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THE EXPANSIVE SCOPE OF LIABLE PARTIES UNDER CERCLA

Owen T. Smith*

In 1980 Congress adopted its most financially extensive environmental protection measure, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"). This legislation authorized the establishment of a four year, $600 million hazardous waste response fund to address a problem which, at that time, was estimated by the Environmental Protection Agency ("EPA") to cost over $44 billion. CERCLA directed the EPA to clean up the thousands of hazardous waste sites existing throughout the United States. Since it is practically impossible to do little more than scratch the surface of the estimated 30,000 to 50,000 hazardous waste sites with the appropriated funds, Congress has directed the EPA to look to the private sector to meet the bulk of the cleanup obligations. To that

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3 See id. At the time the legislation was adopted, the EPA estimated that there were between 30,000 and 50,000 hazardous waste sites in the United States of which 1,200 to 2,000 were believed to pose a serious risk to public health. Id. at 6120.

4 See Enforcement Effort Has Been Inefficient, May Cause Cleanup Delay, Rand Report Finds, 20 Env't Rep. (BNA) No. 20 at 826 (Sept. 15, 1989). During the eight year period from 1981 to 1989, the EPA expended $2.8 billion of its $4.5 billion Superfund appropriation, 64% of which went directly to the cleanup of hazardous waste sites. Id. According to the Rand report, the EPA's efforts to require polluters to pay the cost of cleaning up hazardous waste sites has been ineffective. Id. The EPA has spent $261 million since 1980 in its enforcement program, but has only recovered $230 million from private parties. Id.

The Superfund is a segregated fund generated by a tax imposed on the petrochemical industry. The 1986 amendments to CERCLA, the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986), were designed to raise nine billion dollars over five years from taxes on crude oil and chemical feedstocks, as well as a broad base tax on the U.S. manufacturing industry. See J. Arbuckle, M. Brown, N. Bryson, G. Frick, R. Hall, J. Miller, T. Sullivan, T. Vanderver, L. Wegman, Envi-
end, CERCLA imposes liability upon the “owners or operators” of sites on which there has been a “release” of a hazardous substance, as well as on the generators and transporters of hazardous substances which have been “released.” Liability under section 107 of CERCLA extends to the costs incurred in implementing a cleanup together with resulting “natural resource damages.” If the EPA is forced to use the Superfund, the government may recover punitive damages of up to three times the cleanup costs incurred from the owner or operator of the property or from the generator of the hazardous materials.

In the usual Superfund enforcement case, the EPA designates what is known as a “Potentially Responsible Party” (“PRP”), typically one with “deep pockets,” to implement or finance the cleanup of a site on which hazardous materials have been found. Then, because liability under CERCLA is joint and several, that PRP is sent scrambling to identify other PRPs to whom it can look

RONMENTAL LAW HANDBOOK 123 (10th ed.).

8 See CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A)(Supp. V 1987). The term “owner or operator” means (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 delinquency, 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.

9 See id. § 101(22), 42 U.S.C. § 9601(22) (Supp. V 1987). “The term ‘release’ means 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.


CERCLA claims can be maintained against a PRP by the federal or state government, or even a private party if the government is not already involved in the matter. Any citizen may bring an action against any person or entity, including any governmental entity, who has caused a spill or "release" into the environment of any material that meets CERCLA's broad definition of a "hazardous substance." If a citizen is contemplating bringing an action against the government, he is obligated to give the governmental unit sixty days notice before commencing the action. Where a citizen is bringing an action against a private party, it is necessary to show that the government has not commenced an action involving the same issues and the same parties, or, if the government has commenced such an action, to show that it is not being "diligently" prosecuted.

