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NOTE

LIABILITIES OF THE INNOCENT CURRENT OWNER OF TOXIC PROPERTY UNDER CERCLA

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980¹ ("CERCLA") was enacted to facilitate prompt cleanup of property contaminated by hazardous wastes.² CERCLA seeks to accomplish its goal in part by placing the financial burden of cleanup on those parties who are responsible for the problem and who benefited from the hazardous waste activity.³ Because environmental cleanup is a national priority and the cost of cleaning up toxic waste sites is staggering, the scope of liability under CERCLA is broad.⁴ A clean environment is a laudable goal and compelling responsible parties to bear the cost of cleanup is fair, but in its zeal to divert cleanup costs to private parties, Congress created strict liability for innocent current owners.⁵

CERCLA was hastily enacted by a lame-duck Congress after many last minute compromises and changes. Consequently, many of CERCLA's provisions are vague and cannot be explained by its contradictory legislative history.⁶ As a result, courts have struggled to interpret CERCLA's

1. 42 U.S.C. §§ 9601-57 (1982), amended by 42 U.S.C. §§ 9601-75 (Supp. IV 1986).

2. *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1288 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

3. *Id.* at 1276.

4. See, e.g., *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV., 1458, 1484-85 (1986) [hereinafter *Developments*].

5. For purposes of this Note, the "innocent current owner" is one who did not participate in hazardous waste activities and who acquired property contaminated by hazardous substances without actual knowledge of the contamination.

6. E.g., *Artesian*, 659 F. Supp. at 1277 n.7 (Committee reports and other materials are of relatively little value because CERCLA as enacted reflects "legislative judgments that differed substantially from those incorporated in the earlier House and Senate bills."); *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985) (CERCLA is notorious for its "vaguely-drafted provisions and an indefinite, if not contradictory legislative history."); *United States v. Price*, 577 F. Supp. 1103, 1109 (D.N.J. 1983) (CERCLA's "legislative history must be read with caution since last minute changes in the bill were inserted with little or no explanation.").

provisions consistently with its broad purposes. In particular, courts and commentators disagree whether the imposition of strict liability on nonculpable parties, such as the innocent current owner, is consistent with CERCLA's policy of making those who benefited economically from hazardous waste activities pay for the harm they caused. Case law is in agreement on many basic issues. However, issues relating to joint and several liability, the right of contribution, and the breadth of a statutory third-party or "innocent land owner" defense remain unanswered.

The Superfund Amendments and Reauthorization Act of 1986⁷ ("SARA") resolves some of the ambiguities and provides new guidance on how a purchaser of toxic property may protect himself from liability by creating statutory "innocence." Other provisions of SARA mitigate the harshness of imposing strict liability on nonculpable parties by more equitably distributing liability among responsible parties. Nonetheless, the protection afforded an innocent current owner may be illusory at best. As a practical matter, statutory innocence may be unattainable for most purchasers⁸ and, in absence of that defense, the innocent current owner may buckle under staggering liability created by parties who can no longer be held accountable for the harm they caused.

After giving a brief overview of CERCLA, this Note examines the scope of an innocent current owner's liability under CERCLA prior to the enactment of SARA in 1986. This Note then focuses on how SARA affects the scope of liability and provides the courts with flexibility in fashioning uniform federal rules which will lessen the harshness of the innocent current owner's liability. In particular, this Note recommends judicial caution in developing blanket rules for the imposition of joint and several liability and careful development of equitable factors consistent with CERCLA's underlying policies in fashioning methods for the apportionment of response costs among potentially responsible parties.

II. OVERVIEW OF CERCLA

CERCLA⁹ was hastily enacted on December 11, 1980, in the waning hours of President Carter's administration, partially in response to the Love Canal environmental disaster.¹⁰ Its enactment was intended to sup-

7. 42 U.S.C. §§ 9601-75 (Supp. IV 1986).

8. One commentator has characterized the statutory affirmative defenses as ineffective at best and "at worst a cruel congressional joke." Dubuc & Evans, *Recent Developments Under CERCLA: Toward a More Equitable Distribution of Liability*, 17 *Envtl. L. Rep.* (Envtl. L. Inst.) 10197, 10197 (June 1987).

9. 42 U.S.C. §§ 9601-57 (1982), amended by 42 U.S.C. §§ 9601-75 (Supp. IV 1986).

10. Note, *Hazardous Waste and the Innocent Purchaser*, 38 *U. FLA. L. REV.*, 253, 254-55 (1986). Environmental hazards at Love Canal surfaced in the 1970s, approximately twenty years after more than 21,000 tons of hazardous waste had been deposited in an area later developed for residential purposes. *United States v. Hooker Chems. & Plastics Corp.*, 680 F.

plement the Resource Conservation Recovery Act of 1976¹¹ ("RCRA"), which regulated newly-created hazardous waste from "cradle-to-grave," but failed to reach abandoned and inactive hazardous waste sites already in existence.¹² CERCLA has two major purposes: to create a source of funds, commonly known as "Superfund,"¹³ for financing prompt governmental cleanup of hazardous waste sites, and to force responsible parties to bear the cost of cleaning up the hazards they create.¹⁴

CERCLA creates liability for four classes of potentially responsible parties: (1) current owners and operators of facilities; (2) owners and operators of facilities at the time of disposal; (3) generators who disposed of hazardous waste at the facility; and (4) transporters of hazardous waste to the facility.¹⁵ Responsible parties are liable for the costs¹⁶ of cleaning up

Supp. 546, 549 (W.D.N.Y. 1988). The health threat to residents was so great that nearly 1,000 families were moved at government expense and their homes destroyed or boarded up. *Richmond Times-Dispatch*, Sept. 28, 1988, at A-16, col. 1. Ten years after the problem was discovered, cleanup has progressed to the point that part of the area can be resettled, but other portions are still not habitable. *Id.*

11. 42 U.S.C. §§ 6901-87 (1982), amended by 42 U.S.C. §§ 6901-87 (Supp. II 1984).

12. Note, *supra* note 10, at 254-55; see also Note, *Federal and State Remedies to Clean up Hazardous Waste Sites*, 20 U. RICH. L. REV., 379, 381 n.10 (1986). RCRA regulates the generation, transportation, treatment, storage and disposal of hazardous waste by means of a manifest tracking and permitting system, coupled with inspection and monitoring requirements. *Id.* at 390. Prior to CERCLA, courts had determined that RCRA did not apply to inactive and abandoned hazardous waste sites. *Id.* at 391.

13. "Superfund" is the common name for the "Hazardous Substance Response Trust Fund." Note, *supra* note 10, at 256. The fund is financed primarily by an excise tax on petroleum and other related chemicals and is supplemented by general revenues. *Exxon Corp. v. Hunt*, 475 U.S. 355, 359 (1986); Note, *supra* note 12, at 381 n.13. Monies from the fund may be used to finance "governmental response" costs and to pay expressly authorized "claims" to other persons. *Hunt*, 475 U.S. at 360.

14. *Violet v. Picillo*, 648 F. Supp. 1283, 1288 (D.R.I. 1986); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982); see also *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982). Secondary goals of CERCLA have also been suggested. *E.g.*, *Chemical Waste Management, Inc. v. Armstrong World Indus. Inc.*, 669 F. Supp. 1285, 1290 n.6 (E.D. Pa. 1987) (CERCLA's objectives include the encouragement of care and responsibility in handling hazardous waste, the encouragement of voluntary cleanups, and the encouragement of early reporting on violations of the statute.); *United States v. Price*, 577 F. Supp. 1103, 1114 (D.N.J. 1983) (Cost-spreading was one of CERCLA's legislative aims.).

15. Section 9607(a) defines the four classes of responsible parties as:

(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

hazardous waste facilities¹⁷ when there is a release or threatened release of hazardous substances.¹⁸ Actions seeking recovery from an innocent current owner can be initiated in a variety of ways. CERCLA empowers the Environmental Protection Agency¹⁹ ("EPA") to undertake necessary cleanup itself with Superfund monies and then to seek reimbursement from the current owner or other responsible parties.²⁰ Alternatively, the government may compel a current owner to perform cleanup at its own expense when there is an "imminent and substantial" danger to health or environment "because of an actual or threatened release of a hazardous substance from a facility."²¹ Additionally, CERCLA permits a private cause of action against the current owner by any person who has incurred costs resulting from a release or threatened release of a hazardous substance from the property.²²

Liability under CERCLA is strict²³ and is subject only to very limited affirmative defenses.²⁴ Once a responsible party is found liable, CERCLA permits imposition of joint and several liability²⁵ for a broad array of cleanup costs²⁶ without express provisions for a right of contribution from other responsible parties.²⁷

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 costs, of a hazardous substance.

