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Michael Gibney

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*Michael Gibney**

I. INTRODUCTION

In 1980, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), out of concern over the need to clean up hazardous waste sites.[1] CERCLA established the Superfund to finance costly cleanups.[2] In 1986, the Act was amended by the passage of the Superfund Amendments and Reauthorization Act (SARA) which changed several provisions and increased the size of the Superfund.[3] Many of the SARA changes to CERCLA reflect the recognition that CERCLA, as originally passed, underestimated the immense cost of cleaning up the many hazardous waste sites in this country.[4] Conversely, another change narrowed the scope of liability under CERCLA, thus narrowing the possible sources of recovery of clean-up costs.[5] This change reflected a recognition that CERCLA, as originally passed, went too far in some aspects of imposing liability for the cost of cleanup on private parties.

Both CERCLA and SARA represent a legislative response to the tremendous danger to human life and the ecosystem presented by the introduction of toxic materials into groundwater and soil.[6] Congress recognized the threat that leaks in disposal sites or improper

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[1] 42 U.S.C. §§ 9601–9657 (1982 & Supp. IV 1986).

[2] *Id.* § 9361 (repealed and replaced by 42 U.S.C.A. § 9611 (West 1983 & Supp. 1987)).

[3] Pub. L. No. 99-499, 100 Stat. 1613 (1986).

[4] Superfund Revenue Act of 1986, Pub. L. No. 99-499, §§ 501–531, 100 Stat. 1613 (1986).

[5] *See* 42 U.S.C.A. § 9601(35) (West 1983 & Supp. 1987).

[6] H.R. REP. NO. 253(I), 99th Cong., 2d Sess. 54, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2836.

disposal posed earlier, and addressed that threat in legislation such as the Resource Conservation and Recovery Act (RCRA).[7] RCRA gave the Environmental Protection Agency (EPA) authority over enumerated hazardous wastes from cradle to grave, as well as authority over generators, transporters, and disposers of those wastes.[8] RCRA focused, however, chiefly on keeping track of wastes as they were being disposed, and on dealing with proper disposal techniques.[9] There were no details in RCRA setting out methods for cleaning up wastes that had already contaminated the soil or groundwater.

CERCLA and SARA, then, may be viewed as efforts to cover areas of the hazardous waste problem that RCRA did not address. RCRA sets performance standards rather than establishing a standard of liability for improper handling of the enumerated hazardous wastes.[10] In contrast, CERCLA deals explicitly with liability for release of hazardous wastes.[11]

CERCLA provides two methods to clean up hazardous waste leaks or illegal dumping.[12] First, the EPA may conduct a cleanup of the hazardous waste and pay for that cleanup out of the Superfund.[13] The EPA may then initiate a civil action against the parties deemed liable under the Act in order to recover sums expended from the Superfund.[14] The other option available to the EPA is to seek an

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[7] Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901–6987 (1982 & Supp. III 1985)).

[8] 42 U.S.C. § 6901(a)(3) (1982). That section expresses recognition that, "the continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious . . . management . . . and technical problems in the disposal of solid wastes . . . ." *Id.*

[9] *Id.* § 6924.

[10] *Id.*

[11] *See* 42 U.S.C.A. § 9607(a) (West 1983 & Supp. 1987).

[12] Unless otherwise indicated in the text, references to CERCLA include amendments incorporated into the statute by SARA.

[13] *See* 42 U.S.C. §§ 9604(a), 9611–9613 (1982). The original fund of $1.6 billion was derived from a tax on petroleum and feedstock chemicals, with the remainder coming from general revenues. 42 U.S.C. § 9631(b) (1982) (repealed 1986). SARA replaced the previous funding provision by increasing the size of the Superfund to $8.5 billion over five years by increasing existing taxes and adding a tax on imported chemical derivatives, and an environmental tax. Superfund Revenue Act of 1986, Pub. L. No. 99-499, §§ 11–17, 100 Stat. 1613, 1760–74 (1986) (codified at 42 U.S.C.A. § 9611 (West 1983 & Supp. 1987)).

[14] *See* 42 U.S.C.A. § 9607(a) (West 1983 & Supp. 1987). Section 9607(a) enumerates persons liable:

> (1) the owner and operator of a vessel or a facility,
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> (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,
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> (3) any person who by contract, agreement, or otherwise arranged for disposal or

administrative order or court order compelling the parties responsible under the Act to conduct the cleanup themselves (or hire outside help to do the same).[15] These methods were designed to promptly and effectively clean up hazardous waste sites while allocating clean-up costs to the responsible parties.[16]

Congress strongly implied a standard of strict liability in CERCLA, though it deleted actual reference to strict liability in the final adoption of the Act in 1980.[17] The legislation is also silent as to how liability should be apportioned in a CERCLA suit, though most jurisdictions hold defendants jointly and severally liable.[18]

The Act provides a very limited set of affirmative defenses, however, that are available to the liable parties. Two of these defenses, one that the release of hazardous substances was caused by an act of God, and the other that the release was caused by an act of war,[19] are by their nature provisions that would only apply in the most extreme of circumstances. Section 9607(b)(3), the third defense, is not aimed at circumstances quite so unusual as the previous two defenses. In light of the statute's strict liability standard of liability, the inclusion of section 9607(b)(3) is significant.[20] This section allows assertion of the affirmative defense that the release or threatened release was caused solely by some act or omission of some party other than an employee or agent of the defendant, or by a party whose act or omission occurs in connection with a contractual rela-

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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 . . . .

Id.

[15] *See* 42 U.S.C. § 9606(a) (1982).

[16] *See* H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. I, at 17, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120.

