffman, 21 Env't Rep. Cas. (BNA) 2167, 2168 (1984) (same).

[53] *See* CERCLA § 107(a)(2), 42 U.S.C.A. § 9607(a)(2) (West Supp. 1988). *See also* Artesian Water Co. v. Government of New Castle County, 659 F. Supp. 1269, 1280 (D. Del. 1987), *aff'd on appeal*, 851 F.2d 643 (1988) (CERCLA includes as covered persons former owners and operators who owned or operated facility at time of hazardous waste disposal).

[54] *See* United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2128 (D.S.C. 1984) (chemical company which held title for one hour was held an owner).

[55] *See Shore Realty*, 759 F.2d at 1045. Successor owners are liable; otherwise waste sites would be sold following the cessation of dumping, to new owners who could avoid liability under CERCLA. *Id. See also Cauffman*, 21 Env't Rep. Cas. at 2168 (current owners as well

clear that to impose §107(a) liability on an owner of contaminated property, the only requirement is ownership.[56] Therefore, the relative "innocence" of an owner is irrelevant under CERCLA's liability scheme.[57] An owner who is found liable under CERCLA is required to pay for the cleanup, even if the cost exceeds the value of the land.[58]

CERCLA's policy to protect the environment found in §107(a) conflicts with its policy to protect the rights of innocent landowners found in §107(b). In an effort to reconcile these competing policies, the following subsections examine the broad categories of

as former owners at time of disposal are strictly liable); United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) at 2130 (owners of site are liable). Recently, two courts have found corporate successor liability. *See* Smith Land & Improvements Corp. v. Celotex Corp., 851 F.2d 86, 92 (3d Cir. 1988) (corporate successor liability is appropriate in CERCLA contribution claims), *cert. denied*, 57 U.S.L.W. 3471 (1989); T & E Industries v. Safety Light Corp., 680 F. Supp 696, 709 (D.N.J. 1988) (corporate successor to responsible party held liable to subsequent innocent purchaser for response costs).

[56] *See Shore Realty*, 759 F.2d at 1044 (Section 107(a) imposes strict liability on current owner, without regard to causation); *Artesian Water Co.*, 659 F. Supp. at 1277 (court observed that other courts have uniformly imposed strict liability for §107(a) owners); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 576 (D. Md. 1986). *See also* D. Hayes & C. MacKerron, *supra* note 5, at 28.

[57] *See Shore Realty*, 759 F.2d at 1039 (owner was aware of hazardous waste and of continued dumping after it took title); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1141 (E.D. Pa. 1982) (court implied that despite the city-owner's innocence, it was a potentially responsible party). *Shore Realty* and *Stepan* can be distinguished from the truly "innocent" owner cases where a party acquires property after disposal of hazardous waste without knowledge. *See* McGregor, *Landowner Liability for Hazardous Waste*, 4 THE JOURNAL OF REAL ESTATE DEVELOPMENT 13 (1989) (landowners liable even if they purchased land innovently). *See generally* Moskowitz & Hoyt, *supra* note 9 (author distinguishes an "innocent" owner from a "knowing" owner).

[58] *See* D. Hayes & C. MacKerron, *supra* note 5 (liability under CERCLA, as amended, is extensive). Liability for response costs is limited to the total response costs plus $50 million for any damages. *See* CERCLA § 107(c)(1)(D), 42 U.S.C.A. § 9607(c)(1)(D) (West & Supp. 1988). The EPA may also assess civil penalties of up to $25,000 per violation. *See* CERCLA § 109(a), 42 U.S.C.A. § 9609(a) (West Supp. 1988). "Class I administrative penalty" may be imposed for violations of reporting required under § 103, violations of financial responsibility required under § 108, violations of orders under § 122(d)(3) and for failures or refusals relating to violations of administrative orders, consent decrees or agreements under § 120. *Id.* Moreover, under § 109(a) an additional $25,000 penalty can be assessed for each day the violation continues, and up to $75,000 per day for second or subsequent violations. *See* CERCLA § 109(b), 42 U.S.C.A. § 9609(b) "Class II administrative penalty" (West Supp. 1988).

For suggestions on how to minimize liability, see generally Rosenblatt and Brand, *Handling Hazardous Waste: A Case Study* 30 (WG & L Real Estate *Outlook*), vol. 11 No. 1 (Spring 1988); M. Baker, *Tainted Property: Hazardous Substances, Hazardous Waste and Asbestos in Real Property Transactions* (NYSBA Course Materials Dec. 15, 1988); Fitzsimmons & Sherwood, *The Real Estate Lawyer's Primer (And More) to Superfund: The Environmental Hazards of Real Estate Transactions*, 22 REAL PROP. PROB. & TR. J. 765 (1987).

owners liable under CERCLA and Part IV discusses the availability of the innocent landowner defense.

A. Landlord and Tenant as Owner

Owners/lessors who lease the property to third parties who thereafter cause a release or threat of release of hazardous substances are liable under §107 as "owners," regardless of the owner's innocence or lack of knowledge of the disposal of hazardous waste.[59] Courts have interpreted the landlord-tenant contractual relationship to be a sufficient nexus to hold the landowner liable.[60] Likewise, lessees who sublease the land to a third party are also "owners" for §107(a) purposes.[61]

Moreover, the term of the lease is irrelevant when the lessee created the hazardous condition prior to the expiration of the lease term.[62]

B. Lender Liability

The definition of "owner" or "operator" specifically excludes "a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."[63] Accordingly, the lender who merely

[59] *See, e.g.*, United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984) (court held an owner/lessor unconnected with the lessee's business liable as "owner" under CERCLA).

[60] *Id.* at 1356. *See* United States v. South Carolina Recycling and Disposal, Inc. (SCRDI), 653 F. Supp. 984 (D.S.C. 1984) (oral lease between landlord and tenant is the contractual relationship which makes landlord liable), *aff'd in part and vacated in part*, 858 F.2d 160 (4th Cir. 1988). *But see* RESTATEMENT (SECOND) OF TORTS §§ 379A, 837(1) (1979). At common law lessor was not liable for nuisance unless it existed at the time the premises were leased or would arise from the ordinary use for which the property was leased. *Id. See also* New York v. Monarch Chem. Inc., 90 App. Div. 2d 907, 456 N.Y.S.2d 867, 869 (3d Dep't 1982) (landlord liable under nuisance theory where landlord was aware of hazardous seepage).

