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# Passive Disposal of the Innocent Landowner Defense

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In 1986 when Congress passed the Superfund Amendment and Reauthorization Act (SARA), which amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[1] the innocent landowner defense was congressionally sanctioned.[2] Current court decisions threaten to demolish this congressionally authorized defense to CERCLA liability by their interpretation of "disposal" to include passive migration of hazardous substances. This article examines both the effect of these recent decisions on the innocent landowner defense and the validity of these decisions under the currently existing statutory scheme and recommends congressional action to remedy the problem.

## I. THE INNOCENT LANDOWNER DEFENSE

One group of potentially responsible parties (PRPs) under CERCLA[3] are those persons "who at the time of disposal of any hazardous substance owned or operated any facility at which such

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[1] CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675 (1988) as *amended* by the Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of 42 U.S.C.).

[2] Prior to SARA, 42 U.S.C. § 9611 (1988), at least one court had recognized the possibility of an innocent landowner defense as one type of the third-party defense authorized by CERCLA. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) ¶ 20,994 (E.D. Pa. 1985).

[3] CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988). Due to the limitation of length, this article does not describe the CERCLA liability scheme in detail, except as is necessary for discussing the innocent landowner defense. For an overview of the CERCLA liability scheme, see generally, CPC Int'l, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269, 1276 (W.D. Mich. 1991); B. Shane Clanton, *Fleeting Security: CERCLA Liability for Secured Creditors*, 41 Emory L.J. 167, 167-78 (1992).

hazardous substances were disposed of."[4] One of the limited defenses to CERCLA liability is the third-party defense.[5] The innocent landowner defense is one type of third-party defense which Congress specifically sanctioned and defined[6] in its 1986 amendments to CERCLA. Under the third-party defense, a defendant must demonstrate that a "*totally unrelated third party* is the *sole* cause of the release"[7] or threatened release. In order to qualify for the third party defense, a defendant must establish:

> 1. the release or threat of release and the damages resulting therefrom were caused solely by[8] an act or omission of a third party;
> 2. the third party was not an employee or agent of defendant or one whose act or omission occurred in connection with a direct or indirect contractual relationship with the defendant;
> 3. the defendant "exercised due care with respect to the hazardous substance concerned" in light of all relevant facts, circumstances, and characteristics; *and*
> 4. the defendant took precautions against foreseeable acts, omissions, and consequences thereof, of the third party.

SARA further defined various elements of the third-party defense as it applies to potential innocent landowners. First, the term

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[4] 42 U.S.C. § 9607(a)(2) (1988). Throughout this article, such parties will be referred to as "previous," "past," or "intervening" owners or operators.

[5] 42 U.S.C. § 9607(b)(3) (1988).

[6] A person is an "innocent landowner" when:

> [T]he 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 the 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 through 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 or bequest.

42 U.S.C. § 9601(35)(A).

[7] O'Neil v. Picillo, 682 F. Supp. 706, 728 (D.R.I. 1988) (emphasis in original) (quoting United States v. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987)), *aff'd*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

[8] *O'Neil*, 682 F. Supp. at 720 n.2. *But cf.* Lincoln Prop., Ltd. v. Higgins, 823 F. Supp. 1528, 1542 (E.D. Cal. 1992) (incorporating the concept of proximate cause into the phrase "caused solely by").

"contractual relationship" was defined to include "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 of the three following circumstances is also established:[9]

> 1. at the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which was the subject of the release or threatened release was disposed of on, in, or at the facility;[10]
> 2. the defendant is a government entity which acquired the facility by some involuntary transfer or by eminent domain; *or*
> 3. the defendant acquired the facility by inheritance or bequest.[11]

Thus, a relationship in the chain of title of real property qualifies as a contractual relationship[12] under § 107(b)(3) and thereby defeats the innocent landowner defense unless the real property was acquired after "the disposal or placement of the hazardous substance on, in, or at" the property and certain other requirements are also satisfied.[13]

## II. PASSIVE DISPOSAL DESTROYS THE INNOCENT LANDOWNER DEFENSE

In cases involving previous owners and operators, several recent cases have construed the term "disposal" to include the passive migration through the ground, water, or air, of hazardous substances previously placed into the environment by someone

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[9] CERCLA §101(35)(A), 42 U.S.C. § 9601(35)(A) (Supp. 1993).

