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Towards Defining the Contractual Relationship Exception to CERCLA's Third-Party Defense: Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.

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TOWARDS DEFINING THE CONTRACTUAL RELATIONSHIP EXCEPTION TO CERCLA'S THIRD-PARTY DEFENSE: *WESTWOOD PHARMACEUTICALS, INC. V. NATIONAL FUEL GAS DISTRIBUTION CORP.*

I. INTRODUCTION

Since its enactment in 1980, the Comprehensive Environmental Response Compensation, and Liability Act of 1980[1] (CERCLA) has served as EPA's primary weapon to clean up hazardous waste sites. CERCLA is an effective enforcement mechanism because of the broad authority it grants EPA to exact cleanup costs from "potentially responsible parties" ("PRPs").[2]

CERCLA derives its enormous power to impose liability from the statute itself and also from the way the courts have applied the statute. While the language of CERCLA targets an extremely broad group of PRPs liable for cleanup,[3] the courts have interpreted the statute to impose strict liability on PRPs.[4] In addition, courts have imposed joint and several liability.[5] However, Congress has authorized only three extremely narrow affirmative defenses to defend against this broad liability scheme.[6]

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1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), §§ 101-308, 42 U.S.C. §§ 9601-75 (1988 & Supp. IV 1992).

2. A "potentially responsible party" is any party who may potentially fall within § 107(a) of CERCLA, which defines the scope of liability under CERCLA. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a). For the text of CERCLA § 107(a), see *infra* note 53.

3. *See* Note, *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1514-17 (1986) [hereinafter *Toxic Waste Litigation*]. The text of § 107(a) of CERCLA is set forth *infra* note 53. Generally, CERCLA imposes liability on past and present owners or operators of a facility on which hazardous waste was disposed and generators and transporters of hazardous waste. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a).

4. *See infra* note 52 and accompanying text.

5. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985).

6. Section 107(b) sets forth the affirmative defenses as follows:

(B) DEFENSES

There shall be no liability under section (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(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 con-

A PRP may avoid liability under CERCLA if the PRP can demonstrate that the release or threat of release of hazardous substances was caused solely by an act of God, an act of war, or an act of a third party as specified by the statute.[7] As wars and hurricanes occur relatively infrequently, the typical CERCLA defendant is left with only the third-party defense to avoid liability.[8]

The proposed third-party defense in CERCLA was more broad than as finally enacted. However, Congress was concerned that generators would avoid strict liability under CERCLA merely by engaging a third party to dispose of the waste.[9] Therefore, Congress narrowed the available defenses even further by incorporating into the third-party defense what has become known as the "contractual

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nection 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 substance, 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

(4) any combination of the foregoing paragraphs.

CERCLA § 107(b), 42 U.S.C. § 9607(b).

Although the statute only specifies three defenses, some courts have maintained that equitable defenses to CERCLA liability are available. Consider the following summary of the law by one court:

> [C]ourts have split as to whether § 107 of CERCLA forecloses common law equitable defenses .... Several courts have held that because equitable defenses such as waiver, release, laches, and estoppel are not contained in § 107(b), they are not available to defeat CERCLA cost recovery claims by the United States. Other courts have held that the defenses listed in § 107(b) do not expressly abrogate a district court's equity jurisdiction and do not foreclose the availability of equitable defenses. Finally, some courts have recognized that the language of § 107 of CERCLA may foreclose any equitable defenses but nevertheless have refused to dispose of equitable defenses on a motion to strike.

United States v. Walerko Tool & Eng'g Corp., 784 F. Supp. 1385, 1388 (N.D. Ind. 1992) (citations omitted). *See also Westwood Pharmaceuticals v. National Fuel Gas Distribution Corp.*, 737 F. Supp. 1272, 1274-75 n.1, 1287 (W.D.N.Y. 1990), *affd.*, 964 F.2d 85 (2d Cir. 1992) (district court declined to strike equitable defenses maintained by defendant).

7. CERCLA § 107(b)(1)-(3), 42 U.S.C. § 9607(b)(1)-(3).

8. The judicial history of the third-party defense does not include a single case in which the defense was predicated on either an act of war or an act of God. For a list of cases addressing the third-party defense, see *infra* notes 75-77.

The defendant can avoid liability by attacking other requirements of the statute. For instance, the defendant can contest his categorization as a PRP under CERCLA § 107(a). For an overview of the CERCLA liability scheme, see generally *Toxic Waste Litigation*, *supra* note 3.

9. For a discussion of the legislative history behind the contractual relationship exception, see *infra* notes 61-72 and accompanying text.

relationship exception."[10] This exception effectively bars PRPs from asserting the third-party defense in situations where the PRP was in a contractual relationship with the third party allegedly responsible for the "release or threatened release" that triggered liability.[11]

The statute, however, does not clearly define the scope of the defense or the exception. The Court of Appeals for the Second Circuit narrowed the contractual relationship exception in *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*[12] This decision represents the first definitive statement by a federal circuit court concerning the scope of the contractual relationship exception to CERCLA's third-party defense.[13] In *Westwood Pharmaceuticals*, the Second Circuit narrowed the contractual relationship exception by requiring that the contractual relationship between the defendant and the third party relate to the act or omission that caused the release or threat of release.[14] The court held that in order for the contractual relationship to bar the defense, the contract must either relate to the hazardous substance, or permit the landowner to exert control over the third party such that the exercise of due care could have prevented the release.[15]

This Note traces the development of the contractual relationship exception from its conception in Congress to the Second Circuit's analysis in *Westwood Pharmaceuticals*. This Note suggests that while the court reached a result consistent with statutory language and legislative history, the reasoning in the opinion is flawed because the court failed to discuss the application of the law to the facts before the court. This Note also synthesizes the *Westwood Pharmaceuticals* decision and prior caselaw to present an updated assessment of the judiciary's view of the contractual relationship exception.[16]

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10. *See* CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3).

11. This represents a rough statement of the effect of the contractual relationship exception. This Note will assess the scope of this exception in greater detail. The "release or threat of release" language originates in the text of CERCLA § 107(b)(3). *See supra* note 6.

12. 964 F.2d 85 (2d Cir. 1992).

13. *See infra* note 73 and accompanying text.

14. *Westwood Pharmaceuticals*, 964 F.2d at 91-92. The Second Circuit's holding narrowed the exception in that the circuit courts that addressed the issue before this case did not require a nexus between the contract and the act or omission causing the release.

15. *Id.* at 91. For the Second Circuit's holding, see *infra* text accompanying note 139.

16. For a discussion of the Second Circuit's reasoning and the anticipated impact of the case, see *infra* notes 137-70 and accompanying text. For additional

II. FACTS

The dispute in *Westwood Pharmaceuticals* arose from Westwood Pharmaceutical's (Westwood) 1972 purchase of 8.8 acres of property in Buffalo, New York (the site) from Iroquois Gas Corporation (Iroquois), National Fuel Gas Distribution Corporation's (National Fuel) predecessor-in-interest.[17] Iroquois purchased the property in 1925 and used it for gas manufacture, storage, and compression until 1968.[18] In 1968, Iroquois demolished several of the structures located on the northern end of the site that it had used in its gas operations.[19]

Westwood had occupied the property adjacent to the Iroquois site since at least 1942.[20] In 1972, Westwood agreed to purchase the site from Iroquois.[21] As part of the contract of sale, Westwood was allowed access to the site prior to final settlement.[22] The contract also contained representations by Iroquois that all equipment left on the property had been purged of natural gas and other chemicals used in Iroquois' business.[23]

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discussion of the contractual relationship exception to CERCLA'S third-party defense, see J.B. Ruhl, *The Third Party Defense to Hazardous Waste Liability: Narrowing the Contractual Relationship Exception*, 29 S. TEX. L. REV. 291 (1988).

17. *Westwood Pharmaceuticals*, 964 F.2d at 86-87.

18. Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp., 737 F. Supp. 1272, 1275 (W.D.N.Y. 1990), *on reargument* 767 F. Supp. 456 (1991), *aff'd*, 964 F.2d 85 (2d Cir. 1992). National Fuel pointed out in its brief that the site had been used for industrial purposes since 1866. Brief for Appellee at 1, Westwood Pharmaceuticals v. National Fuel Gas Distrib. Corp., 964 F.2d 85 (2d Cir. 1992) (No. 91-9157). People's Gas Corporation manufactured gas on the site from 1897 until 1925, when it sold the property to Iroquois. *Westwood Pharmaceuticals*, 737 F. Supp. at 1275. This is important in that National Fuel maintained that neither it nor Iroquois disposed of the waste which eventually released hazardous substances. Brief for Appellee at 10.

19. *Westwood Pharmaceuticals*, 737 F. Supp. at 1275. Iroquois destroyed a "1.75 million cubic foot gas holder, a one million gallon oil tank, a relief holder, a gas-purifying house, and at least two tar-separator pits." *Id.*

20. *Id.*

21. *Id.*

22. *Id.* The contract of sale provided that Westwood could: " '(a) inspect the Premises upon reasonable notice to the Seller; (b) enter the Premises for purposes of inspection and planning for Purchaser's occupancy and for the demolition of buildings and improvements; and (c) commence the demolition of buildings and improvements situated upon the Premises . . . .' " *Id.* (quoting sales contract).

