The Effect of Superfund Liability on Property Owners

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THE EFFECT OF SUPERFUND LIABILITY ON PROPERTY "OWNERS"

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I. INTRODUCTION

The disposal of hazardous wastes\(^1\) has recently created a heightened public concern for environmental protection. The problem of cleaning up and assigning liability for the disposal of hazardous substances first received widespread public attention in the mid-1970's.\(^2\) Throughout the 1980's federal, state, and local jurisdictions

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have addressed this public concern through the promulgation of broad legislative and regulatory requirements designed to control the release of environmental pollutants. This extensive effort to control the discharge of pollutants resulted in a regulatory scheme that has become inextricably interwoven with traditional property law. Specifically, the passage of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, commonly known as the Superfund, imposed a substantial burden on property owners by holding them strictly liable for any environmental wastes discovered on their property. Consequently, this legislation has affected long standing methods of doing business including the ownership and transfer of real property interests.

Traditionally, real estate practitioners have not considered environmental contingencies. However, because prospective purchasers today risk exposure to millions of dollars in liabilities for hazardous wastes hidden on a parcel of property, they are increasingly turning to environmental lawyers. Consequently, real estate practitioners are finding it essential to respond to this concern by careful examination of the most recent environmental legislation and litigation, identification of the environmental concerns directly affecting a specific property transaction, and assessment of potential liability on the parties.

This Note will explore how the evolution of environmental liability has affected the traditional practice of real estate law. Part I examines the legislative history and framework of the federal statutes that govern the disposal and clean up of hazardous wastes and discusses generally their relevance in the recognition of environmental issues in real estate transactions. Part II discusses the scope of Superfund liability as the federal courts have applied it to past

7. Id.
and present "owners and operators" of land on which there has been a release hazardous wastes. Finally, Part III reviews procedures currently utilized to limit environmental liability in real estate transactions.

II. FEDERAL HAZARDOUS WASTE LEGISLATION

Environmental protection from the problems associated with hazardous waste disposal emerged as a national priority in the mid-1970's. Initially, in 1976, Congress addressed this concern with the passage of the Resource Conservation and Recovery Act (RCRA) which established the framework for solving the discarded materials disposal problem and for minimizing the dangers of hazardous waste disposal. RCRA proved to be self limiting, however, because it focused on current and future activities, while previously abandoned and inactive hazardous waste disposal sites were the sites posing the greatest threat to the environment. Therefore, on December 11, 1980, Congress signed into law the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) which created a unique legal and financial apparatus to address the release of hazardous substances into the environment and the cleanup of inactive waste disposal sites. Later, in 1986, Congress substantially amended, expanded, and reauthorized CERCLA. The amended CERCLA, entitled the Superfund Amendment and Reauthorization Act of 1986 (SARA), is a significantly larger,
more detailed, more stringent, and more ambitious attempt to clean up the nation's hazardous waste sites.16

Through the passage of CERCLA, Congress sought to provide a body of comprehensive legislation as a means to cleanup the many sites nationwide which were contaminated with hazardous substances. CERCLA imposes liability for cleanup costs on an wide range of potentially responsible parties.17 The statute imposes liability on those who are both directly and indirectly responsible for causing the contamination of a site by disposing of, or arranging for the disposal of, hazardous wastes. In a case where the responsible parties can neither be found nor identified, CERCLA imposes strict liability on the current "owner or operator" of the site. This statute maximizes the likelihood that there will be at least one financially responsible party capable of funding the cleanup effort. CERCLA provides two methods to accomplish this cleanup effort: either the responsible parties may themselves undertake the task of cleanup, allocating costs responsibility among themselves, or the government can undertake the cleanup and seek reimbursement from the responsible parties.18 In either instance, the CERCLA liability provisions may require prior owners, current owners and other parties with a legal interest in a parcel of land to participate in the cleanup of any hazardous wastes discovered on the property even though the wastes were deposited prior to obtaining an interest in the site.

Even though Congress set aside more than eight billion dollars19 to finance cleanup efforts, it also clearly intended to rely on responsible parties as a substantial source of cleanup funding.20 Therefore, to protect the federal government's huge investment in the

16. S. Cooke, supra note 2, at § 12.02[1].
17. 42 U.S.C. § 9607(a). Potentially responsible parties include: (1) the present owner or operator of a site; (2) any person who at the time of contamination owned or operated any facility at which the contamination occurred; (3) any generator who arranged to have waste taken to a hazardous site for treatment or disposal; and (4) any person who transported waste for treatment or disposal. Id.
18. 42 U.S.C §§ 9604, 9607, 9622.
19. The 1986 amendment increased the Fund to more than 8 billion dollars. See 42 U.S.C. § 9611 (Supp. IV 1986).

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Superfund, the courts have, at the urging of the Environmental Protection Agency (EPA), proceeded to develop an extremely expansive interpretation of liability under CERCLA. Under this broad interpretation, the courts almost uniformly impose joint and several liability without regard to the fault of individuals having an interest in the contaminated property. As a result of the broad interpretation and strict enforcement of the Superfund liability provisions, the real estate industry has noticed a pronounced increase in the risks associated with the acquisition or disposal of real property.

To become more adept at handling this increased risk, real estate practitioners must begin to consider the substances and costs covered under CERCLA as well as the standard of liability and to whom that standard applies. By recognizing both the environmental law elements implicit in a real estate transaction and understanding the scope of liability associated with a given property, the real estate practitioner can thoroughly evaluate the risks involved in a transaction and acquire the requisite awareness necessary to identify, address, and resolve the environmental issues associated with the transfer of interests in real estate.

