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A Game of Old Maid: The Ninth Circuit Establishes when the Owner-Operator is Determined for CERCLA Liability in California v. Hearthside Residential Corp.

Dustin M. Glazier

A Game of Old Maid: The Ninth Circuit Establishes when the Owner-Operator is Determined for CERCLA Liability in *California v. Hearthside Residential Corp.*

I. INTRODUCTION

The ripple effect of the Deepwater Horizon oil spill has extended far beyond the coastal regions surrounding it. The massive oil hemorrhage in the Gulf of Mexico has stirred up renewed discussion among politicians and in the media over Superfund and the importance of affixing responsibility to polluters.[1] Superfund, or more specifically, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[2] was enacted in 1980 as a response to "the serious environmental and health risks posed by industrial pollution" and was intended "to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination."[3] Those that are liable for the contamination, as a result of their relationship to the contamination, are identified as potentially responsible parties (PRPs) by the statute. One such PRP is the current "owner and operator" of the contaminated location.[4] But unlike the other PRPs, who are assigned liability due to some role in causing the contamination, this party's only reason for being "responsible" is ownership of the contaminated site.[5] Like the last player stuck holding the "Old Maid" in the classic card game,[6] the

1. *See, e.g.,* Juliet Eilperin, *President to Push for Restoration of the Superfund Tax*, WASH. POST, June 21, 2010, at A5; Shari Shapiro, *Deepwater Horizon—A Love Canal Moment*, CLEANTECHIES (June 2, 2010, 4:30 AM), http://blog.cleantechies.com/2010/06/02/deepwater-horizon-love-canal-moment/ (suggesting that the Gulf spill is akin to the disaster that prompted Superfund's creation).

2. 42 U.S.C. §§ 9601–75 (2006).

3. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1874 (2009).

4. 42 U.S.C. § 9607(a)(2).

5. *See infra* Part III.A.

6. Old Maid is a matching game played with a fifty-one card deck, in which players take turns drawing cards from the prior player's hand and then discarding any matching pairs. "There is no winner in Old Maid; however, there is a clear loser—the person left holding the unmatched card, or the old maid." Daniel Farr, *Old Maid*, *in* 1 ENCYCLOPEDIA OF PLAY IN TODAY'S SOCIETY 425, 425 (Rodney P. Carlisle ed., 2009).

party holding title to the contaminated site is strictly liable for cleanup expenses.[7] Unfortunately, CERCLA is unclear regarding the point in time at which the "card game" stops and a particular owner-operator is determined to be liable for cleanup. In other words, where ownership to a particular site switches hands over a period of time, CERCLA fails to specify which owner-operator is required to front cleanup costs.

In *California v. Hearthside Residential Corp.*, the Ninth Circuit addressed whether "owner and operator" liability under CERCLA is determined at the time of a cleanup action or at the time a resulting suit is filed.[8] As a "question of first impression" the court relied primarily on what it viewed as "CERCLA's purposes" to arrive at its holding that the current owner and operator, for cleanup liability, is set at the time cleanup occurs.[9] This Note argues that the Ninth Circuit's analysis of this issue inappropriately diverges from the Supreme Court's prior interpretations of CERCLA because the court failed to look at the plain meaning of the statute, did not strictly apply liability, and should have found the current owner to be determined when recovery for incurred cleanup costs are sought.

II. FACTS AND PROCEDURAL HISTORY

Hearthside Residential Corporation ("Hearthside") purchased a tract of undeveloped wetlands in Huntington Beach, California in 1999.[10] The tract, known as the Fieldstone Property, sat adjacent to several residential plots ("Residential Site") that were not owned or occupied by Hearthside.[11] At the time of purchase, Hearthside was aware that the Fieldstone Property was contaminated by polychlorinated biphenyls, or PCBs.[12] By 2002, Hearthside had entered into a consent order with the State of California's

7. 42 U.S.C. § 9607(a).

8. 613 F.3d 910, 911 (9th Cir. 2010).

9. *Id.* at 911, 914.

10. *Id.* at 911.

