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LIABILITY OF INSTITUTIONAL TRUSTEES UNDER CERCLA

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INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act[1] (CERCLA) imposes liability for the costs of cleanup when hazardous substances are released. CERCLA's provisions, however, do not explicitly address the issue of institutional trustee liability. Rather, the statute defines four categories of viable defendants (potentially responsible parties) who may be held liable for extensive cleanup costs.[2] Liability may arise under CERCLA even if the defendant did not directly cause the release or contamination, if the party otherwise meets the statutory definition of a "potentially responsible party."[3]

Parts I through III of this article address whether an institutional trustee, by virtue of either its actions or mere status as a trustee of contaminated property, can be deemed a CERCLA responsible party and be held liable for CERCLA remediation costs in its individual capacity. Part IV reviews potential exemptions from, or defenses to, liability. Because little authority directly addressing CERCLA liability for institutional trustees exists and the current

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1. CERCLA §§ 101–405, 42 U.S.C. §§ 9601–9675 (1988).

2. CERCLA § 107(a)(1–4), 42 U.S.C. § 9607(a)(1–4).

3. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (construing CERCLA § 9607(a)(1) to impose liability on current owner without regard to causation).

case law in the few analogous areas is in flux, this article will examine case law relating to trustees generally as well as instances in which institutional trustees have been explicitly involved in CERCLA liability claims.

I. POTENTIAL TRUSTEE LIABILITY

The cost of cleaning up contaminated property held in trust can sometimes far exceed the value of the trust property itself.[4] In such instances, the government or a private-party plaintiff will seek to identify another private source of funding for the remediation of the site. Such sources often include parties identified as "deep pockets."[5] Thus, institutional trustees are particularly attractive targets for plaintiffs seeking to extend CERCLA liability to parties able to pay for the cleanup.

CERCLA lists four classes of potentially responsible parties who may be held liable for remediation of a contaminated site: (1) current "owners or operators" of contaminated property; (2) "owners or operators" of the property at the time hazardous substances were disposed of; (3) persons who "arranged for disposal or treatment" of hazardous substances; and (4) persons who accepted the substances for transport.[6] This broad language has swept many parties into the statute's coverage. Passive landlords or landowners who lease property contaminated by tenants' activities, for example, may be liable as owners.[7] Persons who can control activities affecting hazardous substance releases may also be liable as operators.[8] Most importantly for the purposes of this article, current owners of contaminated property may be held liable solely by virtue of their ownership status, without a requirement that the plaintiff show the owner knew of, caused, or contributed to the release or contamination.[9]

Accordingly, the first consideration in examining whether institutional trustees may be individually liable *beyond the trust's assets* for CERCLA

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4. These costs include attendant costs such as Environmental Protection Agency (EPA) oversight costs or enforcement costs. Such costs are recoverable by the government under CERCLA § 107(a)(4)(A) and potentially by private parties under § 107(a)(4)(B). *Compare* Stanton Road Assocs. v. Lohrey Enters., No. 91-15729, 1993 U.S. App. LEXIS 1272, at *2 (9th Cir. Jan. 28, 1993) (attorneys' fees not recoverable in private cost recovery action), *with* General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1421-22 (8th Cir. 1990) (attorneys' fees recoverable as "necessary costs of response" in private cost recovery action), *cert. denied*, 111 S. Ct. 1390 (1991). These are the only two federal circuit courts to consider this issue.

5. *See, e.g.*, City of Phoenix v. Garbage Serv. Co., No. 89-1709SC, 1993 U.S. Dist. LEXIS 1406 (D. Ariz. Jan. 19, 1993). *See also* discussion *infra* Part II.B.

6. CERCLA § 107(a)(1-4), 42 U.S.C. § 9607(a)(1-4).

7. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 168-69 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

8. *See, e.g.*, United States v. Northeastern Pharmaceutical and Chem. Co., 579 F. Supp. 823, 847-49 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986); *but see* General Elec. Co. v. Aamco Transmissions, Inc., 962 F.2d 281, 285-87 (2d Cir. 1992).

9. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).

remediation costs is whether a trustee may be an owner or operator within the meaning of CERCLA. Thus, one must determine whether trustees' fiduciary relationships or management actions *as trustees* can be construed as a form of ownership or operation[10] that gives rise to CERCLA liability.[11] Trustees hold title to property in most states.[12] Further, typical trustee responsibilities may require the trustee to manage, develop, organize or disburse assets in ways that involve "operations" of property.[13] Thus, for trustees, there appears to be a potential liability risk as an owner or operator under CERCLA.

