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LANDOWNER-LESSOR LIABILITY UNDER CERCLA

ANTHONY J. FEJFAR*

As one looks back along the historic road traversed by the law of land in England and in America, one sees a change from the view that he who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship; which grudgingly, but steadily, broadens the recognized scope of social interest in the utilization of things.¹

INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)² is one of the most significant environmental statutes in force today. CERCLA is of special concern to landowner-lessors because, subject to limited statutory defenses,³ it has been interpreted to impose strict liability upon property owners for cleanups relating to the release or threatened release of hazardous substances on the owner's land.⁴ This Article focuses on the liability of landowner-lessors for releases of hazardous substances on leased

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1. 5A RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 746 (Patrick J. Rohan ed., rev. ed., 1993).

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 [hereinafter "The 1980 Act"], amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. § 9601 to 9675 (1988)) [hereinafter "SARA" when referring to the entire 1986 act, and "CERCLA" when referring to The 1980 Act as amended by SARA].

According to one commentator, "CERCLA has set the hazardous waste remedial agenda since its enactment and has profoundly and permanently changed the approach of parties to transactions involving industrial, commercial, and many residential properties." JOEL S. MOSKOWITZ, *ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS: LAW AND PRACTICE* 48 (1989).

3. CERCLA § 107(b), 42 U.S.C. § 9607(b) (1988). See also *infra* text accompanying note 106.

4. See *infra* text accompanying note 204 (quoting *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985), which held that CERCLA imposes strict liability upon an owner for the release or threat of release of hazardous substances).

premises caused by the acts or omissions of tenants in possession. This issue is significant both academically and practically. Although the release or threatened release of hazardous substances into the environment is a serious matter in its own right, the gravity of the release or threat of a release is compounded by the fact that a cleanup can cost millions of dollars.⁵ Whether these costs will be borne by private individuals (including landowner-lessors), or by the federal government (and indirectly by taxpayers and consumers), is an issue of great concern. Should a landowner-lessor be permitted to avoid liability for clean-up costs merely by including environmentally nonrestrictive language in the lease, and then engaging in absentee landlord practices? Or should a landowner-lessor of a building leased as a retail clothing store, for example, be held liable for clean-up costs when, in spite of periodic inspections by the landlord, the tenant dumped hazardous substances on the leased premises in violation of a restrictive lease clause? In answering these questions, this Article considers whether or not an "innocent landlord" defense is available to a landowner-lessor. As the Article discusses, the courts are in conflict as to the availability of such a defense. Moreover, even where courts have recognized such a defense, the criteria for determining its availability are subject to criticism.

When interpreting a statute such as CERCLA, it is appropriate to refer first to the "statutory language and then to the legislative history if the statutory language is unclear."⁶ Courts have described CERCLA as "a hastily drawn piece of compromise legislation, marred by vague terminology,"⁷ and as being "far from . . . a model of statutory or syn-

5. See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160, 164 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989) (holding defendants jointly and severally liable for response costs in the amount of \$1,813,624).

6. *Monsanto Co.*, 858 F.2d at 167 n.10 (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984), which notes that when "resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear"). The court in *Monsanto Co.* determined that the "plain language" in § 107(a) of CERCLA clearly created a "strict liability scheme," and that therefore the court did not need to examine the legislative history. See *id.* at 167. On the other hand, the court in *Shore Realty* considered the legislative history of The 1980 Act in its interpretation of the liability provisions of § 107(a) even though it found the statutory language clear. *Shore Realty*, 759 F.2d at 1044-45.

7. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). As a result, the court observed, "[t]he courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation." *Id.* at 839 n.15.

tactic clarity.”⁸ These general observations are no less true with respect to many of the issues that this Article will consider.

Accordingly, the discussion and analysis presented in this Article is preceded first by an overview of the statutory language and followed by a description of the legislative history. In its discussion and analysis, the Article first examines “owner” liability under Section 107(a) of CERCLA. That section imposes liability upon current “owners” of a “facility” and upon any past “owners” at the time “disposal of the hazardous substances took place.”⁹ The Article concludes that there is little basis for interpreting Section 107(a) as providing an “innocent landlord defense” for landowner-lessors. The possibility that a landowner could assert an “innocent landlord defense” under the “third-party defense” of Section 107(b) is examined next. Pursuant to CERCLA Section 107(b)(3), a landowner-lessee can assert a “third-party defense” if the landowner can establish that: (1) the act or omission causing the “release or threatened release” is not that of an employee or agent of the defendant; (2) the act or omission has not occurred “in connection with” a direct or indirect contractual relationship between the landowner-lessee and the defendant; and (3) the defendant has exercised the requisite due care and has taken precautions against foreseeable acts or omissions.¹⁰

With respect to the “third-party defense,” the Article first discusses case law in which courts have failed to consider the “in connection with” language found in Section 107(b)(3). These cases are critiqued on the basis of a linguistic analysis of the statute. The Article then discusses cases in which courts have considered and analyzed the “in connection with” language of Section 107(b)(3). This latter group of cases is found objectionable because the test that courts have employed therein provides an incentive for landowner-lessors to become “absentee landlords” who do nothing either to restrict or to monitor the activities of the tenant in possession. Therefore, an alternative test to prevent absentee-landlord practices is proposed. This test encourages landowner-lessors to include, monitor, and enforce appropriate lease clauses that restrict the presence of hazardous substances on the leased premises.

Additionally, this Article discusses the “third-party defense” as applied to the liability of a landowner-lessee for the acts or omissions of a sublessee in possession. This Article suggests that a landowner-lessee

8. *City of New York v. Exxon Corp.*, 633 F. Supp. 609, 613-14 (S.D.N.Y. 1986).

9. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988).

10. CERCLA § 107(b), 42 U.S.C. § 9607(b) (1988).

should be considered to have an "indirect contractual relationship" with a sublessee in possession for purposes of the Section 107(b)(3) "third-party defense." Finally, this Article entertains and addresses several hypothetical objections to its discussion and analysis.

I. OVERVIEW OF STATUTORY LANGUAGE

Section 107(a) of CERCLA imposes liability for "response costs"¹¹ incurred in relation to a "release or threatened release"¹² of "hazard-

11. Pursuant to § 107(a)(4), the United States Government, a State, or an Indian Tribe, in appropriate circumstances, may bring an action for the recovery of "response costs." CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1988). Response costs recoverable under Section 107 are not defined in CERCLA, but "response" is defined in § 101(25), 42 U.S.C. § 9601(25) (1988), to include "remove, removal, remedy, and remedial action"). See also 4 WILLIAM H. RODGERS, ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES 704 (1992). "Generally speaking, response costs include all those expenditures undertaken to identify, interdict, combat, and mitigate hazardous substances releases." *Id.* (citations omitted). When the United States or a State seeks recovery, courts have held that a defendant must prove that the cost incurred by a State or the United States was "not inconsistent with the national contingency plan" in order to avoid liability. ALFRED R. LIGHT, CERCLA LAW AND PROCEDURE 82 (1991) (citations omitted) (quoting CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(A)(4)(B) (1988)). A private person seeking recovery of response costs, on the other hand, has been required to prove that the costs incurred were "consistent with the national contingency plan." *Id.* The "national contingency plan" governs a variety of subjects, including worker safety, documentation, and "CERCLA-quality cleanup." *Id.* at 84-86. See also RODGERS, *supra*, at 705 (noting that "among the costs recoverable are not only the investigatory costs, but also the costs of dikes and trenches used as containment measures, the costs of removing drummed waste and disposing of contaminated soil, and the costs of administration and oversight, litigation and supervision, planning and enforcement."). Finally, in addition to response costs, §107(a) provides a cause of action to recover damages relating to the loss of natural resources. See CERCLA, § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C) (1988).

12. Pursuant to § 101(22), the term "release" means:

[A]ny 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), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act, or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer. CERCLA § 101(22), 42 U.S.C. § 9601(22) (1988). Furthermore, "[a]s the courts have interpreted the 'release' threshold, it is very low indeed. The presence of hazardous substances in soil or groundwater, deteriorating or leaking drums, or any other environmental pres-

ous substances"¹³ into the environment.¹⁴ This liability must be borne by the current "owners" or "operators"¹⁵ of a "facility,"¹⁶ and by past

ence from any known industrial, manufacturing, or storage facility may be sufficient evidence to establish a release." LIGHT, *supra* note 11, at 68-69 (citations omitted).

13. Pursuant to § 101(14), the term "hazardous substance" means:

(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

CERCLA § 101(14), 42 U.S.C. § 9601(14) (1988). See also LIGHT, *supra* note 11, at 72-73. "[Subsection 101(14)] has been construed to bring within the definition of 'hazardous substance' any material on any of the lists in the section. Courts will neither second-guess EPA's listings nor exclude a material from the definition of hazardous substance because it is not a hazardous waste under the Resource Conservation and Recovery Act (RCRA)." *Id.* (citations omitted).

14. See CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988). See also *infra* note 184 (quoting CERCLA § 107(a)). Pursuant to § 101(8), the term "environment" means:

(A) the navigable waters, the waters of the contiguous zone, and the ocean waters for which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act, and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

CERCLA § 101(8), 42 U.S.C. § 9601(8) (1988). A release into the "environment" may include: "burial of waste chemicals containing hazardous substances, spraying of hazardous substances along highways, releases to a 'water column' from rusting capacitors, a gas emitted from radionuclides, or releases of asbestos to the ambient air." LIGHT, *supra* note 11, at 70 (citations omitted).

15. Pursuant to § 101(20)(A), the term "owner or operator" means:

(i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

CERCLA § 101(20), 42 U.S.C. § 9601(20)(A) (1988).

Although § 107(a)(1) refers to the "owner and operator," the courts have concluded that Congress really meant "owner or operator," and thus have disregarded a "literal" interpretation of the language. See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp.

"owners" or "operators" at the time when "disposal"¹⁷ of the hazardous substances took place.¹⁸ Although Section 107(a) has been interpreted as imposing joint, several, and strict liability without regard to fault,¹⁹ Section 107(b) provides certain defenses to liability.²⁰

For example, pursuant to the "third-party defense" of Section 107(b) (3), liability will not be imposed upon a "person"²¹ that other-

573, 577 (D. Md. 1986) (interpreting "and" in the disjunctive and holding that a party does not have to be both an owner and an operator to be held liable under § 107(a)(1)).

16. Pursuant to § 101(9), the term "facility" means:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (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.

CERCLA § 101(a), 42 U.S.C. § 9601(9) (1988). A "facility" can exist, for example, where oil contaminated with hazardous substances has been sprayed on the ground to suppress dust. *United States v. Bliss*, 667 F. Supp. 1298, 1303, 1305 (E.D. Mo. 1987).

17. Pursuant to § 101(29), the term "disposal" . . . shall have the meaning provided in section 1004 of the Solid Waste Disposal Act." CERCLA § 101(29), 42 U.S.C. § 9601(20) (1988). Section 1004 of the Solid Waste Disposal Act provides:

(3) 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.

Solid Waste Disposal Act, 42 U.S.C. § 6903(3) (1988). "[S]everal courts have held that . . . leakage of pollutants while a person operates a facility makes him an operator at the time of disposal." *LIGHT*, *supra* note 11, at 71 (citation omitted). Furthermore, commentators have noted that "[a]n alternate view is that the term 'disposal' is not simply a subcategory of the larger universe of 'releases.' Disposal can be read more narrowly to imply the idea of someone doing something with the hazardous substance. The converse may also be true. Waste can be disposed of without its release into the environment." *Id.* (citation omitted).

18. See CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988). See also *infra* note 184 (quoting CERCLA § 107(a)).

19. *E.g.*, *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042-45 (2d Cir. 1985) (observing that "section [107(a)(1)] unequivocally imposes strict liability"). See also *RODGERS*, *supra* note 11, at 685 (noting that "[l]iability is not only strict under Section 107; it is also joint and several, which means that each and every contributor is presumptively liable for the entire clean up bill"). Actions for contribution have been permitted even though, pursuant to The 1980 Act, there was no express statutory language providing for contribution. See *id.* at 686-87. Notwithstanding the absence of express language providing for contribution, pre-SARA courts held that a responsible person under § 107(a) could bring an action for contribution against another potentially responsible person. *Id.* at 687. The 1986 Amendments, however, included a specific provision for contribution. CERCLA § 113(f)(1) and (2), 42 U.S.C. § 9613(f)(1) and (2) (1988).

20. See CERCLA § 107(b), 42 U.S.C. § 9607(b) (1988). See also *infra* note 106.

21. Under § 101(21), the term "person" means: "[A]n individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." CERCLA § 101(21), 42 U.S.C. § 9601(21) (1988).

wise would be covered if that person can establish by a preponderance of the evidence that: (1) the "release" or "threatened release" of the hazardous substances was caused solely by "an act or omission of a third party other than an employee or an agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant"; (2) the defendant "exercised due care with respect to the hazardous substances concerned"; and (3) the defendant "took precautions against foreseeable acts or omissions of any such third party"²²

CERCLA Section 101(35) defines the term "contractual relationship" for purposes of Section 107(b)(3) of CERCLA to include, but not be limited to, "land contracts, deeds or other instruments transferring title or possession," unless the defendant can meet the remaining conditions set forth in Section 101(35).²³ Finally, CERCLA provides a de minimis settlement provision that "innocent" or "almost innocent" landowners can attempt to utilize.²⁴

II. LEGISLATIVE HISTORY

A. *Legislative History of The 1980 Act*

Six years of work in the House of Representatives and three in the Senate culminated in the 1980 CERCLA legislation.²⁵ Given this long period of legislative ferment, one might assume that the legislative history preceding enactment of the final legislation would be very illuminating, but generally that is not the case. Although the legislative history provides some interpretive assistance, its usefulness is hampered by the circumstances preceding passage of the final bill. Three bills, House Bill 85,²⁶ House Bill 7020,²⁷ and Senate Bill 1480,²⁸ contributed to the final legislation,²⁹ but "[n]one of these bills, as introduced or reported out of committee, was enacted into law. Instead, Congress ultimately adopted a compromise measure that was first

22. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1988).

23. CERCLA § 101(35), 42 U.S.C. § 9601(35) (1988). *See also infra* text accompanying note 180 (quoting CERCLA § 101(35)).

24. CERCLA § 122(g)(1) and (2). *See also infra* text accompanying note 184 (quoting CERCLA § 122(g)(1) and (2)).

25. 1 SUPERFUND: A LEGISLATIVE HISTORY xiii (Helen C. Needham and Mark Menefee, eds., 1982) [hereinafter SUPERFUND].

26. H.R. 85, 96th Cong., 1st Sess. (1979).

27. H.R. 7020, 96th Cong., 2d Sess. (1980).

28. S. 1480, 96th Cong., 1st Sess. (1979).

29. *See* J.P. Sean Maloney, *A Legislative History of Liability Under CERCLA*, 16 SETON HALL LEGIS. J. 517, 518 (1992) (noting that H.R. 85, H.R. 7020, and S. 1480 became part of the final CERCLA legislation).

presented on the Senate floor."³⁰ Therefore, much of CERCLA's early legislative history refers to language that differs from that found in The 1980 Act. Nevertheless, the language and scope of the predecessor bills is sufficiently similar that an analysis of the legislative history provides some useful insights. Accordingly, before discussing the final compromise legislation, this Article will examine the relevant liability provisions of each of the three predecessor bills.

House Bill 85 was introduced by Representative Mario Biaggi on January 15, 1979.³¹ The final version of House Bill 85, as amended and passed by the House on September 19, 1980,³² "imposed joint, several, and strict liability on the owners and operators of vessels and facilities discharging oil or designated hazardous substances into navigable waters."³³ Of particular interest is the fact that Section 101 of House Bill 85 appears to exempt from its definition of "owner" all "passive" landowner-lessors: "[O]wner' . . . does not include a person who . . . holds title to or any indicia of ownership of a vessel or facility and without participating in the management or operation of such vessel or facility, leases or charters to any other person (with whom such person is not otherwise affiliated)"³⁴

Representative Florio introduced House Bill 7020 on April 2, 1980.³⁵ "The bill was intended to regulate inactive sites bearing hazardous wastes, other than oil, on land and in non-navigable waters by a reporting, monitoring and clean-up scheme."³⁶ Representative Florio described the conditions that provided the impetus for the bill: "Hundreds, possibly thousands, of neglected, leaking disposal sites presently dot the country, threatening to release their lethal contents, despoiling water supplies and menacing public health."³⁷ Thus, Representative Florio believed that "[p]reventive measures [were] needed immediately to stop further releases. Remedial action [was] urgently needed at those sites which [were then] causing serious problems."³⁸

30. 1 SUPERFUND, *supra* note 25, at xiii. See also Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982) (noting that "[a] Carter Administration proposal, S. 1341, was submitted in the early days of the Ninety-Sixth Congress, but it was sidetracked.") (citation omitted). Accordingly, S. 1341 will not be discussed here.

31. 1 SUPERFUND, *supra* note 25, at xiii.

32. 126 CONG. REC. 26,391 (1980).

33. 1 SUPERFUND, *supra* note 25, at xiv.

34. *Id.* at 31 (emphasis added). "Upon receiving H.R. 85 from the House, the Senate referred it to the Committee on Environment and Public Works, where the bill died." *Id.*

35. *Id.* at xv.

36. Maloney, *supra* note 29, at 521.

37. 126 CONG. REC. 26,337 (1980).