23. *Westwood Pharmaceuticals*, 737 F. Supp. at 1275-76 n.2. The parties disputed whether Iroquois knew of Westwood's construction plans for the site. National Fuel maintained that Iroquois had no notice of Westwood's plans to construct facilities at the site. However, as the district court noted, this is unlikely. *Id.* at 1276. National Fuel did not dispute that Iroquois had granted Westwood access to the property prior to closing for the specific purpose of inspecting the property and commencing destruction of improvements on the premises. *Id.* at 1275. Furthermore, since Iroquois had represented that the site was safe for West-

Immediately after settlement, Westwood built a warehouse on the southern portion of the site.[24] Soil borings taken by Westwood during construction revealed the presence of petroleum-based contaminants.[25] Additional soil borings were taken in 1984 and 1985 in connection with Westwood's construction of a second warehouse on the northern portion of the site.[26] These tests also revealed that petroleum-based contaminants and other wastes, including underground piping and tar separator pits, were present at the site.[27]

Westwood disposed of the waste at its own expense[28] and subsequently sought reimbursement from National Fuel under CERCLA.[29] National Fuel maintained that Westwood proceeded recklessly in building facilities at the site after discovery of the wastes.[30] National Fuel also claimed that it repeatedly warned Westwood about the "manner and pace" of the construction activity.[31] Predictably, National Fuel asserted the third-party defense, con-

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wood's demolition of improvements, Iroquois should have anticipated that Westwood was demolishing the existing improvements in order to construct its own.

24. *Id.* at 1276.

25. *Id.*

26. *Id.*

27. *Westwood Pharmaceuticals*, 737 F. Supp. at 1276. These facts represent the basis of National Fuel's argument that Westwood was responsible for the release. National Fuel argued that because Westwood knew of the potential for contamination, Westwood should have known to proceed more cautiously during construction at the site. *Id.*

28. *Id.* at 1275-76. Westwood expended over $650,000 investigating and removing the waste. *Id.* at 1277. National Fuel claimed it spent over $75,000 investigating the contamination at the Westwood site. *Id.*

29. The legislative history of CERCLA provides only limited evidence of Congressional intent to authorize a private cause of action. However, courts generally reason that Congress intended the statute to permit private enforcement in order to further CERCLA's goals of efficient and prompt cleanup of hazardous waste. *See, e.g.*, McGregor v. Industrial Excess Landfill, Inc., 709 F. Supp. 1401 (N.D. Ohio 1987); *see also Toxic Waste Litigation*, *supra* note 3, at 1499-1500 (discussing right of private right of action under CERCLA). For a legislative history of CERCLA, see THE ENVIRONMENTAL LAW INSTITUTE, SUPERFUND: A LEGISLATIVE HISTORY, Vols. 1-3, (Helen Cohn Needham & Mark Menefee eds., 1982) [hereinafter CERCLA LEGIS. HIST.].

The right of a private party to bring an action for response costs emerged early in CERCLA's history. *See* Bulk Distribution Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1444-45 (S.D. Fla. 1984); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1140 (E.D. Pa. 1982). Virtually every court deciding the issue has concluded that CERCLA authorizes a private right of action. *E.g.*, 3550 Stevens Creek Assoc. v. Barclay's Bank of Cal., 915 F.2d 1355, 1357 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2014 (1991); Wickland Oil Terminals v. Asarco Inc., 792 F.2d 887, 891 (9th Cir. 1986); McGregor v. Industrial Excess Landfill, Inc., 709 F. Supp. 1401, 1409-10 (N.D. Ohio 1987), *aff'd*, 856 F.2d 39 (6th Cir. 1988); Artesian Water Co. v. New Castle County, 605 F. Supp. 1348, 1356 (D. Del. 1985).

30. *Westwood Pharmaceuticals*, 737 F. Supp. at 1276.

31. *Id.*

tending that Westwood's actions were the sole cause of the release.[32]

Westwood filed a motion for summary judgment on its CERCLA claim regarding most of National Fuel's affirmative defenses, including the third-party defense.[33] The Federal District Court for the Western District of New York denied Westwood's motion for summary judgment on the third-party defense asserted by National Fuel.[34] That court held that National Fuel had raised a triable issue of fact on the availability of CERCLA's third-party defense.[35] Westwood moved for reconsideration arguing that the contractual relationship exception barred National Fuel from asserting the third-party defense.[36] The district court reaffirmed its earlier opinion, but permitted an interlocutory appeal to the Second Circuit.[37]

III. LEGISLATIVE BACKGROUND: THE ORIGINS OF CERCLA AND THE CONTRACTUAL RELATIONSHIP EXCEPTION TO THE THIRD-PARTY DEFENSE

A. CERCLA: Congressional Response to Hazardous Waste Pollution

In response to the common law's inability to effectively deal with the nation's growing pollution problems, Congress intervened with a torrent of federal legislation designed to alleviate the health hazards associated with pollution.[38] The vast majority of this legisla-

32. *Id.* at 1277. National Fuel also claimed that Westwood failed to investigate the origin and scope of the contamination. According to National Fuel, Westwood could have prevented the release by properly conferring with environmental experts and architects. *Id.* at 1276.

33. *Id.* at 1286-87. National Fuel asserted at least twenty-one affirmative defenses. *Id.* at 1274-75 n.1. The district court granted Westwood's motion for summary judgment on several of these defenses. For instance, the court barred National Fuel's defenses which were based upon the unconstitutionality of CERCLA, lack of causation, and the use of state-of-the-art methods for disposal. *Id.* at 1286-87. The district court permitted National Fuel to assert its equitable defenses at trial. *Id.* at 1287.

34. *Westwood Pharmaceuticals*, 737 F. Supp. at 1287.

35. *Id.*

36. Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distrib. Corp., 767 F. Supp. 456 (W.D.N.Y. 1991), *aff'd*, 964 F.2d 85 (2d Cir. 1992).

37. *See Westwood Pharmaceuticals*, 964 F.2d at 88-89.

38. *Toxic Waste Litigation*, *supra* note 3, at 1469. During the 1960's and 1970's, Congress enacted numerous laws to reduce the dangers of pollution in the environment. These laws included significant measures designed to ensure air and water quality. The more noteworthy Congressional efforts in this area include: the Clean Air Act of 1955, 42 U.S.C. § 7401 (1988 & Supp. III 1991); the National Emissions Standards Act of 1967, 42 U.S.C. § 7521 (1988 & Supp. III 1991); the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 (1988 & Supp. III 1991). Implicit in Congressional efforts during this time was the ac-

tion, however, dealt with the quality of air and water resources;[39] it was not until enactment of the Resource Conservation and Recovery Act of 1976 (RCRA)[40] that Congress meaningfully[41] addressed the dangers posed by hazardous waste.[42] RCRA regulates current hazardous waste-related activity, i.e., generation, processing and disposal, from "cradle to grave," but provides no remedy for past releases of hazardous substances.[43]

Congress enacted CERCLA in 1980 to combat the environmental and public health hazards posed by releases from hazardous substances.[44] Under CERCLA, EPA is authorized to take cleanup action itself and later recover its costs from responsible parties.[45] Alternatively, EPA can order a responsible party to take cleanup action itself.[46]

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knowledgement that Congress had failed in the past to adequately address the nation's pollution problems.

39. *See supra* note 38. Each statute referred to in note 38 *supra*, protects air and water quality.

40. Resource Conservation and Recovery Act §§ 3001-5006, 42 U.S.C. §§ 6921-6956 (1988) (RCRA). RCRA is incorporated in subchapter III of the Solid Waste Disposal Act § 1002, 42 U.S.C. § 6901 (1988).

41. The Safe Drinking Water Act of 1974, 42 U.S.C. §§ 300f-300j-26 (1988), authorizes EPA to establish guidelines for regulation of hazardous waste. However, this act was dreadfully ineffective in dealing with the hazardous waste problem because it focused only upon the effects of pollution on drinking water. Congress enacted RCRA to fill this void. Amy E. Aydelott, Comment, *"CERCLA-ING" the Issues: Making Sense of Contractual Liability Under CERCLA*, 3 VILL. ENVTL. L.J. 347, 351 (1992).

42. *See Toxic Waste Litigation*, *supra* note 3, at 1470-71.

43. *See* J. GORDON ARBUCKLE ET AL., ENVIRONMENTAL LAW HANDBOOK 60 (12th ed. 1993). RCRA establishes a manifest system for tracking environmental waste. *Id.* at 60-61.

44. United States v. Hooker Chem. & Plastics Corp., 680 F. Supp. 546, 548 (W.D.N.Y. 1988); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 576 (D. Md. 1986); *see also Toxic Waste Litigation*, *supra* note 3, at 1471 (discussing impetus for passage of CERCLA).

With CERCLA, Congress endeavored to reduce the danger to human health and the environment posed by previously dumped hazardous waste (and thus, not regulated under RCRA). Much of this dumping occurred at sites no longer receiving hazardous waste. This particular threat became known as the "inactive hazardous waste site problem." H.R. REP. No. 1016, 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120 [hereinafter H.R. 1016] (discussing impetus for passage of CERCLA). Love Canal in Buffalo, New York, is the paradigm of the "inactive waste site" Congress sought to address. Love Canal involved the release of large amounts of extremely hazardous waste into waterways. *Hooker Chemicals*, 680 F. Supp. at 548. Aggravating the situation, the property was sold to the local school district, which constructed a school adjacent to the site. *Id.* at 549. In addition, the State of New York built the LaSalle Expressway directly through the area where the waste was dumped. *Id.* For further discussion of the history of the Love Canal disaster, see *infra* note 120.

45. *See* CERCLA §§ 104(a), 107(a), 42 U.S.C. §§ 9604(a), 9607(a).

46. *See* CERCLA § 106(a), 42 U.S.C. § 9606(a).

The circumstances leading to CERCLA's passage have profoundly influenced hazardous waste regulation since 1980. During the two years preceding enactment of CERCLA, the Love Canal disaster[47] awoke public concerns about the widespread danger of hazardous waste pollution.[48] Congress endured significant public pressure to deliver effective hazardous waste litigation before the 96th Congress' recess.[49] Consequently, Congress equipped CERCLA with an iron enforcement fist,[50] but provided little in terms of legislative history to guide EPA and the courts in implementing the law.[51]

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47. For a discussion of the details of the Love Canal incident, see *infra* note 120 and accompanying text.

