The Modern Snake in the Grass: An Examination of Real Estate & Commercial Liability Under Superfund & Sara and Suggested Guidelines for the Practitioner

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THE MODERN SNAKE IN THE GRASS: AN EXAMINATION OF REAL ESTATE & COMMERCIAL LIABILITY UNDER SUPERFUND & SARA AND SUGGESTED GUIDELINES FOR THE PRACTITIONER

Elizabeth Ann Glass*

I. INTRODUCTION

During the past twenty years there has been an increased public concern over the danger posed by the vast number of abandoned hazardous waste sites in this country. This interest reached a peak in 1978, when President Carter declared a state of emergency in Love Canal, a neighborhood located in upstate New York.1 The area gained notoriety due to the health hazard posed by chemicals long-buried in the ground.2 A high incidence of health problems was reported in the Love Canal area—ranging from headaches to birth-defects.3 These chronic health problems were associated with chemicals seeping from the abandoned hazardous waste site into the land on which area homes were located.4 The residents of Love Canal, however, were unable to force the cleanup of the toxic site or to recover damages for injuries the abandoned site caused to both

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persons and property. American law left the inhabitants of Love Canal unprotected.  

Two years before the declaration of emergency at Love Canal, Congress enacted a system of “cradle to grave” regulation of hazardous waste called the Resource Conservation and Recovery Act (RCRA). This legislation was passed as amendments to the Solid Waste Disposal Act, and it was hoped that “the approach taken by this legislation eliminate[d] the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous waste.” RCRA identified four primary waste elements in the management of hazardous waste: (1) identification of wastes as hazardous; (2) tracking the identified wastes from generator, to transporter, to disposal facility; (3) demanding that facilities obtain permits before disposing of wastes and establishing federal minimum standards for waste disposal; and (4) implementing state hazardous waste programs which parallel the federal program. RCRA provided the Environmental Protection Agency (EPA) with a broad range of enforcement mechanisms which included civil as well as criminal penalties. Unfortunately, while RCRA addressed the problem of existing, operating waste disposal sites, it did not anticipate the need for quick response to the release

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7 Pub. L. No. 89-272, 79 Stat. 992 (1965). Although RCRA was passed as amendments to the Solid Waste Disposal Act, the changes were so significant that the entire act has become popularly known as RCRA. For a general description of the RCRA regulatory program, see J. Quarles, Federal Regulation of Hazardous Wastes (1982).
or threatened release of hazardous substances into the environment from abandoned hazardous waste sites.\textsuperscript{15} As a result, RCRA left the EPA unable to respond quickly to the Love Canal situation.\textsuperscript{16}

In 1979, in response to the experience of Love Canal, a study commissioned by the EPA revealed that there were between 32,000 and 50,000 waste disposal sites in the United States which contained hazardous substances.\textsuperscript{17} The study determined that 1,000 to 34,000 of these existing sites probably contained large quantities of hazardous waste.\textsuperscript{18} Moreover, the quantities of hazardous waste abandoned at Love Canal were low compared to many other sites.\textsuperscript{19}

In 1980, Congress and the Executive branch finally responded to increased public pressure to establish guidelines for the cleanup of hazardous waste by enacting the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or the Act).\textsuperscript{20} None of the legislation proposed prior to the Ninety-sixth Congress, regulating toxic waste and spill cleanup passed.\textsuperscript{21} The Carter administration submitted a proposal to the Senate in the dawn of the Ninety-Sixth Congress.\textsuperscript{22} It was, however, lost in the congressional shuffle.\textsuperscript{23} The bill which Congress ultimately passed on December 11, 1980 was designed to provide the state and federal governments and, in some cases, private individuals with the means to either compel the cleanup of hazardous waste sites or clean up the sites with government funds and then seek reimbursement for costs\textsuperscript{24} incurred in the cleanup process.\textsuperscript{25} CERCLA was, however,


\textsuperscript{16} \textit{See} EPA Proposed Guidelines for State Hazardous Waste Programs, § 250.72(a)(3).


\textsuperscript{18} \textit{Id.}

\textsuperscript{19} \textit{See generally} S. EPSTEIN ET AL., \textit{HAZARDOUS WASTE IN AMERICA} (1982).


\textsuperscript{21} \textit{Id.} at 1–2.

\textsuperscript{22} S. 1341, 96th Cong., 1st Sess. (1979).

\textsuperscript{23} Grad, \textit{supra} note 20, at 1.

\textsuperscript{24} \textit{See infra} note 42 and accompanying text.

\textsuperscript{25} Grad, \textit{supra} note 20, at 2.
the product of the last few days of the lame duck session of an outgoing Congress. As such, the bill was a hastily assembled piece of legislation which represented a compromise between one Senate and two House bills.

The most notable results of the compromise were: (1) the reduction in the amount of funds available to sponsor the Superfund program, and (2) the liability provisions established by the Act. In the congressional floor debates, the issue of whether CERCLA should establish strict, joint and several liability was a point of bitter contention. The bill which passed made no mention of the scope of liability created under the Act. CERCLA does not address the Superfund defendants' right to contribution from joint tortfeasors, and does not discuss whether liability can be assessed retroactively.

Most courts confronting these liability issues have interpreted the congressional discussion of predecessor bills and concluded that the

27 The Hazardous Substance Response Trust Fund was established by section 221 of the Act. 42 U.S.C. § 9631 (1982).
29 See Grad, supra note 20, at 14, 21, 25.
30 See W. FRANK, supra note 5, at 7. Moreover, the new Superfund Amendments and Reauthorization Act of 1986 makes little changes in the liability provision of CERCLA. See Pub. L. No. 99-499, § 107, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1613, 1628–31. Thus, the judge-made hazardous waste liability law compiled over the past six years, since the inception of superfund, is virtually unaffected by the new Act.
32 Note that the new Superfund Amendments and Reauthorization Act of 1986 (SARA) bars any claims for contribution brought more than three years after the date of judgment under the Act or the date of the issuance of a section 122(g) administrative order. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 1986 U.S. CODE CONG. & ADMIN. NEWS 1613, 1649 (codified at 42 U.S.C. § 9713(g)(3)).
Act was intended to establish strict, joint and several, and retroactive liability—withstanding the omission of such language in the legislation approved by Congress. This judicial expansion of the statutory language has had profound effects on real estate and commercial transactions. Recently, the Act has been criticized as im-


For congressional discussions of the implication of the exclusion of the term “joint and several” from the Act, see 126 CONG. REC. S14,967 (daily ed. Nov. 24, 1980) (remarks of Senator Stafford, who introduced the compromise bill); 126 CONG. REC. S15,004 (daily ed. Nov. 24, 1980) (remarks of Senator Helms, who disfavored the imposition of joint and several liability under the Act); 126 CONG. REC. H11,788-89 (daily ed. Dec. 3, 1980) (remarks of Congressman Florio, arguing that despite the omission, joint and several liability could be imposed under the Act based on the principles of the common law).


35 See, e.g., Small Businesses Have Financial Problems Because of CERCLA Liability,
posing liability\textsuperscript{36} which is unpredictable and overly expansive.\textsuperscript{37} Some of the issues raised by critics of the original Act have been addressed by the recent amendments to CERCLA, but many have not.

This article begins with an overview of CERCLA. Following this overview, the discussion focuses on the twin problems of purchaser and seller liability under both CERCLA and the Superfund Amendments and Reauthorization Act of 1986 (SARA).\textsuperscript{38} Next, suggestions are made for counseling and representing the client who is involved in a real estate or commercial transaction and wishes to avoid Superfund liability. Finally, the article concludes that in searching for deep pockets to cover the cost of the cleanup program, courts have interpreted liability under the Act to an extreme not evidenced in the legislative history of the Act. Further, the imposition of such zealous liability without procedural safeguards may be detrimental to the general public in the long run. Nevertheless, certain business arrangements are still available which may reduce the risk of Superfund liability of persons involved in real estate and commercial transactions.

II. THE STATUTORY SCHEME

A. Basic Elements of CERCLA

The Superfund program has five basic elements. The Act: (1) provides for the reporting of hazardous waste sites and releases or potential releases of hazardous substances;\textsuperscript{39} (2) establishes a

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\textsuperscript{36} The liability provisions of CERCLA, codified in 42 U.S.C. § 9607, remain essentially unchanged under the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1617 (1986). The most striking change under the new liability provision is that in addition to holding a responsible party liable for response costs incurred in the cleanup action, under the new Act a potentially responsible party is now also responsible for the interest accrued from the date of demand or the date of initial expenditure, whichever occurs first. Id. at 1638–39 (codified as 42 U.S.C. § 9607(b)).


\textsuperscript{38} For purposes of this article, “CERCLA” will be used when referring to the 1980 statute, “SARA” will be used when referring to the 1986 statute and “Superfund” will be used when discussing the two together.

\textsuperscript{39} 42 U.S.C. § 9603 (1982). The person in charge of a facility must immediately report the release of any hazardous substance to the National Response Center, an agency originally established under the Clean Water Act. Failure to report a release as required could result
means and a method by which federal and state governments can clean up identified sites by creating a fund (the “Fund”) to pay for the costs of cleanup;\(^4^0\) (3) creates a mechanism through which the EPA can enforce the abatement of a release or threatened release of toxic substances;\(^4^1\) (4) delineates guidelines which allow the EPA to impose liability for and obtain reimbursement of expenditures that the state and federal government (and in some cases private persons) make in responding to leaks and cleaning up toxic sites,\(^4^2\) and; (5) establishes a post-closure liability trust fund to permit the cut off of liability for operators of existing hazardous waste disposal sites when they close the site in compliance with the RCRA.\(^4^3\) Thus, the legislative framework of CERCLA establishes the Superfund program under an administrative statute,\(^4^4\) a taxing statute,\(^4^5\)

in incarceration for up to a year or a fine of up to $10,000.00. While notification pursuant to section 103 cannot be used as evidence in a criminal prosecution, it may be used to impose civil penalties. The reporting requirement is not applicable where the facility has a RCRA permit. See generally GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.04[c] (1984). Note that Maryland's Superfund statute also has a reporting requirement but grants immunity to persons who assist in preventing the release of hazardous substances. MD. HEALTH-ENVT'L. CODE ANN. § 7-229 (Supp. 1986).

\(^{40}\) 42 U.S.C. § 9604 (1982). Cleanup activities are governed by the National Contingency Plan (NCP). 42 U.S.C § 9605 (1982). The NCP is the EPA's blueprint for discovering, prioritizing and then cleaning up hazardous waste. The sites which pose the greatest hazard to human health and welfare are placed on the National Priority List in accordance with the NCP. The list is updated periodically. For a discussion of how the EPA prioritizes discovered sites, see Brown, Superfund and the National Contingency Plan: How Dirty is “Dirty?” How Clean is “Clean?” 12 ECOLOGY L.Q. 89 (1984).

Under the NCP, the EPA may begin immediate removal of hazardous waste. Such removal must be accomplished within six months or after the agency has spent $1 million. 42 U.S.C. § 9604(c)(1) (1982). See generally W. FRANK, supra note 5, at 10.

The Maryland superfund statute also established a mechanism for listing proposed cleanup sites. See MD. HEALTH-ENVT'L. CODE ANN. § 7-223 (Supp. 1986).


\(^{45}\) 42 U.S.C. §§ 9631–9633 (1982); 26 U.S.C. §§ 4611–4682 (1982). The taxing structure described in the final act was explained in a Senate Report as follows:

Financing the Fund primarily for the fees paid by industry is the most equitable and rational method of broadly spreading the costs of past, present and future releases of hazardous substances among all those industrial sectors and consumers who benefit from such substances. The concept of a fund financed largely by appropriations was not adopted. A largely appropriated fund establishes a precedent adverse to the public interest—it tells polluters that the longer it takes for problems to appear, the less responsible they are for paying the costs of their actions, regardless of the severity of the impacts. Too often the general taxpayer is asked to pick up the bill
B. The Liability Provision: § 107

Liability under section 107 of the Act is triggered by a release or threatened release of a hazardous substance into the environment which causes the government to incur expenses for problems he did not create; when costs can be more appropriately allocated to specific economic sectors, such costs should not be added to the public debt.46


47 Id.

48 Section 101(22) of CERCLA defines release broadly as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment . . . ." 42 U.S.C. § 9601(22) (1982). For a definition of "release" under Maryland law, see MD. HEALTH-ENVT. CODE ANN. § 7-201 (Supp. 1986).


50 The term "hazardous substance" has been defined broadly by referring to substances defined as hazardous in a number of environmental statutes, including those defined in the Solid Waste Disposal Act, 42 U.S.C. § 6921 (1982), the Clean Water Act, 33 U.S.C. § 1317(a) (1984) and the Clean Air Act, 42 U.S.C. § 7412 (1982). See 42 U.S.C. § 9601(14) (1982). But note section 101(14) of CERCLA specifically excludes from the definition of hazardous waste "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance" under the other subsections of section 101(14). 42 U.S.C. § 9601(14) (1982). Natural gas, natural gas liquids, liquefied natural gas, synthetic gas and mixtures of synthetic and natural gas are all excluded from the statutory definition of waste as well. Id. These exclusions do not pose a hazard, for section 104(a) of CERCLA gives the President and the EPA, by the President's delegation of power, authority to clean up a substance which poses an imminent and substantial threat to human health and welfare regardless of whether the pollutant or contaminant is listed under § 101. 42 U.S.C. § 9604(a).

51 See 42 U.S.C. § 9601(8) (1982) for definition of environment under CERCLA.

52 For a discussion of cases requiring the government to incur some cleanup and response costs before allowing recovery, see V. YANNOCONC, B. COHEN & S. DAVIDSON, ENVIRONMENTAL RIGHTS AND REMEDIES (1983 & Supp. 1984).

"Response costs" are distinct from damages, although in a Superfund litigation case, the response costs are likely to compose the bulk of the damages claim. In order to prove damages under the Act, the plaintiff must prove that (1) the damages must be "necessary costs of response" and (2) the costs incurred must be "consistent with the national contingency plan." Jones v. Inmont Corp., 584 F. Supp. 1425, 1429 (S.D. Ohio 1984).

In United States v. Price, 577 F. Supp. 1103, 1115–1116 (D.N.J. 1983), the court determined that a bare assertion that the EPA had incurred response costs in cleaning up a Superfund site was not sufficient. In rendering its opinion, the court stated, in dicta, that the costs may have been recoverable had the government alleged that the costs incurred were costs asso-
cleaning up the site. These expenses are referred to as “response costs.” Liability under the Superfund program is imposed on four classes of persons: (1) the present owner and operator of the waste site (including a vessel subject to the jurisdiction of the United States); (2) any owner or operator who owned or operated upon the land at the time in which the substance was dumped on the site; (3) any generator who arranged to have his own waste taken to the site for disposal or treatment; and (4) any person who transported the waste for disposal or treatment on the site. Through efforts to associated with the investigation of the site and in producing a feasibility study. However, the government made no such allegations and so the pleadings were held to be deficient. Id.


