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The Scope and Limits of the Inheritance Defense in CERLA

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I. INTRODUCTION

The advent of a new Presidency brings with it the possibility of dramatic change in the context of environmental regulation. Indeed, Vice President Al Gore is an ardent supporter of a comprehensive cleaning up of the environment. As most Americans realize, corporations will likely be hard hit with the strengthening of environmental regulations. Yet, as many may be unaware, even individual landowners not involved in corporate affairs, may be potential targets for liability under environmental statutes.

For instance, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1], its corresponding regulations,[2] and the Superfund Amendments and Reauthorization Act (SARA)[3] allow the government to seek costs for cleaning up the environment from the "current owner" or "current operator" of a contaminated land site. Assume, for instance, that taxpayer A has inherited property which, although unused now, was formerly used as a municipal solid waste disposal facility. Assume further that the taxpayer was not involved with the company, nor did he or she own the land during any period of contamination. A cursory examination of the land disclosed no sign of leachate[4] or contamination. Theoretically, under Superfund[5] provisions, A taxpayer could nonetheless be targeted for cleanup costs as a current owner.[6]

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1. 42 USC § 9601 et seq (1980).

2. 40 CFR §§ 300, 304 (1992).

3. 42 USC § 9601 et seq (1986).

4. "Leachate" is defined as "the liquid that has percolated through soil or other medium." *Webster's Third International Dictionary* 1282 (Merriam-Webster 1986).

5. "Superfund" is the popular name for CERCLA. "The name derives from a trust fund initially created by the Act for meeting clean up costs pending reimbursement from responsible parties." *Black's Law Dictionary* 1437 (West, 6th ed 1990).

6. 42 USC § 9607(a)(1).

The issue of what does or does not qualify as a "facility" is beyond the scope of this comment. Consequently, this comment is based upon the assumption that A's land would qualify as a "facility" under the statute. Section 9607(a)(1) targets the "owner or operator of a vessel or a facility" with liability. 42 USC § 9607(a)(1). "Facility is

Some might think this an unjust result, and indeed, Superfund does provide a means of escaping such liability - the "inheritance defense."[7] Essentially, the statute provides that those obtaining land through inheritance or bequest should, subject to certain requirements, not be held responsible for the payment of cleanup costs.[8] Precisely what those requirements consist of, however, is difficult to discern. Inconsistencies and contradictions as to those requirements exist between the statutory language, the legislative history and various secondary sources. Moreover, those federal cases addressing the "inheritance defense" do so only tangentially and thus offer no substantial guidance as to interpreting the defense.[9]

Given this apparent labyrinth regarding the statute, how is one in taxpayer A's situation to assess his or her responsibilities concerning cleanup? This comment seeks to explore the language of the statute, the legislative history, secondary sources and applicable case law in hopes of providing some guidance for those, such as taxpayer A, seeking shelter from liability within the parameters of the inheritance defense.

II. Statute and Legislative History

A. *Statute*

In 1976, Congress gave the Environmental Protection Agency (EPA) authority to regulate the chemical contamination of homes.[10] Yet it was largely due to contamination of homes in the Love Canal area of Niagra Falls, New York in 1978 which brought environmental regulation to the forefront of American consciousness and which encouraged the EPA to accelerate such regulations.[11] Consequently, it was in 1980 when Congress passed Public Law 96-510 - the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[12] CERCLA authorized

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defined as follows:

. . .

(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 USC § 9601(9)(B).

7. 42 USC § 9607(b). See note 22 and accompanying text.
8. See note 22 and accompanying text.
9. See note 80 and accompanying text.
10. Wallis E. McClain, Jr., ed, *U.S. Environmental Laws* 4-1 (BNA 1991).
11. McClain, *Laws* at 4-2 (cited in note 10).
12. Id.

$1.6 billion to finance the cleanup of both the Love Canal area and other abandoned dumpsites.[13]

Although there was a consensus that CERCLA presented the EPA with a powerful tool, many were concerned with the relatively low number of completed cleanups.[14] As a consequence, Congress passed the Superfund Amendments and Reauthorization Act (SARA) of 1986[15] which essentially increased the money in the original fund from $1.6 billion to $8.5 billion over five years.[16] SARA did not drastically alter the 1980 Act's basic concept of liability. For instance, if the government can establish a link to a superfund site it may still recover cleanup costs from a potentially responsible party (PRP).[17]

One of the PRPs is the "current owner or operator" of the facility.[18] Yet, although SARA was designed to increase the completion of cleanup sites, it also created a new defense to liability—the "Innocent Landowner" defense.[19] The defense was created, not by altering the list of defenses in section 9607(b) of the statute, but rather by redefining a term used in that section.[20] The altering of the defense in this indirect manner may seem curious, but "[t]he placement of the provision in [s]ection 101, 42 U.S.C. section 9601 [the "definitions" section, rather than in the "liability" section] emphasizes that the Conference did not anticipate that the defense would be regularly utilized by potentially responsible parties as a defense to liability."[21]

As noted above, the actual wording of the "defenses" section was not amended. The applicable text reads as follows:

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

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13. McClain, *Laws* at 4-2 (cited in note 10).
14. Id.
15. See note 3 and accompanying text.
16. McClain, *Laws* at 4-2 (cited in note 10).
17. Id.
18. 42 USC § 9607(a)(1).
19. 42 USC § 9607(b).
20. 42 USC § 9601(35)(A)(iii).
21. James M. Strock, *The Genesis of the 'Innocent Landowner' Defense*, Toxic L Rep, 590, 594 (BNA Oct 5, 1988).

