DEFENSES TO LIABILITY UNDER CERCLA*

Kenneth A. Hodson & Charles H. Oldham**

I. THE SCOPE OF THIS ARTICLE.

This article discusses potential liability under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA") and certain defenses thereto including the Bona Fide Prospective Purchaser ("BFPP") defense. Under certain circumstances, the assertion of the BFPP defense may enable the purchaser (and the lessee) of real estate to avoid liability under CERCLA.

II. LIABILITY UNDER CERCLA.

A. Persons Liable Under CERCLA.

As discussed more fully below, in general, a potential purchaser of real estate should be aware that, under CERCLA, the new purchaser of the property may be liable for, among other things, the cost of cleaning up any "hazardous substances" that may have been released at the property.

CERCLA's liability provisions identify the persons that may be liable for the remediation of hazardous substances under the statute.[1] Under the above provisions, the "cast of characters" or potentially responsible parties includes:

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*. Neither this article nor Mr. Hodson's remarks constitute legal advice.

**. Mr. Hodson and Mr. Oldham are members of Dickinson Wright PLLC and practice in the Firm's Phoenix office.

1. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a) (2012).

1) The owner and operator of a facility;

2) The owner and operator of a facility at the time the hazardous substance was disposed of;

3) Any party who arranges for the disposal or treatment of hazardous substances by some third party; and

4) Any person who accepts hazardous substances for transport to a disposal or treatment facility selected by that person.

B. Nature of Liability Under CERCLA.

Unless the parties identified above can successfully assert one of the limited defenses to CERCLA liability, the above parties are liable for:

1) All removal or remedial action costs incurred by the federal government, a state or an Indian tribe; provided such costs are not inconsistent with the National Contingency Plan ("NCP");

2) Any response costs incurred by any other person; provided such response costs are consistent with the NCP;

3) Damages for injury to, destruction of, or loss of natural resources; and

4) Costs of any health assessment or health effects study carried out under the applicable provisions of CERCLA.[2]

The courts have held that, under CERCLA, liability is strict, joint, and several. If, however, a liable party can show that its actions caused divisible harm, then that defendant may, under certain circumstances, be held responsible only for the defendant's portion of the harm.[3]

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2. *Id.*
3. *See generally* Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599 (2009).

C. Important Definitions Under CERCLA.

1. Facility.

The term "facility" is very broadly defined under CERCLA and includes "any area where a hazardous substance has . . . come to be located."[4]

2. Hazardous Substance.

The term "hazardous substance" is also very broadly defined under CERCLA and includes substances listed at 40 C.F.R. table 302.4 as well as substances designated under the Clean Water Act, 33 U.S.C. § 1321(b)(2)(A), and other federal statutes.[5]

3. Release or Threatened Release.

Under CERCLA, a "release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping and disposing into the environment."[6] The courts may find that the storage of hazardous substances in an unsafe manner constitutes a "threatened release."[7]

III. DISCUSSION OF DEFENSES UNDER CERCLA.

Under CERCLA, the defenses to liability are narrowly drawn. According to the statute, a person that is otherwise liable can escape liability by establishing (by a preponderance of the evidence) that the release or threat of release of the hazardous substance in question was caused solely by: (1) an act of God; (2) an act of war; (3) an act or omission of a third party (only under very narrow circumstances, as discussed more fully below); or (4) any combination of the foregoing.[8]

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4. *See* CERCLA § 101(9), 42 U.S.C. § 9601(9) (2012).
5. *See id.* § 101(14), 42 U.S.C. § 9601(14).
6. *Id.* § 101(22), 42 U.S.C. § 9601(22).
7. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985).
8. *See* CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3).

A. Innocent Purchaser Defense.

1. Introduction.

In the context of real estate transactions, the so-called "third party" defense of CERCLA section 107(b) is often called the "innocent purchaser" defense. This is because, in asserting such a defense, an innocent purchaser argues that the presence of the hazardous substances on the property in question was caused by the act or omission of a third party—most commonly the prior owner.