Liability under CERCLA may be imposed on the current owner or operator of the property, the owner or operator of the property at the time the material was discharged into the environ-

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18 See Note, supra note 11.
22 Id. Prior to the adoption of SARA there was some confusion as to the potential liability of the federal government. Subsequently, however, it has become clear that the federal government can in fact be subject to liability the same as any other property owner. Id. SARA also made it clear that a state government can be liable for state-owned property, as well. Id.; see Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2277 (1989).
23 See CERCLA § 101(14), 42 U.S.C. § 9601(14) (Supp. V 1987). The term "hazardous substance" is broadly defined in CERCLA to include materials deemed hazardous under any of the several other environmental laws. The term means:
   (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33 [Clean Water Act], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921] . . . (D) any toxic pollutant listed under section 1317(a) of Title 33 [Clean Water Act], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2608 of Title 15 [Toxic Substance Control Act].
24 Id. The term does not include petroleum, certain crude oils, natural gas, or natural gas products. Id.
26 As distinguished from actions brought by the federal, state or local government. See id. § 310, 42 U.S.C. 9659 (Supp. V 1987).
ment, and any person who has contracted, agreed or otherwise arranged for the disposal of the hazardous materials at the site.

This Article will discuss the interpretation of the terms "owner", "operator", and "generator" as they have come to be defined under CERCLA and will examine how the courts have given broad meaning to each term when deciding the extent of liability. An examination of the circumstances which can give rise to liability for the acts of a third party will follow. Finally, this Article will outline the statutory exemptions from liability and the narrow interpretations applied to them under CERCLA.

I. OWNER LIABILITY

The term "owner" is defined by CERCLA to include both persons currently owning or operating a facility and those who owned the site at the time the spill of hazardous materials occurred but have subsequently conveyed title. Strict liability is, in effect, imposed upon the owner of a site where hazardous substances are discovered. No showing of causation is required, and neither the

22 The term "environment" enjoys a very broad definition including:
(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States... and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States. Id. § 101(8), 42 U.S.C. § 9601(8) (1982).


24 See supra note 5; see also Idaho v. Bunker Hill Co., 635 F. Supp. 665, 671 (D. Idaho 1986) ("the plain language of Section 107(a)(2) includes as potentially liable those past owners and operators who were such at the time of disposal of hazardous substances"). But see Jersey City Redevelopment Authority v. PPG Industries, Inc., 655 F. Supp. 1257, 1261-62 (D.N.J. 1987) (to be responsible party former owner must have acted affirmatively to dispose of hazardous waste).

government nor a private plaintiff is obligated to show that the owner was in any way active in the operation of the site, or in any way contributed to the "discharge" of hazardous materials at the site.  

Once it is established that a party is a PRP, it is not difficult to also establish liability. A cause of action is demonstrated by showing that: (a) the site was a "facility"; (b) owned by the defendant; (c) where a hazardous substance has been, or threatens

21 Env't. Rep. Cas. (BNA) 1354, 1357 (D.N.M. 1984). The legislative history demonstrates the congressional intent to abrogate the common law rules of causation. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1153 (1st Cir. 1989). The committee report accompanying the original House bill provided that:  

[T]he usual common law principles of causation, including those of proximate causation, should govern the determination of whether a defendant "caused or contributed" to a release or threatened release. . . . For liability to attach. . .., the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action.  

Id. (quoting H.R. Rep. No. 1016, 96th Cong., 2d Sess. 33 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6136-37). However, this language was omitted from the bill which was finally passed. Id. The statute imposes liability without reference to whether the defendants caused or contributed to the release or threatened release. Id.  

26 See, e.g., Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988); Stepan Chem. Co., [18 Litigation] Envtl. L. Rep. (Envtl. L. Inst.) at 20,133 (city liable as owner despite fact several employees accepted bribes to allow disposal not permitted at site); see also New York v. Shore Realty Corp., 759 F.2d 1032, 1036 (2d Cir. 1985). But see Jersey City Redev. Auth., 655 F. Supp. at 1260 (defendant had not acted affirmatively to "arrange for" disposal of contaminated mud on its property when it sold property to another).

There appears to be an exemption from liability for property owners who convey title to a site prior to the time hazardous materials are released and before the release has been discovered. To avoid liability, however, it is also necessary to show that the former owner was unaware of the contamination at the time of the conveyance. If a property owner conveys title knowing of the hazardous material on the site, and fails to notify the purchaser, he will be liable for cleanup costs and any natural resource damages. See infra notes 75-78 and accompanying text.

27 CERCLA § 101(9), 42 U.S.C. § 9601(9) (Supp. V 1987). This section defines a "facility" as "any building, structure, installation, equipment, pipe or pipeline. . . , well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft" or "any site or area where a hazardous substance has been deposited." Id. (emphasis added).

