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STUDENT NOTE

CLOSING PANDORA'S BOX: ENVIRONMENTAL-QUALITY INSURANCE AS AN ALTERNATIVE TO BROADENING CERCLA LIABILITY

INTRODUCTION

More than 26,000 abandoned and operational hazardous waste sites have been discovered in the United States during the last decade. In response to growing public concern over the environmental and public health hazards posed by the improper disposal of hazardous wastes, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

The 1980 CERCLA legislation established a $1.6 billion "Superfund" to effect immediate remedial action upon the nation's worst sites. CERCLA authorizes the United States Environmental Protection Agency (EPA) to order responsible parties to cleanup the hazardous waste site or, at the EPA's discretion, to cleanup the site itself. The EPA is then permitted to seek reimbursement from specific "responsible parties" held to be strictly liable under the stat-

1. McGowin, Environmental Liability for Vendees and Lenders, 49 ALA. LAW. 264, 266 (Sept. 1988) (these sites are listed by the Environmental Protection Agency for further action or investigation).

2. Public concern over the hazardous waste problem escalated in 1978 with the environmental nightmare at Love Canal in upstate New York. See 11 Env't Rep. (BNA) 139, 143 (May 30, 1980). After the area's inhabitants reported a high incidence of health problems ranging from nosebleeds to birth defects, it was discovered that their neighborhood had been developed above an abandoned hazardous waste site. Mervak v. City of Niagara Falls, 101 Misc. 2d 68, 420 N.Y.S.2d 687, 689 (1979). The long-buried chemicals had contaminated the water supply and were seeping to the surface near the homes. Id. Love Canal was a driving force behind the future environmental legislation.


4. Id. § 9611. This section details the authorized uses of the Hazardous Substance Superfund. See McGowin, supra note 1, at 266. The EPA has placed more than 800 of the country's most destructive hazardous waste sites on a "National Priorities List." Id. Inclusion on this environmental docket qualifies the site for federal funds and a more comprehensive investigation under close EPA supervision.


6. Id. § 9604(a)(1).

7. CERCLA lists four categories of parties potentially responsible for the cleanup of hazardous waste. Id. § 9607. See infra notes 38-44 and accompanying text (defining CERCLA's responsible party categories); see also Buckeye Union Ins. Co. v.
ute. After CERCLA’s enactment, however, it became apparent that the number of uncontrolled hazardous waste sites was much larger than originally anticipated in 1980. Much to the dismay of a well intended Congress, the Superfund coffers were quickly depleted primarily through efforts aimed at identifying and assessing the hazardous waste problem.

CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act (SARA). The amendments provided CERCLA with an additional $8.5 billion to be used over a five year period. SARA’s legislative history suggests that, in replenishing Superfund, Congress was aware that the EPA would not have adequate resources to clean up all contaminated sites.
quate resources to cleanup all of the known hazardous waste sites.\textsuperscript{13} The EPA therefore has become the focus of sustained pressure by Congress to vigorously pursue cleanup reimbursement from responsible parties.\textsuperscript{14} The judiciary has cooperated by broadening its view of CERCLA liability and increasingly placing the financial burden of reimbursement and cleanup on parties which possess more extensive economic resources.\textsuperscript{15} As a result, almost anyone even remotely associated with contaminated real estate bears some risk of incurring CERCLA liability.

The Superfund legislation has created more problems than it has resolved.\textsuperscript{16} Although the environment has enjoyed some degree of recuperative success under CERCLA, legislative efforts to finance Superfund have failed. Moreover, the courts' "witch-hunt" approach to CERCLA liability continues to endanger the vitality of the real estate and banking industries.\textsuperscript{17} CERCLA was a good first step in an overall remedial program, but it is not a panacea. If Superfund is to continue, modifications must be made to adequately finance the program and minimize its negative impact on collateral industries.

This note will focus on the deficiencies inherent in the current en-


\textsuperscript{14} H.R. REP. No. 253, 99th Cong., 2d Sess. 55, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2837 (the House report noted that the "resources given to EPA were simply inadequate to fulfill the promises that were made to clean up abandoned hazardous wastes in this country. . . . EPA was virtually guaranteed to fail from the moment CERCLA passed in 1980.").

\textsuperscript{15} While generators, owners, operators, and transporters have traditionally been included, cases are now holding others liable. See, e.g., United States v. Carolawn Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20698 (D.S.C. 1984) (holding that CERCLA liability can be imposed on a firm acting as a "conduit" in the transfer of title to a waste disposal site even though the firm actually held title to the site for less than an hour); United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984) (holding that a lessor who leased a warehouse it owned to a business generating hazardous waste was liable under CERCLA as an "owner," even though the lessee had no other connection to the lessee's operations); United States v. South Carolina Recycling & Disposal, Inc., 21 Env't Rep. Cas. (BNA) 1577, 1578 (D.S.C. 1984) (holding that a lessee who sublet a portion of its leasehold to a separate corporation conducting a waste disposal operation was liable under CERCLA as an "owner").

\textsuperscript{16} See generally Glass, Superfund and SARA: Are There Any Defenses Left?, 12 HARV. ENVTL. L. REV. 385 (1988). This article examines the legislative history of CERCLA and SARA and outlines the elements necessary to state a claim under the Acts. The author then reviews the viability of defenses under Superfund and concludes that a defendant has few methods in which to limit liability.

\textsuperscript{17} Id. at 386. See infra notes 90-103 and accompanying text.

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vironmental legislation. Part I will review CERCLA and the SARA amendments.\(^\text{18}\) Part II will discuss the problem of financing Superfund and the impact of CERCLA liability on the real estate and banking industries and on the court system.\(^\text{19}\) The environmental consultant plays a critical role in CERCLA's innocent landowner defense. Part II will also examine the potential future liability of the environmental consultant.\(^\text{20}\) Finally, part III will propose an alternative solution to broadening CERCLA liability: the creation of environmental-quality insurance.\(^\text{21}\)

I. ENVIRONMENTAL LEGISLATION

A. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)

CERCLA was enacted in 1980 as a congressional answer to the environmental and public health hazards posed by the improper disposal of hazardous wastes.\(^\text{22}\) CERCLA was meant to supplement the existing Resource Conservation and Recovery Act (RCRA)\(^\text{23}\) and other environmental law previously enacted to control the disposal of hazardous waste materials.\(^\text{24}\) The Act empowers the federal gov-

\(^{18}\) See infra notes 22-89 and accompanying text.

\(^{19}\) See infra notes 90-105 and accompanying text.

\(^{20}\) See infra notes 106-60 and accompanying text.

\(^{21}\) See infra notes 161-221 and accompanying text.


\(^{24}\) Congress enacted the Resource Conservation and Recovery Act (RCRA) in an effort to address the general problems posed by the increasing use and accumulation of hazardous waste. The statute's primary objective is to regulate the on-going generation, transportation, storage, treatment and disposal of hazardous waste. See H.R. Rep. No. 1016, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120 (the RCRA provides what Congress has termed a "prospective cradle-to-grave regulatory regime governing the movement of hazardous waste in our society."). The RCRA authorizes the EPA to bring suit against any person participating in such activity where the solid or hazardous waste may present an "imminent and substantial endangerment" to the public health or environment. See 42 U.S.C. § 6973(a) (1982).

The statute imposes waste management duties upon current generators and transporters of hazardous waste and on the present owners and operators of hazardous waste treatment, storage, and disposal facilities. Under the RCRA, waste "generators" are required to follow rigid guidelines concerning the "identification, labeling, tracking, and reporting of hazardous waste."

Transporters . . . must comply with the RCRA manifest system, meet certain regulations regarding the storage of hazardous waste, and meet notice and reporting requirements in the event of a spill during transportation. Owners and operators are required to comply with detailed requirements regard-
CERCLA provides the EPA with two types of response actions. Section 104 authorizes the EPA to initiate a cleanup action very quickly. First, the EPA must request responsible parties to remove the hazardous waste materials from a site. If the responsible party refuses to act, the EPA can use Superfund money to pay for the cleanup and subsequently bring suit under CERCLA section 107 to recover all costs. Under a section 106 response action the EPA requests a court order forcing the responsible party to cleanup waste sites that pose an imminent and substantial danger to the environment or public health. A section 106 action is more economical than a section 104 action, but the process is slow and often plagued by administrative delays. For this reason the EPA has relied pri-

ing (1) maintenance of records of the treatment, storage, or disposal of hazardous waste, (2) the actual treatment, storing, and disposal of hazardous waste pursuant to methods satisfactory to the EPA, (3) the location and construction of disposal facilities, (4) the maintenance of a contingency plan to minimize damage from hazardous waste, and (5) compliance with permit regulations.

