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## The Moral Position of Landowners Within the Scope of CERCLA

Hundreds of years from now, when history students are looking into the past of America, it might appear that the United States government woke up one morning to discover that its country was on the verge of becoming a vast wasteland. Viewing the great mass of hazardous waste problems throughout the country, Congress hastily enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).<sup>1</sup> Part and parcel to CERCLA was the creation of the Superfund.<sup>2</sup> The idea was that if a problem were too great, and threatened the public health and well being, then no time should be wasted. The government would stop the problem and clean it up, spending the monies of the Superfund. Afterwards, the government would seek out those responsible to take on the economic burden of the clean-up.

Congress left great gaps in CERCLA which were left for the courts to fill. In 1986, Congress amended CERCLA by codifying much of what the courts had done in gap-filling with the Superfund Amendments and Reauthorization Act of 1986 (SARA).<sup>3</sup> SARA amends, clarifies, and reauthorizes the original CERCLA statute while replenishing and increasing the Superfund.

Under CERCLA, liability is assigned to all potentially responsible parties (PRPs).<sup>4</sup> Landowners who are potentially liable find that the exceptions to CERCLA are few and that the price of liability is great. Therefore, landowners have sought vigorously to come within the narrow defenses allowed under CERCLA. As a result, the defenses possible under CERCLA have become quite distinct through the refining fire of litiga-

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1. As amended 42 U.S.C. §§ 9601-9675 (1988).

2. The Superfund is simply a cash reserve which the USEPA may use to clean up hazardous waste sites which endanger the public. Congress intended initially that the Superfund would entail \$ 1.5 billion and last five years. As of this writing, estimated costs that the actual clean ups which will be required under CERCLA using the Superfund will range between \$ 750 billion and \$ 1 trillion, and take 30 years to clean up, if as much contamination exists as some fear. Milton Russel, *Wasteful Waste Disposal?*, WASH. POST, Mar. 20, 1992, at A25.

3. 42 U.S.C. §§ 9601-9675 (1988).

4. 42 U.S.C. § 9607(a)(1)-(4) (1988).

tion and appellate review.

For landowners, there is the possibility of showing that they fit into the "innocent landowner" exception.<sup>5</sup> The landowner can also try to escape liability by contracting with the lessee for full and total indemnification. Both of these possibilities carry great risk because they are asserted after the clean-up when the government is seeking indemnification. If the landowner loses, he may be liable for a large damage award. A back door is open to the landowner in that he may attempt to settle with the Environmental Protection Agency (EPA) for a relatively small amount in a *de minimis* settlement.

However, all of these possibilities can be cut off if the court finds the slightest degree of fault by commission or omission on the part of the landowner.<sup>6</sup> Although CERCLA is recognized as a strict liability statute, courts continue to look to equitable factors of fault when they actually apportion liability in contribution actions.<sup>7</sup> Even if the landowner was not actually producing any of the waste, however, the picture can still appear ominous, considering that courts in many cases are declaring the parties as jointly and severally liable regardless of relative causation.<sup>8</sup>

Landowners have reason for concern because courts have been scrupulously examining the landowner's position in defining when a landowner may be held liable. In a recent case, *United States v. R.W. Meyer, Inc.*,<sup>9</sup> the Sixth Circuit affirmed a district court decision which found liability based on the moral position of the landowner. The moral position standard, simply stated, is that a landowner has an inherently higher moral duty to society to remain informed of all activities which are conducted on his land. The presumed better ability of landowners to monitor potential problems makes them better able to circumvent potential hazardous waste problems.

This paper will explore the impact and implications of this decision by examining the moral position standard under

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5. 42 U.S.C. § 9607(b)(3) (1988), discussed in further detail *infra*.

6. 42 U.S.C. § 9607(6) (1988) (a bar against liability exists only where a PRP can show that the damages caused by the release or threat of release "were caused solely by" one of the enumerated defenses). *Id.*

7. 42 U.S.C. § 9613(f)(1) (1988).

8. See, e.g., *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986).

9. 932 F.2d 568 (6th Cir. 1991).

CERCLA as it applies to landowners. The facts and decision of *Meyer* will be used in Part I as a backdrop for comparing and analysing the application of this standard. Part II will examine the general purpose and structure of CERCLA as well as the tools available to the EPA to implement it. Part III will discuss whether the moral position standard achieves the purposes of CERCLA, what impact this will have on landowners, and how exposure to liability can be reduced.

### I. UNITED STATES v. R.W. MEYER

Procedurally, the appeal in *Meyer* arose at the latest stage possible. The clean-up had already occurred and the court had identified the PRPs. The party who had assumed the burden of "fronting" the costs of the remedial action was pursuing all PRPs to get contribution.