28 See supra note 5. In United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373 (8th Cir. 1989), the Eighth Circuit said:  

To establish a prima facie case of liability under CERCLA, plaintiffs must establish

(1) the . . . site is a "facility;"
(2) a "release" or "threatened release" of a "hazardous substance" from the . . . site has occurred;
(3) the release or threatened release has caused the United States to incur response costs; and
The current owner of a hazardous waste site is even held liable where the release of hazardous materials occurred prior to the period of his ownership, unless he can qualify under one of the narrow exemptions found in section 107.

The method by which a party has acquired ownership of a site generally does not determine the extent of the party's liability. For example, property acquired through a stock purchase from a corporation that owned the property prior to the stock acquisition has given rise to "owner" liability being imposed on the purchaser. Similarly, where two corporations have merged, the surviving corporation has been held liable for contamination found at the acquired sites. Moreover, a corporation may be held liable for a release caused by its subsidiary or by a second corporation in which it had a minority interest. In many instances, the cleanup

(4) the defendants fall within at least one of the four classes of responsible persons described in section 9607(a).

Id. at 1378-79.


32 See infra notes 66-72 and accompanying text (discussion of exemptions from liability for costs incurred due to third persons).


34 New Jersey Dep't of Transp. v. PSC Resources, Inc., 175 N.J. Super. 447, 467, 419 A.2d 1151, 1162 (1980) (where "the successor corporation acquires all or substantially all the assets of the predecessor corporation . . . the successor incurs liability for the damage resulting from any discharges of hazardous substances by its predecessor"); see Barnard, EPA's Policy of Corporate Successor Liability Under CERCLA, 6 STAN. ENVTL. L.J. 78, 78-79 (1986-87).

35 See Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91-92 (3d Cir. 1988) (under CERCLA successor liability may be imposed on corporations which either have merged or consolidated with corporation that is responsible party), cert. denied, ___ U.S. ___, 109 S. Ct. 837 (1989).

costs for a site on which hazardous substances have been found may far exceed the value of the property itself. However, a property owner who finds himself in such a situation cannot avoid liability by simply abandoning the property. Similarly, if property has been abandoned by a party immediately prior to the release of hazardous material, that party will be deemed the "owner" and will be liable for the costs of cleanup.

Courts have also interpreted the term "owner" to encompass lessors, lessees, and sublessors. Lessees are liable for the hazardous waste disposed of during the term of their lease. Moreover, liability will also be imposed for hazardous materials placed on the property prior to the term of the lease if the lessee was under a

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United States v. Nicolet, Inc., 712 F. Supp. 1193, 1202-03 (E.D. Pa. 1989). The Nicolet court noted that "if an individual stockholder can be liable under CERCLA for his corporation's disposal, a corporation which holds stock in another corporation (e.g. a subsidiary) and actively participates in its management can be held liable for cleanup costs, incurred as a result of that corporation's disposal." Id. at 1203.

37 CERCLA § 101(20)(A)(iii), 42 U.S.C. § 9601(20)(A)(iii) (Supp. V 1987). Liability also lies where the property was conveyed due to foreclosure, tax delinquency, or similar circumstances. Id.

38 See id. The term "owner" extends to "any person who owned, operated, or otherwise controlled activities at such facility immediately [before abandonment]." Id.


It is no defense to a landowner that damage was caused solely by a third party if the landowner was in a contractual relationship with that party. See United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 993 (D.S.C. 1984), modified sub. nom. United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, U.S. 109 S. Ct. 3156 (1989); see also United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984)(section 107(a) unavailable as a matter of law where defendant-lessee could not show absence of contractual relation with third party).

A lessee essentially stands in the shoes of the property owner and as such is responsible for controlling and maintaining the property. See South Carolina Recycling, 653 F. Supp. at 1003 ("To conclude otherwise would frustrate Congress' intent that persons with responsibility for hazardous conditions bear the cost of remedying those conditions."); see also Jones & McSlarrow, . . . But were Afraid to Ask: Superfund Case Law, 1981-1989, [19 News & Analysis] Envtl. L. Rep. (Envtl. L. Inst.) 10,430, 10,444 (1989)(analysis of broad definition of covered persons). In addition to the sublessor being liable for the acts of the sublessee, the lessor may also be liable for allowing property under his control to be used in a way that endangers others. South Carolina Recycling, 653 F. Supp. at 1003.

