



1995

The Evolution of the Trust: A Creative Solution to Trustee Liability under CERCLA

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VILLANOVA ENVIRONMENTAL LAW JOURNAL

VOLUME VI

1995

NUMBER 1

THE EVOLUTION OF THE TRUST: A CREATIVE SOLUTION TO TRUSTEE LIABILITY UNDER CERCLA

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I. INTRODUCTION

THE primary focus of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")¹ is environmental cleanup. CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),² retroactively imposes strict and joint and several liability on owners, operators, generators, and transporters of hazardous substances.³ The act attempts to provide for both short and long-term responses to the presence of hazardous wastes that contaminate, or threaten to

1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), §§ 101-308, 42 U.S.C. §§ 9601-75 (1988 & Supp. V 1993).

2. Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601-75 (1988 & Supp. V 1993)).

3. CERCLA § 107(a), 42 U.S.C. § 9607(a). This section provides: Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-

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

contaminate the environment.⁴ Injured parties may recover costs from: “bankrupt estates, corporate officers, active stockholders, current and prior landowners, foreclosing lenders, successor corporations, lessors and lessees, federal government agencies, and persons with an unused ‘capacity to control’ hazardous waste.”⁵

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

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

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.

4. Congress, in response to a “strong public demand for action in light of Love Canal and other celebrated dumpsites,” enacted CERCLA “to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive waste disposal sites.” H.R. REP. NO. 1016, 96th Cong., 2d Sess., Pt. 1, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125.

5. Douglas M. Garrou, Note, *The Potentially Responsible Trustee: Probable Target for CERCLA Liability*, 77 VA. L. REV. 113, 114-16 nn. 9-19 (1991). *See, e.g.*, *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) (concluding that general doctrine of corporate successor liability appropriate in CERCLA contribution claims); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (classifying lending institution as prior owner and imposing liability under CERCLA for backing development of contaminated land); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (holding officer who supervised or arranged for disposal of hazardous waste liable, without piercing corporate veil to reach corporate officer); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (construing CERCLA § 107(a)(1) as unequivocally imposing strict liability on current owner of facility which releases or threatens to release, without regard to causation); *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988) (shareholders who managed and controlled facility held personally liable under CERCLA as owners or operators); *United States v. Northernair Plating Co.*, 670 F. Supp. 742 (W.D. Mich. 1987) (holding corporate officer with responsibility for release liable, without showing officer caused release); *In re Peerless Plating Co.*, 70 B.R. 943, 948 (Bankr. W.D. Mich. 1987) (hold-

Recently, scholars have questioned whether trustees are included as potentially responsible parties ("PRPs") under CERCLA.⁶ There is no legal certainty regarding the extent of trustee liability, but resolution of this issue is important to the reuse of Superfund sites. At any rate, a trustee's CERCLA liability may depend upon the ability of the trustee to exercise control over the activities that caused the contamination.⁷ This Article argues that the trust is a legal instrument which is a viable tool to bring once-contaminated land back into productive use. This Article also analyzes the components of CERCLA liability, lender liability under CERCLA, the framework of fiduciary ownership and management, judicial interpretations of trustee liability, federal legislative responses, and state legislation. A case study of the Industri-Plex Site in Woburn, Massa-

ing bankruptcy estates subject to CERCLA); *United States v. South Carolina Recycling & Disposal Inc.*, 653 F. Supp. 984 (D.S.C. 1986) *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) (finding that lessee of site, apart from its role as operator of site, maintained control over and responsibility for use of property, essentially "standing in the shoes" of property owners); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986) (holding foreclosing lender that took title to parcel of land liable under CERCLA for hazardous waste cleanup); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982) ("CERCLA . . . facilitates prompt cleanup of hazardous dumpsites . . . by placing ultimate financial burden upon those responsible for danger.").

6. See, e.g., Kathryn E. Barnhill, *Trustees' Reasonable Expectations of Coverage for Environmental Liability: Old Insurance for New Problems*, 39 DRAKE L. REV. 843, 862 (1989-90) (protecting reasonable expectation of fiduciaries, beneficiaries and heirs against liability for property damage and personal injury resulting from environmental contamination by following continuous exposure definition of "occurrence"); Keith M. Casto & Cheryl L. Mattson, *Environmental Liabilities for Fiduciaries*, 7 TOXICS L. REP. (BNA) 26 (Jun. 3, 1992) (trustees should approach fiduciary duties by conducting a pre-acquisition environmental investigation of property and by contractually shifting risk of environmental contamination to other parties); Margaret V. Hathaway, *Recent Rulings on Environmental Liability: Big Wins For Lenders, Big Losses for Trustees*, 7 TOXICS L. REP. (BNA) 1097 (Feb. 17, 1993) (discussing ruling in *Phoenix v. Garbage Services Co.*, 816 F. Supp. 564 (D. Ariz. 1993)) [hereinafter *Phoenix II*]; Deborah A. Lawrence, *Probate & Property*, 34 RES GESTAE 561 (1991) (liability for environmental cleanup imposed on any solvent entity with connection to property or facility in question, and no reason to believe trustees will be immune); Garrou, *supra* note 5, at 148 (concluding CERCLA liability is a "nightmare" from which potentially responsible trustee might never awake); William L. Hoey, Note, *Personal Liability of Trustees Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, 68 U. DET. L. REV. 73, 96-97 (1990) (stating prudent trustee may earn nothing more than passage to financial ruin [under Superfund] and "[t]he trust is a creature of legal creativity and will react—by self-extinction if need be."); H. Lewis McReynolds, Comment, *The Unsuspecting Fiduciary and Beneficiary as "Owner or Operator" of a Hazardous Waste Facility Under CERCLA*, 44 BAYLOR L. REV. 71 (1992) (arguing that extent of potential fiduciary and beneficiary liability seems endless; fiduciaries and beneficiaries may be subject to seemingly unending risk as owners or operators of contaminated property).

7. See, e.g., *United States v. Bliss*, 667 F. Supp. 1298 (E.D. Mo. 1987).

achusetts demonstrates the successful use of a trust as an instrument to manage an existing Superfund site.⁸ By way of the case study and previous material, this Article concludes by synthesizing the problems related to trustee liability.

II. CERCLA LIABILITY

To eliminate the adverse health and environmental effects arising from thousands of dump sites, Congress authorized the President of the United States to act directly to abate any actual or threatened release of any hazardous substance.⁹ The President delegated this authority to the Administrator of the Environmental Protection Agency ("EPA")¹⁰ to clean up facilities¹¹ where hazardous substances¹² have been released¹³ or disposed.¹⁴ In 1980, Congress created a fund to enable EPA to undertake cleanup at contaminated sites, and then obtain reimbursement from responsible parties.¹⁵ In addition to cleanup costs, Superfund allows EPA to pursue civil liability for "natural resource damages"¹⁶ and "response costs" incurred during cleanup.¹⁷ These response costs may be recovered from entities determined to be PRPs of contaminated sites.¹⁸

8. *United States v. Stauffer Chem. Co.*, No. ENF (01-87-E005), 1989 EPA Consent LEXIS 137 (D. Mass. Oct. 28, 1989). *Stauffer* is the only CERCLA consent decree with EPA that used a custodial trust. Search of LEXIS, ENVIRN library, ALLEPA file, CUSTODIAL TRUST request (Sept. 8, 1994).

9. CERCLA § 104(a), 42 U.S.C. § 9604(a).

10. *See* Exec. Order No. 12,580, 52 F.R. 2923 (1987), *reprinted in* 42 U.S.C. § 9615.

11. CERCLA defines "facility" to include "any site or area where a hazardous substance has . . . come to be located." CERCLA § 101(9), 42 U.S.C. § 9601(9).

12. The term "hazardous substance" includes over 700 substances designated as hazardous under CERCLA § 102(a). *See* 40 C.F.R. § 302.4 (1991). *See also* CERCLA § 101(a)(14), 42 U.S.C. § 9601(a)(14).

13. CERCLA defines "release" as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant). CERCLA § 101(22), 42 U.S.C. § 9601(22).

14. CERCLA defines "disposal" as, "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." *Id.* § 101(29), 42 U.S.C. § 9601(29).

15. *Id.* § 111(a), 42 U.S.C. § 9611(a) (authorizing initial \$1.6 billion federal trust fund from which name "Superfund" was coined).

16. *Id.* § 107(a)(4), 42 U.S.C. § 9607(a)(4).

17. *Id.* § 107(f)(1), 42 U.S.C. § 9607(f)(1).

18. CERCLA § 107(a), 42 U.S.C. § 9607(a).

CERCLA authorizes EPA, individual states, or private parties that conducted a cleanup of a National Priorities List (“NPL”)¹⁹ site to sue and recover their costs.²⁰ The concerned party may recover from: (1) prior owners or operators of a facility from which there is a release or threatened release of a hazardous substance;²¹ (2) transporters who brought hazardous substances to a facility selected by the transporter;²² and (3) persons who arranged for disposal or treatment of the hazardous material at the facility.²³

A. Imposition of Liability

Liability under CERCLA is strict, so it is imposed on responsible parties without regard to fault or negligence.²⁴ The liability for “indivisible injury” is joint and several.²⁵ Accordingly, a PRP can be held liable for the entire cleanup by EPA, the state or a private party. The responsible party has the right to sue other responsible parties for contribution, asserting both legal and equitable theories of cost allocation.²⁶ Because CERCLA liability is retroactive, EPA may pursue cleanup costs resulting from actions which occurred prior to passage of the statute.²⁷ An owner or operator may even be liable for conduct that was legal at the time it occurred, unless it was a “federally permitted release.”²⁸

The result of CERCLA’s liability structure is that a PRP may be liable for the entire cost of the cleanup, regardless of the amount of hazardous substance that particular PRP actually released.²⁹ In addition, EPA, a state, or a private party is able to choose which PRP or PRPs to sue. CERCLA does not require EPA to sue all other

19. EPA must identify and prioritize releases on the NPL before it can incur cleanup costs. *Id.* § 105(a)(8)(A)-(B), 42 U.S.C. § 9605(a)(8)(A)-(B).

20. *Id.* § 104, 42 U.S.C. § 9604.

21. *Id.* § 107(a)(2), 42 U.S.C. § 9607(a)(2).

22. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4).

23. *Id.* § 107(a)(3), 42 U.S.C. § 9607(a)(3).

24. *See, e.g., Monsanto*, 858 F.2d at 168; *Northeastern Pharmaceutical*, 810 F.2d at 732-33.

25. *See, e.g., Monsanto*, 858 F.2d at 171-73.

26. *Id.* at 173.

27. *See, e.g., id.* at 167-68; *Northeastern Pharmaceutical*, 810 F.2d at 732-34.

28. CERCLA § 101(10); 42 U.S.C. § 9601(10). Such releases are in compliance with specified federal and state environmental laws pursuant to a valid federal permit. *Id.*

29. *See Amland Properties Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784, 793-95 (D.N.J. 1989). The owner was not entitled to recover most of the \$25 million spent cleaning up hazardous waste contamination at the facility because the response action was not in compliance with the National Contingency Plan. *Id.* The National Contingency Plan provides the standard for CERCLA cleanups. CERCLA § 105(a), 42 U.S.C. § 9605(a).

PRPs, however, any PRP may join other responsible parties in the action.

B. The “Innocent Landowner” Defense

Superfund allows only three narrow defenses. These can be asserted when releases are caused solely by an act of God, war or a third party.³⁰ The third party defense was expanded by SARA to include an “innocent landowner defense.”³¹ The defense is available if an owner can establish that when the property was acquired, all appropriate inquiries were made into the previous ownership, in an effort to minimize liability. In determining whether a landowner had “no reason to know,” a court will consider the landowner’s specialized knowledge or experience.³² Furthermore, at least one court rejected the notion that there is an affirmative duty to inquire into the existence of hazardous waste when one acquires an interest in property under any conceivable circumstance.³³ Specifically, in *United States v. Pacific Hide & Fur Depot, Inc.*,³⁴ the district court for the District of Idaho directly rejected the government’s argument that CERCLA required such a preliminary inquiry.³⁵

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

31. *Id.* §§ 101(35)(a)-(b), 107(b)(3), 42 U.S.C. §§ 9601(35)(a)-(b), 9607(b)(3). To assert the innocent landowner defense, a defendant has the burden of proving each of the following four elements by a preponderance of the evidence: (1) the release or threat of release of a hazardous substance and the resulting damages were caused solely by an act or omission of a third party; (2) the third party’s act or omission did not occur in connection with a contractual relationship (either direct or indirect) with the defendants; (3) the defendants exercised due care with respect to the hazardous substance; and (4) the defendants took precautions against the third party’s foreseeable acts or omissions and the foreseeable consequences resulting therefrom. *Id.* § 107(b)(3), 42 U.S.C. § 9607(b)(3).

