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Heidi E. Brieger

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LUST AND THE COMMON LAW: A MARRIAGE OF NECESSITY

*Heidi E. Brieger**

I. INTRODUCTION

Contamination of groundwater by carcinogenic chemical compounds is one of the most significant environmental threats facing the United States.¹ Groundwater is the source of drinking water for more than half of the American population.² Moreover, absorption into the earth's surface is not a hydrological dead end for water, since groundwater in fact re-enters oceans, lakes, and rivers to provide thirty per cent of the total volume of surface waters.³ Groundwater contamination is thus also a threat to the purity of surface waters.

Groundwater that is contaminated by carcinogenic compounds presents a serious public health risk, and the resulting pollution injuries to persons and property produce significant social and economic dislocation. In some cases, people must locate alternative water supplies and communities must undertake expensive groundwater decontamination projects, thereby diverting substantial funds from other municipal priorities. In addition, there are long-term, unpredictable costs of groundwater pollution. People exposed to contaminated groundwater may become ill, or may develop fears of future illnesses, and their property values may decline.

Groundwater contamination incidents have been identified in all fifty states. Many of these incidents involve leaking underground

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¹ OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG., PUB. NO. OTA-0-233, PROTECTING THE NATION'S GROUNDWATER FROM CONTAMINATION (1984) [hereinafter OTA REP.].

² *Id.* at 5.

³ VA. WATER RESOURCES RESEARCH CENTER, VA. POLYTECHNIC INST., GROUNDWATER FOR VIRGINIANS (1984) [hereinafter VA. GROUNDWATER REP.].

storage tanks (LUST).⁴ In fact, the frequency of groundwater pollution accidents involving LUST has increased so significantly in recent years that it is now considered to be one of the major sources of groundwater contamination in this country.⁵ In August, 1984, a CBS Sixty Minutes⁶ segment on LUST revealed that Canob Park, Rhode Island well owners, whose water was contaminated by leaks from a nearby gasoline station, have been forced to rely on bottled water for ten years.⁷ These individuals were routinely turned down by banks for mortgage applications,⁸ and are now concerned that neighborhood children who suffer learning disabilities may have been harmed *in utero* when their mothers were exposed to contaminated water.⁹ This example, like others discussed in this article, demonstrates the need for more stringent governmental regulation of pollution sources as well as for a statutory scheme to compensate pollution victims.¹⁰

Although current data on underground storage tanks (USTs) is scarce and unreliable, the EPA estimates that there are 1.5 to 2

⁴ OTA REP., *supra* note 1, at 91.

⁵ The OTA conducted a state-by-state survey of groundwater pollution sources; UST leaks were found to be one of the leading contributors to groundwater contamination. OTA REP., *supra* note 1, Table 6, *Sources and Classes of Associated Substances*, at 48. See also CONG. RESEARCH SERV., U.S. CONG., LEAKING UNDERGROUND STORAGE TANKS: A POTENTIAL ENVIRONMENTAL PROBLEM, PUB. NO. 84-508 ENR (1984) [hereinafter CRS REP.]. The frequency and severity of UST-related groundwater pollution was also a matter of grave concern for the drafters of the RCRA Amendments. H.R. REP. NO. 1133, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 5649, 6599. See *infra* notes 96-105 and accompanying text.

The OTA REP. concludes that "despite the paucity of quantitative details, sufficient information is available about the nature of groundwater contamination to justify national attention to protect groundwater quality." OTA REP., *supra* note 1, at 22. When the RCRA Amendments were enacted, Congress acknowledged that "there was a growing body of evidence that land disposal of wastes was not providing, and in some cases cannot provide protection against groundwater pollution." H.R. REP. NO. 198, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 5576, 5578. The inclusion of a section to regulate USTs was explained by the conference committee: "[b]ecause half the population of the United States depends on groundwater as a source of drinking water, the Conferees believe this problem has become one of national significance and requires Federal legislation." H.R. REP. NO. 1133, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 5649, 5699.

⁶ CBS, INC., HASSLER, P., PRODUCER, CHECK THE WATER, vol. XVI, No. 49 (1984) [hereinafter CBS REP.].

⁷ *Id.* at 15.

⁸ *Id.* at 17.

⁹ *Id.*

¹⁰ *Id.* See also *Mass PIRG Says Tanks To Store Fuel May Leak*, Boston Globe, Apr. 1, 1983; *Toxic Threat Seen to Water Supplies*, N.Y. Times, Oct. 25, 1984; *Underground Water Supplies Threatened, Report Says*, Boston Globe, Oct. 25, 1984; *Underground Time Bomb?*, Boston Globe, Feb. 13, 1984, at 17, col.b.

million USTs used to store gasoline in the United States.¹¹ Of these USTs, twenty to thirty per cent are leaking their contents into the ground.¹² Major oil companies own approximately forty per cent of the USTs;¹³ the remaining sixty per cent are owned by independent dealers, distributors, and other business establishments.¹⁴

USTs normally were installed by oil companies at the time gasoline service stations were constructed, and, ironically, were placed underground as a safety measure.¹⁵ After construction of the stations, oil companies often sold or leased the stations, as well as the USTs, to independent owners.¹⁶ This original link between the oil companies and the USTs is an important factor in the adjudication of liability for pollution injuries caused by UST leaks, because it may afford plaintiffs access to a financially viable, or so-called "deep pocket," defendant in common law tort suits.

Partly in response to the danger posed by LUST, significant legislative steps have been taken at the federal, state and local levels to protect groundwater. As of December, 1985, Congress had passed at least sixteen federal statutes to protect groundwater supplies,¹⁷ and all fifty states have enacted groundwater protection legislation.¹⁸

¹¹ ENVIRONMENTAL PROTECTION AGENCY, U.S. CONG., A GROUNDWATER PROTECTION STRATEGY 15 [hereinafter EPA STRATEGY].

¹² EPA estimates that 25% of all tanks are leaking. N.Y. Times, Aug. 31, 1984, A1, col.1. Other estimates of the number of leaking USTs are similar: CBS reports that "two or three out of every ten" gasoline stations have leaky tanks. CBS REP., *supra* note 3, at 13. The Maine Dept. of Env'tl. Protection estimates that 20-40% of USTs in Maine leak. CLF REP., *infra* note 18, at 10.

¹³ EPA STRATEGY, *supra* note 11, at 15.

¹⁴ *Id.*

¹⁵ CLF REP., *infra* note 18, at 11.

¹⁶ See Brown, *Franchising — A Fiduciary Relationship*, 1971 TEX. L. REV. 650, 655-57 (1971). In 1971, there were approximately 225,000 gasoline service stations in the U.S. Their proliferation on American street corners is partly the result of the post-World War II demand for gasoline and automobile servicing, and partly the result of the oil industry's so-called "Iowa Plan." Pursuant to this plan, oil companies bought prime real estate, built gasoline stations, and then leased the stations to dealers. In 1985, it was estimated that major American oil companies own 40 per cent of the USTs currently used to store gasoline. EPA STRATEGY, *supra* note 11, at 15.

¹⁷ For a summary of these statutes, see OTA REP., *supra* note 1, at 198 (Table 36, *Summary of Federal Corrective Action Provisions For Sources of Groundwater Contamination*). See also EPA STRATEGY, *supra* note 11, at 31. (Table A, *Summary Table — Existing Federal Ground-Water Protection Programs*).

¹⁸ For a brief description of state regulatory programs, see EPA STRATEGY, *supra* note 11, at 21-25.

There have been numerous proposals to towns and cities for by-laws designed to regulate sources of groundwater pollution. See, e.g., METROPOLITAN AREA PLANNING COUNCIL, UNDERGROUND FUEL STORAGE MANUAL, (1982); CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC., UNDERGROUND PETROLEUM STORAGE TANKS: LOCAL REGULATION OF A

Congress most recently addressed the issue of groundwater pollution in its 1984 amendments (the RCRA Amendments) to the Resource Conservation and Recovery Act of 1974 (RCRA).¹⁹ One of Congress' original goals when it enacted RCRA was the protection of groundwater through the regulation of land disposal of hazardous wastes. The RCRA Amendments address the further issue of LUST.²⁰

Despite the passage of the RCRA Amendments, the critical problem of compensation for citizens who are harmed as a result of LUST remains unresolved at the state as well as the federal level.²¹ As amended, RCRA grants private citizens a limited right of action to seek abatement of the hazard but fails to include provisions enabling pollution victims to recover damages for personal injury or property loss.²²

After first examining the long history of Congress' failure to provide victim compensation legislation, this article suggests and examines several common law alternatives for compensating private pollution victims. It focuses specifically on theories available against major American oil companies in litigation involving groundwater contamination from leaking underground storage tanks used by gasoline service stations. The first section outlines the mechanics of UST leaks and their effect on groundwater, and discusses examples

GROUNDWATER HAZARD, (1985) [hereinafter CLF REP.]; MASS. PUB. INTEREST RESEARCH GROUP, PETRO POLLUTION: A STUDY OF LEAKS IN UNDERGROUND GASOLINE AND OIL STORAGE TANKS, (1983) [hereinafter MASS. PIRG REP.]. For a brief description of some of the obstacles to enacting such local regulations, see EPA STRATEGY, *supra* note 11, at 23.

¹⁹ 42 U.S.C. § 6901 (1982), amended by Pub. L. No. 98-616, 42 U.S.C.A. §§ 6902-91 (West Supp. 1985) [hereinafter RCRA Amendments]. For a more detailed discussion of the RCRA Amendments, see *infra* notes 96-125 and accompanying text. As this article was going to press, Congress amended CERCLA specifically to address the problems posed by LUST. The amendments, however, fail to make any provisions for victim compensation. See section 205 of the Superfund Amendments and Reauthorization Act of 1986, 132 CONG. REC. S13108 (daily ed. Sept. 19, 1986). See *infra* notes 94-95.

²⁰ 24 U.S.C.A. §§ 6991-6991i (West Supp. 1985).