2. Innocent Purchaser Defense – CERCLA Section 107(b).

As indicated above, the third party, or innocent purchaser defense, is drawn very narrowly by CERCLA. Under CERCLA section 107(b)(3), an innocent purchaser must demonstrate by a preponderance of the evidence that the release or threatened release of a hazardous substance was caused solely by an act or omission of a third party, and the third party can be neither an employee nor agent of the party asserting the defense.[9] In addition, except for very limited circumstances, the third party cannot be one whose act or omission "occurs in connection with a contractual relationship, existing directly or indirectly," with the one claiming the defense.[10]

Therefore, CERCLA's definition of the term "contractual relationship" is very important in determining whether a purchaser of real property will be successful in asserting that the prior owner of the property is the party responsible for the remediation of hazardous substances that may be present on the property. Under CERCLA, "contractual relationship" includes deeds and other instruments transferring title or possession or land, unless the purchaser acquired the property after the disposal of hazardous substances at the facility and the purchaser did not know and had no reason to know of the presence of any hazardous substances on the property when the purchaser acquired the property.[11]

In addition to proving the above, the purchaser must also establish that it has met the conditions of CERCLA sections 107(b)(3)(a)–(b) and 101(35)(B)(i)(II).[12] Pursuant to section 107(b)(3)(a)–(b), the purchaser must

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9. *Id.*
10. *Id.*
11. *See* CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A).
12. 42 U.S.C. § 9607(b)(3)(a)–(b), 9601(35)(B)(i)(II).

also show that it exercised due care with respect to the hazardous substances of concern, "taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances,"[13] and that it took precautions against foreseeable acts or omissions of the prior owner and the consequences that could foreseeably result from the prior owner's acts or omissions.[14] Pursuant to section 101(35)(B)(i)(II), the purchaser must also show that it took reasonable steps to:

> (aa) stop any continuing release;
>
> (bb) prevent any threatened future release; and
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> (cc) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person.[15]

As indicated above, under CERCLA's definition of "contractual relationship," the purchaser of the property must establish that at the time it acquired title to the property, it did not know and *had no reason to know* that there was a release or threat of release of a hazardous substance at the property. To establish that the purchaser had no reason to know the above, CERCLA provides that it must have undertaken, at the time of its purchase of the property, "all appropriate inquiry" into the previous ownership and uses of the property in accordance with generally accepted good commercial and customary standards and practices.[16]

The requirements for conducting "all appropriate inquiry" have been codified in federal regulations (see 40 CFR § 312.20), and are the subject of standards set by the American Society for Testing and Materials ("ASTM").[17]

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13. 42 U.S.C. § 9607(b)(3)(a).

14. CERCLA §107(b)(3)(b), 42 U.S.C. § 9607(b)(3)(b) (2012).

15. *Id.* § 101(35)(B)(i)(II), 42 U.S.C. § 9601(35)(B)(i)(II). These requirements are part of what are often referred to as the "continuing obligations" associated with CERCLA defenses. Continuing obligations are the subject of ASTM E2790-11 STANDARD GUIDE FOR IDENTIFYING AND COMPLYING WITH CONTINUING OBLIGATIONS (Am. Soc'y Testing & Materials Int'l 2011), *available at* http://www.astm.org/Standards/E2790.htm.

16. CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B) (2012).

17. *See* ASTM E1527-13 STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENTS: PHASE I ENVIRONMENTAL SITE ASSESSMENT PROCESS (Am. Soc'y Testing & Materials Int'l 2013), *available at* http://www.astm.org/Standards/E1527.htm.

3. Loss of Innocent Purchaser Defense.

a. Introduction.

A review of the discussion above concerning the innocent purchaser defense under CERCLA reveals that this defense is reserved only for the truly innocent, and that there are ways in which a seemingly innocent purchaser may be disqualified from availing itself of the innocent purchaser defense. In asserting the third party defense under CERCLA, a purchaser must demonstrate that it exercised due care with respect to the hazardous substances of concern, "taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances."[18]

b. Defense Denied for Failure to Exercise Due Care.