11. *Id.*

12. *Id.* PCBs are a member of the man-made organic chemical family known as chlorinated hydrocarbons and were manufactured domestically, beginning in 1929, for use in hundreds of industrial and commercial applications. PCBs were banned, however, in 1979 because of their toxicity. Studies have shown that PCBs cause cancer as well as "other adverse health effects on the immune system, reproductive system, nervous system, and endocrine system." *Polychlorinated Biphenyls (PCBs): Basic Information*, EPA, http://www.epa.gov/epawaste/hazard/tsd/pcbs/pubs/about.htm (last visited Feb. 26, 2011).

Department of Toxic Substance Control ("the Department") under which Hearthside agreed to undertake remediation of the PCB contamination of the Fieldstone Property.[13] The Department also determined that the adjoining Residential Site had been contaminated by PCBs as a result of leakage from the Fieldstone Property and considered Hearthside responsible for the process of investigating and remediating the Residential Site.[14] Hearthside opposed this determination, asserting that it bore no responsibility for the Residential Site and therefore limited its cleanup efforts to just the Fieldstone Property.[15]

Subsequent to Hearthside's refusal of responsibility for the PCB contamination on the Residential Site, the Department contracted cleanup efforts at the Residential Site, incurring ongoing cleanup costs between July 2002 and October 2003.[16] On December 1, 2005, the Department certified the completion of the Fieldstone Property cleanup and Hearthside promptly sold the Fieldstone Property to the California State Lands Commission.[17] In October 2006, the Department filed a suit against Hearthside, seeking reimbursement for the costs of the cleanup of the Residential Site.[18]

The Department's complaint relied on two key points. First, the Department alleged that the Fieldstone Property was the source of the Residential Site contamination.[19] Second, Hearthside had ownership of the Fieldstone Property at the time of the Residential Site's cleanup.[20] According to the Department's analysis, Hearthside was the "owner" of the contamination source at the time of the cleanup effort and was therefore responsible for the costs of remediation under CERCLA.[21] Hearthside disputed the Department's assignment of liability, asserting that "owner" status was instead established when the recovery suit was filed, rather than at the time of cleanup.[22] Hearthside was therefore not responsible for

13. *Hearthside*, 613 F.3d at 911.
14. *Id*. at 911–12.
15. *Id*. at 912.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*.; *see* 42 U.S.C. § 9607(a)(2) (2006).
22. *Hearthside*, 613 F.3d at 912.

the cleanup costs of the Residential Site because it had sold the Fieldstone Property prior to the Department filing suit.[23]

The district court, ruling only on the issue of whether Hearthside was an "owner and operator" of the Fieldstone Property, granted partial summary judgment in the Department's favor.[24] The court concluded that determining "owner" status at the time the cleanup claim occurs, rather than at the time of the lawsuit, aligns with the stated purposes of CERCLA.[25] The district court granted the parties' joint request to certify the question for immediate appeal, which the Ninth Circuit agreed to hear.[26]

III. SIGNIFICANT LEGAL BACKGROUND

At issue in this case is the proper date from which to measure ownership of contaminated property in order to determine who is a PRP. Three areas of background inform an examination of *California v. Hearthside Residential Corp.*: the origins and purpose of CERCLA; how the Ninth Circuit has interpreted ambiguity in CERCLA prior to *Hearthside*; and, finally, how the Supreme Court has interpreted CERCLA ambiguity, specifically relating to the identification of PRPs.

A. The Comprehensive Environmental Response, Compensation, and Liability Act

CERCLA, commonly known as Superfund,[27] causes "those responsible for . . . contamination" to be held directly liable in order to assure that the cleanup of designated hazardous sites actually occurs.[28] CERCLA, however, has required numerous clarifications and interpretations by courts due to being "hastily assembled."[29] As it imposes a strict liability standard,[30] a significant amount of the contested ambiguity revolves around the four PRPs identified in the

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. The name "Superfund" comes from the statute's creation of a trust fund called the "Hazardous Substances Superfund." 26 U.S.C. § 9507(a) (2006).

28. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1874 (2009).

29. Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 885 nn.13–14 (9th Cir. 2001).

