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TOXIC CLOUDS ON TITLES: HAZARDOUS WASTE AND THE DOCTRINE OF MARKETABLE TITLE

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I. INTRODUCTION

Suppose a purchaser enters a purchase and sale (P & S) agreement with a seller for real property.[1] The purchaser puts down a substantial deposit on the property. The P & S agreement includes no special provisions protecting the purchaser from risks arising from the presence of hazardous waste on the property. The purchaser then inspects the property and discovers in the back yard a pool of purple ooze that, after testing, turns out to be a highly toxic chemical. Then, during the title search, the purchaser discovers that, fifty years ago, the property was the site of an industrial facility called "Disposers R Us" and is now contaminated. This investigation alerts the purchaser that the property eventually will be the subject of some sort of governmental cleanup. This situation is not improbable and raises many questions. Will the purchaser have to perform the P & S agreement? If yes, for what will the purchaser be liable? Are any affirmative defenses to liability available to the purchaser?

Increased concern over the environment, and the subsequent enactment of environmental protection laws in the past decade, have affected real estate transactions.[2] Both federal and state legislatures have enacted statutes to facilitate and promote prompt cleanup of

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[1] For the purpose of this Comment, a purchase and sale (P & S) agreement is a contract into which a purchaser and a seller enter for the purchase of real property, and that the purchaser must perform unless a defect in title is found. *See* MILTON R. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY 1–6 (4th ed. 1984).

[2] *See* Robert S. Bozarth, *Environmental Liens and Title Insurance*, 23 U. RICH. L. REV. 305, 305, 313–24 (1989); Jeff Civins, *Environmental Law Concerns in Real Estate Transactions*, 43 SW. L.J. 819, 819 (1990).

contaminated property.[3] An unfortunate result of this legislation, however, is that liability for the staggering costs of cleanup[4] can fall upon a current innocent landowner instead of the responsible parties.[5]

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[6] for example, is the federal statute aimed at facilitating cleanup of contaminated sites.[7] CERCLA grants the United States Environmental Protection Agency (EPA) the responsibility and resources to identify and clean up hazardous waste sites.[8] The EPA then may attach a lien to the property in order to receive reimbursement for the monies it expends in cleanup costs.[9] Courts uniformly have imposed a strict liability standard on current owners for the amount of the CERCLA lien.[10]

Although a seller is required to convey marketable title at the time of closing,[11] courts currently hold that hazardous waste contamination of a property does not affect the marketability of the property's title.[12] The doctrine of marketable title traditionally has defined a "marketable title" to be a title to property that a reasonably prudent person would accept.[13] Under existing law, a purchaser cannot void a P & S agreement after discovering hazardous waste

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[3] *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act, (CERCLA) 42 U.S.C. §§ 9601–9675 (1988); CONN. GEN. STAT. ANN. § 22a-134 to 22a-134a (West Supp. 1990); ILL. ANN. STAT. ch. 111 1/2, paras. 1021–1039(g) (Smith-Hurd 1988 & Supp. 1990); N.J. STAT. ANN. §§ 13:1k-6 to 13:1k-32 (West Supp. 1990); *see infra* notes 162–69 and accompanying text for a discussion of the New Jersey statute.

[4] The United States Environmental Protection Agency (EPA) has predicted that the average cost of cleanup is about $25 million per site for average sites and up to $100 billion for more troublesome sites. Amal K. Naj, *See No Evil: Can $100 Billion Have No Material Effect on Balance Sheets*, WALL ST. J., May 11, 1988, at 1, col. 6. These figures do not include sites identified by state environmental agencies. The EPA had identified about 27,000 contaminated sites by 1988. *Id.*

[5] For the purposes of this Comment, "current innocent landowners" and "innocent purchasers" are the owners or purchasers of contaminated property who did not participate in the generation or discharge of hazardous waste, and who took title to the contaminated property without actual knowledge of the contamination.

[6] 42 U.S.C. §§ 9601–9675 (1988).

[7] *Id.* § 9604.

[8] *Id.* §§ 9604–9613.

[9] *Id.* § 9607(l).

[10] *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1277 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986).

[11] *See infra* notes 34–39 and accompanying text.

[12] *See infra* notes 170–200 and accompanying text.

[13] *See infra* notes 35–37 and accompanying text.

contamination on property, unless the contract specifically includes contingency clauses that address environmental risks.[14] A purchaser who attempts to void a P & S agreement by arguing that contamination of property renders a seller unable to convey marketable title to the property will be forced to perform the P & S agreement and take title to the property.[15] The purchaser then will be strictly liable as a current owner for any cleanup costs incurred in the future.[16]

In an effort to transfer cleanup costs to title insurance carriers, a few current innocent landowners have argued that the presence of hazardous waste renders title to the property unmarketable.[17] Similarly, one purchaser has attempted to void a P & S agreement by arguing that the seller was unable to convey marketable title.[18] The courts have rejected these arguments and consistently have held that the presence of hazardous waste on property does not rise to the level of a defect, encumbrance, or cloud on title.[19]

The courts' reasoning in rejecting this idea is flawed for several reasons. Basically, the courts that have addressed this issue have applied a limited and outdated definition of marketable title. Traditionally, the hazard of litigation arising, for example, from the presence of an adverse possessor occupying property, an easement, or an encroachment on property, has rendered title unmarketable.[20] Furthermore, a hazard of litigation has made title unmarketable because it interferes with an owner's quiet enjoyment and use of the property.[21] Property contaminated with hazardous waste subjects a purchaser to an imminent hazard of litigation. Moreover, the threat of litigation due to property contamination and the contamination itself interfere with quiet enjoyment and use of the property. A comprehensive and expanded application of the marketable title doctrine would allow courts to recognize that contaminated property bears unmarketable title.

The rising numbers of sites contaminated with hazardous waste has rendered the traditional doctrine of marketable title obsolete. When an innocent purchaser discovers the presence of hazardous

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[14] *See infra* notes 186–89 and accompanying text.

[15] *See infra* notes 37–41 and accompanying text.

[16] *See infra* notes 104–09 and accompanying text.

[17] *See infra* notes 170–200 and accompanying text.

[18] *In re* Schenk Tours, Inc., 69 B.R. 906, 914 (Bankr. E.D.N.Y.), *aff'd*, 75 B.R. 249 (E.D.N.Y. 1987).

[19] *See infra* notes 170–204 and accompanying text.

[20] *See infra* notes 50–63 and accompanying text.

[21] *See infra* notes 56–63 and accompanying text.

waste on its property, courts should allow such a purchaser to void its P & S agreement based on an expanded doctrine of marketable title. By declaring the P & S agreement void, a court would accomplish the goals of hazardous waste statutes by requiring the current owner to clean up the property prior to sale and by directing liability to responsible parties. Allowing innocent purchasers to void P & S agreements would not hinder cleanups. Furthermore, application of an expanded doctrine of marketable title is fair and just in light of today's hazardous waste problems. Parties that are not responsible for the contamination would not be held liable for the cleanup costs.

Returning to the hypothetical scenario depicted above, the hypothetical purchaser did not include any environmental risk contingency clauses in its P & S agreement. These contingency clauses would have allowed the purchaser to void the P & S agreement when it discovered the contamination. If the purchaser could void the P & S agreement, it would not become an owner and would not incur liability for cleanup. Absent any express contingency clause, however, the law enforces the P & S agreement, and the purchaser is obligated to accept the title as marketable.[22] Not until the EPA or a state environmental agency incurs response costs for a cleanup of the property and files a lien on the property[23] will courts hold title to be unmarketable.[24] At this point, the purchaser will be strictly, jointly, and severally liable for the amount expended.[25]

The hypothetical purchaser, in all likelihood, would be unable to utilize any of the statutory defenses included in CERCLA because of the contractual nature of the conveyance.[26] Furthermore, the purchaser would have taken title with notice of the contamination as the result of his inspection of the property, or through the record notice furnished by the information that a predecessor in title was "Disposers R Us."[27] This notice of the contamination precludes the purchaser from utilizing the innocent purchaser defense,[28] because the purchaser knew or had reason to know of the contamination.[29]

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[22] *See infra* notes 170–203 and accompanying text.

[23] *See infra* note 95 and accompanying text.

[24] *E.g.*, South Shore Bank v. Stewart Title Guar. Co., 688 F. Supp. 803, 805–06 (D. Mass.), *aff'd mem.*, 867 F.2d 607 (1st Cir. 1988); Chicago Title Ins. Co. v. Kumar, 24 Mass. App. Ct. 53, 56, 506 N.E.2d 154, 156 (App. Ct. 1987).

[25] *See infra* notes 105–09 and accompanying text.

[26] *See infra* notes 110–18 and accompanying text.

[27] *See infra* notes 119–32 and accompanying text.

[28] *See infra* notes 119–25 and accompanying text.