42 U.S.C. § 9607(a) (Supp. IV 1986).

The portion of subparagraph (4) which reads "from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substances" modifies subparagraphs (1)-(3) as well. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043 n.16 (2d Cir. 1985).

16. See *infra* notes 76-84 and accompanying text.

17. See *infra* note 55 and accompanying text.

18. See *infra* notes 68-69 and accompanying text.

19. CERCLA actually grants express authority to the President. 42 U.S.C. § 9604(a) (Supp. IV 1986). However, the President delegated most of the authority to the EPA. See Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981); Exec. Order No. 12,286, 46 Fed. Reg. 9901 (1981).

20. Superfund monies may be used for governmental and private party response costs if the owner or other responsible parties will not undertake proper cleanup action. 42 U.S.C. § 9611(a) (Supp. IV 1986). Additionally, the government is authorized to undertake response costs and recover from responsible parties. 42 U.S.C. §§ 9604(a)-(b).

21. *Id.* § 9606(a).

22. *Id.* § 9607(a)(4)(B).

23. See *infra* notes 60-75 and accompanying text.

24. See *infra* notes 90-105 and accompanying text.

25. See *infra* notes 106-25 and accompanying text.

26. See *infra* notes 76-89 and accompanying text.

27. See *infra* notes 126-30 and accompanying text.

III. SCOPE OF CURRENT OWNER LIABILITY

A. *Inclusion of the Current Owner as a Responsible Party*

"CERCLA"²⁸ defines liability in terms of the status of parties in relationship to hazardous facilities and the costs for which they are responsible.²⁹ Responsible parties include "the owner and operator"³⁰ of a hazardous waste facility.³¹ In turn, an "owner or operator" is defined as "any person owning or operating [a] facility."³² Defendants have been unsuccessful in arguing that the conjunctive use of "owner *and* operator" requires that a current owner also be an operator to come within the classification of section 9607(a)(1).³³ Similarly, arguments that Congress did not intend to unfairly impose liability on innocent parties have fallen upon the deaf ears of courts.

The leading case holding a current owner strictly liable on the basis of current ownership alone is *New York v. Shore Realty Corp.*³⁴ In *Shore*, the state brought an action under CERCLA to compel Shore to clean up a hazardous waste disposal site it had purchased for land development and to reimburse the state for cleanup costs already incurred.³⁵ Shore maintained that Congress intended that only those parties who owned the facility at the time of disposal or who caused the presence or release of a hazardous substance be held liable for cleanup costs.³⁶ In holding that section 9607(a)(1) imposes strict liability on all current owners, the court distinguished liability under section 9607(a)(2), which includes prior owners as responsible parties only if they owned the facility "at the time of disposal of any hazardous substances."³⁷ The court reasoned that excluding current owners from the list of responsible parties would create a loophole in CERCLA's coverage allowing waste sites to be sold to new owners after disposal of hazardous waste had ceased and by allowing the

28. 42 U.S.C. §§ 9601-57 (1982), amended by 42 U.S.C. §§ 9601-75 (Supp. IV 1986).

29. *Id.* § 9607.

30. *Id.* § 9607(a)(1).

31. *See infra* note 55.

32. 42 U.S.C. § 9601(20)(A).

33. *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1280-81 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578 (D. Md. 1986).

34. 759 F.2d 1032 (2d Cir. 1985).

35. *Id.* at 1037.

36. *Id.* at 1043-44.

37. *Id.* at 1044; *accord Artesian*, 659 F. Supp. at 1280. Since the *Shore* decision, Congress has provided that some prior owners may be responsible parties absent the disposal of hazardous substances during their ownership. Under the 1986 amendments, a prior owner who "obtained actual knowledge of the release or threatened release of a hazardous substance" while he owned the property and then transferred the property without disclosing his knowledge, is treated as a current owner and is barred from using any of the statutory defenses to strict liability. 42 U.S.C. § 9601(35)(C) (Supp. IV 1986).

new owner to avoid any liability for cleanup.³⁸ Such a result would frustrate CERCLA's goals, because Congress was conscious of the fact that persons who create the hazard sometimes cannot be found or are otherwise unavailable as a source of funds.³⁹

The result in *Shore* was alarming but not particularly harsh in light of the circumstances surrounding Shore's ownership of the property. Shore knew when it purchased the property that hazardous wastes had been deposited there and that expensive cleanup would be necessary before construction of its planned condominium development.⁴⁰ Additionally, with Shore's knowledge, an unauthorized hold-over tenant continued to operate a waste facility and to accept additional chemical wastes after ownership had passed to Shore.⁴¹

In the aftermath of *Shore*, the concern exists that liability based on mere ownership is unfair to parties who unwittingly and without fault find themselves responsible, at enormous costs, for cleaning up the contamination created by others. Relatively few cases actually involve current owners who did not know they were purchasing contaminated property or who did not in some way contribute to the contamination. However, the results in those cases where the owner was seemingly without knowledge of what he was purchasing and without fault in creation of the hazard demonstrate the far-reaching effects of liability based on mere ownership.⁴²

38. *Shore*, 759 F.2d at 1045.

39. *Id.* It is not clear what congressional goal the court thought would be frustrated if it failed to impose liability on all current owners, unless it was the goal of compelling any nongovernmental party connected to the property to bear the cost of cleanup rather than burdening the public with the costs.

40. *Id.* at 1037-38.

41. *Id.* at 1038-39, 1045. However, the court did not find it necessary to rely upon the continuing contamination after title passed to Shore for a finding of liability. *See id.* at 1045.

42. *E.g.*, *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 897 (9th Cir. 1986) (limited partnership forced into bankruptcy when it was required "to expend approximately \$1,200,000" after learning that land it had purchased for condominium project was contaminated); *T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 698-99 (D.N.J. 1988) (current owner required to clean up site it purchased without knowledge of radium tailings left by a company that had ceased manufacturing 48 years earlier, even though it did not learn of hazard until five years after purchase and 10 years after first leasing the property); *Jersey City Redevelopment Auth. v. PPG Indus.*, 655 F. Supp. 1257, 1259 (D.N.J. 1987) (current owner required to comply with cleanup order when its excavation contractor used contaminated fill material); *Interchange Office Park v. Standard Indus., Inc.*, 654 F. Supp. 166, 167 (W.D. Tex. 1987) (current owner required to expend \$2,000,000 to clean up property acquired for commercial, office and residential development when four years after purchase it was notified by state of lead contamination); *D'Imperio v. United States*, 575 F. Supp. 248, 250 (D.N.J. 1983) (current owner not aware of hazardous materials until 11 years after he had purchased the site); *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1139 (E.D. Pa. 1982) (current owner of municipal landfill liable for estimated \$10 million cleanup costs when employees accepted bribes and permitted disposal of hazardous wastes).

Part of the harshness stems from an expansive interpretation of ownership. In addition to ownership based solely upon being the record title holder of the property, courts have applied a control test to find that a party who does not hold record title to the property may nonetheless be an owner if he has control over the property and is responsible for the hazardous conditions.⁴³

Congress did carve out of its definition of "owner or operator" a small exception for a person who "without participating in the management . . . holds indicia of ownership primarily to protect his security interest."⁴⁴ But even this exception was given narrow interpretation in *United States v. Maryland Bank & Trust Co.*⁴⁵ Maryland Bank & Trust acquired title to contaminated property when it purchased the property at its own foreclosure sale.⁴⁶ Over one year later, the bank learned that the property contained hazardous waste.⁴⁷ When the bank refused to clean up the property, the EPA did the cleanup and sought to recover over \$500,000 in costs.⁴⁸ The court rejected the bank's argument that it was exempt from liability under section 9601(20)(A) because it acquired ownership through foreclosure on its security interest.⁴⁹ The court held that the exemption applied only to those parties who "hold indicia of ownership to protect a then-held security interest" at the time of cleanup and not mortgagees who had subsequently acquired full title through foreclosure.⁵⁰ Since the bank's security interest was converted to full ownership by the foreclosure sale, its continued interest in the property was to protect its invest-

43. *E.g.*, *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 671-72 (D. Idaho 1986) (parent corporation is "owner or operator" where familiar with activities at subsidiary's facility and able to control activities there); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1984) (A lessee is treated as an owner when he has control over the property and is responsible for the hazardous conditions and the fact that he sublets a portion of the property strengthens the finding of ownership through control.), *aff'd in part, vacated in part, sub nom.* *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *United States v. Carolawn Co.*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 20,698 (D.S.C. June 15, 1984) (Owner liability might extend to a company that held title for only one hour while acting as a conduit for transfer from a trustee in bankruptcy to company officials, depending upon the amount of control the company retained after transfer.); *cf.* *United States v. Dart Indus., Inc.*, 847 F.2d 144, 146 (4th Cir. 1988) (State environmental agency's actions in inspecting site, approving applications to store waste, and requiring proper transportation of wastes to the facility were not sufficient to support a finding of ownership by control of activities where there was no direct "hands on" management of employees or finances.).