54 The term “response costs” is not defined in the Act. Many courts interpret the term broadly. See Jones v. Inmont Corp., 584 F. Supp. 1425, 1429 (S.D. Ohio 1984) (costs incurred as a direct result of removing hazardous substances and disposing of them in an environmentally sound manner are recoverable); Velsicol v. Reilly Tar, 8 Chem. & Rad. Waste Lit. Rep. (Chem. & Rad. Waste Lit. Rep., Inc.) 631 (E.D. Tenn. 1984) (costs of monitoring, assessing and/or evaluating a release or potential release site are recoverable); New York v. General Elec. Co., 592 F. Supp. 291 (N.D.N.Y. 1984); cf. Cotter Corp. v. Environmental Protection Agency, 21 ERC 2231 (D. Colo. 1984) (landowner lacked standing to challenge EPA costs accrued in investigating site). But see Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331 (4th Cir. 1983) (investigative costs not recoverable under the Act because they are different in kind from costs associated with containment actions, treatment or incineration of waste, provisions of alternate water supplies and monitoring the cleanup project, all costs which are specifically referenced in the Act); United States v. Vertac Chem. Corp., 21 ERC 1458, 1461 (E.D. Ark 1984) (defendant chemical company’s alternative plan to contain the toxic wastes, at an estimated cost of $2 million, was superior to the EPA’s plan, at an estimated cost of $22 million). Likewise, the government may recover its cost to prevent a release or to minimize damage to public health. Jones, 584 F. Supp. at 1429. The term “response cost” has evolved in the judiciary and it is not clear when such costs incurred by the government cease to be recoverable.

The Maryland statute provides that the state has the right to enter and inspect the premise, MD. HEALTH-ENVTL. CODE ANN. §§ 7-106–7107 (1982), but the statute is silent as to whether the costs of inspection would be considered “response costs” under the state act.


52 See 42 U.S.C. § 9607(a)(3) (1982); cf. MD. HEALTH-ENVTL. CODE ANN. § 7-209 (Supp. 1986). The Maryland superfund statute requires generators who generate more than 100 kilograms of a controlled dangerous substance during one calendar month to notify the Secretary of the identity of the substance, the location where it is generated, and the method of treatment and disposal. Id.


pass the costs of cleanup to the parties responsible for the waste site, the government developed an expanded rather than a narrowed definition of who is a responsible party under the Act. The courts have responded to the government interpretations primarily with favor. Thus, the terms "owner," "operator," and "transporter" have all been defined by the courts to include past and present owners, operators, and transporters. Moreover, courts have recently held such persons liable under CERCLA without regard to whether these persons were in compliance with the state and federal environmental laws or were using state of the art disposal methods at the time of the action, factors that were given weight in favor of defendants at common law.

III. WHO IS AN OWNER OR OPERATOR UNDER CERCLA?

The statutory language of CERCLA makes it clear that certain landowners are "covered persons" under section 107 of


60 See supra notes 32-34.


63 While the practitioner should be equally concerned with the definitions of generator and transporter under the Act, this Comment will be limited to the problems associated with ownership liability.

64 CERCLA § 101(20) defines the term "owner or operator" as follows:

"owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or prerating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment. Such term does
the Act. Section 107(a)(1) dictates that current owners and operators of a facility may be held liable. In addition, section 107(a)(2) states that "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" may be held liable. Thus, a widely litigated issue has arisen as to whether mere ownership of a hazardous waste site is sufficient to trigger liability. The government's consistent position is that CERCLA does not require any showing of culpability on the part of the defendant landowner and that ownership alone is sufficient to incur CERCLA liability. The difference, however, in the statutory language between section 107(a)(1) (current "owner and operator") and section 107(a)(2) ("owner and operator" at the time of disposal) has created a distinct question whether ownership of the site without management is sufficient to impose liability under CERCLA.

The express language of the statute mandates that, as a prerequisite to imposing CERCLA liability, the plaintiff must demonstrate

not include a person, who, without participating in the management of a vessel or facility, hold indicia of ownership primarily to protect his security interest in the vessel or facility.


"Person" is defined under Superfund as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (1982); cf. MD. HEALTH-ENVTL. CODE ANN. § 7-201(r) (Supp. 1986) in which the term "person" is defined as including "the federal government, this State, any county, municipal corporation, or other political subdivision of this State, and any of their units." Id.

The definition of "facility" under CERCLA may be found in 42 U.S.C. § 9607(a)(2) (1982); see, e.g., United States v. Waste Indus., Inc., 556 F. Supp. 1301, 1318 (E.D.N.C. 1982) (stating that "with the exception of Superfund legislation, mere ownership of the site is insufficient to establish liability"), rev'd on other grounds, 734 F.2d 159 (4th Cir. 1984).


that the defendant landowners either owned or operated the facility at the time of disposal or currently own and operate the facility.\textsuperscript{72} The disjunctive language in section 107(a)(2) does not expressly demand that the landowners caused or contributed to the hazardous condition, so long as they owned the site at the time of disposal. In contrast, the conjunctive language in section 107(a)(1) implies that the plaintiff must show that the current owner both owns and manages the site at the time the action is commenced. This legislative implication is, however, without judicial support. The courts considering ownership liability have ignored the difference in statutory language between subsection 107(a)(1) and 107(a)(2). Thus, it appears that in order to hold a property owner liable under Superfund, the government need only show that the person charged was an owner or operator of the property at the time of the disposal\textsuperscript{73} or that he presently owns\textsuperscript{74} the site.\textsuperscript{75} The statutory requirement that a current owner both own and operate the site to incur liability has been virtually eliminated by judicial interpretation.\textsuperscript{76} In this manner, judicial gloss has reconciled a discrepancy that was created by the statute, but which seems attributable to hasty draftsmanship.

For example, in New York v. Shore Realty Corp.\textsuperscript{77} the Second Circuit held a development company, its chief executive officer and stockholder liable as an owner and operator of a site under subsection 107(a)(1) even though the company neither owned the site at the time of disposal nor caused or contributed to the site during its tenure on the property.\textsuperscript{78} The court explained that CERCLA did not require a showing of causation to hold a present owner liable for cleanup of the site.\textsuperscript{79} All that need be shown is that the party cur-

\textsuperscript{72} 42 U.S.C. § 9607(a) (1982).
\textsuperscript{75} But see, infra, notes 242-51 and accompanying text for discussion on whether "sandwiched" owners may be held liable under CERCLA.
\textsuperscript{76} For example, land owners have been held liable for environmental harm which was caused by tenants in possession of leased property even though the landlord was not involved in the operations of the tenant and exercised no managerial control over the property at the time the hazard was created. See Caldwell v. Gurley Refining Co., 755 F.2d 645 (8th Cir. 1985); United States v. Argent, 21 ERC 1354 (D.N.M. 1984); United States v. South Carolina Recycling & Disposal, Inc., 21 ERC 1577 (D.S.C. 1984); see also infra notes 224-32 and accompanying text for discussion of the effect of leasing activities on landowner liability.
\textsuperscript{77} 759 F.2d 1032 (2d Cir. 1985).
\textsuperscript{78} Id. at 1037, 1052.
\textsuperscript{79} Id. at 1044.
rently owns and operates the site. In this case the fact of ownership was not contested and the court assumed, without actually deciding, that Shore Realty’s indifference to the cleanup constituted “operating” the site for purposes of imposing CERCLA liability. Thus, under the reasoning of the Second Circuit any present owner who fails to clean a site would constitute an “owner or operator” of a site for liability purposes. Accordingly, following the Second Circuit reasoning, there is no difference between an “owner or operator” under section 107(a)(2) and an “owner and operator” under section 107(a)(1).

Similar reasoning is found in United States v. Price. In that case, the owners of landfill property were held liable as current owners under RCRA, even though they purchased the site several years after all dumping of hazardous materials had ceased. The court explained that their current owner’s “studied indifference” to the hazardous condition amounted to “contributing to” the disposal, making them site operators as well.

In United States v. Maryland Bank and Trust Co., the court was asked to consider whether a foreclosing bank which undisputedly owned the site “operated” the site within the meaning of subsection 107(a)(1). Rather than determine the issue on factual grounds, the court held that “[n]otwithstanding the language ‘the owner and operator,’ a party need not be both an owner and operator to incur

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80 Id.
81 Id. at 1045.
82 Id. The court explained:
Furthermore, as the State points out, accepting Shore’s arguments would open a huge loophole in CERCLA’s coverage. It is quite clear that if the current owner of a site could avoid liability merely by having purchased the site after chemical dumping had ceased, waste sites certainly would be sold, following the cessation of dumping, to new owners who could avoid the liability otherwise required by CERCLA. Congress had well in mind that persons who dump or store hazardous waste sometimes cannot be located or may be deceased or judgment-proof. . . . . We will not interpret section 9607(a) in any way that apparently frustrates the statute’s goals, in the absence of a specific congressional intention otherwise. See Capitano v. Secretary of Health and Human Services, 732 F.2d 1066, 1076 (2d Cir. 1984); Bartok v. Boosey & Hawkes, Inc., 523 F.2d 941, 947 (2d Cir. 1975).
Id. at 1045 (citations omitted).
83 The only exception to this reasoning is that in proving the liability of past owners, the government must prove that the site was owned or operated at the time of disposal where as only current ownership need be shown for present owners. Id. at 1044.
85 Id. at 1073.
liability under this subsection.” Relying on the Second Circuit analysis in *Shore Realty*, the *Maryland* district court explained:

The structure of section 107(a), like so much of this hastily patched together compromise Act, is not a model of statutory clarity. It is unclear from its face whether subsection (1) holds liable both owners and operators or only parties who are both owners and operators. This ambiguity stems in large part from the placement of the definite article “the” before the term “owner” and its omission prior to the term “operator.” Proper usage dictates that the phrase “the owner and operator” include only those persons who are both owners and operators. But by no means does Congress always follow the rules of grammar when enacting laws of this nation. In fact, to slavishly follow the laws of grammar while interpreting acts of Congress would violate sound canons of statutory interpretation. Misuse of the definite article is hardly surprising in a hastily conceived compromise statute such as CERCLA, since members of Congress might well have had no time to dot all the i’s or cross all the t’s.

An examination of the legislative history, sparse as it is, and the lone relevant case convinces the Court to interpret the language of subsection (1) broadly to include both owners and operators. The House Report accompanying H.R. 85, one of the four bills to coalesce into CERCLA, explains the definition of “operator” as follows: “In the case of a facility, an ‘operator’ is defined to be a person who is carrying out operational functions for the owner of the facility pursuant to an appropriate agreement.” By its very definition, an operator cannot be the same person as an owner. Therefore, a class defined as consisting of persons who are both owners and operators would contain no members. Such a definition would render section 107(a)(1) a totally useless provision.

The judicial interpretations of section 107(a) are clear. There is no causation requirement in imposing legal liability on past and present owners. All that need be shown is that the landowner currently owns the site or that the site was owned at the time of disposal. Once ownership is proven, liability under CERCLA is strict, joint and several.

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87 Id. at 577.
88 Id. at 578 (citations and footnotes omitted).
91 See supra notes 28–34 and accompanying text.
IV. PURCHASER LIABILITY: DOES THE MANNER IN WHICH THE TITLE TO THE PROPERTY IS HELD OR TRANSFERRED AFFECT SUPERFUND LIABILITY?

Title to property may be held in many different ways. Accordingly, transactions to transfer property may take many different forms. That property owners, past and present, may be held liable under Superfund is clear. Also clear is that certain types of owners are exempt from liability. The statute explicitly exempts "a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." Similarly, SARA includes an explicit exemption for persons who purchase property without knowledge or reason to know that it contained hazardous waste. Less clear, however, is who fits within these exemptions and whether the manner of transfer affects liability. Also unclear is how much managerial control an employee or stockholder must have before he may be liable as a responsible party. The following sections will explore the respective liability of shareholders, employees and corporations under Superfund to determine whether the manner of transfer and the method by which title is held will affect the liability of such persons.

A. Shareholder Liability

The EPA has taken the position that a shareholder may be held liable for response costs incurred by the government in cleaning up a hazardous waste site. Shareholders may be liable under three theories. First, the term "person," as defined by the Superfund statute, is quite broad. Second, shareholders may be found liable for the debts of a corporation, including response costs assessed in accordance with CERCLA, through application of the equitable doc-

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95 Memorandum from Courtney M. Price, EPA Assistant Administrator for Enforcement and Compliance Monitoring, regarding the Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) at 10 (June 13, 1984).
trine of piercing the corporate veil. Finally, shareholder/officers may be held liable through the common law theory of following the tort.

In United States v. Northeastern Pharmaceutical and Chemical Co., Inc. (NEPACCO), the district court developed a test to determine who is an owner-operator. The court used this test to find the vice president and major stockholder of the company liable in his individual capacity as an owner-operator because he had actively participated in the company's management and, thus, had (1) the capacity to control the disposal of hazardous waste at the plant, (2) the power to direct negotiations concerning the waste disposal, (3) the capacity to prevent and abate the damage caused by the dumping of the hazardous wastes at the disposal site. The court explained that it would be contrary to public policy to allow the defendant to be shielded by the corporate veil because the congressional purpose of the Act demands that persons who are in a position to know of and control the improper disposal of hazardous waste be held liable for the improper disposal of such wastes.

The district court also held the president of the company liable, despite the fact that the president's function had been merely supervisory and he had not been present at the plant during the period hazardous wastes were disposed. The court determined that as the president, founder, and major stockholder in the company, the defendant had the "capacity and general responsibility . . . to control the disposal of hazardous wastes at the . . . site." Thus, applying the NEPACCO test, the court found the president strictly liable in his individual capacity as an "owner and operator" even though he was not present at the site during the time the dumping occurred.

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100 Id. at 847–50.
101 Id. at 849.
102 Id. at 848–49.
103 Id. at 849. Although the company president did make frequent trips to check plant operations, he was not stationed at the plant and it was not established at trial whether the corporate president had prior direct knowledge of the proposed hazardous waste disposal plan. Id. Evidence was, however, produced at trial showing that the corporate president was aware of the gravity of health hazard the waste material posed and that he had participated in at least preliminary negotiations with waste disposal companies. Id.
104 Id.
105 Id.
Unfortunately, the NEPACCO district court did not express whether the liability of these two persons was based on their status as officers, shareholders, or both. Instead, the court looked to those factors in the aggregate to determine that the president and vice president had both control and ownership over the site and should therefore be liable for the costs of cleanup under CERCLA.106

Because the NEPACCO court developed a test of ownership to justify holding the defendant stockholders liable in their individual capacity, the court suggested that it need not address the issue of whether to apply the equitable doctrine of piercing the corporate veil.107 The court determined that a shareholder who exercised sufficient management functions could be held individually liable as an owner and operator. The court did not, however, discuss how much control the shareholder must have before he could be held liable as an owner. Nor did the court discuss if the shareholder must also be an officer to impose CERCLA liability. It is clear from NEPACCO that the shareholder may be held liable even if he is not present on the site at the time the offensive conduct occurred—so long as he had sufficient control over the site. However, it is not clear from the district court opinion how involved a stockholder must be in (a) the daily operations of the company, or (b) the specific waste disposal operations, before he may be held liable.

On appeal, the Eighth Circuit reversed the decision of the lower court, holding that neither NEPACCO, nor its employees or officers, could be held liable as the “owner or operator” of the site under section 107(a)(1), because they did not own the site on which the waste was disposed.108 The disposal site which was the focus of the CERCLA action was separate and apart from the NEPACCO plant. In fact, no cleanup operations were brought on to the plant premises. Thus, although the company and its officers and employees could be

106 For a discussion of officer liability see infra notes 129–37 and accompanying text. See also United States v. Conservation Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1985) (holding that the founder, chief executive officer, and majority shareholder could be held liable under section 107 of CERCLA due to his high degree of personal involvement in the management and daily operations of the site).

107 579 F. Supp. at 849. See also State v. Ventron Corp., 182 N.J. Super. 210, 440 A.2d 455 (App. Div. 1981) (parent corporation held liable for pollution caused by its subsidiary because the profits derived from the subsidiary were reaped by the parent company); Ohio v. Chem-Dyne Corp., 3 Chem. & Rad. Waste Lit. Rep. (Chem. & Rad. Waste Lit. Rep., Inc.) 507 (Ohio Ct. App. 1981) (sole shareholder held liable for environmental torts of the corporation because no separate identity was maintained between the companies owned by the shareholder and shareholder himself—all funds were comingled).