[29] *Id.*; *see, e.g.*, Wickland Oil Terminals v. Asarco, Inc., 19 Envtl. L. Rep. (Envtl. L. Inst.) 20,855, 20,857 (N.D. Cal. Feb. 23, 1988).

The purchaser now is subject to protracted litigation, either to avoid strict liability for any response costs or to obtain contribution from other responsible parties.[30]

If the purchaser is lucky, the property is subject to a state rescission or environmental transfer requirement statute.[31] Even in states with environmental transfer requirement statutes, however, purchasers of residential real estate are not protected, because these statutes do not cover residential property.[32] In these situations, the hypothetical purchaser still is liable for future cleanup costs.[33]

Section II of this Comment discusses the traditional doctrine of marketable title. Section III explores the statutory framework of CERCLA and state hazardous waste cleanup statutes and describes cases that have addressed the issue of hazardous waste and marketable title. Section IV returns to the hypothetical purchaser scenario to analyze the effect that CERCLA and the case law would have on that transaction, and discusses protective devices currently available to real estate purchasers. Section IV also proposes that federal and state legislatures adopt title transfer requirement statutes to protect innocent purchasers from liability for cleanup costs. Section V concludes that courts should expand the traditional doctrine of marketable title to include the effects of hazardous waste contamination.

II. COMMON LAW DOCTRINES AFFECTING TITLE TRANSFERS

A. The Doctrine of Marketable Title

In the absence of an express agreement to the contrary, a purchaser of real estate is entitled to marketable title.[34] Marketability is a characteristic of title that is difficult to define with precision and has no universally accepted meaning.[35] The most commonly accepted definition of "marketable title" is a title that a reasonably prudent person would accept.[36] A reasonably prudent purchaser presumably

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[30] *See* Lauren S. Rikleen, *Negotiating Superfund Settlement Agreements*, 10 B.C. ENVTL. AFF. L. REV. 697, 705 (1983).

[31] *See infra* notes 162–66 and accompanying text.

[32] N.J. STAT. ANN. § 13:1k-8(f) (West Supp. 1990); *see* Wendy E. Wagner, *Liability for Hazardous Waste Cleanup: An Examination of New Jersey's Approach*, 13 HARV. ENVTL. L. REV. 245, 270–71, 271 n.107 (1989).

[33] *See infra* notes 163–64 and accompanying text.

[34] FRIEDMAN, *supra* note 1, at 318.

[35] PAUL E. BASYE, CLEARING LAND TITLES § 371, at 741 (2d ed. 1970); *see* JOHN M. CARTWRIGHT, GLOSSARY OF REAL ESTATE LAW 567 (1972).

[36] BASYE, *supra* note 35, § 371, at 741; CARTWRIGHT, *supra* note 35, at 567.

accepts title only if it is free from all reasonable doubt, in law or fact, as to its validity.[37] A purchaser has the right to insist that a seller deliver a title at the conveyance that is so clear of defects and encumbrances that there is no reasonable doubt as to the title's validity and no reasonable apprehension of litigation in connection with its validity.[38] This right is granted by law, and the terms of the P & S agreement need not expressly guarantee it.[39] Once the conveyance is complete, a purchaser must look to any covenants in the deed for remedies arising from a defect in title.[40] Title need not be perfect, but only need be free from reasonable objections.[41]

Common defects that may render a title unmarketable include name variations of grantors and grantees in the chain of title; time lapses in the chain of title; outstanding mortgages; defectively executed instruments in the chain of title; unrecorded leases or adverse possession claims; outstanding reverter rights; and encumbrances that the seller cannot or will not remove.[42]

Marketable title, however, requires more than good record title.[43] Record title is the chain of title evidenced by the line of recorded documents that lead to the seller.[44] Good record title requires that each link in the chain be on record and not based on extrinsic evidence.[45] While record title is an extremely useful tool for determining the marketability of a title, marketable title also depends upon a number of facts regarding the validity and effectiveness of the title and its transfer both within and outside of the record.[46] For example, a title that appears to be good on the record, but is actually subject to a nonadjudicated claim by an adverse possessor, would be un-

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[37] *E.g.*, Burkhead v. Farlow, 266 N.C. 595, 598, 146 S.E.2d 802, 805 (1966).

[38] *See* Annotation, *Marketable Title*, 57 A.L.R. 1253, 1261 (1928).

[39] *Id.*

[40] *See* Annotation, *Remedy of Grantee in Possession Under Deed with Covenants of Title, Independently of Those Covenants Where the Grantor's Title Is Defective*, 50 A.L.R. 180, 183 (1927).

[41] Norwegian Evangelical Free Church v. Milhauser, 252 N.Y. 186, 190, 169 N.E. 134, 135, *reh'g denied*, 252 N.Y. 617, 170 N.E. 165 (1929). "The law assures to a buyer a title free from reasonable doubt, but not from every doubt . . . . If 'the only defect in the title' is 'a very remote and improbable contingency,' a 'slender possibility only,' a conveyance will be decreed." *Id*; see also BASYE, *supra* note 35, § 371, at 742; CARTWRIGHT, *supra* note 35, at 567; Annotation, *Marketable Title*, 57 A.L.R. 1253, 1288–96 (1928).

[42] CHESTER H. SMITH & RALPH E. BOYER, SURVEY OF THE LAW OF PROPERTY 257 (2d ed. 1971).

[43] *See* CARTWRIGHT, *supra* note 35, at 567; FRIEDMAN, *supra* note 1, § 3.2, at 204–14; Annotation, *Marketable Title*, 57 A.L.R. 1253, 1324–31 (1928).

[44] *See* Annotation, *Marketable Title*, 57 A.L.R. 1253, 1324–31 (1928).

[45] *Id.*

[46] *See* CARTWRIGHT, *supra* note 35, at 567.

marketable even though it satisfied the requirements of good record title.[47] A title acquired through adverse possession is outside the record and is not based on an instrument that the adverse possessor can record in the chain of deeds.[48] Thus, the definition of marketable title encompasses more than what is discoverable from the recorded chain of deeds.[49]

A reasonable hazard of litigation also renders a title unmarketable.[50] Litigation can arise when a third party asserts that it has an interest or right to the property.[51] Thus, any significant encumbrance can render a title unmarketable.[52] An encumbrance on title is a burden or charge on real property, or an outstanding right of a third party that interferes with conveyance by subjecting land to an obligation.[53] For example, any easement for private rights-of-way, public sewers running through property and serving other properties, subsurface water drains, or pipelines render title unmarketable.[54] An unauthorized extension of a structure erected on one property onto adjacent property, called an encroachment, also renders a title unmarketable.[55]

In one case, purchasers had acquired land that had no means of access recorded in the chain of title.[56] The court held that the title to the property was unmarketable, because at the time of conveyance, the purchasers were subject to the hazard of litigation regarding access to the property.[57] Although purchasers later successfully sued their neighbor to obtain an easement by necessity,[58] the court

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[47] *See* BASYE, *supra* note 35, § 52, at 178.

[48] *Id.*

[49] CARTWRIGHT, *supra* note 35, at 567.

[50] FRIEDMAN, *supra* note 1, § 4.1, at 314.

[51] *Id.*

[52] BASYE, *supra* note 35, at 742.

[53] BLACK'S LAW DICTIONARY 527 (6th ed. 1990) (examples include undischarged mortgages, judgment liens, mechanic's liens, leases, security interests, easements, restrictive covenants, and accrued and unpaid taxes).

[54] FRIEDMAN, *supra* note 1, §§ 4.9(a)–(j), at 399–408.

[55] *See* Bethurem v. Hammett, 736 P.2d 1128, 1132–34 (Wyo. 1987); FRIEDMAN, *supra* note 1, § 4.15, at 574.

[56] Myerberg, Sawyer & Rue, P.A. v. Agee, 51 Md. App. 711, 713, 446 A.2d 69, 70 (Ct. Spec. App. 1982).

[57] *Id.* at 717, 446 A.2d at 72 (parties stipulated that title to inaccessible property was unmarketable). *But see* Sinks v. Karleskint, 130 Ill. App. 3d 527, 531, 474 N.E.2d 767, 771 (App. Ct. 1985) (limiting *Myerberg* to instances where buyer never sees property and parties agree that title to inaccessible property is unmarketable).

