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Innocence Amid “LUST”:\footnote{1} The Innocent Buyer and Leaking Underground Storage Tanks Containing Petroleum

Kevin R. Duncan*

B. Todd Bailey**

I. INTRODUCTION

Petroleum products have been stored in underground storage tanks (USTs)\footnote{2} since the 1950s.\footnote{3} These products are stored in USTs primarily for safety reasons.\footnote{4} However, with the passage of time, many USTs have developed leaks and have spilled their contents into the surrounding soil and underlying groundwater. Contamination of our groundwater has been called a problem of “national significance”\footnote{5} which

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1. The acronym “LUST” was originally used by the Environmental Protection Agency (EPA) as the designation for “leaking underground storage tanks.” However, “[c]ognizant in this era of new morality that ‘hell has three gates, lust, anger, and greed,’ EPA . . . changed its LUST program to UST.” MICHAEL L. ITALIANO ET AL., LIABILITY FOR STORAGE TANKS 1 (2d ed. 1992) (quoting BHAGAVAD GITA (THE SONG OF GOD) 16 (P. Lal. trans.)). The abbreviation “UST” will be used throughout this paper; however, the acronym “LUST” is used in the title in order to sound more alluring to prospective readers.

2. For purposes of this article, an “underground storage tank” is a tank system, including its piping, that has at least 10 percent of its volume beneath the surface of the ground. See 42 U.S.C. § 6991(1) (1988).


4. Id. “The safety reasons relate to fire and explosion hazards. Obviously, environmental contamination from leakage was overlooked as a safety concern.” Id.; see also U.S. EPA Pub. EPA/530/UST-88-0088, MUSTS FOR USTs 1 (Sept. 1988) [hereinafter MUSTS FOR USTs] (“Leaking USTs can cause fires or explosions that threaten human safety.”).

5. HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984, H.R. CONF. REP. NO. 245
“has the potential to deplete one of our most precious natural resources.” This is of particular concern because fifty percent of Americans rely on groundwater for their drinking water. Moreover, the Environmental Protection Agency (EPA) estimates that a leak of one gallon of gasoline can contaminate the water supply of 50,000 people.

The EPA estimates that there are as many as 2 million USTs at 750,000 facilities nationwide. Approximately eighty percent of those tanks are made of bare steel. The EPA estimates that as many as twenty-five percent of these tanks are leaking due largely to corrosion of the bare steel. The Conference Report on the Hazardous and Solid Waste Amendments of 1984 indicated that 75,000 to 100,000 USTs were leaking and projected that as many as 350,000 USTs could develop leaks within the next five years.
Facilities which commonly use USTs for petroleum storage include not only gasoline stations, but also taxi companies, rental car agencies, fire departments, post offices, marinas, airports, and construction companies.\textsuperscript{14} Many of these facilities have aging USTs made of bare steel.\textsuperscript{15} The EPA estimates that the failure rate for such tanks due to corrosion depends largely on the age of the tank.\textsuperscript{16} Failures for the bare steel tanks begin when they are ten to twenty years old, and is significantly greater for tanks over twenty years old.\textsuperscript{17} An EPA study found that approximately one third of the existing USTs used to store petroleum are over twenty years old or are of unknown age.\textsuperscript{18}

The total number of USTs and the number of leaking USTs is particularly alarming when the cost of cleaning up a single spill is considered. Cleanup costs for a single site range from $20,000 to $1 million.\textsuperscript{19} The average cost rose from $85,000 in 1989 to $135,000 in 1990.\textsuperscript{20} Many owners of USTs may not be able to afford the cost of cleaning up a petroleum spill from their USTs. The median motor fuel outlet in 1987 had $90,000 in net worth, $210,000 in assets, and $14,000 in annual after-tax profits\textsuperscript{21}—hardly a deep pocket. Furthermore, many of these fuel outlets cannot afford pollution liability insurance since the premiums for such insurance have ballooned in the past several years.\textsuperscript{22}

Due to the sheer number of USTs in the United States, a purchaser of property might discover—after closing a deal and

\begin{footnotes}
\item [14] ITALIANO ET AL., supra note 1, at 2.
\item [15] See supra text accompanying note 10.
\item [17] Id.
\item [18] 52 Fed. Reg. 12,662, 12,664 (1987) (to be codified at 40 C.F.R. pt. 280) (discussing EPA, Underground Motor Fuel Storage Tanks: A National Survey (1986)). A study of USTs in Ohio revealed that approximately 15 percent of tanks fail after 15 years, and 70 percent of service station tanks failed after 20 years. ITALIANO ET AL., supra note 1, at 252-53 (citing POLLUTION LIABILITY INSURANCE ASSOCIATION, RISK EVALUATION GUIDE FOR BULK LIQUID STORAGE TANKS (1984)).
\item [20] Id. at 4.
\item [21] 52 Fed. Reg. at 12,671.
\item [22] Ethel S. Hornbeck, 1991 Joint Survey of Gasoline Marketer Underground Storage Tank Activity, 2, reprinted in 1991 Hearings on UST Program, supra note 10, at 205, 206. “Private insurance has become increasingly expensive, placing it out of reach for the average marketer . . . . [O]nly 17 percent of marketers report carrying PLI [pollution liability insurance], down dramatically from the 40 percent that had a policy one year ago [1989].” Id.
\end{footnotes}
acquiring title—that in addition to the property she bargained for, she has received one or more undisclosed USTs as a bonus. Because state\(^\text{23}\) and federal statutes\(^\text{24}\) impose strict liability on landowners for the abatement of environmental contamination on their land, an *innocent purchaser* can be liable for cleanup costs despite the lack of any culpability or involvement with the leak or any knowledge of its presence on the land.\(^\text{25}\) For this reason, and the fact that removing and cleaning up after leaking USTs is so expensive, USTs have been called the "scourge of the nation's commercial real estate business.\(^\text{26}\)

This article will focus on the innocent purchaser who has acquired property without knowledge of one or more leaking petroleum USTs on the acquired property, or without knowledge (or reason to know) of petroleum contamination on that property from a leaking UST.\(^\text{27}\) Part II will examine the portions of the Resources Conservation and Recovery Act of 1976 (RCRA)\(^\text{28}\) which govern petroleum USTs, including financial responsibility for spills and citizen suits to enforce the operative provisions of that statute. Part III will explore the impact of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)\(^\text{29}\) on petroleum USTs. Part IV examines common law causes of action which the innocent purchaser may have against the party(s) at fault including, but not limited to, the party which sold the property to the innocent purchaser. Part V concludes that although relief for the innocent purchaser is limited or nonexistent under federal statutes, various forms of relief are available at


\(^{29}\) 42 U.S.C. §§ 9601-9675 (1986) [hereinafter CERCLA or Superfund].
II. RCRA AND USTS

A. RCRA Subtitle I

Federal regulation of USTs is based primarily on RCRA. Subtitle I of RCRA specifically governs USTs. Congress enacted Subtitle I to address the problem of groundwater contamination by leaking USTs. Subtitle I sets forth the federal standards governing USTs. Eight categories of standards are enumerated: (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. Enforcement of these standards may take place at both the federal and state levels.

1. Shared responsibility of the EPA and state programs

Although Subtitle I is part of a federal statute, states may assume primary responsibility for its enforcement. States


31. RCRA §§ 9001-9010, 42 U.S.C. §§ 6991-6991i. Subtitle I of RCRA was codified as Chapter IX of the Solid Waste Disposal Act (SWDA). 42 U.S.C. §§6991-6991i. In keeping with common usage, the designation "Subtitle I" of RCRA will be used throughout this article to indicate Chapter IX of the SWDA.


