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Hazardous Waste: Liability of Predecessors in Title

The United States has a long history of improperly disposed toxic waste. Over the years, some enterprises that contaminated their real property through their commercial activities transferred the property without abating the problem. Consequently, many subsequent purchasers unknowingly acquired contaminated property. The cost associated with the presence of toxic waste can be devastating to the innocent purchaser. The state and federal environmental legislation is inadequate to fully compensate landowners who suffer losses as a result of toxic waste left behind by a predecessor in title. Therefore, common law remedies must be relied upon to achieve full compensation. This Comment will explore the viability of the common law doctrine of hazardous activity strict liability as a cause of action available to a landowner against a predecessor in title.

INTRODUCTION

The industrialization of the United States left behind a menacing by-product—toxic waste.¹ The historical lack of environmental regulation lead to a massive accumulation of toxic waste which is now a worldwide problem.² One aspect of this problem involves individuals

1. See R. Lisle Baker & Michael J. Markoff, *By-Products Liability: Using Common Law Private Actions to Clean Up Hazardous Waste Sites*, 10 HARV. ENVTL. L. REV. 99, 99 (1986).

2. DONALD C. NANNEY, REAL ESTATE TRANSACTIONS AND ENVIRONMENT RISKS: A PRACTICAL GUIDE 9 (1990). It is estimated that as early as 1938, the United States chemical industry was producing more than 170 million pounds of synthetic organic chemicals. In the 1940s, the United States entered an era which some refer to as the "chemical revolution." C. HARRIS ET AL., HAZARDOUS WASTE - CONFRONTING THE CHALLENGE 5 (1987). It is estimated that the total chemical production in the United States now is over two trillion pounds each year. *Id.* A 1980 study by the Environmental Protection Agency (EPA) estimated that American industry produced 41 million metric tons of hazardous waste each year. *Id.* (citing Booz-Allen & Hamilton, Inc., and Putnam, Hayes & Bartlett, Inc., *Hazardous Waste Generation and Commercial Hazardous Waste Management Capacity: An Assessment*, II-2 (Dec. 1980) (prepared for the EPA, Office of Solid Waste)). A 1984 report to the EPA Office of Solid Waste estimated that in 1981 alone, 264 million metric tons were produced in the United States. *Id.* at 9 (citing Westat, Inc., *National Survey of Hazardous Waste Generators and Treatment, Storage, and Disposal Facilities Regulated Under RCRA in 1981*, at 2 (Apr. 1984)).

and commercial entities who unknowingly acquired property contaminated by toxic waste left behind by a predecessor in title. Not surprisingly, liability for cleanup costs and other damages is of great concern to both the landowner and the predecessor in title.

The federal and state governments responded to the perceived crisis by implementing legislation to regulate, compensate, and allocate liability for toxic waste improperly disposed in the past.³ However, the federal and state legislation is inadequate to fully compensate landowners who suffer losses as a result of toxic waste left behind by a predecessor in title. Neither the federal nor state legislation provides a cause of action for a variety of economic and consequential damages which landowners incur when they discover toxic waste on their premises. Therefore, common law remedies must be relied upon to achieve full compensation.

Given the inherent dangers associated with toxic waste, the common law remedy of hazardous activity strict liability is frequently invoked against those whose toxic waste activities injure others. Historically, hazardous activity strict liability was largely confined to causes of action against landowners whose toxic waste injured neighboring landowners.⁴ Recently, however, some courts have recognized hazardous activity strict liability as a viable cause of action available to a landowner against a predecessor in title who leaves behind toxic waste.⁵

This Comment will analyze three major reasons why the hazardous activity strict liability theory should be extended to include predecessors in title who leave behind toxic waste. First, many types of economic and consequential damages which landowners incur when toxic waste is discovered on their property may not be recovered under the federal or state environmental legislation.⁶ The common

3. The primarily federal legislation designed to handle the toxic waste which has accumulated since the industrial revolution is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C.A. § 9601-75 (West 1983 & Supp. 1991). California's counterpart to CERCLA is the Carpenter-Presley-Tanner Hazardous Substance Account Act, CAL. HEALTH & SAFETY CODE §§ 25300-95 (West 1984 & Supp. 1991).

4. See examples *infra* note 90.

5. See examples *infra* notes 110 and 125.

6. CERCLA only allows compensation for "any other necessary costs of response incurred by any other person consistent with the national contingency plan; . . . damages for injury to, destruction of, or loss of natural resources . . . and the costs of any health assessment or health effects study carried under 9604(i) of this title." 42 U.S.C.A. §§ 9607(a)(4)(B), (C), (D) (West 1983 & Supp. 1991). The California environmental legislation, known as the Carpenter-Presley-Tanner Hazardous Substance Account Act, only allows commercial enterprises to be compensated for a portion of lost wages or business income due to injury of the claimant or property and for the fair market value of the property if (a) the property is rendered permanently unfit for occupancy and (b) the owner occupies the property. CAL. HEALTH & SAFETY CODE § 25375 (West Supp. 1991).

law remedy of hazardous activity strict liability helps to bridge this gap by allowing compensation for tort damages which may not otherwise be recoverable under federal and state environmental legislation. Second, the underlying policy justification for holding neighboring landowners strictly liable for their hazardous activities applies with equal force to predecessors in title.⁷ Third, because of the growing concern over the state of the environment and the pernicious effects of toxic waste on human health, the ancient doctrine of *caveat emptor* should not prevail in the context of real estate transactions involving toxic waste.

I. OVERVIEW OF HAZARDOUS WASTE PROBLEM IN THE UNITED STATES AND CALIFORNIA

Part I of this Comment briefly sketches the toxic waste problem in the United States and California in specific. In order to better understand the problems many landowners face when toxic waste is discovered on their premises, it is important to grasp the magnitude of the toxic waste problem in the United States. The Environmental Protection Agency (EPA) has identified about 27,000 sites requiring cleanup action under its Superfund program.⁸ The General Accounting Office (GAO), perhaps less optimistic than the EPA, estimates that up to 425,000 sites may require cleanup by the EPA.⁹

This monumental problem is attributable in large part to the historical lack of broad environmental legislation regulating the handling of toxic waste.¹⁰ The storage and disposal of toxic waste in the past is commonly described as "casual."¹¹ In fact, the EPA estimates that prior to 1980, 90% of the 77.1 billion pounds of hazardous waste produced each year was disposed of in an improper manner.¹² Because of this lax attitude toward toxic waste disposal, over the years many purchasers of real property have unknowingly acquired

Therefore, under most circumstances, damages for harm or destruction of real or personal property, diminution of property value, and inability to finance, develop, or sell the property are not recoverable under federal or state environmental legislation.

7. See *infra* note 161 and accompanying text.

8. See JOEL MOSKOWITZ, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS: LAW AND PRACTICE 4 (1989) (citing 9 Hazardous Waste Rep. No. 11, at 3 (Feb. 8, 1988)).

9. *Id.*

10. See NANNEY, *supra* note 2, at 9.

11. Michael B. Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31, 32 (1987).

12. H.R. Rep. No. 1016, 96th Cong., 2d Sess. 21 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6124.

contaminated property.¹³

California has not escaped the toxic waste disposal problem. The California Department of Health Services (DHS), which maintains a listing of properties identified as waste sites or potential waste sites, estimates that in the coming years, 5,000 sites will require evaluation, and that about 2,000 of those will require cleanup action.¹⁴ In California, many innocent purchasers unknowingly acquired contaminated property and may incur huge losses as a result.¹⁵ For example, the EPA recently ordered about 31 companies located in the Burbank, California area to provide over \$70 million for a treatment system to clean up chemical solvent contamination of a portion of the San Fernando Valley.¹⁶ Significantly, only one of the companies is actually confirmed as having caused or contributed to the contamination.¹⁷

II. FEDERAL AND STATE LEGISLATION: THE LIMITATIONS

Part II of this comment gives a general overview of the federal and state environmental legislation designed to handle toxic waste disposed in the past. This section will clarify the shortcomings of federal and state environmental legislation in fully compensating landowners who suffer damages from toxic waste left behind by a predecessor in title.

13. See, e.g., *T & E Indus. v. Safety Light Corp.*, 123 N.J. 371, 587 A.2d 1249 (1991); *Amland Properties Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784 (D.N.J. 1990); *Prospect Indus. v. Singer Co.*, 238 N.J. Super. 394, 569 A.2d 908 (1989); *Hanlin Group, Inc. v. International Mineral & Chem. Corp.*, 759 F. Supp. 925 (D.C. Me. 1990); *Fallowfield Dev. Corp. v. Strunk*, No. 89-8644, 90-4431 1991 WL 78820 (E.D. Pa. June 14, 1991); *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F. Supp. 93 (D.C. Mass. 1990); *Philadelphia Elec. Co v. Hercules, Inc.*, 762 F.2d 303 (3rd Cir.), cert. denied, 474 U.S. 980 (1985); *Mesiti v. Microdot, Inc.* 739 F. Supp. 57 (D.N.H. 1990); *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Dist. Corp.*, 737 F. Supp. 1272 (W.D.N.Y. 1990).

14. Donald C. Nanney, *Hazardous Waste Issues in Real Property Transactions*, in *HAZARDOUS WASTE AND REAL PROPERTY TRANSACTIONS* 112 (Oct./Nov. 1990) (citing an oral presentation by William Soo Hoo, Esq. (Assistant Chief Counsel, Toxic Substances Control Division, DHS), Address Before the Building Industry Association Legal Clinic on Land Planning & Development Controls (July 15, 1988)).