32. *Id.* § 101(35)(b), 42 U.S.C. § 9601(35)(b); H.R. REP. NO. 962, 99th Cong., 2d Sess., at 187-88, reprinted in 1986 U.S.C.C.A.N. 3280, 3281.

33. See *United States v. Serafini*, 706 F. Supp. 346 (M.D. Pa. 1988).

34. 716 F. Supp. 1341 (D. Idaho 1989). The court stated:

It would have been very easy to draft into the statute [CERCLA] the very requirements sought by the Government: Congress could have simply said that some inquiry must be made in every case. But Congress did not do so. Instead, Congress used terms like “appropriate” and “reasonable” in describing the necessary inquiry. The choice of such terms indicates to this Court that Congress was not laying down the bright line rule asserted by the Government. Rather, Congress recognized that each case would be different and must be analyzed on its facts.

Id. at 1349.

35. *Id.* The court determined the transfer from a father to his three children in an *inter vivos* trust was more like an inheritance than a private transaction, which permitted the defendants to successfully assert the innocent landowner defense. *Id.*

C. Duty to Disclose

CERCLA provides that if a prior owner had actual knowledge of a release or a threatened release during ownership and subsequently transferred ownership without disclosure, the owner will be held liable for contamination.³⁶ Thus, past owners may not assert the innocent landowner defense. The result is that liability may attach to previous owners who do not actually participate in the disposal of hazardous wastes.³⁷

III. LENDER LIABILITY UNDER CERCLA

CERCLA places the owner or operator of a facility among the parties liable for cleanup costs of Superfund sites.³⁸ An owner or operator, however, does not include a person who is merely protecting a security interest in the property, and not participating in its management.³⁹ Since CERCLA does not define the actions a security holder may undertake without "participating in the management of a . . . facility,"⁴⁰ courts have been left to address the problem.⁴¹ Courts primarily have examined three areas: (1) foreclosure liability; (2) operational control liability; and (3) lender liability.

A. Foreclosure Liability

Foreclosing banks may be subject to CERCLA liability. Even if they are not contributors to the original contamination, on occasion they can be held liable as owners under CERCLA. One way in which a bank can be liable is if it holds the property as an investment, rather than a security on a loan. In *United States v. Maryland Bank & Trust Co.*,⁴² the court held that a bank which purchased

36. CERCLA § 101(35)(c), 42 U.S.C. § 9601(35)(c).

37. *Id.*

38. *Id.*

39. *Id.* § 101(20)(A)(iii), 42 U.S.C. § 9601(20)(A)(iii). Protecting a security interest is a passive role compared with the active role of management. CERCLA's legislative history states that an owner, "does not include certain persons possessing indicia of ownership (such as a financial institution) who, without participating in the management or operation of a vessel or facility, hold title either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rules, or regulations." H.R. REP. NO. 172, 96th Cong., 2d Sess., at 36 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6160, 6181.

40. CERCLA § 101(20)(A)(iii), 42 U.S.C. § 9601(20)(A)(iii).

41. Many opinions addressing CERCLA operator liability have noted the vague statutory definition. *See, e.g.,* *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988).

42. 632 F. Supp. 573 (D. Md. 1986).

property at a foreclosure sale was liable under CERCLA as the owner of a hazardous waste facility.⁴³ Even though the bank did not contribute to the contamination, the bank was found liable because it held the land as an investment, not simply to protect its security interest in the land.⁴⁴

In *Guidice v. BFG Electroplating and Manufacturing Co.*,⁴⁵ the district court for the Western District of Pennsylvania would not grant summary judgment in favor of a bank that foreclosed on a property that later was found to be contaminated. The court held that a bank which forecloses on property containing hazardous waste is not within the security interest exemption and, accordingly, is subject to CERCLA liability.⁴⁶

B. Operational Control Liability

CERCLA's security interest exemption only protects those lenders who hold a security interest in property but do not participate in the management of a site.⁴⁷ Although participation in the financial aspects of operation is insufficient to warrant CERCLA liability, participation in the actual operation is sufficient to create CERCLA liability. In *United States v. Mirabile*,⁴⁸ a secured lender that actively participated in the management of the facility was treated as an owner or operator.⁴⁹ The court found that the lender was involved in day-to-day management of the business that went beyond making financial decisions.

C. Lender Liability

There are two predominant views of lender liability. The first view is that a lender incurs liability from actual involvement in the management of a facility. The second view is that a mere "capacity to control" can incur liability. The potential scope of lender liabil-

43. *Id.* at 579-80.

44. *Id.* The court distinguished between a security interest and an investment from which a bank expects to realize a windfall. *Id.* The court stated that the security interest exemption should be read narrowly so as to include only a lender who held "indicia of ownership to protect a then-held security interest in the land." *Hines*, 632 F. Supp. at 579.

45. 30 *Env't. Rep. Cas.* (BNA) 1665 (W.D. Pa. Sept. 1, 1989).

46. *Id.* at 1671-72.

47. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A).

48. 15 *Env'tl. L. Rep.* 20,992, 20,996 (E.D. Pa. Sept. 4, 1985).

49. *Id.* Officers from the lending institution frequently appeared at the facility, determined the priority in which orders were to be filled, demanded that additional sales effort be made and directed manufacturing changes and reassignment of personnel. *Id.* at 20,995-97.

ity was expanded beyond operational control liability in *United States v. Fleet Factors Corp.*⁵⁰ The *Fleet Factors* court held that a lender may incur Superfund liability by participating in “the financial management of a facility to a degree indicating a capacity to influence the corporation’s treatment of hazardous wastes.”⁵¹ *Fleet Factors* goes beyond *Mirabile* and *Maryland Bank & Trust* because the court determined that neither involvement in day-to-day operations, nor participation in decisions relating to hazardous wastes, is necessary for a lender to incur liability.⁵²

In contrast to *Fleet Factors*, the court in *In re Bergsoe Metal Corp.*⁵³ held that a municipality’s capacity, or unexercised right to control the operations of a facility was insufficient to void a secured creditor’s exemption from liability. In other words, the court in *Bergsoe Metal*, unlike the court in *Fleet Factors*, determined that the critical issue was what the municipality did, not what it could have done.⁵⁴

50. 724 F. Supp. 955 (S.D. Ga. 1988), *aff’d*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991). The lender, Fleet Factors Corp. (“Fleet Factors”), secured its loan through a security interest in a fabric printing company’s (“SPW”) equipment, inventory, fixtures and facility. *Id.* at 957. When the owners of SPW were unable to make payments, the facility ceased operations and filed bankruptcy. *Id.* at 958. Subsequently, Fleet Factors foreclosed on the inventory and equipment and contracted to have unsold equipment sold at auction. *Id.* After the auction, EPA inspected the facility and found drums of hazardous waste and asbestos contamination. *Fleet Factors*, 724 F. Supp. at 958-59. EPA then removed the contamination and sought recovery of its costs against Fleet Factors. *Id.* at 959.

51. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991). The United States Court of Appeals for the Eleventh Circuit stated that “a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.” *Id.* at 1558. The court determined that this standard would encourage lenders to investigate and monitor the hazardous waste treatments and policies of borrowers, and give lenders incentive to participate in correcting borrowers’ hazardous waste problems. *Id.* at 1557-58. The only interventions that do not incur liability are “occasional and discreet financial decisions.” *Id.* The court did not, however, rule on whether Fleet Factors was liable as an owner or operator under CERCLA § 107(a)(1) or as an “arranger for disposal” under § 107(a)(3). *Fleet Factors*, 901 F.2d at 1557-58. *See also Court Holds Fleet Factors Liable, Defers Ruling on Basis for Liability*, 23 *Env’t Rep.* (BNA) 2834 (Feb. 26, 1993).

52. *Fleet Factors*, 901 F.2d at 1557.

53. 910 F.2d 668 (9th Cir. 1990). In *Bergsoe Metal*, a municipal corporation was a creditor and acquired title to contaminated property as security in a sale-and-lease-back arrangement to finance construction and operation of a lead recycling plant. *Id.* at 670. Its involvement was limited to negotiating and encouraging the building of the plant, permitting it to inspect and foreclose upon the premises as stated in the lease, and entering into a work agreement with the debtor and trustee not to exercise its default remedies under the lease so the workout could proceed. *Id.* at 672-73. *See also United States v. Nicolet Inc.*, 29 *Env’t Rep. Cas.* (BNA) 1851 (E.D. Pa. 1989).

54. *Bergsoe Metal*, 910 F.2d at 672-73.

D. EPA's Lender Liability Rule

In response to *Fleet Factors*, EPA promulgated its rule on lender liability.⁵⁵ This rule attempts to remove any uncertainty surrounding the amount of involvement a secured creditor is permitted in management.⁵⁶ The rule established a two-prong test of participation in management to create liability under CERCLA.⁵⁷ The first prong asks whether the bank usurped the borrower's decision-making abilities regarding environmental compliance.⁵⁸ The second prong asks whether the lender took responsibility for "overall management" of the borrower's affairs with respect to either environmental compliance or substantial operational aspects of the borrower.⁵⁹ This test does not penalize unexercised capability to manage on the part of the lending institution; rather, the test supports and permits active involvement in the borrower's financial and administrative affairs.⁶⁰

IV. FRAMEWORK OF FIDUCIARY OWNERSHIP AND MANAGEMENT

A. Evolution of the Trust

If one views history as a continuum of experience, the significance of the past is that it is a source for learning old ideas anew. The trust is one equitable tool that has adapted to the needs of the

55. See National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 57 Fed. Reg. 18,344, 18,382 (1992) (codified at 40 C.F.R. § 300.1100).

56. *Id.*

57. *Id.* See also Hathaway, *supra* note 6, at 1100. In addition to a review of *Phoenix II*, the author reviewed three other CERCLA cases which were decided after EPA promulgated the lender liability rule: Kelly ex rel. Michigan Natural Resources Comm'n v. Tiscornia, 810 F. Supp. 901 (W.D. Mich. 1993) (holding that conditioning continued financing on replacing chief executive officer with turnaround specialist acceptable to bank indicated that bank merely influenced, but did not control, borrower's decision-making); Ashland Oil, Inc. v. Sonford Prod. Corp., 810 F. Supp. 1057 (D. Minn. 1992) (holding money lender, who foreclosed on and held property for less than one month, had not participated in management of property sufficiently to lose secured creditor exemption); Grantors to the Silresim Site Trust v. State Street Bank & Trust Co., No. 88-1324-K, transcript of court proceedings at 89 (D. Mass. Nov. 24, 1992) (holding bank which loaned money to hazardous waste facility owners and insisted original CEO no longer remain in charge entitled to secured creditor exemption, but declining to decide whether lender liability rule applicable). See also Patricia L. Quentel, *EPA Issues Long-Awaited Lender Liability Rule*, 22 *Env't. L. Rep.* (Env't. L. Inst.) 10,637 (October, 1992).

58. 40 C.F.R. § 300.1100. See also CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A).

59. 40 C.F.R. § 300.1100(c)(1)(i).

60. *Id.* § 300.1100(c)(1)(ii)(B).

past, and a review of its origins demonstrates its adaptability to the changing needs of this modern society.⁶¹

Conveyancers of land in medieval England invented the “use,” which became the ancestor of the modern trust.⁶² By the early 1400s, the use was common in England for landholding.⁶³ By the beginning of the sixteenth century, uses and trusts were disfavored by the crown.⁶⁴ In response to these problems, Parliament passed the Statute of Uses in 1536.⁶⁵ Although it was believed that uses would cease to exist and that all estates in land would be subject to

61. Pierre Lepaulle, *Civil Law Substitutes for Trusts*, 36 YALE L.J. 1126 (1927). There is no trust in civil law. Lepaulle wrote:

[Trusts] are like those extraordinary drugs curing at the same time toothache, sprained ankles, and baldness sold by peddlers on the Paris boulevards; they solve equally well family troubles, business difficulties, religious and charitable problems. What amazes the skeptical civilian is that they really do solve them!

Id. at 1126.

