PART I

An Overview of Environmental Liability
CHAPTER 1

Federal Environmental Liability

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For real estate investors, tenants, and lenders, federal environmental laws represent a minefield that must be navigated with care. Real estate professionals should be concerned about environmental laws because the resulting liability, in addition to being unexpected, tends to be broad and absolute.

Liability under federal environmental statutes frequently takes the liable party by surprise because the liability need not be triggered by any action or inaction by that party. A property owner or tenant may be held liable for contamination even if that person did not deposit hazardous substances on the site or knowingly or negligently allow unsafe conditions to persist there. While such overt actions or omissions most likely will trigger liability, a property owner or user may face the prospect of statutory actions regardless of blame, fault, or causation. Liability often attaches solely based on the holding of bare legal title or as a result of a party’s holding a non-fee interest in property, such as tenancy, which has some of the characteristics of ownership.

A party that falls within a statutorily designated class of “liable” parties generally cannot prevail on traditional tort or contract defenses such as unclean hands, laches, lack of proximate cause, causation by third parties, adherence to prevailing standards of care, or compliance with government regulations. Not even the specific assent or direction of governmental entities to activities carried out on the affected property will provide a defense. The government can impose extraordinarily stringent cleanup standards based on remote or theoretical risks. Enforcement authorities often seem to give little consideration to the possible inequity of holding a particular party liable or to the
fact that the events leading to an environmental problem occurred many years ago. Once liability attaches, it can be virtually limitless. While liability is sometimes avoidable, its breadth and scope under the environmental laws mandates that parties to real estate transactions exercise substantial scrutiny. This chapter provides a general overview of several sources of liability under federal environmental statutes. Subsequent chapters address these sources individually and in more detail.

**Liability Arising from Ownership or Leasing of Real Estate**

Two federal statutes create the greatest potential liability in connection with real estate transactions. They are (1) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA),\(^1\) the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996;\(^2\) and the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Brownfields Act);\(^3\) and (2) the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA).\(^4\) These statutes create liability in slightly different manners, but both involve the cleanup of hazardous materials already released into the environment. In instances of environmental contamination that have not been addressed by Congress in a specific environmental statute, common-law liability for environmental contamination of property may arise. (See Chapter 2).

**The Comprehensive Environmental Response, Compensation, and Liability Act**

CERCLA is perhaps the best-known and most widely feared environmental statute from the perspective of real estate professionals. The statute is notorious because it can be used to impose prohibitively expensive cleanup liability on unsuspecting purchasers, tenants, and lenders but provides these parties with few defenses. Largely because of the threat of CERCLA liability, most real estate transactions today incorporate a process of environmental due diligence aimed at averting the acquisition of contaminated properties. Parties to most real estate transactions also attempt to allocate liability contractually and provide for indemnifications in the event that contaminated property is acquired.

In response to public outcry over environmental catastrophes at Love Canal and Times Beach,\(^5\) Congress passed CERCLA in the last month of the Carter administration. The statute was signed into law
on December 11, 1980. CERCLA is popularly known by the same name as the multibillion-dollar federal trust fund that it created, the Superfund. The Superfund was originally intended to be a revolving fund used for the cleanup of hazardous waste sites and to fund cleanup at orphan sites. The statute created a program to identify sites where hazardous substances had been released into the environment or where such releases appeared imminent, and to respond to those releases or threatened releases. As the regulated public has learned, however, CERCLA is anything but a public works project. On the contrary, the statute has been used to compel private parties to remediate contaminated sites, to recover from those parties “response costs” incurred by the government in responding to a release of hazardous substances, and to assess and recover damages to natural resources caused by such a release.

CERCLA authorizes the U.S. Environmental Protection Agency (EPA) to respond to releases or threatened releases in two ways. First, the agency may conduct short-term “removal actions,” such as removing drums or soil, securing the site, installing water lines, or building dikes to prevent contaminants from escaping. Second, the EPA may conduct longer term and more expensive “remedial actions,” such as installing an underground slurry wall to cut off groundwater flow or from the contaminated area, pumping and treating groundwater, or placing an engineered clay cap over the contaminated surface to prevent rainwater from washing contaminants into groundwater. In addition to CERCLA’s statutory provisions, the National Contingency Plan (NCP) sets forth procedures for discovering sites, ranking them on the National Priorities List (NPL), and selecting and implementing remedial actions.

Scope of CERCLA Liability
CERCLA’s underlying policy is to shift away from the public the ultimate responsibility for cleaning up hazardous substances. The statute establishes four categories of “potentially responsible parties” (PRPs) on whom liability may be imposed:

- The current owners and operators of a facility where hazardous substances were released or are in danger of being released;
- The owners or operators of a facility at the time hazardous substances were disposed of at the facility;
- Persons or entities that arranged for the treatment or disposal of hazardous substances at the facility (commonly referred to as “generators”); and
- Persons or entities that transported the hazardous substances to a facility they selected.
Any person or entity that falls into one or more of these categories is liable for responding to a release of hazardous substances. CERCLA’s definition of “hazardous substances” is quite broad. It includes substances typically found in industrial and manufacturing settings as well as more common substances such as paint, batteries, solvents, drain cleaners, and photographic chemicals.12

The EPA may issue administrative orders directing PRPs to clean up sites under Section 106 of CERCLA, or it may perform the response actions itself and recover the cleanup costs from PRPs under Section 107. CERCLA provides to the states much of the same authority it provides to the EPA.13 CERCLA further authorizes private parties to recover response costs from PRPs. This authorization extends to PRPs themselves, who the courts have held may sue other PRPs for response costs under Section 107(a)(4)(B) or for contribution under Section 113.

**Liability of Owners, Operators, and Generators**

CERCLA defines an “owner or operator” as the “person” owning or operating a facility or, if the facility has been abandoned, as a “person who owned, operated, or otherwise controlled activities at such facility immediately [prior to such abandonment].”14 This rather circular definition has been interpreted by the EPA and the courts in such a way that current owners may be found liable even though no hazardous substances were disposed of during their ownership.15 Some courts have held that a person may be held liable as an owner if that person held title for as little as sixty seconds,16 although other courts have taken a more moderate approach.17 Moreover, a person holding equitable title to property may be deemed an owner.18 Thus, it is possible that a person who merely signs an agreement to purchase contaminated property could face liability under CERCLA. Courts have also ruled that lessees fall within the statutory definition of who can be considered an “owner.”19 In addition, officers and employees of companies operating a facility may be treated as owners or operators and, in some cases, held personally liable even when they were performing the work of their employer.20

The definition of “facility” is also very broad, covering any location “where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.”21 The term is not limited to sites that might commonly be thought of as dump sites. Indeed, CERCLA liability has been extended to such “facilities” as roads, drag strips,22 and horse arenas on which hazardous substances were sprayed,23 residential developments;24 and even individual homes to which hazardous substances were transported on the clothing of factory workers.25
CERCLA's Strict, Joint, and Several Liability Scheme
Courts have uniformly held that CERCLA imposes strict liability, regardless of fault. Under the existing precedent, a CERCLA plaintiff has a relatively light burden of proof. Generally, the courts have held that plaintiffs in a CERCLA suit (e.g., the EPA, state regulatory agencies, and other PRPs) need not prove that a release of a particular defendant’s hazardous substance caused the incurrence of response costs, but only that the defendant disposed of the same type of hazardous substances as those found on the site. Moreover, the plaintiff need not prove that a particular defendant’s waste was present at the site and had been the subject of removal or remedial measures or that the defendant selected the site at which the hazardous waste was dumped. In addition, the plaintiff need not prove that the release was of the same substance or even of the same type of substance as that disposed of by the defendant. As a result, courts have tended to impose liability on CERCLA defendants who fit into one of the PRP classes and who cannot raise one of the limited defenses set forth in CERCLA.

CERCLA liability is also retroactive. Entities that disposed of hazardous substances or owned contaminated property before the statute’s enactment have been held liable for the resulting response costs.

The courts have also held that CERCLA liability is joint and several where the harm is not divisible. Thus, each PRP at a Superfund site bears potential liability for the entire cleanup cost if it is not possible to apportion the responsibility for the harm accurately. Originally, CERCLA did not provide for contribution among responsible parties held jointly and severally liable, but the courts inferred that the right of contribution was intended by the statute’s overall scheme or by federal common law. SARA codified the statutory right of contribution among responsible parties, which was consistent with SARA’s overall goal to “encourage quicker, more equitable settlements, decrease litigation, and thus facilitate cleanups.” The ability to sue for contribution under CERCLA facilitates settlement between the EPA and PRPs by allowing PRPs to pursue contribution against other PRPs.