38. *Id.*

With respect to the liability aspect of the bill, Florio saw a broad "prevention-incentive" purpose, stating: "[The liability provision of the bill] assures that the costs of chemical poison releases are borne by those responsible for the releases. It creates a strong incentive both for prevention of releases and voluntary cleanup of releases by responsible parties. Finally, it replenishes the fund"39

House Bill 7020 was reported out of committee to the House in two parts in May and June of 1980.⁴⁰ Section 3071 of the reported bill imposed strict liability for clean-up costs upon any person who "caused or contributed" to a "release or threatened release," of "hazardous waste into the environment from or at any inactive site"41 Liability was "joint and several," unless the generator, transporter, owner, or operator could identify the portion of the clean-up costs

39. *Id.* at 26,338.

40. H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. I, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119 (H.R. 7020 reported out of the House Comm. on Interstate and Foreign Commerce on May 16, 1980); H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. II (1980), *reprinted in* 1980 U.S.C.C.A.N. 6151 (H.R. 7020 reported out of the House Ways and Means Comm. on June 20, 1980).

41. H.R. 7020, 96th Cong., 2d Sess. (1980). The text of § 3071(a) provided:

Sec. 3071. (a) Liability—(1) Except for a release or threatened release, of hazardous waste which the defendant establishes to be caused solely by—

(A) an act of God or an act of war,

(B) negligence on the part of the Government of the United States,

(C) an act or omission of a third party if the defendant establishes that he exercised due care with respect to the hazardous waste concerned, taking into consideration the characteristics of such hazardous waste, or

(D) any combination of the foregoing where any release, or threatened release, of hazardous waste into the environment from or at an inactive site causes any costs described in subsection (b), any person who caused or contributed to the release or threatened release shall be strictly liable for such costs. Except as provided in paragraph (2), such liability shall be joint and several with any other person who caused or contributed to such release.

(2)(A) If a generator or transporter of hazardous waste establishes that only a portion of the total costs described in subsection (b) are attributable to hazardous waste generated or transported by him, such generator or transporter shall be liable under this subsection only for such portion. If the owner or operator of any inactive hazardous waste site establishes that only a portion of the total costs described in subsection (b) are attributable to hazardous waste which was treated, stored, or disposed of in a period during which he owned or operated the site, such owner or operator shall be liable under this section only for such portion.

(B) To the extent apportionment is not established under subparagraph (A), the court shall apportion the liability, to the maximum extent practicable, among the parties based upon evidence presented by the parties as to their contributions.

(C) Following any apportionment under this paragraph, no person shall be required to pay in excess of his apportioned share of the total costs described in subsection (b).

3 SUPERFUND, *supra* note 25, at 150-51.

that were attributable to their own status or activity, in which case that person would be held liable only for that portion of the costs.⁴²

Section 3071 of House Bill 7020 clearly established a "third-party defense."⁴³ This defense eliminated liability of a defendant for "a release, or threatened release, of hazardous waste which the defendant establishe[d] to be caused solely by- . . . (C) an act or omission of a third party if the defendant establishe[d] that he exercised due care with respect to the hazardous waste concerned, taking into consideration the characteristics of such hazardous waste" ⁴⁴

On September 23, 1980, the House resolved itself into a "Committee of the Whole" in order to consider amendments to House Bill 7020 (as reported out of committee).⁴⁵ At the beginning of the debate Representative Stockman offered an "amendment in the nature of a substitute."⁴⁶ The Stockman substitute bill "essentially provided a system of federal formula grants for state cleanup and remedial programs for inactive hazardous waste sites."⁴⁷ Representative Florio argued against the proposed amendment, asserting that strong federal liability provisions were needed to provide incentives for parties to engage in voluntary cleanups.⁴⁸ Representative Martin also opposed the Stockman substitute.⁴⁹ Although Martin's remarks were not entirely clear, he seems to have been suggesting that House Bill 7020 could, and should, be used to hold absentee landowner-lessors responsible for wastes dumped by their tenants, while the Stockman substitute could not. Martin asserted:

As an example of absentee ownership of sites, three sites near Verona, Mo., have been identified as possibly containing dioxin wastes. The dioxin was produced between 1969 and 1972 by one company which had rental equipment and space from another business which is headquartered in Con-

42. See H.R. 7020, 96th Cong., 2d Sess. § 3071(a)(2)(A) (1980).

43. See *id.* § 3071(a)(1)(C).

44. *Id.* § 3071(a)(1).

45. See 126 CONG. REC. 26,757 (1980).

46. *Id.*

47. Grad, *supra* note 30, at 15.

48. See 126 CONG. REC. 26,761 (1980). Rep. Florio stated:

The strong liability provisions that are in our bill that are not in [Rep. Stockman's] proposal I believe are very important, because we want to induce those who know where these sites are to remedy the sites themselves. If there is no liability provision, they will not have any incentive whatsoever to go forward on a voluntary basis and clean up those sites.

Id.

49. See *id.* at 26,768.

necticut. Now that the Missouri manufacturer has declared bankruptcy, the State may not have anyone to hold liable.⁵⁰

The House of Representatives rejected the Stockman substitute bill.⁵¹

Later on the same day, Representative Gore offered two amendments to House Bill 7020.⁵² These amendments related to the "third-party defense" and the apportionment of liability under the bill.⁵³ Gore noted that the bill, as then drafted, would have allowed a defendant to "escape liability for a release or threatened release of hazardous waste if [the defendant could] demonstrate that such was 'caused solely by . . . an act or omission of a third party if the defendant establishe[d] that he exercised due care with respect to the hazardous waste concerned, taking into consideration the characteristics of such hazardous waste.'"⁵⁴ Gore found this provision objectionable because "a defendant [could] avoid liability, despite being engaged in an ultrahazardous activity, by contracting with a third party to dispose of the hazardous waste."⁵⁵

Representative Gore's concern with this provision stemmed from his belief that the liability provisions of the bill were much more lenient than were common law rules relating to strict liability for ultrahazardous or abnormally dangerous activities.⁵⁶ Gore asserted that under the common law doctrine of vicarious liability for ultrahazardous activities a defendant could not avoid liability simply by contracting for the activity to be performed by a third party.⁵⁷ Gore

50. *Id.* at 26,769.

51. *See id.*

52. *See id.* at 26,781.

53. *See id.*

54. *Id.* at 26,782 (quoting § 307(a)(1)(C) of the version of H.R. 7020 then under discussion).

55. *Id.*

56. *Id.* at 26,783. With respect to common law liability, Gore stated that "[t]here can be little doubt that actions involving hazardous waste would be considered by the courts as abnormally dangerous or ultrahazardous activity sufficient to subject a responsible party to strict liability." *Id.* at 26,782. Similarly, "it is inconceivable that actions involving hazardous waste would not be considered abnormally dangerous. Strict liability would thus be imposed upon anyone responsible for a release of such waste." *Id.* According to Gore, the policy consideration underlying the common law strict liability doctrine, as he considered it to apply, was that "while the generation and disposal of hazardous waste are deemed a necessary evil in our society, 'the unavoidable risk of harm that is inherent in (handling waste) requires that it be carried on at (the defendant's) peril, rather than at the expense of the innocent person who suffers harm as a result of it.' The defendant, then, is basically an 'insurer' against the consequences of his abnormally dangerous conduct." *Id.* (paraphrasing from comment h to RESTATEMENT (SECOND) OF TORTS § 520 (1977)).

57. *See id.* Rep. Gore stated:

Related to the doctrine of strict liability is the rule that holds a defendant liable for injuries resulting from inherently dangerous activity even though he/she con-

believed that his amendment, which ultimately was incorporated into House Bill 7020 and passed by the House,⁵⁸ struck a "middle ground" between the common law as he described it and the version of House Bill 7020 reported out of committee.⁵⁹ Gore described the "third-party defense" set forth in his amendment as a limited defense: "My amendment would restrict the application of the third party defense to situations where the third party is not an employee or agent of the defendant, or where the third party's act or omission does not occur in connection with a contractual relationship."⁶⁰ Then, in a seemingly inconsistent statement, Gore said that "the amendment would permit a defendant to escape liability for damages caused by the act or omission of a third party who has no connection whatsoever with the defendant and which act or omission is unforeseeable."⁶¹ Consistent with his initial statement, however, he then stated that "with regard to foreseeable acts by third parties, the amendment requires that a defendant demonstrate that he acted with due care in order to escape liability. This insures that the defendant will not escape liability if he acted negligently, even if the damage caused is the result of an act of an unrelated third party."⁶²

The second amendment proposed by Representative Gore altered the joint and several liability provisions of House Bill 7020.⁶³ Gore noted in his remarks that under the reported version of House Bill 7020, the language relating to joint and several liability was rendered effectively meaningless by the "exceptions" to such liability.⁶⁴

tracted with a third party for the performance of that activity. This is basically a rule of vicarious liability, whereby the employer is held liable for the negligence of the independent contractor, regardless of whether the employer himself has been at fault.

Id.

58. *See id.* at 26,798-99.

59. *See id.* at 26,783. *See generally* H.R. 7020, 96th Cong., 2d Sess., § 3071(a)(1) and (2) (1980). Rep. Gore stated:

My amendment moves H.R. 7020 closer to the common law in several ways. First, the amendment removes the ability of and incentive for a defendant to contract away liability.

The amendment would insure that the common law rules of both strict and vicarious liability remain intact in cases in which a defendant seeks to shift the responsibility for costs resulting from his ultrahazardous activity to others with whom he is involved in a business relationship.

126 CONG. REC. 26,783 (1980).

60. 126 CONG. REC. 26,783 (1980).

61. *Id.* *See also infra* note 261 (discussing this statement further and presenting a plausible explanation for Gore's seemingly inconsistent statements).

62. 126 CONG. REC. 26,783 (1980).

63. *See id.* at 26,785.

64. *See id.* at 26,784. Rep. Gore stated:

In Gore's view, his second amendment (which ultimately was incorporated into the bill and passed by the House)⁶⁵ moved the legislation closer to common law principles of joint and several liability.⁶⁶

Following the introductory remarks of Representative Gore, members of the House held a general discussion among themselves. Especially relevant to the present inquiry are the seemingly confusing assertions made concerning the requirement that a person have "caused or contributed to [a] release or threatened release" in order to be held liable.⁶⁷ Speaking in favor of the Gore amendments, Representative Madigan emphasized that, according to his understanding of the "causation" requirement, in order "for liability to attach under [the bill as amended], the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action"⁶⁸

Speaking against the bill as amended, Representative Stockman expressed concern that the liability provisions were too broad and would result in a search for "deep pockets."⁶⁹ Apparently in response

Subsection (2)(B) . . . provides that even if the defendants do not establish the apportionability of the remaining damages, the court shall itself apportion the liability. Subsection (2)(B) goes on to provide that once this apportionment has been made by the court, no defendant shall be liable for more than his apportioned share. The effect is that no one defendant can ever be held responsible for the full amount of the damages. Thus, there actually is no joint and several liability in H.R. 7020.

Id. at 26,785.

65. *See id.* at 26,798-99. *See generally* H.R. 7020, 96th Cong., 2d Sess. § 3071(a) (1980).

66. *See* 126 CONG. REC. 26,785 (1980). Rep. Gore stated:

My amendment would move H.R. 7020 closer to the common law by insuring that to achieve apportionment under section 2(A), a defendant must prove apportionability by a preponderance of the evidence. This is the common law standard, and it should be part of any legislation like this. My amendment would also make this bill more in tune with the common law by making the apportionment under section 2(B) discretionary on the part of the court. Instead of requiring apportionment in all cases, as the present legislation does, the amendment permits a court to apportion liability when equity requires it. This would enable a court to apportion liability when sufficient evidence allows it, but to deny apportionment when there is no real basis for it. The amendment assists the court in its task by providing a list of factors specifically geared to the problems inherent in hazardous waste generation and disposal.

Id.

67. H.R. 7020, 96th Cong., 2d Sess. § 3071(a)(1) (1980). *See also supra* note 41 and accompanying text.

68. 126 CONG. REC. 26,785 (1980) (referring to H.R. Rep. No. 1016, 96th Cong., 2d Sess., pt. I, at 33 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6136).

69. *Id.* at 26,786. Rep. Stockman stated:

[O]nce [the people at EPA] move ahead and clean up, then their first action after that cleanup order or that cleanup financing if they do it directly or through the State government, will be to see if they can find some deep pocket somewhere in

to Representative Stockman, Representative Gore stated: "Of course, under strict liability, proof of causation would first have to occur."⁷⁰ Representative Stockman then asked Representative Gore whether liability was "automatic" for any operator of a site or waste generator that cannot satisfy the elements of a Section 107(b) defense.⁷¹ Representative Gore answered that "[p]roof of causation must occur. One must prove the damage was caused by the defendant. There is not an automatic trigger. But once the damage is proven to have been caused by the defendant, then a strict liability standard would apply."⁷² Representative Stockman rejoined, "I would just say in response to the gentleman that I realize causation has to be shown, but in this context the only requirement to show causation is that somebody contributed to the site."⁷³ Representative Gore then insisted that "one must first prove causation. If one cannot prove the defendant caused the damage which led to the suit, then the strict liability standard is never triggered."⁷⁴

Representative Gore concluded his remarks by stating that the "causation" requirement he had described was nothing new, citing the old English case of *Rylands v. Fletcher*⁷⁵ as authority.⁷⁶ Gore apparently was suggesting that the defendant landowner in *Rylands* "caused or contributed" to the damages that occurred when a reservoir the defendant had built upon his property broke and damaged an adjoining landowner's property.⁷⁷ The House adopted the Gore amendments and, having concluded its discussion and consideration of several

the vicinity who contributed, not that ran a disposal site, not that ran a transportation company, but just an industrial firm, a foundry, a plastics plant, anything that contributed waste any time in the foggy past that might be included in this list of 1,165 items that I have read.

And once they have found that deep pocket, they will immediately go to court and sue that deep pocket, and then all of the onus of the law, all of the burden will be on him to prove that he was not responsible for an outcome that occurred 30 years later as a result of this retroactive liability.

Id.

70. *Id.* at 26,787.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. 3 L.R.-E. & I. App. 330 (H.L. 1868). For an interesting discussion of *Rylands*, nuisance, and strict liability in tort for landowners, see William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399 (1942).

76. 126 CONG. REC. 26,787 (1980).

77. See *id.* See also *Rylands*, 3 L.R.-E. & I. App. at 332 (holding that a landowner is strictly liable for any damage caused by things that he brings upon his land, if those things would not be there naturally, and if they are dangerous and "mischievous" if not kept under control).

other amendments, passed the amended version of H.R. 7020 later in the day of September 23, 1980.⁷⁸

78. See 126 CONG. REC. 26,799 (1980). The full text of § 3071(a), of H.R. 7020 (as amended) is as follows:

Sec. 3071. (a) Liability.—(1) Except for a release, or threatened release, of hazardous waste which the defendant establishes to be caused solely by—

(A) an act of God or an act of war,

(B) negligence on the part of the Government of the United States,

(C) an act or omission of a third party other than (i) an employee or agent of the defendant, or (ii) a person whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant, if the defendant establishes that he exercised due care with respect to the hazardous waste concerned, taking into consideration the characteristics of such hazardous waste, or

(D) any combination of the foregoing where any release, or threatened release, of hazardous waste into the environment from or at an inactive hazardous waste site causes any costs described in subsection (b), any person who caused or contributed to the release or threatened release shall be strictly liable for such costs. Except as provided in paragraph (3), such liability shall be joint and several with any other person who caused or contributed to such release.

(2) For purposes of paragraph (1)(C) a defendant (including any person involved in the generation, transportation, treatment, storage, or disposal of hazardous waste) must demonstrate that he exercised due care with respect to all foreseeable acts or omissions of the third party and that he exercised due care in light of all relevant facts and circumstances.

(3)(A) If a generator or transporter of hazardous waste establishes by a preponderance of the evidence that only a portion of the total costs described in subsection (b) are attributable to hazardous waste generated or transported by him, such generator or transporter shall be liable under this subsection only for such portion. If the owner or operator of any inactive hazardous waste site establishes by a preponderance of the evidence that only a portion of the total costs described in subsection (b) are attributable to hazardous waste which was treated, stored, or disposed of in a period during which he owned or operated the site, such owner or operator shall be liable under this section only for such portion.