34. RCRA § 9003(c)(1), 42 U.S.C. § 6991b(c)(1).

35. RCRA § 9003(c)(2), 42 U.S.C. § 6991b(c)(2).

36. RCRA § 9003(c)(3), 42 U.S.C. § 6991b(c)(3).


38. RCRA § 9003(c)(5), 42 U.S.C. § 6991b(c)(5).

39. RCRA § 9003(d), 42 U.S.C. § 6991b(d).

40. RCRA § 9003(e) 42 U.S.C. § 6991b(e).

41. RCRA § 9004, 42 U.S.C. § 6991c. This shared federal-state responsibility for enforcement of federal statutes and regulations has been called part of the "new federalism," a system in which the federal government delegates authority to the states to implement programs fashioned at the national level and through which the states receive federal funds for implementing the programs as long as they
may submit a UST "release detection, prevention, and correction program for review and approval" by the EPA. A state program is approved only if its regulations are "no less stringent than the corresponding requirements" found in Subtitle I and in EPA regulations.

If a state program receives EPA approval, it will be applied "in lieu of the Federal program and the State shall have primary enforcement responsibility with respect to requirements of its program." However, if the state program is not yet approved, Subtitle I continues to apply in addition to any independent state or local regulations. Thus far, ten states have received final approval of their state UST programs: Georgia, Louisiana, Maine, Maryland, Mississippi, New Hampshire, New Mexico, North Dakota, Oklahoma, and Vermont. Tentative approval has been received by Nevada and Rhode Island. The discussion of Subtitle I which follows is relevant only insofar as it has not been supplanted by state programs.

2. Reach of Subtitle I

Not all USTs are governed by Subtitle I. The scope of Sub-

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maintain the federal standards. Yagerman, supra note 3, at 10,136.
42. RCRA § 9004(a), 42 U.S.C. § 6991c(a); see also 40 C.F.R. § 281 (1988) ("Approval of State Underground Storage Tank Programs"). Partial state programs are permitted: "The program may cover tanks used to store regulated substances referred to in 6991(2)(A) [certain hazardous substances] or (B) [petroleum] or both of this title." Id. (emphasis added).
43. RCRA § 9004(b), 42 U.S.C. § 6991c(b) (emphasis added); 40 C.F.R. § 281.30-281.38 (1988).
44. RCRA § 9004(d)(2), 42 U.S.C. § 6991c(d)(2) (emphasis added).
45. Yagerman, supra note 3, at 10,138.
48. Id. at 24,759.
49. Id. at 29,034.
55. Id. at 186.
56. Id. at 61,376.
57. Id. at 53,870.
58. An examination of the UST programs of individual states is beyond the scope of this article. For a list of state statutes affecting USTs, see ITALIANO ET AL., supra note 1, app. 2, at 404-35.
Title I has two important delimitations: a definition of the tanks which are regulated, and the designation of substances within those tanks which are regulated. OnceSubtitle I is found to apply to a particular UST, the persons who may be held responsible for the UST and any spills must be determined.

a. Tanks regulated by Subtitle I. Subtitle I governs only USTs which meet its definition of USTs. For purposes of Subtitle I, a UST is a tank (including the underground pipes connected thereto) of which at least ten percent is beneath the surface of the ground\(^{59}\) and which is used to contain a “regulated substance” as defined in Subtitle I.\(^{60}\) Some USTs are exempted from Subtitle I. Exempt USTs include farm or residential tanks with a capacity of 1100 gallons or less which are used for noncommercial purposes,\(^{61}\) and tanks used for storing heating oil for use on the premises where the oil is stored.\(^{62}\) Subtitle I’s definition of UST encompasses about 1.4 million tanks nationwide.\(^{63}\)

b. Substances regulated by Subtitle I. Some USTs meeting Subtitle I’s UST definition still fall outside of the scope of Subtitle I due to the type of substances stored in those tanks. Subtitle I only governs “regulated substances” which are defined as “(A) any substance defined in section 9601(14) [CERCLA section 101]\(^{64}\) of this title (but not including any substance regulated as a hazardous waste under subchapter III of this chapter), and (B) petroleum.”\(^{65}\) Note that petroleum is specifically regulated by Subtitle I. In addition, substances

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59. For a definition of “beneath the surface of the ground,” see 40 C.F.R. § 280.12 (1988).
60. RCRA § 9001, 42 U.S.C. § 6991, see also 40 C.F.R. § 280.12.
61. RCRA § 9001(1)(A), 42 U.S.C. § 6991(1)(A); see also 40 C.F.R. § 280.12.
62. RCRA § 9001(1)(B), 42 U.S.C. § 6991(1)(B). Other types of tanks are also excluded from Subtitle I’s definition of UST. These include septic tanks; certain regulated pipeline facilities; surface impoundment, pit, pond, or lagoon; storm or waste water collection systems; flow-through process tanks; liquid trap or gathering lines used in oil and gas production and gathering operations; and storage tanks located in underground area but above or upon the surface of the floor where it is located. RCRA § 9001(C)-(I), 42 U.S.C. § 6991(1)(C)-(I).
64. For a discussion of CERCLA classification of substances as hazardous substances, see infra notes 126-130 and accompanying text.
which are otherwise regulated by RCRA subchapter III—"Hazardous Waste Management"—are excluded from Subtitle I thereby avoiding overlap of these two RCRA chapters.

c. **Persons regulated by Subtitle I.** Subtitle I regulations focus on owners and operators of USTs. An operator is "any person in control of, or having responsibility for, the daily operation of the underground storage tank." "Daily operations" should exclude unintentional, inadvertent, or passive operation.

The term "owner" is much less straightforward. Subtitle I has two definitions of owner which depend upon when a UST is "in use":

(3) The term "owner" means—

(A) in the case of any underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances, and

(B) in the case of any underground storage tank in use before November 8, 1984, but no longer in use on November 8, 1984, any person who owned such tank immediately before the discontinuation of its use.

These definitions of an owner are problematic. For example, suppose a tank in use after November 8, 1984, is found to be leaking. Further suppose that the tank has been leaking for several years during which time the ownership of the tank has changed several times. The definition of an owner of a tank in

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67. RCRA § 9003(a), 42 U.S.C. § 6991b(a).


69. Yagerman, supra note 3, at 10,140.

70. RCRA § 9001, 42 U.S.C. § 6991(3) (emphasis added); see also 40 C.F.R. § 280.12.

71. Yagerman, supra note 3, at 10,140.
use after November 8, 1984, is phrased in the present tense, suggesting that only the current owner of the tank meets the Subtitle I definition of owner. This interpretation is partially remedied by language in Subtitle I which states that Subtitle I liability of an owner or operator of a UST may not be transferred by conveyance to another person.  

The determination of who is the operator or owner of a UST is important due to the substantial liability which accrues to them for violations of Subtitle I’s provisions. An owner who knowingly fails to notify the appropriate state or local agency concerning the existence of a UST, or who submits false information with respect thereto, is subject to a civil penalty of up to $10,000 for each tank. Failure of an owner or operator to comply with EPA regulations and standards under approved state programs is subject to a civil penalty of up to $10,000 per tank for each day of violation. Owners and operators may also be liable for the costs of “corrective actions” incurred by the EPA or states.

3. Response to leaking UST

The responsibility to respond to a leaking UST is shared by the EPA (or the analogous state agency in states with EPA approved UST programs) and the owner or operator of the UST. The initial “corrective action” upon discovering that a UST is leaking must be undertaken by the owner or operator. The EPA, however, may also commence “corrective actions” which are paid for with funds from a trust established for that purpose in certain circumstances.


No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any underground storage tank or from any person who may be liable for a release or threat of release under this subsection, to any other person the liability imposed under this subsection. 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.

