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Superfund Liability Alternatives for the Innocent Purchaser

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I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) imposes liability for cleanup costs where there has been a release to the environment of a hazardous substance. Generators, transporters, owners and operators at the time of disposal, 1

and current owners are all potentially liable. Liability has been construed by the courts as strict, even though Congress rejected an explicit provision of strict liability. Congress intended that liability would follow

2 CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982 & Supp. 1986). These four classes of persons liable under CERCLA are called "covered persons" by the Act but are termed "potentially responsible persons" or "PRP" in much of the literature. This Note will refer to these covered persons as simply responsible persons. Generators and transporters have each handled the hazardous substance at some point. Owners and operators at the time of disposal either handled the disposal or were in control of the facility when the hazardous substance was disposed. Even though they may not be negligent or even be a cause of the release of the hazardous substance to the environment, they are held liable because they benefited from the disposal of the hazardous substance. "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remediying the harmful conditions they created." Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) rev'd, Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989). The rationale for inclusion of the current owner is not as clear. Presumably, the current owner somehow also benefited, if only by virtue of a deflated purchase price. Arguably, current owner liability arises from CERCLA's other goal: "Congress intended that the federal government be immediately given the tools for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal." Id. at 1081. What better way than to have the current owners, who are accessible, pay for the cleanup. The two goals are reconciled for the current owner by shifting the burden of proof. The current owner is presumed liable, but she may establish an affirmative defense that a third party was solely responsible for the release.

Absent from the list of responsible persons are intervening owners who did not contribute to the disposal. Like the current owners they did not directly benefit from the hazardous disposal. Unlike the current owners they are less accessible. A lien on the cleanup site is not effective against them. Therefore, the logic that holds current owners may not apply to them. See Cadillac Fairview/California, Inc. v. Dow Chemical Co., 21 Env't Rep. Cas. (BNA) 1108 (C.D. Cal. 1984) (strictly construing the classes of responsible persons and holding that intervening owners are not liable). But see United States v. Carolawn, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20698 (D.S.C. 1984) (refusing to grant summary judgment in favor of an intervening owner). However, in Carolawn the defendant was a chemical company which transferred title to three employees, leaving a question of a retained ownership interest. But cf. infra note 123 for a discussion of how intervening owners can become liable for not disclosing actual knowledge of a hazardous disposal.

The scope of liability for the above responsible persons is for:
(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to . . . natural resources . . . ; and (D) costs of any health assessment or health effects.

CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982 & Supp. 1986). Under (A) the government may order the responsible person to conduct the cleanup. Alternatively, the government may conduct its own cleanup with moneys from the Superfund and order the responsible person to reimburse the Superfund. CERCLA § 111, 42 U.S.C. § 9611 (1982 & Supp. 1986). Either liability under (A) is called Superfund liability.

from the federal common law of abnormally dangerous instrumentalities. Liability is joint and several unless a defendant can prove by a preponderance of evidence that the harm due to the release of the hazardous substances is divisible. Liability is retroactive and has withstood con-


(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

While usually the activity is a "business conducted for profit," the rule is "equally applicable when there is no pecuniary benefit to the actor." Id. at § 520, comment d. Therefore, in the context of Superfund, current owners are equally liable with operators and generators. The harm must be serious and must "take into account the place where the activity is conducted." Id. at § 520, comment g. Thus CERCLA liability does not arise where a hazardous disposal is contained at the facility. Liability arises only when there is a "release into the environment ... which may present an imminent and substantial danger to public health or welfare." CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1982 & Supp. 1986). Unlike the negligence standard, which is left to a jury, strict liability is a decision for the court. RESTATEMENT (SECOND) OF TORTS § 520, comment 1.


3 See, e.g., Chem-Dyne Corp., 572 F. Supp. at 811. In fact, a defense against joint and several liability based on divisible harm is very difficult. The government need only prove that hazardous substances of the same kind as a defendant had disposed was found in the release. The government need not trace the release to the defendant. See, e.g., United States v. Rohm & Haas Co., 721 F. Supp. 666 (D.N.J. 1989).
stitutional challenge on its application for acts and party relationships that predate CERCLA's enactment in 1980. Moreover, CERCLA liability permits no defenses except those found in the Act.

CERCLA provides an affirmative defense to liability actions where a third party has solely caused the release of the hazardous substance. There are two exclusions to this "third party" defense. The defense is excluded if the third party who was the sole cause of the release was the defendant's employee or agent. There is also a contractual relationship exclusion: The third party's act or omission must not have occurred in connection with a contractual relationship with the defendant. To take advantage of this third party affirmative defense, the defendant must also prove that she exercised due care with respect to the hazardous substance and that she took precautions against the third party's foreseeable acts. Prior to 1986, no case squarely addressed the issue whether land contracts were contractual relationships that excluded the availability of the third party defense.

Congress attempted to clarify the land contract issue as part of the Superfund Amendments and Reauthorization Act of 1986 (SARA). SARA defined "contractual relationship" and included land contracts, deeds and other instruments transferring title or possession. However, SARA further provided that land contracts need not invoke the contractual relationship exception to the third party defense if the property was acquired after the disposal of the hazardous substance. The purchaser could establish that she was innocent of cleanup liability by proving that she did not know and had no reason to know of the disposal of the hazardous substance. The innocent purchaser must establish that she had "no reason to know" by proving that she conducted an appropriate inquiry at the time of acquisition.


This Note will focus on two classes of innocent purchasers: first, a prospective purchaser who hopes to avoid CERCLA liability, and second, an actual purchaser who, after buying property, discovers a release of a hazardous substance. The purchaser who discovers a release need not wait for the government to bring a cleanup action against him for joint and several liability. CERCLA provides two alternatives. SARA introduced the more viable alternative. The purchaser may initiate a de minimis settlement with the government for a minimal contribution. An older option under CERCLA is a private action in contribution against other persons potentially liable for the release. Liability in the private action is not strict liability as it is in an action against the government, rather liability is apportioned equitably. The purchaser may even bring the contribution action in the form of a declaratory judgement prior to the claim by the government.

The statutory defense for the innocent purchaser is relevant no matter which forum the purchaser chooses to reduce his liability. In an action against the government, the Act provides the elements for the affirmative defense. In a private action, these same elements become factors for determining an equitable proportion. In the de minimis settlement, the government evaluates the purchaser's potential affirmative defense before agreeing to settle. The innocent purchaser defense is part of the third party defense. Accordingly, this Note will examine judicial interpretations of both defenses.

SARA intended to clarify the purchaser's liability, but prospective purchasers are still confused over the nature and the extent of inquiry required. Appropriate inquiry was intended to be "consistent with good commercial or customary practice." No such practice existed in 1986. The lending industry has since fostered the practice of conducting an environmental site assessment conducted in phases and has outlined procedures for these phases. The lending industry has not, however, addressed a substantive standard for determining the appropriate phase to stop inquiry. Nor have the courts determined the substantive basis for evaluating the purchaser's conduct in following these procedures.

This Note will argue that the substantive basis can be found in SARA. While CERCLA intended liability to be strict, SARA intended in a limited way to reintroduce concepts of negligence. SARA introduced reasonableness concepts into its guidance for evaluating appropriate inquiry. Appropriate inquiry should invoke the standard of a reasonable person with the same requisite knowledge as the purchaser, and involved in the same type of transaction.