48. The national media first reported the Love Canal disaster on August 2, 1978. *See* Donald G. McNeil, Jr., *Upstate Waste Site May Endanger Lives*, N.Y. TIMES, August 2, 1978, at A1. In addition to generating public awareness of the hazardous waste problem, the Love Canal incident was instrumental to the congressional hazardous waste initiative. In fact, CERCLA's legislative history refers specifically to the contamination at the Love Canal site. The very first finding of Congress regarding the need for a legislative initiative reads: "Hooker Chemical's three disposal sites in the Niagara Falls, New York, area contain an estimated 352 million pounds of industrial chemical waste, including TCP (which is often contaminated with one of the most toxic substances known to man, dioxin) and lindane, a highly toxic pesticide product." H.R. 1016, *supra* note 44, at 6121.

49. *See* 1 CERCLA LEGIS. HIST., *supra* note 29, at xviii-xxi (Summary of Major Bills - Stafford-Randolph Compromise).

50. *See* ARBUCKLE, *supra* note 43, at 267. CERCLA defines "hazardous substance" more broadly than any other hazardous waste statute. *See* CERCLA § 101(14), 42 U.S.C. § 9601(14). The statute's regulation of inactive waste disposal sites closes the aperture left by RCRA. ARBUCKLE, *supra* note 43, at 269-74.

51. *See* Frank P. Grad, *A Legislative History of The Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1-2 (1982).

The circumstances attendant to CERCLA's enactment resulted in a vague legislative history. Public concern over the dangers posed by hazardous waste exerted significant pressure on the Congress to take legislative action. The issue came to a head when the national elections of November 1980 removed the Democrats from power in both the Senate and the White House. Unsure of incoming Republicans' stance on hazardous waste regulation, the 96th Congress hurried to put together a law prior to the session's recess. 1 CERCLA LEGIS. HIST., *supra* note 29, at xxi.

When it became clear that the bills then being debated in the separate chambers would not be passed, Senator Stafford offered amendments that ultimately evolved into the Stafford-Randolph Compromise. Senator Stafford intended the amendments to remove the most controversial provisions of the legislation while preserving those provisions critical to achieving the objectives of the lawmakers. *Id.* at xix. This compromise provided that the Senate would approve the compromise legislation in the form of amendments to H.R. 7020. *Id.* at xxi. Since the bill contained revenue generating provisions, the language of S. 1480 replaced the language of H.R. 7020, save the enacting clause, and the bill was returned to the House for final approval in order to comply with Article I, Section 7 of the United States Constitution. *Id.*; Grad, *supra*, at 29.

When the Senate bill reached the House, it generated considerable controversy. Due to the time constraints on Congress, the House debated the bill under a "suspension of the Rules," which effectively amounted to a "take it or leave it"

1. *CERCLA Imposes Strict Liability*

Faced with pressures to remedy the hazardous waste problem, Congress intended that CERCLA would impose strict liability[52] on "covered persons."[53] Only the very narrow affirmative defenses enumerated in section 107(b) of the statute limit this strict liability.[54] That section provides affirmative defenses to covered persons based on a lack of causation.[55] These defenses shield the defendant when response costs are incurred as a result of an act of God, an

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proposition for the Representatives. Grad, *supra*, at 1, 29-30. Anxious to enact hazardous waste legislation, and faced with tenuous support in the Senate and the twilight of the 96th Congress, the House passed the bill. President Carter signed the bill into law on December 11, 1980. *Id.* at 35.

The judiciary and commentators alike have derided CERCLA's legislative history. One court noted: "Even the legislative history must be read with caution since last minute changes in the bill were inserted with little or no explanation." United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983). As Frank Grad wrote, CERCLA "ha[s] virtually no legislative history at all[.]" Grad, *supra*, at 2.

52. New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); *see* 1 CERCLA LEGIS. HIST., *supra* note 29, at 164 (statement of Rep. James Florio). While CERCLA does not explicitly impose strict liability on PRPs, this intent is clear from the legislative history. *Id.* CERCLA's language and structure mirror that of § 311 of the Federal Water Pollution Control Act ("CWA"), which at the time CERCLA was passed, had been consistently interpreted as imposing strict liability. Grad, *supra* note 51, at 15-16. In fact, Representative Florio introduced into the Congressional Record a letter from the Assistant United States Attorney General, summarizing the caselaw that established strict liability under CWA. 1 CERCLA LEGIS. HIST., *supra* note 29, at 164. Thus CERCLA's liability scheme resembles state law versions of strict liability: the burden of proof shifts from the plaintiff to the defendant. *See Toxic Waste Litigation*, *supra* note 3, at 1544.

53. CERCLA § 107(a) imposes liability on "covered persons," defined as follows:

> (1) the owner and operator of a vessel or a facility,
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> (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,
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> (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 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 . . . .

CERCLA § 107(a), 42 U.S.C. § 9607(a).

54. For a discussion of the defenses available under CERCLA, see *infra* text accompanying notes 55-59. For the text of the defenses authorized by CERCLA, see *supra* note 6. As previously noted, many courts have interpreted the statute as obviating all other equitable defenses.

55. *See Shore Realty*, 759 F.2d at 1044; *see also Toxic Waste Litigation*, *supra* note 3, at 1544.

act of war, or an act or omission of a third party other than the defendant.[56] The third-party defense protects PRPs from liability if "an act or omission of a third party"[57] caused the "release or threat of release."[58] CERCLA restricts availability of the defense, however, to situations where the acts or omissions did not occur "*in connection with* a contractual relationship, existing directly or indirectly, with the defendant."[59] If a release or threat of release was caused by an act or omission of a third party *in connection with* a contract with the defendant, the third-party defense is unavailable. Thus, the contractual relationship exception significantly limits the third-party defense. The scope of the contractual relationship exception to the third-party defense was the issue before the Second Circuit in *Westwood Pharmaceuticals.*[60]

2. *Legislative History of the Contractual Relationship Exception*

The third-party defense, as originally drafted in H.R. 7020,[61] did not contain the contractual relationship exception. Instead, H.R. 7020 originally conditioned the defense only on the defendant's ability to show that a third party was the sole cause of the damage, and that the defendant exercised due care.[62] However, by providing a defense that required only the demonstration of due care, H.R. 7020 contravened the Restatement (Second) of Torts, section 522, which imposes strict liability upon those engaged in

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

57. *Id.*

58. *Id.*

59. *Id.* (emphasis added).

60. 964 F.2d 85 (2d Cir. 1992). For a discussion of the issues before the Second Circuit in *Westwood Pharmaceuticals,* see *infra* notes 137-49 and accompanying text.

61. H.R. 7020, entitled the "Hazardous Waste Containment Act" was one of several bills debated by the 96th Congress in pursuit of hazardous waste legislation. Grad, *supra* note 51, at 2. Other bills considered by Congress include H.R. 85 and S. 1480. *Id.* H.R. 7020, in name only, ultimately evolved into CERCLA as enacted. *See supra* note 51. However, the legislation approved by the Senate in the form of H.R. 7020 contained the third-party defense set forth in H.R. 7020 as approved by the House, almost verbatim. *See* 1 CERCLA LEGIS. HIST., *supra* note 29, at 164 (comments of Rep. Florio, stating "[t]hese limited defenses are lifted almost verbatim from our earlier passed bill.").

62. 1 CERCLA LEGIS. HIST., *supra* note 29, at 224-25 (statement of Rep. Gore). As originally enacted, § 307(a)(1)(C) of H.R. 7020 would have permitted the defendant to escape liability if the defendant could show that the damages were "caused solely by . . . an act or omission of a third party [and] if the defendant [could] establish[ ] that he exercised 'due care' with respect to the hazardous waste concerned, taking into consideration the characteristics of such hazardous waste." *Id.*

abnormally dangerous activities.[63] Because of this, Representative Albert Gore was concerned that if the legislation passed in that form, the law would remove the strict liability that the common law imposed on handlers of hazardous waste.[64]

To remedy this apparent weakness in the legislation, Gore introduced an amendment that eventually evolved into the contractual relationship exception.[65] Gore's amendment required the defendant to show that it did not share a contractual relationship with the responsible third party in order to benefit from the defense.[66] The purpose of the amendment was to prevent generators

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63. *Id.* The Restatement (Second) of Torts § 522 states:

CONTRIBUTING ACTIONS OF THIRD PERSONS, ANIMALS AND FORCES OF NATURE

One carrying on an abnormally dangerous activity is subject to strict liability for the resulting harm although it is caused by the unexpectable

(a) innocent, negligent or reckless conduct of a third person, or

(b) action of an animal, or

(c) operation of a force of nature.

RESTATEMENT (SECOND) OF TORTS, § 522 (1977).

64. *Id.* at 219. "Under the common law, the defendant could not escape liability even if he did take every precaution [i.e. exercise due care]. H.R. 7020, then, effectively destroys a rule that has been in effect for over 100 years (since Rylands v. Fletcher)." *Id.* (statement of Rep. Gore in support of his proposed amendment creating contractual relationship exception) (citation omitted). This assessment of the common law was not entirely accurate. Ruhl, *supra* note 16, at 305-06. One cannot definitively state that all activities conducted by handlers of hazardous waste would constitute abnormally dangerous activity under the common law. Gore relied upon only very general secondary authority for this proposition. He argued based on the Restatement (Second) of Torts § 520, which lists the factors to be considered in characterizing an activity as abnormally dangerous. *See* 1 CERCLA LEGIS. HIST., *supra* note 29, at 218-19. Presumably, Gore assumed the courts would consider the handling of hazardous waste to be an abnormally dangerous activity. Since the courts could never evaluate each possible circumstance in which CERCLA would apply, Gore's conclusion that handling hazardous waste would be classified as abnormally dangerous under the common law, while likely accurate in most situations, was an oversimplification of the law. *See* Ruhl, *supra* note 16, at 305-06. Gore was correct in stating that, if strict liability applied, no third-party defense would be available under the common law. *Id.*

65. Grad, *supra* note 51, at 16-17; *see also* Ruhl, *supra* note 16, at 305. Representative Gore's original amendment required the defendant to prove that the third party acted negligently. 1 CERCLA LEGIS. HIST., *supra* note 29, at 227. However, as this standard was regarded as "unnecessary and overburdensome" on the defendant, Gore agreed to delete it from his amendment. *Id.* at 222 (statement of Rep. Florio).