108 810 F.2d 726 (8th Cir. 1986), reh'g denied, April 8, 1987.
liable under section 107(a)(3) by “arranging for the transportation and disposal of hazardous substances,” they could not be liable as an owner-operator where they do not own the site on which the waste was disposed.\(^{109}\) Moreover, the court determined that the liability of the individuals under section 107(a)(3) could be imposed without disregarding the corporate entity because such individuals “personally arranged for the disposal of hazardous substances in violation of CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3).”\(^{110}\) The court explained:

The government argues Lee can be held individually liable, without ‘piercing the corporate veil,’ because Lee personally arranged for the disposal of hazardous substances in violation of CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). We agree. As discussed below, Lee can be held individually liable because he personally participated in conduct that violated CERCLA; this personal liability is distinct from the derivative liability that results from ‘piercing the corporate veil.’ ‘The effect of piercing a corporate veil is to hold the owner [of the corporation] liable. The rationale for piercing the corporate veil is that the corporation is something less than a bona fide independent entity.’ Here, Lee is liable because he personally participated in the wrongful conduct and not because he is one of the owners of what may have been a less than bona fide corporation. For this reason, we need not decide whether the district court erred in piercing the corporate veil under these circumstances.

We now turn to Lee’s basic argument. Lee argues that he cannot be held individually liable for NEPACCO’s wrongful conduct because he acted solely as a corporate officer or employee on behalf of NEPACCO. The liability imposed upon Lee, however, was not derivative but personal. Liability was not premised solely upon Lee’s status as a corporate officer or employee. Rather, Lee is individually liable under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because he personally arranged for the transportation and disposal of hazardous substances on behalf of NEPACCO and thus actually participated in NEPACCO’s CERCLA violations.

A corporate officer is individually liable for the torts he [or she] personally commits [on behalf of the corporation] and cannot shield himself [or herself] behind a corporation when he [or she] is an actual participant in the tort. The fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the doctrine of respondeat su-

\(^{109}\) Id. at 742–43.

\(^{110}\) Id. at 744.
perior; it does not however relieve the individual of his [or her] responsibility. (citations omitted).\textsuperscript{111}

Other cases have addressed the issue of whether to apply the doctrine of piercing the corporate veil\textsuperscript{112} and have concluded that it was not necessary to invoke the doctrine in the respective cases because the shareholders had actively participated in the management of the site\textsuperscript{113} and, therefore, could be held liable as owner-operators. For example, in \textit{United States v. Mottolo}, the court stated that it was not necessary for the plaintiff to establish the criteria necessary to pierce the corporate veil to hold a shareholder or officer liable under CERCLA.\textsuperscript{114} Likewise, in \textit{New York State v. Shore Realty Co.}, the court rejected the use of the doctrine, instead holding the defendant shareholder liable because of his extensive management of the company.\textsuperscript{115}

While no courts have used the doctrine in the context of holding shareholders liable under CERCLA in their individual capacity, neither have any courts precluded its use. Rather, by their rejection of the doctrine in the cases presented, these courts have indicated in \textit{dicta} that the doctrine might be applied—it was merely unnecessary to do so in cases involving closely held corporations where the shareholders were actively participating in the management of the company and the site. Moreover, the doctrine has been expressly recognized in the context of holding parent corporations liable under CERCLA for the actions of their wholly owned subsidiaries.\textsuperscript{116}

\textbf{B. Liability of Parent Corporations for Acts of Subsidiary}

Whether a parent corporation may be liable for acts of its subsidiary similar to the question of whether a stockholder may be held liable for corporate acts. In \textit{Wehner v. Syntex Corp.}, the court held that the question of whether the parent corporation could be held liable for dioxin contamination caused by the parent's subsidiary was

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} For a general discussion of the doctrine of piercing the corporate veil and when its application is appropriate, see H.G. HENN \& J.R. ALEXANDER, \textit{LAWS OF CORPORATIONS} 344-75 (1983).

\textsuperscript{113} See infra notes 114-16 and accompanying text.


\textsuperscript{115} 759 F.2d at 1052.

\textsuperscript{116} For a discussion of the liability of parent corporations via the doctrine of piercing the veil, see Note, \textit{Liability of Parent Corporations for Hazardous Waste Cleanup and Damages}, 99 HARV. L. REV. 986 (1986).
a question of fact which must be developed at trial. Accordingly, the defendant’s motion for summary judgment was denied. In Idaho v. Bunker Hill Co., the court held that personal jurisdiction over a foreign parent corporation would be allowed based on the activities of the wholly owned subsidiary because affidavits and documents submitted by the plaintiff showed that the two corporations were so intertwined and the parent so controlled the subsidiary that subjecting the parent to liability in the foreign court would not offend traditional notions of fair play and justice. Moreover, the flagrant disregard for corporate separateness of the two entities may subject the parent corporation to liability as an owner or operator of the site under section 107. The court explained:

Gulf contends that the facility in question was owned and operated by Bunker Hill, and not Gulf. The parties have argued this issue in much the same fashion as the personal jurisdiction

117 24 Env’t. Rep. (BNA) 1160, 1161 (N.D. Cal. 1986). In this case the court stated:
The motion for summary judgment is denied. Corporation is a publicly owned life sciences and health care company. Syntex (U.S.A.) Inc. is the wholly owned American subsidiary of Corporation. Syntex (U.S.A.) in turn owns the stock of various subsidiaries, including Syntex Agribusiness. Syntex Agribusiness has property and assets in the State of Missouri. Corporation itself owns no property in the State of Missouri. In order for Corporation to be liable for the alleged dioxin contamination in Missouri, the alter ego doctrine must apply. Corporation contends that there is nothing in the record that justifies ignoring the corporate separateness of Corporation and Syntex Agribusiness. The Court has examined the voluminous exhibits of the parties and concludes that the complex issues of law and fact which arise in consideration of the alter ego doctrine are not amenable to summary judgment, but rather should await determination of full discovery and full and complete trial.

118 635 F. Supp. 665, (D. Idaho 1986). The court explained its findings as follows:
The affidavits and documents submitted by the State establish that during the years 1968 through 1982, Gulf and Bunker Hill were so intertwined, and Gulf so controlled the management and operations of Bunker Hill, that subjecting Gulf to this court’s jurisdiction would neither offend due process considerations nor traditional notions of fair play and substantial justice. The court has considered all of the evidence in the record in making this determination. Significant to the court’s decision, however, are the following: Gulf at times controlled a majority of Bunker Hill’s board of directors; in matters dealing with pollution problems, Bunker Hill was not allowed to spend more than Five Hundred Dollars ($500) without approval of Gulf; Bunker Hill’s authorized capital was a mere Eleven Hundred Dollars ($1100) while Gulf received Twenty-seven Million Dollars ($27,000,000) in dividends from Bunker Hill between 1968 and 1974; Bunker Hill’s federal tax returns were consolidated with Gulf’s; all capital expenditures were to be approved by Gulf; and Gulf could overrule a transaction or decision regarding management made by Bunker Hill. Gulf’s activities with respect to Bunker Hill, its control of management and operation and its overall contacts with this State render it personally subject to the jurisdiction of this court.

Id.
issue discussed above. Specifically, the State has argued that an activity/contacts analysis results in a finding that Gulf was the de facto operator of the facility, if not the owner. The court agrees that the analysis with respect to Gulf's involvement in the management and operations of Bunker Hill discussed under the personal jurisdiction issue support a conclusion that Gulf was an owner or operator for purposes of CERCLA liability. . . . Defendant Gulf was in a position to be, and was, intimately familiar with hazardous waste disposal and releases at the Bunker Hill facility; had the capacity to control such disposal and releases; and had the capacity, if not total reserved authority, to make decisions and implement actions and mechanisms to prevent and abate the damage caused by the disposal and release of hazardous waste at the facility. As noted previously in this opinion, approval from Gulf was necessary before more than Five Hundred Dollars ($500) could be spent on pollution matters and before capital expenditures could be made. Gulf at times controlled a majority of Bunker Hill's board of directors and Gulf obtained weekly reports of day-to-day aspects of Bunker Hill's operations. With respect to Congress' intent that those who bore the fruits must also bear the burdens of hazardous waste disposal, it must be noted that Bunker Hill's authorized capital was a mere Eleven Hundred Dollars ($1100) while Gulf received Twenty-seven Million Dollars ($27,000,000) in dividends from Bunker Hill. Gulf fully owned Bunker Hill.

The court finds that the evidence presented is sufficient to impose liability on Gulf as an owner or operator for purposes of Section 107(a)(2), 42 U.S.C. § 9607(a)(2). The court is mindful that in adopting the above test, care must be taken so that "normal" activities of a parent with respect to its subsidiary do not automatically warrant finding the parent an owner or operator. To hold otherwise in the instant action, however, would allow the corporate veil to frustrate congressional purpose. Gulf is, in this case, an owner or operator for purposes of CERCLA liability.119

A more complicated issue was present in City of New York v. Exxon Corp.120 The parent of the now defunct subsidiary moved to dismiss the CERCLA claims against it for lack of personal jurisdiction.121 The court adopted the test enunciated in Volkswagen Werk Atkiengesellschaft v. Beech Aircraft Corp.,122 which sets out five factors to consider in determining whether the activities of the parent are sufficient to impute liability to the parent. These are: (1)
common ownership (such as in the parent-subsidiary relationship); (2) financial dependency of the subsidiary on the parent; (3) interference by the parent in the selection and assignment of the subsidiary's personnel; (4) failure to observe corporate formalities; and (5) degree of control exercised over the marketing and operational policies of the subsidiary.\textsuperscript{123} Applying the five factor test, the court found that personal jurisdiction could be exercised over the parent even though the alleged acts were made by a defunct subsidiary.\textsuperscript{124}

The lesson from these cases is clear. Superfund liability may attach where parent corporations do not strictly maintain the distinct integrity of their subsidiaries. In cases where the subsidiary is undercapitalized, the incentive of the courts to disregard the corporate separateness is strong. To do otherwise, would allow parent corporations to avoid Superfund liability by creating shell corporations which handle the company's hazardous waste. Allowing corporations to form such subsidiaries solely for the purpose of avoiding hazardous waste liability would surely frustrate the congressional intent of forcing cleanup of abandoned waste sites.

On the other hand, where corporations are adequately capitalized and formed for purposes other than avoiding Superfund (or other environmental) liability, the corporate separateness should be respected provided the company itself maintained separate corporate identities. Factors likely to weigh in favor of corporations are: financial independence of the subsidiary; independent selection of officers and personnel; observances of corporate formalities; and, independent control over marketing, operational and financial decisions. In cases in which all or most of these factors are found, then the parent should not be found liable for the acts of its subsidiary.

\section*{C. Officer Liability}

Related to the question of shareholder liability under subsections 107(a)(1) and (2) is the question of officer liability. As explained earlier in the discussion of shareholder liability, an officer may be held liable under CERCLA if he exercises sufficient control over the site. In \textit{United States v. Northeastern Pharmaceutical and Chemical Co.}, the district court explained that the imposition of liability on an individual who actively participated in the corporate management

\textsuperscript{123} 633 F. Supp. at 620–21 (citing Volkswagen Werk Altkiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117 (2d Cir. 1984)).

\textsuperscript{124} \textit{Id.} at 621.
of the site was consistent with the intent of Congress "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."125

In United States v. Mottolo, the president and principal shareholder was held liable (in his individual capacity) for the costs of cleanup because, "[a]s president of [the company], although he does not do everything every day, [the president] is responsible for the entire operation."126 The court determined that the corporation was closely held, had few employees (fluctuating between seven and twelve), and that the president had been involved in "basically every facet" and "just about every aspect" of the company.127 Likewise, in United States v. Conservation Chemical Co., the founder, chief executive officer and major shareholder was held liable under section 107(a) of CERCLA due to his high degree of personal involvement in the operation and management of the hazardous waste site.128

The difficulty in deriving a rule from these cases is that they all involve closely held corporations in which the officers were also shareholders who had a high degree of involvement in all aspects of the corporate operations. No cases have yet been reported in which an officer who is not also a shareholder has been held liable. In this regard the distinctions between the statutory language of subsections 107(a)(1) and 107(a)(2) may be dispositive.

Section 107(a)(1) holds only the current "owner and operator" of the facility liable.129 Section 107(a)(2), on the other hand, hold liable those who "owned or operated" the facility at the time in which the hazardous waste was disposed.130 Therefore, according to the express statutory language, a current officer who manages the site, but owns no part of the business, should not be held liable under a literal reading of the act because he is not both an owner and operator. On the other hand, a past officer who managed the site at the time of disposal and who also did not own the site might be liable under the Act. This distinction, of course, is illogical.

Following this line of reasoning, an officer who presently manages the site, but has no ownership interest in the site, could not be held

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127 Id.
liable so long as he continues to operate and manage the site. However, if that same person leaves his post, or the business is sold (or goes out of business), then he may be held liable under subsection 107(a)(2) as a past operator—even though he never owned a part of the operation. This is an unreasonable result which reflects the poor draftmanship in the statute. As mentioned earlier, this distinction is not likely to be recognized by courts.\textsuperscript{131}

Other courts have refused to allow the corporate shield to protect the individual who was factually responsible for the creation or continuation of the hazardous waste site without finding liability under Superfund, but instead applying the common law principle of nuisance.\textsuperscript{132} In one case, the court determined that if it allowed individuals to escape environmental liability by hiding behind the protection of corporate laws it would contribute to the perpetration of a fraud on the public.\textsuperscript{133} In \textit{New York v. Shore Realty Corp.},\textsuperscript{134} the state of New York brought suit against Shore Realty Corporation and Donald LeoGrande, the corporation's chief officer and sole stockholder, to clean up a hazardous waste site located on property which Shore Realty had purchased for land development purposes. The corporate president knew that the site contained hazardous waste when he purchased it and he was aware at the time of purchase that the site cleanup would be expensive. Neither LeoGrande nor the corporate entity had participated in the generation or transportation of the hazardous waste.\textsuperscript{135} Nonetheless, the court held LeoGrande personally liable.\textsuperscript{136}

The decision to assign liability for the cost of cleanup to a seemingly innocent property owner who purchased with knowledge of the hazardous conditions is not surprising. It is in accord with prior case law—both under CERCLA and under the common law theory of nuisance. Yet the \textit{Shore Realty} court extended this liability to LeoGrande on the basis of both his individual as well as his corporate capacity. The court determined that it would be inequitable to allow the corporate president to shield himself from liability by hiding behind the corporate veil.\textsuperscript{137} The president was in control of the corporation and was an active participant in the corporation's tor-

\textsuperscript{131} See supra notes 72–88 and accompanying text.

\textsuperscript{132} See, e.g., \textit{New York v. Shore Realty Corp.}, 759 F.2d 1032 (2d Cir. 1985).

\textsuperscript{133} \textit{New York v. Shore Realty Corp.}, 759 F.2d 1032 (2d Cir. 1985).

\textsuperscript{134} 759 F.2d at 1032.

\textsuperscript{135} \textit{Id.} at 1038–39.

\textsuperscript{136} \textit{Id.} at 1052–53.