14 CERCLA § 122(g), 42 U.S.C. § 9622(g) (Supp. 1986). See infra Part II.A of this Note.
16 "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." Id.
II. LITIGATION ALTERNATIVES FOR THE INNOCENT PURCHASER

A. Background - Superfund Liability

CERCLA was enacted in part to provide a rapid response to the nationwide threats posed by the thirty to fifty thousand improperly managed hazardous waste sites in this country.\(^1\) The Act authorizes the President to respond to a release, which presents an imminent and substantial danger to the public health or welfare.\(^1\) The President has subsequently delegated this authority to the Environmental Protection Agency (EPA).\(^2\) CERCLA requires the EPA to formulate a National Contingency Plan.\(^3\) Consistent with this plan the EPA is authorized to remove the hazardous substance and to provide for remedial action for the site.\(^4\) The EPA may tap a Superfund to pay for the response costs,\(^5\) in which case the government must attempt to recover the response cost and reimburse the Superfund from responsible persons.\(^6\)

The government's burden in a response reimbursement action\(^6\) is merely to establish that (1) the site where the response cost were occurred

\(^4\) CERCLA § 103, 42 U.S.C. § 9610 (1982 & Supp. 1986). A removal means a "cleanup or removal of released hazardous substance from the environment" that are "necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment" which may result from a release or threat of release. A remedial action is long term and "consistent with permanent remedy." Its purpose is to mitigate the "substantial danger to present or future public health or welfare or the environment." A response means both a removal and remedial action and includes enforcement activities. A release "means any spilling, leaking, pumping, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" and includes "abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant." CERCLA § 101(22)-(25), 42 U.S.C. § 9601(22)-(25) (1982 & Supp. 1986) (definitions); 40 C.F.R. § 300.6 (1988) (definitions).
\(^5\) In addition to paying for government response costs, the Superfund is also available to any person who incurs necessary response costs consistent with the national contingency plan and certified by the EPA. Id. at § 111(a)(2). The Superfund is appropriated an annual amount of $212,500,000. Id. at § 111(p)(1). Omnibus Budget Reconciliation Act, § 6301, Pub. L. No. 101-508, 104 Stat. 825 (1990).
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is a "facility," a "release" or a "threatened release" of a "hazardous substance" from the site has occurred or is occurring, (3) the release or threatened release caused the government to incur response costs, and (4) the defendant falls within one of the classes of responsible persons. Liability is then strict and is joint and several. The government is free to move against any and all responsible persons. It may settle with some and move against others for the remaining balance. The only defense is the third party affirmative defense, which includes the innocent purchaser defense. But the innocent purchaser need not wait to defend against the government. She may settle with the government for a minimal contribution or she may reduce her liability in a private contribution action provided by CERCLA.

B. De Minimis Settlements

SARA introduced a section on settlements, although the EPA has settled with responsible persons from the beginning. Indeed, the EPA was criticized for an alleged propensity to issue sweetheart deals. The new section provides both for general provisions for government settlements with responsible persons and for more specific provisions for "de minimis"

26 The definition of "facility" is very inclusive. The Act provides a lengthy list of places such as buildings, ponds, landfills, moving vehicles, or any area where a hazardous substance has "come to be located." The only exclusions are consumer products in consumer use and vessels. CERCLA § 101(9), 42 U.S.C. § 9601(9) (1982 & Supp. 1986). Vessels are excluded because various separate provisions are unique to vessels.


28 Hazardous substances are not separately defined in CERCLA but take their definition by references to most of the other environmental acts. CERCLA does, however, exclude petroleum and natural gas. CERCLA § 101(14), 42 U.S.C. § 9601(14) (1982 & Supp. 1986); 40 C.F.R. § 300.6 (1988). A provision similar to CERCLA cleanup liability for oil cleanups can be found in the Clean Water Act. Federal Water Pollution Control Act § 311, 33 U.S.C. § 1321 (1982).


31 See, e.g., Chem-Dyne Corp., 572 F. Supp. at 811. See supra note 5.


settlements. In addition, the section provides for “mixed funding.”

SARA provides for expedited final settlements with de minimis responsible persons. The purpose of this procedure is to provide qualified landowners with legal repose and to reduce the administrative burden on the EPA for handling the numerous parties to a response action. De minimis settlements must involve “only a minor portion of the response costs at the facility concerned.”

There are two classes of qualified de minimis settlers. Class ‘A’ settlers include responsible persons with no valid defenses but whose contributions to the hazardous release are minimal either in amount or in hazardous effect. Class ‘B’ settlers include owners who purchased with no “actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.” In addition they may not have conducted or permitted a hazardous disposal nor contributed to its release.

Class ‘B’ settlers are true innocent purchasers. The prohibitions against permitting a disposal or contributing to a release are comparable to the third party defense requirements for precautions against third party foreseeable acts and for due care. The constructive knowledge provision seems, if anything, more strict in the settlement provisions. In any event

37 CERCLA § 122(g), 42 U.S.C. § 9622(g) (Supp. 1986).
38 Mixed funding is a variant of settlement which allows the EPA to reach different kinds of settlements with different persons at the same site. CERCLA § 122(b)(1), 42 U.S.C. § 9622(b)(1) (Supp. 1986). Some private parties are “preauthorized” to conduct the response action and to bring a claim against the Superfund. Some “cash out” in lieu of conducting the response action, while still others do “mixed work,” a combination of preauthorization and cash out. See EPA mixed Funding Settlement Guidelines, 53 Fed. Reg. 8279, 8279 (1988).
39 CERCLA § 122(g), 42 U.S.C. § 9622(g) (Supp. 1986).
40 See EPA De Minimis Landowner Settlement Guidelines, supra note 10, at 34,235.
44 Id.
46 Compare CERCLA § 122(g)(1)(B), 42 U.S.C. § 9622(g)(1)(B) (Supp. 1986) with CERCLA § 101(35)(A)(i), 42 U.S.C. § 9601(35)(A)(i) (Supp. 1986). The constructive knowledge requirement in the settlement provisions actually is more strict than it is in the innocent purchaser defense. In the affirmative defense, an innocent purchaser must not have constructive knowledge of a prior hazardous disposal. In the settlement provisions she must not have constructive knowledge of any prior generation, transportation, storage, or treatment, as well as of any hazardous disposal. The difference is more literal than real. If generation, transportation, storage, or treatment have occurred on the property, disposal has likely occurred as well. See Leifer, EPA’s Innocent Landowner Policy: A Practical Approach to Liability Under Superfund, 20 Env’t Rep. (BNA) 646, 648 (Aug. 4, 1989).
the EPA, who must agree to the settlement, considers these provisions
to be "substantially the same" as those required for the innocent pur-
chaser affirmative defense. 47

An innocent purchaser with a viable affirmative defense should prefer
to settle. The elements of the defenses are identical. At settlement the
government will evaluate the strength of the purchaser's evidence. If the
innocent purchaser does not make a "thorough and convincing demon-
stration" but nonetheless persuades the government that the purchaser
may prevail at trial, the government may still settle. However, it will
probably demand a minimal cash contribution. 48 The innocent purchaser
will likely consent to a minimal cash out in exchange for an early de-
termination and reduced litigation costs.