73. RCRA § 9006, 42 U.S.C. § 6991e(d)(1).


75. See infra notes 77-84 and accompanying text.

76. RCRA § 9003, 42 U.S.C. § 6991b(h)(6).
a. Corrective action. Upon confirming that a petroleum UST is leaking, the owner or operator must initiate a response to the leak within twenty-four hours. The response must include reporting the release to the EPA, prevention of further leakage, and identifying and mitigating fire, explosion and vapor hazards. Next, the owner or operator must undertake a series of abatement measures including removal of any petroleum remaining in the tank and cleanup of any free product in order to prevent further potential damage to groundwater.

The EPA may also undertake "corrective actions" to limit damage caused by a leaking petroleum UST. In addition to undertaking the actions required of owners and operators, allowable EPA corrective actions may include temporary or permanent relocation of affected residents and the procurement of alternative water supplies. However, the EPA may undertake these corrective actions only if such action is necessary "to protect human health and the environment" and one or more of the following circumstances exists: (1) no responsible and able party can be found to clean up the leak, (2) the situation requires prompt attention in order "to protect human health and the environment," (3) the owner or operator of the tank refuses to comply with an EPA order to undertake the corrective actions, or (4) "[c]orrective action costs at a facility exceed the amount of coverage required by" Subtitle I and, therefore, "expenditures from the Leaking Underground Storage Tank Trust Fund are necessary to assure an effective corrective action."

77. The steps for investigating and confirming the existence of a leak are enumerated in 40 C.F.R. § 280.52 (1988) ("Release investigation and confirmation steps.").
78. 40 C.F.R. § 280.61.
79. Id.
80. Id. § 280.62.
81. Id. § 280.64.
82. RCRA § 9003(h)(2), 42 U.S.C. § 6991b(h)(2). The EPA is also authorized to issue an order requiring compliance with the provisions of Subtitle I. RCRA § 9006(a)(1), 42 U.S.C. § 6991e(a)(1). In addition, the EPA may commence a civil action in federal court seeking an injunction or other appropriate remedy. RCRA § 9006(a)(1), 42 U.S.C. § 6991e(a)(1).
83. RCRA § 9003(h)(5), 42 U.S.C. § 6991b(h)(5).
84. RCRA § 9003(h)(2), 42 U.S.C. § 6991b(h)(2) (emphasis added).
b. **UST financial responsibility and the UST Trust Fund.** Subtitle I requires that UST owners or operators demonstrate their "financial responsibility" by proving that they have a predetermined "amount of coverage." The amount of coverage is an indication of a UST owner or operator's ability to pay for cleanup of potential leaks of petroleum. Owners or operators of USTs used for retail sales must have $1,000,000 of coverage; all other owners and operators must have $500,000 of coverage. The Trust Fund, which is financed through a gasoline tax, ensures that sufficient funds will be available for cleanup of spills. However, these funds are not to be used in lieu of the resources to be provided through the "amount of coverage" required of owners and operators. Instead, these funds are for cleanup costs which exceed the required coverage.

The demonstrated financial responsibility of owners or operators plus the Trust Fund resources may appear to be available to the innocent purchaser of real estate containing a leaking UST. However, Subtitle I does not explicitly provide a means for the innocent purchaser to reach the resources of former owners. Moreover, the resources of the Trust Fund are available only to assist owners and operators who have demonstrated their financial responsibility. These resources cannot be reached by the innocent purchaser.

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86. 40 C.F.R. § 280.93(a).
87. Yagerman, supra note 3, at 10,143 n.122.
89. Id. The EPA indicated that the "Trust Fund . . . was created to provide cleanup of UST releases in particular circumstances. Congress did not authorize its use as a financial assurance mechanism. Rather the fund is intended to 'stand behind' the owner or operator who has obtained financial responsibility in the required amounts." Id.
90. The EPA is authorized to seek recovery of costs it incurs in the cleanup of a spill from a petroleum UST. "Whenever costs have been incurred by the [EPA] for undertaking corrective action or enforcement action with respect to the release of petroleum from an underground storage tank, the owner or operator or such tank shall be liable to the [EPA] for such costs." RCRA § 9003(h)(6)(A), 42 U.S.C. § 6991b(h)(6)(A).
B. **RCRA Citizen’s Suits**

Section 7002 of RCRA permits “citizen’s suits” to enforce RCRA’s regulatory scheme. Of the three types of citizen’s suits, only one is of value to the innocent purchaser of real estate seeking reparation of damages from a leaking petroleum UST. That type of citizen’s suit is based on RCRA section 7002(a)(1)(B) which provides that a person may commence a civil suit on his own behalf

against any person ... including any ... past or present owner or operator of a ... storage ... facility, who has [1] contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any [2] solid or hazardous waste [3] which may present an imminent and substantial endangerment to health or the environment.

Section 7002(a)(1)(B) lists three elements of a citizen’s suit which determine whether such a suit may be maintained: (1) contribution, (2) a solid or hazardous waste, and (3) an immi-

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92. RCRA § 7002(a), 42 U.S.C. § 6972(a).
93. Two other types of citizen’s suits are available. First, RCRA § 7002(a)(1)(A) permits an aggrieved party to initiate a citizen suit “against any person ... who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order” pursuant to the provisions of RCRA. 42 U.S.C. § 6972(a)(1)(A) (emphasis added). The person against whom the suit is filed must currently be in violation of the enumerated provisions. RCRA § 7002, 42 U.S.C. § 6972; see also Harris Bank Hinsdale v. Suburban Lawn, Inc., No. 92 C 8814, 1992 U.S. Dist. LEXIS 19737, at *5 (N.D. Ill. Dec. 22, 1992) (past leak of gasoline from a UST did not provide sufficient basis for RCRA citizen suit pursuant to 42 U.S.C. § 6972(1)(1)(A)). The suit cannot be based on “wholly past” violations of the statute. Gwaltney v. Chesapeake Bay Found., Inc., 484 U.S. 49, 57, 64 (1987) (phrase “alleged to be in violation” in the Clean Water Act required showing of present, ongoing violation to support citizen’s suit). Acts or omissions which occurred prior to the innocent owner’s acquisition of the property containing a leaking UST cannot form the basis for a citizen’s suit pursuant to RCRA § 7002(a)(1)(A). Harris Bank Hinsdale, 1992 U.S. Dist. LEXIS, at *5. Therefore, this type of citizen suit is ineffectual for the innocent purchaser.

Second, RCRA § 7002(a)(2) provides that “any person may commence a civil action on his own behalf ... against the [EPA] where there is alleged a failure of the [EPA] to perform any act or duty under [RCRA] which is not discretionary with the [EPA].” 42 U.S.C. § 6972(a)(2). This suit is also of limited value to the innocent purchaser. This type of citizen’s suit will permit the innocent purchaser to compel the EPA to act in its regulatory role. However, it will not enable the innocent purchaser to extract from prior owners or operators the resources or reimbursement for cleanup of the leaked petroleum.

nent and substantial endangerment. A federal district court considered, in two installments of Zands v. Nelson, whether the three elements were present in a case dealing with a gasoline leak from a UST. The court's decisions will be considered below.

1. Zands I: leaked gasoline as a RCRA "solid waste"

In 1980, plaintiffs Samuel and Sara Zands purchased a gasoline service station. Prior to the plaintiffs' acquisition of the station, its gasoline tanks leaked large amounts of gasoline into the surrounding soil and into the groundwater. The plaintiffs claimed that they were unaware of the leakage.

The plaintiffs filed suit against various prior owners and operators of the station. The plaintiffs' complaint stated various causes of action including a claim based on the citizen's suit provision of RCRA section 7002(a)(1)(B). Both the plaintiffs and the defendants moved for summary judgement concerning the plaintiffs' citizen's suit. The issue of whether a citizen's suit under RCRA section 7002(a)(1)(B) could be based on a petroleum leak from a UST was one of first impression for any federal court.