62. GEORGE BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 2, at 13 (2d ed. 1982). To “enfeoff” is to invest with an estate by feoffment, and to make a gift of any corporeal hereditament to another. BLACK’S LAW DICTIONARY 474 (5th ed. 1979). The English use has been said to be modeled after the *treuhand* or *salman* developed under Germanic Law. BOGERT, *supra* at 15. The *salman* was a person to whom land was transferred in order that he might make a conveyance according to his grantor’s direction. *Id.* In addition, the Frankish influenced the use of a third party to act for the beneficiary. *Id.*; 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I* 230 (2d ed. 1968) (1898). The *Lex Salica* employed it by the intermediation of a third person, who is put in seisin of the lands and goods, to succeed in appointing or adopting an heir. *Id.* at 230 (*Lex Salica*, tit. 46 *De adfathamire*. Heusler, *Institutionem*, i. 215). Shortly after the Norman Conquest in 1066, a line of cases began which saw a man conveying his land to another “to the use” of a third. *Id.* at 231. This flourished in the thirteenth century with the arrival of the Franciscan friars who were forbidden to own land because of their vow of poverty. *Id.* at 231. Benefactors conveyed plots of land to the city for the benefit of the Franciscans. *Id.*

63. BOGERT, *supra* note 62, at 14. Because of the strict rules of pleading in English law, the interests of the “cestui que use” were not enforced by the common law courts since no writ existed that fit the case. *Id.* at 21-22. The cestui que use is the person for whose use and benefit the lands or tenements are held by another. BLACK’S LAW DICTIONARY 208 (5th ed. 1979). Ecclesiastical courts had no jurisdiction to enforce them. As a result, trusts existed only as honorary obligations and had no clout in any court. *Id.* The cestui que use has the right to receive the profits and benefits of the estate, but the legal title and possession reside in the other. *Id.* Development of the Court of Chancery brought a change as the custom evolved to petition the King or his Council in cases where there was no remedy at law. *Id.* at 22. The Chancellor, as conscience of the King, decided cases on the basis of equity and fairness, rather than on technical compliance with writs and pleadings. *Id.* Early in the fifteenth century, the petitions to enforce uses and trusts were recognized by the Chancellor in Equity. *Id.* See also GEOFFREY R.Y. RADCLIFFE & GEOFFREY N. CROSS, *THE ENGLISH LEGAL SYSTEM* 134 (3d ed. 1954).

64. BOGERT, *supra* note 62, at 23. Specifically, they relieved tenants of their burdens of feudal landholding, enabled religious orders to have the benefit of land, and afforded greater freedom in the conveyancing of real property. *Id.*

65. 27 Hen. VIII, c. 10.

the same burdens and rules of tenure and conveyance,⁶⁶ in fact, trusts flourished.⁶⁷ After the Statute of Uses, the term "trust" was applied to all such equitable interests.⁶⁸ This became the basis of modern trust law.⁶⁹

B. Modern Background of Trustee Liability

A modern trust is "a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to use that interest for the benefit of another."⁷⁰ The trustee owes the beneficiary of the trust a duty to act solely in the beneficiary's interest, without considering personal advantage.⁷¹ Because of the nature of this relationship, a trustee has fiduciary responsibilities and is expected to show more than ordinary candor, consideration, and probity in dealings with the beneficiary.⁷²

A trustee holds legal title to the trust property and generally has the rights, duties, and liabilities of an owner, except as to the beneficiaries of the trust.⁷³ Possession of the trust property extends liability to the trustee, who is obligated to manage the trust for the benefit of the beneficiary according to any special terms or condi-

66. BOGERT, *supra* note 62, at 25.

67. See RESTATEMENT (SECOND) OF TRUSTS §§ 67-73 (1959) (detailing the impact of Statute of Uses on trusts). In 1925 the Statute of Uses was repealed in England by the Law of Property Act. 12 & 13 Geo. 5, ch. 16, § 1(7). The common law judges construed the Statute of Uses and determined when the use was executed and the cestui que use was given the legal estate. BOGERT, *supra* note 62, at 25. Still, a large number of uses were left unaffected and were recognized and enforced only in Chancery. *Id.* at 27.

68. BOGERT, *supra* note 62, at 27.

69. *Id.* See also THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 598 (5th ed. 1956) (detailing history of Statute of Uses and of real property).

70. BOGERT, *supra* note 62, at 1. There are six basic elements of the trust: (1) the trust property is the interest in property, real or personal, tangible or intangible; (2) the settlor of the trust is the person who intentionally creates it; (3) the trustee is the individual or entity that holds the trust property for another's benefit; (4) the legal title to the trust property usually remains in the trustee; (5) the beneficiary is the person for whose benefit the trustee holds the trust property; and (6) the trust instrument is the document in which the settlor expresses an intent to have a trust and sets forth the trust terms, including details as to beneficiaries and their right and the duties and powers of trustees. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 67, at § 2, cmts. c-e, i-j.

71. BOGERT, *supra* note 62, at 3.

72. *Id.*

73. IIIA WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 265.4 (4th ed. 1988). The owner of the equitable interest in trust property is the beneficiary of a trust. RESTATEMENT (SECOND) OF TRUSTS, *supra* note 67, § 277. The ownership of title to the trust assets, however, remains in the trustee. *Id.* § 277, cmt. a. Thus, the beneficiary is not liable to third parties because he or she is without legal title to the trust property.

tions.⁷⁴ Trustee liability is not limited to the value of the trust estate when the trustee is personally liable for a contract, or incurs tort liability from circumstances involving the trust.⁷⁵ The common law interpretation of trustee liability could be superseded by a statute such as CERCLA.⁷⁶

V. JUDICIAL INTERPRETATIONS OF TRUSTEE LIABILITY

The definition of "person" under CERCLA includes individuals, corporations, and commercial entities and does not specifically include or exclude trustees.⁷⁷ Courts have wrestled with the status of a trustee as an owner or operator under CERCLA. Because trustee liability is in the early stages of development, it is premature to state that a body of law has developed with respect to any particular type of trust. In some cases, courts are willing to hold trustees liable, irrespective of personal involvement. Yet, in other cases, the analysis focuses on: (1) whether the trustee remained active or passive; (2) whether the trustee had the ability to influence decisions concerning the management of the property; (3) whether the trustee was a participant in the management of the property in either a corporate or individual capacity; or (4) whether the trustee tested the property for contamination during possession and proceeded with cleanup efforts after notifying the appropriate regulatory authorities. The following decisions demonstrate the complexity of the disputes surrounding trustee liability and the difficulty in assigning liability for cleanup costs.

A. Liability Imposed on Trustees

1. *Statutory Trust*: *United States v. Bliss*

Statutory trustees of the Houlihan Nursery Company were found jointly and severally liable under CERCLA section 107(a)(3) for response costs in *United States v. Bliss*.⁷⁸ The Nursery was a Missouri corporation until the state revoked its charter in 1983 for fail-

74. THE RESTATEMENT (SECOND) OF TRUSTS provides: Where a liability to third persons is imposed upon a person, not as a result of a contract made by him or a tort committed by him but because he is the holder of the title to property, a trustee as holder of the title to the trust property is subject to personal liability, but only to the extent to which the trust estate is sufficient to indemnify him.

RESTATEMENT (SECOND) OF TRUSTS, *supra* note 67, § 265.

75. IIIA FRATCHER, *supra* note 73, § 265.4.

76. See *United States v. A & P Trucking Co.*, 358 U.S. 121, 124 (1958).

77. CERCLA § 101(21), 42 U.S.C. § 9601(21).

78. No. 84-2086C(1), 1988 WL 169818 (E.D. Mo. Sept. 27, 1988).

ing to comply with registration requirements.⁷⁹ The defendants, who were officers and directors of the corporation, became statutory trustees pursuant to Missouri law.⁸⁰ In 1981, EPA determined that a site owned by the Nursery required remedial action, and incurred response costs in connection with removal of waste.⁸¹ The court found that imposition of liability upon the statutory trustees was proper because they were the legal representatives of the now defunct corporation.⁸² Thus, the court concluded that the trustees were liable under CERCLA "to the extent of corporate assets which came into their hands."⁸³

2. *Realty Trust: United States v. Burns*

In *United States v. Burns*,⁸⁴ the district court for the District of New Hampshire addressed the issue of trustee liability when the government brought an action to recover response costs incurred due to the release of hazardous substances from a real estate trust.⁸⁵ The court addressed two issues: (1) whether the trustee could be considered an owner or operator of the site; and (2) if the trustee were an owner or operator, whether personal participation in conduct which violated CERCLA was required in order to be liable.⁸⁶

The court determined that a liberal construction of CERCLA's purpose, "to protect and preserve public health and the environment,"⁸⁷ required the court to hold that the trustee was an owner of the site. The court reasoned that a broad definition of "owner" is supported by CERCLA's legislative history which indicates that the

79. *Id.* at *2.

80. *Id.*

81. *Id.*

82. *Bliss*, No. 84-2086C(1), 1988 WL 169818, at *9. The court explained that a person need not be a current owner or operator of a facility to be liable, since CERCLA § 107(a)(2) applies to prior owners who owned the facility at the time of the hazardous waste disposal. *Id.* at *8. Furthermore, § 101(21) defines "person" to include corporations. *Id.*

83. *Id.* at *9.

84. No. C-88-94-L, 1988 U.S. Dist. LEXIS 17340 (D.N.H. Sept. 12, 1988).

85. *Id.* The defendant moved for dismissal of the action, claiming that as the trustee and beneficiary, he never owned the land and never personally participated in conduct that violated the statute. *Id.* at *1. In response, the government argued that the defendant was an owner of the site within the meaning of CERCLA, and that personal participation was not necessary for individual liability. *Id.* Specifically, the government alleged that the defendant was both the sole trustee and beneficiary of the trust, which held the industrial site when hazardous substances were disposed. *Burns*, No. C-88-94-L, 1988 U.S. Dist. LEXIS 17340, at *1.

86. *Id.* at *3.

87. *Id.* (citing *Dedham Water Co. v. Cumberland Farms Dairy Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (obliging the court to construe CERCLA's provisions liberally to avoid frustration of the legislative purposes)).

term is meant to include "equivalent evidence of ownership."⁸⁸ The court analogized the position of a trustee to that of a lessee⁸⁹ and concluded that Congress did not intend for a responsible party to be able to avoid liability through the use of a trust.⁹⁰

Additionally, the court found that the trustee would be liable for response costs regardless of personal participation in conduct that violated CERCLA.⁹¹ First, the court noted that an owner is liable under CERCLA regardless of whether it is also an operator of the facility.⁹² Furthermore, CERCLA does not require a causal relationship between ownership and disposal for there to be liability.⁹³ Finally, CERCLA does not require an owner to participate in management in order for liability to attach.⁹⁴ Accordingly, since the court determined that the trustee was an owner, he was liable regardless of personal participation in running the facility.

3. *Closely Held Corporate Trust: Quadion Corp. v. Mache*

In *Quadion Corp. v. Mache*,⁹⁵ the district court for the Northern District of Illinois denied a motion to dismiss a complaint under CERCLA made by the trust, its beneficiaries and its current and previous trustees. The defendant trust owned seventy percent of a corporation which Quadion's predecessor-in-interest purchased.⁹⁶ After Quadion acquired the corporation, it learned that the real property was contaminated.⁹⁷ Quadion's first count sought contribution from the trust and trustees under CERCLA.⁹⁸ The defendants argued that they were only shareholders of the corporation,

88. *Burns*, No. C-88-94-L, 1988 U.S. Dist. LEXIS 17340, at *3 (citing H.R. REP. No. 96-172, 96th Cong., 2d Sess., 36 (1980), reprinted in 1980 U.S.C.C.A.N. 6160, 6181).

89. *Id.* at *3-4 (citing *South Carolina Recycling*, 653 F. Supp. at 1003 (finding lessee liable as owner under CERCLA § 107); *Maryland Bank & Trust*, 632 F. Supp. at 578-80 (finding security interest exception to liability of owner to be narrow exception to general rule of strict liability)).

90. *Id.* at *4 (citing *Shore Realty*, 759 F.2d at 1044-45; IIIA FRATCHER, *supra* note 73, at §§ 265, 265.1 (trustee holding legal title to trust property could be liable for obligations as owner of property)).

91. *Id.* at *4.

92. *Id.* (citing *Shore Realty*, 759 F.2d at 1052; *United States v. Stringfellow*, 661 F. Supp. 1053, 1063 (C.D. Cal. 1987)).

93. *Burns*, No. C-88-94-L, 1988 U.S. Dist. LEXIS 17340, at *4 (citations omitted).

94. *Id.* (citing *United States v. Argent*, 21 Env't. Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984)).

95. 738 F. Supp. 270 (N.D. Ill. 1990).

96. *Id.* at 272-73.

97. *Id.* at 273.