[58] *Myerberg*, 51 Md. App. at 713, 446 A.2d at 70–71. An easement by necessity is an easement indispensable to the enjoyment of the dominant estate. BLACK'S LAW DICTIONARY 510 (6th ed. 1990).

allowed purchasers to recover damages from the law firm hired to perform the title search.[59] The court stated that marketability was not concerned with the results of litigation, only with its likelihood.[60] Similarly, title to property obtained through adverse possession is marketable only if it is clearly proved and free of doubt that the facts will serve as a proper foundation for a decree for specific performance in any possible future litigation.[61] Courts generally have held that these conditions present a reasonable hazard of litigation rendering the title unmarketable.[62] Marketable title, therefore, is one free from liens or encumbrances that give rise to a reasonable hazard of litigation and impinge upon an owner's quiet and peaceable enjoyment of the property.[63]

Another essential element of marketable title is that title must be defensible and saleable on the record as well as in fact.[64] The title must be readily transferable in the market.[65] This does not mean that, if the property is found to be valueless, title will be unmarketable.[66] For example, if property purchased in a subdivision that was thought to be valuable because of future developments is undevelopable, the property may be unsaleable, even though the property's title is marketable.[67] The market value of the land is independent of the condition of the title.[68] Therefore, a purchaser may be forced to take title held to be marketable, even if the land itself is without value.[69] Marketable title is one that a reasonable person—well-informed as to the facts and their legal bearings, and willing and ready to perform the contract, in the exercise of ordinary business prudence—would be willing to accept or compelled to accept by a court in an action for specific performance.[70]

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[59] *Myerberg*, 51 Md. App. at 726, 446 A.2d at 77.

[60] *Id.* at 717, 446 A.2d at 72.

[61] *Id.* at 716–17, 446 A.2d at 72; *see* FRIEDMAN, *supra* note 1, § 4.3, at 337.

[62] *Myerberg*, 51 Md. App. at 716–17, 446 A.2d at 71–72; *see* FRIEDMAN, *supra* note 1, § 4.3, at 337.

[63] FRIEDMAN, *supra* note 1, at 342.

[64] *See* 77 AM. JUR. 2D *Vendor & Purchaser* § 131, at 312–14 (1975); Annotation, *Marketable Title*, 57 A.L.R. 1253, 1285–86 (1928).

[65] *See generally* Annotation, *Marketable Title*, 57 A.L.R. 1253, 1286–88 (1928).

[66] *See* Hocking v. Title Ins. & Trust Co., 37 Cal.2d 644, 651, 234 P.2d 625, 629 (1951) (title insurance coverage inapplicable to showing that condition of land defective).

[67] *See id.*; Chicago Title Ins. Co. v. Kumar, 24 Mass. App. Ct. 53, 57, 506 N.E.2d 154, 157 (App. Ct. 1987).

[68] *See Hocking*, 37 Cal.2d at 651, 234 P.2d at 629; *Kumar*, 24 Mass. App. Ct. at 57, 506 N.E.2d at 157.

[69] *Hocking*, 37 Cal.2d at 651, 234 P.2d at 629.

[70] CARTWRIGHT, *supra* note 35, at 567.

B. Express Warranties

Once a conveyance occurs, a purchaser must look to the express warranties contained in the deed for a remedy to any defects subsequently found in the title.[71] A deed without warranties places the burden on the purchaser to investigate and be satisfied with the status of the title, and precludes all of the purchaser's future claims against the seller.[72] Any previous warranties made in the P & S agreement are merged into the deed.[73] This doctrine is commonly known as merger by deed.[74]

The deed is held to represent the full agreement of the parties and excludes all other warranties or liabilities that are not contained therein.[75] A general warranty deed provides a purchaser with protection from future litigation regarding the validity of the title.[76] The seller warrants that the title is marketable, and that seller will defend the purchaser if litigation arises later.[77] Similarly, a purchaser may be able to require express representations and warranties regarding the condition of the land.[78] If any of these warranties later are breached, the purchaser has a cause of action against the seller.[79]

III. HAZARDOUS WASTE AND STATUTORY LIENS ON TITLES

A. CERCLA Liability

The passage of CERCLA[80] in 1980 and its amendment by the Superfund Amendments and Reauthorization Act (SARA)[81] in 1986 have had a substantial impact on property transfers. CERCLA authorizes the EPA to attach liens on contaminated property to guarantee reimbursement for any hazardous waste cleanup costs that the

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[71] *See* FRIEDMAN, *supra* note 1, § 7.2, at 781–95; SMITH & BOYER, *supra* note 42, at 256–57.

[72] FRIEDMAN, *supra* note 1, § 7.2, at 781.

[73] *See* SMITH & BOYER, *supra* note 42, at 257.

[74] *See* FRIEDMAN, *supra* note 1, § 7.1, at 783.

[75] RESTATEMENT (SECOND) OF TORTS § 352 cmt. a (1965).

[76] FRIEDMAN, *supra* note 1, § 7.1, at 771.

[77] *See id.*

[78] *See id.* at 785–92; *see also infra* notes 215–21 and accompanying text.

[79] FRIEDMAN, *supra* note 1, § 7.2, at 781–95.

[80] Pub. L. No. 96-510, 94 Stat. 2767 (1980) (current version at 42 U.S.C. §§ 9601–9675 (1988)).

[81] Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified primarily at 42 U.S.C. §§ 9601–9675 (1988)).

government incurs.[82] Once filed, these liens, by definition, render the property's title unmarketable.[83]

A lame-duck Congress enacted CERCLA at the eleventh hour of Jimmy Carter's presidency as a response to growing concern over toxic waste disposal sites.[84] Because of Congress's haste, many of CERCLA's provisions are vague and confusing.[85] The statute's legislative history has offered courts little help in their efforts to define and achieve CERCLA's goals.[86] As a result, courts have struggled to interpret CERCLA's provisions consistently with its broad purposes.[87] They have, however, agreed that CERCLA is designed to facilitate prompt cleanup of hazardous waste sites,[88] and that another of its primary goals is to place the financial burden of cleanup on those responsible for the contamination of property.[89]

CERCLA, as amended by SARA, employs three mechanisms to achieve these goals.[90] It grants power to the federal government to remove threats that hazardous waste sources pose to the environment or to public health.[91] CERCLA also establishes the Hazardous Substance Response Trust Fund, or Superfund, to finance the costs of governmental cleanup efforts.[92] The statute authorizes the President to use money allocated to the Superfund to pay for the EPA's costs incurred by identifying, assessing, investigating, and enforcing hazardous waste contamination abatement actions.[93] CERCLA also

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[82] 42 U.S.C. § 9607(l) (1988).

[83] *See supra* notes 42–63 and accompanying text.

[84] United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 548 (W.D.N.Y. 1988); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1276 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988); Diana L. McDavid, Note, *Liabilities of the Innocent Current Owner of Toxic Property Under CERCLA*, 23 U. RICH. L. REV. 403, 403 (1989).

[85] *See, e.g.*, *Artesian*, 659 F. Supp. at 1277; United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986); McDavid, *supra* note 84, at 403.

[86] *E.g.*, *Artesian*, 659 F. Supp. at 1277 n.7 (committee reports are of little value, because CERCLA as enacted differs substantially from earlier House and Senate bills); *Maryland Bank & Trust Co.*, 632 F. Supp. at 578 (CERCLA was hastily patched together and unclear); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1142 (E.D. Pa. 1982) (legislative history does little to clarify questions arising under CERCLA); McDavid, *supra* note 84, at 403 n.6.

[87] *See Artesian*, 659 F. Supp. at 1277; *Maryland Bank & Trust Co.*, 632 F. Supp. at 578.

[88] *Artesian*, 659 F. Supp. at 1276; *Stepan Chem. Co.*, 544 F. Supp. at 1142–43.

[89] United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 548 (W.D.N.Y. 1988); *Artesian*, 659 F. Supp. at 1276; *Stepan Chem. Co.*, 544 F. Supp. at 1142–43.

[90] *Hooker Chems.*, 680 F. Supp. at 548.

[91] 42 U.S.C. § 9604 (1988).

[92] 26 U.S.C. § 9507 (1988); *see* 42 U.S.C. § 9611 (1988).

[93] 42 U.S.C. § 9611 (1988).

provides that the federal government, state governments, and private parties may sue those responsible for the generation, transportation, or disposal of hazardous substances in order to recover amounts spent on cleanup.[94] Finally, as noted above, CERCLA permits the EPA to file a lien against the contaminated property to recover from liable parties Superfund monies used to clean up the site.[95]

The CERCLA liability scheme ostensibly is aimed at ensuring that those responsible for the release or threatened release of hazardous substances pay for the response costs and for damage to the environment.[96] CERCLA liability accrues when there has been a "release"[97] or threatened release of a hazardous substance at a "facility,"[98] and a party has incurred response costs.[99] CERCLA defines

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[94] *Id.* §§ 9607(a), 9613(f)(1).

[95] *Id.* § 9607(l)(1). The federal lien provision provides for a lien in favor of the United States on all real property that is both owned by a person that is liable to the United States for costs and damages and is the object of remedial action. *Id.* This lien essentially functions as a judgment lien. *Id.* A judgment lien is "[a] lien binding the real estate of a judgment debtor, in favor of the holder of the judgment, and giving the latter a right to levy on the property for the satisfaction of his judgment to the exclusion of other adverse interests subsequent to the judgment." BLACK'S LAW DICTIONARY 845 (6th ed. 1990).