A de minimis settlement requires some consideration from the innocent
purchaser. The minimum consideration is site access and due care as-
surances. 49 The due care assurances are those embodied in CERCLA §
107(b)(3) 50 which are defined as the "degree of care which is reasonable
under the circumstances," and "include those steps necessary to protect
the public from a health or environmental threat." 51

In exchange for access and cooperation, the innocent purchaser receives
statutory protection against private action for contribution by other re-
sponsible persons 52 and a covenant not to be sued for cost recovery by the
government. 53 The covenant not to be sued is much broader than that

47 EPA De Minimis Landowner Settlement Guidelines, supra note 10, at 34,237
n.8.
48 Id. at 34,240.
49 Site access to the property and cooperation in the EPA's response activities
must extend to the EPA's response action contractors. Id.
51 EPA De Minimis Landowner Settlement Guidelines, supra note 10, at 34,240
n.19.
(holding that a potentially responsible person is barred from a private contribution
action against a party that settles with the government). Accord, In re Acushnet
1989) (1989 U.S. Dist. LEXIS 4900) (holding that the Uniform Comparative Fault
53 EPA De Minimis Landowner Settlement Guidelines, supra note 10, at 34,240.
The covenant not to sue is not available where it would be "inconsistent with
public interest." CERCLA § 122(g)(2), 42 U.S.C. § 9622(g)(2) (Supp. 1986). The
covenant not to sue also is not binding on a federal natural resource trustee where
there has been damage to a natural resource. See EPA De Minimus Landowner
Settlement Guidelines, supra note 10, at 34,240 n.23; CERCLA § 122(j)(2), 42
supplied under normal settlements. The normal settlement provisions provide for future liability if conditions unknown at the time of settlement are found later. In a de minimis settlement the government will also demand a reopener clause. If information not known to the government at the time of settlement later indicates that the innocent purchaser no longer qualifies for a de minimis settlement, the government may seek further relief. In addition, liability will be reopened if the innocent purchaser fails to exercise due care, exacerbates the release or fails to cooperate with the EPA. However, unlike the normal settlement, the government promises not to reopen merely because the cleanup becomes more costly than originally expected.

C. Private Actions Under CERCLA

1. Contribution

SARA made clear that CERCLA provides a statutory private right of contribution by any person against any other person who is liable or potentially liable for response costs. Both the right to contribution and the liability for contribution arise explicitly under CERCLA § 107(a). The third party defense and its derivative innocent purchaser defense arise under CERCLA § 107(b) and are defenses to CERCLA § 107(a) liability. Therefore, the innocent purchaser defense is also a defense against contribution. However, in most private actions under CERCLA, the innocent purchaser will not be a defendant but a plaintiff. In either case, the elements of proof are the same.

CERCLA requires that “in resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” In using its equitable powers to apportion response costs in a private action for contribution, the court

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55 EPA De Minimus Landowner Settlement Guidelines, supra note 10, at 34,240. See, e.g., United States v. Rohm & Haas Co., 721 F. Supp. 666, 672 (D.N.J. 1989). In Rohm & Haas, the government assumed that the settler had contributed less than one percent of the waste at the site. The reopener in the settlement agreement allowed for further liability “if information not currently known” later showed that the settler contributed more than one percent. A second reopener was triggered if the total costs of remedies exceeded the current estimate of maximum costs for the known hazard. Contrast this deal with the situation of the nonsettler. Liability is open ended with respect to the total response costs due to uncertain remedies and to undiscovered contamination at the site. It is also open ended with respect to percentage of liability.
56 EPA De Minimus Landowner Settlement Guidelines, supra note 10, at 34,240.
may consider the amount of hazardous substance and its degree of toxicity; the degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of the substance; and also the care exercised with respect to the substances and the cooperation with response efforts. These are merely the elements of the third party defense, except that they hold for both parties to the private action. An innocent purchaser by definition has no involvement with the hazardous substance and is required to exercise due care. Clearly, an innocent purchaser has a contribution alternative.

Because liability for a government response action is strict, the innocent purchaser defendant has only an affirmative defense and must prove each element. On the other hand, in a CERCLA private action liability is apportioned equitably. Therefore, the innocent purchaser as a plaintiff merely uses the elements of the affirmative defense as factors to be weighed against the defendant.

An innocent purchaser may have to prove all the elements of the affirmative defense in the private action in order for the court to grant complete indemnity. No reported decision appears squarely on point. However, in Philadelphia v. Stepan Chemical Co., the city was arguably an innocent landowner but was not an innocent purchaser. The defendant allegedly bribed city employees to permit it to dump hazardous waste in the municipal landfill at night. The court held that the city was not entitled to indemnity for the cleanup, although it was entitled to contribution. The court reasoned that “Congress intended to hold innocent landowners liable,” but that Congress created one category of potentially liable persons whom it perceived to be innocent under specified conditions, that is, those who purchased after the disposal of the hazardous substance. Innocent landowners whose liability arose from a disposal after purchase did not qualify as an innocent purchasers. One can infer from

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62 The third party defense requires zero involvement in the hazardous release, but it also requires positive efforts. The defendant must exercise due care toward the hazardous substance and take precautions against foreseeable acts of those who are involved in the hazardous release. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1982 & Supp. 1986).


66 The court refused to create an additional category of innocent persons, that is, those who claim a “scope of employment” exception to the contractual relationship exclusion to the third party defense. Id. at *14.

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this decision that, in order for a court to grant complete indemnity, a landowner would have to be an innocent purchaser as defined by the Act and meet all its tests.

An innocent purchaser often will incur preliminary expenses after the discovery of a hazardous release and prior to a government cleanup. These expenses are ripe for recovery against other responsible persons in a private action even before a government response action has established the liable parties.\textsuperscript{67}

In \textit{Wickland Oil Terminals v. Asarco},\textsuperscript{68} the former owner left slag on the property. The state ordered the present owner to test the slag. The court found that the present owner's action to recover the testing costs from the former owner was ripe even though the federal government had not yet ordered a Superfund cleanup program. In \textit{Cadillac Fairview/California v. Dow Chemical},\textsuperscript{69} the current owner learned after purchase that the former owner had dumped hazardous industrial by-products. The owner conducted tests on his own and found a hazardous release. The state then ordered the current owner to erect a fence and post security. Unlike \textit{Wickland}, there was neither a state nor federal cleanup program in effect, yet the owner's claim for recovery of the cost of the fence and security was ripe against the former owner.

\section*{2. Declaratory and Injunctive Relief}

A contribution cause of action for Superfund liability is also ripe for declaratory relief prior to a government response action as long as the essential facts establishing the right to declaratory relief have already occurred.\textsuperscript{70} Of course, an award of declaratory judgment merely declares that between the parties to the private action, the defendant is liable for cleanup cost.\textsuperscript{71} The plaintiff in the private action may still be liable as a defendant in the government response action, barring an affirmative defense. A contribution award is of no value against an insolvent defendant.

The resolution of future liability is not the innocent purchaser's only concern. He may want to regain use of alienability of his property without waiting for a government cleanup which may or may not be forthcoming. Unfortunately for the innocent purchaser, CERCLA provides no right for

\textsuperscript{67}The expenses, however, must be necessary expenses and must be consistent with the National Contingency Plan. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1982 & Supp. 1986). In order to establish a claim for cost recovery against a responsible party, the innocent party must show (1) that the defendant is a covered person responsible for response costs under Section 107(a)(1)-(4), (2) that there was a release or threat of release of hazardous substances from the site, (3) that the release or threatened release caused the plaintiff to incur costs, (4) that the costs were necessary for the response, and (5) that the response action was consistent with the National Contingency Plan. \textit{See, e.g., General Electric Co. v. Litton Business Systems, Inc.}, 715 F. Supp. 949, 955 (W.D. Mo. 1989).