Killion, The Environmental Statutory Framework: An Overview of CERCLA, SARA, MERLA, RCRA, and UST, 1, 16-21, Environmental Liability for Real Estate and Banking Attorneys (Minnesota Continuing Legal Education 1989). Whether RCRA could be used to force the cleanup of abandoned hazardous waste sites was the subject of some disagreement among the courts. Id. at 17.

25. 42 U.S.C. § 9604(a) (Supp. V 1987). The EPA’s response authority attaches whenever (1) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (2) any pollutant or contaminant is released or there is a substantial threat of a release into the environment which may present an imminent and substantial danger to the public health or welfare. Id. See 40 C.F.R. §§ 300.61–300.71 (1989) (setting forth the actual procedures that must be followed by the EPA when initiating a response action).


28. 42 U.S.C. § 9607 (1982 & Supp. V 1987). The EPA response actions are financed primarily from the Hazardous Substance Response Trust Fund established by section 921 of CERCLA. Id. See S. REP. No. 848, 96th Cong., 2d Sess. 13, reprinted in 1 Superfund: A Legislative History—The Evolution of Selected Sections of the Comprehensive Environmental Response, Compensation and Liability Act 303 (1983) (the purpose of Superfund is to finance response actions "where a liable party refuses to cleanup, cannot be found, or cannot pay the costs of cleanup and compensation"). See also Ohio v. United States Dept. of the Interior, 880 F.2d 432, 448 (D.C. Cir. 1989) ("In CERCLA as originally enacted, public trustees could rely on Superfund money to pay for restoration in cases where they could not recover money from the polluters themselves . . . .")


30. See Note, supra note 26, at 1486.
mainly on the more costly section 104 response action.\textsuperscript{31}

I. Elements of CERCLA Liability

Liability under CERCLA is triggered by a release or threatened release of a hazardous substance into the environment which causes the EPA to incur response costs.\textsuperscript{32} The Environmental Protection Agency or other plaintiff can establish liability against a responsible party if: (1) the site is a facility;\textsuperscript{33} (2) a release or threatened release\textsuperscript{34} of any hazardous substance\textsuperscript{35} from the site has occurred; (3) the release or threatened release has caused the plaintiff to incur response costs;\textsuperscript{36} and (4) the defendant is one of the four classes of persons

\textsuperscript{31} Id.

\textsuperscript{32} In addition to the EPA, CERCLA specifically authorizes private parties, including local governments to cleanup hazardous waste sites and seek reimbursement from either the responsible party or the Superfund. See 42 U.S.C. § 9607(a)(4)(B) (1982 & Supp. V 1987); 42 U.S.C. § 9623(a) (1982).

\textsuperscript{33} A "facility" is defined in part as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." Id. at § 9601(9)(B). See United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 836 (W.D. Mo. 1984), aff'd in part, rev'd in part, 810 F.2d 726, 743 (8th Cir. 1986) (contaminated farm held to be a "facility"); New York v. Shore Realty Corp., 759 F.2d 1032, 1043 n.15 (2d Cir. 1985) (CERCLA defines "facility" broadly to include any property where hazardous substances are located); United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985) (definition of "facility" includes roadways where hazardous waste was dumped); New York v. General Elec. Co., 592 F. Supp. 291, 297 (N.D.N.Y. 1984) (a dragstrip held to constitute a "facility"); United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1148 (D. Ariz. 1984) ("facility" includes real estate development containing toxic waste).

\textsuperscript{34} A "release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22) (1982 & Supp. V 1987).

Although CERCLA does not define "threatened release," courts have given the term a broad reading. See New York v. Shore Realty, 759 F.2d 1032, 1045 (2d Cir. 1985) ("the corroding and deteriorating tanks, [defendant's] lack of expertise in handling hazardous waste, and even the failure to license the facility amount to a threat of release"); United States v. Northernaire Plating Co., 670 F. Supp. 742, 747 (W.D. Mich. 1987) ("The evidence of the presence of hazardous substances at the facility, when combined with the evidence of the unwillingness of any party to assert control over the substances, amounts to a threat of release.").


\textsuperscript{36} Ohio v. United States Dept. of the Interior, 880 F.2d 432, 439 (D.C. Cir. 1989) (responsible party is potentially liable for virtually every cost involved in the cleanup of a hazardous waste site). "Response actions may include both 'removal' (i.e., clean up of the spilled substance) and 'remedial action' (i.e., dredging, repair of leaking containers, collection of rainfall runoff, relocation of displaced residents)."
designated as a party liable for response costs. 37

2. Parties Liable Under CERCLA

CERCLA specifies four categories of parties, known as "potentially responsible parties" (PRPs) who can be held liable for the costs of cleaning up a hazardous waste site: 38 (1) the present owner or operator 39 of the property; (2) the past owner or operator 40 of the property at the time the hazardous substances contaminated the property; (3) persons arranging for disposal or treatment at, 41 or


39. The meaning of "operator" and "owner" can be gleaned from an examination of the Act's legislative history. CERCLA is the product of four bills which were combined and enacted in the waning hours of the 96th Congress. One of the four bills defines an "operator" as "a person who is carrying out operational functions for the owner of the facility pursuant to an appropriate agreement." See Comprehensive Oil Pollution Liability and Compensation Act (first draft), H.R. REP. No. 172, 96th Cong., 2d Sess. 36, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6181-82. Section 101(x) of this bill defined "owner" as "any person holding title to, or, in the absence of title, any other indicia of ownership of a . . . facility." Id. See also United States Maryland Bank & Trust Co., 632 F. Supp. 573, 577 (D. Md. 1986). It is not necessary that the current owner or operator have done anything to cause the release, or threat of release, but only that the release or threat of release occur during its ownership or operation. Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572-73 (5th Cir. 1988).

40. Section 107(a)(l) of CERCLA states that a former owner or operator of land containing hazardous waste may be liable for cleanup costs only if it owned or operated the facility "at the time of the disposal of any hazardous substance." Id. at 1573. See United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981), aff'd, 688 F.2d 204 (3d Cir. 1982) (court held that there must be an actual depositing of hazardous substances during prior ownership for CERCLA liability to attach to a past owner or operator); see also Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d at 1573 (the disposal need not have been a "one-time occurrence . . . there may have been other disposals when hazardous materials are moved, dispersed, or released during landfill excavations and fillings").

41. "Arrange for" is not defined by the statute, but "disposal" is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing" of any hazardous substance such that the "substance may enter the environment." See 42 U.S.C. § 6903(3) (1982 & Supp. V 1987). Congress used broad language in providing for liability for persons who "by contract, agreement, or otherwise arranged for" the disposal of hazardous materials. United States v. A & F Materials Co., 582 F. Supp. 842, 845 (S.D. Ill. 1984) (emphasis added by the court). Courts have concluded that a liberal judicial interpretation is consistent with CERCLA's "overwhelmingly remedial" scheme. United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986). The Act's legislative history sheds some light on the intended meaning of this phrase. The Hazardous Waste Containment Act proposed to regulate inactive hazardous sites, extending liability to "any person who caused or contributed to a release or threatened release of hazardous substances." Id. (emphasis
transport of hazardous substances to, the property; and (4) persons accepting hazardous substances for transport to a contaminated site selected by such persons. These parties are liable to the EPA for injunctive relief requiring site cleanup, or to any other party including the EPA and state and local governments for the costs incurred during the cleanup of a contaminated site. While parties are strictly liable for cleanup costs, without regard to negligence, potentially responsible parties are not absolutely liable. Certain defenses are set out in section 107 of the Act.

3. Defenses to Liability

a. Security Interest Exception

Section 9607(a) of CERCLA identifies "owners and operators" as parties who can be held liable for the remedial costs of cleaning up a hazardous waste facility. Section 9601(20)(A) however excludes


"Treatment" is defined in section 6903(34) as:

[...] any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume.


