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## Current Landowner Liability under CERCLA: Restoring the Need for Due Diligence

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## ARTICLES

# CURRENT LANDOWNER LIABILITY UNDER CERCLA: RESTORING THE NEED FOR DUE DILIGENCE

*Craig N. Johnston\**

### I. INTRODUCTION

The simple thesis of this article is that in the vast majority of cases, those who own contaminated property<sup>1</sup> are strictly and jointly and severally liable for cleanup costs incurred at their property under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).<sup>2</sup> This unremarkable proposition should be subject to only two major exceptions.<sup>3</sup> The first of these, which I will refer to as the "traditional" section 107(b)(3) defense, applies where the release was caused solely by a third party whose acts or omissions did not occur in connection with a contractual relationship between the third party and

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1. The phrase "contaminated property" is used herein to refer to property that is contaminated by "hazardous substance[s]" as defined in section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601(14) (1994). It is worth noting that this phraseology excludes sites that are contaminated solely by petroleum releases. *See id.*

2. 42 U.S.C. § 9601 *et seq.* Potential plaintiffs under CERCLA include the United States, States, Indian Tribes, and even private parties. *See* 42 U.S.C. § 9607(a). In order to recover cleanup costs, private parties must demonstrate that the costs they incurred were consistent with a document known as the National Contingency Plan (NCP), which is set out at 40 C.F.R. § 300.400 *et seq.* *See* 42 U.S.C. § 9607(a)(4)(B). Other CERCLA plaintiffs are entitled to a presumption that their cost were consistent with the NCP. *See* 42 U.S.C. § 9607(a)(4)(A).

3. Section 107(b) also provides defenses where the release was caused solely by an act of God, 42 U.S.C. § 9607(b)(1), an act of war, 42 U.S.C. § 9607(b)(2), or any combination of the available defenses (including the third-party defense), 42 U.S.C. § 9607(b)(4). These additional defenses are seldom used and will not be discussed herein.

the person asserting the defense.<sup>4</sup> A typical third-party scenario might include, for example, contamination caused by a vandal or an upgradient property owner.<sup>5</sup>

The second exception is inherent in CERCLA's "innocent landowner" defense. This is actually a subset of the section 107(b)(3) defense, but it applies to preexisting contamination, where a landowner can show that it undertook a reasonable investigation into the potential existence of contamination, and found none, prior to purchasing the property.<sup>6</sup>

Absent either of these defenses, current landowners are strictly liable under section 107(a)(1). Further, liability under CERCLA

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4. The person asserting the defense must also show that she took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. After becoming aware of the contamination, she must demonstrate that she exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances. *See* 42 U.S.C. § 9607(b)(3). Note that this defense can apply to post-purchase contamination, that is, contamination that occurs after the owner has acquired the property. Indeed, most courts have determined that the traditional section 107(b)(3) has no application to preexisting contamination, at least where the contamination was caused by someone in the chain of title. *See infra* note 139 and accompanying text; *see also infra* note 120.

5. The "upgradient owner" scenario typically involves a situation where contamination from an upgradient parcel seeps (usually through groundwater) onto the downgradient property owner's parcel. Although the downgradient owner qualifies as the owner of a "facility," *see* 42 U.S.C. § 9601(9), § 107(b)(3) provides a defense to liability so long as there is no disqualifying contractual relationship between the two landowners. *See Reichhold Chems. Inc. v. Textron, Inc.*, 888 F. Supp. 1116, 1129-30 (N.D. Fla. 1995); *Kalamazoo River Study Group v. Rockwell Int'l*, 3 F. Supp. 799 (W.D. Mich. 1998).

6. *See* 42 U.S.C. § 9601(35)(A) and (B) (defining the term "contractual relationship," as used in section 107(b)(3), to require that the purchaser have exercised "all appropriate inquiry" into prior uses of the property as a precondition to establishing this defense). Again, because this defense is a subset of the section 107(b)(3) defense, the purchaser also must establish that it exercised due care once it became aware of the contamination. 42 U.S.C. § 9607(b)(3).

is joint and several if the environmental harm is either indivisible or not otherwise subject to apportionment.

The basic aspects of this scheme have existed since Congress first passed CERCLA in 1980. Section 107(a)(1), which imposes liability on current landowners, has remained unaltered since CERCLA's inception. Although the original statute did not explicitly impose strict or joint and several liability, the courts universally have recognized it as incorporating both of these dynamics from the early days of the program.<sup>7</sup> When Congress amended CERCLA in 1986, through the Superfund Amendments and Reauthorization Act (SARA),<sup>8</sup> it specifically embraced these judicial determinations.<sup>9</sup> At the same time, Congress mitigated to a certain extent the harshness of imposing strict liability on current owners by creating the "innocent landowner defense." In establishing this narrow defense, however, Congress indicated its support for the idea that landowners should be held strictly and jointly and severally liable for response costs absent the kind of "due diligence" investigations that give rise to the defense.

In light of SARA, the underlying policy dynamics seem quite clear. The basic idea is that if those who purchase land want to avoid CERCLA liability, they should investigate the potential existence of contamination before they buy it. If they fail to do so, and the land turns out to be contaminated, or if they purchase the property knowing it to be contaminated, they are subject to liability under the statute. While this approach may seem harsh, it is fully consistent with CERCLA's strict liability regime.

Additionally, CERCLA's prospective application has distinct public policy benefits. This approach generates significant amounts of due diligence. Most business transactions involving

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7. See *infra* text accompanying notes 69-92 and 133-36. As noted in the text accompanying notes 79-92, the pre-SARA cases reflected two schools of thought on the issue of joint and several liability, but both of these schools recognized that CERCLA allowed for the imposition of joint and several liability.

8. Pub. L. No. 99-499, 100 Stat. 1615 (1986).

9. 132 CONG. REC. S14903 (daily ed. October 3, 1986) (statement of Sen. Stafford); 132 CONG. REC. H9563 (daily ed. Oct. 8, 1986) (statement of Rep. Dingell); 131 CONG. REC. H11073 (daily ed. Dec. 5, 1985) (statement of Rep. Eckart).

the transfer of land are now preceded by pre-purchase investigations designed to determine whether contamination may be present. In turn, this due diligence frequently generates significant levels of private cleanup, often without any direct governmental prodding or involvement.<sup>10</sup>

Again, the basic dynamics of this plan have been in place since 1980. They have been well-recognized by the courts, both before and after the passage of SARA.<sup>11</sup> Recently, however, four of the Federal Courts of Appeals have collectively articulated three lines of analysis that undercut these bedrock principles of landowner liability. These lines of analysis include: (1) a series of cases narrowly defining the types of "contractual relationships" that negate the traditional third-party defense and that thereby negate any need for property owners to establish the innocent landowner defense; (2) a line of cases suggesting that landowners who themselves have not polluted their property may be able to defeat the imposition of joint and several liability by establishing as a matter of law that their apportionable share of the liability is zero; and (3) two recent Seventh Circuit decisions suggesting that similarly "blameless" property owners (i.e., those who have purchased contaminated land but not added to the contamination) may be treated as if they are not liable, for purposes of determining whether they may impose joint and several liability on other "potentially responsible parties" (PRPs), whether or not they meet the requirements of the innocent landowner defense.

Taken either individually or cumulatively, the above approaches undermine the purchaser's incentive to undertake due diligence investigations before buying land. Surprisingly, the courts have announced these new lines of analysis without any consideration of their interrelationship with, and their evisceration of, the basic dynamics of landowner liability as set forth above.

Section II of this Article will outline the historical development of the basic principles of landowner liability under CERCLA.

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10. See *Foster v. United States*, 922 F. Supp. 642, 656 (D.D.C. 1996) (opining that CERCLA's liability scheme was intended "to provide incentives for private parties to investigate potential sources of contamination and to initiate remediation efforts").

11. See *infra* notes 69-92, 133-36 and accompanying text.

This section will include a description of (1) the relevant portions of both the original statute passed in 1980 and its legislative history; (2) the pre-SARA cases interpreting those provisions; and (3) the pertinent aspects of SARA and its legislative history. It will also include a short summary of where SARA seemed to leave things.

Section III of this Article will include an analysis of the post-SARA case law dealing with landowner liability. As will be seen, the case law can be divided into two categories: (1) the "mainstream" cases that tend to support and elaborate on the basic dynamics described above, and (2) the more problematic decisions that tend to undermine those very same dynamics.

Finally, Section IV will explain that all three of the problematic lines of analysis should be rejected because they are inconsistent with the basic dynamics of CERCLA landowner liability as established by Congress.

## II. HISTORICAL BACKGROUND

### A. *The 1980 Statute and Its Legislative History*

Most of CERCLA's provisions relating to landowner liability have remained unchanged since Congress first enacted the law in 1980. Section 107(a)(1) imposed liability on the owner and operator of any contaminated site. This liability was distinct from, and in addition to, the liability that section 107(a)(2) imposed on anyone who owned or operated the property at the time of disposal.

CERCLA on its face provided little direction with respect to the standard and scope of liability imposed under the Act. With respect to the former, it indicated that the terms "liable" and "liability" were to be "construed to be the standard of liability which obtains" under section 311 of the Clean Water Act.<sup>12</sup> Interestingly, even this reference was oblique, because section 311 did not on its face clearly indicate the standard of liability applicable under that provision.<sup>13</sup> However, this is an improvement over what Congress did with respect to the scope of liability, where CERCLA on its face did not provide any direct statement on the

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12. 42 U.S.C. § 9601(32) (1994).

13. See 33 U.S.C. § 1321.

issue.<sup>14</sup>

Finally, regarding defenses, section 107(b) provided three: (1) acts of God; (2) acts of war; and (3) acts or omissions of third parties, provided: (a) those acts or omissions did not occur in connection with a contractual relationship with the person asserting the defense, and (b) the person asserting the defense met the other required elements of section 107(b)(3), including having taken precautions against foreseeable acts or omissions.<sup>15</sup> The original bill, unlike the current version, did not define the term "contractual relationship."<sup>16</sup>

A fair reading of the basic provisions of the 1980 Act, without any resort to the legislative history, leads to the conclusion that the Act was ambiguous with respect to some aspects of the landowner liability equation. On the basic question of whether current landowners could be liable even where they played no role in contaminating the site, the statute seemed pretty clear. Section 107(a) appeared to create a dichotomy: while former owners

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14. One could argue that section 101(32) should be construed as incorporating not only *the standard of liability* (strict) from section 311 of the Clean Water Act, but also *the scope of liability* (joint and several). Indeed, at least one of the bill's sponsors appeared to suggest that it did. See 126 CONG. REC. H11787 (daily ed. Dec. 3, 1980) (statement of Rep. Florio), reprinted in 1 SUPERFUND: A LEGISLATIVE HISTORY 164-65 (Helen C. Needham & Mark Menefee eds., 1982). But this interpretation appears defective because section 101(32) by its terms refers only to the standard of liability obtaining under section 311. See 126 CONG. REC. S14964 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph), reprinted in 1 SUPERFUND: A LEGISLATIVE HISTORY 168 (Helen C. Needham & Mark Menefee eds., 1982). As will be seen below, such an interpretation would also conflict with other aspects of the legislative history (including other portions of Representative Florio's floor statements), which indicate that Congress only intended to *allow for* the imposition of joint and several liability, not *mandate* its application. See *infra* text accompanying notes 53-61.

15. 42 U.S.C. 9607(b)(3) (1994). As discussed in note 4, *supra*, under section 107(b)(3) the person asserting a third-party defense must also demonstrate that she exercised due care with respect to the contamination once she became aware of it. See also *supra* note 3 (re combination defense).

16. See 42 U.S.C. § 9601(35). In all other respects, the landowner liability provisions are the same today as they were in 1980.

were liable only if disposal occurred during their period of ownership,<sup>17</sup> current owners were deemed liable regardless of the time of disposal.<sup>18</sup> This latter form of liability can be referred to as “status” liability, meaning that the landowner is liable simply as a result of her status as the current owner of the site.

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17. There is a further ambiguity here regarding whether so-called “interim” owners (i.e., those who own contaminated property after wastes are introduced into the environment, but sell it before an action is filed) are liable under section 107(a)(2) as owners at the time of disposal. The courts have been split on this question, with the analysis hinging on whether one reads the term “disposal” as encompassing the passive migration of contaminants through soils or groundwater, or requiring active conduct. *Compare, e.g., Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1510 (11th Cir. 1996) (finding no liability under section 107(a)(2) where there was no evidence that the defendant had physically done anything that had exacerbated the contamination), *with Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 844-46 (4th Cir.), *cert. denied*, 506 U.S. 940 (1992) (passive releases constitute disposal); *see also Idylwoods Assoc. v. Mader Capital, Inc.*, 915 F. Supp. 1290, 1311 (W.D.N.Y. 1996), *aff'd on reh'g*, 956 F. Supp. 410 (W.D.N.Y. 1997), and cases cited therein. This article focuses on the liability on current owners, not owners at the time of disposal. Accordingly, the liability of interim owners will not be discussed further herein.

18. The same logic could be applied to operators; that is, section 107(a) appears to distinguish between former operators, who are liable if they operated the site at the time the disposal activities occurred, and current operators who are liable regardless. This, of course, raises the difficult question of who qualifies as an operator under CERCLA, which is beyond the scope of this article. *See United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876 at 1887 (1998) (“[t]o sharpen the definition for purposes of CERCLA’s concern for environmental contamination, an operator must manage, direct or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations”). For our purposes, it is enough to note that every court that has interpreted section 107(a)(1) has construed it as being disjunctive, that is, as imposing liability on both the current owner and the current operator. *See, e.g., Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1497-98 (11th Cir. 1996); *Long Beach Unified School Dist. v. Dorothy B. Godwin California Living Trust*, 32 F.3d 1364, 1367 (9th Cir. 1994) (and cases cited therein).



The conclusion that section 107(a)(1) in its 1980 form imposed strict liability without regard to causation was further underscored by the interplay between section 107(a) and section 107(b). Section 107(a) was prefaced by the phrase “[n]otwithstanding any other provision or rule of law and *subject only to the defenses set forth in subsection (b) of this section,*” and went on to list the categories of liable parties.<sup>19</sup> Section 107(b) then specified three specific defenses (acts of god, acts of war, and the third-party defense), all of which served to negate causation. As the Second Circuit was quick to point out, these defenses would have been surplusage if CERCLA plaintiffs were required to show causation as an element of liability.<sup>20</sup>

Still, the 1980 version of CERCLA did not explicitly indicate whether it imposed strict liability, or whether it negated any causation requirement.<sup>21</sup> This ensured litigation on these points. More significantly, on its face the 1980 law provided no real help on the question of whether joint and several liability applied.<sup>22</sup> Again, the statute contained no direct statement on the issue. The only textual hint was in section 107(a), where it was indicated that those caught within CERCLA’s liability web were liable for “all costs of removal or remedial action” incurred by governmental plaintiffs.<sup>23</sup>

Furthermore, in 1980 Congress did not clearly delineate how the third-party defense was to apply to current landowners. With respect to post-purchase contamination, its application seemed clear enough: if an unrelated third-party (such as a vandal or an upgradient property-owner) was the sole cause of the release, the landowner would have a defense so long as she: (1) had taken

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19. 42 U.S.C. § 9607(a) (1994) (emphasis added).

20. *New York v. Shore Realty Corp.* (Shore Realty), 759 F.2d 1032, 1044 (2d Cir. 1985).

21. The closest the law came to expressly incorporating principles of strict liability was in section 101(32), where it indicated that liability should be construed to be the same standard of liability which is obtained under section 311 of the Clean Water Act. Again, though, because not even section 311 imposed strict liability on its face, understanding these legislative gymnastics required resort to the legislative history. *See infra* text accompanying notes 49-52.

22. *See supra* note 13.

23. 42 U.S.C. § 9607(a)(4)(A) (1994).

precautions against foreseeable acts or omissions of the third-party; and (2) exercised due care with respect to the existence of the contamination once she became aware of it.<sup>24</sup>

This clarity vanished in the context of pre-existing contamination. The 1980 law was ambiguous as to whether the third-party defense had any application at all in this context. Although nothing in section 107(b)(3) clearly precluded its operation, section 107(b)(3) by its terms required the defendant to show that she took precautions against foreseeable acts or omissions of the third party.<sup>25</sup> It is difficult to square this requirement with the idea that the defense applied to preexisting contamination.<sup>26</sup> How could a subsequent purchaser possibly have taken such precautions? Additionally, if the third-party defense is interpreted as being potentially applicable to those who purchased contaminated property, then the strict liability that section 107(a)(1) imposed on current owners would largely be eviscerated.<sup>27</sup> The clear tension that could have existed between these two provisions under such an interpretation suggests that such a reading of section 107(b)(3) might be problematic.

Even if the third-party defense was not by its terms precluded, there were still questions regarding how the "contractual relationship" aspects of the defense should have played out in the context of land sale agreements. Assume a situation where *Seller A* conveys property that is contaminated to *Buyer B*. If *A* conveys a deed to *B*, does the existence of this deed give rise to a "contractual relationship" under the 1980 law? Again, the term "con-

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24. 42 U.S.C. § 9607(b)(3).

25. *See id.*

26. *See Shore Realty*, 759 F.2d at 1032 (discussed *infra* text accompanying notes 69-77).