[17] 42 U.S.C. § 9601(32) (1982). This subsection states that liability in this act is that of the Federal Water Pollution Control Act (FWPCA) (33 U.S.C. § 1321). The standard of liability evolved through statutory interpretation of this act is strict liability. *See* United States v. Tex-Tow, Inc., 589 F.2d 1310, 1313 (9th Cir. 1978). Presumably, strict liability language was not expressly included in the final bill (it was included in draft form) because it would have weakened support of CERCLA. *See infra* notes 30–32 and accompanying text.

[18] *See* United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 991 (D.S.C. 1984).

[19] 42 U.S.C. § 9607(b)(1),(2) (1982).

[20] *See* W. KEETON, W. PROSSER, THE LAW OF TORTS § 75, at 534 (1984). The basis for strict liability is not tied to the exercise of due care, but § 9607(b)(3) makes the exercise of due care an element in avoiding strict liability. *Id.*

tionship with the defendant.[21] The defendant must establish that he or she exercised due care with the hazardous substance in light of all relevant facts and circumstances, and took precautions against foreseeable acts or omissions of the third party and the foreseeable consequences of those acts.[22]

Section 9607(b)(3) provides for an extremely narrow defense through three important elements. The first element of the defense denies causation by asserting that a third party solely caused the release or threatened release.[23] The second element is an assertion of due care on the part of the defendant.[24] The third element is the taking of precautions against acts or omissions of the third party, but only against such acts or omissions as are foreseeable.[25] This defense is further limited by denying its availability where the third party is an agent or employee of the defendant asserting the defense, or where the third party and the defendant are in a contractual relationship of some sort.[26]

To date, the courts have been extremely reluctant to allow defendants, in actions to recover response costs, to successfully interpose the affirmative defense of third party action coupled with due care.[27] This reluctance in large part results from the heavy burden of proof defendants must meet to use the defense as drafted.[28]

This Comment examines the evolution of the third party/due care affirmative defense, beginning with its creation in the Congress and extending to treatment in the courts, both prior and subsequent to SARA. The Comment then takes a closer look at each requirement

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[21] 42 U.S.C. § 9607(b)(3) (1982). The exact wording allows the defense if the release was caused solely by:

> 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 . . . 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.

Id.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1048–49 (2d Cir. 1985); United States v. Ward, 618 F. Supp. 884, 897–98 (D.N.C. 1985); United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354 (D.N.M. 1983).

[28] *See* 42 U.S.C. § 9607(b)(3) (1982).

of the defense and its relation to the whole, including the influence of each element on the decision of the courts to treat the defense as if it did not exist. Finally, this Comment suggests a more lenient treatment of the defense that does not interfere with the congressional purposes of quick response to hazardous substance releases and cost allocation among the responsible parties to promote greater care in the handling of hazardous substances.

II. THE THIRD PARTY DEFENSE UNDER CERCLA AND SARA

A. CERCLA and Section 9607(b)(3)

CERCLA has relatively little legislative history.[29] Congress passed the Act quickly in the last days of the ninety-sixth Congress.[30] The usual rules were suspended so that no amendments could be added.[31] These unusual measures were employed to assure the swift passage of CERCLA in the little time left in the legislative session.[32] Both houses of Congress passed a bill along the lines of H.R. 7020 rather than S. 1480.[33] The Senate bill was, in the opinion of at least one observer, more stringent,[34] expressly imposing strict liability.[35] H.R. 7020 also originally included explicit language indicating strict liability.[36] S. 1480 excluded the third party/due care defense from the affirmative defenses available as well.[37] Nevertheless, the bill as finally passed included the defense.

The congressional record provides almost no insight into what Congress intended by allowing this affirmative defense while restricting it with such a demanding set of criteria.[38] The House report gives only a general statement of the purpose behind the requirements for use of the third party/due care defense.[39] The House committee indicated that its intent was to compel defendants who

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[29] *See* Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6119.

[34] *See supra* note 29 and accompanying text.

[35] S. 1480, § 4(a)(9), 96th Cong., 2d Sess., 126 CONG. REC. S14,940 (daily ed. Nov. 24, 1980).

[36] H.R. 7020, § 5(a), 96th Cong., 2d Sess., 126 CONG. REC. H9,459 (daily ed. Sept. 23, 1980).

[37] S. 1480, § 4(a), 96th Cong., 2d Sess., 126 CONG. REC. S14,940 (daily ed. Nov. 24, 1980).

[38] *See* Grad, *supra* note 29, at 1.

[39] H.R. REP. NO. 1016, 96th Cong., 2d Sess. 314, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6137.

sought to use the third party/due care defense to show that they had taken every precaution against a release of the hazardous waste that a similarly situated reasonable person would have taken under the circumstances.[40] This inference that a "reasonable and prudent person" standard is a test for liability is expressed as "due care by the defendant" in the statute.[41]

The Committee report also mentioned another test by which liability would be determined, the absence or presence of a causal or contributory nexus between the acts of the defendant and the conditions that required response action.[42] This causal nexus is significant because it indicates that Congress intended to impose liability only on those whose actions had some causal connection to hazardous waste releases.[43] This intention was, presumably, the motivating purpose behind inserting the third party/due care defense into CERCLA. Elimination of the third party/due care defense where there is a contractual relationship between the defendant and the third party, however, seems to contradict this stated purpose.

B. SARA's Impact on the Availability of the Section 9607(b)(3) Defense

In 1986, Congress revised CERCLA by passing the Superfund Amendments and Reauthorization Act, adding several billion dollars to the Superfund, amending many of the existing provisions, and adding new provisions.[44] SARA was drafted over a period of several years,[45] and so offers a great deal more legislative history than CERCLA. SARA, however, like CERCLA before it, was passed at the end of the congressional session.[46] This relatively short time for floor discussion once again limited time for debate or further amend-

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[40] *Id.*

[41] 42 U.S.C. § 9607(b)(3) (1982).