43. Id.


from the "owner or operator" definition persons who merely hold a
security interest in the property. A lender is excluded who "with-
out participating in the management ... holds indicia of ownership
primarily to protect his security interest ... ." Lender liability
arises where the lender participates in the management of the prop-
erty or exercises his right to foreclose on the security interest. There are two important decisions concerning the liability of secured

1) The Mirabile Decision

In this case American Bank & Trust Company (AB&T) foreclosed
on its security interest in the property and was the highest bidder at
the sheriff's sale. AB&T subsequently assigned its bid at the sher-
iff's sale to the Mirabiles who accepted a sheriff's deed to the prop-
erty. The United States brought action against the Mirabiles to
obtain reimbursement of costs incurred in the cleanup of hazardous
waste deposited on the property. The Mirabiles named AB&T as a
third-party defendant, alleging that AB&T was liable because of ac-
tions taken during their course of dealings with a prior operator of
the facility at the time of disposal. AB&T moved for summary
judgment, claiming that the section 9601(20)(A) security interest ex-
ception precluded them from liability as an "owner or operator."

The United States District Court for the Eastern District of Penn-
sylvania held that under the security exception to owner liability, if
"a secured creditor does not become overly entangled in the affairs
of the actual owner or operator of a facility, the creditor may not be
held liable for cleanup costs." The court found that before a se-

47. Section 101(20)(A) provides in full:
"owner or operator" means ... (iii) in the case of an abandoned facility, any
person who owned, operated, or otherwise controlled activities at such facil-
ity 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;
48. See Killion, supra note 24, at 5.
52. Id.
53. Id. EPA had provided the Mirabiles with different cleanup opportunities but
the Mirabiles failed to respond. Id.
54. Id. at 20995. The Mirabiles joined American Bank and Trust Company
(AB&T) and Melon Bank (East) among others. Id.
55. Id.
56. Id.
cured creditor could be held liable, "it must, at a minimum, participate in the day-to-day operational aspects of the site." While AB&T had taken certain steps to protect the property after foreclosure, the court held that these were "prudent and routine steps to secure the property against further depreciation" and did not make AB&T an owner or operator of the property.

2) The Maryland Bank Decision

The United States brought action against Maryland Bank & Trust Co. to recover cleanup costs incurred at a farm site in California, Maryland. During 1972–73, the owners permitted the dumping of hazardous wastes on the farm. The parties dubbed the property the California Maryland Drum site or "CMD" site. In 1980, the owners of the site during the 1972–73 disposal of hazardous waste sold the property to their son. Maryland Bank provided the financing for the purchase and secured the loan with a mortgage on the property. The bank instituted a foreclosure action against CMD in 1981 and purchased the property at the foreclosure sale in May of 1982. In October of 1983, the EPA cleaned up the site. Maryland Bank moved for summary judgment, relying on the secured-party exception contained in section 9601(20)(A).

The United States District Court for the District of Maryland rejected Maryland Bank’s argument, holding that "[t]he exemption of subsection (20)(A) covers only those persons who, at the time of the clean-up, hold indicia of ownership to protect a then-held security interest in the land." The court found that the security interest must have existed at the time of the EPA cleanup: "Only during the life of the mortgage did [Maryland Bank] hold indicia of ownership primarily to protect its security interest in the land."

b. The Third-Party Defense

Section 107 of the Act provides three affirmative defenses to liability: (1) an act of God; (2) an act of war; and (3) an act or omission of a third-party. Parties have little control over acts of war or acts of

57. Id. at 20996.
58. Id.
60. Id. Wastes on the property included organics such as toluene, ethylbenzene and total xylenes and heavy metals such as lead, chromium, mercury and zinc. Id.
61. Id. The new owner, McLeod, soon failed to make payments on the loan.
62. Id. The EPA removed two hundred thirty-seven drums of chemical material and 1180 tons of contaminated soil. Id. at 575–76.
63. Id. at 579.
64. Id.
God, and most documents provide various rights and remedies should an act of war or God occur. Acts of an unrelated third-party, however, are another matter. Under the third-party defense, a party can escape liability if it can establish that the release or threatened release was caused solely by a third person who is neither an agent nor employee of the defendant and with whom the defendant is not in a contractual relationship. The term “contractual relationship” was not defined in CERCLA until enactment of SARA in 1986.

B. Superfund Amendments and Reauthorization Act of 1986 (SARA)

The original CERCLA provisions imposed strict liability only upon those who participated in, and received profits from, the creation of hazardous waste sites. After CERCLA’s enactment it became apparent that the number of uncontrolled hazardous waste sites was much larger than originally anticipated in 1979–80. The legislative history of the Superfund amendments indicates a congressional awareness that the EPA would not have adequate resources to cleanup all of the hazardous waste sites that needed attention. Consequently, the 1986 amendments may represent a shift in the philosophy of recovery from CERCLA’s strict adherence to the concept that the source or beneficiary of toxic waste must pay, to SARA’s recognition that costs of cleanup must now be apportioned over a broader range of parties.


67. Section 9607(b)(3) provides, in part, that “[i]f there shall be no liability . . . for a person otherwise liable who can establish . . . that the release . . . and the damages resulting therefrom” were caused solely by:

an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes . . . that (a) he exercised due care with respect to the hazardous substance . . . 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.


68. See infra notes 78–83 and accompanying text.

69. See City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982). The court notes that CERCLA’s objective is to “facilitate the prompt cleanup of hazardous dump sites by . . . placing the ultimate financial burden upon those responsible for the danger.” Id. at 1142–43.

70. See supra note 9 and accompanying text.


72. Id. The underlying principle of SARA is to “[f]acilitate cleanups of hazardous-
gated provision of the SARA amendments is the innocent landowner or innocent purchaser defense.\(^73\)

1. The Innocent Landowner Defense

SARA's innocent landowner defense is essentially an expansion of the third-party defense outlined in CERCLA.\(^74\) This provision allows a potentially responsible party to escape liability if it can establish that the release was caused solely by a third-party with whom it had no contractual relationship.\(^75\) To successfully raise the innocent landowner defense, it must be established that (1) the defendant had no contractual relationship with the third-party;\(^76\) and (2) at the time the defendant acquired the facility, it did not know and had no reason to know that any hazardous substance had been disposed at the property.\(^77\)

a. Contractual Relationship

The Superfund amendments added section 9601(35)(A) to CERCLA, providing a definition of "contractual relationship" for purposes of the section 9607(b)(3) third-party defense. The first part of section 9601(35)(A) states that a "contractual relationship... includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession..."\(^78\) The second part of the section sets forth a two-pronged exception to the general definition. A relationship will not be deemed a "contractual relationship" if: (1) "the real property on which the facility concerned is located was acquired by the defendant after the disposal... of the hazardous substance... at the facility...";\(^79\) and (2) one or more of the following

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73. The terms "innocent landowner provision" and "third-party defense" will be used interchangeably throughout this note.

74. See supra notes 65–68 and accompanying text.

75. See 42 U.S.C § 9607(b)(3) (1982) ("There shall be no liability [if the release was caused] solely by... an act or omission of a third party other than... one whose act or omission occurs in connection with a contractual relationship.").

76. See infra notes 78–83 and accompanying text.


79. Id.
circumstances is established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance . . . was disposed of on, in, or at the facility; 80
(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation; 81
(iii) The defendant acquired the facility by inheritance or bequest. 82

In drafting section 9601(35) Congress intended to eliminate liability under section 9607(a) for only those landowners who acquire property after disposal of hazardous substances, and remain ignorant of their presence despite exercising due care to discover such substances. 83

2. The Duty to Inquire

Section 9601(35)(A) provides that a defendant must have “had no reason to know” that any hazardous substance had been deposited at the facility in order to successfully employ the innocent landowner defense. 84 To establish that a defendant had “no reason to know,” the defendant must have undertaken “at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property . . . .” 85 This inquiry must be performed in a manner “consistent with good commercial and customary practice . . . .” 86

There is no case law or EPA interpretation of the “reasonable in-

80. Id. § 9601(35)(A)(i) (emphasis added).
81. Id. § 9601(35)(A)(ii).
82. Id. § 9601(35)(A)(iii).
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. . . . Those engaged in commercial transactions should, however, be held to a higher standard than those who are engaged in private residential transactions.

Id.