II. TRUSTEES AS "OWNERS"

The courts have not limited the class of potentially liable owners under CERCLA to those holding title to property. For example, a recent case, *United States v. A & N Cleaners & Launderers, Inc.*,[14] found Marine Midland Bank, which acted as a lessee-sublessor, liable as an owner for exercising a degree of site control that the court considered sufficient to confer ownership status.[15] The bank had the right under its lease to sublet the property, evict tenants, determine use of the property by tenants, collect rents, and enforce tenant obligations.[16] The bank also took responsibility for property maintenance and repair.[17] Though the bank did not have the power of "alienation," the *A & N Cleaners* court, relying on an earlier case, found that the lessee-sublessor bank enjoyed the rights and obligations of an owner.[18]

Another recent CERCLA case found that passage of equitable title was sufficient to impose owner liability.[19] The court ruled that a party who had

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10. CERCLA defines the term "owner or operator" to mean, in part:

> in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and . . . 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.

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

11. Trustee liability will most likely be affected by the way "owners" or "operators" are interpreted to be liable under CERCLA. Theoretically, certain trustee management activities could constitute "arrangement for disposal" if, for example, a trustee assumed operational control of waste containers. As discussed below, however, if such action were a basis for liability, it would probably be as a form of "operator liability." It is unlikely that a trustee would incur liability as a transporter. *See also infra* Part III.

12. *See* I WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 2.6 (4th ed. 1987).

13. *See, e.g.*, CAL. PROB. CODE § 16227 (West 1991).

14. 788 F. Supp. 1317 (S.D.N.Y. 1992).

15. *Id.* at 1330–34.

16. *Id.* at 1333–34.

17. *Id.*

18. *Id.* at 1332 (quoting United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1003 (D.S.C. 1985), *aff'd in part and vacated in part sub nom.* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *and cert. denied*, 490 U.S. 1106 (1989)).

19. United States v. Wedzeb Enters., Inc., No. 90–1877C, 1992 U.S. Dist. LEXIS 19494, at

entered into a contract to purchase a contaminated site but had paid only a small fraction of the purchase price and had not yet received a deed, was an owner under CERCLA because "under Indiana law, 'when the parties enter into [a land sale] contract, all incidents of ownership accrue to the vendee. The vendee assumes the risk of loss and is the recipient of all appreciation in value.'"[20]

Thus, a question may arise regarding whether institutional trustees, either as title holders to property in trust, or by virtue of their activities in leasing or otherwise managing such property, may be deemed owners who can incur individual liability for CERCLA response costs outside the corpus of a trust. Four cases have directly addressed this question.

A. U.S. v. Burns,[21] Premium Plastics,[22] and Petersen Sand & Gravel[23]

Until recently, the trend in the case law seemed to indicate that holding mere title and exercising common fiduciary obligations were not sufficient to render an institutional trustee liable as an *owner.* Rather, more involvement, such as that which applies also to a trust *beneficiary*, was necessary to create owner liability. This trend is evident in the *Burns*, *Premium Plastics*, and *Petersen Sand & Gravel* cases.

In *United States v. Burns*, the United States brought an action pursuant to section 107 of CERCLA to recover cleanup costs it incurred in response to the release or threatened release of hazardous substances on two sites.[24] Among the defendants named was Raymond Crowley, who was *both* a trustee (although not an institutional trustee) and a beneficiary of a realty trust containing one of the sites at issue.[25] Crowley filed a motion to dismiss the action, asserting that he never *owned* the land subject to the action and that he had never personally participated in activities subject to CERCLA liability.[26] The District Court denied Crowley's motion to dismiss.[27]

The language used by the Northern District of New Hampshire in denying Crowley's motion initially appears to interpret CERCLA broadly regarding trustee ownership liability. The court began by stating that "as trustee, Crowley held legal title to the trust property and under trust law could be liable for

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*17 (S.D. Ind. Dec. 9, 1992).

20. *Id.* at *16 (quoting Skendzel v. Marshall, 301 N.E.2d 641, 646 (Ind. 1973), *cert. denied*, 415 U.S. 921 (1974) (citation omitted)).

21. United States v. Burns, No. 88-94-L, 1988 U.S. Dist. LEXIS 17340 (D.N.H. Sept. 12, 1988).

22. Premium Plastics, Inc. v. LaSalle Nat'l Bank, No. 92 C 413, 1992 U.S. Dist. LEXIS 16119 (N.D. Ill. Oct. 21, 1992).

23. United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346 (N.D. Ill. 1992).

24. *Burns*, 1988 U.S. Dist. LEXIS 17340, at *1.