²¹ The Mass. Oil and Hazardous Material Release Prevention Act, MASS. GEN. LAWS ANN. c.21E (West 1983) [hereinafter Mass. Superfund Act] also fails to provide for victim compensation. A legislative commission studied this matter and proposed amendments to provide compensation for some pollution-related injuries. For a complete presentation of their research and conclusions, see MASS. SPECIAL LEGIS. COMM'N ON LIABILITY FOR RELEASES OF OIL AND HAZARDOUS MATERIALS, INTERIM REP., (Sept. 21, 1984), (available from the Special Legis. Comm'n, State House, Room 473 F, Boston, Mass., 02133) [hereinafter MASS. LEGIS. REP.].

²² The RCRA Amendments do create a National Groundwater Commission with general authority: to analyze existing legal rights and remedies regarding contamination of groundwater; to assess the current state of the nation's groundwater supplies; to identify threats to its purity; and to investigate methods to abate groundwater pollution. 42 U.S.C. § 704(a)-(b)(21) (1982).

of the harmful effects of gasoline UST leaks on two New England communities. The second section examines the major federal statutes designed to protect groundwater, and concludes that since no victim compensation schemes have survived the legislative process, injured parties must rely on the common law to recover personal injury and property loss damages. The third section discusses common law theories of liability as employed by parties to ongoing UST-related litigation, and concludes that strict liability is the preferable liability theory upon which victims should rely. This section further notes that plaintiffs' theories of liability will vary depending on the legal relationship between the oil company and the gasoline station operator. If the relationship is a direct one, by virtue of ownership, rental or franchise agreement, then courts can, and do, hold oil companies strictly liable for UST-related damages. On the other hand, when an oil company is no longer party to a direct relationship with the gasoline station operator at the time of the leak, plaintiffs must rely on vicarious liability theories to hold oil companies liable for UST-related pollution damages.

The article concludes that the statutory protection given to our nation's groundwater exceeds the protection extended to citizens harmed by its contamination. Statutory provisions to compensate victims are nonexistent. If the legislative process continues to prevent the emergence of victim compensation provisions, then pollution victims, by necessity, must rely on the common law.

II. NATURE OF THE PROBLEM: UST LEAKS AND THE EFFECT ON GROUNDWATER

Groundwater supplies more than half of the drinking water in the United States. It is relied on for eighty per cent of all rural (domestic and farming) water supplies, and represents forty per cent of the irrigation supplies, as well as twenty-five per cent of all industrial water supplies.²³ Groundwater lies beneath the earth's surface²⁴ in

²³ OTA REP., *supra* note 1. For example, 80% of Massachusetts communities rely on groundwater for drinking water supplies. CLF REP., *supra* note 18, at 13.

²⁴ Subsurface waters play a critical role in the earth's hydrologic cycle. The hydrologic cycle is a continuous natural process, initiated by solar energy, during which water in its various forms moves around and through the earth. The sequence of the hydrologic cycle is relatively simple. As the sun warms surface waters, the water evaporates into the earth's atmosphere, where it cools and then returns to the earth's surface as precipitation. This precipitation may remain on the surface in oceans, lakes, and rivers, or it may be absorbed into the earth's surface. When precipitation is absorbed into the earth's surface, it first enters the unsaturated zone, where some of it is absorbed by trees and other vegetation. The earth's gravitational

vast underground water collectors known as aquifers.²⁵ Aquifers vary in geological make-up; some are artesian, in which water is confined between layers of rock; others are water table, or unconfined, aquifers, in which water flows freely throughout the saturated zone; and still others are solution channels, developed from bedrock cracks that function like pipes for transporting subsurface water.²⁶

Groundwater is cleansed naturally by a process known as recharge.²⁷ When water is drawn downward through the earth's subsurface layers, the surrounding soil and rock act as filters, removing and breaking down organic pollutants.²⁸ This recharge process, however, does not remove inorganic pollutants from groundwater. Chemical contaminants, such as the additives in gasoline, will remain in the water and surrounding soil until they are removed artificially.²⁹ The environmental harm resulting from even a small UST leak can thus be permanent.

Once petroleum UST leaks begin, gasoline is absorbed through the ground into the aquifer's recharge area and then into the aquifer itself.³⁰ It may take months or years to decontaminate an aquifer, depending on the process used and the extent of the damage. During this period, alternative water supplies must be provided.³¹ Even when corrective action is taken, its effectiveness in reducing or eliminating the contamination may not be certain.³²

forces then draw excess water downward into the saturated zone. The upper boundary of the saturated zone, the water table, is what we typically refer to as groundwater. For more detailed descriptions of the hydrologic cycle, see WATER INFORMATION CENTER, INC., *THE WATER ENCYCLOPEDIA*, (1970) [hereinafter *WATER ENCYCLOPEDIA*]; VA. GROUNDWATER REP., *supra* note 3, at 2-6; QUARLES, *FEDERAL REGULATION OF HAZARDOUS WASTES: A GUIDE TO RCRA*; and CLF REP., *supra* note 18, at 15, 19-23.

²⁵ "Aquifer" literally means "water-bearing." WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1981).

²⁶ VA. GROUNDWATER REP., *supra* note 3, at 4.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ CLF REP., *supra* note 18, 19-23.

³¹ For a discussion of various groundwater decontamination procedures, see OTA REP., *supra* note 1, at 185-91 (Table 35, *Corrective Action Techniques: Objectives, Performance, and Status*). Before groundwater decontamination procedures can commence, hydrologic studies must be undertaken to plot the route of the contaminated groundwater. Once begun, most decontamination procedures work by speeding up the hydrologic cycle which, at a natural rate, could take from weeks to centuries to complete. Once the course is plotted, wells are drilled along the groundwater route and water is pumped to the surface, pumped through a filter system, and then pumped into the ground again.

³² Congress found one reason for such uncertainty is that there have been virtually no long-term studies upon which to measure the success of corrective actions. OTA REP., *supra* note 1, at 184. Congress notes four other reasons that contribute to the uncertainty with regard

The critical human health and environmental threats posed by UST leaks arise in large part from a seemingly innocuous element of the contemporary American landscape: the corner gasoline service station. These omnipresent way stations displaying the trademark symbols of major oil companies refuel vehicles with gasoline pumped from USTs.

In the majority of cases, UST leaks are caused by the corrosion of the steel tank, improper tank installation, or inadequate tank maintenance.³³ Corrosion, the most common cause of UST leaks, is the electrochemical process of metal deterioration that produces rust as a by-product.³⁴ Although soil and atmospheric conditions may accelerate steel tank corrosion, it is a process that occurs naturally, regardless of the nature of the surrounding environment.³⁵ Steel tanks that are properly installed and maintained have an estimated lifespan of between fifteen and twenty years.³⁶ In Massachusetts, many USTs have reached or exceeded their life expectancies; a 1982 study shows that seventy per cent of all USTs currently in use in Massachusetts are over twenty years old.³⁷ The EPA estimates that, in the United States, there are at least one million steel petroleum storage tanks that have been in the ground for more than sixteen years.³⁸ Moreover, Congressional studies estimate that between 75,000 and 100,000 USTs are leaking now, and the number is rising.³⁹

LUST is not, however, a new problem for some communities. In Canob Park, Rhode Island, a number of residents discovered gasoline in their well water fourteen years ago.⁴⁰ The level of gasoline contamination rendered the water unsafe for both consumption and

to the efficacy of groundwater corrective actions: 1) performance is relative, depending on the desired level of decontamination; 2) groundwater contamination problems are often site specific; 3) there is a general lack of knowledge about the subsurface environment; and 4) financial and time constraints affect the projected performance of various corrective actions. *Id.* at 183-84.

³³ CLF REP., *supra* note 18, at 35 (Table 1, Am. Petroleum Inst. Underground Leak Survey).

³⁴ *Id.* For a scientific discussion of the corrosion process, see *id.*, App. D, at 101-06.

³⁵ CLF REP., *supra* note 18, at 35 (Table 1), and App. D, at 101-06.

³⁶ CRS REP., *supra* note 5, at 6.

³⁷ CLF REP., *supra* note 18, at 10.

³⁸ EPA STRATEGY, *supra* note 11, at 15. The American oil industry has invested significant resources in UST replacement programs. CLF REP., *supra* note 18, at 11; accord CBS REP., *supra* note 6, at 17. Exxon Oil Co. claims that since 1979 it has spent \$100 million to replace or upgrade its USTs. *Id.* Mobil Oil Co. claims to have installed recently 4,000 fiberglass USTs. *Id.* Most UST replacement programs involve the installation of either fiberglass tanks, or cathodically protected, anti-corrosive, steel USTs. EPA STRATEGY, *supra* note 11, at 15.

³⁹ CRS REP., *supra* note 5, at 1.

⁴⁰ CBS REP., *supra* note 6, at 116-17.

other domestic uses; in fact, the water was so contaminated it was considered ignitable.⁴¹ As additional families in the area discovered gasoline in their wells, the town investigated and discovered that a neighborhood Mobil Oil Company gasoline station was leaking gasoline into the ground from its UST.⁴² A subsequent EPA investigation revealed that another tank at a nearby Exxon Oil Corporation station also was leaking gasoline.⁴³ The EPA issued an enforcement order pursuant to RCRA requiring the two oil companies to abate the pollution and to provide alternative water supplies to the affected neighborhood.⁴⁴ Although both companies deny responsibility for the groundwater contamination, they complied with the EPA order and assisted the state in the extension of town water mains to serve the residents who had been deprived of potable water.

Lacking a private damages remedy under RCRA,⁴⁵ residents joined in a \$100 million class action suit against the supplier, the gasoline service station owner, and the construction company that installed the UST.⁴⁶ The plaintiffs' complaint alleges that:

- a) the water in the . . . wells has been contaminated and . . . rendered unfit for human consumption . . . ;
- b) the . . . premises have been devalued and rendered useless for residential purposes;
- c) plaintiffs were compelled to seek other sources of potable water and were put to great expense and inconvenience;
- d) plaintiffs suffered personal injury⁴⁷

Plaintiffs' complaint is grounded in the common law theories of negligence, nuisance and strict liability.⁴⁸

In a similar incident in 1977, Provincetown, Massachusetts officials were forced to close the town well upon which two-thirds of the residents relied for drinking water. It was discovered that, over a period of one year, the local Amoco station had leaked 3,000 gallons of gasoline from its UST into the groundwater.⁴⁹ The town arranged for emergency water supplies, hired an engineering firm to deter-

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Congress authorized the EPA to issue enforcement orders based upon their receipt of knowledge that contaminants have been released into the environment. 42 U.S.C. § 7003 (1982).