27. If one were to accept the proposition that those who purchased contaminated sites were eligible to raise a section 107(b)(3) defense under the 1980 law, the defense would almost always have been available because the owners would have routinely been able to establish that the acts or omissions of any prior owners did not occur in connection with the land-sale contracts. The only situations in which the defense might generally have been unavailable under such an interpretation would have been where the subsequent purchaser failed to exercise due care after becoming aware of the contamination. *See* 42 U.S.C. § 9607(b)(3).

tractual relationship" was left undefined.<sup>28</sup> And even if deeds are "contractual relationship[s]," did *Seller A's* contamination-causing activities occur "in connection with" that contractual relationship?<sup>29</sup> On its face the statute did not resolve these questions.<sup>30</sup>

The legislative history of the 1980 law is illuminating with respect to at least some of these issues. On the question whether Congress intended current landowners to be liable even absent disposal activities, little help from the legislative history is needed. Still, what history there is clearly supports the statutory text.

The 1980 law was the product of a last-minute compromise between the Senate and the House of Representatives, and is known as the Stafford-Randolph substitute.<sup>31</sup> The liability provisions were derived mostly from an earlier Senate Bill, S. 1480, that was reported out of the Committee on Environment and Public Works on July 11, 1980, but which was never considered by the full Senate.<sup>32</sup> Other provisions came from one or another of two House bills: H.R. 7020, dealing with land-based contamination, which the House had passed on September 23, 1980,<sup>33</sup> or H.R. 85, dealing mostly with liability for oil spills in the navigable waters, which the House passed on September 19, 1980.<sup>34</sup>

28. This, of course, was a question on which Congress weighed in when it enacted SARA in 1986. *See infra* text accompanying notes 112-14.

29. *See* 42 U.S.C. § 9607(b)(3). Different issues would arise if the contamination was caused by someone outside the chain of title, such as a vandal or an upgradient property owner. *See infra* note 128.

30. One might be tempted to quickly conclude that of course a deed is a contractual relationship, but that prior contamination-causing activities did not occur in connection with that relationship. But here again, this reading would lead to the successful establishment of a third-party defense in virtually all situations involving preexisting contamination. Purely as a statutory matter, such an interpretation should have been disfavored because it tended to eviscerate section 107(a)(1).

31. SUPERFUND: A LEGISLATIVE HISTORY xx (Helen C. Needham & Mark Menefee eds., 1982) (hereinafter SUPERFUND: A LEGISLATIVE HISTORY).

32. *See* *United States v. Olin Corp.*, 107 F.3d 1506, 1514 (11th Cir. 1997).

33. 126 CONG. REC. H9479 (1980).

34. *See* SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 233-34.

The basic construct of section 107(a)(1), which imposes liability on current landowners, had its genesis in the very first version of S. 1480, which Senators Culver and Muskie introduced on July 11, 1979. Section 4(a) of that bill imposed liability on the current owner or operator of a facility, as well as on any other person who caused or contributed to any releases, specifically including prior contributing owners.<sup>35</sup> While the source of this language is unclear, it may have been drawn from section 311 of the Clean Water Act, which has imposed strict liability on vessel and facility owners for releases of oil or other hazardous substances into the navigable waters.<sup>36</sup> Section 311 would have been a natural reference point because S. 1480, in its introduced form, did not contain a petroleum exclusion.<sup>37</sup> Interestingly, although all subsequent versions of S. 1480 included the current petroleum exclusion language,<sup>38</sup> this narrowing of the scope of the bill's coverage had no effect on its liability provisions. Indeed, by the time S. 1480 was reported out of the Senate Committee on Environment and Public Works, the landowner liability components of section 4(a) had largely achieved the final form of what is now section 107(a), imposing liability both on the owner of a facility and on "any person who at the time of disposal owned" such facility.<sup>39</sup>

The parallel developments on the House side provide a notable contrast to the evolution of S. 1480's landowner liability provisions. H.R. 7020, the House bill dealing with inactive waste sites, did not impose status liability on landowners and did not even mention landowners by name. Instead, H.R. 7020 imposed liability generally on those who "caused or contributed to the release or threatened release."<sup>40</sup>

H.R. 85, by contrast, imposed liability on owners of "vessels" and "facilit[ies]" that were sources of oil pollution, but the term

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35. *See id.* at 200-01.

36. *See* 33 U.S.C. § 1321(f) (1982); *see also* S. REP. NO. 96-848, at 34, *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 188 (referencing section 311 as a parallel authority imposing strict liability).

37. *See* SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 14.

38. *See id.* at 13.

39. *See id.* at 181.

40. *See id.* at 213.

“facility” was defined not to include the land itself, as became the case under CERCLA,<sup>41</sup> but rather just the “structure[s]” or “group[s] of structures” “used for the purpose of transporting, drilling for, producing, processing, storing, transferring, or otherwise handling oil.”<sup>42</sup> H.R. 85 also did not impose true “status” liability on landowners: landowners were not liable *per se*, but only if they owned the equipment that was the source of the pollution. This begs the question, of course, whether H.R. 85 imposed liability on landowners only if the “facility” caused pollution during their period of ownership. The bill was somewhat ambiguous on this point, but the best reading is probably that it did.<sup>43</sup>

In adopting the Stafford-Randolph substitute, Congress chose the Senate’s straightforward status-based approach to landowner liability, as opposed to either the more traditional causation-based approach reflected in H.R. 7020 or the more complicated regime under H.R. 85. Again, the language of the final bill established a dichotomy under which the liability of current owners was unqualified, whereas former owners were liable only if disposal activities had occurred “on their watch.”

With respect to the standard of liability, all three of the predecessor bills (S. 1480, H.R. 7020 and H.R. 85) specifically incorporated principles of strict liability.<sup>44</sup> For our purposes, S. 1480 is the most germane because its landowner liability provisions most closely resembled those of the final bill. From the outset, S. 1480 specifically contemplated that all identified liable parties — in-

41. See 42 U.S.C. § 9601(9) (1994).

42. H.R. 85 § 101(i), *reprinted in* 2 *SUPERFUND: A LEGISLATIVE HISTORY*, *supra* note 31, at 186.

43. Although section 104(a) of H.R. 85 imposed strict liability, it only did so with respect to one who owned a facility that is the source of oil pollution, or poses a threat of oil pollution. H.R. 85 § 104(a), *reprinted in* 2 *SUPERFUND: A LEGISLATIVE HISTORY*, *supra* note 31, at 191. The present tense phraseology of this provision would seem to require an ongoing release or threat of a release from the facility (i.e., the equipment, not the land).

44. S. 1480 § 4(a), *reprinted in* 1 *SUPERFUND: A LEGISLATIVE HISTORY*, *supra* note 31, at 181-82; H.R. 7020 § 3071(a), *reprinted in* 1 *SUPERFUND: A LEGISLATIVE HISTORY*, *supra* note 31, at 213-14; and H.R. 85 § 104(a), *reprinted in* 1 *SUPERFUND: A LEGISLATIVE HISTORY*, *supra* note 31, at 235.

cluding facility owners — would be strictly liable.<sup>45</sup> This language carried through to the version that the Senate Committee on Environment and Public Works reported out in July.<sup>46</sup> The accompanying Senate Report indicated that strict liability was “the foundation of S. 1480.”<sup>47</sup> Surprisingly, there is little explanation provided in the legislative history as to why the Senate specifically sought to impose liability on facility owners without regard to whether they caused contamination. Most of the references to strict liability in the Senate Report are generic and, if anything, seem more appropriate for generators and/or owners at the time of disposal than they do for current owners who happen to have acquired contaminated land.<sup>48</sup> However, one portion of the Senate Report seems specifically tailored to current landowners: “[a]nother source of legal precedent for strict liability for hazardous substance disposal sites or contaminated areas is nuisance theory. Damage actions involving the maintenance of a public or private nuisance often involve a kind of strict liability standard.”<sup>49</sup>

Interestingly, although all three of the predecessor bills expressly invoked strict liability, the Stafford-Randolph substitute did not. All references to strict liability in the Stafford-Randolph version were dropped. The accompanying legislative history made clear, however, that this was more a matter of form than substance. In the statute itself, Congress replaced the express incorporation of strict liability with a new statutory definition of “liability” in section 101(32), which indicated that the term should be “construed to be the standard of liability which obtains under [§ 311 of the Clean Water Act].”<sup>50</sup> In the legislative history, Congress made clear its understanding that section 311 imposed strict liability.<sup>51</sup> Additionally, Senator Randolph asserted that this

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45. See 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 200.

46. See *id.* at 181.

47. S. REP. NO. 96-848, at 13 (1980), *reprinted in* 2 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 843.

48. See S. REP. NO. 96-848, at 13-14 (1980), *reprinted in* 2 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 843.

49. S. REP. NO. 96-848, at 14 (1980), *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 186.

50. 42 U.S.C. § 9601(32) (1994).

51. See S. REP. NO. 96-848, at 34 (1980), *reprinted in* 1 SUPERFUND: A

drafting exercise did not result in a substantive change:

The liability regime in this substitute contains some changes in language from that in the bill reported by the Committee on Environment and Public Works. The changes were made in recognition of the difficulty in prescribing in statutory terms liability standards in individual cases. The changes do not reflect a rejection of the standards in the earlier bill.

Unless otherwise provided in this act, the standard of liability is intended to be the same as that provided in section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321). I understand this to be a strict liability standard.<sup>52</sup>

Even those who opposed the Stafford-Randolph substitute recognized that it imposed strict liability on current landowners without regard to causation. Representative Broyhill spoke against the compromise in the following terms:

However, the bill is unexcusably [sic] vague in terms of identifying who should be liable and for what. For instance, under the language of section 107, the owner or operator of a vessel or a facility can be held strictly liable for various types of costs and damages entirely on the basis of having been found to be an owner or operator of any facility or vessel. There is no language requiring any causal conviction [sic] with a release of a hazardous substance.<sup>53</sup>

The legislative path was more tortured on the question of joint and several liability. As introduced, S. 1480 and H.R. 85 explicitly and without qualification imposed joint and several liability on those found liable under the bills (including, in the case of S. 1480, current owners).<sup>54</sup> The initial version of H.R. 7020, by con-

LEGISLATIVE HISTORY, *supra* note 31, at 188.

52. 126 CONG. REC. S14964 (daily ed. Nov. 24, 1980), *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 168; *see also* 126 CONG. REC. H11787 (daily ed. Dec. 3, 1980), *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 164-65 (where Rep. Florio, in concluding that strict liability is preserved in the Stafford-Randolph substitute, enters into the record a Department of Justice letter citing cases in which courts had imposed strict liability under section 311, including *Steuart Transp. Co. v. United States*, 596 F.2d 609, 613 (4th Cir. 1979); *Burgess v. M/V Tamano*, 564 F.2d 964, 982 (1st Cir. 1977)).

53. 126 CONG. REC. H11790, *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 166.

54. *See* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 200-02 (S. 1480), and 280-82 (H.R. 85).

trast, generally provided for the imposition of joint and several liability, but also established exceptions that tended to swallow the rule.<sup>55</sup>

While all three bills retained joint and several liability until the end, ultimately both S. 1480 and H.R. 7020 contained significant qualifications.<sup>56</sup> In its final version, S. 1480 provided that:

In any case where a person held liable under this section can demonstrate by a preponderance of the evidence that (A) the contribution of such person to a discharge, release, or disposal of a hazardous substance can be distinguished or apportioned and (B) such contribution was not a significant factor in causing or contributing to the discharge or the damages resulting therefrom, the liability of such person shall be limited to that portion of the release or damages to which such person contributed.<sup>57</sup>

Nothing in either the language of this provision nor in the accompanying Senate Report gave any indication as to whether or how this apportionment provision was to apply to those property owners who had acquired contaminated property.<sup>58</sup>

The final version of H.R. 7020 qualified its joint and several liability scheme significantly.<sup>59</sup> The House fleshed out the appor-

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55. As introduced, section 3071(a)(2) of H.R. 7020 required apportionment in some circumstances (such as where an owner could show that only a portion of the response costs were due to wastes disposed of during her period of ownership) and allowed it (in the court's discretion) in all other cases. See 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 232-33.

56. The final version of H.R. 85 retained an unqualified form of joint and several liability. See H.R. 85 § 104, *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 235-37.

57. S. 1480 § 4(f)(1), *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 183.

58. See S. REP. NO. 96-848, at 38, *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 189. There is no indication anywhere that through this provision the Senate had any intent to undermine the causation-blind strict liability scheme that S. 1480 then otherwise imposed on current landowners. Indeed, it would have been quite odd for the Senate to have carefully laid out the liability of current landowners, and then to have set up a construct under which they could routinely have apportioned their liability down to nothing.

59. It is perhaps worth recalling that H.R. 7020 did not impose strict liability on current landowners. See *supra* text accompanying note 37.



tionment provisions in the bill by incorporating what were referred to as the "Gore factors,"<sup>60</sup> which guided the courts in equitable apportionment. Under the Gore factors, the courts were to consider:

- (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of hazardous substances can be distinguished;
- (2) the amount of hazardous waste involved;
- (3) the degree of toxicity of the hazardous waste involved;
- (4) the degree of involvement of the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- (6) the degree of cooperation by the parties with the Federal, State, or local officials to prevent any harm to the public health or the environment.<sup>61</sup>

In the end, Congress deviated from all three of the preceding bills on the issue of joint and several liability. In the final bill Congress deleted all reference to joint and several liability. However, Senator Randolph and Representative Florio, both of whom were sponsors of the Stafford-Randolph substitute, noted that, by making this deletion, the conferees did not intend to foreclose its application but rather to have the courts impose joint and several liability where its application would be consistent with the common law.<sup>62</sup> Representative Florio indicated that the bill was intended to "encourage the further development of a Federal common law in this area."<sup>63</sup>

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60. These factors are so named because they were introduced to H.R. 7020 through an amendment offered by then-Representative Gore. 126 CONG. REC. H9461 (daily ed. Sept. 30, 1980), *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 218.

61. H.R. 7020, 96th Cong. § 3071(a)(3)(B) (1980), *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 213-14.

62. (Sen. Randolph) (we have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable); 126 CONG. REC. H11787 (daily ed. Dec. 3, 1980), *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 164 (Rep. Florio) (issues of joint and several liability not resolved by this shall be governed by traditional and evolving principles of common law).

63. 126 CONG. REC. H11787 (daily ed. Dec. 3, 1980), *reprinted in* 1

As a whole, this legislative history indicates that however unseemly its drafting methods may have been, Congress did not abandon the principles of strict and joint and several liability when it deleted those terms from the final bill. Instead, Congress clearly intended that CERCLA liability be strict, and that it be joint and several in appropriate cases. For better or for worse, Congress made no real attempt to define the "appropriate" cases, leaving that for courts to determine according to the common law.

The legislative history is less illuminating with respect to the potential applicability of the 1980 bill's third-party defense to current landowners. Section 107(b)(3) apparently had its origins in H.R. 85 and H.R. 7020, neither of which appear to have imposed liability on current landowners for preexisting contamination. Section 4(a) of S. 1480, which clearly did impose this form of liability, contained only two defenses; one for acts of God and a second for acts of war.<sup>64</sup>

The legislative history underlying H.R. 7020<sup>65</sup> appeared to be the most relevant but ultimately even that history was unhelpful. As introduced, H.R. 7020 had a very broad third-party defense which applied whenever the contamination was caused solely by "an act or omission of a third party if the defendant establishes that he exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous waste."<sup>66</sup> This construct was tailored using the

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SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 165.

64. S. 1480 § 4(a), *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 181-82.

65. Because the language used in the 1980 bill tracks the third-party defense language from H.R. 7020, it would appear that Congress was drawing from H.R. 7020 rather than H.R. 85 when it crafted the Stafford-Randolph substitute. However, it is possible that in crafting the third-party provision in H.R. 7020, then-Representative Gore was drawing from H.R. 85. H.R. 85's third-party defense language, which was similar to that which ultimately appeared in H.R. 7020, *was* originally introduced in the House on May 15, 1979. *See* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 281-82. Nothing in the legislative history of H.R. 85 appears to shed any light on whether or how its third-party provisions were to apply to preexisting contamination. This makes sense given that it is unlikely that H.R. 85 would even have imposed liability for preexisting contamination.

66. *See* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 232.

language which ultimately made its way into the 1980 CERCLA law through the efforts of then-Representative Gore. In introducing his amendment, Representative Gore expressed concern that the original formulation of the third-party defense under H.R. 7020, allowed a defendant to avoid liability by contracting with a third-party to dispose of the hazardous waste, so long as the defendant exercised due care in selecting the disposer.<sup>67</sup> Arguing that the statute should treat the disposal of hazardous waste as being analogous to "ultrahazardous activities" under the common law, Representative Gore urged that generators should not be able to "contract away" their strict liability-based obligation to ensure that their wastes were properly disposed.<sup>68</sup>

Nothing in the legislative history of H.R. 7020 gives any indication as to whether the third-party defense was available to the purchasers of contaminated land under the 1980 law and, if so, under what circumstances the defense might apply. This, of course, is unsurprising given that H.R. 7020 did not impose status-based liability on current landowners, but rather required causation as a precondition to liability. If those who merely acquired contaminated land were not liable under H.R. 7020, there was no reason for Congress to address the potential application of the third-party defense.

In summary, an analysis of the 1980 statute and its legislative history appears to indicate that Congress clearly intended for current owners to be liable under CERCLA, that this liability be strict, and, in appropriate circumstances, joint and several. Neither the statute nor its legislative history sheds much light on the applicability of the third-party defense to those who purchased contaminated sites. There is no evidence in either the statute or the legislative history, however, that the third-party defense was to operate in a way that would largely undermine the general rule of strict liability for the current owners of contaminated property.

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67. 126 CONG. REC. H9462, *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 219.

68. *Id.* at H9461-62, *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 218-20.