While CERCLA and SARA are the major federal statutes addressing hazardous substance cleanup and liability in the context of real property transactions, a number of other environmental statutes include regulatory requirements and enforcement provisions that impose liability on responsible parties for the discharge of hazardous substances into the environment. Some of these statutes impose cleanup requirements as well. They include the RCRA, the Clean

21. The objective of the EPA is to "cleanup [hazardous waste] sites. Thus, [the EPA] take[s] broad, sometimes ambiguous provisions of the law and consistently seek[s] to expand them to further that end. In certain areas, the result is that potentially responsible parties will encounter considerable difficulty, in a way that they might not expect." Lucero, EPA's Role in and Perspectives on Property Transfer and Financing Liabilities, in Burdens of Environmental Regulation on Private Property Ownership and Business Transactions: Reasonable or Unreasonable? 18 (1988). (Address by Gene A. Lucero, Director, Office of Waste Program Enforcement Environmental Protection Agency).


23. 42 U.S.C. §§ 6901-6911 (1982 & Supp. III 1985). RCRA is of importance primarily to businesses that generate, store, treat, transport, or dispose of hazardous wastes. However, RCRA can
Water Act,24 the Safe Drinking Water Act,25 the Toxic Substances Control Act,26 and the Hazardous Materials Transportation Act.27

III. THE SCOPE OF SUPERFUND LIABILITY

A. Overview

Generally, CERCLA imposes liability and provides for cleanup and emergency response actions in the event of a release of hazardous substances and for the cleanup of inactive and abandoned waste disposal sites. The statute's provisions for emergency response authorizes the government28 to respond or compel response,29 without the need of court approval, in order to protect against imminent and substantial dangers to the health and welfare of the public and the environment.

Specifically, Superfund legislation prohibits the release30 of any

be an unexpected source of liability in the transfer of contaminated property for a purchaser who played no role in the generation, storage or handling of the hazardous wastes. See H.R. Rep. 1491, supra note 10, at 28. Under RCRA's "imminent hazard" provision, a purchaser may be subject to liability for past actions that create current environmental hazards. 42 U.S.C. § 6973 (1982). Like CERCLA, RCRA therefore can impose liability on a current owner who took no part in the past release of hazardous wastes which currently "present an imminent and substantial endangerment to health or the environment." Id. A full discussion of RCRA liability is beyond the scope of this Note.

28. The Act provides that the President is authorized to delegate and assign any duties or powers imposed upon or assigned to him to carry out the provisions of this title. 42 U.S.C. § 9615.
29. The President delegated much of the authority under the Act to various federal agencies. Executive Order No. 12,316, 46 Fed. Reg. 42,237 (1981). The EPA was given broad discretion in implementing CERCLA. Id.
30. For the purposes of CERCLA: 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), but excludes . . . any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons . . . emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine . . . release of source, byproduct or special nuclear material from a nuclear incident . . . and . . . the normal application of fertilizer. 42 U.S.C. § 9601(22).
hazardous substance\textsuperscript{31} into the environment\textsuperscript{32} from a facility\textsuperscript{33} or vessel\textsuperscript{34} which necessitates the expenditure of response costs\textsuperscript{35} to clean up the site. When a substance defined by CERCLA as hazardous has been released or is threatened to be released, the federal government may unilaterally undertake remedial or removal action without determining that the release presents a danger to the public health or environment. Additionally, the government may recover the costs

\begin{quote}

The term "hazardous substance" is broadly defined with reference to all of the major existing federal environmental statutes, and includes any substance designated or regulated under any of the following statutory provisions: (1) any hazardous substance designated under 311(b)(2)(A) of the Clean Water Act, 33 U.S.C. § 1321(b)(2)(A) listed at 40 C.F.R. § 116; (2) any toxic pollutant listed under § 307A of the Clean Water Act, 33 U.S.C. § 1317 listed at 40 C.F.R. § 401.15; (3) any hazardous waste under § 5001 of RCRA, 42 U.S.C. § 6921 listed at 40 C.F.R. § 261; (4) any hazardous air pollution under § 112(b)(1)(A) of the Clean Air Act, 42 U.S.C. § 7412(b)(1)(A) listed at 40 C.F.R. § 61; or (5) any imminently hazardous chemical substance or mixture under § 7 of the Toxic Substances Control Act, 15 U.S.C. § 2606.

All Superfund hazardous substances are listed alphabetically in Table 302.4 following 40 C.F.R. § 302.4 published at 50 Fed. Reg. 13,475 (1985).

Because CERCLA defines the term "hazardous substance" by referencing substances defined as hazardous in a vast number of previously enacted environmental statutes, the courts have consistently interpreted this provision quite broadly to achieve the beneficial legislative purpose. Dedham Water, 805 F.2d at 1081. See also Eagle-Picher Industries v. United States E.P.A., 759 F.2d 922, 930-31 (D.C. Cir. 1985) extending an extremely narrow interpretation of the statutory exemptions to hold that mining wastes are included in the coverage of "hazardous substances," even though legislative history suggests that mining wastes were intended to be excluded from the meaning of hazardous waste; United States v. Metate Asbestos Corp., 584 F. Supp. 1143 (D. Ariz. 1984) specifically including chrysotile asbestos within the definition of "hazardous substance" despite the contention that it was not hazardous to human health. (The court found that if it was not hazardous, it was the responsibility of Congress to provide an exemption).

32. For the purposes of CERCLA: The term "environment" means . . . 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 . . . any other surface water, ground water, drinking water supply, land surface, or subsurface strata, or ambient air within the United States . . . 42 U.S.C. § 9601(8).

33. For the purposes of CERCLA: The term "facility" means . . . any building, structure, installation, equipment, pipe or pipeline, (including any pipe into a sewer or publicly owned treatment works), 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, stored, disposed of, or placed, or otherwise come to be located; but it does not include any consumer product in consumer use or vessel. 42 U.S.C. § 9601(9).

34. For the purposes of CERCLA, The term "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water. 42 U.S.C. § 9601(28).