The court began by analyzing RCRA's definition of "solid waste." RCRA solid waste includes "discarded material" whether in a solid, liquid or gaseous form. The court noted that the RCRA regulations define "discarded material" as material which has been abandoned, and that materials are solid wastes if they have been "abandoned" by being "disposed" of. The court also noted that the RCRA definition of "disposal" includes "leaking." The court recognized that this

97. Id.
98. Id.
99. Id. at 1261-64. The court acknowledged that this definition of solid waste is broad, but not so broad as to include materials which are still useful. However, the court notes, gasoline which has leaked into the soil is no longer useful despite that fact that it once had great utility. Id. at 1262.
100. Id. at 1261 (citing RCRA § 1004, 42 U.S.C. § 6903(27) (1983 & Supp. 1991)).
101. Id. (citing 40 C.F.R. § 261.2(a)(2) (1988)).
102. Id. at 1261-62 (citing 40 C.F.R. § 261.2(b)).
103. Id. at 1262 (citing 42 U.S.C. § 6903(3) [RCRA § 1004(3)] (1983 & Supp. 1991)).
chain of definitions was circuitous. Nevertheless, the court overlooked this flaw and concluded that Congress intended that RCRA's solid waste provisions apply to gasoline leaks from USTs.  

2. Zands II: "imminent and substantial endangerment" and contribution

   a. "Imminent and substantial endangerment." In addition to reiterating its conclusion from Zands I concerning leaked gasoline as a solid waste, the Zands II court proceeded to discuss whether the "imminent and substantial endangerment" and contribution requirements of RCRA section 7002(a)(1)(B) were satisfied. The term "imminent and substantial endangerment" is not defined by RCRA. Therefore, the court looked to other judicial authority for a definition and adopted the following definition: "An 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public. It is not necessary that the final anticipated injury actually have occurred prior to a determination that an 'imminent hazard' exists." The court concluded that a gasoline leak could ultimately result in harm to the public. Therefore, the "imminent hazard" requirement was met.

   b. Contribution. The court noted that "[i]ndividuals are

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104. Id. at 1263-64. The court also stated that the plain meaning of the statute was sufficient to conclude that RCRA hazardous waste provisions applied to gasoline leakage from a UST.


106. Id. at 808.
liable under RCRA without regard to fault or negligence.”\(^\text{107}\) However, the court points out that the “contributed to” language of RCRA section 7002(a)(1)(B) requires a causal relationship between a defendant and the “imminent and substantial endangerment.”\(^\text{108}\) Plaintiffs may carry their burden of proof concerning this causal relationship simply by proving that a defendant owned or operated a gas station:

> [O]wners and operators contribute to the contamination if the contamination is the direct result of activities related to the operation of a gas station; plaintiff need not prove the specific cause of the contamination. Clearly, individuals who own or operate gas stations are responsible for gasoline that leaks from the piping system or the gas tanks themselves. Indeed, the direct relationship between the leakage and the equipment owned and operated for use at the gas station is sufficient to prove the element of “contribution.”\(^\text{109}\)

Furthermore, the court concluded that (1) if a plaintiff identifies a period of time during which the petroleum leak occurred, (2) for which the defendants are strictly liable, (3) and if all defendants are joined in the action, (4) but the plaintiff cannot prove which of the defendants “caused” the leakage, then the burden shifts to the various defendants to prove that they are not liable for the damage resulting from the leak.\(^\text{110}\)

3. Procedural hurdles

Three additional prerequisites must be met by a plaintiff pursuing a section 7002(a)(1)(B) citizen’s suit. First, the plaintiff must have legal standing to bring the suit. The first line of section 7002(a) states that “any person may commence a civil action” under that section.\(^\text{111}\) However, the legislative history indicates that the term “any person” “does not affect recognized requirements regarding legal standing to bring a case.”\(^\text{112}\) Second, ninety days prior to commencing the suit, the plaintiff must give “notice of the endangerment” to the

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107. Id. at 809.
108. Id.
109. Id. at 810 (emphasis added).
110. Id. at 817-18.
111. RCRA § 7002(a), 42 U.S.C. § 6972(a).
EPA, the state in which the tank is located, and the person alleged to be in violation of RCRA. The ninety day period need not be non-adversarial; a suit by the plaintiff may be pending against the alleged violator when the ninety-day notice is given.

Third, no action against the alleged violator may be commenced if the EPA, "in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment is actively attempting to remedy the "alleged endangerment." These attempted remedies may include prosecuting the alleged violator, engaging in removal of the solid waste, or obtaining a court order to have the violator commence a removal action. A similar prohibition applies for analogous action taken by the state.

4. Available remedies

An innocent purchaser of real estate containing an undisclosed leaking UST may be able to bring a citizen's suit against prior owners or operators of the UST. However, the suit will not necessarily yield the remedy sought. Depending upon the circumstances, a district court has jurisdiction to do the following: (1) to enforce the provisions of RCRA which are allegedly violated; (2) to restrain the defendant from causing further harm; or (3) to order the defendant "to take such other action as may be necessary." None of these remedies appears to allow a court to award damages to the injured innocent purchaser. In fact, no court has awarded damages under the citizen's suit provisions to an innocent purchaser of real estate containing a leaking UST. The only relief available is enforcement of the RCRA regulations. The innocent purchaser must look elsewhere for more complete compensation for dam-

114. Zands I, 779 F. Supp. 1254, 1259-61 (S.D. Cal. 1991) (plaintiffs permitted to amend their complaint to add a citizen's suit pursuant to RCRA § 7002(a)(1)(B) while the action against the plaintiff was pending).
118. RCRA § 7002(a), 42 U.S.C. § 6972(a).
119. RCRA does provide for civil penalties, but these penalties are paid to the government. See RCRA § 7001(a), 42 U.S.C. § 6971(a); RCRA § 3008(a), (g), 42 U.S.C. § 6928(a), (g).
ages sustained due to the leaking UST.

III. CERCLA

A. CERCLA generally

CERCLA\(^{120}\) is a congressional response to the environmental harm caused by improper disposal of hazardous waste. Congress enacted CERCLA to respond to public perception of the massive problem of inactive hazardous waste sites and spills of toxic chemicals.\(^{121}\) CERCLA established a system for governmental response to spills of hazardous materials and long-term problems associated with abandoned hazardous waste.\(^{122}\) In addition, CERCLA provides for a "citizen suit" whereby private citizens can sue polluters to enforce the provisions of CERCLA and recover for harms they have suffered.\(^{123}\) For instance, the 1986 amendments authorize private contribution actions—with a three-year statute of limitations—which allow courts to allocate response costs among liable parties.\(^{124}\) In addition, the citizen suit provision permits any individual to enforce the Act if the government has not commenced an action for cleanup.\(^{125}\)

CERCLA liability hinges on whether a substance is classified as a "hazardous substance."\(^{126}\) Hazardous substances under CERCLA include substances and pollutants listed in the

122. Id.
124. SARA § 113(b), (g), and (f). The role of the CERCLA contribution action has limited applicability to a purchaser of land whom we have assumed to be totally free of wrongdoing. Because it is assumed that no action has yet been brought against the purchaser, the present discussion will not pursue this as a potential cause of action.
125. CERCLA § 310, 42 U.S.C. § 9659.
Clean Water Act, hazardous wastes listed in the Solid Waste Disposal Act (RCRA), hazardous pollutants listed in the Clean Air Act, toxic substances listed in the Toxic Substances Control Act, and other designated substances. Even though a substance is deemed a "hazardous substance" under CERCLA, it may not actually come within the purview of the statute. This may occur, for example, due to the CERCLA "petroleum exclusion."