As can be seen by the following cases, a purchaser that fails to conduct appropriate inquiries into potential hazardous releases or, where the purchaser becomes aware of potential releases, but fails to appropriately address the release or threatened release, may not qualify of the innocent purchaser defense. This is true even where the release, or threatened release, occurred under the predecessor's ownership

In *Containerport Group, Inc. v. American Financial Group, Inc.*,[19] the plaintiff's predecessor corporation purchased property in 1985 for the storage of empty shipping containers. The seller had owned the property since 1901 and had used it for a railroad and rail siding facility.[20] In 1990, the plaintiff attempted to sell the property.[21] In 1993, a potential purchaser discovered contaminants on the property during an environmental assessment.[22] The purchaser opted not to purchase the property.[23] The plaintiff brought an action against the former owner seeking costs incurred for the environmental study and future response costs.[24] The plaintiff sought recovery under 42 U.S.C. § 9607 as well as § 9613.[25] The court recognized that in order for the plaintiff, who was a potentially responsible party itself, to recover costs under § 9607, it needed to establish an affirmative defense to its own liability. The plaintiff sought protection under the innocent

18. CERCLA § 107(b)(3)(a), 42 U.S.C. § 9607(b)(3)(a) (2012).
19. 128 F. Supp. 2d 470 (S.D. Ohio 2001).
20. *Id.* at 471.
21. *Id.* at 472.
22. *Id.*
23. *Id.*
24. *Id.* at 471.
25. *Id.* at 478.

purchaser defense.[26] The court held that in order to successfully assert the innocent purchaser defense, the plaintiff needed to establish the following elements by a preponderance of the evidence:

> (1) a third party was the sole cause of the release of hazardous substances;
>
> (2) the plaintiff acquired the property after the hazardous substances were disposed of there;
>
> (3) at the time the plaintiff bought the property, it did not know that any hazardous substance was deposited there;
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> (4) the plaintiff undertook appropriate inquiry prior to purchasing the property; and
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> (5) once it became aware of the presence of hazardous substances at the site, it exercised due care under the circumstances.[27]

The court found that although the plaintiff proved it did not cause the contamination, that the contamination was already there when it purchased the property, and that it did not know and had no reason to know of the contamination when it purchased the property, the plaintiff failed to make "any attempt to remove them or reduce any possible threat to others or to the environment."[28] Accordingly, the court found that because the plaintiff had "done nothing to secure the site or made any effort to clean up the allegedly hazardous substances" it was not eligible for the "innocent landowner" defense under CERCLA.[29]

In *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc.*,[30] a contractor employed by the owner of real property inadvertently split open a large box containing creosote and benzene that had been buried near a railroad yard since before 1901.[31] The owner acquired the property in 1973 and the release occurred in 1990.[32] The owner incurred cleanup costs in excess of $239,000.[33] The owner sued the former owner of the property under 42 U.S.C. §§ 9613 and 9607.[34] The owner

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26. *Id.*
27. *Id.* at 479.
28. *Id.* at 480.
29. *Id.*
30. 240 F.3d 534 (6th Cir. 2001).
31. *Id.* at 539.
32. *Id.*
33. *Id.* at 540.
34. *Id.* at 549.

asserted that although it was a potentially responsible party, it was entitled to bring a claim under § 9607 because it was an innocent landowner.[35] The defendant argued that the owner was not entitled to the innocent landowner defense because it failed to exercise due care once the release occurred.[36] The trial court found that the owner qualified for the innocent landowner defense.[37] The court of appeals disagreed.[38] The court of appeals found that even though the hazard predated the owner's acquisition of the land, that the owner had no way of knowing of the hazard, and that the release was accidental and not attributable to the owner, the owner "failed to exercise due care after discovering the box."[39] Although the owner eventually erected a barrier to stop the flow of the contaminant, it did not do so until the contaminant had spread nearly forty-five feet.[40] The court refused to conclude that the owner "acted with due care with respect to the contamination" and overturned the trial court's ruling that the owner qualified for the innocent purchaser defense.[41]

In *United States v. A & N Cleaners & Launderers, Inc.*,[42] the United States Government sought contribution for clean-up costs from the owners of the property. The owners, who purchased the property in 1979, argued that they were innocent landowners because the contamination occurred before they purchased the property.[43] The party that actually caused the contamination was a tenant operating a dry cleaning facility.[44] A well field that was supplying between 300,000 and 400,000 gallons of water per day to the surrounding communities was located adjacent to the property. In 1978, contaminants were discovered in the well field.[45] The discovery of the contaminants was widely published in various newspaper articles. Shortly after purchasing the property, the owners consented to allow borings on the property for the purpose of determining where the contamination of the well fields came from.[46] The court found that these factors "and the extent of investigative activity that apparently was taking place at the Property [made the owners] . . . sufficiently aware that they should have made inquiry of the