⁴⁵ See *infra* nn. 78-90 and accompanying text.

⁴⁶ Complaint of the Plaintiffs, Ethel Joyce Pendelton, *et al.* v. Mobil Oil Corp., (C.A. No. 82-375 R.I., Wash. Co. Superior Ct. filed Oct. 6, 1982).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ CLF REP., *supra* note 18, at 9.

mine the extent of the groundwater contamination, and sought advice regarding various decontamination procedures.⁵⁰ Thus far, the town has spent in excess of 1.4 million dollars in its effort to restore the purity of the water, but the well currently yields only one quarter of its previous supply of potable water.⁵¹

Canob Park and Provincetown are examples of the alarming number of UST accidents occurring around the country causing significant public health, social, and economic damage.⁵² The economic costs of such accidents are staggering; after the discovery of UST-related pollution, communities face multi-million dollar clean-up costs, and individuals suffer significant personal and property damages.⁵³ It is difficult to measure the myriad economic consequences of UST leaks, including decreased agricultural productivity, loss of wages, decreased real estate values, lost tourism, and social dislocation costs, because relevant data has not yet been collected and analyzed.⁵⁴

Most scientific, legislative, and media attention has focused on the adverse health effects that are more readily measured. Although scientific and medical data linking disease in humans with exposure to polluted groundwater is far from complete, data currently avail-

⁵⁰ Telephone interview with Robert Bianchi, Esq., Town Counsel, Town of Provincetown, Mass. (Oct. 4, 1984).

⁵¹ Telephone interview with Mark Forrest, Town Manager, Town of Provincetown, Mass. (Oct. 4, 1984). See also CLF REP., *supra* note 18, at 9.

⁵² *Supra* note 51. In a similar case, the groundwater used by residents of East Meadow, N.Y. was contaminated in 1978 by 30,000 gallons of gasoline leaking from an Exxon gasoline station's UST. CRS REP., *supra* note 5, at 4. In settlement, the Exxon Corp. purchased many residents' houses and made lump sum payments to the contamination victims. *Id.*

In the Denver suburb of Northglenn, Colo., gasoline traced to a UST leak from a Chevron Oil Co. gasoline station contaminated the entire area's groundwater supplies. CRS REP., *supra* note 5, at 4. See also *City of Northglenn, Colo. v. Chevron USA, Inc.*, 519 F. Supp. 515 (D. Colo. 1981) (damages caused by underground storage of gasoline in residential area). In settlement, Chevron USA Corp. purchased the homes of the pollution victims. *Id.* See also *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969); *Branch v. Western Petroleum Co.*, 657 P.2d 267 (Utah 1982) (wells contaminated by leaking petroleum products).

⁵³ See, e.g., CLF REP., *supra* note 18, at 9-11, 69-76; accord OTA REP., *supra* note 1, at 19-43. Among the immediate post-leak costs is the provision of substitute water supplies and then the restoration of contaminated groundwater and soil. For an incident-by-incident analysis of the economic effects of groundwater contamination, see OTA REP., *supra* note 1, at 38-39.

To date, the town of Provincetown, Mass. has spent \$1.4 million to clean up UST-related groundwater contamination; the final direct and indirect costs are estimated to reach \$25 million. CLF REP., *supra* note 18, at 9.

⁵⁴ OTA REP., *supra* note 1, at 19-20. The lack of UST regulation has resulted in a paucity of information about UST pollution. Until recently, the hidden nature of groundwater has resulted in an out-of-sight, out-of-mind approach to the problem of groundwater pollution. For a discussion of the changing political attitude towards this problem, see QUARLES, *supra* note 24.

able shows that chemically contaminated groundwater is almost invariably carcinogenic.⁵⁵ There are five identified pathways of human exposure to the contaminants in groundwater: direct ingestion through drinking; inhalation of the contaminants; skin absorption from water; ingestion of contaminated food; and skin absorption from contaminated soil.⁵⁶

When groundwater is contaminated by gasoline, humans are exposed to at least three hundred chemicals, including benzene, ethyl dibromide (EDB), and frequently, lead. All three of these chemicals are proven human carcinogens.⁵⁷ Other components of gasoline have been linked to anemia, central nervous system disorders, and kidney disease.⁵⁸ While gasoline has a relatively familiar smell, some of its components, like benzene, are not easily detectable and therefore can be ingested for a long time before the medical danger is recognized.⁵⁹

In light of this medical data, American oil companies have launched extensive UST monitoring programs. Generally, these programs offer UST owners three alternatives: replace steel tanks with fiberglass tanks; retrofit existing steel tanks with cathodic protection; or apply internal lining to existing steel tanks.⁶⁰ While the long-term

⁵⁵ OTA REP., *supra* note 1, at 38. Recent medical revelations about long latency diseases such as asbestosis, as well as the adverse effects of some prescribed drugs such as DES, have increased public awareness of the epidemiological link between chemicals and human disease. Human disease may result from exposure to some of the over 200 substances that have been found in groundwater, including organic and inorganic chemicals, biological organisms, and radionuclides. For example, in Woburn, Mass., more than sixteen cases of childhood leukemia were diagnosed within one neighborhood in the town. *Leukemia Strikes a Small Town*, N.Y. Times, Dec. 2, 1984, at 100-08 (Magazine). Two of the town wells were found to be contaminated by high levels of trichloroethylene (TCE) and other toxic chemicals. The investigators also found several underground streams of toxic chemicals seeping into town wells. *Id.* Statistics provided by a Harvard University School of Public Health study showed that Woburn children who developed leukemia had been exposed to twice the amount of contaminated well water than children who had not developed the illness. *Id.* As yet, there is no scientific proof of the link between the contaminants and the disease. At the time of this article's publication, the case was being tried in the United States District Court. *Anderson v. W.R. Grace Co.*, No. 82-1672 (S.D. Mass., filed June 15, 1982).

⁵⁶ OTA REP., *supra* note 1, at 32.

⁵⁷ OTA REP., *supra* note 1, at 22-23.

⁵⁸ OTA REP., *supra* note 1, at 32. Some gasoline pollution victims have reported other symptoms, including "skin rashes, diarrhea, asthma, chronic dry coughs, respiratory infections, slow healing cuts and vision impairment." CLF REP., *supra* note 18, at 13.

⁵⁹ CLF REP., *supra* note 18, at 12. Long periods of benzene ingestion inhibits bone marrow development and is linked to both anemia and leukemia. *Id.* The lack of information about the long latency diseases from gasoline contaminated ground water is a major public health concern. OTA REP., *supra* note 1, at 5.

⁶⁰ CLF REP., *supra* note 18, at 33-43. Gasoline stations currently use a variety of leak detection procedures ranging from rudimentary "dipstick" tank content measurement to so-

costs of groundwater contamination exceed the short-term costs of UST replacement, many small UST owners are unwilling to undertake that expense, but instead gamble that the tank will not leak or that early leak detection will avert significant environmental damage.

The scientific uncertainty surrounding the efficacy of groundwater decontamination procedures highlights the importance of stringent governmental regulation designed to prevent such contamination. Regulations to provide the data necessary to measure decontamination performance, as well as to monitor the location and use of USTs in order to prevent leaks, are provided for by the RCRA Amendments. The Amendments, however, fail to provide for victim compensation. The following section examines the current federal statutory framework as it affects groundwater, and presents common law remedies that may be employed to fill the statutory gap left by the omission of victim compensation provisions.

III. GROUNDWATER PROTECTION: THE FEDERAL STATUTORY FRAMEWORK

A. *Pre-1984 Groundwater Protection Statutes*

Protection of the purity of the nation's groundwater has been the focus of significant legislative attention in the past decade. Congress has enacted at least sixteen different bills addressing groundwater.⁶¹ The EPA recently established an Office for Ground-Water Protection that is charged with the coordination of both groundwater policy planning and regulatory enforcement.⁶² Although several federal

phisticated pressure sensitive tank testing systems capable of detecting leaks as slow as .05 gallons per hour. For more detailed analyses of leak detection and prevention procedures available in the industry, see AM. PETROLEUM INST., PUBLICATIONS AND MATERIALS (1984), listing relevant publications: *Installation of Underground Petroleum Storage Systems*, PETROLEUM BULL. 1615 (1979); *Recommended Practice for Bulk Liquid Stock Control at Retail Outlets*, Pub. 1621 (1977); *Underground Spill Cleanup Manual*, PETROLEUM BULL. 1628 (1980); *Recommended Practice for the Interior Lining of Existing Steel Underground Storage Tanks*, Pub. 1631 (1983); *Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems*, Pub. 1632 (1983).

⁶¹ See OTA REP., *supra* note 1, at 63.

⁶² *Id.* at 64. The complex federal regulatory framework implementing and enforcing these programs is beyond the scope of this article. For an introduction to federal groundwater quality standards, see National Primary Drinking Water Regulations; Volatile Synthetic Organic Chemicals; Proposed Rulemaking, 49 Fed. Reg. 24,330 (1984) (to be codified at 40 C.F.R. Pt. 141); National Revised Primary Drinking Water Regulations; Advance Notice of Proposed Rulemaking, 48 Fed. Reg. 45,502 (1983) (to be codified at 40 C.F.R. Pt. 41); Ambient Water Quality Criteria, 45 Fed. Reg. 79,318 (1980).

statutes address USTs,⁶³ the 1984 RCRA Amendments are the first legislation to regulate directly their construction, use and maintenance. The strengths, as well as the shortcomings, of the RCRA Amendments are best understood in the context of predecessor legislation.⁶⁴

The Clean Water Act of 1972 (CWA),⁶⁵ was enacted to "restore and maintain the chemical, physical and biological integrity of the nation's waters."⁶⁶ The statute explicitly includes groundwater within the scope of its protection,⁶⁷ and recognizes the dangers posed by leaking gasoline.⁶⁸ The Act's "muscle," its injunctive authority, also seems broad enough to invoke in cases involving UST leaks.⁶⁹ The CWA is, however, of little use as a guarantor of groundwater quality because cramped judicial interpretation of the statute restricts its application to pollution of navigable waters.⁷⁰ The EPA's

⁶³ OTA REP., *supra* note 1, at 76 (Table 13, Relationship Between Sources of Contamination and Federal Statutes). Regulation of USTs is addressed by the: Clean Water Act of 1977, 33 U.S.C. §§ 1251-1378 (1982); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 6901 (1982); Toxic Substances Control Act of 1976, 15 U.S.C. § 2601 (1982).