[96] *See* 42 U.S.C. § 9607(a) (1988); United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 548–49 (W.D.N.Y. 1988); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1276 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988); Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1143 (E.D. Pa. 1982).

[97] 42 U.S.C. § 9601(22) (1988). A "release" includes "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment . . . ." *Id.*

[98] *Id.* § 9601(9) (1988). The term "facility" is defined as

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or
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> (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located, but does not include any consumer product in consumer use or any vessel.

Id.; *see, e.g.*, T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 708 (D.N.J. 1988) ("facility" is broadly defined to include almost any place into which a hazardous substance could find its way).

[99] 42 U.S.C. § 9607(a)(4)(A)–(C). Recoverable response costs are

> all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan; [and] . . . damages for injury to, destruction of, or loss of natural resources . . . .

Id. § 9607(a). CERCLA defines removal actions as "the cleanup or removal of released hazardous substances from the environment," including actions to monitor, assess, evaluate,

"facility" broadly enough to encompass any area in which a hazardous substance is found.[100]

A defendant in a CERCLA action must be a potentially responsible party (PRP).[101] CERCLA defines PRPs as current owners or operators of a facility, previous owners or operators of a facility, generators of hazardous substances, and transporters of hazardous substances.[102] Courts consistently have declared that a current owner of contaminated property is a PRP, regardless of whether the owner participated in the generation, transportation, or storage of a hazardous substance.[103]

Although CERCLA does not provide an express liability standard,[104] courts uniformly have imposed a strict liability standard when adjudging liability for response costs.[105] Courts have found

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and minimize the release or threat of release of hazardous substances. *Id.* § 9601(23). Remedial actions are "those actions consistent with permanent remedy taken instead of or in addition to removal actions . . . , to prevent or minimize . . . danger to present or future public health or welfare or the environment." *Id.* § 9601(24). Only the United States or a state government can bring an action for natural resources damages. *Id.* § 9607(f)(1).

[100] *Id.* § 9601(9); *see supra* note 98.

[101] 42 U.S.C. § 9607(a). Covered persons are

> (1) the owner and operator of . . . a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who . . . arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person . . ., and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . or sites selected by such person . . . .

Id.

[102] *See id.*

[103] *See, e.g.*, N.L. Indus., Inc. v. Kaplan, 792 F.2d 896, 897–98 (9th Cir. 1986) (partnership liable for approximately $1.2 million in cleanup costs after learning that purchased land was contaminated); T & E Indus., Inc. v. Safety Light Corp. 680 F. Supp. 696, 708 (D.N.J. 1988) (current owner liable for cleanup costs of land contaminated by radium tailings that company, which had ceased manufacture years earlier, had left); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1139 (E.D.Pa. 1982), *reconsideration denied*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,007, 20,009 (E.D. Pa. Aug. 23, 1983) (current owner of municipal landfill liable for estimated $10 million cleanup costs when employees accepted bribes to permit hazardous waste disposal). *But see* United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1350 (D. Idaho 1989) (children and wife of property shareholder exempt from liability for cleanup when ownership shares received after contamination by gift or devise).

[104] CERCLA provides that liability is to be construed as the standard of liability under the Clean Water Act. 42 U.S.C. § 9601(32) (1988). The Clean Water Act provides for the liability of owners and operators to the government for cleanup costs. 33 U.S.C. § 1321 (1988). Courts have held the standard of liability under § 1321 to be strict liability. *See, e.g.*, Stewart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979).

[105] *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 576 (D. Md. 1986); *Stepan Chem. Co.*, 544 F. Supp. at 1139.

clear congressional intent to impose a standard of liability regardless of fault in Congress's incorporation of the Clean Water Act's strict liability standard into CERCLA's provisions.[106] As a result, they have held current owners strictly, jointly, and severally liable for response costs regardless of whether such a current owner owned or operated a facility when hazardous substances were disposed or released there.[107] Based on this strict liability standard, innocent purchasers stand just as responsible as the actual generator and disposer of the hazardous substance.[108] In other words, current innocent landowners of contaminated property may be strictly liable for enormous cleanup costs merely because of their status as owners.[109]

CERCLA does provide limited affirmative defenses to liability.[110] These defenses provide that a current owner may avoid liability if the release was the result of an act of God, an act of war, or an act or omission of a third party who is not an agent or employee or in a contractual relationship with the owner.[111] The last of these defenses, commonly known as the "third-party defense,"[112] provides that a landowner must be able to show that it exercised due care as to the hazardous substance and took precautions against all foreseeable third-party acts or omissions.[113]

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[106] *Shore Realty*, 759 F.2d at 1042 (at time of CERCLA's enactment, Congress knew courts had interpreted Clean Water Act as imposing strict liability); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983).

[107] *E.g.*, *Shore Realty*, 759 F.2d at 1044; Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1280 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

[108] *Shore Realty*, 759 F.2d at 1044; *Artesian*, 659 F. Supp. at 1280.

[109] *Shore Realty*, 759 F.2d at 1042; *Artesian*, 659 F. Supp. at 1281; *Maryland Bank & Trust Co.*, 632 F. Supp at 577. The government need not establish causation. It only has to show that a defendant is within CERCLA's definition of a "covered person." 42 U.S.C. § 9607(a) (1988); United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 548, 549 (W.D.N.Y. 1988). One rationale behind the strict liability standard is that the government may be unable to attribute contamination at a specific site to a particular defendant which may allow owners and operators to escape liability, thereby eviscerating the purpose of CERCLA. *Artesian*, 659 F. Supp. at 1282; *see* United States v. Wade, 577 F. Supp. 1326, 1332–33 (E.D. Pa. 1983).

[110] 42 U.S.C. § 9607(b) (1988).

[111] *Id.*

[112] *See id.* § 9607(b)(3).

[113] *Id.* A current owner can utilize the "innocent landowner" defense if the release or threatened release was a result of

> 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 . . . 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

It was almost impossible for a defendant current owner to utilize these CERCLA defenses as originally adopted. Acts of war and acts of God are rarely the sole cause of hazardous substance releases.[114] Moreover, most current owners were unable to use the third-party defense because of the fact that a contractual relationship existed between the current owner and the responsible third party[115]—under CERCLA as Congress originally enacted it, the innocent landowner was, by the nature of the title transfer, party to a contract with the third party.[116] This provision of CERCLA precluded purchasers of real property from escaping liability by using the third-party defense to place fault on the acts of predecessors in title.[117] As a result, current innocent landowners, lessors, and lenders could be held liable for the actions of previous owners, lessees, and borrowers.[118]

By enacting SARA, Congress attempted to ameliorate the perceived harshness of this result. It redefined the term "contractual relationship" and included an exception to liability commonly known as the "innocent landowner defense."[119] This defense provides that, notwithstanding the contractual relationship of the conveyance, a current owner may be exempt from liability.[120] If the current owner can prove that the contamination took place prior to its acquiring title to the property, and that it did not know and had no reason to know that hazardous substances were on the property, liability will not accrue.[121] In order to establish that the owner, when a purchaser,

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> circumstances, and . . . 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.

[114] *See* Mary E. Hitt, *Desperately Seeking SARA: Preserving the Innocent Landowner Defense to Superfund Liability*, 18 REAL EST. L.J. 3, 7 (1989).

[115] *Id.* at 7; Civins, *supra* note 2, at 845.

[116] *See* 42 U.S.C. § 9601(35)(A) (1988).

[117] *Id.*; *see* United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 548, 558 (W.D.N.Y. 1988); Civins, *supra* note 2, at 845; Hitt, *supra* note 114, at 7 n.20.

[118] *See, e.g.*, New York v. Shore Realty Corp, 759 F.2d 1032, 1042 (2d Cir. 1985); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1281 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 576 (D. Md. 1986); Civins, *supra* note 2, at 845.

[119] 42 U.S.C. § 9601(35)(A) (1988). "The term 'contractual relationship,' for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession . . . ." *Id.*

[120] *Id.*

[121] *Id.* To establish that the owner had no reason to know about the contamination, this provision requires that the owner

> must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding

did not know and had no reason to know of the property's contamination, the owner must show that it has undertaken "all appropriate inquiry" into past owners and uses of the property.[122] SARA also instructs courts to consider factors such as the purchaser's special knowledge or experience, if any; the property's price compared to its value if uncontaminated; and the obviousness or reasonably ascertainable or detectable existence of the contamination.[123]

Courts have been extremely reluctant to allow current owners to escape liability by invoking the innocent purchaser defense.[124] If an owner obtained actual knowledge of the release or threatened release of a hazardous substance at the time of conveyance, then it is precluded from using this defense.[125] Furthermore, there is no definition of what constitutes "all appropriate inquiry."[126] Congress established SARA's "all appropriate inquiry" requirement to instruct potential owners about the actions and investigations that they should conduct in their pre-purchase efforts to discover hazardous waste contamination.[127] The lack of guidance from Congress and the EPA as to what constitutes due diligence eviscerates the innocent purchaser defense.[128]

This lack of guidance has prompted one congressional representative to introduce an amendment to CERCLA that would provide an explicit checklist of the actions that constitute "all appropriate inquiry."[129] Under the amendment, if a purchaser were to follow these guidelines, there would arise a rebuttable presumption that the purchaser met the requirements of the "innocent purchaser"

> sentence, the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

Id.

