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THE PLIGHT OF THE PASSIVE PAST OWNER: DEFINING THE LIMITS OF SUPERFUND LIABILITY

by J. B. Ruhl*

THESE days, if you want to stir up high emotions in Congress, statehouses, corporate boardrooms or citizen group meetings, mention the word Superfund. That alias for the Comprehensive Environmental Response, Compensation, and Liability Act of 1980¹ (CERCLA) evokes strong reactions from industry, environmentalists, bankers, politicians, and just about everyone else. CERCLA, a relative latecomer to the present-day body of federal environmental law, was enacted in 1980 to fill a gap in then existing law by creating the authority and liability for cleanup of abandoned facilities contaminated with hazardous substances. In the short time it has been with us, CERCLA has thrust the previously arcane subject matter of environmental law into the day-to-day experience of the American economy more than any other environmental statute.

One reason CERCLA gets so much attention is that its reach is so pervasive and its effect so drastic. Only a small club of statutes of any sort could match the strength of CERCLA's liability provisions. The liability to governmental and private entities for cleanup of contaminated facilities is retroactive, strict, joint and several, subject to extremely narrow defenses, and potentially very expensive.² Past activities which were perfectly legal at the

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1. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)). CERCLA, also known as the Superfund after the tax-based fund established thereunder, was enacted in 1980 and substantially amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613. The legislative history of the 1980 enactment is contained in STAFF OF SENATE COMM. ON ENV'T AND PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) (Comm. Print 1983) (Mark E. Anthony, author). This article does not provide a comprehensive overview of the legislative history, statutory provisions, and judicial interpretations of CERCLA, as many such compilations have been published. See, Beverly Z. Alexander, *CERCLA 1980-85: A Research Guide*, 13 *ECOLOGY L.Q.* 311 (1987); Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 45 *BUS. LAW.* 923 (1990); Kyle E. McSlarrow, David E. Jones & Eric J. Murdock, *A Decade of Superfund Litigation: CERCLA Case Law from 1981-1991*, 21 *ENVTL. L. REP. (Envtl. L. Inst.)* 10,367 (July 1991) [hereinafter *A Decade of Superfund*]; Note, *Developments in the Law—Toxic Waste Litigation*, 99 *HARV. L. REV.* 1458 (1986).

2. See *A Decade of Superfund*, *supra* note 1, at 10,388-411 (thorough discussion of liabil-

time they occurred can lead to present-day CERCLA liability.³ Present activities which never before were thought to raise concern can lead to CERCLA liability.⁴ Indeed, by the end of its first decade, CERCLA liability had been interpreted by the Statute's principal implementing agency, the United States Environmental Protection Agency (EPA), and the courts in ways so broad and so evolving as to make most environmental attorneys loathe to suggest that CERCLA liability could not attach in any particular set of circumstances.

In the early 1990s, however, some reins have begun to be pulled on CERCLA, albeit in very small ways and only after tremendous public debate. The administrative and legislative effort to define and limit the effect of CERCLA on the lending industry provides a recent example.⁵ Of course, the fact that CERCLA has an effect on the lending industry illustrates the power of the statute. Therefore, attention is raised when the statute's reach is clipped, even at its edges.

One issue which has not been widely publicized yet, possibly because it is so misunderstood, involves what could be called the passive past owner (PPO). A PPO typically is someone who at one time owned, but who no longer owns, a contaminated property and who neither knew of, contributed to, nor exacerbated such contamination during its period of ownership. Many PPOs have been startled to find themselves, years or even decades after their ownership has terminated, included among the persons alleged under CERCLA to be a potentially responsible party (PRP) liable for cleanup of a contaminated site. In several cases a PPO has been held liable notwithstanding uncontroverted evidence of the PPO's passive, unknowing role in conditions at the site.⁶

This Article examines the plight of the PPO. Part I provides a brief re-

ity and defenses under CERCLA); Jane E. Lein & Kevin M. Ward, *Private Party Response Cost Recovery Under CERCLA*, 21 ENVTL. L. REP. (Envtl. L. Inst.) 10,322 (June 1991).

3. The Department of Justice has explained its position that CERCLA liability can attach to waste disposers even when "a state has investigated a waste site, built disposal facilities at the site, and told generators to dispose of their waste there." Letter from Phillip D. Brady, Acting Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, Department of Justice, to Honorable Dan Glickman, Chairman, Subcommittee on Administrative Law and Governmental Relations, United States House of Representatives 4 (Sept. 6, 1985), reprinted in *Superfund Reauthorization: Judicial and Legal Issues, Oversight Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary* 99th Cong., 1st Sess. 241, 244 (1985) [hereinafter *Judicial and Legal Issues*].