25. *Id.*

26. *Id.*

27. *Id.* at *5.

obligations as the owner of the property."[28] The court continued by asserting that "[a]s an owner, Crowley would be liable for response costs regardless of whether he personally participated in conduct that violated CERCLA. An owner is liable without being an operator of the facility."[29]

The court's language, standing alone, appears to allow imposition of liability merely because, as trustee, Crowley held legal title to the contaminated property. However, the opinion is replete with references to Crowley's dual capacity as trustee and beneficiary. After describing Crowley as "sole trustee and beneficiary" of the trust, the court framed the primary issue to be decided as "whether Crowley, as *trustee and beneficiary* . . . , can be considered an owner or operator of the . . . site."[30] Among other things, the court cited the fact that lessees have been considered owners for CERCLA purposes, and then concluded that "Crowley, *as trustee and beneficiary* of the . . . trust, was as much an 'owner' of the . . . trust as would be a lessee."[31]

The briefs and memoranda filed by the United States emphasized the significance of Crowley's dual role as both trustee and beneficiary of the trust. The government argued that the trust:

> was a device through which Raymond Crowley as trustee held legal title and full authority to manage the . . . Site for the benefit of Raymond Crowley, who held equitable title as one of the Trust's beneficiaries . . . . Mr. Crowley thus held *all elements and rights of ownership* in the . . . Site, as surely as if he [and the original co-trustee] had simply purchased the Site as individual joint tenants.[32]

The government also argued that the trustee/beneficiary "essentially used the Trust's accounts as a personal check book, depositing and withdrawing funds virtually at will."[33]

The government's emphasis on the defendant's trustee/beneficiary status is perhaps clearest in its argument that Crowley was properly named as an individual in the suit because, as trustee and beneficiary, he, not the trust, was the true owner of the property for purposes of CERCLA liability.[34] The

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28. *Id.* at *4 (citing III SCOTT ON TRUSTS §§ 265, 265.1 (3d ed. 1985)). The fourth edition states that "today a trustee is personally liable on obligations imposed upon him as holder of the legal title to the trust property, as for taxes, assessments . . . and certain other obligations, unless it is otherwise provided by statute." III-A WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 265 (4th ed. 1988).

29. *Burns*, 1988 U.S. Dist. LEXIS 17340, at *5 (citations omitted).

30. *Id.* at *2 (emphasis added).

31. *Id.* at *4 (emphasis added).

32. Plaintiff's Reply Memorandum in Support of Motion for Partial Summary Judgment on Liability Against Defendant Raymond Crowley, at 4, *Burns*, 1988 U.S. Dist. LEXIS 17340 (emphasis added) (source obtainable through authors).

33. Trial Brief of the United States, at 2, *Burns*, 1988 U.S. Dist. LEXIS 17340 (source obtainable through authors).

34. Plaintiff's Memorandum in Opposition to Defendant Crowley's Motion to Dismiss, at 2–3, *Burns*, 1988 U.S. Dist. LEXIS 17340 (source obtainable through authors).

government further argued that "[i]t would defeat the strict liability scheme of CERCLA if an owner such as defendant Crowley could escape liability simply by having owned property through the device of a trust where he is both a beneficiary and a trustee."[35] The *Burns* court echoed the idea that CERCLA should not let potentially responsible parties hide behind indirect ownership schemes, when it stated that "Congress did not intend for a responsible party to be able to avoid liability through the use of a trust or other forms of ownership."[36] Thus, it is clear that the *Burns* decision rests, at least in part, upon the defendant trustee's status as beneficiary.

Two recent cases, both in the Northern District of Illinois, Eastern Division, relied on state trust law in determining that an Illinois land trustee is not an owner for the purposes of CERCLA, reinforcing the analysis presented in *Burns*.[37] The Northern District of Illinois explained that an Illinois land trust is an "odd legal creature."[38] Under such a trust, the trustee holds both legal and equitable title with limited responsibilities.[39] Indeed, the "trustee's sole duty . . . is to hold and dispose of legal title at the written direction of the beneficiaries."[40]

Citing the Illinois Supreme Court's ruling in *People v. Chicago Title & Trust Co.*,[41] the court in *Premium Plastics, Inc. v. Lasalle Nat'l Bank* held that the beneficiary, not the trustee, was the owner of the land held in trust, for purposes of triggering cleanup liability.[42] The court elaborated that:

> Since [the beneficiary] must be considered the owner of the Site for the purposes of this lawsuit, plaintiffs need not fear that they will be left with no defendant to specify as owner. Moreover, this court will not subject an innocent party such as [the land trustee] to liability in order to assure that plaintiffs have a source of recovery for their expenses related to this matter.[43]

The court granted summary judgment for the defendant, La Salle National Bank, acting as trustee.[44]

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35. *Id.*

36. *Burns*, 1988 U.S. Dist. LEXIS 17340, at *4 (citation omitted).