### B. Pre-SARA Case Law

There was a considerable lack of case law interpreting the relevant portions of CERCLA's liability scheme prior to the passage of SARA. Those cases which were decided reflected both the relatively straightforward aspects of the statutory scheme and also the ambiguities discussed above.

The pre-SARA cases were unanimous in holding that current owners were strictly liable for preexisting contamination under section 107(a)(1).<sup>69</sup> The most significant decision in this regard was *New York v. Shore Realty Corp.*<sup>70</sup> After first determining that Congress intended for PRPs to be strictly liable under CERCLA,<sup>71</sup> the *Shore Realty* court went on to consider whether current owners fit within section 107(a)(1) even where they did not cause any contamination. The court explored Shore Realty's argument to the contrary as follows:

While [§ 107(a)(1)] appears to cover Shore, Shore attempts to infuse ambiguity into the statutory scheme, claiming that [§ 107(a)(1)] could not have been intended to include all owners, because the word "owned" in [§ 107(a)(2)] would be unnecessary since an owner "at the time of disposal" would necessarily be included in [§ 107(a)(1)]. Shore claims that Congress intended that the scope of [§ 107(a)(1)] be no greater than that of [§ 107(a)(2)] and that both should be limited by the "at the time of disposal" language. By extension Shore argues that both provisions should be interpreted as requiring a showing of causation. We agree with the State, however, that [§ 107(a)(1)] unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation.<sup>72</sup>

The Second Circuit cited four bases for its determination in *Shore Realty* that current owners are subject to status liability. First, it contrasted the language in section 107(a)(1) and section 107(a)(2), noting that Congress "intended to cover different classes of persons differently."<sup>73</sup> The court added that while "[p]rior owners and operators are liable only if they owned or

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69. See *infra* note 78 and accompanying text.

70. 759 F.2d 1032 (2d Cir. 1985).

71. *Id.* at 1042 (citing section 101(32) and the relevant portions of the legislative history).

72. *Id.* at 1043-44 (emphasis added).

73. *Id.* at 1044.

operated the facility at the time of disposal of any hazardous substance; this limitation does not apply to current owners, like Shore."<sup>74</sup>

Second, the *Shore Realty* court pointed out that implying a causation requirement in section 107(a)(1) would run counter to the structure of the Act: "[i]nterpreting [§ 107(a)(1)] as including a causation requirement makes superfluous the affirmative defenses provided in [§ 107(b)(3)], each of which carves out from liability an exception based on causation. Without a clear congressional command otherwise, we will not construe a statute in any way that makes some of the provisions surplusage."<sup>75</sup>

Third, the court turned to the legislative history, examining the shift from a causation-based standard in H.R. 7020 to the final standard embodied in section 107(a)(1), which dispensed with any causation requirement. The court found that this shift further supported its interpretation.<sup>76</sup>

Finally, the *Shore Realty* court determined that requiring CERCLA plaintiffs to show causation as a precondition to imposing liability on current owners would "open a huge loophole in CERCLA's coverage"<sup>77</sup> by encouraging the transfer of contaminated properties to new owners, who would then be beyond the scope of the liability scheme. The court concluded that it would not interpret section 107(a)(1) in a way that would frustrate the statute's goals (i.e., that cost-recovery be available) "in the absence of a specific congressional intention otherwise."<sup>78</sup>

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1045.

78. *Id.* At first blush, this rationale seems weak when one considers that the former owner, if it owned the site at the time of disposal, would still be liable. Even if, as noted by the court, there might be a risk that this former owner would be judgment proof, this risk would still be present even if the property remained unsold. Seen from this vantage point, a causation requirement would seem to leave any potential plaintiff in the same position after a sale as he was in before the sale (i.e., a potential lawsuit against a former owner, with all of the attendant insolvency risks). But on closer examination, there is a significant difference: if the buyer were liable, a CERCLA plaintiff would at least have access to any value in the site itself, as restored by the cleanup, in the same way that it would if the former owner retained title. If the current owner were not liable, however, this restored value

There appear to have been only three other pre-SARA decisions involving landowners who alleged that they merely had the misfortune to have acquired contaminated sites; all three were from district courts. These decisions all cited *Shore Realty* for the proposition that section 107(a)(1) imposes strict liability on current owners, without regard to causation.<sup>79</sup> These cases were consistent with numerous other decisions imposing the same standard of liability on other categories of PRPs, typically generators (under section 107(a)(3)) or owners at the time of disposal (under section 107(a)(2)).<sup>80</sup>

The seminal<sup>81</sup> pre-SARA case on joint and several liability was *United States v. Chem-Dyne Corp.*<sup>82</sup> In *Chem-Dyne*, the court first quoted extensively from the floor statements of Senator Ran-

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would be unavailable to any potential plaintiff.

79. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578 (D. Md. 1986); *United States v. Tyson*, No. CIV.A.84-2663, 1986 WL 9250, at \*9 (E.D. Pa. 1986); *United States v. Mirabile*, No. CIV.A.84-2280, 1985 WL 97, at \*13 (E.D. Pa. 1985).

80. *See, e.g.*, *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983); *United States v. Wade*, 577 F. Supp. 1326, 1332-33 (E.D. Pa. 1983); *United States v. Ward*, 618 F. Supp. 884, 895 (E.D.N.C. 1985); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 843-44 (W.D. Mo. 1984); *aff'd*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 191 and 204 (W.D. Mo. 1985) (all involving generators); *United States v. Argent Corp.*, No. CIV.83-0523 BB, 1984 WL 2567, at \*3 (D.N.M. 1984); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1405 (D.N.H. 1985); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 991-93 (D.S.C. 1984), *aff'd sub nom.* *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *United States v. Dickerson*, 640 F. Supp. 448, 451 (D. Md. 1986) (all involving owners at time of disposal); *see also* *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 266 (6th Cir. 1985); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316-17 (9th Cir. 1986); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982); *City of New York v. Exxon Corp.*, 633 F. Supp. 609, 614 (S.D.N.Y. 1986) (all noting generally that CERCLA imposes strict liability).

81. *See, e.g.*, H.R. REP. NO. 99-253(I), at 74 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856 (referring to *Chem-Dyne* as "seminal"); *United States v. Miami Drum Servs.*, No. 85-0038-CIV-A, 1986 WL 15327 (S.D. Fla. 1986) (same); *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1115 (N.D. Ill. 1988) (same).

82. 572 F. Supp. 802 (S.D. Ohio 1983).

dolph and Representative Florio<sup>83</sup> to the effect that, despite its having deleted the terms "joint and several liability," Congress still intended for the courts to apply that standard where consistent with the common law.<sup>84</sup> After noting that "[s]tatements of the legislation's sponsors are properly accorded substantial weight,"<sup>85</sup> the *Chem-Dyne* court concluded that:

A reading of the entire legislative history in context reveals that the scope of liability and the term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases. The deletion was not intended as a rejection of joint and several liability. Rather, the term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.<sup>86</sup>

The *Chem-Dyne* court next determined that courts should apply federal common law principles in resolving whether joint and several liability should be evaluated on a case-by-case basis, noting that "there is no good reason why the United States' right to reimbursement should be subjected to the needless uncertainty and subsequent delay occasioned by diversified local disposition when this matter is appropriate for uniform national treatment."<sup>87</sup>

Finally, relying primarily on the Restatement (Second) of Torts, the court concluded that:

An examination of the common law reveals that when two or more persons acting independently caused a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm. Furthermore, where the conduct of two or more persons liable under [§ 107] has combined to violate the statute, and one or more

83. *Id.* at 806-07.

84. *See supra* text accompanying notes 61-62.

85. *Chem-Dyne*, 572 F. Supp. at 807 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979)).

86. *Id.* at 808 (citations omitted).

87. *Id.* at 809.

of the defendants seeks to limit his liability on the ground that the entire harm is capable of apportionment, the burden of proof as to apportionment is upon each defendant.<sup>88</sup>

The vast majority of pre-SARA decisions cited to either *Chem-Dyne* and/or the Restatement in finding that CERCLA contemplated the imposition of joint and several liability where the harm was indivisible, or where there was no other reasonable basis for apportionment.<sup>89</sup> Moreover, in at least four cases, the courts determined that landowners were subject to joint and several liability, although only one involved a current landowner who merely had the misfortune of acquiring contaminated property.<sup>90</sup>

The only discordant trend in the pre-SARA case law was reflected in three district court decisions which expressed reservations about a strict application of the Restatement approach.<sup>91</sup>

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88. *Id.* at 810 (citations omitted).

89. *See* United States v. Wade, 577 F. Supp. 1326, 1337-39 (E.D. Pa. 1983); United States v. Conservation Chem. Co., 589 F. Supp. 59, 62-63 (W.D. Mo. 1984); United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Col. 1985); United States v. Argent Corp., No. CIV.83-0523 BB, 1984 WL 2567, at \*3 (D.N.M. May 4, 1984); United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 994-95 (D.S.C. 1984), *aff'd sub nom.* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1395-96 (D.N.H. 1985); Colorado v. Asarco, Inc., 608 F. Supp. 1484, 1484 (D. Col. 1985). *See also* United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 844-45 (W.D. Mo. 1984) (reaching the same result without citing *Chem-Dyne*), *aff'd*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. Ward, 618 F. Supp. 884, 893 (E.D.N.C. 1985) (stating categorically that joint and several liability applies under CERCLA).

90. United States v. Mirabile, No. CIV.A.84-2280, 1985 WL 97, at \*14 (E.D. Pa. Sept. 6, 1985) (involving an owner liable under section 107(a)(1)); United States v. Argent Corp., No. CIV.83-0523 BB, 1984 WL 2567, at \*3 (D.N.M. May 4, 1984); United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 994-95 (D.S.C. 1984), *aff'd sub nom.* United States v. Monsanto Co., 858 F.2d 160, 174-75 (4th Cir. 1988); United States v. Northeastern Pharm. and Chem. Co., 579 F. Supp. 823, 844-45 (W.D. Mo. 1984), *aff'd*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (involving owners liable under section 107(a)(2)).

91. *See* United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984); United States v. Stringfellow, No. CV-83-2501-



The leading case of the three was *A & F Materials*.<sup>92</sup> In that case, the court first noted the *Chem-Dyne* analysis approvingly, but then qualified its application of it in the following terms:

After reviewing the legislative history, the Court concludes a rigid application of the Restatement approach to joint and several liability is inappropriate. Under the Restatement approach, any defendant who could not prove its contribution would be jointly and severally liable. This result must be avoided because both Houses of Congress were concerned about the issue of fairness, and joint and several liability is extremely harsh and unfair if it is imposed on a defendant who contributed only a small amount of waste to a site.<sup>93</sup>

The *A & F Materials* court went on to embrace the Gore factors<sup>94</sup> as the key to its "moderate approach to joint and several liability."<sup>95</sup>

With respect to the application of the third-party defense, the pre-SARA cases were schizophrenic. First, there were a number of fairly straightforward cases refusing to apply the defense where generators argued that they should be excused from liability because of the unanticipated actions of their transporters.<sup>96</sup> Second, there were at least two cases indicating that those who owned property at the time of disposal could not escape liability for the actions of their tenants.<sup>97</sup> The case law was less clear, however, with respect to landowners who merely purchased contaminated property.

In *Shore Realty*, the Second Circuit determined that the third-party defense was simply inapplicable with respect to preexisting

MML, 1984 WL 3206, at \*4-5 (C.D. Cal. Apr. 15, 1984); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 677 (D. Idaho 1986).

92. *See A & F Materials Co.*, 578 F. Supp. 1249.

93. *A & F Materials*, 578 F. Supp. at 1256.

94. *See supra* text accompanying notes 59-60.

95. *A & F Materials*, 578 F. Supp. at 1256.

96. *See, e.g., United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 235 (W.D. Mo. 1985); *United States v. Ward*, 618 F. Supp. 884, 897 (E.D.N.C. 1985).

97. *See United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 993 (D.S.C. 1984), *aff'd sub nom. United States v. Monsanto Co.*, 858 F.2d 160, 166 (4th Cir. 1988); *United States v. Argent Corp.*, No. CIV.83-0523 BB, 1984 WL 2567, at \*2 (D.N.M. May 4, 1984).

contamination.<sup>98</sup> In so holding, the court relied on the requirement in section 107(b)(3) that the defendant show, as an element of the third-party defense, that "he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions."<sup>99</sup> The court rejected Shore's assertion of the defense in the following terms:

Shore argues that it had nothing to do with the transportation of the hazardous substances and that it has exercised due care since taking control of the site. Who the "third part(ies)" Shore claims were responsible is difficult to fathom. *It is doubtful that a prior owner could be such, especially the prior owner here, since the acts or omissions referred to in the statute are doubtless those occurring during the ownership or operation of the defendant.* Similarly, many of the acts and omissions of the prior tenants/operators fall outside the scope of [§ 107(b)(3)], because they occurred before Shore owned the property.<sup>100</sup>

In the other three pre-SARA current landowner cases, however, the courts appeared to assume that the third-party defense could potentially be applied to preexisting contamination. In the most significant of these cases, *United States v. Mirabile*,<sup>101</sup> the Mirabiles acquired their property from a bank which had purchased it at a foreclosure sale. After determining that the Mirabiles had no contractual relationship with any of the prior owners or operators who contaminated the property,<sup>102</sup> the court addressed the United States' argument that the third-party defense was unavailable as a matter of law because there was uncontroverted evidence that during the first five months of the Mirabile's ownership, wastes leaked from drums spread across the property. Remarkably, the court rejected this argument, stating that, "a common sense reading of the language of the statute suggests that the defense would be potentially available to a party who can establish that he purchased property on which hazardous wastes were placed by others and that he did not add to those wastes."<sup>103</sup> The court went on to deny the United States'

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98. *Shore Realty*, 759 F.2d at 1048.

99. *Id.* (quoting from 42 U.S.C. § 9607(b)(3) (1994)).

100. *Id.* (emphasis added).

101. No. CIV.A.84-2280, 1985 WL 97 (E.D. Pa. Sept. 6, 1985).

102. See *infra* text accompanying notes 98-99.

103. No. CIV.A.84-2280, 1985 WL 97, at \*17 (E.D. Pa. Sept. 6, 1985).

motion for summary judgment, finding that the Mirabiles also raised a triable issue of fact as to whether they had exercised due care once they assumed ownership of the site.<sup>104</sup>

The other two cases were less noteworthy. In *United States v. Maryland Bank & Trust Co.*,<sup>105</sup> the court rejected a motion for summary judgment due to the lack of a full record regarding the nature of the contractual and business relations between the defendant bank and its borrower. And in *United States v. Tyson*,<sup>106</sup> the court deemed the defense inapplicable because of the defendant's pre-ownership contractual relations with the other defendants, as well as its failure to establish that it either exercised due care or took foreseeable precautions with respect to the dumping activities.

Interestingly, in these latter three cases (all of which post-dated *Shore Realty*), the Environmental Protection Agency (EPA) does not appear to have pressed the *Shore Realty* court's view that the pre-SARA version of the third-party defense was simply inapplicable in the context of preexisting contamination. Nor does it appear to have advanced the equally compelling argument that the landowners in these cases had at least indirect contractual relationships with the contaminators because, in each instance, they bought the property from someone in the chain of title with the party that had contaminated the site. This is precisely the argument that EPA later characterized in its Landowner Liability Guidance as having been its "pre-SARA" position.<sup>107</sup>

In *Mirabile*, for example, the court noted that the United States had "apparently concede[d] . . . that no employment, agency, or contractual relationship existed between the Mirabiles and the individuals and entities previously connected with the Turco site."<sup>108</sup> The United States did this even though the

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104. *Id.*

105. 632 F. Supp. 573, 581 (D. Md. 1986).

106. No. CIV.A.84-2663, 1986 WL 9250, at \*11-12 (E.D. Pa. Aug. 22, 1986).

107. In its 1989 Guidance on Landowner Liability Under Section 107(a)(1) of CERCLA ("Landowner Liability Guidance"), EPA represented that its position as having been that a real estate deed represented a contractual relationship within the meaning of section 107(b)(3), thus eliminating the availability of the third party defense for a landowner in the chain of title with a party who had caused or contributed to the release. 54 Fed. Reg. 34235, 34236-37 (1989).

108. No. CIV.A.84-2280, 1985 WL 97, at \*15 (E.D. Pa. Sept. 6,

Mirabiles were in the chain of title with Mangels Industries and Turco Coatings, which had caused the relevant contamination.<sup>109</sup> The United States went on to fight the battle in *Mirabile* based on the second tier questions of whether the third parties were the sole causes of the releases, and whether the Mirabiles exercised due care and adopted foreseeable precautions.<sup>110</sup> These questions become relevant, of course, only if one: (1) accepts the proposition that section 107(b)(3) is potentially available to those who purchase contaminated land; and (2) takes the view that those who purchase property are not automatically in an indirect contractual relationship with all of those in the chain of title.<sup>111</sup>

### C. SARA and its Legislative History

Congress left most of the relevant provisions of CERCLA alone when it enacted SARA in 1986. It made no changes with respect to either the basic identification of liable parties in section 107(a) or the definition of liability in section 101(32). The

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1985).

109. *See id.* at \*13. Again, the Mirabiles bought the property from a bank (American Bank and Trust Co.) that foreclosed on the property after it had been contaminated by its borrowers, Mangels Industries and Turco Coatings.

110. *See id.* at \*16.