35. *Id.* at 547–48.
36. *Id.* at 548.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. 854 F. Supp. 229 (S.D.N.Y. 1994).
43. *Id.* at 231.
44. *Id.* at 232.
45. *Id.*
46. *Id.* at 234.

various subtenants," including the launderer.[47] The court held that because the owners were given sufficient indicia that releases of hazardous contaminants had occurred and failed to investigate, they were not entitled to assert the innocent landowner defense.[48] Of particular interest is the court's reaction to the owners' argument that the Government "should have notified [them] that there was a problem on the Property."[49] The court found the owners' argument meritless, holding that "Congress has seen fit to shift the public responsibility of locating contamination on to the shoulders of individual property owners."[50]

In *Kaladish v. Uniroyal Holding, Inc.*,[51] the purchaser of property was not entitled to the innocent owner defense because it had constructive knowledge of contamination prior to purchasing the property.[52] The purchaser acquired the property after the contamination took place.[53] However, the contamination was the subject of an earlier lawsuit in which a judgment was entered enjoining any further dumping or burning on the property.[54] The judgment was recorded before the purchaser acquired the property.[55] The court concluded that the recorded judgment put the purchaser on constructive notice that the property was potentially contaminated.[56] Further, the purchaser "admitted that he made no inquiries regarding the property before purchasing it; did not examine any court records pertaining to the property before purchase; and either failed to perform a title search or cannot remember conducting one before his purchase."[57] The court held that a party possessing real property with constructive knowledge of prior contamination is not entitled to the innocent owner defense.[58]

In *New York State Electric & Gas Corp. v. FirstEnergy Corp.*,[59] an owner of property that asserted the innocent owner defense, and might otherwise have been entitled to the defense, was found liable because it interfered with remediation efforts when attempting to resell the property for an exorbitant price. In 1971, I.D. Booth ("Booth") purchased real

47. *Id.* at 243.
48. *Id.*
49. *Id.* at 244.
50. *Id.*
51. No. 3:00 CV 854 (CFD), 2005 U.S. Dist. LEXIS 17272 (D. Conn. Aug. 9, 2005)
52. *Id.* at *14.
53. *Id.* at *4.
54. *Id.*
55. *Id.* at *14.
56. *Id.*
57. *Id.*
58. *Id.* at *14–15.
59. 808 F. Supp. 2d 417 (N.D.N.Y 2011).

property located in upstate New York.[60] Booth was not aware that the property had been used by various utility companies to manufacture gas using coal as the raw material between 1922 and 1940.[61] On the other hand, the court found that Booth "did not perform a title search, interview any past owners, perform an appraisal, review aerial photographs or Sanborn maps of the property, or even walk or survey the site."[62] In the early 1990's, New York State Electric & Gas Corp. ("NYSEG"), the entity that sold the property to Booth, sought to repurchase the property in order to remediate the contamination.[63] The property was appraised at $350,000.[64] Booth, however, demanded $2,000,000 as the cost of relocating its business.[65] Booth ultimately sold the property to NYSEG for $1.8 million, along with a right to repurchase the property for $1.00 following remediation if NYSEG decided to sell.[66] Booth also delayed vacating the building lying over the contaminated area.[67] The court found that "Booth's reluctance to sell the building was a significant obstacle in implementing source excavation at the Site . . . [and Booth's delay] exacerbated the contamination at the site, permitting continued migration of coal tar and other hazardous MPG waste."[68]

The court determined that although Booth was unaware of the contamination when it purchased the property, it failed to make appropriate inquiries at the time of purchase.[69]

The court concluded, therefore, that Booth failed to exercise due care once it became aware of the contamination and was not entitled to the innocent owner defense.[70] The court determined that under 42 U.S.C. § 9607(b)(3), in order to maintain the innocent owner defense, a purchaser must take "those steps necessary to protect the public from a health or environmental threat."[71] Booth failed to exercise due care because it unnecessarily delayed remediation by its failure to timely respond to NYSEG's proposal to purchase the property and by its "aggressive price demand."[72]

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60. *Id.* at 453.
61. *Id.* at 454.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 455.
68. *Id.* at 457.
69. *Id.* at 517.
70. *Id.* at 518–19.
71. *Id.* at 518.
72. *Id.*

Booth clearly had no knowledge of the previous contamination. The court also disregarded Booth's failure to adequately investigate the existence of contaminants before it purchased the property. Nevertheless, Booth failed to qualify as an innocent purchaser because its failure to cooperate with the prior owner obstructed and delayed the prior owner's efforts to clean up the property.

c. Failure to Take Precautions Against Foreseeable Acts.

