THE IMPLICATIONS OF CERCLA IN CORPORATE REORGANIZATIONS

INTRODUCTION

During the past few years there have been corporate mergers and acquisitions of previously unseen proportions. Along with these reorganizations come questions of successor liability. These liabilities often become apparent to the parties during negotiations. That norm, however, has been altered as a result of the enactment of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (the "CERCLA"). The CERCLA subjects owners and operators of hazardous waste sites to liability for clean-up costs. A purchaser must now consider environmental waste problems from the outset in order to avoid liability under CERCLA.

In view of the potential costs imposed by CERCLA, this Comment first addresses corporate successor liability in general, and then discusses relevant CERCLA provisions. Next, corporate successor liability is examined with respect to the environmental issues posed by CERCLA. Finally, this Comment presents practical ways to deal with environmental liabilities in corporate mergers and acquisitions.

SUCCESSOR LIABILITY

The concept of corporate successor liability has existed for many years. This fact is evidenced by the following excerpt from Blackstone's Commentaries:

All the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though

5. Naj, How to Clean Up Superfund's Act, Wall St. J., Sept. 15, 1988, at 20. The Environmental Protection Agency has identified over 27,000 sites for cleanup. Id.
6. See infra notes 221-80 and accompanying text.
7. See infra notes 10-163 and accompanying text.
8. See infra notes 164-220 and accompanying text.
9. See infra notes 221-80 and accompanying text.
the parts which compose it are changing every instant.\textsuperscript{11}

Generally, whether a successor corporation assumes the liabilities of its predecessor depends on the form of the reorganization.\textsuperscript{12} If a merger or consolidation occurs under corporate law, the surviving company acquires the predecessor’s liabilities.\textsuperscript{13} The reason for this is because in a merger or consolidation, the acquired company ceases to exist after the acquisition.\textsuperscript{14} If the acquisition takes the form of a sale of assets, the general rule is that the successor to the assets does not assume the liabilities of its predecessor.\textsuperscript{15} However, there are four generally recognized exceptions to this rule.\textsuperscript{16} These exceptions exist when: (1) the purchaser expressly or impliedly agrees to assume such obligations; (2) the transaction amounts to a “de facto” consolidation or merger; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently in order to escape liability.\textsuperscript{17}

The New Jersey Superior Court analyzed the exceptions to the general rule of nonliability in sale-of-asset transactions in *McKee v. Harris-Seybold Co.*\textsuperscript{18} On January 18, 1968, Edward McKee sustained serious physical injury while operating a paper cutting machine for his employer.\textsuperscript{19} This machine had been originally manufactured by the Seybold Machine Company in 1916.\textsuperscript{20} In 1926, Seybold contracted with Harris Automatic Press Company to sell certain assets, and Harris agreed to assume certain liabilities pursuant to a contract of sale.\textsuperscript{21} This transaction resulted in the formation of Harris-Seybold Corporation.\textsuperscript{22}

McKee brought suit, and initially argued that Harris-Seybold should be liable because it had either expressly or impliedly assumed liability for defects in the machine manufactured by Seybold

\textsuperscript{11} Id. (quoting 1 W. BLACKSTONE, COMMENTARIES 467-69).
\textsuperscript{12} Murphy, The Impact of “Superfund” and Other Environmental Statutes on Commercial Lending and Investment Activities, 41 BUS. LAW. 1133, 1148-49 (1986).
\textsuperscript{14} Id.
\textsuperscript{15} Murphy, 41 Bus. Law. at 1149.
\textsuperscript{17} Id. Some courts have recognized a fifth exception in the event the asset transfer was made without adequate consideration and without provisions for the creditor of the transferor. Id.; Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 309 (citing Husak v. Berkel, Inc., 294 Pa. Super. 452, 457, 341 A.2d 174, 176 (1975)).
\textsuperscript{19} Id. at —, 264 A.2d at 100.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
Machine Company. The court denied McKee's argument because Harris-Seybold had only assumed liabilities "in the usual course of the manufacturing business." McKee also argued that the transaction amounted to a de facto merger and thus Harris-Seybold should be required to assume liability for the defective paper cutting machine. The court rejected this contention because only assets were transferred in exchange for cash and securities, and there was no de facto merger resulting in the assumption of liabilities.

McKee further asserted that Harris-Seybold was a mere continuation of its predecessors. The elements of this argument were stated as: a transfer of assets; for less than adequate consideration; to another corporation which continued the same business; when both corporations had at least one common officer that was instrumental in the transfer; and the transfer kept the transferor from paying its creditors because it was dissolved either in fact or law. The court held that although there was a transfer of assets, a continuity of operations, and a common officer, Harris-Seybold here did more than just represent a "new hat" of the seller and therefore should not be liable for Seybold Machine Company's torts. Finally, McKee argued that he should prevail because either the transaction was entered into fraudulently or it lacked adequate consideration. The court found no evidence of fraud on the record, and the consideration received was greater than the value of the assets exchanged. In light of these findings, Harris-Seybold's motion for summary judgment was granted.

Until recently, the absence of liability in a sale-of-assets context had the potential to lead to harsh and inequitable results. An example of this unfairness arises in the products liability arena. To solve this problem, courts have either expanded the exceptions outlined above or disregarded them in favor of the "product line" ex-

23. Id. at —, 264 A.2d at 101-02.
24. Id. at —, 264 A.2d at 102.
25. Id. at —, 264 A.2d at 103.
26. Id. at —, 264 A.2d at 103-05.
27. Id. at —, 264 A.2d at 105.
29. Id. at —, 264 A.2d at 106.
31. Id. at —, 264 A.2d at 107.
32. Id. at —, 264 A.2d at 108.
34. Id. at 910.
35. See Knapp v. North American Rockwell Corp., 506 F.2d 361 (3d Cir. 1974), cert. denied, 421 U.S. 965 (1975) (expanding the de facto merger exception); Cyr v. B.
That exception states that an entity which acquires a business and continues manufacturing the same line of products shall assume strict liability for defects in units manufactured by its predecessor.

The California Supreme Court adopted the product line exception in *Ray v. Alad Corp.*, thus expanding products liability in sale-of-assets transactions. Robert Ray, claiming injury from a defective ladder, asserted strict liability against Alad Corporation ("Alad"), which had neither manufactured or sold the ladder, but became the successor to the business of the ladder's manufacturer. After acquiring its predecessor's assets, Alad continued to produce the same kind of ladders using its predecessor's name, equipment, designs, personnel, and soliciting its predecessor's customers using the same sales network with no indication of new ownership.