35. See infra notes 37-38 and accompanying text discussing the interpretation given to "response costs" under CERCLA.
to clean up a CERCLA site from any responsible party in an action brought in federal court.\textsuperscript{36} Recoverable costs include the expenditures associated with response, removal, and remedial action incurred by the federal government as well as the costs incurred as a result of the destruction to natural resources.\textsuperscript{37} The courts have consistently applied a broad interpretation to response cost liability. As a result, this allows for recovery of all litigation costs, including attorneys fees, and administrative and investigative costs associated with the cleanup.\textsuperscript{38}

Once liability is imposed upon a person, "[a]ll costs and damages for which a person is liable . . . shall constitute a lien in favor of the United States upon all real property . . . which belong[s] to such person."\textsuperscript{39} This lien remains attached to the property until satisfied.\textsuperscript{40} Subsequently, this attachment may impede the ability to transfer or to finance a property thereby creating additional concern for all parties in the real estate industry. However, this concern is suppressed to an extent because the federal lien provision is subject to previously perfected security interests of other creditors.\textsuperscript{41}

\begin{footnotesize}

36. A guiding principle underlying CERCLA is that the cost of hazardous waste cleanup should rest on those ultimately responsible for the waste. In this way Congress intended to shift the burden to the industries and consumers who benefit most directly from products and services associated with the waste. The Committee on Environment and Public Works noted:

[T]he goal of assuring that those who caused the chemical harm bear the cost of the harm is addressed by the imposition of liability. Strict liability, the foundation of S. 1480, assures that those who benefit financially from a commercial activity internalize the health and environmental cost of doing business . . . .


For a general discussion of cost allocation under CERCLA, see Note, Allocating the Costs of Hazardous Waste Disposal, 94 Harv. L. Rev. 584 (1981).

37. Recoverable costs and damages under the liability provisions of CERCLA include: all costs of removal or remedial action incurred by the United States Government or a State; any other necessary costs of response incurred by any other person consistent with the national contingency plan; 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 the costs of any health assessment or health effects study carried out under section 9604(f) of this title. 42 U.S.C. § 9607(a)(4).


\end{footnotesize}
The liens created by state superfund statutes pose an even greater concern for the real estate practitioner.\(^42\) Several states have enacted "superlien" provisions that impose a first priority lien upon the real property of a responsible party.\(^43\) Unlike CERCLA, the state statutes go much further in ensuring that the state recoups its cleanup costs through the imposition of retroactive, first-priority liens on secured property.\(^44\) Typically, the superlien provisions apply only to non-residential property within the state.\(^45\) As a result, purchasers, sellers, lessors, and title insurers of property should be aware of any applicable state laws that may be a source of additional liability in the transfer of any property which may have been used as a disposal site for hazardous wastes.\(^46\)

**B. Standard of Liability**

1. **Strict Liability**

   The liability provision of CERCLA\(^47\) has been the subject of considerable controversy, due in great part to the lack of guidance that the statute provides as to its intended liability scheme.\(^48\) Section 107(a) of CERCLA, the heart of the liability provision, establishes liability under the statute, but fails to provide an adequate standard with which this liability shall be applied. Instead, the statute requires the standard to be construed under the interpretation given to a

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42. Approximately 80% of the states have passed superfund statutes similar to CERCLA. See Note, The Impact of State "Superlien" Statutes on Real Estate Transactions, 5 VA. J. NAT. RESOURCES L. 297 (1986). [. . .] See also S. Tasher, J. Dean, S. Oster, & B. Kaufman, Environmental Laws and Real Estate Handbook 1V-21 (2d ed. 1987).

43. See Note, supra note 42, at 298. See also Bleicher & Stonelake, supra note 6, at 10,012.


46. See supra note 43 and accompanying text (reviewing real estate concerns posed by state superlien provisions).

47. 42 U.S.C. § 9607(a).

48. "CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for unartful drafting and numerous ambiguities attributable to its precipitous passage. Problems of interpretation have arisen from the Act's use of inadequately defined terms . . . ." Artesian Water Co. v. New Castle Cty., 851 F.2d 643, 648 (3d Cir. 1988) (affirming 659 F. Supp. 1269 (D. Del. 1987)).
similar liability provision in the Water Quality Improvement Act of 1970 (commonly known as the Clean Water Act (CWA)). However, the liability standard provided under the CWA is equally ambiguous, as certain language parallels CERCLA.

Because CERCLA lacks a clear standard of liability, the courts have utilized CERCLA’s legislative history, cases decided under the CWA liability standard, and an adaptation of common law which is reflected in the “abnormally dangerous” doctrine of the Restatement (Second) of Torts to impose a standard of strict liability on potentially responsible parties involved with CERCLA litigation. Under this standard, the courts force financially solvent parties to bear the cost of cleanup even if they had nothing to do with the disposal or release of hazardous wastes. However, the 1986 Superfund Amendments, to an extent, mitigated the harsh operation of strict liability. The Amendment provided an exemption to any party who acquired a site after the disposal of hazardous wastes and who demonstrated that prior to purchase, it diligently inspected the land and found no evidence that waste was contained thereon.

2. Joint and Several Liability
Although CERCLA does not specifically provide for joint and several liability, the courts generally follow an analysis similar to