[10] If the defense relies on this provision, the defendant must also establish that at the time of purchase, it undertook all appropriate inquiry into previous ownership and uses of the property consistent with good commercial or customary practice. The court takes into account any special knowledge or experience of the defendant, the relationship of the sales price to the uncontaminated value of the property, and other factors. 42 U.S.C. § 9601(35)(B). What constitutes "good commercial or customary practice" is judged by what good commercial or customary practices were at the time of purchase, not under today's heightened standard. H.R.W. Systems, Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 348 (D. Md. 1993). *But see* United States v. Serafini, 711 F. Supp. 197, 197-98 (M.D. Pa. 1988) (holding an inspection may be required even if purchase occurred before CERCLA was adopted).

[11] 42 U.S.C. § 9601(35)(A)(i)-(iii) (Supp. 1993).

[12] United States v. Hooker Chemical & Plastics Corp., 680 F. Supp. 546, 558 (W.D. N.Y. 1988).

[13] 42 U.S.C. § 9601(35)(A) (Supp. 1993).

else.[14] Such an interpretation of disposal destroys the innocent landowner defense because the defense can only apply to persons who acquired the property "after the disposal."[15] If the continued passive migration constitutes disposal, then otherwise innocent landowners will, nonetheless, be ineligible for the defense because they will not have acquired the property after disposal, but will have acquired it during disposal.

### *A. Nurad, Inc. v. William Hooper & Sons Co.*[16]

In a case applying the previous owner and operator provision of section 9607(a)(2), the Fourth Circuit recently held that passive migration of previously deposited hazardous substances constituted disposal so as to render the prior owner of the facility liable.[17] In *Nurad*, the current owner of certain real property brought an action against previous owners, including the original owner, intervening owners, and previous tenants, seeking reimbursement of response costs incurred in removing some underground storage tanks (USTs) and their hazardous contents.[18] The Fourth Circuit reversed the district court's grant of summary judgment to the intervening owners on the grounds that the district court too narrowly construed the CERCLA definition of disposal.[19]

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[14] *See, e.g.*, Nurad, Inc. v. William E. Hoopers & Sons Co., 966 F.2d 837 (4th Cir. 1992), *cert. denied*, 121 L. Ed. 2d 288 (1992); *H.R.W. Systems*, 823 F. Supp. at 318; Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528 (E.D. Cal. 1992); C.P.C. Int'l, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269, 1278 (holding "unchecked spread of contaminated ground water qualifies as disposal"); Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659 (E.D. Cal. 1990); *see also* Pantry, Inc. v. Stop-N-Go Foods, Inc., 796 F. Supp. 1171 (S.D. Ind. 1992) (holding that under Kentucky environmental statute, leaking of wastes from USTs is disposal, regardless of whether there is awareness of the leak or whether owner injected any waste into the UST); Emhart Indus., Inc. v. Duracell Int'l, Inc., 665 F. Supp. 549, 574 (M.D. Tenn. 1987) (leaking USTs and continued leaching and seepage are a release or threatened release).

[15] 42 U.S.C. § 9601(35)(A) (Supp. 1993).

[16] 966 F.2d 837 (4th Cir. 1992).

[17] *Id.* at 845-46.

[18] *Id.* at 840. The Fourth Circuit affirmed the district court's grant of summary judgment to the former tenants because those former tenants did not have the authority to control the relevant facility, i.e., the USTs, *id.* at 842-44. The Fourth Circuit also affirmed the summary judgment granted to two individual corporate officers of the original owner because of their lack of authority to control the USTs, *id.* at 844. The Fourth Circuit affirmed the summary judgment granted *against* the original owner of the USTs, *id.* at 840. Only the claims against the intervening owners are of interest for purposes of this article.

[19] *Nurad*, 966 F.2d at 840.