#### A. Facts of United States v. R.W. Meyer, Inc.

R.W. Meyer (Meyer) owned property in Cadillac, Michigan, and, like any reasonable landowner, wished to make some money from his investment. In 1972, Meyer entered into a 10-year lease with Northernair Plating Company (Northernair) to operate a metal electroplating business on Meyer's property. Willard S. Garwood was the president and sole shareholder of Northernair and managed the day-to-day operations of the company. In mid-1981 all the assets of Northernair were sold to Toplocker Enterprises, Inc. (Toplocker).<sup>10</sup>

In March of 1983, officials from the Michigan Department of Natural Resources and the federal EPA examined the property. It had been reported that a child had received burns while playing on the property. When the soil, sludge, and drums containing a vast array of materials on the property were tested, substantial amounts of caustic and corrosive materials were found.<sup>11</sup> Specifically, the EPA noted that they observed cyanide filled drums and tanks haphazardly strewn about the property outside the facility.<sup>12</sup> Officials also determined that Northernair discharged materials into a catch basin where it leaked into the local sewage system.<sup>13</sup>

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10. *Id.* at 569.

11. *Id.* at 570.

12. *Id.*

13. *Id.*

Although the facts of this case are frightening, they are, in actuality, no worse than many of the environmental problems which can be found en masse throughout the country.<sup>14</sup> Since the problem at the facility was continuing and threatened public welfare, the EPA conducted an "Immediate Removal Action."<sup>15</sup> After taking this remedial action and cleaning up the site, the United States commenced an action to recover the costs of clean-up paid out of the Superfund.

The district court found the harm indivisible, and therefore, found all the defendants jointly and severally liable.<sup>16</sup> A lot of the defendants then brought cross-claims for contribution against each other, which claims were all granted summary judgment.<sup>17</sup> The summary judgment rulings are at issue as they involved the final allocation of costs. Interestingly, in the allocation of costs, the trial court assigned two-thirds of the total clean-up costs to Northernair and its principal shareholder Garwood, but assigned an entire one-third portion, or \$114,274.41 to the landowner.<sup>18</sup> The assignment of this share was the focus of the Sixth Circuit's opinion, and this comment will focus on this allocation as well.

### B. *Analysis of the Court in Meyer*

The trial court founded its apportionment of contribution on several frequently cited factors:<sup>19</sup>

- (1) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished;
- (2) the amount of the hazardous waste involved;
- (3) the degree of toxicity of the hazardous waste involved;
- (4) the degree of involvement by the parties in the generation,

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14. There are presently approximately 1,200 "priority sites" throughout the United States with problems similar to those in *Meyer*. Robert Harris, *Hazardous Wastes, Superfund and Toxic Substances*, C667 A.L.I.-A.B.A. 55 (1991).

15. *Id.* at 569.

16. See *United States v. Northernair Plating Co.*, 670 F. Supp. 742 (W.D. Mich. 1987). Liability was founded on Section 107(a) of CERCLA (42 U.S.C. § 9607(a)).

17. *Id.*

18. *Meyer* had "generously" offered to pay the EPA \$1,709.03. 932 F.2d at 571. In some cases such an amount would likely be appropriate as a de minimis settlement. See *infra* text accompanying note 88.

19. *Northernair*, 670 F. Supp. at 742. As this paper is focusing on the contribution issues, the exact grounds for finding *Meyer* generally liable are not discussed.

transportation, treatment, storage, or disposal of the hazardous waste;

(5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and

(6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.<sup>20</sup>

While recognizing that the lessee was the primary contributor, the court nonetheless apportioned to the lessor, Meyer, one third of the liability. This was based primarily on two factors: first, the court found that Meyer had not done his utmost in cooperating with the EPA and state officials, and second, the court did not believe that Meyer, as the owner of the site, had exercised an acceptable degree of care as the landowner with respect to the hazardous waste. In addition, Meyer had allegedly constructed the sewer line on the property negligently.<sup>21</sup> The court further found, that in light of the amount of hazardous waste released and the extreme toxicity of the waste involved, the regulations and standards of CERCLA should be strictly applied.<sup>22</sup>

The section of SARA which illuminates contribution actions, 42 U.S.C. § 9613(f)(1) (1988) states: "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." The trial court also announced that it took into consideration Meyer's moral contribution as the owner of the site.<sup>23</sup> Meyer had attempted to elude liability by arguing that he could not be shown to have caused any of the harm, except perhaps as to the existence of the sewer line.<sup>24</sup> Meyer maintained that his contribution to the release of hazardous materials was negligible.<sup>25</sup> But the court's adoption of a moral position standard, which the Sixth Circuit affirmed,

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20. See 932 F.2d at 571 citing *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 86 (D.Me. 1988), *aff'd sub nom. Travelers Indemnity Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989); *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249 (S.D.Ill. 1984); H.R. REP. NO. 253(III), 99th Cong., 2d Sess. 19, (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3038, 3042.

21. *Meyer*, 932 F.2d at 571.

22. *Id.* at 571-74.

23. *Id.* at 573.