111. It is worth noting that EPA's position, as reflected in the Landowner Liability Guidance, is less aggressive than the *Shore Realty* approach. Under *Shore Realty*, the third-party defense was unavailable to anyone who purchased contaminated land, because the defense only applied if the third-party that caused the release did so during the defendant's tenure on the property. *Shore Realty*, 759 F.2d at 1048. Under the Landowner Liability Guidance approach, by contrast, a current landowner could establish a defense with respect to preexisting contamination if the contamination was caused by someone outside the chain of title, such as a vandal or an upgradient property owner. *See* 54 Fed. Reg. at 34236-37; *see also id.* at 34239 ("Even before the enactment of SARA, it was clear that the third party defense of section 107(b)(3) was available to a landowner whose property was contaminated as a result of the act or omission of a third-party who had no contractual relationship with the landowner through a deed or otherwise, as long as the landowner satisfied the other requirements of the third party defense. Examples of this situation include contamination of property by adjacent landowners and 'midnight dumping.'").

only significant change Congress made involved the third-party defense under section 107(b)(3). In the new section 101(35), Congress defined the term "contractual relationship" as used in section 107(b)(3):

The term "contractual relationship" . . . 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 or have 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 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 [§ 107(b)(a) and (b) of CERCLA (relating to due care and foreseeable precautions, respectively)].<sup>112</sup>

Section 101(35)(B) specified that, in order for a defendant to show that it had no reason to know of the contamination (as required under section 101(35)(A)(i) above), it must "have undertaken, at the time of acquisition, all appropriate inquiry in the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability."<sup>113</sup> It further indicated that, in applying this standard, courts should take into account:

any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by

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112. 42 U.S.C. § 9601(35)(A) (1994).

113. 42 U.S.C. § 9601(35)(B).

appropriate inspection.<sup>114</sup>

What Congress did not do when amending CERCLA in 1986 is almost as significant as what it did. Congress chose to leave the basic construct of section 107(a) as it was, with full knowledge that the courts had read it as imposing strict and, in appropriate cases, joint and several liability on PRPs. In the House Report that accompanied the major predecessor bill to SARA,<sup>115</sup> Congress stated that:

No change has been made in the standard of liability that applies under CERCLA. As under section 311 of the [Clean Water Act], liability under CERCLA is strict, that is, without regard to fault or willfulness. Where appropriate, liability under CERCLA is also joint and several, as a matter of federal common law.

Explicit mention of joint and several liability was deleted from CERCLA in 1980 to allow courts to establish the scope of liability through a case-by-case application of "traditional and evolving principles of common law" and pre-existing statutory law. The courts have made substantial progress in doing so. The Committee fully subscribes to the reasoning of the court in the seminal case of *United States v. Chem-Dyne Corporation*, which established a uniform federal rule allowing for joint and several liability in appropriate CERCLA cases . . . .<sup>116</sup>

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114. *Id.*

115. SARA was derived mostly from H.R. 2817, which the House passed on December 10, 1985. Some portions came from S. 51, which the Senate passed on September 24, 1985.

116. H.R. REP. NO. 99-253(I), at 74 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856; *see also* 131 CONG. REC. H11069-70 (daily ed. Dec. 5, 1985) (statement of Rep. Dingell); *id.* at 11073 (statement of Rep. Eckert); 132 CONG. REC. S14903 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford); 132 CONG. REC. H9583 (daily ed. Oct. 8, 1986) (statement of Rep. Glickman); and *id.* at H9587 (statement of Rep. Florio). This, of course, constitutes *post hoc* legislative history to the extent that it applies to statutory provisions that Congress left unchanged in 1986. But the Supreme Court has made clear that the views of a subsequent Congress are relevant on issues of statutory interpretation where it is clear that the subsequent Congress specifically considered an issue and relied on a common understanding as to the meaning of previously enacted provisions. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782-85 (1985); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985); *United States v. Board of Comm'rs of Sheffield, Alabama*, 435 U.S. 110, 131-35 (1978); *Brown & Williamson Tobacco Corp.*

Moreover, Congress did this knowing full well that CERCLA imposed this form of liability on site owners even if they had nothing to do with causing the relevant contamination. Representative Studds, for example, testified in favor of the amendments' settlement provisions by pointing out that they would mitigate the harshness of the strict liability regime. He used the specific example of the New Bedford Harbor case:

The question of liability is not merely a theoretical problem. It is very important, very real, and very difficult. In my own district, the question of liability for the pollution that exists in New Bedford Harbor has not been resolved. Nor is it clear that procedures exist within the current law that will guarantee the question will ever be settled in an equitable manner.

*This is because there is no clear connection within the law between proportional responsibility for pollution and proportional responsibility for the costs of cleaning up that pollution. Nor is there clear guidance with respect to the assignment of liability to companies that purchased facilities from which pollution once emanated, but which have been responsible for little or no pollution under the current management.*

The evidence indicates, in the New Bedford case, that the vast majority of the discharges of PCBs occurred during the 1950's and 1960's, when one of the major dischargers, Aerovox, was under different management than it is today. The company that operated Aerovox until 1972 has been renamed AVX, and no longer operates anywhere in the New Bedford area.

*Under the law, all companies owning the Aerovox facilities since the time of the discharges are potentially liable for all of the cleanup costs and damages caused by that pollution. Thus, the present owners — and employees — face the possibility of economic hardship, or even potential bankruptcy, as a result of discharges that occurred for the most part 15 to 30 years ago under different management. This is true despite the fact that fairness would seem to dictate that the old company — AVX — should bear the major share of responsibility for the pollution cleanup costs. . . .*

The new amendments will not eliminate completely the inequities that exist within the current statute as they affect the situa-

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v. Food & Drug Admin., 153 F.3d 155, 171-72 (4th Cir. 1998); *see also* Monessen Southwestern Railway Co. v. Morgan, 486 U.S. 330, 338 (1988) (finding Congressional ratification through Congress's failure to disturb a consistent judicial interpretation).

tion in New Bedford. I am hopeful, however, that they will encourage a process of negotiations under which each of the potentially liable companies will be able to settle with EPA, and pay a share of the cleanup costs that is at least roughly proportional to their individual responsibility for the discharges that have contaminated the harbor.<sup>117</sup>

Congress did, however, weigh in on the issue of defenses. By amending the definition of "contractual relationship," Congress created the "innocent landowner" defense. This applies to some landowners, but not all, who have purchased contaminated sites and played no role in exacerbating the contamination. The key limitations are that: (1) before having purchased the property at issue, the landowner must have undertaken "all appropriate inquiry" into the potential existence of contamination; and (2) must have found none.<sup>118</sup>

Representative Frank introduced the first version of the innocent landowner defense as an amendment to H.R. 2817.<sup>119</sup> In its original form, the defense required the landowner to establish, by a preponderance of the evidence, three major elements:

(1) that it "did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, the release or threatened release of which causes the incurrence of a response cost;"

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117. 131 CONG. REC. H11093-94 (daily ed. Dec. 5, 1985) (statement of Rep. Studds) (emphasis added); *see also id.* at H11160 (statement of Rep. Eckart indicating his concern that the innocent landowner defense would constitute a dangerous erosion in the joint and several liabilities section); *id.* at H11158 (statement of Rep. Roe, "If a person buys a piece of property, and he does a record search, as you well know, gets his deed, and he gets the details in his deed that something is there that he is unaware of and nobody knew about, he would be responsible for it under existing law."); *id.* at H11159 (statement of Rep. Moakley, "I believe that we all agree that those who are responsible for the illegal disposal of hazardous waste should be held accountable. Unfortunately, under present law and EPA policy, we also hold an innocent landowner equally responsible."); 131 CONG. REC. S12027-28 (daily ed. Sept. 24, 1985) (colloquy between Sen. Baucus and Sen. Stafford regarding the Milltown dam site).

118. 42 U.S.C. § 9601(35)(A)-(B) (1994).

119. *See* 131 CONG. REC. H11158 (daily ed. Dec. 5, 1985) (statement of Rep. Frank).



(2) that it "did not contribute to the release or threat of release of a hazardous substance at the facility through any act or omission;" and, most importantly,

(3) that it "did not acquire the property with actual or constructive knowledge that the property was used prior to the acquisition for the generation, transportation, storage, treatment, or disposal of any hazardous substance."<sup>120</sup>

In introducing this amendment, Representative Frank indicated it was necessary to resolve the ambiguity in the law so that landowners who could not have reasonably discovered contamination before buying a particular site would have a liability defense.<sup>121</sup> He also emphasized the narrowness of this defense. In particular, he stressed that the defense would be unavailable unless the landowner could prove that she lacked complete and constructive knowledge. In response to a question from Representative Florio, who noted apprehension on the part of some of his colleagues that the defense might be too broad, Representative Frank stated that:

Not only would you lose this defense if you had constructive knowledge, you have the burden of proof to show that you did not have constructive knowledge. The way this is drafted, it says you must establish by a preponderance of the evidence that you did not have constructive knowledge. In other words, if it was widely known in the neighborhood to be not just a hazardous waste site, but if anything had been dumped there, if it was known to you at all, you would have to go to court and prove the negative. We all know that could be hard . . . You have to go to court and prove by a preponderance of the evidence that you did not even have constructive knowledge, that is, that a reasonable person could not have been expected to know that, not even a reasonable person in the neighborhood. You, as a diligent purchaser, would have been under some obligation to find out, and it is only in that case where you failed to be a diligent purchaser that you would be liable.<sup>122</sup>

Interestingly, no one complained that the defense was too narrow. The only objections raised were articulated by Representative Eckart, the primary sponsor of H.R. 2817, who was concerned that the defense was too permissive. Representative Eckart deemed the creation of the defense "a dangerous erosion

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120. *Id.*

121. *Id.*

122. *Id.* at H11159.

in the joint and several liabilities section” and indicated his preference that the innocent landowner issue be dealt with as a matter of prosecutorial discretion under the *de minimis* settlement rubric.<sup>123</sup> Despite this concern, the House as a whole approved Representative Frank’s formulation with only slight modification.<sup>124</sup>

There is no legislative history explaining the transformation of the innocent purchaser language from that which the House passed in December of 1985 to the final version that wound up in SARA. The Conference Report accompanying the final bill indicated the purpose of the final language in the following terms:

[The] new definition of contractual relationship is intended to clarify and confirm that under limited circumstances landowners who acquire property without knowing of any contamination at the site and without reason to know of any contamination . . . may have a defense to liability under section 107 and therefore should not be held liable for cleaning up the site if such persons satisfy the remaining requirements of section 107(b)(3). A person who acquires property through a land contract or deed or other instrument transferring title or possession that meets the requirements of this definition may assert that an act or omission of a third party should not be considered to have occurred in connection with a contractual relationship as identified in section 107(b) and therefore is not a bar to the defense.<sup>125</sup>

#### D. *Where SARA Seemed to Leave Things*

Taken together, SARA and its legislative history did two significant things. First, they confirmed the basic aspects of landowner liability. After the passage of SARA, it could no longer be doubted that: (1) current landowners are liable under CERCLA; (2) liability under the statute is strict and without regard to causation; and (3) CERCLA liability is also joint and several in appropriate cases, consistent with *Chem-Dyne* and the Restatement (Second) of Torts.<sup>126</sup>

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123. *Id.* at H11160 (statement of Rep. Eckart).

124. *Id.* at H11162.

125. H.R. CONF. REP. NO. 99-962, at 186-187 (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 3279-80.

126. By so clearly embracing the *Chem-Dyne* approach, see *supra* text accompanying note 109, Congress at least implicitly disavowed the alter-

Significantly for our purposes, SARA seemed to clarify the interrelationship between landowner liability under section 107(a)(1) and the third-party defense under section 107(b)(3). In so doing, SARA established a different approach from that articulated in any of the prior decisions. Contrary to *Shore Realty*, SARA made it clear that at least some parties who purchase contaminated land may qualify for the third-party defense. If the purchaser did not know or have reason to know<sup>127</sup> of the contamination, she is eligible for the defense, assuming that she also exercises due care once she takes possession of the property,<sup>128</sup> even though she was in no position to take precautions against any foreseeable acts or omissions of the party that caused the contamination.<sup>129</sup>

At the same time, by defining the term "contractual relationship" to specifically include land contracts and deeds, Congress indicated that the vast majority of purchasers would have to meet the "all appropriate inquiry" test as a precondition to avoiding CERCLA's strict liability web (assuming, of course, that it is

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native *A & F Materials* approach to joint and several liability. *See supra* text accompanying notes 86-89. This conclusion is underscored by the fact that Congress expressly referenced *A & F Materials* in the portion of the House Report discussing how liability should be allocated among joint and severally liable parties under the new section 113. *See also* H.R. REP. NO. 99-253(III), at 19, *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042.

127. Again, the "have reason to know standard" imposes an obligation on the purchaser to make the appropriate inquiry into the potential existence of contamination before acquiring the property.

128. 42 U.S.C. § 9607(b)(3)(a) (1994).

129. *See* 42 U.S.C. § 9607(b)(3)(b). *See* text accompanying note 122 above. Despite indications in the Conference Report to the contrary, Congress must have considered the "precautions against foreseeable acts" requirement of section 107(b)(3)(b) simply inapplicable in the innocent landowner context. Otherwise, if one follows the *Shore Realty* approach, Congress' attempt to establish an innocent landowner defense in section 101(35) would have been for naught, because the landowner could not establish that she took the required precautions under section 107(b)(3)(b). Of course, another way to get to this result would be to argue that the acts or omissions of the third party (presumably the seller) were not foreseeable to the purchaser. Either way, the outcome is the same, and it is inconsistent with *Shore Realty*.

proven that the property was contaminated at the time of acquisition).<sup>130</sup> This view is fully supported by the Conference Report.<sup>131</sup> It is further confirmed by the testimony of Representative Frank, which expressly stated that those who failed to qualify as "diligent purchaser[s]" within the meaning of his amendment would be subject to the full brunt of CERCLA liability.<sup>132</sup>

It is important to remember that section 107(b)(3) strips the landowner of her defense if she had even an indirect contractual relationship with the person who contaminated the site.<sup>133</sup> Viewed in this light, it seems apparent that Congress embraced the EPA's philosophy that a defense should be unavailable to purchasers if they are in the chain of title with the entity that

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130. The "vast majority" qualifier in the text is necessary for two reasons. First, section 101(35)(A) lets some parties (e.g., governmental entities who take title through involuntary transfer) off the hook, even absent preacquisition due diligence activities. See 42 U.S.C. § 9601(35)(A)(ii) and (iii). Secondly, although there does not appear to be any case law on this point, there is a strong argument under the SARA formulation that even non-diligent purchasers can avoid liability where the contamination was caused by someone outside the chain of title. This is because, under SARA, current landowners only have to meet the "all appropriate inquiry" standard to the extent necessary to negate a "contractual relationship" that might otherwise exist with the party whose act or omission led to the contamination. This party will of course typically be a prior owner or operator. See sections 9601(35)(A) and 9607(b)(3). In those cases where the contamination was caused solely by someone outside the chain of title (e.g., either a vandal or an upgradient property owner), this would appear to be one circumstance where the "traditional" section 107(b)(3) would still apply to a subsequent purchaser, even absent any pre-purchase investigations, because the subsequent purchaser would have no contractual relationship with the offending party that needs to be negated. It is worth noting that, while the EPA appears to acknowledge the potential validity of this reading in its Landowner Liability Guidance, see 54 Fed. Reg. 34,235, 34,239 (1989), it also articulates a basis for having the defense vanish for want of "due care," at least where the landowner fails on an ongoing basis to discover or address the contamination after acquiring the property. *Id.* (in discussing the potential liability of those who take property by inheritance or bequest).

131. See *supra* text accompanying note 115.

132. See *supra* text accompanying note 120.

133. 42 U.S.C. § 9607(b)(3) (1994).

caused the contamination as a starting point in the analysis.<sup>134</sup> But Congress created an "out" that neither the EPA nor any court had previously advanced: the purchaser can avoid liability under SARA by having engaged in an appropriate investigation, assuming the investigation did not verify the presence of contamination.

### III. POST-SARA CASES ON LANDOWNER LIABILITY

#### A. *The Mainstream Cases*

The vast majority of post-SARA cases have been consistent with the above-described scheme, recognizing that CERCLA imposes strict,<sup>135</sup> as well as joint and several<sup>136</sup> liability on those who own

134. This, of course, is inconsistent with *Mirabile*. Again, in that case the *Mirabiles* were in the chain of title with the contaminating parties. See *supra* text accompanying notes 99-100.