Allocation of Responsibility to Landowners
As the preceding discussion illustrates, the wide net cast by CERCLA can snare a large number of PRPs at a given site. These are usually past and present owners and operators and, in some cases, large numbers of “generator” PRPs. The EPA sometimes takes the position that each of these parties is just as liable as any other. In practice, however, liability is rarely shared equally among the PRPs.
In most cases involving a Superfund site, the PRPs form a steering committee or trust group that negotiates with the EPA, administers the cleanup and, perhaps most critically, negotiates the allocation of liability among the PRPs. It is through the steering committee (or, in some cases, through dueling steering committees or subcommittees representing distinct interests) that allocation disputes are usually resolved, allowing cleanup or reimbursement settlements with the EPA to proceed.

When information on the amount disposed of is available, liability among generator PRPs is most commonly allocated on a volumetric basis. When “waste-in” information does not exist, parties either (1) reconstruct volume figures by examining various factors, such as production or number of employees, or (2) allocate liability on a tiered basis or some other basis. Even when volumetric information does exist, some parties may seek adjustments based on cost or the toxicity or mobility of different waste streams.

Allocation among owners and operators on the one hand and generators on the other hand can be much more difficult. Each group has an incentive to impose a larger share of costs on the other group. Negotiations often deteriorate. As a result, case law has begun to address the allocation of cleanup costs through contribution claims filed by PRPs against one another. The courts have found apportionment difficult, particularly at a site where hazardous substances have been present for an extended period and where the substances possess diverse characteristics. Some courts have placed on the defendant the burden of proving that there is a reasonable basis for apportionment.35

ALLOCATION AMONG SUCCESSIVE OWNERS OR OPERATORS. In BCW Associates Ltd. v. Occidental Chemical Corp.,36 the U.S. District Court for the Eastern District of Pennsylvania apportioned cleanup costs equally among a prior owner/operator, a current owner, and a current operator. The current owner was allocated a one-third share of the costs primarily because the owner purchased the site “as is” (contaminated with lead dust) and received substantial collateral benefits from the cleanup. The prior owner, who actually caused the contamination, was allocated one-third of the costs, and the current occupant-lessee also was allocated a one-third share because it also received a financial benefit from the cleanup.

Similarly, in In re Sterling Steel Treating, Inc.,37 a federal bankruptcy court allocated response costs equally between the bankruptcy estate and the purchaser of the debtor’s property. The property had been auctioned “as is,” along with a trailer containing hazardous wastes. Neither the bankruptcy trustee nor the purchaser was aware of the
trailer’s contents, but the court held the purchaser liable because (1) the purchaser was familiar with the debtor’s operations and therefore should have suspected that hazardous wastes may have been present on the site and (2) the purchaser failed to inspect the property before purchase. Thus, in the contribution context, when a property buyer will benefit from a cleanup, courts are likely to impose substantial cleanup costs on the buyer who fails to conduct an adequate prepurchase investigation of the property.

ALLOCATION AMONG LANDOWNERS AND TENANTS. In South Florida Water Management District v. Montalvo, the U.S. District Court for the Southern District of Florida allocated 25 percent of cleanup costs to an owner and 75 percent to a tenant who was responsible for the disposal of hazardous substances on the leased property. Toxic pesticides used in the tenant’s business contaminated the land. Even though the landowner was not the source of the contamination, the court held that the landowner and tenant were jointly and severally liable.

The Florida court considered several factors in order to apportion liability. The court noted that the tenant used state-of-the-art techniques to minimize contamination and that it clearly profited from the pesticide operation. With respect to the landowner, the court focused on the fact that the land was purchased with full knowledge that a pesticide operation was on it and that the landowner understood the risks associated with the operation. Further, the landowner was intimately familiar with the tenant’s operation and knew of the applicable environmental laws and regulations pertaining to pesticides. Moreover, the landowner purchased the property without conducting a survey or inspection. The court also considered the fact that the landowner did not have an interest in the tenant’s business (other than collecting rent) and the landowner did not pay less for the land because of the contamination. Therefore, the court concluded that the landowner did not financially benefit from buying contaminated land.

The court in South Florida held that “[e]quity demands that the [tenant] pay the lion’s share of any costs finally incurred. Equity equally demands that [the landowner] share in the cleanup by virtue of [its] acquiescence in [the tenant’s] activities.”

In Weyerhaeuser Co. v. Koppers Co., Inc., the landowner was allocated 40 percent of cleanup costs and the tenant was allocated 60 percent. The landowner also had leased his property to a tenant whose business was the sole source of contamination. The U.S. District Court for the District of Maryland held that the tenant and landowner were jointly and severally liable. The court declared that it
was “not limited to any specific equitable factors but may consider those factors relevant to the circumstances of the case.”

Other factors commonly utilized by courts in allocating response costs among liable parties include the extent to which the cleanup will financially benefit a particular party; how well-informed a party is before becoming involved at a site; the relative fault of the parties; whether the parties have contractually allocated responsibility for the cleanup costs; and the “Gore factors.” The Gore factors are a nonexclusive list of factors that include:

- The ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;
- The amount of the hazardous waste involved;
- The degree of toxicity of the hazardous waste;
- The degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- The degree of care exercised by the parties, taking into account the characteristics of the hazardous waste; and
- The degree of cooperation shown by the parties to federal, state, and local officials to prevent any harm to the public health or the environment.

These factors are useful in allocating costs among defendants in the same class (such as between numerous generators at a site). They may not be applicable to apportioning liability among different classes of defendants (such as between an owner and a generator).

In *Weyerhaeuser*, the court stated that “more relevant to the present case are the benefits received by the parties from the contaminating activities and the knowledge and/or acquiescence of the parties in the contaminating activities.” The court held that the landowner was 40 percent responsible because he not only knew of and acquiesced in the tenant’s wood-treatment activities but actually made the continuation of those activities a condition of the lease agreement. Therefore, the landowner benefited from the tenant’s activities.

In another case, a court allocated 50 percent of the cleanup costs to a landowner and 50 percent to a generator. In *Ellman v. Woo*, the site was contaminated with perchloroethylene (PCE) from the lessee (a dry cleaner) and with petroleum hydrocarbons, the origin of which was unknown. In allocating half the cleanup costs to the landowner, the court relied primarily on the fact that the owner knew about the PCE and petroleum contamination at the time he acquired...
title. The court, therefore, concluded that the owner knowingly assumed the risk of environmental liability.

Various allocation cases concern the wartime activities of the United States government in directing or controlling manufacturing activities of private companies to meet wartime needs. For example, in *Cadillac-Fairview/California, Inc. v. Dow Chemical Co.*, the Ninth Circuit affirmed an allocation of 100 percent of costs to the United States and a zero allocation to Dow, which had run a manufacturing plant for the government.

**Corporate Liability under CERCLA**

In 1998, in *United States v. Bestfoods*, the Supreme Court resolved years of disagreement among the lower courts over the degree to which parent corporations should be held liable for the environmental damage caused by their subsidiaries.

The Supreme Court adopted the general rule that a parent company can be liable for the acts of its subsidiary only (1) when a basis exists for “piercing the veil” under traditional corporate law principles or (2) when the parent company actually “manage[s], direct[s], or conduct[s] operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.”

Even active participation in the general affairs of the subsidiary will not make a parent company liable, unless a basis exists for piercing the corporate veil.

Before *Bestfoods*, substantial differences existed among the lower courts as to the standards that should apply in determining whether a parent company, or an individual corporate officer, director, or shareholder, could be held liable under CERCLA. One source of the confusion is that liability can be established two distinct ways, and the courts have sometimes mixed these two theories. The two theories are “direct” and “indirect” liability.

Direct liability applies when the acts of a shareholder or of a parent corporation bring it within one of the four classes of responsible parties. Indirect (sometimes called “derivative”) liability is more commonly known as “veil-piercing” liability. Under veil-piercing liability, a party that may not itself meet the statutory test for liability, but is a parent or shareholder of a company that on its own behalf has direct liability, may nonetheless be liable if the corporate veil of the subsidiary company is pierced. Veil-piercing liability is based not in the CERCLA statute but rather on common law or state corporations statutes. Under veil-piercing liability, the parent or individual
shareholder is held derivatively liable for the underlying liabilities of another corporation.

Traditional factors involved in analyzing whether or not to pierce a parent corporation’s limited liability shield (or “veil”) and hold it liable for the acts of its subsidiary include

- Inadequate capitalization in light of the purposes for which the corporation was organized;
- Extensive or pervasive control by the shareholder or shareholders;
- Intermingling of the corporation’s properties or accounts with those of the owner;
- Failure to observe corporate formalities and separateness;
- Siphoning of funds from the corporation;
- Absence of corporate records; and
- Nonfunctioning officers or directors.52

In a typical parent-subsidiary relationship, the parent exercises considerable control over the subsidiary’s business. A parent company probably does not control the daily operation of its subsidiary’s specific factories and facilities, but it is likely to own 100 percent of a subsidiary’s stock, share the same (or at least many of the same) individual directors and officers, monitor the subsidiary’s performance, supervise the subsidiary’s finance and capital budget decisions, and articulate general policies and procedures for the subsidiary to follow.

