

THIRD CIRCUIT'S REJECTION OF *CAVEAT
EMPTOR* IN CERCLA CONTRIBUTION
CLAIMS IMPOSES DOUBLE LIABILITY ON
REMOTE VENDORS: *SMITH LAND &
IMPROVEMENT CORP. V. CELOTEX*,
851 F.2d 86 (3d Cir.1988)

In 1980 Congress responded to the costly¹ problem of cleaning up abandoned toxic waste dumps by passing the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).² Courts have interpreted CERCLA's liability provisions broadly, permitting state and federal authorities to impose strict³ and joint and sev-

1. Cleanup costs average \$6.5 million per site where groundwater problems do not exist and \$10 million per site where the EPA has found groundwater contamination. Estimates for the total cleanup bill of all targeted sites that eventually may require cleanup have ranged from \$8 billion to \$100 billion. OFFICE OF TECHNOLOGY ASSESSMENT, 99TH CONG., 1ST SESS., SUPERFUND STRATEGY 3 (1985). See also *Hazardous Waste Sites May Cost \$22 Billion to Clean Up, EPA Study Says*, 9 Env't Rep. (BNA) 2085 (Mar. 9, 1979); *\$8.4 Billion to \$16 Billion More Needed to Clean Superfund Sites, EPA Paper Says*, 14 Env't Rep. (BNA) 1725 (Feb. 3, 1984).

2. 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987), as amended by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986). The Act is popularly known as "Superfund."

3. Courts have interpreted the statute to impose strict liability. See *United States v. Price*, 577 F. Supp. 1103, 1113 (D.N.J. 1983) (imposing strict liability on a past, non-negligent, off-site generator for hazardous waste); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983); see also *United States v. Stringfellow*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,385, 20,387 (C.D. Cal. April 5, 1984) (only § 107(a), and not § 106(a), permits joint and several liability); *United States v. South Carolina Recycling & Disposal, Inc.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,272, 20,274 (D.S.C. Feb. 23, 1984) (CERCLA § 107(a) holds defendants strictly liable); *United States v. Conservation Chem. Co.*, 589 F. Supp. 59, 62 (W.D. Mo. 1984) (citing *United States v. Price*, 577 F. Supp. 1103 (D.N.J. 1983), for proposition that "past off-site generators should be held to a standard of strict liability"); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 843-44 (W.D. Mo. 1984) (standard of strict liability applies equally to § 106(a) of CERCLA); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1254-55 (S.D. Ill. 1984) (strict liability is intended standard under CERCLA; Congress did not preclude imposition of joint and several liability).

In addition, Congress designed CERCLA liability to be strict by reference to section 311 of the Federal Water Pollution Control Act (FWPCA), codified at 33 U.S.C.

eral⁴ liability⁵ on responsible⁶ "persons"⁷ for cleanup costs, regardless

§ 1321(c) (1982), a provision for recovery of cleanup costs for spills into navigable waters. 42 U.S.C. § 9601(32) (1982 & Supp. V 1987). The drafters of CERCLA intentionally referred to section 311 to trigger a strict liability standard. See 126 CONG. REC. 30,932 (1980) statement by Senator Randolph,

We have kept strict liability in the compromise, specifying the standard of liability under § 311 of the Clean Water Act (FWPCA). . . . I understand this to be a standard of strict liability. . . . As under § 311, due care or the absence of negligence with respect to a release or threatened release of a hazardous substance does not constitute a defense under this act.

Id. See also 126 CONG. REC. 31,966 (1980) (letter from Assistant Attorney General Alan A. Parker to Rep. Florio and remarks of Rep. Florio). See generally GIBLIN & KELLY, *Judicial Development of Standards of Liability in Government Enforcement Action Under the Comprehensive Environmental Response, Compensation and Liability Act*, 33 CLEV. ST. L. REV. 1, 11-13 (1984-85).

4. United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983), is the seminal case which district courts have followed in imposing joint and several liability. See also United States v. Northeastern Pharmaceutical and Chem. Co., Inc., 579 F. Supp. 823, 844 (W.D. Mo. 1984), *aff'd in relevant part*, 810 F.2d 726 (8th Cir. 1986) ("although Congress deleted the explicit reference to joint and several liability from the final enactment, [we find] that joint and several liability is at least permissible, if not mandated, under the facts of this case."); United States v. Wade, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983) (courts should impose joint and several liability upon responsible defendants, unless defendants establish that a reasonable basis exists for apportioning harm among them); United States v. Cauffman, 21 Env't Rep Cas. (BNA) 2167 (C.D. Cal. 1984) (finding of joint and several liability does not depend on proof of causation); see also United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1105 (D. Minn. 1982) (EPA and state of Minnesota joined successor landowners to insure that the remedial measures requested could be fully implemented.).

5. For a discussion of Congress' deliberations on CERCLA's liability provisions, see Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act ("Superfund") of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

Generally, courts impose joint and several liability when two or more persons independently cause a distinct or single harm. See RESTATEMENT (SECOND) OF TORTS § 433A (1977). On the liability of joint tortfeasors generally, see W. PROSSER & W. KEETON, *THE LAW OF TORTS*, §§ 46-52 (5th ed. 1984).