(B) To the extent apportionment is not established under subparagraph (A), the court may apportion the liability among the parties where deemed appropriate based upon evidence presented by the parties as to their contribution. In apportioning liability under this subparagraph, the court may consider among other factors, the following:

(i) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;

(ii) the amount of hazardous waste involved;

(iii) the degree of toxicity of the hazardous waste involved;

(iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;

(v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste;

(vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

"H.R. 7020, as passed by the House . . . authorized the government to respond to a dangerous release of a hazardous waste, including oil, or a substantial threat of such a release, at an abandoned or an inactive hazardous waste site."⁷⁹ The bill established a six hundred million dollar response fund to finance cleanups.⁸⁰ With respect to liability, "the bill provided that anyone who 'causes or contributes' to a release of a hazardous waste from an abandoned or inactive waste site would be jointly, severally, and strictly liable for governmental emergency, removal, and containment costs, as well as specified private damages."⁸¹ "Following passage by the House, H.R. 7020 was sent to the Senate, which referred it to the Environment and Public Works Committee."⁸² For various reasons, however, "[n]either the Committee nor the full Senate formally considered the House version [of] H.R. 7020 . . ."⁸³ The Senate had been working instead on Senate Bill 1480, its own version of the bill.⁸⁴

Senators Muskie, Stafford, Chafee, Randolph, and Moynihan introduced Senate Bill 1480 on July 11, 1979.⁸⁵ The Bill provided that a broad category of persons involved with the release or disposal of a hazardous substance could be held "jointly, severally, and strictly liable for the resulting governmental remedial and response costs, as well as an assortment of privately incurred damages."⁸⁶ Medical expenses were included among the list of recoverable damages.⁸⁷

Senate Bill 1480, as introduced, imposed joint, several, and strict liability upon

the owner or operator of a vessel or an onshore or offshore facility from which a hazardous substance is discharged, released, or disposed of . . . , and any other person who caused or contributed or is causing or contributing to such discharge, release, or disposal, including but not limited to

(C) Following any apportionment under subparagraph (A) no person shall be required to pay in excess of his apportioned share of the total costs described in subsection (b).

3 SUPERFUND, *supra* note 25, at 112-13.

79. 1 SUPERFUND, *supra* note 25, at xv.

80. *Id.*

81. *Id.* at xv-xvi.

82. *Id.* at xvi.

83. *Id.*

84. *See* Grad, *supra* note 30, at 6 (discussing the legislative history of The 1980 Act).

85. *Id.*

86. 1 SUPERFUND, *supra* note 25, at xviii.

87. *Id.*

prior owners, lessees, and generators, transporters, or disposers of . . . hazardous substances⁸⁸

Section 2 defined the terms "owner or operator": "For purposes of this Act (1) the terms * * * 'owner or operator' * * * shall have the meaning provided in section 311(a) of the Clean Water Act."⁸⁹ The only defenses to liability provided in Senate Bill 1480, as introduced, were "an act of God or . . . and act of war."⁹⁰

Upon its introduction in the Senate on July 11, 1979, Senate Bill 1480 was referred to the Senate Committee on Environment and Public Works.⁹¹ One year later, on July 11, 1980, the Committee reported out a revised version of the Bill.⁹² Although the definition of "owner or operator" remained unchanged in the revised bill,⁹³ the liability provisions found in Section 4 differed. The revised bill imposed joint, several, and strict liability upon:

- (i) the owner or operator of a vessel or a facility,
- (ii) any person who at the time of disposal of any hazardous substance owned or operated any facility or site at which such hazardous substances are disposed of,
- (iii) any person who by contract, agreement, or otherwise arranged for disposal, treatment, or transport for disposal or treatment by any other party or entity of hazardous substances owned or possessed by such person, at facilities or sites owned or operated by such other party or entity and containing such hazardous substances, and
- (iv) any person who accepts any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which a hazardous substance is discharged, released, or disposed of, or from which any pol-

88. *Id.* at 200.

89. *Id.* at 30. When S. 1480 was introduced, the Clean Water Act provided the following definition of "owner or operator":

"Owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment[.]

Clean Water Act § 121(a)(6), 33 U.S.C. § 1321(a)(6) (1988). The Clean Water Act is also referred to herein as the Federal Water Pollution Control Act (FWPCA).

90. 3 SUPERFUND, *supra* note 25, at 33.

91. *Id.* at 27.

92. *See* 1 SUPERFUND, *supra* note 25, at xvii.

93. *See id.* at 27, 30.

lutant or contaminant is released resulting in action under section 3(c)(1) of this Act⁹⁴

Thus, although the Senate Committee added specific provisions imposing liability upon past owners and operators at the time of disposal and upon transporters and generators, the Committee deleted the language relating to liability for those "causing" or "contributing to" or for those who "caused" or "contributed to" the release or threat of a release of hazardous substances.⁹⁵

Especially relevant to the present inquiry is the fact that on August 5, 1980, Senator Gravel introduced an amendment to Senate Bill 1480 (as reported) that would have exempted an owner "lessor" of a "facility" from the definition of "owner or operator" if the owner-lessor did not participate in the management or control of the facility.⁹⁶ The amendment defined the term "owner or operator" as

any person operating a vessel or facility or holding title to, or, in the absence of title, any other indicia of ownership of, a vessel or facility, but *does not include a person who* (either singly or in combination with others) *without participation in the management or operation of a vessel or facility, leases or charters to any other person with whom such person is not otherwise affiliated,* or holds such title or indicia of ownership primarily to protect a security interest in, the vessel or facility, and, in the case of any abandoned vessel or facility, the owner or operator of such a vessel or facility immediately prior to its abandonment.⁹⁷

The Gravel amendment was not considered by the Senate,⁹⁸ and on October 1, 1980, the unamended version of Senate Bill 1480, as reported to the Environment and Public Works Committee, was referred to the Senate Committee on Finance; the Committee on Finance, without amendment or written report, reported the bill favorably back to the full Senate.⁹⁹

Nevertheless, by November of 1980 it was clear that the Senate would not adopt S. 1480.¹⁰⁰ It also was clear that the Senate would not

94. *Id.* at 181 (mark-ups and italics omitted).

95. *Id.*

96. 126 CONG. REC. 21,377 (1980).

97. *Id.* at 21,378 (emphasis added).

98. 1 SUPERFUND, *supra* note 225, at 27.

99. *Id.* at xviii.

100. *Id.*

adopt either H.R. 85 or H.R. 7020, the House versions of the bill.¹⁰¹ Thus, “[i]n an effort to pass a bill during the waning hours of the 96th Congress, two compromises were proposed.”¹⁰² The Senate deemed the first compromise, known as the “Stafford Amendment,” unacceptable and therefore did not formally consider it.¹⁰³ The second compromise bill, known as the “Stafford-Randolph substitute,” was more acceptable and the Senate considered it on November 24, 1980.¹⁰⁴

As amended by the Stafford-Randolph substitute, Section 107 of Senate Bill 1480 contained liability provisions that were identical to those found in Section 107 of The 1980 Act.¹⁰⁵

(a) 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 (otherwise subject to the jurisdiction of the United States) or a facility,

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

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

101. *Id.* See also Maloney, *supra* note 29, at 530 (observing that there was a “lame duck” Congress following the 1980 elections and that this fact considerably altered the version of CERCLA enacted).

102. 1 SUPERFUND, *supra* note 25, at xviii.

103. *Id.* at xix.

104. *Id.* at xx-xxi.

105. *Id.* at 167.

(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.

(b) 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 damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.¹⁰⁶

Similarly, subsection 101(20) of the Stafford-Randolph substitute, which defined the terms "owner" and "operator," is identical to subsection 101(20) of The 1980 Act.¹⁰⁷

(20) (A) "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.¹⁰⁸

106. The 1980 Act § 107(a) and (b), codified as amended at 42 U.S.C. § 9607(a) and (b) (1988). The 1986 Amendments affected some of the language in § 107(a) of The 1980 Act. See CERCLA § 107(a), codified as amended at 42 U.S.C. 9607(a) (1988).

107. 1 SUPERFUND, *supra* note 25, at 26.

108. The 1980 Act § 101(20), codified as amended at 42 U.S.C. § 9601(20) (1988).

The Stafford-Randolph substitute bill deleted previous language¹⁰⁹ that had provided explicitly for joint, several, and strict liability.¹¹⁰ Instead, the substitute bill utilized a new definition of "liability" contained in Section 101(32) of the final bill.¹¹¹ This section, which is identical to Section 101(32) of The 1980 Act, provides: "'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act."¹¹²

The Senate debated the substitute bill following its introduction.¹¹³ Senator Stafford described the Stafford-Randolph substitute bill as "a combination of the best of the three other bills, and an elimination of the worst, or at least the most controversial [provisions]."¹¹⁴ Senator Randolph pointed out that the definition of "liability" contained in the substitute bill, which referred to Section 311 of the Federal Water Pollution Control Act, was to be interpreted as providing a standard of strict liability.¹¹⁵ Similarly, Senator Dole stated: "It . . . makes sense to incorporate a definition of strict liability that will serve as a uniform standard in determining liability for cleanup and other costs, and this has been achieved by reference to the Clean Water Act."¹¹⁶ As Senator Mitchell summarized: "A party may . . . be held strictly liable for the cleanup of chemical contaminants and natural resource damage for which he is responsible."¹¹⁷

109. See, e.g., § 107 of The 1980 Act, quoted at 126 CONG. REC. 30,961-62 (1980).

110. See 126 CONG. REC. 30,972 (1980) (demonstrating that the substitute bill eliminated joint and several liability and limited the scope of liability). See also *id.* at 30,972-82 (containing the text of the substitute bill).

111. *Id.* at 30,958.

112. The 1980 Act § 101(32), codified as amended at 42 U.S.C. § 9601(32) (1988). See also Federal Water Pollution Control Act § 311(f) and (g), 33 U.S.C. § 1321(f) and (g) (1988) (establishing the standards for liability under the FWPCA).

113. 126 CONG. REC. 30,930 (1980).

114. *Id.* at 30,935.

115. *Id.* at 30,932. Sen. Randolph stated:

Unless otherwise provided in this act, the standard of liability is intended to be the same as that provided in section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321). I understand this to be a standard of strict liability.

It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms has been deleted, and the liability of joint tortfeasors will be determined under common or previous statutory law.

As under section 311, due care or the absence of negligence with respect to a release or threatened release of a hazardous substance does not constitute a defense under this act.

Id.

116. *Id.* at 30,950.

117. *Id.* at 30,941.

The Senate passed the Stafford-Randolph substitute bill, as modified by several minor amendments,¹¹⁸ on November 24, 1980.¹¹⁹ Following the vote on Senate Bill 1480,¹²⁰ the Senate discussed the legislation further.¹²¹ At that time, Senator Helms, who had voted against the legislation,¹²² made the following statement:

It is very clear from the language of the Stafford-Randolph substitute itself, from the legislative history, and from the liability provisions of section 311 of the Federal Water Pollution Control Act, that now the Stafford-Randolph bill does not in and of itself create joint and several liability. The Government can sue a defendant under the bill only for those costs and damages that it can prove were caused by the defendant's conduct.¹²³

Later in the floor debate, however, Senator Stafford directly contradicted the statement of Senator Helms, reasserting that the standard of liability under the enacted bill was to be interpreted as joint, several, and strict.¹²⁴

At the conclusion of the post-passage discussion relating to Senate Bill 1480 (as amended by the modified substitute), Senator Randolph asked that House Bill 7020 be amended by substituting the text of Senate Bill 1480 (which had just been passed by the Senate)¹²⁵ for the existing text of House Bill 7020.¹²⁶ The substitute House Bill 7020 was then passed by the Senate with a voice vote on November 24, 1980.¹²⁷ "The Senate version of H.R. 7020 was sent to the House which took it up on December 3."¹²⁸ The House, faced with what

118. *See id.* at 30,956-70 (quoting the full text of Senate Bill 1480 as amended).

119. *Id.*

120. *Id.* at 30,970-72.

121. *See id.* at 30,970-87.

122. *Id.* at 30,955-96.

123. *Id.* at 30,972.

124. *Id.* at 30,986. Sen. Stafford stated:

As reported by the committee, S. 1480 and its accompanying report set the standard of liability as one of joint, several, and strict liability. However, in order to avoid confusion over new language the compromise bill simply defers to existing law in section 311 of the Clean Water Act which already provides a liability standard for recovery of costs for response and remedial actions in preventing and cleaning up releases or discharges of hazardous substances.

Id.

125. *Id.* at 30,956.

126. *Id.* at 30,987.

127. *Id.* The parliamentary maneuver of substituting the Senate Bill into the House Bill and then passing the House Bill "apparently occurred because S. 1480 contained tax provisions and, as a revenue bill, was required by the Constitution to originate in the House." 1 SUPERFUND, *supra* note 225, at xxi.

128. 1 SUPERFUND, *supra* note 25, at xxi.

some representatives considered a "take-it-or-leave-it" attitude on the part of the Senate leadership, debated the bill without making amendments.¹²⁹

In the House debate, referring to the substitute version of House Bill 7020, Representative Florio stated that "[t]he standard of liability in [the substitute bill] is intended to be the same as that provided in section 311 of the Federal Water Pollution Control Act; that is, strict liability."¹³⁰ Florio continued: "Liability remains 'subject only to the defenses' provided in the bill. That is, a defendant can escape liability only if he establishes that the release or threatened release is caused solely by an act of God, an act of war, or an act or omission of a third party, with third parties being narrowly defined."¹³¹ Further, he added, "Since reference to section 311 standards of liability is necessary only where not superseded by standards of this bill, these defenses, and not those of section 311, will control."¹³²

Representative Broyhill, who voted against the substitute bill,¹³³ argued that "the bill is unexcusably vague in terms of identifying who should be liable and for what."¹³⁴ In his opinion, based on the language provided in Section 107 of the bill, "the owner or operator of a vessel or a facility can be held strictly liable for various types of costs and damages entirely on the basis of having been found to be an owner or operator of any facility or vessel."¹³⁵ This is because, he said,

129. *Id.* Needham and Menefee state:

Several observers, and the debates, suggest that the Senate leadership felt that the tenuous political coalition in the Senate would dissolve if the Senate had to consider a subsequent, House amended version. Thus, the Senate leadership apparently believed that any substantive amendments by the House would prove fatal to the bill. Arguing that neither time nor politics permitted the use of a conference committee to modify the bill, the Senate leadership even discouraged the adoption of technical amendments by the House.

Id.

130. 126 CONG. REC. 31,965 (1980).

131. *Id.*

132. *Id.* In order to further "clarify" the standard of liability under the substitute bill, Rep. Florio then introduced into the record an opinion letter from United States Assistant Attorney General Parker regarding the existing liability standard under the Clean Water Act. *Id.* at 31,966. Citing two cases for authority, Mr. Parker stated, "Caselaw construing section 311 clearly indicates that not only are the defenses to be narrowly construed but the plain meaning of the liability regime establishes a strict liability standard." *Id.* (citing *Burgess v. M/V Tomano*, 564 F.2d 964, 982 (1st Cir. 1977), *cert. denied*, 435 U.S. 941 (1978) (construing the "third-party defense" provided in Section 311 of the FWPCA narrowly) and *Stewart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir. 1979) (holding that FWPCA Section 311 imposes strict liability)).

133. See 126 CONG. REC. 31,981 (1980).

134. *Id.* at 31,969.

135. *Id.*

"[t]here is no [statutory] language requiring any causal conviction [sic:connection] with a release of a hazardous substance."¹³⁶ Finally, Representative Harsha criticized the bill, stating that the judiciary would "have a field day in ridiculing the Congress on passing laws that are vague, internally inconsistent, and using tools such as superseding laws which are in conflict without any further guidance. This bill is not a superfund bill—it's a welfare and relief act for lawyers."¹³⁷

Nevertheless, the House passed the substituted form of House Bill 7020 later in the day on December 3, 1980.¹³⁸ Jimmy Carter, the outgoing President of the United States, "signed the bill into law on . . . December 11, 1980."¹³⁹

B. *The SARA Amendments of 1986*

Congress amended The 1980 Act in 1986 by enacting the Superfund Amendments and Reauthorization Act (SARA).¹⁴⁰ Although SARA enacted a significant number of amendments to the original 1980 legislation,¹⁴¹ SARA made relatively few changes to the liability provisions found in Section 107(a) and the related definitions of "owner or operator" and "liability," which remain substantially the same.¹⁴² On the other hand, SARA made significant changes to the liability defenses in Section 107(b) by adding a definition of the term "contractual relationship."¹⁴³ SARA also added a de minimis settlement provision.¹⁴⁴

Crafting SARA was no simple matter. In fact, "[t]he three year process leading to SARA's enactment began in 1984."¹⁴⁵ House Bill 2817 (the predecessor to House Bill 2005, which became the enacted SARA legislation)¹⁴⁶ was introduced on June 20, 1985,¹⁴⁷ and was re-

136. *Id.*

137. *Id.* at 31,970.

138. *See id.* at 31,981.

139. 1 SUPERFUND, *supra* note 25, at xxi.

140. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601 to 9675 (1988)) (as noted *supra* note 2, this act is referred to in its entirety herein as "SARA," and as "CERCLA" when referring to The 1980 Act as amended by SARA).

141. *See* ENVIRONMENTAL LAW INSTITUTE, SUPERFUND DESKBOOK (1986) (*hereinafter* "DESKBOOK") (presenting an overview of The 1986 Amendments contained in SARA).

142. Compare § 107(a) of The 1980 Act, quoted *supra* text accompanying note 106, with CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988).

143. Compare § 107(b) of The 1980 Act, quoted *supra* text accompanying note 106, with CERCLA § 101(35), 42 U.S.C. § 9601(35) (1988).

144. *See* CERCLA § 122(g), 42 U.S.C. § 9622(g) (1988).