. . .

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a CONTRACTUAL RELATIONSHIP, existing directly or indirectly . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took all precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts of omissions . . . .[22]

The expansion of the available defenses, per SARA, to include those landowners acquiring land through inheritance or bequest was achieved by redefining the phrase "contractual relationship." This new definition reads as follows:

(35)(A) The term "CONTRACTUAL RELATIONSHIP," for the purpose of section 9607(b)(3) of this title includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii) OR (iii) is also established by a preponderance of the evidence:

. . .

(iii) THE DEFENDANT ACQUIRED THE FACILITY BY INHERITANCE OR BEQUEST. In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.[23]

The limitations upon invoking this defense are found both within the "liability" section (cited above) and within the "definitions" section which reads as follows:

(C) Nothing in this paragraph or 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to the defendant.
(D) Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission caused or contributed to the re-

22. 42 USC § 9607(b) (1983) (emphasis added).
23. 42 USC § 9601(35)(A).

lease or threatened release of a hazardous substance which is the subject of the action relating to the facility.[24]

Thus, a mere reading of the statutory text, in and of itself, provides some guidance as to the parameters of the inheritance defense. According to the foregoing sections, the landowner must establish by a preponderance of evidence that he acquired the facility AFTER the disposal or release occurred; that he exercised due care with respect to the hazardous substance when he ultimately did obtain knowledge of the release or threatened release; and that he took precautions against the foreseeable acts or omissions of third parties. However, even if the landowner were to meet the above mentioned requirements, the defense would nevertheless be unavailable if the landowner learned of the release or threatened release and failed to disclose such knowledge to a subsequent purchaser, or if he or she contributed to the release or threatened release.

B. *Legislative History*

Although the text of the statute appears to be straightforward, a reading of the legislative history reveals nuances and distinctions not evident in the text itself.[25] As to "Landowner Liability," it is reported that the House proposed an amendment which would have eliminated liability for those landowners who acquired title after the release of hazardous substances, and who, although they had exercised due care with respect to discovering such materials, were nonetheless ignorant of their presence.[26] The Senate Amendment contained no comparable provision.[27]

The Conference Committee (Committee) rejected the House's proposal, and substituted its own amendment - the current language of the statute parallels that of the Committee's amendment. The Committee's amendment added the new term "contractual relationship" to the definitions section.[28] The definition "clarified" and "confirmed" that landowners who acquire contaminated property without knowing, or without reason to know, of the contamination may have a defense to liability if they satisfy the remaining

24. 42 USC § 9601(35)(D).

25. Superfund Amendments of 1986, 99th Congress, 2nd Session, reprinted in 1986 USCCAN 2835, 3279-81 ("1986 USCCAN").

26. 1986 USCCAN at 3279-81 (cited in note 25).

27. Id.

28. Id at 3279.

requirements of section 9607(b)(3).[29]

As stated above, the text of section 9607(b)(3) mandates that the defendant exercise due care with respect to the hazardous substance and that he take precautions against the foreseeable acts of third parties.[30] As to these requirements, the Committee stated that:

> the due care requirement embodied in section [9607(b)(3)] only requires such person to exercise that degree of due care which is reasonable under the circumstances. The requirement would include those steps necessary to protect the public from a health or environmental threat. . . . Foreseeability [as to the acts of third parties] must be considered in light of the specific circumstances of each case.[31]

At this point, the Committee's commentary appears to be consistent with the text of the statute.[32]

Discrepancies between the Committee's amendment and the text of the statute do arise, however, in another context. As stated above, the Committee would recognize the defense for those who acquire the property "without knowing of the contamination at the site and without reason of know of any contamination."[33] The Committee also suggested that there will be a duty to inquire, apparently as to the possible contaminated "status" of the land.[34] The Committee conceded that the duty to inquire would be judged as of the time of acquisition and that the landowner would be held to a higher standard as public awareness associated with hazardous substance releases grew.[35] In terms of ascertaining what a "reasonable inquiry" is, the Committee declared that:

> [t]hose engaged in commercial transactions should . . . be held to a higher standard than those who are engaged in private residential transactions. Similarly, those who acquire property through inheritance or bequest without any actual knowledge may rely upon this section if they engage in a reasonable inquiry, but they need not be held to the same standard as those who acquire property as part of a commercial or private transaction, and those who acquire property by inheritance without knowing of the inheritance shall not be liable, if they satisfy the remaining requirements of section 107(b)(3).[36]

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29. Id.
30. 42 USC § 9607(b)(3).
31. 1986 USCCAN at 3280 (cited in note 25).
32. 42 USC § 9607(b)(3).
33. 1986 USCCAN at 3279 (cited in note 25).
34. Id at 3280.
35. Id at 3279.
36. Id at 3280-81.

