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Volume 19
Number 4 *Symposium: Environmental Litigation
and Enforcement*

Article 4

6-1-1986

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Joel S. Moskowitz & Scott R. Hoyt, *Enforcement of CERCLA against Innocent Owners of Property*, 19 Loy. L.A. L. Rev. 1171 (1986).

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ENFORCEMENT OF CERCLA AGAINST INNOCENT OWNERS OF PROPERTY

Joel S. Moskowitz and Scott R. Hoyt***

I. INTRODUCTION

In 1980, the allocation of \$1.6 billion over a five year period for hazardous waste cleanup seemed to be an impressive expression of national will, however fuzzy the economics which suggested the adequacy of that amount. The informal dubbing of the Hazardous Substance Response Trust Fund¹ as the "Superfund" and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)² as the "Superfund Act" betrayed a confidence which was soon to wither.

In 1986, as the reauthorization of CERCLA is debated, no doubt has been expressed that the Superfund should be increased to an amount exceeding \$5 billion, with some congressional recommendations exceeding twice that amount.³ The inadequacy of these figures have become apparent over the past five years as the financial dimensions of the hazardous waste problems have been revealed. The United States Environmental Protection Agency's (EPA's) 1983 estimate of federal funding needs alone ranged up to \$22.7 billion.⁴ The United States General Accounting Office has indicated the federal bill could reach \$39.1 billion, with the total cost, including state and responsible party costs, reaching more than \$70 billion.⁵ These estimates, however, were based on the

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1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 221, 42 U.S.C. § 9631 (1982).

2. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9657 (1982)).

3. Waldo & Griffiths, *Beyond the House Funding and Right to Know Votes*, 4 ENVTL. FORUM 17, 17 (1986).

4. U.S. GEN. ACCOUNTING OFFICE, CLEANING UP HAZARDOUS WASTES: AN OVERVIEW OF SUPERFUND REAUTHORIZATION ISSUES 17 (1985).

5. *Id.*

cleanup of the 1200-2000 most dangerous inactive sites.⁶ EPA's hazardous waste site inventory currently lists approximately 19,000 sites, and EPA expects the list to grow to about 25,000 sites over the next several years.⁷

While the breadth of the financial chasm is uncertain,⁸ its impressive dimensions have not gone wholly unnoticed by the courts.⁹ The need to bridge this chasm has weighed heavily on EPA, the Department of Justice and the states which, as detailed below, have been urging ever expanding theories of liability on the courts. It is the thesis of this Article that expressions of judicial sympathy with public need and good motivations have stretched the hazy language of CERCLA past the breaking point. In the process, the courts have disregarded traditional notions of fairness in forcing those admittedly innocent of any polluting activities to pay for extravagant cleanup costs.

II. CERCLA AND THE "POLLUTER PAYS" PRINCIPLE

In constructing CERCLA, Congress clearly intended to meet the costs of cleanup with the stretched, but still recognizable application of the "polluter pays" principle.¹⁰ The Superfund itself is primarily funded by industry fees in the form of taxes on chemicals.¹¹ To fully fund the cleanup bill, "Congress intended to have the chemical industry, past and present, pay for the costs of cleaning up inactive hazardous waste sites."¹² "Congress rationally considered the imposition of liability for the effects of past disposal practices as a means to spread the costs of the cleanup *on those who created and profited from the waste disposal*—generators, transporters, and disposal site owners/operators."¹³ In *United States v. Price (Price II)*,¹⁴ the court stated the legislative aims of CER-

6. H.R. REP. NO. 96-1016, 96th Cong., 2d Sess. 18, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6119, 6120.

7. Habicht, *Encouraging Settlements Under Superfund*, 1 NAT. RESOURCES & ENV'T, Fall 1985, at 3.

8. U.S. GEN. ACCOUNTING OFFICE, *supra* note 4, at 17.

9. See, e.g., *United States v. Price*, 577 F. Supp. 1103, 1112 n.8 (D.N.J. 1983) (*Price II*) ("While CERCLA seems to encourage swift government action, it allots only \$1.6 billion dollars to the Superfund. Even the lowest estimates regarding clean up costs exceed that figure by almost 5 billion dollars . . .").

10. This tenet, formally adopted in Europe prior to the enactment of CERCLA, is sometimes honored there, as here, in the breach. Moskowitz, *Hazardous Waste Management in West Germany: An Identification of Issues*, 3 ENVTL. FORUM 20, 24 n.16 (1984).