40 See South Carolina Recycling, 653 F. Supp. at 1003. A lessee's liability continues even after the lease ends if the dangerous condition was created by the former lessee and the lease was prematurely terminated because the site was rendered unsafe. Caldwell v. Gurley Ref. Co., 755 F.2d 645, 651-52 (8th Cir. 1985).
contractual or common law duty to implement a cleanup and failed to do so. Additionally, if pre-existing contamination is made worse by the lessee, he may be held liable for the entire cost of cleanup.

In light of the concern of lessors over potential liability for the acts of a lessee, most commercial leases now contain provisions prohibiting the use of hazardous materials on the leased property and requiring the lessee to maintain the property in a manner consistent with federal, state, and local environmental laws. And, in the event of any violation, the lessee agrees to pay all fines and penalties, and thus, even if a tenant avoids liability under CERCLA, he may nonetheless be liable pursuant to the terms of the lease. In fact, some courts seem to equate the breach of leasehold obligations with liability under CERCLA. Finally, there is a

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43 A typical commercial or industrial lease contains a provision prohibiting the tenant from using or permitting to be stored on the premises any material deemed to be hazardous. In those instances where the use of hazardous materials is so integral to the tenant's business that he cannot avoid having them on the premises, the lessor should include an additional right of inspection in the lease and require periodic “audits” by trained personnel at the lessee's expense.

44 See, e.g., 11A West's McKinney's Forms Real Property Practice § 6-131 (J. Meehan ed. 1980). This model form reads:

The lessee does hereby covenant for himself, his executors, administrators and assigns that he will, at his own cost and expense, during the term hereby created, promptly comply with every law, statute, rule, ordinance, regulation, and notice of any municipal, county, state, federal, or other authority having jurisdiction, pertaining to or affecting the said premises, and will pay all fines and penalties imposed upon the lessor . . . by reason of the failure, neglect or refusal of either or both parties to so comply with such law . . . .

Id.

45 See, e.g., Caldwell, 755 F.2d at 652 (lessee must indemnify lessor after falsely representing that it had complied with state pollution commission requirements).
movement in some states to require a detailed environmental review and cleanup before a tenant moves in.\(^4\)

The liability of a local governmental unit as the owner of contaminated municipal property has never been seriously questioned.\(^4\) However, prior to the adoption of the 1986 amendments to CERCLA there was considerable debate regarding the applicability of the term "owner" to a state government holding title to property on which there had been a discharge of hazardous substances. It was often argued that the application of CERCLA to the states would violate the states' eleventh amendment protection from suits by the federal government.\(^4\) The 1986 amendments made it clear that Congress intended liability under section 107 of CERCLA to reach the states.\(^4\)

\(^{46}\) See, e.g., N.J. STAT. ANN. § 13:K-6 to -13 (West Supp. 1989); Schmidt, New Jersey's Experience Implementing the Environmental Cleanup Responsibility Act, 38 RUTGERS L. REV. 729, 730 (1986). Prior to the transfer of industrial power (including transfer by a lessor to a lessee pursuant to a lease) a cleanup plan or negative declaration that there has been no discharge of hazardous substances must be submitted to the New Jersey Department of Environmental Protection; failure to comply may result in fines of $25,000 per day. N.J. STAT. ANN. § 13:K-13 (West Supp. 1989).

\(^{47}\) See Artesian Water Co. v. County of New Castle, 605 F. Supp. 1348, 1354 (D. Del. 1985). A state statute which bars tort actions against a government unit will not bar a private cost recovery action under CERCLA because of the supremacy clause of the United States Constitution. Id.