[42] H.R. REP. No. 1016, 96th Cong., 2d Sess. 33–34, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6136–37.

[43] *See* Ward v. Coleman, 423 F. Supp. 1352, 1357 (W.D. Okla. 1976). The *Ward* court stated that the purpose of strict liability in the context of FWPCA was to shift the accidental loss, as between non-negligent parties, to the owner or operator of the facility that caused harm. *Id.* This statement implies that there is some minimal connection to the hazardous waste release (in this case, water pollution), such as operation of the instrumentality that created the hazardous situation, which must be found for liability to attach.

[44] *See* Pub. L. No. 99-499, 100 Stat. 1613 (1986).

[45] Atkeson, Connors, Elrod, Goldberg, *An Annotated History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10360, 10366 (Dec. 1986).

[46] *See id.* at 10367. In this instance, the 99th Congress threatened to stay in session beyond its scheduled end to meet the potential challenge of a pocket veto by President Reagan. *Id.*

ment.[47] As with the passage of CERCLA, the purpose behind restricting the amendment process appears to have been to allow for quick passage of SARA in the short time before the end of the legislative session.[48] Also, as with the original CERCLA legislation, the bill that finally passed both houses of Congress, H.R. 2005, contained much the same language as the bill that originated in the House of Representatives, H.R. 2817.[49]

There has been some discussion of the primary public policy concerns which CERCLA was designed to address. The report of the House Energy and Commerce Committee on H.R. 2817, in discussing the need for amending CERCLA, indicates that SARA was intended "to provide EPA with appropriate flexibility and discretion in order to respond appropriately to each site . . . ."[50] The House Judiciary Committee also reported on H.R. 2817, and reiterated the CERCLA policy goals of providing for cleanup of hazardous substance releases and holding responsible parties liable for those costs.[51] The additional views of Representative Brown indicate that there was some unhappiness with the system of liability under CERCLA as amended by SARA. He commented that, "[n]o system of liability should be such that it actively discourages economic growth and job creation."[52] This statement suggests that there was at least some congressional sentiment favoring a less burdensome system of liability.

Very little of SARA has any impact on the availability of the third party/due care defense. The one area where SARA significantly changes the use of the defense is in the definition of contractual relationship.[53] Under SARA, the definition of contractual relationship no longer precludes the use of the third party/due care defense where the only contractual relationship was that the defendant purchased property on which hazardous wastes were previously dumped.[54] Though this change has important ramifications for the

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[47] *Id.* at 10369–70.

[48] *See id.* In the case of SARA, Congress faced a possible presidential veto, and thus needed to allow extra time for an override vote. *Id.* at 10369.

[49] *See* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2835.

[50] H.R. REP. NO. 253, 99th Cong., 2d Sess., pt. I, at 56, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2838.

[51] H.R. REP. NO. 253, 99th Cong., 2d Sess., pt. III, at 15, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3038.

[52] *Id.* at 61, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3067.

[53] Pub. L. No. 99-499 § 101(f)(35)(A), codified as 42 U.S.C.A. § 9601(35)(A) (West Supp. 1987).

[54] *Id.* The amendment reads as follows:

> 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

use of the third party/due care defense, SARA did not change the wording of section 9607(b)(3) itself.[55]

This new allowance of the third party/due care defense despite the existence of certain contractual relationships demonstrates that the question of just who is a responsible party is far from settled. One of CERCLA's primary policy goals is to make responsible parties pay for cleanup.[56] In the absence of a clear legislative statement defining "responsible party" with greater precision, the task of deciding how this policy goal should be met has fallen upon the courts.[57]

III. The Role of Due Care and the Contractual Relationship Constraint in Courts' Analysis

A. The Contractual Relationship Constraint

The guidelines Congress used in determining how to structure liability under CERCLA are not readily apparent. Representative Gore, in his remarks at the end of the Committee report, stated that, "[i]n addition to creating the fund, the other main goal of the legislation originally was to clarify and codify long-standing common law theories as they relate to liability for damages caused by hazardous waste disposal activities."[58] Representative Gore's comment suggests that, by looking at case law prior to the effective date of

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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 or she has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.

Id.

[55] *See* 42 U.S.C.A. § 9607(b)(3) (West 1983 & Supp. 1987).

[56] H.R. REP. No. 253, 99th Cong., 2d Sess., pt. III, at 15, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3038.

[57] *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1048–49 (2d Cir. 1985); United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354 (D.N.M. 1983). These cases demonstrate how the courts summarily reject assertion of the § 9607(b)(3) defense merely by finding a contractual relationship, without explaining how the action or omission is connected to that contractual relationship.

[58] H.R. Rep. No. 1016, 96th Cong., 2d Sess., pt. I, at 62 (additional views of Representative Gore), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6136–37.