37. *Premium Plastics*, 1992 U.S. Dist. LEXIS 16119; *Petersen Sand & Gravel*, 806 F. Supp. 1346.

38. *Petersen Sand & Gravel*, 806 F. Supp. at 1358.

39. *Id.*

40. *Id.*

41. 389 N.E.2d 540, 545 (Ill. 1979) ("[T]here is not a single attribute of ownership, except title, which does not rest in the beneficiary . . . . The land trustee is, in fact, a fiction which has become entrenched in the law of this State and accepted as a useful instrument in the handling of real estate transactions").

42. *Premium Plastics*, 1992 U.S. Dist. LEXIS 16119, at *11–12. Plaintiff's motion—based on other issues—to reconsider the October 21, 1992, order of the court was subsequently denied. Premium Plastics Inc. v. Lake Shore Nat'l Bank, No. 92 C 413, 1992 U.S. Dist. LEXIS 19787, (N.D. Ill. Dec. 23, 1992).

43. *Premium Plastics*, 1992 U.S. Dist. LEXIS 16119, at *11–12.

44. *Id.* at *12.

In *Petersen Sand & Gravel*, the Northern District of Illinois again employed the *Burns* analysis in determining whether an Illinois land trustee was an owner for the purposes of CERCLA liability. Again citing *Chicago Title*, the court stated that "it is the beneficiary who bears the burden of land ownership under Illinois laws, not the trustee."[45] The *Petersen Sand & Gravel* court buttressed this conclusion with the following policy argument:

> Concluding that an Illinois land trustee is an "owner" would not promote the goals of CERCLA. While this conclusion would provide an extraordinarily deep pocket—here, [the land trustee] made under $2,000 for being trustee for more than 20 years, but CERCLA could impose over $800,000 in liability—it would not serve CERCLA's primary goal of making those who are responsible for or who benefitted from environmental damage foot the bill. Whereas Congress might have made owners strictly liable because ownership is generally a good proxy for responsibility, paper ownership like that of an Illinois land trustee is wholly unrelated to responsibility.[46]

Based on this review of CERCLA's purposes, the features of Illinois land trusts, and concepts of ownership under federal and state law, the court granted summary judgment for Northern Trust Co. and found the trustee was not liable under CERCLA as a matter of law.[47]

B. City of Phoenix v. Garbage Service Co.[48]

The fourth case addressing trustee liability, *Phoenix v. Garbage Service Co.*, involved an institutional trustee in a more traditional fiduciary arrangement. The District Court of Arizona has issued two rulings in the case, *Phoenix I* and *Phoenix II*.[49] The rulings appear to draw conclusions significantly counter to those in *Burns*, *Premium Plastics*, and *Petersen Sand & Gravel*.

The *Phoenix II* court described the facts of the case as follows. Valley National Bank (Valley), acting as trustee of a testamentary trust, exercised an option to purchase a landfill in 1966.[50] A warranty deed conveyed the property to the bank as "trustee."[51] The bank continued to lease the site to Garbage Service Company, a company that had managed and administered the landfill and continued to do so for the next six years.[52] After this time, the bank closed the landfill and left the site unused.[53] Throughout and after the

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45. *Petersen Sand & Gravel*, 806 F. Supp. at 1358.

46. *Id.* at 1359 (citation omitted).

47. *Id.*

48. City of Phoenix v. Garbage Serv. Co., No. 89-1709SC, 1993 U.S. Dist. LEXIS 1406 (D. Ariz. Jan. 19, 1993) (*Phoenix II*), and 33 Env't Rep. Cas. (BNA) 1655 (D. Ariz. 1991) (*Phoenix I*).

49. *Id.*

50. *Phoenix II*, 1993 U.S. Dist. LEXIS 1406, at *2.

51. *Id.*

52. *Id.*

53. *Id.*

six years, the bank obtained liability insurance for the landfill and paid its property taxes.[54]

In 1980, the City of Phoenix began condemnation proceedings. Through these proceedings, the city eventually acquired the landfill and the condemnation judgment declared the bank, as trustee, record owner of the site.[55] In 1989, the City of Phoenix sued the bank to recover response costs incurred by the city in cleaning up the contaminated landfill.[56]

In *Phoenix I*, Judge Rosenblatt held that Valley, as the institutional trustee, could not be held liable under CERCLA without evidence of ownership in addition to a warranty deed that conveyed a landfill to Valley.[57] On a motion to reconsider by the plaintiff in *Phoenix II*, Judge Conti held that a trustee is an owner for purposes of CERCLA even if it only holds bare legal title.[58] The court explained that the two holdings were not inconsistent, but to the extent the earlier ruling was unclear, the plaintiff's motion to reconsider was granted.[59] The *Phoenix II* court did not specifically rule on the question of whether a liable trustee would be obligated beyond the value of the trust's assets, and it was reported from the bench that Judge Conti invited briefing on this issue.[60]