6. 42 U.S.C. § 9607(a) (1982 & Supp. V 1987) specifically imposes liability for cleanup costs on the owner or operator of a site, the prior owner or operator at the time of the hazardous waste disposal, those who arranged for waste disposal or treatment at the site, and any transporter of the hazardous waste. Courts interpret the statute to implicitly impose liability on a number of other parties, including owners of property on which illegal dumping has occurred (City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982)); innocent purchasers of contaminated property (New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985)); lessors and lessees (United States v. South Carolina Recycling and Disposal, Inc. (SCRDI), 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,272 (D.S.C. 1984)); secured creditors (United States v. Maryland Bank and Trust, 632 F. Supp. 573 (D. Md. 1986)); successor or merged corporations (Memorandum from Courtney M. Price, EPA Assistant Administrator for Enforcement and Compliance Monitoring, *Liability of Corporate Shareholders and Successor*

of fault.⁸ The Act's few defenses⁹ make it very difficult for blameless parties to escape liability. The harshness of this result has engendered considerable judicial and congressional concern¹⁰ over who should bear the ultimate cost of cleanup.¹¹ In *Smith Land & Improvement Corp. v. Celotex*,¹² the United States Court of Appeals for the Third Circuit refused to allow successor corporations¹³ to invoke the com-

Corporations for Abandoned Sites under the Comprehensive Environmental Response, Compensation and Liability Act 12 (June 13, 1984))[hereinafter EPA Memorandum]; and corporate officials (United States v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO), 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in relevant part*, 810 F.2d 726 (8th Cir. 1986)).

7. The Act defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (1982 & Supp. V 1987).

8. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2nd Cir. 1985) ("[§ 9607(a)(1)] unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation.").

9. CERCLA section 107(b) lists available defenses as an act of God, an act of war, or an act or omission of a third party. To utilize the third party defense, the defendant must show he exercised due care and took precautions against all foreseeable third party acts and omissions. 42 U.S.C. § 9607(b)(3) (1982 & Supp. V 1987).

10. See *infra* notes 62-72 and accompanying text for a discussion of CERCLA amendments.

11. See *supra* note 6 for a list of liable parties. See also Belthoff, *Private Cost Recovery Actions Under Section 107 of CERCLA*, 11 COLUM. J. ENVTL. L. 141, 192 (1986) ("Although the private cost recovery action has several problems and is still in a stage of development, the action provides an effective means to protect the environment from abandoned and inactive hazardous waste sites.").

12. 851 F.2d 86 (3d Cir. 1988). This action arises out of two separate lawsuits. Smith Land filed lawsuits against each individual corporate successor, alleging similar causes of action. Plaintiffs in the original case, *Smith Land & Improvement Corp. v. Celotex*, No. 87-5741, filed suit on October 21, 1987. *Smith Land & Improvement Corp. v. Rapid American*, No. 86-1151 originated on September 22, 1987. The cases were consolidated on appeal in 851 F.2d 86 (3rd Cir. 1988).

13. The balance of the *Smith Land* decision discusses corporate successor liability and holds that corporate successors are liable for the environmental torts of their predecessors in CERCLA contribution claims. *Smith Land & Improvement Corp. v. Celotex*, 851 F.2d at 90-92 (3rd Cir. 1988). The court reached this conclusion by relying on a 1984 EPA Memorandum. See EPA Memorandum, *supra* note 6. The EPA's policy expands liability under CERCLA to include successor corporations who would be potentially liable parties under CERCLA. CERCLA, 42 U.S.C. § 9607(a)(2), provides that past owners and operators of hazardous waste facilities are potentially liable parties under CERCLA. Under the EPA's policy, liability exists regardless of whether the successor continues the same hazardous waste activities as the predecessor. *EPA Memorandum* at 5 (the EPA only requires a "continuation of business operations" between the predecessor and successor). The EPA contends that "public policy considerations"

mon law defense of *caveat emptor*¹⁴ to escape liability for cleanup costs.¹⁵

In 1984 the Environmental Protection Agency (EPA)¹⁶ notified Smith Land¹⁷ that its property contained a hazardous waste site requiring immediate cleanup. Smith Land performed the work itself,¹⁸ but

and the "legislative history" of CERCLA justify the expansion of liability to include successor corporations. *Id.* Supporters of the policy argue that it internalizes costs within the particular type of manufacturing enterprise rather than the industry as a whole. See Comment, *Successor Corporate Liability for Improper Disposal of Hazardous Waste*, 7 W. NEW ENG. L. REV. 909, 921 (1985). Critics, however, argue that because corporate successors have not created the risk of environmental torts under CERCLA, they do not benefit from the predecessor's waste disposal practices, nor are they in a position to lessen the associated danger of environmental damages. See, Cyphert and Key, *Hazardous Waste Facility Successor Liability: the Ultimate in Guilt by Association*, 27 FOR THE DEF. 18 (Nov. 1985).

14. The common law doctrine of *caveat emptor* remains applicable to realty sales in every common law jurisdiction. See M. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* § 1.2(n), at 37 (4th ed. 1984) ("In the ordinary sale of realty this doctrine [*caveat emptor*] not only applies, it flourishes"). RESTATEMENT (SECOND) OF TORTS § 352, comment (a) (1965) summarizes the prevailing view of vendor liability:

Under the ancient doctrine of *caveat emptor*, the original rule was that, in the absence of express agreement, the vendor of land was not liable to vendee, or *a fortiori* to any other person, for the condition of the land existing at the time of transfer. As to sales of land this rule has retained much of its original force, and the implied warranties which have grown up around the sale of chattels have never developed. This is perhaps because great importance always has been attached to the deed of conveyance, which is taken to represent the full agreement of the parties, and to exclude all other terms and liabilities. The vendee is required to make his own inspection of the premises, and the vendor is not responsible to him for their defective condition, existing at the time of transfer.

Id.

15. *Smith Land*, 851 F.2d at 90 (3rd Cir. 1988).