\textsuperscript{68}792 F.2d 887 (9th Cir. 1986).

\textsuperscript{69}840 F.2d 691 (9th Cir. 1988).

\textsuperscript{70}792 F.2d at 893.

\textsuperscript{71}Id. at 889.
a private person to enjoin other responsible persons to conduct a cleanup.\textsuperscript{72} CERCLA does authorize the Attorney General to seek an injunction against a responsible person to force a cleanup “when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment.”\textsuperscript{73} Private injunctive relief would render the express grant to the government redundant and enable private parties to bypass the specific limitations on the government to seek similar injunctions.\textsuperscript{74}

An innocent purchaser may of course clean up her own site and seek reimbursement from the Superfund. However, such a recovery requires that the costs be approved and certified by the government.\textsuperscript{75} The government is unlikely to approve any expenditures by the Superfund when an alternative exists. The innocent purchaser may also attempt to recover these costs from other responsible persons, provided the costs are “necessary costs of response” and are “consistent with the national contingency plan.”\textsuperscript{76}

3. Defenses Against Private Action

The doctrine of unclean hands does not apply to CERCLA private actions.\textsuperscript{77} CERCLA’s fundamental purpose is “to provide for the expeditious and efficacious clean-up of hazardous waste sites.” Congress intended that the responsible persons would be liable for the costs of these clean-ups, and one “incentive for doing so was availability of a private cause of action.”\textsuperscript{78} Application of the clean hands doctrine would discourage quick cleanups. If a responsible person might lose his right of contribution against other responsible persons because of legal indiscretions, he would be less likely to actively participate in early response actions. No such considerations are relevant when the government has already conducted a response action and is seeking recovery. The government can, and statutorily must, require that the defendant be truly innocent to escape liability.

\textsuperscript{72} 840 F.2d at 696-97.
\textsuperscript{74} 840 F.2d at 697.
\textsuperscript{78} \textit{Id.}
Private action rights under CERCLA may be affected by terms of contractual relationships between the parties. CERCLA allows parties to freely contract so as to indemnify or hold harmless one of the parties, although such agreements are not binding on the government in a response action. Such an indemnity action is governed by state contract law and not by federal equitable apportionment under CERCLA's contribution provision.

In *Ecodyne Corp. v. Shah*, a seller treated a water tower with chromium. The buyer agreed to assume responsibility for the cleanup in consideration for a reduction in price and thereby lost his CERCLA right to contribution. The buyer in *Ecodyne* was aware of the hazard and was therefore not an innocent purchaser. However, a similar contract exclusion could also estop an innocent purchaser. A purchaser conducts an appropriate inquiry and honestly, but mistakenly, believes that there was no hazardous disposal at the site. As a result, she indemnifies the seller from any future cleanups as part of the contract bargain. According to *Ecodyne*, she has waived her CERCLA right to contribution.

On the other hand, "as is" contracts are not sufficient to transfer CERCLA liability to an innocent purchaser. Such a provision is "merely a warranty disclaimer and as such precludes only claims based on warranty." In *Southland Corp. v. Ashland Oil, Inc.*, as in *Ecodyne*, the buyer was not an innocent purchaser. The property was already under a court order at the time of sale to halt the release. Yet the buyer under an "as is" sales contract was entitled to contribution. If an "as is" contract provision does not preclude contribution for a knowing purchaser, the provision certainly cannot preclude contribution for an innocent purchaser.

III. ELEMENTS OF THE INNOCENT PURCHASER DEFENSE

A. The Third Party Affirmative Defense

1. Source and Structure

CERCLA, from its inception, listed four classes of covered persons who are potentially liable for response cost and other damages: (1) current facility owners and operators, (2) owners and operators at the time of the disposal of any hazardous substances, (3) generators of found hazardous substances, and (4) persons who disposed of hazardous substances at the site.

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84 Id.
substances, and (4) transporters. Liability is strict. The only defenses are affirmative defenses that establish that the release or threat of release which led to the response cost were caused solely by acts of God, war or a third party. The defense is excluded if the third party was the defendant's employee or agent. It is also excluded if the third party's acts or omissions occurred in connection with a contractual relationship with the defendant.

The third party defense on its face requires a two phase analysis. Theoretically, a defendant could prevail by proving the nonexistence of a contractual relationship with someone who was the sole cause of the release. Arguably, even if a contractual relationship exists, the defendant could still prevail if the third party's acts or omissions did not occur in connection with that contractual relationship. Therefore, the defendant must prove a lack of contractual control over the third party. However, early cases addressing this issue looked merely toward the existence of a contractual relationship and thus broadened the contractual relationship exclusion sufficiently to swallow the defense.

The third party defense seemed virtually eliminated for an innocent landowner. Land titles were certainly contractual relationships and seemed to provide the decisive link between current owners and owners or operators at the time of disposal. Prior to SARA, the EPA took such a position. However, no court squarely addressed the issue. The availability of the third party defense to an innocent landowner was still in doubt.

SARA resolved the issue of the innocent landowner by defining "contractual relationship" in favor of permitting the defense for the innocent purchaser only. SARA's specific provisions will be analyzed later. For

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90 Id. at 310.
92 EPA De Minimis Landowner Settlement Guidelines, supra note 10, at 34,236.
93 Id. at 34,237.
94 CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A) (Supp. 1986). The definition of "contractual relationship" chosen by Congress derives the third party defense to an innocent landowner who was the owner at the time of disposal of a hazardous substance by a third party.
now it is important to observe that the innocent purchaser is a clarification within the third party defense and not a separate defense. The following discussion examines the third party defense provisions that have been part of CERCLA from the beginning.

2. Sole Cause Requirement

The requisite first step in the third party defense is to prove that some third party who is not in a contractual relationship with the defendant is the sole cause of the release or threat of release. For example, in O'Neil v. Picillo generators of hazardous waste claimed that a licensed transporter was responsible for the hazardous disposal that caused the release at the disposal site. The generators consigned their waste to the transporter, and the transporter decided where the waste would go. The court rejected this defense because the third party had to be a totally unrelated third party.

The sole cause element can turn on the distinction between a release and a disposal of the hazardous substance. A response action is triggered "whenever (A) any hazardous substance is released into the environment or there is a substantial threat of such a release, or (B) there is a release or threat of a release of a contaminant which may present an imminent and substantial danger to public health or welfare." A release requires a spill or a leak into the environment. Thus, a contained placement or disposal does not constitute a release. While a person becomes poten-
tially liable merely for a disposal of a hazardous substance which is later released, the third party defense requires that some third party was solely responsible for the release or threat of release.\textsuperscript{103}

Proving that a third party solely caused the release may in theory be as simple as differentiating the defendant's wastes from those substances that are the subject of release. But the proof is not simple and the defendant has the burden of proof in an affirmative defense. In Washington \textit{v. Time Oil Co.},\textsuperscript{104} an alleged innocent purchaser was an oil company who after purchase deposited filter cakes containing hazardous substances on the property. The purchaser claimed that the property was contaminated at the time of purchase and that the hazardous substances that he released did not include the filter cakes. The court noted that it was the defendant's burden, not the government's, to trace the release to one defendant or another.\textsuperscript{105}

The sole cause of release is an issue of material fact. In \textit{United States v. Fleet Factors Corp.},\textsuperscript{106} two shareholders managed the corporate facility while in bankruptcy. A third party creditor\textsuperscript{107} foreclosed on the inventory and equipment but not on the property. In the process of an auction of the inventory and the equipment, the creditor allegedly disturbed asbestos wrappings on the pipes and thereby solely caused the release of the asbestos. The government moved for summary judgement against the two


\textsuperscript{104} 687 F. Supp. 529 (W.D. Wash. 1988).