⁶⁴ For thorough discussions of the individual statutes, see Anderson, *RCRA of 1976: Closing the Gap*, 1978 WIS. L. REV. 633 (1979); F. SKILLERN, ENVIRONMENTAL PROTECTION: THE LEGAL FRAMEWORK §§ 4.28-4.34, at 190; Note, *The Safe Drinking Water Act and the Realities of Groundwater Pollution*, 1983 ST. LOUIS U.L.J. 1019 (1983); Tripp and Jaffe, *Preventing Groundwater Pollution: Towards a Coordinated Strategy to Protect Critical Recharge Zones*, 1979 HARV. ENVTL. L. REV. 1 (1979); Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980* 1982 COLUM. J. ENVTL. L. 1 (1982).

⁶⁵ 33 U.S.C. §§ 1251-1371 (1982).

⁶⁶ *Id.* § 1251(a).

⁶⁷ *Id.* § 1251(d). The President is delegated authority by Congress to "... develop conservation programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters . . ." (emphasis added).

⁶⁸ *Id.* § 1362(b).

⁶⁹ *Id.* § 1364. The CWA provides, in part, that where pollution presents an "imminent and substantial endangerment to the health of persons . . .," the EPA is authorized to seek injunctive relief on behalf of the U.S. in the appropriate federal court. Congress established a contingency fund to alleviate any "imminent and substantial threat to the public health" posed by "the release into the environment of any pollutant or other contaminant." *Id.* § 1364(b)(1), (3) (1982) (emphasis added).

⁷⁰ See, e.g., *Kelley v. U.S.*, 618 F. Supp. 1103 (W.D. Mich. 1985). In *Kelley*, the court held that the CWA provides government with no regulatory or enforcement authority over groundwater contamination, regardless of whether the groundwater ultimately rejoins navigable waters. See *United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tex. 1975) (CWA does not apply to subsurface wells where there is no evidence that the discharge of pollutants affects surface waters). See also *State of New York v. United States*, 620 F. Supp. 374 (E.D.N.Y. 1985). In this case the court declined to decide whether the CWA applies to discharges of pollutants into groundwater because "it is clear that plaintiff has alleged that the pollutants threaten to contaminate . . . undisputably navigable waters."

regulatory authority is similarly restricted to navigable waters. Pursuant to the CWA, the EPA is authorized to require states to adopt groundwater programs only where surface water quality is threatened.⁷¹ The EPA must thus show that there is a hydrogeologic nexus between the groundwater and surface waters before exercising its regulatory authority.

The Safe Drinking Water Act of 1974 (SDWA),⁷² was enacted in part to remedy the deficiencies of the CWA. Congress intended the SDWA to improve and protect the nation's public drinking water sources.⁷³ Congress delegated to the EPA authority to promulgate national drinking water standards, to monitor underground waste injections, and to protect certain types of aquifers.⁷⁴ However, to the extent that groundwater pollution victims rely on private wells, they do not benefit from the SDWA's protections.⁷⁵ The private well water supplies used, for example, by residents of Canob Park, Rhode Island,⁷⁶ do not fall within the scope of "public water systems" as defined by the statute.⁷⁷ The SDWA is thus of limited use to the

⁷¹ Kentucky *ex. rel.* Hancock v. Train, 9 ENVTL REP. (BNA)(ERC) 1280, 1282 (E.D. Ky. 1976). The EPA also has authority to regulate deep water well injection where there is a threat to surface water quality. Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974). The EPA has yet to promulgate enforceable regulations for the underground injection of hazardous wastes under the Safe Drinking Water Act (SDWA). H.R. REP. NO. 198, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 5587-89. In hearings prior to the enactment of the RCRA Amendments, members of Congress expressed "grave concern" over the EPA's "failure to carry out the SDWA's requirements." *Id.* To date, underground injections of hazardous waste is virtually unregulated and not all national drinking water regulations are enforceable. *Id.* For a critical discussion of the CWA and its subsequent judicial interpretation, see Tripp, *supra* note 64.

⁷² 42 U.S.C. § 300f-300j-10 (1982). During debate over the SDWA, members of Congress acknowledged the increased frequency of groundwater pollution incidents and noted that the public was largely unaware of the adverse health effects of drinking contaminated water. H.R. REP. NO. 93d Cong. 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6454, 6456.

⁷³ 42 U.S.C. § 300h-3(e) (1982). The SDWA protects public water systems, but it also protects aquifers designated as the "sole or principal drinking water source for the area." *Id.* For an interesting case making use of the "sole source" aquifer designation, see Montgomery County, Maryland v. EPA, 662 F.2d 1040 (4th Cir. 1981) (protection of the SDWA extended to private wells that drew from an aquifer properly designated as sole source of drinking water for the area).

⁷⁴ 42 U.S.C. § 300f(1) (1982).

⁷⁵ *Id.* The drinking water standards are to apply to "public water systems" defined as systems providing drinking water for human consumption and consisting of at least fifteen service connections serving at least twenty individuals. *Id.*

⁷⁶ See notes 6-9 and accompanying text.

⁷⁷ This statutory definition removes private well owners from the statute's jurisdiction. Moreover, the court in United States v. Price, 688 F.2d 204 (3d Cir. 1982), unambiguously restricted EPA's injunctive authority under the SDWA to public water systems.

class of citizens discussed in this article: the private well owners who suffer injuries as a result of groundwater contaminated by leaking USTs.

Congress believed it had "closed the gap"⁷⁸ in environmental protection statutes when it enacted the Resource Conservation and Recovery Act of 1976 (RCRA).⁷⁹ Congress recognized the "pernicious effect" on groundwater of inadequate regulation of the land disposal of hazardous waste.⁸⁰ Since inadequate hazardous waste disposal was found to pollute the groundwater, RCRA was drafted to regulate hazardous materials from "cradle to grave."⁸¹ The EPA⁸² is authorized to regulate all pollution sources, as well as to seek injunctive relief against appropriate parties upon receipt of evidence that transportation or disposal of hazardous wastes may present "an imminent and substantial endangerment to health or the environment."⁸³

The provisions of RCRA apply directly to groundwater contamination, and the statutory term "disposal" explicitly includes leaks from USTs.⁸⁴ When a UST leak presents an imminent and substantial danger to the environment or the public health, the EPA may issue an administrative abatement order and then bring an action in federal court to enforce it.⁸⁵ Certain factors operate, however, to un-

⁷⁸ H.R. REP. NO. 1491, 94th Cong., 2d Sess., reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238. Congress intended the enactment of RCRA to eliminate "the last remaining loophole in environmental law." *Id.* at 6241.

⁷⁹ 42 U.S.C. §§ 6921-74 (1982).

⁸⁰ H.R. REP. NO. 994-1491, 94th Cong., 2d Sess., reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6325.

⁸¹ For a judicial interpretation of this congressional intent, see *United States v. Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823, 834 (W.D. Miss. 1984).

⁸² 42 U.S.C. § 6922 (1982).

⁸³ *Id.* § 6903 (1982).

⁸⁴ *Id.* The Act regulates "disposal" of hazardous substances; the term "disposal" is defined as "the discharge, deposit, injection, dumping, spilling, *leaking*, or placing of any solid waste or hazardous waste into or on any land or water so that . . . [it] may enter the environment, or be emitted into the air or discharged into any waters, *including groundwaters*. *Id.* (emphasis added).

⁸⁵ *Id.* § 6973. RCRA provides that the Administrator of the EPA may:

upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to the health or the environment, . . . bring suit on behalf of the United States . . . to immediately restrain any person from contributing to such handling, storage, treatment, transportation, or disposal, to stop . . . [such activities] . . . or to take such other action as may be necessary to protect public health and the environment.

Id.

dercut the effectiveness of this statutory provision as it applies to gasoline UST leaks. First, the EPA's regulatory scheme establishes standards that apply only to storage and disposal of hazardous "wastes."⁸⁶ Second, there are statutory exceptions for those wastes "being beneficially used or reused."⁸⁷ Thus, prior to the RCRA Amendments of 1984, UST leaks involving gasoline might have been exempt from EPA abatement orders because gasoline was not considered a waste, and, even if it were, its underground storage would have fallen within RCRA's beneficial use exception. These exemptions, combined with the discretion granted to the EPA to intervene,⁸⁸ have lead to a laissez-faire regulatory approach to UST gasoline leaks, an approach that did not change until after enactment of the RCRA Amendments of 1984.⁸⁹ This delay resulted in part from the fact that Congress' next significant environmental statute, the Comprehensive Environmental Response, Compensation and Liability Act of 1980⁹⁰ (CERCLA) also failed to address UST gasoline leaks.

Congress intended CERCLA to remedy two critical problems that remained unresolved after RCRA was enacted: insufficient appropriations to combat pollution from hazardous waste sites; and RCRA's inapplicability to abandoned and inactive hazardous waste sites.⁹¹ CERCLA authorized the establishment of a hazardous substance response trust fund, popularly know as "Superfund,"⁹² and granted the EPA enforcement authority to seek appropriate relief in federal courts for violations of the statute.⁹³

⁸⁶ 40 C.F.R. § 262.10.

⁸⁷ 40 C.F.R. § 261.6(a)(1)-(2). The regulations also exempt those "hazardous wastes . . . legitimately recycled or reclaimed; . . . being accumulated, stored or physically, chemically treated prior to beneficial use . . ." *Id.*

⁸⁸ 42 U.S.C. § 6903 (1982).

⁸⁹ See *infra* notes 96-127 and accompanying text.

⁹⁰ 42 U.S.C. §§ 9601-57 (1982).