4. The Department of Justice has explained its position that CERCLA holds "a party strictly liable even if he shows he was as careful as possible given the existing level of information and technology." *Judicial and Legal Issues*, supra note 3, at 243.

5. In June 1991 the EPA issued a proposed rule for dealing with the complexities that had been raised by courts interpreting the liability of lenders under CERCLA. 56 Fed. Reg. 28,798 (1991) (proposed June 24, 1991). For a discussion of the case law on lender liability under CERCLA, see George Anhang, *Cleaning Up the Lender Management Participation Standard Under CERCLA in the Aftermath of Fleet Factors*, 15 HARV. ENVTL. L. REV. 235 (1991); Timothy R. Zinneclier, *Lender Liability Under CERCLA and the Fleet-ing Protection of the Secured Creditor Exemption*, 44 SW. L.J. 1449 (1991); Paula T. Perkins, Comment, *Abandonment in the Face of Possible Toxic Contamination: What's a Lender to Do?*, 44 SW. L.J. 1563 (1991).

6. See discussion *infra* notes 22-42.

view of the statutory structure that makes PPO liability possible (but by no means necessary) as a part of CERCLA's general liability scheme. As is the case with other CERCLA liability issues, the central liability provisions of CERCLA are so broad as to raise the question of PPO liability, yet are so ambiguous as to leave the question open for interpretation. Part II of this Article discusses how courts have interpreted that question, showing the decisions to be sharply divided and, in general, not particularly incisive. In Part III several provisions of CERCLA added by the 1986 amendments to the Statute,⁷ which the courts have entirely ignored in addressing the PPO issue, are analyzed for the manner in which they interrelate with the general liability provisions and may thereby resolve the question. The conclusion is that CERCLA as a whole requires that PPOs not be subjected to liability without evidence of direct knowledge of or involvement in the contamination during the period of ownership.

I. CERCLA GENERAL LIABILITY PROVISIONS

CERCLA subjects specified governmental and private entities to liability for their costs of remediating facilities contaminated with hazardous substances. A PRP may include:

the owner and operator of a . . . facility, [and] any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . from which there is release, or a threatened release which causes the incurrance of response costs, of a hazardous substance.⁸

7. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (amending CERCLA of 1980).

8. 42 U.S.C. § 9607(a)(1), (2), (4) (1988). With certain exceptions, an "owner or operator" is defined under CERCLA as:

(i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. § 9601(20)(A) (1988). An "onshore facility" is "any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land or nonnavigable waters within the United States." *Id.* § 9601(18). A "hazardous substance" includes the following:

(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921 (1988)] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. §§ 6901-6992 1988] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412 (1988)], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise

The statute clearly divides owners of facilities at which a hazardous substance release requires a response into two categories: the present owner and those who owned the facility at the time of disposal of any hazardous substance. Present owners may be liable regardless of whether any hazardous substances are disposed of at the facility during the tenure of ownership — only a release is necessary. By contrast, a past owner may be held liable only if disposal took place during its tenure of ownership, regardless of whether a release took place during that period.

specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Id. § 9601(14). A "release" includes the following actions:

any spilling, leaking, pumping, pouring, emitting, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely with a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. §§ 2011-2296 1988], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C. § 2210 (1988)], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title; and (D) the normal application of fertilizer.

Id. § 9601(22). Response costs are the costs of responding to a release of hazardous substances, which includes "removal" and "remedial action." *Id.* § 9601(25). A "removal" generally includes the following actions:

the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

Id. § 9601(23). A "remedial action" generally includes the following:

those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

Id. § 9601(24). For a discussion of how the CERCLA cleanup and liability provisions are administered, see *A Decade of Superfund*, *supra* note 1, at 10,367-88; William N. Hedeman, Jonathan Z. Cannon, & David M. Friedland, *Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme*, 21 ENVTL. L. REP. (Envtl. L. Inst.) 10,413 (July 1991). It is important to note that CERCLA does not pre-empt states from enacting similar or more stringent remediation legislation. Such state laws thus may define the liability of past owners differently than CERCLA. For example, the Texas hazardous substance facility remediation statute applies to the person who "owned or operated a solid waste facility at the time of processing, storage, or disposal of any solid waste." TEX. HEALTH & SAFETY CODE ANN. § 361.211(2) (Vernon 1991). Though considerably broader than the CERCLA provision—processing and storage do not necessitate disposal and solid waste includes more than hazardous waste—the potential still exists for the PPO scenario to arise.