The Bestfoods decision resolved many ambiguities among lower courts and adopted a fairly narrow rule governing direct and indirect liability of related parties under CERCLA. The Court asked “whether a parent corporation that actively participated in, and exercised control over the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary,” and went on to answer this question: “We answer no, unless the corporate veil may be pierced.”53 The Bestfoods case returns to the “bedrock principle” that “a parent corporation . . . is not liable for the acts of its subsidiaries.” The Court said that “nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible.”54 The Court held that “when (but only when) the corporate veil may be pierced may a parent corporation be charged with derivative liability for its subsidiary’s actions.”55

The Court explained that there is no “CERCLA-specific rule of derivative liability that would banish traditional standards and expectations from the law of CERCLA liability. . . . [S]uch a rule does not arise from congressional silence, and CERCLA’s silence is dispositive.”56
Independent from traditional corporate law doctrine, the Court also established in Bestfoods the circumstances in which a parent company could be deemed to have direct liability under CERCLA as an “operator” within the meaning of the statute. The correct operator standard for direct liability is whether a parent controls the subsidiary’s facility where the pollution occurred, not its overall business.

The Court stated that an operator includes a party “who directs the workings of, manages, or conducts the affairs of a facility.” Most importantly, the Court stated, “an operator must manage, direct, or conduct operations specifically related to pollution, that is operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.”

The Supreme Court listed three ways a parent could become an operator. First, a parent could be directly liable if it operates a facility in the stead of its subsidiary, or as a co-operator in a joint venture. Second, an individual employed as a dual officer or director for both parent and subsidiary might be held to have operated a facility while wearing his or her parental hat. The Court stressed that there is a presumption that dual officers/directors are in fact wearing their subsidiary hat when ostensibly acting for the subsidiary, but this presumption can be rebutted. The presumption “is strongest when the act is perfectly consistent with the norms of corporate behavior, but wanes as the distance from those accepted norms approaches the point of action . . . plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent.”

Third, an individual working for the parent and not for the subsidiary might be held to have been managing or directing activities at the facility. Again, norms of corporate behavior are applied; activities consistent with the parent’s investor status, such as monitoring the subsidiary’s performance, supervising finance and budget decisions, and setting general policies and procedures for the subsidiary, would not constitute operating its facility.

Although federal courts have been faithful to the three philosophies of direct liability established in Bestfoods, the decisions rarely single out a single theory in determining whether or not to impose direct operator liability. Rather, the courts review all of the ways a parent is involved with a subsidiary and its facility and analyze whether or not the behavior is “typical” of a parent-subsidiary relationship.

In United States v. Kayser-Roth Corp., the U.S. Court of Appeals for the First Circuit imposed direct operator liability on a parent whose executive vice-president made the decision to select one method of cleaning a product manufactured at the subsidiary’s facility over another, more expensive, method. The subsidiary’s facility produced...
newly woven fabric that contained oil and dirt. The two practical methods for cleaning the fabric were a soap scouring system and a chemical dry cleaning system. The executive at the parent, who had no formal role at the subsidiary, made the decision to install the chemical dry cleaning system (which ultimately led to the contamination at the site) rather than a lagoon system for treating wastewater generated by soap scouring.

The court also considered other facts demonstrating that the parent was managing or directing activities at the facility. The court specifically noted a pattern of behavior that justified imposing direct liability, including the facts that (1) the parent’s board of directors made the final decision to settle an environmental lawsuit filed against the subsidiary; (2) the parent issued a directive to its subsidiary that the parent’s legal department must be notified of all future correspondence between the subsidiary and government agencies regarding environmental matters; and (3) the parent generally handled overall control of the subsidiary’s pollution control decisions. Although these additional facts had little to do with the parent’s active control of the facility and seem more appropriate to a veil-piercing analysis, they were all used by the court in its justification for imposing direct liability.

In Schiavone v. Pearce, the U.S. District Court for the District of Connecticut refused to impose direct operator liability on a parent whose dual-hatted board of directors examined and approved capital expenditures, including pollution control equipment, for the subsidiary’s facility. In analyzing whether the parent managed, directed, or conducted operations specifically related to pollution at the subsidiary’s facility, the court discussed the role of the parent versus the subsidiary in controlling and assuming responsibility for overall compliance with environmental regulations as well as the leakage and disposal of hazardous creosote at issue in the case.

The court held that even though the parent’s dual-hatted officers and directors controlled the subsidiary’s capital financing and expenditures, including decisions concerning physical improvements to the polluting facility, direct operator liability should not be imposed because the parent never singled out the pollution control equipment for review or became more deeply involved with that particular aspect of the capital budget.

Perhaps the best lesson to draw from Bestfoods is that the case preserves some safe harbors for corporate parents that honor the traditional bedrock proscriptions against abusing the corporate relationships with their subsidiaries. Given that federal courts appear to be following standard veil-piercing doctrines in CERCLA cases, companies should operate their subsidiaries with reassurance that veil-
piercing is the exception rather than the rule and that the standard used by the courts will be consistent with veil-piercing cases outside of the environmental law context.

*Bestfoods* declined to resolve differences among lower courts about the precise circumstances in which the corporate veil may be pierced in the CERCLA context. The circuits remain split as to whether to apply individual state veil-piercing standards or a common federal standard (or, if using a federal standard, what that federal standard should be).

**Liability of Successor Corporations**

CERCLA does not expressly state whether or under what circumstances a company that merges with, acquires, or purchases some or all of the assets of another company succeeds to the liabilities of the predecessor company. Nevertheless, some cases have imposed successor liability for CERCLA costs. One key question that continues to face the courts is whether to use state law on successor liability or federal common law. Many commentators have suggested that the Supreme Court’s decision in *Bestfoods* disfavors the use of federal common law in successor liability cases, but federal appellate courts remain split on the issue. Although most circuits follow federal common law, several follow state law or have not taken a position. Circuits following federal common law reason that hazardous waste disposal is a nationwide problem that calls for a uniform national solution.

The traditional rule is that where one company sells or otherwise transfers its assets to another company, the latter is not liable for the debts and liabilities of the transferor. However, the doctrine of successor liability permits exceptions to the general rule in four instances, specifically when

- The purchaser expressly or implicitly agrees to assume liability;
- The purchase is a de facto consolidation or merger;
- The purchaser is a mere continuation of the seller; or
- The transfer of assets is for the fraudulent purpose of escaping liability.

These exceptions are the subject of successor liability caselaw under federal common law and most state laws. In addition, some federal courts have expanded successor liability in specific contexts (including CERCLA) by stretching the “mere continuation” exception into what is known as the “substantial continuity” test. Some courts continue to apply the “substantial continuity” standard even following *Bestfoods*. Under the “substantial continuity” test, a successor...
corporation may be held liable for the acts of a predecessor corporation if the new corporation continues substantially the same business operations as the selling corporation. Thus, the “substantial continuity” test relaxes the strict level of continuity required for there to be liability under the “mere continuation” standard.

Liability of Lenders and Recyclers

Financial institutions that lend money to companies that own or operate property contaminated with hazardous substances have long relied on the so-called “secured creditor” or “security interest” exemption to shield them from liability under CERCLA. The secured creditor exemption excludes from the definition of “owner or operator” any person “who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.”

Court decisions establishing lender liability under CERCLA fall into two main categories: (1) those in which the lenders foreclose on a mortgage and take legal title to a property and (2) those in which the lenders exercise control over the property or the operations of the borrower. A 1990 decision of the Court of Appeals for the Eleventh Circuit caused considerable alarm in the lending community when it appeared to greatly increase the potential exposure of lenders by narrowing the scope of CERCLA’s secured creditor exemption. The EPA responded by issuing a rule intended to narrow the scope of a lender’s liability, but the D.C. Circuit reversed that rule as ultra vires. (For a complete discussion of these issues, see Chapter 4.)

Congress eventually codified the provisions of the EPA rule when it passed the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, known as the Lender Liability Amendments. The law offers some qualified protection for lenders and fiduciaries from liability so long as they do not participate in the management of a facility contaminated with hazardous substances. Because lenders at times have incurred liability after foreclosing on a contaminated property, the law provides illustrations of actions a lender may take without triggering liability, but the illustrations are qualified. The law also provides a qualified limitation of a fiduciary’s liability to the value of the assets in trust.