98. *Id.*

not owners, and that the plaintiff failed to establish that defendants exercised sufficient control over the corporation to be considered operators.⁹⁹ The court found that as shareholders of a closely held corporation, they could be liable under CERCLA, even if there were insufficient facts to warrant piercing the corporate veil.¹⁰⁰

The court adopted a test for determining when a shareholder of a closely held corporation can be liable under CERCLA. The test focuses on authority to control waste management, and responsibility undertaken or neglected.¹⁰¹ After applying this test, the court concluded that the owners and the closely held corporation were not legally distinct and denied the defendants' motion to dismiss.¹⁰²

4. *Corporate Liquidating Trust*

In *Rollins Environmental Services (FS), Inc. v. Wright*,¹⁰³ the plaintiff, a Delaware corporation, contracted with the defendant to perform cleanup work at the defendant's Arkansas facility.¹⁰⁴ The defendant was also a Delaware corporation, but had already dissolved and petitioned the court to appoint trustees.¹⁰⁵ The plaintiff sought payment from the trustees and filed suit when the trustees failed to make any payment.¹⁰⁶ The court found that the relevant statute applied to liquidating trusts,¹⁰⁷ and concluded that it had personal jurisdiction over the trustees, and that the trustees' due process rights were not violated.¹⁰⁸ The trustees succeeded to all

99. *Quadion*, 738 F. Supp. at 274.

100. *Id.* at 274.

101. *Id.* at 274-75. The court stated that evidence to consider includes: authority to control waste handling practices, such as whether the individual is an officer or director; distribution of power within the corporation, including position in the corporate hierarchy and percentage of shares owned; responsibility undertaken for waste disposal; and attempts to prevent unlawful hazardous waste disposal. *Id.*

102. *Id.* at 275.

103. 738 F. Supp. 150 (D. Del. 1990).

104. *Id.* at 151.

105. *Id.*

106. *Id.* at 152.

107. *Rollins*, 738 F. Supp. at 152.

108. *Id.* The trustees argued their due process rights were violated because they lacked sufficient contacts with Delaware. *Id.* The court, however, concluded that the litigation was related to the trustee defendants' contacts with the state since they were appointed liquidating trustees of a Delaware corporation. *Id.* at 153. Furthermore, since the trustee defendants purposefully established "minimum contacts" with Delaware and previously sought protection of the state's courts, the court stated they could "reasonably anticipate being haled into court" in Delaware. *Id.* at 153-54. Finally, the court noted that its exercise of in personam jurisdiction did not offend traditional notions of "fair play and substantial justice."

right, title and interest of the corporation, and had the power to defend all suits necessary to wind up the corporation's affairs.¹⁰⁹ The court stated that any person with a claim against the dissolved corporation now had a claim against the trustees.¹¹⁰ The trustees were authorized to defend any actions necessary to conclude the corporation's affairs, including actions based on legal obligations of the dissolved corporation.¹¹¹ Thus, the court denied the defendants' motion to dismiss.¹¹²

The court in *Waste Management of Wisconsin, Inc. v. Uniroyal, Inc.*¹¹³ denied a trustee of a liquidating trust's motion to dismiss for lack of personal jurisdiction and failure to state a claim for which relief may be granted. In *Uniroyal*, a waste management company brought an action to recover past and future response costs at two Superfund sites. The company sought damages from the trustees of CDU Holding, Inc., Liquidating Trust ("CDU Holding").¹¹⁴

The first issue the court addressed was whether the trustees were subject to personal jurisdiction.¹¹⁵ The court determined that CERCLA provides for nationwide service of process by the United States but not for private causes of action.¹¹⁶ Yet, the court found that the state's long arm statute was applicable, and concluded that it had personal jurisdiction over the trustees.¹¹⁷ In addition, the court found that the defendants' contacts with the state were sufficient to comply with due process.¹¹⁸ The court reasoned that bring-

Rollins, 738 F. Supp. at 154. Thus, the court concluded that it did not violate due process to assert jurisdiction over the trustee defendants. *Id.*

109. *Id.* at 154.

110. *Id.*

111. *Rollins*, 738 F. Supp. at 154-55.

112. *Id.* at 155.

113. No. 91-C-1020-5, 1992 U.S. Dist. LEXIS 12003 (W.D. Wis. June 2, 1992).

114. *Id.* at *1. The defendants were involved in a manufacturing process that resulted in spent solvents, solvent sludge and dry waste scrap disposal at the two sites. *Id.* at *3-4. After several transfers, mergers, and corporate transactions, certificates of dissolution were filed for Uniroyal and upon dissolution, assets were transferred to CDU Holding Liquidating Trust. *Id.* at *4. Waste Management sought to hold the defendants Uniroyal Holding, CDU Holding, and the trustees liable for costs of response and damages incurred up to that time at its landfill, together with future response costs as successors to the defendant Uniroyal. *Uniroyal*, No. 91-C-1020-5, 1992 U.S. Dist. LEXIS 12003, at *4-11.

115. *Id.* at *12.

116. *Id.* (citing FED. R. Crv. P. 4(c)).

117. *Uniroyal*, No. 91-C-1020-5, 1992 U.S. Dist. LEXIS 12003, at *14-15. The trustee defendants, including CDU Holding, assumed responsibility for the liabilities incurred by Uniroyal, Inc. for the generation and disposal of hazardous substances, and the transfer of assets and reorganization justified inferring responsibility for liabilities arising in Wisconsin. *Id.* at *13-14.

118. *Id.* at *15-16.

ing successor defendants into a forum where they were permitted to do business did not offend traditional notions of fair play and substantial justice.¹¹⁹ Accordingly, the court denied the motion to dismiss.¹²⁰

The second issue addressed by the court was whether the complaint should be dismissed against CDU Holding for failure to state a claim for which relief could be granted.¹²¹ The court found that CERCLA preempted state dissolution proceedings¹²² and therefore, the actions of the trustees as successors-in-interest did not automatically relieve Uniroyal or CDU Holding of liability.¹²³

5. *Bank Trusts*

The court in *City of Phoenix v. Garbage Service Co.* ("Phoenix I")¹²⁴ found that although status as a trustee alone did not trigger CERCLA liability, the possibility that the trustee may have taken other actions that could bring it within CERCLA's definition of owner justified denial of a partial summary judgment motion.¹²⁵ The only issue presented to the court was whether the defendant, Valley National Bank ("VNB"), was an owner under CERCLA.¹²⁶ The court concluded that liability did not attach based only on VNB's role as executor or trustee and determined that there was a question of fact regarding whether VNB "bore the indicia of ownership" necessary to be liable under CERCLA.¹²⁷

The court in *City of Phoenix v. Garbage Service Co.* ("Phoenix II")¹²⁸ squarely addressed the issue of VNB's liability under CERCLA. In *Phoenix II*, the court began its analysis by determining whether VNB was either an operator or an owner of the landfill.¹²⁹ The court did not find that the defendant was liable as an operator

119. *Id.* at *16. The court noted that as far back as 1955, liquid waste products were generated which resulted in two sites being placed on the NPL. *Id.*

120. *Id.* at *16.

121. *Uniroyal*, No. 91-C-1020-5, 1992 U.S. Dist. LEXIS 12003, at *16-17.

122. *Id.* at *17.

123. *Id.*

124. 33 Env't Rep. Cas. (BNA) 1655 (D. Ariz. Apr. 5, 1991).

125. *Id.* at 1655. Pursuant to CERCLA § 107, the city filed to recover response costs incurred in cleaning up an allegedly contaminated landfill site which it acquired during condemnation proceedings. *Id.* The defendant, Valley National Bank ("VNB"), asserted that neither as executor of a testamentary estate, nor in its capacity as trustee, did it possess any of the rights of ownership. *Id.* at 1655-56.

126. *Phoenix I*, 33 Env't Rep. Cas. (BNA) at 1656.

127. *Id.*

128. 816 F. Supp. 564 (D. Ariz. 1993).

129. *Id.* at 567-69.

under CERCLA because as a trustee it was not involved in the daily administration of the landfill.¹³⁰

However, the court held that VNB was liable under CERCLA as an owner of the landfill.¹³¹ In determining liability, the court examined “whether a trustee, as the holder of legal title to property, may be held liable under CERCLA for cleanup costs as an ‘owner’ even though he played no role in the contamination of the property.”¹³² The court held that a trustee may be liable as an owner under section 107 of CERCLA despite only having “bare legal title.” The court reasoned that CERCLA does not impose a culpability requirement for ownership liability.¹³³ The court relied on legislative history¹³⁴ and commentators¹³⁵ to support the proposition that CERCLA’s definition of owner includes trustees who merely hold legal title to property. The court recognized the only exception to title holder liability under CERCLA: under CERCLA section 101(20)(A), “lenders who hold ‘indicia of ownership’ primarily to protect [their] security interest” are exempt from liability.¹³⁶

B. Liability Not Imposed on Trustees

1. Land Trust

In *Premium Plastics v. LaSalle National Bank*,¹³⁷ the plaintiffs filed a contribution suit against LaSalle National Bank (“LaSalle”) alleging that as trustee of a contaminated property, LaSalle was re-

130. *Id.* at 567. The court stated that under CERCLA, liability as an owner only attaches where the defendant has control over day-to-day administration of a facility, and rejected the plaintiff’s contention that VNB’s status as trustee gave it such authority to control. *Id.* The court noted that the evidence clearly showed that VNB did not enter into or negotiate contracts for waste disposal, and that VNB was only involved in matters of the estate, not the landfill. *Id.* at 567.

131. *Id.* at 569.

132. *Phoenix II*, 816 F. Supp. at 568.

133. *Id.* While the court acknowledged the difficulty in assessing liability in excess of the value of the trust’s assets, the degree of culpability had nothing to do with owner/operator liability under CERCLA. *Id.* at 568. “The trigger to liability under § 9607(a)(2) is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination.” *Id.* at 567 (quoting *Nurad, Inc. v. Hooper & Sons Co.*, 966 F.2d 837, 846 n.198 (4th Cir. 1992)).

134. *Id.* at 567. The court noted that CERCLA’s legislative history “seems to take for granted that any titleholder is an ‘owner’ under the statute.” *Id.* at 567 (citing H.R. REP. NO. 172, 96th Cong., 2d Sess. 36 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6160, 6181).

135. *Id.* at 567-68. The court stated that the consensus of commentators is that CERCLA’s definition of owner includes trustees even if they only hold legal title. *Id.* at 567 (citations omitted).

136. *Phoenix II*, 816 F. Supp. at 568 (quoting CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A)).

137. No. 92-C-413, 1992 U.S. Dist. LEXIS 16119 (N.D. Ill. Oct. 22, 1992).

sponsible for the hazardous waste disposal that occurred at the site.¹³⁸ The court dismissed the plaintiffs' contribution claim¹³⁹ and granted LaSalle's motion for summary judgment holding that as a trustee, the bank was only a title holder and not an owner or operator under CERCLA.¹⁴⁰

The court's analysis recognized that aside from a relationship based on legal title, a land trustee's title is insignificant.¹⁴¹ Because LaSalle was only a title holder and took no active part in the property or venture, it was not an owner or operator of the site.¹⁴² For that reason, the court held that CERCLA did not impose liability on LaSalle.¹⁴³ In addition, the court rejected the plaintiffs' argument that if LaSalle's request for summary judgment were granted, other defendants would claim they were not owners, and plaintiffs could not recover.¹⁴⁴ The court looked to the plain language of the trust agreement, and concluded the beneficiary retained all control, and was to be considered the owner of the site.¹⁴⁵ Accordingly, the court refused to "subject an innocent party such as LaSalle to liability in order to assure that plaintiffs have a source of recovery for their expenses related to this matter."¹⁴⁶

2. *Contingent Remaindermen of Family Trusts*

In *Nurad, Inc. v. Wm. E. Hooper & Sons*,¹⁴⁷ the Fourth Circuit affirmed the district court's grant of summary judgment in favor of the defendants, and found that they were not liable under CERCLA.¹⁴⁸ Nurad argued the defendants were liable as prior owners and operators because they held stock in the company and were

138. *Id.* at *1-3. The plaintiffs spent over \$100,000.00 in cleanup costs to remedy the situation and subsequently filed suit for contribution costs. *Id.* at *4-5.

139. The plaintiffs alleged they were entitled to contribution since they paid costs above their pro-rata share. *Id.* at *4. The court noted only a tort-feasor has the right to contribution under the state statute. *Premium Plastics*, No. 92-C-413, 1992 U.S. Dist. LEXIS 16119, at *5. The plaintiffs claimed they did not cause the contamination, therefore, they were not jointly liable and were not entitled to contribution. *Id.* at *6.

140. *Id.* at *10.

141. *Premium Plastics*, No. 92-C-413, 1992 U.S. Dist. LEXIS 16119, at *10 (noting trustee is legal fiction and ownership truly rests in beneficiary).