Even on its face CERCLA exhibits its dependence on fortuity for defining the scope of liability. It is not immediately apparent why the requirement of disposal would be made for past owners, but not for the present owner. Clearly, however, Congress meant to add that requirement for past owners, as it would have been simple to combine present and past owners into one liability provision had no distinction been intended. Some effect, therefore, must be given to the "at the time of disposal" condition on past owner liability.

A person who owned a facility prior to disposal of any hazardous substances at the facility clearly is excluded from liability. In that manner the "at the time of disposal" condition operates to define the starting point in the chain of title of potential liability. The owner at the time of the first disposal event clearly is included as a PRP. All subsequent owners, except the present owner, must determine whether any disposal within the meaning of CERCLA took place during their respective periods of ownership. Thus arises the possibility of a PPO.

The determination of when a PPO exists depends largely on the meaning of the term disposal as used in CERCLA. Section 101(29) of CERCLA⁹ defines disposal by incorporating the definition provided in the Solid Waste Disposal Act, known more commonly as the Resource Conservation and Recovery Act (RCRA),¹⁰ which defines disposal as:

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.¹¹

To better understand what is included in disposal, it is useful to refer to CERCLA's definition of release which includes all the acts and conditions included in disposal, plus "escaping" and "leaching."¹² There are several possible interpretations of the effect of those additional criteria. On the one hand, Congress may have meant nothing at all except to provide a more comprehensive list of what generally constitutes release and disposal events. But under that argument, one would have to accept that disposal and release are equivalent, which is inconsistent with Congress' use of two distinct terms in the first place. Hence, a more reasonable interpretation is one that gives some meaning to Congress' choice of two separate terms and to the deliberately expanded category of events and conditions comprising release as opposed to disposal.

The latter interpretation offers the "passive" characteristic of the PPO.

9. 42 U.S.C. § 9601(29) (1988).

10. 42 U.S.C. §§ 6901-6992k (1988 & Supp. I 1989).

11. 42 U.S.C. § 6903(3).

12. CERCLA's definition of release includes "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . ." 42 U.S.C. § 9601(22) (1988).

Escaping and leaching can and normally do occur without human action, except for the initial action necessary to create the conditions which make the escaping or leaching possible at a later time. By contrast, the events and conditions included within disposal generally suggest human involvement. Wastes do not "deposit" or "inject" themselves. Hence, it could be argued that the distinction between disposal and release hinges upon whether the event or condition in question is the result of direct human actions or is occurring without such involvement. Disposal would include only the former; release would include both.

The preceding approach has its limitations, however, as some of the disposal criteria arguably could occur without direct human action. For example, a buried drum could corrode years after being buried and only then be said to be discharging or leaking, terms which clearly are encompassed under the disposal definition. But those conditions also are associated with active human involvement, unlike leaching and escaping. Overall, the fact that Congress apparently felt the need to add escaping and leaching to the release definition, neither of which is normally associated with direct human action, indicates that the distinction between passive and active human involvement was intended, though the intended effect may not be entirely clear.

Assuming Congress intended the statute to operate according to the foregoing distinction, the potential for PPOs is easily identified. For example, assume that Owner A places hazardous waste into an earthen pit on Property and later conceals the pit. Without mentioning the pit, Owner A sells Property to Owner B ten years later, who uses it as a mini-storage warehouse business. Owner B sells Property to Owner C five years later, who intends to develop Property as an office park. When excavating for the sub-surface parking garage later that year, Owner C exposes the pit, which is discovered to have been leaching hazardous constituents into ground water for at least ten years.

Owners A and C clearly are PRPs under CERCLA. Owner A was the owner at the time of disposal of a facility at which a release of a hazardous substance is occurring. Owner C is the present owner of the facility at which a release of a hazardous substance is occurring. But what of Owner B? Owner B did not actively add to the hazardous substance at the facility, but owned the facility during the period the pit began leaching a hazardous substance into ground water. Did Owner B own the facility "at the time of disposal of any hazardous substances," or is Owner B outside the web of CERCLA liability? Both the case law and, arguably, several provisions of the 1986 amendments to CERCLA address that question. However, the case law includes decisions which openly disagree as to the meaning of disposal under CERCLA, and the 1986 amendments offer only clues as to what Congress may have intended.

II. THE CONFLICTING CASE LAW ON PPOs

A. *The RCRA Section 7003 Cases*

Prior to enactment of CERCLA in 1980, the EPA attempted to force

cleanup of several of the worst known contaminated sites under RCRA. Pursuant to the "imminent hazard" provision of section 7003 of RCRA,¹³ the EPA could bring suit in federal district court to immediately restrain any person contributing to any "handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste [that] may present an imminent and substantial endangerment to health or the environment."¹⁴ In the absence of any broad cleanup authority such as CERCLA, the EPA relied on the RCRA provision with limited success to achieve basically the same objective.