B. The CERCLA Petroleum Exclusion

Congress provided broad coverage for CERCLA through its definition of hazardous substances. Nevertheless, Congress provided for an exclusion from CERCLA coverage: "The term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance . . . ." In creating this exclusion, Congress failed to define the terms "petroleum" and "fraction." This has permitted some confusion concerning the applicability of CERCLA to spills of gasoline and other petroleum products from USTs. The confusion has arisen because some of the common components of petroleum—including benzene, toluene, xylene, ethyl-benzene and lead—are themselves listed as CERCLA hazardous substances.

1. The leading case: Wilshire

In Wilshire Westwood Ass'n. v. Atlantic Richfield Corp., the Ninth Circuit considered the scope of the petroleum exclusion. In 1987, Wilshire filed a complaint against Atlantic Richfield alleging a claim for response costs pursuant to section 107(a) of CERCLA. Wilshire alleged that gasoline contain-

131. See supra notes 126-130 and accompanying text.
133. 881 F.2d 801 (9th Cir. 1989).
134. Id. at 802. Section 107(a) of CERCLA imposes strict liability on the polluter. That section provides in pertinent part:
   Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
ing "hazardous substances" including benzene, toluene, xylene, ethyl-benzene and lead leaked from a USTs contaminating the surrounding soil including soil on land owned by Wilshire. Wilshire attempted to circumvent the CERCLA petroleum exclusion by listing the hazardous substances that are "fractions" of gasoline, arguing that these hazardous fractions should trigger liability for cleanup under CERCLA regardless of their presence in an exempted petroleum product. The Ninth Circuit, affirming the decision of the lower court, concluded that CERCLA does not apply to gasoline even though some of its component parts or common additives are separately designated as hazardous substances by this statute. In reaching its conclusion, the court considered the plain meaning of the language of the exclusion, the EPA's interpretations of the exclusion, and the legislative history of the statute.

The court began its discussion of the plain meaning of the petroleum exclusion by reviewing standards of statutory construction. In particular, the court pointed out that the interpretation of a statute should be in keeping with the general intent of its framers and that its provisions "should not be construed to make surplusage of any provisions." With no further analysis, the court held that application of the standards of statutory construction to the CERCLA petroleum exclusion "requires us to exclude gasoline, even leaded gasoline,

(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

(4) ... shall be liable for—

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.


135. Wilshire, 881 F.2d at 802. The court took judicial notice of the facts that benzene, toluene, xylene, ethyl-benzene, and lead are CERCLA hazardous substances and that they are all components of crude oil. Id. at 803.

136. The court took judicial notice of the term "fraction": a fraction is "one of several portions (as of a distillate or precipitate) separable by fractionation and consisting either of mixtures or pure chemical compounds." Wilshire, 881 F.2d at 803 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED (1981)).

137. Id.

138. Id. at 810.

139. Id. at 804.


141. Id. (quoting Pettis ex rel. United States v. Morrison-Knudson Co., 577 F.2d 668, 673 (9th Cir. 1978)).
from the term ‘hazardous substance’ for purposes of CERCLA. Any other construction ignores the plain meaning of the statute and renders the petroleum exclusion a nullity.”

Next, the court noted the lack of legislative history. Congress provided virtually no legislative history to accompany its enactment of CERCLA. Therefore, the court looked to subsequent legislative “history” for clues concerning Congress’ intent concerning the petroleum exclusion. To that end, the court examined congressional action when Congress had the opportunity to amend CERCLA and its petroleum exclusion. The court quoted statements from various members of Congress indicating that those members believed that petroleum spills were exempt from CERCLA. The court recognized that these statements provide some inferential, although “hazardous,” indication of the vitality of the petroleum exclusion.

Finally, the Wilshire court considered the EPA’s interpretations of the petroleum exclusion. The court indicated that it reviewed memoranda from the EPA’s General Counsel, as well as EPA pronouncements in the Federal Register, interpreting the petroleum exclusion. The court did not discuss the contents of the various memoranda and entries in the federal

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142. Id.
143. Id. at 805.
144. Id. at 806-08.
145. Id. at 807. The quotations included such statements as the following. “Spills of the fuel cannot be cleaned up under the Superfund [CERCLA] law because it is a petroleum product.” Id. (quoting 130 Cong. Rec. S2028, S2080 (daily ed. Feb. 29, 1984) (Senator Durenberger introducing the 1984 amendments to RCRA)). RCRA should be “amended to address the problem of leaking underground storage tanks, including petroleum tanks which are not covered by Superfund.” Id. (quoting Rep. Strangeland in House debate on the Superfund Amendments and Reauthorization Act of 1986, 132 Cong. Rec. H9572 (Oct. 8, 1986)). And “[t]his bill will not diminish the scope of the present petroleum exclusion.” Id. at 808 (quoting 132 Cong. Rec. S14,932 (daily ed., Oct. 3, 1986) (Sen. Simpson during SARA debate)).
146. Id. at 808.
147. Id. at 808 n.8.
148. Among the memoranda cited by the court is one dated July 31, 1987. Id. In this memorandum, the EPA General Counsel opines that “fractions of crude oil, including hazardous substances such as benzene . . . must be included in the term ‘petroleum’ for that provision to have any meaning. EPA Gen. Coun. Memo. on “Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2),” at 5 (July 31, 1987). This memo also explained the EPA’s position relative to lead additives for gasoline: “Petroleum” under CERCLA also includes hazardous substances which are normally mixed with or added to crude oil or crude oil fractions during the
register, but it concluded that "the EPA's interpretation of the scope of the petroleum exclusion is entirely consistent with its plain meaning and legislative history ..." Moreover, the court "conclude[d] that the EPA's interpretation of the scope of the petroleum exclusion should be accorded considerable deference, especially because of the virtual absence of contemporaneous legislative history." The Wilshire court concluded that the CERCLA petroleum exclusion applies to both refined and unrefined gasoline despite the fact that certain of its indigenous components and additives introduced during the refining process are designated as hazardous substances under CERCLA. Accordingly, Wilshire's CERCLA claim against Atlantic Richfield was dismissed for lack of subject matter jurisdiction.

2. Post-Wilshire developments.

The Wilshire court suggested that petroleum products which contain substances other than their indigenous components and common additives would not be excluded from the reach of CERCLA. Subsequent courts have reached the same conclusion under a variety of circumstances. For instance, "waste oil" resulting from cleaning oil tanks did not fall within the petroleum exclusion because it contained chromium and nickel oxides scraped from the interior of the tanks during the cleaning process. Likewise, the petroleum exclusion did not

refining process . . . . These substances are also part of "petroleum" since their addition is part of the normal oil separation and processing operations at a refinery in order to produce the product commonly understood to be "petroleum."

Id. For additional discussion concerning the interpretive pronouncements by the EPA, see Michael M. Gibson & David P. Young, Oil and Gas Exemptions Under RCRA and CERCLA: Are They Still "Safe Harbors" Eleven Years Later, 32 S. Tex. L. Rev. 361 (1991); Richard J. Denny et al., Contamination From Oil and Gas Production: Who Pays for Cleanup? 1990 Min. L. Inst. ch. 6 (proceedings of 36th Annual Institute) (July 19-21, 1990). 149.

Wilshire, 811 F.2d at 808.

150. Id. at 810. Furthermore, Congress granted the EPA considerable discretion in administering CERCLA. Id. at 809. This is evidenced by language in CERCLA requiring the EPA to promulgate regulations designating and governing hazardous substances. Id. (citing CERCLA § 102(a), 42 U.S.C. § 9602(a)).


152. Wilshire, 881 F.2d at 803 n.3. "The district court simultaneously dismissed plaintiffs' pendent claims for lack of subject matter jurisdiction, thereby resulting in dismissal of the action." Id.