49. See statutes cited supra note 24. CERCLA provides that liability “shall be construed to be the standard of liability which obtains under section 1321 of title 33.” 42 U.S.C. § 9601(32).
50. The liability standard under CWA provides that the responsible party “shall . . . be liable” for costs. 33 U.S.C. § 1321(f)(1).
51. The legislative history of the liability provision indicates that the CERCLA standard of liability is that of strict liability. See, e.g., “The liability provisions of this [CERCLA] bill do not refer to the terms strict . . . liability . . . I have reviewed carefully the statutory . . . and precedents under [CWA]. I have concluded that despite the absence of [the] specific [term], the strict liability standard . . . is preserved.” 126 Cong. Rec. H11,787 (daily ed. December 3, 1980) (statement of Rep. Florio) “Unless otherwise provided in the act [CERCLA], the standard of liability is intended to be the same as that provided in [CWA]. I understand that to be a standard of strict liability.” 120 Cong. Rec. 30,932 (1980) (statement of Senator Randolph).
52. Restatement (Second) of Torts, §§ 519, 520 (1977).
54. For a discussion of the “innocent purchaser” defense, see infra notes 115-16 and accompanying text.
that utilized in the development of strict liability. Due to the absence of statutory guidelines, the courts rely on the prevailing common law principle of a "single and indivisible harm" to impose a standard of joint and several liability on all parties to a CERCLA action unless a clear basis for division of responsibility exists. Thus, for example, the courts may require a current property owner of a hazardous waste site to shoulder a disproportionate share of the total cleanup effort, even if all of the contamination occurred prior to obtaining an interest in the property. However, the statutory provision that allows an innocent party who initially is held liable for cleanup costs to seek contribution from other responsible parties tends to temper the apparent severity of joint and several liability. In deciding contribution issues, the courts generally analyze the specific factual circumstances of a case to determine the appropriate equitable factors such as relative fault to apportion the costs of cleanup to all responsible parties.

Even though CERCLA does not definitively address the scope of liability, the district courts and more recently the circuit courts, have almost unanimously adopted a very expansive interpretation of CERCLA liability. However, the courts have somewhat narrowed the scope of recovery by expressly refraining from imposing liability for loss to property rights, the cost of personal injury, or third party economic damages that are attributable to a contaminated site.

55. Restatement (Second) of Torts § 875 (1977).

For a discussion of the development of joint and several liability in hazardous waste litigation, see Note, supra note 45, at 109.
57. E.g., Shore Realty, 759 F.2d at 1043-44.
C. Who Is Liable

Section 107 (a) of CERCLA provides that response costs may be recovered from, among others, the current owner or operator of a contaminated site, as well as any person who previously owned or operated a site during the time in which hazardous wastes were deposited thereon. The current decisions interpreting the “owner or operator” language rely on the comprehensive nature of CERCLA’s provisions to consistently expand liability. Present and past owners of property have been distinguished by holding the latter liable only if they owned or operated the facility at the time wastes were deposited. Current owners and operators are apparently held strictly liable for all prior disposals regardless of whether they had any relationship to the responsible parties or any knowledge of the presence of toxic substances on the property when they acquired it.

The majority of the circuit courts and a considerable number of the district courts have had the opportunity to address and define the breadth of liability imposed upon the “owners and operators” of property. As a result, buyers, sellers, lessors, lessees, trustees, lenders, and a variety of other sophisticated parties dealing with real estate have become entangled in the expansive web of CERCLA liability as “owners or operators” of hazardous waste sites.

1. Owners and Operators

One of the earliest and most often cited circuit court decisions addressing the scope of CERCLA’s liability provisions imposed on current property owners is State of New York v. Shore Realty Corporation. Shore Realty Corp. purchased a 3.2 acre tract of wa-

64. 759 F.2d at 1032.
terfront property to be utilized for condominium development. Before purchasing the property, Shore's environmental consultant had prepared a detailed report and concluded that the property contained hazardous wastes which would have to be removed prior to breaking ground for construction. Subsequent to Shore's acquisition of the site and prior to the start of development activities, the State of New York commenced cleanup efforts and brought suit against Shore Realty under CERCLA § 107(a)(1) for the response costs it incurred.

Shore argued that it was not covered by CERCLA § 107(a)(1) because it neither owned the site at the time of disposal nor caused the release of hazardous materials. The Court of Appeals for the Second Circuit found Shore liable as a current owner without regard to culpability. This interpretation closed a potential loophole unintentionally left in the statute by Congress. In the absence of this interpretation, property owners or operators could churn their property after the release of contaminants in an effort to eliminate exposure to liability.

Since the Shore Realty decision, the courts have endeavored to develop a workable meaning of "owner or operator" to supplement the inadequate circular reasoning provided by the statutory definition. At least one circuit court has established that the circular nature of the statutory language implies that the defined terms have their ordinary meanings rather than unusual or technical interpretations. In an attempt to employ the ordinary meaning of the stat-

65. Id. at 1044.
66. The court rejected Shore Realty's arguments:
if the current owner of a site could [clearly] avoid liability merely by having purchased the site after chemical dumping had ceased, waste cites certainly would be sold, following the cessation of dumping, to new owners who could avoid the liability otherwise required by CERCLA. Congress had well in mind that persons who dump or store hazardous wastes sometimes cannot be located or may be deceased or judgment proof. [This Court] will not interpret section 9607(a) in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intention otherwise.

Id. at 1045 (citations omitted). See also Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89 (3d Cir. 1988) ("the current owner of a facility as well as the entity that owned the facility at the time of hazardous substance was deposited are liable under CERCLA . . . for rectifying the condition . . . .")

67. CERCLA provides that "[t]he term 'owner or Operator' means . . . in the case of an onshore facility . . . , any person owning or operating such facility . . . ." 42 U.S.C. § 9601(20)(A).
utory language and to provide additional guidance to the application of CERCLA liability, the courts have produced divergent opinions defining the ordinary meaning of property “owner”.

For example, a district court in *FMC Corp. v. Northern Pump Co.* found that the mere ownership of property at the time hazardous wastes are deposited thereon is not sufficient to hold the owner financially responsible for any portion of the cleanup effort. The court concluded that both ownership and accountability for the disposal of hazardous wastes are required to impose financial liability on a party. On the other hand, a district court in *United States v. Carolawn* ascertained that despite a statutory provision which provides an exemption from liability for persons who do not participate in the management of a facility and who merely hold the indicia of ownership to protect a security interest, financial responsibility may be imposed upon a company that held legal title and control over a contaminated site for just one hour.

In addition to defining “owner,” the courts have likewise struggled to develop a uniform definition of an “operator” of a CERCLA site. The Fourth Circuit recently held that a state governmental agency was not an “operator” of a hazardous waste site. The agency was not held financially responsible under the liability provisions of CERCLA even though the agency supervised, monitored and loosely regulated the activities at an abandoned waste site. The court held that the agency was not an operator due to the lack of any “hands-on” activities that could be construed as direct site management.