11. See 26 U.S.C. §§ 4611, 4661 (1982).

12. *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 840 (W.D. Mo. 1984) (citing 126 CONG. REC. S14,962-63, (daily ed. Nov. 24, 1980)).

13. *Id.* at 841 (emphasis added).

14. 577 F. Supp. 1103 (D.N.J. 1983).

CLA included "goals such as cost-spreading and assurance that responsible parties bear their cost of the clean up."¹⁵

A. Those Expressly Liable under CERCLA

To reimburse the Superfund for costs expended in cleanup and provide a means of direct action against responsible parties to force them to clean up or pay for the cleanup of hazardous waste sites, Congress provided for abatement actions and actions to recoup cleanup costs incurred by the federal or state governments, or by others. Section 106 of CERCLA provides that the United States Attorney General may bring an action in the federal district court in the district where a hazardous waste threat occurs in order to abate such a danger or threat.¹⁶ Section 107 sets forth four categories of persons who may be sued for cleanup costs by the federal or state government or any other person who incurred cleanup costs consistent with CERCLA's mandates.¹⁷ Those persons who may be liable include:

- (1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response

15. *Id.* at 1114 (citing H.R. REP. NO. 96-1016, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6119). See also *J.V. Peters & Co. v. Ruckelshaus*, 584 F. Supp. 1005, 1008 (N.D. Ohio 1984) ("parties responsible for the hazardous release" held subject to liability for cleanup costs under CERCLA), *aff'd*, 767 F.2d 263 (6th Cir. 1985); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." (emphasis added)).

16. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1982).

17. *Id.* § 107(a), 42 U.S.C. § 9607(a).

costs, of a hazardous substance, shall be liable¹⁸

B. Those Expressly Exempted from Liability under CERCLA

Congress clearly intended to exempt from CERCLA liability those having nothing to do with creating, contributing to or knowingly maintaining a hazardous waste condition. This intent is manifest in provisions exempting holders of security interests,¹⁹ and those who can show the hazard was created solely by the acts or omissions of others.²⁰

Section 101(20)(A) of CERCLA defines "owner or operator" to exclude those "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"²¹

Section 107(b) provides that a person may avoid liability under section 107 by showing the release or threat of release of hazardous substances was caused solely by

an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions²²

The exemption and defense set forth above, if literally enforced, would further Congress' intent to place liability under CERCLA only on those responsible for creating or profiting from a hazardous condition.

C. Judicial Elimination of the Requirements of Negligence and Causation

Motivated by a desire to provide a broad financial base for cleaning up inactive waste sites, courts have extended liability beyond that envisioned by Congress. This extension of liability is a direct result of omis-

18. *Id.*

19. *Id.* § 101(20)(A), 42 U.S.C. § 9601(20)(A).

20. *Id.* § 107(b), 42 U.S.C. § 9607(b).

21. *Id.* § 101(20)(A), 42 U.S.C. § 9601(20)(A).

22. *Id.* § 107(b)(3), 42 U.S.C. § 9607(b)(3).

sions from and ambiguities in CERCLA itself. That CERCLA presents a Rorschach Test for judicial activities was noted in *United States v. Northeastern Pharmaceutical & Chemical Co.*,²³ where the court stated:

CERCLA, although nicknamed "the Superfund," is not the ultimate tool in dealing with the problems associated with inactive or abandoned hazardous waste sites as initially intended by its sponsors. CERCLA is in fact a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions. . . . [N]umerous important features were deleted during the closing hours of the Congressional session [citations omitted]. The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation.²⁴

One of CERCLA's ambiguities is its failure to specify a standard of liability for the categories of persons liable under section 106 (abatement action) and section 107 (response costs reimbursement action). The original senate bill provided for strict liability but that provision was deleted from the statute as it was enacted. Although section 107(a) now provides merely that the categories of liable persons "shall be liable," the original senate proposal provided that such persons "shall be jointly, strictly, and severally liable."²⁵ The courts have resolved the ambiguity of section 107(a), holding that CERCLA provides for strict liability.²⁶ These courts note that CERCLA section 101(32) states that "liable" or "liability" will be construed to be the standard of liability provided under section 1321 of Title 33, now part of the federal Clean Water Act.²⁷ They reason that Congress intended a strict liability standard under CERCLA because "[t]he courts have consistently construed § 1321 as a strict liability provision."²⁸

Traditionally, the imposition of strict liability required that the defendant caused the harm for which he is held liable.²⁹ Congress' deletion of the phrase "caused or contributed" from the compromise version of

23. 579 F. Supp. 823 (W.D. Mo. 1984).