\textsuperscript{137} \textit{Id.}
tious conduct of maintaining a nuisance. However, the court found the president liable under the state common law of nuisance without finding it necessary to determine Superfund liability or pierce the corporate veil. 138 Under the common law, a corporate officer who participates in the torts of the corporation may be held liable for the resulting harm. 139 LeoGrande had entered into a consent decree with the State of New York in which he agreed, both in his individual as well as his corporate capacity, to clean up the hazardous waste site—a nuisance under state common law. LeoGrande failed to comply with the order. The court was thus willing to look beyond mere legal title and hold the person who was actually responsible for the cleanup liable for failure to do so.

D. Corporate Liability

Because the definition of liable “persons” under CERCLA includes a corporation, 140 a principal concern for corporations is what actions may expose them to Superfund liability. While a corporation is obviously liable if it is a generator, transporter, past owner or operator of a waste disposal site at the time of disposal or a corporate owner and operator, 141 a more indefinite question is when a successor corporation assumes liability under CERCLA through purchase of assets, stock exchanges, mergers, joint ventures, or due to the actions of an employee under the doctrine of respondeat superior.

1. Liability Resulting from Acquisition of Contaminated Real Estate

As a general rule, when one corporation sells its assets to another, the successor corporation does not assume liability of the predecessor simply by virtue of its acquisition of the predecessors corporation’s assets. 142 The EPA has, however, taken the position that broad liability should be imposed on successors where: (1) the successor expressly or impliedly contracts to assume the obligations of its predecessor; (2) the merged entity continues essentially the same operation as the prior owner; (3) the transaction amounts to a de facto merger; or (4) the transaction was fraudulently entered into in

138 Id. at 1052. There was a question as to whether the company was undercapitalized. Id.
139 Id.
order to avoid environmental liability.\textsuperscript{143} This position is in accord with the common law approach to landowners engaged in ultrahazardous activities\textsuperscript{144} and the general principles of corporate law.\textsuperscript{145}

This problem of the extent to which a person can sell or acquire its liabilities for hazardous waste disposal has been a topic of judicial consideration almost since the conception of the Act.\textsuperscript{146} In a number of cases, the question has arisen in situations where the asset acquired is the waste disposal site itself. In \textit{United States v. Price},\textsuperscript{147} the court was faced with the problem of determining the liability of both a past generator of a hazardous waste site and the purchaser who acquired the property. The sellers had operated the site as a non-hazardous landfill from 1969 to 1976. The site was in compliance with relevant New Jersey regulations and was represented to the buyers as such. The court found that the sellers had permitted the unauthorized dumping of hazardous waste materials. The sellers did not inform the buyers of the disposal of these hazardous industrial wastes and the buyers acquired the property as innocent purchasers.\textsuperscript{148}

After reviewing the legislative history of CERCLA, the court held that both the buyers as well as the sellers were liable not under Superfund but under RCRA.\textsuperscript{149} The sellers were liable because they

\textsuperscript{143} Memorandum from Courtney M. Price, EPA Assistant Administrator for Enforcement and Compliance Monitoring Regarding the Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) at 13–15 (June 13, 1984). This legal concept has been termed the "mere continuation" exception to the general rule that an acquiring corporation does not assume liability for the torts of the predecessor by purchasing assets. Where a corporation acquires substantially all of the assets of another corporation and continues essentially the same operation as the predecessor corporation, the successor corporation may be liable for the torts of the predecessor based on the mere continuation aspect of the transaction. This exception developed in the context of products liability cases and has been applied, by analogy, in the context of hazardous waste disposal. See, e.g., Department of Transportation v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (1980). But see United States v. Outboard Marine Co., 549 F. Supp. 1032 (N.D. Ill. 1982). For early cases in which the courts developed this continuity of business operations approach, see Oner II, Inc. v. United States, 597 F.2d 184 (9th Cir. 1979); Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 431 A.2d 811 (1981); Ray v. Alad Corp., 19 Cal.3d 22, 136 Cal. Rptr. 574, 506 P.2d 3 (1977).

\textsuperscript{144} State v. Ventron, 94 N.J. 473, 468 A.2d 150 (1983); Rylands v. Fletcher, 1 L.R.-Ex. 265 (1866), aff'd, 3 L.R.-E. & I. App. 330 (1866).


\textsuperscript{147} 523 F. Supp. at 1055.

\textsuperscript{148} Id. at 1073.

\textsuperscript{149} Id. at 1072–73.
had allowed the waste to be dumped on the site.\textsuperscript{150} The buyers were held liable because they “contributed to the disposal (i.e. leaking) of wastes merely by virtue of their studied indifference to the hazardous condition” that existed.\textsuperscript{151}

The \textit{Price} court’s decision was influenced by a number of factors peculiar to the case. First, the purchase price paid for the property reflected the fact that the property had previously been used as a landfill.\textsuperscript{152} Second, the purchaser was a real estate developer and not a private individual purchasing the property to build his own residence.\textsuperscript{153} “As sophisticated investors, [the purchasers] had a duty to investigate the actual conditions that existed on the property or take it as it was.”\textsuperscript{154} Finally, after learning of the dangerous conditions, the purchasers left the site unattended. As owners of the site, they failed to abate the hazardous conditions on their premises.\textsuperscript{155}

The opposite result was reached in \textit{State Department of Environmental Protection v. Ventron Corp.},\textsuperscript{156} where “innocent” purchasers installed a containment system upon the discovery of hazardous waste materials. The trial court found that the buyers had successfully abated the hazardous condition by their mitigating actions.\textsuperscript{157} The trial court thus concluded that the purchasers should not be

\textsuperscript{150} \textit{Id.} The court explained:
It is evident that the current leaking of contaminants from the landfill is being contributed to in large measure by the failure of the . . . defendants to store properly the chemical wastes. Certainly, that proper storage should have been done in 1971 and 1972, when the wastes were originally deposited in the landfill. But it cannot be denied that their continued failure to rectify the hazardous condition they created has been and is contributing to the leaking that is now occurring. \textit{Id.} at 1072. This reasoning can be applied by analogy in the CERCLA context, since the goals of CERCLA and RCRA are both to protect the public from hazardous wastes.

\textsuperscript{151} \textit{Id.} at 1073. The court reasoned that the generation of waste need not be active in order to hold a landowner liable for the costs of cleanup. See \textit{id}.

\textsuperscript{152} \textit{Id.} at 1059.

\textsuperscript{153} \textit{Id.} at 1058.

\textsuperscript{154} \textit{Id.} at 1073.

\textsuperscript{155} \textit{Id.} The court found further support for the proposition that landholders who fail to abate the hazardous condition should be held liable for the cost of cleanup in section 6934 which states that the liability of subsequent landowners will be limited to situations in which they “could not reasonably be expected to have actual knowledge of the presence of hazardous waste at such facility or site and of its potential for release.” \textit{Id.} at 1074 (quoting 42 U.S.C. § 6934(b)).


\textsuperscript{157} 94 N.J. at 486–87, 468 A.2d at 156–57.
held liable for the response costs. The buyers' actions were not "a substantial factor in proximately causing the total dangerous and toxic condition."\textsuperscript{158} To the contrary, the purchasers had acted with providence and had done all within their power to reverse the hazardous situation. Therefore, the court refused to hold the purchasers liable for response costs under CERCLA, while in the other cases the buyers had been liable.

Taken together, the two cases demonstrate that an "innocent purchaser" who attempts to rectify the hazardous condition upon discovery is not likely to be held liable for cleanup of hazardous wastes located on the purchased property. This principle is consistent with the common law of nuisances which holds that a landowner who abates (rather than maintains) the nuisance is not liable in tort. On the other hand, a sophisticated investor who knows or has reason (by virtue of sophistication) to know that the site contains hazardous waste will be held liable for response costs.\textsuperscript{159}

This discrepancy in liability between innocent landowners and sophisticated investors is codified by SARA in CERCLA section 101(35).\textsuperscript{160} Under this new section, a person who, at the time of acquisition, "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,"\textsuperscript{161} or who acquired it by inheritance or bequest,\textsuperscript{162} would not be liable under section 107. The burden of proving that one is an innocent landowner is, of course, on the landowner.\textsuperscript{163} Moreover, in determining the landowner's relative innocence "the court shall take into account any specialized knowledge or experience on the part of the defendant, . . .

\textsuperscript{158} Id. at 492–98, 468 A.2d at 160. In addition to finding that the buyers were not liable, the \textit{Ventron} court allowed the purchasers to recover from the sellers the cost of installing the containment system as well as the difference in value between the purchase price of the land and actual value of the land containing the hazardous waste. \textit{Id.} The buyers' recovery was based on the fact that the presence of hazardous waste on the site was a latent defect which was intentionally concealed by the sellers. \textit{Id.} at 486.


\textsuperscript{161} SARA § 101(f), Pub. L. No. 99-499, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1616, 1616 (to be codified at, 42 U.S.C. § 9601(35)).


and the ability to detect . . . contamination by appropriate inspection.”

A slightly different problem is presented where the asset purchased is not merely a piece of land, but is a corporation, corporate name or other personal property. In Missouri v. Independent Petrochemical Corp., the court held, in a very brief opinion, that a corporation may be held liable under CERCLA section 107(a) where its corporate predecessor arranged for the disposal of hazardous waste at the cleanup site. Unfortunately, the court neither described the purchase agreement between the two corporations nor described the extent to which the operations of the predecessor corporations were continued after purchase. The court merely held that the contract to dispose of the waste, made by the predecessor corporation, created a cognizable claim against the successor corporation.

Relying on the scant reasoning in Missouri v. Independent Petrochemical Corp., the court in United States v. Conservation Chemical Co. held that a company may be held liable as a transporter and disposer of hazardous waste due to the acts of its predecessor. The successor corporation incorporated in 1982 and thereafter purchased the name and other assets of the predecessor corporation. The purchase agreement expressly provided for the assumption of liability by the successor corporation in certain (unspecified) matters. The disposal that triggered liability was completed before the successor company had even incorporated. The sale agreement did not clearly state the relationship the successor corporation was to have with the predecessor. Therefore, the court denied the motion for summary judgment because a genuine issue as to material facts existed. The court noted that, if the relationship of the successor to the predecessor is found to be a continuation, it is likely that the successor will be held liable. On the other hand, if the successor is found to be a new and separate corporation, it is likely that it “cannot be held liable as it was incorporated on October 19, 1982, as counsel makes extremely clear, after the closure of the CCC site.”

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166 Id. In its conclusion the court remarked that the “[d]efendant, of course, remains free to assert at trial any of the affirmative defenses listed in 42 U.S.C. § 9607(b).” Id.
168 Id. at 253.
169 Id. at 253-54.
In general, where the purchased assets include a hazardous waste site, general corporate laws are unnecessary to impose liability if the purchaser continues the same or substantially the same operations as those of his predecessor. The acquiring owner may be held liable under section 107 of CERCLA as a current owner or operator. Courts have not yet addressed the issue where the acquired assets are used for a different purpose, although recent cases suggest that the acquiring corporation is likely to be held liable for cleanup costs as a current owner, even though the site is used for different purposes. Moreover, one court has found the purchaser liable under the common law for failure to abate a public nuisance even though the “innocent” purchaser could not be enjoined under Superfund.

2. Mergers, Consolidations and Other Transactions Involving Exchanges of Stock

For the uninformed, mergers, consolidations and other transactions involving an exchange of stock pose an even greater risk of CERCLA liability than do asset acquisitions. The most significant difference between a stock exchange and an asset acquisition, from the standpoint of Superfund liability, is that a stock exchange may result in liability for the surviving corporation for past hazardous waste disposal at sites which the acquired company used or owned prior to the exchange. Under corporate law, a surviving corporation is held liable for all the debts, contracts and torts (including environmental liabilities) of the predecessor corporation. Therefore, if the merged company may be held liable as a past or present owner,

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170 The problem of defining when one corporation ceased and the other began is more significant where the corporation is being held liable as a past owner or operator, a generator, or a transporter. The issue is largely irrelevant where the corporation owns or operates the site presently since it can then be held liable as a present owner. In contrast, the issue is critical in these other contexts because if the corporations are separate they may not be considered covered persons under the statute.


generator, or transporter, the surviving company will retain that liability without regard to when the merger took place or whether the successor corporation was aware of the past acts which led to the imposition of CERCLA liability.\textsuperscript{176} Persons contemplating a stock exchange must look very carefully into the history of the corporation considered for acquisition to determine whether it may have produced hazardous wastes as a by-product or in conjunction with any of its past or present operations, and if so how these wastes were disposed.\textsuperscript{177}

The liability of a person purchasing through a stock exchange or merger is substantially greater than an asset acquisition. In an asset acquisition, the purchaser need only consider the site itself. In a merger or stock exchange, inquiry must be made into all corporate dealings to determine if any hazardous wastes were generated, transported, or owned in any past as well as present sites or operations, for liability in a merger or stock exchange could extend to any such actions.

3. Liability of a Company for Acts of Employees

A final means by which a corporation can become liable under CERCLA is by the acts of its employees.\textsuperscript{178} In \textit{United States v. South Carolina Recycling and Disposal, Inc. (SCRDI)},\textsuperscript{179} the court held that the company could be held liable as an operator of a hazardous waste site for three reasons. First, the company was generally involved in the hazardous waste business.\textsuperscript{180} Second, the company's vice president held himself out to the public, the government agencies and to potential clients of the waste disposal company as a duly authorized agent of the company. The court was unclear whether the vice president's authority was express, implied or merely apparent authority, but determined that under any of these


\textsuperscript{177} See generally Comment, Successor Corporate Liability for Improper Disposal of Hazardous Waste, 7 W. NEW ENG. L. REV. 909 (1985).

\textsuperscript{178} For a general discussion of the doctrine of respondeat superior, see W. PROSSER & W.P. KEETON, TORTS 499–532 (1984).


\textsuperscript{180} The court explained that this involvement was "evidenced by COCC's cleanup of the waste disposal site in Clover, South Carolina and subsequent removal of some of the waste materials from that site to the Bluff Road facility [the facility which was the subject of suit]." 14 Envtl. L. Rep. at 20897.
agency theories the company would be bound under the doctrine of respondeat superior. 181

Third, the SCRDI court held that even if the plaintiff could not prove that the vice president was an authorized official of the corporation, the company could still be held liable as an operator of the site under partnership law by applying the principles of joint ven-

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181 Id. at 20898. The court explained:

[The evidence leads this court to conclude that from 1974 to 1976, James Q. A. McClure was an employee and servant of COCC—a vice president in charge of the company's Solvents and Bulk Chemicals Division. In his official capacity as vice president, McClure supervised and directed the storage and disposal of hazardous substances at the Bluff Road site. McClure's authority to conduct these activities was either express or implied by virtue of his position as vice president. Moreover, even if these activities were not expressly or implicitly authorized by COCC, McClure clearly had the apparent authority to conduct waste storage and disposal activities. Under the principle of apparent authority, "one who holds out another, or allows him to appear as having authority to act, as his agent with respect to his business generally, or with respect to a particular matter, cannot . . . deny that his apparent authority is real." Glens Falls Indemnity Bank Co. v. Palmetto Bank, 23 F. Supp. 844, 848 (W.D.S.C. 1938) (emphasis added). The court in Glens Falls made the following observations:

The public is compelled to rely upon the apparent authority of agents of . . . corporations, especially when as managers or superintendents or executives, they are placed in control or in charge of the corporation's business. The fact that one has an office at the principal place of business of the corporation where its actual operations take place, that he is apparently in charge of the office and the work, that he supervises and gives orders to employees, that he opens letters of the corporation, that he conducts its correspondence, that he signs the checks, handles the bank accounts, the cash, etc. and all the surrounding facts and circumstances may be considered and taken into account regardless of his title, in determining what his apparent authority is.