Thus, according to the Committee, even those who acquire property through inheritance must make a reasonable inquiry as to the possible contamination of the land.[37]

Support for the imposition of this duty is not found in a strict reading of the statute. The statute does require the making of a "reasonable inquiry," but does so in a provision separate from that of inheritance.[38] The statute imposes no requirements upon the inheritance defense other than that the landowner must have acquired the property after the contamination occurred and, according to section 9607(b)(3), that the landowner exercise due care with respect to the hazardous substances, and that he or she take precautions against the foreseeable acts or omissions of third parties. Without a requirement that the landowner neither "know nor have reason to know," it appears inconsistent to neverthless hold a landowner to a duty of inquiry as to the status of the land. Thus, the legislative history's suggested imposition of a duty to make a "reasonable inquiry" is in direct contradiction to the wording of the statute. Curiously, although the Committee would seemingly impose this duty upon those obtaining land through a commercial or private transaction as well as upon those acquiring land through inheritance or bequest, it did not impose this duty upon the only remaining category of landowners referred to in the statute—the government acquiring land through escheat et cetera.[39] The Committee's notes fail to explain this discrepancy.[40]

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37. Id.

38. "The term 'contractual relationship,' for the purpose of section 9607(b)(3) of this title includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in or at the facility, and one or more of the circumstances described in clause (i), (ii), OR (iii) is also established by the defendant by a preponderance of the evidence:

(i) AT THE TIME THE DEFENDANT ACQUIRED THE FACILITY THE DEFENDANT DID NOT KNOW AND HAD NO REASON TO KNOW THAT ANY HAZARDOUS SUBSTANCE WHICH IS THE SUBJECT OF THE RELEASE OR THREATENED RELEASE WAS DISPOSED OF ON, IN OR AT THE FACILITY.

(ii) The defendant is a government entity which acquired the facility by escheat, or though any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) THE DEFENDANT ACQUIRED THE FACILITY BY INHERITANCE OF BEQUEST.

42 USC § 9601(35)(A)(emphasis added).

39. 1986 USCCAN at 3279 (cited in note 25). One may reach this conclusion through negative implication because although the Committee discusses the applicable standards for conducting an "appropriate inquiry," it does so only in the context of those acquiring land through commercial or private transactions, and inheritance or bequest, and makes no mention of the duty to which the government would be held. Id.

40. Id.

The legislative history also differs from the statutory text in that it makes distinctions between and among those obtaining land through inheritance or bequest. The Committee's report states, in one instance, that "those who acquire property through inheritance or bequest WITHOUT ACTUAL KNOWLEDGE may rely upon this section if they engage in a reasonable inquiry," yet in another instance notes that "those who acquire property by inheritance WITHOUT KNOWING OF THE INHERITANCE shall not be liable, if they satisfy the remaining requirements of" section 9607(b)(3).[41]

Read with the assumption that all landowners acquiring land in this manner would be held to the same requirements for the invoking of the defense, it appears that the Committee is inconsistent in terms of exactly what requirements are imposed. The first reference to "knowledge" incorporates the duty to make a "reasonable inquiry."[42] The second reference to "knowledge" makes no mention of the duty to make a reasonable inquiry, and rather requires the landowner to merely exercise due caution upon discovering the hazardous substance, and to take precautions against the foreseeable acts and omissions of third parties.[43]

This apparent contradiction may, however, be eliminated if the reference to "knowledge" is interpreted as meaning different things in each phrase. As to the first reference, "without knowledge" may refer to knowledge of the release or threatened release of hazardous substances (i.e.—contamination), knowledge of which could be obtained through conducting a "reasonable inquiry," as to the possible release of such substances.[44] Thus, "without knowledge" in this instance, appears to be a reference to the status of the land in terms of contamination. Presumably, based upon the language of the statute, this landowner would also have to meet the requirements of section 9607(b)(3)—exercising due care and taking precautions against the foreseeable acts of third parties.[45]

As to the second reference, the text explicitly states that "those who acquire property by inheritance WITHOUT KNOWING OF THE INHERITANCE shall not be liable, if they satisfy the remaining requirements" of section 9607(b)(3).[46] Thus, unlike the first reference, where "knowledge" referred to "contamination," in this phrase

41. 1986 USCCAN at 3280-81 (emphasis added) (cited in note 25).
42. See note 36 and accompanying text.
43. 1986 USCCAN at 3280-81 (cited in note 25).
44. Id at 3280.
45. 42 USC § 9607(b)(3).
46. 1986 USCCAN at 3280-81 (emphasis added)(cited in note 25).

"knowledge" seemingly refers to "inheritance." Apparently, one who is without knowledge of inheritance is only required to exercise due care and to take precautions against foreseeable acts of third parties—one is not required to make reasonable inquiry into the possible existence of contamination.[47] Those requirements imposed must presumably be complied with when the landowner ultimately learns of the inheritance or bequest.[48]

The reason for making a distinction between such landowners is not provided in the Committee's amendment. However, one might conclude that the distinction is neither arbitrary, nor a mistake. The Committee amendment states that the defense is to be granted to those landowners "who acquire property without knowing of any contamination at the site and without reason to know of any contamination"[49]—the implication perhaps being that the landowner must be ignorant of the contamination at the time that he is aware that he has ACQUIRED the property. This is consistent with the first phrase—requiring those who had knowledge of their inheritance to make a reasonable inquiry as to the status of the land at the time of inheritance.[50] Presumably, if such inquiries were made and contamination discovered, the person may be able to disclaim the property and thereby avoid liability. Seemingly, a lesser duty/burden is imposed upon those landowners who were without knowledge of inheritance.[51] Such landowners would have no notice of their inheritance and thus would have no reason to inquire as to the possibility of contamination. Moreover, they might not be afforded the luxury of disclaiming the property if a reasonable inquiry did reveal contamination. Consequently, those landowners ignorant of their very inheritance must only meet the requirements of section 9607(b)(3)—presumably when they ultimately learn of their inheritance.[52]

In summary, the Committee's amendment would have required those landowners who have knowledge of their inheritance or bequest to make a reasonable inquiry as to the possible contamination of the land.[53] This duty, which is not supported by the statute

47. It may be difficult to conceptualize a situation in which one is unaware of an inheritance or bequest—nevertheless, this seems to be a reasonable construction of the legislative history.