The EPA's use of section 7003 ran head-on into many of the issues which later were litigated *ad nauseum* in the early years of CERCLA.¹⁵ One such issue was the reach of the disposal definition in cases where no ongoing active disposal conduct was alleged. For example, in *United States v. Price*,¹⁶ the EPA sued to force cleanup of an abandoned hazardous waste landfill at which hazardous constituents were leaching into ground water. Among the defenses raised was the argument that the defendants were not currently contributing to any disposal because, as was uncontested, they were never actively involved in the dumping that occurred at the landfill and they never knew of the chemical wastes that had been dumped there until after they purchased the property.¹⁷ The court rejected this argument by stating that the gravamen of a section 7003 action was not the defendant's dumping practices but rather the imminent hazard created by the continued leaking.¹⁸

The reasoning in *Price* was endorsed later in *United States v. Waste Industries*,¹⁹ in which defendants argued that the government could not use section 7003 to force cleanup of an abandoned landfill because of the lack of any allegation of ongoing active disposal. The district court agreed, but the court of appeals rejected that reasoning by construing the disposal definition

13. 42 U.S.C. § 6973.

14. *Id.*

15. For a discussion of the major issues litigated under CERCLA in the 1980s, see *A Decade of Superfund*, *supra* note 1.

16. 523 F. Supp. 1055 (D.N.J. 1981).

17. *Id.* at 1070.

18. The court's reasoning was as follows:

The Government correctly observes that RCRA's definition of "disposal," one of the activities within the ambit of section 7003, is quite broad

Not only is this definition quite broad but, significantly, it includes within its purview leaking, which ordinarily occurs not through affirmative action but as a result of inaction or negligent past actions

That disposal need not result from affirmative action by the defendants but may be the result of passive inaction. In brief, section 7003 does not mandate the clean up of the ten years of leachate contamination that has emanated from the landfill. It does, however, authorize Government suits to restrain the continued leaking of wastes in a manner that may present an imminent hazard to the environment or to health

The gravamen of a section 7003 action, as we have construed it, is not defendants' dumping practices, which admittedly ceased with respect to toxic wastes in 1972, but the present imminent hazard posed by the continuing disposal (i.e., leaking) of contaminants into the groundwater.

Id. at 1071.

19. 734 F.2d 159 (4th Cir. 1984).

broadly to include leaking of hazardous wastes.²⁰ Subsequent section 7003 decisions followed *Price and Waste Industries* without question.²¹

Ironically, the RCRA section 7003 line of cases strained to allow RCRA to reach what CERCLA had already covered by the time the cases were decided. By doing so, however, they laid the seed for importing the now broadly defined RCRA disposal term into CERCLA. Since these cases were decided after CERCLA was enacted, it is unclear whether Congress would have incorporated the RCRA definition of disposal into CERCLA had it known how far the section 7003 cases would go. Hence, when the PPO issue finally surfaced in CERCLA litigation, the confused history of the RCRA disposal provision threatened to confuse the CERCLA outcome as well.

B. The CERCLA Cases

The first case in which the PPO issue was raised under CERCLA is the only such case preceding the 1986 SARA amendments. In *Cadillac Fairview/California Inc. v. Dow Chemical Co.*²² the court granted a motion to dismiss several of the defendants. The dismissed defendants were owners of the property that was the subject of the cleanup only after Dow Chemical and other previous owners had disposed of hazardous wastes on the property. The court relied on the following rationale:

This defendant argues on this motion that the scope of liability of the Act is not so broad as to encompass a party who merely owned the site at a previous point in time, who neither deposited nor allowed others to deposit hazardous wastes on the site. This appears to be correct under any but a very strained reading of the Act.²³

The PPO issue was next raised under CERCLA, albeit indirectly, in *Em-*

20. The court concluded as follows:

[A] strained reading of that term limiting its section 7003 meaning to active conduct would so frustrate the remedial purpose of the Act as to make it meaningless. Section 7003 . . . does not regulate conduct but regulates and mitigates endangerments

The inclusion of "leaking" as one of the diverse definitional components of "disposal" demonstrates that Congress intended "disposal" to have a range of meanings, including conduct, a physical state, and an occurrence. Discharging, dumping, and injection (conduct), hazardous waste reposing (a physical state) and movement of the waste after it has been placed in a state of repose (an occurrence) are all encompassed in the broad definition of disposal. "Leaking" ordinarily occurs when landfills are not constructed soundly or when drums and tank trucks filled with waste materials corrode, rust, or rot. Thus "leaking" is an occurrence included in the meaning of "disposal"

We must assume that Congress included "leaking" as a definitional component of "disposal" for a purpose. We conclude that Congress made "leaking" a part of the definition of "disposal" to meet the need to respond to the possibility of endangerment, among other reasons.