CERCLA as passed in 1980, one can gain insight as to the congressional intent behind the liability and affirmative defense provisions that were included in CERCLA.[59] Relevant treatment of liability in the prior cases is apparently the basis for the derivation of the liability provisions of CERCLA.[60]

There are very few cases involving something akin to the third party/due care defense. *United States v. Price*[61] shows how one court dealt with the issues prior to the use of CERCLA.[62] In *Price*, the government sued former and current owners of property upon which wastes were dumped between 1970 and 1972, while the landfill was owned by Price.[63] Both defendants claimed that they were not "persons within the ambit of liability defined by the statute."[64]

In considering the liability of defendant Price, the former owner of the site, the district court rejected Price's claim that he was not actively contributing to the hazardous waste leakage.[65] The court found that the original improper storage coupled with a failure to correct that condition was actively contributing to the leakage occurring at the time of this action.[66]

Defendant A.G.A.'s (a real estate broker and the current owner) argument is closer to a true third party intervention defense, resting on the fact that all dumping of hazardous wastes occurred prior to A.G.A.'s acquisition of the property.[67] The court, however, found that allowing a third party defense in this case was inappropriate.[68] Despite the fact that A.G.A. neither actually placed the hazardous waste on the property, nor chose the original method of storage, A.G.A. was still liable for contributing to the release of the hazardous wastes because it was currently in control of the property and was not taking steps to address the hazard presented by these released wastes.[69] The court found that demonstrable indifference to the condition was the equivalent of active contribution to the continuing release of hazardous wastes.[70]

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[59] *See id.*

[60] *See* 42 U.S.C. § 9601(32) (1982). This definition of liability refers to prior cases decided under FWPCA.

[61] 523 F. Supp. 1055 (D.N.J. 1981) (action under RCRA).

[62] *Id.*

[63] *Id.* at 1057–58.

[64] *Id.* at 1072.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 1073.

[68] *Id.*

[69] *Id.*

[70] *Id.*

The *Price* court held that, because A.G.A. knew at the time of purchase that the property had been a landfill, and was aware of the presence of toxic chemicals by the summer of 1979, "[A.G.A.] had a duty to investigate the actual conditions that existed on the property . . . ."[71] In other words, A.G.A. was required to exercise some degree of due care. The court did not find A.G.A. liable solely on the basis of its contractual arrangement with the actual disposer of the wastes, but rather looked for and found a causal nexus in A.G.A.'s inaction and failure to investigate the conditions of the property adequately.[72]

Liability in cases based on a CERCLA action has been strict, in accord with the case law developed under the Federal Water Pollution Control Act and referred to in CERCLA section 9601(32).[73] Courts hearing CERCLA actions in which a party has asserted the third party/due care affirmative defense of section 9607(b)(3) have consistently rejected that defense.[74] These courts have also consistently based verdicts for plaintiffs primarily on the relationship of the defendants to the third parties identified in assertion of the third party/due care defense.[75]

For example, in *United States v. Argent Corp.*,[76] the owner–lessor defendant attempted to assert the third party/due care affirmative defense.[77] The court denied the lessor's motion for summary judgment, pointing to one of the criteria that set apart this defense as codified in CERCLA from the earlier approach.[78] CERCLA, at the time of the *Argent Corp.* decision, denied the defense, regardless of the presence or absence of due care, to any defendant who was in a contractual relationship with the third party whose act or omission solely caused the release of hazardous wastes.[79] Any contractual relationship between the defendant and the third party, whether direct or indirect, is a sufficient basis under CERCLA for denying

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[71] *Id.*

[72] *Id.*

[73] *See* United States v. Northeastern Pharmaceutical and Chem. Co., Inc., 579 F. Supp. 823, 843–44 (D. Mo. 1984); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (D. Ohio 1983); Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1140 n.4 (D. Pa. 1982).

[74] *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1048–49 (2d Cir. 1985); United States v. Ward, 618 F. Supp. 884, 897–98 (D.N.C. 1985); United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1983).

[75] *See Shore Realty*, 759 F.2d at 1048–49; *Ward*, 618 F. Supp. at 897; *Argent Corp.*, 21 Env't Rep. Cas. (BNA) at 1356.

[76] 21 Env't Rep. Cas. (BNA) 1354.

[77] *Id.* at 1356.

[78] *Id.*

[79] 42 U.S.C. § 9607(b)(3) (1982).

the third party/due care defense to a defendant.[80] In *Argent Corp.*, the contractual link between the defendant lessor and the lessee was the lease arrangement itself.[81] The court explained that the existence of the lease made it impossible for the lessor to show that the release was caused solely by a third party with whom the lessor did not share a contractual relationship.[82]

This explanation was not entirely accurate. What the defendant lessor could not show to satisfy section 9607(b)(3) was that it did not have a contractual relationship with the lessee, whose actions may have solely caused the release.[83] The court's explanation gives the impression that the question of sole causation was reached when in fact the result was reached wholly on the basis of the presence of a contractual relationship.[84]

The House of Representatives amended the original draft of section 9607(b)(3) to require that the third party whose actions or omissions form the basis of the assertion of the third party/due care defense not be contractually involved with the defendant.[85] This requirement eliminates many situations in which a defendant might have asserted the third party defense at common law. As *Argent Corp.* demonstrates, the defense is eliminated not only where the third party is party to a contract with the defendant pertaining to the storage or disposal of the waste, but also where the parties are related by any contract, such as a lease agreement.[86]

The same House amendment that foreclosed the possibility of asserting the third party defense in contractual relationships created a further requirement that the third party not be an agent or an employee of the defendant.[87] In *United States v. Ward*,[88] the generator of PCBs was charged for response costs for the cleanup of PCBs dumped on the road-side by a transporter hired to remove the wastes from the generator's facility.[89] The defendant-generator as-

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[80] *Argent Corp.*, 21 Env't Rep. Cas. (BNA) at 1356.

[81] *Id.* at 1355.

[82] *Id.* at 1356.

[83] *See* 42 U.S.C. § 9607(b)(3) (1982).

[84] *Argent Corp.*, 21 Env't. Rep. Cas. (BNA) at 1356.

[85] 126 CONG. REC. H9,461–63 (daily ed. Sept. 23, 1980). Congressman Gore submitted this amendment out of concern that the due care aspect would suggest a negligence standard. It has been suggested that the House bill (H.R. 7020) was being toughened in order to bring it closer to the bill being considered in the Senate at the time (S. 1480). *See supra* note 29 and accompanying text.