[122] *Id.* § 9601(35)(B).

[123] *Id.*

[124] *See supra* notes 107–09 and accompanying text.

[125] *See* 42 U.S.C. § 9601(35)(A)(i) (1988); United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1348 (D. Idaho 1989); Wickland Oil Terminals v. Asarco, Inc., 19 Envtl. L. Rep. (Envtl. L. Inst.) 20,855, 20,856 (N.D. Cal. Feb. 23, 1988).

[126] H.R. 2787, 101st Cong., 1st. Sess. (1989); *see* Civins, *supra* note 2, at 847; G. Van Velsor Wolf, Jr., *Emerging Contours of the CERCLA "Innocent Purchaser" Defense*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,483, 10,487 (Nov. 1990).

[127] *See* Van Velsor Wolf, *supra* note 126, at 10,487.

[128] *See id.*

[129] H.R. 2787, 101st Cong., 1st Sess. (1989).

defense.[130] Therefore, if the purchaser were able to fulfill the due diligence requirements, liability would not accrue.[131] Unfortunately, this bill has never been the subject of a hearing in the House committee to which it was referred.[132]

CERCLA provides that a PRP cannot transfer its liability to the government to other parties who are more directly responsible for a property's contamination.[133] CERCLA, however, does codify a PRP's right to contribution from other PRPs.[134] This right to contribution is significant, because it allows PRPs whom the EPA has targeted to bring other, untargeted PRPs into the litigation.[135] In these private cost recovery actions, CERCLA also provides that a PRP held liable to the government can be held harmless or indemnified by another party, if the parties have so contracted.[136] The courts also have found that a party who voluntarily cleans up the hazardous waste without governmental action can exercise the right to contribution.[137]

The courts are divided on whether the defenses listed in CERCLA are exclusive.[138] The majority of courts have concluded that equitable defenses are available to CERCLA defendants, but only in private recovery actions.[139] For example, in *Mardan Corp. v. C.G.C. Music,*

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[130] Civins, *supra* note 2, at 847.

[131] *See supra* notes 119–21 and accompanying text.

[132] Van Velsor Wolf, *supra* note 126, at 10,487 n.49.

[133] 42 U.S.C. § 9607(e)(1) (1988). Section 9607(e)(1) states that "[n]o indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from . . . any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section." *Id.*

[134] *Id.* § 9613(f)(1). Section 9613 (f)(1) states that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title . . . ." *Id.*

[135] *See id.*

[136] 42 U.S.C. § 9607(e)(1) (1988); *see* Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1573 (E.D. Pa. 1988) (person that is liable under CERCLA may be held harmless or indemnified by another party by agreement). *But see* CPC Int'l, Inc. v. Aerojet-General, 759 F. Supp. 1269, 1282 (W.D. Mich. 1991); AM Int'l, Inc. v. International Forging Equip., 743 F. Supp. 525, 529 (N.D. Ohio 1990) (allowing a PRP to be indemnified by its insurance company or other non-PRPs, but invalidating indemnification agreements between PRPs).

[137] *See* Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 290 (N.D. Cal. 1984); Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1143 (E.D. Pa. 1982), *reconsideration denied,* 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,007, 20,009 (E.D. Pa. Aug. 23, 1983).

[138] *See, e.g.,* United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1350 (D. Idaho 1989) (question as to whether CERCLA defenses are exclusive); United States v. Marisol, 725 F. Supp. 833, 844 (N.D. Pa. 1989) (question of whether equitable defenses are available in CERCLA action is not settled area of law).

[139] *See, e.g.,* Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1057–58 (D. Ariz. 1984), *aff'd,* 804 F.2d 1454, 1463 (9th Cir. 1986); United States v. Hardage, 26 Env't Rep. Cas. (BNA) 1049, 1051 (W.D. Okla. 1987) (equitable defenses not precluded by CERCLA

Ltd.,[140] the United States District Court for the District of Arizona held that the doctrine of "unclean hands" barred a plaintiff landowner's claim for response cost recovery from the previous owner.[141] The court reasoned that allowing the defendants to use the unclean hands defense did not defeat the intent and purpose of CERCLA, because defendants remained liable to the state and federal government under CERCLA.[142] Thus, according to the court, applying the clean hands doctrine in a private recovery action under CERCLA did not defeat the public policy of assuring that responsible parties bear the costs of cleanup.[143]

In contrast, a minority of courts have held that CERCLA's enumerated defenses are exclusive.[144] In *Smith Land & Improvement Corp. v. Celotex Corp.*,[145] the United States Court of Appeals for the Third Circuit held that the doctrine of *caveat emptor*, or "the buyer beware," did not apply to cases between a private party and the government, or between private parties in a contribution action.[146] Although the application of *caveat emptor* in a contribution action arguably would not contradict the statutory text, according to the court, it would contravene the policies underlying CERCLA.[147] *Caveat emptor* would bar recovery by a purchaser without regard for the equities affecting the parties, thereby frustrating Congress's desire to encourage cleanup by responsible parties.[148] A landowner might delay cleanup while awaiting a legal ruling on other PRPs' liability for contribution.[149]

Other sections of CERCLA suggest that additional defenses may be available to private parties.[150] For example, CERCLA limits the

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when used for purposes other than avoiding strict liability); United States v. Conservation Chem. Co., 619 F. Supp. 162, 213 (D.C. Mo. 1985) (CERCLA does not automatically bar laches defense).

[140] 600 F. Supp. 1049 (D. Ariz. 1989).

[141] *Id.* at 1057–58.

[142] *Id.* at 1058.

[143] *Id.*; *see* Philadelphia Elec. Co. v. Hercules, 762 F.2d 303, 315 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985).

[144] *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989); Kelly v. Thomas Solvent Co., 714 F. Supp. 1439, 1451 (W.D. Mich. 1989) (CERCLA bars defenses not expressly provided).

[145] 851 F.2d 86 (3d Cir. 1988).

[146] *Id.* at 89–90. This court acknowledges, however, that CERCLA's defenses may not be exclusive in suits for contribution. *Id.* at 89; *see* Prospect Indus. Corp. v. Singer Co., 238 N.J. Super. 394, 403, 569 A.2d 908, 912 (1989) (*caveat emptor* was not a defense to purchaser's recovery claim against prior owner of PCB contaminated site).

[147] *Id.* at 89–90.

[148] *Id.* at 90.

[149] *Id.*

[150] *Id.* at 89.

period in which an action may be brought to three years.[151] Agreements to indemnify or hold harmless may be enforceable between private parties but are not enforceable against the government.[152] A party that has resolved its liability to the government may use its settlement as a defense to liability in private contribution actions.[153] Courts may also use other equitable considerations to mitigate a private party's liability.[154]

Therefore, the majority of courts have held that, in private cost recovery actions, equitable defenses may coexist with those enumerated in CERCLA.[155] While a few courts have held that CERCLA's defenses are exclusive,[156] most courts have held that equitable defenses will not automatically be stricken.[157] Thus, a court could allow an innocent purchaser to rescind a P & S agreement, if the seller could not convey marketable title because of the presence of hazardous waste contamination, without contravening CERCLA's provisions.

B. State Statutory Environmental Liens on Titles

Although almost every state has enacted some sort of hazardous waste cleanup statute to serve essentially the same purpose as CERCLA,[158] only some of these statutes substantially affect land conveyancing and titles.[159] These statutes include state emergency response statutes with lien provisions similar to CERCLA's lien provisions.[160]

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[151] *Id.*; *see* 42 U.S.C. § 9613(g) (1988).

[152] *See Smith Land*, 851 F.2d at 89; 42 U.S.C. § 9607(e)(1) (1988).

[153] *See Smith Land*, 851 F.2d at 89; 42 U.S.C. § 9613(f)(2) (1988).

[154] *See Smith Land*, 851 F.2d at 89; 42 U.S.C. § 9606 (1988) (providing that a court may "grant such relief as public interest in the equities of the case may require").

[155] *See supra* notes 139–43 and accompanying text.

[156] *See supra* notes 144–49 and accompanying text.

[157] *See supra* notes 139–43, 155 and accompanying text.

[158] *E.g.*, OHIO REV. CODE ANN. § 3734.01 (Anderson 1988); OR. REV. STAT. § 466.205 (1987); VA. CODE. ANN. § 0.1-1406 (Michie Cum. Supp. 1988); WASH. REV. CODE ANN. § 70.105B.150 (West Supp. 1989); *see also* Bozarth, *supra* note 2, at 315.