142. *Id.* at *10-11.

143. *Id.*

144. *Id.* at *11.

145. *Premium Plastics*, No. 92-C-413, 1992 U.S. Dist. LEXIS 16119, at *11.

146. *Id.* at *12.

147. 966 F.2d 837 (4th Cir. 1992).

148. *Id.* at 844.

remaindermen in a family trust.¹⁴⁹ The Fourth Circuit agreed with the district court that the defendants were not owners or operators since they did not have sufficient authority to control or prevent disposal.¹⁵⁰ The court noted that although the defendants were company officers, their authority was completely subordinate to that of their father, who was the president and majority stockholder of the company.¹⁵¹ The district court found "neither [defendant] had the ability nor the capacity to exercise such control over the operations since their father . . . retained all decision-making authority over the company including the daily operations at the finishing plant."¹⁵² Thus, the district court declined to hold the defendants liable under CERCLA,¹⁵³ and the Fourth Circuit affirmed.¹⁵⁴

3. *Avoiding Liability as Trustee*

In *Con-Tech Sales Defined Benefit Trust v. Cockerham*,¹⁵⁵ the trustee successfully avoided liability by testing the property for contamination and initiating a cleanup. The plaintiffs sought to recover CERCLA response costs and to assess liability for future expenses, and the defendants moved for summary judgment arguing the plaintiffs' cleanup did not comply with the National Contingency Plan ("NCP").¹⁵⁶ In deciding whether to grant a summary

149. *Nurad v. Wm. E. Hooper & Sons Co.*, No. WN 90-661, 1991 U.S. Dist. LEXIS 17090, *21-22 (D. Md. Aug. 15, 1991) *aff'd in part, rev'd in part*, 966 F.2d 837 (4th Cir. 1992). According to *Nurad*, the defendants were in a position to influence decisions made by the company because they were officers and directors at the time of disposal. *Id.* at *22. The defendants alleged they never participated in disposal decisions, and that they had neither controlling company stock, nor power to control company operations. *Id.*

150. *Nurad*, 966 F.2d at 844.

151. *Id.*

152. *Nurad*, No. WN 90-661, 1991 U.S. Dist. LEXIS 17090, at *30. The evidence established that the father was solely responsible for running the company and made all major corporate decisions by voting the majority of shares of stock placed in trust after his father's death. *Id.* at *31 n.23.

153. *Id.* at *31-32.

154. *Nurad*, 966 F.2d at 844.

155. No. 87-5137, 1991 U.S. Dist. LEXIS 14624 (E.D. Pa. Oct. 9, 1991).

156. *Id.* at *3, 7. Plaintiffs purchased the property ("Exton Parcels") in 1986, and later excavations uncovered a trench filled with hazardous wastes allegedly trucked to the site by the defendants. *Id.* at *6. The plaintiffs removed 9,700 tons of waste, but 4,700 tons still remained, so they brought suit to recover response costs incurred and to assess liability for future expenses. *Id.* at *6-7.

The defendants sought partial summary judgment on the basis that no legal obligation existed to defray response costs incurred because the plaintiffs allegedly conducted their cleanup in a manner inconsistent with the National Contingency Plan ("NCP"). *Con-Tech*, No. 87-5137, 1991 U.S. Dist. LEXIS 14624, at *7. The court considered three issues in deciding whether to grant the motion: (1)

judgment, the court analyzed the retroactivity of the 1990 version of the NCP, which requires “‘substantial compliance’ with the appropriate regulations.”¹⁵⁷ The unamended version of the NCP, however, has been interpreted by courts as requiring strict adherence to specified requirements.¹⁵⁸ The court evaluated the plaintiffs’ claims under the 1990 NCP substantial compliance standard, but to the extent it imposed additional requirements, the court applied the unamended NCP standard.¹⁵⁹

The court stated the plaintiffs’ cleanup action should be considered consistent with the NCP if it was in substantial compliance with the NCP requirements, and produced a “CERCLA-quality cleanup.”¹⁶⁰ Since the plaintiffs could recover if they substantially complied with the NCP, the court denied the motion for summary judgment.¹⁶¹

V. LEGISLATIVE RESPONSES

A. Innocent Landowner Defense

The “Innocent Landowner Defense Amendment of 1993,”¹⁶² was introduced to Congress by Representative Curt Weldon. The Bill would amend CERCLA to provide specific requirements for the innocent landowner defense and would apply to trustees and other entities who acquire contaminated property. A purchaser of real property would have the benefit of a rebuttable presumption that all appropriate inquiries into the previous ownership and uses of the property were made if it is established that “immediately prior to or at the time of acquisition he obtained a Phase I Environmental Audit.”¹⁶³

whether the amended version of the NCP applied; (2) the standard of compliance required of plaintiffs; and (3) whether the plaintiffs’ response action was a removal or a remedial action. *Id.* at *8.

157. *Id.* at *9. See 40 C.F.R. § 300.700 (1990).

158. *Con-Tech*, No. 87-5137, 1991 U.S. Dist. LEXIS 14,627, at *9. See 40 C.F.R. § 300.71 (1988).

159. *Con-Tech*, No. 87-5137, 1991 U.S. Dist. LEXIS 14,624, at *10.

160. *Id.* at *19 (citing 40 C.F.R. § 300.700(c)(3)(i) (1990)).

161. *Id.* at *28-30.

162. H.R. 570, 103d Cong., 1st Sess. (1993). A version of the Bill was introduced previously as H.R. 2787, 101st Cong., 1st Sess. (1989).

163. *Id.* The Bill would redesignate subparagraphs (C) and (D) of CERCLA as subparagraphs (D) and (E), and insert after subparagraph (B) a new subparagraph (C) which would provide:

(C)(i) A defendant who has acquired real property shall have established a rebuttable presumption that he has made all appropriate inquiry . . . if he establishes that, immediately prior to or at the time of acquisition, he

The audit would be performed by an environmental professional,¹⁶⁴ in order “to determine or discover the obviousness of the presence or likely presence of a release or threatened release of hazardous substances on the real property.”¹⁶⁵ The audit would require review of previous ownership and uses of the property.¹⁶⁶ These inquiries would determine whether the prospective owner searched for reasonably available documented or visual evidence of hazardous substances. After the search, an owner would avoid liability for contamination which occurred prior to ownership. Furthermore, if the audit should reveal the presence or likely presence of a release or threatened release of hazardous substances, the buyer would be required to take “reasonable steps” consistent with current technology and engineering practice to confirm the absence of any releases in order to claim the rebuttable presumption.¹⁶⁷

B. Fiduciary and Lender Liability

Representative John LaFalce introduced legislation which addressed the issue of trustee liability.¹⁶⁸ The Bill sought to limit the liability under CERCLA and the Resource Conservation and Recovery Act (“RCRA”)¹⁶⁹ of fiduciaries, lending institutions, and others holding indicia of ownership primarily to protect a security interest.¹⁷⁰ The Bill would provide that those who hold indicia of ownership primarily to protect a security interest and who do not

obtained a Phase I Environmental Audit of the real property which meets the requirements of this subparagraph.

Id.

164. *Id.* An “environmental professional” is defined as, “an individual, or an entity managed or controlled by such individual who, through academic training, occupational experience and reputation (such as engineers, environmental consultants and attorneys), can objectively conduct one or more aspects of a Phase I Environmental Audit.” *Id.*

165. *Id.*

166. H.R. 570. The information reviewed during an audit consists of the recorded chain of title for a period of 50 years, reasonably available aerial photographs, recorded environmental cleanup liens, reasonably obtainable governmental records which document releases, and a visual site inspection of the property and immediately adjacent properties. *Id.*

167. *Id.* The information must be maintained in writing by the purchaser in order to claim the presumption of being an innocent landowner. *Id.*

168. H.R. REP. NO. 1450, 102d Cong., 1st Sess. (1991).

169. Resource Conservation and Recovery Act (“RCRA”) §§ 3001-5006, 42 U.S.C. §§ 6921-56 (1988 & Supp. V 1993).

170. H.R. 1450.

participate in management are not owners or operators under CERCLA and RCRA.¹⁷¹

The Bill would exempt a fiduciary or trustee from being an owner or operator under CERCLA.¹⁷² A fiduciary or trustee who acquires ownership or control of a facility without prior management participation is considered exempt from liability arising out of actions taken by previous owners.¹⁷³ Liability would be imposed, however, on a trustee or fiduciary “who willfully, knowingly, or recklessly causes or exacerbates a release or threatened release of a hazardous substance . . . to the extent that the release or threatened release is attributable to the fiduciary’s or trustee’s activities.”¹⁷⁴ The Bill would not prevent actions against an estate’s assets held by the fiduciaries or trustees in their representative capacities.¹⁷⁵

C. Asset Conservation

In the 102d Congress, Senator Jake Garn introduced a Bill¹⁷⁶ entitled the “Asset Conservation and Deposit Insurance Protection Act of 1991.”¹⁷⁷ The Bill would amend the Federal Deposit Insurance Act¹⁷⁸ to limit the liability of trustees and others acting in a fiduciary capacity. The Bill would apply to insured depository institutions and mortgage lenders when acting in a fiduciary capacity.¹⁷⁹

The limitation on liability would insure depository institutions against liability under any federal law imposing strict liability for the release or threatened release of a hazardous substance from certain

171. *Id.* The Bill defines “indicia of ownership” as any interest in a facility acquired to secure loan payment, indebtedness or obligation in the course of protecting a security interest. *Id.* Participation in management is considered to mean actual, direct control over a facility by one who holds a security interest, and which divests the debtor of such control. *Id.*

172. *Id.*

173. *Id.*

174. H.R. 1450. The proposal did not specifically address the issue of liability arising from a failure to stop a release or threatened release of a hazardous substance.

175. *Id.*

176. The Bill was not reintroduced in the 103d Congress. Earlier versions of the Bill were S. 2319, 101st Cong., 2d Sess. (1990) and S. 2827, 101st Cong., 2d Sess. (1990).

177. S. 651, 102d Cong., 1st Sess. (1991).

178. 12 U.S.C. § 1811-33e (1988 & Supp. V 1993).

179. S. 651. The Bill defined “fiduciary capacity” to include those “acting for the benefit of a nonaffiliated person as a trustee, executor, administrator, custodian, guardian of estates, receiver, conservator, committee of estates of lunatics, or any similar capacity.” *Id.*

properties.¹⁸⁰ Liability would be limited to the actual benefit conferred on the "institution by a removal, remedial, or other response action undertaken by another party."¹⁸¹ Mortgage lender liability also would be limited in a similar manner.¹⁸² However, this limitation would not apply to mortgage lenders in a fiduciary capacity.

The proposal also addresses the "unexercised capacity to influence" which would exempt both the insured depository institution and mortgage lender from liability, "based solely on the fact that the institution or lender has the unexercised capacity to influence operations at or on property in which it has a security interest."¹⁸³ The limitation on liability would not apply to three groups: (1) any person that caused or contributed to the release of a hazardous substance forming the basis for liability; (2) any person who failed to take reasonable steps to prevent the continued release of a hazardous substance forming the basis for liability, including discovery prior to, or after acquisition or termination of the lease; and (3) any person who actively directed or conducted operations resulting in the release of hazardous substances forming the basis for liability.¹⁸⁴

VI. STATE LEGISLATION

Seven states have addressed the issue of fiduciary and trustee liability under environmental laws.¹⁸⁵ The states' approaches can be divided into three categories. In the first category are North Carolina, Rhode Island, Utah and Virginia. The statutes of these states set forth the following enumerated discretionary powers. First, the statutes provide for an inspection of property held in a fiduciary capacity to determine the level of compliance with environmental laws, in addition to those rights and remedies set forth by any will, trust, or other document.¹⁸⁶ Second, any necessary ac-

180. These properties included those acquired through foreclosure, held in fiduciary capacity, held by a lessor pursuant to the terms of an extension of credit, or those subject to financial control or oversight pursuant to the terms of an extension of credit. *Id.*

181. *Id.*

182. *Id.*

183. S. 651.

184. *Id.*

185. See ALA. CODE § 19-3-11 (1990); IND. CODE ANN. §§ 13-7-20-24, 13-7-20.1-14 (West 1994); N.C. GEN. STAT. § 32-27 (8.1) (1991); R.I. GEN. LAWS § 18-4-26 (Supp. 1993); TENN. CODE ANN. § 35-50-110 (32) (1991); UTAH CODE ANN. § 75-1-109 (1991); VA. CODE ANN. § 64.1-57(t) (Michie Supp. 1994).