24. *Id.*

25. *Id.*

completely rejected any such arguments. An analysis of the general aims of CERCLA is necessary in order to understand the import of the moral position standard.

## II. STRUCTURE OF CERCLA

Uncontrolled toxic dumps and storage of hazardous materials constitute a major threat to millions of people throughout the United States.<sup>26</sup> Congress stated that CERCLA was enacted in 1980 to confront, "[t]he legacy of past haphazard disposal or chemical wastes and the continuing danger of spills or other releases of dangerous chemicals."<sup>27</sup> In order to further protect public health and safety and to preserve the environment, Congress promulgated CERCLA and SARA.<sup>28</sup> The provisions of the 1980 CERCLA statute make up the nucleus of the federal response to difficulties connected with cleaning up contaminated lands.

The 1986 SARA amendments clarify and reauthorize CERCLA.<sup>29</sup> Recognizing that time is the most critical element in a hazardous waste clean-up, Congress sought out measures which would allow the government to clean up the problem now and ask questions later.<sup>30</sup> Specifically, Congress wanted to give the EPA a strong oversight role with "tough legal enforcement standards."<sup>31</sup>

### A. Tools Available to the EPA under CERCLA

CERCLA effectively gave the Executive branch of the government, or the agency administering the statute, the Environmental Protection Agency, the tools necessary to fulfill this mission. CERCLA authorizes the President to take any action he "deems necessary to protect the public health or welfare or

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26. See *infra* note 2.

27. SENATE COMM. ON ENV'T AND PUB. WORKS, ENVIRONMENTAL EMERGENCY RESPONSE ACT, S. REP. NO. 848, 96th Cong., 2d Sess. 2 (1980), reprinted in 1 *Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980* at 477 (1983).

28. *Ascon v. Mobil Oil Co.*, 866 F.2d 1149 (9th Cir. 1989).

29. Thus the SARA amendments have become one within CERCLA, and this comment will be referring to the whole statutory scheme simply as CERCLA.

30. SARA "has been written with the underlying belief that Congress should focus on ways to ensure rapid and thorough cleanup of abandoned hazardous wastes . . . ." H.R. REP. NO. 253(I), 99th Cong., 1st Sess. 3,55 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2837.

31. *Id.*

the environment."<sup>32</sup> The President is instructed to seek out both known and threatened releases of hazardous pollutants, substances, or contaminants.<sup>33</sup> Congress created a fund which the President, through the EPA could draw on to clean up the wastes.<sup>34</sup> Thus, the Superfund was created to combat problems which the EPA found to pose a serious risk to either the public or the environment.<sup>35</sup>

The Superfund money will be completely allocated to this clean up response unless the EPA can find a solvent liable party.<sup>36</sup> When the EPA can find a responsible party, then the government must seek an injunction or issue an administrative order to force the responsible parties to pay for the costs.<sup>37</sup> When the hazardous waste problem is seen as an imminent danger, for example, when the waste continues to seep through the ground or flow into a public sewer, then the EPA simply cleans up the mess and then goes hunting for PRPs.<sup>38</sup> There are two actions available to the EPA are two: (1) short-term "removal" actions,<sup>39</sup> and (2) long-term "remedial" efforts.<sup>40</sup>

Section 9607(a) of CERCLA places liability for the clean-up on four different groups: (1) individuals who owned the property at the time the toxics were released, (2) individuals who accept hazardous waste for transportation, disposal, or treatment, (3) individuals who arranged for disposal of hazardous substances by contract or otherwise, and (4) the current landowners.<sup>41</sup> For the purposes of administrative ease and reduction of

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32. 42 U.S.C. § 9604(a)(1) (1988).

33. 42 U.S.C. § 9604(a)(1)(A)-(B) (1988).

34. See generally 42 U.S.C. § 9611 (1988).

35. *Id.*

36. 42 U.S.C. § 9607(a) (1988).

37. *Id.* Congress could plainly see that it could not finance the entire clean-up of America, and hence, anytime the money can be recovered, it must be sought. See *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1445 (W.D. Mich. 1989).

38. See, e.g., *Mardan Corp. v. C.G.C. Music Ltd.*, 804 F.2d 1454 (9th Cir. 1986); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043-44 (2d Cir. 1985).

39. 42 U.S.C. § 9601(23) (1988) (i.e., cleaning up spilled substances before they have contaminated the entire area, or building an impoundment wall).

40. *Id.* § 9601(24) (i.e., relocation of displaced residents, dredging, repairing leaking containers).

41. 42 U.S.C. § 9607(a) states in pertinent part:

Notwithstanding any other provision or rule of law, and subject only to the defense set forth in subsection (b) of this section—

(1) the owner and operator of . . . a facility,

(2) 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,



litigation costs, the EPA often seeks to recover these costs only from the current landowner.<sup>42</sup>

### B. *Strict Liability under CERCLA*

Although the Superfund exists to finance the clean up of hazardous wastes, courts construing CERCLA often impose strict liability upon all responsible parties so that all the monies expended from the Superfund can be recouped.<sup>43</sup> CERCLA does not contain express language demanding the imposition of strict liability. However, the Second Circuit in *New York v. Shore Realty Corp.*<sup>44</sup> stated that CERCLA section 9607(a)(1) "unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation."<sup>45</sup> Therefore, the simple ownership of land can, in some instances, be the key to the allocation of large portions of liability.