\(^{49}\) See CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D) (Supp. V 1987). The statute provides that "[t]he term 'owner or operator' does not include a unit of State or local government which acquired ownership ... involuntarily ... by virtue of its function as sovereign." However, the exclusion does not apply "to any State or local government which has caused or contributed to the release ... of a hazardous substance." Id. Moreover, the conference report on SARA indicated that this provision, § 9601(20)(D), was included to "clarify that if the unit of government caused or contributed to the release ..., then such unit is subject to the provisions of CERCLA, both procedurally and substantively, as a non-governmental entity ... including liability under section 107." H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 135-56 (1986); see also Pennsylvania v. Union Gas Co., ___ U.S. ___, 109 S. Ct. 2273, 2276-80 (1989) (SARA clearly evinced legislative intent to hold states liable under CERCLA); Dickerson, Inc. v. United States, 875 F.2d 1577, 1584 (11th Cir. 1989) (federal government liable to private property owner for negligent failure to ensure third party property disposal of waste); Wickland Oil Terminals v. Asarco, Inc., 854 F. Supp. 955, 957 (N.D. Cal. 1997) (definition of person under CERCLA includes state and its "political subdivision").
II. OPERATOR LIABILITY

CERCLA and its subsequent case law have similarly afforded the term "operator" a broad definition. Under CERCLA, operator status is accorded to anyone exercising control over activities at a site where hazardous materials have been released. Relying on CERCLA's broad statutory language, courts have held officers and principal shareholders of a corporate property owner liable as "operators" when they have actively participated in managing the property. Liability has thus been imposed for cleanup costs incurred, without having to address the traditionally perplexing issues involved with piercing the corporate veil. Similarly, creditors who have exercised control over their debtors in an effort to shore up bad loans have been held liable as operators of a site. In general, courts have imposed operator liability on defendants because

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literally reads that a person who owns interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste...

... [CERCLA] ... was designed to insure, so far as possible, that the parties responsible for the creation of hazardous waste sites be liable for the response costs in cleaning them up.


64 See United States v. Mirabile, [15 Litigation] Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,995 (E.D. Pa. 1985). The Mirabile court held that the lender's activities at the site prior to foreclosure did not rise to the level of that of an operator. Id. However, the court recognized that "difficulty arises ... in determining how far a secured creditor may go in protecting its interests before it can be said to have acted as an owner or operator within the meaning of [CERCLA]." Id; see also King, 'Lenders' Liability for Cleanup Costs', 18 ENVT. L. 241, 268-70 (1987-88); Note, Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA, 98 YALE L.J. 925, 927 (1989). An exemption from liability applies to creditors holding an interest in property merely for the purpose of securing an obligation. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (Supp. V 1987).
of their involvement at a site, even when their activities do not meet CERCLA's standards for owner or generator liability.\textsuperscript{55}

### III. Generator Liability

Under CERCLA, any person who owns or possesses hazardous substances and arranges for their disposal, treatment, or transportation may be held liable as a generator.\textsuperscript{56} It is not necessary to demonstrate that the substances "disposed of" caused the environmental problem at the site, but only that the generator "arranged for disposal or treatment of hazardous waste."\textsuperscript{57} Even a generator who disposed of materials at a site which is only subsequently designated a hazardous waste site may be liable for the costs of implementing a cleanup, regardless of whether the materials disposed of by the generator caused the damage.\textsuperscript{58}

An examination of the judicial interpretation of the statutory term "disposal"\textsuperscript{59} is helpful in explaining the courts' broad imposition of generator liability. Although the statutory definition of "disposal" speaks in terms of "waste,"\textsuperscript{60} liability may exist even

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\textsuperscript{55} See, e.g., United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1003-04 (D.S.C. 1984), modified sub nom. United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 3156 (1989). The trial court in South Carolina Recycling found one of the defendants liable as an operator under three different theories: (1) the defendant was involved in the waste disposal business; (2) an officer of the defendant had directed the storage and disposal of hazardous wastes; and (3) the defendant had engaged in a joint venture with a vice president who directed the activities on the site. Id. Moreover, the appellate court found that companies generating hazardous waste and storing it in a third party facility must affirmatively prove that all of their own waste was removed from the facility prior to cleanup in order to avoid operator liability. Monsanto, 858 F.2d at 169.


\textsuperscript{57} Id.; see also United States v. Price, 577 F. Supp. 1103, 1114 n.11 (D.N.J. 1983) ("Congress eliminated any language requiring plaintiff to prove proximate cause").