In its definition section, CERCLA does not independently define disposal, but instead adopts the definition of disposal found in the Solid Waste Disposal Act (SWDA).[20] That definition states:

> The term "disposal" means 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.[21]

The Fourth Circuit noted that some of the relevant terms "readily admit to a passive component: hazardous waste may leak or spill without any active human participation."[22] Other federal courts have latched onto this seemingly simple concept as the basis for determining that disposal includes passive migration of previously disposed wastes.[23] The Fourth Circuit also stated that a less expansive "construction of 'disposal' ignores the language of the statute, contradicts clear circuit precedent, and frustrates the fundamental purposes of CERCLA."[24]

"Congress intended to impose liability on those parties who 'caused or contributed to a release or threatened release of hazardous waste.' "[25] Contrary to the assertion of the Fourth Circuit, it is far from clear whether a narrower interpretation of "disposal" would impinge on this congressional intent. If a previous owner is liable under CERCLA only because of passive migration of hazardous substances during its ownership, imposing liability on that owner does not necessarily support the congressional in-

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[20] CERCLA § 101(29), 42 U.S.C. § 9601(29) (1988) (adopting "the meaning provided in section 1004 of" SWDA 42 U.S.C. §§ 6901-6992k).

[21] 42 U.S.C. § 6903(3) (1988).

[22] *Nurad*, 966 F.2d at 845.

[23] *See, e.g.*, H.R.W. Systems, Inc. v. Washington Gas Light Co., 823 F. Supp. 318 (D. Md. 1993); C.P.C. Int'l, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269 (W.D. Mich. 1991).

[24] *Nurad*, 966 F.2d at 844.

[25] Kaiser Aluminum & Chemical Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1343 (9th Cir. 1992) (citing H.R. REP. No. 1016, 96th Cong., 2d Sess. 33 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6136); *see* C.P.C. Int'l, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269 (W.D. Mich. 1971). "[C]ourts have emphasized that . . . the statutory language should be construed expansively in order to give effect to Congressional intent that all who participate in the generation and disposal of hazardous wastes should share in cleaning up the harm from their activity." *C.P.C. Int'l*, 759 F. Supp. at 1277 (citation omitted).

tent of imposing liability on those who "caused or contributed" to the release.

The Fourth Circuit postulated that a narrower definition of disposal would "frustrate the statutory policy of encouraging 'voluntary private action to remedy environmental hazards.' "[26] The Fourth Circuit theorized that an owner could avoid liability by doing nothing "while an environmental hazard fester[ed] on his property" and then transferring the property before any response costs were incurred.[27] However, that fear simply will not be realized under CERCLA. If any owner obtains knowledge about a release or threatened release (which does include passive migration) and transfers the property without disclosing such knowledge, that person becomes liable, not as a former owner under section 9607(a)(2), but as a current owner under section 9607(a)(1), which designates a class of PRPs that is liable regardless of whether there was a disposal.[28]

However, there is one loophole that may remain open. If an *operator* of a facility discovers that a release or threatened release is about to take place, but no active disposal had taken place at the facility during the operator's tenure, this operator could still transfer operation of the facility to another party and become a past operator. If active disposal is required, as a past operator the person might slip through the CERCLA cracks. Section 9601(35)(C) does not address this problem because it refers only

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[26] *Nurad*, 966 F.2d at 845 (citation omitted).

[27] *Id.*

[28] That person also loses the benefit of the innocent landowner defense and all other defenses under § 9607(b)(3):

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

CERCLA § 101(35)(C), 42 U.S.C. § 9601(35)(C) (Supp. 1993); United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1353 (N.D. Ill. 1992). Moreover, criminal penalties are imposed for failure to report a release in a timely fashion. *Petersen*, 806 F. Supp. at 1353. Also, prospective purchasers have an incentive to investigate the environmental condition of the property before purchase, which lessens the ability of an owner to avoid liability or to obtain the market value, as if in an environmentally unimpaired state, of the property upon a subsequent sale. *Petersen*, 806 F. Supp. at 1353.

to owners who sell the real property. The problem with operators may, as a practical matter, be less substantial than with owners but, nevertheless, represents some real risk.

The Fourth Circuit was also concerned about the differing treatment between current owners and previous owners, each of whom had not actively disposed of hazardous substances. The Fourth Circuit noted that the district court's requirement of active participation for a disposal to exist would introduce "the anomalous situation where a current owner . . . who never used the storage tanks could bear a substantial share of the cleanup costs, while a former owner who was similarly situated would face no liability at all."[29] While the specter of unequal treatment for seemingly equivalent situations nearly always raises the eyebrows of jurists, the *Nurad* court failed to account for the fact that Congress apparently created such a distinction when it chose different requirements to delineate the liability of present owners and that of prior owners. Present owners are liable for response costs *without regard to* whether hazardous substances were disposed of during their ownership, while the liability of previous owners exists *only if* hazardous substances were disposed of during their ownership.[30] This potential disparate treatment of current and prior owners is sanctioned by CERCLA itself. Instead of supporting the congressional structure, the Fourth Circuit's approach in *Nurad* substantially erodes the congressionally-established distinction between present and former owners. Given the breadth of *Nurad*'s interpretation of what constitutes disposal, the difference between the liability of past and present owners and operators becomes practically nonexistent.[31]

### *B. Passive Migration Nullifies the Innocent Landowner Defense*

The *Nurad* decision, along with similar holdings in other cases,[32] threatens the very existence of the innocent landowner de-

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[29] *Nurad*, 966 F.2d at 845.