Id. at 164-65.

21. See *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1399-1400 (D.N.H. 1985).

22. 21 Env't. Rep. Cas. (BNA) 1108 (1985), *rev'd on other grounds*, 840 F.2d 691 (9th Cir. 1988).

23. The court elaborated on its interpretation of CERCLA:

hart Industries, Inc. v. Duracell International, Inc.,²⁴ involving a suit by the current owner of a contaminated battery manufacturing facility against the former owner, Duracell. The evidence showed that during Duracell's tenure on the site, PCB wastes were actively dumped and spilled on the facility property, whence they leached into the groundwater. The active disposal ceased prior to the current owner's tenure, but waste drums and underground tanks continued to leak, and those and earlier spills continued to leach into the groundwater. The court found that the continued leaking and leaching of wastes constituted a release of hazardous substances.²⁵ The court, however, unnecessarily defined disposal broadly in addressing Duracell's liability:

[T]he spilling of PCBs during their use by Duracell in the manufacturing process, as well as the dumping of PCBs outside the plant, the flow of PCBs into the Green River, *and the leaching of PCBs through the soil and into the groundwater* during Duracell's ownership all constitute disposal under CERCLA.²⁶

Clearly, Duracell's active conduct constituted disposal under even the narrowest interpretation of CERCLA; hence, the court did not have to address the question of whether leaching also constitutes disposal. Presumably the court did not appreciate the distinction, as Duracell was in no position to portray itself as a true PPO.

The first case to decide the PPO question squarely under CERCLA was *In re Hemingway Transport, Inc.*,²⁷ a bankruptcy court case in which the current owner of a contaminated industrial site sued the trustee of the bankrupt former owner, Hemingway, for recovery of response costs. The central allegation was that a cache of leaking barrels had been disposed on the site during the tenure of a former owner. There was no allegation or finding, however, that Hemingway was the former owner who disposed of the drums

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

Section 9607(a) sets forth four classes of action liable under the Act for three types of costs. This defendant fits none of these classes of potential defendant. The only class which might conceivably include this defendant is Section 9607(a)(2) which reads, "Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of."

Since this defendant is not alleged to be an owner at any time when the disposals complained of were made, but is alleged to have merely owned the site after such disposal and prior in time to plaintiff's ownership, it cannot be liable under the Act.

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

Id. at 1113.

24. 665 F. Supp. 549 (M.D. Tenn. 1987).

25. *Id.* at 574.

26. *Id.* (emphasis added).

27. 108 B.R. 378 (Bankr. D. Mass. 1989), *aff'd*, 126 B.R. 656 (D. Mass. 1991).

or knew of their existence, or even that whoever disposed of the drums did so during Hemingway's tenure;²⁸ rather, the leaking of the drums during Hemingway's ownership was alleged to be sufficient basis for liability.²⁹ The court agreed.³⁰ Drawing from the RCRA section 7003 cases, as well as from the general body of CERCLA case law supporting broad application of the statute, the court made the following conclusion:

Hemingway was an owner of the property at the time of disposal, and that that time was co-extensive with the period of Hemingway's possession of the property . . . as the drums, particularly those that were overturned and from which a tar-like substance was emerging, obviously were deteriorating and thus "leaking" due to their exposure to the elements over a period of years.³¹

The court was unmoved by the fact that Hemingway had absolutely no involvement in or knowledge of the leaking drums. Possibly, the court held Hemingway culpable because it believed Hemingway should have known of the drums; however, the court did not express that as a basis for liability and even noted the difficulty of accessing the location of the drums from the operations portion of the facility.³² The lack of depth in the Hemingway court's analysis leaves its basis for decision unclear.

A more incisive discussion of the PPO issue came later in *Ecodyne Corp. v. Shah*,³³ in which the seller of a contaminated water tower construction facility sued its purchaser and subsequent owners for recovery of response costs. The seller, Ecodyne, owned and operated the facility at the time of the construction operation and had been required to remediate chromium waste contamination resulting from its wood preservative process. Ecodyne sold the property to Shah, who contractually assumed responsibility for the remediation. The effect of the contract was litigated in state court; in federal court, Ecodyne alleged that Shah was liable in any event under CERCLA for contribution of Ecodyne's response costs because the chromium conditions at the property allegedly worsened during Shah's ownership as a result of general migration of the pre-existing contamination.³⁴

Unlike the *Emhart* and *Hemingway* courts, the *Ecodyne* court was able to free itself from the RCRA section 7003 cases and interpret the meaning of

28. *Id.* at 380.