86. See 42 U.S.C. § 9601(35)(B) (1982 & Supp. V 1987). This section provides that the court, in evaluating the quality of a defendants inquiry, shall take into account:

[A]ny specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contaminat-
quity" requirement of the innocent landowner exception. There are, however, certain measures which parties can take to reduce the risk of exposure to hazardous substance liability. A comprehensive audit by an environmental consultant should generally be sufficient to satisfy the reasonable inquiry requirement.

II. PROBLEMS WITH THE CERCLA LEGISLATION

Public interest in the environmental effects of improperly disposed hazardous waste has evolved from a localized grass roots movement into one of the most important social and political issues of modern times. While public policy clearly supports environmental legislation, the economic burden that CERCLA has placed on the shoulders of American business demands immediate legislative and judicial re-thinking. Part II will serve two functions. First, it will examine CERCLA's negative impact on three parties: 1) the lender, 2) the real estate investor, and 3) the court. Second, this section will argue that the environmental consultant is the next judicial target for CERCLA liability and will outline the courts' probable rationale.

A. CERCLA's Negative Impact

1. The Lender

   a. Damage to Collateral

   Lenders can easily avoid direct liability for hazardous waste
ENVIRONMENTAL QUALITY INSURANCE

The innocent purchaser defense codified in the SARA amendments allows lenders to escape liability through the performance of a "due diligence" environmental audit. Therefore direct liability for waste contamination is of little threat to the prudent lender. Rather, the lender's primary concern over hazardous waste is damage to the collateral value of the property. Property contaminated by hazardous waste presents the owner with potential liability for millions of dollars in cleanup costs. Even if the borrower has agreed to cleanup hazardous waste, the cost may be so high as to bankrupt the borrower. Moreover, property contaminated by toxic waste is usually unmarketable. The lender may therefore be compelled to abandon the collateral altogether.

b. Eliminating Foreclosure Remedy

Section 9601(20)(A) of CERCLA provides that a person holding an indicia of ownership primarily to protect his security interest is not a responsible party under CERCLA. According to the court in Maryland Bank, the security interest exclusion is forfeited once the lender acquires title through foreclosure. The court stated that the lender always has the option of not foreclosing and not bidding at the foreclosure sale. This interpretation, however, seems adverse to the legislative intent to protect the holder of a security interest. By discouraging the exercise of the foreclosure remedy a lender's security interest protection becomes meaningless.

2. The Real Estate Investor

Despite the Securities and Exchange Commission disclosure requirements, businessmen are becoming increasingly reluctant to
invest in businesses which might generate, transport or store hazardous waste products. Investors are beginning to discover that potential liability often outweighs the investment opportunity of a potentially profitable company. Rather than deterring abandonment, current trends have resulted in the alienation of lands and businesses which may have at one point been associated with hazardous waste.

3. The Court

CERCLA has effectively transformed the court system into a debt collection agency for the EPA. The philosophical formula underscoring the 1980 Superfund legislation was deceptively simple: cleanup now—litigate later. In theory, this arrangement is a sound means of effecting swift remedial action upon known hazardous waste sites. The policy insures that mitigating environmental harm will take precedence over fund reimbursement. In practice, however, this mechanism is both costly and inefficient. CERCLA does not merely encourage litigation, it requires litigation. If the EPA exercises its discretionary power to use CERCIA funding to facilitate the cleanup of a hazardous waste site, the only legislative prescription for cost reimbursement is judicial action. As a result, court dockets clog with CERCLA liability suits and potentially responsible parties incur millions of dollars in attorney fees and court costs. The current liability system is simply not an efficient way of doing business.

B. Environmental Consultant Liability

Environmental consultants are playing an increasingly important role in determining the success of residential and commercial real estate transactions. Existing statutory defenses to liability provide very little protection in the absence of an extensive environmental audit. As a result, the growth of the hazardous waste consulting market has soared to an estimated $1 billion per year. It is interesting to note that all of the parties involved in a typical real estate disposal. This information allows potential purchasers access to data which would be otherwise unavailable. A failure to disclose may give rise to a cause of action under anti-fraud provisions of the federal securities laws. Id.

102. See Glass, supra note 16, at 386.
104. See supra notes 5–8 and accompanying text.
105. Id.
106. See Zinn & Fraxedas, supra note 89, at 55 (“the language does not merely suggest an audit, it requires an audit to escape liability”).
transaction, the environmental consultant is the only participant that 1) has not been held to be a "potentially responsible party" under CERCLA, and 2) profits from the continued existence of hazardous waste sites. If the legislature and judiciary are looking for additional deep pockets, their search may be over.\textsuperscript{109}

CERCLA has been called a deep pocket statute in that it provides a court with the statutory authority to find the deep pocket liable, often seemingly ignoring whether it is reasonable or equitable to do so.\textsuperscript{110} A court sometimes acts equitably and finds that a party has only a casual relationship with the hazardous waste site and therefore is not within the statute's classes of liable parties.\textsuperscript{111} The relationship between the environmental consultant and real estate contaminated with hazardous waste, however, is anything but casual.

Most consultants are chemical engineers\textsuperscript{112} specializing in detecting and remediating the dangerous effects of environmental contamination. Environmental consultants have the power to single-handedly fulfill the fundamental purpose of CERCLA: to locate and facilitate the prompt cleanup of hazardous waste sites. Moreover, careless and wanton environmental audits are detrimental not only to the physical health of the environment but also to the financial health of this nation's real estate, lending, and investment industries.\textsuperscript{113} The environmental consultant does not seem to be the type of party that courts should absolve from CERCLA liability out of a spirit of equity.

The existing environmental legislation and related case law provide a solid framework for finding environmental consultants liable for CERCLA response costs.\textsuperscript{114} The discussion that follows will argue that a consultant, while performing an environmental audit, is an

\textsuperscript{108} Typical parties to a modern commercial or industrial real estate transaction include the buyer, seller, lender, mortgage banker, attorney, and environmental consultant.

\textsuperscript{109} Environmental consultants may be considered "deep pockets" by the courts because of the large profits earned through their consulting efforts.

\textsuperscript{110} See Glass, supra note 16, at 413. For recent cases demonstrating this apparent unreasonableness, see supra note 15 and accompanying text.


\textsuperscript{112} See Zinn & Fraxedas, supra note 89 and accompanying text. See generally Duffy, Selecting, Contracting With, and Working With Your Environmental Consultant: A Consultant's Perspective, at 1, Environmental Liability for Real Estate and Banking Attorneys (Minnesota Continuing Legal Education 1989) (suggesting criteria for selecting an environmental consultant).

\textsuperscript{113} See supra notes 90–103 and accompanying text.

\textsuperscript{114} See supra notes 26–31 and accompanying text for a discussion of what courts have construed as response costs.
“operator” within the meaning of CERCLA. The conclusion reached is that failure to detect a “release” or “threat of release” of a hazardous substance actually present at the site, technically subjects the environmental consultant to liability for cleanup costs.

C. Consultant as Operator

In deciding whether a party fits within one of the four categories of liable parties, most courts perform a strict and mechanical application of the statute to the facts of the case. In addition, “in an effort to find liability wherever possible, the courts have interpreted the statutory categories of liable parties quite broadly.” Consequently, defendants who are associated with or who have derived profits from the existence of hazardous waste are likely to be held liable as responsible parties under CERCLA.

1. Facility

CERCLA identifies an operator as “any person owning or operating [a] facility.” The term facility is defined as “any site or area where a hazardous substance has been deposited.” It is

115. See supra notes 39–40 for a discussion of present and past owner and operator liability.
116. See supra note 34 for a discussion of what is a “release” under the Act.
117. See supra note 34 for a discussion of what is considered a “threat of release” under the Act.
119. Glass, supra note 16, at 412. See, e.g., United States v. Northeastern Pharmaceutical Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986) (noting that a “construction of CERCLA to impose liability upon only the corporation and not the individual corporate officers and employees who are responsible for making corporate decisions about the handling and disposal of hazardous substances would open an enormous, and clearly unintended loophole in the statutory scheme”).
121. See Glass, supra note 16, at 413. Glass refers to CERCLA as a “deep pocket statute” which enables the government to impose liability on a party with adequate financial resources to bear the cost of cleanup. Id.
important to distinguish the "site of deposit" from the "site of generation." In United States v. Northeastern Pharmaceutical Chemical Co., the hazardous substances produced at a chemical manufacturing plant were deposited at an off-site rural farm. The Eighth Circuit Court of Appeals held that the farm site and not the chemical plant was the "facility" within the meaning of CERCLA. Since the defendants neither owned nor operated the farm site, they could not be held liable as the "owners or operators" of a "facility." Consequently, the issue of consultant liability should focus not on whether the consultant was an operator at the site of waste production, but rather on whether he was an operator at the site of contamination.