70. Id. at 1290-91.
75. Id. CERCLA provides an exemption from liability for a State governmental unit that acquires control of a site due to abandonment. 42 U.S.C. § 9601(20)(D). However, the exclusion “does not apply to any State or local government which caused or contributed to the release or threatened release of a hazardous substance from the facility . . . .” Id. See also NEPACCO., 810 F.2d at 743 (8th Cir. 1986) (suggesting that “the authority to control the handling and disposal of hazardous substances” is “critical” to the statutory scheme).
The Seventh Circuit turned to common law analogies to further distinguish the meaning of "Operator" in *Edward Hines Lumber Co. v. Vulcan Materials Co.* This court ruled that the defendant-appellee, who designed and built the facility responsible for the release of contaminants, furnished the toxic materials, trained the employees, and reserved a right to inspect the ongoing operation, was an independent contractor. At common law, the employer of an independent contractor is not responsible for the contractor's torts. Accordingly, the court held that even though the contractor was involved in the management and decision process that created the hazardous situation, an independent contractor is not an "operator" under common law doctrine. Therefore, the independent contractor avoided responsibility under the CERCLA liability provisions.

Case law interpreting "owner and operator" is still developing, but the trend has been to apply the statutory definition literally. However, in a situation that is not easily defined within the parameters of the ordinary meaning of "owner or operator," the extent to which control or legal ownership alone confers irrefutable responsibility is somewhat unclear. Therefore, in this unsettled climate, the conservative approach suggests that any party who maintains any interest in or control over property through either managerial influence or legal mechanisms may be considered an "owner or operator" of such property and subject to CERCLA liability for cleanup costs. Whether or not the party was directly or indirectly involved with the disposal or release of hazardous wastes is immaterial.

2. *Lenders*

Legislative history suggests that Congress intended to provide an exemption from liability for creditors who hold title to property primarily to secure a loan so long as they do not participate in the management of the site or assume the full range of operational responsibility. Additionally, the statutory definition of "owner and

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78. *Id.* at 158.
79. *Id.* at 157.
operator’” expressly excludes a party who merely holds the indicia of ownership of a property to protect a secured interest.\textsuperscript{81} However, due to recent judicial interpretations of this provision, financial lending institutions may have to face the risk of exposure to CERCLA liability.

\textit{United States v. Mirabile}\textsuperscript{82} addressed the issue of the security interest exception as it pertained to “owner or operator” liability. In \textit{Mirabile} several financial institutions had interests secured by real property and assets of a company that was found to be responsible for the release of hazardous wastes on the mortgaged property.\textsuperscript{83} Interpreting the security interest exception, the court imposed no liability on the lender that purchased the site at a foreclosure sale and subsequently assigned its interest to a third party within several months.\textsuperscript{84} The court concluded that the purchase upon foreclosure was undertaken solely in an effort to protect a secured interest in the property.\textsuperscript{85} However, the court denied a second lender’s motion for summary judgment and held that it may be subject to liability as a result of its postbankruptcy activities which included involvement in the day-to-day operations of the failed company.\textsuperscript{86}

In a more recent decision, \textit{United States v. Maryland Bank & Trust Co.},\textsuperscript{87} a district court granted summary judgment to hold a bank liable after it foreclosed and acquired title to waste-laden property that served as security for a mortgage.\textsuperscript{88} The bank purchased

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\textsuperscript{81} See 42 U.S.C. § 9601(20)(A). The term “‘owner or operator’ . . . 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.” \textit{Id.}


\textsuperscript{83} \textit{Id.} at 20994.

\textsuperscript{84} \textit{Id.}

\textsuperscript{85} \textit{Id.} at 20996.

\textsuperscript{86} \textit{Id.} at 20997.


\textsuperscript{88} \textit{Maryland Bank & Trust}, 632 F. Supp. at 382.
the site upon foreclosure for approximately $380,000 and held title for four years during which the EPA incurred approximately $550,000 in cleanup costs. The court concluded that the security interest exception did not apply to "former mortgagors currently holding title after purchasing the property at a foreclosure sale, at least when, as here, the former mortgagor has held title for nearly four years and a full year before the EPA cleanup." Thus, the lender became the "owner" of the property by virtue of the length of time the title was held. Accordingly, the court held the bank liable for the full cost of the cleanup effort. While financial institutions can take comfort in the liability exclusion for parties merely holding the indicia of ownership for the protection of a security interest, the courts have placed lenders on notice that strict liability will be imposed if the lender becomes more involved with the daily operations and management of the property.

3. Corporate Officers and Majority Shareholders

Generally, corporate officers, majority shareholders, and parent corporations are not liable for the torts of a corporation in which they have an interest. However, a number of courts have ruled that the corporate or individual representatives that exercise control over an entity may be responsible for the acts of such entity. The courts have again utilized an expansive interpretation of the CERCLA liability provisions to place the financial responsibility of cleanup efforts on an entity that may be only remotely involved with the contamination of a hazardous waste site.

The majority of courts that have imposed financial responsibility on corporate officers, majority stockholders, and parent corporations have developed a theory of liability directly from the statutory

89. Id. at 575-76.
90. Id. at 579.
91. Id. at 582.
language provided in CERCLA. These decisions do not address the "corporate veil" doctrine. Instead, the courts completely ignore the implications of the corporate form and ground their rulings on the judicial interpretation of statutory terms such as "owner or operator," and "control." Several courts have relied on a strict literal reading of the liability provisions of CERCLA to impose financial responsibility for cleanup costs on any person who owns an interest in a facility and actively participates in its management. This line of cases purports to promote Congressional intent by utilizing a literal interpretation of the statute. These decisions have highlighted the fact that the statutory definition of "owner or operator" excludes from liability a person who does not participate in the management of a facility responsible for the release of hazardous wastes. Therefore, because a non-manager is specifically excluded from liability, a literal interpretation of the statute and its construction implies the imposition of liability on persons who actively participate in the management of a facility.