[30] *Compare* CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (1988) *with* CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1988).

[31] Presumably, unless the original owner injected the hazardous substance into some type of sealed, leak-proof container, all intervening owners will be liable to the same extent as the present owner. *See Petersen*, 806 F. Supp. at 1352.

[32] Although the courts are split, a slight majority of the cases decided to date held that mere passive migration constitutes disposal. Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659, 662 (E.D. Cal. 1990) (noting split of authority and citing cases); *see* C.P.C. Int'l, Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 789 (W.D. Mich. 1989)

fense. A previous owner cannot qualify for the innocent landowner defense if disposal occurred while that person owned the property in question. Third-party defenses are only available if the release is caused solely by the act or omission of a third party who is not in a contractual relationship with the defendant.[33] Section 9601(35)(A) provides that the term "contractual relationship" used in restricting the third-party defense includes land contracts "unless the real property on which the facility is located was acquired by the defendant after the disposal or placement of the hazardous substance."[34] Thus, if disposal includes the passive migration of hazardous substances deposited by a previous owner, an intervening landowner could not qualify for the innocent landowner defense because disposal would have occurred during its ownership.

Some courts have recognized that such an interpretation would nullify the innocent landowner defense.[35] For example, the court in *HRW Systems, Inc. v. Washington Gas Light Co.* determined that if the definition of disposal as determined by the *Nurad* Court was applied to the innocent landowner defense, "there would be, for all practical purposes, no innocent landowner defense, so broad is the statute's definition of disposal."[36] However, the *HRW Systems, Inc.* Court attempted to resolve this dilemma by intimating that the term "disposal" could have one meaning when used in section 9607(a)(2) and another meaning when used in section 9607(b)(3).[37] While the *HRW Systems* court recognized the problem created by the Fourth Circuit's decision in *Nurad*, its solution of contradictory readings of the term "disposal" is unsupported by the language of CERCLA. While this differing approach may have appeal when Congress is draft-

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(citing ample case law to support a broad interpretation of disposal); *cf. Petersen*, 806 F. Supp. at 1350 (noting that courts that have decided the issue are about evenly split).

[33] The act or omission must occur "in connection with a contractual relationship, existing directly or indirectly, with the defendant." CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1988).

[34] 42 U.S.C. § 9601(35)(A) (Supp.1993).

[35] *See* H.R.W. Systems, Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 348 (D. Md. 1993); *Petersen*, 806 F. Supp. at 1352; *In re* Diamond Reo Trucks, Inc., 115 B.R. 559, 566 n.3 (Bankr. W.D. Mich. 1990).

[36] *H.R.W. Systems*, 823 F. Supp. at 348. Without any discussion or analysis, another district court rejected the contention that the interpretation of disposal to include passive migration would effectively dismantle the innocent landowner defense. *See* Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659, 664 (E.D. Cal. 1990).

[37] *See H.R.W. Systems*, 823 F. Supp. at 348.

ing or amending the statute,[38] the current scheme of CERCLA provides no support for these contrary definitions of the same term in the same section of the same statute.

### *C. Disposal Does Not Include Passive Migration of Hazardous Substances*

Other courts have determined that passive migration does not constitute disposal under CERCLA.[39] Because hazardous substances can continue to migrate passively long after their introduction into the environment, the *Nurad* court's "sweeping interpretation of disposal" would effectively impose CERCLA liability on every owner in the chain of title after the initial disposal.[40] If Congress had chosen to impose liability on every intervening owner in the chain of title, it could have done so, but it did not. Congress knew how to draft language that created liability without regard to disposal. Congress did so with respect to current owners and operators. Past owners and operators are liable only if disposal occurred during their ownership or operation, while present owners and operators are liable without regard to whether there was disposal during their tenure. Given the *Nurad* court's interpretation of disposal, for all practical purposes the "at the time of disposal" language in section 9607(a)(2) is meaningless as it applies to all intervening owners of polluted property. If Congress had intended such a result, it presumably would not have chosen different language.