[86] *See Argent Corp.*, 21 Env't Rep. Cas. (BNA) at 1356.

[87] *See* 126 CONG. REC. H9,463 (daily ed. Sept. 23, 1980).

[88] 618 F. Supp. 884 (D.N.C. 1985).

[89] *Id.* at 891–92.

serted the third party/due care defense, but the court rejected that defense.[90] The court explained that the third party/due care defense was not available to the defendants because the transporter was either an agent or employee of the generator.[91] The *Ward* court felt it unnecessary to specify whether the relationship was agency or employment, or some other type of contractual relationship.[92]

Although not explicitly mentioned in *Ward*, the question of what precautions a generator must take against unscrupulous action by a transporter is important in a similar setting, where a transporter has dumped the wastes without the knowledge of the generator.[93] The defendant is responsible for taking precautions against only foreseeable actions by the third party.[94] If all indications are that an established transporter is responsible and reliable, and that reputation is verified through some reasonable inquiry, then the roadside dumping by the transporter is not a foreseeable action, and thus the generator should be able to use the defense.

Analysis of liability from the perspective of contractual relationships, then, has evolved from the pre-CERCLA treatment, in which courts simply increased the level of due care required of the defendant when there was a contractual relationship.[95] The current stage of this evolution uses the language of CERCLA to make the question of contractual relationship dispositive.[96] The courts do not address question of due care.[97]

B. Due Care Analysis

In addition to identification of a third party whose acts or omissions are the sole cause of the release, and who is not in a contractual relationship with the defendant, the defendant must also convince the court that the defendant exercised "due care," including reasonable precautions, in light of the danger presented by the hazardous substance and the possibility of acts or omissions by a third party causing a hazardous waste release.[98] The courts' analyses have stated

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[90] *Id.* at 897.
[91] *Id.*
[92] *Id.*
[93] *See* 42 U.S.C. § 9607(b)(3)(B) (1982).
[94] *Id.*
[95] *See* United States v. Price, 523 F. Supp. 1055, 1072–73 (D.N.J. 1981).
[96] *See* United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1355–56.
[97] *See id.*
[98] 42 U.S.C. § 9607(b)(3) (1982).

that failure to meet the due care requirement is a basis for denial of the third party/due care defense.[99]

In *United States v. Maryland Bank & Trust Co.*,[100] Maryland Bank & Trust Co. (MB&T) loaned money to the purchaser of a site where hazardous wastes had been dumped seven years earlier (1972–1973).[101] Later, MB&T bought the property at a foreclosure sale after the borrower defaulted in 1981.[102] MB&T asserted the third party/due care affirmative defense and the government sought partial summary judgment, claiming that MB&T could not meet its burden of proof.[103] The court denied summary judgment, placing importance on the issue of the defendant's notice of the presence of toxic wastes.[104] The court pointed out that several significant factual issues were in dispute, including whether MB&T knew of the presence of hazardous wastes, whether it should have been aware of the presence of hazardous wastes in light of the accessibility of the dump site, and whether hazardous wastes would be apparent from a mere visual inspection.[105] The opinion suggests that due care should be viewed in light of the particular knowledge of the defendant asserting the third party/due care defense.[106]

The *Maryland Bank & Trust* court, however, held only that there was a material issue of fact, not that the defense was available to this defendant.[107] Thus, while there is discussion of due care in light of the knowledge of the defendant, the court did not go so far as to find that due care was exercised in light of the knowledge of the defendant in this particular factual setting.

In contrast to the inconclusive discussion in *Maryland Bank & Trust*, the due care issue was at the center of the Second Circuit's consideration of the affirmative defense in *New York v. Shore Realty Corp.*[108] In *Shore Realty*, the defendant had purchased a tract of land on which leaking hazardous waste containers were present.[109] The defendant knew that the containers were on the site, and an

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[99] *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1049 (2d Cir. 1985); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 581–82 (D. Md. 1986).

[100] 632 F. Supp. 573 (D. Md. 1986).

[101] *Id.* at 575.

[102] *Id.*

[103] *Id.* at 576.

[104] *Id.* at 581.

[105] *Id.*

[106] *See id.*

[107] *Id.*

[108] 759 F.2d 1032, 1048 (2d Cir. 1985).

[109] *Id.* at 1038–39.

environmental consultant had apprised the defendant of the danger posed to the environment by their state of disrepair.[110] The court rejected the defendant's claim that it was not liable by virtue of the third party/due care defense.[111] In this case, the court seemed to place a greater emphasis on the need for the defendant to take positive precautionary steps to mitigate the harm caused by third party actions.[112] Despite the presence of a contractual relationship between the defendant and the third party whose actions were being regarded as the sole cause of the release, the court provided a full explanation of the basis of liability.[113] The court did not simply rely on the presence of a contract, but carefully pointed out how the defendant had failed in its duty to take precautions.[114]

By providing this explanation, the *Shore Realty* court did more than compel the liable party in this case to pay. The court also gave the impression that it considered all pertinent information and that the result was a comprehensive analysis of all elements of the third party/due care defense.[115] Another indirect benefit of this holding is that it specifically warned purchasers of real estate that they must take active steps to remedy any potential hazardous waste release on their property.

Given that SARA is a set of amendments that was absorbed into the body of CERCLA, and because it was so recently passed, relatively little case law has developed that treats the third party/due care defense "under SARA," as opposed to "under CERCLA." Recently decided cases nonetheless reflect some of the concerns expressed in SARA that the third party/due care defense was narrower than it should be.[116]

In one of the most recent cases to consider the issue, *Jersey City Redevelopment Authority v. PPG Industries*,[117] the court denied a current landowner's motion for summary judgment based on the third party/due care affirmative defense.[118] The court, for purposes

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[110] *Id.*

[111] *Id.* at 1048.