The court found that none of the four general exceptions to non-liability in sale-of-assets transactions applied. It stated that these liabilities shall only be expanded when necessitated by public policy. The court, however, listed three justifications for imposing strict liability on the successor corporation. First, absent successor liability, a plaintiff would have no remedy against the original manufacturer because of the successor's purchase of the business. Second, the successor's are in a better position to spread the risk. Third, since the successor acquired the goodwill of the predecessor, it should also assume the accompanying risks. The court in *Ray* found that all three justifications were present. The court concluded that any "party which acquires a manufacturing business and continues the output of its line of products under the circumstances here presented assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired."
Similarly, the New Jersey Supreme Court adopted the product line theory in *Ramirez v. Amsted Industries*. In *Ramirez*, Efrain Ramirez brought suit against Amsted Industries for injuries he had sustained while operating a power press. The power press was manufactured by Johnson Machine and Press Company ("Johnson"). Amsted Industries, which had previously acquired all of Johnson's inventory, equipment, trademarks, books, records, and other assets, was the corporate successor to Johnson.

The court ignored a disclaimer of liability clause and held that: where one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor.

In sum, successor liability is invoked if the transaction involved was a merger or consolidation. If the transaction is a sale-of-assets as in *Ray* and *Ramirez*, liability will ultimately depend on the applicable state law.

CERCLA

ORIGIN AND LEGISLATIVE HISTORY

Since 1970, Congress has passed several environmental acts which have set forth regulatory requirements such as air and water quality. The Resource Conservation and Recovery Act of 1976 (the "RCRA") was the first federal act to tackle the regulation of hazardous wastes. The RCRA has been described as a "cradle-to-grave" system of controlling hazardous wastes through regulation of, among others, generators, transporters, and disposers of toxic chemicals.

51. Id. at —, 431 A.2d at 812-13.
52. Id. at —, 431 A.2d at 812-13.
53. Id. at —, 431 A.2d at 813-14.
54. Id. at —, 431 A.2d at 825.
55. See supra notes 13-14 and accompanying text.
56. See supra notes 15-54 and accompanying text.
59. Id. at 19; Note, *The Comprehensive Environmental Response, Compensation*
The RCRA was shown to have two major shortcomings: (1) it was prospective in nature; and (2) it provided inadequate funding for state hazardous waste programs.\textsuperscript{60} To fill the gaps left by RCRA, Congress enacted CERCLA to address the problem of cleaning up hazardous waste sites.\textsuperscript{61} In 1986, amendments to CERCLA were passed as a part of the Superfund Amendments Reauthorization Act (the “SARA”).\textsuperscript{62}

As originally proposed, CERCLA was intended to provide federal regulations which enabled government and private parties to pursue environmental claims.\textsuperscript{63} However, as one court stated, the final draft of CERCLA was passed in the “waning hours of the 96th Congress,” and was “the product of apparent legislative compromise [that] is not a model of clarity.”\textsuperscript{64} Nevertheless, an act such as CERCLA was needed to remedy the patent inadequacies of existing environmental laws.\textsuperscript{65}

The Committee Report of the original Senate bill cited the following as the aims of CERCLA:

(1) to provide an incentive for maximum care in the prevention of releases; (2) to assure that responsible parties bear the full cost of activities; (3) to encourage the internalization of health and environmental costs; (4) to encourage compensation of innocent victims by removing difficult proof burdens; (5) to place incentives for greater care on the parties with the best knowledge [of] risks inherent in the wastes and in the best position to control and supervise their disposal; (6) to spread costs; and (7) to encourage efficient resource allocation.\textsuperscript{66}

\textsuperscript{60} Cyphert & Key, supra note 58, at 19 (citing OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 1ST SESS., REPORT ON HAZARDOUS WASTE DISPOSAL 31 (Comm. Print 1979)).


\textsuperscript{64} Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988).

\textsuperscript{65} New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985), (quoting F. ANDERSON, D. MANDELKER, & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW & POLICY 568 (1984)).

In short, CERCLA was intended to promote the efficient clean-up of waste disposal sites, and to require those who created the contamination to bear the clean-up costs.67

CERCLA FRAMEWORK

To achieve its objectives, CERCLA has a three tier approach.68 First, it gives the federal government the power to respond to the problem that the hazardous waste sites create.69 Thus, the government has the power to remove the threat to the environment and the public health.70 Second, CERCLA establishes liability for those proven responsible for the release or threatened release of hazardous substances.71 Third, CERCLA creates a fund to finance the clean-up efforts.72 Originally, the fund was subsidized through taxes on the petroleum and chemical industries.73 Eventually, Congress determined that cleaning up the environment was a societal responsibility and not merely one borne by the petroleum and chemical industries.74 Thus, the SARA amendments broadened the tax base for the fund.75

PARTIES LIABLE UNDER CERCLA

Liability under CERCLA is imposed on four separate classes of individuals: (1) current owners and operators; (2) past owners and operators; (3) persons who generate waste or arrange for its disposal; and (4) persons who transport the material to disposal or treatment facilities.76 "Facilities" is broadly defined to include any place where

69. Id.
70. Id. (citing 42 U.S.C. § 9604).
71. Id. (citing 42 U.S.C. § 9607).
74. Id. at 14.
75. Id.
76. 42 U.S.C. § 9607(a) (Supp. IV 1986). This statute imposes liability against:
   (1) the owner and operator of a vessel or a facility,
   (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
   (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by
hazardous substances are located.\textsuperscript{77}

In order for any of these parties to be liable, there must be either a release or threatened release of hazardous substances.\textsuperscript{78} A "release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" of a hazardous substance.\textsuperscript{79} "Hazardous substances" include over 600 kinds of chemicals under CERCLA.\textsuperscript{80}

There are several costs for which a responsible party may be liable under CERCLA.\textsuperscript{81} These costs consist of all removal expenses incurred by the government,\textsuperscript{82} any necessary costs not inconsistent with the National Contingency Plan,\textsuperscript{83} damages to natural resources,\textsuperscript{84} and the costs of any health assessment.\textsuperscript{85} Although a party may be liable for a multitude of costs, there are statutorily fixed liability limits under CERCLA.\textsuperscript{86}

\textsuperscript{77} 42 U.S.C. § 9601(9).

\textsuperscript{78} This section provides:

"[F]acility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

\textsuperscript{79} Id.

\textsuperscript{80} Id. § 9601(14); 40 C.F.R. Part 261 (1987).

\textsuperscript{81} 42 U.S.C. § 9607(a)(4).

\textsuperscript{82} Id. § 9607(a)(4)(A).

\textsuperscript{83} Id. § 9607(a)(4)(B). The National Contingency Plan, 33 U.S.C. §§ 1321(c) (1982), provides the President with emergency powers to effectuate cleanup of hazardous waste discharge. Id. § 1321(c) (1982).