In perhaps the most cogent discussion of the issue to date,[41] the Northern District of Illinois in *United States v. Petersen Sand & Gravel, Inc.* recognized and discussed the conflict between a definition of disposal which included passive migration and the existence of the innocent landowner defense. In *Petersen*, the government sought to hold an intervening operator liable under section 9607(a)(2) as an operator at the time of disposal on the theory, among others, that passive disposal occurred while the in-

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[38] *See infra* pp. 16-18.

[39] United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346 (N.D. Ill. 1992); Snediker Developers Ltd. Partnership v. Evans, 773 F. Supp. 984, 988-89 (E.D. Mich. 1991); Ecodyne Corp. v. Shah, 718 F. Supp. 1454, 1457 (E.D. Cal. 1989); *In re* Diamond Reo Trucks, Inc., 115 B.R. 559, 565-66 (Bankr. W.D. Mich. 1990).

[40] *See Snediker*, 773 F. Supp. at 989.

[41] 806 F. Supp. 1346 (N.D. Ill. 1992).

tervening operator ran the property.[42] After noting the prior decisions on passive migration, the court engaged in a searching analysis in an attempt to reconcile the various terms within the definition of disposal and the innocent landowner defense. Instead of merely focusing on whether the event terms of the disposal definition (discharge, deposit, spilling, leaking, etc.) included active and/or passive terms, the *Petersen* court also examined the remainder of the definition of disposal.[43] The second part of the definition requires that for such an event to be a disposal, the hazardous waste must "enter the environment or be emitted into the air or discharged into any waters, including ground waters."[44] According to the *Petersen* court,

> [t]he kind of migration of substances contemplated by "passive" disposal, however, is itself an entering of the environment; it is not a predicate to entering the environment. Congress appreciated the difference: when it defined "release" in CERCLA, Congress did so as a series of events (spilling, leaking, etc.) followed simply by "into the environment."[45]

Whereas, when Congress defined disposal, it did so as a series of events followed by "so that such solid waste or hazardous waste or any constituent thereof may enter the environment."[46] From this distinction, the *Petersen* court found support for its conclusion that passive migration did not constitute disposal even though it does constitute a release.[47]

The *Petersen* court drew further support for its interpretation by comparing the contextual relationship in CERCLA between release and disposal.[48] The court noted:

> Congress could have made [past owner and] operator liability depend on a "release"; instead, Congress designed the entire CERCLA response scheme to activate whenever a "release" occurred, but limited the liability for [past owners and] operators to those who were [owners and] operators during a "disposal." Some distinction must have been intended, and the so-called in-

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[42] *Id.* at 1350.

[43] *Id.* at 1351.

[44] Solid Waste Disposal Act (SWDA) § 1004(3), 42 U.S.C. § 6903(3) (1988).

[45] United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1351 (N.D. Ill. 1992) (citation omitted).

[46] 42 U.S.C. § 6903(3) (1988).

[47] *Petersen*, 806 F. Supp. at 1351.

[48] *Id.*

> nocent owner defense shows that the distinction must have been between active and passive events.[49]

The *Petersen* court correctly noted that "in order for the [innocent landowner] defense to apply in all but the rarest of circumstances, 'disposal' must be limited to its active meaning."[50] Giving disposal passive meaning would eviscerate the plain purpose of the innocent landowner defense, which was to exclude certain owners who purchased the land after the hazardous waste was placed on the land.

The *Petersen* court also noted that by juxtaposing release and disposal, the innocent landowner defense makes the relative scope of the two terms "unequivocally clear. The reference to a period 'after' a disposal but during ('is the subject of') a 'release' or 'threatened' release establishes that 'disposal' refers to a discrete human act with a discrete ending."[51]

Finally, the *Petersen* court examined the other references to disposal in CERCLA and noted that based on those other uses, "giving 'disposal' a passive meaning controverts the plain language of CERCLA."[52] Even though the *Petersen* result is the better reasoned approach and gives effect to all parts of the CERCLA scheme, rational people could certainly disagree as to whether such a passive meaning controverts the *plain* language of CERCLA.