48. 1986 USCCAN at 3280-81 (cited in note 25).

49. Id at 3279.

50. See note 44 and accompanying text.

51. See note 46 and accompanying text.

52. 1986 USCCAN at 3280-81 (cited in note 25).

53. See note 45 and accompanying text.

itself, would be in addition to those statutory mandates—that the landowner exercise due care in regards to the hazardous substance, and that he take precautions against the foreseeable acts or omissions or third parties.[54] In contrast, according to the Committee, a landowner who is ignorant of the inheritance or bequest would only be held to comply with these latter requirements and would be under no duty to make a reasonable inquiry as to the status of the land.[55]

Although the legislative history appears to contradict the statute in terms of the "scope" of the defense, it is consistent with the statute in terms of the "limits" of the defense.[56] The Committee noted that the definition of "contractual relationship" still allows for liability in certain circumstances. For instance, if a person with knowledge of the release or threatened release transfers property without disclosing such information to the purchaser, then the defense is lost.[57] Moreover, the Committee stated that mere disclosure of contamination would not entitle the party to a defense if the party would otherwise be liable (i.e.—contributed to the contamination).[58] There appears to be no discrepancy between the statutory reading of the limits of the defense and the legislative history's treatment of the limits.

III. Secondary Authority

A. *Scope of the Defense*

As there are apparently discrepancies between the statutory language itself and the legislative history, one might turn to secondary authorities for a resolution of these issues. As previously stated, the Environmental Protection Agency (EPA) is the administrative agency designated to enforce CERCLA and Superfund, and it therefore follows that the EPA's interpretation of the inheritance defense may be particularly insightful. A potential source of such information are "Guidance Reports"—statements which are designed to inform the public of the EPA's policy and position on a particular environmental question. Unfortunately, the EPA has not issued a Guidance Report on the inheritance defense in particular, or on "contractual relationships" in general. However, a

54. See note 45 and accompanying text.
55. See note 46 and accompanying text.
56. 1986 USCCAN at 3279-80 (cited in note 25).
57. 1986 USCCAN at 3280 (cited in note 25).
58. Id.

Guidance Report was issued on "*de minimis* settlements."[59] Within this Report the EPA stated that:

> [t]he requirements which must be satisfied in order for the Agency to consider a settlement with landowners under the *de minimis* settlement provisions of Section 122(g)(1)(B) are substantially the same as the elements which must be proved at trial in order to establish a third party defense under Section 107(b)(3) and Section 101(35).[60]

Given the EPA's characterization of the *de minimis* provision as substantially similar to the inheritance defense provision, the Guidance Report on "*de minimis* settlements" may arguably thus be used as a guideline in determining the scope and limits of the inheritance defense.

The Guidance Report addressed section 101(35)(A)(iii) and quoted the Conference Committee Report's passage referring to that section.[61] The EPA noted that although section 101(35)(A) removed acquisitions by inheritance or bequest from the definition of "contractual relationship," the Conference Committee report nevertheless "suggests that the 'all appropriate inquiry' requirement is nonetheless relevant."[62] This statement intimates that the EPA also found this to be an extra-statutory requirement. However, rather than criticizing such an addition, the EPA instead apparently adopted this construction. The EPA stated that:

> It is recommended that inquiry by the heir at the time of acquisition and thereafter be considered, not only for the purpose of determining the existence of a contractual relationship, but also for the purpose of determining whether the due care requirements of the third party defense have been satisfied.[63]

Although the EPA endorsed the "reasonable inquiry" requirement, it did not make any reference to the distinctions made in the Committee's report (as discussed above) among heirs—those without knowledge of contamination and those without knowledge of inheritance. Thus, the EPA Guidance Report failed, in some in-

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59. The authorization of *de minimis* settlements is in regards to "parties who may be able to 'buy' their way out of the cleanup process because of their limited involvement. The idea is to facilitate the settlement process and also to use the revenues gained from the de minimis parties to entice other PRPs to settle." McClain, *Laws* at 4-3 (cited in note 10).

60. Edward E. Reich, *EPA Guidance of Landowner Liability Under Section 170(a)(1) and De Minimis Settlements Under Section 122(g)(1)(B) of CERCLA, and Settlements With Prospective Purchasers of Contaminated Property*, Environment Reporter - Federal Laws/Index 31:5371 (June 6, 1989).