\textsuperscript{84} 42 U.S.C. § 9607(a)(4)(C).

\textsuperscript{85} Id. § 9607(a)(4)(D).

\textsuperscript{86} Damage limitations, which do not include costs of waste removal, are as follows:

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, pipeline (as defined in the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C.A. § 2001 et seq.) or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous...
The liability standard of CERCLA is identical to that imposed by a provision of the Clean Water Act.\textsuperscript{87} At the time of CERCLA’s enactment, this provision had been judicially interpreted so as to impose strict liability.\textsuperscript{88} It is proper to assume that Congress was aware that courts had interpreted this provision of the Clean Water Act to impose a standard of strict liability.\textsuperscript{89} Furthermore, every court which has considered the standard of liability under CERCLA has determined that strict liability should be imposed.\textsuperscript{90}

**DEFENSES AVAILABLE UNDER CERCLA**

The allowable defenses to liability claims under CERCLA consist only of those statutorily provided by that Act.\textsuperscript{91} Liability can be avoided if one can prove that the release was caused solely by either an act of God, an act of war, or by someone who did not have a contractual relationship with the defendant.\textsuperscript{92} Once it is established that

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\textsuperscript{87} Id. § 9601(14)(A) of this title into the navigable waters, $8,000,000). Such regulation shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

\textsuperscript{88} See, e.g., Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979) (stating that “the final bill [of the Clean Water Act] embodied the Senate’s strict liability proposal”); United States v. Tex-Tow, Inc., 589 F.2d 1310, 1314-15 (7th Cir. 1978) (stating that the standard of liability under the Clean Water Act is an absolute one); Burgess v. M/T Tamano, 564 F.2d 964, 981 (1st Cir. 1977), cert. denied, 435 U.S. 941 (1978) (stating that owners under the Clean Water Act are liable without fault); Tug Ocean Prince, Inc. v. United States, 436 F. Supp. 907, 924 (S.D.N.Y. 1977), aff’d in part and rev’d in part on other grounds, 584 F.2d 1151, 1164 (2d Cir. 1978) (stating that the penalty provision “holds the owner or operator strictly liable”). The Federal Water Pollution Control Act is commonly known as the Clean Air Act.


\textsuperscript{90} See, e.g., Shore Realty, 759 F.2d at 1042 (stating that Congress intended strict liability be imposed under CERCLA although the statute does not explicitly provide for it); Miami Drum, 25 Env’t Rep. Cas., at 1473 (holding that strict liability should be imposed to further the purposes of CERCLA); United States v. Ward, 618 F. Supp. 884, 897 (E.D.N.C. 1985) (stating that “CERCLA was clearly established to provide strict liability for any of the persons coming within the definitions given’.

\textsuperscript{91} 42 U.S.C. § 9607(a), (b).

\textsuperscript{92} Id. Section 9607(b) states in full:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that
a party is potentially liable, the burden of proof is shifted to the defendant to show by a preponderance of the evidence that the defendant did not cause or contribute to the environmental threats as allowed under one of the statutory defenses.\textsuperscript{93}

The first two defenses, which require a showing that the release or threat of release was caused solely by an act of God or an act of war, are unlikely to be applicable in the merger and acquisition context.\textsuperscript{94} The only practical help is offered in the third statutory defense, commonly known as the third-party defense.\textsuperscript{95} To qualify for this defense, a party must show that a third-party’s act or omission was the sole cause of the release and that no contractual relationship existed.\textsuperscript{96} Upon proving this, the defendant must still show that it exercised due care with regard to the hazardous substance and took precautions against foreseeable acts or omissions of third parties.\textsuperscript{97}

As originally enacted, the third-party defense was unclear and was questioned by the courts.\textsuperscript{98} Legislators subsequently sought to develop an exception to liability for prior innocent landowners.\textsuperscript{99} To achieve this goal, Congress changed the definitional section of CERCLA rather than directly altering any of its liability provisions.\textsuperscript{100}

This change was accomplished through the SARA amendments

\begin{quote}
the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
\begin{enumerate}
\item an act of God;
\item an act of war;
\item 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 (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substances in light of all relevant facts and circumstances, 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; or
\item any combination of the foregoing paragraphs.
\end{enumerate}
\end{quote}

\textit{Id.}


94. Schwenke, supra note 73, at 14.


99. \textit{Id.}

100. \textit{Id.}
by defining the term "contractual relationship," a revision which created the "innocent landowner" defense.\textsuperscript{101} The SARA amendments defined contractual relationships to include, among other things, "land contracts, deeds or other instruments transferring title or possession."\textsuperscript{102} The new section also states that if the real property is acquired after the hazardous substances were disposed on it and if the purchaser then follows the procedures set forth by SARA, it shall not be deemed to have a contractual relationship with the party responsible for the release or threat of release.\textsuperscript{103} As a result, the purchaser may assert the third-party defense under CERCLA.\textsuperscript{104}

To meet these guidelines for asserting the defense, the purchaser must not have had reason to know that hazardous substances were present on the property at the time of purchase.\textsuperscript{105} To prove that it had no reason to know, the purchaser must have conducted "an appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability."\textsuperscript{106} This inquiry, however, must take place before the purchase of the property.\textsuperscript{107} In addition, the following factors are considered in determining the amount of investigation required: (1) specialized knowledge or experience of the purchaser; (2) comparison of purchase price to value of uncontaminated property; (3) any known or ascertainable information regarding the property; (4) an obvious or likely presence of contamination; (5) ability to determine whether the property is contaminated through inspection.\textsuperscript{108}

The legislative history indicates that there is meant to be a higher standard for those asserting the defense in a commercial

\begin{itemize}
\item \textsuperscript{101} 42 U.S.C. § 9601 (35); Schwenke, supra note 73, at 15.
\item \textsuperscript{102} 42 U.S.C. § 9601(35)(A).
\item \textsuperscript{103} Id. § 9601(35).
\item \textsuperscript{104} Id.
\item \textsuperscript{105} 42 U.S.C. § 9601(35)A) states in relevant part:
\end{itemize}

\begin{itemize}
\item The term "contractual relationship," for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
\begin{itemize}
\item (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.
\end{itemize}
\item Id. § 9601(35)(B).
\item Id. See Schwenke, supra note 73, at 15.
\item Id.
\end{itemize}
transaction rather than in a residential transaction.\textsuperscript{109} It further appears that the "innocent landowner" defense in SARA provides purchasers a defense that was previously unavailable under CERCLA.\textsuperscript{110}