A second line of cases that impose liability on officers and stockholders has rested on the degree of control that these parties exercise over the management and disposal of hazardous wastes. These

93. See, e.g., Smith Land & Improvement, 851 F.2d at 92 (imposing successor liability on parent corporations which have either merged with or consolidated with a corporation that is a responsible party); NEPACCO, 810 F.2d at 744 (holding corporate officers liable as "persons" who arranged the disposal of hazardous wastes and as an "owner or operator" of the facility responsible for the contamination); Shore Realty, 759 F.2d at 1052 (holding officer and majority shareholder liable as "owner or operator"); United States v. Bliss, 667 F. Supp. 1298, 1306 (E.D. Mo. 1987) (plant supervisor and chief executive officer had ultimate authority for corporate decision and therefore were held individually liable as "owners or operators"); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986) (holding the parent corporation liable as "owner or operator" with respect to a subsidiary's facilities); United States v. Conservation Chemical Co., 619 F. Supp. 162, 190 (W.D. Mo. 1985) (holding that "corporate officials who actively participated in the management of a disposal facility can be held personally liable" as "owners or operators"). See also United States v. Mottolo, 605 F. Supp. 898, 914 (D.N.H. 1985); United States v. Ward, 618 F. Supp. 884, 894-95 (E.D.N.C. 1985); NEPACCO, 579 F. Supp. at 848-49; Carolawn, Env't. Rep. Cas. (BNA) at 2128.
95. 42 U.S.C. § 9601(21).
98. See id.
99. See id. at 848. See also 42 U.S.C. § 9601(20)(A).
100. See, e.g., Shore Realty, 579 F.2d at 1052; Bunker Hill, 635 F. Supp. at 672.
decisions do not automatically impose liability on parent corporations or officers and stockholders by the mere virtue of their management positions. These decisions consider the extent to which a party influences and controls the corporate operations. More specifically, these decisions hinge on the amount of direct control that the officer, stockholder, or parent has over the final decisions surrounding the disposal of hazardous waste. These decisions have largely ignored the traditional common law theory of limited liability for corporate officers and stockholders. While neither the legislative history nor the express language of the statute provides for the imposition of liability on corporate officers, majority shareholders, or parent corporations, the courts have undertaken an extensive effort to expand the liability provisions of CERCLA to include these groups. By imposing financial liability on those parties who are directly responsible for the decisions to dispose of waste products, the courts are able to promote the congressional objectives which require hazardous waste cleanup costs to be borne by those who benefit the most by its disposal. Additionally, these decisions have placed the corporate community on notice that the courts will expand traditional doctrines of common law to replenish the Superfund coffers which perpetuate the cleanup of abandoned and inactive hazardous waste disposal sites.

4. Lessors and Lessees

Lessors and lessees of real estate face unexpected liabilities if sources of contamination are found on the leased property. In United States v. Monsanto Co.,¹⁰¹ the Court of Appeals for the Fourth Circuit imposed joint and several liability for CERCLA response costs on an absentee landowner who leased warehouse space to a corporation that was deemed responsible for depositing hazardous wastes on the leased property.¹⁰² The court held that even though the lessors were completely unaware of the disposal activities undertaken by the lessees, the imposition of liability was proper because CERCLA “does not sanction such willful or negligent blindness

¹⁰¹. 858 F.2d 160 (4th Cir. 1988).
¹⁰². Id. at 171-73.
on the part of absent landowners.” In addition, the courts have imposed liability for the response costs necessary to cleanup a contaminated site upon a lessee who caused the contamination. Also, a current lessee is subject to liability for the contamination caused by a sublessee.

5. Trustees

In conjunction with the increase in CERCLA litigation, the courts have continued to expand the sphere of CERCLA liability to impose financial responsibility on parties having even the most remote interest in contaminated property. For example, in an isolated decision, a court imposed liability on a trustee under the CERCLA “owner” standards because the responsibilities granted to the trustee justified ownership status. In United States v. Burns, a trust held title to property that was previously contaminated by the release of hazardous wastes. The court utilized an expansive interpretation of “owner,” as suggested by CERCLA’s legislative history, to impose personal liability for response costs on the trustee and sole beneficiary of the trust.

IV. PROCEDURES TO LIMIT ENVIRONMENTAL LIABILITY

A. Statutory Defenses

Even though the courts generally apply the CERCLA liability standard without regard to fault, the Act expressly provides three

103. Id. at 169. See also, United States v. Northernaire Plating Co., 670 F. Supp. 742, 748 (W.D. Mich. 1982) (holding a landowner/lessor liable for response costs even though the lessee was solely responsible for the disposal of contaminated wastes at the leased site); United States v. Argent Corp., 21 Env't. Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984) (holding that a landowner/lessor is an “owner” susceptible to liability under CERCLA).


107. Id.

108. The legislative history states that “owner” was intended to “include not only those persons who hold title . . . but those in the absences of holding a title, possess some equivalent evidence of ownership.” See H. R. Rep. No. 172, supra note 79, at 36.

109. The court also stated that “Congress did not intend for a responsible party to be able to avoid liability through the use of a trust or other forms of ownership.” Burns, No. C-88-94-L, citing Shore Realty, 759 F.2d at 1044-45. See also, III SCOTT ON TRUSTS §§ 265, 265.1, slip op. at 4 (a trustee is subject to personal liability for trust property by mere virtue of ownership of the property).
Superfund Liability defenses against liability. The statute provides protection against liability for response costs incurred as a result of contamination released solely by an act of God,\textsuperscript{110} act of war,\textsuperscript{111} or an act or omission of a third party with whom the property owner had no contractual relationship.\textsuperscript{112} While the courts recognize only these defenses as effectively limiting liability, these statutory defenses have met considerable resistance with limited success.\textsuperscript{113} These defenses have proven unsuccessful as a result of the court's narrow interpretation of the statutory language.\textsuperscript{114} Additionally, the court's broad interpretation of the general CERCLA liability provisions serves to further limit the application of these defenses.\textsuperscript{115}

Real estate practitioners are well aware of the inability to control the acts of God or the acts of war. As a result, most documents that transfer an interest in real estate are replete with boilerplate provisions that allocate rights and remedies should an uncontrollable act of God or an act of war occur. However, problems arising from the acts of unrelated third parties are more difficult to solve.