15. See, e.g., *Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20965 (C.D. Cal. 1989); *Pinole Point Properties v. Bethlehem Steel Corp.*, 596 F. Supp. 283 (N.D. Cal. 1984); *Mangini v. Aerojet-Gen. Corp.*, 230 Cal. App. 3d 1125, 281 Cal. Rptr. 827 (1991); *CAMSI IV v. Hunter Tech. Corp.*, 230 Cal. App. 3d 1525, 282 Cal. Rptr. 80 (1991); *Wiegmann & Rose Int'l Corp. v. NL Indus.*, 735 F. Supp. 957 (N.D. Cal. 1990).

16. Nanney, *supra* note 14, at 111.

17. *Id.*

A. Federal Environmental Legislation

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹⁸ is the major federal environmental legislation in this area. It authorizes the federal government to respond¹⁹ to the release²⁰ or threatened release of hazardous substances²¹ and creates a Hazardous Substance Superfund²² to finance the government's response activities.²³ CERCLA was enacted to cure deficiencies in previously enacted environmental legislation, the Resource Conservation and Recovery Act (RCRA),²⁴ specifically the problem caused by the large number of uncontrolled inactive hazardous waste sites.²⁵ Because RCRA was only enacted to provide a regulatory scheme governing the present-day generation of toxic waste,²⁶ CERCLA was enacted to address the toxic waste which was generated in the past, perhaps since the dawn of the industrial revolution.²⁷

Under CERCLA, when there is a release or threatened release of hazardous substances, the federal government may either clean up the site itself²⁸ and seek reimbursement for its cleanup costs²⁹ from statutorily liable parties,³⁰ commonly known as "potentially responsible parties" (PRPs), or compel the PRPs to clean up the

18. 42 U.S.C.A. §§ 9601-75 (West 1983 & Supp. 1991). In 1986 CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

19. For a description of what "respond" under CERCLA entails, see 42 U.S.C.A. § 9601(25) (West Supp. 1991).

20. For a description of what constitutes a "release" under CERCLA, see 42 U.S.C.A. § 9604 (West Supp. 1991).

21. See 42 U.S.C.A. § 9604 (West Supp. 1991). Federal legislation describes hazardous substances as "elements, compounds, mixtures, solutions and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment." 42 U.S.C.A. § 9602 (West Supp. 1991). See also 42 U.S.C.A. §§ 9601(14), 9602 (West Supp. 1991), 40 C.F.R. § 302.4 (1990).

22. 42 U.S.C.A. § 9601(11) (West 1983 & Supp. 1991).

23. 42 U.S.C.A. § 9611 (West Supp. 1991).

24. 42 U.S.C.A. § 6901 (West 1983 & Supp. 1991).

25. See 1980 U.S.C.C.A.N. 6119, 6120; MOSKOWITZ, *supra* note 8, at 5.

26. See 1980 U.S.C.C.A.N. 6119, 6120; MOSKOWITZ, *supra* note 8, at 5.

27. MOSKOWITZ, *supra* note 8, at 6.

28. 42 U.S.C.A. § 9604 (West Supp. 1991).

29. 42 U.S.C.A. § 9607(a)(4)(A) (West Supp. 1991).

30. Statutorily liable parties are:

(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 any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and

site.³¹ Liability under CERCLA is strict³² and defenses are very limited.³³ CERCLA designates as PRPs current owners of contaminated property who are in no way responsible for the contamination.³⁴ Current owners are designated as PRPs regardless of fault or participation in the contamination.³⁵ Their only association with the contamination is current ownership in the land.³⁶ Although in 1986 the so-called "innocent landowner defense" was added to CERCLA,³⁷ the proof requirements are rigorous³⁸ and consequently have not significantly expanded the third party defense.³⁹

containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable.

42 U.S.C.A. § 9607(a)(1)-(4) (West Supp. 1991).

31. 42 U.S.C.A. §§ 9604, 9606(a) (West 1983 & Supp. 1991). The scope of liability imposed on current owners who are in no way responsible for the contamination can run into the millions of dollars. NANNEY, *supra* note 2, at 5. In the past, the EPA's approach had been to effect the cleanup themselves and then seek reimbursement from PRPs. However, in June of 1989, the EPA declared that the priority strategy would now be to order the cleanup actions by PRPs. *Id.* at 6.

32. Congress, in a somewhat circuitous manner, stated that "[t]he term 'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under § 1321 of Title 33 [Clean Water Act]." 42 U.S.C.A. § 9601(32) (West Supp. 1991). The standard of the Federal Water Pollution Control is strict liability. 33 U.S.C.A. §§ 1251-1387 (West 1983 & Supp. 1991). Accordingly, courts interpret CERCLA to impose strict liability. *See, e.g.,* Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988); *New York v. Shore Realty Corp.*, 648 F. Supp. 255, 265 (E.D.N.Y. 1986); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1572 (E.D. Pa. 1988); *United States v. Price*, 577 F. Supp. 1103, 1113 (D.C.N.J. 1983).

33. CERCLA provides for limited defenses against cost recovery action if the PRP can show "by a preponderance of the evidence" that the contamination was caused "solely by (1) an act of God; (2) an act of war; or (3) 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." 42 U.S.C.A. § 9607(b) (West 1983).

34. 42 U.S.C.A. § 9607(a)(1) (West 1983 & Supp. 1991).

35. NANNEY, *supra* note 2, at 13. *See, e.g.,* *New York v. Shore Realty Corp.*, 648 F. Supp. 255 (E.D.N.Y. 1986); *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988).

36. NANNEY, *supra* note 2, at 13.

37. 42 U.S.C.A. § 9601(35)(A)(i) (West Supp. 1991). The defense states that the landowner who acquired the property after the disposal of the toxic waste will not be a statutorily liable party if he or she can show by a preponderance of the evidence that: "[a]t 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." *Id.* To establish that the defendant had no reason to know, the "defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." 42 U.S.C.A. § 9601(35)(B) (West Supp. 1991).

38. For requirements, see 42 U.S.C.A. § 9601(35)(B) (West Supp. 1991).

39. *See* NANNEY, *supra* note 2, at 24; *but see* *United States v. Pacific Depot, Inc.*, 716 F. Supp. 1341 (D. Idaho 1989) (innocent landowner defense recognized).

Current owners in no way responsible for the contamination, who are ordered by the EPA to clean up the site, may seek a private right of action for reimbursement or contribution from other PRPs for any necessary response costs consistent with the national contingency plan.⁴⁰ In the alternative, current owners may undertake a cleanup on their own initiative (without waiting for a government enforcement action) and seek a private right of action for contribution from other PRPs for any necessary response costs consistent with the national contingency plan.⁴¹ However, current owners seeking contribution may only recover for response costs (investigation and cleanup),⁴² natural resource damages,⁴³ and health assessment.⁴⁴

CERCLA provides no compensation for any other types of damages, such as economic and consequential losses, which landowners may incur upon the discovery of toxic waste on their property. For example, toxic waste contamination can severely diminish the property value of the site or even render it worthless. The landowner may not seek compensation for this loss in property value in a CERCLA

40. See 42 U.S.C.A. § 9601(35)(C), (D) (West Supp. 1991); § 9607(a)(4)(B) (West 1983 & Supp. 1991) (the party responsible for the contamination shall be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan"); § 9613(f) (West Supp. 1991); § 9607(f)(1) (West Supp. 1991) ("Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) . . ."). For a description of what is consistent with the national contingency plan, see 42 U.S.C.A. § 9605 (West 1983 & Supp. 1991). For a discussion of private recovery actions under CERCLA, see generally Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 *ECOLOGY L.Q.* 181 (1986). For examples of cases which recognize a private right of action after the EPA has ordered the party to clean up, see *Walls v. Waste Resource Corp.*, 761 F.2d 311, 317-18 (6th Cir. 1985) (dismissed on different grounds); *Kalik v. Allis-Chalmers Corp.*, 658 F. Supp. 631, 637 (W.D. Pa. 1987); *Pinole Point Properties v. Bethlehem Steel*, 596 F. Supp. 283, 289 (N.D. Cal. 1984).

41. 42 U.S.C.A. § 9607(a)(4)(B) (West Supp. 1991). Section 9607 has been interpreted to create a private right of action, even in the absence of governmental pre-authorization. See *Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 19 *Envtl. L. Rep. (Envtl. L. Inst.)* 20965, 20965 (C.D. Cal. 1989) (private plaintiff may pursue recovery of cleanup costs without being held legally liable by state or local governments); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898-99 (9th Cir. 1986) (refusing to bar a private cause of action to recover response costs under § 9607 for failure to report the release of the hazardous substance before incurring response costs); *New York v. Shore Realty Corp.*, 648 F. Supp. 255 (E.D.N.Y. 1986) (prior government approval not necessary for plaintiff to state a claim under CERCLA); *Tanglewood E. Homeowners v. Charles-Thomas Inc.*, 849 F.2d 1568 (5th Cir. 1988); *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 901 F.2d 1206 (4th Cir. 1990).

42. 42 U.S.C.A. § 9607(a)(4)(B) (West Supp. 1991).

43. 42 U.S.C.A. § 9607(a)(4)(C) (West Supp. 1991).