⁹¹ H.R. REP. NO. 1016, 94th Cong., 2d Sess., reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120.

⁹² 42 U.S.C. § 9631 (1982). The Superfund is derived from a general revenue appropriation, *id.* § 9631(b)(2); a tax on petroleum and on chemicals used in the processes that create hazardous wastes, *id.* § 9661; and a tax on the hazardous wastes themselves, *id.* For a typical example of judicial interpretation of the congressional intent of the Superfund, see *United States v. Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823, 841 (1984) (CERCLA intended to spread costs of clean up among those who create and profit from waste disposal).

⁹³ 42 U.S.C. § 9606 (1982). The EPA may intervene when:

any hazardous substance is released, or there is a substantial threat of such a release . . . ; [or where there is] a release or substantial threat of a release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the health or welfare.

Despite the EPA's new-found access to financial resources, its broader enforcement authority, and the broader statutory liability for polluters, CERCLA does not protect groundwater, or its users, from UST leaks involving gasoline. During the statute's drafting, petroleum products were specifically excluded from the Act's regulatory reach.⁹⁴ The Act, in addition, fails to provide for victim compensation, so groundwater pollution victims are required to rely in the alternative on common law liability theories.⁹⁵

B. The RCRA Amendments of 1984

On November 8, 1984, four years after the passage of CERCLA, and nearly a decade after the passage of RCRA, Congress squarely addressed the environmental dangers associated with UST leaks. The RCRA Amendments⁹⁶ set forth a comprehensive scheme to regulate USTs.⁹⁷ Congress' principal aims in drafting the amendments were to increase the number of statutorily recognized hazardous substances, and to initiate the first national effort to detect and prevent LUST.⁹⁸ Several of the provisions are primarily aimed at collecting the data necessary to monitor the use of USTs.

Id. § 9604(a)(1)-(B). CERCLA provides for a wide scope of liability for hazardous waste site pollution: current facility owners and operators, facility owners at the time the wastes were disposed, and transporters of hazardous substances, are all liable to the federal government

⁹⁴ *Id.* 42 U.S.C. § 9601(14). The term "hazardous substance" for the purposes of CERCLA ". . . does not include petroleum, including crude oil or any fraction thereof. . . ." *Id.* Section 205 of the Superfund Amendments and Reauthorization Act of 1986 establishes a response program to ensure that the EPA can rapidly respond to petroleum leaks from USTs. *See* 132 CONG. REC. S13108 (daily ed. Sept. 19, 1986). *See supra* note 19 and *infra* note 95. It is not questioned, however, whether CERCLA's protection extends to groundwater, *id.* § 9601(8), and that a leak constitutes a "release" for the purposes of the statute, *id.* § 9601(22). For a further discussion of the legislative history of CERCLA, see *Grad, supra* note 52; and Note, *Generator Liability for Cleanup of Abandoned Hazardous Waste Dumpsites*, 130 U. PA. L. REV. 1229 (1982).

⁹⁵ During the initial stages of its drafting, CERCLA contained a provision for victim compensation that would have enabled those who suffer pollution injuries to assert claims against the Superfund for medical expenses and lost wages. S. REP. NO. 848, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119. A legislative compromise was later reached that deleted the provision. *Id.* The Superfund Amendments and Reauthorization Act of 1986 establishes a \$500 million Leaking Underground Storage Tank Trust Fund to finance response costs. Superfund Amendments and Reauthorization Act of 1986, section 205(d), 132 CONG. REC. S13108 (daily ed. Sept. 19, 1986).

⁹⁶ 42 U.S.C.A. §§ 6991-6991i (West Supp. 1985).

⁹⁷ *Id.*

⁹⁸ *Id.*

The regulatory program promulgated pursuant to the RCRA Amendments contains all the elements necessary for comprehensive environmental protection from UST leaks. It includes: notification to a designated agency of potential environmental hazards;⁹⁹ regulation of substance release, detection, prevention and correction;¹⁰⁰ financial responsibility requirements to ensure a fund to compensate third parties;¹⁰¹ performance standards;¹⁰² federal approval process for state regulatory programs;¹⁰³ regulation of UST inspection, monitoring and testing;¹⁰⁴ and federal enforcement authority.¹⁰⁵

As amended, RCRA defines an underground storage tank as "any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which . . . is ten per centum or more beneath the surface of the ground."¹⁰⁶ The definition of "regulated substance" is broader than the one contained in CERCLA, so that "petroleum, including crude oil or any fraction thereof" is expressly included.¹⁰⁷

UST owners are required to notify the appropriate state or local agency of the existence of USTs, and to specify their age, size, type, location and uses.¹⁰⁸ USTs that are no longer in use also are included within the statute's ambit; any tank taken out of operation after January, 1974, unless it has been removed from the ground, must be reported by its owner.¹⁰⁹ To ensure that all UST owners comply with the new notification requirements, distributors of regulated substances,¹¹⁰ such as gasoline distributors or sellers of USTs, are required to inform UST owners of the new reporting requirements.¹¹¹

The EPA is authorized to promulgate mandatory leak prevention and detection procedures for UST owners,¹¹² and is required to issue

⁹⁹ *Id.* § 6991a(a).

¹⁰⁰ *Id.* § 6991b.

¹⁰¹ *Id.* § 6991b(d).

¹⁰² *Id.* § 6991b(c).

¹⁰³ *Id.* § 6991c.

¹⁰⁴ *Id.* § 6991d.

¹⁰⁵ *Id.* § 6991e.

¹⁰⁶ *Id.* § 6991(1).

¹⁰⁷ *Id.* § 6991(2)(B). USTs with less than an 1,100 gallon capacity, and which are used for noncommercial purposes, are exempt from regulation. *Id.* § 6991(1)(A).

¹⁰⁸ *Id.* § 6991a(a)(1).

¹⁰⁹ *Id.* § 6991a(a)(2)(A).

¹¹⁰ *Id.* § 6991a(a)(5).

¹¹¹ *Id.* § 6991a(a)(6).

¹¹² *Id.* § 6991b. These procedures may include requirements that all UST owners maintain

performance standards for all USTs.¹¹³ During the period prior to the EPA's issuance of those standards, Congress placed an interim prohibition on the installation of new USTs.¹¹⁴ Congress instructed the EPA to consider in its rulemaking such factors as tank design, construction, installation, release detection, and compatibility standards.¹¹⁵ This new regulatory program is a significant step forward in legislative efforts to protect the nation's groundwater, but it does not address the needs of the victims of groundwater pollution. The following section discusses the one provision of RCRA relating to victims, and how that provision fails to enable them to recover damages.

C. Citizen Suits

RCRA grants citizens the right to bring suits to abate pollution.¹¹⁶ Such suits may be brought against any person or government agency, including past or present generators, transporters, owners and operators, who contributed to waste disposal that presents an

leak detection systems, maintain records of leak detection systems, *id.* § 6991b(c)(i), report releases and report any corrective action taken in response, and follow UST closure requirements to prevent future releases. Congress discouraged the use of rudimentary "dipstick" leak detection systems; the EPA regulations are thus likely to require more stringent testing procedures. H.R. REP. NO. 1133, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5649, 5698. *Id.* § 6991b(c)(5). In promulgating regulations, the EPA is authorized to distinguish between types of USTs, taking into consideration such factors as location, soil and climate conditions, uses, maintenance history, age, current industry recommended practices, national census codes, hydrogeology, water table, size, quantity of stored substances, technical capability of owners and operators, and the compatibility of stored substances with the tank's construction. *Id.* The aspect of the RCRA Amendments that may prove to be the most significant victory for environmentalists is the requirement that these systems be monitored by, and that leaks be reported to, designated regulatory authorities. By holding potential polluters accountable to regulatory authorities for the maintenance of their USTs, this new requirement will help to reduce the number of over-aged, "time-bomb" USTs.

¹¹³ 42 U.S.C. § 6991e (West Supp. 1985).

¹¹⁴ *Id.* § 6991g.

¹¹⁵ *Id.* § 6991b(b). In order lawfully to install a new UST that will contain regulated substances, owners must prove to designated authorities that the UST:

(A) will prevent releases due to corrosion or structural failure for the operational life of the tank;

(B) is cathodically protected against corrosion, constructed of a noncorrosive material, or designed in a manner to prevent the release or threatened release of any stored substance; and,

(C) the material used in the construction or lining of the tank is compatible with the substance to be stored. *Id.*

The EPA's new tank performance standards, to be promulgated by May, 1987, presumably will incorporate these requirements.

¹¹⁶ *Id.* § 6972(a)-(f).

imminent and substantial endangerment to health or the environment.¹¹⁷ Though Congress chose not specifically to grant citizens the right to initiate suits to recover damages for personal injuries and property damages, the RCRA Amendments permit the EPA to promulgate regulations designed to ensure the availability of a financially viable defendant in a common law tort action.¹¹⁸

Congress delegated to the EPA discretionary authority to promulgate regulations requiring UST owners to be financially capable of taking the corrective actions necessary to "compensate third parties for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from operating an underground storage tank."¹¹⁹ Congress envisioned that evidence of such financial responsibility would be established by requiring UST owners to maintain pollution insurance, to provide appropriate state agencies with surety bonds, letters of credit, or guarantees, or to demonstrate qualifications for self-insurance.¹²⁰ In cases where there are pollution damages resulting from a UST leak and the owner is insolvent, injured third parties could assert a claim for damages against the guarantor.¹²¹

There are, however, several limitations to this statutory protection of third party pollution victims. Most notably, the authority to promulgate financial responsibility regulations is discretionary; the EPA need only promulgate such regulations if it is deemed "necessary or desirable."¹²² Such permissive authority reduces the possibility that these regulations will ever be promulgated.¹²³ Furthermore, the third party's liability would be limited to the amount of the fund created, which is not likely to be sufficient to compensate for all of the personal and property damages incurred due to groundwater contamination.¹²⁴ Finally, the guarantor is not strictly liable for such damages; instead, the guarantor is entitled to ". . . invoke all the rights and defenses which would have been available to the owner or operator if any action had been brought against the owner

¹¹⁷ *Id.*

¹¹⁸ *Id.* § 6991b(d).