Such an allocation follows Congress' intent. The legislative history shows that Congress established a strict liability standard under CERCLA based on its conclusion that anyone who engages in any activity connected with hazardous substances is involved in an abnormally dangerous activity.<sup>46</sup> Negligence, causation, and fairness are not elements of responsibility under CERCLA. As already stated, since the current owner is easily found and often solvent, the EPA frequently seeks a recovery of the Superfund allocations from him.

### C. *Joint/Several Liability under CERCLA*

Responsible parties are regularly held jointly and severally

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(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity . . . and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of hazardous substance, shall be liable for [all costs incurred].

42. See, e.g., *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913 (N.D. Okla. 1987).

43. 42 U.S.C. § 9607(a)(4)(A) ("[PRPs] shall be liable for (A) all costs of removal or remedial action incurred by the United States . . .").

44. 759 F.2d 1032 (2d Cir. 1985).

45. *Id.* at 1044.

46. See 42 U.S.C. § 9601(32) (1988); S. REP. NO. 848, 96th Cong., 2d Sess. 13,33-34 (1980) (Hazardous substance is a term which is defined by the USEPA).

liable since it is difficult to prove that the harm is divisible.<sup>47</sup> Often materials combine to create new hazardous substances so that any tracing is impractical if not impossible. "The practical effect of placing the burden on defendants has been that responsible parties rarely escape joint and several liability . . . ."<sup>48</sup> Some courts have felt that the time consuming task of tracing waste to allocate liability would ignore Congress' concern that the clean-up efforts proceed quickly.<sup>49</sup> These courts have held that differentiation of substantial versus trivial causation should not be used in CERCLA litigation.<sup>50</sup> For this reason, even landowners who have only remote contact with their lands can potentially be held completely responsible for the entire clean-up costs. In the initial allocation of liability, there is no place for comparative causation.

#### D. Defenses to CERCLA Liability

CERCLA section 9607(a), which assigns liability, specifically states that it is subject only to the defenses defined in subsection (b) of section 9607.<sup>51</sup> The enumerated defenses are: (1) an act of God, (2) an act of war, and (3) the "innocent landowner" defense.<sup>52</sup> The innocent landowner defense states in pertinent part:

[There is no liability where the defendant can establish that the release was caused 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 . . . 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

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47. 42 U.S.C. § 9607(a). See *Shore Realty*, 759 F.2d at 1042 n.13. See also *United States v. Monsanto Co.*, 858 F.2d 160, 171-73 (4th Cir. 1988); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809-11 (S.D. Ohio 1983).

48. *O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989).

49. *Id.* at 179 n.4.

50. *Id.*

51. See *supra* note 30.

52. 42 U.S.C. § 9607(b) (1988).

acts or omissions . . . .<sup>53</sup>

Section 9607(b)(3) must be read with section 9601(35) if the owner has taken title subsequent to the release.<sup>54</sup>

The innocent landowner defense is the most commonly invoked defense,<sup>55</sup> and to successfully raise the defense the defendant must prove all the elements of section 9607(b)(3). Such a standard is hard for any landowner to prove, and as will be shown, the moral position which the Sixth Circuit announced potentially makes asserting this defense even harder.

The landowner may be held liable for the acts of his tenants.<sup>56</sup> Courts have also considered the tenants to be "owners" under CERCLA.<sup>57</sup> These same courts have concluded that both the tenant and the landowner together are to be considered owners under CERCLA section 9607(a). The landowner cannot invoke the innocent landowner defense unless he can show that he undertook "all appropriate inquiry into the previous ownership and uses of property consistent with good commercial or customary practice."<sup>58</sup> What constitutes appropriate inquiry is a question of fact which must now be interpreted in light of the moral position standard.

### *E. Contribution Actions Under CERCLA*

Often it is the current landowner who is sought out for contribution by the EPA. But any party, such as a possessory tenant, who is found liable can spread the liability among all PRPs through a contribution action.

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53. 42 U.S.C. § 9607(b)(3) (1988).

54. Under § 9601(35) the buyer must still show that he had no knowledge of the hazardous substance and he must also show that he used due diligence in attempting to make sure that there was no hazardous substance on the property. See *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986).

55. Claims of act of God and act of war are rarely successful as they are hard to prove. For either defense, the defendant would have to show that it contributed in no way to the cause of the problem. As the simple storage of materials or the leasing to one who stores hazardous materials can be seen as a causative connection, especially under the moral position standard, these defenses are useless to most landowners.