145. DESKBOOK, *supra* note 141, at 5.

146. *See generally id.* at 5, 6 (noting that the House floor debate of December 5, 6 and 10 of 1985 was on H.R. 2817, but that after that the House passed a Conference version,

ferred to the Committees on Energy and Commerce, Ways and Means, and Public Works and Transportation.¹⁴⁸ After the Committee on Energy and Commerce reported H.R. 2817 on August 1, 1985, the bill was referred to the Committees on the Judiciary and Merchant Marine and Fisheries.¹⁴⁹ Because the various House committees had reported out somewhat different versions of House Bill 2817, a compromise version was developed.¹⁵⁰ It was at this point that Section 122(g)(1) and (2) was added to the compromise bill, permitting the administrator of the EPA to enter into de minimis settlement agreements with "innocent" or "almost innocent" landowners who satisfied the stated criteria.¹⁵¹ The House version of Section 122(g)

designated H.R. 2005, reconciling positions taken in the floor debate and Committee reports. H.R. 2005 was signed into law as SARA on October 17, 1986). See also *infra* text accompanying notes 173-176.

147. 131 CONG. REC. 16,581 (1985).

148. *Id.* at 34,633.

149. *Id.*

150. *Id.* at 34,639.

151. *Id.* at 34,705. The text of the de minimis provision found in the H.R. 2817 "compromise bill" is as follows:

(g) De Minimis Settlements.—

(1) Expedited Final Settlement.—Whenever practicable and in the public interest, as determined by the Administrator, the Administrator shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 106 or 107 if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the Administrator, the conditions in either of the following subparagraph (A) or (B) are met:

(A) Both of the following are minimal in comparison to other hazardous substances at the facility:

(i) The amount of the hazardous substances contributed by that party to the facility.

(ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

(B) The potentially responsible party-

(i) is the owner of the real property on or in which the facility is located;

(ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

This subparagraph does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

(2) Release From Liability. The Administrator may provide a covenant not to sue with respect to the facility concerned, or grant a release from liability with respect to the facility concerned, to any party who has entered into a settlement under this subsection unless such a covenant or release would be inconsistent with the public interest as determined under subsection (f).

substantially paralleled the bill that eventually was enacted into law.¹⁵²

On December 5, 1985, the House resolved itself into a "Committee of the Whole" and began considering amendments to the House Bill 2817 "compromise bill."¹⁵³ During the floor debate, Representative Packard sought to clarify the intent of the *de minimis* settlement provision.¹⁵⁴ Referring to "landowners whose participation is limited to ownership of the fee title to or equity interest in the property on which a toxic-generating or disposal facility is located and who have no management control over activities at the facility giving rise to a response action,"¹⁵⁵ Representative Packard stated:

[T]he [Public Works C]ommittee believes it to be inequitable to consider such noncontributory parties as owners or operators of a facility[.] Finally, I would hope that the understanding which came out of our informal discussions leads the committee to expect the administrator of the Environmental Protection Agency to actively utilize his authority under this act to enter into *de minimis* final settlements and grant releases from liability to eligible potentially responsible parties.¹⁵⁶

Representative Roe, responding to Representative Packard, stated, "The gentleman's statements do, indeed, reflect the committee's position on this point."¹⁵⁷

Immediately following the exchange between Representatives Packard and Roe, Representative Frank saw the opportunity to propose the following amendment to Section 107 of The 1980 Act, creating an "innocent landowner defense:"¹⁵⁸

(m) Landowner Liability—There shall be no liability under subsection (a) (1) of this section for a person otherwise liable who can establish by a preponderance of the evidence that he—

Id.

152. Compare the text quoted *supra* note 15151 with CERCLA § 122(g)(1) and (2), 42 U.S.C. § 9622(g)(1) and (2) (1988).

153. 131 CONG. REC. 34,632 (1985).

154. See *id.* at 34,715 (questioning whether he is correct in assuming that landowners who do not participate in the management of a facility are considered not to be owners or operators for purposes of liability).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

(1) is the owner of the real property on or in which the facility is located;

(2) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, the release or threatened release of which causes the incurrence of a response cost;

(3) did not contribute to the release or threat of release of a hazardous substance at the facility through any act or omission; and

(4) did not acquire the property with actual or constructive knowledge that the property was used prior to the acquisition for the generation, transportation, storage, treatment, or disposal of any hazardous substance.¹⁵⁹

During consideration of the Frank amendment, Representative Breaux inquired as to the existing state of the law with respect to the CERCLA liability of a purchaser of contaminated property.¹⁶⁰ Representative Frank responded that the answer was unclear,¹⁶¹ but that he thought "all of us would agree that you should not be held responsible. I would hope that frankly even under the current law you might ultimately be held not responsible, but no one can have that assurance."¹⁶²

Representative Eckart then proposed a modification of the Frank amendment that would have removed the language "the release or threatened release which causes the incurrence of a response cost" from subparagraph (2).¹⁶³ Representative Frank responded: "[A]s I understand [it, the] concern is [with] the part in paragraph 2 which says 'the release or threatened release of which causes the incurrence of a response cost.' I understand that concern. On the other hand, I would not be satisfied if you would strike that altogether."¹⁶⁴ Repre-

159. *Id.*

160. *Id.* Rep. Breaux asked:

Without the gentleman's amendment, am I to understand that a person would be able to buy property, a tract of land and have in the deed of conveyance a covenant that this property is transferred and there is no toxic waste located on this property, there is no way that person can visually find out or reasonably know that there is any kind of toxic waste underneath that property; and then 5 years or some time period down the road discover [sic] for the first time that that property has some toxic wastes that had been buried years before under his property, that without the gentleman from Massachusetts's [sic] amendment that that property owner would then be somehow held responsible?

Id.

161. *Id.*

162. *Id.*

163. *Id.* at 34,716.

164. *Id.* at 34,717.

sentative Eckart argued that any "innocent landowner" amendment should be narrowly drawn.¹⁶⁵ Concluding that perhaps they might be unable to reach an agreement, Representative Frank asserted that it was a "pro-Superfund" policy that purely innocent landowners not be held liable for releases of hazardous waste in which they have not been involved.¹⁶⁶ Representative Eckart replied that the better solution would be to let the de minimis settlement provision take care of the problem of the potential liability of "innocent" landowners.¹⁶⁷ In response, Representative Glickman pointed out that utilizing the de minimis provision would not enable an "innocent" landowner to avoid being involved in litigation.¹⁶⁸ Representative Eckart then proposed

165. *Id.* Rep. Eckart stated:

I would rather err on the side of being conservative, that there will be as few releases as possible in the innocent landowner provisions, erring on the side of maximizing the environmental protection and limiting the use of this landowner liability because I think there will be greater protection to the health and environment.

Id.

166. *Id.* See *supra* text accompanying note 159 (quoting the text of the Frank amendment, at subparagraph (m)(2)). Rep. Frank stated:

It looks like we may not be able to reach agreement. I agree that we should err on the side, if we err at all, of conservatism in this regard. I think this is already fairly conservatively drafted. If we simply struck altogether what the gentleman is proposing, we would have no amendment left at all, because if you disturb anything at all, you would have a serious problem and you would lose the benefit of this amendment. I think it is pro-Superfund to see that purely innocent people are not swept up under the restrictive provisions.

Id.

167. *Id.* Rep. Eckart stated:

I would just say that I have a particular problem with the amendment. I think it poses a dangerous erosion in the joint and several liabilities section. There is a difference, a dramatic difference, between providing for a pre-suit position before there is an establishment of liability under the de minimis settlement provision, which restates this language, as opposed to creating an affirmative defense in the strict joint and several liabilities area.

The problem, very simply, I submit to the Members of the Committee, is that there are probably only a few, very narrow set of circumstances—two, I am advised—to which this could apply. I am not prepared at this point in time to pass a single, very narrow, special interest escape clause to a very important, strict joint and several liabilities provision that I think needs to be in place, given the fact I think this measure is covered under subparagraph (g), under de minimis settlements, the PRP could do it.

Id.

168. *Id.* at 34,718. Rep. Glickman stated:

Now, what Mr. Eckart said has some truth. He said that the de minimis provisions in the bill, that it, allowing a release for a de minimis generator, a small generator would take care of this particular case.

The problem is, it does not really take care of it because you are in the litigation, and then you would have to be settled out of the litigation. This offers a

an alternative modification to the Frank amendment:¹⁶⁹ "I ask unanimous consent to change the amendment in lines 10 and 11 by striking the expression 'the incurrence of a response cost,' and replace it with 'significant environmental hazard[.]'"¹⁷⁰ Frank accepted the second proposed modification, stating, "I would hope we could go ahead with that kind of language, with the understanding that it is always hard to work things out exactly here. When we get to conference, maybe that has to be perfected some way."¹⁷¹ The Frank amendment, as modified, was accepted by the Committee of the Whole.¹⁷²

The House of Representatives passed House Bill 2817, which included the modified Frank amendment, five days later, on December 10, 1985.¹⁷³ The House immediately amended House Bill 2005, the "Superfund" bill that the Senate previously had passed and sent to the House,¹⁷⁴ by substituting the text of House Bill 2817 for the Senate title and text.¹⁷⁵ The final version of House Bill 2005 then was sent to the Conference Committee.¹⁷⁶

defense with somebody who is truly an innocent bystander, and that is the difference between utilizing that methodology and this one.

Id.

169. *Id.*

170. *Id.* Subparagraph (2) of the Frank amendment, as modified, would then have provided: "(2) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, the release or threatened release of which causes significant environmental hazard[.]" *Id.* at 34,719. Compare *id. with id.* at 34,715 (quoting the full text of the original Frank amendment, also quoted *supra* text accompanying note 159).

171. *Id.* at 34,718. Rep. Frank concluded his remarks by stating, "I am confident that if we adopt [my amendment] with this language change we will go to conference and adopt language that will serve all of our purposes, so I hope it is accepted." *Id.* at 34,719.

172. *Id.*

173. *Id.* at 35,658.

174. During September 17-24, 1985, the Senate considered its Superfund bill. See 131 CONG. REC. 23,983-84, 24,755-56 (1985). Prior to voting on the bill, designated S. 51, however, the Senate voted to instruct the Senate Finance Committee to cease its consideration of a social security bill, designated H.R. 2005, which had originated in the House. See *id.* at 24,756 (statement of Sen. Packwood requesting and receiving unanimous consent to discharge the Finance Committee's consideration of H.R. 2005). At the same time, the Senate voted to consider H.R. 2005, substituting the original House title and text with the title and text of S. 51, as amended. *Id.* The Senate then passed its Superfund bill, now designated H.R. 2005, and sent it to the House for consideration. *Id.* at 25,090. As in the case of the 1980 legislation, apparently this procedural maneuver was performed so that the bill, which contained funding provisions, would be deemed to have "originated" in the House. See *supra* note 127.

175. 131 CONG. REC. 35,658, 35,738 (1985).

176. *Id.* at 35,658 (containing a request by Rep. Dingell to have the House and Senate confer on H.R. 2005).

The Conference Committee, however, declined to adopt the Frank amendment to Section 107 as contained in House Bill 2817.¹⁷⁷ Instead, the Committee developed a similar provision in which it created a separate definition of the term "contractual relationship."¹⁷⁸ Although The 1980 Act had employed the term "contractual relationship" in the "third-party defense" language found in Section 107(b)(3), that term was not otherwise defined in the 1980 legislation.¹⁷⁹ The text of the new definition contained in the Conference Report is identical with that found in SARA, as enacted, and 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 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 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.

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.

(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 own-

177. H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 186, (1986), *reprinted in* 1986 U.S.C.A.N. 3276, 3279.

178. *Id.*

179. *See generally* The 1980 Act § 101, codified as amended at 42 U.S.C. § 9601 (1988) (containing the terms defined in The 1980 Act).

ership 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 or 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.

(C) 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.

(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 release or threatened release of a hazardous substance which is the subject of the action relating to the facility.¹⁸⁰

The Conference Report that accompanied the compromise conference bill explained the final version of Section 101(35) and discussed that section's relationship with Section 107(b)(3).¹⁸¹ The

180. CERCLA § 101(35), 42 U.S.C. § 9601(35) (1988).

181. The Conference Report provided, in pertinent part:

[The] new definition of contractual relationship is intended to clarify and confirm that under limited circumstances landowners who acquire property without knowing of any contamination at the site and without reason to know of any contamination (or as otherwise noted in the amendment) may have a defense to liability under section 107 and therefore should not be held liable for cleaning up the site if such persons satisfy the remaining requirements of section 107(b)(3). A person who acquires property through a land contract or deed or other instrument transferring title or possession that meets the requirements of this definition may assert that an act or omission of a third party should not be considered to have occurred in connection with a contractual relationship as identified in section 107(b) and therefore is not a bar to the defense.

In the limited circumstances identified in this definition, such landowners are entitled to the defense if they exercise the requisite due care upon learning of

Conference Committee comments do not suggest an intent otherwise to expand or narrow the availability of the "third-party defense" beyond the specific "innocent" purchaser situation.

The Conference Committee also adopted the de minimis settlement language from Section 122(g)(1) and (2) of the House Bill¹⁸² in a substantially similar form.¹⁸³ Section 122(g)(1) and (2), as enacted, provides:

(g) DE MINIMIS SETTLEMENTS

(1) EXPEDITED FINAL SETTLEMENT

Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 9606 or 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:

(A) Both of the following are minimal in comparison to other hazardous substances at the facility:

(i) The amount of the hazardous substances contributed by that party to the facility.

(ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

(B) The potentially responsible party—

(i) is the owner of the real property on or in which the facility is located;

such release or threat of release. For example, where the release or threat of release is caused by an act of vandalism, the landowner may be able to assert the defense where he exercises due care and takes satisfactory precautions against foreseeable acts as discussed below.

The Conferees recognize that the due care requirement embodied in section 107(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. Finally, the precautions against foreseeable acts of third parties requirement of section 107(b)(3)(b) does not prevent a subsequent purchaser after contamination has occurred from claiming the defense, but only comes into play after the landowner acquires the property. Foreseeability must be considered in light of the specific circumstances of each case. The provisions of section 101(35)(B) as to "reason to know" govern the purchaser's responsibility with regard to acts of third parties to the purchase.

H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 186-87 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3279-80.

182. See *supra* note 151 (quoting the de minimis language in H.R. 2817).

183. Compare the enacted language, quoted *infra* text accompanying note 169, with the text quoted *supra* note 151.

(ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

(2) COVENANT NOT TO SUE

The President may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this subsection unless such a covenant would be inconsistent with the public interest as determined under subsection (f) of this section.¹⁸⁴

184. CERCLA § 122(g)(1) and (2), 42 U.S.C. § 9622(g)(1) and (2) (1988). SARA also changed some language in § 107(a). Section 107(a), as amended, provides:

(a) . . .

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,

(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.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under

According to one commentator, "[t]he presence of both the 'innocent landowner' defense and the *de minimis* landowner-settlement provisions in CERCLA is something of a fluke."¹⁸⁵ Apparently, "EPA originally advocated the *de minimis* provision in several House committees during the SARA reauthorization process to forestall inclusion of an additional defense to liability."¹⁸⁶ Although the House "acceded to EPA's approach," during the floor debate the House also adopted the modified Frank amendment, thus adding the "innocent landowner" defense without removing from the legislation the *de minimis* alternative.¹⁸⁷

The Senate passed the Conference Committee version of SARA on October 3, 1986.¹⁸⁸ The House passed it on October 8, 1986.¹⁸⁹ Thus, in modified form, the House versions of the "innocent landowner" defense and the *de minimis* settlement provision were incorporated into CERCLA.¹⁹⁰

III. DISCUSSION AND ANALYSIS OF THE STATUTORY LANGUAGE, LEGISLATIVE HISTORY, AND CASE LAW

As stated in the Introduction, the scope of this Article is limited to the important but circumscribed topic of a landowner-lessor's liability under CERCLA for response costs associated with the release or threatened release of hazardous substances caused by the act or omission of a tenant in possession. Before proceeding with a discussion of liability under Section 107(a), let us assume the following hypothetical:

In 1987, Larry Landlord purchased Brownacre and its accompanying buildings for cash from Samantha Seller. At the time of the purchase, Larry Landlord had a "due diligence" survey conducted, which concluded that no hazardous substances were present on or in the land. After taking title, Landlord leased the property for five years to Terry

this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988).

185. LIGHT, *supra* note 11, at 221.

186. *Id.*

187. *See id.* *See also supra* text accompanying note 173.

188. 132 CONG. REC. 28,456 (1986).

189. *Id.* at 29,790.

190. LIGHT, *supra* note 11, at 221.

Tenant. Under the lease terms, Tenant is responsible for maintaining the leased premises; thus, Landlord has no contact with Tenant other than receiving the rent check in the mail each month. The lease places no restriction upon Tenant's use of the property.

During the lease term, Tenant utilizes the main building located on Brownacre for manufacturing processes. These processes involve the use of chemical solvents, which after use, are discarded as waste. The wastes are placed in fifty-five gallon drums and stored for extended periods of time in a smaller storage building located on the rear of the property.

After being stored for approximately two years, the drums begin to deteriorate and the solvents begin to seep into the ground through cracks in the concrete floor. The State becomes aware of the problem, incurs response costs for clean-up activities, and brings an action under CERCLA against Larry Landlord and Terry Tenant. Terry Tenant has minimal assets available to pay any damage award that is imposed by a court.

Given the above hypothetical, the question is, broadly speaking, whether the landowner-lessor is liable under CERCLA for damages relating to the response costs incurred by the State. Pursuant to CERCLA Section 107(a), "covered persons" can be held liable for "response costs" when there has been a "release" or "threatened release" of "hazardous substances" into the environment.¹⁹¹ In the above hypothetical, let us assume that the statutory definitions found in CERCLA relating to "facility,"¹⁹² "hazardous substances,"¹⁹³ "release,"¹⁹⁴ and "response costs"¹⁹⁵ have been satisfied.