24. *Id.* at 838 n.15.

25. S. 1480, 96th Cong., 2d Sess. 1980, reprinted in *The Environmental Emergency Response Act: Hearing Before The Senate Comm. on Finance*, at 5. See also *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. at 843 (W.D. Mo. 1984).

26. See, e.g., *Northeastern*, 579 F. Supp. at 844; *United States v. Price*, 577 F. Supp. 1103, 1114 (D.N.J. 1983) (*Price II*).

27. Clean Water Act § 311, 33 U.S.C. § 1321 (1982); CERCLA § 101(32), 42 U.S.C. § 9601(32) (1982).

28. *Northeastern*, 579 F. Supp. at 844.

29. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 597-98, 607 P.2d 924, 928, 163 Cal. Rptr. 132, 136 (1980).

CERCLA created another ambiguity which courts have construed as imposing liability without regard to causation.³⁰ Thus the door has been judicially opened for holding innocent current and prior owners absolutely liable based solely on their status.

In *New York v. Shore Realty Corp.*, the court noted that CERCLA provides for a "causation defense" in section 107(b), which allows an owner to rebut causation in conjunction with the imposition of strict liability and thereby avoid liability.³¹ Without citing legislative history or other guidance, however, the *Shore* court arbitrarily concluded this defense is available only when third party acts or omissions creating the hazard occurred during the ownership of the defendant relying on the defense.³² This interpretation leaves the even more innocent successor owners defenseless, an anomaly addressed in more detail below.

III. SPECIAL APPLICATION OF THE "POLLUTER PAYS" PRINCIPLE

A. Holders of Security Interests in Property

The holder of a security interest in property which becomes the subject of a CERCLA action is exempt from liability.³³

Thus, a lender will have no liability under CERCLA regardless of its knowledge of hazardous waste problems on property, so long as it strictly limits its involvement to merely holding a security interest in the property. Potential liability may arise, however, if the lender becomes involved in the management of the property. Section 101(20)(A) of CERCLA exempts those holding security interests only if they are not "participating in the management" of the facility.³⁴

In *United States v. Mirabile*,³⁵ the court interpreted the exemption for holders of security interests to preclude liability of certain secured lenders. In that case, the federal government sued, among others, the current owners of a hazardous waste site to recover costs incurred in cleanup. The current owners, the Mirabiles, joined American Bank and Trust Company (ABT) and Mellon Bank National Association (Mellon) who had loaned money to business entities operating the site and took a

30. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985); *United States v. Cauffman*, No. 83-6318, slip op. at 2-3 (C.D. Cal. Oct. 23, 1984).

31. *Shore*, 759 F.2d at 1044. See *supra* note 22 and accompanying text for a discussion of CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3).

32. *Shore*, 759 F.2d at 1048.

33. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1983). See *supra* notes 19 & 21 and accompanying text for a discussion of this section.

34. *Id.*

35. CV No. 84-2280 (E.D. Pa. Sept. 6, 1985).

security interest in the property. ABT and Mellon in turn counter-claimed against the Small Business Administration (SBA) for its financial involvement with the business entities operating on the site.³⁶

During the 1970's, the site had been utilized by Arthur C. Mangels Industries, Inc. (Mangels) for paint manufacturing. In 1973, ABT loaned money to Mangels, secured in part by a mortgage on the site. In 1976, Turco Coatings, Inc. (Turco) acquired ninety-five percent of the shares of stock in Mangels and continued to manufacture paint on the site. In December 1980, Turco ceased operations on the site and one month later, Turco filed for protection under Chapter 11 of the Bankruptcy Code.³⁷

In 1981, Turco's Chapter 11 petition was dismissed and ABT proceeded with foreclosure on the site. ABT was the highest bidder at the sheriff's sale on August 21, 1982 and it informed the sheriff and tax department that it intended to take title. ABT thereafter secured the building on the site from vandalism, inquired about the cost of disposing of various drums on the site and showed the site to prospective purchasers. On December 15, 1981, ABT assigned its bid to the Mirabiles who accepted a sheriff's deed to the property.³⁸

In 1976, Girard Bank, the predecessor of Mellon, entered into a financing agreement with Turco to advance capital secured by the inventory and assets of Turco. After Turco ceased operations, Girard took possession of the inventory.³⁹