44. 42 U.S.C. § 9601(20)(A) (iii).

45. 632 F. Supp. 573 (D. Md. 1986).

46. *Id.* at 575.

47. *Id.*

48. *Id.* at 575-76.

49. *Id.* at 578-79.

50. *Id.* at 579. The court relied upon legislative history suggesting that Congress intended the exemption to apply only where the mortgagee is the actual title holder by operation of common law and not where the mortgagee has acquired full title. *Id.* at 579-80.

ment, not its security interest.⁵¹

The court maintained that its narrow construction of the security interest exemption was consistent with CERCLA's underlying policy. To hold otherwise would allow a mortgagee to acquire property cheaply by foreclosure and reap the benefit of increased value in land cleaned up at government expense while other prospective purchasers would not be entitled to the same advantage.⁵² Rather than broadening the security interest exemption, the court preferred to place responsibilities on lending institutions "to investigate and discover potential problems in their secured properties."⁵³ The holding is consistent with the requirements for the innocent landowner defense because of its similar requirement of inspection and investigation.⁵⁴

51. *Id.* at 579. In dicta, the court suggested that its holding might be limited to similar situations where the former mortgagee-turned-owner had held title for a number of years, some of which were prior to cleanup. *Id.* In doing so, the court declined to expressly disagree with *United States v. Mirabile*, 15 ENVTL. L. REP. (Envtl. L. Inst.) 20,992 (E.D. Pa. Sept. 4, 1985), which had applied the exemption to a former mortgagee who held the property for only four months. *Id.* at 580 n.5. It should be noted, however, that the mortgagee in *Mirabile* was not the current owner and held only a security interest in the property at the time hazardous substances were disposed of there. *Mirabile*, 15 Env'tl. L. Rep. at 20,995. Section 9607(a)(2) includes a prior owner as a responsible party only if there was disposal of hazardous waste during the tenure of ownership. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985). For a thorough discussion of lender liability under CERCLA as exemplified in the *Maryland Bank & Trust* and *Mirabile* decisions see Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261 (1987).

52. *Maryland Bank & Trust*, 632 F. Supp. at 580. The court noted, however, that liability could have been avoided had the bank not foreclosed or not bid at the foreclosure sale. *Id.* at 580 n.6. The question which has not been addressed directly by courts or commentators is whether a lender can avoid liability by electing not to foreclose until after other parties have borne the cleanup costs. This option seems implicit in the 1986 amendments authorizing an automatic federal lien on properties cleaned up with Superfund monies because the lien is made explicitly subordinate to the rights of a secured creditor who perfected its interest before actual notice of the lien was received or before notice of the lien was filed. 42 U.S.C. § 9607(l)-(m) (Supp. IV 1986). If Congress had intended to discourage secured parties from delaying foreclosure to avoid liability, it could have granted priority status to the federal lien.

53. *Maryland Bank & Trust*, 632 F. Supp. at 580. For a discussion of the potential conflict between the requirement that lenders monitor their secured properties and the limitation of the security interest exemption to those lenders who do not participate in the management of the property, see Note, *supra* note 51, at 1295. Lenders can also reallocate risks by requiring borrowers to clean up environmental problems and comply with environmental laws and by obtaining warranties and guarantees from the borrower. *Climate for Real Estate Lawyers "Gloomy" Due to Environmental Liability*, ABA TOLD, 18 ENV'T REP. (BNA) 1106 (Aug. 21, 1987) [hereinafter *Climate Gloomy*].

54. See *infra* notes 148-59 and accompanying text. The holding is also supported by SARA's amended definition of "owner or operator," which excludes governmental units acquiring ownership through foreclosure but does not make the same provision for private mortgagees. 42 U.S.C. § 9601(20)(D) (Supp. IV 1986).

Additional harshness results from the broad definition of "facility" as virtually any place where hazardous wastes are found.⁵⁵ Although a "consumer product in consumer use" is not a facility under section 9601(9), the exception has not been tested in the courts. This leaves open the possibility that a current homeowner may be liable for cleanup and containment costs if there is a release or threatened release of hazardous substances from his property.

Just such a result occurred in *Tanglewood East Homeowners v. Charles-Thomas, Inc.*⁵⁶ In *Tanglewood*, owners of lots in a subdivision built on property operated as a wood-treatment facility brought suit under CERCLA against a lending institution, developers, construction companies, and real estate agents and agencies participating in the development.⁵⁷ Prior to bringing suit, the homeowners incurred relocation and investigatory costs and expended monies for building dikes and trenches to contain the release of hazardous substances.⁵⁸ Because *Tanglewood* has not yet been heard on the merits,⁵⁹ it is unknown to what extent the homeowners will prevail on recovery of costs or whether the court will specifically address the consumer exception.

B. Imposition of Strict Liability

CERCLA imposes strict liability on responsible parties whenever there is a release or threatened release of a hazardous substance from a facility and costs are incurred in responding to the harm.⁶⁰ CERCLA does not, however, expressly provide that responsible parties be held strictly liable.⁶¹ Yet, without exception, courts have found clear congressional intent

55. *United States v. Ward*, 618 F. Supp. 884, 895 (E.D.N.C. 1985); see also *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143, 1148 (D. Ariz. 1984) (asbestos fibers on the ground enough to qualify subdivision as a facility).

Section 9601(9) defines "facility" as:

(A) 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 (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9).

56. 849 F.2d 1568 (5th Cir. 1988).

57. *Id.* at 1571.

58. *Id.* at 1575. The hazardous conditions, which will require future costs for the demolition of six homes, the construction of bunkers to contain the hazardous materials, and millions of dollars in cleanup, was not discovered until eight years after developers had acquired the property and constructed numerous homes. *Id.* at 1571.

59. The Court of Appeals for the Fifth Circuit heard the case only as an interlocutory appeal of the trial court's refusal to grant the defendants' motions to dismiss. *Id.* at 1571-72.

60. 42 U.S.C. § 9607(a) (1982).

61. Section 9601(32) provides only that "liability . . . shall be construed to be the stan-

to impose strict liability from CERCLA's legislative history and its incorporation by reference of the liability standard of the Clean Water Act.⁶²

In applying a strict liability standard in *New York v. Shore Realty Corp.*,⁶³ the court refused to read a causation requirement into the imposition of strict liability on current owners.⁶⁴ The court reasoned that requiring a showing that the potentially responsible party had caused the harm would render the statutory defenses meaningless because the defenses serve as a substitute for a causation requirement by excepting otherwise responsible parties from liability on the basis of causation.⁶⁵ In short, the conduct of a party is not examined once it is determined that he meets the criteria of being a responsible party.⁶⁶

While it is not necessary when imposing strict liability to show that the cause of the harm was a responsible party's culpable conduct, it is necessary to show a causal connection between the release or threatened release and the incurrence of response costs.⁶⁷ However, release⁶⁸ and the threat of release have been given liberal interpretations,⁶⁹ and courts are

dard of liability" under 33 U.S.C. § 1321, the Federal Water Pollution Control Act (The Clean Water Act). *Id.* § 9601(32).

62. The finding of clear congressional intent is based upon the assumption that at the time of CERCLA's enactment, Congress knew the courts had interpreted the Clean Water Act as imposing strict liability. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983).

63. 759 F.2d 1032 (2d Cir. 1985).

64. *Id.* at 1044.

65. *Id.* at 1044. In so holding, the court relied upon legislative history showing that the Senate and House compromise version of CERCLA deleted causation requirements present in earlier versions. *Id.* at 1044-45; accord *Violet v. Picillo*, 648 F. Supp. 1283, 1292 (D.R.I. 1986).

66. *United States v. Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546, 549 (W.D.N.Y. 1988).