The first issue to consider is simply whether or not Larry Landlord is a "covered person" pursuant to Section 107(a)(1) and (2).¹⁹⁶ As mentioned previously,¹⁹⁷ the terms "owner" and "operator" are succinctly defined in Section 101(20) to mean those who "own" or "operate."¹⁹⁸ In the hypothetical, Larry Landlord held legal title to the property when the State commenced the lawsuit; therefore, it seems

191. See CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988). See also *supra* note 184 (quoting the amended version of Section 107(a)).

192. See CERCLA § 101(9), 42 U.S.C. § 9601(9) (1988) (defining "facility").

193. See *id.* § 9601(14) (defining "hazardous substance").

194. See *id.* § 9601(22) (defining "release").

195. See *supra* note 11 (discussing response costs).

196. See CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988). See also *supra* note 184 (quoting the amended version of Section 107(a)).

197. See *supra* note 15 and accompanying text.

198. See CERCLA § 101(20), 42 U.S.C. § 9601(20) (1988).

clear that Landlord would be considered a current "owner" for purposes of Section 107(a)(1).

Assuming that Larry Landlord is considered an "owner" and that all of the other previously mentioned¹⁹⁹ statutory elements are satisfied, a prima facie case for liability under Section 107(a) has been met.²⁰⁰ Nevertheless, "passive" landowner-lessors have argued in defense of suits to recover CERCLA response costs that they should not be held liable under Section 107(a). For example, in *New York v. Shore Realty Corp.*,²⁰¹ the defendant landowner-lessor argued that liability could not be imposed upon it as a current "owner" under Section 107(a)(1) unless "causation" for the "release" could be attributed to it.²⁰² In support of this "innocent landlord defense," the landowner-lessor apparently cited the statements of Representative Gore during the House debates relating to a "causation" requirement.²⁰³ Nevertheless, the *Shore* court rejected the argument that Section 107(a)(1) contains a causation requirement, stating that "section [107(a)(1)] unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation."²⁰⁴

The *Shore* court noted that the comments of Representative Gore were inapposite because they referred to House Bill 7020 (as modified by the Gore amendments),²⁰⁵ rather than to the Stafford-Randolph substitute language for House Bill 7020, which was passed by both houses.²⁰⁶ The court also pointed out that Representative Broyhill had opposed the Stafford-Randolph substitute to House Bill 7020, in part, because he believed that an "owner" could be held strictly liable on the basis of ownership, without regard to causation.²⁰⁷ The *Shore* court discounted Senator Helms's remarks to the contrary.²⁰⁸

199. See *supra* text accompanying notes 192-195.

200. See also *infra* text accompanying note 253 (delineating the elements of the possible "third-party defense"). See generally *infra* text accompanying notes 226-357 (analyzing "third-party defense" to CERCLA liability).

201. 759 F.2d 1032 (2d Cir. 1985).

202. *Id.* at 1043.

203. *Id.* at 1045. See also 126 CONG. REC. 26,786-87 (1980) (containing the remarks of Rep. Gore during the House debate, quoted *supra* text accompanying notes 70-74).

204. *Shore*, 759 F.2d at 1044.

205. *Id.* at 1044-45. See also 126 CONG. REC. 26,798-99 (1980) (containing the text of § 3071(a) of H.R. 7020, as amended, quoted *supra* note 78).

206. *Shore*, 759 F.2d at 1044-45. See also 126 CONG. REC. 31,981 (1980) (containing the text of The 1980 Act § 107(a), quoted *supra* text accompanying note 106).

207. See *Shore*, 759 F.2d at 1045 n.19. See also 126 CONG. REC. 31,969 (1980) (containing the remarks of Sen. Broyhill, quoted *supra* text accompanying notes 134-136).

208. *Shore*, 759 F.2d at 1045 n.19. See also 126 CONG. REC. 30,972 (1980) (containing the remarks of Sen. Helms, quoted *supra* text accompanying note 123).

Similarly, in *United States v. Monsanto Co.*,²⁰⁹ the landowner-lessors attempted to assert an “innocent landlord defense” to alleged CERCLA liability arising from their status as past “owners” at the time of disposal, pursuant to Section 107(a)(2).²¹⁰ The *Monsanto* court adopted the strict liability interpretation of Section 107(a): “We agree with the overwhelming body of precedent that has interpreted section 107(a) as establishing a strict liability scheme.”²¹¹ Applying this standard to the landowner-lessors, the *Monsanto* court stated:

In light of the strict liability imposed by section 107(a), we cannot agree with the site-owners [sic] contention that they are not within the class of owners Congress intended to hold liable. The traditional elements of tort culpability on which the site-owners rely simply are absent from the statute.²¹²

The *Shore* and *Monsanto* courts’ interpretation of Section 107(a) as creating strict landowner-lessor liability is sound for several reasons. Both the statutory language and the legislative history cited by the *Shore* court provide reasonable bases for the courts’ interpretation. As the *Shore* court pointed out, the remarks of Representative Gore were made in relation to the “caused or contributed/causing or contributing” liability language found in House Bill 7020 (as modified by the Gore amendments),²¹³ rather than to the finally enacted version of House Bill 7020, which contained substantially different liability language.²¹⁴

Moreover, in the context of landowner-lessor liability, if one were to consider remarks made in relation to earlier versions of House Bill 7020, then the remarks of Representative Martin (a supporter of the bill) also should be considered.²¹⁵ Martin’s statements suggest that he believed the version of House Bill 7020 originally reported out of committee to the House²¹⁶ would or should hold absentee landowner-lessors responsible for response costs associated with wastes dumped

209. 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

210. *Id.* at 166.

211. *Id.* at 167.

212. *Id.* at 168.

213. *Shore*, 759 F.2d at 1044-45. See also *supra* text accompanying note 78.

214. See *Shore*, 759 F.2d at 1044-45 (comparing 126 CONG. REC. 26,786-87 (1980) (containing remarks of Rep. Gore) with 126 CONG. REC. 31,981-82 (1980) (containing the compromise version)). See also *supra* text accompanying note 105 (discussing the different versions).

215. See 126 CONG. REC. 26,768-69 (1980).

216. See *supra* note 41 (containing the text of H.R. 7020 as reported out of committee).

by their tenants.²¹⁷ It also would seem that the contradictory remarks of Senator Helms, positing a causation requirement, should not be accorded any great weight for several similar reasons: (1) the remarks were made *after* the bill had passed the Senate; (2) the remarks were made just after he had voted against the bill; and, (3) the remarks were immediately contradicted by Senator Stafford, one of the bill's sponsors.²¹⁸ Finally, the *Shore* and *Monsanto* courts' conclusion that Section 107(a) does not provide an "innocent landlord defense" finds further support in the fact that an express exemption from the definition of "owner" for landowner-lessors that were "not otherwise participating in the management or control" of a facility was offered or considered in both houses,²¹⁹ but never became part of The 1980 Act.²²⁰

Having discussed the landowner-lessor as an "owner" and as a potentially "covered person" under Section 107(a), this Article next examines the Section 107(b)(3) "third-party defense." Before proceeding with that discussion, however, let us consider the following hypothetical:

Rose Realty is in the business of leasing commercial real estate. Realty leases Blackacre to Paul Proprietor for use as a retail clothing store for a term of five years. The leased premises consists of a main store building and a smaller storage building in the back of the lot.

The lease restricts the use of Blackacre to that of a retail clothing store. It prohibits both illegal activity and the storage of hazardous substances on the leased premises. It also grants the landlord the right of periodic inspection to ensure compliance with the terms of the lease. The landlord covenants in the lease that it will maintain the premises in a condition suitable to their intended purpose under the lease. The lease permits the landlord to have the necessary access to the leased premises to comply with its duty to keep the premises in repair. Rose Realty has the power to evict Paul Proprietor for any breach of the lease covenants.

217. See 126 CONG. REC. 26,769 (1980) (quoting the remarks of Rep. Martin). See also *supra* text accompanying note 50.

218. See 126 CONG. REC. 30,986 (1980) (quoting the remarks of Sen. Stafford). See also *supra* note 124.

219. See 1 SUPERFUND, *supra* note 25, at 31 (setting forth Section 101 of H.R. 85 as passed by the House, which contained the exemption); 126 CONG. REC. 21,378 (1980) (containing the Senate's consideration of such an exemption).

220. See generally The 1980 Act § 107, codified as amended at 42 U.S.C. § 9607 (1988) (containing no such liability exemption).

The tenant, Paul Proprietor, also owns a landscaping company and purchases several thousand gallons of herbicides at a liquidation sale at a very cheap price for his landscaping company. Proprietor decides to store the fifty-five gallon drums of herbicides, sixty in all, in the small storage building located in the rear of Blackacre. Proprietor hopes that eventually he will either be able to use the chemicals or resell the drums at a profit.

Six months after being placed in storage on Blackacre, the drums begin to corrode and the herbicide contained in the drums starts to seep into the ground through cracks in the concrete. The herbicide begins migrating toward a pond located adjacent to Blackacre. Proprietor has minimal assets to pay any court-imposed response costs.

Initially, let us assume that the statutory requirements relating to "release,"²²¹ "hazardous substance,"²²² "facility,"²²³ and "owner,"²²⁴ have been met, and that the contamination problem will be discovered and "response costs"²²⁵ ultimately will be incurred. Broadly speaking, the question is whether Rose Realty will succeed in asserting the "third-party defense" provided in Section 107(b), and thereby avoid liability.

Section 107(b) permits a defendant to assert certain defenses to what otherwise would be strict liability for the release of hazardous substances.²²⁶ To assert the defense under the language of Section 107(b)(3), a defendant would have to prove the following: (1) that the release or threatened release in question was caused solely by a third party *other than* an employee or agent of the defendant, and by a third party *other than* one whose act or omission occurs in connection with a contractual relationship existing directly, or indirectly, with the defendant; (2) that the defendant exercised due care with respect to the hazardous substance(s); and (3) that the defendant took precautions in relation to foreseeable acts or omissions of the third party.²²⁷ Section 101(35) of CERCLA as amended defines the term "contractual relationship" to include relationships resulting from an instru-

221. See CERCLA § 101(22), 42 U.S.C. § 9601(22) (1988) (defining "release").

222. See *id.* § 9601(14) (defining "hazardous substance").

223. See *id.* § 9601(9) (defining "facility").

224. See *id.* § 9601(20) (defining "owner"). See also *supra* text accompanying notes 197-220 (discussing the "owner" designation in the landowner-lessor context).

225. See *supra* note 11 (discussing response costs).

226. See CERCLA § 107(b), 42 U.S.C. § 9607(b) (1988). See also *supra* text accompanying note 106.

227. See *id.* § 9607(b)(3).

ment "granting possession" unless the landowner meets certain criteria for innocence.²²⁸

Certain questions, therefore, are relevant to the hypothetical involving Rose Realty: (1) Does the lease agreement between Rose Realty and Paul Proprietor constitute a "contractual relationship" for purposes of Section 107(b)(3)? (2) Assuming that the lease does constitute a "contractual relationship," and assuming that an "act or omission" of Proprietor caused the "release," did the act or omission of Paul Proprietor occur "in connection with" the lease relationship? Several cases in which the defendant has asserted the "third-party defense" are relevant to these inquiries.

The court in *United States v. Argent Corp.*²²⁹ applied pre-SARA statutory language to determine the defendant's liability for the release of hazardous substances. That case involved the lease of a warehouse to a tenant who "operated a business utilizing hazardous chemicals to recover silver from used film" on the leased premises.²³⁰ The defendant landowner-lessor had no connection with the tenant's business other than through the leasehold relationship.²³¹ A "release" of hazardous substances occurred on the leased property during the term of the tenancy;²³² the landowner-lessor asserted that the release was caused "solely by an act or omission" of the tenant.²³³ Thus, the landowner-lessor argued that he was not liable for response costs because he was protected by the "third-party defense" in Section 107(b)(3).²³⁴ The *Argent* court disagreed, finding that Section 107(b)(3) provided a defense only when the act or omission of the third party did not take place "in connection with a contractual relationship" with the defendant landowner-lessor.²³⁵ The court held that because the lease agreement created a "contractual link" between the landowner-lessor and

228. See CERCLA § 101(35), 42 U.S.C. § 9601(35) (1988). See also *supra* text accompanying note 180 (quoting CERCLA § 101(35)). Section 101(35) has been interpreted by the courts as providing an "innocent landowner defense" for those persons who exercise the requisite due diligence when acquiring property, and who otherwise meet the statutory requirements provided in 101(35) and 107(b). See, e.g., *United States v. Pacific Hide and Fur Depot, Inc.*, 716 F. Supp. 1341, 1346-49 (D. Idaho 1989) (applying the language of § 101(35)).

229. 21 Env't Rep. Cas. (BNA) 1354 (D.N.M. 1984).

230. *Id.* at 1355.

231. *Id.*

232. *Id.*

233. *Id.* at 1356.

234. *Id.* See also The 1980 Act § 107(b)(3), codified as amended at 42 U.S.C. § 9607(b)(3) (1988) (setting forth the asserted defense).

235. *Argent Corp.*, 21 Env't Rep. Cas. at 1356. Thus, the defense was unavailable because there was a lease agreement between defendant and the third party. *Id.*

the tenant, the defendant could not establish a "third-party defense" "as a matter of law."²³⁶

Similarly, in *United States v. South Carolina Recycling and Disposal, Inc.*,²³⁷ the defendant landowners-lessors entered into an oral lease with the defendant-tenant Columbia Organic Chemical Company,²³⁸ which purportedly intended to use the property for the "storage of raw chemicals and materials used in [the tenant's] manufacturing processes."²³⁹ Approximately one year after COCC entered into possession under the lease, several people associated with the tenant began storing hazardous substances on the leased premises "as part of a waste brokering and recycling operation."²⁴⁰ Several years later, in early 1974, these people formed a corporation named South Carolina Recycling and Disposal, Inc. and "continued hazardous waste operations at the site under auspices of the corporation [SCRDI]."²⁴¹ "SCRDI occupied part of the site from the years 1976 to 1978, and it assumed the verbal lease [as a tenant] in 1978."²⁴² SCRDI continued its hazardous waste operations on the leased premises through 1980.²⁴³ During that time, many of the drums that SCRDI had stored at the site began to deteriorate and leak, resulting in a "release," a cleanup, and the incursion of CERCLA response costs.²⁴⁴

Utilizing pre-SARA statutory language, the defendant landowners-lessors argued that they were covered under the Section 107(b)(3) "third-party defense" because they were "ignorant of all waste disposal activities,"²⁴⁵ and had never inspected the site during the relevant time period.²⁴⁶ The trial court rejected this argument, stating that "[b]ecause there is no question of the contractual link between the landowners and SCRDI, whose liability is admitted, the landowners cannot under any circumstances prove that the release was caused

236. *Id.*

237. 653 F. Supp. 984 (D.S.C. 1984), *aff'd sub nom.* *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

238. *See South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. at 990. The tenant in this case, Columbia Organic Chemical Company, is referred to herein as "COCC."

239. *Id.*

240. *Id.*

241. *Id.* The defendant, South Carolina Recycling and Disposal, Inc., is referred to herein as "SCRDI."

242. *Id.*

243. *See Monsanto Co.*, 858 F.2d at 164.

244. *See South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. at 990-91.

245. *Monsanto Co.*, 858 F.2d at 169.

246. *Id.*

solely by a third party which did not share a contractual relationship with them."²⁴⁷

Finally, in *United States v. Northernair Plating Co.*,²⁴⁸ the tenant operated an electroplating business on the leased premises under a ten year lease.²⁴⁹ At the end of the lease term "significant amounts of hazardous substances customarily used in electroplating" were found to be contaminating the soil of the leased premises,²⁵⁰ and response costs were incurred in relation to that "release" or "threatened release" on the premises.²⁵¹ Employing the pre-SARA statutory language, the defendant landowner-lessor apparently argued that it was shielded from liability by the "third-party defense" under Section 107(b)(3).²⁵² The court described the elements the defendant must establish in order to use that defense:

(1) that a third party was the sole cause of the release or threatened release of a hazardous substance; (2) that the act or omission of the third party causing the release did not occur in the context of a contractual relationship existing directly or indirectly with the defendant; and (3) that the defendant took due care and precautions to prevent the foreseeable acts or omissions of the third party causing the release or threatened release.²⁵³

247. *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. at 993. On appeal, the fourth circuit affirmed the district court, stating that the defendant landowner-lessors could not have satisfied the elements necessary to establish the "third-party defense":

First, the site-owners could not establish the absence of a direct or indirect contractual relationship necessary to maintain the affirmative defense. They concede they entered into a lease agreement with COCC. They accepted rent from COCC, and after SCRDI was incorporated, they accepted rent from SCRDI. Second, the site-owners presented no evidence that they took precautionary action against the foreseeable conduct of COCC or SCRDI. They argued to the trial court that, although they were aware COCC was a chemical manufacturing company, they were completely ignorant of all waste disposal activities at [the leased premises] before 1977. They maintained that they never inspected the site prior to that time. In our view, the statute does not sanction such willful or negligent blindness on the part of absentee owners. The district court committed no error in entering summary judgment against the site-owners.

Monsanto Co., 858 F.2d at 169 (citations omitted).