In July 1979, the SBA loaned money to Turco secured by liens on its inventory and equipment and by a second mortgage on the site. SBA representatives visited the site three times during 1981 to monitor the liquidation of Turco's assets.⁴⁰

When they were brought into the case, ABT, SBA and Mellon moved for summary judgment. The motions were made primarily on the basis that they were not "owners or operators" under CERCLA, but rather were exempt as the holders of security interests who, if they participated at all, did so solely to protect their security interests.⁴¹

ABT's motion for summary judgment was granted. The court held that although ABT had obtained equitable title to the property by foreclosure, it had done so only in an effort to protect its security interest and

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

“made no effort to continue Turco’s operations on the property.”⁴² The court held:

[T]he statutory exemption for secured creditors is particularly applicable to ABT’s limited activities at the property following the foreclosure. The actions undertaken by ABT with respect to the site simply cannot be deemed to constitute participation in the management of the site. . . . [I]n enacting CERCLA Congress manifested its intent to impose liability upon those who were responsible for and profited from improper disposal practices. Thus, it would appear that before a secured creditor such as ABT may be held liable, it must, *at a minimum, participate in the day-to-day operational aspects of the site. In the instant case, ABT merely foreclosed on the property after all operations had ceased and thereafter took prudent and routine steps to secure the property against further depreciation.*⁴³

The court also granted SBA’s motion for summary judgment, holding that because the SBA never took either legal or equitable title, its case for summary judgment was even stronger than ABT’s. The court rejected arguments that SBA was liable because its loan agreement contemplated involvement in management, stating that “participation in purely financial aspects of operation . . . is [not] sufficient to bring a lender within the scope of CERCLA’s liability.”⁴⁴

The court denied Mellon’s motion for summary judgment, finding that issues of fact were created by deposition testimony. This testimony showed that certain loan officers at Mellon and its predecessor, Girard, had been involved in the management of Turco by frequently visiting the site, requesting manufacturing changes and generally discussing sales efforts. Although the court noted that the “reed upon which the Mirabiles seek to impose liability on Mellon is slender indeed,” it nevertheless held that the questions of fact made it necessary to deny Mellon’s motion for summary judgment.⁴⁵

Under the *Mirabile* court’s interpretation, a lender may avoid “owner-operator” liability under CERCLA if it does not involve itself in the daily management, operational or production affairs of the site *at the time a hazardous waste problem was created*. If the lender forecloses, it must do so only after the operations creating the problem have ceased, in order to avoid liability. This interpretation seems consistent with con-

42. *Id.*, slip op. at 7.

43. *Id.* (emphasis added).

44. *Id.*

45. *Id.*, slip op. at 9.

gressional intent, but certainly limits the advantage of foreclosing on income-producing property.

Because Congress has expressly exempted holders of security interests from CERCLA liability, it would seem repugnant to congressional intent to hold such persons liable if they take steps to protect that interest or to foreclose in order to satisfy the secured debt. Such an interpretation would emasculate the exemption—a lender would remain exempt only if the debtor does not default. Debtors would be encouraged to default under such an interpretation in order to pass on the cleanup problem to the lender. Lenders would likely delay foreclosure beyond prudent business practice.

In California, a lender cannot take other legal steps to collect a secured debt *until after it exhausts the security by foreclosure*.⁴⁶ This is true even if the security is valueless—as when cleanup costs exceed fair market value—at the time the security instrument is executed.⁴⁷ The only exception to this rule is where the security becomes valueless without fault of the beneficiary after the security instrument is executed.⁴⁸ A lender holding a security interest in property with a hazardous site on it could take advantage of this exception. If the hazard and cleanup costs render the property valueless, the lender could pursue a deficiency judgment against the debtor without foreclosing upon the property and becoming entangled with CERCLA cleanup responsibility.

There is a clear distinction between participation in the management of the facility *when* the hazard is created and participation in the management or ownership to protect or foreclose upon a security interest *after* the hazard has been created by others, as recognized by the *Mirabile* court. This distinction is in accord with congressional intent to place responsibility for cleanup upon those who *created* and profited from the hazardous condition.⁴⁹

In *United States v. Northeastern Pharmaceutical & Chemical Co.*,⁵⁰ the court held two individuals liable as “owner-operators” of a facility. One individual had been vice president in charge of the plant generating the toxic waste involved and was in charge of having it dumped. He was also a major stockholder actively participating in the management of the

46. CAL. CIV. PROC. CODE § 726 (West 1980). See *Roseleaf Corp. v. Chierighino*, 59 Cal. 2d 35, 378 P.2d 97, 27 Cal. Rptr. 873 (1963); 1 H. MILLER & M. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 3:82, at 483 (1975).