16. The Environmental Protection Agency is the agency responsible for implementing CERCLA. Since Congress enacted CERCLA, the EPA has compiled an inventory of hazardous waste disposal sites that require some type of cleanup. See CONGRESSIONAL BUDGET OFFICE, 1ST SESS., *HAZARDOUS WASTE MANAGEMENT: RECENT CHANGES AND POLICY ALTERNATIVES* 17 (1985).

17. *Smith Land*, 851 F.2d at 87. Smith Land was not the original vendee. The district court noted that Smith's predecessor was a "sophisticated" company that had inspected the land on five occasions, knew of its past use, and admitted that the pile of waste was a "negative" factor in the decision to purchase the property. *Id.* at 88.

18. Under threat of enforcement action by the EPA, Smith Land entered into a consent agreement whereby the EPA required Smith Land to conduct a remedial program. Smith Land covered all exposed asbestos with soil, graded all slopes to decrease erosion, covered all slopes with vegetation, erected fences and warning signs around the perimeter of the facility and established a permanent monitoring program. Plaintiff incurred costs of \$218,945.44 in connection with its cleanup efforts. Brief for appellant at 6, *Smith Land Corp. v. Celotex*, 851 F.2d 86 (3rd Cir. 1988) (No. 87-5740).

sought indemnification¹⁹ from the successor corporations currently holding title to the property²⁰ before settling with the EPA. When the remote vendors refused to indemnify Smith Land, the vendee filed suit²¹ under Section 107²² of CERCLA. The District Court for the Middle District of Pennsylvania²³ held that *caveat emptor* precluded Smith Land from recouping cleanup costs.²⁴ The court noted that Smith Land, through its predecessor, inspected²⁵ the property on more

19. 42 U.S.C. § 9613(f)(1) provides that “[a]ny person may seek contribution from any other person who is liable. . . . under Section 9607(a).” Such claims “shall be governed by Federal law.” *Id.* In resolving contribution claims, “the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” *Id.* In addition, a person “who has resolved its liability to the United States for some or all of a response action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement.” 42 U.S.C. § 9613(f)(3)(A).

20. The Celotex Corporation (“Celotex”) and Rapid-American are successor corporations to the Philip Carey Manufacturing Company (“Philip Carey”). Rapid-American is the actual successor corporation to Philip Carey Manufacturing Company, while Celotex is the successor-in-interest to Mr. Philip Carey. Philip Carey operated a manufacturing company in Pennsylvania from 1906 to 1961. Its manufacturing process produced asbestos waste which the company disposed of on the land now owned by Smith Land. Brief for Appellant at 3-7, *Smith Land & Improvement Corp. v. Rapid-American Corp.*, 851 F.2d 86 (3rd Cir. 1988)(No. 87-5740). Asbestos is a “hazardous substance” as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14)(1982 & Supp. V 1987).

In 1963, Smith Land’s predecessor, Exeter Investment Corp., a wholly-owned subsidiary of Smith Land, purchased the land owned by Philip Carey upon which Philip Carey had disposed of the hazardous waste. Subsequent to the conveyance, Exeter Investment Corporation merged with Smith Land. Smith Land notified both Celotex and Rapid-American of its intention to seek indemnification. Brief for Appellant at 3-7, *Smith Land & Improvement Corp. v. Rapid American Corp.*, 851 F.2d 86 (3d Cir. 1988)(No. 87-5740).

21. Smith Land brought the actions under CERCLA and included several pendent law claims under Pennsylvania state environmental statutes. Smith Land also made claims under common law theories of restitution, unjust enrichment and indemnity. Brief for United States as Amicus Curiae at 13-14, 851 F.2d 86 (3d Cir. 1988) (No. 87-5740).

22. 42 U.S.C. § 9607(a)(4)(B) provides that responsible parties are liable for cleanup costs incurred by “any person” in remedying releases of hazardous substances. *Id.* See *supra* note 6 for a listing of liable parties.

23. The district court’s opinion is unpublished.

24. *Smith Land*, 851 F.2d at 88; see also, *Kain v. Weitzel*, 72 Ohio App. 229, 50 N.E. 2d 605, 607 (1943) (“Under the rule of *caveat emptor*, a purchaser takes all the risks being bound to judge and examine for himself as to title of land purchased unless he is dissuaded from doing so by representations of some kind.”).

25. *Smith Land*, 851 F.2d at 88. Exeter Investment, Smith Land’s predecessor, inspected the land on more than five occasions. The district court also noted that Exeter

than five occasions and presumably paid a price which reflected potential future liability.²⁶ The United States Court of Appeals for the Third Circuit reversed,²⁷ finding that neither the legislative history nor the language of the Act supported the district court's holding. Allowing defendants to plead *caveat emptor*, the court held, would frustrate Congress' aim to encourage cleanup by responsible parties.²⁸ Moreover, the defense would completely bar recovery by a purchaser regardless of other equities affecting the parties.²⁹

Despite the court's rejection of *caveat emptor* in CERCLA contribution actions, the common law has long recognized the doctrine as a defense to liability for the condition of land at the time of transfer absent express agreement between the parties.³⁰ *Caveat emptor* requires the vendee to make his own inspection before purchase, with the deed of conveyance representing the full agreement of the parties.³¹ Because the vendor and vendee deal at arms length with equal access to information, the common law entitles buyers to only those protections for which they specifically contract.³²

Congress enacted CERCLA in 1980 to establish a system of liability

knew of the site's past use and admitted that the pile of waste was a "negative" factor in Exeter's decision to purchase the land. *Id.*

26. 851 F.2d at 88. The district court relied on *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985), in which the Third Circuit upheld the defense of *caveat emptor* under an identical set of facts. The only difference, however, between the two cases is that *Philadelphia Elec.* was a state law claim under the Pennsylvania Clean Streams Law, 35 PA. CONS. STAT., § 691 (1987 & Supp. 1988) rather than CERCLA.