\textsuperscript{105} Id. at 532.


\textsuperscript{107} Creditors are not included in the classes of responsible persons. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982 & Supp. 1986). The term owner or operator "does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (Supp. 1986). Creditors can, however, become liable under CERCLA if they actively participate in the management of the property during or after foreclosure. See Bergsoe Metal Corp. \textit{v. East Asiatic Co.}, 910 F.2d 668 (9th Cir. 1990) (port authority bond holder during bankruptcy proceedings not liable unless at a minimum it participated in the \textit{actual} management of the facility); United States \textit{v. Mirabile}, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20994 (E.D. Pa. 1985) (bank liable for becoming involved with the day-to-day management of the facility while creditor was in bankruptcy proceedings); United States \textit{v. Maryland Bank & Trust Co.}, 632 F. Supp. 573 (D. Md. 1986) (bank liable for holding onto property for two years from time of foreclosure until subsequent sale). \textit{But see} United States \textit{v. Fleet Factors Corp.}, 901 F.2d 1550, 1558 (11th Cir. 1990) ("secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could (emphasis added) affect hazardous waste disposal decisions if it so chose"); Freeman, \textit{Recent Case Law May Expand Lenders' Risks Under Superfund}, \textit{Nat'l L.J.} 18 (Sep. 17, 1990). See generally, Mays, \textit{Secured Creditors and Superfund: Avoiding the Liability Net}, 20 Env't Rep. (BNA) 609 (Jul. 28, 1989).
shareholders as current owners. The court denied the motion. The shareholders were entitled to establish the third party defense at trial by proving that the creditors solely caused the asbestos release.

3. Due Care Requirement

In addition to proving that a third party solely caused the release, a landowner who is a responsible person must prove that she "exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts." If a landowner acts so as to exacerbate the harm after a release has occurred, she has lost the third party defense for lack of due care. For example, she may fail to shield the area from the public. If the landowner actually contributed to the release by some act, she would be denied the defense for lack of a third party who was solely responsible.

A defendant may breach the due care requirement by a failure to act. In United States v. Sharon Steel Corp., a responsible party, the State of Utah, owned a right of way on which the legal owner's predecessor in interest allegedly left hazardous tailings. Utah did nothing except to ask the legal owner to correct the problem. Utah was denied summary judgement on its cross-claim for indemnity against the legal owner because it had violated due care as required for the third party defense.

4. Precaution Against Third Party Foreseeable Acts

In addition to a requirement of due care, the third party defense requires that the responsible person take "precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." The due care require-
ment controls the landowner’s conduct after a release, while the foreseeable act requirement controls acts or omissions that might have prevented the third party from causing the release in the first place. Where the third party’s sole-cause act was vandalism, a landowner would have to prove that she took proper precautions such as fences or security. Similar precautions might be required against “midnight dumping.”

Holdings in this area sometimes stress the failure of the landowner to exercise contractual control over the third party. At this stage of the analysis the defendant has already proved the primary elements of the defense. A third party has caused the hazardous release and the third party’s acts or omissions that caused the release were not called for directly or indirectly by a contract between the third party and the defendant. Nonetheless, a contract exists between the defendant and the third party.

In New York v. Shore Realty Corp., Shore knew that the tenant on the property it had just purchased for future real estate development would continue to dump hazardous waste from the time of closing until Shore evicted the tenant. Shore was, therefore, denied a third party defense because it did not take precautions against these foreseeable acts.

In United States v. Monsanto Co., the defendant landowners were absentee landlords to a recycling company. However, they never inspected the site during the lease. Therefore, they were unable to present any evidence that they took precautionary action against the recycling company’s foreseeable acts that caused the release. Similarly, in Washington v. Time Oil Corp., a landlord oil company failed to exercise sufficient control over a “sloppy” oil refinery subleasee to qualify for the third party defense.

113 See H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 186 (1986), approving the use of the third party defense where the release was caused by an act of vandalism, providing the landowner took satisfactory precautions against foreseeable acts of vandalism. Vandalism is a classic illustration of a third party defense situation. The vandal solely causes the release. The vandalism is not part of the contract with the landowner. But the landowner may still be liable. If the vandalism was foreseeable, the landowner must take reasonable precautions.

114 See, e.g., Cadillac Fairview/California v. Dow Chemical Co., 840 F.2d 691 (9th Cir. 1988), where the state actually ordered the landowner to erect the fence and post security. See supra note 69 and accompanying text.

115 Cf. Philadelphia v. Stepan Chemical Co., 18 Envtl. L. Rep. (Envtl. L. Inst.) 20133 (E.D. Pa. 1987) (1987 U.S. Dist. LEXIS 7056, *11), see supra note 64 and accompanying text. The city did not meet the sole cause requirement of the third party defense. Its own employees at the landfill were a cause of the release because they received a bribe from the midnight dumpers. However, the court could just as well have held that the city did not properly screen or monitor its employees to prevent foreseeable bribery attempts from midnight dumpers.

116 759 F.2d 1032 (2d Cir. 1985).


119 Id. at 169.

5. The Contractual Relationship Exclusion for Landowners

CERCLA excludes the third party defense if the act or omission of the third party which caused the release occurred in connection with a contractual relationship between the third party and the defendant.121 Prior to SARA, no court had addressed the issue as to whether land contracts and similar transactions transferring title or use were the type of contracts that excluded the third party defense. SARA clarified the issue for the innocent purchaser, who is entitled to a third party defense.122

B. The Innocent Purchaser Defense

1. Source and Structure

With SARA in 1986, Congress clarified what is commonly called the "innocent landowner" defense. The statutory defense applies to three classes of landowners who acquired real property after a hazardous disposal: Those who acquire by inheritance or bequest, any government entity that acquires property involuntarily, and the innocent purchaser.123 SARA did not create a new defense for the innocent purchaser. The amendment was intended to "clarify and confirm" the third party defense.124 The defense appears in the definition section as a means of de-