56. See *United States v. Argent Corp.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,616 (D.N.M. May 4, 1984); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984).

57. *South Carolina Recycling*, 653 F. Supp. at 1003.

58. *United States v. Serafini*, 711 F. Supp. 197, 198 (M.D. Pa. 1988). See also 42 U.S.C.A. § 9601(35)(B)(West Supp. 1989).

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may *allocate response costs among liable parties using such equitable factors as the court determines are appropriate*. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.<sup>59</sup>

This section was added through the SARA amendments. Prior to the SARA Amendments, the federal courts applied an equitable analysis and come to the same conclusions.<sup>60</sup> Section 9613(f) is, therefore, simply a codification of the federal common law which developed prior to the SARA amendments both in applying joint and several liability and allowing contributions against other liable parties.<sup>61</sup>

For landowners, or anyone caught up in a contribution action, a threshold question becomes what factors the court will consider as appropriate equitable factors. The House Judiciary Committee, which drafted language similar to section 9613(f), explained that a court could consider anything it felt relevant and enumerated the following possible considerations:

[T]he amount of hazardous substances involved; the degree of toxicity or hazard of the materials involved; the degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of the substances; the degree of care exercised by the parties with respect to the substances involved; the degree of cooperation of the parties with government officials to prevent any harm to public health or the environment.<sup>62</sup>

A court is not substantially limited in what it may consider because its determinations and conclusions have their basis in equity. Years ago the Supreme Court announced that: "The

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59. 42 U.S.C. § 9613(f)(1) (1988) (emphasis added).

60. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

61. *Id.*

62. H.R. REP. NO. 253, 99th Cong., 1st Sess. 3,55 (1985) *reprinted in* 1986 U.S.C.A.N. 3042.

essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."<sup>63</sup> In CERCLA litigation, the public interests in having the Superfund replenished, guarding the public health, and providing an effective deterrent are seen as central to any apportionment decisions. "The hallmark of a court of equity is its ability to frame its decree to effect a balancing of all the equities and to protect the interests of all affected by it, including the public."<sup>64</sup>

The legislative history of section 9613(f) exhibits Congress' intent that a court adjudicating a contribution action should evaluate moral as well as legal considerations in the apportionment. This is because the statute requires the court to not look exclusively to traditional equitable factors, but instead to "such equitable factors as the court determines are appropriate."<sup>65</sup> The latitude given under the statute is, therefore, extremely broad because the court's determination regarding equitable factors can only be reviewed under an abuse of discretion standard.<sup>66</sup> Since the lists of factors provided by the legislature and the cases interpreting the statute are only guidelines, the cited factors for apportionment are in no way exhaustive. As in the traditional application of equity, the court will look closely at the facts of each case.

In a restitutionary approach to contribution some courts have looked at the benefits received by the parties as well as the knowledge or acquiescence of the parties in the contaminating activities when apportioning liability.<sup>67</sup> In this regard, landowners can receive larger apportionments based on the knowledge, whether actual or constructive, of the nature of their tenant's business. The collection of rent, therefore, carries with it the obligation, in the eyes of some courts, to become knowledgeable concerning the actions of a tenant who possesses the land in question.

In prior adjudications of contribution actions under section

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63. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)(citations omitted).

64. *Kay v. Mills*, 490 F. Supp. 844, 855 (E.D.Ky. 1980) (citing W. DeFuniak, *HANDBOOK OF MODERN EQUITY* 25 (1956)).

65. 42 U.S.C. § 9613(f)(1) (1988).

66. *Loudermill v. Cleveland Bd. of Educ.*, 844 F.2d 304, 308 (6th Cir.), *cert. denied*, 488 U.S. 946 (1988).

67. *South Florida Water Management Dist. v. Montalvo*, No. 88-8038, 1989 U.S. Dist. LEXIS 17555 (S.D. Fla. Feb. 15, 1989).

9613(f) have shown that the courts are generally most concerned with achieving the purposes of CERCLA and replenishing the Superfund. Therefore, a court in its consideration of equitable factors might "consider the state of mind of the parties, their economic status, any contracts between them bearing on the subject, and any traditional equitable factors deemed appropriate as mitigating factors . . . ."<sup>68</sup> The expandable nature of this provision was intended by the legislature. As the legislative history of section 9613(f) states, "contribution claims will be resolved pursuant to Federal common law."<sup>69</sup>

As the court in *Meyer* stated, traditional defenses in equity will only be seen as mitigating factors. Such traditional defenses as unclean hands, laches, caveat emptor, waiver, unjust enrichment, and estoppel have no place in CERCLA liability allocation.<sup>70</sup> Courts are especially adverse to allowing defendants in contribution actions to escape liability under such equitable defenses since spreading the costs of a clean up will more likely replenish the Superfund.<sup>71</sup>

For instance, courts have elaborated as to why the doctrine of unclean hands is an inapplicable bar to a contribution action. First, the statutory language itself sets no limit as to who among the PRPs may be brought into a contribution action. Section 9613(f) authorizes "any party" to recover response costs from "any other person who is liable." Second, since contribution actions apply to PRPs, all the parties involved have unclean hands by definition, and to allow a party to assert the equitable defense of unclean hands would emasculate section 9613(f). The relative "cleanliness" of the parties' hands can have an effect on the determination made by the court, but there can be no bar to recovery based on this equitable defense.