27. *Smith Land*, 851 F.2d at 89-90.

28. *Id.* at 89. The court concluded that *caveat emptor* does not keep with the policies underlying CERCLA. *Id.*

29. *Smith Land*, 851 F.2d at 90. The court held that *caveat emptor* may only be considered in mitigation of amount due to *Smith Land*. *Id.*

30. *See, e.g.*, *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983) (purchasers of unimproved property reasonably expected to make knowledgeable inspection before purchase and were more likely to have bargained for express warranty). For an excellent history of the doctrine of *caveat emptor*, see Hamilton, *The Ancient Maxim of Caveat Emptor*, 40 YALE L.J. 1133 (1931).

31. *See supra* note 14.

32. *See, e.g.*, *Wolf v. Christman*, 202 Pa. 475, 51 A. 1101 (1902) ("Rule of *caveat emptor* does not obtain where one buys on a warranty or express representation"); *Pinole v. Roovers*, 193 Pa. 94, 44 A. 275 (1899) ("Where grantee accepts. . . deed, and pays the purchase money, *caveat emptor* will apply, when, in ejectionment, he sets up a deficiency in quality as warranting him in holding more land than was conveyed to him."). *But see* *Elderkin v. Gaster*, 447 Pa. 118, 124, 288 A.2d 771, 774-75 (1972) (courts will apply implied warranty theory where transaction involves sale of new home,

that would ensure that those parties responsible for generating the hazardous waste problems would pay the cleanup costs.³³ The Act established a \$1.6 billion "Hazardous Substance Response Trust Fund"³⁴ to give the federal government the resources to finance immediate cleanups. Furthermore, the Act authorizes fund representatives to sue responsible³⁵ private parties for response costs.³⁶ Courts interpreting the Act have upheld CERCLA defendants' right to implead other re-

because builder-vendors enjoy superior bargaining power and are better able to assume liability because of their expertise).

33. See *United States v. Mottolo*, 605 F. Supp. 898, 903 (D.N.H. 1985) ("[G]overnment is free to undertake thorough and cautious action in potentially protracted hazardous waste clean-up operations"); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("[CERCLA] should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs.").

34. 42 U.S.C. § 9604(a)(1) (1982 & Supp. V 1987) provides:

Whenever (A) any hazardous substance is released or there is a substantial threat of such release into the environment or (B) there is a release or substantial threat of release in the environment of any pollutant or contaminant which may produce an imminent or substantial danger to the public health or welfare, the President is authorized to act . . . to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant any time. . . .

Id. 42 U.S.C. § 9631(b) provides that Congress will finance the fund by taxes levied over a five-year period on the oil and chemical industry and by a smaller contribution from the general revenues. *Id.*

35. See *supra* note 6 for a listing of liable parties.

36. 42 U.S.C. § 9607 (1982 & Supp. V 1987). Generally, response costs are those costs that the government incurs in cleaning up or controlling the release of a hazardous substance. See *United States v. Shell Oil Co.*, 22 Env't Rep. Cas. (BNA) 1473 (D. Colo. 1985); *United States v. Northeastern Pharmaceutical & Chem. Co.*, (NEPACCO), 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in relevant part*, 810 F.2d 726 (8th Cir. 1986); *United States v. Wade*, 546 F. Supp. 785 (E.D. Pa. 1982) (*Wade I*). Few courts have actually addressed the definition or dimension of response cost. Congress did not specifically define response costs, however it did define "response" as "removal, remedy and remedial action." 42 U.S.C. § 9601(25). Response costs must be necessary and consistent with the National Contingency Plan. 42 U.S.C. § 9607(a)(4)(B).

The court in *United States v. Northeastern Pharmaceutical and Chem. Co.* held that response costs include: the United States Government's litigation costs and attorney fees; salaries and expenses associated with the United States Government's monitoring, assessing, and evaluating the release of contaminants; expenses associated with the government's actions taken to prevent, minimize, or mitigate damages that might result from the release or threat of contaminants from a hazardous waste disposal site; pre-judgment interest at the rate of nine percent per year calculated from the date the complaint was filed under CERCLA; and all future costs of removal or remedial actions that are consistent with the National Contingency Plan and incurred by the United States government in cleaning up a hazardous waste site. *Id.* at 850, 852.

sponsible parties in order to recoup response costs.³⁷ Largely because the Act was the product of hurried Congressional compromise,³⁸ Congress left the precise liability standards,³⁹ the definition of responsible party⁴⁰ and the scope of the defenses⁴¹ for judicial resolution.⁴²

Working under this imprecise legislative guidance, courts developed

37. See, e.g., *United States v. Ward*, 14 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,804, 20,805 (E.D.N.C. 1984) (right to contribution not necessarily found to be implicit in the statute, but within the court's power to create federal common law); *United States v. Northeastern Pharmaceutical and Chemical Co.*, 579 F. Supp 823, 850 (W.D. Mo. 1984), *aff'd in relevant part*, 810 F.2d 726 (8th Cir. 1986) ("[t]he fact that there is not a claim before this Court seeking recovery on behalf of the fund does not bar recovery by the plaintiff"). See Note, *The Right to Contribution for Response Costs Under CERCLA*, 60 *NOTRE DAME L. REV.* 345, 346 (1985) ("The Act's legislative history and the federal government's implementation of CERCLA indicate that a right to contribution arises for response costs whenever joint and several liability exits under CERCLA.").