47. See 1 H. MILLER & M. STARR, *supra* note 46, at 487.

48. See *Republic Truck Sales Corp. v. Peak*, 194 Cal. 492, 515, 229 P. 331, 340 (1924); 1 H. MILLER & M. STARR, *supra* note 46, at 488.

49. See *supra* notes 19-22 and accompanying text.

50. 579 F. Supp. 823 (W.D. Mo. 1984).

company. In holding him liable, the court noted the following significant factors: "[his] capacity to control the disposal of hazardous waste at the . . . plant; the power to direct the negotiations concerning the disposal of wastes at the Denney farm site; and the capacity to prevent and abate the damage caused by the disposal of hazardous wastes at the Denney farm site."⁵¹

The other individual held liable as an owner-operator was the president of the company as well as a major stockholder. The court found he had the capacity and general responsibility as president to control the disposal of hazardous waste at the . . . plant; the power to direct the negotiations concerning the disposal of wastes at the Denney farm site; and the capacity to prevent and abate the damage caused by the disposal of hazardous wastes at the Denney farm site.⁵²

The court found these individuals liable as owner-operators under CERCLA, notwithstanding the exemption for an individual who "without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his interest in the . . . facility."⁵³ The court held:

The statute 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. Such a construction appears to be supported by the intent of Congress. CERCLA promotes the timely cleanup of inactive hazardous waste sites. It 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*. Congress has determined that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up.⁵⁴

The key fact relied upon by the *Northeastern* court in holding the individuals liable was the individuals' active participation in the management of the facility as owner-operators. This showed the individuals had the ability *to control the disposal of wastes at the time the hazardous situation was created*. The court thus recognized a distinction between a person in this category and one who participates in the management or ownership of a site *after* the creation of a hazard by others, solely to protect a security interest or foreclose on it. This recognition accords

51. *Id.* at 849.

52. *Id.*

53. *Id.* at 848 (quoting CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A)).

54. *Id.* (citations omitted) (emphasis added).

with the *Mirabile* court's interpretation and the congressional intent cited in *Northeastern*: to make the "parties responsible for the creation of hazardous waste sites be liable for the response costs in cleaning them up."⁵⁵

Lenders who participate in the management of sites *during the time a hazardous condition is created* in such daily business matters as production, sales or distribution, and thereby demonstrate an involvement with or ability to control disposal practices, are not likely to be exempt from CERCLA liability.

B. Innocent Prior Owners

Section 107 of CERCLA provides only for the liability of current owners and those who owned or operated any facility "at the time of disposal of any hazardous substance."⁵⁶ Therefore, one who owned property and sold it without any knowledge of a hazardous waste problem, without having created or contributed to a hazard on it, should be able to avoid liability. Potential liability exists, however, in light of the broad interpretation given by at least one court to the term "disposal."⁵⁷

"Disposal" is defined in CERCLA section 101(29) as having the meaning provided in section 1004 of the Resource Conservation and Recovery Act (RCRA).⁵⁸ "Disposal" is defined in that section as the:

[D]ischarge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.⁵⁹

In *United States v. Price (Price I)*,⁶⁰ the court interpreted "disposal" as used in RCRA to include the further leaking of contaminants placed on the site by others.⁶¹ Therefore, one who owns and sells property without ever detecting or having reason to detect a hazardous waste problem on it conceivably could still be held liable if contaminants placed there by

55. *Id.* (citations omitted) (emphasis added).

56. CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1982).

57. *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982) (*Price I*). See *infra* notes 60-65 and accompanying text.

58. CERCLA § 101(29), 42 U.S.C. § 9601(29) (1982); RCRA § 1004, 42 U.S.C. § 6903(3) (1982).

59. RCRA § 1004, 42 U.S.C. § 6903(3) (1982).

60. 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

61. *Id.* at 1071, 1073.

others were leaking into the soil, groundwater or air during his ownership.