While the *Petersen* court provided a thorough analysis of the problem and arrived at a decision in which the innocent landowner defense was preserved, many will find that court's analysis more cumbersome and complicated than that of the Fourth Circuit in *Nurad*, which is more straightforward even though not as precise. Moreover, the *Petersen* court's interpretation of disposal does not solve the problem discussed above regarding an operator who has not actively disposed of waste but who discovers that a release has occurred or is threatened. Such an operator can trans-

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[49] *Id.*

[50] *Id.* at 1352. "Otherwise, this defense would be available only to innocent owners who are fortunate enough to have purchased a facility where all the hazardous waste is sealed in concrete [because] any seepage or leaking on a site occurring after the purchase would eliminate the defense." *Id.*

[51] *Id.* at 1352.

[52] *Id.*

fer the property and be viewed as a past operator with the section 9607(b)(3) defenses still available.[53]

## CONCLUSION

For various reasons, the decisions of the different courts addressing the passive disposal issue are all somewhat unsatisfactory. On the one hand, courts such as the *Nurad* court which include passive migration in the definition of disposal ignore the effect of such an interpretation on the innocent landowner defense, the distinction between the concepts of release and disposal, and the second part of the definition of disposal. On the other hand, courts holding that "disposal" does not include passive migration, such as the *Petersen* court, do not completely satisfy the questions regarding the passive nature of some of the terms used in defining disposal, require a more rigorous analysis, and do not directly prevent past operators from avoiding CERCLA liability. However, given the current structure of CERCLA, the interpretation given by the *Petersen* court is highly preferable to the Fourth Circuit's interpretation in *Nurad* which annihilates the innocent landowner defense.

Ideally, Congress should resolve these problems and the uncertainty surrounding these issues by amending CERCLA to clarify the passive migration issue and the extent of the innocent landowner defense. One approach might be for Congress to adopt expressly the concept of passive migration into the definition of disposal and to create an "active disposal" and a "passive disposal" category. Congress could then amend section 9607(a)(2) to provide for liability for past owners or operators during times of active or passive disposal. Congress could expressly state that the innocent landowner defense does not apply if there was an active disposal but can still apply if only a passive disposal occurred during the ownership or operation of the property.

One significant problem with this approach is that the elements of the innocent landowner defense can be nearly impossible to satisfy for someone already identified as a PRP.[54] By enlarging

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[53] The potential criminal penalties for failure to report the release and the incentive any purchaser would have to investigate the property significantly decrease the likelihood of any such operator successfully making this transition, *id.* at 1353.

[54] "Courts have been generally reluctant to find that a PRP qualifies for the innocent purchaser defense." Kyle E. McSlarrow et al., *A Decade of Superfund Litigation: CERCLA Case Law from 1981-1991, in* SUPERFUND DESKBOOK 530 (1992) (citations omitted).

the universe of former owners and operators who are PRPs and making them rely on the innocent landowner defense to escape liability, this approach would solve the clarity issue but would catch too many truly innocent landowners in the CERCLA liability web. Thus, this approach should be discarded.

The preferred approach would be for Congress to state expressly in the definition section that disposal does not include passive migration of wastes but only includes active placement, leaking, spilling, etc. Section 9601(35)(C) is adequate to prevent property owners who become aware of passive migration of wastes on their property from escaping liability by selling their property without disclosing this information because such passive migration would constitute a release even though it does not constitute a disposal, and any transfer of the ownership without disclosing that knowledge would subject the seller to liability as a current owner, causing the entire issue of disposal to vanish. However, section 9601(35)(C) needs to be amended to provide the same penalty and forfeiture of defenses for current operators who become aware of a release or threatened release but transfer the operation of the facility without disclosing the release or threatened release of hazardous substances.

Such a proposal closes the potential loophole for operators to escape liability while respecting the congressionally-sanctioned innocent landowner defense. Also, this suggested approach will not broaden the universe of PRPs who are past owners or operators beyond the point where it is today. This proposal is similar to the result reached by the *Petersen* court, with the advantage of closing the potential operator loophole, but the result is clearer and more uniform. This approach solves the problem of each court having to make the difficult analysis of *Petersen* which inevitably will lead to differing results. Such congressional action is preferable to allowing courts to keep wrestling with the issue because, despite the *Petersen* court's statement to the contrary, the preferred result is not readily evident from the plain language of CERCLA.