[112] *Id.* at 1048–49. Just what steps Shore Realty could have taken to satisfy the due care requirement is not stated. At least after Shore Realty took title and evicted the tenants who dumped the waste, the court felt some steps should have been taken to prevent further dumping by the tenant, which dumping apparently occurred. *Id.* at 1049.

[113] *Id.* at 1048–49.

[114] *Id.*

[115] *See id.*

[116] *See* Jersey City Redevelopment Auth. v. PPG Indus., 655 F. Supp. 1257 (D.N.J. 1987).

[117] *Id.*

[118] *Id.* at 1262.

of summary judgment, applied the SARA definition of contractual relationship, though it did not reach the question of whether the date of the amendments made them applicable to the case.[119] Using the CERCLA guidelines as amended by SARA, the court found the determinative issue to be whether the present owner knew or had reason to know that the property held hazardous contaminants.[120] The courts' "had-reason-to-know" language indicates a case by case consideration of what is required of the defendant, rather than a rigid requirement that the defendant take specific steps in every case.[121] This approach adds more flexibility to the due care test that courts may apply to assertions of the third party/due care defense.[122] This flexibility is significant in that it indicates that the courts would be willing to apply a flexible test to elements of a CERCLA action, such as distinguishing between third party actions that are directly connected to the contractual relationship and those that are not.[123]

In the cases where the standard of care has been determinative in the section 9607(b)(3) defense, the courts have approached the issue as a two-tiered test.[124] First, the court looks to the circumstances of the particular case to see what facts were known, or should reasonably have been known by the defendant.[125] Second, the court examines whether, in light of what a reasonably prudent defendant would know under the circumstances, the defendant in fact exercised the requisite due care.[126]

In cases where the defendant is the owner of a site on which the wastes in controversy are released, the courts have focused their analysis on whether the defendant knows, or should know, of the presence of hazardous substances.[127] In cases such as *United States v. Ward* involving generators, the court often decides the validity of the third party defense against the defendant because of the presence of a contractual relationship, and never reaches the first step of this two-tiered test.[128] Such a decision leaves potential defendants

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[119] *Id.* at 1261–62.

[120] *Id.* at 1262.

[121] *See id.*

[122] *Compare PPG Indus.*, 655 F. Supp. at 1262 *with* 42 U.S.C.A. § 9601(35)(B) (1983 & Supp. 1987).

[123] *See infra* text accompanying notes 151–53 for a further discussion.

[124] *See* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 581 (D. Md. 1986).

[125] *Id.*

[126] *See id.*; *see also* New York v. Shore Realty Corp., 759 F.2d 1032, 1049 (2d Cir. 1985).

[127] *Cf.* United States v. Ward, 618 F. Supp. 884, 897 (D.N.C. 1985) (the court decided this case on presence of contractual relationship only, and did not reach this analysis).

[128] *Id.* at 897.

to speculate about what the court would look at in determining due care on the part of a generator. In many, if not most cases, the presence of a contract is not the only reason for the imposition of liability, yet is the only reason discussed.[129] Verdicts for plaintiffs would have a sounder basis if all reasons for a verdict were discussed in full. This discussion would include factors that a defendant must consider before entering into any contract relating to the storage or disposal of hazardous wastes in order to meet the burden of due care. In addition to the presence of a contract, the defendant may have unreasonably ignored the potential threat of a hazardous waste release.[130] The court would render a more acceptable and complete decision by explaining this additional reason for denying the defense.

The factors determining whether the defendant exercised due care must depend on the particular facts of the case. If the release was the result of improper storage at the disposal facility, then the issue could well be whether the generator knew or should have known that the owner or operator of the facility was incompetent or otherwise likely to allow a release of the hazardous waste. If the release was the result of a transporter illegally dumping the hazardous waste while in transit, as in *Ward*, the question would be whether the generator had reason to know that the transporter might act in such a manner.[131]

Regarding the second tier of this test, the court in the *Maryland Bank & Trust* case pointed out that analysis of this aspect of the test is dependent on a finding of what the defendant should reasonably have known.[132] After noting that the record was incomplete as to what the defendant should reasonably have known, the court stated that, without detailed information, it could not decide whether MB&T exercised due care.[133] In contrast, the court in *New York v. Shore Realty Corp.* decided that the defendant site owner had failed to meet the standard of proper precaution, but gave no guidelines on what precautions should have been taken.[134] SARA's addition to the definition section of CERCLA provides some guidance as to what

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[129] *See Ward*, 618 F. Supp. at 887; United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1983).

[130] *See Shore Realty*, 759 F.2d at 1049.

[131] *See* H.R. REP. No. 1016, 96th Cong., 2d Sess. 34, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6137.

[132] *See* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 581–82 (D. Md. 1986).

[133] *Id.*

[134] New York v. Shore Realty Corp., 759 F.2d 1032, 1049 (2d Cir. 1985).

sort of care a subsequent owner of a disposal site must exercise.[135] Section 9601(35)(B), however, deals only with a very narrow area and leaves potential defendants in circumstances other than that of subsequent owner without much guidance in this area. Thus, the problem is that the contractual relationship restriction eclipses due care analysis in the courts' analysis.