186. N.C. GEN. STAT. § 32-27(8.1)(a); R.I. GEN. LAWS § 18-4-26(1)(a); UTAH CODE ANN. § 75-1-109(1)(a); VA. CODE ANN. § 64.1-57(t)(1).

tion may be taken on behalf of the trust or estate to prevent or remedy any violation.¹⁸⁷ Third, a fiduciary is allowed "to accept property in trust if . . . any property . . . is contaminated by any hazardous substance or is being used or has been used for any activity directly or indirectly involving hazardous substances which could result in liability to the trust or impair the value of its assets."¹⁸⁸ Fourth, settlements and compromises are permitted "at any time and all claims against the trust or estate which may be asserted by any governmental body or private party involving the alleged violation of any environmental law."¹⁸⁹ Fifth, a fiduciary can "disclaim any power granted by any document, statute, or rule of law which may cause the fiduciary to incur personal liability under any environmental law."¹⁹⁰ Sixth, the fiduciary is able to decline to serve because of a conflict of interest.¹⁹¹ Seventh, the fiduciary is entitled to charge the cost of any authorized inspection, review, abatement, response, cleanup, or remedial action against the income or principal of the trust or estate.¹⁹²

The second category of states consists of Alabama and Tennessee. These two states include the seven previously discussed provisions in their statutes,¹⁹³ and also state that a fiduciary in its individual capacity shall not be considered an owner or operator of any property of the trust or estate for purposes of any environmental law.¹⁹⁴

Indiana has two statutes that limit the liability of creditors and fiduciaries as to petroleum facilities and underground storage tanks.¹⁹⁵ Essentially, creditors and fiduciaries are not liable unless

187. N.C. GEN. STAT. § 32-27(8.1)(b); R.I. GEN. LAWS § 18-4-26(1)(b); UTAH CODE ANN. § 75-1-109(1)(b); VA. CODE ANN. § 64.1-57(t)(2).

188. N.C. GEN. STAT. § 32-27(8.1)(c); R.I. GEN. LAWS § 18-4-26(1)(c); UTAH CODE ANN. § 75-1-109(1)(c); VA. CODE ANN. § 64.1-57(t)(3).

189. N.C. GEN. STAT. § 32-27(8.1)(d); R.I. GEN. LAWS § 18-4-26(1)(d); UTAH CODE ANN. § 75-1-109(1)(d). The Virginia statute does not contain this provision.

190. N.C. GEN. STAT. § 32-27(8.1)(e); R.I. GEN. LAWS § 18-4-26(1)(e); UTAH CODE ANN. § 75-1-109(1)(e); VA. CODE ANN. § 64.1-57(t)(4).

191. N.C. GEN. STAT. § 32-27(8.1)(f); UTAH CODE ANN. § 75-1-109(1)(f); VA. CODE ANN. § 64.1-57(u) (not permitting power to decline to serve, but permitting a fiduciary already appointed to resign because of potential environmental liability of trust or estate assets). Rhode Island does not have this provision in its statute.

192. N.C. GEN. STAT. § 32-27(8.1)(g); R.I. GEN. LAWS § 18-4-26(1)(g); UTAH CODE ANN. § 75-1-109(3); VA. CODE ANN. § 64.1-57(t)(5).

193. ALA. CODE § 19-3-11(a)(1)-(6); TENN. CODE ANN. § 35-50-110(32)(A)(1)-(B)(i). The Alabama statute provides that a fiduciary shall have these powers whether or not set forth in the instrument. ALA. CODE § 19-3-11(a).

194. ALA. CODE § 19-3-11(d); TENN. CODE ANN. § 35-50-110(32)(B)(ii).

195. IND. CODE ANN. §§ 13-7-20-24, 13-7-20.14(c) (West 1994).

they have exercised actual and direct managerial control of the petroleum facility or underground storage tank.¹⁹⁶

VII. THE INDUSTRI-PLEX SITE CASE STUDY

In 1989, a consent decree was signed in *United States v. Stauffer Chem. Co.* for the remediation of the Industri-Plex Site ("Site").¹⁹⁷ As a result of the settlement, the Industri-Plex Site Remedial Trust ("Remedial Trust") and the Industri-Plex Site Custodial Trust ("Custodial Trust") were established.¹⁹⁸ This is the first custodial trust used at a Superfund site in the United States.¹⁹⁹ While the possibility of trustee liability remains, the experience at the Site is instructive because it uses a trust in a manner which makes the trust part of the legal solution to the problems of a contaminated site. In addition, it not only incorporates remediation through the Remedial Trust, but plans for two contingencies: (1) sale via the Custodial Trust; or (2) management of the property through a long-term trust if the land cannot be remediated, to facilitate sale of the property.²⁰⁰ The plan is to return the land to productive use as part of infrastructure and public transportation development.²⁰¹ Thus, CERCLA's statutory goal of providing a permanent solution to the maximum extent possible would be fulfilled.²⁰²

This case study begins with an overview of background information on the Site, and an explanation of the interrelationship between the consent decree, the Remedial Trust, the Custodial Trust, and the long-term trust to demonstrate how they work in unison. Additionally, this case study analyzes how the provisions of the Custodial Trust are incorporated and how the issue of trustee liability is addressed. From this analysis, the practitioner will be able to obtain a working knowledge of a legal mechanism that provides a solution to an expensive and time-consuming environmental problem.

196. *Id.*

197. Industri-Plex Site Remedial Trust I, *Industri-Plex Site Fact Sheet* [hereinafter *Fact Sheet*] (Jan. 5, 1993) (on file with author).

198. *Id.* The Remedial Trust was formed to conduct and pay for the cleanup, and represents the parties who are potentially liable for the contamination, including approximately 22 current and former owners of the site. *Id.* The Custodial Trust was created by the consent decree to hold, manage and sell a parcel of the site, the proceeds of which will go to the City of Woburn, EPA and members of the Remedial Trust. *Id.*

199. See generally *Stauffer*, No. ENF (01-87-E005), 1989 EPA Consent LEXIS 137.

200. See generally *Fact Sheet*, *supra* note 197, at 1-2.

201. *Id.*

202. CERCLA § 121(b)(1), 42 U.S.C. § 9621(b)(1).

A. Background of the Site

The Site is a 245-acre industrial park located in Woburn, Massachusetts.²⁰³ From the mid-1800s until 1969, the Site was used to manufacture chemicals, leather, textiles, and paper products.²⁰⁴ Later, EPA designated it as a Superfund site.²⁰⁵ The pollution discovered included animal hides and residues emitting noxious odors, which were buried at the Site after being used to manufacture glue.²⁰⁶ Both the groundwater and soil at the Site are contaminated.²⁰⁷

The remedies needed to clean up the site include treating the soil, hide piles, wetlands, and groundwater.²⁰⁸ Clean soil will be mixed with soil containing high levels of heavy metals and a geotextile layer will be added to prevent physical contact with contaminants.²⁰⁹ In areas which release noxious odors, soil will be placed over a drainage layer, which will rest on top of an impermeable synthetic layer and a gravel layer.²¹⁰ At the wetlands portions of the

203. *Fact Sheet, supra* note 197, at 1. The Site is open land which contains streams, ponds, utility right-of-ways, roads, railroads and some operating commercial businesses. *Id.* Sixty acres are used by commercial businesses while the remaining 185 acres are undeveloped. *Id.* The anticipated future use is to have 110 acres for commercial use, 35 acres for infrastructure and local transportation, and 100 acres for wetlands and open land. *Id.*

204. Industri-Plex Site Remedial Trust, *Industri-Plex Site Chronology* [hereinafter *Chronology*] (Jan. 5, 1993) (on file with author). Before 1853, the land was undeveloped and there was no known owner. From 1853 until 1968, various chemical companies controlled the site including: (1) Woburn Chem. Works, 1853-63 (manufactured chemicals for textiles, leather and paper and disposed of wastes in pits, streams and sewers); (2) Merrimac Chem. Co. (manufactured acids and pesticides and left inorganic wastes on the site); (3) Monsanto Chem. Co., 1929-31 (similar products and wastes as Merrimac Chem. Co.); (4) New England Chem. Industries, Inc., 1934-36 (manufactured animal hide glues and gelatin); (5) Consolidated Chem. Industries, 1936-61 (same as New England Chem. Industries, Inc.); (6) Stauffer Chem. Co., 1961-68 (same as prior owner); (7) Mark-Phillip Trust (created four piles of hide wastes which released odors from decomposition). *Id.* The Mark-Phillips Trust is one of the successive owners of the property, and is separate from the interim custodians, long-term custodial, and remedial trusts. *Id.*

205. *Fact Sheet, supra* note 197, at 1. In the 1970s, construction activity at the Site uncovered accumulated by-products and wastes. *Id.* at 2. Citizens complained to state agencies about odors and notices of violation were issued by the Department of Environmental Quality Engineering. Subsequently, EPA added the Site to its list of priority hazardous waste sites in 1982. *Id.*

206. *Id.* at 1.

207. *Id.*

208. *Chronology, supra* note 204, at 2.

209. *Id.* Permeable soil caps will be used to allow liquids and gases to flow through. *Id.*

210. This will provide a barrier which will restrict the flow-through of liquids and gases. *Chronology, supra* note 204, at 2. Underneath the impermeable layer, a

Site, sediments will be covered with clean soil to restore wetland habitat, and lost wetlands will be replaced by creating a new wetland area.²¹¹ An interim remedy for groundwater contamination will treat hot spot areas and several wells will be installed to monitor effectiveness.²¹² This procedure is expected to permanently remedy the groundwater contamination and will address the removal of metals.²¹³ The Remedial and Custodial Trusts will play a pivotal role in the remediation and reuse of the property. Remediation and final use are intertwined because, if remediated, the property can be sold. In the event the land cannot be remediated, there must be a long-term management plan.²¹⁴

B. Custodial Trust Provisions

The consent decree defines the Custodial Trust as a trust established "for the purposes of, among other things, receiving, holding, and realizing value from real property and other assets."²¹⁵ In addition, the trust has all the responsibilities and obligations under federal and Massachusetts law of a private, non-charitable landowner.²¹⁶ Generally, the Custodial Trust can sell or convey the property once all remedial action is complete.²¹⁷ Furthermore, the

gas collection system will be built to treat gases produced by decomposition of organic hide wastes. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Chronology, supra* note 204, at 2.

215. *Stauffer*, No. ENF (01-87-E005), 1989 EPA Consent LEXIS 137, at *7-8. The Mark-Phillip Trust was required to convey all of its property to the Custodial Trust. *Id.* at *28. The consent decree outlines the Custodial Trust's general obligations concerning the Mark-Phillip Trust, including: receiving and holding property in any form received; managing and maintaining the property until sold; complying with institutional controls; providing access to the Site; subdividing, locating purchasers and negotiating terms of sale; granting options and making contracts concerning real estate; and paying proceeds of sales into an escrow account. *Id.* at *30-31, app. IV, § 6.01-09.

216. *Id.* at *32.

217. *Id.* at *34. "Remedial action" is defined as "the work required by this Consent Decree, including the [Remedial Design/Action Plan], with the exception of Long-Term Operation and Maintenance." *Id.* at *11. However, there are two alternative exceptions to this provision: (1) EPA and the State may determine all remedial work is completed at a given parcel and all institutional controls are in place; or (2) EPA and the State may agree to a sale to assure both performance of remedial action and implementation of institutional controls. *Id.*

With regard to the Mark-Phillip Trust property, the trust is specifically authorized to sell all salable portions of the property to a single buyer, even if the potential sale of individual parcels would generate more revenue. *Id.* at app. IV, § 3.03. The salable portions must be sold not later than four years from the date of certification of completion of remedial work unless a longer time is agreed to. *Stauffer*, No. ENF (01-87-E005), 1989 EPA Consent LEXIS 137, at app. IV, § 3.03. If any

Custodial Trust is not permitted to assign interests in the property without advance approval of the United States in consultation with the State.²¹⁸ Any net proceeds realized from sale of the property must be paid by the Custodial Trust to the escrow account.²¹⁹ In addition, the Custodial Trust must establish and fund a long-term trust if EPA, the State and the settlors agree that any of the property is unsalable.²²⁰

Institutional controls,²²¹ which generally run with the land, are binding on the Custodial Trust.²²² Until implementation of the controls is complete or a determination is made that they are not required, no settlor or successor may sell any possessory interest in the property without written approval from EPA and the State.²²³ Additionally, settlors and successors-in-title may not disturb or modify implemented institutional controls unless the action is consistent with the consent decree.²²⁴ The consent decree requirements terminate “upon completion of the work, as certified by EPA in consultation with the Commonwealth or determined by the Court.”²²⁵ However, certain requirements remain in effect until

portion of the property is deemed unsalable, the trustee is to provide for the custodial care of the unsalable property after all salable portions are sold. *Id.* at app. IV, § 3.05. For a further discussion of the Custodial Trustee’s obligation to provide for unsalable property, see *infra* note 220 and accompanying text.