The apparent scope of an agent's authority is that authority which a reasonably prudent man, induced by the principal's acts or conduct, and in the exercise of reasonable diligence and sound discretion, under similar circumstances with the party dealing with the agent, and with like knowledge, would naturally suppose the agent to have.

Id.

In this case, a reasonably prudent man would naturally have concluded that McClure had the authority to conduct hazardous waste activities on behalf of COCC. Here, McClure was given office space and secretarial support by COCC, conducted correspondence relating to hazardous waste activities on COCC stationary, and held himself out to the public, to government agencies, and to potential waste disposal customers as a duly authorized agent of COCC. Because McClure had either the express, implied, or apparent authority to conduct waste storage or disposal activities, COCC is, under the doctrine of respondeat superior, bound by his acts and liable under CERCLA for the result of those acts. E.g., Johns Hopkins University v. Hutton, 422 F.2d 1124 (4th Cir. 1970); Bradley v. Hullander, 272 S.C. 6, 249 S.E.2d 486 (1978).

Id. at 20897–98.
A joint venture is created when two or more persons join together for profit or for mutual benefit. No partnership designation need be made by the parties so long as they intend to work together on a venture for profit.

In *SCRDI*, the court found that the vice president's action of soliciting clients coupled with the written contract between the corporation and the vice president to do so, indicated that a joint venture existed between the officer, as an individual, and the corporation, as an entity. The law of partnership dictates that one joint venturer may be held jointly and severally liable for the torts, contracts, and debts incurred by either joint venturer on behalf of the joint enterprise. Therefore, the corporation could be held liable as an operator under CERCLA based on the joint venture relationship between the corporation and one of its corporate officers.

**E. Lenders as Owners or Operators**

Recent cases make it clear that lending institutions may be liable under Superfund section 107 if the lender currently exercises or exercised in the past so much control over the borrower as to effectively become the owner or operator itself. At issue is whether the creditor of an owner or operator fits within the statutory definition of "owner or operator" set out in section 101(20)(a). This section reads as follows:

"owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility . . . .

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182 *Id.*
183 *Id.*
184 *Id.*
185 *Id.*
186 *Id.* The court said that "[a]pplication of this [joint venture] rule to public health and safety statutes like CERCLA seems particularly appropriate." *Id.*
187 See *id.*
In *United States v. Mirabile*,\(^{190}\) the court held that a hazardous waste site owner's secured creditor may be held liable for response costs under CERCLA section 107 if he exercised control over the nuts and bolts operations of the site.\(^{191}\) The facts are as follows. The United States brought suit against the present owners of a site on which a paint factory was located. The owners in turn sued two private lenders, American Bank and Trust Company (ABT) and Mellon Bank (East) Nation Association (Mellon), which had financed the manufacturing plant, alleging that the lenders exercised so much control over the facility as to constitute "owners" within the meaning of CERCLA. The banks in turn sued the United States Small Business Administration (SBA), which also had made loans to the owners of the plant.\(^{192}\) In a motion for partial summary judgment, the court dismissed the actions against ABT and SBA, but not Mellon Bank.\(^{193}\)

The *Mirabile* court explained that the problem of creditor liability is largely analogous to the issue of shareholder liability.\(^{194}\) Just as there is an inference of shareholder liability when the shareholder engages in active participation in the management of the facility, so too is there an implication of liability in the case of a foreclosing mortgagee who participates in the management of the facility to an extraordinary degree.\(^{195}\)

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\(^{191}\) The court explained its reasoning as follows:

"Thus, the statutory definition of "owner or operator" becomes critical: "owner or operator" means ... (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility ... Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility. 42 U.S.C. § 9601(20)(A) (1982). (Emphasis added)."

\(^{192}\) "Id. at 20995. (emphasis in original). Were it not for the underscored exemption from liability, the definition would be a hopeless tautology. Nevertheless, the exemption plainly suggests that provided a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be held liable for cleanup costs. The difficulty arises, of course, in determining how far a secured creditor may go in protecting its financial interests before it can be said to have acted as an owner or operator within the meaning of the statute.

\(^{193}\) "Id.

\(^{194}\) "Id. at 20997.

\(^{195}\) The court acknowledged the NEPACCO test for defining who is an owner, but explained that, "NEPACCO, Shore and Carolawn provide only limited guidance in the instant case because in each case the individual defendants were extremely active in the affairs of closely held corporations." *Id.*
The *Mirabile* court distinguished, however, between lender participation in the day to day operations of the site versus strictly financial involvement. The mortgagee must participate in the management of the facility itself, and not merely make financial recommendations to the corporate entity, before the foreclosing bank may be held liable as an owner and operator under section 107. Accordingly, the *Mirabile* court concluded that ABT, a creditor who merely foreclosed on the collateral property after all disposal operations had ceased and who took all prudent and ordinary steps to secure the property from vandalism, would not be liable under section 107. In addition, the court determined that the SBA, a creditor who had the authority to participate in the management of the company, but who did not exercise the option, would also be held not liable under section 107 (and was thus entitled to summary judgment on the issue of liability).

Disposal activities. Mere financial ability to control waste disposal practices of the sort possessed by the secured creditors in this case is not, in my view, sufficient for the imposition of liability.

196 The court explained that the intent of CERCLA was "to impose cleanup costs on those who bore the fruits of hazardous waste disposal and who were involved in the planning and implementation of the disposal practices." *Id.*

197 The bank took only the following actions with regard to the property: It secured the building against vandalism by boarding up windows and changing locks, made inquiries as to the approximate cost of disposal of various drums located on the property, and, through its loan officer Donald Hans, visited the property on various occasions for the purpose of showing it to prospective purchasers. All these activities occurred several months after Turco ceased its operations at the site.

198 The court said that it need not decide the issue of whether ABT's successful bid at the sheriff's auction vested it with the sort of ownership defined under CERCLA because regardless of the nature of the title ABT held, "its actions with respect to the foreclosure were plainly undertaken in an effort to protect its security interest in the property." *Id.* ABT made no effort to continue the operations of its predecessor on the land. In fact, ABT had foreclosed on the property eight months after the operations had ceased. *Id.*

199 The court's reasoning in this regard is particularly important:

Obviously, imposition of liability on secured creditors or lending institutions would enhance the government's chances of recovering its cleanup costs, given the fact that owners and operators of hazardous waste dumpsites are often elusive, defunct, or otherwise judgment proof. It may well be that the imposition of such liability would help to ensure more responsible management of such sites. The consideration of such policy matters, and the decision as to the imposition of such liability, however, lies with Congress. In enacting CERCLA Congress singled out secured creditors for protection from liability under certain circumstances.

Unlike ABT, the SBA never took either legal or equitable title to the site. In this respect, its case for summary judgment is stronger than that of ABT. The Mirables place principal reliance on the SBA's loan agreement with Turco which apparently
In contrast, Mellon Bank, the third Mirabile creditor was held potentially liable under CERCLA. The court found that the nature of the third creditor’s involvement in the site was not clear and “requires a more finely tuned determination of the sort of participation in management which will lead to the imposition of CERCLA liability . . . .” The court suggested that Mellon Bank’s participation in the affairs of its borrower may have extended beyond mere participation in purely financial affairs. The court, therefore, de-

contemplated some degree of involvement which could be characterized as participation in day-to-day management; however, this involvement apparently never occurred. The loan agreement also contained certain restrictions on Turco’s finances which the Mirables contend are evidence of SBA participation in the management of Turco. They argue that in placing restrictions on the use of loan proceeds, the SBA “may have failed to prevent Turco from disposing of alleged hazardous substances on the site.” I find nothing in the language of the statute or the case law under it which suggests that a lender must ensure that its loan proceeds are applied to clean up costs.

As noted above, I do not believe participation in purely financial aspects of operation, of the sort which occurred here, is sufficient to bring a lender within the scope of CERCLA liability. Furthermore, in the present case, many of the restrictions imposed by the SBA loan agreement limited the flow of corporate funds to principals of Turco. Thus, these restrictions do not support the Mirables’ contention that the SBA precluded the use of its funds for cleanup activities and should therefore be held potentially liable. I will therefore enter summary judgment in favor of the SBA on all claims asserted against it.

Id. The two creditors, ABT and SBA, properly brought themselves within the protection of the statute. ABT was protected because it was a secured creditor and SBA because it participated in purely financial aspects of the operation. Id. at 20996–97.

Id. at 20997.

See id. The court explained:

The Mirables place principal reliance upon Mellon’s participation, through its loan officer Brett Sauer, in the Turco Advisory Board, and upon Mellon loan officer Peter McWilliams’ post-bankruptcy oversight of the company. Were the record before me limited to the activities of Mr. Sauer, I would have little difficulty in granting Mellon’s motion.

For example, the Mirables rely upon the deposition testimony of Edwin Stulb, IV to establish Sauer’s participation in the management of the company; however, that testimony unmistakably reveals that Mr. Sauer gave general financial advise and did not discuss production or waste disposal . . . .

What gives me pause with respect to Mellon’s summary judgment motion is the uncertainty surrounding McWilliams’ participation in the management of the company. Mr. McWilliams testified he became involved with Turco because his superiors at Mellon wanted him to have “more of a day-to-day hands-on involvement.” He described this involvement as including monitoring the cash collateral accounts, ensuring that receivables went to the proper account, and establishing a reporting system between the company and the bank. (McWilliams dep. at 42, Exhibit F to Mirabile response). Under my reasoning outlined above, this sort of activity would not give rise to CERCLA liability.

Mr. Fitch testified it seemed for a period of time as if Mr. McWilliams was “always” present at the site. He clarified this by stating that McWilliams visited the plant
The court's holding was not without caveat: The reed upon which the Mirables seek to impose liability on Mellon is slender indeed; however, bearing in mind that all doubts are to be resolved in favor of that party opposing a motion for summary judgment, I conclude that, taken as a whole, the deposition testimony outlined above presents a genuine issue of fact as to whether Mellon Bank, through its predecessor Girard Bank, engaged in the sort of participation in management which would bring a secured creditor within the scope of CERCLA liability. In particular, it would be helpful to have a clearer picture of McWilliams' participation in the manufacturing processes and of the extent to which Garfinkle acted at the direction of Girard.

Id. at 576.
to protect a then-held security interest in the land." The court explained that the exclusion was created to protect mortgagees in states following the common law such that the lender holds a title interest in the land taken as collateral. Accordingly, the court reasoned that the exclusion would not apply to former mortgagees, such as Maryland National Bank and Trust, who currently hold title to the collateral after purchasing it at a foreclosure sale and holding title for nearly four years (and a full year before the EPA commenced its cleanup operations).

Although purely financial involvement with a borrower should not render a lender liable under Superfund, certain activities might more readily subject a lender to liability. In Maryland National Bank, it was made clear, for example, that actions which are aimed at protecting the lender's investment rather than simply protecting its collateral are likely to bring the lender within the definition of "owner" or "operator" under CERCLA. Thus, an astounding principle emerges. A lender may be held liable under Superfund whether

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207 Id. at 579.
208 See id. at 580. The court relied on H.R. Rep. No. 96-172, Part 1 in reaching its conclusion that "Congress intended to protect banks that hold mortgages in jurisdictions governed by the common law of mortgages, and not all mortgagees who later acquire title." Id. at 580.
209 See id. The court distinguished the situation before it from the Mirabile situation. Id. In Mirabile, the court found that the purchase of the land at foreclosure was "plainly undertaken in an effort to protect its security interest in the property." Id. The Maryland National Bank court explained that the rule in Mirabile pertained only to a situation in which a mortgagee-turned-owner promptly assigned the property; and to the extent that the Mirabile holding "suggests a rule of broader application, this court respectfully disagrees." Id.
210 Another commentator stated that based on debtor-creditor principles, these activities are likely to result in CERCLA liability:
- Taking over the management of the debtor;
- Obtaining the right to have a third party manage the affairs of the debtor;
- Installing an agent to take over the management of the debtor's business;
- Promising payments to other creditors on behalf of the debtor; and
- Foreclosing on contaminated property that is held as security for a loan.

211 Activities designed merely to create and protect the lender's security interest should not give rise to Superfund liability. Among these are:
- Entering into a security agreement;
- Filing financing statements (UCC-1 forms), even for hazardous materials;
- Requiring a debtor to submit to the creditor detailed financial statements;
- Auditing the books of a debtor;
- Monitoring cash collateral accounts;
- Establishing a financial reporting system between the debtor and the creditor;
- Providing the debtor with financial counseling; and
- Recommending consultants to the debtor.

Burcat, supra note 210, at 537–38.
or not it chooses to foreclose. Under *Mirabile*, a creditor may be held liable if he directs the debtor's operations in an attempt to keep the debtor from defaulting.\(^{212}\) Whereas, under *Maryland National Bank*, the creditor may be held liable if it fails to become involved in a workout, allows the debtor to default, and then seizes the collateral.\(^{213}\) The combined effect of these two cases puts lenders in an extremely awkward situation in circumstances where the borrower is in financial difficulty and has engaged in activities which produce hazardous waste.

The government's decision to charge the foreclosing bank liable as an owner is likely to have profound effect on future lending transactions. Lenders holding a lien on real property who have reason to believe that the property contains hazardous waste are forced to make an economic decision whether or not to foreclose on the property if the debtor defaults.\(^{214}\) It may be cheaper for the bank to write off the amount of the loan as a bad business venture rather than risk being held liable for the cost of cleaning up the waste site. As a result of this drastic measure, the *Maryland National Bank* holding may profoundly affect future lending transactions in which a hazardous waste site is implicated. The practical effect of *Maryland National Bank* may frighten lenders into avoiding loan transactions in which a hazardous waste site is involved, or cause the mortgage terms to economically preclude closing the deal.\(^{215}\)

Because Superfund liability may be imposed on a lender who becomes excessively involved in the affair of the borrower, lenders should be reluctant to structure loan arrangements which allow or require them to become involved in the borrower's affairs, should the borrower run into financial difficulty. This effect of Superfund may prevent lenders from engaging in typical "workout" techniques with borrowers who need financial guidance. When this fact is coupled with the fact that a lender cannot be sure of the degree of


\(^{214}\) See *Small Businesses Have Financial Problems Because of CERCLA Liability, House Panel Told*, [16 Current Developments] Env't Rep. (BNA) 518, 519 (July 26, 1985). See also United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986); *In re T.P. Long Chem. Co.*, 45 Bankr. 278, 288--89 (N.D. Ohio 1984) (bank could not be held liable as owner or operator of facility even if the property was repossessed because the bank did not participate in the management of the company).

\(^{215}\) See *EPA Chief Asks Senate Judiciary to Retain Joint, Several Liability in Superfund Law*, [16 Current Developments] Env't Rep. (BNA) 270 (June 14, 1985), wherein Richmond attorney George C. Freeman stated that the EPA enforcement policy "is a signal to investors that doing business in the United States has become unpredictable and unfair."
Superfund liability it may incur, since environmental audits undertaken prior to the making of a loan in no way can predict the extent of liability later on, loans to borrowers engaged in activities which may produce hazardous waste become very shaky investments indeed. Thus, the effect of Mirabile and Maryland National Bank on persons seeking loans may be very chilling. 216

F. Leasing Activities: The Landlord and Tenant as Owners or Operators

The process of assessing ownership liability is particularly difficult in the context of the landlord/tenant relationship. In order to be held liable for the costs of cleanup under CERCLA section 107, it must be shown that the potentially responsible party owned, operated, generated or transported the waste materials. 217 Congress did not require that a landowner participate in the management of the property in order to be held liable. 218 Rather, CERCLA demands only that the landowner be a true owner of the property. 219 Thus, an owner who leases his land to a tenant who in turn creates an environmentally hazardous condition may be held liable under the Act, notwithstanding the fact that the owner did not create or contribute to the site. 220 The test of liability is ownership—not fault. 221

Liability on the part of the landowner/lessor will not relieve the lessee from liability. 222 As a tenant in possession, the lessee may be held liable under CERCLA as an owner or operator. 223 In the land-

216 It should be noted that the Maryland legislature, in response to the Maryland National Bank decision, enacted a provision which specifically excludes foreclosing lenders from the definition of liable person under the Maryland superfund. Md. Health-envtl. Code Ann. § 7-201(x) (1986).