A party asserting the "innocent purchaser" defense must show that it took precautions against foreseeable acts or omissions of the prior owner and the consequences that could foreseeably result from the prior owner's acts or omissions.[73] A finding that a purchaser failed to take such precautions could result in a loss of ability to assert the innocent purchaser defense.[74]

d. Failure to Disclose Release Upon Transfer of Ownership.

A party attempting to assert the innocent purchaser defense must also be sure to disclose any release or threatened release of a hazardous substance at the property before transferring the property to a third party. Under CERCLA's definition of the term "contractual relationship," failure to so disclose the above information results in the transferor's ineligibility for the defense under CERCLA section 107(b)(3).[75]

e. Due Care Satisfied.

Not all innocent landowner defenses are denied. For example, in *Redwing Carriers, Inc. v. Saraland Apartments, Ltd.*,[76] general partners of a limited partnership that owned property identified on the Environmental Protection Agency's ("EPA") National Priorities List were found by the court to have exercised due care with respect to hazardous substances contained in tar that began to rise to the surface of the property, by "not significantly worsening the problem" and by contacting the EPA and the state environmental agency about the appearance of the tar. According to the court, the general partners were not required to take other measures with respect to the tar in order to qualify for the third party defense under

73. CERCLA § 107(b)(3)(b), 42 U.S.C. § 9607(b)(3)(b) (2012).

74. *See United States v. Monsanto Co.*, 858 F.2d 160, 168–69 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

75. *See* CERCLA § 101(35)(C), 42 U.S.C. § 9601(35)(C) (2012).

76. 875 F. Supp. 1545 (S.D. Ala. 1995), *aff'd in part and rev'd in part*, 94 F.3d 1489 (11th Cir. 1996).

CERCLA.[77] For example, the general partners were not required to prevent the tar from surfacing or to enter into an order with the EPA.[78]

B. Contiguous Property Owner Defense.

1. The Defense.

Under 42 U.S.C. § 9607(q), a person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) of that section solely by reason of that contamination if the person establishes a preponderance of the evidence that:

(i) the person did not cause, contribute, or consent to the release or threatened release;

(ii) the person is not-

(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

(II) the result of a reorganization of a business entity that was potentially liable;

(iii) the person takes reasonable steps to-

(I) stop any continuing release;

(II) prevent any threatened future release; and

77. *Id.* at 1567.
78. *Id.*

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(iv) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

(v) the person-

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

(vi) the person is in compliance with any request for information or administrative subpoena issued by the President under CERCLA;

(vii) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(viii) at the time at which the person acquired the property, the person

(I) conducted all appropriate inquiry within the meaning of section 9601(35)(B) of CERCLA with respect to the property; and

(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of

one or more hazardous substances from other real property not owned or operated by the person.[79]

It is important to note, however, that any person that does not qualify for the Contiguous Property Owner defense because the person had, or had reason to have, knowledge that the purchased property may have been contaminated by hazardous substances from a contiguous property at the time of acquisition of the real property may qualify as a bona fide prospective purchaser if the person meets the conditions of the BFPP defense.[80]

2. Groundwater – EPA Policy Toward Owners of Property Containing Contaminated Aquifers.

With respect to a hazardous substance from one or more off-site sources that enters groundwater beneath the property of a person solely as a result of subsurface migration in an aquifer, 42 U.S.C. § 9607(q)(A) does not require the person to conduct groundwater investigations or to install groundwater remediation systems, except in accordance with the policy of the EPA concerning owners of property containing contaminated aquifers, dated May 24, 1995.[81]