[61] *See* United States v. South Carolina Recycling and Disposal, Inc., 21 Env't Rep. Cas. (BNA) 1577, 1581 (sublessor of site who maintains control over and responsiblity for property, stood in the shoes of property owner). *See also* Glass, *supra* note 13, at 420-21 (author suggests since the tenant is entitled to exclusive use and enjoyment of premises, tenant is an "owner").

[62] *See* CERCLA § 107(a)(2), 42 U.S.C.A. § 9607(a)(2) (West Supp. 1988) (owner at time of disposal). *See also* Glass, *supra* note 13, at 421 (since former owners may be liable for acts during their ownership, so too can tenants be liable for acts during their tenancy even after lease term expires).

[63] CERCLA § 101(20)(A), 42 U.S.C.A. § 9601(20)(A) (West Supp. 1988). *See supra* note

holds the mortgage is not an "owner or operator."[64] CERCLA, however, is silent as to whether this security exception protects a lender who takes title to the mortgaged property through foreclosure or otherwise. A recent line of decisions exemplifies that the law is not settled on the issue of when a lender becomes an owner for purposes of CERCLA liability.[65]

In *United States v. Mirabile*,[66] three financial institutions were sued under CERCLA to recover cleanup costs of a paint manufacturing site.[67] The court scrutinized each lender's activities to de-

51 for statutory text.

[64] *See* H.R. REP. No. 1016, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6181-82. The legislative history indicates that financial institutions fall within the exemption:

> " 'Owner' is defined to include not only those persons who hold title to a vessel or facility but those who, in the absence of holding a title, possess some equivalent evidence of ownership. It does not include certain persons possessing indicia of ownership (such as a financial institution) who, without participating in the management or operation of a vessel or facility, hold title either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rules or regulations."

Id. at 6181.

[65] *See* United States v. Fleet Factor Corp., 17 Chem. Waste Litig. Rptr. 657, 661-62 (S.D. Ga. Dec. 22, 1989) C court held lender was not an owner or operator of facility because of lack of control or activities at the facility). United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986) (lender who becomes owner not entitled to § 101(20)(A) secured interest exemption); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985) (court looked at lender's participation in management, not whether it held title); *In re* T.P. Long Chem., Inc., 45 Bankr. 278, 289 (Bankr. N.D. Ohio 1985) (BancOhio not liable because it held only a perfected security interest in debtor's personal property). Many articles have been written about lender liability under CERCLA. *See, e.g.*, King, *Lenders' Liability for Cleanup Costs*, 18 ENVTL. L. 241 (1988) (lenders should restrict involvement in borrower's affairs and take suggested protective measures); Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under Cercla*, 1988 WIS. L. REV. 139 (lenders should take affirmative steps to protect themselves from liability by not participating in management or control of borrower); Comment, *The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment*, 41 U. MIAMI L. REV. 879 (1987) [hereinafter "*Impact of the 1986 Superfund*"] (CERCLA liability will result in lenders becoming the EPA's enforcement arm).

[66] 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985).

[67] *Id.* at 20,995. The EPA brought suit against the current owners (Mirabile) who in turn sued two private lenders, American Bank & Trust Company (ABT) and Mellon Bank (Mellon) as third-party defendants, which financed the manufacturing plant. *Id.* The banks then counterclaimed against the United States Small Business Administration (SBA) who also made loans to the owners of the plant. *Id.*

The facts indicate that ABT made a loan to Arthur C. Mangels Industries, Inc. *Id.* at 20,996 (Mangels) which owned the paint facility. *Id.* at 20, 996. Mangels sold the facility to Turco Coatings, Inc. (Turco). *Id.* Mellon (through its predecessor-in-interest) advanced monies to Turco in return for a security interest in Turco's inventory and assets. *Id.* SBA

termine whether the lenders were protected as secured creditors or were liable as "owners" by the exercise of control over the facility.

The court held that the lender (American Bank & Trust Company), which foreclosed on the property but never took title because it assigned its bid, was not liable since its involvement was limited to participation in financial decisions and taken only to protect its security interest.[68]

The court further determined that the lender (Small Business Administration) which did not hold legal or equitable title was not liable, reasoning that the lender's involvement in the operations was limited to purely financial aspects, even though it had authority to participate in management decisions.[69]

However, the lender (Mellon Bank) which had a security interest in inventory and accounts, was not released from potential liability because the court found a "cloudier situation" with its involvement in the company's activities.[70]

Another approach to lender liability is found in *United States v. Maryland Bank & Trust Co.*,[71] wherein the lender acquired title to

also loaned Turco capital, taking back a security interest in Turco's machinery, equipment and inventory, a mortgage on real property and a pledge of stock. *Id.* Turco then filed a petition in bankruptcy. *Id.* ABT foreclosed and assigned its bid to the Mirabiles. *Id.*

[68] *Id.* at 20,996. The court stated that in order to be liable, a lender must "at minimum participate in the day-to-day operational aspects of the site." *Id.*

[69] *Id.* at 20,997. SBA had authority to provide management assistance by virtue of loan regulations in effect at the time of the loan. *Id.* at 20,996.

[70] *Id.* at 20,997. The court denied summary judgment and required more fact finding, suggesting that its participation in the company's affairs may have been beyond the purview of financial aspects. *Id.*

The threshold question is what acts by the lender will constitute control and participation in management. The *Fleet* court significantly provided lender with some guidelines. *See Fleet*, 17 Chem. Waste Litig. Rptr. at 661-62. The court stated, "I interpret the phrases "participating in the management of a . . . facility" and *primarily* to protect his security interest," to permit secured creditors to provide financial assistance and general, and even isolated instances of specific management advice to its debtors without risking CERCIA liability if the secured creditor does not participate in the day-to-day management of the leasing facility either before or after the business ceases operation." *Id.* at 661. Further, due to the significance of these issues the court granted interlocutory appeal. *Id.* at 665. *See* J. Levis, *The Secured Lender's Duty to Clean Up a Polluted Site*, N.Y.L.J. (March 9, 1989) at 5, col. 1 (author states that this decision is not beneficial to lenders because it raises more issues without addressing the distinction between participation in management and control). *See also* [19 Current Dev.] ENVTL REP. (BNA) No. 40, 2062 (Feb. 3, 1989) (highlights of *Fleet*).