61. Reich, *EPA Guidance* at 31:5374-75 (cited in note 60).

62. Id.

63. Id.

stances, to reconcile or explain the differences between the statute and the legislative history.[64] Yet the Report does make clear that the EPA would require all landowners obtaining land through inheritance or bequest to conduct a reasonable inquiry as to the status of the land.[65]

The inheritance defense was also addressed by another commentator who noted that:

> . . . parties acquiring property through inheritance or bequest will not be liable, although the EPA has read into the statute a responsibility on the part of the inheritor to inquire as to the status of the property at the time of the acquisition. No such requirement is apparent in the statute, but there is legislative history to support the agency's position.[66]

Leifer recognized that the duty to make a reasonable inquiry at the time of acquisition was not reflected in the statute, yet he rationalized this additional requirement based upon the legislative history.[67] Leifer also noted that in addition to making a reasonable inquiry, the landowner "must still exercise due care in his management of the property" in order to avail himself of the defense.[68] This reference appeared to be in regards to section 9607(b)(3)—which is mandated by statute.[69]

Other secondary sources which discussed "contractual relationships" did so in general terms and did not focus specifically upon the inheritance defense. For example, in a BNA Toxics Law Daily Special Report, it was noted that:

> Innocence is not a defense. However, a property owner has a defense if the release and damage were caused solely by someone else with whom the property owner did not have a contractual relationship and the property owner took precautions to discover the problem and how to avoid the problem. A purchaser will not have a contractual relationship with his seller if the release took place before the sale and the purchaser did not know or have reason to know of the contamination. Finally, to prove that he did not have a reason to know, the purchaser must engage in "appropriate inquiry."[70]

The secondary sources, including the EPA Guidance Report,

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64. See note 24 and accompanying text.

65. Reich, *EPA Guidance* at 31:5375 (cited in note 60).

66. Steven L. Leifer, *EPA's Innocent Landowner Policy: A Practical Approach to Liability Under Superfund*, 20 Envir Rptr 646, 647 (BNA Aug 4, 1989).

67. Leifer, 20 Envir Rptr at 647 (cited in note 66).

68. Id.

69. 42 USC § 9607(b)(3).

70. Aaron Gershonowitz and Miguel Padilla, *Superfund's Innocent Landowner Defense: Elusive of Illusory?*, Toxics L Daily Special Report (BNA Oct 28, 1991).

therefore reaffirm the general thrust of the legislative history—that is, in addition to meeting the statutory requirements, heirs will also be required to make a reasonable inquiry into the status of the land upon acquisition of the property.

B. *Limitations of the Defense*

In terms of limitations to the defense, the sources parallel the statute as well as the legislative history. For instance, "an innocent purchaser who discovers a problem and inadvertently contributes to it, loses the defense."[71] Additionally, "permitting the problem to continue or failing to respond adequately can also destroy the defense."[72] Furthermore, "[m]inute quantities of waste, the failure to quickly respond to an unforeseen problem, or the mere fact of having disposed of waste years ago may all prevent a third party from being the sole cause."[73] "[P]revious owners who learned of releases on site and transferred ownership without disclosing such information to subsequent purchasers are now fully liable under Section 107(a)(1), and are explicitly barred from asserting a third-party defense to cleanup liability."[74] Given the consistent treatment of the limitations on the defense by the statutory text, the legislative history, and the secondary sources, the landowner seems to be afforded reasonable notice of what actions may deprive him or her from invoking the defense.

C. *"Reasonable Inquiry"*

Given that the secondary sources would impose a duty of inquiry upon a party obtaining land through inheritance, one must ascertain what constitutes a "reasonable inquiry." Representative Curt Weldon (R-Pa.) proposed a bill which would have amended section 101(35) by adding a new subsection (C).[75] That subsection would have established, in favor of the landowner, a rebuttable presumption that the landowner has made all appropriate inquiry within the meaning of subsection (B) if that landowner conducted a "Phase I" environmental audit prior to or at the time of acquisi-

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71. Gershonowitz, *Innocent Landowner Defense*, Toxics L Daily Special Rep at ¶12 (cited in note 70). (This publication contains no page numbers, consequently, the specific paragraphs containing the information were cited for ease of reference).

72. Id.

73. Id.

74. David J. Hayes and Conrad B. MacKerron, *Superfund II: A New Mandate*, Envir Rptr, Special Rep (BNA 1987).

75. Leifer, 20 Envir Rptr at 647 n 8 (cited in note 66).

tion of the property.[76]

Theoretically, Weldon's proposal should have no impact upon the inheritance defense, as subsection B, which focused on the "reasonable inquiry" requirement, technically does not apply to the inheritance provision.[77] Under a strict reading of the statute, an heir is not compelled to make a "reasonable inquiry."[78] Yet, given that the legislative history, the EPA and other secondary sources would obligate such a landowner to make a reasonable inquiry, a Phase I audit would feasibly be mandated.[79]

IV. Case Law

A thorough search of court cases and administrative decisions disclosed very few cases which addressed the inheritance defense. Moreover, even those cases that did address the provision failed to clarify its scope or limits. The decision rendered in *United States v Pacific Hide & Fur Depot*[80] discussed the provision at length, yet even this decision was vague, unclear and largely unhelpful.[81]

In this action, the United States brought suit against three companies and seven individuals to recover costs incurred in cleaning up a recycling yard contaminated with polycholrinated biphenyls (PCBs).[82] The government sought to impose liability upon the individual defendants under two distinct theories; (1) as the current

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76. Richard H. Mays, *The Blessed State of Innocence: The Innocent Landowner Defense Under Superfund* 20 Envir Rptr 809 (Sept 8, 1989).

77. The applicable section of the statute reads as follows:

> (35)(B)To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge of experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

42 USC § 9601(35)(B).

78. 42 USC § 9601(35)(A)(iii).