Recyclers of paper, plastic, glass, textiles, rubber, metal, and batteries also were given certain qualified protections against liability by the Superfund Recycling Equity Act of 1999. To qualify for the recycler’s exemption, the person who “arranged for the recycling” must demonstrate by a preponderance of the evidence that all of the following criteria were met at the time of the transaction:
The recyclable material met a commercial specification grade;  
A market existed for the material;  
A substantial portion of the material was made available for use as feedstock for the manufacture of a new, saleable product;  
The material (or product to be made from the material) could have been a replacement or substitute for a virgin raw material; and  
With respect to transactions occurring ninety days or more after the enactment of the act, the person exercised “reasonable care” to determine that the facility where the material would be managed by another was in compliance with federal, state, or local environmental laws or regulation.  

Costs for Which the Landowner or Purchaser Is Liable

CERCLA provides for recovery of removal or remedial action costs incurred by the United States or the individual states or of necessary response costs incurred by any other person. Response costs incurred by the federal or state government must be “not inconsistent with the National Contingency Plan.” Response costs incurred by any other person must be “consistent with the National Contingency Plan.” This small difference in wording has been construed to mean that in government enforcement cases the burden of proving the inconsistency of particular costs with the NCP rests on the defendants, who are attempting to prevent the government from recovering cleanup costs. By contrast, in litigation between private parties, plaintiffs attempting to recover cleanup costs bear the burden of proving that the costs they incurred are consistent with the NCP.

Various courts have held that the term “response costs” includes the costs of removal, remedial action, monitoring, testing, site investigation, medical evaluations, relocation, provision of alternative water supplies, and interest. Litigation-related fees in private response cost recovery actions are not recoverable, but legal work that is closely tied to the actual cleanup (work that benefits the entire cleanup and serves a statutory purpose other than cost reallocation) may constitute a necessary cost of response. For example, work performed in identifying potentially responsible parties has been held to be recoverable. Cleanup costs also include government oversight costs. In United States v. Rohm and Haas Co., however, the Third Circuit held that the EPA is not entitled to recover costs associated with overseeing cleanup activities conducted and paid for by private parties. The Rohm and Haas court determined that CERCLA allows the EPA to recover costs associated with removal actions, which the court
defined as “direct actions by the government to investigate, evaluate, or monitor a release, threat of release, or a danger posed by such a problem.”\textsuperscript{84} In addition, removal actions include activities “intended to enable EPA to formulate a position on what would be the most appropriate response action at a given facility.”\textsuperscript{85} The court found that Congress did not intend to include oversight costs within the definition of removal.\textsuperscript{86} Thus, “if what the government is monitoring is not the release or hazard itself, but rather the performance of a private party, the costs involved are nonrecoverable oversight costs.”\textsuperscript{87} Costs that are not recoverable include “the costs of contractors hired by EPA to review the plans and work of a private party or its agents executing a response action.”\textsuperscript{88}

Responsible parties, in addition to facing liability for response costs, are also liable for natural resource damages. CERCLA requires parties responsible for a release of hazardous substances that damage natural resources to reimburse the U.S. government or the appropriate state or tribal government for the costs of restoring the resources (or acquiring the equivalent of the natural resources injured by the release). The law is unclear on two other kinds of costs. One is damages associated with \textit{lost use} of the resource, such as the costs of providing alternative fishing opportunities where a fishing stream is contaminated. The other is damages associated with \textit{nonuse} (or passive use) values (values unrelated to the person’s actual use of the resource to date). Examples of nonuse values are the “option value” of hiking or fishing in a place one has not been to, the “existence value” of whooping cranes one has not seen and does not intend to see, and the “bequest value” of passing a resource on to future generations.

These nonuse values are the most controversial type of natural resource values because responsible parties fear that they will be applied so as to seek substantial and potentially arbitrary monetary damages. An increasing number of natural resource damage claims have been filed in recent years, with some claims in the range of several hundred million dollars. One of the largest cases involved the Clark Fork River basin in Montana, where the State of Montana and the U.S. government sought $765 million for environmental injuries from mining activities.\textsuperscript{89} The action was eventually settled in 1998 for $260 million—a not inconsiderable sum.\textsuperscript{90}

\textbf{Defenses to CERCLA Liability}

Parties to CERCLA lawsuits have attempted to employ a variety of defenses. Almost invariably those efforts have failed. For example, although some courts have allowed equitable defenses, such as unclean
hands, in CERCLA actions, others have rejected such defenses as being contrary to congressional intent. In particular, courts have rejected the caveat emptor defense under CERCLA.

CERCLA explicitly provides for three statutory defenses: an act of God, an act of war, or an act or omission of a third party. Of these, the third-party defense has been the most widely litigated. This defense is made available to a person who can show that the release or threat of release of a hazardous substance was caused solely by an act or omission of a third party.

To establish that the contamination was caused solely by a third party, all three elements of CERCLA Section 107(b)(3) must be met: (1) that no direct or indirect relationship, contractual or otherwise, exists between the defendant/landowner and the third party who (allegedly) caused the contamination; (2) that upon discovery of hazardous substances, the landowner exercised due care; and (3) that the landowner took precautions against the acts or omissions of the third party.

INNOCENT LANDOWNER DEFENSE. Although the third-party defense was contained in the original CERCLA, controversy arose in the early 1980s about whether the statute precluded use of the defense by innocent buyers of previously contaminated land. Such a buyer might hope to be protected against CERCLA liability by claiming that the presence of a hazardous substance on the property was caused solely by a third party (the seller or the seller’s predecessors in title). But a buyer could not rely on the defense because it has a “contractual relationship” with the seller (the contract of sale) that appeared to block any potential use of the third-party defense.

To rectify the problem, SARA added a definition of “contractual relationship.” Contractual relationship, the amendments declared, includes deeds and other instruments transferring title or possession of land—with an exception: The term “contractual relationship” does not include transferring instruments where the land was acquired after the hazardous substances were disposed of, and the person at the time of acquisition “did not know and had no reason to know” that any hazardous substances had been disposed of there. SARA required that to establish that a buyer “had no reason to know,” a buyer 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.” This requirement effectively mandated some type of preacquisition property audit or survey to identify potential environmental hazards. In sum, under SARA, one who buys land after “all appropriate inquiry”
reveals no hazardous substances has a third-party defense if hazardous substances are later discovered there and a CERCLA cleanup is commenced.98 Used in this way, the CERCLA third-party defense has become known as the “innocent landowner defense.”99

SARA, however, left certain gaps. For example, SARA did not precisely define the nature of the “appropriate inquiry” required to retain the protections of the “innocent landowner” provisions. Moreover, SARA did not clearly protect a landowner that bought a property after having performed appropriate environmental due diligence and having learned through such diligence that an environmental problem did exist on the property.

ADVANCING THE ISSUE OF LIMITED LIABILITY: THE BROWNFIELDS ACT AND THE EXPANSION OF THE INNOCENT LANDOWNER DEFENSE. Ending a decade-long debate, legislation was signed into law in early 2002 providing a range of new options for public and private entities to redevelop abandoned industrial properties known as brownfields.100 Formalizing new limits on potential liability for developers and increasing federal subsidies for cleanup, the law is designed to revitalize aging, contaminated properties and help curb continuing development pressure on clean, undisturbed “greenfield” properties. A centerpiece of the new law was the clarification and expansion of the “innocent party” defense.

CLARIFYING “ALL APPROPRIATE INQUIRY” AND THE USE OF THE INNOCENT LANDOWNER DEFENSE. Because critical financial consequences may attach to whether one conducted “all appropriate inquiry” before buying land, the meaning of the phrase has been long debated. The Brownfields Act clarifies CERCLA’s “innocent landowner” defense and gives the EPA administrator until January 2004 to establish standards and practices that define “all appropriate inquiry.”101

The Brownfields Act spells out what the regulations must include, specifically (1) the results of an inquiry by an environmental professional; (2) interviews with past and present owners, operators, and occupants of the facility; (3) reviews of historical sources, such as chain of title documents; (4) searches for recorded environmental cleanup liens; (5) reviews of government records; (6) visual inspection of the facility; (7) specialized knowledge on the part of the defendant; (8) the relationship of the purchase price to the value of the property if uncontaminated; (9) commonly known or reasonably ascertainable information about the property; and (10) the obviousness of the presence or likely presence of contamination at the property.102 These requirements for the EPA’s regulations closely track the
contents of the American Society for Testing and Materials (ASTM) standard for environmental site assessments.\textsuperscript{103} The Brownfields Act also contains special “all appropriate inquiry” definitions for those who bought land prior to the promulgation of the EPA’s regulations. For property purchased before May 31, 1997, the act specified that a court should take into account any specialized knowledge on the defendant’s part, the relationship of the purchase price to the value of the property if uncontaminated, commonly known information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability of the defendant to detect the contamination.\textsuperscript{104} For property purchased on or after May 31, 1997, but before the EPA promulgates its standards, the procedures of the ASTM\textsuperscript{105} shall constitute “all appropriate inquiry.”\textsuperscript{106} Because the post-promulgation requirements parallel the ASTM standards, all property bought after May 31, 1997, is held to nearly the same “all appropriate inquiry” standard.