153. Id. at 805.

apply to waste oil in which the concentration of hazardous substances increased during use.\textsuperscript{155}

However, the petroleum exclusion is not overcome by the introduction of all substances to the petroleum. The introduction of soil which does not contain CERCLA-listed hazardous substances will not of itself overcome the petroleum exclusion.\textsuperscript{156} Instead, the exclusion is overcome by the introduction, or increased concentration of substances which are otherwise designated as hazardous substances.\textsuperscript{157}

Whether an aggrieved party has a cause of action under CERCLA for a leaking UST will depend upon the substance leaked. If the UST contained hazardous substances other than petroleum with its indigenous components and common additives, the injured party will not be barred from pursuing relief under CERCLA for any harm suffered. If, however, a UST contained only petroleum with its indigenous components and common additives, the injured party does not have a CERCLA cause action against the polluter.

IV. COMMON LAW LIABILITY

Since the innocent purchaser will likely not be made whole through actions or proceedings based on federal statutes, the purchaser should consider various common law remedies. Many common law theories may be employed by the innocent purchaser to recoup costs incurred to cleanup the damage caused by a leaking petroleum UST. Of course, the applicable theories will depend upon the facts of the given case and upon the case law of the jurisdiction. The various theories include actions arising from the sale of the real estate (e.g., breach of contract or fraud), negligence, nuisance, and strict liability.

A. Actions Arising from the Sales Transaction

1. A hurdle: caveat emptor

A legal hurdle in UST cases involving causes of action


\textsuperscript{157} Id.
arising out of a sales transaction has been the doctrine of *caveat emptor*. The Restatement (Second) of Torts summarizes this view of vendor liability: "Under the ancient doctrine of *caveat emptor*, the original rule was that, in absence of express agreement, the vendor of land was not liable to vendee, or a fortiori to any other person, for the condition of land existing at the time of transfer . . . ."\(^{158}\) Some courts have created exceptions to the doctrine of *caveat emptor* and have been reluctant to take a harsh stand in environmental cases.\(^{159}\)

However, a recent Third Circuit decision leaves the availability of common law actions by purchasers against sellers in a questionable status. In *Philadelphia Electric Co. (PECO) v. Hercules Inc.*,\(^{160}\) the court held that the seller was not liable to the purchaser, PECO, for an alleged nuisance involving environmental contamination on the land sold. The court concluded that a vendor is liable only for express provisions in the contract of sale.\(^{161}\) The court stated that

> In the absence of fraud or misrepresentation a vendor is responsible for the quality of the property being sold by him only to the extent for which he expressly agrees to be responsible . . . . The theory of the doctrine is that the buyer and seller deal at arm’s length, each with an equal means of knowledge concerning the subject of sale, and that therefore the buyer should be afforded only those protections for which he specifically contracts.\(^{162}\)

After considering PECO’s sophistication in purchases of this kind, the court found that PECO’s offer price reflected the possibility of environmental risks.\(^{163}\) *PECO* stands as a strong impediment to recovery actions by subsequent purchasers on common law theories.\(^{164}\) The court was reluctant to

\(^{158}\) *RESTATEMENT (SECOND) OF TORTS* § 352 comment a (1977).

\(^{159}\) See *Johnson v. Davis*, 480 So. 2d 625, 628 (Fla. 1985) (“the tendency of the more recent cases has been to restrict rather than extend the doctrine of *caveat emptor*”).


\(^{161}\) *Id.* at 312.

\(^{162}\) *Id.* (quoting *Elderkin v. Geister*, 288 A.2d 771, 774-75 (Pa. 1972)).

\(^{163}\) *Id.* at 314.

\(^{164}\) Care should be exercised when reading cases which discuss the defense of *caveat emptor*. This defense may be an impediment on common law cases, but is not a bar to recovery in other types of environmental cases. See, e.g., *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988) (*caveat emptor* inapplicable to actions under CERCLA); *Sunnen Prod. Co. v. Chemtech Indus. Inc.*, 658 F. Supp. 276 (CERCLA case in which court stated the defense of *caveat emptor* is not a bar to recovery).
hold sellers liable to potentially remote buyers, especially when the price reflected a good faith attempt to allocate risks.\(^{165}\)

2. **Contract actions**

A contracts might also provide a basis for a common law cause of action if a breach of that contract occurred. Unfortunately, real estate contracts rarely specify a warranty clearly enough to impose liability on the seller.\(^{165}\) Assuming that the seller passes good title, an innocent purchaser might claim a breach of covenant against encumbrances. However, one court has ruled that a claim based on a breach of covenant against encumbrances does not extend to hazardous waste.\(^{167}\) The term "encumbrance" is usually associated with liens, mortgages, easements, restrictive covenants and other third party interests in the land.\(^{168}\) Because the innocent buyer's liability for cleanup does not create an outstanding right at the time of conveyance, an action based on breach of this covenant is not likely to succeed.\(^{165}\)

If a clear promise was made in a contract and then broken, that promise might be a better foundation for a claim for breach. For example, a seller might contract to remediate some harmful waste if such waste were to appear. In that unlikely event, failure to perform such a promise would increase the chances of the seller's liability. But a simple "as is" clause in a purchase agreement can preclude an action for breach.\(^{170}\)

Another theory based in contractual terms is an action based on unjust enrichment. "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."\(^{171}\) The restitution would be equal to the excess of the cleanup cost over the value of the land trans-

\(^{165}\) See *PECO*, 762 F.2d at 314.


\(^{168}\) Id.

\(^{170}\) See *Allied Corp. v. FROLA*, 30 Env't Rep. Cas. (BNA) 1954 (D.N.J. 1989) (court refused to recognize a breach of contract action to recover cleanup costs, though other common law claims were possible).


\(^{171}\) *Restatement of Restitution § 1* (1937).
ferred. At least one court has rejected this theory. That court held that the purchaser could not recover cleanup costs from the prior owner on an unjust enrichment claim because the seller received the benefit involuntarily.

Finally, a purchaser might consider bringing an action to rescind the transaction completely because of a mutual mistake of fact. One court commented that "if there were no representations of any kind made by the defendants, rescission should be granted." The court reasoned that mutual mistake would exist if neither party were aware of any environmental problems which would give rise to liability. If petroleum USTs are the source of liability, the seller will usually know of such a possibility, suggesting that other causes of action would be better suited. If the seller did not know of the existence of the USTs, then rescission would be one of the only claims cognizable under common law.

3. Fraud or misrepresentation

As the PECO court pointed out, a purchaser may maintain an action for fraud or misrepresentation against the offending vendor in two situations. First, the fraud can be a positive assertion of a false material fact. Second, the seller can purposely conceal knowledge about environmental problems associated with the property. In both scenarios, even courts reluctant to impose liability will probably do so.

For example, New Jersey's Supreme Court recognized an exception to caveat emptor for fraudulent nondisclosure in State Department of Environmental Protection v. Ventron Corp. The court stated that to prove fraudulent concealment by a seller in a real estate transaction, the buyer must prove "deliberate concealment or nondisclosure by the seller of a material fact or defect not readily observable to the purchaser."
er, with the buyer relying upon the seller to his detriment." 179

In Ventron, the court regarded mercury pollution in soil as a latent defect. 180 The buyer knew the purchase involved a chemical company, but it did not know of any contamination. The seller knew of the contamination but intentionally failed to disclose its existence at the time of the purchase. 181 The court held that the buyer could recover any decrease in the land's market value, the cost of a containment system put in by the buyer, and legal fees incurred by the buyer. 182 In addition, the court did not hold the buyer liable to the government for response costs. 183

Misrepresentations by the seller, even those without fraud, can often provide a basis for liability. 184 The usual remedy allows the buyer to retain the property and receive the difference between what the property is worth and what it would have been worth without the misrepresentation. However, one court has ruled that a seller's superior, even if not actual, knowledge makes his nondisclosure tantamount to an affirmative statement. 185 Because some courts have accepted the notion of a stricter duty to disclose environmental defects, 186 a seller's failure to disclose pertinent facts can result in an action for damages by the purchaser who relied upon such a misrepresentation. The misrepresentation might be sufficiently material to rescind the transaction due to mutual mistake. It might also nullify an "as is" clause in the purchase agreement or it may even allow the purchaser to receive punitive damages from the seller.