[159] For a discussion of the variety of state hazardous waste management statutes, see Bozarth, *supra* note 2, at 315–24; *see also infra* notes 160–69.

[160] *E.g.*, OHIO REV. CODE ANN. §§ 3734.2-.22, .28 (Baldwin 1990); OR. REV. STAT. 466.670–.680 (1980); VA. CODE. ANN. § 10.1-1406 (Michie 1989 & Supp. 1990); WASH. REV. CODE ANN. § 70.105D.070 (West Supp. 1991). Some states have enacted "secret liens," which attach to all of a seller's property to ensure funding for the cleanup of other contaminated land. *E.g.*, CONN. GEN. STAT. ANN. § 22a-452a(c) (West Supp. 1990); ME. REV. STAT. ANN. tit. 38, § 1371 (West Supp. 1990). Other states have enacted "superliens," environmental liens that take priority over any other lien on the property. *E.g.*, CONN. GEN. STAT. ANN. § 22a-452a(d) (West 1985 & Supp. 1990); MASS. GEN. LAWS ANN. ch. 21E, § 13 (West Supp. 1990).

Moreover, some state emergency response statutes provide that the title to any property used or intended to be used in the unlawful discharge of hazardous waste is forfeited to the state.[161]

State environmental transfer requirement statutes allow a state to order that contaminated property be cleaned up before it is abandoned, sold, or leased.[162] The most comprehensive of these statutes is New Jersey's Environmental Cleanup Responsibility Act (ECRA).[163] ECRA requires that a seller, prior to a title transfer, either submit to the state a "negative declaration" that the property is free from hazardous waste contamination or, for certain classes of property, conduct an environmental inspection.[164] A purchaser can rescind a sale or conveyance of property if the seller has not complied with the provisions of the statute.[165] A few other states have enacted comparable, but less formidable, statutes that allow a purchaser to void a transfer as a protection against loss from enforcement of environmental liens.[166]

Because ECRA requires environmental investigations, the early discovery of the extent of the contamination and the accelerated pace of cleanups reduces the risks to public health.[167] Parties responsible for the contamination are also discovered earlier, which may insure that at least some of these parties will still be solvent, thereby providing more funds for cleanup.[168] Finally, ECRA provides a strong deterrent to improper waste disposal, because responsible parties will be forced to assume the costs of cleanup.[169]

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[161] *E.g.*, ME. REV. STAT. ANN. tit. 38, § 1370 (West Supp. 1990); N.J. STAT. ANN. § 13:1k-1 (West Supp. 1990); OHIO REV. CODE ANN. § 3734.23 (Baldwin 1990); R.I. GEN. LAWS § 23-19.1-17.1 to -19.1-23 (1989 & Supp. 1990).

[162] *E.g.*, CONN. GEN. STAT. ANN. § 22a-134 to 22a-134a (West Supp. 1990); ILL. ANN. STAT. ch. 111 1/2, paras. 1021(n), 1039(g) (Smith-Hurd Supp. 1990); N.J. STAT. ANN. § 13:1k-9 (West Supp. 1990).

[163] N.J. STAT. ANN. § 13:1k-6 to 13:1k-32 (West Supp. 1990). For an in-depth discussion of ECRA, see Wagner, *supra* note 32, at 265–97.

[164] N.J. STAT. ANN. § 13:1k-6 (West Supp. 1990). ECRA only applies to industrial property and excludes all residential property. *Id.* § 13:1k-8(f). Property is considered industrial if it is a "place of business" that includes closed storage facilities and facilities engaging in on-site operations of generation, manufacturing, refining, treatment, storage, handling, or disposing of hazardous waste. *Id.*; *see* Wagner, *supra* note 32, at 271 n.107.

[165] N.J. STAT. ANN. § 13:1k-13 (West Supp. 1990).

[166] CONN. GEN. STAT. ANN. § 22a-134 (West Supp. 1990); ILL. ANN. STAT. ch. 111 1/2, paras. 1021(n), 1039(g) (Smith-Hurd Supp. 1990); MINN. STAT. ANN. § 115B.16 (West 1987); W. VA. CODE § 20-5E-20 (1989).

[167] *See* Wagner, *supra* note 32, at 300.

[168] *Id.* at 301.

[169] *Id.*

C. Hazardous Waste and Marketable Title

In the few instances in which the question has arisen, courts have held that the presence of hazardous waste on property has no effect on the title to the property.[170] These courts have held that, in accordance with traditional marketable title doctrine, the state of the title is independent from any defects in the property.[171]

In *United States v. Allied Chemical Corp.*,[172] the first case to address this issue, the plaintiff purchaser argued that the defendant seller had breached a warranty to convey a parcel of land free from encumbrances, because the property was contaminated.[173] The United States District Court for the District of Northern California declined to interpret the term "encumbrance" to include the presence of hazardous waste on the property.[174] According to the court, encumbrances traditionally have included only liens, easements, restrictive covenants, and other such third-party interests in the land.[175] The court held that dangerous physical conditions of the property do not rise to the level of an encumbrance on title.[176]

Another court recently decided the same issue in *Cameron v. Martin Marietta Corp.*[177] The purchaser of contaminated property argued that the presence of hazardous waste at the time of conveyance breached an express warranty requiring that there be no restrictions, easements, zoning, or governmental regulation that would prevent reasonable use of the property.[178] The purchaser alleged that the hazardous waste contamination would prompt government regulation and remedial action, thereby violating the governmental regulation warranty and the express warranty guaranteeing that the property was free from encumbrances.[179] The purchaser argued that

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[170] *See* South Shore Bank v. Stewart Title Guar. Co., 688 F. Supp. 803, 805–06 (D. Mass.), *aff'd mem.*, 867 F.2d 607 (1st Cir. 1988); United States v. Allied Chem. Corp., 587 F. Supp. 1205, 1206 (N.D. Cal. 1984); *In re* Schenk Tours, Inc., 69 B.R. 906, 914–15 (Bankr. E.D.N.Y.), *aff'd*, 75 B.R. 249 (E.D.N.Y. 1987); Chicago Title Ins. Co. v. Kumar, 24 Mass. App. Ct. 53, 57, 506 N.E.2d 154, 156–57 (App. Ct. 1987).

[171] *See South Shore Bank*, 688 F. Supp. at 806; *Allied Chem. Corp.*, 587 F. Supp. at 1206; *Schenk Tours*, 69 B.R. at 915; *Kumar*, 24 Mass. App. Ct. at 57, 506 N.E.2d at 157.

[172] 587 F. Supp. 1206 (N.D. Cal. 1984).

[173] *Id.* at 1206.

[174] *Id.*

[175] *Id.*; *see supra* notes 42–63 and accompanying text.

[176] *Allied Chem. Corp.*, 587 F. Supp. at 1206–07. The court also noted that plaintiff could cite no authority to extend the definition of encumbrance to include hazardous waste contamination on property. *Id.* at 1206.

[177] 729 F. Supp. 1529 (E.D.N.C. 1990).

[178] *Id.* at 1531.

[179] *Id.* at 1532.

the contamination violated both CERCLA and the North Carolina cleanup statute,[180] and that the sellers therefore had breached the express warranty.[181] The court held that neither CERCLA nor the state cleanup statute threatened the purchaser with liability, and that these statutes did not prevent the purchasers from enjoyment of their property.[182] Relying on *Allied Chemical*,[183] the court held that the term "encumbrance" does not extend to the presence of hazardous waste on property.[184] Despite plaintiff's argument that North Carolina law holds the violation of a local ordinance to constitute an encumbrance on title, the court dismissed the plaintiff's claims, because it was not convinced that the purchaser might be held liable under CERCLA or the state cleanup statute. [185]

In an attempt to avoid liability for potential hazardous waste cleanup costs, the purchaser in *In re Schenk Tours, Inc.*[186] argued that the seller was unable to convey marketable title because of contamination and related cleanup costs associated with the property.[187] The Bankruptcy Court for the Eastern District of New York held that the purchaser could not rescind its sales contract based on the presence of hazardous waste and therefore had to forfeit its deposit of $255,000.[188] The court rejected the purchaser's argument that, because the government might assess response costs against the purchaser at a later date, a "de facto" lien on the property existed.[189] As in *Allied Chemical*, the court reasoned that the seller held unencumbered title to the property, because no lien actually had been filed.[190]

Purchasers in some instances have attempted to avoid liability for government response costs by asserting claims under their title insurance policies.[191] A title insurance policy is an agreement in

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[180] N.C. GEN. STAT. § 143-215.83 (1990).

[181] *Cameron*, 729 F. Supp. at 1531.

[182] *Id.* at 1531.

[183] *See supra* notes 172–76 and accompanying text.

[184] *Cameron*, 729 F. Supp. at 1532.