The *Phoenix II* court framed the issue as "whether a trustee, as the holder of legal title to property, may be held liable under CERCLA for cleanup costs as an 'owner' even though he played no role in the contamination of the property."[61] At the outset of its analysis, the court noted that there is no culpability requirement for ownership liability under CERCLA.[62] The court then cited the legislative history for the proposition that "any titleholder is an 'owner' under [CERCLA]" and claimed that "commentators uniformly agree that the term 'owner' under CERCLA includes trustees who hold legal title only."[63] As further evidence of Congress's intent that the term owner have the broadest possible meaning, the court noted that Congress carved out a single exception to titleholder liability for "lenders who hold 'indicia of ownership primarily to protect [their] security interest.'"[64]

The bank pointed to a proposed Environmental Protection Agency (EPA) rule that would not impose CERCLA liability on innocent trustees or

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54. *Id.*
55. *Id.*
56. *Id.* at *2–3.
57. *Phoenix I*, 33 Env't Rep. Cas. at 1656.
58. *Phoenix II*, 1993 U.S. Dist. LEXIS 1406, at *10.
59. *Id.* at *10 n.3.
60. Transcript of Status Hearing at 3:24–4:1, 14:8–14:11, 14:16–14:18, *Phoenix II*, 1993 U.S. Dist. LEXIS 1406 (source obtainable through authors).
61. *Phoenix II*, 1993 U.S. Dist. LEXIS 1406, at *6.
62. *Id.* at *6–7.
63. *Id.* at *7–8.
64. *Id.* at *8 (quoting CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A)).

fiduciaries.[65] However, the court rejected this argument, finding that the EPA proposal dealt only with secured creditor liability.[66] Thus, the proposed rule only applied to trustees that were also secured creditors.[67] As evidence of EPA's intent, the court cited *Lone Star Indus., Inc. v. Horman Family Trust.*[68] In that case, EPA issued formal notice to three different defendants, including a trustee, that they may be liable for CERCLA response costs as potentially responsible parties.[69]

Finally, the *Phoenix II* court relied on its interpretation of *Burns* in holding that "a trustee is an 'owner' for the purposes of Section 107 of CERCLA, even though the trustee may hold only bare legal title."[70] The court elaborated:

> It may seem unjust to subject trustees that are not involved in the contamination of the property to liability for cleanup that, in some cases, may far exceed the value of the trust's assets. But . . . a defendant's degree of culpability has nothing to do with owner/operator liability under CERCLA. If Congress had meant to exempt uninvolved trustees from liability as 'owners' under CERCLA, it would have said so in the statute.[71]

In reaching its conclusion, the District Court of Arizona chose to focus on the fact that the *Burns* court did not disregard the trust entity entirely, even though the defendant was a beneficiary.[72] Rather, it emphasized that the defendant trustee in *Burns* held legal title to the property.[73] As such, the trustee could be held liable for cleanup costs as the owner under trust law.[74]

Another court presented with the issue of trustee liability under CERCLA failed to address it. In *Quadion Corp. v. Mache*,[75] Quadion's predecessor-in-interest purchased the shares of a corporation from an individual and a trust.[76] After its purchase, however, Quadion learned that the corporation's property was severely contaminated and sought to cleanup the site.[77] Quadion then sued several parties to recover its costs, including the individual, the trust and

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65. *Id.* at *9.

66. *Id.*

67. *Id.*

68. 960 F.2d 917 (10th Cir. 1992).

69. *Id.* at 921.

70. *Phoenix II*, 1993 U.S. Dist. LEXIS 1406, at *10. This holding appears to be inconsistent with the ruling in *Phoenix I* that "[n]o liability attaches to [the bank] solely by virtue of the warranty deed conveying the landfill to [the bank], as trustee." *Phoenix I*, 33 Env't Rep. Cas. (BNA) at 1656.

71. *Phoenix II*, 1993 U.S. Dist LEXIS 1406, at *10.

72. *Id.* at *9.

73. *Id* at *9–10.

74. *Id.* (quoting United States v. Burns, No. 88-94-L, 1988 U.S. Dist. LEXIS 17340, at *4 (D.N.H. Sept. 12, 1988), citing III SCOTT ON TRUSTS §§ 265, 265.1 (3d ed. 1985)).