79. A Phase I assessment consists of a review of the prior uses of the property; a review of the government records regarding both the ownership and the use of the property; a review of environmental compliance by owners and operators of the property; and an examination of the property itself—to look for sources of contamination or any evidence that further investigation is needed. Gershonowitz, *Innocent Landowner Defense*, Toxics L Daily Special Rep at ¶ 22 (cited in note 70).

80. 716 F Supp 1341 (D Idaho 1989).

81. *Pacific Hide*, 716 F Supp at 1341.

82. Id.

owners/operators of the facility; and (2) as the owners/operators at the time of contamination.[83] The individuals filed a motion to dismiss, characterizing themselves as "innocent landowners" entitled to protection from liability.[84]

Defendant McCarty's Inc. was formed by Samuel McCarty. He later devised stock to his children S.R., William, and Richard.[85] William and S.R. McCarty operated the scrapyard during the period in which the PCBs were disposed of.[86] Richard's affidavit established that he was a nominal shareholder and that he had no real duties in relation to the scrapyard.[87] McCarty's subsequently sold a portion of the scrapyard property to Pacific Hide.[88]

Upon S.R.'s death, his wife Danya inherited his shares.[89] Although she assumed the position of "secretary" of the corporation, the court concluded that she had no knowledge of the contamination.[90]

William McCarty eventually made a gift of one share each of McCarty's stock to his children Terry, Sherry and Michael.[91] The corporation then forfeited its charter and transferred its assets to the shareholders (William; Dayna; Richard; Terry; Sherry; Michael) in return for redemption of their shares.[92] Affidavits of Terry, Sherry and Michael indicated that they had no real involvement in the running of McCarty's.

Addressing liability under the "current owner or operator" provision, the court concluded that as William was not a current owner, liability could not be imposed upon him based upon this provision.[93] In contrast, Richard, Dayna, Terry, Sherry and Michael were current owners.[94] The court imposed a burden of proving, by a preponderance of evidence, that they met those requirements which would have entitled them to the innocent landowner defense.[95] The court summarized the requirements as follows:

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83. Id at 1346.
84. Id at 1343.
85. Id.
86. Id.
87. Id.
88. Id.
89. Id at 1344.
90. Id.
91. Id at 1345.
92. Id.
93. Id at 1346.
94. Id.
95. Id.

> (1) the release or threat of release of a hazardous substance and the resulting damage were caused solely by an act or omission of a third party;
> (2) the third party's act of 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.[96]

The court then referred to the definition of "contractual relationship" in its entirety.[97] In reference to this definition, the court stated that the defendants could "get around the contractual relationship bar if they proved by a preponderance of evidence that at the time they acquired the facility they did not know and had no reason to know that PCBs were disposed of on, in, or at the gravel pit."[98] The court then referred to the definition of "knowledge" as found in section 9601(35)(B).[99]

As to Terry, Sherry and Michael, the court noted that the release was caused solely by the acts of third parties, rather than by the defendants and therefore the defendants had no reason to know of the contamination.[100] Furthermore, the court likened receipt of stock through a gift to receipt through inheritance or bequest,[101] and noted that the legislative history indicated that the duty to inquire should be more lenient in regards to inheritances than in regards to private commercial transactions.[102] The court also considered that Terry, Sherry and Michael had no "specialized knowledge or experience" concerning PCBs.[103] As a result of these various factors, the court ultimately concluded that Terry's, Sherry's and Michael's conduct in regards to making an appropriate inquiry had been sufficient under the circumstances, and found them not liabile under the current owner prong of liability.[104]

As to Dayna McCarty, the court took notice of the fact that she had received her interest through inheritance.[105] The court further noted that she had no "specialized knowledge or experience" that

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96. Id at 1346-47.
97. Id at 1347.
98. Id.
99. Id.
100. Id at 1348.
101. Id.
102. Id.
103. Id.
104. Id at 1349.
105. Id.

would have put her on notice of PCB contamination.[106] Consequently, the court therefore concluded that Dyana was not liable under the current owner prong of liability.[107]

One difficulty in analyzing this case in reference to the inheritance defense is that the court never explicity based the opinion on it. Indeed, although one of the defendants inherited her interest, and despite the court's analogy between gifts and inheritances, the court never quoted the applicable statutory provision.

As to Dayna McCarty, who inherited an ownership interest, the court did not cite the inheritance defense although the facts seemed ripe for resolution of the issue on this basis. Rather, the court referred to the general requirements of the "innocent landowner defense." The court analyzed this defendant's liability in regards to any special knowledge and conducting a reasonable inquiry. Thus, it is not clear whether the court merely concluded that those obtaining an interest through inheritance are held to the same duties as those obtaining land in a different manner, or whether the court decided the issue on grounds other than the inheritance defense. If the former, the court's analysis would seem to parallel the legislative history and contradict the plain language of the statute.

Considering for a moment, the issue of the gifts, the court likened the gifts to inheritances because they did not involve arms-length transactions.[108] The court's seeming equation of the inheritance defense with arms-length transactions may appear imprudent for it would seem to provide for an extra-statutory means of escaping liability. For instance, if a landowner wanted to rid him/herself of contaminated lands, he/she could merely "give" the land away. The beneficiary would be entitled, under this case, to invoke the inheritance defense, and the former owner would escape liability under the current owner provision. This effectively cuts off the number of PRPs, and consequently, the potential sources of cleanup funds. Of course the court would impose the additional duties of an appropriate inquiry and would consider any specialized knowledge on the part of the defendant, although the court in *Pacific Hide* has shown this standard to be lax. One may counter that the inheritance defense itself is a means of cutting off the

106. Id.

107. Id. As to Richard McCarty, the court noted that he neither had a hand in the operation of the site, nor had he any special knowledge of PCBs. The court consequently absolved him of liability under the current owner prong of liability.