248. 670 F. Supp. 742 (W.D. Mich. 1987), *aff'd sub nom.* *United States v. R. W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

249. *See Northernair Plating Co.*, 670 F. Supp. at 744.

250. *Id.*

251. *See id.* at 745. The United States alleged that the cost of removal was approximately \$173,000. *Id.*

252. *See id.* at 748 (discussing the merits of a "third-party defense"). *See also* The 1980 Act § 107(b)(3), codified as amended at 42 U.S.C. § 9607(b)(3) (1988).

253. *Northernair Plating Co.*, 760 F. Supp. at 748.

Citing *Argent Corp.* and *South Carolina Recycling & Disposal, Inc.*, the *Northernair* court concluded that the defense was not available to the defendant landowner-lessee because it had not satisfied the second element.²⁵⁴ “[The tenant] leased the facility from [the landowner-lessee]. This contractual relationship preclude[d] either of these defendants from invoking the protections of Section [107(b)(3)] by arguing that the other defendant [was] the third party which was the cause of the release.”²⁵⁵

Thus, the *Argent Corp.*, *South Carolina Recycling & Disposal, Inc.*, and *Northernair* cases all stand for the proposition that a defendant landowner-lessee automatically is precluded from asserting a “third-party defense” when the acts or omissions of a tenant result in a “release” or “threatened release” on the leased premises leading to the expenditure of response costs. Although, at least on the surface, these cases seem to utilize the statutory language appropriately,²⁵⁶ upon closer inspection, this becomes doubtful.

The language found in section 107(b)(3) states in pertinent part:

There shall be no liability . . . [if] the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . . (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs *in connection with a contractual relationship*, existing directly or indirectly, with the defendant²⁵⁷

Consistent with the later SARA definition of “contractual relationship” found in Section 101(35), the *Argent Corp.*, *South Carolina Recycling & Disposal, Inc.*, and *Northernair* courts held that a lease agreement does constitute a “contractual relationship” for purposes of Section 107(b)(3).²⁵⁸ After reaching this conclusion, however, the same courts proceeded to bar the “third-party defense” solely because there was a contractual relationship between the defendant landowner-lessee and the tenant, choosing not to determine expressly whether or

254. *Id.* (citing the existence of the lease agreement as the dispositive factor establishing a contractual relationship that would render the third-party defense unavailable).

255. *Id.*

256. See Dorothy M. Helms & Nancy R. Jeffries, *Liabilities of Landlords and Tenants Under CERCLA*, 41 S.C. L. Rev. 815, 819 (1990) (discussing *Argent Corp.*, *South Carolina Recycling & Disposal, Inc.*, and *Northernair*, and summarizing that “if there is a ‘contractual relationship’ with the third party who caused the release, section 107(b)(3) is not applicable and liability follows”).

257. See The 1980 Act § 107(b), codified as amended at 42 U.S.C. § 9607(b) (1988) (emphasis added). See also *supra* text accompanying note 106.

258. See CERCLA § 101(35), 42 U.S.C. § 9601(35) (1988).

not the acts or omissions of the third party took place *in connection with* the contractual relationship—in these cases, the lease agreement.²⁵⁹ In so holding, the courts ignored relevant statutory language.

In defense of the courts in *Argent Corp., South Carolina Recycling & Disposal, Inc.*, and *Northernair*, one might suggest that the end result of these cases would have been the same had the courts explicitly addressed the “connection” issue.²⁶⁰ Moreover, there is at least some basis in the legislative history for the position taken by the courts.²⁶¹ Nevertheless, it is apparent that the statutory language requires an “in connection with” test, not merely a finding of the “presence” of a “contractual relationship.”²⁶² The drafters certainly could have created such a “presence” standard, rather than an “in connection with” standard, had they wished. The statutory language in Section 107(b)(3) could have read: “There shall be no liability . . . [if] the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . . (3) an act or omission of a third party other than an employee or agent of the defendant; an act or omission of a third party other than one who has a direct or indirect contractual relationship with the defendant”

Further difficulty arises with such language, however. The “employee” or “agent” language becomes somewhat superfluous, except

259. See, e.g., *Northernair Plating Co.*, 670 F. Supp. at 748 (noting that the defendants did not meet the second element of the third-party defense because there was a contractual relationship with the third party).

260. This Article sets forth criteria for evaluating the “connection” requirement. See *infra* text accompanying notes 322-334 (discussing the “in connection with” clause of CERCLA § 107(b), 42 U.S.C. § 9607(b) (1988)).

261. See 126 CONG. REC. 26,783 (1980). Rep. Gore first stated that the “third-party defense” is limited to situations “where the third party is not an employee or agent of the defendant, or where the third party’s act or omission does not occur in connection with a contractual relationship.” *Id.* In his next sentence, however, Rep. Gore made a cryptic statement that can be interpreted as directly contradicting his previous statement: “[T]he amendment would permit a defendant to escape liability for damages caused by the act or omission of a third party who has no connection whatsoever with the defendant and which act or omission is unforeseeable.” *Id.*

A plausible explanation for this apparent contradiction is that, in his second sentence, Rep. Gore accidentally said the word “who” instead of “which.” Rep. Gore may have meant to say: “[T]he amendment would permit the defendant to escape liability for damages caused by the act or omission of a third party *which* has no connection whatsoever with the defendant and which act or omission is unforeseeable.” Such a statement would be consistent with the preceding sentence and with the § 107(b)(3) requirement that the third party’s act or omission be the sole cause of the release; that the defendant was not a “cause” of the act or omission. See also The 1980 Act § 107(b), codified as amended at 42 U.S.C. § 9607(b) (1988).

262. See The 1980 Act § 107(b), codified as amended at 42 U.S.C. § 9607(b) (1988).

perhaps to the extent that it provides examples of a broader class of "contractual relationships," because employees or agents of the defendant necessarily would have a contractual relationship with the defendant.²⁶³ Thus, the statutory language might have been even more abbreviated: there shall be no liability [if] the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by- (3) an act or omission of a third party with whom the defendant does not have a contractual relationship.

Employing the SARA amendments, two arguments can be made against this Article's interpretation of the "in connection with" requirement suggested above. The first argument would be that Congress only intended to create the narrow exception to liability provided in the "innocent landowner" defense of Section 101(35).²⁶⁴ Because the activities of the tenant in possession leading to the "release" or "threatened release" necessarily would entail "disposal or placement of the hazardous substance, on, in, or at the facility" after the defendant landowner-lessor had "acquired" the property, the "third-party defense" would be unavailable to the landowner-lessor.

The legislative history, however, does not provide significant support for such an interpretation. As discussed earlier, Representative Frank originally introduced the "innocent landowner" amendment in

263. See J. B. Ruhl, *The Third-Party Defense to Hazardous Waste Liability: Narrowing the Contractual Relationship Exception*, 29 S. TEX. L. REV. 291, 297 (1987). Ruhl argues,

The [third party] defense provision . . . excludes from the category of the term "third party" any employee or agent of the defendant. If the language following that exclusion, that is, the contractual relationship language, were not read so as to refer to similar control-based relationships, the employee or agent exclusion would be superfluous; any employee or agent of the defendant necessarily would be involved in a direct or indirect contractual relationship with the defendant. Thus, the contractual relationship language should be interpreted as referring not literally to *any* contractual relationship, but rather, consistent with the scope of the employee or agent exclusion, to any analogous contractual relationship extending a sufficient degree of control to the defendant over the third party's treatment of the regulated substance

Id. (citation omitted) (emphasis in original)

Mr. Ruhl's linguistic analysis, while very interesting, does not point to an interpretation that is *necessarily* true. More accurately, it could be said that not every act or omission of a party to a contract need be "in connection with" the relevant "contractual relationship" in order to satisfy § 107(b)(3). Moreover, the test for determining "in connection with a contractual relationship" need not be confined to a "control" criterion. Given the policy arguments set forth *infra* text accompanying notes 316-324, it makes more sense to develop appropriate criteria for interpreting "in connection with" and to retain a conventional interpretation of "contractual relationship." Among other things, this would avoid the awkwardness of saying that parties to a contract do not have a "contractual relationship."

264. See CERCLA § 101(35), 42 U.S.C. § 9601(35) (1988). See also *supra* text accompanying note 180.

the House.²⁶⁵ Because there was no similar language in the Senate bill, there is a basis for assuming that the Frank amendment was the impetus for the language finally adopted by the Conference Committee. Frank's remarks, as well as the floor debate, seem to evidence not an intent to limit what already was available under the "third-party defense," but rather a desire to ensure that the defense, at least in the innocent purchaser situation, would be available.²⁶⁶ Representative Eckart, expressing concern in his remarks and in his amendment, seemed to desire not to expand the "third-party defense" beyond what already was available, rather than to narrow the existing language in The 1980 Act.²⁶⁷

Finally, the comments of the committee drafting the Conference Report also appear not to support a "narrowing" interpretation.²⁶⁸ The Report consistently refers to the requirements for asserting the "innocent landowner defense" provided in Section 101(35), without any language suggesting that Section 101(35) was intended to limit the application of Section 107(b)(3) to "innocent purchasers." Rather, the Conference Report language suggests that, in addition to meeting the requirements of Section 101(35), those who would assert the "innocent landowner defense" *also* must comply with the requirements of Section 107(b)(3).²⁶⁹

The second argument against the "in connection with" interpretation suggested above is based upon the *de minimis* settlement provision found in Section 122(g)(1) and (2) of CERCLA.²⁷⁰ That language can be interpreted as containing a presumption that a current landowner always will be held strictly liable for releases resulting from the storage, treatment, or disposal of hazardous substances occurring during ownership. Therefore, liability is presumed; Section 122(g) merely permits the Environmental Protection Agency to reach a settlement with a landowner for a limited amount of money after considering that landowner's lack of participation in the polluting activities. This second argument, however, also is not persuasive.

265. See 126 CONG. REC. 34,715 (1980). See also *supra* text accompanying notes 158-159.

266. See 126 CONG. REC. 34,715-18 (1980). See also *supra* notes 159-168 and accompanying text (quoting the floor debate, including remarks of Rep. Frank).

267. See 126 CONG. REC. 34,717 (1980). See also *supra* notes 165-167 and accompanying text (quoting the floor debate, including remarks of Rep. Eckart).

268. See H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 186-87 (1986), *reprinted in* 1986 U.S.C.A.N. 3276, 3279-80. See also *supra* note 181 (containing excerpts from House Conference Report).

269. See H.R. CONG. REP. NO. 962, 99th Cong., 2d Sess. 186-87 (1986), *reprinted in* 1986 U.S.C.A.N. 3276, 3279-80. See also *supra* note 181.

270. See CERCLA § 122(g)(1) and (2), 42 U.S.C. § 9622(g)(1) and (2) (1988). See also *supra* text accompanying note 184.

The relevant legislative history must be taken into account in interpreting Section 122(g). As noted earlier, the *de minimis* provision was inserted at the Committee stage in the House of Representatives, while the Frank amendment on the "innocent landowner" defense was adopted during the floor debate in the House.²⁷¹ Although the representatives' remarks during the floor debate suggest that each measure was intended to deal with the "innocent landowner" situation, there is no indication that the *de minimis* provision was intended to operate in exclusion either of the Section 101(35) "innocent landowner" defense or of any defense available under Section 107(b)(3).²⁷²

Moreover, although

[t]he situations in which a property owner may qualify for a *de minimis* settlement [are] remarkably similar to the situations in which the owner would not be liable under the "innocent purchaser" defense [S]ection 122(g)(1)(B) seems broader, allowing the unknowing purchaser of contaminated property to obtain a *de minimis* settlement though perhaps [the purchaser is] technically not qualified for the defense.²⁷³

In a "guidance" issued by the EPA in 1989, however, the agency appeared "to take the position that only persons that 'may ultimately be able to prove a third party defense' are within the scope of the *de minimis* provision."²⁷⁴ Under either interpretation of Section 122(g),

271. See *supra* text accompanying notes 186-187 (discussing the adoption of the innocent landowner defense and the *de minimis* settlement provision).

272. See *supra* 151-157 and accompanying text (quoting the debates among Representatives regarding the applicability of the *de minimis* settlement provision).

273. LIGHT, *supra* note 11, at 221.

274. *Id.* The "guidance" referred to in the text is found in EPA, *Superfund Program; De Minimis Landowner Settlements, Prospective Purchaser Settlements*, 54 Fed. Reg. 34,235 (1989):

The requirement[s] which must be satisfied in order for the Agency to consider a settlement which [sic: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 for a landowner to establish a third party defense under Section 107(b)(3) and Section 101(35).

. . . .

. . . Since it serves no purpose to require a landowner who satisfies the elements of section 107(b)(3) and who wishes to obtain legal repose to incur the litigation costs of establishing the defense at trial, if the Agency determines that the landowner has a persuasive case that each of these elements has been met, the Agency will entertain an offer for a *de minimis* settlement under 122(g)(1)(B).

Id. at 34,237-38. Cf. *supra* notes 165, 167 (containing the remarks of Rep. Eckart). But see *supra* text accompanying notes 155-157 (containing the remarks of Reps. Packard and Roe, apparently encouraging EPA to engage in settlements with "non-participating" landowners in situations where disposal activities were taking place during the ownership period).

it is clear that there is little support for the previously suggested argument that the enactment of Section 122(g)(1) and (2) implies that Congress intended that landowners always be held liable for releases occurring during their ownership.²⁷⁵ Finally, there is case law that supports the "in connection with" interpretation suggested above.

In *Shapiro v. Alexanderson*,²⁷⁶ a post-SARA case, the defendant landowners agreed to sell property to a purchaser for use as a landfill and allowed the purchaser to use the property for this purpose prior to closing.²⁷⁷ Due to a complex set of circumstances, the vendee in possession retained this "quasi-tenant" status for approximately sixteen months, and used the property as a landfill throughout this time period.²⁷⁸ A "release" or "threatened release" of hazardous substances occurred as a result of "the emanation of hazardous leachate" caused by water percolating through the dumped material.²⁷⁹

The landowner-vendors in *Shapiro* argued that they were shielded from liability under Section 107(b)(3) on the basis that any release or threatened release was caused solely by the acts of the vendee in possession.²⁸⁰ The court, however, held that the "third-party defense" was not available to the defendant owners because "the landfill was operated by the [vendee in possession] 'in connection with a contractual relationship' with the owners."²⁸¹ In a subsequent opinion involving the same case, the court elaborated upon its interpretation of Section 107(b)(3):

The Court, however, does not embrace the view that the contractual relationship clause encompasses all acts by a third party with any contractual relationship with a defendant. Such a construction would render the language "in connection with" mere surplusage. The act or omission must occur in a context so that there is a connection between the acts and the contractual relationship. For example, the classic scenario in which courts preclude a covered person from asserting a Section [107(b)(3)] defense is when the covered

275. See Ruhl, *supra* note 263, at 299 (utilizing a different analytic approach than that presented in this Article, but nevertheless arguing that not every "contractual relationship is of the type contemplated by the 'in connection with' exception to the § 9607(b)(3) 'third party defense'").

276. 741 F. Supp. 472 (S.D.N.Y. 1990).

277. *Id.* at 474-75. The contract allowed the purchaser to commence landfill operations upon signing the contract and resolution by the Board of Supervisors. *Id.*

278. *Id.* at 475. After a 16-month period of using the property as a landfill the contract was terminated. *Id.*

279. *Id.* at 477.

280. *Id.* at 478.

281. *Id.*

person asserting the defense is a landowner and the third-party is operating the landfill pursuant to a contract with the owner. The acts or omissions of that operator, while operating the landfill, are in connection with the landowner-operator contract and therefore preclude the owner's assertion of the Section [107(b)(3)] defense.²⁸²

Similarly, in *United States v. A & N Cleaners & Launderers, Inc.*,²⁸³ another post-SARA case, the court applied an "in connection with" analysis in a landowner-lessor context.²⁸⁴ The facts in *A & N Cleaners* disclose that a predecessor owner, Six & Twenty-Two, leased a building, parking lot, and land to Marine Midland Bank for a period of ten years, with two successive five year renewal options.²⁸⁵ Marine exercised the renewal options and subleased portions of the building for various periods of time between 1970 and 1990.²⁸⁶ The building was located approximately 900 feet from a water "well field," which supplied drinking water to the local community.²⁸⁷ The parking lot was built directly over a "dry well" and the floor drains in the building also allegedly emptied into the "dry well."²⁸⁸

Under the initial 1970 lease between Marine and the owner, Marine had the "right to sublet all or part of the [leased] [p]roperty."²⁸⁹ Marine actually took the 1970 lease subject to existing leases, which were assigned to it by Six & Twenty-Two.²⁹⁰ A company called Pircio's held one of these subleases that terminated on November 30, 1972.²⁹¹ While in possession, Pircio's used the portion of the leased building for a dry cleaning business.²⁹² The Pircio's sublease provided that "the premises were to be used and occupied as a dry cleaning establishment and that responsibility for the care and maintenance of the Dry Well belonged to Pircio's."²⁹³

On October 5, 1970, Marine instructed Pircio's to "make all rent payments to Marine 'as your new landlord.'"²⁹⁴ Soon thereafter, Pircio's apparently assigned its sublease to a company called A & N

282. *Shapiro v. Alexanderson*, 743 F. Supp. 268, 271 (S.D.N.Y. 1990).

283. 788 F. Supp. 1317 (S.D.N.Y. 1992).

284. *Id.* at 1326.