75. 738 F. Supp. 270 (N.D. Ill. 1990), *summary judgment granted in part, summary judgment denied in part*, 1991 U.S. Dist. LEXIS 8222 (N.D. Ill. June 11, 1991).

76. *Id.* at 273.

77. *Id.*

its beneficiaries, the trustee at the time of the sale, and the successor trustees.[78] Among other things, the lawsuit alleged that the trustees were owners or operators of the contaminated property under CERCLA.[79] In the context of the plaintiff's claim that the trustees failed to disclose a latent defect, the court noted that under Illinois law, a successor trustee is not liable for acts of a predecessor trustee.[80] However, without explanation, the court refused to dismiss the CERCLA claim against the successor trustees.[81]

III. TRUSTEES AS "OPERATORS"

Even though no court has yet found an institutional trustee liable as an operator under CERCLA, institutional trustees may face potential liability as operators in their capacity as landlords or property managers. In *Phoenix II*, the court did not find the trustee liable as an operator but, as discussed above, did find the trustee liable as an owner.[82] In that case, the plaintiff, City of Phoenix, argued that the defendant's status as trustee over property used as a landfill gave it "authority to control" the cause of contamination, making it liable as an operator under CERCLA.[83] The *Phoenix II* court held, however, that because the defendant trustee was not involved in the day-to-day administration of the contaminated landfill property, the trustee had no liability as an operator under CERCLA.[84] As grounds for reaching its decision, the court specifically mentioned the following facts: (1) the trustee "did not enter into or negotiate contracts for the disposal of wastes at the landfill"; (2) the trustee "did not know the identity or the nature of [the landfill's] customers"; and (3) the trustee's "communication with [landfill] personnel was limited to matters involving [the] estate, such as tax questions, and not the operation of the [l]andfill."[85]

Although the activities described in *Phoenix II* did not give rise to operator liability, other trust management activities may create CERCLA operator liability for institutional trustees. This potential risk can be examined by analogy to other classes of liable parties. For example, if an institutional trustee holding real property in trust was involved in leasing the property to industrial tenants, a court might treat the trustee as it could a landlord. Such a role creates potential CERCLA liability.[86]

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78. *Id.* at 270.

79. *Id.* at 274.

80. *Id.* at 275.

81. *Id.* at 274.

82. *Phoenix II*, No. 89-1709SC, 1993 U.S. Dist. LEXIS 1406, at *6–10 (D. Ariz. Jan. 19, 1993).

83. *Id.* at *4–5 (quoting Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1341 (9th Cir. 1992)) ("'operator' liability under [CERCLA] only attaches if the defendant had [the] authority to control the cause of the contamination at the time the hazardous substances [are] released into the environment").

84. *Id.* at *6.

85. *Id.*

86. Nurad, Inc. v. Wm. E. Hooper & Sons Co., 22 Envtl. L. Rep. (Envtl. L. Inst.) 20079

Landlords may be held liable as operators with or without direct management of the property. The Federal District Court of Maryland held a landlord liable when he routinely participated in and controlled property management decisions relating to a site.[87] However, landlords may also be held liable without such active participation. For instance, in *United States v. Monsanto Co.*, the court held that an absentee landlord could not assert a defense to liability despite its ignorance of disposal activities on the property, because CERCLA "does not sanction such willful or negligent blindness on the part of absentee owners."[88]

Trustees often take actions with respect to trust property that the cases noted above have found to constitute operations.[89] In fact, the fiduciary duties imposed on trustees may make it difficult for them to limit their roles and potential liability because, as fiduciaries, they cannot abstain from *all* involvement with the property. In many states, a "trustee has a duty not to delegate to others the performance of acts that the trustee can reasonably be required personally to perform . . . ."[90] This duty may keep trustees involved in property management issues, consequently opening them to allegations of owner or operator liability.

Similarly, many states require trustees to make trust property productive.[91] In order to fulfill this duty, trustees may have to become involved in difficult decisions, including those regarding hazardous substances, if such decisions could affect the value of the property. While becoming involved in such decisions could open trustees to allegations of operator liability, failure to become involved may subject them to liability for breaching fiduciary duties created by trust law.[92]

(D. Md. 1991), *aff'd in part and rev'd in part*, 966 F.2d 837 (4th Cir. 1992), *and cert. denied sub nom.* Mumaw v. Nurad, Inc., 113 S. Ct. 377 (1992).

87. *Id.* at 20084.

88. United States v. Monsanto Co., 858 F.2d 160, 169 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

89. *See, e.g.*, CAL. PROB. CODE § 16227 (West 1991).

90. *Id.* at § 16012.

91. *See, e.g., Id.* at § 16007.