In response to the liability problems surrounding unrelated third parties, CERCLA provides a relatively convoluted defense provision to protect landowners from the financial consequences associated with contamination created by third parties.\textsuperscript{116} Even though somewhat confusing, this "third party" or "innocent purchase" defense is perhaps the most plausible and therefore the most useful statutory defense available to property owners. This defense is available to owners or operators of a facility that has been contaminated solely by the acts or omissions of "unrelated" third parties. A third party is "unrelated" to a property owner in the absence of a contractual relationship between the parties.\textsuperscript{117} The 1986 Superfund Amendments

\textsuperscript{111} 42 U.S.C. § 9607(b)(2) (1982).
\textsuperscript{112} 42 U.S.C. § 9607(b)(3) (1982).
\textsuperscript{113} See, e.g., Pinole Point Properties v. Bethlehem Steel Corp., 596 F. Supp. 283, 286 (N.D. Cal. 1984) (describing the scope of liability as "extremely broad" and the available defenses as "extremely limited").
\textsuperscript{114} See Glass, supra note 22, at 395.
\textsuperscript{115} Id.
\textsuperscript{116} See 42 U.S.C. § 9607(b)(3).
\textsuperscript{117} Id.
defined the term "contractual relationship" to include land contracts, deeds, and other instruments necessary for the transfer of title to or possession of real property.\textsuperscript{118} Due to the broad definition of "contractual relationship," a landowner is liable for contamination caused by a seller, a predecessor in the chain of title, or a third party linked to the land by a lease, contract or other legal mechanism.

To obtain the full benefit of the "third party" defense, the landowner is held to a higher standard than merely proving that an unrelated third party was the sole cause of the hazardous release. The landowner must also prove by a preponderance of the evidence that "due care" was exercised in light of all relevant facts and circumstances and that all precautions were taken against foreseeable acts or omissions of the third party.\textsuperscript{119} The shear breadth of the requirements necessary to qualify for the "third party" defense creates, at best, a narrow measure of relief for the property owner or operator.\textsuperscript{120}

\textsuperscript{118.} For the purpose of CERCLA:
The term 'contractual relationship', . . . includes, but is not limited to, land contracts, deed, or other instruments transferring title or possession, unless the real property on which the facility concerned is located 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 of 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 requirement of section 9607(b)(3)(a) and (b) of this title.


Section 9607 (b)(3)(a) and (b) of this title provide that the defendant must establish "by a preponderance of the evidence that . . . 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 . . . 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 . . . .” 42 U.S.C. §§ 9607(b)(3)(a), (b).


\textsuperscript{120.} See, e.g., Shore Realty, 759 F.2d at 1032 (Real estate developer acquired land for devel-
As a result of the nature of these qualifications, the 1986 Superfund Amendments established the "innocent landowner/purchaser" provisions, which operated to expand the "third party" defense and provide additional comfort to owners and operators. Under this provision, despite the existence of a contractual nexus between the landowner and the polluter, the landowner is not liable for the acts of the third party if he can prove that at the time of acquiring title or taking possession he undertook a reasonable investigation and had no reason to believe that the property was contaminated. The "innocent landowner" provision appears to expand the availability of the third party defense by protecting the innocent purchaser from unknowingly acquiring liability that was not bargained for in the property transaction. However, in order to benefit from this defense, a party must make all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice. Due to these stringent qualifications it is difficult to establish a position as an innocent property owner or operator. To the extent that innocent landowner status is established, the third party statutory defense provisions are available. However, given the due diligence standard required for innocent status, this defense is likely to succeed in only the most narrow circumstances.

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opment. At the time of acquisition, developer/purchaser was aware that hazardous waste was stored at the site. The court denied "third-party" defense claim because defendant did not take the requisite precautions against these foreseeable acts or omissions.); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 993 (D.S.C. 1984) (denying "third-party" defense to a landowner due to a lease agreement with responsible party); United States v. Argent Corp., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20616 (D.N.M. 1984) (affirmative "third-party" defense based on complete absence of causation was not available to landowners who entered into lease with company which stored hazardous wastes on property). Cf. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20994 (E.D. Pa. 1985) (A bank that had financed the waste disposal company foreclosed on property and then made the high bid itself at the sheriff's sale. It then assigned the bid to the defendants. The bank's role in the transfer of ownership from the waste generator to the defendants arguably created an indirect connection, but the court ruled there was no contractual relationship between the two. Accordingly, the court refused to grant summary judgment on liability against the current owners due to the lack of the necessary contractual relationship.).

121. 'Good commercial or customary practice' means that a "reasonable inquiry must have been made in all circumstances, in light of the best business and land transfer principles. Those engaged in commercial transactions should . . . be held to a higher standard than those who are not engaged in private residential transactions." H. R. Rep. No. 962, 99th Cong., 2nd Sess. 187 (1986).
The courts have not been called on to interpret the CERCLA defense provisions to a great extent. However, the courts that have addressed this issue have indicated that the "due diligence" and "appropriate inquiry" provisions are purely factual standards that are scrutinized on a case-by-case basis. Due to the limited judicial interpretation of the statutory defense provisions, a well-defined body of law has not developed. Therefore, the real estate practitioner will find difficulty in developing an adequate method of transferring real property interests that enables an innocent purchaser to take advantage of the full benefits of the third party defense.