Courts have construed the term facility very broadly to include "virtually any place at which hazardous wastes have been dumped, or otherwise disposed of." As a result, the scene of any environmental audit could qualify as a CERCLA facility. The remaining issue is whether the consultant is an operator of the site of contamination within the meaning of the statute.

2. Operator

CERCLA does not define the term operator. However, some insight into its intended meaning can be gleaned from an examination of the Act's legislative history. CERCLA is the product of four bills which were combined and enacted into the present statute. One of the four bills defines "operator" as "a person who is carrying out operational functions for the owner of the facility." In

124. 810 F.2d 726 (8th Cir. 1986).
125. Id. at 730. The drums containing the hazardous waste were dumped on the farm in July of 1971. The EPA received an "anonymous tip" about the waste in October 1979. Id. The EPA investigated in April 1980 and found approximately 85 55-gallon drums containing hazardous material. Soil samples of the site revealed "alarmingly" high concentrations of hazardous chemicals. Id.
126. Id. The Eighth Circuit adopted the reasoning that the term "facility" in the CERCLA statute should be broadly construed. The government's cleanup efforts were undertaken at the farm site and not the pharmaceutical plant, thus the appropriate facility in this case was the farm site. Id.
127. Id.
128. See infra notes 130–55 and accompanying text.
York v. Shore Realty Corp.,¹³³ the Second Circuit Court of Appeals held the managing stockholders of a corporation liable as "owners and operators" of a contaminated waste site.¹³⁴ The court noted that the defendant was "in charge of the operation of the facility . . . and as such [was] an 'operator' within the meaning of CERCLA."¹³⁵ Legislative history and judicial interpretation suggest that two elements are required for a party to be an operator: (1) the party must be obligated to perform certain operational functions,¹³⁶ and (2) the party must be in charge.¹³⁷

a. Operational Functions

The dictionary definition of "operation" is "an effect brought about in accordance with a definite plan; action; activity."¹³⁸ The services of an environmental consultant are secured for one purpose or effect: to make a reasonably accurate¹³⁹ determination as to the environmental health of the subject property. To achieve this effect, the consultant performs various tasks in accordance with a written action plan or project proposal.¹⁴⁰ An environmental consultant, therefore, performs "operational functions" when conducting an environmental audit at a hazardous waste site.

¹³³. 759 F.2d 1032 (2d Cir. 1985).
¹³⁴. Id. at 1052. The Second Circuit Court of Appeals found the stockholder/officer liable without piercing the corporate veil. Id. The Second Circuit cited New York corporate law and held "that a corporate officer who controls corporate conduct and thus is an active individual participant in the conduct is liable for the torts of the corporation." See State v. Ole Olsen, Ltd., 53 N.Y.2d 979, 324 N.E.2d 886, 365 N.Y.S.2d 528 (1975); LaLumia v. Schwartz, 23 A.D.2d 668, 669, 257 N.Y.S.2d 348, 350 (1965).
¹³⁶. See infra notes 138-40 and accompanying text.
¹³⁷. See infra notes 141-55 and accompanying text.
¹³⁸. BLACK'S LAW DICTIONARY 984 (5th ed. 1979). The word "operation" has been neither defined in the statute nor interpreted by the courts. Therefore, this note assumes, for the sake of this argument, that courts will adopt the "plain meaning" of the word.
¹³⁹. See Duffy, supra note 112, at 5. "The [environmental audit] cannot and does not certify to non-contamination. . . . The investigation . . . is intended to minimize risks consistent with the nature of the study which the client authorizes using currently accepted (state of the art) techniques and procedures." Id.
¹⁴⁰. Id. at 3-4. The scope of a consultant's services typically include: (1) a review of pertinent site documentation, (2) a site inspection, (3) other specific site investigations such as asbestos testing, PCB analysis, and groundwater monitoring, and (4) preparation of an environmental investigation report. Id.
b. In Charge

There is no definition of the term "in charge" within CERCLA. The language is used, however, in outlining the statute's reporting requirements. The meaning of the phrase was discussed in a recent Second Circuit Court of Appeals case. In United States v. Carr, a supervisor of maintenance directed a work crew to dispose of waste paint cans in an inappropriate manner and failed to report the resulting release of the hazardous substances to the EPA. The court recognized that CERCLA is silent as to the meaning of "in charge" and focused its analysis on the statute's legislative history. The court held that the term "in charge" includes "any reasonable person," even those of relatively low rank, "who were in the position to detect, prevent and abate the release of hazardous substances." 

In United States v. Mobil Oil Corporation, the Fifth Circuit Court of Appeals contemplated the definition of "in charge" in the context of the reporting requirements of the Clean Water Act. The court held that "in charge" referred to parties occupying positions of responsibility. The court noted that parties in charge of hazardous waste are in the best position to make a timely discovery of the release and have the capacity to "prevent and abate" the environmental damage.

While judicial interpretations of the "in charge" language are not uniform, they differ only in the degree of authority that the operator

141. 42 U.S.C. § 9603(b)(3) (1982 & Supp. V 1987) states, in pertinent part, that "any person . . . in charge of a facility from which a hazardous substance is released, . . . who fails to notify immediately the appropriate agency . . . shall, upon conviction, be fined . . . or imprisoned, . . . or both." Id.
142. 880 F.2d 1550 (2d Cir. 1989).
143. Id. at 1551. The defendant had ordered his workers to toss cans of waste paint into a man-made pit filled with water. The workers had thrown approximately 50 cans into the pond before they noticed paint was leaking from the cans. They then stacked the remaining cans in a nearby shed. Id.
144. Id. at 1551. The defendant subsequently ordered the workers to cover up the paint cans in the pond with dirt. The investigation by the EPA was triggered when one worker reported the disposal of the cans to a relative who was a special agent with the Department of Defense.
145. Id. at 1552-53.
147. United States v. Carr, 880 F.2d at 1553.
148. Id. at 1554.
149. 464 F.2d 1124 (5th Cir. 1972).
151. United States v. Mobil Oil Corp., 464 F.2d at 1128.
152. Id. at 1127.
must command. Courts appear to be in unequivocal agreement, however, that a party in charge has the distinct characteristic of being in the position to prevent and abate the release of hazardous substances. This interpretation is strengthened by the fact that it supports one of the driving purposes of CERCLA.

c. Summary

Any site at which an environmental consultant performs an environmental audit is a “facility” within the meaning of CERCLA. In performing the operational functions of the audit, the consultant takes charge of the site as evidenced by his unique ability to “prevent and abate” the release of hazardous substances. Consequently, the environmental consultant is an “operator of a facility” and could be held liable under CERCLA for response costs.

III. Environmental-Quality Insurance

Reflecting upon CERCLA’s legislative and judicial evolution during the 1980s, the discussion above has suggested three conclusions: 1) considering the large amount of money expended, CERCLA has, at best, made only a relatively small impact on the nation’s hazardous waste problem; 2) the Act’s cost recovery mechanism is ineffective and has brought fear and uncertainty into the real estate and banking industries; and 3) the environmental consultant, the essential ingredient in a successful innocent landowner defense, may soon be numbered among CERCLA’s numerous liable parties.

It was Congress’ original intent that the ultimate financial burden of environmental cleanup should come to rest upon those responsible for creating hazardous waste sites and those who derive profit from their continued existence. In an effort to find liability wherever possible, however, courts have interpreted CERCLA’s responsible party categories rather broadly. The innocent landowner defense

153. Compare United States v. Carr, 880 F.2d 1550, 1554 (2d Cir. 1989) (“in charge” includes even those “of relatively low rank”) with United States v. Mobil Oil Corp., 464 F.2d at 1128 (“in charge” includes only those persons “who occupy positions of responsibility and power”).
154. See supra note 148 and accompanying text.
155. See supra notes 22–25 and accompanying text.
156. See supra notes 122–29 and accompanying text.
157. See supra notes 138–40 and accompanying text.
158. See supra notes 141–55 and accompanying text.
159. See supra note 39 and accompanying text.
160. See supra notes 22–31 and accompanying text.
provides some relief to the virtuous purchaser who, despite the completion of a pre-purchase environmental audit, discovers that his investment has been polluted with toxic contaminants. But there is no defense to protect a lender against the loss of his collateral or his inability to assert common law foreclosure rights. Nor is there relief for the real estate investor who learns that hazardous waste has rendered his property unmarketable. Most importantly, CERCLA provides no help to the ordinary real estate purchaser who desires nothing more than the quiet enjoyment of his property but discovers that Blackacre poses life threatening risks to his health.