Since the SARA amendments were added in 1986, there has been minimal case law dealing with the third-party defense, and no one has successfully asserted that defense.\textsuperscript{111} An example of the third-party defense is contained in \textit{United States v. Mottolo}.\textsuperscript{112} In \textit{Mottolo}, the State of New Hampshire, following up on a tip, investigated property located in Raymond, New Hampshire as a possible hazardous waste site.\textsuperscript{113} Finding the site to be contaminated, the state called in the Environmental Protection Agency (the "EPA") to conduct removal activities.\textsuperscript{114}

The property was found to have been owned by Richard Mottolo since 1964.\textsuperscript{115} Mottolo subsequently acquired Service, a waste cleaning company, in 1973 and contracted to dispose of waste generated by K.J. Quinn & Company ("Quinn") and Lewis Chemical Company ("Lewis").\textsuperscript{116} Service disposed of this waste on Mottolo's property.\textsuperscript{117} In 1980, Mottolo incorporated Service to avoid personal liability.\textsuperscript{118}

The United States, on behalf of the EPA and the State of New Hampshire, sought under CERCLA to recover the government's clean-up costs against Mottolo, Service, and Quinn.\textsuperscript{119} Because Mottolo owned the site at the time of the disposal, he was held to be liable under CERCLA.\textsuperscript{120} Service was liable because it operated the facility at the time of the disposal.\textsuperscript{121} In addition, since Mottolo admitted to forming Service to shield himself from liability, the court disregarded the corporate form and also held Mottolo personally liable as an operator.\textsuperscript{122} Quinn was held liable as a generator of hazardous waste.\textsuperscript{123}

Quinn alleged that the State of New Hampshire and the EPA were negligent in supervising the clean-up and thus there should be a

\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Hooker}, 680 F. Supp. at 558.
\textsuperscript{111} Ruhl, 29 S. Tex. L. Rev. at 300.
\textsuperscript{112} 695 F. Supp. 615 (D.N.H. 1988).
\textsuperscript{113} \textit{Id.} at 618-19.
\textsuperscript{114} \textit{Id.} at 619.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.} This dumping began in 1975 and continued thereafter through 1980. \textit{Id.}
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.} at 618.
\textsuperscript{120} \textit{Id.} at 623.
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.} at 624.
\textsuperscript{123} \textit{Id.} at 625. Between 1975 and 1979, Quinn utilized the site owned by Mottolo to dispose of his hazardous waste materials. \textit{Id.}
valid third-party defense. That is, the release was caused solely by the EPA and the state and not by Quinn. The court found that there had been releases at the Mottolo site before the government involvement. Therefore, it was determined that the sole cause of the release could not be attributed only to the governmental agencies. Absent the agencies being the sole cause, the court held that Quinn could not establish a third-party statutory defense. Quinn also argued that it used due care in its dealings with Mottolo and Service; however, the court found that due care could only be argued within the confines of the third-party defense and since Quinn could not meet the prima facie burdens of that defense, it was unable to assert due care as a defense.

Another example in which the third-party defense was used is City of Philadelphia v. Stepan Chemical Co. In Stepan Chemical, Philadelphia was the owner and operator of a landfill called the Enterprise site. Stepan Chemical was a generator of hazardous waste and had hired waste transporters to haul and dispose of this waste. These transporters subsequently bribed city employees in exchange for allowing them to dispose of Stepan Chemical’s waste on the city’s property.

Upon discovering the illegal dumping, the city cleaned up the site at its own expense and sought to recover these clean-up expenses from, among others, Stepan Chemical. Stepan Chemical admitted potential liability as a generator of hazardous wastes, but asserted that, under CERCLA, the city should bear some of the responsibility as the current owner and operator of the site. On this basis, Stepan Chemical brought a motion for summary judgment under CERCLA claiming that the city was partially responsible for the costs and

124. Id. at 625.
125. Id. at 625-26.
126. Id. at 626.
127. Id.
128. Id.
129. Id.
131. Id. at 2.
132. Id.
134. Stepan Chemical, supra note 130, at 2.
135. Id. at 2-3. The city brought separate actions against both Lightman and ABM. Stepan Chemical, 544 F. Supp. at 1139 n.1.
136. Stepan Chemical, supra note 130, at 3. Stepan Chemical asserted that the city was liable as either an owner or operator under CERCLA. Refer to 42 U.S.C. § 9607(a)(1)-(2).
damages resulting from the dumping of hazardous substances on city property.\textsuperscript{137}

The city argued that because it did not create the hazardous condition and had exercised due care in avoiding hazardous wastes, it should not be liable.\textsuperscript{138} The court rejected this argument by recognizing that CERCLA imposes strict liability and that causation need not be shown.\textsuperscript{139} Next, the city argued that because its clean up was voluntary, it should not be liable under CERCLA.\textsuperscript{140} The court denied this argument also, stating that it was unsupported by the statute and its acceptance would allow culpable parties to escape liability.\textsuperscript{141} Finally, the city argued that it was "unfair and in contradiction of Congressional intent to hold an innocent landowner liable."\textsuperscript{142} The court, however, stated that Congress specifically intended to hold innocent landowners liable under CERCLA.\textsuperscript{143} The intent of the SARA amendments was determined to provide relief to a category of persons Congress perceived as entitled to special protection.\textsuperscript{144} The court explained that "[a]ny fairness qualifications are properly made in connection with the statutory defenses, not the definition of covered persons."\textsuperscript{145}

Stepan Chemical argued that the city should not be able to assert the third-party defense because its employees were the cause of the release or threat of release of hazardous substances at the site.\textsuperscript{146} Stepan Chemical referred to the statute, which specifically allows a defense for releases caused solely by "an act or omission of a third-party other than an employee."\textsuperscript{147} The city, however, argued that the third-party defense should be available because its employees acted beyond the scope of their employment.\textsuperscript{148}

In response to the city's argument, the district court determined that the legislative history does not follow common law principles and that Congress intended the defense to apply only when the responsible party had no contact with the third-party.\textsuperscript{149} The court held that since the city and its employees have contacts with each

\begin{itemize}
\item 137. \textit{Id. at 2.}
\item 138. \textit{Id. at 3.}
\item 139. \textit{Id.}
\item 140. \textit{Id.}
\item 141. \textit{Id.}
\item 142. \textit{Id.}
\item 143. \textit{Id. at 5.}
\item 144. \textit{Id. at 6.}
\item 145. \textit{Id.}
\item 146. \textit{Id. at 8.}
\item 147. \textit{26 U.S.C. § 9607(b)(3).}
\item 148. \textit{Stepan Chemical, supra note 130, at 8.}
\item 149. \textit{Id. at 10.}
\end{itemize}
other, it cannot make use of the third-party defense. Further, the court stated that "[t]o adopt a scope of employment exception without the benefit of appropriate safeguards could seriously undermine CERCLA’s goal of prompt clean-up of hazardous substances at the expense of parties designated by Congress." As a result, Stepan Chemical’s motion for partial summary judgment was granted.