67. *Dedham Water Co. v. Cumberland Farms, Inc.*, 689 F. Supp. 1223, 1224-25 (D. Mass. 1988); *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1282 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 674 (D. Idaho 1986). Section 9607(a)(4) provides that responsible parties are liable when "there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance."

68. With minor exceptions, a release means "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22). Under the Superfund Amendments and Reauthorization Act of 1986 (SARA), Congress expanded the definition of "release" to specifically include "the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant." *Id.* § 9601 (22) (Supp. IV 1986).

69. *E.g.*, *New York v. Shore Realty Co.*, 759 F.2d 1032, 1045 (2d Cir. 1985) (inexperience in handling hazardous waste amounts to threatened release); *United States v. Northernair Plating Co.*, 670 F. Supp. 742, 747 (W.D. Mich. 1987) (presence of hazardous substances combined with unwillingness of any party to assert control over them amounted to a threat of release); *United States v. Mirabile*, 15 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,992, 20,993 (E.D. Pa. Sept. 4, 1985) (release threatened because of deteriorating condition of drums contain-

willing to apply a weak causation nexus between the release and the response costs.⁷⁰

In a case of first impression, the court in *Artesian Water Co. v. New Castle County*⁷¹ rejected a “but for” rule of causation and applied a “substantial factor” rule where there were two potential sources of release.⁷² Artesian, a water utility, sought to recover response costs from New Castle County, claiming that a release from the county’s landfill had contaminated its water supply and necessitated finding temporary and permanent alternative supplies.⁷³ Studies showed that part of the contamination might have been from another landfill, but technological limitations made it impossible to “fingerprint” the contamination as emanating from either site.⁷⁴ The court rejected the “but for” rule because it would have allowed both parties to avoid liability; and found New Castle liable because its release was a “material element” and a “substantial factor” in bringing about Artesian’s incurrence of response costs.⁷⁵

C. Allowance of Broad Recovery Costs

Liability under CERCLA covers a broad array of costs.⁷⁶ Responsible

ing hazardous wastes); *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143, 1149 (D. Ariz. 1984) (release occurred when wind blew asbestos fibers from the ground).

70. Ordinarily, in an action against a current owner there is little difficulty in establishing that response costs were necessitated by a release from his facility because a governmental agency will have already made that determination. *E.g.*, *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 889 (9th Cir. 1986) (state agency advised current owner that slag left by a former owner constituted a potentially serious hazard); *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1275 (D. Del. 1987) (state agency informed water utility company that groundwater pollution had been discovered near its source of water supply and that county landfill was mostly likely source of pollution). The problem of causation arises more frequently in determining the liability of generators and transporters of hazardous waste, a topic which is outside the scope of this Note.

71. 659 F. Supp. 1269 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

72. *Id.* at 1283. A “but for” rule would require showing that costs would not have been incurred “but for” a release from a particular site. The “substantial factor” rule applies when “two or more causes have concurred to bring about an event, and any one of them, operating alone, would have been sufficient to cause the identical result.” *Id.*

73. *Id.* at 1274-75.

74. *Id.* at 1276.

75. *Id.* at 1282-84. By analogy the court adopted the rule applied in *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983), where the court held that it was not necessary to “fingerprint” waste as being from a particular generator if wastes found at the site are of the same kind the generator produced. *See Artesian*, 659 F. Supp. at 1282 (citing *Wade*, 577 F. Supp. at 1332-33).

76. 42 U.S.C. § 9607(a)(4)(A)-(C). As originally enacted, section 9607(a) provided that responsible parties were liable for:

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

parties are liable for all removal⁷⁷ or remedial⁷⁸ costs incurred by governmental agencies and for necessary response⁷⁹ costs incurred by any other person.⁸⁰ The removal or remedial actions, however, must be conducted within National Contingency Plan ("NCP") guidelines.⁸¹ A private party may be reimbursed from the Superfund only if it obtains preapproval from the EPA. Preapproval is limited to cleanup of sites on the national priority list.⁸² However, demonstrating consistency with NCP guidelines by obtaining preapproval is not a prerequisite to recovery of response costs from another responsible party.⁸³ Liability does not extend to compensation for economic losses or personal injury.⁸⁴

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

The Superfund Amendments and Reauthorization Act of 1986 added provisions including liability for costs of health assessment studies and specifically providing that amounts recoverable include interest. 42 U.S.C. § 9607(a) (Supp. IV 1986).

77. Removal actions are defined in section 9601(23) and are those actions which are intended only as a short-term abatement of the hazard. *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1278 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

78. Remedial actions are defined at section 9601(24) and are generally those actions which permanently restore long-term environmental quality. *Id.* at 1278.

79. Response costs include both removal and remedial costs. § 9601(25). Response costs are "necessary" if they are required by a governmental agency on the federal, state or local level. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

80. In *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1141-43 (E.D. Pa. 1982), the court held that the term "any other person" did not preclude one responsible party, the current owner, from seeking recovery from other responsible parties, particularly where the current owner had not voluntarily contributed to the hazard.

81. Section 9605 requires preparation of a National Contingency Plan ("NCP") setting forth a comprehensive scheme for addressing the problem of hazardous waste removal. Part of the NCP directs the establishment of a national priorities list identifying priority cleanup sites. *Id.* § 9605(8)-(9). The current NCP is found at 40 C.F.R. § 300.1 (1986).

82. *Ohio v. United States EPA*, 838 F.2d 1325 (D.C. Cir. 1988). Section 9611(a)(2) specifically provides that use of Superfund monies to pay claims by nongovernmental parties must be approved under the plan and certified by the responsible official.

83. In early cases, courts were split on whether consistency with the NCP required prior governmental approval for recovery of private response costs. *Compare, e.g., Bulk Distribution Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1445-48 (S.D. Fla. 1984) (A claimant must obtain governmental approval of its cleanup plan and incur costs before commencing an action to recover costs from other responsible parties.) *with Pinole Point Properties v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 289-90 (N.D. Ca. 1984) (Consistency with the NCP does not require preauthorization or supervision.). However, the final revisions of the NCP made it clear that prior governmental approval is not a prerequisite to private party recovery. *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1575 (5th Cir. 1988); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986); *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1274 n.4 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988) (quoting 50 Fed. Reg. 47934 (Nov. 20, 1985)).

84. *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986); *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1285-86 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988). Although medical expenses for treatment of personal injuries and disease are not recoverable, "cost of medical testing and screening . . . to assess the effect of the release or discharge on

Responsible parties are also liable for damages to natural resources, but only in actions brought by the federal government or a state, and only where both the release and the resulting damages occurred wholly after CERCLA's enactment.⁸⁵ In contrast to the prospective nature of liability for damages to natural resources, liability for response costs is retroactive, and thus is imposed without regard to the fact that the conduct creating the hazard occurred prior to the passage of CERCLA. Constitutional challenges to CERCLA's retroactive application have been unsuccessful.⁸⁶

As a practical matter, application of a strict liability standard in conjunction with a weak causation requirement and broad recovery means that an innocent current owner is liable for enormous cleanup costs simply because of his status as owner even if his conduct was not wrongful and even though there is no certainty his property caused the harm.⁸⁷ Proponents of such extensive liability argue that the innocent owner expands the harm by failing to abate the hazard.⁸⁸ However, such liability can be greatly disproportionate to the innocent owner's contribution to the harm and unrelated to any economic benefit he derived from hazardous waste activities. Yet, the courts have reasoned that liability without fault is consistent with CERCLA's goal of spreading costs among as many parties as possible and is more equitable than imposing the full costs of cleanup on the public.⁸⁹

D. *Limitations on Defenses*

Strict liability under CERCLA is not absolute. An otherwise responsible party may assert three affirmative defenses to escape liability. These defenses require a showing that the hazardous condition and resulting damages were "caused solely" by an act of God,⁹⁰ an act of war, or an

public health or to identify potential public health problems presented by the release" may be recoverable. *Brewer v. Ravan*, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988).

85. 42 U.S.C. § 9607(f); see *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 674-75 (D. Idaho 1986).

86. *E.g.*, *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 995-98 (D.S.C. 1984), *aff'd in part, vacated in part, sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 217-21 (W.D. Mo. 1985). For a discussion of the constitutional challenge to CERCLA's retroactive application see Freeman, *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 Bus. Law. 215 (1986).