[71] 632 F. Supp. 573, 579 (D. Md. 1986). The *Maryland* court distinguished *Mirabile* by the fact that the lender who foreclosed promptly assigned its interest. *Id.*

the property at a foreclosure sale.[72] The court held that the §101(20)(A) exclusion for secured creditors does not apply to a former mortgagee who subsequently acquires title and who holds title for four years.[73] The court reasoned that if the lender was held to be within the ambit of §101(20)(A), the "mortgagee-turned-owner" would benefit from cleanup, while the government paid the cost.[74]

The rule that emerges from *Mirabile* and *Maryland* is that creditors who participate in the management of the facility beyond purely financial involvement and lenders who become owners may be liable under CERCLA. Commentators have argued that the combined effect of these two cases will cause chilling liability on the lending industry.[75] This novel argument of chilling liability was recently contended in *Tanglewood East Homeowners v. Charles-Thomas, Inc.*[76] The defendants, a lending institution, developers,

[72] *Id.* at 575. In *Maryland*, the bank made a loan to the McLeods who had a farm and dealt in the garbage disposal business. *Id.* The McLeods allowed hazardous waste to be dumped on their farm. *Id.* The McLeods' son bought the farm by a loan from the bank. *Id.* The son defaulted on loan payments and the bank foreclosed and took title to the property. *Id.*

[73] *Id.* at 579.

[74] *Id.* at 580. The *Maryland* court stated:

> Under the scenario put forward by the bank, the federal government alone would shoulder the cost of cleaning up the site, while the former mortgagee-turned-owner, would benefit from the clean-up by the increased value of the now unpolluted land. At the foreclosure sale, the mortgagee could acquire the property cheaply. All other prospective purchasers would be faced with potential CERCLA liability, and would shy away from the sale. Yet once the property has been cleared at the taxpayers' expense and becomes marketable, the mortgagee-turned-owner would be in a position to sell the site at a profit.

Id.

[75] *See* Comment, *Impact of the 1986 Superfund*, *supra* note 65, at 900 (increased costs to protect lenders from liability will be passed on to borrowers; causing demand for capital to decline, resulting in stunted economic growth). *See also* Glass, *supra* note 13, at 419 (lenders are forced to make economic decisions whether or not to foreclose). As a result of possible liability, lenders will have an incentive not to foreclose and perhaps avoid loan transactions in which a hazardous waste site is involved. *Id. But see* Rashby, *United States v. Maryland Bank & Trust Co.: Lender Liability Under CERCLA*, 14 ECOLOGY L.Q. 569, 591 (1987) (extension of liability to lenders is consistent with CERCLA's policy); Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261, 1288 (1987) (risk that secured property may be less valuable than originally expected is a risk inherent in the lending transaction). *See generally* Fleischaker and Mitchell, *The Insecurities of Security Interests in Hazardous Waste Cases*, Nat. L. J., Sept. 15, 1986, at 18, col. 1 (discussion of risks facing foreclosing lenders).

[76] 849 F.2d 1568 (5th Cir. 1988).

real estate and construction companies,[77] argued on a motion for summary judgment that "legislation was not meant to impose chilling liability on the defendants' businesses."[78] The court found all defendants potentially responsible parties,[79] without addressing their fear of chilling liability.[80] Therefore, lenders remain subject to CERCLA liability but may find relief in the third party "innocent landowner defense."[81]

C. Officers, Directors and Shareholders

CERCLA's definition of "persons" expressly includes corporations;[82] however, the issue remains whether the corporation's shareholders, directors and officers may be individually liable. It has been established that an officer, director and shareholder of a corporation may be individually liable as an "owner/operator" under CERCLA,[83] when the individual actively participated in the control and management of the facility.[84]

[77] *Id.* at 1571.

[78] *Id.* at 1573. The defendants reasoned that CERCLA was intended to cover generators and those persons engaged in the chemical waste industry, not those in the real estate and lending industries. *Id.*

[79] *Id.* at 1574.

[80] *Id.* The court was "persuaded beyond peradventure that a determination of the specific businesses and activities covered by CERCLA is beyond the pale of a 12(b)(6) motion. That remains for another day." *Id.*

[81] CERCLA § 101(35)(A)(B), 42 U.S.C.A. § 9601(35)(A)(B) (West Supp. 1988). *See supra* notes 45 and 47 for statutory text. The lender must acquire title to the property after the disposal of hazardous waste and must have no reason to know of such disposal. *Id.* Further, the lender's "appropriate inquiry" will be viewed in light of its specialized knowledge and expertise. *Id. See also* H.R. CONF. REP. No. 962, 99th Cong., 2d Sess., at 187 *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3280 ("Those engaged in commercial transactions should, however, be held to a higher standard than those who are engaged in private residential transactions."). If the lender fails to establish the innocent landowner defense, a *de minimis* settlement might be available. *See* CERCLA § 122, 42 U.S.C.A. § 9622 (West Supp. 1988).

[82] *See* CERCLA § 101(21), 42 U.S.C.A. § 9601(21) (West Supp. 1988). *See supra* note 38 for statutory text.

[83] *See* New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (shareholder/officer liable under CERCLA); United States v. Mottolo, 605 F. Supp. 898, 913-14 (D.N.H. 1985) (officer and sole shareholder may be individually liable under CERCLA); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 848 (W.D. Mo. 1984) (shareholder/officer found liable as owner and operator), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2131 (D.S.C. 1984) (corporate officers personally liable).

[84] *See* Vermont v. Staco, Inc., 684 F. Supp. 822, 831-32 (D. Vt. 1988). Corporate execu-

In *United States v. Carolawn Co.*,[85] the court found personal liability appropriate for individuals who were responsible for the "day-to-day" operations of hazardous waste disposal.[86] The court determined the two relevant factors to be the amount of authority or control an individual has and his level of participation in management.[87]

In addition, courts have found corporate officers liable as owners, without piercing the corporate veil, reasoning that §107(a) read in conjunction with §311 (a)(7) of the Clean Water Act, allows the imposition of liability on persons who own an interest in a facility and are actively participating in its management.[88]

tives are liable as owners when they participate in the control and management of the corporation that owned and operated the facilities. *Id.* at 832. *See also Carolawn*, 21 Env't Rep. Cas. (BNA) at 2131 (relevant factors to consider before liability attaches are amount of control and authority over site). *See generally* Glass, *supra* note 13, at 395-413 (discussion of officer, shareholder, corporate and parent corporation liability); Comment, *supra* note 13, at 611. The author states:

> [s]hareholder liability under CERCLA is almost certain in many circumstances: for example, when a shareholder actively arranges for or disposes of hazardous wastes, participates in the illegal disposal of hazardous waste, or owns and operates or manages a hazardous waste disposal facility. When a shareholder does not actively manage a site, but occupies a position of corporate responsibility, the question of potential liability is less clear.

Id.

[85] 21 Env't Rep. Cas. (BNA) 2124 (D.S.C. 1984).

[86] *Id.* at 2131.