38. The hurried compromise resulted in vagueness and confusion in the statute. *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1111 (D. Minn. 1982). See generally Gulino, *A Right of Contribution Under CERCLA: The Case for Federal Common Law*, 71 *CORNELL L. REV.* 668, 693 ("The presence of an incomplete statutory scheme and a strong federal interest in abating hazardous waste spills buttress the argument for gap filling by federal courts.").

39. See *United States v. Wade*, 577 F. Supp. 1326, 1337 (E.D. Pa. 1983) (citing various senators' statements explaining the deletion of joint and several liability in favor of an equitable case-by-case approach); see also 126 *CONG. REC.* 30,932 (1980) (comments of Sen. Randolph):

It is intended that issues of liability not resolved by this Act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms has been deleted, and the liability of joint tortfeasors will be determined under common law or previous statutory law.

Id. For an overview of senators' pertinent commentary, see generally, Note Gulino, *A Right of Contribution under CERCLA: The Case for Federal Common Law*, 71 *CORNELL L. REV.* 668 (1986).

40. For a statutory overview see Note, *CERCLA Defendants: The Problem of Expanding Liability and Diminishing Defenses*, 31 *WASH. U.J. URB. & CONTEMP. L.* 289, 300-11 (1987).

41. See *supra* note 6 for a listing of liable parties.

42. See *supra* note 9 for a list of CERCLA defenses. In the instant case, the court noted that the defenses enumerated in section 9607(b) are not exclusive to contribution suits.

Other CERCLA provisions suggest additional defenses. For example, the Act limits to three years the period in which an action may be brought. 42 U.S.C. § 9613(g) (1982 & Supp. V 1987). A party which has resolved its liability to the government is not liable to other parties for contribution, and the settlement may reduce the claim pro tanto. See *id.* § 9613(f)(2). In addition, agreements to indemnify or hold harmless are enforceable between the parties but not against the government. See *id.* § 9607(e). Moreover, the defenses in section 9607(b) coexist with equitable considerations that may mitigate damages. See *Smith Land*, 851 F.2d at 90.

varied interpretations of CERCLA liability for contribution costs in the vendor-vendee context. In *City of Philadelphia v. Stepan Chemical Co.*⁴³ the United States District Court for the Eastern District of Pennsylvania first encountered the problem of whether a vendee who inherited, but did not cause or contribute to, a hazardous waste problem must ultimately pay cleanup costs. Despite the vendee's own strict liability as owner,⁴⁴ the district court held that CERCLA permits a vendee to independently clean the site and recover cleanup costs from a prior owner.⁴⁵ The court addressed the liability of such an "innocent party" in dicta and reasoned that courts should impose liability only on those parties who participate in substantial and purposeful waste disposal activity or who reap some commercial benefit from their conduct.⁴⁶

Following the reasoning of *Stepan Chemical*, courts have recognized that CERCLA's defenses⁴⁷ are themselves equitable and nonexclusive.⁴⁸ In *Mardan Corp. v. C.G.C. Music Corp.*,⁴⁹ for example, the

43. 544 F. Supp. 1135 (E.D. Pa. 1982).

44. 42 U.S.C. § 9607(a) states that "the owner and operator of a vessel or a facility . . . shall be liable [for clean up costs]."

45. *City of Philadelphia*, 544 F. Supp. at 1142. CERCLA § 107(a)(4)(B) provides for a system of liability so that those responsible for the particular hazardous waste problem will pay for the cleanup. See *Bulk Distrib. Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (S.D. Fla. 1984) ("[CERCLA] is designed . . . to facilitate the prompt cleanup of hazardous dump sites by providing a means of financing both governmental and private response costs and by placing the ultimate financial burden on those responsible for the danger."); see also *Velsicol Chemical Corp. v. Reilly Tar & Chem. Corp.*, 15 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,103, 20,105 (E.D. Tenn. August 16, 1984) (the dispositive consideration in *Stepan* was that the plaintiff City did not operate a hazardous waste disposal facility on the premises and did not voluntarily permit the placement of the hazardous substances on its property); *D'Imperio v. United States*, 575 F. Supp. 248, 253 (D.N.J. 1983) ("[in] order to seek recovery [under § 107(a)(4)(B)], it is necessary for the plaintiff to prove that he himself is not liable for these costs.").

In order for a private party to claim against the Fund, a release of a reportable quantity of hazardous substance must occur. 42 U.S.C. § 9612(a). Subsequently, the party must make a demand for recovery of costs incurred in cleaning up the spill, and must wait 60 days for satisfaction of the demand. *Id.*

46. *City of Philadelphia*, 544 F. Supp. at 1143 n.10.

47. See *supra* note 9 for a list of CERCLA defenses.

48. *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1055 (D. Ariz. 1984) ("defenses listed in subsection of liability provision of CERCLA are not exclusive"); see also *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 579 F. Supp. 823, 847 (W.D. Mo. 1984), *aff'd in relevant part*, 810 F.2d 726 (8th Cir. 1986) (actions based on Section 107 are actually equitable actions in the nature of restitution).