The Brownfields Act also adds a few preconditions to use of the innocent landowner defense to bring it into conformance with the preconditions for the contiguous property and prospective purchaser defenses discussed below. These new preconditions are that the landowner fully cooperates with, and provides access to, persons authorized to conduct the response action; complies with land use restrictions; and does not impede institutional controls at the facility.\textsuperscript{107} The Brownfields Act did not affect the prior obligation of landowners under CERCLA to exercise due care regarding hazardous substances at a site and to take precautions against foreseeable acts or omissions of third parties.\textsuperscript{108}

\textit{Contiguous Properties}

The Brownfields Act also provides protection from Superfund liability for owners of land contaminated by a source on contiguous property and for prospective purchasers of property that is known to be contaminated. These provisions essentially codified existing EPA policy.\textsuperscript{109}

CERCLA itself has never provided a blanket exemption from liability for a landowner merely because the contamination on the landowner’s property originated from an adjacent property, with no complicity on the landowner’s part. A party that has the misfortune to own land next to a hazardous waste dumpsite, for example, may become liable under CERCLA when contaminated groundwater from the dumpsite migrates onto or under the property. Under such circumstances, the homeowner becomes an “owner” of a contaminated “facility”—a status to which CERCLA attaches liability.
Recognizing the potential problems with such liability, the EPA has attempted to provide some assurance to landowners through nonbinding enforcement policies. Under one such policy, the EPA has articulated its general intention not to seek to impose CERCLA liability on residential homeowners unless their activities led to the release. The EPA also has articulated its general policy not to seek to impose liability on owners of land above aquifers contaminated by subsurface migration from outside the property.

In codifying similar protections, the Brownfields Act states that a contiguous property owner shall not be deemed the owner or operator of a facility for purposes of CERCLA liability, if the person satisfies eight conditions. Among those conditions are that the person must not have caused or contributed to the hazardous-substance release, must not be potentially liable or affiliated with any other person that is potentially liable for response costs at a facility, must have taken reasonable steps to stop or prevent releases, and must fully cooperate with and give access to those authorized to conduct response actions or natural resource restoration.

The last-listed of the eight qualifying conditions is that when the person acquired the property, the person must have conducted “all appropriate inquiry” and yet “did not know or have reason to know” that the property was or could be contaminated by a release or threatened release of hazardous substances from the other property. A person disqualified from invoking the law’s contiguous property exemption because the person had, or had reason to have, such knowledge, may still qualify for prospective purchaser status under the law.

Prospective Purchasers

Persons interested in investing in contaminated sites were required to face the fact that at the moment they accepted ownership of the site, they became liable under CERCLA as owners (and perhaps operators). Historically, the EPA has used “prospective purchaser agreements”—binding commitments by the agency not to enforce against someone who wants to buy contaminated property for cleanup or redevelopment.

The Brownfields Act created a liability carve-out for “bona fide prospective purchasers” whose liability, following purchase, is based solely on their owner or operator status under CERCLA. As with contiguous property owners, however, numerous conditions attach to qualifying as a bona fide prospective purchaser. Two key conditions are, first, that the owner must have purchased the property after the law was enacted in January 2002, and second, that the owner does not impede the response action or natural resource restoration.
Other conditions require that all disposal of hazardous substances at the facility must have occurred before purchase, and that the person made “all appropriate inquiry” into the previous ownership and uses of the facility, exercises appropriate care as to hazardous substances found at the facility, cooperates with and gives access to those authorized to do response actions or natural resource restoration at a facility, does not impede any institutional control at the facility, and is not potentially liable or affiliated with any other person that is potentially liable for response costs at a facility.\textsuperscript{116}

While bona fide prospective purchasers are protected from liability, the law seeks to ensure that they not reap a windfall in the form of the increase in the property’s value as a result of the federal cleanup. If (a) the United States incurs response costs at a facility acquired by a bona fide prospective purchaser, (b) these costs are not recovered from liable parties, and (c) the response action increases the facility’s value over its pre-response value, then the federal government is entitled to a lien on the facility.\textsuperscript{117}

Since the enactment of the Brownfields Act, the EPA has taken the position that prospective purchaser agreements are generally no longer necessary, or appropriate.\textsuperscript{118} However, the EPA is reserving the possibility of providing some future prospective purchasers with formal covenants not to sue. Such instances might include projects in which (1) there is a significant public benefit to be realized; (2) a contaminated site is completely orphaned and a potential developer is unwilling to invest without an agreement from the EPA not to pursue a CERCLA enforcement action; (3) the facility is currently involved in CERCLA litigation such that there is a very real possibility that a party who buys the facility would be sued by a third party; or (4) there is likely to be a windfall lien and the purchaser needs to resolve the lien prior to purchasing the property in order to secure financing.\textsuperscript{119}

Completing the circle of potential liability issues for prospective purchasers, the Brownfields Act also makes explicit that buyers of residential property (other than governments and commercial entities) need meet only relaxed standards for adequate inquiry. For such buyers, a facility inspection and title search that reveal no basis for further investigation are sufficient.\textsuperscript{120}

In keeping with the EPA’s intention to use a “kinder and gentler” approach for residential homeowners, the EPA’s general enforcement policy is to refrain from taking action against a residential property owner on land subject to CERCLA cleanup unless the homeowner (1) acts in a way leading to a release or threat of release of hazardous substances resulting in the taking of a response action; (2) fails to cooperate with the EPA’s response actions; or (3) uses the residential property in a manner inconsistent with residential use or the
development of residential property leads to a release. Although well established, the enforcement policy is not actual law and does not provide a formal exemption from CERCLA liability.

**Liability of Small Businesses**

In the Brownfields Act, Congress expanded the protection afforded to generators of small amounts of hazardous wastes by including two key provisions. First, the law exempts from Superfund liability contributors of "de micromis" quantities of material containing hazardous substances (less than 110 gallons of liquid or less than 200 pounds of solid material) at sites on the National Priorities List prior to April 1, 2001. Second, it also protects from liability households and small businesses with fewer than one hundred employees that disposed only municipal solid waste at Superfund sites.

Under the law, if the parties protected from liability are sued for contribution to the cleanup costs at NPL sites, the burden of proof would be on the suing party, except in the case of a government suing a small business, where the burden of proof would be on the business. The law also allows expedited settlements for businesses based on their limited ability to pay.

**De Minimis Settlements under CERCLA**

Purchasers who may not be able to avail themselves of the absolute defense under CERCLA Section 101(35) may nevertheless be able to minimize their liability by being characterized as *de minimis* parties. SARA added to CERCLA a provision allowing *de minimis* settlements. Under the provision, the EPA may settle with a PRP if "the settlement involves only a minor portion of the response costs at the facility concerned" and the PRP falls into one of two categories: (1) PRPs for whom the amounts or toxic effects of their contribution of hazardous substances to the site are minimal in comparison to other hazardous substances at the site; and (2) owners of the real property on which the facility is located who did "not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, and did not contribute to the release or threat of release of a hazardous substance at the facility." In addition, the property owner must establish that he or she purchased the property without actual or constructive knowledge of the presence of hazardous substances.

In implementing this settlement provision, the EPA has often required landowners to meet the due diligence requirements of the innocent landowner defense under CERCLA Section 107(b)(3). Typically, the landowner has the burden of demonstrating the following: the condition of the property at the time of purchase; prior use of the
property at the time of purchase; the purchase price; the fair market value of comparable property; and any relevant information regarding specialized knowledge of the landowner. Nonetheless, CERCLA Section 122(g)(1)(B) offers landowners an opportunity to settle with the EPA early in the controversy and to avoid litigation over the availability of the defense, often in exchange for access to the site, cooperation with the EPA, or a cash payment.

The Resource Conservation and Recovery Act

RCRA was enacted in 1976 as an amendment to the Solid Waste Disposal Act. As originally enacted, RCRA and CERCLA appeared to serve two separate and distinct purposes. CERCLA was thought to be purely backward-looking: It was a nonregulatory statute enacted to address lingering problems with former disposal sites and to impose liability for the cost of those cleanups. By contrast, the original RCRA was considered forward-looking: It was intended to provide a comprehensive regulatory program for the active management of hazardous wastes from the point of generation to ultimate disposal (cradle to grave). Thus, RCRA was of lesser significance for real estate professionals and lenders, except on properties where active hazardous waste facilities were located. The Hazardous and Solid Waste Amendments of 1984, however, helped to blur the distinction between CERCLA and RCRA by adding to RCRA enhanced provisions for requiring the cleanup of former hazardous waste sites. In addition, the 1984 amendments added a new federal program for the regulation of underground storage tanks (USTs). These amendments enhanced the importance of RCRA for real estate professionals and lenders.