[87] *Id. See also Northeastern Pharmaceutical*, 579 F. Supp. at 848. This case is significant because the court found individual generator employees liable without piercing the corporate veil. *Id.* at 848-49. The court found the vice president in his individual capacity liable because he had "actively participated" in the company's management. *Id.* at 849. The court also found the president liable in his individual capacity as "owner and operator" by virtue of his position and capacity to prevent and control unlawful disposal. *Id.* On appeal, however, the Eighth Circuit, reversed holding that neither the corporation, nor its employees or officers could be liable as "owner or operator" because they did not own or operate the Denney farm site. *Northeastern Pharmaceutical*, 810 F.2d 726, 743 (8th Cir. 1986). The president, however, was instead held strictly liable as "contributor" under RCRA § 7003(a). *Id.* at 745. The court found liability without distinguishing between officer or shareholder status. *Id.*

This approach is also emphasized in the recent lender liability cases. *See, e.g.*, United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986) (level of lender's participation is determinative); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985). *See generally supra* notes 63 - 81 and accompanying text for discussion of lender liability.

[88] *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985) (sole shareholder who controlled all corporate decisions held liable as operator/owner under CERCLA); United States v. Mottolo, 605 F. Supp. 898, 913-14 (D.N.H. 1985) (president, treasurer and sole shareholder can be personally liable even without piercing the corporate veil if he directed or personally participated in hazardous activity).

D. Liability of Parent Corporation

The courts' treatment of parent corporations liability for acts of its wholly-owned subsidiary is similar to that of individual officer/shareholder liability. In *Idaho v. Bunker Hill Co.*,[89] the court held a parent company liable as an "owner or operator" under CERCLA because it had the capacity to control disposal and had participated in the management of its subsidiary.[90] However, the *Bunker* court indicated that not all participation by a parent company would invoke liability, rather a parent corporation can participate in the "normal" activities of a parent with respect to its subsidiaries.[91] Moreover, parent liability is also found without "piercing the corporate veil."[92]

E. Past Owners

CERCLA is a retroactive statute[93], therefore, owners or opera-

[89] 635 F. Supp. 665 (D. Idaho 1986).

[90] *Id.* at 672. The *Bunker* court stated:

> Gulf was in a position to be, and was, intimately familiar with hazardous waste disposal and releases at the Bunker Hill facility; had the capacity to control such disposal and releases; and had the capacity, if not total reserved authority, to make decisions and implement actions and mechanisms to prevent and abate the damage caused by the disposal and releases of hazardous wastes at the facility . . . Gulf at times controlled a majority of Bunker Hill's board of directors and Gulf obtained weekly reports of day-to-day aspects of Bunker Hill operations.

Id.

[91] *Id.* The court did not define what activities are considered "normal." Attaching CERCLA liability to a parent of a defunct subsidiary has the additional problem of finding personal jurisdiction. *See, e.g.*, City of New York v. Exxon Corp., 633 F. Supp. 609 (S.D.N.Y. 1986) (defendant parant argued lack of personal jurisdiction). The court utilized the *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.* test to determine whether the parent's activities were sufficient to attach liability: (1) common ownership; (2) financial dependency of the subsidiary on the parent; (3) interference by the parent in the selection and assignment of the subsidiary's personnel and failure to observe corporate formalities; and (4) degree of control exercised over the marketing and operational policies of the subsidiary. *Id.* at 620-21. Based on this test, the *Exxon* court found personal jurisidiction over the parent despite the fact that the alleged acts were made by a defunct subsidiary. *Id.* at 621.

[92] *See* United States v. Nicolet Turner & Newall, No. 85-3060 (E.D. Pa. 1987) (parent corporation of subsidiary that was past owner/operator of Superfund site was liable without piercing the corporate veil); *Cf.* State v. Ventron Corp., 94 N.J. 473, 502, 468 A.2d 150, 165 (1983) (parent company's corporate veil was pierced based on state law).

[93] *See* United States v. Miami Drum Services, Inc., 17 Envtl. L. Rep. (Envtl. L. Inst.) 20,539, 20,542 (S.D. Fla. Dec. 12, 1986) (Congress intended Act to apply retroactively); United States v. Shell Oil Co., 605 F. Supp. 1064, 1072 (D. Colo. 1985) (CERCLA is by its very nature backward looking); United States v. Northeastern Pharmaceutical & Chem.

tors who owned or operated any facility at the time of disposal of any hazardous substance remain liable.[94] Thus, former owners who caused release of hazardous substances cannot escape liability,[95]
and past owners who owned the property at the time of disposal are likewise liable under CERCLA.[96]

Furthermore, past owners can be liable in private party actions based upon a contract liability.[97] It should be emphasized, however, that §107(e)(1) provides that liability to the Government may not be avoided by an indemnification clause in a real estate contract.[98]

Prior owners who neither create nor contribute to the hazard-

Co., 579 F. Supp. 823, 840 (W.D. Mo. 1984) (retroactive application of CERCLA § 106 and § 107 do not violate fifth amendment due process rights), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied* 108 S. Ct. 146 (1987).

[94] *See* CERCLA § 107(a)(2), 42 U.S.C.A. § 9607(a)(2) (West Supp. 1988). CERCLA changed the common law rule that seller alone are liable for hazardous conditions until buyer has discovered or had reasonable time to discover the condition and abate it. *See also* RESTATEMENT (SECOND) OF TORTS § 839 (1979).

[95] *See, e.g., United States v. Price*, 523 F. Supp. 1055, 1073 (D.N.J. 1981) (Section 7003 of RCRA applied to prior owners whose waste disposal practices caused present day groundwater contamination, despite sale of the property), *aff'd* 688 F.2d 204 (3d Cir. 1982); *T & E Indus. v. Safety Light Corp.*, 680 F. Supp. 696 (D.N.J. 1988) (court held corporate successor to prior owner that released radium tailings at site liable to subsequent innocent purchaser under CERCLA).

[96] *See Miami Drum* 17 Envtl. L. Rep. at 20,542; United States v. South Carolina Recycling and Disposal, Inc., 21 Env't Rep. Cas. (BNA) 1577 (D.S.C. 1984); United States v. Reilly Tar and Chem. Corp. 546 F. Supp. 1100, 1118 (D. Minn. 1982) (prior owners who owned facility at the time of disposal of hazardous waste are liable for cleanup even though site has been sold because § 107 is absolute).

[97] *See* Nunn v. Chemical Waste Management, Inc., 22 Env't Rep. Cas. (BNA) 1763 (D. Kan. 1985) (seller who warranted to buyer that land was in compliance with all laws was liable to buyer for costs incurred in cleanup based on contract.)