122 The innocent seller is not entitled to a third party defense. See United States v. Hooker Chemical and Plastics Corp., 680 F. Supp. 546, 558 (W.D.N.Y. 1988) (decided after SARA but using pre-SARA law); EPA De Minimis Landowner Settlement Guidelines, supra note 10, at 34,237 n.4. Defendant Occidental Chemical in Hooker operated a chemical waste disposal site at Love Canal. It claimed that it safely and lawfully enclosed the waste. No hazardous release occurred while it owned the site. Subsequent owners and developers ruptured the enclosure and released the dioxin, 680 F. Supp. at 552. Occidental claimed that the developers were the sole cause of the release and that it was entitled to a third party defense. The court denied Occidental's third party defense. Occidental's sale to the developers was a contractual relation which excluded the defense. "Congress did not intend to extend the [third party] defense to the original disposers," who "are able to control the acts of these subsequent purchaser." 680 F. Supp. at 552. A similar result could have been reached without automatically denying the defense to land sellers. Occidental could, nevertheless, be denied use of the defense for not taking precautions in the sales contract to prevent the developers from releasing the hazardous substance.
123 CERCLA § 101(35)(a), 42 U.S.C. § 9601(35)(a) (Supp. 1986). The defense applies to current owners. Landowners who acquired after a hazardous disposal but no longer own the property generally do not need the defense. They are not in the class of the covered persons potentially liable for response costs, CERCLA § 107(a), 42 U.S.C. § 9607(a) (Supp. 1986). See supra note 2. They are, however, liable if they had actual knowledge of a release or a threat of a release of a hazardous material and subsequently transferred the property without disclosing such knowledge. CERCLA § 101(35)(c), 42 U.S.C. § 9601(35)(c) (Supp. 1986).
fining the contractual relationship exclusion to the third party defense. It allows that "land contracts, deeds and other instruments transferring title or possession" are contractual relationships for purposes of excluding the third party affirmative defense. The third party defense can be used where the contractual relationship exclusion does not apply. The exclusion does not apply where the defendant acquired the real property "after the disposal or placement of the hazardous substances on, in, or at the facility," provided at the time of the acquisition, the defendant "did not know and had no reason to know" of the disposal.

The amendment elaborates on what the innocent purchaser must establish in order to prove that she had "no reason to know." She must prove that at the time of acquisition, she made "all appropriate inquiry into the previous ownership and use of the property consistent with good commercial or customary practice in an effort to minimize liability." Moreover, the amendment list factors that the court shall take into account to adjudge appropriate inquiry.

2. Appropriate Inquiry into Previous Ownership and Use

Actual knowledge at the time of acquisition of a prior disposal on the purchased property precludes the innocent purchaser defense. In Wickland Oil Terminals v. Asarco, the buyer was aware of large slag piles and knew they contained lead when the property was purchased. In United States v. Tyson, the buyer knew that the former owner hauled industrial waste to the site. As a result of their knowledge, both were denied the defense.

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128 Id., infra note 171 & accompanying text. An otherwise innocent purchaser who after purchase obtains actual knowledge of a hazardous release or threat of release and subsequently transfers the property without disclosing such knowledge loses the benefit of the innocent purchaser defense. CERCLA § 101(35)(C), 42 U.S.C. § 9601(35)(C) (Supp. 1986). The purchaser's burden in establishing the defense is to prove lack of constructive knowledge at the time of the property acquisition of a hazardous disposal. Apparently, the purchaser may learn of the disposal after moving in but as long as she has no actual knowledge of a release or threat of a release, she may subsequently transfer the property without disclosure. On the other hand "transferring property with disclosure [of a disposal] does not provide a person with a defense, if such person is otherwise liable." H.R. CONF REP NO. 962, 99th Cong., 2d Sess. 188 (1986).

Note that several states require the seller to give notice to a buyer of any known prior disposal of a hazardous substance. See, e.g., MASS. GEN. L. ch. 21C, § 7 (1989).

Where actual knowledge of a prior disposal is absent, SARA directs the courts to look to good commercial or customary practice in order to determine an appropriate inquiry into previous ownership and use. However, the ambiguity in the appropriate inquiry requirement "has had the real estate and environmental communities in a state of confusion since 1986 . . . " The problem is the lack of any standard for what is good commercial or customary practice. Moreover, Congress did not intend a single fixed standard. Congress intended that the duty to inquire should be judged by the standard at the time of acquisition and that the standard should increase as public awareness of hazardous releases grows. Good commercial practice means that "reasonable inquiry must have been made in all circumstances, in light of best business and land transfer principles." But business principles vary with the type of transaction. The standard for commercial transactions should, therefore, be higher than for private residential transactions.

Good commercial or customary practice is time dependent. If the purchase was made far enough in the past, custom at that time may not have required even a visual inspection. For example, in United States v. Serafini, a developer purchased land in 1969 that was obviously and visibly contaminated with hundreds of abandoned drums, and he did so without a site visit. Yet the court refused to rule that as a matter of law that good commercial practice among real estate developers called for a visual inspection of the property prior to purchase. Because the standard of inquiry should increase as public awareness of hazardous releases increases, a commercial purchase without a visual inspection today would surely constitute an insufficient inquiry as a matter of law.

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131 CERCLA § 101(35)(A)(i), 42 U.S.C. § 9601(35)(A)(i) (Supp. 1986). The knowledge requirement arguably does not apply to an involuntary acquisition by a government entity or to an acquisition by inheritance or bequest, which defenses appear in subsections (ii) and (iii) respectively. Section (35)(A) requires that an innocent landowner need establish only "one or more of the circumstances" of the three subsections. However, the Joint Conference Committee Report expresses the opinion that those who acquire by inheritance or bequest without actual knowledge must "engage in a reasonable inquiry but they need not be held to the same standard as those who acquire property as part of a commercial or private transaction." H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 187 (1986). See also EPA De Minimis Landowner Settlement Guidelines, supra note 10, at 34,239.


133 Id.


135 Id.

136 Id. Those who acquire through inheritance or bequest without actual knowledge should have the lowest standard and need only engage in a reasonable inquiry. See also supra note 131.

137 706 F. Supp. 354 (M.D. Pa. 1989). But see EPA De Minimis Landowner Settlement Guidelines, supra note 10, at 34,238 n.11, criticizing the opinion in Serafini, claiming "the criteria set forth . . . seem[s], at a minimum, to contemplate a visual inspection . . . ."

The standard for appropriate inquiry also depends on the parties involved and requires an examination of any requisite knowledge that the buyer has or should have. In *Jersey City Redevelopment Authority v. PPG Industries*, a landfill contractor in 1964 purchased property for a landfill. The contractor knew at the time of purchase that the land contained chromium but claimed lack of knowledge that chromium was hazardous. The contractor became liable for contribution by transporting chromium bearing fill to plaintiff's property where the chromium subsequently was released. The court held that a triable issue existed as to whether the contractor had the requisite lack of knowledge to establish the innocent purchaser defense. What is interesting about the court's holding in this case is that someone in the landfill business was not held liable as a matter of law for knowing that known constituents of soil were hazardous. It is likely, although the court does not say so, the decision may have hinged on the early purchase date of 1964.

No reported decision has yet to address the appropriate inquiry issue for a purchase that has occurred since SARA announced the requirement. The only reported decision thus far that has accepted the innocent landowner defense as a matter of law involved a 1982 transaction. Moreover, the defendants were not purchasers for consideration but were gift recipients.

In *United States v. Pacific Hide and Fur Depot*, a family corporation operated a metal recycling scrap yard. The corporation deposited PCB transformers in a gravel pit at the yard before 1973. In 1979 Pacific Hide bought the main part of the property but not the gravel pit. In 1981 one brother of the corporation died and devised his shares to his wife. In 1982 another brother transferred all of his interest to his three children, just four months before the EPA found the PCP capacitors leaking in the gravel pit. When the corporation dissolved shortly afterwards, the property of the corporation including the gravel pit was transferred to the wife and the three children in exchange for their stock.

Because the defendants obtained their interests by gift and by corporate events beyond their control, the court held that they were entitled to the innocent landowner defense as a matter of law even though they had made no inquiry. The court reasoned that Congress did not lay down a "bright line rule" requiring inquiry in every case. None of the defendants had any special knowledge and Congress intended to treat inheritance and bequest leniently. The court did not hold, however, that inquiry would never be required for a gift recipient.