Buyers, sellers, investors and lenders need some means of assuring the environmental "wellness" of real estate. The creation of environmental-quality insurance, analogous to title insurance, would provide such assurance. The current condition of environmental law is strikingly similar to the conditions that existed immediately prior to the advent of the title insurance industry. The discussion that follows will first discuss the genesis of the title insurance industry and the elements of a title insurance program. Second, a program of environmental-quality insurance will be outlined.

A. Title Insurance Industry

1. History

Title insurance involves the issuance of an insurance policy promising that if the condition of the title is different than that stated on the face of the policy, and if the insured suffers damage as a consequence of the difference, the insurer will reimburse the insured for all losses and legal expenses incurred up to the policy amount.162 Title insurance provides a standardized nationwide means of assuring titles and has dramatically reduced the risk-of-loss problems inherent in the traditional methods of title assurance.163

a. Title Assurance Mechanisms Before 1868

On October 14, 1066, William of Normandy crossed the English Channel, defeated King Harold at the battle of Hastings, and the

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162. See 1 COUCH ON INSURANCE 2d § 1:105 (rev. ed. 1984):
Title guaranty insurance is a contract whereby one agrees for a consideration to protect another against all loss or damage, not in excess of a specified sum .... The insurer under a title insurance policy undertakes to indemnify the insured if the title proves to be defective. Knowledge of defects in the title by the insured in no way lessens the liability of the insurer. The doctrine of skill or negligence has no application to such a contract.
English feudal system was born.\textsuperscript{164} Out of feudalism there developed a system of land holdings whereby real property was held by the possessor, not as an owner, but rather as a tenant of a feudal lord.\textsuperscript{165} The population explosion of rural England during the thirteenth century created an increasing demand for land.\textsuperscript{166} As a result, the belief that a tenant should have the power to convey his fee absent a lord’s consent began to gain popularity.\textsuperscript{167} By the end of the thirteenth century, the Statute Quia Emptores\textsuperscript{168} established that the fee was freely alienable.

Once the fee became alienable, a system of freehold estates developed giving form to the concept of private land ownership.\textsuperscript{169} As the incidence of private ownership began to increase, so too did the frequency of real estate transfers and the need to insure that the seller had the right to convey the property. Methods of title assurance were therefore developed enabling the purchaser to both discover in advance whether the seller had the ability to convey the quality of title claimed, and obtain a post-purchase cause of action against the seller if the state of the title turned out to be less than represented.\textsuperscript{170} The most important forms of traditional title assurance are 1) the deed covenant; and 2) the recording system.

1) Deed Covenant

Of all of the title assurance mechanisms in use in this country, the deed covenant or warranty deed is by far the least effective. The deed covenant is comprised of six distinct types of title covenants.\textsuperscript{171}

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\textsuperscript{164} See J. Dukeminier \& J. Krier, Property 145 (2nd ed. 1988).

\textsuperscript{165} \textit{Id.} at 157. During the period immediately following the Norman Conquest, a tenant’s interest (termed “fee” or “fief”) was unalienable. Upon death, a tenant’s interest in the land ceased, and the lord was under no obligation to recognize the tenant’s heir as his successor. By the beginning of the thirteenth century, inheritance became a matter of right. \textit{Id.} at 157.

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} The desire for unilateral conveyance rights was rooted in economic concerns. As the rural population began to increase, so too did the value of land. Landowners were therefore tempted to sell before they died and cut off their heir’s right to succession. \textit{Id.}

\textsuperscript{168} Quia Emptores, enacted by Parliament in 1290, established the principle of free alienation of land. As a result, all free tenants had the right to transfer all or part of their land without having to secure the lord’s consent. \textit{Id.} at 152–53. See Cairns, \textit{The Explanatory Process in the Field of Inheritance}, 20 Iowa L. Rev. 266, 277 (1935).

\textsuperscript{169} The four possessory estates in land are: 1) the fee simple, 2) the fee tail, 3) the life estate, and 4) the leasehold. See J. Dukeminier \& J. Krier, supra note 164, at 156–84 (discussing the types of traditional possessory estates in land).

\textsuperscript{170} See G. Nelson \& D. Whitman, supra note 163, at 181.

\textsuperscript{171} The first three covenants are termed “present” covenants, as they can be breached only at the moment the deed is delivered. The first is a covenant of seisin, which is a promise by the grantor that he owns the land (“well seized”). The right to convey, like the covenant of seisin, promises that the grantor has the authority to con-
The integrity of each covenant, however, is derived simply from the knowledge that the grantor has and is willing to reveal about the title. Title covenants allocate the risk of undisclosed title defects among the parties but provide no external financial pool for indemnification of the party on whom the risk falls. Instead, the grantee must either absorb a loss without further recovery, or institute an action against the grantor under a breach of warranty theory.

2) Recording System

The public recording of deeds, liens, and other instruments affecting title began in the Massachusetts Bay and Plymouth colonies in 1640. Today every state has enacted statutes or recording acts providing for land title records to be maintained by the county recorder in each county. The recording acts do not affect the validity of a deed. A deed is a valid instrument against the grantor upon delivery without recordation. Rather, the recording system authorizes local governments to act as passive repositories for all instruments affecting title which people choose to record.

Recording acts have the function of protecting purchasers for value and lien creditors against prior unrecorded interests. At common law, priority of title was determined by priority in time of conveyance. Under the recording acts, however, a subsequent bona fide purchaser is protected against prior unrecorded interests. Therefore, a prudent purchaser must perform two tasks: first, survey his interest in real estate. The third present covenant, a promise against encumbrances, alleges that title is passing free of mortgages, liens, future interests and other covenants that run with the land.

The next three covenants are termed "future covenants" in that they are breached only when an eviction of the grantee occurs. The warranty and quiet enjoyment covenants promise to compensate the grantee for a loss if the title is defective and the grantee suffers an eviction. Further assurances is a promise by the grantor to execute any documents necessary to perfect the grantee's title. See G. Nelson & D. Whitman, supra note 163, at 183-84 (providing a complete discussion of the six warranty deed covenants).

172. Id. at 182.
173. Id. at 182-83.
174. See J. Dukeminier & J. Krier, supra note 164, at 690. Public recording of deeds was an American invention. England did not adopt a general public registration system until the twentieth century. Id.
175. There are three types of recording statutes: 1) Notice—in order to prevail against A, B must be a purchaser for value and without notice; 2) Race—to prevail B must record his own conveyance before A records; and 3) Race-Notice—to prevail, B must both be a purchaser for value and without notice and also record before A. See generally G. Nelson & D. Whitman, supra note 163, at 194-209.
176. Id. at 194-95.
177. This concept gave rise to the common law axiom: "First in time, first in right."
178. Bona fide purchaser status is comprised of two elements: paying value and
form a title search of the county records for the existence of adverse prior recorded claims on the seller's property; and second, record the deed to bar a claim by a subsequent purchaser from a previous owner.\textsuperscript{179}

While the recording acts provide some protection for the bona fide purchaser, they do not guarantee clear title. The most difficult problems arise with interests in land, such as adverse possession or marital rights, which are not created by a written agreement. There is no practical way for a title examiner to discover the existence of these rights.\textsuperscript{180} Similar problems are raised by mechanics' liens.\textsuperscript{181} Even where such technical problems are not present, other problems may arise. "[I]t is all too easy for a searcher [title examiner] to make a mistake. . . . These kind of mistakes may result in liability for damages if the searcher [or title examiner] is a lawyer or an abstracter."\textsuperscript{182} Damages, however, may be difficult to collect and are a poor substitute for the land itself.\textsuperscript{183}

\textbf{b. Title Assurance Mechanisms After 1868}

The need for title insurance arose because traditional methods of title assurance did not provide adequate protection to prospective real estate purchasers and produced a continuing source of potential liability for real estate attorneys and abstractors.\textsuperscript{184} Most legal historians credit a 1868 Pennsylvania case holding an abstractor liable to a negligence standard as giving the industry its real start.\textsuperscript{185} In \textit{Watson v. Muirhead},\textsuperscript{186} a conveyancer (Muirhead) searched and abstracted a title for the purchaser of a real estate tract (Watson). In good faith and after consulting an attorney, Muirhead chose to ignore certain recorded judgments and to report the title as good and lacking notice of a prior conveyance. See G. Nelson \& D. Whitman, \textit{supra} note 163, at 227.