[98] CERCLA § 107(e)(1), 42 U.S.C.A. § 9607(e)(1) (1983). However, CERCLA does not attempt to eliminate such agreements which are effective as between the parties. *See* CERCLA § 107(e)(2), 42 U.S.C.A. § 9607(e)(2) (1983). Indemnification clauses not only hold a prior owner liable but can also release the prior owner from liability to other responsible persons. *See* Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1055-56 (D. Ariz. 1984) (purchaser signed agreement releasing seller from future liability of all claims, including hazardous waste disposal), *aff'd*, 804 F.2d 1454 (9th Cir. 1986). The *Mardan* Court held that the broad release language was effective to bar all claims which the parties reasonably contemplated at the time of the execution of the agreement. *Id.* at 1056. Purchaser's claim against seller under CERCLA for cleanup was barred. *Id. But see* Smith Land & Improvements Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988) (*caveat emptor* is not a defense to liability for CERCLA contribution claims but may be mitigating factor), *cert. denied*, 57 U.S.L.W. 3471 (1989). *See also* [17 Current Developments] Env't Rep. (BNA) 1337, 1338 (Dec. 12, 1986) (Section 107(e)(i) expressly allows private party agreements concerning indemnification and release).

ous waste site, nor owned the site at the time of disposal, but merely held title to the land after disposal may also be held liable under CERCLA.[99]

As amended under §101(35), CERCLA[100] effectively makes *all* past owners potentially liable when they knew of the existence of the site. Thus, past owners who are owners at the time of disposal may be liable under §107(a)[101] and liable under §101(35)(C) for their failure to disclose information concerning releases on the site.[102]

IV. Third Party Defense - Section 107(b)(3)

The broad scope of CERCLA liability under §107(a) reaches virtually all parties to a real estate transaction, subject only to limited affirmative defenses.[103] The third party defense, as amended by SARA, may be effective to protect the truly innocent landowner. However, the availability of the defense will be determined by judicial interpretation of the statute's requirement. The following is an analysis of judicial interpretation of §107(b)(3) prior to and after the enactment of SARA.

A. Pre-SARA case law

CERCLA §107(b)(3) as originally enacted provides that before an owner can be relieved of liability, he must show by a preponderance of the evidence that the release was the sole cause of the damage to the third party and that there was no contractual relationship with the third party. Moreover, the defendant must prove he exercised due care and took precautions against foresee-

[99] *See* United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124 (D.S.C. 1984) (court held one who held title for less than one hour was liable as an "owner" under CERCLA). The defendant argued it was merely a conduit in the transfer of ownership, but the court found the facts to be "cloudy" and could not say whether it was merely a conduit or acquiring an ownership interest. *Id.* at 2128.

[100] CERCLA § 101(35)(C), 42 U.S.C.A. § 9601(35)(C) (West Supp. 1988). *See supra* note 49 for statutory text.

[101] CERCLA § 107(a), 42 U.S.C.A. § 9607(a) (West Supp. 1988). *See supra* note 38 for statutory text.

[102] CERCLA § 101(35)(C), 42 U.S.C.A. § 9601(35)(C) (West Supp. 1988). *See supra* note 49 for statutory text.

[103] *See supra* notes 41 - 50 and accompanying text.

able acts.[104]

The statute, as originally enacted, did not define the term "contractual relationship" and courts have construed the exception broadly. For example, in *United States v. South Carolina Recycling & Disposal, Inc. (SCRDI)*,[105] an absentee landlord/owner was held jointly and severally liable for cleanup costs as a result of the activities of its tenants/generators. The §107(b)(3) defense was denied by virtue of the contractual relationship, an oral lease between the owners and the generators. The court held that the contractual relationship between the landlord and tenant precludes the defense under any circumstances.[106]

This broad interpretation of the contractual relationship exception reduces the analysis to one step: whether *any* contractual relationship exists. It is suggested that the court's failure to distinguish the sole-cause test from the contractual relationship exception results in the sole-cause test being an unnecessary analysis.[107]

The two part analysis was, however, discussed in *New York v.*

[104] CERCLA § 107(b)(3), 42 U.S.C.A. § 9607(b)(3) (1983). The third party defense reads as follows:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by - . . .
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .

Id.

[105] 653 F. Supp. 984 (D.S.C. 1984), *aff'd in part and vacated in part*, 858 F.2d 160 (4th Cir. 1988).

[106] *Id.* at 993. The court found that "[b]ecause there is no question of the contractual link between the landowners and SCRDI, whose liability is admitted, the landowners cannot under *any* circumstances prove that the release was caused '*solely*' by a third party which did not share a contractual relationship with them." *Id.* (emphasis added).

[107] *See* Ruhl, *The Third-Party Defense to Hazardous Waste Liability: Narrowing the Contractual Relationship Exception*, 29 S. TEX. L. REV. 291, 301-02 (1987) (existence of the contractual relationship should not determine whether the third party was the sole cause of the release).

Shore Realty Corp.[108] In this case the owner knew at the time of acquisition that hazardous waste was stored on the site.[109] The owner argued that it was not involved in the transportation of the hazardous substances. The court denied the owner's affirmative defense because: (1) the owner knew of the tenant's illegal dumping of hazardous waste; and,[110] (2) a contractual relationship was found to exist.[111]

The *Shore* court followed the mandate of the statute by complying with a two-step analysis. Since the defendant failed the sole-cause test and its due care obligations, the court correctly denied the third party defense.[112] However, the court then noted that a contractual relationship existed vis-a-vis the purchase agreement and further suggested that the language of the contract made the defendant responsible for some environmental liability.[113]

In *United States v. Maryland Bank & Trust Co.*,[114] the court not only applied a two-step analysis, but suggested that a determination of the nature of the contractual relationship was required.[115] The *Maryland* court held that a foreclosing mortgagee who held title to contaminated property for four years was liable for cleanup costs.[116] Since there was no dispute that the financial institution did not cause the release, the court analyzed the contractual relationship and concluded that genuine issues of material fact existed as to the nature of the contractual relationship and

[108] 759 F.2d 1032 (2d Cir. 1985).

[109] *Id.* at 1037.