66. *Id.* at 218; *see also* CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). The Gore amendment was subsequently amended. *See supra* note 65. However, the essential nature of the amendment survived and appears in CERCLA as enacted. For a discussion of the amendment and resulting legislation, see *infra* notes 67-72 and accompanying text.

of hazardous waste from avoiding liability simply by contracting it away.[67]

Gore's amendment, however, did not completely eradicate the third-party defense.[68] The amendment incorporated a contractual relationship exception and a standard of due care for the selection of contractors.[69] The incorporation of the due care standard into the defense indicates that Gore intended there to be contractual relationships that did not automatically preclude defendants from asserting the third-party defense.[70]

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67. *See* 1 CERCLA LEGIS. HIST., *supra* note 29, at 220. In explaining the purpose of the amendment, Representative Gore stated:

> My amendment moves H.R. 7020 closer to the common law in several ways. First, the amendment removes the ability of and incentive for a defendant to contract away liability. The amendment would insure that the common law rules of both strict and vicarious liability remain intact in cases in which a defendant seeks to shift the responsibility . . . to others with whom he is involved in a business relationship.

Id.

68. Ruhl, *supra* note 16, at 306; *see* 1 CERCLA LEGIS. HIST., *supra* note 29, at 227. Gore's amendment permitted the third-party defense to survive. The proposed amendment, however, significantly restricted the availability of the defense. Applying Gore's original amendment to H.R. 7020 as reported out of the House Committee on Interstate and Foreign Commerce, the defenses available under the legislation would have appeared as follows:

> SEC. 3071. (a) LIABILITY.—(1) Except for a release or threatened release, of hazardous waste which the defendant establishes to be caused solely by—
>
> (A) an act of God or an act of war,
>
> (B) negligence on the part of the Government of the United States,
>
> (C) 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.
>
> (2) For purposes of subparagraph (1)(C), a defendant (including a generator, transporter, shipper or disposer) must demonstrate that he exercised due care with respect to all foreseeable acts or omissions of any third party and that he exercised due care in light of all relevant facts and circumstances, including:
>
> (A) exercised due care in the selection and instruction of a responsible person engaged by such defendant for the transportation, storage, treatment or disposal of said hazardous waste;
>
> (B) provided adequate information as to the identity, quality, composition, condition, characteristics and potential hazard of the waste to such person;
>
> (C) took reasonable measures to assure and verify that such person properly carried out the activities for which he was engaged;
>
> (D) properly labeled, loaded and packaged the waste and properly equipped and maintained the container or facility used for the transportation, storage, treatment or disposal of the waste.

Id. at 227, 230. The above represents the author's combination of Gore's proposed amendments and the original bill as reported from committee.

69. 1 CERCLA LEGIS. HIST., *supra* note 29, at 227.

70. *See* Ruhl, *supra* note 16, at 306. Ruhl noted that

As enacted, CERCLA requires a defendant to show that "he exercised due care with respect to the hazardous substance concerned."[71] The inclusion of the contractual relationship exception "supports the position that the exception is limited to situations where the defendant could exercise or reasonably should have exercised control over the third party under the contract."[72]

IV. JUDICIAL INTERPRETATION

Westwood Pharmaceuticals represents the only significant circuit court discussion of the contractual relationship exception. Other circuit courts have faced the issue, but have not addressed the scope of the exception in detail,[73] choosing instead to rule on the availability of the defense based on other requirements of the statute, such as the "sole cause" or "due care" requirement. With the

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> [i]f Congressman Gore had intended for his amendment to cover all contractual relationships, his retention of the . . . due care standard for selection of contractors would have been in direct conflict with his intent. Rather, Congressman Gore contemplated the situation of a third party who is engaged by such a defendant for the transportation, storage, treatment, or disposal of the hazardous waste, and he prescribed the due care criteria applicable to such contractual relationships . . . . Therefore, not all contractual relationships would have been removed from the third party defense.

Id.

71. *See* CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). Contrast this reference with the extensive language of how the law would have appeared with Gore's original amendment, set forth at note 68, *supra.*

72. Ruhl, *supra* note 16, at 307. This is precisely what National Fuel argued to the Second Circuit in *Westwood Pharmaceuticals*, 964 F.2d 85 (2d Cir. 1992). Brief for Appellee at 19-24. National Fuel pointed to five facts as evidence of its lack of control over Westwood. First, there was an extended period of time between the sale of the property and the release. Second, the agreement of sale lacked any provisions regarding Westwood's post-purchase use of the land. Third, National Fuel was not informed of Westwood's intentions regarding the property. Fourth, National Fuel asserts that all of the wastes left on the site were properly sealed. Fifth, Westwood ignored National Fuel's repeated warnings to investigate the site and proceed more cautiously. *Id.* at 23-24.

73. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988). In both of these cases, the courts did not directly discuss the contractual relationship exception. In *Shore Realty*, the Second Circuit summarily addressed the contractual relationship exception with a brief comment in a footnote. New York v. Shore Realty Corp., 759 F.2d 1032, 1048 n.23 (2d Cir. 1985). For a discussion of the *Shore Realty* decision, see *infra* notes 97-106 and accompanying text. The Fourth Circuit in *Monsanto* relied heavily upon the reasoning of the district court decision in that case, and offered virtually no statutory analysis in support of its holding. *See* United States v. Monsanto Co., 858 F.2d 160, 173 (4th Cir. 1988). For a discussion of the *Monsanto* decision, see *infra* notes 79-89 and accompanying text.

exception of one district court in one case, the district courts have similarly avoided discussing the issue.[74]

The cases preceding *Westwood Pharmaceuticals* that addressed the contractual relationship exception can be classified into three general categories. The first category includes early cases in which the court construed the contractual relationship exception broadly, thereby limiting the availability of the third-party defense.[75] In later cases, courts interpreted the exception narrowly, making the defense available in more situations.[76] Cases that do not fall into the previous two categories comprise the third category. This category includes cases in which the court was not clear in its holding or hinged its decision on another requirement of the defense.[77]

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74. The Federal District Court for the Southern District of New York addressed the scope of the contractual relationship exception in Shapiro v. Alexanderson, 741 F. Supp. 472 (S.D.N.Y July 9, 1990) *on reargument* 743 F. Supp. 268 (S.D.N.Y Aug. 24, 1990). For discussion of the relevant caselaw that did not confront this issue, see *supra* notes 79-125 and accompanying text.

75. Cases interpreting the exception broadly include the following: United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) (precluding third-party defense based on existence of lease agreement between defendant and third party); United States v. Northernaire Plating Co., 670 F. Supp. 742, 748 (W.D. Mich. 1987) (finding that because defendants leased facility from landowner, their contractual relationship precluded defendants from asserting the third-party defense); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 993 (D.S.C. 1984), *aff'd sub nom.*, United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) ("Because there is no question of the contractual link between the landowners and [the third party], whose liability is admitted, the landowners cannot under any circumstances prove that the release was caused 'solely' by a third party which did not share a contractual relationship with them."); O'Neill v. Picillo, 682 F. Supp. 706, 728 (D.R.I. 1988) (requiring defendant to show that "'a *totally unrelated third party* is the *sole* cause of the release'" in order to benefit from the defense) (quoting United States v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987); City of Philadelphia v. Stepan Chem. Co., 18 Envtl. L. Rep. 20,133, 20,134 (E.D. Pa. 1987) (suggesting limitation of the defense "to situations where the responsible party has *no* connection to the third party"); United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356, (D.N.M. 1984) ("Because of this contractual link, defendant . . . cannot show . . . that the release was caused solely by a third party which did not share a contractual relationship with him.").

76. Cases interpreting the exception narrowly include: Shapiro v. Alexanderson, 743 F. Supp. 268, 271 (S.D.N.Y. 1990) ("The Court . . . does not embrace the view that the contractual relationship clause encompasses all acts by a third party with any contractual relationship with a defendant."); United States v. Hooker Chem. & Plastics Corp., 680 F. Supp. 546, 558 (W.D.N.Y. 1988) ("[Defendant's] . . . contractual relationships . . . preclude the company's assertion of a viable third-party defense in this case, because . . . of the nature of its relationships with these defendants in this case."); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 581 (D. Md. 1986) ("The evidence presented does not clearly demonstrate the full nature of the contractual and business relations between [the parties].").

77. The "other cases" include: New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (implying that any contractual relationship is sufficient to preclude

By the time the Second Circuit addressed the issue, a distinguishable trend towards interpreting the contractual relationship exception narrowly had evolved.[78]

A. Early Cases: Leaving Defendants Defenseless

Among the early cases interpreting the exception broadly was *United States v. South Carolina Recycling & Disposal, Inc. (SCRDI).*[79] *SCRDI* involved an action brought by EPA against both the landowners and the tenant of the property to recover cleanup costs incurred at a hazardous waste site in Columbia, South Carolina.[80] The landowner defendants had leased the property to co-defendant South Carolina Recycling & Disposal, Inc. ("South Carolina Recycling"), which disposed of hazardous waste on the leased property.[81] When EPA brought the action against the defendant landowner, the landowners sought the protection of the third-party defense, claiming that the tenant, South Carolina Recycling, was solely responsible for the release.[82]

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third-party defense); Washington v. Time Oil Co., 687 F. Supp. 529, 532 (W.D. Wash. 1988) ("There has been an insufficient showing that the release [was] caused solely by a third party."); United States v. Mottolo, 695 F. Supp. 615, 626 (D.N.H. 1988) ("The Court found above . . . that there were releases and threatened releases of hazardous substances at the [site] prior to [third party] involvement. Therefore, [third parties] could not be the sole cause of the releases, and a third-party defense is unavailable to [defendant]."); United States v. Tyson, 25 Env't. Rep. Cas. (BNA) 1987 (E.D. Pa. 1986) (holding that parties engaged in contractual relationship of ownership and accounts receivable sales were contractually related and unable to assert defense).