¹¹⁹ *Id.* § 6991b(d)(1).

¹²⁰ *Id.* § 6991(d)(2).

¹²¹ *Id.* § 6991(d)(3).

¹²² *Id.* § 6991b(d)(1).

¹²³ EPA's recent history of non-regulation in the face of discretionary (and even mandatory) statutory directives has been documented and criticized. See e.g., Cross, *Section 111(c) of the Clean Air Act: A New Approach to the Control of Airborne Carcinogens*, 13 B.C. ENVTL. AFF. L. REV. 215, 216-28 (1986).

¹²⁴ 42 U.S.C.A. § 6991b(d)(4) (West Supp. 1985).

or operator by the claimant"¹²⁵ Consequently, even if the UST owner is deemed financially reliable in accordance with the as-yet unpromulgated financial responsibility regulations, the guarantor may successfully assert defenses to that liability.

Instead of granting the EPA discretionary authority to ensure the availability of financial resources to compensate for pollution damages, Congress should have included a victim compensation provision. From the point of view of the plaintiff, statutory compensation provisions are preferable to common law damage actions because the statute removes often insurmountable legal obstacles, such as proof of causation.¹²⁶ The common law theories of liability, such as nuisance, negligence, and trespass, were developed before the legal and scientific complexities of toxic chemical exposure arose. When UST pollution victims seek to recover damages through common law damage actions, their attorneys must grapple with scientific uncertainties regarding causation and proof. Their claims are subject to restrictive statutes of limitations that do not take into account the long latency aspects of injuries resulting from exposure to contaminated groundwater.¹²⁷ In sum, the common law has not kept pace with the modern hazards of pollution.

Congress has thus far failed to enact a victim compensation provision, although such provisions are not unheard of. Japan has enacted a victim compensation statute,¹²⁸ and model statutes have been

¹²⁵ *Id.* § 6991(d)(3).

¹²⁶ For an analysis of the shortcomings of common law actions to compensate victims of toxic chemical exposure, see Trauberman, *Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim*, HARV. ENVTL. L. REV. 177, 188-202 (1983). See also Bohrer, *Fear and Trembling in the Twentieth Century: Technological Risk, Uncertainty and Emotional Distress*, 1984 WIS. L. REV. 83 (1984), in which the author concludes that the common law provides an inadequate compensatory scheme in era marked by technologies, the byproducts of which risk the health of huge populations and create unforeseeable and unpredictable injuries.

The Massachusetts Special Commission, MASS. LEGIS. REP., *supra* note 21, concluded that the existing common law compensates victims only when the following conditions are present: 1) the person or company who released the substances is identifiable and solvent; 2) the lawsuit is brought within the three year statute of limitations; 3) the party who released the substances was negligent or could be found strictly liable; 4) the victims' injuries were more likely than not caused by the release; 5) the victims' injuries are compensable under existing legal rules; 6) the damage award is likely to be large enough that an attorney would take the case on a contingent fee basis; and, 7) the victims' financial status enables them to wait for the award until after the judgment.

¹²⁷ *Supra* note 126.

¹²⁸ A victim compensation scheme was enacted in Japan in 1973. Kogai Kenko Higai Hoshu Ho, Law No. 111 of 1973. The Japanese law establishes an administrative procedure, roughly comparable to U.S. worker's compensation statutes, whereby upon official certification, victims may be compensated for pollution-related injuries. *Id.* The statute provides for a tax to be

proposed in the United States.¹²⁹ The RCRA Amendments do help to reduce the number of future incidents of groundwater pollution and reveal Congressional recognition of the plight of victims of groundwater pollution. It is clear, however, that those victims, in the face of legislative inaction, must look to the common law for compensation. The next section discusses the common law theories of liability applicable to litigation with oil companies.

IV. COMMON LAW REMEDIES FOR UST POLLUTION DAMAGES

Courts and juries who determine whether UST pollution victims should be compensated, and if so, for what injuries and by which parties, not only must resolve factual disputes, but must also make policy decisions. Few individual UST owners have the financial resources necessary to cover the enormous costs of groundwater decontamination. The issue thus arises as to which parties involved in the gasoline marketing chain are best able to bear the cost of environmental and personal damages associated with gasoline sales.

The oil companies, not their customers or the general public, are best able, among those who benefit from the storage and sale of gasoline, to spread the costs of these risks.¹³⁰ Unless oil companies

paid by polluters that finances the compensation fund. This statute, as well as its historical origins and applications, is considered in GRESSER, FUJIKURA, AND MORISHIMA, ENVIRONMENTAL LAW IN JAPAN, (1981); see also Aronson, *Review Essay: Environmental Law In Japan*, 7 HARV. ENVTL. L. REV. 135 (1983).

¹²⁹ A model victim compensation statute is proposed and discussed in Trauberman, *supra* note 126, at 215, which would enable victims of chemical injuries covered by the statute to present a claim against a compensation fund. This fund would be designed to allocate costs to the enterprises responsible for generating the costs.

In Massachusetts, proposed amendments to the state's Superfund Act, *supra* note 21, would provide for compensation for many types of chemical injuries. MASS. LEGIS. REP., *supra* note 18. The same study suggested legislative modifications to the common law, including: provisions for expedited trials for chemical exposure victims; waiver of some Mass. R. Civ. P. 23(b) class action requirements; and allowance of certain scientific evidence that is currently excluded. MASS. LEGIS. REP., *supra* note 18, at 51-63.

¹³⁰ In an early article advocating vicarious liability as the preferred way to administrate the risks of modern business, the late Justice William O. Douglas presented the "entrepreneur theory." Justice Douglas reasoned that the hazards of business should be borne by the business directly, and then the resulting higher costs would be reflected in the consumers' purchase price. See Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584 (1929). This theory spawned many scholarly works; furthermore, it is reflected in the recent expansion in the number of cases involving strict liability in tort. RESTATEMENT (SECOND) OF TORTS § 402A (1977). In a later article that also addresses the public policy supporting vicarious liability, Professor Morris reasserts Justice Douglas's entrepreneur theory and argues that businesses should internalize the costs of business-related risks. See Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172, 1176 (1952). More recently, Professor Calabresi suggests that the most efficient allocation of pollution damages

are found liable, taxpayers and individuals in affected communities must allocate public funds to finance expensive groundwater decontamination projects. If oil companies are insulated from liability for these business-related hazards, the costs of groundwater pollution become a "hidden public subsidy to the sellers and purchasers of fuel who are not . . . required to shoulder the true economic risk and consequence of their activities."¹³¹

Because there is no statutory relief for pollution victims, the common law is the next best alternative for recovery of personal and property damages. The most appropriate theory of liability in a particular case depends in part on the legal relationship between the oil company and the UST. For purposes of analysis, UST cases may be divided into two categories: two party cases involving only an oil company that owns the UST and the pollution victim; and multi-party cases involving oil companies, intermediate parties, and pollution victims. In the latter situation, an intermediate party might be a franchisee, a lessee, or a vendee. The next sections of the article present theories of liability that are appropriate in two-party cases where the oil company owns and operates the service station.

1. Strict Liability

The pollution victim's best theory of liability when the oil company owns and operates the gasoline service station is strict liability. The doctrine of strict liability arose in the nineteenth century in the famous case of *Rylands v. Fletcher*,¹³² its application holds a party liable without regard to fault for injuries resulting from abnormally dangerous activities.¹³³ Courts impose strict liability where the defendant's activity is abnormally dangerous. In groundwater pollution cases, the issue is whether the storage of gasoline in USTs is an abnormally dangerous use of land.

Abnormally dangerous activities are ones that place innocent parties at a high risk of injury, activities that cannot be avoided by due

is to allocate them to the "cheapest long-run cost avoider." G. CALABRESI, THE COSTS OF ACCIDENTS, 138 (1970). Professor Calabresi offers three guidelines for accomplishing this goal:

[o]ptimize the relationship between avoidance costs and administrative costs in searching for the best cost avoider; avoid externalization of costs where consistent with the above point; and seek out the 'best briber,' meaning the party who can enter into a transaction most readily to rectify an allocation of costs that is less than optimal

.....
G. CALABRESI, THE COST OF ACCIDENTS, 143-52 (1970).

¹³¹ CLF REP., *supra* note 18, at 76.

¹³² See *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868).

¹³³ See, e.g., *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 274-75 (Utah 1982).

care, that are uncommon or inappropriate to the locale, and that produce benefits shared equally throughout society.¹³⁴ The public policy supporting imposition of strict liability for damages caused by these activities is based on the notion that when all members of society benefit from an activity, they should also bear the cost of associated risks. This policy is effectuated when those who undertake abnormally dangerous activities are required to compensate those injured by the activities, and can then pass on the cost of accidents in the prices charged to consumers.

The underground storage of gasoline is such an abnormally dangerous activity. Even if the oil companies or their agents regularly monitor the tanks, the risk of leaks and attendant harms still exists.¹³⁵ Storage tanks that threaten water supplies can be characterized as inappropriate, and the benefits arising from storage are societal in scope. Lastly, the oil companies are uniquely capable risk-spreaders through their ubiquitous retail operations.

An early case set the stage for oil company liability by finding a gasoline service station owner strictly liable for pollution damages resulting from underground gasoline storage tank leaks.¹³⁶ In *Yommer v. McKenzie*,¹³⁷ the plaintiff's residential well was contaminated by gasoline that leaked from the defendant's UST. The defendant was an independent gasoline service station owner whose USTs were located immediately adjacent to plaintiff's property. At trial, the plaintiff argued that the operation of the gasoline station in a residential area constituted a nuisance.¹³⁸ The court agreed, and plaintiffs were awarded money damages.¹³⁹

On appeal, the decision was affirmed, but not on nuisance grounds. The defendant argued that the operation of a gasoline service station did not constitute a nuisance, that the plaintiff's pollution damages were not caused by negligent operation of the filling station, and that there was no adequate proof that his USTs caused the contamination.¹⁴⁰ The appeals court rejected these arguments and concluded instead that the defendant was strictly liable for the groundwater contamination.¹⁴¹

¹³⁴ RESTATEMENT (SECOND) OF TORTS § 520 (1977).