IV. Suggested Changes in Treatment of the Third Party Defense Under CERCLA

The lack of a basis for determining what actions could be taken to ensure the exercise of due care is partly attributable to the manner in which the contractual relationship restriction is drafted and applied to the third party/due care defense.[136] CERCLA does not explain what constitutes due care.[137] That Congress in SARA chose to lift the contractual relationship restriction in the area of land purchases shows some congressional awareness that such a blanket constraint on the third party/due care defense was not a fair method for ensuring that response costs are recovered. The most glaring example of the inequitable outcomes that may result from an absolute denial of the third party/due care defense would be a generator-transporter relationship, as in *Ward*, but where the generator had no knowledge or reason to know that the transporter would illegally dump the hazardous wastes.[138] Holding the generator liable might be proper if the transporter hired had relatively little experience handling hazardous wastes, or had a past record of irresponsible behavior. Under such circumstances, a generator could foresee the possibility of mishandling the toxic waste. The contractual relationship restriction, however, prevents the court from considering the due care element.[139]

The courts' predeliction for addressing only half of the reason for denying use of the third party/due care defense is not necessarily

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[135] *See* 42 U.S.C.A. § 9601(35)(B) (West Supp. 1987). The requirements include reasonable inquiry consistent with good commercial or customary practice, any special knowledge of the defendant, and the obviousness of the presence of hazardous wastes.

[136] *See* United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1983). The statute makes lack of a contractual relationship a prerequisite for assertion of the third party/due care defense, but courts ignore language that the defense is precluded only if action is connected to the contract. *See id.* In *Argent Corp.*, the contractual relationship is a lease, and the connection to hazardous waste release is tenuous at best. *Id.*

[137] *See* 42 U.S.C. §§ 9601–9657 (1982 & Supp. III 1985) (amended 1986).

[138] United States v. Ward, 618 F. Supp. 884 (D.N.C. 1985).

[139] *See* 42 U.S.C. § 9607(b)(3) (1982) (amended 1986).

the sole fault of Congress in placing such a broad limit on the use of the third party/due care defense. The wording of the defense allows a defendant to assert that the release is solely caused by a third party other than "one whose act or omission occurs in connection with a contractual relationship . . . ."[140] As construed by the courts, this provision covers any action by a party involved in a contractual relationship, except as allowed under the new section 9601(35)(A).[141]

This construction of section 9607(b)(3) is not the only one possible. Construed more narrowly, this provision could be read to rule out assertion of the defense when the transporter, in removing the hazardous substance, accidentally causes a release.[142] The defense could be asserted, however, when the transporter acted in direct violation of the contract and simply dumped hazardous substances in a vacant lot.[143]

In the former situation, where the transporter is trying to transport hazardous wastes in compliance with the contract, the release occurred in carrying out terms of the contract. This sort of release is an act or omission "in connection with [the] contractual relationship."[144] In the latter situation, the action was completely outside of the contemplation of the parties in their contractual relationship. This construction, differentiating actions that are contemplated by the contracting parties from those that constitute intentional behavior by one party totally outside of the intent of the contractual arrangement, would simply allow the defense to pass a summary judgment motion in certain situations where the third party action would not reasonably be contemplated by a defendant entering into a contract. Application of this construction does not mean, however, that the defense would succeed if asserted. The due care, two-tier test must still be met.[145]

Another difficulty with the contractual relationship provision is its overlap with the exclusion of the defense for third parties who are either "an employee or agent of the defendant . . . ."[146] The treatment of such parties in the courts' consideration of the third party/due care defense shows that this overlap is something of a redun-

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[140] *Id.*

[141] *See Ward*, 618 F. Supp. at 897; United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1983).

[142] *See* 42 U.S.C. § 9607(b)(3) (1982) (amended 1986).

[143] *See id.*

[144] *See id.*

[145] *See supra* text accompanying notes 124–35.

[146] 42 U.S.C. § 9607(b)(3) (1982).

dancy.[147] The *Ward* court, for instance, stated that the third party/due care defense was not available to the defendants because the transporter was either an agent or employee of the defendants, or was in a contractual relationship with the defendants.[148] If an agency or employment relationship exists between the defendant and the third party whose actions are to be used as a defense, an underlying contractual relationship that bestowed the status of agent or employee on the third party must also be present.[149] Congress must therefore have had some other reason for including the employee or agent restriction in the language of section 9607(b)(3).

Unfortunately, nothing in the Committee reports comments on this particular clause. One possible explanation for the agent/employee rule is that Congress wanted to be especially sure that the third party/due care defense was not asserted when the release or threatened release was the result of action or omission by a party tied to the defendant by either an employment or agency relationship.

This explanation for the existence of a prohibition on the third party/due care defense when there are either employment/agency contracts or contracts generally would lead one to speculate that the general "contractual relationship" constraint is a "safety net." The "safety net" would prevent a defendant from arguing that the third party whose actions or omissions are to be interposed as a defense is not really an agent or employee, but rather is in some other contractual relationship with the defendant not covered by the statutory exclusion. Congress, for the first time, tacitly acknowledged that it cast the net too widely when it restricted the scope of the contractual relationship constraint in SARA.[150]

Allowing the defense in this singular contractual situation—the land sale contract—is significant, but it does not comprehensively address the problem of over-inclusiveness. This partial retraction of the "safety net" leaves a roadblock in the use of the defense in situations that are similar to land use contracts. One such similar situation is where courts hold owner-lessors liable when they are unaware of the lessees' illegal dumping of hazardous wastes on the site.[151]

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[147] *See* United States v. Ward, 618 F. Supp. 884, 897 (D.N.C. 1985).

[148] *Id.*

[149] *See* BLACK'S LAW DICTIONARY 58, 471 (5th ed. 1979) (definitions of agency and employ).

[150] *See* 42 U.S.C.A. § 9601(35)(A) (West Supp. 1987).