92. Trustees have expressed some concern that, by their mere ability or authority to control disposal activities, they may fall under CERCLA's coverage as an "arranger of disposal." Under this theory, a trustee could face liability even without participating in disposal decisions, as long as the trustee had power to participate in those decisions. However, the Second Circuit recently rejected this argument in General Elec. Co. v. Aamco Transmissions, Inc., 962 F.2d 281 (2d Cir. 1992). In that case, three oil companies were sued on the theory that, because they had the ability to direct individual dealers in waste disposal decisions, they should be liable under CERCLA even if they never actually participated in disposal decisions. The court, however, held that the mere capacity to direct or control the disposal of hazardous waste does not give rise to "arranger" liability under CERCLA. *Id.* at 286.

IV. EXEMPTIONS, DEFENSES AND TENUOUS THREADS

Certain exemptions or defenses may be available to trustees either under CERCLA itself or pursuant to state trust laws. However, these exemptions and defenses are limited in scope.

A. EPA Interpretation

EPA recently promulgated its final rule interpreting the scope of CERCLA's secured *lender* exemption.[93] Because institutional trustees do not hold title for the purpose of protecting a security interest, they do not appear to be covered by any of the rule's provisions. Nevertheless, EPA took the opportunity in its rulemaking preamble to comment on the concerns of lending institutions acting as trustees. The preamble to the lender liability rule offers the following gratuitous statement:

> The assumption of several commenters—that a trustee is personally liable under CERCLA solely because a trust asset is contaminated, even if the trustee had no knowledge of the asset's contamination and was in no way involved in the activities that resulted in the contamination—is incorrect. No case has so held, and no commenter cited any principle of law that would command this result. *A trustee is not personally liable for CERCLA cleanup costs solely because a trust asset is contaminated by hazardous substances.*[94]

Thus, EPA has declined to state affirmatively that trustees have personal (or corporate) liability beyond the trust assets. However, it is unclear what effect, if any, EPA's language will have on suits to recover cleanup costs under CERCLA.

B. CERCLA Defenses

CERCLA provides institutional trustees with two possible defenses should liability for response costs be asserted against them. The "innocent purchaser" and the "acquisition by bequest or inheritance" defenses apply to trustees who meet their narrow qualifications.[95] However, both defenses are limited in important respects.

1. Innocent Purchaser

CERCLA exempts an otherwise liable party from liability if the party can establish that it had "undertaken, at the time of acquisition, all appropriate

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93. National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (1992) (to be codified at 40 C.F.R. at 300). "CERCLA section 101(20)(A) exempts persons whose indicia of ownership in a facility are held primarily to protect a security interest, provided that they do not participate in the management of the facility." *Id.*

94. 57 Fed. Reg. 18,344, 18,349 (emphasis added).

95. *See* CERCLA §§ 101(35)(A), 107(b)(3), 42 U.S.C. §§ 9601(35)(A), 9607(b)(3).

inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability," and yet did not know of the contamination.[96] While this defense appears to reduce the risk of liability for many trustees, applying the defense to trustees may be problematic. There has been no judicial consideration of what constitutes the "customary practice" of investigation by an institutional trustee before taking title. Moreover, there is considerable uncertainty regarding whether a trustee has the same right and ability to investigate property prior to entering a trust relationship that an ordinary buyer enjoys before acquisition. Absent clear limitations or prohibitions on institutional trustees' ability to investigate, EPA and the courts may require a fairly high degree of diligence by institutional trustees wishing to benefit from this exemption. Furthermore, institutional trustees may carry the burden to demonstrate all necessary elements of the innocent purchaser defense.

2. Inheritance or Bequest

If the trust holding contaminated property came into being as a testamentary trust at the death of the settlor, the trustee may be able to assert the acquisition of the trust property by inheritance or bequest as a defense.[97] For example, in one case the district court held that five defendants who inherited stock in a contaminated facility and became owners of the facility when the corporation was dissolved were not liable under CERCLA because the transfer of ownership was more like an inheritance than a private transaction.[98]

To take advantage of the innocent purchaser or inheritance/bequest defenses, the institutional trustee must show: (1) that the property was contaminated at the time it came into the trust,[99] and (2) that the trustee exercised due care with respect to the hazardous substance concerned.[100] This due care requirement could raise questions regarding the scope of the trustee's obligations to initiate cleanup or containment of the hazardous substances at its own expense once the contamination is identified, particularly if the trust assets are inadequate to pay for such costs.