Some courts have allowed equitable defenses despite CERCLA language which states that the only allowable defenses are those provided by the statute. The equitable defenses that have been recognized in CERCLA actions are restitution, settlement agreement and release, laches, unclean hands, and estoppel. One court found “subject only to the [statutory] defenses” language in CERCLA not exclusive and reasoned that refusal of courts to recognize equitable defenses would be both inequitable and contrary to the intent underlying CERCLA. The court reasoned that since the liability of CERCLA parallels that of the Clean Water Act, which allows equitable defenses, so should CERCLA. Most courts, however, allow equitable arguments only for mitigation purposes.

CONTRIBUTION

Contribution is the right of one tortfeasor, upon payment to an injured party, to recover a proportional share from another party at fault. A majority of courts have determined that under CERCLA contribution was authorized prior to SARA. The SARA amend-

150. Id. The court cited United States v. Argent Corp., 21 Env’t Rep. Cas. (BNA) 1354 (D.N.M. May 4, 1984), wherein it was determined that a lessor/lessee relationship is a contractual relationship that precludes the lessor from using any of the “extremely limited affirmative defenses.” Stepan Chemical, supra note 130, at 10. The court also cited Comment, Developments in the Law of Toxic Waste Litigation, 99 HARV. L. REV. 1458, 1546 (1986) (determining that the term “contractual relationship” should be read to include any business relationship). Stepan Chemical, supra note 130, at 10.

151. Id. at 11.
152. Id. at 12.
153. 42 U.S.C. § 9607(a). This section states that liability will be imposed “subject only to the defenses set forth in subsection (b).”
156. Id.
157. See Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89-90 (3d Cir. 1988) (holding that under CERCLA, “caveat emptor is not a defense to liability for contribution but may be considered in mitigation of amount due”).
158. BLACK’S LAW DICTIONARY 297 (5th ed. 1979).
ments subsequently codified this right. Generally, contribution may be attained only from those at fault. However, in the case of an innocent purchaser under CERCLA, implied indemnity may be allowed. This possibility exists because the judiciary is required to use "such equitable factors as [it] determines are appropriate" in assessing the amount of contribution.

CORPORATE SUCCESSOR LIABILITY UNDER CERCLA

As previously explained, traditional corporate law holds that in a merger or consolidation the successor acquires the liabilities of its predecessor. The application of this rule in a CERCLA context is illustrated in Smith Land & Improvement Corp. v. Celotex Corp. Smith Land & Improvement Corporation ("Smith") owned property upon which was previously deposited a large quantity of manufacturing waste containing asbestos. In 1984, the EPA notified Smith that if it did not clean up the asbestos hazard, the federal government would undertake the clean-up and then seek reimbursement under CERCLA.

Smith proceeded to correct the situation to the satisfaction of the EPA. Subsequently, Smith sought contribution from Celotex Corporation as a corporate successor to the Philip Carey Company, the party which had originally created the waste. Although Celotex never owned or operated the facility, Smith argued that Celotex should be liable as a corporate successor through its merger with Philip Carey.

In looking to CERCLA for guidance, the United States Court of


160. 42 U.S.C. § 9613(f)(1) provides that “any person may seek contribution from any other person who is liable . . . under section 9607(a).”


162. Id. at 1360-61.


164. See supra note 13 and accompanying text.


166. Id. at 87.

167. Id.

168. Id.

169. Id. at 88. Philip Carey Company later sold the land to Smith’s predecessor.

170. Id. at 90-91.
Appeals for the Third Circuit opined that "[i]t is not surprising that, as a hastily conceived and briefly debated piece of legislation, CERCLA failed to address many important issues, including corporate successor liability."\(^{171}\) Since Congress did not deal with the question of successor liability, the court was faced with the duty of determining the applicable law, and analogized the assumption of tort liability to the assumption of liability under CERCLA.\(^{172}\)

The Third Circuit explained that as between the taxpayers and the successor, it is the successor who should bear the cost of clean-up.\(^{173}\) The original corporation and its successors reaped the initial cost savings from its inadequate disposal methods and thus should bear the burden of the clean-up cost.\(^{174}\) The court stated that it was "in line with the thrust of the legislation to permit — if not require — successor liability under traditional concepts."\(^{175}\) Further, the court reasoned that CERCLA was intended to impose successor liability on corporations that have either merged or consolidated with a corporation that is deemed a responsible party under CERCLA.\(^{176}\)

The United States Court of Appeals for the Third Circuit in Philadelphia Electric Co. v. Hercules, Inc.,\(^{177}\) applied both the "assumption of liabilities" and "de facto merger doctrine" exceptions in sale-of-assets transactions in an environmental liability context.\(^{178}\) In Hercules, Philadelphia Electric Company ("Philadelphia") brought a claim against Hercules, a corporate successor to the Pennsylvania Industrial Chemical Corporation ("PICCO"), asserting that PICCO had caused ground water and river contamination because of its operation of a chemical plant on the property.\(^{179}\) Prior to 1971, PICCO owned the property at issue.\(^{180}\) During this ownership, PICCO buried several types of contaminants on the site.\(^{181}\) PICCO subsequently sold the property to Gould, Inc., which did no further dumping on the land.\(^{182}\)

In 1973, Philadelphia, which operated a facility on an adjacent piece of property, obtained an option from Gould to purchase the

\(^{171}\) Id. at 91.
\(^{172}\) Id.
\(^{173}\) Id. at 92.
\(^{174}\) Id.
\(^{175}\) Id.
\(^{176}\) Id.
\(^{177}\) 762 F.2d 303 (3d Cir. 1985).
\(^{178}\) Id. at 309, 311.
\(^{179}\) Id. at 306-07.
\(^{180}\) Id. at 306.
\(^{181}\) Id.
\(^{182}\) Id. However, it was apparent from the record that ABM, Gould's tenant, did do some dumping on the land. Id.
property. Philadelphia investigated the site and, because it found evidence of spills, decided against exercising its purchase option until 1974. In 1980, the Pennsylvania Department of Environmental Resources discovered contaminants seeping from the land, similar to those placed by PICCO. Philadelphia spent approximately $400,000.00 to clean-up the property and consequently brought an action against both Gould, the seller, and Hercules, the successor to the contaminator, to recover its clean-up costs. Hercules had previously purchased the remaining assets of the now-dissolved PICCO.