78. The "distinguishable trend" is evident in the three decisions immediately preceding the Second Circuit's decision in *Westwood Pharmaceuticals: Hooker Chemicals, Shapiro,* and the district court decision in *Westwood Pharmaceuticals.* In each of these cases, the court adopted the narrow view of the exception. Meanwhile, not a single court advocated a broad view of the exception in the four years preceding the Second Circuit's decision.

79. 653 F. Supp. 984 (D.S.C. 1984), *aff'd sub nom.*, United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988) (affirmed with regard to third-party defense; vacated and remanded on unrelated issues), *cert. denied,* 490 U.S. 1106 (1989) [hereinafter *SCRDI*].

80. *Id.* at 990-91.

81. *Id.* at 990. In 1972, defendant-landowners, Hutchinson and Seidenberg, leased property to Columbia Organic Chemical Co. (COCC), which planned to use the facility to store raw chemicals and materials used in its manufacturing process. In 1973 or 1974, several individuals associated with COCC began storing hazardous waste at the site. These individuals formed South Carolina Recycling & Disposal, Inc. ("South Carolina Recycling") in 1976, and continued storing wastes at the site. In 1978, South Carolina Recycling assumed COCC's verbal lease. During that time, South Carolina Recycling stored the chemicals in a dangerous manner, which resulted in fires, explosions, and the release of toxic fumes. *Id.*

82. *Id.* at 993.

EPA filed a Motion for Summary Judgment on the availability of the third-party defense. The Federal District Court for the District of South Carolina granted EPA's motion, thus precluding the landowners from asserting the third-party defense. Under the standard set forth by the court, "the landowners [had] to prove *inter alia* that 'the release or threat of release of a hazardous substance and the damages resulting therefrom were caused *solely* by . . . a third-party other than . . . one whose act or omission occur[ed] in connection with a contractual relationship . . . .'"[83] According to the court, because a contractual relationship existed between the landowners and South Carolina Recycling, "the landowners [could not] under any circumstances prove that the release was caused 'solely' by a third-party which did not share a contractual relationship with them [i.e., the landowners]."[84] The court assumed that *any* contractual relationship between the landowners and the defendant tenant precluded the third-party defense.[85] This interpretation conflicts with congressional intent in incorporating the contractual relationship exception into the third-party defense.[86]

In 1988, the Fourth Circuit summarily affirmed the SCRDI view on the scope of the contractual relationship exception. In *United States v. Monsanto Co.*,[87] the court upheld the *SCRDI* ruling, adding little to the district court's analysis.[88] Significantly, the Fourth Circuit based its decision in part on the landowners' admission that a lease existed: "[The landowners] concede they entered into a lease agreement with [the third party]. They accepted rent from [the

83. *SCRDI*, 653 F. Supp. at 993 (quoting CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3)) (emphasis added by the court).

84. *Id.*

85. *See id.* at 993. The court's decision is conclusory on the scope of the contractual relationship exception. Ruhl, *supra* note 16, at 302 ("The SCRDI court engaged in no separate causation analysis and did not consider the parameters of the contractual relationship with regard to the degree of control involved.").

86. Since Congress clearly intended to permit some contractual relationships that did not preclude the defense, the court's interpretation conflicts with congressional intent. For a discussion of the legislative history of the third-party defense, see *supra* notes 61-72 and accompanying text. The *result* in this case was not necessarily incorrect; however, the court's analysis failed to adequately consider the scope of the contractual relationship in coming to this result. Ruhl, *supra* note 16, at 302-03.

87. 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

88. *See id.* at 168-69. The Fourth Circuit discusses neither the statute nor the relationship between the parties. The court merely restates the district court's findings and presents carefully selected supporting evidence. *Compare Monsanto*, 858 F.2d at 168-69 *with SCRDI*, 653 F. Supp. at 993.

third party] and after [South Carolina Recycling] was incorporated, they accepted rent from [South Carolina Recycling]."[89]

The district court in *United States v. Argent Corp.*[90] also interpreted the contractual relationship exception broadly. The facts of *Argent Corp.* parallel those of *SCRDI*: a defendant-landowner sought to invoke the third-party defense, claiming that the tenant-disposers solely caused the release.[91] Relying upon *SCRDI*, the court rejected the defense and granted the government's Motion for Summary Judgment.[92] The court held that "[b]ecause of this contractual link, defendant . . . cannot show . . . that the release was caused solely by a third-party which did not share a contractual relationship with [defendant]."[93] In *United States v. Northernaire Plating Co.*,[94] upon essentially similar facts,[95] a district court again declined to examine the nature of the contractual relationship between the parties and precluded the defendants from asserting the third-party defense.[96] The courts' summary disposition of the issues in these cases embodies the early trend to strictly limit the availability of the third-party defense.

B. The Emerging Trend: A Narrow Interpretation of the Contractual Relationship Exception

The first case to suggest that more than the mere existence of any contractual relationship was required to preclude the third-party defense was *New York v. Shore Realty Corp.*[97] On July 14, 1983,

89. *Monsanto*, 858 F.2d at 169. The Fourth Circuit also based its decision in part on the landowners' failure to exercise due care. *Id.* The Fourth Circuit's brief discussion of the lease agreement and rent payments arguably evidences the court's consideration of the nature of the parties' contractual relationship. In light of the court's failure to indicate that the contractual relationship exception hinged upon the nature of the contract, a more plausible explanation is that the court cited the lease and rent payments as evidence that a contractual relationship existed and not as a discussion of the nature of the relationship.

90. 21 Env't. Rep. Cas. (BNA) 1354 (D.N.M. 1984).

91. *See id.* at 1356.

92. *Id.*

93. *Id.* The *Argent Corp.* court used language virtually identical to that used by the court in *SCRDI*. *See supra* text accompanying note 83.

94. 670 F. Supp. 742 (W.D. Mich. 1987).

95. *See id.* at 744. Defendant Northernaire operated a metal electroplating business in Cadillac, Michigan, on property owned by and leased from co-defendant R.W. Meyer, Inc. *Id.* Meyer argued it was entitled to advance the third-party defense because Northernaire, its tenant and a third party, was responsible for the release. *Id.* at 748.

96. *Id.* "Northernaire leased the facility from [the landowner]. This contractual relationship precludes either of these defendants from invoking the protections of Section 9607(b)(3) . . . ." *Id.*

97. 759 F.2d 1032 (2d Cir. 1985).

the defendant, Shore Realty, entered into a contract to purchase a tract of land near Hempstead Harbor.[98] The contract provided that Shore could void the agreement after conducting an environmental study.[99] After Shore conducted a study which revealed significant soil contamination, Shore applied to the New York State Department of Environmental Conservation (DEC) for a waiver from liability and was denied.[100] Notwithstanding the DEC's denial of the waiver, Shore assumed title to the property on October 13, 1983.[101] During the two months Shore owned the property, the tenants stored additional wastes at the site.[102] By January 3, 1984, it became apparent that the waste was leaking from the storage equipment.[103]

The Second Circuit denied Shore the third-party defense based on Shore Realty's ownership of the property during the period of disposal.[104] In a footnote, however, the court stated: "[w]hile we need not reach the issue, Shore appears to have a contractual relationship with the previous owners that also blocks the defense. The purchase agreement includes a provision by which Shore assumed at least some of the environmental liability of the previous owners."[105] It is significant that the court did not rely upon the mere *existence* of a contractual relationship to preclude the defense. Rather, in the second sentence of the footnote, the

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98. *Id.* at 1038.

99. *Id.*

100. *Id.* at 1039.

101. *Shore Realty*, 759 F.2d at 1039.

102. *Id.*

103. *Id.*

104. *Id.* at 1048. In this assertion, the Second Circuit was unclear. The court reasoned as follows:

> Shore argues that it had nothing to do with the transportation of the hazardous substances and that it has exercised due care since taking control of the site. Who the "third part(ies)" Shore claims were responsible is difficult to fathom. It is doubtful that a prior owner could be such, especially the prior owner here, since the acts or omissions referred to in the statute are doubtless those occurring during the ownership or operation of the defendant.

Id.

It is not unreasonable to argue that the tenants on the property were responsible for the release or threat of release of hazardous waste. This approach was taken in *SCRDI*, *Argent*, and *Northernaire Plating Co.* The court was more likely proposing that the defendant could not satisfy the "sole cause" or "due care" requirements because it permitted disposal of wastes, from which there was a release, *after* taking title to the property.

105. *Shore Realty*, 759 F.2d at 1048 n.23.

Second Circuit implied that the *nature* of the contractual relationship, not its mere existence, precluded the third-party defense.[106]

United States v. Maryland Bank & Trust Co.[107] was the first case to hold[108] that the contractual relationship exception did not preclude all parties with *any* contractual relationship with a third-party from asserting the defense. In that case, Maryland Bank & Trust ("MB&T") had assumed title to property contaminated by hazardous waste.[109] EPA removed the waste from the site and sought reimbursement from MB&T under CERCLA section 107(a)(1), as the current owner of the property.[110] In addition to contesting its status as an "owner and operator" under CERCLA,[111] MB&T raised the third-party defense, arguing that the prior owners were solely responsible for the release.[112] In support of a Motion for Summary Judgment, EPA argued that the bank could not maintain the third-party defense because a contractual relationship existed between MB&T and the parties MB&T sought to hold responsible.[113] This relationship consisted of several loans to prior owners of the property for business purposes, and a loan to the most recent owner for which the property was mortgaged.[114] The court denied EPA's Mo-

106. *See* Ruhl, *supra* note 16, at 303. The court did not reject the defense because of the existence of the purchase agreement between the parties. Rather, the court focused on the terms of the agreement and the agreement's relationship to the hazardous waste. The Second Circuit's subsequent interpretation of the contractual relationship exception in *Westwood Pharmaceuticals*, the subject of this Note, supports this view of the *Shore Realty* court's language.