[110] *Id.* at 1049. The court stated: "In light of this knowledge, we cannot say that the releases and threats of release resulting of these activities were 'caused solely' by the tenants or that Shore 'took precautions against' these 'foreseeable acts or omissions.' " *Id.*

[111] *Id.* at 1048 n.23. The court reasoned that "[w]hile we need not reach the issue, Shore appears to have a contractual relationship with the previous owners that also blocks the defense. The purchase agreement includes a provision by which Shore assumed at least some of the environmental liability of the previous owners." *Id.*

[112] *See* Ruhl, *supra* note 107, at 303-04. The *Shore* court acted consistently with the statute. The defense failed the sole cause test, and thus did not have to reach the contractual relationship issue. *Id.*

[113] *Id.* at 304. Ruhl explains the consequences of *Shore*: "*Shore Realty* thus illustrated that the third party defense can remain narrow enough to serve the enforcement purposes of CERCLA and simultaneously be applied in a sensible, orderly and fair manner." *Id.*

[114] 632 F. Supp. 573 (D. Md. 1986). *See supra* notes 71-75.

[115] *Id.* at 581.

[116] *Id.*

the extent of the bank's due care.[117]

The *Maryland* court's query into the "nature of the contractual relationship" suggests that the element of control is an appropriate part of the contractual relationship test.[118]

B. Post-SARA case law

The SARA amendments defined the term "contractual relationship" for purposes of §107(b)(3).[119] This definition adds elements that the defendant must establish in order to qualify for the §107(b)(3) defense.[120] First, the release must occur prior to defendant's ownership. Second, defendant must show that he did not know and had no reason to know of the existence of the hazardous substances on the site.[121] To establish that defendant had no reason to know, defendant must undertake "all appropriate inquiry" into the condition of the property consistent with good commercial practice at the time of purchase.[122] The statute expresses specific factors a court may consider when determining whether the inquiry was appropriate.[123]

[117] *Id.* (decision left the availability of § 107(b)(3) defense open).

[118] *See* Ruhl, *supra* note 107, at 304 (*Maryland* case is the broadest interpretation of third party defense thus far).

[119] *See* CERCLA § 101(35)(A), 42 U.S.C.A. § 9601(35)(A) (West Supp. 1988). *See also supra* note 45 for statutory text.

CERCLA was amended to "clarify and confirm that under limited circumstances landowners who acquire property without knowing of any contamination at the site and without reason to know of any contamination . . . may have a defense to liability under Section 107. . . ." *See* H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 186, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3279.

[120] *See* Jersey City Redevelopment Auth. v. PPG Indus., 655 F. Supp. 1257, 1261 (D.N.J. 1987). To prevail on the innocent landowner defense, owner must prove it exercised due care and took precautions against foreseeable consequences of a third party. *Id.* at 1261 n.3. *See also* M. Baker, *The Impact of Environmental Law on Real Estate and Commercial Transactions* (NYSBA Course Materials) at 152 (Dec. 15, 1988) (requirements of § 107(b)(3)(a) & (b) must also be met).

[121] *See* CERCLA § 101(35)(A), 42 U.S.C.A. § 9601(35)(A) (West Supp. 1988). *See supra* note 45 for statutory text.

[122] CERCLA § 101(35)(B), 42 U.S.C.A. § 9601(35)(B) (West Supp. 1988). *See supra* note 47 for statutory text.

The availability of the defense is further restricted by § 101(35)(C) which precludes owners who transfer property, after learning of release, without disclosing such information. *See* CERCLA § 101(35)(C), 42 U.S.C.A. § 9601(35)(C)(West Supp. 1988). *See also supra* note 49 and accompanying text.

[123] *See* CERCLA § 101(35)(B), 42 U.S.C.A. § 9601(35)(B) (West Supp. 1988). Congress specified that the specialized knowledge and experience of the purchaser, the relationship

Consequently, while SARA assists the courts in determining whether a contractual relationship exists, the utility of the innocent landowner defense depends upon judicial interpretation of whether the due diligence requirements were met and whether the element of control should exist in the contractual relationship.[124] The following three recent cases have attempted to clarify the availability of the innocent landowner defense.

In *United States v. Monsanto Co.*,[125] the court denied the third party defense holding the owners liable under §107(a). Since the owners were unaware of the release of hazardous substances by their tenants until a toxic cloud formed at the site,[126] the owners argued that "they were innocent absentee landlords unaware of and unconnected to the waste disposal activities that took place on their land."[127] The Court of Appeals for the Fourth Circuit disagreed and found the defendant/owners to be within the class of §107(a)(2) owners, regardless of their degree of participation.[128] Specifically, the court found that the defendants failed the sole-cause and due care elements of §107(b)(3),[129] as they had "knowledge" of the presence of hazardous substances and failed to take "precautionary action against the foreseeable conduct of COCC or SCRDI."[130]

Although the *Monsanto* court correctly denied the affirmative defense based upon the owners' knowledge, an aspect of the sole

of the purchase price of the property to the market value if uncontaminated, any commonly known or reasonably ascertainable information about the property, and the obviousness of the contamination must be taken into consideration in determining whether the inquiry was appropriate. *Id.*

[124] *See* Ruhl, *supra* note 107, at 308. SARA provides little guidance as to the degree of control a contractual relationship must have to fall within the scope of § 107(b)(3). *Id. See also* Baker, *supra* note 120, at 154 (defense depends upon judicial interpretation of what buyers know or should have known).

[125] 858 F. 2d 160 (4th Cir. 1988) (appellate decision of SCRDI). In 1972 the owners verbally leased warehouse space to Columbia Organic Chemical Company (COCC). *Id.* at 164. In 1976 the principals of COCC incorporated South Carolina Recycling & Disposal Inc. (SCRDI) to assume its waste-handling business and defendant/owners accepted rent from SCRDI. *Id.* SCRDI deposited a majority of the waste at the facility. *Id.*

[126] *Id.* (it was not until 1977 that the owners became aware of tenant's activities).

[127] *Id.* at 166.

[128] *Id.* at 168. The court noted, however, that the degree of fault may be considered in a contributory action. *Id.* at 168 n.13.

[129] *Id.* at 169.

[130] *Id.* The court held that the "statute does not sanction such willful or negligent blindness on the part of absentee owners." *Id.*

third party cause and due care elements, the ambiguity of the nature of the contractual relationship was still not clarified. In fact, the court maintained that because of the lease agreement, the owners "could not establish absence of a direct or indirect contractual relationship necessary to maintain the affirmative defense."[131]

Similarly, in *O'Neil v. Picillo*,[132] the court found that defendant generators did not qualify for the third party defense because they failed to demonstrate by a preponderance of the evidence that, "a *totally unrelated third party* [was] the *sole* cause of the release."[133] Thus, the *Picillo* court comingled the sole cause and contractual relationship tests into a single analysis, without consideration of the contractual relationship to determine whether an element of control existed.