Many of the other equitable defenses have not been litigated, but there is no reason to believe that a court would allow them as a bar to recovery in any instance. A contribution action simply signifies that the EPA chose one or two PRPs, usually

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68. *United States v. Meyer, Inc.*, 932 F.2d 568, 572-73 (6th Cir. 1991).

69. H.R. REP. NO. 253(I) (Energy & Commerce Committee), 99th Cong., 1st Sess. 80 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2862; see also H.R. REP. NO. 253(III) (Judiciary Committee), 99th Cong., 1st Sess. 19 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3042.

70. *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1002 (D.N.J. 1988) (equitable defenses apply to damages only as mitigating factors).

71. Invoking the statute of limitations against a contribution action is viable as it is provided for in CERCLA itself. 42 U.S.C. § 9613(g) (1988).

those with the deepest pockets, to initially clean up the site. This leaves the splitting of hairs to contributions actions. Such a formulation meets the needs of CERCLA in that the often slow process of apportionment takes place after the threat to the public has been obviated.

The language of CERCLA's contribution section "reveals Congress' concern that the relative culpability of each responsible party be considered in determining the proportionate share of cost each must bear." Numerous courts have applied a scheme of applied comparative negligence principles within the strict liability structure of CERCLA. The legislative history exhibits that Congress intended the contribution section to "encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups." While the threat of contribution may in fact facilitate settlement and private clean-up actions, it will probably not cut down on litigation at all. Since the amounts of liability in most CERCLA actions are so great, settlement is often impossible with parties who are attempting to elude all liability. Therefore, litigation in many cases will only be increased.

The *Restatement (Second) of Torts* recognizes two approaches to apportionment: (1) pro rata, and (2) comparative contribution. Under the pro rata method shares are divided up equally. This would present a windfall for large corporations since large shares could be assumed by small entities or individuals with few assets who actually contributed little to the problem. Therefore, courts generally do not apportion contribution on the pro rata basis. Courts have noted that pro rata apportionment would not fulfill Congress' intent that apportionment be fair.

Under the comparative causation scheme courts consider such factors as knowledge, amount of risk created by the conduct, degree of negligence, and overall circumstances. Causation is compared while not being the basis of liability, as CERCLA is a strict liability statute. The causation only determines what share the parties will bear.

A modification of the pro rata and comparative causation schemes may be found in the proposed *Gore Amendment* to CERCLA. While the House of Representatives passed the amendment, it failed to pass the Senate and was subsequently dropped from CERCLA. The Gore Amendment would apportion liability with an eye to the furtherance of the goals of CERCLA. This amendment directed the court to look at the

volume and toxicity of the release as they relate to culpability.

In *United States v. R.W. Meyer*, one finds that the district court used all of the methods mentioned above. The court compared causation in the sense of the Gore Amendment, but at the same time finally ended with a purely pro rata share. As stated, Congress was concerned that parties who actually caused little of the release would bear burdens too great under the strict liability standard and the contribution scheme. However, the district court in *Meyer* supplies the reader with the basis as to why the outcome is fair and the final apportionment fully fulfills the goals of CERCLA. The district court achieves this through the recognition of the moral position of PRPs.

### III. IMPLICATIONS OF THE MORAL POSITION STANDARD

#### A. *The Moral Position of Contributors Under CERCLA*

The district court in *Meyer* stated that its decision to apportion one-third of the total clean-up costs was based on the fact that Meyer did not cooperate with the EPA and that Meyer had a causative connection to the release since he had constructed the sewer through which the wastes were released.<sup>72</sup> Additionally, the court stated that Meyer had a significant responsibility "simply by virtue of being the landowner."<sup>73</sup> It is mainly this conclusion which Meyer disputed on appeal.

The Sixth Circuit stated likewise: "[T]he trial court quite properly considered here not only the appellant's [Meyer's] contribution to the toxic slough described above in a technical causative sense, but also its moral contribution as the owner of the site."<sup>74</sup> The court reasoned that meticulous findings of causation were not warranted nor intended by Congress under CERCLA. Instead, the primary factors that a court should be concerned with are that the clean-up costs will be borne by those who are responsible, and that the public interest can be protected.<sup>75</sup> The moral contribution or position standard achieves this purpose by first assigning the costs to persons who, like Meyer, could have done something about the hazardous substance release. The facts show that Meyer knew exactly what was going on. Second, in order to protect the public, the courts should adopt the moral position standard as a warning

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72. *United States v. Meyer, Inc.*, 932 F.2d 568, 571 (1991).