¹³⁵ See *supra* notes 33-39 and accompanying text.

¹³⁶ *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969) (gasoline station owner strictly liable for UST pollution damages to neighboring well).

¹³⁷ *Id.*

¹³⁸ *Id.* at 222, 257 A.2d at 139.

¹³⁹ *Id.*

¹⁴⁰ *Id.* For a similar result on appeal, see *Mowrer v. Ashland Oil and Refining Co., Inc.*, 518 F.2d 659 (7th Cir. 1975).

¹⁴¹ *Yommer*, 255 Md. at 222, 257 A.2d at 139; For a similar result on appeal, see *Mowrer*,

The *Yommer* court held that the underground storage of gasoline near residential wells was an abnormally dangerous activity.¹⁴² The court found that "the placing of a large underground tank in close proximity to the appellees' residence involve[d] . . . a risk since it [was] not a matter of common usage."¹⁴³ Activities that are a matter of common usage are customarily engaged in by most people, and not by a few specially-trained experts.¹⁴⁴ The *Yommer* court's application of strict liability in this case was appropriate; the gasoline service station owner engaged in a dangerous and potentially pollution-causing activity, and thus should be required to internalize the risk of resulting damages.

In the similar case of *City of Northglenn v. Chevron USA, Inc.*,¹⁴⁵ the defendant oil company stored several thousand gallons of gasoline in USTs located in a storage yard near a residential area and its sewer lines. The court held the oil company strictly liable for damages to city sewer lines that resulted when the UST leaked.¹⁴⁶ The court adopted the *Yommer*¹⁴⁷ court's reasoning that parties who store gasoline underground for economic profit should be liable for harm to persons or property caused by leaks.¹⁴⁸ In addition, the

518 F.2d 659. Plaintiffs should not give up on nuisance as a viable theory of liability: numerous courts have held groundwater polluters liable in nuisance. For a thorough, inter-jurisdictional review of such cases, see Davis, *Groundwater Pollution: Case Law Theories For Relief*, 39 Mo. L. REV. 177 (1974). See also *Wood v. Picillo*, 443 A.2d 1244 (R.I. 1982) (maintenance of hazardous waste dump that contaminated groundwater constitutes public and private nuisance); *Pollard v. Land West, Inc.*, 96 Idaho 274, 526 P.2d 1110 (1974) (contamination of plaintiff's groundwater supply by discharge from sewage system constitutes nuisance); *Cities Service Oil Co. v. Merritt*, 332 P.2d 677 (Okla. 1958) (where residential wells contaminated by saltwater discharge from oil company operations, plaintiff recovers in nuisance); *Haveman v. Beulow*, 36 Wash. 2d 184, 217 P.2d 313 (1950) (where refuse matter from dehydrating plant contaminates residential wells, defendant liable in nuisance).

Depending on the situation, plaintiffs could also include a count alleging trespass on the part of groundwater polluters. See, e.g., *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 121 N.E.2d 249 (1954) (to be liable, polluter must intentionally permit gasoline to leak into neighbors' well).

¹⁴² *Yommer*, 255 Md. at 224, 257 A.2d at 140.

¹⁴³ *Id.* ACCORD RESTATEMENT (SECOND) OF TORTS § 520 (1977) ". . . the storage of gasoline, or other inflammable liquids in large quantities in a populated area . . . is a matter of strict liability."

The *Yommer* court relied on the Restatement's distinction between common and uncommon uses: "gas and electricity in household pipes and wires [are examples of common usage], as contrasted with large gas storage tanks or high tension power lines." *Id.*, at 140, citing RESTATEMENT (SECOND) OF TORTS § 520(d) and comment to (d) (Tent. Draft No. 10, 1964).

¹⁴⁴ RESTATEMENT (SECOND) OF TORTS § 520(d) (1977).

¹⁴⁵ 519 F. Supp. 515 (D. Colo. 1981).

¹⁴⁶ *Id.*

¹⁴⁷ *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969).

¹⁴⁸ *Id.*

Chevron court found that application of strict liability provided a particularly appropriate remedy in this case because the underground storage of gasoline posed extensive danger to human life and health, noting that the widespread use of gasoline did nothing to diminish its dangerousness.¹⁴⁹

Another court applying strict liability in a groundwater contamination case found support in express statutory public policy.¹⁵⁰ The plaintiff in *Branch v. Western Petroleum*,¹⁵¹ operated a dairy farm that relied exclusively on two groundwater wells drilled on his property. These wells were contaminated by petroleum that leached into the aquifer from the defendant's waste water disposal pit located on property immediately adjacent to the plaintiff's.¹⁵² The trial court held the defendant strictly liable for the pollution damages to plaintiff's wells and agricultural property.¹⁵³

On appeal, the application of strict liability was affirmed.¹⁵⁴ The court found not only that the ponding of toxic petroleum substances near a residential area constituted an abnormally dangerous use of the land,¹⁵⁵ but also that holding the defendant liable under a theory of strict liability was consistent with the state's declared public policy prohibiting the discharge of waste waters into the groundwater of the state "without first being given the degree of treatment necessary to protect the beneficial uses of such waters"¹⁵⁶

In sum, strict liability is the most appropriate theory of liability in gasoline UST groundwater pollution cases. Regardless of whether courts expand the public policy ground for strict liability articulated in *Branch*, the risk inherent in the underground storage of gasoline qualifies it as an abnormally dangerous activity. Consistent with the policy underlying strict liability, oil companies that are found liable can factor their legal costs into the price of the goods they provide.¹⁵⁷

¹⁴⁹ 519 F. Supp. 515 (D. Colo. 1981).

¹⁵⁰ See, e.g., *Branch v. Western Petroleum, Inc.*, 657 P.2d 267 (Utah 1982).

¹⁵¹ *Id.*

¹⁵² *Id.* at 270.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 275.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 273, citing Utah Water Pollution Control Act, 1981 Utah Laws 126.

¹⁵⁷ See Morris, *supra* note 130. Professor Morris states the majority view that:

[o]ne who should know that his activity, even though carefully prosecuted, may harm others, should treat this harm as a cost of his activity. If . . . the activity is a business enterprise, this cost item will be passed on to the consumers, spread so thin that no one will be seriously affected.

Id. at 1176.

2. Vicarious Liability

Victims of gasoline UST pollution have a more complicated legal battle when an oil company sells, leases or franchises both the gasoline service station and the UST that caused pollution injuries. The issue arises whether the victim may still seek recovery from the oil company, as well as from the vendee, lessee or franchisee.

a. Oil Company As Vendor

The general rule is that when the assets of one company are transferred to another, the transferee is not liable for the debts and liabilities of the transferor.¹⁵⁸ There are exceptions, however, to the general rule. In the case of the sale of a business, which includes such fixtures as USTs, the fixtures are covered by warranties of merchantability, adopted either judicially or by statute, that operate to hold sellers strictly liable for the injuries that result from sale of defective products.¹⁵⁹ Courts have held that these warranties apply to used goods, such as USTs, as well as to new goods.¹⁶⁰ These warranties, and the strict liability in tort that they create, are applicable both to the buyers and to a broad class of users and bystanders who may be injured by the product. UST pollution victims may thus include a products liability count in suits against oil companies, so long as the plaintiff properly alleges that the pollution-related damages result from a deteriorated, over-aged UST that was sold to the current owner in a defective, unreasonably dangerous condition.

At common law, sellers are liable for personal injuries but not property damages that result from a product that is sold in a defective condition unreasonably dangerous to any ultimate user.¹⁶¹ To determine whether a defect renders a good unreasonably dangerous,

¹⁵⁸ FLETCHER CYCLOPEDIA OF CORPORATIONS §§ 7122-23 (1983).

¹⁵⁹ RESTATEMENT (SECOND) OF TORTS § 402A (1977) provides that:

[o]ne who sells any product in a defective condition unreasonably dangerous to a user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer or to his property, if a.) the seller is engaged in the business of selling such a product; and b.) it is expected to and does reach the user without substantial change in the condition in which it is sold.

¹⁶⁰ See, e.g., *Jordan v. Sunnyslope Appliance Propane and Plumbing Supplies Co.*, 135 Ariz. 309, 660 P.2d 1236 (1983) (since § 402A does not mention word "new," buyer of used propane tank with defective valve may recover from seller); *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 336 A.2d 62 (1975) (public policy demands that buyers receive used chattel safe for purposes intended). For a current annotation discussing the application of products liability theory to used goods, see Annot., 53 A.L.R.3d 388 (1975) (Supp. 1984).

¹⁶¹ RESTATEMENT (SECOND) OF TORTS § 402A (1977).

courts consider several factors, including the level of the buyer's knowledge of the nature of the product and the buyer's ability to correct a defect before harm results.¹⁶² When a major oil company sells a gasoline station with a deteriorated UST to a smaller independent operator, the oil company should warrant the UST's condition.¹⁶³ The oil company has the superior expertise and resources both to anticipate and to correct possible risks from UST failure.

b. Oil Company As Lessor

The common law rule is that lessors are not liable for physical harms caused by dangerous conditions that arise after the lessee has taken possession of the premises.¹⁶⁴ Courts have developed an exception to the general rule of lessor nonliability where a lessor is aware at the time of the lease of an unreasonably dangerous condition on the premises, and is aware that such a condition creates an unreasonable risk to the lessee and to third parties.¹⁶⁵ In such cases, lessors are subject to liability for damages resulting from the condition.¹⁶⁶ Lessors are also liable for injuries to third parties in cases where the lessor is aware of a dangerous condition at the time of the lease, and is aware that the lessee plans to permit the general public to enter onto the premises.¹⁶⁷

¹⁶² See *Turner*, 133 N.J. Super. 277, 336 A.2d 62 (court assesses buyer's level of knowledge as to the nature of the product before applying strict liability); *Hovenden v. Tenbush*, 529 S.W.2d 302 (Tex. Civ. App. 1975) (unreasonableness of defect contingent on buyer's ability to correct a defect before harm results).