135. For cases involving those who purchased contaminated property, see, e.g., *Tanglewood East Homeowners v. Charles Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994); *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554 (11th Cir. 1990); *Foster v. United States*, 922 F. Supp. 642, 651 (D.D.C. 1996); *American Nat'l Bank Trust Co. v. Harcros Chems., Inc.*, 997 F. Supp. 994, 998 (N.D. Ill. 1998); *LaSalle Nat'l Trust v. Schaffner*, 818 F. Supp. 1161, 1169 (N.D. Ill. 1993); *United States v. Occidental Chem. Corp.*, 965 F. Supp. 408, 416 (W.D.N.Y. 1997); *State v. W.R. Peele, Sr. Trust*, 876 F. Supp. 733, 744 (E.D.N.C. 1995); *Lefebvre v. Central Maine Power Co.*, 7 F. Supp. 2d 64, 69-72 (D. Me. 1998); *United States v. Shell Oil Co.*, 841 F. Supp. 962, 968 (C.D. Cal. 1993); *United States v. Serafini*, 706 F. Supp. 346, 350 (M.D. Pa. 1988); *Idylwoods Assoc. v. Mader Capital, Inc.*, 915 F. Supp. 1290, 1299 (W.D.N.Y. 1996), *aff'd on reh'g*, 956 F. Supp. 410 (W.D.N.Y. 1997); *Atlantic Richfield Co. v. Current Controls, Inc.*, No. 93-CV-0950E(H), 1996 WL 528601, at \*5-6 (W.D.N.Y. Sept. 6, 1993); *Catellus Dev. Corp. v. L.D. McFarland Co., Ltd.*, CIV.No. 91-685-JE, 1993 WL 485145, at \*10 (D. Or. July 27, 1993); *Goe Eng'g Co. v. Physicians Formula Cosmetics*, No. CV 94-3576-WDK, 1997 WL 889278, at \*10 (C.D. Cal. June 4, 1997); *City of Toledo v. Beazer Materials & Servs., Inc.*, 923 F. Supp. 1013, 1015 (N.D. Ohio 1996). For cases involving those who owned the property at the time of disposal, see, e.g., *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988); *Bedford Affiliates v. Sills*, 156 F.3d 416, 425 (2d Cir. 1998); *Long Beach Unified School Dist. v. Dorothy B. Godwin California Living Trust*, 32 F.3d 1364, 1366 (9th Cir. 1994) (but going on to hold that an easement holder

does not qualify an owner under CERCLA); *Violet v. Picillo*, 648 F. Supp. 1283, 1290 (D. R.I. 1986); *City of Philadelphia v. Stepan Chem. Co.*, CIV.A. No. 81-851, 1987 WL 15214, at \*1 (E.D. Pa. 1987); *Johnson County Airport Comm'n v. Parsonnit Co.*, 916 F. Supp. 1090, 1094 (D. Kan. 1996); *South Florida Water Management Dist. v. Montalvo*, No. 88-8038-CIV-D, WL 260215, at \*1 (S.D. Fla. Feb. 15, 1989). For cases involving those who owned contaminated property at the time of disposal, *see, e.g.*, *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988), *Violet v. Picillo*, 648 F. Supp. 1283, 1290 (D.R.I. 1986); *Long Beach Unified School Dist. v. Dorothy B. Godwin California Living Trust*, 32 F.3d 1364, 1366 (9th Cir. 1994) (but going on to hold that an easement holder does not qualify an owner under CERCLA); *City of Philadelphia v. Stepan Chem. Co.*, CIV.A. No. 81-851, 1987 WL 15214, at \*1 (E.D. Pa. July 30, 1987); *Johnson County Airport Comm'n v. Parsonnit Co.*, 916 F. Supp. 1090, 1094 (D. Kan. 1996); *South Florida Water Management Dist. v. Montalvo*, No. 88-8038-CIV-D, 1989 WL 260215, at \*1 (S.D. Fla. Feb. 15, 1989). *See also* *United States v. National Bank of the Commonwealth*, CIV.A. No. 89-2127, 1990 WL 357792, at \*3 (W.D. Pa. Apr. 23, 1990) (imposing strict liability on a current operator that had played no role in causing the relevant contamination); *Clear Lake Properties v. Rockwell Int'l Corp.*, 959 F. Supp. 763, 768 (S.D. Tex. 1997) (same); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1509 (11th Cir. 1996) (finding plaintiff had alleged sufficient facts to impose current operator liability without regard to causation).

136. For cases involving those who purchased contaminated property, *see* *Chesapeake & Potomac Tel. Co. of Virginia v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1280-81 (E.D. Va. 1992); *United States v. Occidental Chem. Corp.*, 965 F. Supp. 408, 416 (W.D.N.Y. 1997). For cases involving those who owned the property at the time of disposal, *see* *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507-08 (6th Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 171-72 (4th Cir. 1988); *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1279-81 (3d Cir. 1993); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121 n.4 (3d Cir. 1997); *United States v. Mottolo*, 695 F. Supp. 615, 629 (D.N.H. 1988); *United States v. Stringfellow*, 661 F. Supp. 1053, 1059-60 (C.D. Cal. 1987); *International Clinical Lab. Inc. v. Stevens*, No. CV 87-3472, 1990 WL 43971, at \*4 (E.D.N.Y. Jan. 11, 1990); *South Florida Water Management Dist. v. Montalvo*, No. 88-8038-CIV-D, 1989 WL 260215, at \*2 (S.D. Fla. Feb. 15, 1989). It is worth pointing out that, in view of SARA, several courts have expressly rejected the *A & F Materials* alternative approach to joint and several liability. *See* *In re Bell Petroleum Servs.*, 3 F.3d 889, 901-02 (5th Cir. 1993); *United States v. Township of Brighton*, 153 F.3d 307, 310 (6th Cir. 1998); *Transportation*

contaminated property. Indeed, at least one appellate court has determined that landowners can be jointly and severally liable for an entire cleanup even where they own merely a portion of the affected site.<sup>137</sup> While most of the cases imposing joint and several liability involve those who owned property at the time the disposal activities occurred, the logic that the courts have applied is equally applicable to purchasers of contaminated property. Courts have relied on the fact that the harm in question at these sites (i.e., the contamination and its resulting environmental hazards) represents an indivisible harm as between the landowner and the other PRPs.<sup>138</sup> This, of course, is fully consistent with the nature of the "status" liability that section 107(a)(1) imposes on those who own contaminated property.

On the defense front, several courts have narrowly construed CERCLA's defenses to meet the statute's broad remedial objec-

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Leasing Co. v. California, 861 F. Supp. 931, 940 (C.D. Cal. 1993); United States v. Western Processing Co., 734 F. Supp. 930, 938 (W.D. Wash. 1990); United States v. Miami Drum Servs., Inc., No. 85-0038-CIV-A, 1986 WL 15327, at \*5 (S.D. Fla. Dec. 12, 1986). *See also infra* note 133. *But see* Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1117-18 (N.D. Ill. 1988) (expressing doubt as to whether Congress rejected the *A & F Materials* approach, in the context of an action by one PRP against another, where pure joint and several liability shouldn't apply anyway). *See also supra* notes 90-93, 124-27 and accompanying text.

137. *See* United States v. Rohm & Haas Co., 2 F.3d 1265, 1279-80 (3d Cir. 1993); *but see* United States v. Township of Brighton, 153 F.3d 318-19 (6th Cir. 1998) (indicating that one who is liable as an operator at the time of disposal might be able to establish apportionment as a matter of law for parts of the site with respect to which it performed no operational activities).

138. *See* Chesapeake & Potomac Tel. Co. of Virginia v. Peck Iron & Metal Co., 814 F. Supp. 1269, 1278-79, 1281 (E.D. Va. 1992) (involving current owners); United States v. Monsanto Co., 858 F.2d 160, 171-72 (4th Cir. 1988); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507-08 (6th Cir. 1989); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1121 n.4 (3d Cir. 1997); United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987); United States v. Mottolo, 695 F. Supp. 615, 629 (D.N.H. 1988), *aff'd*, 26 F.3d 261 (1st Cir. 1994) (all involving owners at the time of disposal). *Cf.* United States v. Township of Brighton, 153 F.3d 307, 314 (6th Cir. 1998) (in the context of operator liability).

tives.<sup>139</sup> Specifically, in the context of ownership liability, most courts have concluded that purchasers of contaminated property may avoid liability only by meeting the requirements of the innocent landowner defense.<sup>140</sup> In so holding, the courts determined

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139. *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1539 (E.D. Cal. 1992). See also *Reichhold Chems. Inc. v. Textron, Inc.*, 888 F. Supp. 1116, 1129 (N.D. Fla. 1995); *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1540 (W.D. Mich. 1989); *City of Philadelphia v. Stepan Chem. Co.*, CIV. A. No. 81-851, 1987 WL 15214, at \*4 (E.D. Pa. July 30, 1987); *Violet v. Picillo*, 648 F. Supp. 1283, 1293 (D.R.I. 1986) (emphasizing narrowness of defenses).

140. See *United States v. Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. 1341, 1347 (D. Idaho 1989) (noting that, under SARA, "Congress set down a strict rule that any instrument transferring title or possession of the facility would be a 'contractual relationship' barring the use of the [§ 107(b)(3)] defense unless certain enumerated conditions were met.") *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1280-81 (E.D. Va. 1992); *United States v. DiBiase Salem Realty Trust*, No. CIV.A.91-16028-MA, 1993 WL 729662, at \*6 (D. Mass. Nov. 19, 1993); *Foster v. United States*, 922 F. Supp. 642, 654 (D.D.C. 1996); *Lefebvre v. Central Maine Power Co.*, 7 F. Supp.2d 64, 69 (D. Me. 1998); *Helix v. Southern Pac. Transp. Co.*, No. C-92-2312 DLJ, 1995 WL 481704, at \*2 (N.D. Cal. Aug 1, 1995); *Goe Eng'g Co. v. Physicians Formula Cosmetics*, No. CV-84-3576-WDK, 1997 WL 889278, at \*10 n.7 (C.D. Cal. June 4, 1997); See also *Clear Lake Properties v. Rockwell Int'l Corp.*, 959 F. Supp. 763, 769 (S.D. Tex. 1997) (applying the innocent landowner analysis to a lessee); *United States v. National Bank of the Commonwealth*, CIV.A. No. 89-2127, 1990 WL 357792, at \*5-6 (W.D. Pa. Apr. 23, 1990). A number of other courts have assumed, without specifically holding, that current owners may escape liability only through establishing the innocent landowner defense. See, e.g., *In re Hemingway Transp., Inc.*, 993 F.2d 915, 932 (1st Cir. 1993); *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994); *United States v. Shell Oil Co.*, 841 F. Supp. 962, 973 (C.D. Cal. 1993); *United States v. Glidden Co.*, 3 F. Supp.2d 823, 834 (N.D. Ohio 1997); *United States v. Serafini*, 706 F. Supp. 346, 351-52 (M.D. Pa. 1988); *Idylwoods Assocs. v. Mader Capital, Inc.*, 915 F. Supp. 1290, 1300 (W.D.N.Y. 1996), *aff'd on reh'g*, 956 F. Supp. 410 (W.D.N.Y. 1997); *State v. W.R. Peele, Sr. Trust*, 876 F. Supp. 733, 744 (E.D.N.C. 1995); *Atlantic Richfield Co. v. Current Controls, Inc.*, No. 93-CV-0950E(H), 1996 WL 528601, at \*6 (W.D.N.Y. Sept. 6, 1996); *Wickland Oil Terminals v. Asarco, Inc.*, No. C-83-5906-SC, 1988 WL 167247, at \*4 (N.D. Cal. Feb. 23, 1988); *Boyce v. Bumb*, 944 F. Supp. 807, 812 (N.D. Cal. 1996).



that the existence of a deed precludes any operation of the "traditional" section 107(b)(3) defense for purchasers of contaminated property, at least where the contaminator and defendant are in the same chain of title.<sup>141</sup>

To avoid liability under CERCLA, most courts adamantly require prospective purchasers to meet the "all appropriate inquiry"<sup>142</sup> standard inherent in the innocent landowner defense. Unfortunately, these courts have provided less than clear signals

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141. See *United States v. Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. 1341, 1347 (D. Idaho 1989); *M & M Realty Co. v. Eberton Terminal Corp.*, 977 F. Supp. 683, 686 (M.D. Pa. 1997); *Foster v. United States*, 922 F. Supp. 642, 654 (D.D.C. 1996); *Lefebvre v. Central Maine Power Co.*, 7 F. Supp.2d 64, 71 n.3 (D. Me. 1998); *State v. W.R. Peele, Sr. Trust*, 876 F. Supp. 733, 745 (E.D.N.C. 1995) ("the contractual relationship between the defendant and the third-party need not relate to the handling of the hazardous substance or allow the defendant some control over the third-party's activities to defeat the third-party defense"); *United States v. DiBiase Salem Realty Trust*, No. CIV.A.91-16028-MA, 1993 WL 729662, at \*6 (D. Mass. Nov. 19, 1993); *United States v. Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546, 558 (W.D.N.Y. 1988); *Goe Eng'g Co. v. Physicians Formula Cosmetics*, No. CV.94-3576-WDK, 1997 WL 889278, at \*10 n.7 (C.D. Cal. June 4, 1997); *Helix v. Southern Pac. Transp. Co.*, No. C-92-2312 DLJ, 1995 WL 481704, at \*2 (N.D. Cal. Aug. 1, 1995). See also *United States v. Occidental Chem. Corp.*, 965 F. Supp. 408, 414 (W.D.N.Y. 1997). In the section 107(a)(2) context (involving owners at the time of disposal), most courts have determined that lease agreements also preclude any application of the traditional section 107(b)(3) defense. See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160, 169 (4th Cir. 1988); *Bedford Affiliates v. Sills*, 156 F.3d 416, 429 (2d Cir. 1998) (noting where the contamination was caused by a sublessee); *United States v. Northernair Plating Co.*, 670 F. Supp. 742, 748 (W.D. Mich. 1987), *aff'd*, *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989); *International Clinical Lab., Inc. v. Stevens*, 710 F. Supp. 466, 470 (E.D.N.Y. 1989); *Washington v. Time Oil Co.*, 687 F. Supp. 529, 533 (W.D. Wash. 1988) (noting lessor had indirect contractual relationship with sublessee); *In re Diamond Reo Trucks, Inc.*, 115 B.R. 559, 568 (W.D. Mich. 1990); *cf.* *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1275 (E.D. Cal. 1997) (holding that a land transfer under the Mining Law of 1872 did not establish a "contractual relationship").

142. *United States v. CDMG Realty Co.*, 96 F.3d 706, 721 (3d Cir. 1996)

as to exactly what that means.<sup>143</sup> The courts have squarely indicated, however, that the innocent landowner defense is inapplicable where the landowner purchased the site with knowledge of

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143. See, e.g., *Foster v. United States*, 922 F. Supp. 642, 655-56 (D.D.C. 1996) (finding the innocent landowner defense unavailable where the purchaser undertook no environmental investigation before buying the site in 1985); *United States v. Taylor*, No. 1:90:CV:851, 1993 WL 760996 at \*11 (W.D. Mich. Dec. 9, 1993) (deeming the defense unavailable with respect to a purchase in 1986 where “[a]ny diligence would have revealed problems”); *United States v. Rohm & Haas Co.*, 790 F. Supp. 1255, 1264 (E.D. Pa. 1992), *aff’d*, 2 F.3d 1263 (3d Cir. 1993) (landowner did not meet test where it offered no evidence of having investigated the prior uses or previous ownership of the property); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1281 (E.D. Va. 1992) (wives were ineligible for defense where they could have learned of contamination by asking their husbands); *Lefebvre v. Central Maine Power Co.*, 7 F. Supp.2d 64, 70-71 (D. Me. 1998) (declining to conclude as a matter of law that the landowner failed to meet the standard even though it had presented no evidence that it performed due diligence activities); *United States v. Serafini*, 706 F. Supp. 346, 351-52 (M.D. Pa. 1988) (requiring further evidence from the government that “the defendant’s failure to inspect or inquire was inconsistent with good commercial or customary practices” in 1969); *LaSalle Nat’l Trust v. Schaffner*, 818 F. Supp. 1161, 1169 (N.D. Ill. 1993) (declining to resolve the issue at the summary judgment stage because there were issues of fact remaining regarding the adequacy of the purchaser’s investigation); *United States v. National Bank of the Commonwealth*, CIV.A. No. 89-2127, 1990 WL 357792, at \*5-6 (W.D. Pa. Apr. 23, 1990) (determining that in 1982 good commercial or customary practice did not require a prospective lessee to undertake investigatory measures before entering into a lease); *Goe Eng’g Co. v. Physicians Formula Cosmetics*, No. CV 94-3576-WDK, 1997 WL 889278, at \*12-13 (C.D. Cal. June 4, 1997) (finding that the purchaser met the all appropriate inquiry standard where it had inspected the property prior to purchasing it in 1985, even though it apparently had undertaken no sampling despite knowing that the prior owner had operated a machine shop using underground storage tanks at the site); *United States v. Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. 1341, 1348-49 (D. Idaho 1989) (finding that the defendants, who had redeemed shares in a corporation that they had received through gifts into partial ownership of the relevant property, met the requirements of the defense; even though there was evidence that some of them had holes eaten in their clothes by battery acid at the site before they acquired the property).

the contamination.<sup>144</sup>

Finally, those courts that have imposed joint and several liability on current landowners have noted that the relative fault of these landowners (or the lack thereof) may be taken into account when it comes time to allocate responsibility among the jointly and severally liable parties under 113(f).<sup>145</sup> Not surprisingly, those who are liable solely due to their status as landowners have done well in the equitable allocation process.<sup>146</sup>

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144. *United States v. DiBiase Salem Realty Trust*, CIV.A. No. 91-11028-MA, 1993 WL 729662, at \*8 (D. Mass. Nov. 19, 1993) ("Ignorance of the hazardous substances at the facility at the time of purchase is an essential element of the innocent landowner defense."); *United States v. Shell Oil Co.*, 841 F. Supp. 962, 973 (C.D. Cal. 1993); *Wickland Oil Terminals v. Asarco, Inc.*, 1988 WL 167247, at \*4 (N.D. Cal. Feb. 23, 1988); *American Nat'l Bank and Trust Co. v. Harcross Chems., Inc.*, No. 95 C 3750, 1997 WL 281295, at \*14 (N.D. Ill. May 20, 1997); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1280-81 (E.D. Va. 1992). *See also* *Clear Lake Properties v. Rockwell Int'l Corp.*, 959 F. Supp. 763, 769 (S.D. Tex. 1997) (applying the same analysis to a lessee).