Finally, in *United States v. Hooker Chemicals & Plastics Corporation*[134] the court clarified at least one aspect of CERCLA's ambiguous third party defense. Beginning in 1942, Occidental Chemical Corporation (OCC) used the Love Canal land for waste disposal.[135] In 1947, OCC purchased the property and then sold it to the Board of Education of the City of Niagara Falls, New York in 1953. During the 1970's hazardous substances were found in the surface water, soil, basement of homes, sewers and other locations surrounding the Love Canal site.[136] Plaintiffs argued that OCC was strictly liable as an owner at the time of the disposal.[137] OCC raised the third party defense and argued that the "contractual relationship" exception is inapplicable because the exception was intended only when the causal third party was an agent of the

[131] *Id.*

[132] 682 F. Supp. 706 (D.R.I. 1988).

[133] *Id.* at 728 (emphasis in original). The court held that it was likely that the disposers with whom defendants contracted were responsible. *Id.* Defendants had argued that they consigned their waste to licensed waste transporters and therefore had no direct or indirect relationship with the responsible party. *Id.* at 727-28.

[134] 680 F. Supp. 546 (W.D.N.Y. 1988).

[135] *Id.* at 549.

[136] *Id.*

[137] *Id.* During the period of OCC's ownership it disposed of more than 21,000 tons-42 million pounds of various wastes into the Love Canal. *Id.* at 549. Note that plaintiff cites §552 of the RESTATEMENT (SECOND) OF TORTS (1977) and argues that where ultrahazardous activity is involved, OCC is strictly liable, *absent a showing that the acts of third parties were willful, malicious and criminal. Id.* at 551 n.4. (emphasis added).

generator or other related party.[138] The court examined the elements of §107(b)(3) and stated that OCC could not avoid liability unless it showed: (1) it was totally blameless in causing the release[139] and (2) it had no direct or indirect contractual relationship with one or more third parties who are solely responsible.[140] The court then stated that the SARA amendments clearly indicate that purchasers are estopped from basing the third party defense on acts of sellers and did not extend the defense to the original disposer.[141]

In an effort to clarify whether the element of control should exist in the contractual relationship, the *Hooker* court stated: "OCC's direct or indirect contractual relationships with both the Board and the City preclude the company's assertion of a viable third party defense in this case because, as the plaintiffs assert, *OCC was able to control the acts* of these subsequent purchasers *because of the nature of its relationship with these defendants* in this case."[142] Moreover, the court found that even if no contractual relationship existed, the defense was unavailable as OCC failed the sole-cause test.[143]

The *Hooker* court was the first court to scrutinize the nature of the contractual relationship and expressly apply a control test. It is submitted that this inquiry into the nature of the contractual relationship and the extent of defendant's ability to control the third party, is a necessary exercise in order for the contractual relationship to fall within the exception.

To provide an effective §107(b)(3) defense, it is suggested that courts follow the lead of the *Hooker* court to determine whether the innocent landowner defense is available. The defense should be interpreted to require a separate analysis of the sole cause and

[138] *Id.* at 551. OCC contended that the actions of third parties compromised the barriers that secured the Canal causing the release. *Id.* at 552. *See* Ruhl, *supra* note 107, at 297 (author suggests the contractual relationship should be read consistent within the scope of the employee or agent exclusion).

[139] *Id.* at 554.

[140] *Id.* at 558.

[141] *Id.*

[142] *Id.*

[143] *Id.* It is clear that "OCC's disposal practices were at least partially responsible for the release . . ." *Id.*

contractual relationship exception elements,[144] as well as a determination as to whether the potentially responsible person had a sufficient degree of control over the acts of the third party so as to prevent contamination.[145] This interpretation of the third party defense is consistent with the intent of Congress to provide a defense for the innocent landowner.[146] Furthermore, since CERCLA liability is to be construed as the standard of liability under §311(f) of the Clean Water Act.[147] The Clean Water Act, contemplates a control element,[148] and it is this interpretation that should guide the third party defense.[149]

[144] *See* United States v. Serafini, No. 86-1591 at 11, 12 (U.S. Dist. Ct. Feb. 19, 1988) (LEXIS, Genfed library). The court analyzed the third party defense to require four elements; the first being sole cause and the second is whether a contractual relationship exists. *Id.*

[145] This approach avoids an innocent owner being held liable for the criminal acts of third parties. *See* United States v. Hooker Chemicals & Plastics Corp., 680 F. Supp. 546, 551 n.4 (W.D.N.Y. 1988) (plaintiffs argued defendants are strictly liable unless the acts of the third parties are willful, malicious, or criminal); Violet v. Picillo, 648 F. Supp. 1283, 1283 (D.R.I. 1986) (generator held liable for a transporter's illegal dumping because due care requires the generator to adequately supervise to ensure waste disposal at the specified site). The element of control seems to define due care. *See also* Ruhl, *supra* note 107, at 297-98 (author questions whether a defendant should be liable for fraudulent concealment of criminal acts committed by contractual third parties).

[146] *See* Ruhl, *supra* note 107, at 305-07. The legislative history of the contractual relationship exception suggests this is the intent of Congress. *Id.* Such intent to provide a defense for the innocent landowner is illustrated by Congressman Gore's desire to restrict the contractual relationship exception to situations where a third party is acting on behalf of or at the defendant's direction. *Id. See also* Comment, *Impact of the 1986 Superfund*, *supra* note 65, at 905. (Congress should either provide an effective innocent landowner defense or do away with § 107(a)(1)'s imposition of strict liability on owners of land).

[147] 42 U.S.C.A. § 9601(32) (West Supp. 1988).

[148] *See* 33 U.S.C.A. § 1321(f) (West 1986). Section 311(f) third party defense provides in pertinent part:

> (1) Except where an owner or operator can provide that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent . . . such owner or operator . . . shall . . . be liable to the United States Government . . . .

Id.

[149] *See* United States v. LeBeouf Bros. Towing Co., 621 F.2d 787, 789 (5th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981) (not third parties because ultimate control retained by barge owners); Burgess v. M/V Tamano, 564 F.2d 964, 981-82 (1st Cir. 1977), *cert. denied*, 435 U.S. 941 (1978) (independent contractor was not third party within meaning of statute because he was at all times under ultimate control of ship's master). *See also* Ruhl, *supra* note 107, at 300 and 309-11 (analysis of § 311 of the Clean Water Act which is the basis for argument that element of control must exist before the third party defense is denied). *Id.*

V. Impact of The Innocent Landowner Defense on Real Estate Transactions

Generally, real estate and other business transactions have been affected by extensive cleanup costs[150] and CERCLA's principles of strict, joint and several liability.[151] Although seen as the cure to CERCLA's sweeping liability,[152] the innocent landowner defense instead burdens the owner with substantial investigatory and due care requirements.[153] These requirements of due care and the duty of inquiry that are needed to qualify for the innocent landowner defense are similar to the New Jersey Environmental Cleanup Responsibility Act (ECRA),[154] a pre-conveyance statute which imposes certain affirmative obligations on the parties to certain transactions.[155] Furthermore, since the scope of inquiry will

[150] *See supra* note 58.