The Third Circuit stated that because Hercules expressly assumed liabilities of its predecessor, the first exception to the general rule of nonliability applied. The de facto merger doctrine was also applied because the transaction required that: (1) Hercules acquire the assets and liabilities of PICCO; (2) PICCO use its best efforts to maintain business as usual; (3) PICCO transfer its corporate name; and (4) that PICCO be left with little money, and subsequently dissolve. Because of social policy considerations, the court held that the de facto merger doctrine should apply to environmental cases.

In 1984, the EPA issued a memorandum which asserted that suc-

183. Id. 184. Id. at 306-07. 185. Id. at 307. 186. Id. 187. Id. The agreement expressly provided “that PICCO was to convey” the following:

[A]ll of its properties and assets of every kind and description as a going concern together with but not limited to cash, monies on deposit, goodwill, including the right to use the name PICCO, customer lists, credit and sales records and all other interests to which it has any right by ownership, use or otherwise [in exchange for 240,000 shares of common stock of Hercules and ]

(ii) The assumption by Hercules of any and all obligations and liabilities of PICCO under the various agreements, contracts, leases, licenses and other writing referred to in Article I herein, including those specifically excepted from the representations in Article I; and (iii) The assumption by Hercules of all the debts, obligations and liabilities of PICCO as of the Closing Date, excepting therefrom the liabilities arising out of any warranty of PICCO contained herein, in any certificate or other instrument furnished hereunder, any misrepresentation by PICCO herein, or the failure of PICCO to perform under any of its agreements and contracts herein, and except liabilities of PICCO set forth in subsection (iv) for which cash is specifically reserved herein.


188. Philadelphia Electric, 762 F.2d at 309.

189. Id. at 311 (quoting Philadelphia Electric, 587 F. Supp. at 151-52).

190. Id. at 312. Although the court held that successor liability applied, it found for Hercules on other grounds. In addition, the court stated: “For example, Hercules could be liable to neighboring landowners in private nuisance, or to users of Delaware River waters in public nuisance. The Department of Environmental Resources or the federal Environmental Protection Agency may be able to proceed directly against Hercules on statutory or public nuisance theories.” Id. 318 n.20.
cessor liability be imposed under CERCLA in sale-of-assets transactions.\textsuperscript{191} To create liability under such transactions, the EPA has stated its desire to abandon the tradition of nonliability in favor of the liability-creating “product line” exception in CERCLA actions.\textsuperscript{192} This product line approach has already been adopted by some state courts in dealing with environmental torts.\textsuperscript{193} The EPA based its decision on public policy and the legislative history of CERCLA.\textsuperscript{194} Others have argued that because of the goals of CERCLA and its imposition of strict liability, liability should attach regardless of how the transaction is structured.\textsuperscript{195}

The New Jersey Superior Court applied the product line approach, previously adopted in the products liability field, to environmental torts in \textit{Department of Transportation v. PSC Resources, Inc.}\textsuperscript{196} The New Jersey Department of Transportation (“DOT”) sued PSC Resources, Inc. (“PSC”), alleging that PSC’s predecessor had dumped oily wastes, sludge, and contaminated water onto DOT’s property causing DOT over \$4,000,000 in clean-up costs.\textsuperscript{197} DOT urged the New Jersey court to utilize the product line approach, which it had previously set forth in \textit{Ramirez v. Amsted Industries},\textsuperscript{198} claiming that the underlying policy of that approach, is similarly applicable in an environmental tort context.\textsuperscript{199}

The court reasoned that because environmental tort claims sounded in strict liability, similar to products liability cases, the same analysis could be applied.\textsuperscript{200} It was determined that an adoption of the “product line” approach would better achieve the policy goal of spreading the risk to society.\textsuperscript{201} In reaching this determination, the court rejected the argument that the imposition of successor liability would create unpredictability in the market and stifle commercial


\textsuperscript{192} \textit{Id.} at 22; see \textit{supra} notes 33-56 and accompanying text.

\textsuperscript{193} \textit{See supra} note 230 and accompanying text.

\textsuperscript{194} EPA Memorandum, \textit{supra} note 191, at 22; Comment, EPA’s Policy of Corporate Successor Liability Under CERCLA, 6 Stan. Envtl. L.J. 78, 85 (1986-87).

\textsuperscript{195} Mottolo, 695 F. Supp. at 624.

\textsuperscript{196} 175 N.J. Super. 447, —, 419 A.2d 1151, 1162 (Law Div. 1980).

\textsuperscript{197} \textit{Id.} at —, 419 A.2d at 1152-53.

\textsuperscript{198} 86 N.J. 332, 431 A.2d 811 (1981). \textit{See supra} notes 50-54 and accompanying text.

\textsuperscript{199} \textit{PSC Resources}, 175 N.J. Super. at —, 419 A.2d at 1157.

\textsuperscript{200} \textit{Id.} at —, 419 A.2d at 1162.

\textsuperscript{201} \textit{Id.} at —, 419 A.2d at 1162.
transactions. Based upon these considerations, the court held PSC liable under New Jersey law for any claims arising from the discharge of pollutants.

Similarly, the product line approach was found applicable under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") in Oner II, Inc. v. EPA. In Oner II, Del Chemical Corporation ("Del") was charged with several violations of FIFRA by the EPA. Thereafter, three people formed Oner II to purchase the assets of Del. Oner II acquired the assets and assumed the trade liabilities of Del, but excluded the assumption of any environmental liability, leaving Del as a shell corporation. Nevertheless, the EPA held Oner II liable because to do otherwise would violate the purposes of FIFRA by endangering the public. In addition, Oner II was held liable because it had notice of the debt, maintained the same personnel, and continued the same business as its predecessor.

Liability under CERCLA for mere ownership was illustrated in New York v. Shore Realty Corp. The State of New York brought suit against Shore Realty and Donald LeoGrande, its officer and shareholder, to clean-up the hazardous waste site which Shore Realty had previously acquired. Although Shore Realty had not participated in dumping waste, it knew that hazardous waste was stored on the property, and also knew, at the time of the purchase, that clean-up would be expensive.