145. *United States v. Monsanto Co.*, 858 F.2d 160, 171 n.22 (4th Cir. 1988); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507-08 (6th Cir. 1989); *United States v. Rohm & Haas Co.*, 2 F.3d 1263, 1280-81 (3d Cir. 1993); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1278 n.10 (E.D. Va. 1992); *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987). *See also* *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 270 n.29 (3d Cir. 1992) (stating, in a generator liability case, that "the contribution proceeding is an equitable one in which a court is permitted to allocate response costs based on factors it deems appropriate, whereas the court is not vested with such discretion in divisibility determination"); *United States v. Township of Brighton*, 153 F.3d 307, 317 (6th Cir. 1998) (stating, in the context of operator liability, that "[w]e distinguish the divisibility defense to joint and several liability from the equitable allocation principles available to defendants under CERCLA's contribution provision"); *United States v. Western Processing Co.*, 734 F. Supp. 930, 938 (W.D. Wash. 1990).

146. *See, e.g., Gopher Oil Co. v. Union Oil Co. of California*, 955 F.2d 519, 527 (8th Cir. 1992) (upholding the lower court's determination that, as between the two PRPs, the active polluter should pay all of the cleanup costs and the current owner should pay none of the costs); *Redwing Carriers, Inc. v. Saraland Apartments*, 875 F. Supp. 1545, 1569 (S.D. Ala. 1995) (active polluters should pay all), *remanded* 94 F.3d 1489,

## B. *The Problematic Lines of Analysis*

### 1. The *Lashins* Contractual Relationship Line of Cases

The most troubling line of cases in the landowner liability context is a trio of cases of interpreting the “contractual relationships” that render the traditional third-party defense inoperative. As discussed above,<sup>147</sup> the traditional third-party defense is unavailable if the third party’s act or omission causing the release occurred “in connection with a contractual relationship, existing either directly or indirectly” with the person asserting the defense.<sup>148</sup> As also discussed, in passing SARA, Congress specifically defined the phrase “contractual relationship” to include “land contracts, deeds, or other instruments transferring title or possession” unless the landowner meets the requirements of the innocent landowner defense.<sup>149</sup>

The first of these cases did not involve issues of current landowner liability. Instead, it involved a rather brazen assertion of the traditional third-party defense. In *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp. (Westwood)*,<sup>150</sup> the current owner of the property, Westwood Pharmaceuticals, alleged that National Fuel’s predecessor in interest had abandoned wastes in underground pipelines and other structures prior to

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1512-14 (11th Cir. 1996); *U.S. Steel Supply, Inc. v. Alco Standard Corp.*, No. 89 C 20241, 1992 WL 229252 (N.D. Ill. Sept. 9, 1992) (same); *Alcan-Toyo America, Inc. v. Northern Illinois Gas Co.*, 881 F. Supp. 342, 346-47 (N.D. Ill. 1995) (determining that the current owner should pay 10% of cleanup costs); *United States v. DiBiase*, 45 F.3d 541, 545 (1st Cir. 1995) (approving a settlement which reserved 15% of the cleanup costs for the nonsettling current owner). *See also* *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991) (upholding the district court’s decision to impose one third of the cleanup costs on a passive owner whose land was contaminated by its tenant, based at least in part on the owner’s “moral contribution as the owner of the site”); *Bedford Affiliates v. Sills*, 156 F.3d 416, 429 (2d Cir. 1998) (upholding the lower court’s determination that a landlord should be allocated a 5% share of the cleanup costs for contamination caused by its tenant).

147. *See supra* text accompanying note 4.

148. 42 U.S.C. § 9601(35)(A) (1994).

149. *Id.*

150. 964 F.2d 85 (2d Cir. 1992).

selling the land to Westwood.<sup>151</sup> When Westwood sued for cost-recovery, National Fuel argued that Westwood's post-purchase construction activities, which had punctured the underground receptacles, had been the sole cause of the release.<sup>152</sup> The bizarre nature of this argument comes to light when one recognizes that in order to successfully establish the section 107(b)(3) defense, National Fuel needed to establish both: (1) that Westwood was the sole cause of the releases even though National Fuel's predecessor allegedly had abandoned the wastes that ultimately were released; and (2) that National Fuel's predecessor had exercised "due care with respect to the hazardous substances concerned" when it disposed of them in underground receptacles and then sold the property to Westwood without disclosing the existence of the buried substances.<sup>153</sup>

Instead of focusing on either of these troublesome aspects of National Fuel's defense, the Second Circuit, like the district court before it, chose to focus solely on the "contractual relationship" element of the defense. In affirming the district court's determination that the defendant had raised a triable issue of fact, the Second Circuit stated:

We hold that the district court correctly held that the phrase "in connection with a contractual relationship" in CERCLA § 107(b)(3) requires more than the mere existence of a contractual relationship between the owner of land on which hazardous substances are or have been disposed of, and a third party whose act or omission was the sole cause of the release or threatened release of such hazardous substance into the environment, for the landowner to be barred from raising the third-party defense provided for in that section. In order for the landowner to be barred from raising the third-party defense under such circumstances, the contract between the landowner and the third party must either relate to the hazardous substances or allow the landowner to exert some element of control over the third party's activities.<sup>154</sup>

The Second Circuit's holding in *Westwood* was framed in terms that were far broader than were necessary to resolve the issue

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151. *See id.* at 87-88.

152. *Id.*

153. *See id.* at 91-92.

154. *Id.*

before the court. Even assuming that the court should have addressed the "contractual relationship" issue, all it needed to say was that Westwood's activities, which National Fuel was alleging were the sole cause of the release, *post-dated* the existence of the contractual relationship. That alone should have rendered the contract irrelevant for purposes of the traditional third-party defense.<sup>155</sup>

The *Westwood* court's chosen language clearly had ominous implications for current landowner liability under CERCLA, because deeds and other land transfer agreements frequently make no mention of activities involving hazardous substances. According to a literal reading of *Westwood*, a prospective purchaser could avoid any need to undertake due diligence before acquiring property as long as the purchaser took pains to ensure that the deed in no way contemplated or otherwise related to the presence of hazardous substances on the property.

It did not take long for these ominous implications to bear fruit. In *New York v. Lashins Arcade Co.* ("*Lashins*"),<sup>156</sup> the Second Circuit picked up on its language from *Westwood* in holding that the "contractual relationship" language did not preclude a current landowner from asserting the traditional third-party defense even though, based on the allegations before the court, it could not meet the requirements of the innocent landowner defense.

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155. If two parties have a contractual relationship, of whatever type, but one of them causes a release after the expiration of that relationship, the fact that they at one time had a contractual relationship should not preclude the other party from asserting a third-party defense. In *Shapiro v. Alexanderson*, 743 F. Supp. 268 (S.D.N.Y. 1990), for example, the defendant had operated a landfill on the plaintiff's property. The defendant raised a third party defense, arguing that the release at issue had been caused solely by the plaintiff's failure to properly care for the site after the expiration of the contractual relationship between the parties (i.e., after the defendant had vacated the premises). The court rightly concluded that the existence of the contract would not in and of itself preclude the operation of section 107(b)(3) under these circumstances. *Id.* at 271. See also *American Nat'l Bank and Trust Co. v. Harcos Chems., Inc.*, 997 F. Supp. 994, 1001 (N.D. Ill. 1998) (the fact that a property owner had purchased a separate site from another defendant that had also contaminated the site in question did not preclude the owner from asserting a third party defense with respect to the site in question).

156. 691 F.3d 353 (2d Cir. 1996).

*Lashins* involved a situation where the current owner, Lashins, had purchased the relevant property well after it allegedly had been contaminated by a number of parties, including the immediate prior owner, Milton Baygell.<sup>157</sup> Lashins had been informed of the contamination by both Mr. Baygell's attorney and an environmental firm.<sup>158</sup> Lashins had failed to undertake any further due diligence efforts, such as seeking information regarding the status of the site from either EPA or the New York Department of Environmental Conservation, both of which had undertaken formal investigations to determine the nature of the contamination.<sup>159</sup>

The *Lashins* court deemed *Westwood Pharmaceuticals* dispositive on the question whether Lashins satisfied the elements of the traditional third-party defense:

In *Westwood*, the seller of the contaminated site sought exoneration from the buyer's conduct, whereas in this case the buyer seeks exoneration from the seller's activities, but this is surely an immaterial distinction in terms of the *Westwood* rationale. . . . The straightforward sale of the Arcade by Baygell to Lashins did not "relate to hazardous substances" or vest Lashins with authority "to exert some element of control over [Baygell's] activities" within the contemplation of our ruling in *Westwood*.<sup>160</sup>

Thus, the court determined that "Baygell's allegedly offending conduct did not 'occur in connection with a contractual relationship . . . with [Lashins]' within the meaning of § 9607(b)(3)."<sup>161</sup>

In reaching this result, the Second Circuit never even mentioned that had Lashins known of the contamination prior to purchasing the property, it was ineligible for the innocent landowner defense. Furthermore, the Second Circuit did not try to harmonize this result with Lashins' minimal due diligence ef-

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157. *Id.* at 360 (citation omitted).

158. *Id.* at 357. This, of course, should in and of itself have precluded any potential application of the innocent landowner defense. See 42 U.S.C. § 101(35)(A)(i) (requiring that "[a]t 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"); see also *supra* text accompanying note 125.

159. *Id.* at 357.

160. *Id.* at 360.

161. *Id.*

forts. Instead, after finding that the sale did not “relate to hazardous substances,” the court focused exclusively on whether Lashins exercised “due care” after acquiring the property.<sup>162</sup> In this regard, the court determined that because the State had already commenced its remedial investigation and feasibility study, “[i]t would have been pointless to require Lashins to commission a parallel investigation once it acquired the Arcade and became more fully aware of the environmental problem.”<sup>163</sup>

The third case in the “contractual relationship” triumvirate is *United States v. Cordova Chemical Co. of Michigan* (“Cordova”).<sup>164</sup> In *Cordova*, the Cordova companies also had purchased the relevant property knowing it was contaminated. In fact, one of the companies had executed a partial settlement with the Michigan Department of Natural Resources regarding remediation of the contamination prior to purchase.<sup>165</sup>

Like the Second Circuit in *Lashins*, the Sixth Circuit in *Cordova* ignored the fact that the defendants were ineligible for the innocent landowner defense, instead focusing on the traditional section 107(b)(3) defense. Interestingly, without even citing *Lashins*, the *Cordova* court quickly wound up at the same place:

In parsing the exceptions to the defense, the district court noted that under 42 U.S.C. § 9601(35)(A), the term “contractual relationship” includes deeds transferring title. Thus, the district court concluded that a defense would be unavailable to a defendant who had a direct or indirect contractual relationship with the parties responsible for contaminating the site. Under this view, the defense could not be invoked by any defendant who was party to a deed with a polluter. The district court, however, ignored the requirement that, in order to render the defense inapplicable, the hazardous substance release must have resulted from the act of a third party “in connection with” the contractual relationship with the defendant. The “in connection with” language of the defense appears to have been designed to preclude a person from escaping liability by contracting for a third party to do his dirty work for him.<sup>166</sup>

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162. *Id.*

163. *Id.* at 361.

164. 113 F.3d 572 (6th Cir. 1997) (*en banc*), *rev'd in part and remanded on other grounds*, *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876 (1998).

165. *See id.* at 576.

166. *Id.* at 583 (citation omitted).



The court thus remanded the matter to the district court, with instructions that it should revisit the applicability of the section 107(b)(3) defense.<sup>167</sup>

## 2. The *Alcan/Rohm & Haas* Divisibility Line of Cases

In the early 1990s, two different circuit courts addressed divisibility issues in cases involving Alcan Aluminum Corp.<sup>168</sup> In both cases, Alcan had sent waste emulsion to sites that ultimately required Superfund remediation. In both cases, Alcan argued that the harm was divisible, not because its wastes had not been commingled with other wastes, but because its wastes contained hazardous substances in such low concentrations that they could not be deemed to have caused or contributed to the incurrence of response costs.<sup>169</sup> The court rejected the Government's arguments that it could establish joint and several liability merely by demonstrating that the defendant's wastes had been commingled with others and that the resulting mixture required a response. Both courts remanded matters to the district court to give Alcan the opportunity to prove that its emulsion, when mixed with other wastes, did not contribute to the release and the resulting response costs.<sup>170</sup> In *Alcan-Butler*, the court explicitly noted that if Alcan could make this showing, this would not only result in apportionment, but in Alcan having an apportionable share of zero.<sup>171</sup>

While the *Alcan* cases involved generator liability,<sup>172</sup> their impli-

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167. *See id.*

168. *See generally* United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992) (*Alcan-Butler*); United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993) (*Alcan-Oswego*).

169. *See Alcan-Butler*, 964 F.2d at 269-70; *Alcan-Oswego*, 990 F.2d at 722.

170. *See Alcan-Butler*, 964 F.2d at 270; *Alcan-Oswego*, 990 F.2d at 722.

171. *Alcan-Butler*, 964 F.2d at 270. While this point is not explicit in *Alcan-Oswego*, it seems evident from the opinion that the court was following the *Alcan-Butler* approach. It is perhaps also worth noting that on remand in *Alcan-Butler*, the district court determined that Alcan could not make the showing required by the Third Circuit. The court therefore deemed Alcan jointly and severally liable. *See* United States v. Alcan Aluminum Corp., 892 F. Supp. 648 (M.D. Pa. 1995).

172. *See Alcan-Butler*, 964 F.2d at 264; *Alcan-Oswego*, 990 F.2d at 721.

cations for current landowner liability were immediately apparent. In both cases, the courts articulated an approach that could have allowed Alcan to avoid any responsibility for response costs, even though it was liable and did not have any defenses under section 107(b), if it could have shown that it did not create the problem or make it worse.<sup>173</sup> As the Second Circuit recognized in *Alcan-Oswego*, this essentially creates a non-causation defense to the imposition of joint and several liability.<sup>174</sup> Conceptually, this approach has obvious potential application where a current landowner has been caught in the CERCLA-liability web without having caused or added to any releases.<sup>175</sup>

*United States v. Rohm & Haas Co.* (“*Rohm*”)<sup>176</sup> illustrates this potential. In *Rohm*, the Third Circuit indicated its potential willingness to apply the *Alcan* analysis to landowners. Chemical Properties, Inc. (CP), the landowner in *Rohm*, had argued that the harm was subject to apportionment because most, if not all, of the hazardous substances found on its property had been disposed of by others.<sup>177</sup> The court rejected this argument after finding that CP had failed to demonstrate a “reasonable basis for determining the extent of its contribution to the harm.”<sup>178</sup> In doing so, however, the court suggested in *dicta* that “if CP were able to prove that none of the hazardous substances found at the site were fairly attributable to it, we might well conclude that apportionment was appropriate and CP’s apportioned share would be zero.”<sup>179</sup>

While the court’s language is qualified (“might well”), it strongly suggests that the Third Circuit believes that the *Alcan* formulation has potential application to current landowners who played no part in causing the relevant contamination. Under

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173. See *Alcan-Butler*, 964 F.2d at 264; *Alcan-Oswego*, 990 F.2d at 721.

174. See *Alcan-Oswego*, 990 F.2d at 722 (stating “we candidly admit that causation is being brought back into the case, through the backdoor, after being denied entry at the frontdoor, at the apportionment stage”).

175. *Alcan-Butler*, 964 F.2d at 263-64; *Alcan-Oswego*, 990 F.2d at 721.

176. 2 F.3d 1265 (3d Cir. 1993).

177. *Id.* at 1280.

178. *Id.* (internal quotations omitted).

179. *Id.*

such an approach, qualifying landowners would routinely be able to avoid any ultimate responsibility for cleanup costs. Significantly, the court seemed to endorse the potential application of this construct in *Rohm* even though it was clear in that case that CP did not meet the requirements of the innocent landowner defense.<sup>180</sup>

### 3. The *AMI/Rumpke* Cost-Recovery/Contribution Line of Cases

The third line of cases tending to erode principles of landowner liability comes from the Seventh Circuit in a trilogy of decisions addressing the nature of the claims that PRPs may pursue against other PRPs under CERCLA. The first of these cases, *Akzo Coatings, Inc. v. Aigner Corp.*,<sup>181</sup> was innocuous enough. In *Akzo*, the court determined that where one PRP cleans up a site under a consent decree with the EPA, its claim against any other PRP necessarily lies in contribution (under section 113(f)), not cost-recovery (under section 107(a)(4)(B)).<sup>182</sup> In so doing, the court contrasted *Akzo's* situation — *Akzo* was liable as a generator under CERCLA — with other situations where private parties might be allowed to bring cost-recovery actions under section 107(a)(4)(B):

*Akzo* has experienced no injury of the kind that would typically give rise to a direct claim under section 107(a)—it is not, for ex-

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180. See *United States v. Rohm & Haas Co.*, 790 F. Supp. 1255, 1264 (E.D. Pa. 1992), *rev'd*, 2 F.3d 1265 (3d Cir. 1993). Other courts have found that apportionment based on non-causation is available to those who are liable under s 107(a)(2) (owners and operators at the time of disposal). See also *United States v. Township of Brighton*, 153 F.3d 307, 317 (6th Cir. 1998); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 902-04 (5th Cir. 1993). See *infra* text accompanying notes 134-36.

181. 30 F.3d 761 (7th Cir. 1994).