44. 42 U.S.C.A. § 9607(a)(4)(D) (West Supp. 1991).

cause of action.⁴⁵ In addition, neither personal nor real property damage or loss, other than damage to natural resources, may be recovered under CERCLA.⁴⁶ Loss of income due to the contamination, resulting from business interruption or lost rentals, is not compensated under CERCLA. The United States Supreme Court, as well as lower state and federal courts, consistently reject claims for these losses.⁴⁷ One court noted that compensation for both property and income loss were intentional omissions of CERCLA.⁴⁸

In order to understand the shortcomings of CERCLA, it is important to note its legislative history. CERCLA's original goals were much loftier than the legislation actually enacted. Sponsors in both houses initially proposed the CERCLA legislation as a broad federal regulatory scheme which would provide a basis for environmental claims by the government and private parties.⁴⁹ The leading Senate Superfund bill,⁵⁰ which was not adopted, provided a private cause of action for, among other things, all damages for economic loss and loss due to personal injury.⁵¹ However, these features were ultimately rejected. According to the Chairman of the Senate Environment and Public Works Committee, the substitute bill (the current

45. See MOSKOWITZ, *supra* note 8, at 152 ("No recovery may be had under CERCLA for diminution of the value of the property, nor for consequential damages."); SUPERFUND § 301(E) STUDY GROUP, 97TH CONG., 2D SESS., INJURIES AND DAMAGES FROM HAZARDOUS WASTES - ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES 125 (Comm. Print 1982) [hereinafter STUDY GROUP] ("CERCLA . . . does not provide for damage for loss or injury to private property . . .").

46. See NANNEX, *supra* note 2, at 169 ("Property damage claims (other than damages to natural resources) are not redressed by CERCLA.").

47. See, e.g., *Exxon Corp. v. Hunt*, 475 U.S. 355, 359 (1986) ("Superfund money [is not] available to compensate private parties for economic harms that result from the discharges of hazardous substances."); *Adams v. Republic Steel Corp.*, 621 F. Supp. 370 (W.D. Tenn. 1985) (private right of action for damages only are not available under CERCLA, as recoverable costs are limited to costs incurred for cleanup of the site); *Artesian Water Co. v. Governor of New Castle County*, 851 F.2d 643 (3d Cir. 1988) (CERCLA only authorizes recovery of cleanup costs, not damages suffered as a consequence of the contamination); *Wehner v. Syntex*, 681 F. Supp. 651, 653 (N.D. 1987) ("Economic damages for loss of property are not covered by the [CERCLA] statute."); *Piccolini v. Simpon's Wrecking*, 686 F. Supp. 1063, 1068 (M.D. Pa. 1988) (plaintiff could not seek monetary damages as compensation for alleged loss of value of land under a CERCLA cause of action).

48. *Artesian Water Co. v. Governor of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988) ("One of the deliberate omissions of CERCLA was reimbursement for property or income loss.").

49. See Michael Dore, *The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund*, 57 NOTRE DAME LAW. 260, 267 (1981). See generally Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982); Joseph K. Brenner, Note, *Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms*, 69 GEO. L.J. 1047 (1981).

50. S. 1480, 96th Cong., 2d Sess. § 4(a)(2)(A)-(G) (1980).

51. See *id.* Losses which would have been recoverable under this bill included any injury, destruction or loss of any real or personal property, or any loss of use thereof, and any loss of income or profits or impairment of earning capacity due to personal injury or

CERCLA legislation) contained many concessions from the original bill, such as the deletion of the federal cause of action for property or income loss.⁵² In choosing to enact CERCLA, Congress made it clear that no compensation for property, income, or other economic losses resulting from toxic contamination would be afforded.⁵³ The legislative history of CERCLA confirms that Congress intended to provide a vehicle for cleaning up hazardous waste sites, rather than a new front of law which would allow private parties to be compensated for economic and consequential damages.

B. State Environmental Legislation

Most states have environmental protection legislation largely analogous to CERCLA.⁵⁴ California's counterpart to CERCLA is the Carpenter-Presley-Tanner Hazardous Substance Account Act.⁵⁵ Like CERCLA, liability under California's environmental law is strict,⁵⁶ and current owners are designated as PRPs.⁵⁷ The California statute also authorizes a private right of action for cleanup cost recovery by a landowner who voluntarily or under order cleans up the contamination against other PRPs, except where the liability of a PRP has been formally apportioned.⁵⁸

The California legislation does provide some compensation for commercial enterprises from its superfund for certain types of losses beyond that of CERCLA. For example, a limited amount may be recovered for lost wages or business income due to injury of the claimant or property. In addition, property owners may recover the fair market value of their property if: (a) the property is rendered permanently unfit for occupancy, and (b) the owner occupies the property.⁵⁹ Unfortunately, other consequential losses, such as real

from injury to or destruction of real or personal property.

52. 126 CONG. REC. S14964 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph).

53. See generally Grad, *supra* note 49, at 21-22.

54. NANNEY, *supra* note 2, at 32.

55. CAL. HEALTH & SAFETY CODE §§ 25300-95 (West 1984 & Supp. 1991).

56. CAL. HEALTH & SAFETY CODE § 25363 (West Supp. 1991) ("The standard of liability for any costs or expenses recoverable is strict liability . . .").

57. CAL. HEALTH & SAFETY CODE § 25323.5(a) (West Supp. 1991) (PRPs are defined as "those persons described in section 107(a) of the federal act (42 U.S.C. § 9607(a))." California has a provision which states that innocent owners of property may not be ordered to perform *solely* on the basis of that ownership. CAL. HEALTH & SAFETY CODE § 25358.3(a)(1) (West Supp. 1991).

58. CAL. HEALTH & SAFETY CODE § 25363(e) (West Supp. 1991).

59. CAL. HEALTH & SAFETY CODE § 25375 (West Supp. 1991).

and personal property damage and diminution of property value (if the premises are not rendered permanently unfit for occupancy), may not be recovered in most circumstances. However, California law states that nothing in its provisions affects or modifies common law liability.⁶⁰

In short, neither state nor federal legislation provides a landowner who is injured by toxic waste with a remedy which fully compensates the landowner for its actual damages. Apparently, the priority of the federal and state environmental legislation is to ensure that the site is cleaned up, not to provide recovery mechanisms for actual damages for harm suffered.⁶¹ For these damages, common law theories must be utilized.

III. HAZARDOUS ACTIVITY STRICT LIABILITY OVERVIEW

A. *Historical Roots of Hazardous Activity Strict Liability*

Part III of this Comment presents an overview of the theory of hazardous activity strict liability and its application in the United States. Prior to the seminal decision of *Rylands v. Fletcher*,⁶² a landowner who complained of an unauthorized interference with his or her right to possession and quiet enjoyment of land was limited to trespass⁶³ or nuisance⁶⁴ causes of action, as they were historically defined. No cause of action pertained to non-continual activity on the defendant's property that indirectly interfered with the plaintiff's property rights.⁶⁵ This was the setting for the *Rylands* decision.

B. *The Rule of Rylands*

Strict liability for harm arising from unusually dangerous conditions and activities has its genesis in *Rylands v. Fletcher*.⁶⁶ In *Rylands*, the plaintiff's coal mine was damaged by the escape of water

60. CAL. HEALTH & SAFETY CODE § 25366(c) (West 1984 & Supp. 1991) ("Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under any other provision of state and federal law, including common law . . .").

61. Hingerty, *supra* note 11, at 35.

62. 3 L.R.-E. & I. App. 330 (1868).

63. Historically, the requirements for trespass to land were "an invasion (a) which interfered with the right of exclusive possession of the land and (b) which was the direct result of some act committed by the defendant." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 67 (5th ed. 1984) [hereinafter PROSSER & KEETON].

64. Historically, nuisance consisted of an interference with the use and enjoyment of one's land that was offensive to the senses and continuing or recurring. PROSSER & KEETON, *supra* note 63, § 86, at 617, and § 78, at 545.

65. PROSSER & KEETON, *supra* note 63, § 78, at 545.

66. 3 L.R.-E. & I. App. 330 (1868).

from a mill-owner's reservoir.⁶⁷ The defendant had not been negligent and neither nuisance nor trespass were viable causes of action because of the non-continual, indirect nature of the flooding. The Exchequer Chamber wrote that "the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."⁶⁸ The House of Lords affirmed the Court of Exchequer's decision, but added that the defendant's use of his land had to be a "non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it."⁶⁹

At the time of *Rylands*, the industrialization of the United States was in its infancy.⁷⁰ Consequently, American acceptance of hazardous activity strict liability was slow. Strict liability was seen as an interference with the industrialization process.⁷¹ As industry matured, the force of the foregoing objection weakened, and the concept that hazardous enterprises should be liable for injuries which they inflicted gained some recognition.⁷² In 1924, the Minnesota Supreme Court recognized a cause of action for strict liability based on the rule in *Rylands* for the escape of water.⁷³ Four years later, in *Green v. General Petroleum Corp.*,⁷⁴ the California Supreme Court held a non-negligent oil company strictly liable when its oil well exploded, casting debris on plaintiff's property.⁷⁵ The *Green* court articulated a

67. *Id.* at 332.

68. *Rylands v. Fletcher*, 3 L.R.-Ex. Ch. 265, 279 (1866).

69. *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330, 339 (1868).