87. Note, *supra* note 10, at 262.

88. Note, *supra* note 10, at 265; see also *United States v. Northern Plating Co.*, 670 F. Supp. 742, 748 (W.D. Mich. 1987) ("Congress clearly intended that the landowner be considered to have 'caused' part of the harm.")

89. *Philadelphia v. Stepan Chem. Co.*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,133, 20,134 (E.D. Pa. July 28, 1987); *United States v. Price*, 577 F. Supp. 1103, 1114 (D.N.J. 1983); Note, *supra* note 10, at 262.

90. An "act of God" is narrowly defined as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the ef-

unrelated third party.⁹¹ In order to prevail as an innocent landowner under the third party defense, the current owner must show that: (1) the sole cause of the damage was the act or omission of a third party; (2) the third party was not an employee or agent or directly or indirectly in a contractual relationship with the current owner; and (3) he exercised due care and took precautions against foreseeable acts or omissions of the third party.⁹² The showing of due care must be established by a preponderance of the evidence.⁹³

Few current owners to date have successfully avoided liability under the third-party defense. *New York v. Shore Realty Corp.*⁹⁴ was one of the

facts of which could not have been prevented or avoided by the exercise of due care or foresight." 42 U.S.C. § 9601(1).

The act of God defense has been asserted in only two cases, without success in either. In *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986), toxic chemicals spread to a surrounding neighborhood during efforts to extinguish a fire which started when a bolt of lightning struck a warehouse. *Id.* at 312. The defense was asserted when the owner was ordered to expend monies over and above the several hundred thousand dollars already spent. *Id.* at 313. Acknowledging that successful assertion of the defense would remove Wagner from the classification of a responsible party and entitle him to indemnification from a third party, the court went on to state that in an act of God defense "there is no third party . . . and reimbursement from the EPA is doubtful." *Id.* at 316-17.

In *United States v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal. 1987), the owner/operator of a toxic waste facility raised the act of God defense, asserting that heavy rainfalls were natural disasters constituting acts of God. *Id.* at 1061. The court rejected the defense, finding that the "rains were not the kind of 'exceptional' natural phenomena to which the narrow act of God defense" applies because they were "foreseeable based on normal climatic conditions and any harm caused by the rain could have been prevented through design of proper drainage channels." *Id.*

91. Section 9607(b) provides:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

42 U.S.C. § 9607(b) (Supp. IV 1986).

92. *Id.*

93. *Id.*

94. 759 F.2d 1032 (2d Cir. 1985).

first cases in which the responsible party asserted the third-party defense. Shore claimed it was entitled to the third-party defense because the hazardous conditions were created by a prior tenant and Shore had exercised due care while it was in control of the property.⁹⁵ The court held that the harm to Shore was not "caused solely" by a third party because Shore knew of the prior tenant's activities before purchasing the property, should have foreseen that such activities would continue, and did not take "precautions against" the tenant continuing the activities.⁹⁶

Other courts have found an insufficient showing of sole causation and failure to exercise due care where an owner did nothing more than seek a preliminary injunction to prevent a sublessee from running a "sloppy operation,"⁹⁷ and where an absentee owner negligently or willfully failed to inspect property leased to a chemical manufacturing company.⁹⁸

Most current owners attempting to use the third-party defense have been unable to overcome the relationship hurdle, which requires that the third-party not be in a contractual or employee relationship with the current owner.⁹⁹ For example, in *Philadelphia v. Stepan Chemical Co.*,¹⁰⁰ two employees accepted bribes and allowed unauthorized disposal of hazardous wastes at the city's landfill.¹⁰¹ The city claimed it was entitled to the third-party defense because the employees were acting outside the scope of their employment, a defense available to employers under com-

95. *Id.* at 1048.

96. *Id.* at 1049. Shore knew before purchasing the property that a tenant was operating a hazardous waste storage facility, had conducted an environmental study which showed the site to be a "potential time bomb," but purchased the property although the state denied Shore a waiver of liability. *Id.* at 1038-39. After Shore acquired title to the property, the holdover tenant continued to add hazardous chemicals to the site while Shore did nothing to stop the continuing pollution except seek an eviction. *Id.* at 1039. The court noted that Shore might also have been barred from using the defense because the purchase agreement provided that Shore assume some environmental liability from the prior owner. *Id.* at 1048 n.23.

97. *Washington v. Time Oil Co.*, 687 F. Supp. 529, 532-33 (W.D. Wash. 1988).

98. *United States v. Monsanto Co.*, 858 F.2d 160, 169 (4th Cir. 1988).

99. It would seem obvious that there is a contractual relationship between a current owner and his predecessor in title. However, one court did not preclude the current owner's use of the third-party defense on the basis of a contractual relationship with the predecessor in title when a mortgagee foreclosed on the prior owner's property, bid on the property at the sheriff's sale and assigned the bid to the current owner, who then took title. *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992 (E.D. Pa. Sept. 4, 1985). The court stated that the relationship "obstacle which has previously precluded use of this defense is not present in this case." *Id.* at 20,994. Because the question was before the court on the current owner's motion for summary judgment and the government apparently conceded that there was no contractual relationship, the statement must be viewed as dicta. When the relationship is one of lessor and lessee, the third-party defense also fails. *E.g.*, *United States v. Northern Plating Co.*, 670 F. Supp. 742, 748 (W.D. Mich. 1987).

100. 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,133 (E.D. Pa. July 28, 1987).

101. One of the employees was a security guard hired to protect against unauthorized dumping. *Id.* at 20,133.

mon-law principles of vicarious liability.¹⁰² The court rejected the argument, relying on legislative history that indicated the defense was intended to be more akin to the third-party defense under common law principles of strict and vicarious liability for ultrahazardous activities and was available under CERCLA only where the responsible party had no connection to the third party.¹⁰³ Although the court acknowledged the harshness of its holding, it nonetheless found that the city and its employees were connected and that the connection was not broken by a "scope of employment" limitation.¹⁰⁴ To adopt such a limitation, the court reasoned, would "undermine CERCLA'S goal of prompt clean-up of hazardous substances at the expense of parties designated by Congress" and "create an opportunity for covered persons to defeat its purposes."¹⁰⁵ The court was essentially unwilling to provide such an opportunity for parties to escape liability.

E. *Application of Joint and Several Liability*

Early versions of the CERCLA legislation expressly provided for joint and several liability among responsible parties, but the provision was deleted before final passage.¹⁰⁶ Most courts found that this deletion from the final version meant only that CERCLA does not mandate imposition of joint and several liability but permits application of common law tort principles, including joint and several liability.¹⁰⁷ Accordingly, courts impose joint and several liability in "appropriate circumstances." The courts differ, however, in determining when circumstances are appropriate.¹⁰⁸

The seminal case on the issue of joint and several liability under CERCLA is *United States v. Chem-Dyne Corp.*,¹⁰⁹ in which the government sought cleanup costs from twenty-four generators and transporters of hazardous wastes. The court adopted the approach of the Restatement (Second) of Torts, which finds joint and several liability appropriate

102. *Id.* at 20,134.

103. *Id.*

104. *Id.* at 20,134-35.

105. *Id.* at 20,135.

106. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805-08 (S.D. Ohio 1983); Note, *supra* note 10, at 263 n.81.

107. *Developments, supra* note 4, at 1524-25. At common law, when there is more than one defendant, liability may be joint and several or apportioned. Dubuc & Evans, *supra* note 8, at 10,197-98. Imposition of joint and several liability makes each defendant totally responsible for the full amount of damages, while apportionment requires a defendant to pay only its share. *Id.*

108. Because there is basic agreement that development of a federal common-law approach to joint and several liability is more appropriate than application of varying state laws, the disagreement focuses on what the federal common law should be. *Developments, supra* note 4, at 1526-27.

109. 572 F. Supp. 802 (S.D. Ohio 1983).

when two or more persons acting independently cause harm which is indivisible and incapable of being reasonably apportioned.¹¹⁰ The burden of showing divisible harm and reasonable apportionment of liability is on the parties who would otherwise be jointly and severably liable.¹¹¹

The Restatement's indivisible harm rule is subject to criticism because under CERCLA, application of the rule inevitably results in joint and several liability and forces parties who did not benefit from the activity and did not contribute to the harm to pay disproportionately high recovery costs.¹¹² This occurs because wastes have differing degrees of toxicity and migratory potential and, once commingled, may produce a synergistic effect different from the effect each would have caused separately.¹¹³ Arguably, the innocent current owner could avoid joint and several liability by showing his lack of contribution to the harm; however, under CERCLA he is deemed to have contributed to the harm by failing to abate the hazard.¹¹⁴

In *United States v. A & F Materials Co.*,¹¹⁵ the court declined to follow *Chem-Dyne* and fashioned what it considered to be a more moderate approach to joint and several liability based upon an amendment proposed by Congressman Gore prior to CERCLA's enactment.¹¹⁶ The Gore Amendment was designed to soften the impact of joint and several liability by permitting apportionment where a defendant who contributed only a small amount to the harm could not prove the degree of his contribution.¹¹⁷ The approach allows a court to apportion liability on a variety of factors, including relative contribution to hazardous waste in terms of amount and toxicity, the degree of involvement of the parties, the degree of care exercised, and cooperation with the government in prevention of harm.¹¹⁸

110. *Id.* at 810.