73. *Id.*

74. *Meyer*, 932 F.2d at 573.

75. *Id.*



to future landowners.

Through the adoption of this standard, landowners will be less passive about watching questionable activities occur on their land, and they will understand that they may be liable for any environmental problems which may occur. They will make it their business to know what is taking place on their land. If an environmental catastrophe is averted through such a strict standard, then the objectives of CERCLA will have been achieved.

The scope of CERCLA liability serves to encourage private remedial initiative as to existing sites, to discourage careless disposition of toxic wastes, and not least to ensure the vigilance of those whose proximity to generators of toxic substances creates the potential for liability, who also occupy the most *advantageous positions* from which to monitor [generators].<sup>76</sup>

The moral position standard is not completely new to CERCLA litigation; it is an extension of an emerging trend. When a landlord leases land to a tenant, both the landlord and the tenant are liable as possessors and owners of a "facility" under CERCLA.<sup>77</sup> Courts have held that the landlord is liable even if the tenant is shown to be the sole cause of the release.<sup>78</sup> The knowledge or consent of the landlord is irrelevant.<sup>79</sup> One might reason that the landlord should have known about circumstances which would lead to CERCLA liability.

A corollary of the moral position standard is found in the already well settled area of contribution from landowners who purchased the land after the release. To avoid liability, purchasers must show that they did not know and had no reason to know that the property was contaminated.<sup>80</sup> A landowner who owned the land before the release should be expected to adhere to at least the same standard, if not a higher one.

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76. AM Int'l, Inc. v. International Forging Equip., 743 F. Supp. 525, 527 (N.D. Ohio 1990) (emphasis added).

77. 42 U.S.C. § 9607(a). United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1003 (D.S.C. 1984). See note 32 *supra* at 11.

78. United States v. Monsanto Co., 858 F.2d 160, 168-69 (4th Cir. 1988); United States v. Argent Corp., 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,616 (D.N.M. May 4, 1984).

79. *Id.*

80. 42 U.S.C. § 9601(35)(A)(i) (1988).

In *United States v. Monsanto Co.*,<sup>81</sup> the landowners verbally leased their property on a month-to-month basis. It was the lessor's understanding that the party to whom he leased the land would be using it for storing of raw materials and finished products. Later, the lessee began using the land as a facility for the disposal and storage of chemical wastes generated by third parties.<sup>82</sup> The landowners were unaware of this activity for several years.<sup>83</sup> Eventually, an environmental problem surfaced which required a remedial action by the government. The landowners were held jointly and severally liable for the \$1.8 million in clean-up costs.<sup>84</sup>

The moral position standard simply demands a more narrow reading of the innocent landowner's defense as well as extending more responsibility to those who have owned property for the entire period in question. The moral position should be compared with the provision that the landowner exercised due care with respect to the hazardous substance, and that he took precautions against the third party's foreseeable acts.<sup>85</sup> The due care that the landowner should be expected to exercise should include occasional personal observations of what occurs on his property. The landowner should also be imputed to have had the common sense to know that when a product is manufactured wastes are produced. The landowner, therefore, should be inquisitive as to what those wastes are and if he might be potentially liable in the future.

Thus, through tightening the innocent landowner defense with the imposition of a moral position standard, PRPs will not stick their heads in the sand and hope for the best. Instead, they will be proactive in ensuring that their liability exposure is reduced. Some landowners may find through diligent effort that a release has already occurred, and while they might not be able to escape all liability, a landowner can at least minimize his total liability.

### *B. Reduction of Liability Exposure*

The landowners must accept the fact that the moral position standard is a sign of an emerging trend acknowledging the

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81. 858 F.2d 160 (4th Cir. 1988).

82. *Id.* at 164.

83. *Id.*

84. *Id.*

85. See 42 U.S.C. § 9607(b)(3) (1988).

inherent responsibility that landowners possess. The acceptance of this responsibility, coupled with the recognition that landowners are often the PRP the EPA first seeks out for compensation, should prompt landowners to attempt to limit their liability. Exposure to liability can be reduced through attempting to contract out of the liability, seeking de minimis settlements, and cooperating with the EPA.

### 1. *Limitations on Contracting Out of CERCLA Liability*

The court in *Mardan Corp. v. C.G.C Music, Ltd.*, recognized that parties can allocate environmental liability between themselves by contract.<sup>86</sup> The court stated:

Contractual arrangements apportioning CERCLA liabilities between private "responsible parties" are essentially tangential to the enforcement of CERCLA's liability provisions. Such agreements cannot alter or excuse the underlying liability, but can only change ultimately who pays that liability. Moreover, regardless of how or under what law these agreements are interpreted, the result cannot prejudice the right of the government to recover cleanup or closure costs from any responsible party . . . .<sup>87</sup>

The Ninth Circuit's holding reflects CERCLA section 9607(e)(1),<sup>88</sup> and has great import for the landowner as he is often the defendant of choice for the government and may have to front the clean-up costs until he can complete an action for contribution under CERCLA.