218. *Id.* at *34-35.

219. *Stauffer*, No. ENF (01-87-E005), 1989 EPA Consent LEXIS 137, at *34. Net proceeds are distributed in amounts of 10% of the first \$3,000,000 and the proceeds in excess of \$10,000,000, up to a total of \$645,000, to the City of Woburn. *Id.* at *33-34. Any monies due to the Remedial Trust are also to be repaid and the balance of the proceeds are then to be distributed in accordance with the escrow agreement. *Id.* at *35-38.

220. *Id.* at *31-33. If the Custodial Trustee determines any part of the property is unsalable, it must submit a report stating the reasons for the conclusion to the Remedial Trustee, EPA and the State. *Id.* Only after the Trustees, EPA and the State agree that all reasonable efforts have been made to sell the property may it be declared unsalable. *Stauffer*, No. ENF (01-87-E005), 1989 EPA Consent LEXIS 137, at *31-33. Once this is determined, the Custodial Trustee may establish a long-term trust to manage the property. *Id.*

221. The consent decree defines “institutional controls” as, “the land use restrictions and other regulations and controls designed . . . to maintain the integrity and prevent the unauthorized disturbance of the caps and other structures that will be constructed at the Site.” *Id.* at *9-10.

222. *Id.* at *42.

223. *Stauffer*, No. ENF (01-87-E005), 1989 EPA Consent LEXIS 137, at *42-43.

224. *Id.* at *43. Upon receipt of a written request by a proposed successor-in-title, EPA and the State are required to provide a written statement concerning the current owner’s compliance with institutional controls within thirty days. *Id.* at *43-44.

225. *Id.* at *92.

the parties agree otherwise and the court approves.²²⁶ In addition, termination of the consent decree will not affect any covenants not to sue.²²⁷

The consent decree contains provisions which address Custodial Trustee liability. The Custodial Trustee is only liable to the beneficiaries for negligence, gross negligence, bad faith or willful misconduct.²²⁸ Furthermore, the Custodial Trustee is not required to expend personal funds or incur financial liability while performing its duties.²²⁹ Also, settlors may be held jointly and severally liable for any failure by the Custodial Trust to comply with the consent decree.²³⁰ Additionally, noncompliance is imputed to the settlors rather than the Custodial Trust or the escrowee of the escrow.²³¹ Moreover, provisions in the covenants not to sue contain reservations by the United States and the State of Massachusetts against settlors.²³²

C. Remedial Trust

The Remedial Trust portion of the consent decree contains two provisions that pertain to the Custodial Trust. The first provi-

226. *Id.* Such requirements include: institutional controls, settlors' coordinator, annual reports, access, dispute resolution, stipulated penalties, retention and delivery of records and notices. *Id.*

227. *Stauffer*, No. ENF (01-87-E005), 1989 EPA Consent LEXIS 137, at *92.

228. *Id.* at app. IV, § 8.01.

229. *Id.* at app. IV, § 8.05.

230. *Id.* at *36-37.

231. *Stauffer*, No. ENF (01-87-E005), 1989 EPA Consent LEXIS 137, at *36-37. In addition, the Custodial Trust and its trustees will not be considered owners or operators of any of the property at the site, solely on the basis of the Custodial Trust's ownership and disposition of the property by the Trust in accordance with the consent decree. *Id.* at *37. This presumption, however, is subject to the condition that they do not conduct or permit others to perform any activities other than those specified in the consent decree. *Id.* at *78-88.

232. *Id.* at *84-85. Specifically:

The United States and the Commonwealth reserve all rights against settl[o]rs with respect to all other matters, including but not limited to: (1) claims based on a failure by any Sett[l]o[r] to meet a requirement of this Consent Decree; (2) claims based on the failure of any Sett[l]o[r] who is a Landowner or any Successor-in-Interest (including the Custodial Trust) to comply with any applicable requirements [regarding institutional controls or access]; (3) liability arising from the past, present or future disposal, release or threat of release of Hazardous Substances outside of the site and not attributable to the Site; (4) liability for the disposal of any Hazardous Substances taken from the Site; (5) liability for groundwater contamination . . . or for soil contamination that causes or contributes to groundwater contamination; or (6) liability for damages for injury to, destruction of, or loss of natural resources.

Id.

sion provides for the payment by the Remedial Trustee of Custodial Trustee expenses incurred pursuant to the consent decree.²³³ The decree also covers interest-free loans to the Custodial Trustee for arranging property sales.²³⁴ Furthermore, the Custodial Trustee may submit a request and invoice to the Remedial Trustee at any time for additional funds.²³⁵ The second provision authorizes the Remedial Trustee to pay to the long-term trustee an amount the Custodial Trustee determines necessary to care for property to be held by the long-term trust.²³⁶

The consent decree also addresses the Remedial Trustee's liability. Like the Custodial Trustee, the Remedial Trustee is only liable for gross negligence or willful misconduct in relation to duties under the agreement.²³⁷ Furthermore, the consent decree does not require the Remedial Trustee to expend personal funds or otherwise incur any financial liability while performing duties if repayment or indemnity is not reasonably assured.²³⁸

D. Long-Term Trust

The purpose of providing for a long-term trust is to receive, hold and manage unsalable property transferred to it pursuant to the consent decree.²³⁹

The trustee of the long-term trust must receive and hold title to the real property, comply with institutional controls, provide access to property, insure the Custodial Trust Property against loss due to casualty or third-party liability and comply with all relevant provisions of the consent decree.²⁴⁰ The trustee's duties concerning distribution of property and termination of the trust are also

233. *Id.* at app. III, § 5.03. Payment by the Remedial Trustee is subject to approval of the Management Committee, which is made up of the donors in day-to-day transactions. *Id.* at app. III, § 3.01.

234. *Id.* at app. III, § 5.03.

235. *Stauffer*, No.ENF (01-87-E005), 1989 EPA Consent LEXIS 137, at app. III, § 5.03.

236. *Id.* The amount must be approved by EPA and the State, and may include, but is not limited to, trustee's fees, insurance, maintenance and security. *Id.* After approval by the Management Committee, payment is required within thirty days after receipt of approval by the Remedial Trustee. *Id.*

237. *Id.* at app. III, § 8.02. The Remedial Trustee's responsibilities include: holding, administering, depositing, securing, investing and using funds as required by the consent decree, and following donors' and management committee's directions. *Id.*

238. *Id.* at app. III, § 8.06.

239. *Stauffer*, No. ENF (01-87-E005), 1989 EPA Consent LEXIS 137, at app. IV, ex. 1, § 2.02.

240. *Id.* at app. IV, ex. 1, § 3.01.

specified.²⁴¹ The trust terminates after all property is distributed.²⁴² Any balance of the Custodial Trust fund must be distributed to tax exempt charitable, religious, scientific, literary, or educational organizations.²⁴³ Furthermore, the trustee is urged to exercise its discretionary power to distribute such balance to organizations concerned with preserving the environment.²⁴⁴

Trustee liability in the Custodial Trust and the long-term trust are the same except for one limitation on liability. The long-term trustee is to be liable only for negligence, gross negligence, or willful acts or omissions in relation to its duties, but not for bad faith.²⁴⁵

VIII. DISCUSSION

This discussion analyzes the many facets of trustee liability. First, it reviews the application of the innocent landowner defense to trustees as owners or operators. Next, it discusses the status of trustees, highlighting the particular liability problems for trusts, and how legal solutions affect different types of trusts. It also considers various legal tests for liability and summarizes the law of trustee liability. Additionally, this discussion addresses the problem of pre-acquisition handling of property by trustees, and proposes a solution which focuses on how a trustee can attempt to avoid or minimize liability. Finally, it shows how the Industri-Plex Site model goes beyond the legal solutions proposed, and provides further protection and reduced CERCLA liability.

A. The Innocent Landowner Defense

The issue of whether a trustee is entitled to the innocent landowner defense under CERCLA section 107(b)(3) is a problem facing many trustees. Because "due care" and "precautions against foreseeable acts or omissions of a third party" are undefined, it is difficult to determine whether the innocent landowner defense ap-

241. See generally *id.* at app. IV, ex. 1, § 4.01. Distribution by the trustee is discretionary, but property is to be distributed to the City of Woburn, the United States, the State, or any other appropriate governmental unit if the transferee agrees to accept it. *Id.*

242. *Id.* at app. IV, ex. 1, § 4.02.

243. *Stauffer*, No. ENF (01-87-E005), 1989 EPA Consent LEXIS 137, at app. IV, ex. 1, § 4.02.

244. *Id.*

245. *Id.* at app. IV, § 8.01.

plies in a given case.²⁴⁶ The court in *Pacific Hide & Fur* held there is no absolute duty to inquire into the existence of hazardous waste when obtaining an interest in property.²⁴⁷ However, the case did not provide a bright line test to guide trustees in exercising due care and taking the necessary precautions. As a practical matter, a trustee must determine precisely what is required to take advantage of the statutory defense.

Representative Curt Weldon's proposal would clarify this issue because it provides specificity and outlines requirements a trustee and other entities should follow when acquiring contaminated property.²⁴⁸ More importantly, the proposal sets forth a demarcation line between successive owners. If an owner complies with and documents the inquiries and searches required by the statute, then the task of determining liability is simplified. Thus, innocence may be adjudicated on the basis of records kept by the owner.

B. Owner or Operator

Another issue which must be determined is whether a particular trustee is an owner or operator. The solution to this problem is more difficult than that of the innocent landowner. A distinction must be drawn between voluntary ownership of a party acquiring property and involuntary acquisition by a secured lender. If the acquisition is voluntary there is more flexibility and opportunity to protect an interest than if the acquisition is involuntary.

While Representative Curt Weldon's proposal distinguishes prior owners through specific checks on the background and use of a property, it does address the situation where an environmental hazard occurs between lending and foreclosure. Senator Jake Garn's proposal²⁴⁹ addresses this problem, which was raised in *Bergsoe Metal*,²⁵⁰ by exempting depository institutions and mortgage lenders from liability for the unexercised capacity to influence operations at or on property in which it has a security interest. Yet not

246. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). In relevant part, CERCLA states that no liability will exist if the defendant can demonstrate he exercised "due care with respect to the hazardous substance concerned," and "he took precautions against foreseeable acts or omissions of" a third party. *Id.*

247. *Pacific Hide & Fur*, 716 F. Supp. at 1348-49. For a further discussion of this case, see *supra* notes 34-35 and accompanying text.

248. For a further discussion of Representative Curt Weldon's proposal, see *supra* notes 161-66 and accompanying text.

249. For a further discussion of Senator Jake Garn's proposal, see *supra* notes 175-83 and accompanying text.

250. *Bergsoe Metal*, 910 F.2d at 668. For a further discussion of this case, see *supra* notes 52-53 and accompanying text.

every situation permits such a “hands off” approach. The new EPA Lender Liability Rule attempts to bridge this gap.²⁵¹ This is a direct response to the problems noted in *Maryland Bank & Trust*, *Mirabile*, *Guidice*, and *Fleet Factors*.²⁵² The Lender Liability Rule does not, however, address the similar problems faced by trustees.²⁵³

C. Different Types of Trusts

One approach to the problem of trustee liability focuses on the type of trust involved. Most problems arise in the context of statutory trusts, realty trusts, closely held corporations, liquidating trusts and trustee titleholders. The statutory trustee’s role in *Bliss* was sufficient to incur liability as the statutory legal representative.²⁵⁴ In *Burns*, liability for the realty trust arose irrespective of personal participation.²⁵⁵ In *Quadion*, the court found that a closely held corporation was liable without piercing the corporate veil because it was wholly owned by the trust.²⁵⁶ In *Rollins* and *Uniroyal*, the corporate liquidating trusts were found to have stepped into the shoes of the predecessor and were therefore liable.²⁵⁷ Finally, in *Phoenix II*, the bank trustee was held liable as an owner under CERCLA section 107, “even though the trustee [held] only bare legal title.”²⁵⁸

In contrast, the use of the land trust and contingent remainder family trusts have fared better. In these situations, the trustees were not held liable. In the case of the land trust, the *Premium Plastics* court found the trustee did not incur CERCLA liability merely by

251. For a further discussion of EPA’s Lender Liability Rule, see *supra* notes 55-60 and accompanying text.

252. For a further discussion of these cases, see *supra* notes 42-51 and accompanying text.

253. See 40 C.F.R. § 300.1100. It penalizes control of environmental compliance decision making and overall management of environmental compliance. *Id.* Left intact is the permissible management of internal financial and administrative affairs of the property by the lender. *Id.*

254. *Bliss*, No. 84-2086C(1), 1988 WL 169818, at *9. The decision was also influenced by the trustee assisting in loading drums of hazardous waste and living on the property. *Id.* For a further discussion of this case, see *supra* notes 78-83 and accompanying text.