111. *Id.* at 811.

112. *Developments, supra* note 4, at 1529-31.

113. *Id.* at 1528-29; *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 994-95 (D.S.C. 1984), *aff'd in part, vacated in part, sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *see United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987).

114. Note, *supra* note 10, at 265.

115. 578 F. Supp. 1249 (S.D. Ill. 1984).

116. *Id.* at 1255-56.

117. *Id.* at 1256.

118. In full, the Gore amendment would permit courts to apportion liability according to the following criteria when a responsible party could not prove his contribution to the harm:

- (i) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished;
- (ii) the amount of the hazardous waste involved;
- (iii) the degree of toxicity of the hazardous waste involved;
- (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- (v) the degree of care exercised by the parties with respect to the hazardous waste

The approach of the Gore amendment is viewed as being more equitable than the *Chem-Dyne* approach. It reduces the potential for unfair targeting of defendants on the basis of ease of identification and wealth. It promotes fairness, particularly when the party's contribution to the harm was minor, by imposing liability proportionate to culpability.¹¹⁹ However, the government must absorb the costs of orphan shares, where there are absent or judgment-proof responsible parties. The government must also bear the costs of locating and impleading all responsible parties.¹²⁰ Such results are inconsistent with CERCLA's intent to defray as many costs as possible from taxpayers and provide efficient allocation of Superfund monies.

Imposition of joint and several liability, especially under the indivisible harm rule, leads to harsh results for the innocent current owner. The current owner is frequently the easiest target for recovery because he is readily identifiable and other responsible parties may be absent or insolvent.¹²¹ Once identified, the current owner can be compelled to undertake total cleanup with no assistance from the government in identifying, locating or impleading other potentially responsible parties.¹²² However, proponents of CERCLA and courts facing the issue have found that joint and several liability consistent with CERCLA's goal of ensuring full government recovery of cleanup costs. Further, courts have held that Congress specifically sought to provide a means of recovery where responsible parties cannot be located or are insolvent.¹²³ Because most releases of hazardous substances cause a single, indivisible harm, recovery would be impossible if it was contingent upon showing the degree of each responsible party's contribution.¹²⁴ Proponents of the imposition of joint and several liability also argue that imposing joint and several liability promotes prompter environmental cleanup because joint and several liability releases the government from the burden of locating and impleading other responsible parties.¹²⁵

F. *The Right to Contribution*

Connected to the question of joint and several liability is the question of contribution. Although CERCLA as originally enacted did not contain

concerned, taking into account the characteristics of such hazardous waste; and (vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

Id. (citing 126 CONG. REC. 26,781 (1980)).

119. *Developments*, note 4, at 1533-34.

120. *Id.* at 1534.

121. *Id.* at 1529-30.

122. *E.g.*, *United States v. Dickerson*, 640 F. Supp. 448, 450 (D. Md. 1986).

123. Note, *supra* note 10, at 263 n.81.

124. *Id.* at 263, 265.

125. *Developments*, *supra* note 4, at 1525.

an express right to contribution from other responsible parties, courts generally held that such a right exists when joint and several liability has been imposed.¹²⁶ Once two or more parties are found jointly and severally liable, contribution allows the court to apportion liability among the parties in accordance with fair and equitable considerations.¹²⁷ To find that CERCLA does not permit a right to contribution would unjustly require a single party to bear the entire cost of cleanup while allowing other responsible parties to avoid liability altogether.¹²⁸

A right to contribution mitigates the harshness of joint and several liability by giving the innocent current owner the right to implead and recover costs from other responsible parties.¹²⁹ Additionally, a current owner who knows he can seek contribution from other parties is more likely to voluntarily initiate prompt cleanup. Moreover, contribution furthers CERCLA's goal of spreading the costs of cleanup.¹³⁰

IV. EFFECT OF SARA ON INNOCENT OWNER LIABILITY

Despite the criticism leveled at the broad and liberal construction courts gave CERCLA,¹³¹ the Superfund Amendments and Reauthorization Act of 1986¹³² ("SARA") passed by a wide margin and did little to change CERCLA's broad liability provisions.¹³³ In fact, post SARA decisions assert that SARA supports imposition of strict liability on current owners because it promotes cleanup of hazardous waste by increasing the pool of responsible parties and reducing the costs to the public.¹³⁴

126. Although a number of courts had stated in dicta that a right to contribution existed under CERCLA, *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985), was the first case to actually hold that the development of federal common law principles of contribution was not precluded by CERCLA's failure to provide for such a right and that the right to contribution was consistent with the overall legislative scheme. See also *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 224-30 (W.D. Mo. 1985) (arriving at same conclusion without benefit of the *ASARCO* decision). For a comprehensive discussion of the private right of contribution among potentially responsible parties, see *United States v. New Castle County*, 642 F. Supp. 1258, 1262-69 (D. Del. 1986).

127. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 224-25 (W.D. Mo. 1985). Liability may be apportioned on a pro rata basis or according to comparative fault. *Id.* at 225.

128. *Chemical Waste Management, Inc. v. Armstrong World Indus., Inc.*, 669 F. Supp. 1285, 1295 (E.D. Pa. 1987).

129. Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 *Ecology L.Q.* 365, 370 (1987); *Developments, supra* note 4, at 1535.

130. *Chemical Waste Management*, 669 F. Supp. at 1290-91.

131. 42 U.S.C. §§ 9601-57 (1982).

132. 42 U.S.C. §§ 9601-75 (Supp. IV 1986).

133. *Dubuc & Evans, supra* note 8, at 10197.

134. *Philadelphia v. Stepan Chem. Co.*, 18 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,133, 20,134 (E.D. Pa. July 28, 1987); *United States v. New Castle County*, 642 F. Supp. 1258, 1264 (D. Del. 1986).

SARA's specific inclusion of a right to contribution and its stamp of approval on de minimis settlements and mixed funding of cleanups will alleviate some of CERCLA's harshness. However, SARA's reenforcement of joint and several liability and the narrowing of the innocent landowner defense continue to leave the innocent current owner vulnerable to bearing more than his fair share of the cost of cleanup when his involvement in creating the hazardous condition and the benefit he derived from hazardous waste activities is compared to that of other potentially responsible parties.

A. *Narrowing the Third-Party "Innocent Landowner" Defense*

Under CERCLA an innocent current owner could defend against liability by showing that a third party, with whom he did not stand in a direct or indirect contractual relationship, was solely responsible for the damages and that he had exercised due care and took precautions against the third party's foreseeable conduct.¹³⁵ Although "contractual relationship" was not defined in CERCLA, courts generally find that the innocent current owner cannot avoid liability on the grounds that the harm was caused solely by a third party who was a predecessor in title or a lessee.¹³⁶

SARA affirms these court decisions by defining "contractual relationship" as including "land contracts, deeds, or other instruments transferring title or possession" of real property.¹³⁷ However, if the property is acquired after the disposal of hazardous substances, and the current owner does not know and has no reason to know the property is contaminated, he is entitled to the third-party defense notwithstanding his contractual relationship with the third party, if he can also meet the due care and precautionary requirements of CERCLA.¹³⁸ In order to establish that

135. *Supra* notes 91-93 and accompanying text.

136. *See supra* notes 99-105 and accompanying text.

137. 42 U.S.C. § 9601(35)(A) (Supp. IV 1986).