49. 600 F. Supp. 1049, 1057 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986).

court held that the equitable defense of "unclean hands"⁵⁰ is applicable in a CERCLA private response cost recovery action.⁵¹ Additionally, the *Mardan* court held that the vendor's settlement agreement and release barred all subsequent claims, a result which the parties may have reasonably intended to preclude at the time of negotiation.⁵² In *Mardan* the plaintiff actively participated in the creation of hazardous waste after purchasing the property. The court reasoned that those who knowingly purchase a contaminated site and who participate in further contamination are equitably estopped from recovering cleanup costs from prior owners.⁵³ Such a conclusion, the court reasoned, does not contravene the intent or purpose of the Act because the prior owners would remain liable to the state or federal government despite those defenses.⁵⁴

Courts have also recognized a defense to current owners' strict liability for those purchasers who knowingly inherit a hazardous waste problem, but who subsequently and independently commence cleanup operations. In *Pinole Point Properties v. Bethlehem Steel Corp.*⁵⁵ the court permitted an innocent purchaser who did not cause or contribute to the waste problem to recover cleanup costs from the vendor. The court held that even though a private party, and not the government, initiated cleanup efforts, courts have not hesitated to grant relief.⁵⁶

CERCLA has also subjected secured creditors to liability for cleanup costs.⁵⁷ CERCLA imposes liability on any secured creditor

50. The unclean hands defense suggests that one party can only sue a potentially responsible party under CERCLA section 107(a) when the first party did not participate in the creation of the hazardous waste site.

51. *Mardan*, 600 F. Supp. at 1058. *But see* *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285, 1291 n.7 (E.D. Pa. 1987) ("the 'unclean hands' doctrine espoused in *Mardan Corp. v. C.G.C. Music Ltd.*, has no place in CERCLA actions.").

52. *Mardan*, 600 F. Supp. at 1056.

53. *Id.* at 1058.

54. *Id.* 42 U.S.C. § 9607 (a)(4)(A)(1982 & Supp. V 1987) provides that any person liable under subsection (a) shall be directly liable to the United States Government or a State for all costs of removal or remedial action incurred by those parties. *See also* *Bulk Distrib. Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1443 (S.D. Fla. 1984) ("Although private parties may recover costs under section 9607(a)(4)(B), the fact remains that much of CERCLA's language deals with government-sponsored clean-up efforts.").

55. 596 F. Supp. 283 (N.D. Cal. 1984).

56. *Id.* at 291.

57. *See* *United States v. Maryland Bank and Trust*, 632 F. Supp. 573 (D. Md. 1986)

who participates in the financial management of a facility.⁵⁸ The court in *United States v. Mirabile*,⁵⁹ however, rejected a broad interpretation of "participation in . . . management" suggested by creditors. The court distinguished between participation in financial decisions and participation in operational, production or waste disposal activities.⁶⁰ As such, the court concluded that actual control over the "nuts-and-bolts" of the site operations was a prerequisite to imposition of liability.⁶¹

Recent CERCLA amendments⁶² also recognize the hardship that the Act's liability provisions may impose upon innocent purchasers of real property.⁶³ Congress incorporated a third-party defense provision⁶⁴ into the Superfund Amendments and Reauthorization Act

(bank that held mortgage for property and later purchased it at foreclosure sale was liable for cleanup costs). For a discussion of banks' and other creditors' liability under CERCLA, see Murphy, *The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities*, 41 BUS. LAW. 1133 (1986).

58. CERCLA section 101(20)(a), 42 U.S.C. § 9601(20)(a) provides:

Owner or operator means. . . (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility. . .

Id.

59. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985).

60. *Id.* at 20,995-97.

61. *Id.* at 20,996. The court noted that Congress contemplated this distinction when it enacted CERCLA. "In the case of a facility, an 'operator' is defined to be a person who is carrying out operational functions for the owner. . ." *Id.* at 20,995-96 (quoting H.R. REP. NO. 172, 96th Cong., 2d Sess. 37, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6182.) In a related opinion, the *Mirabile* court discussed the liability of the landowners who inherited, but did not cause, the hazardous waste problem. *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992 (E.D. Pa. Sept. 4, 1985). The court held that because the vendees did not add to the waste, but, on the contrary, exercised due care and took precautions against foreseeable acts or omissions of others, they could invoke the third party defense to liability. *Id.*

62. See 42 U.S.C. § 9601(35)(A)(i)(1982 & Supp. V 1987).

63. See, e.g., 131 CONG. REC. H11,158 (daily ed. Dec. 6, 1985) (comments of Rep. Frank) ("nothing is more damaging to a good regulatory scheme than [sic] having anything in it that could inadvertently sweep out within its coils innocent individuals"); 131 CONG. REC. S12,008 (daily ed. Sept. 24, 1985) (comments of Sen. Domenici) (the use of an "extraordinary legal standard" for CERCLA liability unfairly burdens those who clean up the hazardous waste.).

64. 42 U.S.C. § 9601(f)(35)(1982 & Supp. 1987):

The third-party defense excuses a potentially responsible party from liability for the acts or omissions of third parties. . . . when that party has exercised due care

(SARA) of 1986.⁶⁵ This defense to liability under CERCLA permits vendees of real estate to qualify for the statutory defense⁶⁶ if they acquire property without knowledge or reason to know⁶⁷ of any contami-

and taken reasonable precautions if the property was acquired after the hazardous substance was placed on, in, or at the facility and the landowner. . . .did not know and had no reason to know that a hazardous substance. . . .was disposed of at the facility.

Id. Congress amended the definition of "contractual relationship," for the purposes of section 9607(b)(3), to make clear that innocent purchasers of land may rely on the "third-party" defense despite the fact that they engaged in a land transaction with the previous owner who caused a release.

65. SARA, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-75 and scattered sections of U.S.C. (1982 & Supp. V 1987)). For a general discussion of the amendments, see Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 *ECOLOGY L.Q.* 365 (1987).

66. CERCLA section 107(b), 42 U.S.C. § 9607(b) states: There shall be no liability. . . for a person otherwise liable who can establish. . . that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:

. . . .