Price I did not involve a truly innocent owner, however, and its holding should be limited to the category of owner involved. In that case, the federal government sued to establish the liability of current and prior owners of a hazardous waste site. The current and prior owners sought summary judgment. The prior owners had allowed the dumping of hazardous waste on the site and the current owners were aware the site was a landfill when they purchased it. The current owners acknowledged as part of the purchase agreement that the site was a landfill and they assumed responsibility for it. The purchase price was substantially lower than the value of the land would have been had it not been a landfill. Once the current owners learned of the toxic waste problem, they took no steps to prevent continuing pollution. The current owners were brokers, who, the court held, had a duty under New Jersey law to inquire about conditions of the property affecting its value, given the facts set forth above.⁶²

Under the circumstances, the court denied the owners' motions for summary judgment. As to the prior owners, the court held they contributed to the disposal of hazardous waste by not properly storing chemicals when they allowed dumping and by failing to rectify the hazard they were aware of.⁶³

The court held the current owners contributed to the disposal by "their studied indifference to the hazardous condition that now exists."⁶⁴ It stated that as sophisticated investors, the current owners had a duty to discover the hazard when they purchased the property.⁶⁵

Price I therefore applies to owners who created a hazard, those who are aware or should be aware of a hazard when they purchase, and those who fail to take action to prevent further pollution when they are aware of the problem. *Price I*'s interpretation of what constitutes "disposal" should be limited to such owners, especially as the term is used in CERCLA.

"Disposal" was given a more reasonable interpretation in the context of CERCLA section 107(a)(2)⁶⁶ in *Cadillac Fairview/California, Inc.*

62. *Id.* at 1058-59.

63. *Id.* at 1072.

64. *Id.* at 1073.

65. *Id.*

66. CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1982) (relating to prior owners).

*v. Dow Chemical Co.*⁶⁷ In *Cadillac Fairview*, the court granted a prior owner's motion to dismiss, commenting that they did not appear to be liable under section 107(a)(2). The court reasoned they did not own at the time of "disposal" because they did not dump the toxins or otherwise create the hazard during their ownership. The court suggested that to hold such prior owners liable as disposers would require a strained interpretation of CERCLA.⁶⁸

Congress made a distinction in CERCLA between the terms "disposal" and "release." The term "release" is used in setting forth the liability of those persons who accept hazardous substances for transport.⁶⁹ That term is defined in CERCLA section 101(22) as including "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment"⁷⁰

This definition includes several passive terms not included under the previously discussed definition of "disposal," including "escaping" and "leaching." The term "release" is not found within the description of liability of prior owners in CERCLA.⁷¹ Arguably, had Congress intended passive prior owners to be liable for the ongoing results—i.e., escaping or leaching—of prior owners' acts of disposal, it would have utilized the term "release" in that subsection.

In *New York v. Shore Realty Corp.*,⁷² the court held CERCLA section 107(a)(2) to be more limited in scope than section 107(a)(1). The court held that "[p]rior owners and operators are liable only if they owned or operated the facility at the time of disposal of any hazardous substance; this limitation does not apply to current owners."⁷³ The *Shore* court noted that subsection (a)(1) imposes strict liability on current owners when there is "a release or threat of release, without regard to causation."⁷⁴

The distinction between "release" and "disposal" appears significant in the *Shore* court's analysis. If "disposal" is interpreted to include undetected leaking during an innocent prior owner's tenure, section 107(a)(2) would not necessarily be more limited than section 107(a)(1). By concluding that subsection (a)(2) is more limited, the *Shore* court seemingly

67. 21 Env't Rep. Cas. (BNA) 1108, *on reh'g*, 21 Env't Rep. Cas. (BNA) 1584 (C.D. Cal. 1984).

68. *Id.* at 1114.

69. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1982).

70. *Id.* § 101(22), 42 U.S.C. § 9601(22).

71. *See id.* § 107(a)(2), 42 U.S.C. § 9607(a)(2).

72. 759 F.2d 1032 (2d Cir. 1985).

73. *Id.* at 1044 (footnote omitted).

74. *Id.*

recognized that the term "disposal" connotes some involvement in the creation of the hazard while the term "release" used in subsection (a)(1) does not. Without such a distinction, the defense in section 107(b)(3)⁷⁵ is virtually worthless. An innocent owner, held to have contributed to a hazard simply because of undetected leaking during his ownership, could not claim the hazard arose *solely* from the acts or omissions of others. This defense should be available to innocent prior owners.