182. *Id.* at 764. To this extent, *Akzo* appears to be consistent with a unanimous body of law from other circuits. See, e.g., *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2d Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998); *New Castle County v. Halliburton NUS, Corp.* 111 F.3d 1116, 1124 (3d Cir. 1997); *In re Reading Co.*, 115 F.3d 1111, 1120-21 (3d Cir. 1997); *Sun Co. v. Browning-Ferris Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997); *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994).

ample, a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands. Instead, Akzo itself is a party liable . . . for the contamination at the Fisher-Calo site, and the gist of Akzo's claim is that the costs it has incurred should be apportioned equitably amongst itself and the others responsible. That is a quintessential claim for contribution . . . .<sup>183</sup>

In 1997, the Seventh Circuit twice dealt with the same issue in a slightly different context, where a landowner had cleaned up a site without direct governmental prodding. In the first of these cases, *AM International, Inc. v. Datacard Corp.* ("AMI"),<sup>184</sup> Datacard was a subsequent purchaser of property that had been contaminated by AMI. After Datacard cleaned up the site on its own initiative, it sued AMI under section 107(a)(4)(B). The district court allowed the suit to go forward and the Seventh Circuit affirmed in the following terms:

In [*Akzo Coatings*], we held that cost recovery disputes between two potentially responsible parties should ordinarily be addressed as claims for contribution under § 113(f). However, we noted that if a landowner faces liability solely because a third party spilled or allowed hazardous waste to migrate onto its property, the landowner may directly sue for its response costs. In this case, Datacard presumably paid less for [the property] because it knew it was buying into an expensive cleanup. While that may have rendered Datacard a little less "innocent" than the landowner described in *Akzo*, Datacard did not take part in the manufacture [of the substances that were spilled at the site]. Instead, Datacard — like a party forced to clean up contamination on its property due to a third party's spill — faces liability merely due to its status as a landowner. As a result, Datacard qualifies under *Akzo's* exception and can directly pursue its response costs under § 107(a)(4)(B).<sup>185</sup>

In *Rumpke of Indiana, Inc. v. Cummins Engine Co.*,<sup>186</sup> the Seventh Circuit addressed a very similar case in similar terms, without even citing to *AMI*. Once again, the landowner had begun the cleanup on its own initiative and alleged that it played no role in causing the relevant contamination.<sup>187</sup> The court determined that

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183. *Akzo*, 30 F.3d at 764 (emphasis added) (citation omitted).

184. 106 F.3d 1342 (7th Cir. 1997).

185. *Id.* at 1347 (citations omitted).

186. 107 F.3d 1235 (7th Cir. 1997).

187. *See id.* at 1239.

the landowner should be allowed to go forward with both its section 107 and section 113 claims, noting that:

[O]ne of two outcomes would follow from a landowner suit under § 107(a): either the facts would establish that the landowner was truly blameless, in which case the other PRPs would be entitled to bring suit under § 113(f) within three years of the judgement to establish their liability among themselves, or the facts would show that the landowner was also partially responsible, in which case it would not be entitled to recover under its § 107(a) theory and only the § 113(f) claim would go forward.<sup>188</sup>

Elsewhere, the *Rumpke* court clarified that it was not equating the term "blameless" with that narrow subset of landowners that have a proper defense under section 107(b):

If one were to read § 107(a) as implicitly denying standing to sue even to landowners like *Rumpke* who did not create the hazardous conditions, this would come perilously close to reading § 107(a) itself out of the statute. As one district court in New Jersey recognized, this position would "mean that Section 107(a) private party plaintiffs will be few and far between. Truly innocent private party plaintiffs would be limited to, for example, a neighbor of a contaminated site who has acted to stem threatened releases for which he is not responsible, or a party who can claim one of the complete defenses set forth in [§ 107(b)]." *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 801 (D.N.J. 1996) . . . . We conclude instead that landowners who allege that they did not pollute the site in any way may sue for their direct response costs under § 107(a). . . .<sup>189</sup>

These cases establish a surprising exception to the ordinary rule that PRPs must rely on section 113(f), not section 107(a)(4)(B), when they bring action against other PRPs. The result itself is not that surprising. Other courts have recognized that PRPs such as *Datacard* and *Rumpke* might have claims under section 107(a)(4)(B) where they have cleaned up a site at their own initiative.<sup>190</sup> What is surprising about *AMI* and *Rumpke*

188. *Id.* at 1240.

189. *Id.* at 1241 (citations omitted).

190. *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997) (*Pinal Creek*) (finding that in such situations PRPs may bring implied claims for contribution under section 107(a)(4)(B)); *United Techs. Corp. v. Browning-Ferris Indus., Inc.*,

is that: (1) the courts were motivated by their perception that the landowners were "innocent" or "blameless," not by the fact that they had undertaken the cleanup measures of their own volition; and (2) the courts viewed the landowners as such, even though they were liable under the statute and did not have valid innocent landowner defenses.<sup>191</sup> Additionally, the *Rumpke* decision appears to indicate that these "blameless" landowners, even though they qualify as PRPs, may seek to hold other PRPs jointly and severally liable and thereby entitling themselves to be made whole as a matter of law.<sup>192</sup>

This last point is important and deserves further treatment. Neither *AMI* nor *Rumpke* were definitive as to the precise nature of liability that the relevant landowners could impose on other PRPs. *AMI* was simply silent on this point.<sup>193</sup> *Rumpke*, by contrast, appears to suggest that the "blameless" landowner is entitled to full recovery from the defendant PRP as a matter of law. At one point, for example, the court contrasted the nature of the recovery available under section 107(a), which it indicates is joint and several, with that which would be available under section 113(f). The court described 113(f) as existing "for the express purpose of allocating fault among PRPs."<sup>194</sup> Elsewhere, the court appeared to compare *Rumpke* favorably with a hypothetical party that, in actuality, would be more likely to have a valid defense to liability under section 107(b)(3): "We see no distinction between this situation and a case where a landowner discovers that someone has been surreptitiously dumping hazardous materials on

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33 F.3d 96, 99 n.8 (dicta to same effect); *Key Tronic Corp. v. United States*, 114 S.Ct. 1960, 1966 (1994) (suggesting the same result).

191. As indicated above, in *AMI*, Datacard knew of the contamination when it acquired the property. See *supra* text accompanying note 182; see also 42 U.S.C. § 9601(35)(A)(i) (1994). In *Rumpke*, *Rumpke* itself had purchased a landfill without performing any environmental inspection of the property. See *Rumpke*, 107 F.3d at 1236. It is inconceivable that this could satisfy the "all appropriate inquiry" standard under section 101(35)(B).

192. Compare *Rumpke*, 107 F.3d at 1240 (noting that section 107 claims are for joint and several liability), with *Pinal Creek*, 118 F.3d at 1301-03 (noting that the implied claim under section 107 in these circumstances is one for contribution and does not allow for the imposition of joint and several liability).

193. See *AMI*, 106 F.3d at 1346.

194. See *Rumpke*, 107 F.3d at 1240.

property it already owns, apart from the potentially more difficult question of fact about the landowner's own responsibility in the latter case."<sup>195</sup>

Still, elsewhere, the *Rumpke* court appeared to suggest that the landowner's section 107(a)(4)(B) claim would be in the nature of a claim for implied contribution.<sup>196</sup> Other courts have followed this logic in determining that PRPs that have valid causes of action under section 107(a)(4)(B) may not pursue full recovery as a matter of law, but rather are limited to implied claims for contribution based on principles of exclusively several liability. Under this approach, the courts are free to reallocate any "orphan shares"<sup>197</sup> among all the PRPs (including the plaintiff) pursuant to the equitable allocation principles set forth in section 113(f)(1).<sup>198</sup>

In the end, *Rumpke* must be considered ambiguous as to the nature of the landowner's claim against the other PRPs. At the very least, the Seventh Circuit's opinions in both *AMI* and *Rumpke* hold out the possibility that "blameless" landowners might be entitled to full recovery from other PRPs as a matter of law.<sup>199</sup>

#### IV. ANALYSIS

##### A. *In General*

The basic problem with the *Lashins*, *Alcan/Rohm & Haas*, and *AMI/Rumpke* approaches is that they all reflect a misunderstanding-

195. *Id.* at 1242.

196. *Id.* at 1241 ("To the extent this looks like an implied claim for contribution, where the landowner is alleging that its share should be zero, we note that dicta in the Supreme Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994) suggests that the Court was not disturbed by that possibility.").

197. *Pinal Creek*, *supra* note 190, at 1303 (the term "orphan shares" refers to "those shares attributable to PRPs who either are insolvent or cannot be located or identified").

198. See, e.g., *Pinal Creek*, 118 F.3d at 1303; *Sun Co. v. Browning-Ferris Inc.*, 124 F.3d 1187, 1194 (10th Cir. 1997).

199. To add further to the ambiguity in this area, it is worth noting that neither *AMI* nor *Rumpke* even acknowledges, let alone addresses, the possibility that the defendant PRPs would have a counterclaim against the plaintiff landowners.

ing of the nature of the "status"- based liability that CERCLA imposes on current landowners. Viewed collectively, the circuits that have articulated these lines of analysis appear to have viewed the relevant landowners as "blameless" or not "culpable,"<sup>200</sup> despite the fact that in all cases the relevant landowners either knew of the contamination before buying the relevant property, or had failed to undertake even minimal steps to investigate the potential existence of contamination.<sup>201</sup> This sentiment seems to have played a central role in motivating these courts to absolve the landowners of responsibility under the statute. In the case of *AMI* and *Rumpke*, it has allowed the courts to take advantage of joint and several liability in their actions against other PRPs despite the PRP's failure to qualify for the innocent landowner defense.

All of these approaches ignore the fact that landowner liability under CERCLA is not based on principles of blameworthiness or culpability, at least to the extent that those terms imply direct responsibility for the presence of the offending contaminants. As

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200. See *Lashins*, 91 F.3d at 360 (noting that *Lashins* had no control over the prior owner's activities); *Cordova*, 113 F.3d at 578 ("we adhere to the tenet that liability only attaches to those parties who are culpable in the sense that they, by some realistic measure, helped to create the harmful conditions"); *AMI*, 106 F.3d at 1346 (in deeming *Datacard* innocent enough to qualify for the *Akzo* exception, the court noted that *Datacard* faced liability merely due to its status as a landowner, and equated it with a party forced to clean up contamination on its property due to a third-party's spill); *Rumpke*, 107 F.3d at 1240 (noting that although the court did not discuss this, *Rumpke* might prove to be blameless even though it was a current owner that clearly did not meet the requirements of the innocent landowner defense). There are no similar pronouncements in *Rohm & Haas*, presumably because the court found that the facts did not merit any lenient treatment for the landowner (CP) in that case.

201. See *Lashins*, 91 F.3d at 357 (describing how the State argued that *Lashins*, despite having been made aware of the contamination, performed almost no further due diligence activities); *Cordova*, 113 F.2d at 576 (indicating that one of the *Cordova* companies knew of the contamination when it acquired the site); *AMI*, 106 F.3d at 1347 (indicating that *Datacard* knew it was acquiring contaminated property); *Rumpke*, 107 F.3d at 1236 (describing how *Rumpke* bought a landfill without performing any environmental inspections).



the Fourth Circuit pointed out in *Westfarm Assoc. Ltd. Partnership v. Washington Suburban Sanitary Comm'n*, "[a]lthough the simplistic slogan 'make the polluter pay' may have helped propel CERCLA into law, the statutory scheme does not take a simplistic view of who is and who is not a 'polluter.'" <sup>202</sup>

In the landowner context, it has been clear since 1980 that Congress intended to hold current landowners responsible for cleanup costs associated with their property, irrespective of whether they "caused" the underlying contamination.<sup>203</sup> Congress confirmed this result when it enacted SARA in 1986, noting that, "[n]o change has been made in the standard of liability that applies under CERCLA. As under section 311 of the [Clean Water Act], liability under CERCLA is strict, that is, without regard to fault or willfulness."<sup>204</sup> In line with this history, in the 1991 case of *Hercules, Inc. v. United States Environmental Protection Agency*, the D.C. Circuit determined that:

CERCLA explicitly supports the imposition of remediation obligations on parties who were not responsible for the contamination and who have no experience in the handling or remediation of hazardous substances, as when it imposes liability on the sole basis that a party is the current owner or operator of a site contaminated by some previous owner or operator.<sup>205</sup>

Of course, Congress in 1986 also created the innocent landowner defense in the confluence of section 107(b)(3) and the new section 101(35), providing an escape hatch for current landowners who could meet the requirements set forth in those sections.<sup>206</sup> But this was a narrow defense, requiring that the land-

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202. 66 F.3d 669, 681 (4th Cir. 1995) (deeming a sewer commission subject to liability under section 107(a)(2) for a release from a sewer system even though the waste had been dumped into the system by third parties) (citation omitted).

203. See *supra* text accompanying notes 16-19, 34-52, 69-79.

204. H.R. REP. NO. 99-253(I), at 74, reprinted in 1986 U.S.C.C.A.N. 2835, 2856; see also n.109, *supra* regarding the effect of *post hoc* legislative history.

205. 938 F.2d 276, 281 (D.C. Cir. 1991) (citing *Shore Realty*, 759 F.2d 1032, 1043-45 (2d Cir. 1985); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); see also *supra* text accompanying note 130.

206. 42 U.S.C. §§ 9607(b)(3), 9601(35) (1994); see also *supra* text accompanying notes 110-12.

owner have investigated the potential existence of contamination and found none.<sup>207</sup> Moreover, the legislative history made clear that, in establishing this defense, Congress was defining the "limited circumstances" under which current landowners would be able to avoid liability:

[The] new definition of contractual relationship is intended to clarify and confirm that *under limited circumstances* landowners who acquire property without knowing of any contamination at the site and without reason to know of any contamination . . . may have a defense to liability under section 107 and therefore should not be held liable for cleaning up the site if such persons satisfy the remaining requirements of section 107(b)(3). A person who acquires property through a land contract or deed or other instrument transferring title or possession that meets the requirements of this definition may assert that an act or omission of a third party should not be considered to have occurred in connection with a contractual relationship as identified in section 107(b) and therefore is not a bar to the defense.<sup>208</sup>

Representative Frank, who crafted the defense, was even more explicit that those who acquire contaminated property have to prove that they qualify as diligent purchasers in order to avoid liability under the Act.<sup>209</sup>

CERCLA's juxtaposition of a strict liability standard for current landowners together with the limited relief valve inherent in the innocent landowner defense can only lead to the conclusion that Congress considered non-diligent purchasers to be "part of the problem." Interestingly, Congress was not very explicit in either 1980 or 1986 as to exactly why it saw fit to view landowners in this manner. About the closest it came to indicating such a rationale was in its 1980 reference to nuisance law as a precedent for the imposition of strict liability: "[a]nother source of legal precedent for strict liability for hazardous substance disposal sites or contaminated areas is nuisance theory. Damage actions involving the maintenance of a public or private nuisance often involve a kind of strict liability standard."<sup>210</sup> In *Shore Realty*, the Second Cir-

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207. *Id.*

208. H.R. CONF. REP. NO. 99-962 at 186-87, *reprinted in* 1986 U.S.C.C.A.N. 2835, 3279-80 (emphasis added).

209. *See supra* text accompanying note 120.

210. S. REP. NO. 96-848, at 14 (1980), *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, *supra* note 31, at 186.

cuit offered a further justification for imposing nuisance-based liability on current landowners, quoting from the Restatement (Second) of Torts § 839 comment d:

[L]iability [of a possessor of land] is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it and should have the responsibility of taking reasonable measures to remedy conditions that are a source of harm to others.<sup>211</sup>

In the CERCLA context, the First Circuit has offered yet another rationale for why Congress might have deemed non-diligent landowners responsible. In *In re Hemingway Transport, Inc.*, the court determined that, “[a]s an acquiring party and an owner of the facility during a period of ‘passive’ disposal, Juniper would be held to an especially stringent level of preacquisition inquiry — on the theory that an acquiring party’s failure to make adequate inquiry may itself contribute to a prolongation of the contamination.”<sup>212</sup> And in the same vein, the Fourth Circuit has noted that “[a] CERCLA scheme which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot be what Congress had in mind.”<sup>213</sup>

By referencing nuisance law as a precedent for the imposition of strict liability on current landowners, Congress, in 1980, apparently determined that landowners have an affirmative obligation to address contamination problems on their property. Seen in this light, a landowner’s failure to undertake appropriate investigatory measures may be viewed as an omission that not only prolongs the contamination, but also allows for the worsening of the contamination through the ongoing migration of contaminants in the environment. Following this logic through, the landowner could then be seen as being “responsible” for both increased environmental threats (in terms of both the extent and the dura-

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211. 759 F.2d at 1051; *see also id.* at 1052-53 (noting that in the public nuisance context, “everyone who participates in the maintenance of the nuisance are [sic] liable jointly and severally”) (internal quotations omitted).

212. *In re Hemingway Transp., Inc.*, 993 F.2d 915, 932-33 (1st Cir. 1993).

213. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845-46 (4th Cir. 1992), *cert. denied*, 506 U.S. 940 (1992) (in the context of holding an interim owner liable under section 107(a)(2)). *See supra* note 16.

tion of the exposure) and, potentially, any accompanying increase in the ultimate cleanup costs. This would certainly seem to be enough to render the landowner sufficiently "blameworthy" within the context of this strict liability statute.<sup>214</sup>

Interestingly, the same Second Circuit that decided *Lashins* has more recently recognized this dynamic in the context of allocating liability between a landlord and its subtenant for contamination caused by the latter. In *Bedford Affiliates v. Sills (Bedford)*,<sup>215</sup> the lower court had determined that the landlord property owner should bear 5% of the cleanup costs despite the fact that it played no active role in causing the relevant contamination.<sup>216</sup> When the landlord appealed, the Second Circuit upheld the lower court's equitable allocation in the following terms:

Bedford faces CERCLA liability as a result of its status as a landowner throughout [the tenant's tenure on the property]. Moreover, Bedford is not truly blameless for the Site's contaminated state. Upon learning that the Site was contaminated in 1990, plaintiff waited almost three years to hire [an environmental consultant] and contact a government agency to begin cleanup. While this inaction is not tantamount to pollution, it serves as an independent basis for imposing some liability on Bedford. Had it acted quicker, the contamination might have been less.<sup>217</sup>

Of course, SARA modified CERCLA's application of strict liability to current landowners by creating the innocent landowner defense. This had the effect of eliminating a subset of current landowners — those who adequately investigated the potential existence of contamination before buying their property and found none — from the category of landowners who are to be deemed "responsible" under the statute for preexisting contamination. But the legislative history makes clear that this should be construed as the exception that proves the rule; that is, that ab-

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214. See *United States v. Northern Plating Co.*, 670 F. Supp. 742 (W.D. Mich. 1987), *aff'd*, *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989) (see also *infra* text accompanying notes 234-35).