[185] *Id.*

[186] 69 B.R. 906 (Bankr. E.D.N.Y.), *aff'd*, 75 B.R. 249 (E.D.N.Y. 1987).

[187] *Id.* at 914.

[188] *Id.* at 914–15.

[189] *Id.* at 915.

[190] *Id.* This court also noted that the purchaser could cite to no authority to support its arguments. *Id.*

[191] *See* South Shore Bank v. Stewart Title Guar. Co., 688 F. Supp. 803, 804 (D. Mass.), *aff'd mem.*, 867 F.2d 607 (1st Cir. 1988); Chicago Title Ins. Co. v. Kumar, 24 Mass. App. Ct. 53, 56, 506 N.E.2d 154, 156 (App. Ct. 1987). Title insurance generally protects against past conditions that may affect a title or title transfer. *See* Bozarth, *supra* note 2, at 328.

which an insurer agrees to indemnify an insured, usually a lender or purchaser, for a loss incurred through a defect in a property's title.[192] In the leading case in this area, *Chicago Title Insurance Co. v. Kumar*,[193] the plaintiff argued that the possibility of Massachusetts placing a lien on certain contaminated property made that property's title unmarketable.[194] The Massachusetts Appeals Court rejected this argument, holding that the possibility of a future lien did not create a defect in title.[195] Therefore, the possibility of a future lien on property currently contaminated by hazardous waste could not trigger the title insurance policy coverage.[196]

In *South Shore Bank v. Stewart Title Guaranty Co.*,[197] a purchaser attempted to avoid liability by asserting a claim under an express hazardous waste lien protection endorsement included in the purchaser's title insurance policy. The purchaser's title insurance provided coverage against any loss incurred by the purchaser as a result of a lien filed by the state pursuant to the Connecticut environmental cleanup statute.[198] The United States District Court for the District of Massachusetts held that liability under an environmental cleanup statute did not accrue until the state government expended funds for cleanup and attached a lien to the property.[199] Therefore, the possibility of a future lien did not trigger title insurance coverage under the endorsement, because there was no current defect in title.[200]

In each of these cases, courts held the property's title to be unaffected by the mere presence of hazardous waste on the property.[201] According to this line of reasoning, a purchaser can hold marketable title to completely valueless land,[202] and an owner of contaminated

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[192] CARTWRIGHT, *supra* note 35, at 937.

[193] 24 Mass. App. Ct. 53, 506 N.E.2d 154 (App. Ct. 1987). Plaintiff alleged that Massachusetts would file a response cost lien pursuant to the state hazardous waste cleanup statute. *Id.* at 56, 506 N.E.2d at 156. Under this statute, the owner of contaminated property is liable to the Commonwealth for cleanup, and the Commonwealth is empowered to attach a lien on the property for the reimbursement of response costs. *See* MASS. GEN. LAWS ANN. ch. 21E, §§ 5, 13 (West Supp. 1990).

[194] *Kumar*, 24 Mass. App. Ct. at 57, 506 N.E.2d at 157.

[195] *Id.* at 55–56, 506 N.E.2d at 157.

[196] *Id.* at 56–57, 506 N.E.2d at 156–57.

[197] 688 F. Supp. 803 (D. Mass.), *aff'd mem.*, 867 F.2d 607 (1st Cir. 1988).

[198] *See South Shore Bank*, 688 F. Supp. at 805; *see also* CONN. GEN. STAT. ANN. § 22a-452(a) (West Supp. 1990).

[199] *South Shore Bank*, 688 F. Supp. at 805.

[200] *See id.* at 805–06.

[201] *See id.*

[202] Chicago Title Ins. Co. v. Kumar, 24 Mass. App. Ct. 53, 57, 506 N.E.2d 154, 157 (App.

property can have marketable title, while the land itself is unmarketable.[203] In both scenarios, the property's title does not become unmarketable until the government expends money on cleanup and then files a lien to recover its costs.[204]

IV. A Critique of the Concept of Current Innocent Landowner Liability

A. Current Innocent Purchaser Liability and Marketable Title

The hypothetical purchaser in Section I of this Comment is without any defense to liability for future response costs. The purchaser may be strictly liable for future CERCLA or state environmental cleanup costs.[205] Moreover, the purchaser is unable to argue that the seller holds unmarketable title to the property because of the hazardous waste contamination. As the present law stands, regardless of contamination, the hypothetical seller holds marketable title.[206] Therefore, it may force the hypothetical purchaser to perform the P & S agreement and take title to the contaminated property, and the purchaser subsequently could incur liability for future response costs.

B. Enacting State Title Transfer Requirement Statutes and Refining CERCLA Liability

Congress and state legislatures should enact ECRA-like title transfer requirements.[207] Such requirements would accomplish the original goals of CERCLA by insuring that, in most cases, the liable party is the party responsible for the hazardous waste contamination.[208] ECRA has proven effective in assigning liability to responsible parties while protecting innocent purchasers.[209] Title transfer requirements would assure purchasers that they are buying clean property, or that the previous owner or the state will finance any

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Ct. 1987); Hocking v. Title Ins. & Trust Co., 37 Cal. 2d 644, 651–52, 234 P.2d 625, 629–30 (1951).

[203] *Kumar*, 24 Mass. App. Ct. at 57, 506 N.E.2d at 157; *Hocking*, 37 Cal. 2d at 651–52, 234 P.2d at 629–30.

[204] *Kumar*, 24 Mass. App. Ct. at 56, 506 N.E.2d at 156.

[205] *See supra* notes 105–09 and accompanying text.

[206] *See supra* notes 170–203 and accompanying text.

[207] *See supra* notes 162–69 and accompanying text.

[208] *See* Wagner, *supra* note 32, at 245–47.

[209] *See id.* at 300.

cleanup.[210] Similarly, these requirements would avoid the confusion surrounding CERCLA's "all appropriate inquiry" standard by placing the burden on the seller to guarantee that the property is free of contamination, or to clean up the property prior to sale.[211] Even if Congress eventually passes the proposed amendments to the "all appropriate inquiry" standard,[212] ECRA-like amendments probably more successfully would facilitate cleanups by requiring sellers to guarantee that their property was free from contamination prior to sale.[213] Furthermore, sellers would bear the costs of the environmental audits and assessments that CERCLA's amorphous inquiry standard currently places on purchasers.[214] ECRA-like legislation would provide a much fairer allocation of liability, greater reduction in public health risks, and an accelerated cleanup program for contaminated property.

C. Protection for Real Estate Purchasers

The courts' unwillingness to accept arguments based on marketable title doctrine, combined with the strict liability standard under CERCLA, should make purchasers—especially purchasers of commercial property—extremely wary. A prudent purchaser should include a provision in its P & S agreement that will allow it to escape the contract should it discover hazardous waste.[215] The purchaser also should perform an environmental audit, as well as physically inspect the land, before sale.[216] A special contingency in the P & S agreement should allow the purchaser to escape the contract if the results of the inspection and audit prove unsatisfactory. A real estate purchaser utilizing this approach is unlikely to wind up strictly liable for unanticipated hazardous waste cleanup costs because, by making "all appropriate inquiry," the purchaser should qualify for CERCLA's innocent landowner defense.[217]

Even if a purchaser finds no waste before the sale occurs, it should include in its P & S agreement an express warranty in the deed in

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[210] *See* N.J. STAT. ANN. § 13:1k-9(b) (West Supp. 1990); Wagner, *supra* note 32, at 300.

[211] *See supra* notes 163–65 and accompanying text.

[212] H.R. 2787, 101st Cong., 1st. Sess. (1989); *see* Van Velsor Wolf, *supra* note 126, at 10,487 n.49.

[213] *See* N.J. STAT. ANN. § 13:1k-8(g) (West Supp. 1990).

[214] *Id.*

[215] *See* John M. DeMeester, *Practical Guidance for Due Diligence Environmental Auditing*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,210, 10,210 (June 1988).

[216] *Id.* at 10,211.

[217] *See supra* notes 110–23 and accompanying text.

order to insure that it will not be liable for response costs sometime in the future.[218] Because of the growing sophistication and knowledge of purchasers, standard warranties that do not allocate liability for hazardous waste contamination seldom are used today.[219] Express warranties and representations should cover the following areas: the status of the use of the property; the existence of any notices to or from governmental entities; the status of any permits, the status of any litigation or administrative proceedings; and the disclosure of the presence of hazardous waste.[220] The parties carefully should draft all warranties to cover any potential governmental recovery actions.[221]

V. Expanding the Definition of Marketable Title

A property purchaser who discovers hazardous waste contamination on the property prior to closing is caught in a catch-22. Without an express environmental risk contingency clause, the purchaser cannot escape from the P & S agreement based on an argument that the seller holds unmarketable title.[222] The purchaser either can refuse to close or can go forward with the purchase. If it refuses to close, the seller may forego the transaction, and the purchaser then forfeits its deposit, or the seller may obtain an order for specific performance that forces the purchaser to take title.[223] If the purchaser is forced to complete the conveyance, it will become strictly liable for any future cleanup costs, as well as expenses for extensive litigation.[224]

Courts should apply a more comprehensive definition of marketable title when deciding whether to enforce P & S agreements regarding contaminated property. Title to contaminated property should be unmarketable, because the presence of hazardous waste subjects a purchaser to imminent litigation. Placement of EPA and state liens on contaminated property is not a remote possibility or an improbable contingency,[225] and reasonably prudent purchasers

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[218] *See* DeMeester, *supra* note 215, at 10,210.