The effect on lenders who made loans prior to the enactment of CERCLA may be even more drastic. These lenders had no way to anticipate the Superfund implications when they made their loans. Accordingly, the standard loan clauses which were outlined as suspect may be included. If the debtor defaults in such circumstances, the lender is in a real bind. He can not become involved in the workout or foreclose on the property, and yet his option to participate in management may be sufficient to impose Superfund liability on him.

217 42 U.S.C. § 9607 (1982). Note that CERCLA reversed the common law rule, which would not hold the lessor liable for the nuisance unless it existed at the time the premises were leased or would necessarily arise from the ordinary use for which the property was leased (and of which the lessor was aware). See Restatement (Second) of Torts §§ 379A, 837(1) (1979).


219 See supra notes 64–88 and accompanying text.


221 See supra note 33.


lord/tenant relationship, the equities between landowner and tenant are split. The landowner holds legal title to the property, but the tenant is entitled to the exclusive use and enjoyment of the leased premises. Therefore, both are owners for the purposes of assessing CERCLA liability and both may be held jointly and severally liable for the costs of cleanup under the Act. 224

The term of the lease is not material in cases where the lessee created the hazardous condition before the lease expired. Just as former owners may be held liable under the Act, former lessees may be held accountable for their conduct. 225 The fact that the term of the lease has ended and the landowner has resumed possession of the property is immaterial in determining the liability of a lessee who created the hazard on site, although the lessor's conduct, once he has discovered the hazardous site, may be considered to mitigate (or exacerbate) the lessor's liability.

Similarly, just as present owners may be held liable for contamination that occurred prior to their tenure on the land, so too may tenants be held liable for hazardous waste deposited on the land before the lease commenced. Superfund does not assess liability based on culpability, but based upon the relationship of the defendant with the land.

The lessor's ability to sue the lessee and the lessee's corresponding duty to indemnify the lessor for the costs of cleanup, where the lessee created the hazardous site, have yet to be resolved by the courts. One court has held that the lessor was entitled to indemnification where the lease was terminated prematurely. 226 However, this lessee's liability was predicated on the fact that he had misrepresented to the lessor the fact that the site was in compliance with all relevant environmental statutes. 227 Thus, the lessee's duty to indemnify rested on the notion of misrepresentation and not on the liability provisions of CERCLA.

224 See supra notes 147-53 and accompanying text. Note that the linguistic differences between section 107(a)(1) and (a)(2) may influence the liability of the landlord and his tenant. Section 107(a)(1) holds current owners and operators liable. 42 U.S.C. § 9607(a)(1) (1982). In contrast, section 107(a)(2) holds former owners or operators liable. In the landlord/tenant context, a lessee who creates a site is likely to be liable as a current owner and operator; but the lessor should not be held liable unless he exhibits sufficient managerial control over the site to be considered both an owner and an operator, rather than merely an owner. On the other hand, to be held liable as a past owner or operator no managerial control need be proven—all that is necessary is that the potentially responsible party owned or operated the site.


227 Id. at 651-53.
V. SELLER LIABILITY

A. Liability of Past Owners

1. Former Owners Who Owned Property at the Time the Hazard was Created

Under the common law, a vendor’s liability for injury caused by a dangerous condition on the premises is cut off when the vendee has had reasonable time and opportunity to abate the dangerous condition. The common law duty of the vendor, therefore, continues for a period after sale, but eventually terminates. The general principle underlying the rule is that liability shifts to subsequent landowners once they have had a reasonable time to abate the hazardous condition. Seller liability, under the common law, is thus limited to the time following the sale in which the buyer reasonably could be expected to discover and correct the hazardous condition.

CERCLA has, however, radically changed the common law rule. Former owners who created the site may no longer escape liability by selling the asset. Owners or operators who owned or operated the site at the time of disposal remain liable notwithstanding the actions of subsequent owners. For example, in *United States v. Reilly Tar & Chemical Corp.*, the court held that the former owners of a property containing a hazardous waste site could be held liable for the cleanup of the site even though the site had been sold more than ten years before the EPA brought suit. The defendant in *Reilly Tar* had owned the facility at the time of the disposal of
the hazardous waste, and could, therefore, be held jointly and severally liable under the Act for the costs of cleanup. The court was not swayed by the fact that the former owners no longer had control of the waste site, because the plain language of the statute stated that liability would be imposed upon former owners and operators “who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substance were disposed of . . . .”

A similar result was reached in Nunn v. Chemical Management, Inc., where the seller was held liable for the costs of cleanup because he had warranted to the buyer that the land was in compliance with state and federal laws. The site was not, in fact, in compliance. The buyer, upon discovery of the release of the hazardous substances, acquired a duty to clean up the site and became liable under CERCLA as a current owner. The court held that the seller’s warranty gave the buyer a basis on which to sue the seller for costs incurred and liability assessed due to the failure of the site to meet standards imposed by the state and federal environmental statutes. Thus, while the buyer was properly held liable under CERCLA as a current owner, the seller was liable to the buyer based on contract.

2. Intervening Owners

An interesting question considered by commentators, and which has only recently been addressed by any court, is whether an owner who did not himself create or contribute to the hazardous waste site but merely held title to the land at some point subsequent to disposal may be held liable under CERCLA. The generator of the waste is clearly liable. Additionally, the purchaser may also be held liable as a current owner. The question is whether the intervening owner

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236 Id. at 1105-06.
237 Id. at 1118.
239 Id. at 1765-67.
240 Id. at 1766.
241 Id. at 1767. Under SARA § 101(35), the buyer in Nunn would probably be held not liable under Superfund, since he seems to fit the definition of an innocent purchaser. The reasoning of Nunn, with regard to the ability of a buyer to sue a seller, however, survives SARA.
who is neither a generator as defined under the act nor a present owner may be held liable. This question was answered in the affirmative in *United States v. Carolawn*.244

In *Carolawn*, the court was asked to consider whether a chemical company that held title to a hazardous waste disposal site for less than one hour could be considered an owner or operator within the meaning of section 107 of CERCLA.245 The defendant contended that it had acted merely as a conduit in the transfer of title and had no true ownership interest in the facility. The court, however, determined that because there was a factual dispute as to whether the defendant had acted only as a conduit or whether the defendant was in reality acquiring an ownership interest in the property, the defendant’s motion for summary judgment on the issue should be denied. Although the company held the property for less than an hour, it might be liable under CERCLA.246

The court’s holding in *Carolawn* is arguably incorrect, although the basis for the holding is unclear. The statutory language of CERCLA does not contemplate holding the intervening owners liable.247 Under the common law, a seller is liable to the buyer for only a limited period of time after the sale.248 Property owners who presently hold title to the land may be held liable, from a policy perspective, because they owe the public a duty to maintain the premises in a safe condition and free from a nuisance. Therefore, even if these owners did not create the site themselves, but were the victims of a midnight dumping of the hazardous materials on their land, public policy dictates that the present owner should clean up the site.249

245 Id. at 2127–29.
246 Id. at 2128.
248 See Restatement (Second) of Torts, § 373 (negligence) and § 840(A) (nuisance) (negligent vendor or vendor creating nuisance is liable until vendee discovers or could reasonably discover harmful condition). But see State Dept. Envtl. Protection v. Ventron Corp., 182 N.J. Super. 210, 440 A.2d 455 (1981) (corporation that spilled, leaked and deposited mercury into local creek liable despite sale of facility); Merrick v. Murphy, 83 Misc. 2d 39, 371 N.Y.S.2d 97 (Sup. Ct. 1975) (liability for affirmative acts creating a dangerous condition on the premises not cut off by sale).
249 CERCLA has been interpreted to impose strict liability—liability without regard to culpability, negligence, or fault. See supra note 34 and accompanying text. The only exceptions to this imposition of strict liability are outlined in section 107(b). These include: an act of God, an act of war, and an act of an unrelated third party with whom the defendant has no contractual relationship. 42 U.S.C. § 9607(b) (1982). A due care standard is necessary to establish the affirmative defenses. United States v. Conservation Chem. Co., 619 F. Supp.
The current owner's obligation to clean up the site stems from the common law and was not changed by CERCLA. Legislation was necessary to hold the persons who owned the site at the time it was created liable for the costs of cleanup. But this was a change from the common law, which held that only property owners have an obligation to maintain their land in a safe (nuisance free) condition. It logically follows that since the legislature expressly expanded the common law liability for hazardous waste to include past owners who created the site, in doing so they did not intend to include intervening owners. Had the legislature intended such broad coverage, it would have said so rather than carving out a rather specific exception to the common law rule.

A case which held that an intervening owner should not be held liable under CERCLA is *Cadillac Fairview/California Inc. v. Dow Chemical Co.*250 In that case a private plaintiff brought suit seeking indemnification against two parties under CERCLA “because they owned the site before plaintiff and were ‘aware that at the time it owned the Site that chemical substances including hazardous wastes and hazardous substances had been disposed of on the Site, and that they failed and continues [sic] to fail to undertake any removal, remedial or other action to prevent release of such chemical substances from the site into the environment.”251 The defendant argued that the scope of liability under CERCLA was “not so broad as to encompass a party who merely owned the site at a previous point in time, who neither deposited nor allowed others to deposit hazardous wastes on the site.”252 The court held in favor of the defendant explaining as follows:

The only provision in CERCLA which imposes liability for cleanup and removal is 42 U.S.C., Section 9607, and it is under this section that plaintiff proceeds.

Section 9607(a) sets forth four classes of action liable under the Act for three types of costs. This defendant fits none of these classes of potential defendant. The only class which might conceivably include this defendant is § 9607(a)(2).

Since this defendant is not alleged to be an owner at any time when the disposals complained of were made, but is alleged to

162, 203 (W.D. Mo. 1985). To date, no case has recognized the affirmative defense of an act of an unrelated third party and owners have been held liable even where vandals caused the damage.


251 Id. at 1113.

252 Id.
have merely owned the site after such disposal and prior in time to plaintiff's ownership, it cannot be liable under the Act.

Plaintiff has argued that the section includes past as well as present owners because no specification is made. However, none need be made because of the express limitation provided by the words "at the time of disposal." Since this defendant is not in that class, no cause of action under § 9607 can be stated against it.253

Thus, the better rule appears to be that intervening owners should not be held liable under section 107(a) of Superfund.

All rules have qualifications, and the case of the intervening landowner is no exception. Despite the seeming lack of coverage for intervening owners, those who learn or learned of existence of the hazardous site during their tenure of the land and sold it without disclosing the hazard, may be held liable under CERCLA section 101(35)(C) as added by SARA.254 This new provision states that "if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 107(a)(1) and no defense under section 107(b)(3) shall be available to such defendant."255 Thus, SARA effectively holds all past owners potentially liable under Superfund where they knew of the existence of the site. Past owners who are creators of the site may be held liable under section 107(a).256 Intervening owners may be held liable under the new section 101(35)(c).257

B. Brokers as Sellers and Sellers' Agents

The real estate industry has emerged as an unwitting target of environmental liability. For example, a couple looking for a home informed their real estate agent that they wanted a home which was far away from any poisonous substances because they wanted to protect their children from such harm.258 With the agent's help, the

253 Id.
255 Id. (emphasis added).
couple found a house and signed a contract of sale. The property inspection report did not indicate any evidence of hazardous materials, but a casual conversation with a neighbor indicated that the couple had been sold a home near a toxic landfill. The couple refused to close the deal, and the lending bank, among others, sued the couple for breach of contract. The couple countersued, claiming that the real estate agent, the property inspectors and the title searchers failed to disclose the environmental hazard to them.\(^{259}\)

The duties a real estate agent owes a client are unclear.\(^{260}\) Liability may be assessed against real estate agents and brokers based on two theories: negligence\(^ {261}\) and breach of contract.\(^ {262}\) In *Easton v. Strassburger*, a California district court held a real estate agent liable for failure to disclose soil instability and a history of landslides in the area because the agent had a duty to "conduct a reasonably competent and diligent inspection" of the premises to be sold.\(^ {264}\) In addition, the court held that the agent had a duty to disclose to the buyer material facts and adverse factors which the agent should have known about.\(^ {265}\) The court did not, however, discuss what factors an agent generally "should have known."\(^ {266}\)

Despite this duty, the extent of the broker's duty to inquire as to the existence of environmental problems on the land offered for sale is unclear under present law.\(^ {267}\) The difficulty in using a duty to inspect as a basis for assessing environmental liability lies in the latent nature of many hazardous waste sites.\(^ {268}\) Once the broker knows of the existence of these violations, however, failure to disclose could be considered negligence or fraud.\(^ {269}\) But if the broker is not aware of these violations and has no reason to know of them apart from asking, then he should not be deemed liable—unless of

\(^{259}\) Id.


\(^{261}\) See Edwards *supra* note 260, at 19–23.

\(^{262}\) See *Restatement (Second) of Contracts* § 164(2) (1979).


course it appears that his failure to ask is a breach of duty, or constitutes wilful blindness.

VI. GUIDELINES FOR THE PRACTITIONER

A. Protecting the Buyer/Client

To date, there is very little an attorney can do to protect his client from environmental liability. Possible ways to limit the buyer's liability include: (1) obtaining a warranty from the vendor or certification from the vendor's corporate officers stating that the land is in compliance with all environmental laws and regulations; (2) obtaining an indemnification agreement supported by a bond or letter of credit; (3) obtaining insurance; and (4) most importantly, obtaining accurate information as to the extent of liability which may be incurred and upon which a realistic risk assessment can be made.

1. By Contract

a. Indemnification, Certification and Warranties

CERCLA provides that a contract of indemnification will not affect the government's right to sue a liable party. Such a contract term will, however, enable a party sued pursuant to CERCLA to recover from the other party to the indemnity contract the costs contemplated in the contract. Thus, indemnification contracts give the buyer of a site, asset or other acquisition a cause of action against the seller for reimbursement of costs incurred due to the violation of an environmental statute.

This protection is especially important in cases where the seller is an intervening landowner—that is, the seller did not dispose of the waste—since such a seller may not otherwise be liable once the

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270 42 U.S.C. § 9607(e)(1) (1982). A new exception to this rule was carved out in SARA. New section 119(c) allows the President to indemnify response action contractors for negligence in performing their duties. The extent of liability is, of course, limited to injuries sustained in response actions and is available only where insurance to cover such liability is not available. SARA § 119, Pub. L. No. 99-499, 100 Stat. 1617 (1986) (codified at 42 U.S.C. § 9619).


site is sold.274 Use of indemnification agreements is less important, however, where the seller is a liable past owner since the joint and several standard of liability275 gives the buyer an automatic right to at least partial recovery from the seller. Since a buyer may not know his seller’s status regarding the release of hazardous waste at the time of purchase, including an indemnification clause in any case in which the seller might be considered an intervening owner is a better idea.