285. *Id.* at 1320. Hereinafter, the Marine Midland Bank will be referred to as "Marine."

286. *Id.*

287. *Id.* at 1320-21.

288. *Id.* at 1320.

289. *Id.*

290. *Id.*

291. *See id.*

292. *See id.*

293. *Id.*

294. *Id.*

Cleaners²⁹⁵ and "A & N occupied the premises as a dry cleaning business."²⁹⁶ Marine extended the sublease that had been assigned to A & N Cleaners through 1977 and gave A & N an option to renew.²⁹⁷

In 1979, the defendant landowner-lessor, the Berkman Group, purchased the property from Six & Twenty-Two subject to the existing lease and subleases.²⁹⁸ A & N Cleaners exercised its renewal option through 1982, when it entered into a new sublease with Marine²⁹⁹ that "specifically provided that the premises would be used and occupied for a dry cleaning, rug cleaning and laundry establishment."³⁰⁰ A & N Cleaners continued to sublet the property and run its dry cleaning business through 1992.³⁰¹

Beginning in 1970, and continuing through either 1978 or 1983, A & N Cleaners dumped chemically contaminated waste water into the floor drain of the building on a regular basis.³⁰² In 1978, it was discovered that the water in the adjoining "well field" was contaminated.³⁰³ In 1987, a study "identified the Dry Well as a source of . . . contamination."³⁰⁴ Thus, the cleaner's "release" of hazardous substances led to the incurrence of response costs.³⁰⁵

In *A & N Cleaners*, the landowner-lessor Berkman Group argued that it was shielded from Section 107(b) liability by reason of the "third-party defense."³⁰⁶ The landowner-lessor asserted that it was not liable because there was no "direct" or "indirect" contractual relationship between the landowner-lessor and A & N Cleaners, who had dumped the waste.³⁰⁷ The court agreed that there was no "direct or indirect contractual relationship" for purposes of Section 107(b)(3), finding that under New York common law there was no privity of con-

295. *See id.*

296. *Id.*

297. *See id.* (noting that Pircio's lease was extended, and in turn A & N Cleaners was given an option to renew its sublease for one three-year term and one two-year term).

298. *Id.* at 1321.

299. *See id.* at 1320.

300. *Id.* at 1320-21.

301. *See id.* at 1321 (noting that even at the time of the opinion, A & N Cleaners continued to occupy the building).

302. *See id.* (noting that A & N Cleaners' operator admitted disposing a solvent, PCE, "through the floor drain of the property").

303. *See id.*

304. *See id.* (noting that the study identified the dry well as a source of the well field contamination).

305. *See id.* at 1325 (noting that a causal connection existed between the release of hazardous substances by A & N Cleaners and the incurrence of response costs).

306. *See id.* at 1326.

307. *See id.* (noting that the landowner-lessors had no lease with A & N Cleaners; the lease was with Marine).

tract between a landowner-lessor and a sublessee who leases from an intermediary tenant sublessor.³⁰⁸ The court found it significant that (1) no rent was paid directly from the sublessee to the landowner-lessor; (2) the sublessee was “not directly liable to the original lessor for performance of the covenants contained in the [primary] lease”; and (3) under New York law, “the [primary] lessor may not maintain an action [directly] against the sub[lessee] for breach of the [primary] lease.”³⁰⁹ The court, however, refused to grant summary judgment in favor of the landowner-lessor, stating that there were present triable issues of fact as to the “due care” and “precautions” requirements of Section 107(b)(3)(a) and (b).³¹⁰

The court in *A & N Cleaners* also considered the potential liability of Marine, the tenant-sublessor.³¹¹ After finding that Marine was an “owner” for purposes of Section 107(a)(2), the court addressed Marine’s asserted “third-party defense”: “[t]he lease agreement between Marine and A & N constitutes a direct contractual relationship. This finding is not dispositive of the availability of the “third-party defense” to Marine, however.”³¹² Citing a Second Circuit opinion as authority, the *A & N Cleaners* court described what it found to be the relevant standard for adjudicating whether a third-party defense is available:

“The mere existence of a contractual relationship between the owner of land on which hazardous substances are or have been disposed and a third party whose act or omission was the *sole* cause of the release or threatened release of such hazardous substances into the environment does not foreclose the owner of the land from escaping liability In order for the landowner to be barred from raising the third-party defense under such circumstances, the contract between the landowner and the third party must either relate to the hazardous substances or allow the landowner to exert some element of control over the third party’s activities.”³¹³

308. *Id.* at 1327-28.

309. *Id.* *But see* *Fulway Corp. v. Liggett Drug Co.*, 148 N.Y.S.2d 222, 231 (N.Y. App. Div. 1956) (applying New York law, the court granted injunctive relief on behalf of the primary lessor against the sublessee in possession, where sublessee was in violation of a restrictive covenant contained in the primary lease).

310. *See A & N Cleaners & Launderers, Inc.*, 788 F. Supp. at 1329-30.

311. *Id.* at 1330.

312. *Id.* at 1334-35.

313. *Id.* at 1335 (quoting *Westwood Pharmaceuticals v. National Fuel Gas Distrib. Corp.*, 964 F.2d 85, 89, 91 (2d Cir. 1992)). In *Westwood Pharmaceuticals*, the plaintiff purchaser, Westwood, sought summary judgment as to the § 107(a) liability of the defendant, National Fuel (the successor corporation to the seller of the property, Iroquois Gas Corpora-

Applying the above standard to the facts in *A & N Cleaners*, the court stated:

The contract between Marine and A & N relates to hazardous substances. Both the Pircio's Lease and the 1982 Lease specifically provide that the premises are to be used for a dry cleaning establishment. A & N used hazardous substances as a matter of course in conducting its business. Thus, "the contract between the landowner and the third party somehow is connected with the handling of hazardous substances," making the third party defense unavailable to Marine.³¹⁴

The courts' decisions in *Shapiro* and *A & N Cleaners* support the assertion that an analysis of the "third-party defense" in the landowner-lessor/tenant context must, in addition to finding the *presence* of a contractual relationship, consider whether the acts or omissions of the third party who caused the release took place *in connection with* the contractual relationship. Nevertheless, questions remain regarding when there is a sufficient "connection" with the contractual relationship. The *A & N Cleaners* court did not articulate the policy underlying its interpretation of the criteria for determining whether such a "connection" exists. In the landowner-lessor/tenant context, it certainly makes sense to analyze the "connection" test in light of the lease relationship, but it is questionable whether it makes sense to require either: (1) landowner-lessor "control," or (2) a lease contract

tion). *Westwood Pharmaceuticals*, 964 F.2d at 86. The trial court denied the motion for summary judgment because there were triable issues of fact as to whether or not the release of toxic substances occurred "in connection with" the purchase agreement "contractual relationship." *Id.* at 86-87. The defendant argued that the eventual release of hazardous substances from secure underground storage tanks, which actually resulted from the purchaser's post-sale construction activities, did not take place "in connection with" a "contractual relationship" for purposes of the § 107(b)(3) "third-party defense." *Id.* at 87. The Court of Appeals for the Second Circuit affirmed the trial court's ruling, rejecting the plaintiff's argument that the enactment of § 101(35)(C) necessarily precludes previous owners of property upon which hazardous substances were disposed or placed from successfully asserting the "third-party defense":

[Section] 101(35) shields innocent landowners from liability for the release or threatened release of contaminants caused solely by the act or omission of a third party, *even though the act or omission of the third party occurred "in connection with a contractual relationship" with the innocent landowner.*

* * *

Logic suggests that Congress intended § 101(35)(C) merely to circumscribe the parameters of the innocent landowner exception set forth in § 101(35)(A) and (B), and not to abrogate completely the right of previous owners to raise the third-party defense set forth in § 107(b)(3).

Id. at 90.

314. *A & N Cleaners*, 788 F. Supp. at 1335 (citations omitted).

that implicitly or explicitly refers to the use or storage of "hazardous substances" on the leased premises by the tenant in possession.

The statements of Representative Florio,³¹⁵ who originally introduced House Bill 7020, indicate that an important statutory policy underlying CERCLA is that of preventing or minimizing "releases" of hazardous substances and preventing or minimizing damage to public health and the environment resulting from "releases."³¹⁶ Florio's remarks suggest that when possible the statute should be construed to provide *incentives* to encourage persons to take actions designed to *prevent* releases or conditions likely to result in releases.³¹⁷ Given this policy perspective, the criteria set forth in *A & N Cleaners* to determine whether a sufficient "connection" exists are inadequate.³¹⁸

First, the "relation to hazardous substances" test set forth in *A & N Cleaners* encourages an owner-lessor to leave the lease silent as to its "purpose" (e.g., dry cleaning operations), so that the lease contract, on its face, will not be "related" to the use of hazardous substances.³¹⁹ Along the same line, the "control" test provides an incentive for landowner-lessors *not* to include lease clauses that restrict the presence or use of hazardous substances, out of fear that such clauses might provide a "connection" that would prevent them from asserting the "third-party defense."³²⁰ Thus, from the policy standpoint of preventing hazardous waste releases, the *A & N Cleaners* holding is in some respects inferior to the *Argent* line of cases because the *Argent* cases preclude the third-party defense from being asserted in *all* lease situations and thus provide an incentive for landowner-lessors to include restrictive clauses and to monitor and enforce those restrictions carefully.³²¹

To promote the important statutory policy of preventing releases of hazardous waste in the first instance and to give meaning to the "in connection with" language, courts must take a different approach to interpreting that phrase. The interpretation described below is intended to discourage absentee landlord practices and to promote the inclusion, monitoring, and enforcement of appropriate restrictive clauses in leases. This Article proposes that:

315. See 126 CONG. REC. 26,337 (1980).

316. See *supra* text accompanying notes 35-39 (containing remarks of Rep. Florio).

317. See *id.*

318. See *supra* text accompanying note 313.

319. See *supra* text accompanying notes 313-314.

320. *Id.*

321. See *United States v. Argent Corp.*, 21 Env't Rep. Cas. (BNA), 1356, 1358 (D.N.M. 1984) (holding that, as a matter of law, the "third-party defense" could not be established by the landowner-lessor in relation to acts or omissions of a tenant).

(1) Any presence of a hazardous substance on leased premises that is not completely prohibited by a lease should be considered to be "in connection with" any act or omission of the tenant that causes a release or threatened release of that hazardous substance.

(2) Any tenant activities on the leased premises that the landowner-lessee knows or has reason to know will involve the presence of hazardous substances should be considered "in connection with" any act or omission of the tenant that causes a release or threatened release of any such hazardous substance.³²²

(3) Any landowner-lessee actions relating to the presence, monitoring, and enforcement of clauses restricting the presence of hazardous substances ordinarily should not be considered either a "cause" of a release or threatened release by a tenant, or "in connection with" a contractual lease relationship with the tenant.³²³

322. See, e.g., Ruhl, *supra* note 263, at 299. In the context of an analysis arguing for a "causation" element in the definition of "contractual relationship," Ruhl develops a separate test for "in connection with" that is similar to the second criterion ("knows or has reason to know") stated in the above text: "[W]henever the purpose or subject matter of the contract expressly or by reasonable implication encompasses the handling of hazardous waste, the contract should be deemed to be in connection with the acts or omissions of either party which are the sole cause of a release." *Id.* Ruhl's test for "contractual relationship," however, appears to be inconsistent with the first and third criteria stated in the above text.

323. If a landowner-lessee, or an officer, stockholder, employee, or agent of the landowner-lessee, is found to be an "operator" of a facility on the leased premises for purposes of CERCLA, then the "third-party defense" may be unavailable with respect to a release or threatened release on the leased premises "caused" by the act or omission of the tenant in possession. If the test utilized to determine the statutory designation of "operator" employs activity-oriented criteria requiring actual participation in the daily operations on the leased premises, then an "operator" determination necessarily would preclude the "third-party defense" because such a defendant, as an actual participant in the daily operations on the leased premises, would "know or have reason to know" of any activity involving the presence of hazardous substances on the leased premises.

If a court were to consider the inclusion, monitoring, and enforcement of restrictive lease clauses as constituting "participation," however, an "operator" determination based on such facts alone would not preclude the successful assertion of the "third-party defense" under the criteria stated in the text. The possibility that courts would perform such an "actual participation" analysis is suggested in *Levin Metals, Corp. v. Parr-Richmond Terminal Co.*, 781 F. Supp. 1454, 1458 (N.D. Cal. 1991) (holding that an officer was not liable as a CERCLA "operator" when he did not participate in the actual management of the facility).

If the test utilized to confer an "operator" designation upon a landowner-lessee, or an officer, stockholder, employee, or agent of a landowner-lessee, is based primarily upon the status of the defendant, then again an "operator" designation would not automatically preclude the successful assertion of the "third-party defense" because, as a matter of policy, the "operator" essentially stands in the same position as an "owner," and thus should have the same capacity to assert the defense. The possibility that courts would adopt such a

In addition to the above proposal, as a further disincentive to absentee landlord practices, this Article suggests that the precautions required in Section 107(b)(3)³²⁴ be interpreted as not only permitting, but also requiring, periodic inspections by the landowner-lessor. The extent and frequency of inspection required would depend upon the circumstances. For example, the letting of a single family house, the use of which is restricted to residential purposes, ordinarily would require only minimal inspection. On the other hand, a commercial tenancy—involving a warehouse, for example—would require more frequent and extensive inspections. For office space leases, the inspection stringency would fall somewhere between residential and commercial. To standardize the frequency and seriousness of inspections, the Environmental Protection Agency could issue regulations that set forth minimum inspection criteria for certain types of leases.

Applying the foregoing standard to the hypothetical situations previously considered, it is clear that Larry Landowner, as the defendant landowner-lessor in the first case, would not succeed in asserting the “third-party defense” because the lease in question does not contain a clause prohibiting hazardous substances on the leased premises. Furthermore, by reason of the tenant’s manufacturing activities, the landowner-lessor knew or had reason to know that such substances would be present. Finally, Larry Landowner did not periodically inspect the leased premises for possible contamination.

In the second hypothetical situation, involving Rose Realty, the lease contains a clause prohibiting toxic substances on the leased premises. Additionally, Rose Realty appears to have no actual knowledge that hazardous substances are present, nor would the type of business involved seem to provide Rose Realty with reason to know that toxic substances were present on the leased premises. Nevertheless, Rose Realty probably would not meet the monitoring or inspection requirement that would permit her to assert the “third-party defense” successfully.

Furthermore, because the Rose Realty lease contemplates commercial tenancy and use of a main building and a storage building on the leased premises, it is foreseeable that a commercial tenant might

“status” oriented approach is suggested in *Nurad, Inc. v. William E. Hooper & Sons Co.*, 22 Env’t. L. Rep. 20079, 20083 (D. Md. 1991), *aff’d in part, rev’d in part*, 966 F.2d 837 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992) (stating that the court agreed with cases that look to the individual’s authority to control “a facility’s waste disposal activities in determining . . . liability under CERCLA”).

324. See CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1988) (noting that in order to escape liability, the defendant must establish that precautions “against foreseeable acts or omissions of [a] . . . third party” were taken). See also *supra* text accompanying note 106.

try to store hazardous substances in the storage building. Rose Realty, therefore, would be under an obligation to stop by periodically and visually inspect the premises. The facts indicate that the landowner-lessee had a right under the lease to inspect the premises, but that no inspections actually occurred. If Rose Realty had performed inspections on a monthly basis, had discovered the hazardous substances, had brought immediate legal action, and had notified the proper authorities, Rose Realty would have no liability for any response costs resulting from a release or threatened release occurring between inspections.

Finally, it is appropriate to take another look at the court's decision in *A & N Cleaners* in light of the "prevention-incentive" policy suggested in this Article and to examine the landowner-lessee's ability to assert the "third-party defense" successfully. By insulating the landowner-lessee in *A & N Cleaners* from liability for the acts of a sublessee,³²⁵ the *A & N Cleaners* court may be tacitly encouraging owners to shield themselves from potential liability for anticipated and known uses of hazardous substances on leased premises by potential lessees using "intervening" tenants, or "middlemen." By permitting landowner-lessees to escape liability when sublessees release hazardous substances, the *A & N Cleaners* rule diminishes the landowner-lessees' incentive to include, monitor, and enforce lease clauses that restrict the presence of hazardous substances on the leased premises.

The *A & N Cleaners* court's analysis is unpersuasive. The court appears to base its analysis upon the fact that the sublessee did not "directly" contract with the landowner-lessee and thus was not in contractual "privity" with the sublessee.³²⁶ The court found it significant that (1) the sublessee did not pay rent directly to the landowner-lessee; (2) the sublessee was not liable directly to the landowner-lessee for nonperformance of the primary lease covenants; and (3) the landowner-lessee could not have maintained an action against the sublessee for a breach of the primary lease.³²⁷ Although it is true that there is no "direct" contractual relationship between the landowner-lessee and the sublessee, the real question is whether there is an "indirect" contractual relationship for purposes of Section 107(b)(3). It can be forcefully argued that an "indirect" relationship exists precisely because the landowner-lessee, who permits subleases in the lease agreement, necessarily knows that the tenant can or will sublease all or part of the property to a third party. The *A & N Cleaners* court does not

325. See *supra* text accompanying note 308.

326. *Id.*

327. *A & N Cleaners*, 788 F. Supp. at 1327-28. See also *supra* text accompanying note 309.

present a persuasive argument as to why this situation does not constitute an "indirect" contractual relationship. Moreover, CERCLA does not limit the term "indirect" to situations in which contractual privity exists. In fact, the term suggests that such privity is not required.³²⁸

There seems to be little reason, as a matter of policy, to distinguish a direct tenancy from a subtenancy for purposes of CERCLA liability.³²⁹ The landowner-lessor ordinarily can enforce restrictive lease clauses in the primary lease against the sublessee by evicting or threatening to evict the direct tenant, under whom the sublessee holds the leasehold interest.³³⁰ Additionally, even if there is no privity of contract between the landowner-lessor and the sublessee, the landowner-lessor retains the ability to enforce restrictive lease covenants in equity against a sublessee in possession.³³¹ The sublessee does not need to have actual notice of the restriction because the sublessee is

328. See CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1988) (providing no indication that the term "indirect" is limited to situations in which there is privity of contract).