(3) an act or omission of a third party. . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned. . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

Id. See also, H.R. REP. NO. 99-962, 99th Cong., 2nd Sess. 187 (1986). In reference to the landowner liability provision, the legislative history states that:

The duty to inquire under this provision shall be judged as of the time of acquisition. Defendants shall be held to a higher standard as public awareness of the hazards associated with hazardous substance releases has grown, as reflected by this Act, the 1980 Act and other Federal and State statutes. Moreover, good commercial or customary practice. . . shall mean that a reasonable inquiry must have been made in all circumstances, in light of best business and land transfer principles. Those engaged in commercial transactions should, however, be held to a higher standard than those who are engaged in private residential transactions.

Id.

67. 42 U.S.C. § 9601(35)(B) states that in order to establish that the purchaser had no reason to know of environmental contamination at the property the purchaser must inquire into the previous ownership and uses of the property in an effort to minimize liability. The scope of that inquiry is subject to a test of consistency with "good commercial or customary practice," defined to include the following factors:

(1) any specialized knowledge or experience on the part of the defendant; (2) the relationship of the purchase price to the value of the property if uncontaminated; (3) commonly known or reasonably ascertainable information about the property; (4) the obviousness of the presence or likely presence of contamination at the property; and (5) the ability to detect such contamination by appropriate inspection.

Id.

For a discussion of the impact of the amendments, see Berz and Spracker, *The Impact of Superfund On Real Estate Transactions*, 2 *PROB. AND PROP.* 49(5) (March-April

nation. To establish the defense, the vendee must make an inspection, which is implicit in *caveat emptor*,⁶⁸ or risk a finding of negligence.⁶⁹ The purchaser must make a good faith inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice at the time of acquisition in order to minimize liability.⁷⁰ In deciding whether innocent purchasers have met the test, courts weigh equitable factors and hold parties involved in commercial transactions to a higher standard than those engaged in private residential transactions.⁷¹ Congress recognized that the latter group of vendees would probably pay a price unreflective of potential future liability and would generally not be in the best economic position to assume liability for cleanup costs.⁷²

The Third Circuit squarely addressed this issue in *Philadelphia Electric Co. v. Hercules, Inc.*,⁷³ a state law action, and held that *caveat emptor* is a defense to liability for cleanup costs pursuant to the Pennsylvania Clean Streams Law.⁷⁴ The court reasoned that in an arm's-length transaction where both parties possess equal means of knowledge about the land, *caveat emptor* operates to hold the seller liable only for express provisions in the contract.⁷⁵ In *Hercules* the vendee inspected the land, inquired into its past use, and learned of hazardous waste on the property before purchasing.⁷⁶ When evaluating the ven-

1988) ("The major effect of this new amendment. . . is not to provide limited relief to innocent landowners. Rather, it places substantial investigatory and remedial obligations on purchasers and sellers of property.").

68. See *Smith Land*, 851 F.2d at 90 n.1 ("The duty of inspection implicit in *caveat emptor* has not been ignored in CERCLA.").

69. For a discussion of the innocent landowner provision of the 1986 CERCLA amendments, see Levitas and Hughes, *Hazardous Waste Issues in Real Estate Transactions*, 38 MERCER L. REV. 581, 597-600 (1987) ("recent changes in CERCLA may operate to impose a standard of negligence on some landowners."). *Id.* at 597.

70. 42 U.S.C. § 9601(f)(35)(B).

71. See *supra* notes 66-67 for a discussion of liability under the SARA amendments. See generally, Bleicher and Stonelake, *Caveat Emptor: The Impact of Superfund and Related Laws on Real Estate Transactions*, 14 *Envtl. L. Rep. (Envtl. L. Inst.)* 10017 (emergence of new statutory and common law governing liability for toxic waste pollution has greatly magnified the scope of potential liability).

72. See generally Note, *Hazardous Waste and the Innocent Purchaser*, 38 U. FLA. L. REV. 253 (1986).

73. 762 F.2d 303 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985).

74. 35 PA. CONS. STAT. § 691 (1987 & Supp. 1988).

75. *Hercules* 762 F.2d at 312.

76. *Id.* at 304, 314. The plaintiff claimed that the vendor's predecessor in interest

dee's purchase practices, the court found it inconceivable that the purchase price did not reflect potential environmental liability.⁷⁷ Therefore, the court concluded that negating the market's allocation of risks would place unbargained for liability upon vendors who may have originally sold the property at a discount to remote vendors.⁷⁸

*Smith Land & Improvement Corp. v. Celotex*⁷⁹ presented the court with a unique opportunity to apply *caveat emptor* in the context of a federal statute. For the first time, the court examined the scope of CERCLA's liability and defense provisions in a situation where neither the vendor nor the vendee were the original parties to the transaction.⁸⁰ The majority found that neither the statute nor its legislative history supported the district court's finding that *caveat emptor* is a permissible defense to corporate successor liability for cleanup costs.⁸¹ In reaching its conclusion, the court conceded that the defenses enumerated in § 107(b)⁸² are "not exclusive"⁸³ and "coexist with equitable considerations."⁸⁴ Nevertheless, the court concluded that because *ca-*

had caused contamination of ground water and river water during the vendor's operation of a chemical plant on the property. *Id.*

77. *Id.*

78. *Id.*

79. 851 F.2d 86 (3d Cir. 1988).

80. See *supra* notes 17, 20 and accompanying text (discussing the parties' relationships to the original vendor and vendee and corporate successor liability).