Shore Realty argued it was not liable as an owner under CERCLA because it "neither owned the site at the time of the disposal nor caused the presence or the release of the hazardous waste at the facility." The United States Court of Appeals for the Second Circuit, however, ignored causation and held that CERCLA imposes strict liability on the current owner of property on which there has been a release or threatened release of hazardous material. In imposing strict liability, the court reasoned that to do otherwise would

202. Id. at —, 419 A.2d at 1163.
203. Id. at —, 419 A.2d at 1164.
204. 597 F.2d 184, 186-87 (9th Cir. 1979).
205. Id. at 185.
206. Id.
207. Id. at 185-86.
208. Id. at 186-87. The EPA's authority to hold successor corporations liable is derived from the purposes of FIFRA: the regulation of pesticides and the protection of the national environment. Id. at 186. FIFRA is codified at 7 U.S.C. §§ 136-136w (1982).
209. Oner II, 597 F.2d at 186-87.
210. 759 F.2d 1032 (2d Cir. 1985).
211. Id. at 1037.
212. Id.
213. Id. at 1043.
214. Id. at 1044.
allow property owners to escape liability by waiting to buy the property until after the cessation of dumping.\textsuperscript{215} The ability of a purchaser to avoid liability in this fashion would defeat the purpose of CERCLA.\textsuperscript{216}

As the foregoing cases illustrate, there are several scenarios in which a corporate successor may be liable under CERCLA. First, successor corporations are likely to be liable if their transaction constitutes either a merger or a consolidation.\textsuperscript{217} In addition some courts have applied the traditional exceptions to nonliability in sale-of-assets transactions and determined that a successor may be liable under CERCLA in such a situation.\textsuperscript{218} Other courts, however, have created successor liability by adopting the product line exception in environmental torts cases.\textsuperscript{219} Finally, a mere ownership of contaminated property may create liability for a successor under CERCLA.\textsuperscript{220}

**MINIMIZING CORPORATE SUCCESSOR LIABILITY UNDER CERCLA**

Minimizing corporate successor liability under CERCLA is not an easy task.\textsuperscript{221} Nevertheless, there are certain measures that can be taken to insulate one from such liability.\textsuperscript{222} The following discussion provides guidelines setting forth various methods of avoiding liability under CERCLA in corporate mergers and acquisitions.\textsuperscript{223}

**STRUCTURING THE TRANSACTION**

First, the form of the transaction is important. In these transactions one can help limit the potential CERCLA liability by acquiring only noncontaminated property.\textsuperscript{224} In that situation, the corporation would not be a statutory owner under CERCLA and may be able to avoid liability.\textsuperscript{225} Obviously, if the transaction is structured as a merger or consolidation, liability would ensue anyway under tradi-

\textsuperscript{215} Id. at 1045.
\textsuperscript{216} Id.
\textsuperscript{217} See supra notes 165-76 and accompanying text.
\textsuperscript{218} See supra notes 177-90 and accompanying text.
\textsuperscript{219} See supra notes 196-209 and accompanying text.
\textsuperscript{220} See supra notes 210-16 and accompanying text.
\textsuperscript{222} 42 U.S.C. § 9607(b). See Cyphert & Key, supra note 58.
\textsuperscript{223} See infra notes 212-67 and accompanying text.
\textsuperscript{225} 42 U.S.C. § 9607(a)(1)-(2). To be a statutory owner one must own or have owned or operated property upon which the release or threat of release exists. Id.
tional corporate law. Similarily under CERCLA, at least in the merger or consolidation context, the traditional rule of liability should be followed in order to create national uniformity. Therefore, a successor corporation by way of a merger or consolidation will assume the CERCLA liabilities of its predecessor as illustrated in Smith Land & Improvement Corp. v. Celotex Corp.

Structuring a transaction as a sale-of-assets would generally exculpate one from liability under corporate law, but in order to uphold the purposes of CERCLA, courts may disregard the corporate form and deem the party liable under CERCLA. Although a court has yet to hold a successor corporation liable under CERCLA in a sale-of-assets transaction, courts have done so in environmental torts and under FIFRA. In sale-of-assets transactions some states have adopted the "product line" exception in products liability cases which, if applied, could create liability under CERCLA.

Arguably, the justifications for imposing strict liability on successor corporations are not applicable under CERCLA actions. These strict liability justifications are: (1) absent successor liability there would be no remedy; (2) the successor is in a better position to spread the risk; and (3) because the successor inures to the ill-gotten benefits obtained by the purchased corporation, it should accept the risks. However, Superfund clearly provides a remedy and prospective purchasers are not necessarily in a better position to spread risk which they are unable to assess. In CERCLA cases, the EPA has urged an extension of the "product line" approach in place of the traditional nonliability approaches in sale-of-assets transactions. The EPA's success in using this exception will depend on whether federal courts adopt this approach when considering a sale-of-assets...

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226. See supra notes 165-76 and accompanying text.
227. Smith Land, 851 F.2d at 92.
230. See supra notes 196-203 and accompanying text.
231. See supra notes 204-09 and accompanying text.
233. Comment, EPA's Policy of Corporate Successor Liability Under CERCLA, 6 STAN. ENVTL. L.J. 78, 100-02 (1986-87) (citing United States v. Stringfellow, No. CV-83-2501-MML (C.D. Cal. Feb. 21, 1984) (holding that the product line extension does not apply under CERCLA)).
234. See supra notes 44-49 and accompanying text.
235. Comment, 6 STAN. ENVTL. L.J. at 100.
236. See supra notes 191-95 and accompanying text.
transaction. Irrespective of which approach is adopted for sale-of-assets transactions, liability will attach if the successor becomes the owner of the contaminated property. CERCLA is the only environmental statute which imposes liability for mere ownership.

DEFENSES

If a party is deemed responsible under CERCLA, as would be the case in an exchange of stock, merger, consolidation, and in some sales-of-assets transactions, the statutory defenses will be a buyer's only protection. It is unlikely that the act of God and act of war defenses will be available to shield a purchaser from liability. Unless the court decides to entertain equitable defenses, the third-party defense may therefore be the only way to escape liability.

To make use of the third-party defense, the purchaser must prove that a third-party was the sole cause of the release. The buyer must then prove that it did not have a contractual relationship with the third-party. Finally, it must demonstrate that it exercised due care in taking precautions against the release or threat of release of hazardous substances. By "due care," Congress intended that the purchaser "must demonstrate that [it] took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances."

Since most business transactions involve contractual relationships, it is unlikely that a corporate purchaser could meet this burden. However, in defining "contractual relationship," SARA treats

237. Comment, 6 STAN. ENVTL. L.J. at 94-95 (stating that many states refuse to apply the product line exception).
239. See United States v. Waste Indus., 556 F. Supp. 1301, 1318 (E.D.N.C. 1982), rev'd on other grounds, 734 F.2d 159 (4th Cir. 1984) (stating that liability under RCRA is not as broad as liability under CERCLA). Furthermore, structuring the transaction as a lease or right-of-use agreement will not exculpate one from liability. United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984); 42 U.S.C. § 9601(35)(A).
240. See supra note 91 and accompanying text.
241. United States v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (holding that heavy rains were not exceptional enough to come within the act-of-God defense); 42 U.S.C. § 9607(b)(1)-(2).
243. See supra note 96 and accompanying text.
244. See supra notes 101-04 and accompanying text.
245. See supra note 97 and accompanying text.
certain purchasers as not having a contractual relationship with their sellers if they performed certain due diligence requirements before they purchased the property.248