107. 632 F. Supp. 573 (D. Md. 1986).

108. *Shore Realty* predates United States v. Maryland Bank & Trust Co., discussed *infra* notes 107-17 and accompanying text. However, as the *Shore Realty* court limited its discussion of the contractual relationship exception to a footnote, the author does not regard *Shore Realty* as the first case to recognize, in its holding, the distinction intended by Congress. For a discussion of the courts' interpretation of the legislative history to the contractual relationship exception, see *supra* notes 61-72, 97-106.

109. *Maryland Bank & Trust Co.*, 632 F. Supp. at 575.

110. *Id.* at 575-76.

111. *Id.* at 577-80. MB&T argued that its status as a lender protecting its security interest entitled the bank to the security interest exemption under CERCLA § 101(20)(A). *Id.*; *see* CERCLA § 101(20)(A), 42 U.S.C. 9601(20)(A).

112. *Maryland Bank & Trust Co.*, 632 F. Supp. at 576.

113. *Id.* at 581.

114. *Id.* at 575. During the 1970's, Maryland Bank & Trust (MB&T) made several loans to Herschel McLeod, the former owner of the property at the center of the controversy, for use in his trash and garbage business. The property on which the release occurred, secured at least one of these loans. *Id.* During 1972 or 1973, McLeod permitted the dumping of hazardous waste on the property. In 1980, Mark McLeod (son of Herschel) borrowed $335,000 from MB&T to purchase the property from his father. Mark McLeod soon failed to make payments on the loan and MB&T took title to the property through a foreclosure sale. *Id.*

tion for Summary Judgment, holding that material issues of fact existed concerning the nature of the relationship between MB&T and the prior owners of the property.[115] The court based its decision on the lack of any evidence showing that there were outstanding loans in 1972 and 1973, the period of the disposal.[116] The court indicated that the availability of the defense hinged on the *nature* of the contractual relationship, and not its mere existence.[117]

United States v. Hooker Chemicals & Plastics Corp.[118] followed the rationale set forth in *Shore Realty* and *Maryland Bank & Trust.* The *Hooker Chemicals* litigation stemmed from the Love Canal disaster in Buffalo, New York.[119] This case involved an action by both the federal government and the State of New York against the former owner of Love Canal to recover response costs incurred as a result of the former owner's dumping of hazardous waste.[120] The defendant, who was the disposer and former owner of the property, sought the protection of the third-party defense, maintaining that actions taken by the subsequent owners of the property were the sole cause of the release.[121]

The district court granted the plaintiff's Motion for Partial Summary Judgment on the CERCLA claim, denying the defendant

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115. *Id.* at 581.

116. *Maryland Bank & Trust Co.*, 632 F. Supp. at 581.

117. *Id.* "[T]he evidence presented does not clearly demonstrate the full nature of the contractual and business relations between McLeod [(the third party)] and MB&T." *Id.* The court also pointed out that the loans, while secured by the property, were not necessarily used for business purposes. *Id.* at 581 n.9.

118. 680 F. Supp. 546 (W.D.N.Y. 1988). The Second Circuit and district courts of New York were the first courts to give a narrow construction to the contractual relationship exception. Judge Curtin of the United States District Court for the Western District of New York authored both the *Hooker Chemicals* and *Westwood Pharmaceuticals* decisions. *Shore Realty* was also decided in the Second Circuit.

119. *Hooker Chemicals*, 680 F. Supp. at 548.

120. *Id.* at 548-52. Love Canal was originally designed to be a power canal bypassing Niagara Falls. When this project was abandoned, a dead-end canal along the Lawrence River remained. In the 1940's, Occidental Chemical Corporation (OCC) arranged with the Niagara Power and Development Company for the use of this property for waste disposal. *Id.* at 549. Eventually, OCC purchased the property. During the period from 1942 until approximately 1953, OCC dumped wastes in the canal. *Id.* In 1953, OCC deeded the property to the Board of Education of Niagara Falls, New York, who built a school adjacent to the canal. *Id.* at 549, 552. The Board of Education subsequently deeded a portion of the property to the City of Niagara Falls, which installed sewers and conduits through the site. *Id.* at 552. In 1968, the State of New York constructed the LaSalle Expressway directly through the waste site. *Id.* OCC argued that these last three parties, the Board of Education, the City of Niagara Falls, and the State of New York, were responsible for the response costs incurred at Love Canal. *Id.* at 549, 552.

121. *Id.*

use of the third-party defense.[122] Judge Curtin based his decision on the nature of the contractual relationship between the defendants and the allegedly responsible third parties.[123] The court concluded that the contractual relationship between the parties precluded the defense because the "[defendant] was able to control the acts of the[ ] subsequent purchasers because of the nature of its relationship with the[ ] defendants in this case."[124]

The *Hooker Chemicals* holding is significant because it recognized that the mere existence of the contractual relationship is not sufficient to preclude the defense. Further, it introduces a new concept into the contractual relationship exception analysis: a defendant's control over the third party.[125] The district court's assertion that control was a necessary element in the relationship between the defendant and the allegedly responsible third party marked a significant step in defining the nature of the relationship necessary to preclude the third-party defense.

Shapiro v. Alexanderson is the most recent case, exclusive of *Westwood Pharmaceuticals*, to address the boundaries of the contractual relationship exception.[126] In *Shapiro*, a landowner sought to recover response costs from Putnam County, New York.[127] Defendant, Putnam County, agreed to purchase land from the plaintiffs, and the parties executed an agreement of sale to that effect.[128] The

122. *Id.* at 559.

123. *Hooker Chemicals*, 680 F. Supp. at 559.

124. *Id.* The court did not explain exactly how the defendant, OCC, could exert significant control over the third parties that OCC alleged were responsible for the contamination. *See id.*

125. *Id.* at 551. The Second Circuit's analysis contains the first reference to "control" in the relevant caselaw. The reference likely descends from the government's argument. The United States argued that Congress intended to preclude the defense through the contractual relationship exception when control was exercised by the defendant. *Hooker Chemicals*, 680 F. Supp. at 551. According to the United States, " '[b]ecause the generator has a contract with the disposer, the generator is in a position to *control* the disposer's behavior with respect to the generator's waste.' " *Id.* at 551. (quoting brief for United States) (emphasis appeared in brief).

One commentator has called for a revision of the statute which would require control as an element of the relationship necessary to preclude use of the third-party defense. *See* Ruhl, *supra* note 16, at 312. Regardless, the element of control does not descend from an analysis of legislative history of the contractual relationship exception. *See supra* notes 61-72 and accompanying text.

126. Shapiro v. Alexanderson, 741 F. Supp. 472 (S.D.N.Y. July 9, 1990) [hereinafter *Shapiro I*], *on reargument*, 743 F. Supp. 268 (August 24, 1990) [hereinafter *Shapiro II*].

127. *Shapiro I*, 741 F. Supp. at 472. The opinion on reargument did not restate the facts of the case. Accordingly, the relevant facts were gleaned from the district court's original opinion.

128. *Id.* at 474.

agreement permitted the county to dispose of hazardous waste at the site during the executory period.[129] Although Putnam County used the property as a solid waste disposal site (pursuant to the contract), the sale transaction never occurred, leaving Shapiro with legal title to the property at all times.[130] Shapiro incurred response costs resulting from leaching of the waste that the county had deposited at the site and sought reimbursement from the County.[131]

In a cross Motion for Summary Judgment, the County advanced the third-party defense, claiming that Shapiro was responsible for the release of hazardous substances into the environment.[132] The district court found that questions of material fact existed concerning the cause of the leachate problems.[133] On appeal, Shapiro argued that the questions of fact were irrelevant because the contractual relationship between Shapiro and Putnam County precluded the County's use of the defense.[134] The court permitted the defense:

> The Court . . . does not embrace the view that the contractual relationship clause encompasses all acts by third parties with any contractual relationship with a defendant. Such a construction would render the language "in connection with" mere surplusage. The act or omission must

129. *Id.* The executory period is the period commencing with the execution of the sale agreement and ending with the settlement transaction.

130. *Id.* The contract of sale provided the county with the right to immediately begin operating a landfill. The County later resolved to rescind the contract due to misbehavior of a County official in connection with the sale. The state court of New York voided the contract. *Shapiro II*, 743 F. Supp. at 271 n.1.

131. *Shapiro I*, 741 F. Supp. at 474.

132. *Shapiro II*, 743 F. Supp. at 269-70. The County argued that Shapiro caused the release after Putnam County surrendered possession to Shapiro. *Shapiro I*, 741 F. Supp. at 478. According to the County, Shapiro constructed a berm on the property, which if maintained properly, would have prevented leaching of wastes into the water supply. *Id.* The County argued that the owner's negligent maintenance of the berm caused the release. *Id.* Shapiro contended that the berm never existed, and even if it had, it would not have prevented leaching. *Id.*

133. *Shapiro I*, 741 F. Supp. at 478.