It may be advisable to ask seller to post a surety bond or offer a letter of credit276 along with the indemnification agreement. Of course, indemnity contracts as well as bonds and letters of credit

274 Cadillac Fairview/California, Inc. v. Dow Chemical Co., 21 ERC 1108, 1113 (C.D. Cal. 1984) (holding inter alia that intervening owner was not liable under CERCLA). But see SARA, § 101(35) (holding sellers who transfer property with knowledge of the waste site liable).

275 Although most courts have interpreted section 107 of CERCLA as allowing the imposition of joint and several liability, some courts have held that joint and several liability should not be imposed where “defendants establish that a reasonable basis exists for apportioning the harm amongst them.” United States v. Wade, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983). The defendants bear the burden of suggesting an apportionment formula. See United States v. A. & F. Materials, Co., 578 F. Supp. 1249, 1255 (S.D. Ill. 1984); United States v. Chem-Dyne, 572 F. Supp. 802, 811 (S.D. Ohio 1983). The criteria used to determine whether the damage may be apportioned are not fixed by statute, but the following have been adopted by some courts:

(i) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of hazardous waste can be distinguished;
(ii) the amount of 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; and
(vi) the degree of cooperation by the parties with the Federal, State, or local officials to prevent any harm to the public or the environment.


The new act, SARA, has partially resolved this debate by enacting section 113(f), which imposes a statute of limitations on persons suing for contribution. SARA § 113, Pub. L. No. 99-499, 100 Stat. 1613, 1647–1649 (1986) (codified at 42 U.S.C. § 9713(f)).

For example, it would be unreasonable to hold an intervening owner liable for the entire cost of cleanup where the damage on the site during his tenure on the land was de minimus and the majority of the waste materials were placed on the land after his term had ended.

276 The problem with using a surety bond, hold back, guarantee, escrowed funds or letter of credit as security is that the buyer has no way to estimate the extent of liability in order to determine what is adequate coverage. In addition, the buyer cannot determine how long the device should remain in effect. See Whitsett, Hazardous Waste and the Secured Lender (Aug. 12, 1986) (Paper presented to the ABA).
will cause the price of the property to increase. In addition, the utility of such devices depends upon the financial health of the party to the contract. The buyer must thus make a business decision whether to pursue the incorporation of an indemnity clause or similar device into the contract of sale or whether to pay a lessee purchase price and accept the risk that he might suffer liability.

Another device that offers the buyer similar legal protection is the warranty. Courts have held liable to the buyer sellers who warranted that the property was in compliance with all environmental laws when the site actually was in violation of CERCLA.\(^{277}\) Thus, contracts certifying or warranting that the land is sound environmentally are enforceable against the seller of land, giving the buyer a cause of action against the seller in the event he should be assessed with environmental liability.\(^{278}\) Without such a clause, the buyer has no cause of action against the seller. His sole remedy would be to sue the seller for fraud, provided that facts of fraud can be supported.\(^{279}\)

b. Insurance and Title Insurance

Although other environmental statutes require the owner-operator of a hazardous waste storage or treatment facility to carry insurance,\(^{280}\) landowners other than such persons are not required to carry this insurance. Thus, a prospective buyer who purchases land without buying insurance will not find himself in violation of CERCLA.

Even if a landowner desired to purchase insurance, it is unlikely that such insurance would provide the desired protection against Superfund liability. Traditionally, landowners looked to title companies and insurance companies for shields against liability. Today


\(^{278}\) If the buyer wishes to incorporate either an indemnity clause or a warranty that the land is environmentally sound, it is imperative that the clause be written to survive closing. Without such a clause, the agreement is terminated at closing and the terms will not merge into the deed.

\(^{279}\) The SEC has promulgated regulations regarding the disclosure of information concerning hazardous waste materials. See generally, Varnum and Achterman, Toxic Waste Liability: A Risk in Acquisitions, Nat. L.J., Oct. 28, 1985, at 15 col. Therefore, the federal anti-fraud laws concerning the sale of securities may present a remedy where common law fraud is not available.

these traditional shields are scarcely available. Courts have held that title companies have no duty to indemnify landowners for their failure to discover hazardous waste on the property because hazardous waste contamination is not a common law lien on the land. Title insurance covers only clouds on the title. Although CERCLA liability will certainly effect the ability to sell the property, it is not a cloud on the title in the traditional sense. Consequently, courts will not construe a title insurance policy to cover hazardous conditions on the property which may have given rise to environmental liability. As a result, although title insurance is available to the purchaser of land containing hazardous waste, such insurance is useless as a means to mitigate the impact of Superfund liability.

In contrast, most general insurance contracts provide a shield against environmental liability. Until recently, insurers and the general public shared a perception that legal responsibilities, including environmental liabilities, always would be insurable at a price. However, underwriters have displayed a growing tendency to refuse to insure against environmental torts because the field no longer conforms to the fundamental principles of tort law and, therefore, the insurance carrier’s risk is not determinable. As Richard Schmaltz said before the United States Senate Committee on Environment and Public Works on behalf of the American Insurance Association:

If a loss is certain to happen, then there is no risk of loss to transfer, and an insurance transaction cannot take place. There is a growing perception among underwriters that the cumulation of legal remedies provided under state and federal law, together

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284 It should be noted, however, that a title insurer may be liable for any encumbrances on the property which result from the Superlien provision of SARA, since such provisions affect title. See SARA, § 107(f).

285 For a discussion of why insurance rates are so high and why insurance for hazardous waste liability may be unavailable see, Teff, Alarm/rom London, 15 THE BRIEF 16 (1985); see also Ericsson, Insurance Furor, 15 THE BRIEF 10, 13 (1985).

with a spreading adoption of the CERCLA concepts of responsibility, are increasing a hitherto insurable probability of loss to an uninsurable, virtual certainty.\textsuperscript{287}

The availability of insurance in the field of environmental liability has reached a crisis stage. The consequence of the courts' expansive interpretation of liability provisions is that most insurance companies either have refused to cover land which poses an environmental risk or have priced the cost of coverage so high that insurance becomes economically impracticable.\textsuperscript{288} The unpredictable and expansive nature of CERCLA liability has resulted in the virtual unavailability of comprehensive liability insurance, the traditional shield of the landowner, for industries involved with the production of hazardous waste.

2. Environmental Investigation

The best advice an attorney can give the client who fears environmental liability resulting from the sale of land is to examine carefully the land.\textsuperscript{289} The new "innocent landowner" provision of SARA\textsuperscript{290}

\textsuperscript{287} Schmalz, Developments In Concepts of Causation (July 10, 1985) (Paper Presented to the Torts and Insurance Practice Section Energy Resources Law Committee).

\textsuperscript{288} See Schmalz, supra note 281.

\textsuperscript{289} A purchaser is potentially liable for hazardous waste found on the site as a current owner, but if he buys a business he may be liable for any waste generated or transported by the prior owner if he continues the prior owner's operations. See supra notes 140–87 and accompanying text. Therefore, purchasers must check into past records of off-site waste disposal as well as on-site disposal when a business, rather than merely land, is purchased.

\textsuperscript{290} The innocent landowner provision of SARA reads as follows:

The term 'contractual relationship', for the purpose of section 107(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 satisfied the requirements of section 107(b)(3)(A) and (B).

“(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
implicitly requires purchasers of property to examine it for hazardous waste, in that the provision does not absolve from Superfund liability purchasers who do not make a reasonably diligent investigation.\textsuperscript{291} A purchaser may check for environmental compliance in a number of ways. The following is a checklist that the concerned client should use to assess environmental risk:

*Consider the type of land and facilities involved. Is the facility likely to generate hazardous waste? What is the hydrogeology of the land? Is the land conducive to storage of hazardous waste? How likely is it that contamination existing on the land will spread? How far? At what rate? Is it likely to effect residential or agricultural land?

*Consider the age and ownership history of the land. For what purposes is the land currently used? What have been past uses? Is there a trash heap or a waste site? Does the site contain any drums or stagnant pools? Does the land have any unusual bumps that do not follow the general terrain? Are there or have there been any abandoned roads? In other words, might there be any buried or concealed drums on the site?

*Consider the security of the site. How large is the developed portion of the land compared with the vacant portion? Is there public access to the undeveloped portions? Is there much traffic by the site? How often has the site been checked, by foot or by air, for changes in the terrain? Is the topography of the land such that an unauthor-

\textsuperscript{291} Id.
ized dumping would be readily discovered? Could this land be, or might it have been, the subject of a midnight dumping?

*Consider the neighboring facilities. Are there any facilities nearby that may have generated, transported or stored hazardous waste? Does any nearby facility currently generate, transport or store hazardous waste? Are there any homes or farms nearby which may be the source of personal injury suits if the release should spread?

*Consider the physical composition of the site. Is there chemical or material used on the site which may have spilled accidentally? Are there any chemicals used in the plant, or transported to or from the plant, which might leak into the environment? What type of wastes does the facility generate? Do the neighboring facilities use state of the art technology? Are neighboring facilities likely to contaminate ground water?

*Consider machines used on the land. Do they contain substances which might leak as they get older, or are abandoned? For example, many old buildings contain transformers which contain PCBs, a hazardous substance under CERCLA. These transformers rust as they get older and often leak. Thus, old transformers are unwitting sources of environmental violations.

*Consider substances used in the building. Many old buildings are insulated with asbestos, a hazardous material as defined by both CERCLA and RCRA.

*Consider the types of permits and licenses the past owner held concerning the land and the facility. Do any permits or licenses indicate a source of environmental liability? Was the owner conscientious in maintaining the correct permits? Bad records may indicate a general lack of maintenance of the property.

*Consider the insurance history of the site. Who insured the land? For what time period? What did the policy say? Is the policy available? Is the policy likely to cover liability under CERCLA (in light of the most recent insurance coverage cases)? If the policy covers CERCLA liability, retain copies of the policy and consider using it in bargaining for an indemnity agreement.

*Consider the future plans for the site. Is the site the subject of any short term or long range county plans? What is the development trend of the area? Is it possible that future development might damage existing waste sites? Will future activities in the area increase the likelihood of a release, add to existing waste sites, or increase the risk of a midnight dumping? Will future development make the cleanup of the site more difficult (and, hence, more expensive)?
*Consider the likelihood of suit. Is the site listed on the National Contingency Plan? Is the property the subject of state or local concern? Are there any other potentially responsible parties who are solvent and might share in the liability for response costs?

*Consider the contamination itself. How bad is it? What is the contamination's depth and width? How easily and at what expense can the problem be corrected? Would further use of the property require environmental permits (for instance under RCRA)?

Although this checklist concerns primarily purchasers of real property, the considerations raised are equally applicable to lenders as well as to transferees in mergers, consolidations, and acquisitions where the acquired corporation owns any real property. Transferees, however, should contemplate certain additional considerations if they acquire real estate by a transaction other than a simple purchase of property. For example, if a merger or consolidation (or any other transaction in which stock is exchanged) is contemplated, consider the other assets and operations of the company to be acquired. Does the company to be acquired engage or has it ever engaged in any activities which generate hazardous waste? If so, how and where were these wastes disposed? Who handled the disposal? Is that company still solvent? What method of disposal was used? Does the company to be acquired have reason to believe that the disposal company may not have complied with the disposal agreement or used a methodology other than what it claimed to have used? What did the disposal agreement say?

The sources used to gather information can be as revealing to the buyer as the information itself. The smart seller will cooperate in giving the buyer all the information he needs. The seller who cooperates is less likely to be saddled with the entire liability, because the buyer will have acted as a prudent businessman and his decision to buy the property will be deemed a calculated business risk. The seller who discloses the requested information will be more likely to be shielded from liability on the basis of fraud.

Although the smart seller cooperates in disclosing information, many sellers are not cooperative. Thus, the buyer must be able to obtain the needed information from other sources. The following

292 See supra note 40.

293 Panel Discussion, "Basic Business and Real Estate Transactions: Dealing with Superfund and Hazardous Waste Liabilities", Presented by the ABA Environmental Controls, Committee Section on Corporation, Business and Banking Law, and the Environmental Law Committee, Section on Real Property, Probate and Trust Law (July 9, 1985) [hereinafter "Panel Discussion"]; see also Lawler, Hazardous Waste and Real Property Transactions: How to Avoid It and What to Do If You Find It, 40 WASH. ST. B. NEWS, 11 (Oct. 1986).
is a list of potential sources a prospective buyer may use to obtain information about the site despite an uncooperative seller and to ascertain whether the information received is truthful and accurate:

*Check state and federal environmental records to see if the site has ever been listed to have been in need of cleanup. The National Priority list maintained by the EPA is printed in the Federal Register. The Maryland Register or equivalents in other states list local sites. The prospective buyer should make Freedom of Information Act requests to the EPA to determine if past owners made CERCLA section 103(c) notifications. The RCRA section 3010 notification list and the Remedial Response Information System listing of hazardous waste sites also may provide additional sources of information about a site.

*Interview parties who might be familiar with the site. Former employers and employees who have worked with the company for a long time frequently have a better knowledge than management of how waste is actually handled. They often know the location of spills and what action, if any, was taken to clean or cover up these spills. Management often lacks knowledge of daily mishaps which might result in liability, but employees frequently are aware of such occurrences. Employees no longer employed with the company often are willing to talk about possible problems at the site.

*Neighbors often know a great deal about the activities of the site's landowners—especially if they are concerned about the activities which occur in the area. Inquire about any organized, or unorganized, grievances by neighboring landowners concerning activities on the site. Neighbors are also good sources of information about past activities on the land.

*Discussions with management can be useful in obtaining information regarding site history, environmental compliance, processes used on the premises, raw materials used, the types of wastes and by-products produced, how and where the company disposed of these wastes and by-products as well as how the company handled complaints from neighbors.

*Discussions with citizens or environmental groups may yield information about the site or its surrounding area. Contact with such groups should be handled with caution, however, as inquiry may lead to activity by the group.

*Discussions with local real estate brokers and agents may be helpful in determining information concerning the site and its relative value over the past few years. Real estate agents are often familiar with who bought and sold land, how they did so, and for
what purpose. If the property values in the area have changed for reasons attributable to the site or its surrounding area, an experienced real estate agent in the locality is likely to know about that change and why it occurred.

*County records can be very useful in discovering past uses of the premises. Building permit records, tax assessment work sheets, and the planning and zoning boards are all fertile sources of information regarding the past, present and potential uses of the property and adjacent properties.

*Environmental documents of interest would include: permits issued; records of product spills and losses; reports to, by, or for a state, local, or federal environmental agency; enforcement actions by environmental agencies; records of waste analysis; foundation boring and well drilling records and tests; drawings and specifications for landfills; and environmental audits.

*Have an environmental engineer check groundwater characteristics and surrounding land uses to answer the following questions: Do any nearby waterways show any evidence of contamination? Does the topography indicate that the site in question might be the source of the contamination? If a spill occurred on a neighboring site, is the waste likely to migrate to the facility?

*Check an atlas, maps and newspapers regarding past usage and owners of the land. If the site is a point of economic importance to the community, check the records in the local library for sources of historical information (many libraries have "vertical" files about important people, places, and industry in the area).

*Finally, on-site investigation provides one of the best sources of information. Besides walking the site and looking for overt evidence of environmental damage (via use of the senses), certain scientific tests may be used to check for the presence of hazardous waste. These tests include: hydrogeological studies, material analysis, aerial photography, and metal detection (to look for buried drums or storage tanks).