215. 156 F.3d 416 (2d Cir. 1998).

216. *Id.* at 430.

217. *Id.* It should be noted that *Bedford* is factually distinguishable from *Lashins* in this regard, because in *Lashins* the Second Circuit found that the relevant governmental agencies had taken control of the cleanup before *Lashins* acquired the property. 91 F.3d at 361.

sent due diligence, current landowners are deemed to be liability-worthy under the statute.

The courts that have applied the *Lashins*, *Alcan/Rohm & Haas*, and *AMI/Rumpke* lines of analysis to current landowners have virtually ignored these dynamics. Only one of these decisions even cites *Shore Realty*, the seminal case on status-based current landowner liability under CERCLA.<sup>218</sup> More surprisingly, none of the relevant courts even acknowledged the existence of the innocent landowner defense, let alone considered the significance of the fact that the relevant landowners did not qualify for the protection contemplated thereunder. Nor did any of these courts consider the damage that their analyses would do to the incentive would-be-purchasers will have to engage in due diligence investigations.<sup>219</sup>

In reality, all three of these lines of analysis tend to eviscerate the due diligence requirements inherent in the innocent landowner defense. Under *Lashins*, for example, the defendant landowner was found to have established a defense under section 107(b)(3) even though it had purchased the property knowing it was contaminated and had made only minimal efforts to determine the extent of the contamination.<sup>220</sup> In *Cordova* and *AMI*, the owners had likewise purchased the property knowing it was contaminated.<sup>221</sup> And in *Rumpke*, the landowner had failed to undertake any environmental investigation before buying the property, even though the property in question was a landfill.<sup>222</sup>

And yet in all of these cases, the landowners were treated as if they were "blameless" in the eyes of CERCLA, either avoiding any responsibility for the ultimate cleanup costs or apparently being allowed to use joint and several liability in their efforts to impose those costs on others.

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218. *Lashins*, 91 F.3d at 359.

219. *See id.* at 360; *Cordova*, 113 F.3d at 583; *AMI*, 106 F.3d at 1346; *Rumpke*, 107 F.3d at 1240; *Rohm & Haas*, 2 F.3d at 1280.

220. *Lashins*, 91 F.3d at 356.

221. *Cordova*, 113 F.3d at 576; *AMI*, 106 F.3d at 1346.

222. *Rumpke*, 107 F.3d at 1236.

B. *Specific Consideration of the Lashins/Contractual Relationship Line of Cases*

The problem with the *Lashins* approach lies in the Second Circuit's determination that the traditional section 107(b)(3) was available to a party that purchased contaminated property, despite the fact that the contamination was allegedly caused at least in part by prior owners and operators.<sup>223</sup> The court reached this result by concluding that the seller's alleged activities did not occur "in connection with" the land sale agreement, because that agreement neither "relate[d] to hazardous substances" nor vested *Lashins* with control over the seller's activities within the meaning of its earlier decision in *Westwood*.<sup>224</sup>

Again, in *Westwood*, the court held that a landowner should be precluded from raising a third-party defense with respect to contamination that was caused by someone with whom the landowner had a contractual relationship only if the contract "relate[d] to hazardous substances."<sup>225</sup> This formulation makes perfect sense with respect to contamination that occurs during the property owner's period of ownership. The statute, after all, provides a third-party defense where a third party causes the release, unless the third party's act or omission occurs "in connection with" a contractual relationship existing with the defendant.

Assume, for example, that a landowner hires a landscaper to perform yard work. If the landscaper returns without authorization at night and disposes of hazardous waste on the property, she is for all intents and purposes a vandal. The mere fact that the landowner has a landscaping contract with her should not preclude the landowner from asserting a third-party defense. The landscaper's nighttime activities in this hypothetical simply have no relationship to her contractual relationship with the landowner.<sup>226</sup>

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223. *Lashins*, 91 F.3d at 360; see also *supra* note 133.

224. See *Lashins*, 91 F.3d at 360.

225. *Westwood*, 964 F.2d at 91-92.

226. See also *Reichhold Chems. Inc. v. Textron, Inc.*, 888 F. Supp. 1116, 1129-31 (N.D. Fla. 1995) (downgradient property owner was not precluded from raising the third party defense with respect to contamination caused by its upgradient neighbor merely because it purchased some of its raw materials from its neighbor's facility). The *Westwood* for-

The *Westwood* approach makes no sense, however, in the context of preexisting contamination. Here, it runs directly afoul of the dynamic Congress created when it coupled the strict liability provisions of section 107(a)(1) with the narrow escape valve inherent in the innocent landowner defense. It also negates the very deliberate step that Congress took in revising the definition of "contractual relationship" to expressly include deeds and other land transfer agreements.

Again, when Congress enacted SARA it was well aware that courts had interpreted the 1980 Act as imposing strict liability on landowners without regard to causation.<sup>227</sup> In tempering this scheme, Congress replaced what had been the uncertain application of the traditional section 107(b)(3) defense, as it related to current landowners, with the innocent purchaser defense.<sup>228</sup> Congress did this through a statutory two-step: (1) it defined the term "contractual relationship" to include land transfer agreements; but (2) it negated the existence of this contractual relationship if the buyer exercised "all appropriate inquiry" prior to acquisition and found no contamination.<sup>229</sup>

The accompanying Conference Report made clear that the innocent landowner defense replaced, rather than supplemented, the traditional section 107(b)(3) defense as it relates to those who purchase contaminated property:

A person who acquires property through a land contract or deed or other instrument transferring title or possession that meets the requirements of this definition *may assert that an act or omission of a third party should not be considered to have occurred in connection with a contractual relationship* as identified in section 107(b) and therefore is not a bar to the defense.<sup>230</sup>

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mulation could arguably raise more complicated questions in the landlord/tenant context. Under what circumstances, for example, will a lease be deemed to "relate to hazardous substances?" Thus far, the courts have routinely deemed the section 107(b)(3) defense unavailable to landlords where their tenants cause contamination. *See, e.g.*, cases cited in *supra* note 139. In *Bedford*, the Second Circuit recently joined this camp. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998).

227. *See supra* text accompanying notes 116-18.

228. *See supra* text accompanying notes 116-18, 126-30.

229. 42 U.S.C. § 9601(35) (1994).

230. H.R. CONF. REP. NO. 99-499, at 186-87 (1986), *reprinted in* 1986

The highlighted portion of this text makes clear that when a buyer meets the requirements of section 101(35), i.e., by exercising an "all appropriate inquiry," its inquiry serves to negate a statutory conclusion that would otherwise apply, i.e., that the seller's offending activities in contaminating the land are deemed to have occurred in connection with the land sale agreement.

The *Lashins* approach undermines this framework because it assumes that, so long as the land sale agreement does not "relate to hazardous substances" (by which one can only assume the court means that the agreement does not explicitly address the existence of contamination), the seller's contaminating activities will not be deemed to have been "in connection with" that contractual relationship.<sup>231</sup> Thus, under *Lashins*, the buyer need not be concerned with any requirement that she undertake due diligence activities. To establish her defense, she need only ensure that the land sale agreement did not reflect the potential existence of contamination. This "ignorance is bliss" approach cannot be squared with either the statute, the Conference Report, or the testimony of Representative Frank.<sup>232</sup>

C. *Specific Consideration of the Alcan/Rohm & Haas Divisibility Line of Cases*

The *Alcan/Rohm & Haas* approach is similarly flawed. Under the *Alcan* theory defendants are allowed to prove causation as a way of establishing divisibility. Whatever merits the *Alcan* theory may have, as applied to generator liability, its application to current landowners would erode the entire notion of non-causation based liability under section 107(a)(1). It has been clear since the days of *Shore Realty* that Congress intended current landowners to be liable under CERCLA irrespective of whether they played any part in causing or contributing to the contamination. And it has been clear since *Chem-Dyne* that this liability will most

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U.S.C.C.A.N. 2835, at 3279-80 (emphasis added).

231. See generally, *Lashins*, 91 F.3d at 359.

232. See *Lefebvre v. Central Maine Power Co.*, 7 F. Supp.2d 64, 68 n.3 (D. Me. 1998); *Goe Eng'g Co. v. Physicians Formula Cosmetics*, No. CV 94-3576-WDK, 1997 WL 889278, at \*10 n.7 (C.D. Cal. June 4, 1997) (both expressly rejecting the *Lashins* approach); see also *supra* text accompanying notes 137-41.



commonly be joint and several. In enacting SARA, Congress clearly embraced these basic points. Indeed, the testimony of Representatives Studds and Eckart reflected their clear understanding that current landowners are jointly and severally liable under the Act.<sup>233</sup>

The *Rohm & Haas* court, like the *Alcan* courts before it, relied on § 433A of the Restatement (Second) of Torts for the proposition that “[d]amages for harm are to be apportioned among two or more causes where . . . there is a reasonable basis for determining the contribution of each cause to a single harm.”<sup>234</sup> But in applying this formulation to landowners, the Third Circuit ignored the fact that Congress considered current owners to be liability-worthy (i.e., part of the problem) where they purchased the relevant property without meeting the requirements of the innocent landowner defense.<sup>235</sup> In *United States v. Northernair Plating Co.*,<sup>236</sup> a federal district court in Michigan made a very similar point in holding a landlord jointly and severally liable for contamination caused by its tenant and one of the tenant’s employees:

The presence of the substances at the Northernair site is directly attributable to the activities of [the tenant and its employee]. Therefore, it could be argued that they alone are responsible for causing the entire harm. This is, however, contrary to the plain language of the statute, which makes the landowner strictly liable absent his ability to assert a defense under [§ 107(b)(3)]. Congress clearly intended that the landowner be considered to have “caused” part of the harm. As such the harm is indivisible, and all of the defendants are jointly and severally liable.<sup>237</sup>

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233. 131 CONG. REC. H11093-94 (daily ed. Dec. 5, 1985) (statement of Rep. Studds that “all companies owning the Aerovox facilities since the time of the discharges are potentially liable for all of the cleanup costs and damages caused by that pollution”); *see also id.* at H11160 (statement of Rep. Eckart that the innocent landowner defense constituted “a dangerous erosion in the joint and several liabilities section”).

234. *Rohm & Haas*, 2 F.3d at 1280.

235. *See supra* text accompanying note 120.

236. 670 F. Supp. 742 (W.D. Mich. 1987), *aff’d*, *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989).

237. *Id.* at 748 (citation omitted).

Again, the *Rohm & Haas* dicta appears to strongly suggest that current landowners who can show that they did not actively cause or contribute to the contamination should be able to establish that their apportionable share of the harm is zero.<sup>238</sup> They would thus not only avoid joint and several liability, but would avoid any responsibility for cleanup costs. Whether one terms this a “defense” or a method of apportioning liability down to zero is in the end only a semantic distinction. In essence, these landowners would be given a free pass irrespective of whether they met the requirements of the innocent landowner defense.

Like the *Lashins* approach, the *Rohm & Haas* formulation is flatly inconsistent with the dynamic Congress created when it combined section 107(a)(1) with the limited escape valve inherent in the innocent landowner defense. Through SARA, Congress essentially instructed those who would acquire property to look before they leap, or else suffer the consequences.<sup>239</sup> Allowing current landowners to rely on non-causation based divisibility arguments undermines the incentive that potential purchasers otherwise have to undertake “all appropriate inquiry” before buying property. Why would a potential buyer spend significant sums on environmental investigations if it would bear no responsibility for any later-discovered contamination that did not make it worse? The short answer is that most would not.

D. *Specific Consideration of the AMI/Rumpke Cost-Recovery/Contribution Line of Cases*

The Seventh Circuit’s decisions in *AMI* and *Rumpke* are not as troubling as either the *Lashins* or *Alcan/Rohm & Haas* lines of cases, but they may still be problematic. Again, these cases addressed whether landowners which have played no direct role in causing contamination may pursue cost-recovery claims under section 107(a)(4) or, alternatively, whether they are limited to contribution claims under section 113(f). The court allowed both landowners to pursue cost-recovery claims. In *Rumpke*, the court appeared to indicate that this claim would be based on principles of joint and several liability.<sup>240</sup>

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238. See *supra* text accompanying notes 174-78.

239. See *supra* text accompanying notes 110-12 and 116-23.

240. *Rumpke*, 107 F.3d at 1240.

If these cases stand for the proposition that any landowners who did not actively contribute to contamination are entitled to full recovery as a matter of law in their actions against other PRPs, even where they do not meet the requirements of the innocent landowner defense, then they are inconsistent with Congress's view of the "responsibility" that non-diligent landowners bear under CERCLA. Again, Congress considered those who have acquired contaminated property without having performed adequate investigations to be liability-worthy under CERCLA. The statute decrees that if they have not performed the appropriate investigations, they are to be treated as if they "had reason to know" of the relevant contamination.<sup>241</sup> Their having proceeded with the purchase in the face of this constructive knowledge makes them "responsible" in the CERCLA sense of the term.

The Second Circuit recently rejected the *AMI/Rumpke* analysis in a closely related context for this very same reason. In *Bedford*, the defendant landlord cited *Rumpke* in arguing that it should be allowed to go forward with a section 107(a)(4) cost recovery claim against its subtenant because the landlord had played no role in causing the relevant contamination.<sup>242</sup> In holding that the landlord was limited to a contribution claim, the court held, "[a] potentially responsible person under section 107(a) that is not entitled to any of the defenses enumerated under section 107(b), like *Bedford*, cannot maintain a section 107(a) action against another potentially responsible person."<sup>243</sup> Elsewhere, the court explained its rationale in the following terms:

One of the questions plaintiff raises is whether it, as a party "innocent" of causing a hazardous spill, should completely escape liability for the costs of the cleanup. The answer is "no." To be innocent in a CERCLA response cost suit, one must be innocent in the eyes of the law. To be ignorant of the contaminated condition on one's property may be a generic form of innocence, but not the kind that will escape liability under the statute.<sup>244</sup>

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241. 42 U.S.C. § 9601(35)(A)(i) (1994).

242. *Bedford Affiliates v. Sills*, 156 F.3d 416, 425 (2d Cir. 1998).

243. *Id.* at 424.

244. *Id.* at 419.

Once one recognizes that non-diligent landowners are not "blameless" in the eyes of CERCLA, the next question involves the type of claim they should have against other PRPs. But this question answers itself. As the *Bedford* court and others have recognized, Congress created section 113(f) for the express purpose of allocating liability among jointly and severally liable parties.<sup>245</sup> Therefore, it only makes sense for courts to look to this provision. This should be true regardless of whether the landowner cleaned up the site at the behest of EPA or a State, thus giving rise to a prototypical contribution claim under section 113(f) (as was the case in *Bedford*), or whether the landowner may have cleaned up the site on its own initiative, thus possibly giving rise to an implied contribution claim under section 107(a)(4)(B).<sup>246</sup>

Under section 113(f), the courts are to "allocate response costs among liable parties using such equitable factors as [they determine] are appropriate."<sup>247</sup> As we have seen, passive landowners have done relatively well under this framework, as compared with those who played a more active role in causing the pollution. In *Bedford*, for example, the Second Circuit affirmed the lower court's determination that the passive landowner should bear 5 percent of the cleanup costs.<sup>248</sup> The key point here, though, is that the discretion to undertake this equitable allocation should reside in the district court. In many cases, the courts may deem it appropriate to have non-diligent current owners bear some portion of the response costs due to the fact that they failed to discover the relevant contamination.<sup>249</sup>

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245. *Id.* at 427; see also *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-03 (9th Cir. 1997); *supra* notes 188-97 and accompanying text.

246. This was the case in *Pinal Creek*, which led the court to conclude that the landowner's claim was in the nature of a hybrid action under sections 107(a)(4)(B) and 113(f), with the former provision creating the implied right of contribution, and the latter qualifying the nature of that claim. 118 F.2d at 1301-02.

247. 42 U.S.C. § 9613(f)(1) (1994).

248. *Bedford*, 156 F.3d 416, 425; see also *supra* text accompanying note 144.

249. See, e.g., *Alcan-Toyo America, Inc. v. Northern Illinois Gas Co.*, 881 F. Supp. 342, 346-47 (N.D. Ill. 1995); *United States v. DiBiase*, 45 F.3d 541, 545 (1st Cir. 1995); *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991), *supra* text accompanying note 144.

## V. CONCLUSION

CERCLA, as amended by SARA, creates a straightforward scheme where current landowners are strictly and jointly and severally liable for contamination caused by their predecessors on the property unless they meet the requirements of the innocent landowner defense. This creates a strong incentive for purchasers to investigate the environmental status of target properties prior to acquisition. In the end, this dynamic promotes not only the discovery of contamination, but also its ultimate remediation as parties work through the transactional process.

Unfortunately, at least four of the Federal Circuits have lost sight of these basic dynamics in announcing lines of analysis that serve to undercut the due diligence requirements inherent in the statutory scheme. Future courts should be wary of committing the same mistake.