¹⁶³ A pollution victim's alternative 402A claim is based on the presumption that the oil company sold to the buyer the real estate upon which the gasoline station rests. At common law, when real estate is sold, the completed sale shifts all liabilities in the land from the seller to the purchaser. See generally PROSSER AND KEETON ON TORTS, § 64 (1984). There are, however, exceptions to this rule where there is a risk of harm to the purchaser from a dangerous condition on the property at the time of the sale. *Id.* A plaintiff could properly allege that an aging, deteriorated UST constitutes a dangerous condition on the property, and that unless the seller properly exercised a duty of care in warning the buyer of attendant risks, the seller should be liable for the UST pollution damages, notwithstanding the fact that he or she no longer owns the service station.

¹⁶⁴ RESTATEMENT (SECOND) OF TORTS § 355 (1965).

¹⁶⁵ For a discussion of these principles see, for example, *Javins v. First National Realty Co.*, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

¹⁶⁶ See, e.g., *Amoco v. Hart*, 356 F.2d 657 (5th Cir. 1966) (landlord oil company breached duty of care to lessee's employee where lessor knew of defective condition of pipe that injured plaintiff); *Young v. Garwaki*, 380 Mass. 162, 402 N.E.2d 1045 (1980) (landlord liable to tenant's guest for injuries sustained from unreasonably dangerous condition of porch railing).

¹⁶⁷ See, e.g., *Benlehr v. Shell Oil Co.*, 62 Ohio App. Rep. 2d 1, 402 N.E.2d 1203 (1978) (where lessor oil company allegedly negligently entrusted gasoline service station to lessee and harm results, issue of fact for jury whether oil company is liable); *Spain v. Kelland*, 379

These exceptions to lessor nonliability are particularly applicable in UST pollution cases because the lessor oil company can be presumed to know the approximate age and condition of its UST, and therefore the relative dangers it poses, at the time of the lease. For instance, in *Wofford v. Rudick*,¹⁶⁸ the court held a landlord liable for leaks from the sewage pipes that contaminated a neighbor's well. The court reasoned that where a landlord leases property, knowing of an unreasonably dangerous condition upon it, the landlord is liable for any damages that result.¹⁶⁹ In the case of a gas station leased by an oil company, if at the time of the lease the oil company knows of the deteriorated condition of the UST, the oil company should be liable to those who suffer pollution damages as a result of UST leaks.

Courts also have applied the theory of strict liability in tort¹⁷⁰ to hold lessor oil companies strictly liable for damages resulting from their lessee's activities. In *Price v. Shell Oil Co.*,¹⁷¹ the court found that the public policy underlying products liability theory applies equally to sellers and lessors since both supply a product for consumer use. The court in *Price* held the lessor oil company strictly liable for injuries sustained by the lessee's employee when the ladder on a rented gasoline tank truck collapsed.¹⁷² As the court reasoned in *Price*, a lessee who is without knowledge of hidden defects is not able to protect himself against liability for injuries to third parties. The policy underlying strict liability that places the risk of liability on manufacturers or sellers should also be applied in UST pollution cases.¹⁷³

In *Sutton v. Chevron Oil Co.*,¹⁷⁴ the court applied strict products liability to hold the lessor oil company strictly liable for the damages caused by its lessee's defective repairs: "[o]il companies which lease . . . service stations fall within the strict liability doctrine as developed. For the protection of the motoring public, they have a duty to supervise station operators, exercise care in the selection of lessees, insure greater safety and promote accident prevention."¹⁷⁵ The *Sutton* court thus adopted the basic theory presented by the

P.2d 149 (Ariz. 1963) (where landlord leases tavern for use by the general public, landlord liable for unreasonably dangerous conditions).

¹⁶⁸ 62 N.M. 307, 318 P.2d 605 (1957).

¹⁶⁹ *Id.*

¹⁷⁰ RESTATEMENT (SECOND) TORTS § 402A (1977).

¹⁷¹ 2 Cal. 3d 245, 85 Cal. Rptr. 178, 466 P.2d 722 (1970).

¹⁷² *Id.* at 258, 85 Cal. Rptr. 187, 466 P.2d at 731.

¹⁷³ *Id.* at 251-53, 85 Cal. Rptr. at 182-83, 466 P.2d at 726-27.

¹⁷⁴ 85 N.M. 604, 514 P.2d 1301 (1973).

¹⁷⁵ 85 N.M. at 612, 514 P.2d at 1309.

*Yommer*¹⁷⁶ court to hold a polluter strictly liable: "[l]iability risk must be shifted from lessee to the oil company because it is more able to bear the costs of accidents or distribute the cost of liability insurance and protect the public from judgment-proof lessees."¹⁷⁷

c. Oil Company As Franchisor

Where an oil company is party to a franchise agreement with an independent service station operator, the operator-franchisee's presence may insulate the oil company-franchisor from liability under some circumstances.¹⁷⁸ Nonetheless, the UST pollution victim may still bring an action for damages against the oil company based on the theory of vicarious liability.

Franchise agreements, and the obligations they impose upon parties, vary among industries according to the custom of the trade, and vary among states according to state franchise regulations.¹⁷⁹ In exchange for the right to use trademarks and to share in promotional activities, the franchisee agrees to provide to the franchisor a share of the proceeds from the business.¹⁸⁰ At common law, a franchisee retains the status of independent contractor rather than that of employee.¹⁸¹

The line between independent contractor status and employee status is, however, a thin one. The line is drawn with reference to the extent a franchisor retains the right to control the business activities of the franchisee either in the franchise agreement or in

¹⁷⁶ *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969), see *supra* notes 136-144 and accompanying text.

¹⁷⁷ *Sutton*, 85 N.M. at 612, 514 P.2d at 1309.

¹⁷⁸ A franchise is literally a "right to vote." 37 C.J.S. *Franchise* § 1 (1943) (Supp. 1985). A franchise agreement is

a license from the owner of a trademark permitting another to sell under that name in accordance with the franchisor's guidelines and procedures where the franchisor provides advertising assistance in exchange for the sales and distribution services of the franchisee.

H & R Block v. Lovelace, 208 Kan. 538, 493 P.2d 205 (1972). By contrast, an agency relationship exists where the oil company is the principal and the service station operator is the agent; this relationship allows the oil company a greater right to control the business enterprise of the service station operator, and thereby imposes upon the oil company greater liability for the service station operator's torts. RESTATEMENT (SECOND) OF AGENCY § 267 (1957). The determination of whether the relationship between an oil company and the gas station bearing its trademark symbols is an agency relationship or is a valid franchise relationship, is a question of fact for the jury to decide. *Id.*

¹⁷⁹ *Supra* note 178.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

actual practice.¹⁸² Where a franchisor retains too much control over a franchisee's business activities, courts apply the doctrine of apparent authority to hold the franchisor liable for the franchisee's torts.¹⁸³ This doctrine applies where the franchisor retains a legally significant level of control over the franchisee, for example, where the fact finder determines that an oil company is involved in day to day service station activities.¹⁸⁴

If an apparent authority relationship between the oil company and the gasoline service station operator is not found, and the service station operator is regarded as an independent contractor, courts do not impute pollution liability to the oil company. There is, however, a recognized exception to this general rule of nonliability.¹⁸⁵ Where an independent contractor is hired to undertake inherently risky activities, the party who hires him has a nondelegable duty to ensure that the independent contractor exercises due care.¹⁸⁶ UST pollution victims may therefore assert that the limited lifespan of USTs creates an unreasonable risk of leaks, and that therefore the franchisor has a nondelegable duty to ensure that service station franchisees take the precautions necessary to prevent leaks. When this duty is breached, and the plaintiff suffers harm, then courts may hold the franchisor oil company liable for the damages.

V. CONCLUSION

In the last decade, national concern about the effects of groundwater contamination has grown. Americans' increasing reliance on groundwater as a source of drinking water, the mounting scientific

¹⁸² *Shaver v. Bell*, 74 N.M. 700, 297 P.2d 723 (1964) (question of whether a service station operator is an oil company employee or an independent contractor is dependent upon who has control or the right of control).

¹⁸³ *See, e.g., Gizzi v. Texaco*, 437 F.2d 308 (3d Cir. 1971) *cert. denied* 404 U.S. 829 (1971) (question of fact for jury as to status of service station mechanic who sold auto with defective brakes). In *Gizzi*, the plaintiff was injured in an accident caused by brake failure in a recently purchased used automobile. The seller was a gasoline service station that sold the defendant oil company's products. At trial, the judge directed a verdict for the oil company, which was reversed on the grounds that the question of the existence of an apparent or implied agency relationship was a matter for the jury to decide. *See also Williams v. St. Claire Medical Center*, 657 S.W.2d 590 (Ky. 1983) (patient who suffered brain damage as a result of anesthesiologist's negligence may recover from hospital, even though anesthesiologist is not employee, on grounds that hospital created ostensible agency relationship).

¹⁸⁴ *Gizzi*, 437 F.2d at 308.

¹⁸⁵ RESTATEMENT (SECOND) OF TORTS § 409 comment b., at 370 (1977).

¹⁸⁶ *See, e.g., Pendergrass v. Lovelace*, 57 N.M. 661, 262 P.2d 231 (1953) (where independent contractor was hired to undertake inherently dangerous activities, employer is strictly liable for independent contractor's torts).

evidence linking chemical groundwater contaminants to disease, and the startling increase in the frequency of groundwater contamination incidents contribute to this concern.

Studies show that gasoline leaking from USTs is a major cause of groundwater contamination. While legislative efforts have addressed the regulatory aspects of the solution, no victim compensation provisions have been enacted. And so, ironically, we extend statutory protection to the groundwater itself with no comparable provisions for those who are harmed by its contamination. In light of this omission, those who suffer personal and property damages as a result of UST-related pollution must rely on the common law theories of liability to recover damages.

It is equitable, economically rational, and consistent with public policy to hold oil companies strictly liable for LUST. When oil companies are strictly liable both directly and under vicarious liability principles to victims for their pollution-related injuries, the oil companies can internalize the risks of manufacturing, distributing, and storing gasoline by reflecting the cost in gasoline prices. This common law solution for the modern technological failure of gasoline USTs can thus reduce the financial burden of those who suffer losses for the convenience we all enjoy in the form of our familiar corner gas stations.