70. See Virginia E. Nolan & Edmund Ursin, *Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 262 (1987).

71. See PROSSER & KEETON, *supra* note 63, § 78, at 549 ("[O]ne important reason often given for the rejection of strict liability was that it was not adapted to an expanding civilization. Dangerous enterprises involving a high degree of risk to others, were clearly indispensable to the industrial and commercial development of a new country and it was considered in the interest of those in the vicinity of such enterprises to give way to them, and that too great a burden must not be placed on them."); William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 913 (1981); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 485-86 (1973). See, e.g., *Losee v. Buchanan*, 51 N.Y. 476 (1873); *Brown v. Collins*, 53 N.J. 442 (1873).

72. See PROSSER & KEETON, *supra* note 63, § 78, at 549. See, e.g., *Bridgeman-Russell v. City of Duluth*, 158 Minn. 509, 197 N.W. 971 (1924); *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952 (1928); *Exner v. Sherman Power Construction Co.*, 54 F.2d 510 (2d Cir. 1931).

73. *Bridgeman-Russell v. City of Duluth*, 158 Minn. 509, 197 N.W. 971 (1924).

74. 205 Cal. 328, 270 P. 952 (1928).

75. *Id.*

broad principle of strict liability by stating:

Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should in all fairness, be required to compensate the other for the injury done.⁷⁶

C. Restatement of Torts *Sections 519 and 520*

In 1938, the American Law Institute (A.L.I.) articulated its theory of hazardous activity strict liability in sections 519 and 520 of the *Restatement of Torts*. Section 519 provides:

“One who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.”⁷⁷

Section 520 defines an ultrahazardous activity as one that “(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.”⁷⁸ The central theme is that actors, usually enterprises, who engage in an activity which creates an abnormal risk of serious harm should be held strictly liable, despite the social utility of the activity.⁷⁹ The policy rationale is that those enterprises causing harm should absorb the cost of harm inflicted by their dangerous activities.⁸⁰ Following the adoption of the first *Restatement*, more courts began to apply strict liability principles to a variety of activities.⁸¹

D. Restatement (Second) of Torts *Sections 519 and 520*

In 1977, the A.L.I. adopted sections 519 and 520 of the *Restatement (Second) of Torts*. Section 519 states that “[o]ne who carries on abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity,

76. *Id.* at 955.

77. RESTATEMENT OF TORTS § 519 (1938).

78. *Id.* § 520.

79. See PROSSER & KEETON, *supra* note 63, § 78, at 555.

80. *Id.*

81. See Nolan & Ursin, *supra* note 70, at 270-71. For examples of ultrahazardous activities, see *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1 (1948) (fumigation); *Loe v. Lenhardt*, 227 Or. 242, 362 P.2d 312 (1961) (crop dusting); *Smith v. Lockheed Propulsion Co.*, 247 Cal. App. 2d 744, 56 Cal. Rptr. 128 (1967) (rocket testing on ranch land); *Sacks v. Chiat*, 281 Minn. 540, 162 N.W.2d 243 (1968) (pile driving in a peat bog); *Gorton v. Phoenix Ins. Co.*, 339 F. Supp. 241 (D. Mass. 1972) (dynamite blasting); *Siegler v. Kuhlman*, 81 Wash. 2d 448, 502 P.2d 1181 (1972), *cert. denied*, 411 U.S. 983 (1973) (hauling of gasoline).

although he has exercised the utmost care to prevent the harm."⁸² Section 520 sets out six factors that a court should consider in determining whether an activity is "abnormally dangerous." The factors are as follows:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.⁸³

The *Restatement (Second)* adds two additional factors to be considered when deciding if an activity is abnormally dangerous: factors (e) and (f).⁸⁴ Using this definition, courts have found activities such as pile driving,⁸⁵ storage of explosives,⁸⁶ and operation of a propane gas storage yard⁸⁷ to be hazardous activities to which strict liability attaches.

IV. APPLICATION OF HAZARDOUS ACTIVITY STRICT LIABILITY AGAINST LANDOWNERS WHOSE TOXIC WASTE FLOWS ONTO THE PROPERTY OF OTHERS

Part IV of this Comment analyzes how the theory of hazardous activity strict liability is utilized against landowners whose toxic waste flows onto the property of others. The theory of hazardous activity strict liability now receives general judicial recognition.⁸⁸ In the past, some skepticism existed about the application of hazardous

82. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

83. *Id.* § 520.

84. Scholars have noted that the addition of these last two factors makes the test for hazardous activity strict liability look more like a test for negligence. *See* PROSSER & KEETON, *supra* note 63, § 78, at 555.

85. *Vern J. Oja & Assocs. v. Washington Park Towers*, 89 Wash. 2d 72, 569 P.2d 1141 (1977).

86. *Yukon Equip., Inc. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206 (Ala. 1978).

87. *Zero Wholesale Gas Co. v. Stroud*, 264 Ark. 27, 571 S.W.2d 74 (1978).

88. *See* PROSSER & KEETON, *supra* note 63, § 78, at 549. Most states accept some form of the *Rylands* rule. By 1984, only seven states (Maine, New Hampshire, New York, Oklahoma, Rhode Island, Texas, and probably Wyoming) claim to have rejected the *Rylands* decision by name. *Id.* *See also* Note, *Strict Liability for Generators, Transporters and Disposers of Hazardous Wastes*, 64 MINN. L. REV. 949, 969-70 (1980); Jon G. Anderson, *The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, Ultrahazardous, or Absolute Nuisance?*, 1978 ARIZ. ST. L.J. 99, 100 (1978) ("[T]he *Rylands* principle of strict liability is given nearly universal recognition in the United States . . .").

activity strict liability to the generation, storage, and disposal of toxic waste.⁸⁹ Nonetheless, courts increasingly recognize the cause of action against neighboring landowners whose hazardous substance-producing activities injure others.⁹⁰ Given the inherent danger posed to surrounding landowners by the generation, storage, and disposal of toxic waste, these activities seem to be natural candidates for hazardous activity strict liability.⁹¹

In 1983, the New Jersey Supreme Court held a landowner strictly liable for harm resulting from toxic waste produced on the land which seeped onto surrounding property. In *State Department of Environmental Protection v. Ventron Corp.*,⁹² the defendants operated a mercury processing plant and dumped untreated waste onto the land for almost fifty years.⁹³ There was an estimated 268 tons of toxic waste on the tract which seeped into a creek, contaminating the water and surrounding premises.⁹⁴ The plaintiff brought suit for the cost of cleanup and abatement costs of the mercury pollution.⁹⁵ In finding the defendant strictly liable for resultant damages, the *Ventron* court stated that it was

time to recognize expressly that the law of liability has evolved so that a landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others The net result is that those who use, or permit others to use, land for the conduct of abnormally dangerous activities are strictly liable for resultant damages.⁹⁶

The court adopted sections 519 and 520 of the *Restatement (Second) of Torts* for abnormally dangerous activity.⁹⁷ In analyzing the six factors in section 520 for determining whether an activity is abnormally dangerous, the court found that: (a) the toxic wastes that seep

89. See Nolan & Ursin, *supra* note 70, at 293; Ginsberg & Weiss, *supra* note 71, at 913-20 (*Restatement* and *Restatement (Second)* suggest "that where the nature and magnitude of the risk could not be anticipated at the time of disposal . . . and the harmful potential of the substances was scientifically unascertainable," strict liability will not be invoked); Note, *supra* note 88, at 969-76.

90. See, e.g., *Cities Serv. Co. v. State*, 312 So. 2d 799 (Fla. Dist. Ct. App. 1975); *State Dep't of Env'tl. Protection v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983); *Crawford v. National Lead Co.*, 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 21174 (D.C. Ohio 1989); *Branch v. Western Petroleum, Inc.*, 657 P.2d 267 (Utah 1982); *City of Northglenn, Colo. v. Chevron U.S.A., Inc.*, 519 F. Supp 515 (D. Colo. 1981). However, not all courts have accepted the concept of strict liability based on hazardous activity, much less for the storage or disposal of hazardous waste. In one New Hampshire case, the defendant, a neighboring landowner, released chemicals which harmed the plaintiff's property. The court refused to recognize a cause of action for hazardous activity strict liability and required that the plaintiff instead prove negligence. *Bagley v. Controlled Env'tl. Corp.*, 127 N.H. 556, 503 A.2d 823 (1986).

91. See Nolan & Ursin, *supra* note 70, at 313.

92. 94 N.J. 473, 468 A.2d 150 (1983).

93. *Id.* at 483-84, 468 A.2d at 154.

94. *Id.* at 481, 468 A.2d at 154.

95. *Id.* at 482, 468 A.2d at 154.

96. *Id.* at 488, 468 A.2d at 157.

97. *Id.* at 492-93, 468 A.2d at 159-60.

onto neighboring land necessarily harm the environment; (b) toxic waste disposal may cause a variety of harms; (c) there is no safe way to dispose of mercury by dumping it onto land or into water; (e) mercury disposal was inappropriate to the area; and (f) the activity was not of value to the community because dumping of hazardous waste is a major problem in New Jersey.⁹⁸ Significantly, the court did not address factor (d), whether the activity was a matter of "common usage." The *Ventron* court concluded, given that set of facts, the disposal of mercury and other toxic waste, past or present, was an abnormally dangerous activity.⁹⁹ The court articulated its policy rationale by stating that while the disposal of toxic waste is of some use to society, the inevitable risk inherent in the activity mandates that it be carried out at its own peril, rather than at the peril of innocent persons who are harmed as a consequence.¹⁰⁰ The court broadly concluded that "[t]hose who poison the land must pay for its cure."¹⁰¹

A Florida district court recognized a landowner's cause of action for hazardous activity strict liability against a neighboring mining company whose reservoir broke and allowed about one billion gallons of phosphate slimes to escape.¹⁰² The court stated that while historically it was vital that landowners be permitted to use their land in any manner to promote commercial and industrial development, the situation had changed.¹⁰³ The court concluded that although there are many hazardous activities which are still socially desirable, actors who engage in these activities should be held responsible for the resulting harm.¹⁰⁴ An innocent neighbor should not have to bear the burden.¹⁰⁵

Similarly, an Ohio district court held operators of a uranium metal production plant strictly liable to neighboring landowners for their hazardous waste disposal activities.¹⁰⁶ The defendant operated

98. *Id.*

99. *Id.* at 493, 468 A.2d at 160.

100. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 520 cmt. h (1977)).

101. *Id.*

102. *Cities Serv. Co. v. State*, 312 So. 2d 799 (Fla. Dist. Ct. App. 1975). The court mentions §§ 519 and 520 of the *Restatement of Torts* and §§ 519 and 520 of the *Restatement (Second) of Torts*, but appears to give decisive weight to the non-natural use rationale of *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330 (1868), in deciding to apply strict liability.

103. *Cities Serv. Co.*, 312 So. 2d at 801.

104. *Id.*

105. *Id.*

106. *Crawford v. National Lead Co.*, 19 *Envtl. L. Rep.* (Envtl. L. Inst.) 21174 (D.C. Ohio 1989).

the plant from 1951 through 1985, during which it discharged uranium into the river, soil, and atmosphere.¹⁰⁷ Applying sections 519 and 520 of the *Restatement (Second) of Torts*, the court found that the production of uranium constituted an abnormally dangerous activity and the company was therefore strictly liable for the resulting harm.¹⁰⁸

V. STRICT LIABILITY FOR POLLUTING PREDECESSORS

Part V examines the viability of a hazardous activity strict liability cause of action by a landowner against predecessors in title who leave behind toxic waste. This section proposes that the underlying policies of hazardous activity strict liability justify its application in this context. Property and contract defenses, such as *caveat emptor* and “as is” disclaimers, are shown to be potentially inappropriate in the realm of toxic waste contamination.

A. Courts Which Recognize the Theory of Hazardous Activity Strict Liability as a Viable Cause of Action Against a Predecessor in Title

The Supreme Court of New Jersey is the only state supreme court thus far to specifically recognize the theory of hazardous activity strict liability as a viable cause of action for landowners against polluting predecessors in title. However, the New Jersey courts are recognized leaders in the realm of environmental law¹⁰⁹ and therefore may influence other courts’ rulings on toxic waste issues. In *T & E Industry v. Safety Light Corp.*, a landowner brought suit against a predecessor in title who left behind radium contaminants on the property.¹¹⁰ From 1917 to 1926, the defendant’s corporate predecessor, United States Radium Corp. (USRC), operated a radium-processing plant on the property, where it buried the radioactive waste.¹¹¹ Forty-eight years later, T & E purchased the property unaware of the presence of radioactive waste.¹¹² In 1979, the New Jersey Department of Environmental Protection instructed T&E to clean up the radium contamination.¹¹³ T & E filed suit against all successor corporations of USRC in 1981.¹¹⁴

107. *Id.* at 21174-75.

108. *Id.* at 21175.

109. New Jersey has acquired pre-eminence in the field of environmental law because of its large hazardous waste problem. 4 Toxic L. Rep. No. 9, at 247 (Aug. 2, 1989).

110. 123 N.J. 371, 587 A.2d 1249 (1991).

111. *Id.* at 376, 587 A.2d at 1252.

112. *Id.* at 379, 587 A.2d at 1253.

113. *Id.* at 379-80, 587 A.2d at 1253.

114. *Id.* at 380-81, 587 A.2d at 1254.

The precise issue before the New Jersey Supreme Court was whether an owner of radium-contaminated property could hold a predecessor in title who was responsible for the contamination strictly liable for damages caused by that predecessor's abnormally dangerous activity.¹¹⁵ The court rejected the contention that the cause of action only applied to instances of interference with a neighbor's property, and not to instances of harm to successive landowners.¹¹⁶ The court found that processing, handling, and disposal of radium under the facts of the case constituted an abnormally dangerous activity as defined by sections 519 and 520 of the *Restatement (Second) of Torts*.¹¹⁷ Defendant Safety Light was held strictly liable for the losses and injuries proximately caused by the hazardous activities of its predecessors.¹¹⁸

The court focused on two policies underlying hazardous activity strict liability which merited application of the theory to predecessors in title. First, enterprises should be held responsible for the harm caused by their hazardous activities.¹¹⁹ Second, enterprises can more easily spread the cost of accidents attributable to hazardous activities by passing it onto the consumer.¹²⁰ The court noted that neither policy was premised on property rights.¹²¹ Rather, the first policy was designed to induce certain enterprises to be responsible for the external costs of activities,¹²² while the second aimed to shift the seemingly inevitable loss onto the party best able to administer the cost.¹²³ Consequently, the court held that liability for harm caused by abnormally dangerous activities does not necessarily cease with the transfer of property.¹²⁴

Prior to the New Jersey Supreme Court decision of *T & E Industry*, some lower courts in New Jersey and elsewhere recognized that

115. *Id.* at 375, 587 A.2d at 1251.

116. *Id.* at 384-87, 587 A.2d at 1256-57.

117. *Id.* at 390-95, 587 A.2d at 1259-61. The court specifically noted that "a court must make the determination about the abnormally dangerous character of an activity one case at a time." *Id.* at 391, 587 A.2d at 1259.

118. *Id.* at 390-95, 587 A.2d at 1263. Damages awarded to the plaintiff included indemnification for cleanup costs, the value of the building and improvements of the land if they had to be demolished in the cleanup process, the cost of improving the plaintiff's relocation site, the carrying costs of the new facility while the contaminated site was being cleaned up, and the maintenance expense of the contaminated site. *Id.*

119. *Id.* at 387, 587 A.2d at 1257.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

a predecessor in title may be strictly liable to a successor owner for damages caused by its toxic waste disposal activities.¹²⁵ In *Amland v. Aluminum Co. of America (ALCOA)*, the plaintiff purchased an industrial manufacturing plant contaminated with polychlorinated byphelyn (PCB), allegedly by the defendant, a predecessor in title.¹²⁶ From 1956 to 1965, defendant ALCOA created PCB byproducts which contaminated the land.¹²⁷ ALCOA sold the premises in 1968 and, after two intervening owners, Amiland purchased the property in 1983.¹²⁸ Amiland discovered the PCB contamination in 1985 and brought suit in 1986 against ALCOA, asserting, among other common law theories, a hazardous activity strict liability cause of action and a CERCLA cause of action.¹²⁹ The federal district court, applying New Jersey law, rejected the distinction that strict liability only applies to interference with a neighbor's property.¹³⁰ In upholding the cause of action, the court found that the theory of hazardous activity strict liability applies to instances of harm to successive landowners.¹³¹

Similarly, in *Allied Corp. v. Frola*,¹³² a landowner was permitted to assert a hazardous activity strict liability cause of action against the vendor of contaminated property.¹³³ In rejecting claims for trespass or nuisance, the court noted that New Jersey had moved towards strict liability as the preferred theory in environmental pollution cases between successive landowners.¹³⁴

In a 1990 district court case in Maine, a purchaser of a heavily contaminated manufacturing plant sued a predecessor in title who left behind toxic materials.¹³⁵ The defendant operated a chemical manufacturing facility on the property from 1967 until 1982, during which it discharged mercury and other hazardous contaminants.¹³⁶ In 1982, it sold the property to the plaintiff who was unaware of the

125. See, e.g., *Amland Properties Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784 (D.N.J. 1989); *Prospect Indus. Corp. v. Singer Co.*, 238 N.J. Super. 394, 569 A.2d 908 (1989); *Allied Corp. v. Frola*, 730 F. Supp. 626 (D.N.J. 1990); *Hanlin Group, Inc. v. International Mineral & Chem. Corp.*, 759 F. Supp. 925 (D. Me. 1990) (court rejected the defendant's motion for summary judgment to dismiss the hazardous activity strict liability count).

126. 711 F. Supp. 784, 787 (D.N.J. 1989).

127. *Id.* at 787.

128. *Id.*

129. *Id.* at 788-89.

130. *Id.* at 802-03.

131. *Id.*

132. 730 F. Supp. 626 (D.N.J. 1990).

133. *Id.* at 630.

134. *Id.* at 634.

135. *Hanlin Group, Inc. v. International Minerals & Chem. Corp.*, 759 F. Supp. 925 (D. Me. 1990).