134. *Shapiro II*, 743 F. Supp. at 270. In its original opinion, the district court precluded a third party from asserting the defense because of its contractual relationship with the defendant, Putnam County. *Shapiro I*, 741 F. Supp. at 478. The county advanced the third-party defense claiming the acts of the landfill's operator, Steven A. Estrin, Inc., were the sole cause of the release and that the County had exercised due care in the selection of the operator. *Id.* The court summarily rejected that defense based on the existence of the contractual relationship. *Id.* On reargument, Shapiro sought preclusion of the defense as it applied to its acts on the same "contractual relationship" theory. *Shapiro II*, 743 F. Supp. at 270.

> occur in a context so that there is a connection between the acts and the contractual relationship.[135]

The court concluded that "the contractual relationship had dissolved and therefore the alleged omissions of the owners were not in connection with the contract."[136] This analysis is significant because it represents the first judicial analysis of the statutory language of the contractual relationship exception. Further, the *Shapiro* court was the first court to *expressly* reject a broad construction of the contractual relationship exception.

IV. WESTWOOD PHARMACEUTICALS, INC. V. NATIONAL FUEL GAS DISTRIBUTION CORP.

Against this background, the Second Circuit considered the scope of the contractual relationship exception to CERCLA's third-party defense.[137] Westwood had sought to preclude National Fuel from asserting the third-party defense based on the contractual relationship Westwood had formed with National Fuel in connection with the sale of the property.[138] The Second Circuit held that in order for the contractual relationship exception to bar the third-party defense: (1) the phrase "in connection with a contractual relationship" under CERCLA section 107(b)(3), required more than the mere existence of any contractual relationship between the owner of land from which there had been a release of hazardous substances, and a third party whose act or omission was the sole cause of the release; and (2) the contract must either relate to the hazardous substance, or permit the landowner to exert control over the third party such that the release could have been prevented by the landowner's exercise of due care.[139]

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135. *Shapiro II*, 743 F. Supp. at 271.

136. *Id.* at 272.

137. The Second Circuit relied heavily upon the district court's reasoning. *See Westwood Pharmaceuticals*, 964 F.2d at 89. In large part, the Second Circuit simply adopts the rationale of the district court by reference. Consequently, this Note in certain instances, will impute the district court's reasoning to the Second Circuit. The Second Circuit's brief restatement and adoption of the district court's reasoning warrants such an approach.

138. *Id.* at 86.

139. *Id.* at 91-92. The Second Circuit made a third holding on a distinct, but related issue. The court held that in defining "contractual relationship," CERCLA § 101(35)(C) "does not entirely preclude previous landowners from invoking the third-party defense." *Id.* Westwood argued that this section should preclude all previous landowners from asserting the defense. Brief on behalf of Appellant at 31. CERCLA § 101(35)(C) provides:

> Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who

A. The Second Circuit's Reasoning

The court based its decision principally upon a statutory interpretation of section 107(b)(3).[140] The court stated that the contractual relationship exception should be construed to give effect to each and every word of the statute; to do otherwise would violate well accepted principles of statutory construction.[141] The construction urged upon the court by Westwood, however, would effectively render the "in connection with" language of the section meaningless and, therefore, the court rejected that construction.[142] To sup-

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would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release . . . when the defendant owned the real property and then subsequently transferred ownership of the property . . . without disclosing such knowledge, . . . no defense under section 9607(b)(3) of this title shall be available to such defendant.

CERCLA § 101(35)(C), 42 U.S.C. § 9601(35)(C). The holding of the Second Circuit responded to Westwood's argument that CERCLA's definition of "contractual relationship," as amended by Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986) [hereinafter SARA], precluded National Fuel from asserting the third-party defense. *See* Brief on behalf of Appellant Westwood Pharmaceuticals, Inc. at 31-37.

The Second Circuit rejected this argument for three reasons. First, the court reasoned that Congress knew how to place the defense out of the reach of a certain class of persons, as demonstrated by the second sentence of § 101(35)(C). Thus, if Congress wanted to do so for all previous landowners, it would have. *Westwood Pharmaceuticals*, 964 F.2d at 90. Second, the Second Circuit doubted that Congress would bury a significant change in the scope of the third-party defense in the definition section of the statute. *Id.* Third, the first sentence of the section provides an exception to the "in connection with" language for the innocent landowner. *Id.* Thus, this language was irrelevant because National Fuel was not asserting the innocent landowner defense. *Westwood Pharmaceuticals*, 767 F. Supp. at 461. For more extensive discussion of the innocent landowner defense, see L. Jager Smith, Jr., Note, *CERCLA's Innocent Landowner Defense: Oasis or Mirage?*, 18 COLUM. J. ENVTL. L. 155 (1993); Daniel M. Steinway, *The Innocent Landowner Defense: An Emerging Doctrine*, 4 Toxics L. Rep. (BNA) 486 (Sept. 27, 1989); Richard H. Mayes, *The Blessed State of Innocence: The Innocent Landowner Defense Under Superfund*, 20 Env't Rep. (BNA) 809 (Sept. 8, 1989).

140. *See Westwood Pharmaceuticals*, 964 F.2d at 89.

141. *Id.* "'[E]ffect must be given, if possible, to every word, clause and sentence of a statute . . . so that no part will be inoperative or superfluous, void or insignificant.'" Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp., 737 F. Supp. 1272, 1275 (W.D.N.Y. 1990), *on reargument* 767 F.Supp. 456 (W.D.N.Y. 1991), *aff'd*, 964 F.2d 85 (2d Cir. 1992) (quoting *National Ass'n of Recycling Indus., Inc. v. Interstate Comm. Comm'n*, 660 F.2d 795, 799 (D.C. Cir. 1981) (citations omitted)).

142. *See Westwood Pharmaceuticals*, 964 F.2d at 89. Westwood argued that the phrase "in connection with" could retain utility under the broad interpretation of the contractual relationship exception in situations involving contracts other than real estate transfers. Brief for Appellant at 27, Westwood Pharmaceuticals v. National Fuel Gas Distrib. Corp., 964 F.2d 85 (2d Cir. 1992) (No. 91-9157) [hereinafter Appellant's Brief]. According to Westwood, "the phrase retains vitality as a qualifier to other kinds of contracts that section 107(a) liable parties might have, including transporters or generators, or even owners with respect to contracts

port its interpretation of the statute, the Second Circuit relied on *Shapiro* for the premise that the mere existence of a contractual relationship was not sufficient to preclude the third-party defense.[143]

The court also relied on *Hooker Chemicals*, in which the district court precluded the defendant's assertion of the third-party defense.[144] The appellant, Westwood Pharmaceuticals, had argued that *Hooker Chemicals* was factually identical to the situation before the court,[145] and, therefore, because the district court in *Hooker Chemicals* barred the defendant from asserting the third-party defense, to rule otherwise in this case would be inconsistent with *Hooker Chemicals*.[146]

Although the Second Circuit never discussed the factual similarities of the two cases,[147] it emphasized the *Hooker Chemicals* court's finding that the contractual relationship permitted the defendant to exert control over the third parties *in that particular case*.[148] The district court found that Westwood had failed to show that its contractual relationship with National Fuel sufficiently resembled the relationship between the parties in *Hooker Chemicals*; therefore, National Fuel was entitled to assert the third-party de-

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other than the sale or purchase of real estate." *Id.* The Second Circuit did not address this contention. *See Westwood Pharmaceuticals*, 964 F.2d at 89-92.

143. *Westwood Pharmaceuticals*, 964 F.2d at 89. In its brief, Westwood distinguished *Shapiro* on two grounds. First, Westwood asserted that *Shapiro* represented a unique set of facts. Appellants claimed that since the contract had been for a limited period of time, there was temporal disconnection between the parties. Appellant's Brief, *supra* note 141, at 18-20. Second, Westwood submitted that the district court's interpretation of the case was erroneous. *Id.* Because the *Shapiro* court held that a party could and could not assert the defense, the only appropriate interpretation of the case is that the case should be heard as claims for equitable contribution. *Id.* This argument, however, seems borne of desperation to distinguish adverse authority. The appellant's argument depends on the court's failure to find that the harm was divisible between the harm caused during the contract term, and the harm caused after the contract was terminated. *See id.* at 19 n.9. Since *Shapiro* involved summary judgment motions, the case's procedural posture precluded a finding of divisibility of the harm.

144. *Westwood Pharmaceuticals*, 964 F.2d at 89.

145. Indeed, the cases are factually similar. Both cases involve a former landowner seeking the protection of the third-party defense by ascribing responsibility for a release to the purchaser and subsequent owner. Both subsequent owners allegedly caused the release through reckless construction activity. Both defendants alleged that the wastes disposed at the sites were properly contained. For a discussion of the facts of *Westwood Pharmaceuticals*, see *supra* notes 18-37; for a discussion of the facts of *Hooker Chemicals*, see *supra* note 120 and accompanying text.

146. *See* Appellant's Brief, *supra* note 141, at 16-18.

147. *See id.* at 88-90.

148. *Westwood Pharmaceuticals*, 964 F.2d at 89

fense at trial.[149] By its silence, the Second Circuit implicitly adopted this district court finding.

B. A Critical Analysis of *Westwood Pharmaceuticals*

The Second Circuit's analysis of the contractual relationship exception was brief and cursory. Although the court analyzed the statute and relevant caselaw,[150] it failed to provide an organized framework for addressing the issue. Furthermore, the analysis the court did provide was inadequate in several critical areas.

1. The Second Circuit Failed to Establish an Organized Framework for its Statutory Analysis.

The Second Circuit's discussion of the contractual relationship exception failed to establish an organized framework for addressing the issue. The court should have clearly and explicitly engaged in a two step analysis.[151] First, the court was required to determine the scope of the exception, independent of the facts before it.[152] Second, the court should have evaluated whether the particular contractual relationship between the parties fell within the scope of the exception defined in its initial inquiry.[153] The court's analysis was

149. *Westwood Pharmaceuticals*, 737 F. Supp. at 1286. It is difficult to understand how Westwood could have demonstrated a similarity between the contractual relationship in *Hooker Chemicals* and the instant case. The district court in *Hooker Chemicals* did not identify how the relationship between OCC (the original generator and disposer) and the subsequent purchasers of the property permitted OCC to exert control. *See supra* note 124. If anything, the available facts indicate that the "control" situation was similar to that of the Westwood-National Fuel relationship. Defendants in both cases communicated concerns to the third parties whom they claimed were solely responsible for the release. In both cases, the third parties failed to heed the warnings of the defendants. While the court was correct in stating that the *Hooker Chemicals* court made a finding particular to that case, the situation in the instant case warranted further analysis of the similarities between the contractual relationships.