\hspace{1em} \textsuperscript{179} See J. Dukeminier \& J. Krier, \textit{supra} note 164, at 691.

\hspace{1em} \textsuperscript{180} See G. Nelson \& D. Whitman, \textit{supra} note 163, at 202. Similar problems occur in the bankruptcy area where property is transferred to a trustee. There is no deed representing the transfer and therefore nothing to record. \textit{Id.}

\hspace{1em} \textsuperscript{181} The priority date of a mechanic's lien relates back to the first "visible improvement" on the property. Because the claimant is given a period of time (generally 120 days) after completion of the work to file the claim in the public records, an existing mechanic's lien may be "secret" and out of reach of the title examiner. \textit{Id.}

\hspace{1em} \textsuperscript{182} \textit{Id.} at 203.

\hspace{1em} \textsuperscript{183} \textit{Id.}

\hspace{1em} \textsuperscript{184} See Gandrud, \textit{Title Insurance Overview}, at 5, Title Insurance in Minnesota (Minnesota Continuing Legal Education 1988) ("The origin of title insurance is directly traceable to the limited protection that the work of such a conveyancer provided the purchaser of real property.").

\hspace{1em} \textsuperscript{185} See D. Burke, \textit{supra} note 162, at 2; Roberts, \textit{Title Insurance: State Regulation and the Public Perspective}, 39 Ind. L.J. 1, 6–7 (1963).

\hspace{1em} \textsuperscript{186} 57 Pa. 161 (1868).
unencumbered.\textsuperscript{187} Relying on Muirhead's abstract, Watson purchased the property and was subsequently presented with, and required to satisfy, the judgment liens that Muirhead had ignored.\textsuperscript{188} Watson sued Muirhead to recover his losses. The Pennsylvania Supreme Court determined that an abstractor must be held to the same negligence standard applied to an attorney.\textsuperscript{189} The court, however, ruled that the abstractor was not negligent in preparing the abstract and dismissed the case.\textsuperscript{190}

The Pennsylvania court's determination that abstractors are to be held to a negligence standard was important. But this ruling was overshadowed by the reality that Watson, an innocent purchaser who had suffered financial loss as a result of the unreported encumbrances on his title, had no legal recourse.\textsuperscript{191} The decision demonstrated that the existing title assurance protections did not supply adequate assurance to purchasers of real estate to promote security in their ownership.\textsuperscript{192} The Pennsylvania legislature responded by passing an act "to provide for the organization and regulation of title insurance companies."\textsuperscript{193}

2. \textit{Structure of Modern Title Insurance}

Since its birth in Philadelphia 114 years ago, title insurance has grown into a multi-billion dollar industry and is the predominant form of title assurance in the United States.\textsuperscript{194} Title insurance occupies a unique position within the insurance industry for at least two

\begin{itemize}
\item \textsuperscript{187} \textit{Id.} See Gandrud, supra note 184, at 5–6 (presenting an analysis of the case).
\item \textsuperscript{188} \textit{Watson v. Muirhead}, 57 Pa. at 161.
\item \textsuperscript{189} \textit{Id.} at 166.
\item \textsuperscript{190} \textit{Id.} at 167.
\item \textsuperscript{191} See Gandrud, supra note 184, at 6.
\item \textsuperscript{192} See Roberts, supra note 185, at 6:
\item [T]his decision shocked the conscience of both the bench and bar in Philadelphia, revealing as it did a defect in the conveyancing system. That is, absent recourse against the vendor on warranties, the vendee was forced to suffer the entire loss should an adverse claimant appear . . . after the vendee's conveyancer had, in the exercise of due care, advised vendee that the title was free and clear.
\item \textit{Id.}
\item \textsuperscript{193} Gandrud, supra note 184, at 6.
\item \textsuperscript{194} See \textit{In re Ticor Title Insurance Company}, Federal Trade Commission, Docket No. 9190, Initial Opinion (December 22, 1986) (citing the 1983 calendar year earnings for two of the largest title insurance companies representing 23.1 percent of the national marketshare): Chicago Title reported gross income of approximately $206,000,000 from title insurance premiums and $52,000,000 from other sources. SAFECO earned approximately $163,000,000 from title insurance premiums and $30,000,000 from other sources.
\end{itemize}

Various theories have been advanced to explain the rapid growth and popularity of title insurance among institutional investors. Because these investors were doing business on a national scale, they either had to know the reliability of thousands of local conveyancers or had to run their own searches. Because both options were im-
significant reasons. First, title insurance is based not on prophesy, but on the search of a diligent abstractor of titles.195 If a defect is found in the records, it becomes the basis of an exception from coverage written into the policy.196 The title insurer is in the unique position of being able to eliminate potential claims through its own work.197 Second, a title insurance policy is a single premium agreement198 to indemnify a policy holder for losses precipitated by both on-record and off-record title defects.199

"Title insurance, like other forms of insurance, is a contractual relationship between an insured and an insurer."200 All contractual obligations of the insurer are set forth on the face of the policy.201 The policy itself202 is divided into several parts. For the purposes of this discussion, the two most important policy sections are: 1) Schedule B; and 2) duty to defend.

practical, institutional investors began to demand title insurance as a condition to their lending money on the security of the property. See Roberts, supra note 185, at 8.

195. In contrast to title insurance investigations, life or accident insurance is based upon predictions of future events by an actuary or statistician. See D. Burke, supra note 162, at 22.

196. Id. A life insurance company knows with a high degree of certainty that sooner or later it will have to pay the face amount of the policy. Id. at 22-23.

198. The single-premium provides coverage lasting indefinitely. Each time the tract of real estate is sold, however, the new vendee must obtain his own title insurance policy. Given the prevailing rate of $3.50 per thousand dollars coverage, the costs of protection can be rationalized by spreading out the premium over the expected length of possession. See Roberts, supra note 185, at 5.

199. "On-record" defects are those that can be discovered through a search of public record information. "Off-record" defects are not found in the public record and cannot be discovered even through the most competent title search. These risks include misfiling of a document by the recorder and the status of the parties executing the document (an alien, married person, and insolvent, for example). See D. Burke, supra note 162, at 22-23.

200. R. Werner, Title Insurance: The Lawyer's Expanding Role 6 (1985).

201. Id. Most courts regard the relationship between the insurer and insured as purely contractual in nature, thereby limiting insurer liability, and potential insured-party liability to the policy's contractual terms. See Heyd v. Chicago Title Ins. Co., 354 N.W.2d 154, 156 (Neb. 1984) (noting the courts' frequently repeated axiom that "title insurance is a contract of indemnity"). But see Lawyer's Title Ins. v. Research Loan & Inv. Corp., 361 F.2d 764, 767 (8th Cir. 1966) (a minority view holding that a title insurance policy also entails a professional title search, opinion and guarantee). The Eighth Circuit position suggests that the insurer should be held to a negligence standard.

202. There are two types of title policies: (1) owner's policy—protecting the owner by guaranteeing the marketability of the title; and (2) mortgagee's policy—issued to satisfy and protect the lender. There are two separate policies but the buyer pays for both. See generally G. Nelson & D. Whitman, supra note 163, at 227-40.
ENVIRONMENTAL-QUALITY INSURANCE

a. Schedule B

Schedule B begins with a statement of general exceptions for risks that are outside the traditional examination role for the title insurer.203 These exceptions are identical to the boiler-plate exceptions of an attorney title opinion.204 The title insurer will often cover these risks upon request for an additional premium.