136. *Id.* at 927-28.

contamination.¹³⁷ In 1986, the plaintiff was ordered by the EPA to fund the cleanup.¹³⁸ The plaintiff sued the defendant seeking relief under CERCLA and various common law remedies, including hazardous activity strict liability.¹³⁹ The court denied the defendant's motion for judgment on the pleading, rejecting the defendant's contention that the strict liability claim failed because it did not allege injury to property other than which the plaintiff purchased.¹⁴⁰

B. Courts Which Have Rejected the Theory of Hazardous Activity Strict Liability as a Viable Cause of Action Against Polluting Predecessors in Title

Some courts refuse to extend the hazardous activity strict liability cause of action from a claim available to neighbors to a claim available to subsequent owners of the property. In *Wellesley Hills Realty Trust v. Mobil Oil Corp.*,¹⁴¹ purchasers of contaminated property sued the prior owner-vendor of the premises for harm that the purchasers incurred as a result of hazardous waste left behind.¹⁴² The purchaser asserted that the vendor contaminated the property by releasing hazardous materials during its operation of a service station on the premises from 1926 to 1987.¹⁴³ In rejecting the plaintiffs' claim for hazardous activity strict liability, the court found the operation of a gas station qualifies as an abnormally dangerous activity.¹⁴⁴ The court noted the risk of the release of oils is precisely what makes the operation of a gas station abnormally dangerous, and such contamination of property constitutes harm to the property.¹⁴⁵ Despite this, the court held the plaintiff failed to state a claim for strict liability because the vendor's operation of the station "caused harm to property of its own not property of another."¹⁴⁶ The court concluded the articulation of hazardous activity strict liability in the *Restatement (Second) of Torts* requires the harm resulting from the hazardous activity to be to the person or property of another.¹⁴⁷ The

137. *Id.*

138. *Id.*

139. *Id.* at 927.

140. *Id.* at 934.

141. 747 F. Supp. 93 (D. Mass. 1990).

142. *Id.*

143. *Id.* at 94.

144. *Id.* at 101.

145. *Id.*

146. *Id.* at 101-02.

147. *Id.*

court noted, while the rule of *Rylands* eventually expanded to encompass situations that did not involve an “escape” from the land, harm to the property or person of another has always been a requirement.¹⁴⁸

A Florida court of appeal followed the *Wellesley* court’s view of hazardous activity strict liability. In *Futura Realty v. Lone Star Building Centers (Eastern), Inc.*,¹⁴⁹ the current owner of a parcel of land brought a hazardous activity strict liability cause of action against the prior owner and lessee of the prior owner for damage to the site through the use of certain toxic chemicals.¹⁵⁰ In support of its claim, Futura cited *T & E Industry v. Safety Light Corp.*¹⁵¹ However, the Florida court disagreed with the New Jersey court’s analysis and instead followed the *Wellesley* decision.¹⁵² The *Futura* court refused to extend the cause of action from a claim available to neighbors to a claim available to subsequent owners of property.¹⁵³ The court’s principal rationale was that the purchaser of commercial property is able to protect itself through careful inspection and price negotiations.¹⁵⁴ Therefore, the vendor is not liable to the purchaser for damage to the land. The court found this factor to be the main distinction between the duty owed a neighbor and the duty owed a purchaser of real property.¹⁵⁵

C. Underlying Policies of Hazardous Activity Strict Liability Merit Its Application Against Polluting Predecessors in Title

The theory of hazardous activity strict liability as articulated in *Rylands v. Fletcher*¹⁵⁶ seemed to anticipate the harm would be caused by an “escape” of the danger from the actor’s land to the land of another.¹⁵⁷ The rule eventually expanded to encompass situations which did not necessarily involve an “escape” from the actor’s

148. *Id.* at 102.

149. 578 So. 2d 363 (Fla. Dist. Ct. App. 1991).

150. *Id.* at 364.

151. *Id.* at 365. *T & E Indus. v. Safety Light Corp.*, 227 N.J. Super. 228, 546 A.2d 570 (1988), was the New Jersey court of appeal decision which held that previous owners of property who operated a radium processor were strictly liable to subsequent purchasers. The New Jersey Supreme Court subsequently affirmed this holding at 123 N.J. 371, 587 A.2d 1249 (1991).

152. *Futura Realty*, 578 So. 2d at 365 (following *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F. Supp. 93 (D. Mass. 1990)).

153. *Id.*

154. *Id.*

155. *Id.*

156. 3 L.R.-E. & I. App. 330 (1868).

157. See *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F. Supp. 93, 102 (D. Mass. 1990) (“The original articulation of the rule in *Rylands* anticipated that such harm would be caused by the ‘escape’ of the danger from the actor’s land.”); Anderson, *supra* note 88, at 105 (“The doctrine [of *Rylands*] does not apply only in the adjacent landowning situation, although that is its genesis and major use.”).

land onto a neighbor's land.¹⁵⁸ For example, an actor who engages in an abnormally dangerous activity will be strictly liable for harm to persons (not trespassers) who come on the land.¹⁵⁹

Although hazardous activity strict liability originally grew out of a need to supplement the law governing the rights of adjacent landowners, the policy rationales underlying the theory justify a more expansive application.¹⁶⁰ Hazardous activity strict liability reflects a broad policy determination that enterprises which introduce a high risk of harm into the community, for their own profit, should bear the costs of harm caused by their activities.¹⁶¹ Accordingly, predecessors in title who engaged in hazardous activities, such as the creation and disposal of toxic waste, which harm a subsequent purchaser should not escape strict liability simply because the harmed entity is not a neighboring landowner. Holding a predecessor in title strictly liable reflects a modern policy determination that enterprises who contaminate the property should retain responsibility for the harm caused by the toxic waste throughout the life of the toxic waste, absent overt acceptance of liability by the purchaser.¹⁶²

Moreover, holding a predecessor in title strictly liable for toxic waste contamination is not a new concept in the realm of environmental law. The standard of liability for responsible parties under CERCLA and California legislation is strict liability.¹⁶³ However, under CERCLA, even parties who took title after the hazardous substances were deposited, but who in no way contributed to the contamination, may be held strictly liable if such owners were actually aware of the presence of hazardous waste when they transferred the property.¹⁶⁴ A hazardous activity strict liability cause of action

158. See Anderson, *supra* note 88, at 105-06.

159. *Id.*; see, e.g., *McLane v. Northwest Natural Gas Co.*, 255 Or. 324, 467 P.2d 635 (1970).

160. *T & E Indus. v. Safety Light Corp.*, 123 N.J. 371, 386, 587 A.2d 1249, 1257 (1991) ("Although the rule grew out of a need to fill a void in the law governing the rights of adjacent landowners, another thread woven into its rationale justifies a much broader application.").

161. PROSSER & KEETON, *supra* note 63, § 78, at 556 ("[C]ertain conditions and activities may be so hazardous to another or to the public generally and of such relative infrequent occurrence to justify allocating the risk of loss to the enterpriser engaging in such conduct as a cost of doing business."); *Berg v. Reaction Motors Div.*, 37 N.J. 396, 410, 181 A.2d 487, 494 (1962) (an enterprise that introduces unusual danger into the community should pay its own way if harm is caused to others).

162. Laura M. Schleich, *An "As Is" Provision in a Commercial Property Contract: Should It Be Left As Is When Assessing Liability for Environmental Torts?*, 51 U. PITT. L. REV. 995, 1009 (1990).

163. See *supra* notes 32, 56.

164. 42 U.S.C.A. § 9601(35)(C) (West Supp. 1991) ("[I]f the defendant obtained

would only target those past owners and users who participated in the hazardous activity and not those who did not engage in hazardous activities, but were merely interim owners.

Whether an enterprise's knowledge, or ability to obtain such knowledge, of the hazardous nature of its activity should be assessed at the time the enterprise engaged in the activity, or at a later time, is an open question. Some commentators take the position that the *Restatement* standards for hazardous activity strict liability suggest risk must be foreseeable.¹⁶⁵ However, the applicable case law is unclear.¹⁶⁶ The court in *T & E Industry* found the defendant had ample constructive knowledge of the dangers associated with its activities and therefore did not resolve the issue whether strict liability is contingent upon such knowledge.¹⁶⁷ However, the court stated in dicta that the requirements of "'knowledge' and 'foreseeability' smack of negligence and may be inappropriate in the realm of strict liability."¹⁶⁸

D. Hazardous Activity Strict Liability in California

The California Supreme Court has twice ruled on the applicability of hazardous activity strict liability. In 1928, the California Supreme

actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable . . . and no defense . . . shall be available to such defendant.").

165. The first *Restatement's* articulation of hazardous activity strict liability included foreseeability of the type of harm and the class of persons injured as a requirement for applying strict liability for ultrahazardous activity. RESTATEMENT OF TORTS § 519 (1938) (actor is liable only to those who he "should recognize as likely to be harmed," and then only for harm "which makes the activity ultrahazardous"). The *Restatement (Second)* retained the language limiting liability to the type of harm which makes the activity abnormally dangerous, but deleted the language limiting liability to the class of persons foreseeably harmed by the actor's activities. See RESTATEMENT (SECOND) OF TORTS § 519 (1977). For commentators who propose that the *Restatement (Second)* standards for hazardous activity suggest the risk must be foreseeable, see James R. Zazzali & Frank P. Grad, *Hazardous Wastes: New Rights and Remedies?*, 13 SETON HALL L. REV. 446, 462 (1983) ("The *Restatement (Second)* formula of strict liability, adopting an "abnormally dangerous" activity test, requires a balancing of numerous factors such as the utility of the activity, the foreseeability of harm, and the appropriateness of the locale of the activity."); Ginsberg & Weiss, *supra* note 71, at 918 (foreseeability requirement present in both *Restatements*); M.L. Lieberman, *Absolute Liability for Ultrahazardous Activities: An Appraisal of the Restatement Doctrine*, 37 CAL. L. REV. 269, 272 (1949) (*Restatement* impliedly requires foreseeability of risk).