150. For a discussion of the Second Circuit's analysis, see *supra* notes 137-49 and accompanying text.

151. The *Shapiro* court performed two separate analyses: an evaluation of the scope of the contractual relationship and a separate analysis of the nature of the relationship between the parties. *Id.*; *see also Hooker Chemicals*, 680 F. Supp. 546, 558 (W.D.N.Y. 1988).

The *Hooker Chemicals* court engaged also in a two-step analysis. The *Hooker Chemicals* court grounded its decision in the defendant's ability to control the actions of the third parties which defendants sought to blame for the release. *Id.* This assumes the court had concluded that the contractual relationship exception did not swallow the entire defense.

152. The court adequately performed this step. *See Westwood Pharmaceuticals*, 964 F.2d at 86-89.

153. *See Shapiro II*, 743 F. Supp. at 270-72; *see also* Ruhl, *supra* note 16, at 311-12. Ruhl's recommendation that the statute requires a certain element of control supports the two-step approach which the Second Circuit should have applied. *See*

inadequate because the court failed to discuss the particular contractual relationship between Westwood Pharmaceuticals and National Fuel.[154]

The particular facts of the contractual relationship between Westwood and National Fuel were critical to fair resolution of the case, especially in light of the *Hooker Chemicals* decision, which, ironically, the court cited favorably in its opinion.[155] The facts in *Hooker Chemicals* were sufficiently similar to those in *Westwood Pharmaceuticals* to warrant a discussion of which facts led the court to distinguish between the two cases.[156] By failing to do so, the courts, both circuit and district, overlooked an important opportunity to clarify the scope of the contractual relationship exception.[157]

2. *The Second Circuit's Inadequate Discussion of Authority*

The Second Circuit's analysis was shallow and conclusory in several critical areas. Notably, the court neglected to provide a thorough discussion of the legislative history, which is critical to a complete analysis of the scope of the exception.[158] As discussed

id. at 312. The two-step approach involves, first, a determination that the statute requires control, and second, an evaluation of the control element within the particular contractual relationship.

154. *See Westwood Pharmaceuticals*, 964 F.2d at 89. The court concluded that the contractual relationship exception to the third-party defense did not include all contractual relationships, and, therefore, it did not necessarily include the contractual relationship between Westwood and National Fuel. While this may be a proper decision in response to a Motion for Summary Judgment, it is inconsistent with *Hooker Chemicals*. Given the factual simularities between the two cases, some comment by the court was warranted, even if only expressing its deference to the district court's finding. For a discussion of *Hooker Chemicals*, see *supra* notes 118-25 and accompanying text.

155. *See Westwood Pharmaceuticals*, 964 F.2d at 89. The Second Circuit agreed with the district court that the defendant is precluded from asserting the defense if a third-party is somehow related to the handling of the hazardous waste or if the contract afforded the defendant a substantial amount of control over the third party. *Id.* There is no evidence that the Second Circuit reviewed the district court's determination that the instant contractual relationship did not furnish the defendant a significant amount of control. *See id.*

156. The Second Circuit made no attempt to distinguish *Hooker Chemicals*. *Westwood Pharmaceuticals*, 964 F.2d at 89. The Court apparently relied on the district court's finding that "Westwood ha[d] not shown that its contractual relationship with National Fuel sufficiently approximated [that] between [defendant] and the subsequent purchasers in that case so as to entitle Westwood to a similar pretrial ruling . . ." *Westwood Pharmaceuticals*, 737 F. Supp. at 1286.

157. While a factual determination by the Second Circuit was impossible given the procedural posture of the appeal, some discussion of the defendant's (non-moving party's) factual claims was required of either the Second Circuit or the district court.

158. *See Westwood Pharmaceuticals*, 964 F.2d at 89. For a discussion of the legislative history of the § 107(b)(3) defense, see *supra* notes 61-72 and accompanying text.

previously, a strong argument can be made from CERCLA's legislative history to support the Second Circuit's literal interpretation of the third-party defense; reference to this legislative history would have reinforced the court's position.

Moreover, the court's discussion of existing caselaw was also inadequate. The Second Circuit limited its discussion of the caselaw to two cases, *Hooker Chemicals* and *Shapiro*.[159] The court overlooked most of the existing authority on the issue before it.[160] A review of this authority would have further clarified the extent of control necessary to preclude the defense.[161] Considering the disagreement among courts and the judicial inertia towards determining which contractual relationships preclude the defense, the court could have clarified the law had it considered all available authority for its decision.

V. A SYNTHESIS OF JUDICIAL INTERPRETATION INCLUDING WESTWOOD PHARMACEUTICALS

The Second Circuit concluded that the contractual relationship exception does not bar the defense in all contractual relationships. This decision will likely stand;[162] the statutory analysis makes sense and comports with the provision's legislative history.[163] However, the question of which contractual relationships should bar the third-party defense remains.

Certain factors are clearly relevant to the determination. First, a relationship must exist between the third party whose "act or omission" caused the release, and the defendant; this much seems clear from the statute.[164] Second, as *Maryland Bank & Trust* and *Shapiro* indicate, a temporal and substantive relationship must exist between the contract and the dumping that causes the release or threat of release; in other words, the "act or omission" must occur

159. For a discussion of the court's analysis, see *supra* notes 140-49 and accompanying text.

160. For a complete discussion of the caselaw, see *supra* notes 73-136 and accompanying text.

161. The opinion did not specify the elements of control that were necessary to preclude the defense, despite the opportunity and need. See *infra* 164-167 notes and accompanying text for a discussion of the omissions of the court in setting forth these requirements.

162. The trend in the caselaw has been moving away from the view that *any* contractual relationship will bar the defense. *See supra* note 73. *See generally* Ruhl, *supra* note 16.

163. For a discussion of the legislative history of the third-party defense, see *supra* notes 61-72 and accompanying text.

164. *See* CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3).

"in connection with" the contract.[165] Finally, there is authority that requires an element of control between the third-party and the defendant in order to bar the defense; *Hooker Chemicals* and *Westwood Pharmaceuticals* both stand for this proposition.[166] The Second Circuit held only that "some" control may be necessary to preclude the defense.[167] The *extent* of control necessary to bar the defense remains unanswered.

VI. THE EFFECT OF *Westwood Pharmaceuticals* ON FUTURE CERCLA LITIGATION

Westwood Pharmaceuticals solidifies the numerous district court decisions holding that the contractual relationship exception to the third-party defense does not bar the defense due to the mere existence of a contractual relationship. The decision also legitimizes the view that control may be a necessary element of the contractual relationship for the exception to apply. Combined with the previously established requirements of temporal and substantive relation, the control requirement established in *Westwood Pharmaceuticals* further defines the contractual relationship that precludes the third-party defense. Although CERCLA is scheduled for reauthorization during the current Congress, it is unlikely that Congress will clarify the contractual relationship exception, given the emerging agreement among the courts. The precise boundaries of the contractual relationship exception will evolve only with additional and more exhaustive judicial direction.[168]

The *Westwood Pharmaceuticals* decision will please environmental defense attorneys. It resurrects CERCLA's only real defense by relegating the contractual relationship exception to what it was in-

165. *See supra* notes 107-17, 126-36 and accompanying text.

166. The court in *Hooker Chemicals* barred the defense because the nature of the contractual relationship was such that the defendant could *control* the actions of the third party. *Hooker Chemicals*, 680 F. Supp. 546, 558 (W.D.N.Y. 1988). The Second Circuit ruled similarly: "The [defendant would be precluded from asserting the defense] if the contract allows the [defendant] to exert some control over the third party's actions . . . ." *Westwood Pharmaceuticals*, 964 F.2d at 89.

167. *Westwood Pharmaceuticals*, 964 F.2d at 89.

168. Since CERCLA's enactment in 1980, Congress has declined to correct or guide judicial interpretation of the contractual relationship exception to the third-party defense. SARA, passed in 1986, included an additional definition of "contractual relationship," that became the "innocent landowner defense," but did not clarify the "in connection with" language. Now that the courts have given effect to clear congressional intent, it is unlikely that Congress will amend the statute merely to define more clearly the nature of the contractual relationship necessary to preclude the defense.

tended to be: an exception. The *Northernaire*, *SCRDI*, *Monsanto*, and *Argent Corp.* courts allowed the exception to swallow the rule.[169]

Westwood Pharmaceuticals places an additional burden on plaintiffs seeking summary judgment regarding the third-party defense. After *Westwood Pharmaceuticals*, a plaintiff seeking summary judgment must show not only that a contractual relationship existed between the defendant and the third party, but also that the contract either related to the hazardous waste or permitted the defendant to significantly control the activity of the third party.[170] Ultimately, this decision shifts the forum for the presentation of the defense. Instead of being a matter of law before the court, the availability of the defense will more frequently be decided by a jury.

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169. For a discussion of the early caselaw, see *supra* notes 79-96 and accompanying text. The courts' view of the contractual relationship exception demonstrated by these cases virtually eliminates the defense. It is difficult to conceive of a situation in which a defendant could assign responsibility for a release to a party with which it did not share a contractual relationship. Under this view of the defense, the third party would have to be a complete stranger to the defendant. The defense would thereby retain little practical vitality as few defendants would know the identity of the responsible party.

170. *See* text accompanying *supra* note 139.