\textsuperscript{58} See United States v. Wade, 577 F. Supp. 1326, 1333 (E.D. Pa. 1983). The Wade court rejected the argument that the government had to prove a causal nexus between the costs incurred in the cleanup and each generator's contribution to the collection of waste at the site. Id. The court stated that the core language of the statute: impose[s] liability on a generator who has (1) disposed of its hazardous substances (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. This reduces the government's burden of proof in that it need only show that the polluting substance is the same as that disposed of by the defendant and not that it originated in the particular defendant's waste. Id.; see Monsanto, 858 F.2d at 169-70.


\textsuperscript{60} CERCLA does not itself define "disposal," but incorporates by reference the defini-
though the offending material was transferred to a third party for a useful purpose. In United States v. A & F Materials Co., Inc., the court held a manufacturer liable as a generator when it sold spent caustic solutions to the highest bidder, who in turn used the solution to neutralize acidic oil for resale. A similar result was reached in New York v. General Electric Co., where General Electric sold used transformer oil to a drag strip to control dust. General Electric argued that it had merely sold the oil in the ordinary course of commerce, and thus was not liable for its disposal. The court rejected this argument, noting that to accept it would create a significant hole in the CERCLA regulatory process.

IV. LIABILITY FOR ACTS OF THIRD PARTIES—THE "INNOCENT PURCHASER DEFENSE"

Section 107(b)(3) of CERCLA provides that property owners, operators, and generators are excused from liability if a discharge of hazardous materials was caused by a third party. However, few PRPs have been successful in relying on the third party defense to avoid CERCLA liability. Courts have held that the third party...
defense "essentially serve[s] to shift the burden of the proof of causation to the defendants." In order to carry this burden, the defendant must prove by a preponderance of the evidence that there was no direct or indirect contractual relationship with the third party alleged to have caused the release, and that the defendant exercised due care with respect to the hazardous material and took precautions against the foreseeable acts and omissions of such third party. In addition, some courts apparently require a showing that the third party was the sole cause of the release, and was neither an employee nor agent of the defendant.

An issue which has been the subject of litigation is whether an owner can take advantage of the third party defense by claiming that the prior owner was in fact the guilty party. The courts have answered in the negative, holding that a contractual relationship exists between the current owner and the prior owner based upon the deed by which the property was conveyed. However, Congress


Violet v. Picillo, 648 F. Supp. 1283, 1293 (D.R.I. 1986); Developments in the Law—Toxic Waste Litigation, 99 Harv. L. Rev. 1458, 1544 (1986). In Violet, the defendant sought to avoid liability by showing that the plaintiff-transporter had diverted hazardous materials from the disposal site where defendant had a contract and disposed of the materials elsewhere. Violet, 648 F. Supp. at 1285. The court reasoned that this interpretation ignored the statutory elements of the defense. Id. at 1293-94.


See United States v. Monsanto Co., 858 F.2d 160, 169 (4th Cir. 1988), cert. denied, 109 S. Ct. 3156 (1989); International Clinical Labs., 710 F. Supp. at 470; O'Neil v. Picillo, 682 F. Supp. 706, 727-28 (D.R.I. 1988), aff'd, 883 F.2d 176 (1st Cir.), cert. denied, (Nov. 20, 1989). In Violet, the defendant sought to avoid liability by showing that the plaintiff-transporter had diverted hazardous materials from the disposal site where defendant had a contract and disposed of the materials elsewhere. Violet, 648 F. Supp. at 1285. The court reasoned that this interpretation ignored the statutory elements of the defense. Id. at 1293-94.


See United States v. Monsanto Co., 858 F.2d 160, 169 (4th Cir. 1988), cert. denied, 109 S. Ct. 3156 (1989); International Clinical Labs., 710 F. Supp. at 470; O'Neil v. Picillo, 682 F. Supp. 706, 727-28 (D.R.I. 1988), aff'd, 883 F.2d 176 (1st Cir.), cert. denied, (Nov. 20, 1989). In Violet, the defendant sought to avoid liability by showing that the plaintiff-transporter had diverted hazardous materials from the disposal site where defendant had a contract and disposed of the materials elsewhere. Violet, 648 F. Supp. at 1285. The court reasoned that this interpretation ignored the statutory elements of the defense. Id. at 1293-94.