108. Id at 1348.

number of PRPs and therefore available funds. This point is conceded, yet this defense was statutorily created—the statute does not refer to "those receiving property by gift," nor does it absolve from liability all those receiving property in an other than arms-length transaction.[109]

Nevertheless, if one assumes that the court disposed of this issue as if it involved an inheritance, presumably then this court would hold such a defendant to conduct an appropriate inquiry and would also consider any "specialized knowledge" on the part of the defendant as to the contamination. Although this case does not aid in setting standards for what would constitute an "appropriate inquiry," other cases may.[110] For instance, in *United States v Monsanto*[111] the court held that the innocent landowner defense does not sanction "willful or negligent blindness,"[112] and that such actions would consequently not satisfy the "inquiry duty."

Furthermore, in *Wickland Oil Terminals v Asarco Inc.*[113] the court held that the defendant had not conducted an appropriate inquiry and was consequently deprived of the innocent landowner defense.[114] The court determined that the defendant-purchaser was aware of the presence of metal slag piles on the property and concluded that had the defendant examined all the "available" information (i.e.—taken test borings and reviewed government documents relating to the property), it would have been aware of the environmental problems.[115] The court rejected the defendant's contentions that its consultants explained that the slag piles did not present an environmental risk.[116]

An even stricter duty was announced in *Jersey City Development Auth v PPG Industries.*[117] The court determined that, although he was not aware that it was hazardous, the defendant did know that chromium waste was on the property when he purchased it in 1960. The court held that to lose the innocent land-

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109. See note 23 and accompanying text.

110. The following cases address the innocent landowner defense in general rather than the inheritance defense specifically. Yet given that this court apparently held the defendants to those duties imposed upon others invoking the innocent landowner defense, the following cases may serve as useful guidelines.

111. 858 F2d 160 (4th Cir 1988).

112. *Monsanto*, 858 F2d at 169.

113. 654 F Supp 955 (ND Cal 1987).

114. *Wickland*, 654 F Supp at 955.

115. Id.

116. Id.

117. 28 Envir L Rptr 1873 (3rd Cir 1988).

owner defense, one must merely know of the presence of waste, not whether the waste was hazardous. This was especially significant given that the 1960's standards would not likely have required a purchaser to test the waste.

As illustrated above, recent case law is somewhat muddled as to the scope of the inheritance defense in particular, yet it does help determine its limits. In *Westwood Pharmaceuticals v National Fuel Gas Distribution Corporation*,[118] for example, the court stated that a party failing to divulge his or her knowledge of contamination would not qualify for the innocent landowner defense.[119] Similarly, delay in responding to contamination may result in a loss of the defense, as illustrated in *Shapiro v Anderson*,[120] where the landowner was not allowed to use the third party defense because, inter alia, he waited nearly five years after discovering the problem before responding.[121] Failure to take precautions against the foreseeable acts of third parties may also foreclose reliance upon the third party defense.[122] Moreover, even minor contributions to the contamination will prevent a defendant from successfully asserting the third party defense.[123] These cases do not specifically discuss the inheritance defense, yet they focus

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118. 767 F Supp 456, 461 (WD NY 1991).

119. *Westwood Pharmaceuticals*, 767 F Supp at 461. See also, *Westwood Pharmaceuticals v National Fuel Gas Distribution Corporation*, 1992 WL 44918 (2d Cir NY 1992).

120. 741 F Supp 472, 478 (SD NY 1990).

121. *Shapiro*, 791 F Supp at 472. In this case the landowner brought an action against both the county and another co-owner seeking recovery of costs of response to the release and threatened release of hazardous substances. Id at 475-76. The landowner and co-owner asserted that they should be protected from liability because they were innocent landowners. Id at 478. The court rejected this argument because not only did the defendants have a contractual relationship with those responsible for the contamination, but also because there was a delay in responding to the leachate problem for nearly five years. Id.

122. *New York v Shore Realty*, 759 F2d 1032, 1048 (2d Cir 1985). In this case the State of New York commenced an action against the defendants to clean up a hazardous waste disposal site. *Shore Realty*, 759 F2d at 1037. Liability was based upon the current owner provision. The defendant asserted an affirmative defense based upon section 9607(b)(3). The court denied the defendant this haven because, inter alia, it concluded that the defendant should have reasonably foreseen that certain parties would dump hazardous waste. Id at 1048-49. The court determined that it could not say that the defendant took reasonable precautions against the foreseeable acts or omissions of those parties. Id.

123. *Louisiana-Pacific Corp. v ASARCO*, 735 F Supp 358, 363 (WD Wash 1990). Suit was brought by the government against several parties allegedly responsible for depositing hazardous waste as a site, and one of those parties brought a thrid party action against Louisiana-Pacific. The court held that although the vast majority of the contamination was caused by unrelated third parties, because the waste Louisiana-Pacific delivered contained minute queantities of hazardous substances, it was precluded from invoking the innocent landowner defense. *ASARCO*, 735 F Supp at 363.

upon those requirements common to any party seeking to invoke the "innocent landowner defense."