Currently, RCRA prohibits open dumping; encourages recycling and treatment of hazardous wastes; establishes standards for hazardous waste management; regulates cleanup of active facilities; restricts land disposal of hazardous wastes; provides technical requirements for disposal facilities; controls use of USTs; and establishes hazardous waste permit review procedures for storage, treatment, or disposal facilities. RCRA regulations prescribe detailed requirements for anyone who generates, transports, treats, stores, or disposes of hazardous wastes. Disposal is defined as the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste on the land or water in such a way that the waste enters the environment.

The two types of RCRA regulation of greatest significance to real estate professionals are the regulations governing hazardous waste and USTs. RCRA hazardous waste regulation, in turn, generally takes
one of two forms: regulation of the generators of hazardous waste; and regulation of the owners and operators of facilities for the treatment, storage, or disposal of hazardous waste. This chapter, which focuses on the liabilities associated with real estate ownership and operation, emphasizes the regulation of the owners or operators of hazardous waste facilities.

RCRA imposes two basic types of liabilities: civil penalties generally amounting to $25,000 per day, with criminal penalties available under certain circumstances; and certain obligations to perform or finance “corrective actions” or cleanups or to remedy imminent and substantial endangerments to health or the environment. Thus, unwary purchasers, occupiers, or financiers of real estate may find themselves liable for penalties, cleanup costs, or both.

Landowner Liability for Disposal of Hazardous Substances
RCRA liability has been imposed on landowners for hazardous waste dumped on the property before their ownership. For example, in United States v. Price, the United States sought injunctive relief against current and past owners of property on which the past owners had operated a landfill for hazardous chemicals. The government sought to force the landowners to fund an investigation of groundwater contamination attributable to the landfill. Both the past and current landowners denied RCRA liability, arguing that RCRA was designed to prevent future dumping, not to remedy the effects of past waste disposal practices. The court held, however, that the term “disposal” encompassed the leaking of hazardous wastes into the groundwater; therefore, the government was authorized to bring suits under RCRA to prevent continued harm to the environment.

The previous landowners further argued that they were no longer contributing to the disposal of hazardous wastes at the site, but the court rejected this argument, holding them liable because they failed to store chemical wastes properly and to rectify a hazardous condition. Simply put, the court would not allow the previous owners to avoid liability under RCRA simply by selling their property.

The current owners argued that the disposal of hazardous wastes occurred before their ownership and therefore they had not contributed in any way to the disposal of hazardous wastes. The current owners knew the property had been used as a landfill but failed to investigate, before purchase, whether the landfill had been properly closed. At no time did the current owners “actively dispos[e] of any wastes at the landfill or actively contribut[e] to the migration of contaminants from the site.” Nonetheless, the court found that the
current owners had contributed “merely by virtue of their studied indifference to the hazardous condition” that existed. The court held them liable under RCRA for their failure “to stop the continued leaking of contamination from the site.” Thus, the court imposed an affirmative duty on purchasers either to investigate the property before purchase or to accept the property as is, complete with cleanup responsibilities.

In *United States v. Waste Industries*, the U.S. Court of Appeals for the Fourth Circuit followed the reasoning of *Price* and held that disposal under RCRA did not require an affirmative act. Reversing a lower court’s decision that disposal under RCRA required “active human conduct,” the Fourth Circuit stated that such “a strained reading of that term [disposal] limiting its Section 7003 meaning to active conduct would so frustrate the remedial purpose of the Act as to make it meaningless.” Thus, the current owners of the site were liable for its cleanup even though they did not actively dispose of hazardous wastes.

**Landowner Liability for Underground Storage Tanks**

RCRA is also important to real estate professionals because of requirements designed to prevent underground storage tanks from leaking hazardous wastes and petroleum products into the surrounding environment. Groundwater contamination from leaking tanks, a widespread concern among many parties, was partially addressed by a mandate that operators replace single-wall tanks with double-wall tanks by 1998. RCRA continues to apply eight categories of federal standards to owners and operators of USTs: (1) notification of tank existence; (2) leak detection; (3) records maintenance; (4) release reporting; (5) corrective action; (6) tank closure; (7) financial responsibility; and (8) performance standards for new tanks. (For a complete discussion of potential liability with regard to USTs, see Chapter 19.)

**Liability Arising from the Buying or Selling of Real Estate**

In addition to ownership and operation of property, real estate transactions are another potential source of environmental liability. Transaction-related liabilities generally relate to disclosure of environmental issues in the course of transferring property. While most disclosure requirements exist under state law, some liability may attach under CERCLA.
Disclosure of Known Releases or Threatened Releases on Property

A general discussion of the common-law or statutory disclosure requirements attendant on the sale of real estate is beyond the scope of this chapter. Nonetheless, there is one specific provision of CERCLA that arguably creates a new kind of liability for nondisclosure of environmental information.

As previously discussed, the four categories of PRPs under CERCLA include current landowners or operators and owners or operators at the time of disposal. Noticeably absent from this list, however, are “interim landowners.” These are landowners who first held title after any disposal took place and who transferred title to another party before any EPA proceeding was commenced. By the terms of Section 107(a), absent some continuing act of disposal, such parties would not appear to be liable. A decision by the United States Court of Appeals for the Third Circuit supports such a reading of CERCLA.

In *United States v. CDMG Realty Co.*, the court permitted interim landowners to escape CERCLA liability when the only connection these owners had to the site was that hazardous substances migrated during their period of ownership. In *CDMG Realty Co.*, Dowel Associates acquired a ten-acre plot that had been used as a landfill. During Dowel’s ownership of the parcel, no disposal took place by Dowel or any other party. Dowel later sold the parcel to another entity, HMAT Associates, fully disclosing that the property had been part of a landfill and that the property was being investigated by state and federal authorities. The EPA and the state commenced an action against HMAT and other PRPs, excluding Dowel. HMAT filed a third-party suit against Dowel seeking contribution under CERCLA, alleging that disposal took place during Dowell’s period of ownership because contamination dumped on the property prior to Dowell’s purchase spread during Dowell’s period of ownership.

The court rejected HMAT’s passive disposal theory and held that in the context of CERCLA’s definition of disposal, “‘leaking’ and ‘spilling’ should be read to require affirmative human action.” The court also found that if Congress intended to make all people who owned or operated a facility after the introduction of hazardous waste liable under CERCLA, there would be no need for the separate responsible party categories. In addition, the court found that its conclusion that CERCLA’s definition of disposal does not include passive migration was supported by the innocent landowner defense. The court reasoned that “[b]ecause CERCLA conditions the innocent owner defense on a defendant’s having purchased the property ‘after the disposal’ of hazardous waste at the property, ‘disposal’ cannot
constitute the allegedly constant spreading of contaminants. Otherwise, the defense would almost never apply, as there would be no point ‘after disposal.’”

As part of SARA’s innocent landowner provision, however, Congress included a curious provision that raises questions about the liability of interim landowners who fail to disclose the presence of hazardous wastes on property. In Section 101(35)(C), Congress provided as follows:

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) of this title shall be available to such defendant. This provision appears within the innocent landowner provision, and it therefore would seem likely that the provision would only apply to parties already liable under Section 107(a). Nonetheless, it might be argued that the provision’s mandatory language modifies Section 107(a), thereby creating a new, fifth type of PRP: an interim landowner who transfers ownership without disclosing any of its knowledge regarding hazardous waste on its property. Whether Congress actually intended to create such a fifth category remains an issue for the courts or Congress to clarify.

In addition to this CERCLA provision, various states have enacted disclosure, assessment, and remediation requirements triggered by sale of property or, in some cases, by transfer of an ownership interest in the parties who own property. The most well known of these state statutes is New Jersey’s Industrial Site Recovery Act (ISRA), formerly known as the Environmental Cleanup Responsibility Act (ECRA). (These statutes are discussed in greater detail in Chapter 3.)

Sale of Real Estate as Arranging for Disposal under CERCLA

CERCLA holds liable persons “who by contract or otherwise” arrange for the disposal of hazardous substances. Normally, such persons are hazardous substance generators. Generator liability has dominated CERCLA litigation. The courts have found a surprising array of parties liable as “generators,” including companies that sold hazardous materials for profit, entities that brokered waste deliveries, organizations that had their pesticides processed by a third
party, and companies that arranged for materials to be disposed of at a site different from the one at which the material was actually disposed.