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140 Id. at 1262.
142 Id. at 1348.
143 Id. at 1349.
144 Id. at 1348; see supra note 131.
145 The decision in *Pacific Hide* may very well be equitable but the fact pattern suggests a potential for abuse and a frustration of a main goal of CERCLA. The owner who transferred all his interest to his children just prior to the discovery
IV. PRE-ACQUISITION ENVIRONMENTAL SITE ASSESSMENTS

A. Current Status of Commercial Practice

The previous sections dealt mainly with the problem of a person who purchased real property innocent of a prior hazardous disposal on the property, later finds a release of the hazardous substances, and now faces Superfund liability. This Note now turns to prospective purchasers and how they may avoid Superfund liability. SARA requires that purchasers conduct, at the time of acquisition, appropriate inquiry into previous ownership and use. This procedure for appropriate inquiry is called an "environmental site assessment" which is also known as a "pre-acquisition site assessment."146

As previously noted, the courts have yet to shed much light on the meaning of the "all appropriate inquiry" requirement for the innocent purchaser defense. Little is known beyond what is in the statute itself or expressed by the legislative history:147 The standard increases in time as public awareness increases, and more sophisticated transactions require higher standards. The implications for current and future real estate transactions are disturbing. The real estate community is in a state of confusion.148 Commercially viable properties are lying useless for fear of Superfund liability.149 Lenders, fearing that they may become "deep pockets," shun small business real estate acquisitions.150

The problem is that the statutorial standard for "all appropriate inquiry" is "good commercial or customary practice,"151 but commercial practice has yet to be standardized.152 Custom is what the community "finds... of a release is still potentially liable as an owner at the time of disposal. Id. at 1349. However, he may have transferred to his children all the means by which the government may execute on a judgment for recovery of response costs. Thus a main goal of reimbursing the Superfund could be frustrated while the children as innocent landowners could have the benefit of a cleanup at government expense. Ironically, if an outsider had purchased the same property from the owner, that purchaser would be held to a higher standard of inquiry merely because she paid consideration for the property. A more equitable approach would hold recipients by inheritance or bequest to the same standard as held to purchasers, but limit the liability of the gift recipients to their interest in the property.

149 See Small Businesses, Lenders Suffocating under CERCLA Liability, Witnesses Say, 20 Env't Rep. (BNA) 654 (Aug. 11, 1989), discussing Rep. LaFalce's (D-N.Y.) bill to protect businesses and banks from Superfund liability, H.R. 101-
150 Id.
to be an acceptable course of action.” 153 However, a particular course of conduct, even if followed by an entire industry, can still be found negligent if it cannot withstand the test of reasonable behavior and ordinarily prudent judgement.” 154 Therefore, it is not enough that real estate interests develop procedures. Courts must find these procedures to be reasonably acceptable. Until they do, confusion is likely to remain.

B. Procedural Guidelines

The EPA’s long-waited Guidance on Landowner Liability 155 merely outlined de minimis settlements but failed to provide guidance on appropriate inquiry. 156 In the breach, the lending industry has begun to develop procedures for pre-acquisition environmental assessments which are intended to be included as part of loan closings. A full site assessment includes extensive soil sampling. It can cost tens of thousands of dollars 157 and is impractical for small properties, especially residential properties. Moreover, a full assessment causes significant delays. 158 These problems are addressed by a phased approach which is now becoming standard in the lending industry. 159

Fannie Mae guidelines 160 to the lending industry for multi-family property loan applications call for a two phase assessment. Phase I “focuses on a review of readily ascertainable information about the property including a review of government environmental records and interviews with people knowledgeable about the property,” followed by a property inspection by qualified persons. Phase II involves soil sampling, but is only done if a need is indicated by Phase I. 161

For many small residential property acquisitions, even a Phase I assessment can be prohibitively expensive especially when conducted by environmental consultants, who are presently in great demand. 162 One environmental consultant suggested that Phase I be split. Phase I(a) would include a review of government environmental records, a forty-year title search and a borrower questionnaire, all for about $500. Phase I(b), if needed, would include an on-site inspection by a knowledgeable

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154 Bennett, 52 Banking Rep. at LEXIS BNA file *19.
158 Id.
159 See Bennett, 52 Banking Rep. at LEXIS BNA file *14.
161 Bennett, 52 Banking Rep. at LEXIS BNA file *15.
person of readily ascertainable information. More importantly, the whole Phase I could be conducted by a trained loan officer.\footnote{163}

It should be kept in mind that the lending industry developed these assessment guidelines for the benefit of lenders, not for the benefit of purchasers. The guidelines do not tell a buyer whether or not to purchase, but rather tell a lender whether or not to grant a loan. The risk for the lender is much less because those who hold property primarily to protect security interests are not held liable as owners under CERCLA.\footnote{164} The lender's primary concern is the loss of their security interest if Superfund liability causes the mortgagor to default.\footnote{165} Liability for the purchaser extends not just to the property but to her personal assets as well. Therefore, a purchaser should seek a more detailed assessment in order to make an informed decision. In order to keep cost down, however, the assessment should be multi-phased.

One environmental consultant suggested a three phase assessment for purchasers, beginning with a pre-Phase I initial scoping step.\footnote{166} The assessment process would start with a one-day site visit. The inspector would observe general conditions, collect readily available information and interview personnel. Phase I would include a title search and a review of all pertinent records. It could also include a review of any available historical aerial photographs. This information would then be used to plan a reconnaissance visit to observe all suspicious conditions observable on the surface. Phase I would be used to plan for Phase II, which if needed, consists of sampling air, soil, surface water or ground water. If Phase II revealed significant contamination, Phase III would require additional testing but with the goal of determining the scope of recommended remedial action required at the site, and the probability of a release of those contaminants. These guidelines are procedural, but engineering guidelines are also needed for the actual sampling.\footnote{167}

None of the procedural guidelines suggested guarantees freedom from Superfund liability. Courts must first accept these procedures and develop their standards for review of a purchaser's use of the procedures. This Note will recommend how the court may proceed in the next section.

\section*{V. Summary and Recommendations}

\subsection*{A. Summary}

In 1980 CERCLA, as finally approved, was hurriedly put together in the Senate and considered and passed in the House with limited debate.\footnote{168}

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\end{flushright}
Its language was "circuitous" and its legislative history "sparse and unreliable." SARA of 1986 was mainly an oversight bill. It gave the Superfund more realistic funds to enact cleanups and it added new provisions, strengthened others and supposedly clarified still others. The innocent purchaser defense was not intended to be a new provision, but rather a clarification of the third party defense as it pertains to one class of defendants. However, its requirement for an appropriate inquiry prior to acquisition rested on nonexistent customary and commercial practices. The provision itself raised public awareness and rendered the defense even more difficult to establish. Following SARA, the real estate community was just as confused and even more fearful. The community knows it has a pre-purchase duty to make an appropriate inquiry. However, it does not know what an appropriate inquiry entails.

B. How the Law of Appropriate Inquiry Should Develop

The crux of the innocent purchaser defense is appropriate inquiry prior to purchase, and the talisman of appropriate inquiry is good commercial and customary practice. In the previous section we examined the procedural steps that the lending and real estate industries are developing to establish a customary practice. The analysis does not end there. It becomes more substantive. Such analysis looks beyond the procedural steps and examines whether the purchaser decided correctly to stop at a particular step.