Tyson, 25 Env't Rep. Cas. (BNA) at 1907 (failure to exercise due care as to hazardous substance precluded third party defense).

See New York v. Shore Realty Corp. 759 F.2d 1032, 1048-49 (2d Cir. 1985) (court rejected defense both because third party was not sole cause and because defendant failed to take precautions against foreseeable acts of third parties).


has attempted to provide a meaningful defense for unwary purchasers of property on which hazardous materials have already been released. The so-called "innocent purchaser defense," which was added by the 1986 amendments to CERCLA, provides a definition of "contractual relationship" designed to protect innocent purchasers from liability. A deed is considered a contract unless the purchaser did not know or have reason to know that the property was contaminated after making appropriate inquiry into the condition of the property at the time of acquisition. The requisite level of inquiry required, as well as the extent to which knowledge will be imputed to the owner, are each a function of proper commercial and customary practice to minimize liability, and must account for the specialized knowledge and experience of the particular owner, the relationship between the purchase price and the value of the property if uncontaminated, any common or reasonably ascertainable knowledge concerning the property, and the ease with which the contamination could have been detected.

Section 101 of CERCLA provides that an otherwise innocent landowner who learns of contamination on his property must disclose this fact to any subsequent purchaser, or else he waives the innocent purchaser defense.

Some possible applications of the innocent landowner defense include the following scenarios: contaminants migrating from an adjacent hazardous waste site onto a neighboring landowner's property, despite the exercise of due care; a landowner being victimized by the acts of an unrelated third party, such as a midnight dumper; a party acquiring contaminated property by inheritance or gift; a party involuntarily acquiring contaminated property; (W.D.N.Y. 1988) (SARA clearly intended deed between prior and current owner to be contractual relation barring third party defense).

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78 Id.

79 Id. § 101(35)(B), 42 U.S.C. § 9601(35)(B); see infra note 82.


81 But see United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986). It would appear that a bank acquiring property by foreclosure would not qualify as a party involuntarily acquiring property since the bank made the election to foreclose. See id.
and an owner, having no reason to know of pre-existing contamination discovering hazardous waste on the property after acquisition. To successfully establish an innocent landowner defense, the following must be shown: the release or threatened release of a hazardous substance and the resulting damages were caused solely by an act or omission of a third party; the third party's act or omission did not occur in connection with a contractual relationship (direct or indirect) with the defendants; the defendants exercised due care with respect to the hazardous substance; and the defendants took precautions against the third party's foreseeable acts or omissions and their foreseeable consequences.

It should be noted that CERCLA's legislative history indicates an intent that the standards applicable to third party defenses become more stringent as public awareness of the hazardous waste problem increases. Moreover, it has been suggested that those engaged in commercial transactions should be held to a higher standard of care than those engaged in residential transactions.

V. OTHER DEFENSES AND EXEMPTIONS

CERCLA also provides a "Good Samaritan" defense which precludes liability arising from assistance provided in accordance

(bank which became owner of property by purchase at foreclosure sale liable for hazardous waste release by prior owner-mortgagor).

In evaluating the extent to which an acquiring party should have known of pre-existing contamination, the EPA will measure a lender's "knowledge" from the time it actually acquired title, and not from the time of acquisition by the borrower. Thus, lenders need to carefully investigate a site prior to foreclosure. Even if the lender has a mortgage on a site, it may be more profitable to forfeit the property than to foreclose on it. See Comment, Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA, 1988 Wis. L. Rev. 139, 140-42. In addition, the EPA will apply the statutory criteria while accounting for the increasing extent to which sellers, purchasers, and lenders have become familiar with procedures for evaluating site conditions. See supra note 78 and accompanying text. Thus, the burden of appropriate inquiry will largely depend on the position of the acquiring party, e.g., homeowners will be held to a lesser standard of inquiry than purchasers of commercial property.


Pacific Hide, 716 F. Supp. at 1346-47.

See, e.g., H.R. REP. No. 253(I), 99th Cong., 2d Sess. 122, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2904 (statement of Lee M. Thomas, Administrator, EPA) ("As we continue to emphasize Superfund enforcement, we... help ensure that responsible parties play an increasingly important role").