255. *Burns*, No. C-33-94-L, 1988 U.S. Dist. LEXIS 17340, at *4. For a further discussion of this case, see *supra* notes 84-94 and accompanying text.

256. *Quadion*, 738 F. Supp. at 274. For a further discussion of this case, see *supra* notes 95-102 and accompanying text.

257. *Rollins*, 738 F. Supp. at 150; *Uniroyal*, No. 91-C-1020-5, 1992 U.S. Dist. LEXIS 12003, at *15-17. For a further discussion of these cases, see *supra* notes 103-23 and accompanying text.

258. *Phoenix II*, 816 F. Supp. at 564-68. For a further discussion of this case, see *supra* notes 124-36 and accompanying text.

holding title.²⁵⁹ The court in *Nurad* determined that, as contingent remaindermen in a family trust, the defendants had no authority to influence decisions and were subordinates in the corporate setting.²⁶⁰ In *Con-Tech*, the court provided an instructive roadmap for what a trustee must do to avoid liability, namely, that the trustee test the property for contamination and proceed with the cleanup.²⁶¹

One solution to this confusion is addressed by Representative John LaFalce's proposal, which simply exempts fiduciary trustees and lenders from liability as owners or operators.²⁶² This plan insulates trustees from liability arising out of actions taken by previous owners. Representative Curt Weldon's proposal provides broader protection to both trustees and non-trustees by requiring all entities to make appropriate inquiry into prior ownership and use of property. In contrast, Senator Jake Garn's proposal deals specifically with an unexercised capacity to control, as occurred in *Bergsoe Metal*. The best solution to trustee CERCLA liability would be a combination of these three proposals.

D. Tests for Liability

The variety of legal tests for trustee liability demonstrate the complexity of the issue and the need for a simple, uniform approach to the problem. In *Bliss*, the court adopted a four-part test which asked whether there was a facility, whether a release occurred or was threatened, whether response costs were incurred, and whether the statutory trustees were responsible persons.²⁶³ The court's analysis in *Burns* hinged on whether the realty trust was an owner or operator regardless of personal participation in any management actions.²⁶⁴ In *Quadion*, the court framed the test in terms of the ability to control actions and avoid damage.²⁶⁵ The court in *Con-Tech* first determined which NCP applied in order to decide whether retroactive application of CERCLA was proper.²⁶⁶ The court then addressed which standard of compliance would be

259. *Premium Plastics*, No. 92-C-413, 1992 U.S. Dist. LEXIS 16119, at *10. For a further discussion of this case, see *supra* notes 137-46 and accompanying text.

260. *Nurad*, 966 F.2d at 844. For a further discussion of this case, see *supra* notes 147-54 and accompanying text.

261. *Con-Tech*, No. 87-5137, 1991 U.S. Dist. LEXIS 14624, at *28-29. For a further discussion of this case, see *supra* notes 155-61 and accompanying text.

262. For a further discussion of Representative John LaFalce's proposal, see *supra* notes 168-75 and accompanying text.

263. *Bliss*, No. 84-2086C(1), 1988 WL 169818, at *8-10.

264. *Burns*, No. C-88-94-L, 1988 U.S. Dist. LEXIS 17340, at *5.

265. *Quadion*, 738 F. Supp. at 274-75.

266. *Con-Tech*, No. 87-5137, 1991 U.S. Dist. LEXIS 14624, at *9-10.

imposed and whether the action taken was a remedial or a removal action.²⁶⁷ From still another perspective, *Uniroyal* addressed whether CERCLA liability survived a state corporate dissolution.²⁶⁸ The issues in *Premium Plastics* were whether the trustee held title as an owner or operator and whether plaintiffs who were not joint tortfeasors with defendants were entitled to contribution.²⁶⁹ *Nurad* focused on the authority-to-control test.²⁷⁰ Finally, the court in *Phoenix II* used the owner or operator test to determine whether the trustee was liable under CERCLA.²⁷¹ In sum the courts used a liberal construction to support the policy that responsible parties should bear the burden of paying for cleanup.

In addition to the three federal legislative proposals, state solutions are instructive in finding a solution to the trustee liability problem. A fiduciary can properly act in an environmental setting by inspecting property, preventing or remedying violations, refusing to accept contaminated property and reaching settlements. Additionally, the right to disclaim power otherwise granted by statute, law or any other document, the power to decline to serve, and the ability to charge the costs of cleanup against the trust are important considerations. However, this does not instruct successive business entities on how to avoid problems prior to acquisition. Of course, the broadest solution a state could implement would be simply to adopt the provision that a trustee or fiduciary is not an owner or operator under CERCLA.

E. When a Trustee is Liable

Generally speaking, trustees may be liable for environmental cleanup as owners under federal, state and common law theories, and incur limited or unlimited personal liability.²⁷² The trustee can be held liable under nuisance, intentional tort, negligence or strict liability.²⁷³

The law incorporating the basic principles of trustee liability under CERCLA may be summarized in the following manner. First, the court in *Bliss* held statutory trustees of a defunct corporation liable for permitting disposal of hazardous waste to the extent that

267. *Id.*

268. *Uniroyal*, No. 91-C-1020-5, 1992 U.S. Dist. LEXIS 14624, at *12-16.

269. *Premium Plastics*, No. 92-C-413, 1992 U.S. Dist. LEXIS 16119, at *4-11.

270. *Nurad*, 966 F.2d at 837.

271. *Phoenix II*, 816 F. Supp. at 567-69.

272. Barnhill, *supra* note 6, at 845.

273. *Id.*

corporate property and effects come into their hands. Second, *Burns* found owners of a realty trust liable without personal participation in management. Third, the *Quadion* court held trustees which were sole owners of a closely held corporation liable without sufficient facts to pierce the corporate veil merely because they had the responsibility to control activities and avoid damage. Fourth, the *Rollins* court determined that a corporate liquidating trust was liable because it stepped into the shoes of its predecessor. Fifth, the court in *Con-Tech* decided that a trustee was not liable when it notified the regulators of pre-existing contamination and proceeded with a private cleanup. Sixth, the *Uniroyal* court found that a liquidating trustee is liable for surviving claims under CERCLA, even though a state dissolution proceeding was initiated against its predecessor. Seventh, the court in *Premium Plastics* held that a land trustee was not liable as an owner or operator by only holding title to property. Eighth, *Nurad* held that contingent remaindermen of a family trust are not liable when they lack the authority to control decisions concerning the property. Finally, *Phoenix II* held a bank acting as trustee of an estate with title to a landfill liable as an owner or operator under the doctrine of res judicata when the bank was previously determined to be an owner.²⁷⁴

F. Pre-Acquisition: Avoiding Problems

When concerned about CERCLA liability, perhaps the most critical juncture for the trustee or any other potential owner of property is prior to acquisition. What should one do? Representative Curt Weldon's proposal would set the standard for appropriate action by the trustee and provide uniformity. The list of specific duties required in the Phase I Environmental Audit provides an extremely useful checklist which can easily be followed by the practitioner.

Absent such a statutory enactment, the best pre-acquisition advice which a prospective trustee can receive from an attorney is to identify and evaluate hazardous waste problems. The trustee should seek to satisfy the standard of inquiry necessary to preserve the innocent landowner defense if hazardous substances are discovered on the land. There are several sources of information which may be used in an environmental pre-acquisition investigation including: hazardous waste site lists; federal government agencies; state environmental agencies; past permits; environmental reports;

²⁷⁴. For a discussion of *Phoenix II*, see *supra* notes 128-36 and accompanying text.

compliance records; Security and Exchange Commission ("SEC") records; county records; conversations with the seller, employees and neighbors; law firms with a significant environmental practice; and a physical inspection of the property.²⁷⁵ Soil and water samples could also be obtained from the property at the time of acquisition to establish whether the site was free from contamination prior to ownership. Finally, the trustee could demand that any contamination present be cleaned up prior to acquisition of the land. The trustee can take several other measures to avoid liability prior to acquisition of the property. Insurance against liability for cleanup can be purchased.²⁷⁶ In addition, indemnities, warranties, and covenants can also be obtained from the previous owner to protect the trustee.

G. Post-Acquisition: The Industri-Plex Solution

There are four critical parts of the Industri-Plex Site solution worthy of a closer analysis. Specifically, these are: (1) how to address the problems of the innocent landowner; (2) status as owner or operator; (3) status as trustee; and (4) the relationship of parties to a Superfund cleanup.

Innocent landowners are dealt with primarily through the use of the Remedial and Custodial Trusts. The Remedial Trust's purpose is to perform the environmental cleanup. Once completed, the Custodial Trust is used to ensure the land is clean prior to sale. At least as to subsequent purchasers, the problem of being an innocent landowner is avoided, because such a cleanup is a prerequisite to sale. Whether the trustee is an owner or operator is addressed in the consent decree. One mechanism is the imputed liability to the settlors for liability incurred by the trustees. Additionally, EPA and the State agree that trustees are not owners or operators. Accordingly, the trustees are shielded from liability for past actions by PRPs, and the tangled analyses of the federal cases are avoided.

Furthermore, trustee liability is addressed by the Remedial Trust, Custodial Trust, and the long-term trust. The Remedial Trustee is in charge of cleanup and is liable for negligence, gross negligence, and willful misconduct. The Custodial Trustee is additionally liable for bad faith. The long-term trust is similar to the Remedial Trust. It is important that cleanup duties and responsibilities for sale and long-term holding of the property be separate be-

275. See Kathryn E.B. Robb, *Environmental Considerations in Project Financing*, 605 P.L.I. COMM. 543 (1992).

276. Barnhill, *supra* note 6, at 850.

cause this avoids a judicial inference that the Custodial Trust and the long-term trust are actively involved in property management. Their positions are more analogous to the land trust, which has been met with some measure of success in avoiding liability under the judicial determinations analyzed in this discussion.

Most importantly, the relationship of the parties is essential to the success of Industri-Plex Site. The Custodial Trust cleverly makes EPA, the State, the City of Woburn and the Remedial Trust beneficiaries. Two consequences result from this alliance. First, it puts parties that are normally at odds on the same side. Thus, for purposes of sale, all parties must be consulted to proceed. Furthermore, if there is not to be a sale of the property, that decision is also made in consultation with the regulators. This unique blending of the role of regulator with that of beneficiary ultimately fosters cooperation and financial gain. The incentive for reuse is strong for all parties because they have a contingent interest in such sale, with the sole exception of the trustee. Second, the long-term trust resolves an important problem of how to deal with the property which cannot be resold. It manages the property by addressing this contingency in tandem with the prospect of eventual sale. Assuming sale is not possible, the long-term trust essentially resolves the issue of retroactive liability, since that previously was addressed in the Consent Decree as residing in the original settlors. Thus, the trustee is removed from latent liability.

H. Is it Safe to be a Trustee?

It is safe to be a diligent trustee under CERCLA. There are three keys to ensuring this safety. The first key is the pre-acquisition investigation. Regardless of the type of trust involved, the trustee can take necessary measures to discover the status of the property. Another key is to use due care in the management of the site in carrying out fiduciary duties to ensure preservation of the property for the beneficiary. Finally, the appropriate legal mechanisms must be in place to protect the trustee. As demonstrated in the Industri-Plex Site model, the use of the consent decree proved instrumental in serving to protect the trustees of the Custodial Trust and long-term trusts. In particular, the agreement with EPA that the trustee was not an owner or operator, combined with the imputed liability to the original settlors, provides a great deal of safety to the prudent trustee. When the trustee does not make the appropriate pre-acquisition inquiries or carry out his or her fiduciary duties with diligence, the risk of liability increases. Even the

most sophisticated legal drafting cannot rescue inattentive behavior from liability under CERCLA.

IX. CONCLUSION

Law through the centuries has adapted to the changing needs of society. History shows the trust has been particularly adept at solving problems that could not be resolved by legal remedies. The law of trusts, adapted from English common law, has developed and changed. In the modern context of environmental law, the trust can help deal with pollution and hazardous waste. The time has come to seek solutions to environmental problems. It is clear that the trust can be a mechanism to meet that challenge, as it has with others in the past, and enable responsible parties to return damaged land to a useful and productive state.