According to the above policy, it is the Agency's position that where hazardous substances have come to be located on any property solely as a result of subsurface migration in an aquifer from a source or sources outside the property, the EPA will not take enforcement action against the owner of such property to require the performance of response actions or the payment of response costs. The policy, however, is subject to certain conditions. For example, the EPA states that where the property contains a groundwater well, the existence or operation of which may affect the migration of contamination in the affected aquifer, the policy may not apply.[82]

3. Effect of law.

With respect to a person described in this subsection, nothing in this subsection-

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79. 42 U.S.C. § 9607(q) (2012). Items (iii) through (vii) comprise the full list of what are known as the "continuing obligations" under CERCLA defenses. *See supra* note 15.

80. 42 U.S.C. § 9607(q)(C) (2012).

81. *Id.*§ 9607(q)(D).

82. *See* ENVT'L PROT. AGENCY (EPA), FINAL POLICY TOWARD OWNERS OF PROPERTY CONTAINING CONTAMINATED AQUIFERS 3 (1995), *available at* http://www2.epa.gov/sites/production/files/2013-09/documents/contamin-aqui-rpt.pdf.

(i) limits any defense to liability that may be available to the person under any other provisions of law; or

(ii) imposes liability on the person that is not otherwise imposed by Section 9607(a) of CERCLA.

Therefore, if applicable, the third party defense and the divisible harm argument might also be used to limit a contiguous property owner's liability for contaminants migrating onto the property from off-site.[83]

4. Assurances.

The EPA Administrator may-

(i) issue an assurance that no enforcement action under CERCLA will be initiated against a person that is eligible for the Contiguous Property Owner defense; and

(ii) grant such a person protection against a cost recovery or contribution action under section 9613(f) of this CERCLA.[84]

C. "Bona Fide Prospective Purchaser" Defense.

If the purchaser conducts an appropriate inquiry into the environmental condition of a property and identifies a release of hazardous substances, the purchaser may seek to assert the Bona Fide Prospective Purchaser (BFPP) defense under CERCLA.

1. Burden of Proof.

In order to qualify as a bona fide prospective purchaser, a person must have acquired the facility after January 11, 2002, must not impede the performance of a response action or natural resource restoration at the facility and must establish by a preponderance of the evidence each of the following:

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83. 42 U.S.C. § 9607(q)(2) (2012). *See supra* Parts II.B, III.
84. 42 U.S.C. § 9607(q)(3) (2012).

(i) The disposal of hazardous substances at the facility occurred before the facility was purchased;

(ii) purchaser made all appropriate inquiry into the previous ownership and uses of the property "in accordance with generally accepted good commercial and customary standards and practices;"

(iii) The purchaser met all applicable reporting requirements;

(iv) The purchaser exercised appropriate care with respect to the hazardous substances found at the facility by taking reasonable steps to – (a) stop any continuing release; (b) prevent any threatened future release; and (c) prevent or limit human environmental or natural resource exposure to any previously released hazardous substance;

(v) The purchaser provided cooperation, assistance and access to parties that are responding to the release of hazardous substances at the facility;

(vi) The purchaser is in compliance with any land use restrictions associated with such a response and the purchaser has not impeded the effectiveness or integrity of any institutional control associated with such a response action;

(vii) The purchaser has complied with requests for information from EPA; and

(viii) The purchaser has established that it is not a potentially responsible party or affiliated with any other person that is potentially liable.[85]

2. Proving up the BFPP Defense.

In attempting to qualify for the BFPP defense, one of the most difficult conditions can be (iv) above, which requires that any release of a hazardous substance at a property be evaluated on a case-by-case basis to identify the "reasonable steps" that may be necessary in order to qualify for the defense.

85. *See* 42 U.S.C. §§ 9601(40), 9607(r).