Some courts have held that an arrangement for the sale of a contaminated property may, under CERCLA, be deemed an “arrangement for disposal” of hazardous substances in some situations. For example, in Sanford St. Local Development Corp. v. Textron, the District Court for the Western District of Michigan held that the sale of property with electrical transformers containing polychlorinated biphenyls (PCBs) at a discounted rate was “arranging for disposal” of a hazardous substance within the meaning of CERCLA. The defendant sold a foundry at a price substantially below fair market value. During the buyer’s ownership, the electrical system was disconnected and the PCB transformers were determined to be intact and leak-free by state environmental officials. The property was subsequently sold to a second and then a third buyer. The third buyer conducted a post-sale inspection and found PCB-containing oils on the floor surrounding the transformers. The buyer sued the original seller to recover cleanup costs, arguing that the defendant had arranged for the disposal of the transformers when it sold the property.

The court found that the discounted price of the property demonstrated that the defendant believed that the property was not marketable because of the PCB transformers. Thus, the court concluded that the sale was an arrangement for disposal of a hazardous substance.

For a case in which arranger liability was not imposed in a sale of real estate deal, see Jersey City Redevelopment Authority v. PPG Industries. Jersey City involved a redevelopment authority attempting to recover the costs of cleaning up a construction site previously contaminated with fill material. The court held that the former owner of the site from which the fill material had been removed was not a covered person under Section 107(a)(3) of CERCLA, even though the former owner had sold the property with the knowledge that contaminated mud was likely to be transported elsewhere and used as fill material. The court refused to impose liability under the theory that in CERCLA a PRP must affirmatively act to dispose of the waste itself. By conveying the entire property to the contractor even while foreseeing that the waste mud might be sold as fill by the future owner, the defendant did not “arrange for” the disposal of the contaminated mud on the redevelopment authority’s construction site.

Although arranger liability cases sometimes focus on the motivation and knowledge of the seller, similar fact patterns often yield opposite results. For example, in CP Holdings v. Goldberg-Zoino Associates, the court held that the sale of a building with asbestos-containing
materials was “arranging for disposal” of a hazardous substance under CERCLA because the seller was aware that the buyer intended to demolish the building.\textsuperscript{146}

Yet, the court in \textit{G.J. Leasing Co. v. Union Electric Co.} refused to impose liability under very similar circumstances.\textsuperscript{147} The defendant sold an obsolete power station consisting of power generation equipment housed in a structure with significant amounts of asbestos in the walls. The defendant knew that the buyer intended to remove the equipment, and that in order to do that the building would have to be demolished. Nevertheless, the court held that the mere sale of property containing a hazardous substance is not a disposal imposing liability if the object in question (the building) is still a useful product with commercial value.

\textit{Conclusion}

Federal environmental statutes, particularly CERCLA and RCRA, cast a wide net of potential liability for parties involved in real estate transactions. To minimize liability associated with real estate conveyance and ownership, some important questions should be asked before taking title to property.

- Are there hazardous substances on the property?
- Does the property’s history indicate that hazardous substances were sent off the site for storage, treatment, disposal, or recycling?
- What environmental permits regulate activities on the property? Are the permits transferable? What permits are required for the buyer’s operations?
- Has soil, groundwater, surface water, or air at the site been tested?
- Is the property identified by the EPA or a state in CERCLIS (the Comprehensive Environmental Response, Compensation, and Liability Information System) or another database as a potential problem or Superfund site?
- What role, if any, is the lender planning to assume in the management and control of the property?
- Is the property involved in any type of enforcement action, litigation, or regulatory directive?
- Are USTs present on the property?
- Have any liens been imposed on the property as a result of an environmental activity?
- Are there any state or federal prerequisites to conveyance?
In addition, several activities should be conducted before the transaction is finalized. A buyer may avoid CERCLA liability under the innocent landowner or prospective purchaser defenses only if, at the time of acquisition, “all appropriate inquiry” was undertaken. Thus, a due diligence investigation should be conducted in connection with real estate transactions. A Phase I investigation may include review of title documents, corporate records, government records, and other sources of information as well as a site visit. In some transactions a more extensive Phase II assessment may be necessary, involving sampling and investigation to address specific concerns identified in Phase I. (Chapter 8 discusses how to choose an environmental consultant to assist with these pre-purchase activities.)

Finally, environmental liability may also be minimized by allocating responsibility for hazardous materials contamination in the terms, indemnities, and warranties in the purchase contract. (Chapter 10 discusses strategies for structuring the real estate transaction.)

Notes
1. 42 U.S.C. § 9601 et seq.
4. 42 U.S.C. § 6901 et seq. Regulation of wetlands under the Clean Water Act also creates potential liability in connection with real estate transactions. Wetlands issues are discussed in Chapter 26. Storm water regulations are discussed in Chapter 28.
5. Love Canal was part of a proposed hydroelectric power canal bypassing Niagara Falls that had been excavated in the 1890s but was never completed. The Occidental Chemical Corporation had used the old canal bed for the disposal of chemicals. In the 1970s, chemicals were found to be leaking from the canal bed.

The people of Times Beach, a small town in southwestern Missouri, were exposed to high levels of dioxin, a highly toxic chemical compound. The compound was in a dust-controlling oil made out of the chemical wastes of a Missouri plant that had produced Agent Orange during the Vietnam War. In 1971, thousands of gallons of this oil were sprayed on the unpaved roads of Times Beach. The contaminated soils were discovered, and the town was evacuated in November 1982. In February 1983, the federal government decided to use $33 million of Superfund money to purchase Times Beach and relocate the people. The town was officially closed by April 1985.

6. The Superfund was originally financed from a corporate environmental income tax and excise taxes on petroleum and specified chemicals, along with a modest federal appropriation and recovered cleanup costs and penalties. The program annually generated about $1.5 billion in taxes before the authority to collect the taxes expired in 1995. In the absence of tax receipts, however, the trust fund balance has sharply declined and will be reduced to less than $30 million.
by the end of fiscal year 2003. In an effort to keep the program on track, in the
last several years Congress has appropriated increasing amounts of general rev-
enue dollars, with fiscal year 2002 appropriations exceeding $630 million.

9. 40 C.F.R. § 300.
10. The NPL is the list of sites where the EPA may use Superfund money for
remedial actions. The EPA is authorized to use Superfund money for remedial
actions at sites listed on the NPL and for removal actions at any sites. There are
or have been Superfund sites in all fifty states. As of February 13, 2002, there
were 1,222 sites on the NPL. 67 Fed. Reg. 8838 (February 26, 2002). Over 750 sites
have been placed on the Construction Completed List (a construction-completed
site is a former toxic waste site where physical construction of all cleanup actions
is complete, all immediate threats of harm have been addressed, and all long-
term threats are under control).
12. CERCLA does exclude certain substances, including petroleum, natural
gas, natural gas liquids, liquefied natural gas, and synthetic gas usable for fuel.
16. See Graybill Terminal Co. v. Union Oil Co., No. 92-0238-K(LSP) (S.D.
Cal. Jan. 4, 1993) (holding defendant may be liable as a past owner under theory
of “passive disposal” even where defendant held property for sixty seconds as
real estate middleman because hazardous substances migrated during time of
ownership); see also Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837
(4th Cir. 1992) (a short-term owner is an owner for CERCLA liability purposes).
17. See Robertshaw Controls Co. v. Watts Regulator Co., 807 F. Supp. 144 (D.
Me. 1992) (“to impose owner liability under Section 9607(a) on the basis of one
twenty-four-hour period of title possession during a two-step sales transaction
seems beyond the bounds of congressional intent.”).
Dec. 9, 1992) (finding that an individual holding equitable title under state law
while the purchase is pending should be deemed liable as an “owner,” despite
the fact he paid only 8 percent of the purchase price and the deed remained in
escrow).
984, 1003 (D.S.C. 1984) (lessee “maintained control over and responsibility for
the use of the property and, essentially, stood in the shoes of the property
owners. . . . Accordingly, site lessees . . . should, along with the property owners
themselves, be considered ‘owners’”), aff’d in part, vacated in part, 858 F.2d 160
Realty Corp., 759 F.2d 1032, 1052–53 (2d Cir. 1985); Kelly v. Arco Indus., Inc., 17
21. CERCLA § 101(9), 42 U.S.C. § 9601(9). A facility includes any building, structure, installation, equipment, pipe or pipeline, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, and any site where hazardous substances have been placed.

22. New York v. Gen. Elec. Co., 592 F. Supp. 291 (N.D.N.Y. 1984) (imposing liability on a manufacturer for selling oil contaminated with polychlorinated biphenyls (PCBs) that was used on a drag strip by the purchaser on grounds that the manufacturer either had known or had imputed knowledge that the oil would be disposed on the drag strip).