[219] *Id.* at 10,215.

[220] *Id.* at 10,210.

[221] *Id.* at 10,211.

[222] *See supra* notes 201–04 and accompanying text.

[223] *See supra* notes 186–90 and accompanying text.

[224] *See supra* notes 105–09 and accompanying text.

[225] By 1988, the EPA had identified 27,000 sites substantially contaminated with hazardous waste. *See* Bozarth, *supra* note 2, at 30. The EPA has placed 1187 sites on the National Priority List for governmental cleanup. *See Recent Developments*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,490, 10,500 (Nov. 1990).

typically are not willing to accept title to contaminated property that will undergo an EPA or state statutory cleanup.

While traditional marketable title doctrine states that no purchaser should have to "buy a lawsuit,"[226] it confines the risk of litigation to litigation regarding the state of a title.[227] The presence of hazardous waste on property, however, places an owner of that property in imminent danger of litigation. The purchaser will have to litigate either in an attempt to avoid liability or to seek contribution from previous owners or operators.[228]

The decisions in *Schenk Tours*,[229] *Kumar*,[230] and *South Shore Bank*[231] were incorrect. The courts in these cases determined that hazardous waste contamination affected marketable title only after the government had filed a lien on the property at issue to recover its cleanup costs.[232] Although the government had not filed a lien on the property involved in these cases, all of the conditions that would cause it to file a lien were present at the time of conveyance.[233] These courts should have recognized that the contamination of these properties gave rise to a reasonable hazard of litigation affecting the marketability of the titles.

The courts should have allowed the purchasers to void their P & S agreements, because the condition of the land may have given rise to future litigation as to the validity of the title. After all, purchasers can assert successfully that a party adversely possessing the land, an unrecorded easement on the property, or encroachment of a structure onto adjacent property is a physical condition of property that gives rise to a reasonable hazard of litigation and thus renders title unmarketable.[234] Similarly, hazardous waste contamination may give rise to litigation, and ultimately, the government may encumber the property's title with a response cost lien. Therefore, the courts

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[226] *See* Annotation, *Marketable Title*, 57 A.L.R. 1253, 1301–09 (1928); *supra* notes 50–63 and accompanying text.

[227] *See supra* notes 50–63 and accompanying text.

[228] *See supra* notes 133–36 and accompanying text; Rikleen, *supra* note 30, at 705.

[229] 69 B.R. 906 (Bankr. E.D.N.Y.), *aff'd*, 75 B.R. 249 (E.D.N.Y. 1987); *see supra* notes 186–90 and accompanying text.

[230] 24 Mass. App. Ct. 53, 506 N.E.2d 154 (App. Ct. 1987); *see supra* notes 191–96 and accompanying text.

[231] 688 F. Supp. 803 (D. Mass.), *aff'd mem.*, 867 F.2d 607 (1st Cir. 1988); *see supra* notes 197–200 and accompanying text.

[232] *See South Shore Bank*, 688 F. Supp. at 805–06; *Schenk Tours*, 69 B.R. at 906; *Kumar*, 24 Mass. App. Ct. at 56, 506 N.E.2d at 156.

[233] *See South Shore Bank*, 688 F. Supp. at 805–06; *Schenk Tours*, 69 B.R. at 906; *Kumar*, 24 Mass. App. Ct. at 56, 506 N.E.2d at 156.

[234] *See supra* notes 54–55 and accompanying text.

erred in not treating contamination as a physical condition of property—similar to adverse possession, easements, and encroachments—that gives rise to an imminent hazard of litigation rendering the property's title unmarketable.

The courts in *Allied Chemical*[235] and *Cameron*,[236] should have held that hazardous waste contamination is an encumbrance on title. Contamination interferes with the quiet and peaceable enjoyment of property in two ways. First, the looming threat of litigation impinges on an owner's ability to use and enjoy the property.[237] Second, the contamination itself hinders the use and enjoyment of the property, because once the property is identified as contaminated, an owner will find it difficult to develop, utilize, or transfer.[238] The land will be unsaleable because of the contamination and the reasonable apprehension of litigation.[239] Hazardous waste is an encumbrance or cloud on title in light of a current owner's potential liability under CERCLA and state cleanup statutes and the impending threat of litigation.[240]

Moreover, equity and fairness dictate that a purchaser should be able to void a P & S agreement if the purchaser discovers hazardous waste on the property prior to closing. If the purchaser is forced to complete the conveyance, it will be strictly liable for response costs without a viable defense to liability.[241] The policy underlying state environmental transfer requirement statutes, which allow a purchaser to rescind a title transfer if the property is not free from hazardous waste, is to protect unsuspecting buyers from liability,[242] as well as to facilitate cleanups and hold those who created the contamination financially responsible.[243] These goals also should be applied to the realm of marketable title. Innocent purchasers should be able to rescind P & S agreements when they discover contamination because of the inherent unfairness of holding them strictly

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[235] 587 F. Supp. 1205 (N.D. Cal. 1984); *see supra* notes 172–76 and accompanying text.

[236] 729 F. Supp. 1529 (E.D.N.C. 1990); *see supra* notes 177–85 and accompanying text.

[237] *See supra* notes 50–63 and accompanying text.

[238] *See, e.g.*, Peter J. Patchin, *Valuation of Contaminated Properties*, 56 APPRAISAL J. 7, 9–10 (1988).

[239] *See id.*; *see also* Reardon v. United States, No. 90-1319, slip. op. at 24 (1st Cir. Oct. 29, 1991) (CERCLA lien significantly affects property interests by clouding title, impairing ability to alienate property, tainting credit ratings, and reducing chance of refinancing).

[240] This should not create overburdensome liability for title insurers, because most title insurance companies now routinely exclude coverage for environmental risks unless the purchaser expressly contracts for coverage. *See* Bozarth, *supra* note 2, at 330–34.

[241] *See supra* notes 104–09, 114–28 and accompanying text.

[242] *See supra* notes 162–66 and accompanying text.

[243] *See* Wagner, *supra* note 32, at 300–01.

liable for a hazard which they did not create. Allowing a purchaser to void a P & S agreement will not hinder cleanups, because the owner, who may have created the hazard, not only will be barred from transferring liability to an unsuspecting buyer, but also will be held liable themselves. Even if a seller is not directly responsible for contamination on its property, forcing the purchaser to take title to the property neither facilitates cleanup nor holds a responsible party liable for cleanup.

The statutory defenses of CERCLA would not preempt the proposed expanded common law defense of unmarketable title. Only innocent purchasers who discover hazardous waste contamination on the property prior to closing should be able to invoke this expanded doctrine of marketable title. This doctrine is proposed not as a defense to CERCLA, but as a basis for purchasers to escape P & S agreements in very limited circumstances. Most courts have allowed parties to assert equitable defenses in private party actions for purposes other than avoiding CERCLA liability to the government.[244] In keeping with this practice, courts should allow a purchaser to assert that a seller cannot convey marketable title if contamination is discovered prior to closing and prior to the actual filing of a statutory environmental cleanup lien.

VI. CONCLUSION

The current law holds innocent purchasers liable for cleanup costs of property contaminated with hazardous waste, regardless of these purchasers' fault or knowledge. To date, courts have failed to grant relief to owners of property based on a traditional application of the marketable title doctrine. Now, courts should adopt an expanded definition of unmarketable title. They should acknowledge that hazardous waste contamination affects the marketability of title, because hazardous waste contamination is an encumbrance to the land that deprives the owner of full use and enjoyment of the property. In applying an expanded doctrine of marketable title, courts would be protecting unwary buyers of contaminated property from liability and litigation and, in most cases, would be holding those responsible for the contamination liable for cleanup. Courts could apply a more

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[244] *See, e.g.*, Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1057–58 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454, 1463 (9th Cir. 1986); United States v. Hardage, 26 Env't Rep. Cas. (BNA) 1049, 1051 (W.D. Okla. 1987); United States v. Conservation Chem. Co., 619 F. Supp. 162, 213 (D.C. Mo. 1985).

equitable standard of liability without hindering cleanups of contaminated property. "Courts have a duty to reappraise old doctrines in light of the facts and values of contemporary life–particularly old common law doctrines which the courts themselves created and developed."[245] It is now time for the courts to reconsider marketable title doctrine.

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[245] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970) (Wright, J.).