[151] *See* United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984)

Some change in the restriction of the third party/due care defense is thus in order. The process of amending the categories of persons liable begun by SARA should be carried further. Dropping the contractual relationship restriction would be extreme, because there are times when a party to a contract should be liable for all actions or omissions of the other party to the contract, such as respondeat superior in an employment arrangement.[152] Congress could take less extreme action by adopting language that distinguishes between actions that arise directly from the contractual relationship and actions that occur outside of the authority of the parties under the contract.

Adoption of such language would lead to a greater number of cases in which the parties litigated the issue of due care.[153] Adoption of such language might also lead the courts to state the requirements of due care in particular fact situations. Such a full examination of all the issues pertinent to the availability of the third party/due care defense would help avoid the triumph of form over substance in which a defendant is held liable without all the facts surrounding the question of causation being considered.[154]

This sort of complete analysis would have two immediate beneficial effects. One effect would be that such an analysis would put future defendants on notice as to the exact burden they must meet in terms of due care. Precise requirements may encourage voluntary compliance with the standard established, because the waste disposal industry would have a clearly understood standard with little ambiguity. The other effect would be that such an analysis would further the stated congressional purpose behind CERCLA of allocating the cost of hazardous waste cleanup to the responsible parties[155] by allowing innocent defendants to prove their innocence and forcing the government or private plaintiff to find the truly responsible parties.

Another purpose also deserves consideration, that of providing for prompt and effective cleanup of hazardous waste releases.[156] Certain

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[152] *See* United States v. Ward, 618 F. Supp. 884, 897 (D.N.C. 1985).

[153] *See* Jersey City Redevelopment Auth. v. PPG Indus., 655 F. Supp. 1257, 1262 (D.N.J. 1987).

[154] *See* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986); *Argent Corp.*, 21 Env't Rep. Cas. (BNA) 1354. In both of these cases there was no discussion of whether the release of the hazardous wastes was "in connection" with the contractual relationship. *See supra* note 42.

[155] H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. I, at 17, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120.

[156] *Id.*

cases will arise where the only party capable of paying a judgment for the cost of cleanup is the defendant seeking to assert the third party/due care defense. It is unthinkable that, in its zeal to make the Superfund self-supporting, Congress valued an easy recovery of expenditures above a desire to hold liable only those parties whose acts or omissions had some causal nexus to the release of hazardous wastes.[157] Accordingly, the proper allocation of liability should have priority over the desire to make the Superfund a self-sufficient response enterprise.

To take a contrary view goes against all principles of justice in both statutory and common law.[158] To say that any party going into an enterprise that puts that party in risk of violating CERCLA must take its chances that it may be held liable ignores the fact that such parties already pay for cleanups in paying the tax dollars that create the Superfund.[159] Structuring CERCLA so that only truly responsible parties must pay response costs in a civil action does not let all other parties off the hook.[160] Rather, such structuring means that, in those cases where the clean-up costs cannot be recovered through civil action, the entire industry must bear the cost through increased taxes to support the Superfund.

V. Conclusion

The steps Congress has taken to address the problem of hazardous waste releases in enacting CERCLA and SARA represent a substantial effort to remedy one of the most dangerous threats of our time to human health and the environment. The use of the Superfund ensures that resources are available for responding to hazardous waste releases. The system by which response costs are recovered through civil action provides the double benefit of replenishing the Superfund and allocating the burden to responsible parties in the hazardous waste related industries.

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[157] *See* H.R. REP. NO. 1016, 96th Cong., 2d Sess. 33–34, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6136–37.

[158] *See* Ward v. Coleman, 423 F. Supp. 1352, 1357 (W.D. Okla. 1976). The purpose of strict liability under FWPCA, and thus under CERCLA, is not to recover costs in the easiest manner possible, but rather to allocate the burden as between non-negligent parties, to the party who has chosen to be at risk. *Id.* This purpose has been changed under CERCLA so that, when several parties have put themselves at risk by working with hazardous wastes, the courts no longer worry about the proper allocation of the burden. They hold liable any party who can be held liable under a technical reading of the liability provisions.

[159] *See* Pub. L. No. 99-499, §§ 511–517, 100 Stat. 1760–74 (1986).

[160] *See id.*

CERCLA does allow a very limited set of affirmative defenses for situations where certain actions are completely beyond the control of the defendant. Of the three allowable affirmative defenses, only the third party/due care defense has restrictions placed upon it. While some form of restriction is necessary to prevent overuse of the third party/due care defense, courts, after the passage of CERCLA, went too far in use of the contractual relationship restriction. This use of form over substance led to a dearth of cases considering the due care element of the defense because the defense was essentially rejected before being considered. As a result, very little case law exists to guide parties involved with hazardous substances in exercising due care.

With the passage of SARA, Congress rolled back one corner of the blanket contractual relationship restriction in the area of real estate purchase agreements where all dumping of wastes occurred prior to the sale of the property. There was also some language in section 9601(35)(A) discussing due care in the area of real estate transactions. This change in the law should encourage more courts to reach the question of due care.

More change, however, is needed. Congress needs to further refine the scope of the contractual relationship restriction. Actions taken by the parties in a contractual relationship that do not foreseeably arise from that contract should still be a basis for asserting the third party/due care defense. To deny the defense when based on such an act or omission is to create a causation fiction on the basis of any agreement between the parties, regardless of its content.

Absent a legislative redrafting, the courts need to take a closer look at the language of section 9607(b)(3) to see that not all actions or omissions by a third party in a contractual relationship with a defendant are actions or omissions connected to the contract. A looser reading of section 9607(b)(3) would allow courts to reach the question of due care and to determine which defendants are actually in the causal chain of a hazardous waste release, and which defendants should not be held liable for response costs.