138. Section 9601(35)(A) provides:

The term "contractual relationship," for the purpose of section [9607(b)(3)], includes, but is not limited to, land contracts, deeds 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 or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that he has satis-

he had no reason to know of the contamination, the current owner must have undertaken appropriate inquiry at the time of purchase into commonly known or reasonably ascertainable information about the previous ownership and uses of the property.¹³⁹ Other factors taken into account include any specialized knowledge or experience of the owner, the relationship of purchase price to value, the obviousness or likelihood of contamination, and the ability to discover the contamination by inspection.¹⁴⁰ The owner is not entitled to the defense if he causes or contributes in any way to the release.¹⁴¹ Further, if he learns of a release or threatened release while he owns the property and subsequently transfers ownership without disclosing that knowledge, he is treated as a responsible party and is barred from using the third-party defense.¹⁴²

SARA only appears to soften the harshness of CERCLA's imposition of strict liability on innocent current owners. It does not create a separate innocent landowner defense but merely clarifies that under certain circumstances the current owner is entitled to CERCLA's original third-party defense despite his contractual relationship with a prior owner who contributed to the hazardous condition.¹⁴³ At best, SARA provides a prospective purchaser with vague guidelines on the circumstances that are sufficient to create statutory innocence, and those guidelines impose substantial affirmative obligations.¹⁴⁴ While the new statute has not yet been tested in the courts, it appears that only a thorough investigation of prior ownership and uses of the property, coupled with a physical and environmental inspection will rise to the level of statutory innocence Congress

ified the requirements of section [9607(b)(3)(a) and (b)].

Id.

139. Section 9601(35)(B) provides:

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

Id.

140. *Id.*

141. *Id.* § 9601(35)(D).

142. *Id.* § 9601(35)(C). The addition of this provision actually serves the interest of the innocent current owner. Prior to its enactment, courts had held that a prior owner was a responsible party only if he participated in hazardous waste disposal activities, without regard to his knowledge of the contamination. *See supra* note 37 and accompanying text.

143. Garber, *supra* note 129, at 378.

144. Marcotte, *Toxic Blackacre: Unprecedented Liability for Landowners*, A.B.A. J., Nov. 1, 1987, at 68.

felt was fair.¹⁴⁵

Post-SARA purchasers may be able to lessen the risk of CERCLA liability by undertaking a thorough physical and historical investigation of the property and by obtaining warranties from the seller. However, few current owners who purchased contaminated property prior to the enactment of SARA will have conducted the precautionary steps necessary to establish statutory innocence because the steps required go beyond those ordinarily taken by a prospective purchaser. Accordingly, for the pre-SARA purchaser, the contractual relationship with a predecessor in title who contaminated the property will continue to bar the use of the third-party defense.

B. *Reinforcement of Joint and Several Liability*

SARA does not address the issue of joint and several liability, but its legislative history reflects a congressional decision to adopt the standards which were developing in the courts under CERCLA.¹⁴⁶ The rule established in *United States v. Chem-Dyne Corp.*¹⁴⁷ was endorsed by Congress as an appropriate uniform federal rule for the imposition of joint and several liability.¹⁴⁸ Under *Chem-Dyne*, joint and several liability is imposed whenever the harm is indivisible and incapable of apportionment.¹⁴⁹

In cases decided after SARA, the majority of courts have adopted the *Chem-Dyne* rule and have found the harm indivisible because the different properties of the wastes involved and the synergistic effect that results from their commingling make it impossible to determine the extent of each party's contribution to the harm.¹⁵⁰ Because the current owner is

145. *Id.* at 68-70. Reliance upon a physical inspection of the property is insufficient because evidence of past contamination may not be visible and because the contamination may have resulted from the release of hazardous substances from another site. *Id.*; *Climate Gloomy*, *supra* note 53, at 1106. To guard against contamination which is not obvious, costly environmental audits and exhaustive research into the history of the property's use are recommended. Marcotte, *supra* note 144, at 69-70.

146. H.R. REP. NO. 99-253(I), 99th Cong., 2d Sess. 1, 74, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2856.

147. 572 F. Supp. 802 (S.D. Ohio 1983).

148. H.R. REP. NO. 99-253(I), 99th Cong., 2d Sess. 1, 74, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2856.

149. *See supra* text accompanying notes 111-13.

150. *E.g.*, *United States v. Monsanto Co.*, 858 F.2d 160, 172-73 n.25-27 (4th Cir. 1988) (rejecting apportionment of liability between generators on the basis of volume of waste deposited where there was no showing of a relationship between the volume, release and harm and no evidence of the individual and interactive qualities of the substances); *O'Neil v. Picillo*, 682 F. Supp. 706, 724-25 (D.R.I. 1988) (rejecting apportionment of liability on the basis of phase of cleanup during which generator's wastes was discovered and on basis of number of drums of wastes where wastes were not identical and where some drums had ruptured while others were still intact); *United States v. Tyson*, No. 84-2663, slip op. at 6-8 (E.D. Pa. Jan. 29, 1988) (1988 WESTLAW 7163) (finding harm indivisible between owners,

strictly liable if he is not entitled to one of the enumerated defenses, he is considered to have caused part of the harm and, under the *Chem-Dyne* approach, the extent of his contribution to the harm is deemed to be indivisible from the harm caused by other responsible parties.¹⁵¹

In short, although SARA does not mandate imposition of joint and several liability, neither does it provide any means for separating a nonculpable current owners's contribution to the harm and excluding him from the imposition of joint and several liability. Most courts view the issue of the innocent current owner's comparative lack of fault as being more appropriately considered in suits for contribution after the government has been provided with funds to facilitate prompt cleanup.¹⁵²

In *Allied Corp. v. Acme Solvents Reclaiming, Inc.*,¹⁵³ the court observed that the issue of joint and several liability arises most frequently in actions involving the scope of a responsible party's liability to the government.¹⁵⁴ The *Allied* court did not specifically disapprove of the *Chem-Dyne* approach to joint and several liability in a suit brought by the government against responsible parties.¹⁵⁵ However, the court adopted the moderate approach based upon the factors in the Gore Amendment¹⁵⁶ where the cause of action involves a claim by one potentially responsible party against other potentially responsible parties.¹⁵⁷ In making the distinction, the court noted that claims between potentially responsible parties are not always in the nature of contribution and that "[a] blanket prohibition against joint and several liability in claims between responsible parties would discourage a willing PRP from cleaning up on its own . . . especially . . . where one or more of the parties are insolvent and, thus, incapable of sharing the costs of cleanup."¹⁵⁸

As courts continue to develop the rules of joint and several liability under CERCLA, the flexible approach of *Allied* should be retained and expanded as circumstances and equitable considerations dictate. CER-

operators and generators because of mixing and commingling of different wastes). *But cf.* *United States v. Miami Drum Servs., Inc.*, 25 Env't Rep. Cas. (BNA) 1469, 1475 n.6 (S.D. Fla. 1986) (suggesting that divisibility of harm could be shown where there are reliable records "indicating who disposed of the hazardous waste or in what quantities") (quoting 126 CONG. REC. H11,788 (daily ed. Dec. 3, 1980)).

151. *United States v. Northern Plating Co.*, 670 F. Supp. 742, 748 (W.D. Mich. 1987); see *Tyson*, at 6-8 (1988 WESTLAW 7163).

152. *E.g.*, *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563 (E.D. Pa. 1988); *O'Neil v. Picillo*, 682 F. Supp. 706, 725-26 (D.R.I. 1988); *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987).

153. 691 F. Supp. 1100 (N.D. Ill. 1988).

154. *Id.* at 1117.

155. *Id.* at 1118 n.12.

156. See *supra* note 118 for the factors considered in apportioning liability under the Gore Amendment.

157. *Allied*, 691 F. Supp. at 1115-18.

158. *Id.* at 1118.

CLA does not mandate a rigid application of the *Chem-Dyne* rule in every instance, especially "where the peculiar facts of the case point to a more fair apportionment of liability."¹⁵⁹ A more flexible approach based upon the factors in the Gore Amendment and traditional concepts of comparative fault is particularly appropriate where one of the parties is an innocent current owner who did not participate in hazardous waste activities, exercised care when he learned of the hazardous condition of his property, and cooperated in minimizing the harm, even if his conduct prior to acquiring the property did not meet the demanding requirements of the innocent land owner defense.