At the substantive stage of analysis, the statutory definition of the phrase "no reason to know" becomes significant. According to the Act:

The court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

These factors all have a ring of negligence to them. They are all based on information obtained in the first or second phase of a pre-acquisition environmental assessment. They are not unlike the considerations that are routinely made to determine whether a landowner is negligent for failure to protect a visitor to his property from physical injury. They lend themselves to a case-by-case determination under a standard of reasonableness.

These factors could also very easily be interpreted as imposing a reasonable person standard for appropriate inquiry. Moreover, customary practice is also a means of establishing reasonable behavior. Under a reasonable person standard, a prospective purchaser would have a duty to initiate a phased environmental site assessment. Whether the purchaser would have a duty to proceed to a next higher assessment phase would be judged on the basis of whether a reasonable person would proceed.

Which reasonable person standard should apply? Prosser notes that a person of superior knowledge will be held accountable for that knowledge. The Act requires that "the court shall take into account any specialized knowledge or experience on the part of the defendant." And as noted earlier, commercial transactions command a higher standard than do residential transactions. Therefore, an appropriate reasonable person would have the same requisite knowledge as the defendant and be involved in the same type of transaction.

A negligence standard for appropriate inquiry of course runs counter to the strict liability nature of CERCLA. But so does any exception, including the general third party defense and the more specific innocent purchaser defense. However, the turnabout is not complete. The innocent purchaser defense is still an affirmative defense. The purchaser must prove that a prior owner solely caused the release and that the purchaser did not exacerbate the hazard. He must also prove that he followed customary procedures for an environmental site assessment prior to purchase. If a purchaser proves these elements, the burden would then shift to the government to prove that the purchaser was negligent in interpreting the site assessment.

The development of the law suggested here follows judicial decisions and statutory language. No change in the Act is required. Recently, however, Rep. Curt Weldon (R-Pa.) introduced a bill to amend CERCLA along the lines suggested here. The bill intends to clarify the meaning of appropriate inquiry. The completion of a prescribed assessment procedure

\[^{172}\text{Evidence of the usual and customary conduct" raises an inference "that the actor is conforming to the community's idea of reasonable behavior." Unless something in the "evidence or in common experience ... lead[s] to a contrary conclusion, this inference may be so strong that it calls for a directed verdict on the issue of negligence." W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts, 193-94 (5th ed. 1984).}\]

\[^{173}\text{Id. at 185.}\]


\[^{176}\text{H.R. 2787, 101st Cong., 1st Sess. 135 Cong. Rec. H3317 (1979).}\]
would create a rebuttable presumption of an appropriate inquiry.\footnote{177} However, this bill would apply only to commercial real estate purchases.\footnote{178}

The bill adopts the phased-in approach to environmental assessment. A purchaser must conduct historical research into previous ownership and uses, a comprehensive review of government records and a surface site investigation of the property, including historical aerial photographs, if available. The bill would not require sampling unless the prior research reveals a contaminant release or threat of release.\footnote{179}

The bill goes beyond the suggestions here and actually modifies the present Act. The Act now requires that an innocent purchaser have no reason to know of any disposal of a hazardous substance. Rep. Weldon's bill would allow an innocent purchaser to know of a disposal as long as he had no reason to know that there was a release or threat of release of the hazardous substance.

\section*{C. What to Do Until the Law is Settled}

\subsection*{1. The Decision to Buy}

All prospective purchasers are advised to conduct some inquiry into evidence of an earlier disposal of any hazardous substance. For a purchaser of residential property, the inquiry may be no more than an examination of property records to ascertain whether the property was used by a business or manufacturer that might have disposed of a hazardous substance. In addition, the purchaser should inspect the property for obvious signs of waste disposal. Most importantly, the purchaser must follow up on any evidence of disposal.

For a purchaser of commercial property the standards of inquiry are greater than for residential purchases. The purchaser should have a professional search the records of title and government records for evidence of a possible disposal of any hazardous substance. The search materials should include historical records of aerial photographs not only for hazardous substances that may be on the surface, but also for signs of activity that are indicia of hazardous substance disposal. Only if these initial steps indicate the possibility of a disposal should soil sampling be necessary. Not all land purchases, not even all commercial land purchases, require a full and complete environmental assessment. Rather, the extent of the assessment should be judged on a standard of reasonableness appropriate to the circumstances.


\footnote{179} 135 CONG. REC. at 2368.
Lenders are likely to insist on some kind of assessment. Normally, lenders are conservative and are likely to drop out at the first sign of trouble. Therefore, if a lender requires an environmental site assessment, that assessment should suffice for appropriate inquiry, especially for a residential purchaser. However, a holder of a security interest has immunity that a purchaser does not have. If a commercial purchaser is sound financially, a lender may extend credit even though the purchaser may have some finite risk of liability. These commercial purchasers are well advised to make their own independent evaluations.

If a reasonable analysis indicates that some hazardous substances have indeed been disposed of on the property, the purchaser may still buy the property even though the purchase will eliminate the innocent purchaser defense. Knowledge of a disposal deprives the purchaser of the defense, but the disposal itself does not bring liability. Liability results from a release of the hazardous substances. The purchaser should therefore analyze the probability of a release and the cost of a cleanup if a release does occur. The product of these two factors equals a fair discount on the property.

2. Litigation After a Hazardous Release

An innocent purchaser can and should avoid litigation. The Act provides, and the government has indicated, a receptiveness to de minimis settlements. In this forum an innocent purchaser sets forth the innocent purchaser defense. If the defense is good, settlement is quick and the purchaser need only promise access and cooperation with the response efforts. He would have to cooperate anyway to establish the due care requirement of the affirmative defense. If the defense is questionable, the government may still settle to reduce its litigation costs. But now the government will require a minimal cash-out contribution. Even a truly innocent purchaser will gladly accept this compromise and save litigation costs. Most importantly, in a lost suit against the government, liability is joint and several and need not be proportional to the injury caused. An innocent purchaser would have to initiate contribution suits after the suit by the government and incur further litigation costs. Even if the innocent purchaser prevails through all this litigation, his property rights and business credit will have been hampered by the uncertain liability during the protracted litigation.

If the government is not receptive to a de minimis settlement, an innocent purchaser may seek a declaratory judgment for contribution against other responsible persons. However, note that de minimis settlements are available not just to innocent purchasers. The government will also settle with any responsible person whose liability is small relative to total response costs. Therefore, those with whom the government will refuse to settle are likely not to be innocent purchasers. Nonetheless, a somewhat innocent purchaser can seek declaratory relief that will limit her liability to an equitable proportion.
The only time an innocent purchaser should have to defend a government response action is when all or most of the other responsible persons are judgment proof. Such an event is not unlikely. Superfund liability can easily bankrupt responsible persons. The government would certainly seek a deep pocket to reimburse the Superfund. SARA nonetheless authorizes a de minimis settlement even though the Superfund would not be reimbursed. However, the purchaser may find it difficult to overrule the government's failure to settle. Government authority to settle is discretionary.\(^\text{180}\) In order to overcome an administrative act of discretion, one must prove that the agency was "arbitrary and capricious or otherwise not in accordance with the law."\(^\text{181}\) Such a standard of proof is difficult to maintain.

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\(^{180}\) CERCLA § 122(a), 42 U.S.C. § 9622(a) (Supp. 1986).