30. *See infra* Part III.C.

statute:[31] 1) the owner and operator of a property, 2) any person who owned a contaminated property at the time of contamination, 3) any person who arranged for transportation, disposal, or treatment of hazardous substances by any other party, and 4) any person who accepts hazardous substances for transportation to disposal or treatment.[32] Under CERCLA, an entity that qualifies as one of these four types of PRPs "shall be liable for all costs of removal or remediation incurred" at the contamination site.[33]

B. The Importance of Plain and Ordinary Meaning in Interpreting CERCLA

In its most recent examination of CERCLA, *Burlington Northern & Santa Fe Railway Co. v. Shell Oil Corp.,* the Supreme Court was tasked with providing clarity to ambiguous terminology in CERCLA.[34] At issue in *Burlington* was whether Shell Oil qualified as a party that "arranged for disposal" of contaminating material; if so, it would be liable for cleanup as a PRP.[35] Justice Stevens, writing for the majority, stated that, in determining PRP liability, the Court first looks to the language of the statute.[36] But where the statutory definitions of CERCLA fail to provide sufficient specificity, the Court must "give the phrase its ordinary meaning."[37] In other words, the Court will use "common parlance," or the meaning of the words as found in a dictionary.[38] The Court then draws upon this meaning as the "plain language of the statute."[39]

This was not the first time the Court utilized the concept of plain language or common usage to interpret CERCLA. In *United States v. Atlantic Research Corp.*, the Court relied on the "plain language" of CERCLA when interpreting the phrase "any other person" to mean that any private party—including another PRP—is authorized

31. *See Burlington*, 129 S. Ct. 1870; United States v. Bestfoods, 524 U.S. 51 (1998).

32. 42 U.S.C. § 9607(a)(1)–(4) (2006).

33. *Id.* § 9607(a)(4).

34. 129 S. Ct. at 1878.

35. *Id.*

36. *Id.*

37. *Id.* at 1879.

38. *Id.* The Court in *Burlington* actually derived its interpretation from Merriam-Webster's Collegiate Dictionary, citing to it directly.

39. *Id.*

to commence cost-recovery actions.[40] Similarly, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, the Court used the concept of "natural meaning" to interpret the use of "may" in CERCLA's enabling clause to authorize contributions to cleanup costs only in specific circumstances, based upon the context of the language as read in that sentence of the statute.[41] Perhaps even more demonstrative of the Court's willingness to focus on plain meaning was its interpretation of direct liability in *United States v. Bestfoods*.[42] In *Bestfoods*, the Court not only used the "plain language" of CERCLA to indicate that a parent company is strictly liable for operating a polluting facility but also again relied upon a dictionary definition—this time for the word "operate"—to establish an ambiguous term's "ordinary meaning."[43]

Admittedly, while these cases do not constitute an exhaustive treatment of the Court's use of plain or ordinary language to interpret CERCLA, they nevertheless make it apparent that the Court considers using the language of the statute—even when it is simply stating what a common reading suggests—vital to resolving ambiguity in CERCLA language.[44]

C. The Strict Liability Foundation in CERCLA

Strict liability "does not depend on actual negligence or intent to harm,"[45] and in fact the Court has suggested that "knowledge of the facts [is] unnecessary."[46] Therefore, strict liability "maximizes deterrence and eases enforcement difficulties" by establishing liability based on bright-line conditions.[47] For environmental contamination, the Supreme Court has repeatedly stated that "CERCLA imposes strict liability."[48] This strict liability standard relies upon "the seminal

40. 551 U.S. 128, 136 (2007).

41. 543 U.S. 157, 166 (2004).

42. 524 U.S. 51 (1998).

43. *Id.* at 65–67.

44. *See also* Meghrig v. KFC W. Inc., 516 U.S. 479, 484 (1996) (using "plain reading"); Key Tronic Corp. v. United States, 511 U.S. 809, 819 (1994) (using "plain terms").

45. BLACK'S LAW DICTIONARY 998 (9th ed. 2009).

46. United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971).

47. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002) (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 14 (1991)).

48. *E.g.*, Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1878 (2009).

opinion" of Chief Judge Carl Rubin in *United States v. Chem-Dyne Corp.*,[49] in which the Court found support for strict liability in the history of CERCLA.[50] While it is undisputed—both from historical interpretation and recent Court discussion—that CERCLA imposes strict liability, it is important to keep this background principle of efficient enforcement in mind since it is a motivating factor for imposing strict liability in the first place.

IV. THE COURT'S DECISION

In *California v. Hearthside Residential Corp.*, the Ninth Circuit set out to identify the time at which the current owner-operator is determined under CERCLA.[51] In reaching its decision on this issue, which was a question of first impression, the court proceeded to use three elements to frame its holding: 1) the language of CERCLA, 2) the context of CERCLA liability, and 3) the purposes for CERCLA's creation. The court concluded by dismissing concern over the factual determinations required by its decision.