166. See, e.g., *Garcia v. Estate of Norton*, 183 Cal. App. 3d 413, 420, 228 Cal. Rptr. 108, 112 (1986) (actual knowledge of the extent of danger involved in an ultrahazardous activity is not required); *Amland Properties Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784, 807 (D.N.J. 1989) (it is not certain whether the defendant's knowledge of the risk involved in a hazardous activity is a necessary finding under RESTATEMENT (SECOND) OF TORTS § 520 (1977)).

167. 123 N.J. 371, 393, 587 A.2d 1249, 1260 (1991).

168. *Id.*

Court in *Green v. General Petroleum Corp.*¹⁶⁹ held a non-negligent oil company strictly liable for damage to a neighbor's property when one of its oil wells exploded. The court held that when a person commits an act with knowledge an injury may result, and injury does result, even if all due care was exercised, in "fairness" the actor should compensate the injured party.¹⁷⁰ In 1948, the California Supreme Court again decided the issue of hazardous activity strict liability. In *Luthringer v. Moore*,¹⁷¹ a fumigator was held strictly liable when gas from a fumigated basement seeped into an adjacent pharmacy and injured the plaintiff.¹⁷² Although the court mentioned the *Rylands* decision¹⁷³ and quoted extensively from sections 519 and 520 of the *Restatement*,¹⁷⁴ it did not specifically adopt either. Instead, the court followed the principle of hazardous activity strict liability articulated in *Green*¹⁷⁵ and added that "certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy."¹⁷⁶

Curiously, the California Supreme Court has not considered the issue since the *Luthringer*¹⁷⁷ decision in 1948. California lower court decisions utilize both *Restatement*¹⁷⁸ and *Restatement (Second)*¹⁷⁹ theories of hazardous activity strict liability. Two California lower court decisions, however, appear to go beyond both of the *Restatements*. These cases focus instead on fairness and public policy, which are actually what both the *Green*¹⁸⁰ and *Luthringer*¹⁸¹ courts empha-

169. 205 Cal. 328, 270 P. 952 (1928).

170. *Id.* at 334, 270 P. 955.

171. 31 Cal. 2d 489, 190 P.2d 1 (1948).

172. *Id.* at 492-94, 190 P.2d at 3.

173. *Id.* at 500, 190 P.2d at 8.

174. *Id.* at 499, 190 P.2d at 7.

175. *Id.* at 500, 190 P.2d at 8. The court stated, "[T]here can be no doubt that the case of *Green v. General Petroleum Corporation* . . . enunciated a principle of absolute liability which is applicable to the instant case." *Id.*

176. *Id.* at 500, 190 P.2d at 8.

177. 31 Cal. 2d 489, 190 P.2d 1 (1948).

178. *See, e.g., Garcia v. Estate of Norton*, 183 Cal. App. 3d 413, 228 Cal. Rptr. 108 (1986).

179. *See, e.g., SKF Farms v. Superior Court*, 153 Cal. App. 3d 902, 200 Cal. Rptr. 497 (1984); *Goodwin v. Reilly*, 176 Cal. App. 3d 86, 221 Cal. Rptr. 374 (1985).

180. 205 Cal. 328, 270 P. 952 (1928).

181. 31 Cal. 2d 489, 190 P.2d 1 (1948).

sized.¹⁸² In *Smith v. Lockheed Propulsion Co.*,¹⁸³ the court applied hazardous activity strict liability to the test firing of a rocket motor that resulted in damage to nearby property.¹⁸⁴ The court stated that “[p]ublic policy” called for strict liability because a profit-oriented enterprise was in the best position to spread the loss to the public.¹⁸⁵ In *Chavez v. Southern Pacific Transportation Co.*,¹⁸⁶ the court held a railroad company strictly liable for harm resulting from an explosion occurring in the course of transporting bombs pursuant to a government contract, despite the traditional immunity for common carriers transporting hazardous items.¹⁸⁷ In reaching this conclusion, the *Chavez* court emphasized the public policy of loss spreading.¹⁸⁸

In the California courts, plaintiffs injured by toxic waste increasingly seek to hold those who created the contamination strictly liable. For example, in *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*,¹⁸⁹ a landowner sued a predecessor in title who had left behind toxic waste on the property for damages suffered by the landowner when the toxic waste was discovered. In short, the court refused to grant the defendant’s motion to dismiss the hazardous activity strict liability count.¹⁹⁰ Significantly, the court did dismiss the private nuisance cause of action, holding that nuisance law does not authorize a landowner to sue a previous owner.¹⁹¹ The court apparently did not find this to be an obstacle for hazardous activity strict liability.

In another district court case, *Pinole Point Properties v. Bethlehem Steel Corp.*,¹⁹² a landowner discovered toxic waste on the property which had been left behind by the defendant, a predecessor in title.¹⁹³ The landowner sued the defendant on various common law theories, including hazardous activity strict liability, and also asserted a CERCLA cause of action.¹⁹⁴ Although the court dismissed

182. In *Green*, the court stated that the defendant “should, in all fairness, be required to compensate.” *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952, 955 (1928) (emphasis added). In *Luthringer*, the court found “strict liability as the best public policy.” *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1, 8 (1948) (emphasis added).

183. 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967).

184. *Id.*

185. *Id.* at 785, 56 Cal. Rptr. at 137.

186. 413 F. Supp. 1203 (E.D. Cal. 1976).

187. *Id.* at 1213-14. For a description of the common carrier immunity, see RESTATEMENT OF TORTS § 521 (1938) and RESTATEMENT (SECOND) OF TORTS § 521 (1977).

188. *Chavez v. Southern Pac. Transp. Co.*, 413 F. Supp. 1203, 1208-09 (E.D. Cal. 1976).

189. 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20965 (C.D. Cal. 1989).

190. *Id.* at 20966.

191. *Id.*

192. 596 F. Supp. 283 (N.D. Cal. 1984).

193. *Id.* at 285.

194. *Id.*

the hazardous activity strict liability claim as barred by the statute of limitations, it stated in dicta that even if the claim was not time barred, it would fail on the merits.¹⁹⁵ The court stated that "strict liability in tort is 'limited to the kind of harm the possibility of which makes the activity abnormally dangerous.'" ¹⁹⁶ The court opined that the harm alleged by the plaintiff, that is the cost of cleanup and the diminished property value, was not the type of harm for which strict liability would attach.¹⁹⁷

As the above cases indicate, it is far from certain how California courts will decide on the issue of hazardous activity strict liability for the generation, storage, or disposal of toxic waste. At this time, no California court has squarely decided whether the generation, storage, or disposal of toxic waste is a hazardous activity to which strict liability attaches. Therefore, whether a predecessor in title, or even a neighboring landowner, can be held strictly liable for his or her toxic waste activities is still an open question. However, in light of the favorable precedent of *Green*¹⁹⁸ and *Luthringer*,¹⁹⁹ and lower court decisions such as *Lockheed*²⁰⁰ and *Chavez*,²⁰¹ California courts have a solid base for applying hazardous activity strict liability to the generation, storage, and disposal of toxic waste for both neighboring landowners and purchasers of contaminated land.

E. Caveat Emptor and "As Is" Clauses

The ancient doctrine of *caveat emptor* ("let the buyer beware") assumes that, absent an express agreement, fraud, or concealment, the vendor of land is not liable to the purchaser for the condition of the land existing at the time of transfer.²⁰² Sellers have long been protected by this doctrine.²⁰³ However, the doctrine of *caveat emptor*

195. *Id.* at 292 n.5.

196. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 519 (1977)).

197. *Id.*

198. 205 Cal. 328, 270 P. 952 (1928).

199. 31 Cal. 2d 489, 190 P.2d 1 (1948).

200. 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967).

201. 413 F. Supp. 1203 (E.D. Cal. 1976).

202. See RESTATEMENT (SECOND) OF TORTS § 352 (1965) ("Except as stated in section 353, a vendor of land is not subject to liability for physical harm caused to his vendee or others while on the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time the vendee took possession."); *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985) (the doctrine of *caveat emptor* does not exempt a seller from responsibility if the seller is guilty of fraud or concealment).

203. See, e.g., *Swinton v. Whitinsville Sav. Bank*, 311 Mass. 677, 42 N.E.2d 808 (1942); *Henshaw v. Cabeceiras*, 14 Mass. App. Ct. 225, 437 N.E.2d 1072 (1982).

has not maintained its original vigor.²⁰⁴ The continuing validity of the doctrine has been questioned in many contexts. For example, in the area of products liability the doctrine has been largely abandoned because of safety,²⁰⁵ fairness,²⁰⁶ and loss spreading rationales.²⁰⁷ Similarly, builder-vendors of homes may also be denied the defense of *caveat emptor*, in favor of the doctrine of implied warranty of habitability, when purchasers find defects in design and construction.²⁰⁸

Courts which have considered the doctrine of *caveat emptor* in the context of toxic waste have reached different results.²⁰⁹ In *T & E Industry*, the court rejected the argument that *caveat emptor* relieved the polluting predecessor in title from liability.²¹⁰ The court noted that it had refused to recognize the validity of *caveat emptor* in a variety of situations, such as when purchasers of new homes discover defects in the property attributable to the builder-vendors.²¹¹ The court explained that the builder-vendor exception was premised on the belief that the builder-vendor is in a better position

204. See, e.g., *Weintraub v. Krobatsch*, 64 N.J. 445, 450, 317 A.2d 68, 71 (1974); *Sorrell v. Young*, 6 Wash. App. 220, 224, 491 P.2d 1312, 1315 (1971).