3. Requirement of Disclosure and the Effect of Voluntary Cleanup

The purchaser of land who discovers hazardous waste on his property is faced with the problem of whether to report the site. Environmental statutes make failure to report the leakage of a hazardous substance a criminal act. Environmental officials report that they

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receive an increasing number of voluntary reports coupled with a plan for cleanup. As noted earlier in this article, buyers who attempt to abate the nuisance generally are found less liable, proportionately, than those who leave the site in its hazardous condition. CERCLA requires prompt reporting of the site and a report will not, by itself, evidence the buyer's lessened culpability. Buyers, however, who have proposed cleanup plans for the site, have been more likely to retain control over the cleanup of the site and have decreased the likelihood of having to submit to an EPA cleanup plan (which is likely to be more costly). The EPA, although not required to approve privately proposed plans, generally approves reasonable ones. The courts have yet to resolve whether a defendant successfully could raise voluntary cleanup as a defense to or a mitigating factor in assessing section 107 liability.

4. The Reduced Purchase Price

Businessmen often set off environmental risk by reducing the purchase price of the site. The courts have viewed a reduced purchase price for land containing hazardous waste materials as an acknowledgment by the buyer that he is aware that the land contains such wastes. Despite the fact that liability under CERCLA does not demand that the owner-operator have knowledge of the wastes, courts have used reduced purchase price to show that the defendant was not an "innocent purchaser," but had assumed the risk of environmental liability in exchange for a lower purchase price. The courts have found no bar to assessing the buyer with liability for cleanup costs under CERCLA when the buyer was a sophisticated consumer.

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296 "Panel Discussion," supra note 293.
296 See supra notes 156-58 and accompanying text.
299 Section 104 of CERCLA permits governmental action only when the cleanup would not otherwise have occurred. 42 U.S.C. § 9604 (1982).
300 See National Contingency Plan 40 C.F.R. § 300.68(i)(1) (1986) (lead agency shall choose cost effective remedial alternative which effectively abates threat and provides public with adequate protection).
303 Id.
businessman and not an "innocent purchaser." Thus, the effect of a purchase price which is obviously below market value is to impute the purchaser with at least constructive, if not actual, knowledge of the potential for environmental liability.

Likewise, innocent purchasers may be held liable under Superfund as current owners if they did not diligently investigate the site prior to purchase. As liable persons, these innocent parties may be held strictly liable for the entire cost of cleanup. If, however, the sellers are still solvent, innocent purchasers stand a good chance of demonstrating to the court that their apportioned share of liability is quite minimal compared to that of the seller. Therefore, the effect of a reduced purchase price is to indicate that the buyer knows of the risk of liability but will accept that risk of suit. A reduced purchase price may indicate a willingness on the buyer's part to indemnify the seller against Superfund liability. A buyer is thus well-advised to include an indemnification agreement in the contract if purchasers obtain the property at a reduced purchase price.

5. Use of Opinion Letter and Certification of Environmental Compliance

Due to the increased potential for incurring financial liability under stricter environmental laws, many lenders are demanding legal opinions concerning the compliance of the borrowers with relevant environmental laws and regulations. While these opinions most often are used in the context of loan transactions, prospective purchasers of both land and businesses also may find opinion letters equally useful.

The difficulty in using opinion letters is that the field of environmental law is rapidly changing and quite extensive. A buyer would have an extremely difficult time certifying, without reservations, that any given site, business, partnership or corporation was in compliance with all relevant environmental and land use laws, orders, rules and regulations. Instead, the parties will need to negotiate about the environmental issues the attorney is to evaluate, and about the experts (such as architects, engineers, geologists and perhaps a toxicologist) who will determine the compliance strategies necessary with regard to those matters. An attorney can then pro-

304 Id.; see also Baldwin, Hazardous Waste Problems—Implications for Developers, The Daily Record 3 (Nov. 21, 1985).
vide assurances concerning compliances which may form the basis of apportioning future liability, if any.306

B. Protecting the Seller/Client

1. Disclosure Prior to Sale

The common law concept of caveat emptor is quite old.307 The concept of caveat venditor has developed much more recently.308 Both Congress and the courts have, however, acknowledged that under certain circumstances sellers may be liable to their buyers for non-disclosure of material information.

Fraud is among the common law causes of action which were used prior to the enactment of CERCLA to hold persons liable for the sale of land containing hazardous waste when the seller did not disclose such facts.309 Thus, common law fraud was, and continues to be, a cause of action available to the innocent purchaser of a waste site against his predecessor.

Under CERCLA, the buyer’s liability was based on his status as a current owner or operator.310 As discussed earlier, under the statutory design, the seller’s liability was dependent solely upon his relationship with the land when he owned it. To be held liable under CERCLA for the costs of the cleanup, the seller must have stored, generated or transported the waste, or owned the land at the time of the release.311 Theoretically, a seller who was not a generator, transporter or owner at the time of release could not have been held liable under CERCLA. “Intervening owners” were not covered persons under CERCLA.312 SARA ended this loophole, which absolved

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306 Although opinion letters have hitherto been used only infrequently in the environmental field, their use is a common practice among bond lawyers.
308 The concept of caveat venditor has developed with particular vigor in the securities context. See generally T. HAZEN, THE LAW OF SECURITIES REGULATION 438-506 (1985).
311 Id.
312 Id. But see United States v. Carolawn Co., 21 Env’t. Rep. Cas. (BNA) 2124 (D.S.C. 1984) (company which held title for one hour may be liable under CERCLA).
from liability intervening owners, who deceitfully transferred land to unwitting buyers. SARA added section 101(35)(C) which imposes liability upon sellers who knew of the existence of a site and failed to disclose it to the purchaser.\textsuperscript{313} This legislative change represents a dramatic departure from the practice under the original Superfund legislation. By inserting this provision, the legislature codified the policy considerations underlying the common law tort of fraud.

Thus, the law will protect neither purchasers of land who were not prudent in making their purchase, nor sellers who unfairly foisted their hazard on another.\textsuperscript{314} Because both the common law action of fraud and the new section 101(35) are available to the innocent purchaser of a site, it is in the best interest of the seller to disclose to the buyer all that is asked of him regarding possible environmental liability. Buyers who purchase without inquiring whether there is the possibility of hazardous waste or who have not investigated the site are not likely to prevail on either the count of fraud or under SARA.\textsuperscript{315} Such buyers are not the persons whom either the common law action of fraud or the SARA innocent landowner provision is designed to protect, since they have not met their duty of reasonable inquiry.\textsuperscript{316} Once the inquiry has begun, however, the seller would be wise to disclose all facts which a reasonable buyer would find material.\textsuperscript{317} As one court noted, the concept of \textit{caveat emptor} is not only alive and well today, it flourishes.\textsuperscript{318} But the law will not allow an innocent party to rectify his bad purchase through fraud.

2. Provisions in the Contract of Sale—Indemnification and the “As Is” Sale

What is the legal effect of disclosure? Courts have determined that sophisticated businessmen who have purchased land containing a hazardous waste site at a reduced price are not innocent purchasers:

\textsuperscript{316} See id.
Rather, they are current owners under the Act. Thus, both the statute and case law suggests that courts will honor indemnity agreements or agreements to sell the land "as is" (even in the absence of environmental audit or review) made in the contract of sale where it is apparent that the land was sold at a reduced purchase price. Persons who opt to forgo their right to inspect the premises or admit to accept the risk of uncertain liability are not all innocent purchasers. By their actions (or inaction as the case may be) such persons bring themselves within the ambit of section 107(a). They are not the type of persons whom the statute is designed to protect, but rather their reckless conduct is the type which the Act expressly discourages.

Although parties to a real estate transaction may make agreements concerning indemnification or purchase of the property "as is" which are enforceable in court, these private agreements may not be raised as a defense against CERCLA liability. The courts will, however, consider the existence of such agreements when deciding whether or not to grant a motion to join the contract maker as a potentially responsible party and whether to apportion liability.

In considering the use of an "as is" provision in a contract of sale, both buyer and seller must be cautious. A buyer who purchases subject to such a provision is likely to have assumed the risk of the entire cost of cleanup. In short, the practical effect of the "as is" provision would seem to create an indemnity provision for the seller against the buyer (but not against the government). SARA demands that purchasers exercise reasonable diligence in investigating sites purchased. Thus, a buyer who fails to exercise reasonable diligence and who accepts an "as is" agreement would seem to have no recourse against his seller. That is not, however, necessarily the case. SARA also imposes a corresponding burden upon sellers to disclose to the buyer the existence of the hazardous site if it is known or should be known to them. Where the seller fails to make a

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322 Id.
323 See Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049 (D. Ariz. 1984), aff’d on other grounds, 804 F.2d 1454 (9th Cir. 1986).
325 Id. at 1617 (codified at CERCLA § 101(35)(C), 42 U.S.C. § 9601(35)(C)).
disclosure, the buyer has a cause of action under SARA, as well as the common law tort of fraud, against the seller.

So how does the “as is” agreement fit into these reciprocal duties? Courts are likely to look at the relative experience, sophistication and power of the bargaining parties. Where both parties are sophisticated investors in real estate, the buyer’s duty to investigate should prevail over the seller’s duty to disclose. Use of an “as is” clause should raise a question in the mind of a sophisticated purchaser and cause him to undertake an extremely diligent inspection. Where the buyer is a relatively unsophisticated party and the seller is rather sophisticated (a large corporation or in the business of selling real estate for example), then the seller’s duty to disclose should be paramount over the buyer’s duty to investigate. The bottom line in any analysis, however, are the facts and circumstances of the particular case. Thus, the parties should be wary of the “as is” agreement. It may foist tremendous liability upon a buyer or it may constitute an admission by the seller that he did not make adequate disclosure as required by SARA. Accordingly, whenever an “as is” clause is contemplated, sellers should be careful to document their disclosure to the buyers. Similarly, buyers should take care to detail their inspection of the premises. Only with a detailed documentation can the parties maintain their respective (possibly) protected status under SARA.

C. Protecting the Lender/Client

Lenders are in a peculiar position in the acquisition process. While not an owner per se, in some states mortgagees have a title interest in the mortgaged property.\(^{326}\) In enacting CERCLA, Congress considered the predicament of mortgagees in these title theory states, and carved out an exception in subsection 101(20)(A) in which equity owners holding merely a security interest in the property were excluded from the definition of covered persons.\(^{327}\) Despite the language in subsection 101(20)(A), however, banks have been held liable as the current owner and operator of a hazardous waste site.\(^{328}\) The following criteria should be considered by lenders both before con-


\(^{328}\) See United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 580 (D. Md. 1986); see also supra notes 203–13 and accompanying text.
summating the loan and again if default should occur and foreclosure is contemplated:

* Does the borrower currently own and operate, or has he in the past owned or operated, a hazardous waste disposal (or any other type) site?
* Could the creation of toxic wastes occur as a by-product of the borrower's past, current or future activities?
* Are there any underground storage tanks on the site which may contain hazardous waste?
* If a site exists or might reasonably be created, how extensive is the quantity of waste? What is its toxicity? How likely is the site to shift or expand?
* Would clean up of the site, if necessary, enhance the value of the collateral enough to justify the clean-up costs as a business expense? Is it likely that a complete cleanup is possible?
* Is the site the result of illegal operations (e.g., improper storage, illegal dumping, or operation of the site without proper permitting) or is the site the end product of operations at a lawful site? In other words, might the existence of the site be the subject of criminal as well as civil sanctions?
* Would cleanup, if necessary, be best handled by private contract or by governmental action, considering all legal, social, political and economic ramifications?

After evaluating the site and extending the loan, there are certain precautions a lender may wish to take to strengthen his position. First, because of the expansive definition of owner or operator under CERCLA, it is advisable for a lender to never make a loan to the operator of a hazardous waste site. If the lender chooses to make such a loan (and to prevent liability in the event that such a transaction is unwittingly undertaken), the lender should make contractual arrangements so that the lender is sure that the borrower, or his guarantors, will bear the cost of cleanup rather than the lender himself.329

329 For example, the lender can require: covenants in the loan requiring compliance with applicable environmental laws and requiring the borrower to affirm such compliance on a periodic basis; a financially solid guarantor of the loan; a bond to be posted in case of environmental liability; environmental liability insurance; a collateral description which excludes toxic wastes as a part of the collateral.

Secondly, if the borrower defaults, the lender should never get involved in the management of the site and limit workout advice to strictly financial matters. The courts interpreting the definition of owner and operator under section 107 of CERCLA have all looked to control participation in the management of the site as relevant factors in determining liability.\textsuperscript{330} It is, therefore, axiomatic that if a lender does not become involved in the management and avoids control over the company, he is much less likely to be held liable for response costs under the Act.

Finally, if the lender does find himself in a situation in which the borrower has defaulted and there are no guarantors (or financially solvent guarantors) to the loan, the lender may have to make a financial decision as to whether foreclosure on the site is a viable remedy or if it would be more financially rewarding to walk away and abandon the property.

VII. CONCLUSION

No statutory remedy is without problems, and nearly all statutes require judicial clarification. Congress enacted Superfund in order to facilitate the prompt cleanup of hazardous waste. The legislation was passed in the eleventh hour of a lame duck Congress which was reacting to public outcry over hazardous waste sites. The Act, despite recent revision, is riddled with ambiguities and unclarities.

In interpreting Superfund, the courts have taken the concept of strict liability to an unprecedented extreme, such that the Act has become a "deep pocket" statute. Superfund liability may not be avoided by "responsible persons," as defined by the Act, despite the parties' lack of culpability. CERCLA liability may, therefore, arise and reek havoc in real estate and commercial transactions involving relatively innocent persons—persons who had no direct relation to, or control over, the creation of the hazard. CERCLA has thus developed into a modern snake in the grass. Liability, and potential liability, under the Act is often concealed. Superfund liability may arise in any real estate or commercial transaction involving land, often without warning.

Moreover, because costs incurred in cleaning up abandoned waste sites are so high,\textsuperscript{331} CERCLA has become a witch hunt statute.

\textsuperscript{330} See supra notes 188–216 and accompanying text.

\textsuperscript{331} See supra note 269. Not only are the costs presently high, the new Act is going to make them even higher for it allows the government to charge interest on response costs accrued. In addition, the new preferences for total cleanup will increase costs even further than they
Superfund allows the government to seek out parties who are only marginally responsible for the dump and hold them wholly liable because they are financially able to bear the cost of cleanup. 332 The government is forced to search out deep pockets because the Fund would be quickly depleted if it were not reimbursed by private parties. 333 The theory underlying the statute is let the persons who profited from the creation and disposal of the wastes pay for the cleanup rather than the taxpayers. 334 Unfortunately, this concept is naive. First, the costs saved by forcing private parties to clean up sites are greatly reduced when one considers the enormous expense incurred in litigating liability. Second, the private parties pass on the costs of cleanups to their consumers. Thus, the general public winds up paying for the costs of cleanup and the costs of litigating the issue who will clean the site up.

In short, although CERCLA has accomplished its goal of cleaning up some hazardous waste sites, it is fraught with problems in need of resolution. The Superfund program requires the expenditure of vast amounts of money in litigating liability. These sums are better spent on the actual site cleanup.

Although a good idea in theory, Superfund has created as many problems as it resolved. 335 It, therefore, would be advisable for the American people to re-evaluate the current program. The witch hunt mentality of the Superfund liability provisions benefit the American people only in the short term. In the long term it will cost the public more money than it is designed to save.

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333 More than 750,000 businesses generate some quantity of hazardous waste. In both 1978 and 1979, the EPA estimated that 90% of hazardous waste produced in this country was disposed of improperly. See Hazardous and Toxic Waste Disposal: Joint Hearings on S.1341 and S.1480 Before the Subcomm. on Environmental Pollution and Resource Protection of the Senate Comm. on Environmental and Public Works (Part 4), 96th Cong., 1st Sess. 7 (1979) (statement of Thomas C. Jorling).