C. Defenses Under State Trust Law

When the question of personal trustee liability beyond the corpus of the trust is finally examined by a court, protection from CERCLA liability may be found in existing state trust law concepts. Many states have codified provisions of the Uniform Probate Code, which limits a trustee's personal liability to

96. CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B).
97. CERCLA § 101(35)(A)(iii), 42 U.S.C. § 9601(35)(A)(iii).
98. United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1348 (D. Idaho 1989).
99. CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A).
100. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3).

intentional or negligent acts by the trustee.[101] The Uniform Probate Code states: "A trustee is personally liable for obligations arising from ownership or control of [trust] property . . . only if [the trustee] is personally at fault."[102]

For a trustee defendant to prevail with this argument, federal courts must incorporate state trust law concepts in fashioning a federal rule of decision to define trustee liability under CERCLA. In *Mardan Corp. v. C.G.C. Music, Ltd.*,[103] the court considered whether Congress intended federal courts to develop uniform federal rules of decision that would incorporate state law to decide which types of settlement or indemnification agreements would be recognized under section 107(e)(1) of CERCLA.[104] While the court noted that federal law governed the issue, it emphasized that it must determine whether state law should be incorporated to provide the content of the federal rule.[105] The *Mardan* court considered the following factors: "(1) whether the issue requires 'a nationally uniform body of law'; (2) whether 'application of state law would frustrate specific objectives of the federal programs'; and (3) whether 'application of a federal rule would disrupt commercial relationships predicated on state law.'"[106]

An analysis similar to that used in *Mardan* could be used to determine the application of CERCLA owner liability to institutional trustees. Although the CERCLA rule of strict liability for owners guides any liability rationale, it can be argued that it is appropriate for federal courts to look to state trust law for guidance as to whether the term "owners" should be interpreted to encompass trustees personally. Because it is an important policy under state law that trustees be held personally liable only for negligent or intentional acts, it can be argued that trustees should not be deemed subject to CERCLA simply because of their status and relation to the trust property.

The application of a federal rule imposing strict liability on trustees by virtue of their ownership or operator status may disrupt existing commercial relationships predicated on state trust law. Although exempting trustees from strict liability as owners limits the class of potentially liable parties under CERCLA, this fact alone does not demonstrate that the state law rule frustrates the specific objectives of CERCLA. Obviously, Congress intended that there be limits to the scope of potentially liable parties.[107] Further, CERCLA

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101. *See, e.g.*, CAL. PROB. CODE § 18001 (West 1991).

102. UNIF. PROB. CODE § 7-306(b), 8 U.L.A. 560 (1983).

103. 804 F.2d 1454 (9th Cir. 1986).

104. *Id.* at 1457-58.

105. *Id.*

106. *Id.* at 1458 (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979)).

107. *See, e.g.*, Edward Hinès Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988) ("To the point that courts could achieve 'more' of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits. Born of compromise, laws such as CERCLA and SARA do not pursue their ends to their logical limits. A court's job is to find and enforce stopping points no less than to implement other legislative choices." (citation omitted)).

owner liability for trustees does not seem to require a nationally uniform body of law. This is particularly true because some states have unique trust arrangements, such as the Illinois land trustee, that demand consideration of state trust law provisions granting trustees certain protections from personal liability.[108]

CONCLUSIONS

Professional trustees now face uncertainty concerning their status as potentially liable parties under CERCLA. Given the considerable uncertainties in the general case law and the *Phoenix* precedent, trustees must attempt to avoid liability based on the little information available. A trustee should carefully monitor operation of the property held in trust so as to diminish the chance of a release of hazardous substances and the corresponding possibility of owner/operator liability. In addition, it may be advisable to include a provision in all leases requiring tenants to comply with environmental laws.

In order to assert the innocent landowner or inheritance defense under CERCLA, a trustee should thoroughly investigate property before acquisition or prior to accepting a trusteeship. It is also advisable to perform pre-acquisition environmental assessments or investigations of property once a trust is operational.

Finally, a trustee may seek to include language in trust agreements requiring settlors to indemnify the trustee in the case of environmental liability, or requiring other trust assets to be available for cleanup costs and for trustee indemnification. Of course, such provisions will be meaningful only to the extent that the settlor or the trust possesses assets sufficient to cover such costs.

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108. The argument that trustees should not be subject to CERCLA's strict liability standard as owners has gained support with regard to bankruptcy trustees. A federal bankruptcy court recently ruled that receivers appointed by state courts may never be held personally liable for cleanup costs incurred under CERCLA as a result of their receivership activities, because they are agents of state judges, who enjoy judicial immunity. *In re* Sundance Corp., No. 88-01246-R41, 1993 Bankr. LEXIS 46, at *10 (Bankr. E.D. Wash. Jan. 13, 1993). *See also* Wisconsin v. Better Brite Plating, Inc., 483 N.W.2d 574 (Wisc. 1992)(holding that a violation of state law does not *automatically* mean a trustee acted outside its scope of authority).