"Due diligence" has been interpreted as requiring the performance of an environmental audit prior to purchasing the property.249 While there may not be an affirmative duty to inspect the property prior to acquisition, failure to do so will not allow one to qualify for the third-party defense.250 If an owner purchased a site without actual knowledge of it being a CERCLA site, but did not diligently investigate prior to purchase, that owner is most likely to be held liable under CERCLA.251 Thus, the effect of the SARA amendments is to establish a negligence standard.252

A higher standard of care will likely be applied to corporate transactions than nonbusiness transactions.253 That is because the court will take into account any specialized knowledge or experience of the corporate purchaser in determining whether the third-party defense is applicable.254 The legislative history of SARA states that "the precautions against foreseeable acts of third parties requirement . . . does not prevent a subsequent purchaser after contamination has occurred from claiming the defense, but only comes into play after the landowner acquires the property."255 It is the "reason to know" requirement that governs a purchaser's responsibility as to acts of third parties that occurred before purchase.256

An environmental audit has been defined to be "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."257 There are three reasons for environmental auditing: (1) it tells the condition of the property; (2) it provides a factual basis for determining the marketability of title and making representa-

249. Evans, Environmental Audits of Real Property Before Purchase, NAT. RESOURCES & ENVT, Fall 1988, at 22.
250. Id. at 20.
252. Schwenke, supra note 73, at 15.
254. See supra note 108 and accompanying text.
256. Id.
tions and warranties concerning the property; and (3) an audit may lead to a successful use of the innocent purchaser defense. To support a successful third-party defense, the due diligence inquiry must follow the formalities of an environmental audit much like corporate directors' use of the business judgment rule under corporate law. The audit must also take place before the decision to purchase.

To have an effective environmental audit, the buyer should do at least the following: (1) obtain information about past problems; (2) examine files of the company; (3) review court filings regarding the property; (4) conduct interviews regarding previous waste disposal practices; and (5) inspect the property. Failure to follow these procedures will keep a corporation from qualifying for the statutory defense. If the property is determined to be contaminated, the prospective purchaser can either: (1) decide not to purchase the property or to purchase only the noncontaminated parts; or (2) find another solution which minimizes the risk. If the property is not determined to be contaminated at the time of the audit, but there are later found to be hazardous substances present, the defense should be available to the purchaser.

**INDEMNIFICATION AND CONTRIBUTION**

One way of minimizing the risk is for the seller to sign an indemnification agreement agreeing to absolve the buyer from any potential liabilities. CERCLA expressly allows for these kind of agreements. However, these agreements will not indemnify a buyer against the government. Contribution actions are also expressly allowed under CERCLA. Recovery of contribution will be

258. Evans, supra note 249, at 21.
259. See supra note 249 and accompanying text; cf. Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (holding that in order for a corporation's board of directors to have the protection of the business judgment rule, its decisions must be shown to have been made on an informed basis).
260. Evans, supra note 249, at 22.
261. Id. at 22, 49.
262. Id. at 49.
264. Evans, supra note 249, at 49.
265. Murphy, The Impact of "Superfund" and Other Environmental Statutes on Commercial Landing and Investment Activities, 41 Bus. Law. 1133, 1152 (1986).
266. 42 U.S.C. § 9607(e).
268. See supra notes 159-60 and accompanying text.
a likely avenue of relief to an innocent purchaser because in con- 
tribution claims the court will consider equitable defenses.269

LIABILITY TO AND OF SHAREHOLDERS

In addition, corporate shareholders may be liable through the 
piercing of the corporate veil,270 or statutorily liable under CER-
CLA.271 This is because a shareholder, as a current owner, is a cov-
ered party under CERCLA.272 Also, as an owner at the time of 
disposal, a former shareholder may be held liable.273 As a result, 
a shareholder of an acquiring company has an interest in making sure 
the corporation does not acquire any CERCLA property.274 Further, 
the shareholders may have a cause of action against the board of di-
rectors for not following the business judgment rule in that they 
failed to follow the statutorily recognized procedure for establishing 
the third-party defense.275

OTHER MINIMIZATION TECHNIQUES

There are other ways in which a corporation may limit its CER-
CLA liability. For example, a corporation may enter into a settle-
ment agreement with the state or federal government whereby it 
would agree to participate either directly or indirectly in the clean-
up.276 A corporation could also use a subsidiary as a shield if the par-
et corporation merely succeeded to the subsidiary’s problem but did 
not itself have any ties to the subsidiary at the time of the release.277 
As another option, a corporate buyer could obtain insurance that 
would provide protection.278

One commentator has aptly stated that “[b]ecause of the poten-
tially extensive impact environmental issues can have on the value of

269. See supra note 163 and accompanying text.
270. See United States v. Mirabile, 23 Env’t Rep. Cas. (BNA) 1511, 1512-13 (E.D. 
Pa. June 6, 1985) (holding that courts should be allowed to pierce the corporate veil 
under CERCLA to uphold the purposes of the Act).
271. Comment, The Threat to Investment in the Hazardous Waste Industry: An 
Analysis of Individual and Corporate Shareholder Liability Under CERCLA, 1987 
U TAH L. REV. 585, 599.
272. Id.
273. Id.
274. See supra note 270 and accompanying text.
275. See supra note 259 and accompanying text; 42 U.S.C. § 9607(b)(3) (setting 
forth the requirements for the third party defense).
276. Jones, Drafting CERCLA Consent Decrees, 3 NAT. RESOURCES & ENV’T, Winter 
1988, at 31.
277. See generally Note, Liability of Parent Corporations for Hazardous Waste 
278. See generally Crisham & Davis, CGL Coverage for Hazardous Substances 
Clean-up, FOR THE DEFENSE, Mar. 1988, at 21.
the transferred property, such issues should be included early in the negotiations for the transfer of a company's stock or assets.\footnote{279} Failure to consider environmental problems at an early stage of the negotiations can terminate what seems like a sure deal.\footnote{280}

CONCLUSION

Years of neglect have prompted federal and state governments to enact legislation to deal with environmental problems. Under CERCLA, unlike any other environmental related statute, liability may be imposed for mere ownership. In the corporate context, the imposition of liability depends on the form of the transaction and on procedures followed in investigating the existence of environmental liabilities.

Corporate successors should be aware that several potential transactions have fallen through because corporations failed to address environmental considerations at an early stage of the negotiations. This Comment hopefully has provided an alert to, as well as remedies for, the problems which a successor corporation may encounter under CERCLA. Awareness of these issues not only lends itself to more successful merger and acquisition discussions, but also allows the corporate successor to minimize CERCLA liability.

Mark J. Rater—'89