The March 6, 2003 EPA Interim Guidance regarding the Innocent Purchaser and BFPP defense discusses what constitutes "reasonable steps" for purposes of condition (iv) above.[86] The above Guidance states that the EPA believes that Congress did not intend for a party that qualifies for the BFPP defense to have the same types of response obligations that exist for a party that is liable under CERCLA (e.g., removal of contaminated soil, extraction and treatment of contaminated groundwater).[87] The EPA Guidance also states, however, that there "could be unusual circumstances where the reasonable steps required of a bona fide perspective purchaser . . . or innocent land owner would be akin to the obligations of a potentially responsible party (e.g., . . . the land owner is the only person in a position to prevent or limit an immediate hazard)."[88] The EPA states that the above circumstance "may be more likely to arise in the context of a bona fide perspective purchaser as the purchaser may buy the property with knowledge of the contamination."[89]

3. Caselaw Interpreting the BFPP.

In *Ashley II of Charleston LLC v. PCS Nitrogen Inc.*,[90] the court examined whether a buyer qualified for the BFPP defense. The purchaser removed certain buildings but left cracked concrete slabs and sumps that could fill with rain water and, therefore, did *not* qualify for the BFPP defense, in part because the court held that the purchaser should have capped, filled or removed the sumps.[91] Further, because the purchaser indemnified and released certain potentially responsible parties and attempted to discourage the EPA from recovering response costs from those parties, the court found that the purchaser failed to meet the "no affiliation" requirement of the BFPP defense (condition (viii) above).[92] In explanation, the court said that the purchaser's action revealed "just the sort of affiliation Congress intended to discourage."[93]

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86. EPA, INTERIM GUIDANCE REGARDING CRITERIA LANDOWNERS MUST MEET IN ORDER TO QUALIFY FOR BONA FIDE PROSPECTIVE PURCHASER, CONTIGUOUS PROPERTY OWNER, OR INNOCENT LANDOWNER LIMITATIONS ON CERCLA LIABILITY ("COMMON ELEMENTS") 1 (2003), *available at* http://www2.epa.gov/sites/production/files/documents/common-elem-guide.pdf.

87. *See id.* at 9.

88. *See id.* at 10 n.10.

89. *Id.*

90. 791 F. Supp. 2d 431 (D.S.C. 2011), *aff'd*, 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 514 (2013).

91. *Id.* at 501–02.

92. *Id.* at 502.

93. *Id.*

In *Saline River Properties, L.L.C. v. Johnson Controls, Inc.*,[94] the purchaser asserted that it was a bona fide prospective purchaser under CERCLA and was not liable for the release of hazardous substances at the twenty-two acre facility.[95] In its evaluation of the assertion by Saline River Properties that it was a BFPP, the court noted that Saline allegedly took the affirmative action of breaking up a concrete slab located at the property which may have caused hazardous substances beneath that barrier to migrate into soils and groundwater.[96] Because there was a factual dispute about whether Saline's action caused such contamination, the court found that Saline had not established that it was a BFPP under CERCLA for summary judgment purposes.[97]

In *3000 E. Imperial, L.L.C. v. Robertshaw Controls Co.*,[98] the purchaser of property was able to successfully defend its assertion that it was a BFPP under CERCLA.[99] After purchasing the property, Imperial sampled nine underground storage tanks ("USTs") and identified the presence of trichloroethylene ("TCE"), which is a hazardous substance under CERCLA.[100] Imperial emptied the contents of the USTs and, two years later, Imperial excavated and removed the USTs.[101]

In attempting to defeat Imperial's assertion of the BFPP defense, the defendant argued that Imperial was not eligible for the BFPP defense because Imperial had unreasonably waited two years after the purchase of property to excavate the USTs.[102] According to the district court, however, because Imperial had emptied the USTs shortly after identifying the presence of TCE, Imperial had taken reasonable steps to stop any continuing leak and prevent any future releases from the USTs.[103] The court also stated that because the USTs were empty "it was not unreasonable for [Imperial] to leave the USTs in the ground at that time . . . ."[104]

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94. 823 F. Supp. 2d 670 (E.D. Mich. 2011).

95. *Id.* at 685.

96. *Id.* at 686.

97. *Id.* Saline was later found liable to Johnson Controls, but only for a nominal amount covering additional monitoring costs. *Saline River Properties, L.L.C. v. Johnson Controls, Inc.*, No. 10-10507, 2012 U.S. Dist. LEXIS 113593 (E.D. Mich. Aug. 13, 2012).

98. No. CV 08-3985 PA (Ex), 2010 U.S. Dist. LEXIS 138661 (C.D. Cal. Dec. 29, 2010).

99. *Id.* at *35.

100. *Id.* at *8–9.