B. Negligence

Most UST litigation founded on common law principles is based on negligence, or on negligence in combination with other theories including contract, trespass, and nuisance. 187 Neg-
ligence, independent of the other theories, will be discussed separately. The elements of ordinary negligence include (1) a duty to exercise reasonable care, (2) a breach of the duty, (3) causation in fact, plus proximate cause, and (4) actual harm to the plaintiff. 188

1. Duty of reasonable care

In order to prevail, a plaintiff must show, by a preponderance of the evidence, that a defendant had a duty associated with a leaking UST. Proof of a leak is irrelevant without a showing of such a duty. Some pre-RCRA cases held that a UST owner or operator who had no notice of a leak—and who was not required by a contract or trade practice to monitor the UST—could not be held liable for negligence associated with a leak from the tank. 189

Congress changed this with the enactment of RCRA and promulgation of regulations thereunder. RCRA has imposed rules concerning UST design, construction, installation, 190 monitoring 191 and leak detection. 192 These rules establish a minimum standard of care for tank owners and operators. A violation of these rules can constitute negligence per se. 193 If plead by a plaintiff, this would shift the burden of proof away from the plaintiff and on to the defendant who has violated RCRA’s regulations.

2. Breach of duty of care

Failure to plead a breach of the defendant’s duty of care can defeat a cause of action based on negligence. 194 The breach of the duty occurs when an owner or operator of a UST acts, or fails to act, causing damage when an unreasonable risk

188. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 30 at 164-65 (5th ed. 1984) [hereinafter PROSSER & KEETON].
191. Id. § 280.30-280.33.
192. Id. § 280.40-280.45.
193. Stafford v. United Farm Workers, 656 P.2d 564 (Cal. 1983); Martin v. Herzog, 126 N.E. 814 (1920) (noncompliance with regulations or a permit requirement may be prima facie evidence of negligence). However, if the allegedly negligent act or omission occurred before the standard of conduct was established in such regulations, courts will be less likely to impose liability for such conduct. Department of Envtl. Protection v. Ventron Corp., 468 A.2d 150 (N.J. 1983).
of harm is foreseeable and a reasonable person would have taken some precautions against the potential harm. Acts which lead to an unreasonable risk of harm include improper installation of a UST. Omissions which may provide grounds for a cause of action in negligence include the failure to discontinue use and to repair a UST once a leak is discovered.

3. Causation

Causation requires a showing of both causation in fact and of proximate cause. Proximate cause requires that "legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." This determination is made by the court. Causation in fact must be proven by the plaintiff.

Causation can, and generally must, be shown by circumstantial evidence. "Circumstantial evidence is crucial in each case because direct cause and effect evidence is rarely available because of inherent technical difficulties in tracing or replicating the path of pollutants to groundwater." Circumstantial evidence concerning an unexplained loss of gasoline, combined with the fact that a UST has been used beyond its recommended useful life, has been sufficient to find causation due to a lack of direct evidence.

Circumstantial evidence was also sufficient when the following facts were proven: (1) defendant's service station was the nearest source of gasoline, (2) a test of one of defendant's USTs revealed that it was leaking, and (3) the service station had sustained unexplained financial losses during the period in question. A plaintiff may consider pleading res ipsa loquitur in order to meet the prima facie burden of showing

195. ITALIANO ET AL., supra note 1, at 122 (citing PROSSER AND KEETON, supra note 188, at 169, 174, 280).
198. PROSSER AND KEETON, supra note 188, at 265, 273-74.
199. Id. at 264.
200. ITALIANO ET AL., supra note 1, at 125.
causation. Res ipsa loquitur, literally “the thing speaks for itself,” permits a “rebuttable presumption or inference that the defendant was negligent [if the] instrumentality causing injury was in defendant's exclusive control, and the accident was one which ordinarily does not happen in absence of negligence.”

4. Actual harm to plaintiff

Failure by the plaintiff to allege actual damages will cause a claim based in negligence to fail. Furthermore, if there are no actual damages, there can be no claim of negligence. Prima facie evidence of damages may come from numerous sources including medical records.

C. Nuisance

A leaking petroleum UST may support an action based on a nuisance theory. A “nuisance” is the substantial and unreasonable interference with another's use and enjoyment of an interest in property. The Restatement (Second) of Torts indicates that the interference may arise from actions

203. ITALIANO ET AL., supra note 1, at 127 (quoting BLACK'S LAW DICTIONARY 1173 (5th ed. 1979)).
204. PROSSER AND KEETON supra note 188, at 165.
207. A nuisance may be either public or private. PROSSER & KEETON, supra note 188, § 86, at 618-19. A public nuisance is an annoyance or inconvenience interfering with public rights. Id. A private nuisance involves the interference with right of an individual, or group of individuals with a closely aligned interest, to the use and enjoyment of an interest in property. Id.

As explained in Philadelphia Elec. Co. (PECO) v. Hercules, Inc., 762 F.2d 303 (3d Cir. 1985), an innocent purchaser has no standing to bring an action for public nuisance against the seller. Public nuisance is “an interference with the rights of the community at large.” Id. at 315. To recover under a public nuisance suit, a private party must have suffered damages of a kind different from those suffered by other members of the public. RESTATEMENT (SECOND) OF TORTS § 821C(1) (1977). The court rejected such a claim in PECO because PECO did not allege an exercise of rights common to the general public. PECO, 762 F.2d at 316. The discussion in this section applies explicitly to private nuisances.

208. RESTATEMENT (SECOND) OF TORTS § 821F (1977); PROSSER & KEETON, supra note 186, § 88, at 626-30.
209. RESTATEMENT (SECOND) OF TORTS § 822(a) (1977); PROSSER & KEETON, supra note 188, § 88, at 626-30.
210. RESTATEMENT (SECOND) OF TORTS § 821D (1977). "Nuisance is the unreasonable, unusual, or unnatural use of one's property so that it substantially impairs the right of another to peacefully enjoy his property." Frank v. Environmental Sanitation Mgmt., Inc., 687 S.W.2d 876, 880 (Mo. 1985).
which are intentional, unintentional, negligent, reckless, or involve abnormally dangerous activities.\footnote{211}{RESTATEMENT (SECOND) OF TORTS § 822 (1977). The Restatement treats the pollution of ground water as unintentional. See id. § 382 cmt. f, § 825 illus. 2, 3. Prosser and Keeton advocate the application of the theory of nuisance only if the conduct involved was intentional. PROSSER & KEETON, supra note 188, § 86, at 624.} In fact, commentary to the Restatement suggests that pollution of groundwater may constitute a nuisance even though such pollution is usually not based on intentional conduct “since the course of the waters is usually unknown and the actor can thus foresee no more than a risk or harm.”\footnote{212}{RESTATEMENT (SECOND) OF TORTS § 832 cmt. f, illus. 7; see also Mel Foster Co. v. Amoco, 427 N.W.2d 171 (Iowa 1988) (leaking UST constitutes a nuisance without the need to show intentional conduct).}

An interference with another’s use and enjoyment of land must be substantial to constitute a nuisance. When an interference with use and enjoyment “involves a detrimental change in the physical condition of land, there is seldom any doubt as to the significant character of the invasion.”\footnote{213}{RESTATEMENT (SECOND) OF TORTS § 821F, cmt. d.} If the interference involves the pollution of groundwater—a hallmark of a leaking petroleum UST—and the pollution has affected the rental or market value of the plaintiff’s property, the interference would be “substantial.”\footnote{214}{PROSSER & KEETON, supra note 188, § 88, at 627.} It follows that the proper measure of damages is the diminution of rental or market value which results from the nuisance.\footnote{215}{Mel Foster Co. v. Amoco, 427 N.W.2d 171, 176 (Iowa 1988).}

The interference must also be unreasonable. Prosser and Keeton define “unreasonable” in a circuitous fashion: the harm is unreasonable if “it would not be reasonable to permit the defendant to cause such an amount of harm intentionally without compensating for it.”\footnote{216}{PROSSER & KEETON, supra note 188, § 88, at 626.} Courts perform a balancing test in making this determination. The seriousness of the harm involved is balanced against the utility of the activity or condition which gives rise to the alleged nuisance.