205. See, e.g., *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262-63, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899-900 (1964); *Sindell v. Abbott Lab., Inc.*, 26 Cal. 3d 588, 611, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, cert. denied, E.R. Squibb & Sons v. Sindell, 449 U.S. 912 (1980).

206. See, e.g., *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

207. See, e.g., Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944); *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 62-63, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963); *Sindell v. Abbott Lab., Inc.*, 26 Cal. 3d 588, 611-14, 607 P.2d 924, 936-37, 163 Cal. Rptr. 132, 144-45, cert. denied, E.R. Squibb & Sons, Inc., v. Sindell, 449 U.S. 912 (1980). See generally PROSSER & KEETON, *supra* note 63, § 98, at 692-94.

208. See, e.g., *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982) (the defense of *caveat emptor* in the sale of homes by a vendor-builder is rejected); *Wimmer v. Down East Properties*, 406 A.2d 88, 93 (Me. 1979) (in the sale of new homes by a builder-vendor, the law implies warranties that the house is suitable for habitation and constructed in a reasonably skillful and workmanlike manner).

209. Significantly, the *caveat emptor* defense is not a recognized defense in CERCLA causes of action when the purchaser has no actual knowledge, even when the property is purchased pursuant to an "as is" contract. See 42 U.S.C.A. § 9607(a) (West Supp. 1991) (stating that statutorily liable parties will be held liable "[n]otwithstanding any other provisions or rule of law, and subject only to the defenses set forth in subsection (b) of this section"). For examples of cases which have denied the *caveat emptor* defense in CERCLA causes of action, see *Westwood Pharmaceuticals Inc. v. National Fuel & Gas Dist. Corp.*, 737 F. Supp. 1272, 1280 (W.D.N.Y. 1990); *Smith Land & Improvement Corp. v. Celotex*, 851 F.2d 86, 89 (3d Cir.), cert. denied, 488 U.S. 1029 (1988); *Southland v. Ashland Oil Inc.*, 696 F. Supp. 994, 1001 (D.N.J. 1988); *Chanelmaster Satellite Sys. Inc. v. JFD Elec. Corp.*, 702 F. Supp. 1229, 1232 (E.D.N.C. 1988).

210. *T & E Indus.*, 123 N.J. 371, 387, 587 A.2d 1249, 1257 (1991).

211. *Id.* at 389, 587 A.2d at 1258 (citing *MacDonald v. Mianeccki*, 79 N.J. 275, 398 A.2d 1283 (1979) (*caveat emptor* rejected in context of purchaser of new home from small scale developer)).

to prevent the problems from arising in the first place and that the party responsible for creating the condition should be held liable. The court found that the justifications for the builder-vendor exception were even more persuasive in the case where a vendor creates the defective condition through its hazardous activities.²¹² The court concluded that rejecting the doctrine of *caveat emptor* where a vendor's hazardous activities caused the purchaser harm was consonant with the underlying policies of hazardous activity strict liability: enterprises who conduct hazardous activities should bear the costs attributable to their activities.²¹³

The *T. & E. Industry* court also rejected the contention that the "as is" purchase contract²¹⁴ relieved the seller of liability for the harm attributable to its hazardous activities. The court held that in order for an "as is" clause in a sales contract to relieve the seller from liability, the buyer must have actual knowledge of the risk.²¹⁵ The court concluded that a real estate contract which does not disclose the hazardous condition does not shield the seller who created the hazardous condition from liability.²¹⁶

In *Amland Properties Corp. v. Aluminum Co. of America*,²¹⁷ the defendant relied on the purchaser's inspection of the property to argue the purchaser assumed the risk a toxic contaminant might be present at the site.²¹⁸ The court acknowledged assumption of risk as a defense in a strict liability action, but only where the plaintiff has actual knowledge of the condition and knowingly and voluntarily encounters the risk.²¹⁹ The court held the "as is" clause would not insulate the seller from strict liability for its abnormally dangerous activities because Amiland had no actual knowledge of the hazardous condition.²²⁰ Other courts have reached similar conclusions.²²¹

212. *Id.*

213. *Id.*

214. The Uniform Commercial Code defines "as is" as a term which is ordinarily understood to mean that the buyer assumed the entire risk as to the quality of the goods involved. U.C.C. § 2-316 n.7 (1988). In real estate transactions, sellers and builders often try to relieve themselves of any continuing liability by using disclaimers regarding the state of the property and its structures.

215. *T & E Indus.*, 123 N.J. at 390, 587 A.2d at 1258-59.

216. *Id.* at 390, 587 A.2d at 1259.

217. 711 F. Supp. 784 (1989).

218. *Id.* at 802.

219. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 523 cmt. c (regarding strict liability, "the plaintiff does not assume the risk unless he knows of its existence")).

220. *Id.* at 803 n.20.

221. *See, e.g., Allied Corp. v. Frola*, 730 F. Supp. 626, 630 (D.N.J. 1990) (an "as is" clause does not relieve the seller of common law strict liability); *Prospect Indus.*

However, some courts reach a contrary conclusion, holding the doctrine of *caveat emptor* prevails even when the purchaser does not have actual knowledge of the contamination. In *Futura Realty v. Lone Star Bldg. Centers (E.), Inc.*, the court held the duty to disclose applies exclusively to the sale of homes and not to the sale of commercial property.²²² The court concluded that a seller of commercial property contaminated by toxic chemicals had no duty to disclose this fact to the buyer and therefore was not liable for any damages.²²³ The court noted *caveat emptor* was still the rule in the sale of commercial property.²²⁴

In light of the massive toxic waste disposal problem in the United States and the unique hazards which toxic waste poses to the environment and human health, this view seems particularly archaic. Other public policy considerations, such as holding the polluting party liable and cleaning up the environment for the safety of humanity, seem to outweigh the policy of *caveat emptor*, which was enunciated long before the emergence of industrial toxic waste. The party responsible for the contamination should remain liable for the contamination as long as it exists or until a purchaser explicitly accepts liability. The polluting party is generally more knowledgeable about the presence of toxic waste and is in a better position to prevent the resulting problems than a purchaser who may not discover the waste for several years. Moreover, the purchaser should not have to shoulder the losses caused by the activities of a polluting predecessor, which created toxic waste, for the predecessor's benefit. In fairness, the benefiting party should pay for the harm which it caused. Public health, nature conservation, and the goal of maintaining land productivity speak in favor of abandoning the doctrine of *caveat emptor* in the context of toxic waste in real estate transactions.²²⁵

Some states have statutorily eliminated the doctrine of *caveat emptor* in the context of hazardous waste in real estate transactions.²²⁶ In those states, sellers of real property have a statutory duty to disclose the presence of hazardous waste upon transfer. However, even the states that impose such a duty to disclose have only done so

Corp. v. Singer Co., 238 N.J. Super. 394, 569 A.2d 908 (1989) (the court rejected the argument that the "as is" clause relieved the seller of liability when the purchaser had no knowledge of the contamination).

222. 578 So. 2d 363, 364 (Fla. App. 1991).

223. *Id.* at 364-65.

224. *Id.*

225. See Schleich, *supra* note 162, at 1009.

226. States which have disclosure laws that are triggered upon sale include California, Connecticut, Illinois, Indiana, Massachusetts, Minnesota, New Jersey, North Carolina, Pennsylvania, Washington, and West Virginia. NANNEY, *supra* note 2, at 90; Schleich, *supra* note 162, at 1004 n.42.

in very recent years.²²⁷ In California, as of 1988, a seller of commercial property has a statutory duty to disclose the presence of hazardous waste located on the premises when the seller knows or has reason to know of its presence.²²⁸ However, landowners who purchased property prior to 1988 are not protected. In light of the policies discussed above, the defense of *caveat emptor* should not bar the landowners' recovery.

CONCLUSION

The United States has a long history of improperly disposed toxic waste. Many landowners have had the unpleasant and costly experience of discovering toxic waste on their premises left behind by a predecessor in title. In order to achieve full compensation, landowners increasingly look to the chain of title, seeking to hold the polluters strictly liable for their hazardous activities. Although hazardous activity strict liability can produce nightmarish results for many former owners of industrial property, the theory does give innocent owners of contaminated property an opportunity to recover costs which they many not otherwise be able to recover under federal or state environmental legislation. Recognizing a cause of action by a landowner against a predecessor in title whose hazardous activities have caused the harm reflects the underlying premise of hazardous activity strict liability: enterprises who engage in certain activities should bear the costs attributable to such activities.²²⁹ In light of growing concerns over the state of the environment and the pernicious effects of toxic waste on human health, the doctrine of *caveat emptor* in the context of toxic waste should not defeat a landowners cause of action against a polluting predecessor. The doctrine of hazardous activity strict liability should be a recognized cause of action by a landowner against a polluting predecessor.

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227. For example, the effective date of Illinois' and Indiana's disclosure laws is January 1, 1990.

228. CAL. HEALTH & SAFETY CODE § 25359.7 (West Supp. 1991). For a detailed discussion of this section, see Oppenheimer & Nanney, *Recent Developments Regarding Hazardous Substance Disclosure Obligations of Lessees, Lessors and Sellers of Real Property*, in FUNDAMENTALS OF REAL PROPERTY PRACTICE (Jan./Feb. 1989).

229. PROSSER & KEETON, *supra* note 63, § 78, at 555-56.