329. "If the tenant transfers the leasehold for the entire term in all or a part of the leased premises, the transfer is an assignment. If, however, the tenant retains a reversion, the transfer is a sublease." JOHN E. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 271 (3d ed. 1989).

330. See, e.g., *Boston Properties v. Pirelli Tire Corp.*, 185 Cal. Rptr. 56, 60 (Cal. Ct. App. 1982) (noting that "since the subtenant's tenancy is subordinate to the covenants of the master lease, if they are breached by the subtenant the landlord can terminate the master lease . . ." (citation omitted) (emphasis in original)); *Commercial Auto. Loan Corp. v. Keith*, 53 S.E.2d 381, 383-84 (Ga. Ct. App. 1949) (holding that a provision in the primary lease restricting use of the leased premises to making "loans and automobile financing" prohibited use of the premises by sublessee as a restaurant).

This "eviction/threat of eviction" argument also seems to have been made by the government in *A & N Cleaners*. See *A & N Cleaners*, 788 F. Supp. at 1328 (arguing that the landowner-lessors could have requested or required their tenant to take action against the sublessee, *A & N Cleaners*). The court, however, did not find that argument persuasive. See *id.*

331. RESTATEMENT (FIRST) OF PROPERTY § 539 (1944) (noting that "a [negative] promise respecting the use of land is effective [in equity] against the successors in title or possession of the promisor"). Similarly, "[i]t has been noted . . . that the privity requirements have not been applied in equity," and thus, that an adverse possessor, for example, can be "bound [by] a restrictive covenant in equity . . ." Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 190 n.59 (1970) (citations omitted). In the landlord-tenant context, "[a] restriction on use, included in the prime lease, binds a subtenant." 1 MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* § 7.702 (3d ed. 1990) (citations omitted). Professor Cribbet describes the policy rationale underlying this rule:

A sublessee holds a new leasehold estate carved out by the tenant, therefore is not in privity of estate with the landlord, and accordingly is not liable to the landlord for rent or most other obligations in the lease. However, there are important exceptions. Provisions (promissory or otherwise) in leases that prohibit specific acts . . . bind even sublessees. The basis for enforcing restrictions against sublessees is the equity doctrine that a transferee of any interest in land with notice of restrictions cannot in good conscience disregard them, and therefore will be restrained from doing so.

presumed to be aware of restrictive covenants contained in the primary lease under which the sublessee holds.³³² Thus, a primary landlord may obtain injunctive relief for a subtenant's violation of a restrictive covenant in the lease.

Moreover, the argument that a landowner-lessor and a sublessee have an "indirect" contractual relationship is supported by *Washington v. Time Oil Co.*³³³ Without addressing the nature of either the primary lease or the sublease, the *Washington* court found that there was an "indirect contractual relationship" between the landowner-lessor and the sublessee in possession of the leased premises.³³⁴ In light of the arguments presented in this Article and the important "prevention-incentive" policy articulated above, there are ample grounds for determining that a landowner-lessor has an "indirect" contractual relationship with a sublessee in possession for purposes of Section 107(b)(3).

Notwithstanding the policy and logical arguments supporting the "in connection with" position suggested here, several objections to that interpretation can be raised. The first objection would be that the remarks of Representative Florio, relating to incentives intended to prevent releases,³³⁵ referred to House Bill 7020 as originally introduced. Because the original bill was designed to deal with inactive waste sites³³⁶ and contamination resulting from past conduct, any "prevention-incentive" policy arguably must be interpreted as merely encouraging private parties to clean up already-contaminated prop-

CRIBBET, *supra* note 329, at 273 (citations omitted). See, e.g., *Peer v. Wadsworth*, 58 A. 379, 383 (N.J. Ch. 1904) (granting injunctive relief for specific performance in favor of a landlord to force the sublessee to comply with a restrictive covenant in the primary lease limiting the tenant's right to make physical alterations to the building on the leased premises); *Rosen v. Wolff*, 110 S.E. 877, 882 (Ga. 1922) (enjoining a sublessee from violating a provision in the primary lease limiting the use of the leased premises to use as a bakery); *Fulway Corp. v. Liggett Drug Co.*, 148 N.Y.S.2d 222, 231 (N.Y. Sup. Ct. 1956) (granting injunctive relief in favor of a landlord to force the sublessee to comply with a restrictive covenant in the primary lease that prohibited use of the premises as a "luncheonette or soda fountain business").

332. See CRIBBET, *supra* note 329, at 273 (noting that "[s]ublessees . . . are deemed to have notice of provisions in the prime lease, as they claim under it."). See also FRIEDMAN, *supra* note 331, at 384-85 (stating that a sublessee is bound by a restriction in the primary lease "whether or not the [sublessee] has actual knowledge of the restriction.") (citation omitted). Accord *Peer v. Wadsworth*, 58 A. 379, 381 (N.J. Ch. 1904); *Cesar v. Virgin*, 92 So. 406, 407 (Ala. 1922).

333. 687 F. Supp. 529 (W.D. Wash. 1988).

334. *Id.* at 533. Although the court in *A & N Cleaners* cited the *Time Oil* ruling, it did not find that opinion persuasive. *A & N Cleaners*, 788 F. Supp. at 1327.

335. See *supra* text accompanying note 39.

336. See *supra* text accompanying note 36 (describing the purpose of the original bill).

erty,³³⁷ rather than requiring the government to do the cleanup (presumably at a higher cost).

The policy need not be stated so narrowly. It is reasonable to interpret the "prevention-incentive" policy not only as encompassing the cleanup of existing contamination, but also as preventing situations leading to releases or threatened releases. This broader interpretation finds support in Representative Florio's statement that House Bill 7020, as introduced, "creates a strong incentive *both* for prevention of releases *and* voluntary cleanup of releases by responsible parties."³³⁸ Even the original version of House Bill 7020 contained incentives encouraging preventative activity. Therefore, the final legislation, which is even broader in scope,³³⁹ also should be interpreted as providing incentives encouraging such preventative activity.

A second objection to the "in connection with" interpretation would be that there is no basis for placing the "prevention-incentive" policy above the policy that "the costs of chemical poison releases are [to be] borne by those responsible for the releases."³⁴⁰ Upon closer examination, this objection also appears unpersuasive. Although all may agree that those "responsible" for releases of hazardous waste should be required to pay for the cleanups, the question of who is "responsible" for purposes of the statute remains. A determination of responsibility will involve an analysis of liability under Section 107(a), and the "third-party defense" to liability under Section 107(b). That is precisely the analysis that is being attempted in this Article. Thus, adopting a "responsibility" policy criterion in the present context does not advance the formal analysis because one is "rationally" faced with the choice between simply asserting an interpretation of "responsibility" without explicit criteria, or merely restating the initial problem in a different way. Accordingly, an objection to the "indirect" contractual relationship argument based upon the priority of a "responsibility" policy is unpersuasive.

337. See, e.g., *supra* note 48 (containing the remarks of Rep. Florio).

338. 126 CONG. REC. 26,338 (1980) (emphasis added). See also *supra* text accompanying note 39 (quoting Rep. Florio).

339. Compare the liability provision in § 107(a) of the initial version of H.R. 7020, quoted *supra* note 41, with the amended version of § 107(a), quoted *supra* note 78, and the final version of § 107(a), quoted *supra* text accompanying note 106.

340. 126 CONG. REC. 26,238 (1980). A similar argument is that it is another objective of the legislation to ensure that the response fund is "replenished." See *id.* Of course, under the statute, only those who are deemed "responsible" for a release are required to replenish the fund. See CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988). Thus, the "deep pocket" replenishment argument collapses into a "responsibility" argument, which carries with it the same weaknesses.

A third objection relates to the status of landowner-lessors who do not have restrictive clauses in their leases at present. The question is whether it would be equitable to impose liability on such landowner-lessors, who would have had no advance notice of the "prevention-incentive" policy. Although this objection may seem plausible at first glance, it cannot withstand closer scrutiny. First, *A & N Cleaners* appears to be the first reported case in which a court has adopted an "in connection with" interpretation of the "third-party defense" in the landowner-lessee context. Second, *A & N Cleaners* is a relatively recent case, so it is probable that relatively few persons have relied upon it in drafting leases.³⁴¹ Third, in jurisdictions that follow the *Argent* line of cases, there is no real possibility of unfairness under the new standard precisely because the *Argent* approach bars the assertion of the defense by a landowner-lessee in every case.³⁴² Thus, lessors relying on the *Argent* approach already have an incentive to include restrictive lease clauses.

Moreover, even when there is no language in the lease explicitly restricting the presence of hazardous substances on the leased premises, and thus the "third-party defense" is not available, a landowner-lessee still may be able to avoid a release or threatened release of wastes through rigorous monitoring and prevention activities. The landowner-lessee may find authorization for such oversight in standard lease language that prohibits "unlawful activities" on the leased premises.

For example, in the recent case of *Sachs v. Exxon Co., U.S.A.*,³⁴³ the plaintiff landowner-lessors alleged that the defendant-lessee's gasoline storage tanks may have caused damage to the soil and subsurface water on the leased premises.³⁴⁴ The lease contained a clause requiring that the "[l]essee's use of [the leased] premises shall comply with all ordinances and laws . . . applicable to [the leased] premises"³⁴⁵ The *Sachs* court stated that the covenant of "good faith and fair dealing" as applied to the "no unlawful activity" clause "require[d] a reasonable means by which the [lessors could] assure themselves as to the status of environmental hazards which may be the result of the tenant's activities."³⁴⁶ The court reversed the trial court's summary judgment denying the landowner-lessors declaratory judgment as to

341. See *A & N Cleaners*, 788 F. Supp. at 1317 (this case was decided in 1992).

342. *Argent Corp.*, 21 Env't Rep. Cas. at 1356. See also *supra* text accompanying note 236.

343. 12 Cal. Rptr. 2d 237 (Cal. Ct. App. 1992).

344. See *id.* at 241.

345. *Id.*

346. *Id.* at 242.

their right to conduct environmental tests on the leased premises and remanded the case for a factual determination as to the necessity and scope of further testing.³⁴⁷

The *Sachs* case suggests that a release or threatened release of hazardous substances under CERCLA would violate a lease clause prohibiting "unlawful" conduct by the tenant, and therefore, would be a ground for evicting the tenant. Because lease clauses that prohibit the tenant from engaging in unlawful activity are standard in both commercial and residential leases, *Sachs* suggests that a landlord who is not able to prohibit hazardous substances on the leased premises by other means nevertheless should be able to restrict and monitor the activities of tenants in order to prevent releases or threatened releases.

A fourth objection to the "in connection with" argument relates to the definition of "liability" in Section 101(32).³⁴⁸ That provision states that "'liable' or 'liability' . . . shall be construed to be the standard of liability which obtains under section [311 of the Federal Water Pollution Control Act]."³⁴⁹ Thus, CERCLA's "third-party defense" to "liability" also should be interpreted in light of Section 311 of the Federal Water Pollution Control Act.³⁵⁰ This argument lacks merit because, as noted earlier, the floor debate in the Senate suggests that Congress had "joint, several, and strict" liability in mind when it adopted the Section 101(32) definition.³⁵¹ Moreover, in the House, Representative Florio specifically stated that reference should be made to FWPCA Section 311 liability only when there are no specific provisions in CERCLA.³⁵² Section 107(b)(3) of CERCLA, however, does contain specific provisions relating to liability defenses, and therefore, should control.³⁵³ Finally, the "third-party defense" in FWPCA Section 311 does not contain the terms "in connection with"

347. *Id.* at 242-43.

348. See CERCLA § 101(32), 42 U.S.C. § 9601(32) (1988). See also *supra* text accompanying note 112.

349. CERCLA § 101(32), 42 U.S.C. § 9601(32) (1988).

350. *E.g.*, Ruhl, *supra* note 263, at 309 ("In view of the fact that liability under CERCLA is to be construed as the same standard that applies under the [Federal Water Pollution Control Act] oil spill prevention provision, the third-party defense provided by the oil spill statute should guide the interpretation of the corresponding CERCLA provision." (citation omitted)).

351. See 126 CONG. REC. 30,932, 30,941, 30,950 (1980). See also *supra* note 115 and accompanying text and text accompanying note 117.

352. See 126 CONG. REC. 31,965 (1980). See also *supra* text accompanying note 132 (containing the remarks of Rep. Florio).

353. See CERCLA § 107(a) and (b), 42 U.S.C. § 9607(a) and (b) (1988). See also *supra* text accompanying note 106.

or "contractual relationship" as utilized in CERCLA.³⁵⁴ Accordingly, it is inappropriate to analyze CERCLA's "third-party defense," which is closely connected with such phrases, under FWPCA Section 311.³⁵⁵

This Article has suggested that certain criteria be employed in analyzing whether the acts or omissions of a tenant leading to a release or threatened release of hazardous substances should be deemed to occur "in connection with" the contractual relationship created by the lease agreement. One final objection may be that those criteria cannot be applied in situations outside the landlord-tenant context. If this Article required that the landlord-tenant criteria identified be applied to other relationships, problems certainly could arise. There is no need to apply those criteria elsewhere, however, because "in connection with" need not be interpreted in a univocal fashion. Rather, appropriate criteria can be developed and applied in other contexts based upon relevant policies. In the case of a transfer of title from one person to another, for example, the Section 101(35) "innocent landowner defense" added by SARA in 1986, with its accompanying legislative history,³⁵⁶ suggests that "*not* in connection with" should be interpreted according to criteria no broader than those applicable to determinations of "*no* contractual relationship."³⁵⁷ Once the phrase "in connection with" is understood in this fashion, the problem suggested above disappears.

CONCLUSION

This Article has considered the liability of a landowner-lessor under CERCLA for releases or threatened releases caused by the acts or omissions of a tenant in possession. The Article began with an overview of the statutory language and proceeded with a discussion of the legislative history surrounding the passage of The 1980 Act and the 1986 SARA amendments relevant to its topic. Next, this Article discussed and analyzed the liability of an "owner" landowner-lessor under Section 107(a) and concluded that a plausible case for an "innocent landlord" defense could not be found in that language. The Article next examined the "third-party defense" set forth in Section 107(b)(3).

354. See FWPCA § 311, 33 U.S.C. § 1321 (1985).

355. See *supra* text accompanying notes 131-132 (containing the remarks of Rep. Florio to that effect).

356. See *supra* note 181 (citing the Conference Report that explains § 101(35) and § 107(b)(3)).

357. See CERCLA § 101(35), 42 U.S.C. § 9601(35) (1988). See also *supra* text accompanying note 180.

The Article discussed and critiqued the *Argent* line of cases on the basis that those cases failed to consider the "in connection with" language found in Section 107(b)(3). The Article also discussed and critiqued *A & N Cleaners*, in which the court adopted an "in connection with" analysis, but applied a test that was objectionable because it encouraged landowner-lessors to become "absentee landlords" by providing them with a disincentive to restrict or monitor the activities of their tenants in possession. An alternative "prevention-incentive" test was proposed; this test encourages landowner-lessors to include, monitor, and enforce appropriate lease clauses that restrict the presence of hazardous substances on the leased premises.

Next, this Article discussed and critiqued the position taken by the court in *A & N Cleaners* with respect to landowner-lesor liability as related to the acts and omissions of a sublessee. The Article concluded that a landowner-lesor can be considered to have an "indirect contractual relationship" with a sublessee in possession. Several hypothetical objections to the discussion and analysis presented in the Article were then proposed, discussed, and found unpersuasive.

Given the foregoing, one can conclude that not all activities of a tenant should be considered "in connection with a contractual relationship" with the landowner-lesor. Additionally, a landowner-lesor can be considered to have an "indirect contractual relationship" with a sublessee in possession.

The proposed "prevention-incentive" test supports an important statutory policy: preventing the harmful effects to public health, safety, and the environment that result from the release of hazardous substances. Consistent with common sense notions of fair play, persons such as residential landowner-lessors should not be held liable for the acts or omissions of their tenants in all circumstances. At the same time, the "third-party defense" is construed narrowly, so that landowner-lessors will be held strictly liable unless the landowner-lesor takes affirmative steps to prohibit the presence of the relevant hazardous substances in the lease, does not know or have reason to know of the presence of such substances on the leased premises, and monitors and restricts the activities of the tenant appropriately. This interpretation is consistent with both the legislative history and our communal traditions which state that ownership of land requires that proper stewardship be exercised.³⁵⁸

358. See *supra* text accompanying note 1 (stating Professor Powell's reflection on the development of notions of stewardship in Anglo-American law).