A defense against a contribution action based on a contrac-

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86. 804 F.2d 1454, 1458 (9th Cir. 1986) ("[A] uniform federal rule should not be developed to govern the issue of whether and when agreements between private 'responsible parties' can settle disputes over contribution rights under section 107 [§ 9607]."). *Id.*

87. *Id.* at 1459. *Accord* *Smith Land & Improv. Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1988); *Channel Master Satellite Sys., Inc. v. JFD Elecs. Corp.*, 702 F. Supp. 1229, 1231 (E.D.N.C. 1988).

88. 42 U.S.C. § 9607(e)(1) states:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

tual agreement will only be upheld if the parties' intent to preclude assertion of statutory rights is clear and unambiguous.<sup>89</sup> The applicable law, however, will be the state law applicable to the contract at issue. Therefore, effectively contracting allocation of potential liabilities varies depending on jurisdiction.

Contractual agreements which can be construed narrowly will not preclude CERCLA liability where it is not clearly the intent of the parties.<sup>90</sup> In *Southland Corp. v. Ashland Oil, Inc.*,<sup>91</sup> an express indemnity clause limited all liability for two years. While holding that parties can contract out of CERCLA liability, the court held that the clause in this case did not preclude liability under CERCLA because the clause was not specific enough as to environmental liability.<sup>92</sup>

Thus, landowners who attempt to allocate CERCLA liability in contracts, such as leases, should be specific in their allocation. In view of the fact that the government may sue them first, landowners should consider the possibility that the indemnity clause will do them no good if the party with whom they contracted is insolvent or non-existent when the hazardous situation is discovered. Therefore, landowners should be prepared to limit their liabilities in other ways.

## 2. *De Minimis Settlements for PRP Landowners*

Congress acknowledged that some PRPs would be unfairly burdened if they were forced to assume large portions of liability under CERCLA's strict liability scheme. Pursuant to section 122(g)(1) of SARA,<sup>93</sup> individuals may qualify as de minimis waste contributors. The EPA is given authority to enter into negotiations with de minimis contributors in an attempt to reach an equitable settlement.

In the typical de minimis settlement, the settling parties, in exchange for a payment, will receive statutory contribution protection under section 122(g)(5)<sup>94</sup> of SARA and may be granted a covenant not to sue where such a covenant is con-

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89. *Mardan*, 804 F.2d at 1461.

90. *Channel Master Satellite Sys.*, 702 F. Supp. at 1231 (E.D.N.C. 1988) (indemnification clause did not apply to violations of federal law).

91. 696 F. Supp. 994 (D.N.J. 1988).

92. *Id.* at 1002.

93. Codified at 42 U.S.C. § 9622(g)(1) (1988).

94. 42 U.S.C. § 9622(g)(5) (1988).

sistent with the public interest under section 122(g)(2).<sup>95</sup>

For those landowners who find themselves liable, but who can show that they have fulfilled many of the requirements that they would need to assert a valid innocent landowner defense, a de minimis settlement often is the best avenue for limiting liability. As the first party which the EPA will sue to pay for a remedial action, many legal costs can be saved by entering into negotiations with the EPA. Refusing to make a de minimis settlement also opens the landowner up for large amounts of liability. If the interest of the landowner is to minimize liability exposure, then a de minimis settlement is almost always the best alternative.

### *3. Cooperation with the EPA Essential to Liability Minimization*

"PRPs who have been unresponsive to information requests or subpoenas generally should not be considered for de minimis settlements."<sup>96</sup> It is never in the interest of a landowner to be uncooperative with the EPA. First, such behavior can obliterate any chances of entering into a de minimis settlement. Second, among the list of factors courts look at when apportioning liability in a contribution action is "the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment."<sup>97</sup> It can only hurt the landowner if he is uncooperative.

Thus, through either contracting out of liability, or seeking a de minimis settlement, exposure to massive liability can be reduced. At a minimum, cooperation with the EPA is essential. There are, of course, no guarantees that any efforts to reduce exposure will help lessen liability in a strict liability scheme considering the harm has already been adjudicated as joint and several.

## *IV. CONCLUSION*

Through the imposition of the moral position standard in analyzing potential landowner liability, courts like the Sixth Circuit in *Meyer* recognize the great influence landowners can

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95. Superfund Program: De Minimis Contributor Settlements, 52 Fed. Reg. 24,334 (1987).

96. *Id.* at n.2.

97. *See supra* note 20.

have over environmental waste problems. The moral position evaluation lies well within the court's equitable powers and allows the court to achieve the goals intended by Congress in CERCLA. If landowners recognize the high standard to which they must conform, then they can act accordingly in preventing harm to the environment. At the same time, by being conscious of their obligation to the public to guard against the release of hazardous substances, landowners can limit their own liability exposure under CERCLA.

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