81. 851 F.2d at 87. The district court relied upon the Third Circuit's approval of *caveat emptor* as a defense to corporate successor liability in *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985). *Smith Land*, 851 F.2d at 88. *Hercules* is distinguishable from *Smith Land* only on the ground that it involved a state law claim rather than a federal one.

The court did, however, state that courts may consider *caveat emptor* in mitigation of contribution costs. *Smith Land*, 851 F.2d at 89. The court stated that CERCLA provides explicitly that federal law governs contribution claims, and that the court based its decision in *Philadelphia Elec. Co. v. Hercules, Inc.* on Pennsylvania state law while sitting in diversity. Consequently, the court held that it could not transfer its holding in that case to a CERCLA claim "as a matter of course." *Id.*

82. 42 U.S.C. § 9607(b)(1982 & Supp. V 1987).

83. 851 F.2d at 89.

84. *Id.* (citing H.R. REP. NO. 253(I), 99th Cong., 1st Sess. 1, 80 (1985), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2862). The court also concluded that *caveat emptor*, though not a defense to a government suit for cleanup costs, "arguably would not contradict the statutory text." *Id.* See also, 126 CONG. REC. S. 14964 as explained by Sen. Randolph, a major sponsor of the bill:

The liability regime in this substitute [which became CERCLA] contains some changes in language from that in the bill reported by the committee on Environment and Public Works. The changes were made in recognition of the difficulty in

veat emptor completely bars recovery by a purchaser regardless of other equities between the parties, its adoption would frustrate Congress' desire to encourage cleanup by the responsible parties.⁸⁵

The court's decision to extend CERCLA liability to corporate successors⁸⁶ in the vendor-vendee context while denying them the defense of *caveat emptor* is misguided, inequitable, and based on an inadequate reading of the evidence. When the court expanded CERCLA to include corporate successor liability,⁸⁷ it should not have limited defendants' affirmative defenses to those specified in CERCLA.⁸⁸ Instead, defendants should be entitled to all the defenses available to corporate successors with respect to liability inherited from predecessors. As the district court recognized, one such defense is *caveat emptor*.⁸⁹

The court acknowledged that Congress implicitly incorporated *caveat emptor* into the innocent landowner defense in the 1986 SARA amendments.⁹⁰ Under SARA, a vendee can only claim innocence from liability for cleanup costs if the vendee thoroughly inspects the property and finds no evidence of hazardous waste.⁹¹ Acting through its predecessor, Smith Land found evidence of hazardous waste. The

prescribing statutory liability standards which will be applicable in individual cases.

Id.

85. 851 F.2d at 89. The court also argued that *caveat emptor* contradicts the statutory text because CERCLA authorizes the government to seek reimbursement costs from any of the potentially responsible parties and leaves them to share the expenses equitably. Thus, the court reasoned that *caveat emptor* would force Congress to choose one defendant from among several and would cause "ill will between the government and the unlucky party." *Id.* at 90.

86. *See supra* note 13 for a discussion of the corporate successor liability issue.

87. *See supra* notes 17, 20 and accompanying text (discussing the parties' relationships to the original vendor and discussing the corporate successor liability issue).

88. *See supra* notes 9, 41 and accompanying text (description of CERCLA's defense scheme).

89. *See supra* notes 23-26 and accompanying text (discussing the district court's holding).

90. 851 F.2d at 90 n.1. The court states:

The duty of inspection implicit in *caveat emptor* has not been ignored in CERCLA. . . The Act relieves a landowner from initial liability on proof that after 'all appropriate inquiry consistent with good commercial or customary practice' the owner had no reason to know of the presence of a hazardous substance, quoting 42 U.S.C. § 9601(35)(B).

Id.

91. 42 U.S.C. § 9601(f)(35)(B). *See supra* notes 65-74 and accompanying text for relevant discussion.

purchase price reflected that potential liability.⁹² If the court had assessed Smith Land's experience in real estate transactions⁹³ in light of SARA's inspection requirement, the court would have recognized that defendants were entitled to invoke the *caveat emptor* defense.⁹⁴ As a result of the court's holding, vendors stand to be doubly liable.

CERCLA's legislative history indicates that Congress expressly deleted proximate cause and liability standards because they wished to leave these issues to the courts to decide in an equitable manner.⁹⁵ Assuming that a vendor discounts his purchase price to reflect a vendee's potential liability for cleanup costs, an equitable solution exists. Such a solution would dictate that the courts give effect to the market's allocation of risks and resources when deciding liability. If the courts allow knowledgeable purchasers to avoid liability, such purchasers will reap a windfall equal to the difference between the purchase price of the land and its fair market value after cleanup.⁹⁶ Courts construing CERCLA's liability provisions should recognize that many of its provisions address government-sponsored actions and, as such, do not fully contemplate private cost recovery actions or the appropriate defenses.⁹⁷ If the courts continue to expand CERCLA's liability sections without also providing for the appropriate equitable defenses, CERCLA liability will continue to be a hidden trap for all but the most wary.

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92. See *supra* note 27 and accompanying text.

93. See *supra* notes 25-26 and accompanying text (discussing *Smith Land* as an experienced purchaser).

94. 851 F.2d at 87 (3d Cir. 1988).

95. See *supra* notes 20, 68 and 88 for a discussion of equitable issues.

96. See *supra* note 72.

97. See generally Note, *Hazardous Waste and the Innocent Purchaser*, 38 U. FLA. L. REV. 253, 280 (1986) ("If allowed to avoid liability, knowledgeable purchasers may reap a windfall equal to the difference between the purchase price of the land and its fair market value when cleansed of toxic wastes.").

* J.D. 1990, Washington University.

RECENT DEVELOPMENTS