Id.
with the National Contingency Plan or at the direction of an on-
scene coordinator.\textsuperscript{87} This defense, however, does not preclude liabil-
ity for damages caused by the defendant's own negligence.\textsuperscript{88}

State and local governments are similarly exempt from liabil-
ity, in the absence of gross negligence, for actions taken in re-
sponse to an emergency created by the release, or threatened re-
lease, of a hazardous substance.\textsuperscript{89}

A number of liability exemptions under CERCLA are the re-
sult of political pressures which existed when the act was initially
adopted. For example, because service station operators were con-
cerned that they would be liable for the disposal of waste oil, they
are now exempt from liability for their oil recycling program.\textsuperscript{90}
Similarly, because hazardous waste cleanup contractors were un-
able to obtain liability insurance, with the result that only a few
were willing to continue in such cleanup operations, Congress ex-
empted these contractors from liability in order to insure that an
adequate number remained in the marketplace.\textsuperscript{91} While the ex-
emption does not cover liability for negligence, gross negligence, or
intentional misconduct,\textsuperscript{92} the EPA is permitted to extend the in-
demnity to actions based on negligence where the contractor was
unable to obtain insurance at a fair and reasonable price.\textsuperscript{93} In addi-
tion, contractors at a number of landfills had installed equipment
to recover and burn the methane they generated. Faced with po-
tential liability under CERCLA as the "operator" of a landfill,
many of these methane gas recovery operators withdrew from the
business. As a result, Congress adopted legislation which had the
effect of exempting these firms from liability as well.\textsuperscript{94}

In light of the number of affirmative defenses available to
owners of contaminated property, Congress has provided a mecha-
nism to help the government avoid bringing suits destined to fail.
The Agency may, in its discretion, evaluate data collected pursuant
to its information gathering authority, along with any other mate-
rial provided by a particular landowner, and assess, prior to, or in

\textsuperscript{88} Id.
\textsuperscript{89} Id. § 107(d)(2), 42 U.S.C. § 9607(d)(2).
\textsuperscript{90} See id. § 114(c), 42 U.S.C. § 9614(c); see also id. § 101(37), 42 U.S.C. § 9601(37)
(definition of "service station dealer").
\textsuperscript{91} Id. § 119(a), 42 U.S.C. § 9619(a).
\textsuperscript{92} Id. § 119(a)(2), 42 U.S.C. § 9619(a)(2).
\textsuperscript{93} Id. § 119(c)(1), (4), 42 U.S.C. § 9619(c)(1), (4).
\textsuperscript{94} Id. § 124, 42 U.S.C. § 9624.
the early stages of, litigation, whether all of the prerequisites for invoking an affirmative defense may be satisfied.\footnote{Id. §§ 104, 122, 42 U.S.C. §§ 9604, 9622 (1982 & Supp. V 1987); see 54 Fed. Reg. 34,235 (1989).} If so, the EPA will forego enforcement action, or, on request, may allow the owner to settle, provided he commits to exercising care in managing the property and to cooperating with government cleanup efforts.\footnote{Id. §§ 104, 122, 42 U.S.C. §§ 9604, 9622 (1982 & Supp. V 1987); see 54 Fed. Reg. 34,235 (1989).}

VI. Conclusion

CERCLA was enacted for the dual purpose of cleaning up existing waste disposal sites and protecting the public from the creation of additional hazardous sites in the future. The statute seeks to attain these goals at the least possible cost to the government by imposing strict liability, making the statute retroactive, shifting the cleanup response costs to violators, and permitting private actions.

CERCLA's implementation has resulted in considerable litigation, coupled with the actual cleanup of only a handful of sites. Property owners have found the costs staggering, in many instances exceeding the value of the property. A large portion of the monies expended on response costs to date have gone to funding extensive legal fees surrounding difficult and costly negotiations with the EPA. In addition, sizeable amounts have been spent by state regulatory agencies involved in implementing CERCLA.

To counter the severity of the statutory provisions, Congress created a number of affirmative defenses for certain "innocent" defendants, as well as public policy based exemptions for certain other potentially liable parties. However, the courts have thus far interpreted these defenses quite narrowly, providing an expansive scope to CERCLA liability.