29. *Id.* at 381.

30. *Id.* at 382.

31. *Id.*

32. 108 B.R. at 380.

33. 718 F. Supp. 1454 (N.D. Cal. 1989).

34. The court explained the issue as follows:

In nuce, [sic] defendants seek to dismiss this claim by contending that they did not own or operate the property at any time when the disposal of chromium occurred. Plaintiffs contend that defendants are liable because the general movement and migration of the chromium on the property at the time defendants owned it is, by definition, a disposal. Thus, the outcome of this portion of defendants' motion hinges on the meaning of the term "disposal" as it appears in § 9607(a)(2).

Id. at 1456.

disposal in the CERCLA context.³⁵ The *Ecodyne* court concluded that disposal could not encompass the PPO situation either as a matter of statutory interpretation or policy.³⁶ The court reasoned:

To define disposal as plaintiff wishes would effectively make all property owners from the time a site became polluted (up to and including the current owner) potentially liable under § 9607(a)(2) even if these owners did not introduce the chemicals onto the site. Such a construction conflicts with the limited scope of § 9607(a)(2).

In sum, in an effort to provide a more temporal interpretation of § 9607(a)(2), this Court reads this provision as only providing an action against prior owners or operators who owned the site at the time the hazardous substances were introduced into the environment.³⁷

The split between *Emhart* and *Hemingway* on the one hand and *Ecodyne* on the other was widened with two later PPO decisions.

In *CPC International, Inc. v. Aerojet-General Corp.*³⁸ the former owner of contaminated property claimed that the Michigan Department of Natural Resources (MDNR) could be held liable for response costs at the site because, contrary to an agreement it reached with one of the other former owners, MDNR had failed to operate ground water purge wells designed to remediate groundwater contamination at the facility. Although MDNR had not disposed of any new wastes, MDNR's failure to operate the wells allowed the subsurface contamination to migrate into ground water and a nearby creek, which constituted disposal under CERCLA. Relying on the RCRA section 7003 cases and the dicta in *Emhart*, the *CPC* court reasoned:

MDNR does not offer any support for its assertion that there was no

35. The court's reasoning was as follows:

In arguing that the general movement and migration of the chromium constitutes a disposal under § 9607(a)(2), the plaintiffs primarily focus on the words "discharge" and "leaking". Some Courts in examining these definitional components of the word "disposal" have concluded that Congress intended that disposal be given a relatively broad definition

However broad Congress may have intended the definition, Congressional intent does not justify the distortion [of] the statute. Therefore, instead of relying on legislative history (an exercise unnecessary in this case), the Court will apply sound principles of statutory and grammatical interpretation.

Id. at 1456-57.

36. The Court determined the meaning of disposal as follows:

The meaning of a word is or may be known from the accompanying words — this is the principle of *noscitur a sociis*. In ascertaining what disposal means, the Court looks at its definitional components and find that these three nouns (discharge, deposit, and injection) and four gerunds (dumping, spilling, leaking, and placing), when read together, all have in common the idea that someone do something with hazardous substances. Taking the clearest example, the Court notes that "placing", read in the context of the statute, means a person introducing — putting — formerly controlled or contained hazardous substances into the environment. For plaintiff solipsistically to read, for example, "leaking" as meaning the general migration of chemicals and, as such, a disposal under § 9607(a)(2), renders not only the definitional phrase of § 6903(3) "into or on any land or water" superfluous, but would also conflict with the general structure of § 9607(a)

Id. at 1457.

37. *Id.*

38. 731 F. Supp. 783 (W.D. Mich. 1989).

disposal at the Site during its period of operation. CERCLA defines "disposal" as including "the discharge, deposit, injection, dumping, spilling, leaking, or placing" of any toxic substance such that it "may enter the environment." 42 U.S.C. § 6903(3); 42 U.S.C. § 9601(29). Ample case law supports a broad interpretation of the term "disposal". I am satisfied that the complaint adequately alleges that substantial pollutants "spilled" or "leaked" into the environment during the period that MDNR was an operator of the Site.³⁹

In sharp contrast, the Court in *In re Diamond Reo Trucks, Inc.*⁴⁰ sided with *Ecodyne* in a case against the trustee of the bankrupt former owner of a contaminated manufacturing facility for contribution of response costs incurred by defendants in connection with the local municipality's CERCLA cost recovery action.⁴¹ The debtor alleged that it could not be held liable because no disposal took place during its tenure, only migration of wastes which had previously been disposed of on the property.⁴² The court concluded that the reasoning in *Ecodyne* must apply:

Otherwise, the liability imposed by § 9607(a) could have been drafted to simply include all owners or operators in the chain of title subsequent to the contamination. However, while imposing strict liability, Congress limited its imposition to certain persons who meet the specific requirements set forth at § 9607(a). Thus, the mere ownership of the site during a period of time in which migration or leaching may have taken place, without any active disposal activities, does not bring Reo Properties within the liability provision of § 9607(a)(2).⁴³

The case law thus remains sharply divided over the fate of PPOs under CERCLA. The cause of this disagreement appears to be the differing treatment each court gives to the early judicial interpretations of the RCRA section 7003 concept of disposal. Those cases, however, involved efforts of the government to bend RCRA section 7003 to fit what later would be CERCLA cases. Those courts may have strained RCRA beyond its intended bounds; on the other hand, without such interpretation the government would have been powerless to address seriously contaminated facilities until passage of CERCLA. Ironically, the RCRA cases were not decided until after CERCLA was passed, meaning that Congress could not have known of the implications those decisions would later have for CERCLA section 107(a)(2). The urgent and unusual circumstances surrounding the RCRA cases should caution courts to avoid transporting the RCRA disposal definition into CERCLA section 107(a)(2) without assessing Congress' intended structure for its principal remedial statute.

III. DECIPHERING THE 1986 AMENDMENTS

Several provisions of the 1986 CERCLA amendments were intended to

39. *Id.* at 789 (citations omitted).

40. 115 B.R. 559 (Bankr. W.D. Mich. 1990).

41. *Id.* at 565.

42. *Id.*

43. *Id.*

rescue PRPs from what by then had come to be perceived as inequitable effects of the general liability provisions.⁴⁴ Two such provisions bear upon the PPO issue, albeit indirectly. The first involves Congress' attempt to clarify the so-called third party defense to CERCLA liability set forth in section 107(b)(3). The second added discretionary authority for the EPA to enter into settlements with PRPs whose involvement at the facility, while sufficient to impose PRP status, was so insignificant as to make the CERCLA policy of joint and several liability with the major PRPs grossly unfair.

A. *The Third Party Defense Provision*

Section 107(b)(3) of CERCLA provides PRPs a defense where it is shown by a preponderance of the evidence that the release was caused solely by: an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.⁴⁵

From the beginning it was clear this defense would rarely be available given its conditions and exceptions. The effect of the contractual relationship exception to the defense as interpreted by the courts was to nearly eradicate any defense at all, leaving it for all practical purposes available only to the CERCLA equivalent of the innocent bystander.⁴⁶

Congress attempted in the 1986 amendments to clarify the contractual relationship exception at least with respect to contracts for the transfer of title of the facility. The resulting definition of contractual relationship, now set forth in section 101(35),⁴⁷ has taken on a life of its own as the so-called innocent purchaser defense. Rather than clarifying anything, however, the definition is so utterly convoluted as to be almost ineffective except in striking fear into the hearts of property purchasers.

The contractual relationship definition begins by including land contracts within the definition of contractual relationship "unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substances on, in, or at the facil-

44. These perceived inequities were a major focus of legislative deliberations on the 1986 amendments. See *Judicial and Legal Issues*, *supra* note 3.

45. 42 U.S.C. § 9607(b)(3) (1988).

46. See J. B. Ruhl, *The Third-Party Defense to Hazardous Waste Liability: Narrowing the Contractual Relationship Exception*, 29 S. TEX. L. REV. 291 (1988).

47. 42 U.S.C. § 9601(35).

ity."⁴⁸ That is a somewhat perplexing beginning from the standpoint of the PPO issue. Does it imply that a subsequent purchaser who engages in no active disposal, a true PPO, could be a PRP and thus must seek the harbor of the defense; or does it merely confirm that a true PPO has no reason to require the defense since it is not a PRP in the first place?

Two additional conditions on the post-disposal purchaser clause imply the former interpretation, at least on their faces. The first states that the defendant also must show 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."⁴⁹ A true PPO should be able to meet this condition. But another condition requires further that "[t]o establish that the defendant had no reason to know . . . the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability."⁵⁰ Many PPOs, particularly those in the chain of title before such appropriate inquiry became common practice, could not satisfy this condition.