The Restatement factors used in weighing the gravity of the harm involved include (1) the extent of the harm involved, (2) the character of the harm involved, (3) the social value of the use or enjoyment involved, (4) the suitability of the particular use or enjoyment to the locality involved, and (5) the bur-
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den on the person harmed of avoiding the harm. The Restatement factors for evaluating the utility of the allegedly annoying activity or condition include (1) the social value of the activity, (2) the suitability of the activity to the locality involved, and (3) the impracticability of preventing or avoiding the invasion.

The balancing test is dependent upon the Restatement factors as well as the relative weight given to those factors. A 1932 case decided by the Rhode Island Supreme Court illustrates the application of a balancing test similar to that advanced by the Restatement. The case involved a leaking UST at the defendant's oil refinery which was located in an industrial area. Petroleum leaked from the UST into the plaintiff's well used for drinking water, rendering the water unfit for such use. The court, concentrating on the location of the activity and the value of the oil refineries in the particular area, weighed the plaintiff's harm against the utility of the defendant's activity and ruled that the activity did not constitute a nuisance. However, fifty years later, the Rhode Island Supreme Court reversed the 1932 decision. In performing the balancing test in the latter case, the court recognized a shift in public policy toward greater regard for protecting the environment. The court held that a claim of nuisance could be based on unintentional, non-negligent conduct in cases involving groundwater pollution.

Note that an action for nuisance may not be maintained by the innocent purchaser of real estate against the seller. A claim of nuisance does not permit "a purchaser of real property to recover from the seller ... for conditions existing on the very land transferred." Instead, liability for a nuisance rests upon a "finding that [the defendant's] conduct violates a protected interest of the neighbor-plaintiff." Furthermore, lia-

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218. Id.
220. The court stated, in dicta, that in localities where oil refining was not as important to the economy, a claim of nuisance would be sustainable without a showing of negligence. However, in areas dependant upon oil refining, a showing of negligence would be required. Id.
222. Id.
224. Id. at 314 n.9 (quoting Powell on Real Property § 704, at 320 (1969)).
D. Strict Liability

The theory of strict liability for hazardous activities has its roots in the English case, *Rylands v. Fletcher.* The defendants in *Rylands* constructed a reservoir on their own land. Water from the reservoir leaked into an abandoned mine shaft, flowed through the shaft, and flooded the plaintiff's active coal mine. Defendants could not be held liable for negligence because they were unaware of the abandoned mine. They hadn't committed a trespass because the flooding was not sufficiently sudden and direct. Furthermore, the flooding did not constitute a nuisance since it was not offensive to the senses. Nevertheless, the English courts were not content to let the plaintiff go uncompensated. Therefore, they fashioned a new doctrine which would provide the plaintiff some relief. This doctrine, sometimes called the rule of *Rylands,* imposes liability on a person who brings on to his land something which, if it escapes, could do harm to another's property and which puts the land to a "non-natural use."*

The doctrine of *Rylands,* which has evolved somewhat, is found in section 519 of the Restatement (Second) of Torts:

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

2. This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.
The liability arises out of the activity's abnormal danger and the risk of harm that it creates to those in proximity to the activity. Section 520 of the Restatement lists six factors to consider in deciding whether an activity is "abnormally dangerous":

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

Courts applying the Restatement factors to petroleum leaks from USTs have reached differing conclusions. The court in Arlington Forest Associates v. Exxon Corp., held that the strict liability provisions of the Restatement did not apply to a gasoline leak from a service station. The court focused its analysis on whether the operation of the service station could be made safe through the exercise of reasonable care. Absolute safety, the court noted, is not required. Instead, the court determined that the attendant "risk must be reducible by due care to a point where the likelihood of harm is no longer high." The court concluded that "[m]aintained, monitored, and used with due care, underground gasoline storage tanks present virtually no risk of injury from seepage of their contents."

229. Id., cmt. d.
230. Id. § 520. For a discussion of the Restatement criteria as they relate to USTs, see Dennis M. Toft & Stephen H. Bier, N.J. L.J., Nov. 2, 1992, at 20.
232. Id. at 390.
233. Id.
234. Id. (emphasis added). Other courts have not been as willing to impose liability under the strict liability theory. A few courts have viewed cleanup costs and diminution of property value as injury which is not the type of damages to which strict liability attaches. Pinole Point Prop., Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 292, n.5 (N.D. Cal. 1984) (dicta). Second, one court has refused to apply the doctrine where other remedies exist. Bagley v. Controlled Envtl. Corp., 503 A.2d 823, 825-26 (N.H. 1980). Even so, strict liability is an alternative which inno-
Other courts have applied the Restatement's strict liability provisions when USTs are located near residential areas or in close proximity to a community's water supply. These courts have reasoned that placing gasoline USTs in close proximity to residential areas does not constitute common usage. In addition, these courts opine that the USTs present a risk of contamination of the water supply. One court stated that "locat[ing] a large supply of such a highly toxic chemical in close proximity to the water supply of an entire community is clearly inappropriate." Furthermore, the court determined that widespread use of such tanks does not diminish their inherently dangerous nature: "it is proper to surmise that this risk [of a leak] cannot [be] or at least was not, eliminated by the exercise of reasonable care. Moreover, since there are "many hazardous activities which are socially desirable, it now seems reasonable that they pay their own way."

Plaintiffs should be able to plead strict liability to reach assets of a successor in interest to a person who is responsible for a petroleum leak from a UST. In T & E Industries, Inc. v. Safety Light Corp., the purchaser of land brought an action in strict liability against the successor corporation of the polluter. The court ruled that there is no distinction between the rights of a successor in title to use land and the rights of a neighboring land owner.

V. CONCLUSION

The ubiquitous petroleum UST presents the possibility of enormous environmental hazards. An estimated two million...
such tanks exists. Approximately one-quarter of them are leaking. Because such tanks are used extensively throughout the United States at diverse business and residential locations, the possibility exists that a purchaser might unwittingly come into possession of real estate which contains such a tank or which has been contaminated by petroleum leaked by a UST in proximity to that real estate.

Even though USTs are regulated by federal law, those laws provide little relief for the innocent purchaser who purchases land containing a leaking petroleum UST. CERCLA is inapplicable due to its petroleum exclusion. RCRA is applicable to petroleum USTs. Although RCRA does provide a scheme for regulating the use of USTs, it provides little relief against former owners of real estate containing the leaking UST.

Various common law remedies may be employed by the innocent purchaser. These remedies include actions based on the sales contract, negligence, nuisance, and strict liability. An innocent purchaser should be able to obtain some relief by resort to these common law theories. The relief available will, of course, depend upon the facts of each case, which theories of relief may be employed, and the extent of available direct and circumstantial evidence available to determine the party responsible for the damage caused by the leaking UST.