A. CERCLA's Language

After distinguishing *Hearthside* from other circuit court discussions of ownership, the court identified the central issue as simply determining the time at which a PRP becomes "the owner or operator of a vessel or a facility."[52] Although not expressly stated in CERCLA, the court interpreted this to mean the "current" owner or operator of the contaminating location.[53] The court noted, however, that the definition of owner and operator is silent on the point in time at which "current" ownership is determined.[54] This absence of clarity in the "plain text" of CERCLA required the court to look beyond the plain language and use the statutory context and purposes of CERCLA.[55] The court reasoned that utilizing these

49. 572 F. Supp. 802 (S.D. Ohio 1983).

50. *Burlington*, 129 S. Ct. at 1880–81.

51. 613 F.3d 910, 911 (9th Cir. 2010).

52. *Id.* at 910; 42 U.S.C. § 9607(a)(1) (2006).

53. *Hearthside*, 613 F.3d at 912–13 (citing Carson Harbor Vill., Ltd. v. Unocal Corp., 270 Fed 863, 881 (9th Cir. 2001) (en banc)); *accord, e.g.*, United States v. Capital Tax Corp., 545 F.3d 525, 530 (7th Cir. 2008); ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 456 (6th Cir. 2007).

54. *Hearthside*, 613 F.3d at 913.

55. *Id.* at 914.

elements of CERCLA would best illuminate how Congress intended the determination of ownership to be measured when the language of the statute is not plain.[56]

B. CERCLA's Context

The court's analysis of CERCLA's context was largely based on a review of those provisions related to imposition of liability under the statute—specifically, the statute of limitations incorporated in CERCLA.[57] The court found it reasonable to assume that it was Congress's intent to have the statute of limitations run against the owner of the property when cleanup occurred in order to protect against stale claims.[58] The court hypothesized that a well-timed transfer of a cleaned property to an "innocent owner" could undermine the aim of providing notice and predictability to a defendant.[59] The court took this view of the statute of limitations as strong contextual evidence that Congress intended the "current owner" to be the owner at the time of the cleanup effort.[60]

C. CERCLA's Purposes

In the second prong of the court's analysis, the court found that an examination of the purposes of CERCLA produced the same results as the court's review of the statute's context.[61] The court delineated the purposes of CERCLA into two components: 1) to encourage responsible parties to remediate hazardous facilities without delay and 2) to encourage early settlement between PRPs and environmental regulators.[62]

1. CERCLA encourages PRPs to remediate without delay

This policy of incentivizing timely action, according to the court, suggests that a landowner should be given no reason to delay

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 914–15. In the court's hypothetical example, a recently cleaned property could be sold to an innocent owner one day before the statute of limitations runs out and, as a result, this "new" innocent owner would bear full liability for cleanup under CERCLA for any timely recovery action that is later filed. *Id.*

60. *Id.* at 915.

61. *Id.*

62. *Id.*

completion of cleanup—accomplished by attaching ownership liability for recovery costs during the cleanup action.[63] Conversely, the court suggested that under Hearthside's theory a property owner could attempt to dodge liability by delaying cleanup completion until he or she could arrange a transfer of the land to a new owner.[64] This is particularly likely when a recovery suit will be filed once the cleanup is complete and the actual total cost is calculated. Therefore, the court reasoned that because an owner might employ any manner of "contrived delay" as a means to secure a buyer—and thereby transfer liability—before the suit is filed, ownership must be determined based on when cleanup costs are incurred rather than the filing of the suit.[65]

2. CERCLA encourages early settlement between PRPs and regulators

The court found that Hearthside's argument—that current ownership be determined at the time of the suit—is weakened by the importance of settling in CERCLA on two counts.[66] First, if ownership is measured at the time the lawsuit is filed, then a lawsuit must be filed for every recovery action, and any rule that would create a lawsuit in every instance "is the opposite outcome that CERCLA seeks to promote."[67] Secondly, an "agreed remedial action plan" is central to CERCLA settlement, and the owner at the time of cleanup is thereby included in the technical consulting process—selecting from among the alternatives the scope of the cleanup.[68] The court reasoned that, because of CERCLA's attempts to include the owner during cleanup in the process, current ownership should be set at the time cleanup occurs.[69]

63. *Id*.