B. Environmental Investigation

The real estate industry has had limited experience with procedures to reduce environmental liability other than the statutory defenses promulgated in CERCLA § 107(b). Possible procedures that may limit the financial exposure of an owner or operator include procurement of insurance coverage, inclusion of contractual provisions to allocate liability, and perhaps the most important, performance of an environmental survey of the site to determine the presence or absence of environmental wastes. A complete environmental audit is vitally important in reducing uncertainties regarding environmental liabilities. Additionally, the audit will provide considerable weight in fulfilling the "due diligence" and "appropriate inquiry" requirements of the third party defense provision. Also, a thorough environmental audit will provide information on a facility's compliance with applicable environmental laws and regulations as well as a foundation to estimate the potential range of liability associated with any given site.

There are no uniform standards available that regulate the performance of an environmental audit. However, the assessment should begin with a visual inspection of the site. The initial inspection of a site should identify both the type of business conducted as well as any potential sources of contamination. A preliminary investigation is necessary to determine the need for a more expensive and comprehensive assessment.

In the event a full scale environmental audit is required, a prospective owner or operator should review the history of the site for
any industrial activity, including any manufacturing processes utilized; any on-site or off-site waste disposal operations; and any on-site storage facilities such as above-ground and underground tanks, drum storage areas, surface impoundments, and storm water runoff areas. This information can be compiled through a review of the publicly filed land records and environmental reports and through discussions with the current owners and operators of the site. Further indications of contamination may be confirmed by chemical analysis, including soil sampling and groundwater testing.

A properly performed audit will determine the extent and severity of actual or threatened environmental hazards. Additionally, the audit will provide counsel with a foundation to prepare an opinion letter as to the potential exposure to environmental liability. Therefore, even though a complete environmental audit is a very expensive and time consuming undertaking, the overriding financial risks arising out of possible CERCLA litigation makes a thorough investigation mandatory.

C. Contractual Provisions

A complete environmental audit provides essential information to assist the real estate practitioner in the evaluation of potential exposure to CERCLA liability. The practitioner will find this information useful to effectively allocate liability for both known and unexpected hazardous material problems when drafting purchase or lease agreements and other contractual arrangements that facilitate the transfer of interests in real estate. Generally, liability allocation provisions take the form of warranties, indemnifications, certifications, disclaimers, and representations. These provisions should be drafted to meet the specific needs of the concerned owner or operator. For example, a purchase or lease agreement may include a provision to allocate financial responsibility for the cleanup of known hazardous wastes; a provision that requires a seller to certify compliance with pertinent hazardous waste legislation; an indemnification provision to protect the buyer against any unforeseen environmental liabilities; a seller representation that the property has never been subject to the release of hazardous wastes; or a representation made by the purchaser that a diligent investigation was
conducted and no hazardous wastes were found. These contractual provisions are useful to remove uncertainties associated with potential financial exposure to hazardous waste liabilities. However, while a warranty or indemnification provision may provide a seller with a cause of action against a third party polluter under a contract theory, these provisions do not provide a defense to an action brought against an owner or operator under the strict liability provisions of CERCLA.122

D. Insurance

Comprehensive general liability insurance policies provide coverage for bodily injury and property damage that result from sudden and accidental incidents which occur during the policy period.123 These traditional policies may not cover the non-accidental, gradual discharge and release of environmental wastes.124 The insurance industry has recently developed environmental impairment liability policies to cover the nonsudden discharge of environmental wastes.125 The appropriate scope of coverage for a company will depend on the nature of the risks present at a specific site and the needs of the insured.126 Therefore, property owners and operators should review their current insurance coverage to determine the extent of their non-insured financial exposure to environmental liability.

V. Conclusion

This Note has explored the dichotomy that has emerged as a result of the interaction between the practice of traditional property law and the recent concern over the protection of the environment. On one hand Congress has addressed the concern surround-
ing the cleanup of previously abandoned and inactive waste disposal sites through the passage of the comprehensive CERCLA legislation. However, on the other hand CERCLA has proven to be a hastily conceived and convoluted body of law that provides the courts with very little guidance as to its intended scope of liability. As a result, this legislation has introduced an unconventional environmental liability scheme into the sphere of real property law and has created exposure to considerable financial risks that were not previously considered by those in the real estate industry.

Due to the lack of guidance provided by CERCLA, the decided trend of the courts has been toward expanding responsibility through the development of standards of strict and joint and several liability. Under this newly created standard of liability, the courts may impose a disproportionate financial burden on property owners or operators that may have had little or nothing to do with the actual disposal or release of toxic wastes at a site. Additionally, some parties may escape their relative portion of financial responsibility unless a contribution action is established through further litigation.

In view of the liabilities imposed by CERCLA and the heavy costs associated with any cleanup of hazardous wastes, property owners, operators, sellers, purchasers and others with an interest in real estate should begin to take measures to limit their exposure to environmental liabilities. The process of minimizing exposure to environmental liability rests on the identification and allocation of all known risks. The first step in reducing the risks associated with the transfer of interests in real property begins with a preliminary environmental survey to determine whether any hazardous substances are present on the site. The range of potential liability is vast and in some circumstances may be estimated only after detailed review of a site. A properly performed environmental audit will assist a potential purchaser in the determination of seller’s degree of compliance with applicable environmental laws and regulations. Additionally, the environmental audit will provide counsel with a basis to prepare an opinion letter as to the potential exposure to environmental liability. Subsequent to an environmental audit, an agreement to transfer an interest in real property can be drafted and modified to allocate liability for both known and unexpected hazardous material problems.
The inherent risks now associated with real estate transactions can never be entirely avoided. However, advice on ways to minimize those risks can be offered. The process of assessing the environmental risks associated with the transfer of a parcel of property will be expensive and time consuming. However, given the current statutory interpretations, the failure to identify the extent and severity of actual or threatened environmental hazards could have disastrous economic consequences.

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