Taken as a whole, the innocent purchaser provisions do not make sense within the broader context of CERCLA as far as the PPO issue is concerned. A past owner should not need the benefit of the defense in section 103(b)(3) unless it otherwise would be a PRP under section 107(a)(2). The conditions apparently placed on the ability of a PPO to escape liability in sections 101(35) through 103(b)(3), suggest that PPOs must be PRPs under section 107(a)(2). But if that is so, the distinction between present owners in section 107(a)(1) and past owners in section 107(a)(2) would be unnecessary, as section 101(35) would provide the distinction through the definition of the defense. Hence, perhaps section 101(35) is directed at defining the defense conditions only for *present* owners, who, after all, *can* be liable without evidence of a *disposal* during the period of ownership.

The latter interpretation appears consistent with both the continuation in section 101(35) of the distinction between disposal and release raised in section 107(a)(2), and with yet another condition in section 101(35) relating specifically to *previous* owners. Section 101(35)(C) suggests that the preceding clauses of section 101(35) address only present owners by stating:

Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3)

48. *Id.* § 9601(35)(A).

49. *Id.* § 9601(35)(A)(i).

50. *Id.* § 9601(35)(B).

of this title shall be available to such defendant.⁵¹

After all, a past owner who owned the facility at the time of disposal is not a PPO and could never qualify for the defense under section 101(35) anyway. Present owners, however, can be liable under section 107(a)(1) without evidence of disposal during the period of ownership, and hence section 101(35) comes to the rescue for the innocent *present* owner. PPOs, on the other hand, shouldn't need the protection of sections 107(b)(3) and 101(35) in the first place. Hence, section 101(35)(C) may be a warning to PPOs that their protected status can be lost through gaining knowledge of a release and failing to pass that knowledge to the subsequent purchaser. Viewed any other way, section 101(35) fails to harmonize all the liability provisions of CERCLA.

B. *The De Minimus Settlement Provision*

A similar conclusion is more emphatically compelled under the so-called de minimus settlements provision in section 122(g)(1), which provides:

Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 9606 or 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:

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

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

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

(B) The potentially responsible party—

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

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

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

This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.⁵²

This provision makes no sense if PPOs are liable under section 107(a)(2). A true PPO could meet the conditions of subsections (B)(ii) and (B)(iii); however, section (B)(i) would exclude PPOs since it applies only to the owner of the facility, i.e., the present owner. Thus, PPOs would be inexplicably rele-

51. *Id.* § 9601(35)(C).

52. 42 U.S.C. § 9622(g)(1) (1988).

gated to the subparagraph (A) conditions, which makes no sense: why would PPOs proceed under section (A) and only present owners proceed under subsection (B)? Like section 101(35)(C), section 122(g) suggests that a PPO is not a PRP unless the PPO obtains knowledge of the release and fails to pass that knowledge along.

Although they do not squarely address the PPO issue, the contractual relationship and the de minimus settlement provisions of the 1986 amendments to CERCLA strongly suggest that Congress did not intend for section 107(a)(2) to mean that a true PPO could be held liable.⁵³ The structure of the amendatory provisions is inconsistent with the interpretation that PPO liability can attach for mere leaching of wastes disposed of prior to and without knowledge of the PPO's tenure on the site. By contrast, the statutory framework as a whole is harmonized by construing section 107(a)(2) as not imposing PPO liability.

IV. CONCLUSION

The issue of PPO liability is but one of many dusty corners of CERCLA, but it is a serious matter nonetheless. The uncertainty which would be caused for countless past property owners if PPOs could be held liable is unjustified given the entirely innocent, non-causal role of a true PPO. Indeed, the origin of PPO liability, apart from the ambiguous nature of CERCLA itself, is the transport of the RCRA section 7003 disposal concept into section 107(a)(2). The RCRA cases, however, involved parties who clearly would have been liable under CERCLA as present owners or operators or as disposers — none could have established PPO status. To use those cases to decide the PPO issue under CERCLA thus mixes apples and oranges notwithstanding the fact that the same definitional language applies.

The courts, even those deciding that PPOs are not liable under CERCLA, appear to have forgotten about the origin of the RCRA section 7003 cases and have overlooked the inappropriateness of using that line of decisions to decide the CERCLA question. The courts also have generally ignored the provisions of CERCLA, other than section 107(a)(2), that suggest PPO liability was not intended. Yet, notwithstanding the rather superficial level of analysis, some courts have muscled their way through the issue to get to the better result — no PPO liability. Other courts, however, have decided the issue incorrectly, and no clear message from Congress or a higher court appears imminent. Hence, for the time being, PPO liability under CERCLA remains a hit-or-miss proposition with stakes higher than most avid gamblers would care to bet on.

53. The legislative history is silent on Congress' intent with respect to the PPO issue. See *Judicial and Legal Issues*, *supra* note 3.