64. *Id*.

65. *Id*.

66. *Id*. CERCLA has been interpreted by the Ninth Circuit as emphasizing early settlement on several occasions. *See* Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 880 (9th Cir. 2001); Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 948 (9th Cir. 2002).

67. *Hearthside*, 613 F.3d at 915.

68. *Id*.

69. *Id*. at 916.

D. Factual Determination

The last portion of the court's decision was concerned with Hearthside's assertion that the lawsuit-filing date would create "a simple and clear date from which to measure" ownership.[70] The court agreed that measuring ownership from the time of cleanup would, in some cases, necessitate factual determinations to determine "current ownership."[71] Nevertheless, the court was not persuaded that the "limited factfinding" required to determine ownership was sufficiently burdensome so as to necessitate a different holding by the court.[72] Factual questions regarding cleanup dates are commonplace in CERCLA actions, and the courts are "well equipped" to resolve such issues.[73] Therefore, in view of its weighty consideration of CERCLA's context and purposes, the court held that current ownership for purposes of liability is to be measured from the time of cleanup.[74]

V. ANALYSIS

The Ninth Circuit incorrectly analyzed the issue of owner-operator determination under CERCLA in *California v. Hearthside Residential Corp.* by failing to give proper deference to plain meaning and strict liability in the examination of language, context, purposes, and factual determinations under CERCLA.

A. CERCLA's Language

The court's holding that § 9607(a)(1) refers to the "current" owner-operator of the contaminated site is the most logical interpretation of the statute's language. However, the court should have reviewed the language of the statute more thoroughly in its analysis. Instead of examining the "plain meaning" of the terms "owner and operator" and "current" in the context of timing, the court was quick to claim a lack of clarity and move to the intent and purposes of CERCLA. Proper analysis of liability under CERCLA must "begin with the language of the statute."[75] This is not to say

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1878 (2009).

that the Ninth Circuit should have looked solely to the language, but rather that the statutory language must be carefully examined for the court's analysis to be complete and proper.

The "owner" of a piece of land is commonly understood to be the person holding title to it. Moreover, the definition of "own"—"owner" being one who owns[76]—is "to have or hold as property."[77] Thus, both the plain meaning and the dictionary definition of owner denote that to be an owner, a person must possess or hold title to property. An individual who sells his property today was an owner yesterday, but will not be tomorrow. Although the court suggests that it is merely the timing behind the term that is ambiguous, it is undisputable that the very meaning of the term "owner" is tied up with timing. Therefore, it is not a question about when liability attaches, but rather a question of when § 9607(a) is called upon to establish liability. When § 9607(a) is invoked, the plain language of CERCLA clearly considers the person holding title at that moment to be the "owner and operator" for liability purposes.

B. CERCLA's Context

The Ninth Circuit's contextual analysis was limited to the statute of limitations, examining both when the timing starts and the protection it provides to PRPs. Congress's activation of the statute of limitations at the completion of removal and the initiation of remediation is not "strong contextual evidence" as the court suggests,[78] but simply the most logical point in time. Before remediation or removal, there has been no action taken, so it would not be reasonable to start the clock for the statute of limitations. Moreover, along the timeline of cleanup and recovery, the only other point in time to activate the statute of limitations would be when recovery is actually sought, most likely by filing a suit. Using cleanup as the trigger is not indicative of Congress's intent, but simply the only practical option in that context.

Beyond the statute of limitations provision in CERCLA, the calculation for the accrual of interest in the statute also provides some contextual insight. CERCLA states in relevant part that

76. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1612 (1986). "Own" is the verb implicated by the noun "owner." *Id.*

77. *Id.*

78. *Hearthside*, 613 F.3d at 915.

interest on cleanup costs accrues "from the later of" the date the costs are incurred or the date a specific amount is demanded in writing.[79] This seems to indicate that the determination and attribution of liability under CERCLA is invoked by formal notification of intent to recover cleanup costs.

The court implied that CERCLA liability is frozen in time as soon as cleanup commences. However, this is inconsistent within CERCLA as initiation of remediation, completion of removal, and written notification requesting recovery are all different points in the timeline of CERCLA actions.