V. Conclusion

The precise scope of the inheritance defense is somewhat muddled. The statutory text would require a landowner seeking to invoke the inheritance defense to exercise due care and to take precautions against the foreseeable acts or omissions of third parties as well as the consequences that could foreseeably result from such acts or omissions.[124] The legislative history would impose the further requirement upon the landowner of making a "reasonable inquiry" as to the status of the land at the time of acquisition. According to the legislative history, the duty of inquiry would be less stringent for those obtaining land through inheritance or bequest than those obtaining land via a commercial transaction.[125] Moreover, the legislative history would impose different standards for those who were unaware of their very inheritance, and for those who were aware of their inheritance but were unaware as to the status of the land.[126] The secondary sources essentially affirm the position espoused in the legislative history, save the fact that they fail to make a distinction between those landowners who are either aware or unaware of their inheritance.[127] The case law has not addressed the defense in any meaningful way and is therefore of little guidance.[128]

The limits of the defense are much clearer than the scope. As stated above, the landowner will lose the availability of the defense if he or she owned the property during a period of contamination,[129] or if he or she failed to react promptly upon discovering the contamination or threat of contamination.[130] Similarly, if he/she subsequently transferred the land without disclosing the contamination,[131] or if he/she failed to take reasonable precautions against the foreseeable acts of third parties, the affirmative defense would be forfeited.[132]

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124. 42 USC § 9607(b)(3).
125. See note 36 and accompanying text.
126. See note 41 and accompanying text.
127. See note 60 and accompanying text.
128. See note 80 and accompanying text.
129. 42 USC § 9601(35)(A).
130. 42 USC § 9607(b)(3).
131. 42 USC § 9601(35)(C).
132. 42 USC § 9607(b)(3).

What is taxpayer A supposed to do regarding his or her situation? Presumably A would prefer that this land be economically beneficial. As it currently stands, the land is a potential liability. Although there may be no visible leachate, it is nevertheless unclear, especially given the historical use of the property, whether the land is contaminated. If contamination exists, A could potentially be liable under the "current owner or operator" provision of CERCLA. Obviously, if the land is free from contamination, retaining ownership would not translate into a risking of CERCLA liability—but the mere determination of the status of the land (i.e. a Phase I inquiry) would likely be expensive.[133] As stated above, the conducting of a reasonable inquiry is not mandated by statute and A might seek shelter in the statutory language and thus avoid making an inquiry.[134] Yet given that the legislative history, the secondary sources, and the case law support his requirement; if A wanted to retain the land, he/she should probably error on the side of caution and engage in such an inquiry in order to avoid the risk of losing the protection of the inheritance defense. Assuming that the land was retained and that a reasonable inquiry did not reveal contamination, A would also be held to exercise due caution in the event that hazardous substances ever were discovered, and to take precaution against the foreseeable acts or omissions of third parties.[135] By complying with these requirements, A would have fulfilled the mandates of the statute, the legislative history and secondary sources and would not likely be deprived of the inheritance defense if it were ever necessary to invoke.

In an effort to avoid potential liability, A might also consider selling the land; if the land is sold, then A could not be targeted for liability under the "current owner or operator" provision. In the event that A was successful in obtaining a potential buyer, it is likely that, give today's market, the buyer might require that an environmental assessment be performed upon the property. Such an assessment could prove to be extremely dangerous to A. Not only would it likely result in the loss of the sale if contamination is discovered, but the buyer may be obligated to report the findings of contamination to the state environmental agency and/or to the federal EPA, which in turn might trigger not only cleanup costs, but litigation costs as well.

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133. See note 79 and accompanying text.
134. See note 34 and accompanying text.
135. See note 22 and accompanying text.

One may attempt to avoid such a potentially disastrous outcome by securing a buyer willing to purchase the property "as is, where is." Selling the property without a warranty would circumvent performance of an assessment and would likely result in escaping the above-mentioned outcomes. The purchase price will likely be lower than that obtained in a warranty sale, but the loss in purchase price would presumably be heavily outweighed by potential cleanup costs. Moreover, if a sale were consummated and contamination was subsequently discovered, A could not be targeted for liability under the "current owner or operator" provision.

A sale of the land "as is, where is" might not, however, be feasible, yet retaining the land constitutes a risk. A may still have an alternative means of avoiding potential CERCLA liability as a current owner. For instance, A might consider withholding payment of taxes in regards to the property. Failure to pay such taxes would eventually result in a tax sale. In such a sale, the delinquent taxpayer is usually entitled to that amount of money paid as the purchase price over and above the amount needed to satisfy the previously accrued taxes. It is unlikely that contamination would be discovered in such a sale because there would be no "warranties of fitness" attached to the land and the government probably would therefore not engage in any testing which might reveal contamination. Yet such an avenue might not afford A the protection he/she wants.

Despite the avenue A may choose, he/she should keep in mind the fact that regardless of the manner or type of sale, if A has knowledge of contamination and fails to disclose such knowledge to the purchaser, the inheritance defense would be waived.

The one clear thing about the inheritance defense is that the requirements for invoking the defense are anything but clear. Although increasing concentration upon environmental issues appears to be on the horizon, the focus will not likely be upon formulating a clearer definition of the inheritance defense. Rather, clarification will probably be dependent upon case law. Given the present paucity of case law on the inheritance defense and given the somewhat "hidden" existence of the defense (in that it is contained in the "definitions" section of the statute), the much needed clarification may be a long time in coming.

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