C. *Specific Inclusion of Right to Contribution*

SARA specifically provides for the right to contribution from other potentially responsible parties.¹⁶⁰ The right to contribution is to be governed by federal law and allows the courts to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate."¹⁶¹ By explicitly providing for a right to contribution in cases of joint and several liability, Congress sought to encourage private party settlements and cleanups by bringing all responsible parties together in one action and lessening the ill will that results when one responsible party is targeted for the full costs of response actions.¹⁶²

Congress, however, did not elucidate on what the federal law of contribution should be nor expand on what equitable factors courts should consider in allocating recoverable costs. A right to contribution, however, does not absolve the innocent current owner of liability because the right exists only after joint and several liability has been imposed and upon a showing that the innocent current owner has discharged more than his fair share of the common liability.¹⁶³ Therefore, the right to contribution must be distinguished from the court's decision to apportion damages among responsible parties rather than impose joint and several liability in the first instance.¹⁶⁴ From the perspective of the innocent current owner,

159. *Id.* at 1116.

160. 42 U.S.C. §§ 9601, § 9613(f) (Supp. IV 1986).

161. *Id.*

162. H.R. REP. NO. 99-253(I), 99th Cong., 2d Sess. 1, 79, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2861-62.

163. *E.g.*, *United States v. Seymour Recycling Corp.*, 686 F. Supp. 696, 700 (S.D. Ind. 1988); *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987); *Note, supra* note 10, at 269.

164. As the court in *Stringfellow* explained:

There are two distinct contexts in which the issue of "apportionment" arises In the first context, the question is whether the harm resulting from two or more causes is indivisible, or whether the harm is capable of division or apportionment among separate causes

The second context in which the issue of "apportionment" arises occurs after the

the distinction is significant because suits for contribution do not typically provide for joint liability.¹⁶⁵ The result is that once the innocent current owner is found jointly and severally liable with another responsible party, they alone are responsible for the liability of absent parties while impleaded parties are responsible only for their individual share of the damages.¹⁶⁶ By contrast, if the current owner's contribution to the harm was found divisible so that joint and several liability was not imposed in the first instance, he would not be responsible for the liability of parties who were absent because they were unknown, could not be located, or were judgment-proof.¹⁶⁷

Alteration of the common law rules by providing that joint and several liability can be imposed against other responsible parties in suits for contribution would alleviate the inequity that results when the innocent current owner must rely solely upon his right of contribution to force others to pay for the harm they have created.¹⁶⁸ Since joint and several liability can be imposed when one potentially responsible party seeks recovery from other potentially responsible parties in an action under section 9607,¹⁶⁹ a responsible party who seeks contribution under section 9613(f) should not be denied the same protection simply because the government initiated the action.

To date, courts faced with suits for contribution have not addressed the question of joint and several liability but have focused on the equitable factors to be applied in developing a federal approach to apportioning damages that will be consistent with CERCLA's policies. While no uniform rule has yet emerged, the trend appears to be in the direction of adopting the factors of the Gore Amendment,¹⁷⁰ along with more traditional equitable considerations,¹⁷¹ in apportioning damages. The stan-

first inquiry regarding the indivisibility of the harm. If the defendants are found to be jointly and severally liable, any defendant may seek to limit the amount of damages it would ultimately have to pay by seeking an order of contribution apportioning the damages among the defendants.

Stringfellow, 661 F. Supp. at 1060.

165. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 229 (W.D. Mo. 1985); *Developments*, *supra* note 4, at 1532.

166. *Developments*, *supra* note 4, at 1532.

167. *Id.* at 1525.

168. *See id.* at 1535-39.

169. *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1118 (N.D. Ill. 1988).

170. *See Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78 (D. Me. 1988); *United States v. Tyson*, No. 84-2663 (E.D. Pa. Jan. 29, 1988) (1988 WESTLAW 7163); *see Chemical Waste Management v. Armstrong World Indus., Inc.*, 669 F. Supp. 1285, 1292 n.10 (E.D. Pa. 1987); *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987).

Other methods of contribution are pro rata contribution, comparative fault and comparative causation. For a discussion of how these methods fail to accomplish CERCLA's goals, *see Garber*, *supra* note 129, at 382-85.

171. *E.g.*, *Smith Land & Improvements Corp. v. Celotex Corp.*, 851 F.2d 86, 90 (3d Cir.

dards of the Gore Amendment have not been applied in contribution actions involving an innocent current owner and are more precisely tailored for apportioning damages between parties actively engaged in hazardous waste activities. However, courts should be able to adapt the Gore criteria to the innocent current owner's contribution to the harm by comparing his degree of involvement in the activity to that of other responsible parties, his care with respect to the hazardous condition once it becomes known to him, and his cooperation with the government in minimizing the harm.

D. *Provision for De Minimis Settlements and Mixed Funding*

SARA¹⁷² specifically authorizes prompt settlement with a potentially responsible party under two sets of circumstances if the settlement involves only a minor portion of the response costs.¹⁷³ First, a de minimis settlement is authorized where the amount of the party's contribution to the hazardous substances or the toxicity of the substances contributed were minimal in comparison to other substances at the facility.¹⁷⁴ Secondly, if the potentially responsible party is the property owner, a de minimis settlement is authorized if the owner did not conduct or permit hazardous waste activities, did not contribute to the release or threatened release, and did not have actual or constructive knowledge of the contamination when he purchased the property.¹⁷⁵

1988) (the doctrine of caveat emptor, reduced purchase price and cost of response are properly considered in the allocation of costs), *cert. denied*, 109 S. Ct. 837 (1989); *United States v. Stringfellow*, 661 F. Supp. 1053, 1062 (C.D. Cal. 1987) (comparative fault, contributory negligence and due care are appropriate considerations in apportioning damages); *Chemical Waste Management, Inc. v. Armstrong World Indus., Inc.*, 669 F. Supp. 1285, 1292 (E.D. Pa. 1987) ("innocence" and "fault" are relevant to issue of damages).

172. 42 U.S.C. §§ 9601-75 (Supp. IV 1986).

173. *Id.* § 9622(g).

174. Section 9622(g)(1)(A) states:

(A) Both of the following are minimal in comparison to other hazardous substances at the facility:

(i) The amount of the hazardous substances contributed by that party to the facility.

(ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

Id. § 9622(g)(1)(A).

175. Section 9622(g)(1)(B) states:

(B) The potentially responsible party—

(i) is the owner of real property on or in which the facility is located;

(ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the

In addition to authorizing de minimis settlements, SARA provides for mixed funding, which allows the use of Superfund monies to pay for the liability of responsible parties who are unknown, cannot be found or are otherwise unavailable or unwilling to settle.¹⁷⁶ In providing for de minimis and mixed settlements, Congress sought to encourage responsible parties to voluntarily initiate prompt cleanup.¹⁷⁷

Although the provision for mixed funding may alleviate the problems created when the imposition of joint and several liability places the burden of paying for orphan shares on the original defendants, the authorization of de minimis settlements will not lessen the harshness of strict liability for innocent current owners. Few innocent current owners will be able to show they had no constructive knowledge that the property had been used for hazardous waste activities, because they will be unable to meet the burden of proving that they took sufficient precautionary steps of inquiry and investigation.

V. CONCLUSION

In developing legislation to combat environmental contamination from hazardous waste, Congress devised a broad scheme of liability in the hope that it would ensure prompt cleanup and spread the cost to those parties who had benefited from hazardous waste activities. As the courts strictly construed the legislation, there was alarm that innocent parties were unfairly caught in the web of strict liability, limited defenses, and joint and several liability for harm they did not cause and from which they received no benefit.

Congress, in responding to those concerns, has sought to create a more equitable balance of cost sharing and encourage faster progress in tackling the massive cleanup that still lies ahead. Although liability remains strict and statutory "innocence" may be extremely difficult to attain, the specific grant of a right of contribution and the endorsement of a policy allowing de minimis and mixed funding settlements should encourage all parties who face liability to initiate voluntary cleanup. Nonetheless, the innocent current owner deserves additional protection against disproportionate liability.

Having recently addressed the plight of the innocent current owner in SARA, it seems unlikely Congress will take any additional steps in the near future because of the magnitude of the cleanup task that lies ahead.

property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

Id. § 9622(g)(1)(B).

176. *Id.* § 9622(b).

177. H.R. REP. NO. 99-253(I), 99th Cong., 2d Sess. 1, 58-59, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2840-41.

For the moment, then, courts face the responsibility of developing a method of fair and equitable distribution of liability. Congress preserved flexibility for the courts in fashioning a uniform federal law for the imposition of joint and several liability and the apportionment of damages in actions for contribution. By guarding against the rigid application of joint and several liability against an innocent current owner and by careful consideration in suits for contribution of equitable factors that further CERCLA's goal of requiring those who benefited from hazardous waste activity to pay for the harm they caused, courts will be able to evenly balance congressional concerns for both prompt cleanup and fairness.

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