C. CERCLA's Purposes

1. CERCLA encourages PRPs to remediate without delay

The court believed that an owner would delay cleanup efforts in order to transfer the property before a suit is filed. However, in order for an owner to effectively delay remediation or removal, that owner would need to be in charge of those cleanup efforts—much like Hearthside's efforts to cleanup the Fieldstone Property.[80] But there will never be a suit filed for the cleanup costs resulting from the owner's efforts because that would result in the owner suing himself. Instead, it is a third party, like the Department in *Hearthside*, who sues to recover costs of the cleanup it coordinated either on or in connection with the owner's land.

Not only is it unlikely that an owner would be able to effectively delay a cleanup performed by other parties, it is possible that if liability is not determined until recovery is sought, owners will remediate faster. For example, Hearthside acted timely to remediate the contamination of PCBs on its own property and then quickly sold the property within weeks of having the cleanup certified. There would be no incentive for an owner to act quickly—to remediate, certify cleanup, and pass the "old maid" card of ownership—when liability will potentially follow him for six or more years. It would be better to sit on the property and hope that the land increases in value enough to offset the eventual cost of liability. However, by determining ownership when recovery is sought, the owner during any point of the cleanup is able to move on and assign liability for

79. 42 U.S.C. § 9607(a)(i)–(ii) (2006).

80. *See Hearthside*, 613 F.3d at 911–12.

the contaminated site. Future buyers would also benefit, as they would receive cleaned lands, and the liability that follows "current ownership" is a bargaining chip that would allow for deeply discounted lands. Using the commencement of actions to recover costs as the determining point in time—rather than the commencement of cleanup—comports with CERCLA's purpose of encouraging remediation without delay as well.

2. CERCLA encourages early settlement between PRPs and environmental regulators

The court presumed that if the time of filing is the key to defining "current ownership," such a standard would require lawsuits for every recovery action, which would run counter to CERCLA's purpose of encouraging early and efficient settlement. The court was correct that a scheme that uses such a standard for determining ownership is inappropriate because it would be too narrow. It would be more accurate and fitting to describe the determining point in time to be when notice is given that recovery of costs are being sought. This then includes the actual filing of a lawsuit, agency orders requesting recovery, and even the sending of a letter requesting repayment for costs incurred. When the total costs incurred are known and repayment is sought, liability should attach. With such a clear request presented, the "current owner" at that time can easily settle or pursue litigation. This would then fulfill the purposes behind the statute of limitations, accrual of interest, and early settlement.

The court also stated that because the owner during cleanup can "influence" the remediation program, he should be the one responsible for the costs of that program.[81] However, *Hearthside* suggests a counterexample to the court's reasoning—where the owner denies responsibility, and so the government proceeds to unilaterally contract the cleanup.[82] Again the court seems to mix cleanup actions undertaken by the owner with actions by the government, which later seeks recovery of expenses. While the owner during cleanup could be involved in the scope and measures taken to remediate, the obvious possibility that recoverable cleanup can occur without any input from the owner demonstrates that using this as a

81. *Id.* at 915–16.

82. *Id.* at 912.

standard for supporting cleanup as a determining factor for ownership is unsuitable.

D. Factual Determination

The court's rejection of "a simple and clear date from which to measure" seems out of place in the context of CERCLA's strict liability standard.[83] This is especially true when the court does not dispute that calculating ownership at cleanup can necessitate factual determinations to determine "current ownership."[84] Requiring a court to sort out facts also requires filing a suit for every claim and actually discourages early settlement. By determining current ownership at the time of recovery, CERCLA "maximizes deterrence and eases enforcement difficulties"[85] by reducing the need for even limited fact-finding.

VI. CONCLUSION

In *Hearthside*, the Ninth Circuit failed to look at the plain meaning of the language used in the statute, did not strictly apply liability, and should have found the current owner to be determined when recovery for incurred cleanup costs are sought, not when cleanup happens. Like stopping a game of Old Maid when people still have cards in their hand, determining liability during cleanup prematurely stops the process before any of the parties involved are actually ready to look at liability and settle up.

Dustin M. Glazier[*]

83. *Id.* at 916.

84. *Id.*

85. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002).

* J.D. Candidate, April 2011, J. Reuben Clark Law School, Brigham Young University.