26. See, e.g., Gen. Elec. Co. v. Litton Indus., 920 F.2d 1415 (8th Cir. 1990). But see Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261 (E.D. Pa. 1994) (holding that the defendant must have manifested some intent to own the property in order to be an “owner”).


28. Id. at 1332–33; United States v. Bliss, 667 F. Supp. 1298, 1309–10 (E.D. Mo. 1987). In some cases, however, the courts required a showing that a defendant’s release of hazardous substances caused the incurrence of the particular response costs sought to be recovered from the defendant. See Farmland Indus. v. Morrison-Quirk Grain Corp., 987 F.2d 1335, 1339 (8th Cir. 1993); United States v. Alcan Aluminum Corp., 990 F.2d 711, 717 (2d Cir. 1993); Achushnet Co. v. Coaters, Inc., 937 F. Supp. 988 (D. Mass. 1996).


30. See, e.g., United States v. Northeastern Pharm. & Chem. Co. (NEPACCO), 579 F. Supp. 823, 844 (W.D. Mo. 1984); aff’d in part, rev’d in part, 810 F.2d 776 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); United States v. Mottolo, 695 F. Supp. 615, 621–22 (D. N.H. 1988). The constitutionality of retroactive liability was briefly called into question following the Supreme Court’s decision in Eastern Enters. v. Apfel, 524 U.S. 498 (1998). However, the decision was a fractured one and subsequent cases have failed to find any precedential value from it.


35. See, e.g., United States v. Wade, 577 F. Supp. 1326, 1338–39 (E.D. Pa. 1983) (holding that the burden of proof is upon the defendants to establish that a reasonable basis exists for apportioning the harm amongst them rather than imposing joint and several liability); In re Bell Petroleum Servs., Inc., 3 F.3d 889, 903 (5th Cir. 1993) (precluding the imposition of joint and several liability upon a finding that the former owner of a chrome-plating facility met its burden of proving that there was a reasonable basis for apportioning liability between it and other former owners on a volumetric basis).


39. Id. at 3–4.


41. The tenant in Weyerhaeuser operated a wood-treatment plant on the property for more than thirty-three years.

42. Weyerhaeuser, 771 F. Supp. at 1426.

43. Id.

44. Id.


46. Weyerhaeuser, 771 F. Supp. at 1426 n.9; see also Montalvo, No. 88-8038 at 4 n.2 (S.D. Fla. Feb. 15, 1989) (finding that the [factors] provide little or no assistance in allocating costs between a landowner and a generator and instead are intended to distinguish among operators and generators).

47. 771 F. Supp. at 1426. The court relied on Montalvo in reaching its decision.


51. Id. at 66–67.


54. Id. at 62 (emphasis added).

55. Id. at 64 (emphasis added).

56. Id. at 70.

57. Id. at 67.

58. Id. at 71.

59. Id.

60. 524 U.S. at 70.

61. Id. at 71.

62. United States v. Kayser-Roth Corp., 272 F.3d 89, 103 (1st Cir. 2001) (“There is evidence that an agent of Kayser-Roth... directly exerted operational control..."
over environmental matters at the Forestdale facility. [Agent] was neither an officer nor a director of [subsidiary].”

63. Id. at 102.
65. Id. at 292.
66. See Carter-Jones Lumber Co. v. LTV Steel Co., 237 F.3d 745, 747 (6th Cir. 2001) (citing Bestfoods for the proposition that state law should be used to determine whether or not to pierce a corporate veil in the context of a CERCLA case). Other appellate courts have suggested that a federal common law would be superior. See In re Nextwave Pers. Communications, Inc., 200 F.3d 43, 57 (2d Cir. 1999) (discussing in dicta how federal common law should apply to CERCLA veil-piercing cases); Board of Trustees, Sheet Metal Workers’ Nat’l Pension Fund v. Elite Erectors, Inc., 212 F.3d 1031, 1038 (7th Cir. 2000) (discussing how federal common law should probably apply to CERCLA veil-piercing cases).
67. See Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988) (examining CERCLA’s legislative history and purpose and holding that, when choosing between the taxpayers or a successor corporation, congressional intent requires that the successor bear the cost of cleanup).
69. Lenders may also face environmental liability under state laws. For example, a federal district court judge refused to dismiss a suit against a mortgagor brought under Massachusetts’s Lead Poisoning and Control Act. The court held that the defendant was an owner within the meaning of the act because the defendant’s name appeared on the mortgage papers as a mortgagor. Roman v. Friedland, No. 92-30229-MAP (April 14, 1994). Lenders also may, depending on their activities, face liability as parties that “arranged for the disposal or treatment” of hazardous substances.
70. CERCLA Section 101(20)(A) provides in part that “Such 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.” 42 U.S.C. § 9601(20)(A).
74. Id. § 9627(c).
77. Id.
78. Id.
82. See, e.g., United States v. Ottati & Goss, 900 F.2d 429 (1st Cir. 1990).
83. 2 F.3d 1265 (3d Cir. 1993).
84. Id. at 1278.
85. Id.
86. However, oversight costs associated with remedial investigations and feasibility studies (RI/FS) conducted by private parties pursuant to Section 104(a)(1) of CERCLA were included in the definition of removal.
87. Rohm & Haas, 2 F.3d at 1279.
88. Id.
89. The Atlantic Richfield Company (ARCO) spent hundreds of millions of dollars to clean up a basin in the Clark Fork River, polluted after more than a hundred years of copper mining and smelting. In addition to cleaning the site, the state of Montana demanded that ARCO restore the basin and sued the company for $765 million (the amount the state estimated would be needed to pay for the environmental damage).
93. See, e.g., Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988) (if defense were allowed it would improperly shift CERCLA liability from responsible parties to unwitting purchasers).
94. CERCLA § 107(b)(3); 42 U.S.C. § 9607(b)(3).
95. Id.
96. CERCLA § 101(35); 42 U.S.C. § 9601(35).
97. CERCLA § 101(35)(B); 42 U.S.C. § 9601(35)(B). In most cases, defendants have the burden of proving that they did not know and had no reason to know of the contamination.
98. Two other unique defenses are also used. First, there is a valid defense if the defendant is a government body that acquired the property by escheat, any involuntary transfer, or through exercise of eminent domain. Second, a valid defense can be offered if the property was inherited.
99. The innocent landowner defense should be distinguished from the innocent landowner provisions in CERCLA § 122(g)(1)(B). The latter offers innocent landowners who have not done "all appropriate inquiry" an opportunity for expedited settlement with EPA, rather than a total defense from liability. 42 U.S.C. § 9622(g)(1)(B).

100. Brownfields Act, supra note 3.

101. EPA's definition will also govern the meaning of "all appropriate inquiry" as used in the contiguous property and prospective purchaser contexts.

102. Brownfields Act § 223.

103. ASTM, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process (E 1527) [hereinafter Standard Practice]. For a more complete discussion of the ASTM standards, see Chapter 7.

104. Brownfields Act § 223.

105. Standard Practice, supra note 103.

106. Brownfields Act § 223.

107. Id.

108. CERCLA § 107(b)(3); 42 U.S.C. § 9607(b)(3).


111. Id.

112. Brownfields Act § 221.

113. Id.

114. Id.

115. Id. § 222.

116. Id.

117. Id. Under the law, windfall liens must not exceed the response-action-caused increase in a property’s value, and may continue only until satisfied or until the United States recovers all its response costs at the facility.

118. EPA, Memorandum on Bona Fide Prospective Purchasers and the New Amendments to CERCLA, Office of Enforcement and Compliance Assurance (May 31, 2002).

119. Id.

120. Brownfields Act § 222(a).

121. Id. § 107.

122. Id.

123. Id.

124. Id.


126. In addition, the distinction has been blurred by the EPA’s application of the statutes. The EPA has increasingly used CERCLA to address active facilities rather than abandoned dumps.


129. HSWA created the statutory authority for corrective action under RCRA. Section 3004(u) requires the corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under RCRA. 42 U.S.C. § 6924(u). The EPA may also order corrective action or other response actions at facilities “authorized to operate under section 3005(e)” (the interim status provision). RCRA § 3008(h), 42 U.S.C. § 6928. In addition, Section 3008(h) has been interpreted to cover facilities that have lost interim status without obtaining a permit or failed to obtain status properly.


132. 734 F.2d 159 (4th Cir. 1984).

133. Id. at 163.


135. 96 F.3d 706 (3d Cir. 1996).

136. 96 F.3d at 714.

137. Id. at 716.


139. CERCLA § 107, 42 U.S.C. § 9607.