In *United States v. Mirabile*,⁷⁶ the court rejected the government's contention that a current owner who had not placed contaminants on the property, or otherwise created the hazard, nevertheless could not escape liability under section 107(b)(3) where the contaminants had continued to leak during the current owner's tenure. The court stated that "a common sense reading of . . . the statute [CERCLA § 107(b)(3)] suggests that the defense would be potentially available to a party who can establish that he purchased property on which hazardous wastes were placed by others and that he did not add to those wastes."⁷⁷

C. *Liability of Innocent Present Owners*

Although there are cases suggesting a present owner may be liable without regard to causation or knowledge of the hazard, none of these cases factually involved such an innocent owner.

*New York v. Shore Realty Corp.*⁷⁸ involved an owner who was aware of the hazardous waste problem in purchasing the property, who assumed the environmental liability of the previous owner pursuant to the purchase agreement, and who was aware tenants on the property were continuing to dump hazardous waste after he obtained title.⁷⁹ Presumably, the owner knowingly took advantage of the reduced purchase price resulting from the hazardous waste problem. Such an owner assumed the risk of any hazardous problem on the property, and comes within the group of individuals Congress intended to hold liable for participating in or profiting from activities creating the hazardous condition.⁸⁰

For a secured lender to be deemed to have assumed the risks associated with a hazardous waste problem so as to be liable upon foreclosing as an "owner" under the *Shore* holding, the lender should have been

75. See *supra* notes 20-22 and accompanying text.

76. CV No. 84-2280 (E.D. Pa. Sept. 6, 1985); see *supra* notes 35-45 and accompanying text for a discussion of *Mirabile*.

77. *Id.*, slip op. at 13.

78. 759 F.2d 1032 (2d Cir. 1985).

79. *Id.* at 1048-49.

80. *Id.*

aware of such problem when it made the decision to accept the property as security. If the lender had the opportunity to value the security with knowledge of its hazards, it can be said to have assumed the risk. Otherwise, even if the lender becomes aware of the hazard before foreclosure, it does not truly assume the risk simply by foreclosing. At that point, foreclosure is necessary to mitigate the lender's loss on a loan made before the lender's knowledge of the problem.

In *City of Philadelphia v. Stepan Chemical Co.*,⁸¹ the court suggested in dicta that a city-owner of a waste site was absolutely liable without regard to whether it caused or had knowledge of a hazard. In that case, generators bribed city employees to allow toxic dumping during the City's ownership of the site. The City sued those who generated and dumped the waste to recover the costs of cleanup. The court implied that the City was one of those responsible for cleanup as the owner of the site, even though it was completely innocent of the activities creating the problem. The court noted that the City would not be vicariously liable for the criminal acts of its employees in accepting bribes to allow dumping.⁸²

The city-owner in *Stepan* can still be distinguished from an innocent owner who acquires the property *after* the problem was created. In *Stepan*, the means of controlling the problem were available to the city-owner and the problem was created during its ownership by its own employees. This distinction must have been significant to Congress because the defense provided in section 107(b)(3) does not allow a defendant to escape liability for a release if it results from an act or omission of *an employee or agent of the defendant*. It excludes liability only for "an act or omission of a third party *other than* an employee or agent of the defendant."⁸³

The City in *Stepan* did not question the generators' contention that the City was liable as an owner. However, the court commented that at least one law review author "argued persuasively that where an entity falls within the technical description of a responsible party but has little or no connection with the creation of the hazardous condition, the imposition of CERCLA liability may be unwarranted."⁸⁴

81. 544 F. Supp. 1135 (E.D. Pa. 1982).

82. *Id.* at 1141, 1142 n.8.

83. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1982) (emphasis added); see *supra* text at note 22 for the relevant language of this section. See also *supra* notes 50-55 and accompanying text for a discussion of *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984). The *Northeastern* court held control at the time the hazard was created to be significant. *Id.* at 874.

84. *Stepan*, 544 F. Supp. at 1143 n.10 (citing Dore, *The Standard of Civil Liability for*

*United States v. Price (Price I)*⁸⁵ has already been distinguished from an innocent owner context because it involved an owner who assumed the risk of the hazard and failed to prevent further pollution after acquiring knowledge of the danger.⁸⁶

If the decisions discussed above are limited to the "knowing" owners or the owners not otherwise exempt under CERCLA section 107(b)(3) who were involved in those cases, they can be more easily reconciled with Congress' intent to hold those who *created or profited from* the hazard responsible.⁸⁷ If, however, these decisions are applied to truly innocent owners who neither created a hazard nor were aware of it when acquiring the property, they are contrary to Congress' intent.