Also within Schedule B are the “special exceptions” unique to the title being insured. These are the title defects identified through the company’s pre-insurance examination process. A prospective policy holder is made aware of these special exceptions upon receipt of a title commitment prior to the issuance of the title insurance policy.205 Armed with the knowledge of these title defects, the commitment-holder may secure insurance coverage in one of two ways. The most obvious is the elimination of the defect. The purchaser of real estate occupies a rather strong bargaining position prior to closing and may be successful in compelling the seller to satisfy or correct the defect in title. A second option is to convince the insurance company to insure over the defect. Title insurance companies are in the business of issuing title policies. If the existence of a particular title defect presents the insurer with a reasonable or nominal risk of loss, the company may provide extended coverage by way of endorsements or deletion of the general or special exceptions.206

b. Duty to Defend

One of the most important contributions of the title insurance program is the company’s contractual obligation to defend all adverse claims against the insured’s title.207 Pre-title insurance methods of title assurance involved the services of either an attorney or an abstractor. The work products of both the attorney and, after the

203. R. WERNER, supra note 200, at 6. Preceding Schedule B are the declarations of the policy or “Schedule A.” Schedule A lists the relevant policy information including policy number, date, and dollar amount of the coverage. In addition, this section recites the name of the insured, the interest in real estate covered by the policy, and a description of the land. See G. NELSON & D. WHITMAN, supra note 163, at 228–34 (showing a reproduced ALTA title insurance policy form).

204. These standard exceptions include: a) parties in possession; b) matters that could be shown by an accurate survey; and c) mechanic’s liens (secret liens for 120 days in Minnesota).

205. A "title commitment" is a promise by the insurance company to issue an insurance policy based upon the exceptions listed in Schedule B. Once the commitment is issued, the insurance company must deliver the described policy even if it discovers a defect (a "wild deed," for example) prior to closing.

206. See generally Gralen, Title Insurance for Lawyers: Additional Coverages in Title Insurance: The Lawyer’s Expanding Role, at 142–84 (A publication of the Section of Real Property, Probate and Trust Law 1985) (discussing the issue of extended coverage and endorsements in title insurance policies).

207. See generally D. BURKE, supra note 162, at 287–330.
Muirhead decision, the abstractor, were evaluated under a negligence standard.\textsuperscript{208} As a result, adverse claims against the purported fee owner were defended only if negligence was alleged in the preparation of the abstract. In contrast, the title insurance policy admits all potential liability on the face of the document. Moreover, title insurance companies have a duty to defend even spurious claims against the insured.\textsuperscript{209} A title insurance policy's promise to compensate the insured for all losses not excepted in Schedule B\textsuperscript{210} coupled with the covenant to defend all claims against the insured, provides the policy holder and the real estate industry with stability and uniformity.

B. Environmental-Quality Insurance

Part I of this note discussed CERCLA and SARA and the legislative scheme for remediying the effects of hazardous waste sites.\textsuperscript{211} Part II examined the negative impact of Superfund legislation on the nation's real estate, investment, and banking industries.\textsuperscript{212} One section also discussed the role of the environmental consultant in real estate transactions and offered a prophetic argument for holding the consultant liable under CERCLA.\textsuperscript{213} Part III has thus far discussed title assurance methods and the curative effects of title insurance on real estate transactions. The remainder of the note will argue for the creation of a title insurance type program for the environmental risks inherent in all modern real estate transactions.

1. The Need for Change

Before discussing the nature of environmental-quality insurance, it should first be mentioned why it is of importance. The 1980s taught us that our current system of environmental cleanup and formula for liability does not work. As we enter the 1990s, the question as to what types of changes should be made remains unanswered. If any lesson can be gleaned from the success of the title insurance industry it is that careful investigations into potential real estate defects and a broad apportionment of financial risk is both curative and economically successful.

The history of title insurance also suggests that the system is ripe

\textsuperscript{208} Watson v. Muirhead, 57 Pa. 161 (1868). See supra notes 186–90 and accompanying text.

\textsuperscript{209} See, e.g., sample American Land Title Association (ALTA) title insurance policy, reproduced in G. Nelson & D. Whitman, supra note 163, at 231 ("We will defend your title in any court case that is based on a matter insured against by this policy. We will pay the costs, attorney's fees, and expenses we incur in the defense.").

\textsuperscript{210} See supra notes 203–06 and accompanying text.

\textsuperscript{211} See supra notes 22–89 and accompanying text.

\textsuperscript{212} See supra notes 90–105 and accompanying text.

\textsuperscript{213} See supra notes 106–160 and accompanying text.
for the implementation of an environmental-quality insurance program. Today, any party about to become associated with real estate in the United States must consider the potential liability under the environmental statutes. To be involved with real estate and, at the same time, fall outside of CERCLA’s four broadly interpreted responsible party categories, rivals the miracle of the “loaves and fishes.” The only statutorily defined safe-harbor is reached through the performance of a pre-purchase environmental audit. To satisfy the “due diligence” requirement of the innocent landowner exception, this audit almost always requires the services of an environmental consultant. Although the audit may absolve the real estate participant from CERCLA liability, it will not solve all of the problems discussed in part II.

It seems reasonably clear that the environmental consultant will soon face liability in the courts. Although the rationale for CERCLA liability offered above may border on the imaginative, the courts have been quite creative in the past in their search for responsible parties. It seems equally clear, however, that attempts to hold the consultant liable under CERCLA will ultimately fail for public policy reasons. To hold the consultant strictly liable as an “operator” of a hazardous waste site will accomplish nothing more than drive engineering firms out of the environmental consulting business. Future consultant liability will be derived from a different source. The environmental consultant, like the pre-1868 abstractor of titles, has not been held liable to a negligence standard in the performance of environmental audits. A likely explanation for this oversight is that the courts have no means by which to measure their negligence. Neither the legislature nor the EPA has promulgated an industry standard of consultant performance or required competency. Once consultant standards have been established, the courts will undoubtedly find examples of consultant negligence. Environmental-quality insurance will be created, if not by a need to protect the insured, then by a desire to protect the insurer, an environmental consulting firm, against its legal liabilities.

2. The Nature of Environmental-Quality Insurance

The program must begin with a legislative act providing for the

215. See supra notes 84-89.
217. See supra notes 90-105 and accompanying text.
218. See supra notes 106-60 and accompanying text.
219. See, e.g., supra note 15 (providing examples of creative judicial interpretation).
organization and regulation of environmental-quality insurance companies.  

Environmental-quality insurance, like its title insurance counterpart, would involve the issuance of an insurance policy promising that if the environmental quality of the real estate proved to be other than as represented on the face of the policy, and if the insured suffered any loss as a result of the difference, the insurer would reimburse the insured for that loss and any related legal expenses, up to the face amount of the policy.

The process would begin upon receipt of an application for insurance from a prospective real estate purchaser. The insurance company would retain the services of an environmental consultant to perform a pre-insurance environmental audit of the property. The scope and complexity of the audit would be within the discretion of the insurance company. However, since the company would be liable for any undiscovered toxic contaminants, the audit would undoubtedly be thorough; perhaps more thorough than currently performed by environmental consultants. Any contamination discovered on the property would be listed on a "commitment to insure." The company would agree to insure the property with the exception of the items listed in Schedule B on the insurance commitment.

The pre-closing discovery of environmental contamination benefits all parties to a real estate transaction. The potential buyer learns of any environmental problems well in advance of the purchase. The seller then has the option of cleaning up the site himself and concluding the sale, or losing a buyer and ultimately being compelled by the EPA to remedy the problem. The lender benefits in that the actual condition of the intended collateral is discovered before a mortgage is taken. Environmental-quality insurance would benefit the environment by encouraging the pre-release discovery of hazardous waste sites. If no contamination is found on a site and an environmental-quality insurance policy is issued, the insurance company is liable for the prompt cleanup of any contamination discovered subsequent to the policy date.

**Conclusion**

It was Congress' original intent that the ultimate financial burden of environmental cleanup come to rest upon those who created the hazardous waste sites. However, recent case law is replete with examples of deep pocket defendants being held liable almost without regard to whether or not it is reasonable to do so. This judicial "witch-hunt" has brought fear and uncertainty into the real estate,

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investment, and banking industries and, at the same time, has failed to replenish the Superfund coffers. A viable solution to the hazardous waste problem lies in adopting an insurance program analogous to title insurance. Environmental-quality insurance would be a self-sustaining program encouraging the pre-release discovery of hazardous waste and bringing certainty back to the real estate transaction.

The expansion of CERCLA liability cannot continue. During the 1980s, legal scholars asked: "Who will be next?" A more appropriate question for the 1990s might be: "Who is left?"

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