[151] S. Turner, *Superfund and the Innocent Landowner*, The Impact of Environmental Law on Real Estate and Commercial Transactions ((N.Y.S.B.A. Course Materials) at 3 (Dec. 15, 1988). CERCLA's principles of strict, joint and several liability and the cost of cleanup alters a businessman's view of a transaction. *Id.*

[152] S. Turner, Remarks at seminar cosponsored by the Environmental Law Section and the Committee on Continuing Legal Education of the New York State Bar Association (Dec. 15, 1988). Business and real estate industries lobbied to get relief from CERCLA's liability. *Id.* As a result the innocent landowner defense was created. *Id.*

[153] *See* Berz & Spracker, *The Impact of Superfund on Real Estate Transactions*, Prob. and Prop., (March/April 1988) at 49. Commentator states: "The major effect of this new amendment . . . is not to provide limited relief to innocent landowners. Rather, it places substantial investigatory and remedial obligations on purchasers and sellers of property." *Id. See also* Comment, *Impact of the 1986 Superfund, supra* note 65, at 898 (focus of inquiry shifts from one of causation to one of notice).

The lowest threshold standard of inquiry seems to be found in a case where a landowner bought property when the hazardous condition was obvious and visible. United States v. Serafini, No. 86-1591 at 17 (U.S. Dist. Ct. Feb. 19, 1988), (LEXIS, Genfed library). The court held the condition of the property alone is not enough to deny the defense without evidence that defendants' failure to inspect or inquire was inconsistent with good commerical or customary practices. *Id.* at 18.

[154] N.J.S.A. §13:1k-6 *et. seq.*

[155] *See* Berz & Spracker, *supra* note 153, at 50; D. Hayes & C. MacKerron, *supra* note 5, at 30; Schwenke, *supra* note 8, at 10362 (while inspection is not an affirmative duty under CERCLA, it may be necessary to establish a defense). *See also* Scagnelli & Casazza, *New York's Movement Toward an Environmental Cleanup Responsibility Act: Learning From the New Jersey Experience* 8 Envtl. L. Sec. J. (NYSBA) No. 3 at 5 (Sept. 1988). Generally, ECRA applies to the closing, termination or transferring of operations at covered industrial establishments. *Id.* The owner is required to submit to the New Jersey Department of Environmental Protection notice of the transaction and a site evaluation. *Id.* ECRA must be complied with before consummation of the transaction to ensure the site is "acceptably clean." *Id.* Further, failure to clean the property renders the sale voidable at option of the Buyer or state. *Id.* at 6.

New York is currently considering two proposals based upon ECRA. *See* Assembly Bill

be determined in light of the specialized knowledge of the defendant, commercial transactions will be subject to a higher standard of inquiry than residential transactions.[156]

By creating this incentive to investigate and possibly clean up property prior to litigation, the responsibility for cleanup shifts from the government to private real estate parties. This burdens parties to a real estate transaction through increased spending, as well as causing substantial delays in closing.[157]

The impact on the lending industry, in particular, is most severe and highly criticized. The possible imposition of liability on lenders requires them to take costly precautions to protect their investment and to shield themselves from liability.[158] This chilling liability can have an "economic ripple" effect at all levels of society.[159]

Conclusion

The need for legislation to facilitate prompt cleanup of hazardous waste is irrefutable. CERCLA filled a void in the environmental legal scheme and provided a framework for cleanup of hazardous waste sites. The ensuing trend toward the expansion of landowner liability and the unavailability of the innocent landowner defense to all who have raised it, perhaps is illustrative of SARA's theory that the cleanup problem is so important that it

No. 11618 (Attorney General's Legislative Program Bill); Assembly Bill No. 1474-C (Governor's Program Bill).

[156] *See* H.R. Rep. No. 962, 99th Cong., 2d Sess., at 187 (1986). *See also* Schwenke *supra* note 8, at 10363 "[A]ll that is clarified by legislative history . . . is that parties to a commercial setting have a greater duty than those in residential settings." *Id.*

[157] *See* Berz & Spracker, *supra* note 153, at 53 (authors suggest performance of these investigative obligations and subsequent cleanup without governmental oversight runs risk of challenge to the adequacy of the remedial work). *See also supra* notes 154 and 155 (cleanup under ECRA must be performed prior to legal conveyance).

[158] *See* Comment, *Impact of the 1986 Superfund*, *supra* note 65, at 899-900. The author suggests that § 107(b)(3) may create an incentive for foreclosing lenders to "look but not find" hazardous waste since finding hazardous substances will prevent an innocent landowner status and thus prevent the § 107(b)(3) escape route. *Id.* at 901.

[159] *Id.* at 900. The author states that increased costs to the lender will cause the demand for capital to decline. *Id.* This in turn will contribute to decreases in housing, construction and new businesses, and in turn there will be an increase in unemployment. *Id. See* McMahon, *Lender's Perspectives on Hazardous Waste and Similar Liabilities*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10368, 10369 (Sept. 1988) (lender liability schemes tend to devalue the property, making loans scarcer, and money less available).

should be borne by society and not just the polluter. However, the juxtaposition of CERCLA's broad liability scheme and SARA's new innocent landowner defense suggests that the rights of innocent landowners should not be dismissed.

To reconcile the conflicting policies, it is suggested that the *Hooker* court's laudable analysis of the third party defense be followed because it clarified some of the requisite elements that a defendant must prove; namely, the sole cause by a third party and the lack of a contractual relationship in which defendant had or should have had control over the acts of the third party. The element of control will truncate the contractual exception to the third party defense, which courts have tended to interpret too broadly. Still unresolved, however, is the extent of due diligence an innocent landowner must prove before the defense is allowed.

Is innocence a defense? CERCLA, as amended, indicates it should be. However, the defense is not certain unless the *Hooker* court's interpretation of the third party defense is followed and guidelines are established to determine whether the landowner has performed the requisite due diligence. Then, and only then, will concepts of fairness and innocence no longer be sacrificed to the countervailing goal of environmental cleanup.

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