In any event, innocent owners should be able to rely upon the section 107(b)(3) defense without the arbitrary distinction made by the *Shore* court between those who own the property when the hazard is created and those who acquire it later.⁸⁸ Owners in both situations should be able to use the defense.⁸⁹

D. Innocent Owners' Indemnity from Third Parties

Courts have construed CERCLA to permit joint and several liability between those responsible under the Act.⁹⁰ Courts have also held that contribution actions are authorized under CERCLA.⁹¹ Truly innocent owners, however, should be entitled to full reimbursement or indemnity from those responsible for the hazard. In contrast, contribution is obtained between those having comparative *fault*.⁹² In *National Indemnity Co. v. United States*,⁹³ the court stated:

Hazardous Waste Disposal Activity: Some Quirks of Superfund, 57 NOTRE DAME LAW. 260, 276 (1981)).

85. 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

86. *See supra* notes 60-65 and accompanying text.

87. *See supra* notes 12-13 and accompanying text.

88. *See supra* note 73 and accompanying text.

89. *See United States v. Mirabile*, No. 84-2280 (E.D. Pa. Sept. 6, 1985) (current owner who acquired title to site after operations creating the hazard (third party acts or omissions) ceased, could rely upon the section 107(b)(3) defense).

90. *See United States v. Wade*, 577 F. Supp. 1326, 1337 (E.D. Pa. 1983); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

91. *See Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1492 (D. Colo. 1985); *Reilly Tar & Chem. Corp. v. Burlington*, 589 F. Supp. 275, 282 (D. Minn. 1984); *United States v. Ward*, 22 Env't Rep. Cas. (BNA) 1239 (E.D.N.C. May 14, 1984); *United States v. South Carolina Recycling & Disposal, Inc.*, 20 Env't Rep. Cas. (BNA) 1753, 1759-60 n.8 (D.S.C. Feb. 23, 1984); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807 (S.D. Ohio 1983).

92. *See, e.g., National Indem. Co. v. United States*, 444 F. Supp. 1356 (C.D. Cal. 1977), *aff'd*, 602 F.2d 1326 (9th Cir. 1979).

93. *Id.*

Indemnity, which imposes the entire loss on one of two or more tortfeasors, is distinct from contribution, which distributes the loss equally among joint judgment tortfeasors. . . .

. . . Implied indemnity will lie where the facts show that "two persons are responsible by law to an insured person, if one is passively or impliedly negligent, he is entitled to shift the entire liability for the loss to the other party whose active negligence was the proximate and immediate cause of the loss."⁹⁴

Courts in California, however, have held that strict liability is *fault* which may be apportioned with the negligence of other tortfeasors.⁹⁵ Whether this means that one who is strictly liable and thus at fault cannot shift the entire loss to negligent tortfeasors remains to be seen.

Although liability under CERCLA may not be shifted from one person to another by way of indemnity agreements, indemnity agreements between parties to allocate liability between them are permitted.⁹⁶ Claims for implied indemnity have also been judicially recognized under CERCLA.⁹⁷ However, an owner seeking implied indemnity from a prior owner is not likely to be successful if the prior owner's involvement with the site was also passive; that is, an owner that did not allow disposal activities on site during his ownership.⁹⁸ If strict liability is considered apportionable fault,⁹⁹ then, at the least, contribution may still be sought between passive prior and current owners held strictly liable under CERCLA.

IV. CONCLUSION

Although some courts' interpretations of CERCLA open the door to liability of innocent owners, their holdings on that point are dicta.

94. *Id.* at 1360.

95. *See Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322, 330, 579 P.2d 441, 445, 146 Cal. Rptr. 550, 554 (1978).

96. CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1) (1982). Section 107(3)(1) provides as follows:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

Id. § 107(e)(1), 42 U.S.C. § 9607(e)(1).

97. *See Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1492 (D. Colo. 1985).

98. *See, e.g., Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 21 Env't Rep. Cas. (BNA) 1108. For a discussion of *Cadillac Fairview*, see *supra* notes 67-71 and accompanying text.

99. *See supra* note 95 and accompanying text.

Each case involved either "knowing" owners who purchased the site aware of the hazardous waste problems, or owners not exempt under the section 107(b)(3) defense. These cases should be followed only for the proposition that such "knowing" owners are liable under CERCLA. Congressional intent supports an interpretation of CERCLA that exempts innocent owners from liability under the Act.