101. *Id.* at *9.

102. *Id.* at *33–34.

103. *Id.* at *34.

104. *Id.*

4. Brief Discussion of the EPA's "Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision," dated December 5, 2012.

Under CERCLA section 101(40), a tenant may derive BFPP status from an owner who satisfies and maintains compliance with the BFPP criteria. The EPA's "Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision," ("EPA Guidance"), confirms that the tenant remains "a BFPP and is protected by Section 107(r) from CERCLA liability as long as the owner maintains its BFPP status," all disposal of hazardous substances at the facility occurred prior to acquisition, and the tenant does not impede the performance of a response action.

The EPA Guidance goes on to address the potential liability of a tenant in a situation where the owner of a property is not a BFPP or where the owner fails to maintain its BFPP status. According to the EPA Guidance, "the EPA intends to exercise its enforcement discretion on a site-specific basis to treat the tenant as a BFPP *when the tenant itself meets all of the BFPP provisions in CERCLA* . . . ."[105] Because it is not possible to know for certain whether a landlord is (or will remain) a BFPP, it may be prudent for a party that intends to lease property that may be contaminated by the release of a hazardous substance to attempt to meet the applicable BFPP provisions under CERCLA.

5. CERCLA's BFPP Defense and RCRA.

In *Voggenthaler v. Maryland Square, L.L.C.*,[106] homeowners that owned property above an aquifer contaminated by a release of PCE from a drycleaner located at a nearby shopping center sought an injunction under the Resource Conservation and Recovery Act ("RCRA") to require the owners of the shopping center, including a purchaser that bought the property after the PCE spills had occurred, to clean up the groundwater contamination. Under RCRA, "any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to the health or the

105. Memorandum from Cynthia Giles, Assistant Adm'r, Office of Enforcement and Compliance Assurance, & Mathy Stanislaus, Assistant Adm'r, Office of Solid Waste and Emergency Response, to Regional Administrators, EPA Regions I-X at 4 (Dec. 5, 2012) (emphasis added), *available at* http://www2.epa.gov/sites/production/files/documents/tenants-bfpp-2012_0.pdf

106. 724 F.3d 1050 (9th Cir. 2013).

environment . . .” may be assessed liability under the statute.[107] In *Voggenthaler*, the circuit court remanded the matter to the district court so the issue of the subsequent purchaser’s RCRA liability could be fully considered.[108] The circuit court also vacated the district court’s grant of summary judgment against the subsequent purchaser so that the subsequent purchaser would have an opportunity to “establish that it has met the statutory and regulatory requirements to qualify as a bona fide prospective purchaser.”[109]

IV. CONCLUSION

CERCLA provides certain narrowly construed defenses whereby an otherwise liable person may avoid liability for the release of a hazardous substance. The defenses discussed in this article are the “third party” defenses. A potentially responsible party seeking to avoid liability under one of CERCLA’s third party defenses must demonstrate, among other things, that it did not release the hazardous substance. In addition, each of the defenses discussed above requires that the party asserting the defense demonstrate that it conducted an appropriate inquiry of the environmental condition of the property, that it was not affiliated with the third party that released the hazardous substance, and that, once it discovered the release, the party asserting the defense exercised appropriate care to prevent or limit human environmental or natural resource exposure to the contamination. Finally, to assert the defense, a party must also cooperate with parties responding to the contamination.

Because of the onerous burden of proof that must be met by a party asserting a third party defense under CERCLA and because of the uncertainty associated with court cases examining such defenses, it may be prudent for a new owner of property to employ a multi-faceted strategy for minimizing its environmental liability. For example, in addition to attempting to qualify for a defense under CERCLA, it may be prudent for a new purchaser to negotiate a “prospective purchaser” agreement with the applicable regulatory authority. Such an agreement may include an acknowledgement that the new owner is not liable for any contamination at the newly purchased property. In addition, if the newly acquired property has a history of environmental issues, a purchaser may also want to explore the possibility of purchasing a pollution legal liability insurance policy from

107. *See* Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. § 6972(a)(1)(B) (2012)).

108. *Voggenthaler*, 724 F.3d at 1068–69.

109. *Id.* at 1063.

a reputable carrier to cover any remedial costs that might ultimately be attributed to the purchaser.