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ARTICLES

A Comparative Analysis: The Affirmative Defense of an Innocent Landowner versus the Prima Facie Case of a Toxic Tort Plaintiff: *Can CERCLA'S Innocent Landowner Provision Be Used as a Defense in a Toxic Tort Suit?*

CHARLES H. SARLO*

TABLE OF CONTENTS

I. Introduction 244
II. The Toxic Tort-CERCLA Relationship 248
III. Statutory Provisions of the Innocent Landowner Defense 250
IV. Application of the Innocent Landowner Defense 252

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A. Defendant Must Acquire Property After the Disposal of Hazardous Substances 253
B. The Requirement of No Causation, Due Care and Foreseeability on the Part of the Purchaser 256
C. Lack of Knowledge Required Upon Acquisition of the Property 259
D. Successful Assertion of the Innocent Landowner Defense 266
V. A Comparitive Analysis: the Affirmative Defense of an Innocent Landowner Versus the Prima Facie Case of a Toxic Tort Plaintiff 268
A. The Theory of Trespass 269
B. The Theory of Strict Liability 272
C. The Theory of Nuisance 275
D. The Principles of Causation 278
VI. Conclusion 281

I. Introduction

Today, only the foolhardy would purchase a commercial or industrial piece of property without performing some degree of an environmental due diligence. Such an acquisition may result in exposure to environmentally-related liabilities that can easily dwarf the value of the acquired real estate. These liabilities could result from at least two kinds of legal attacks: by neighbors who bring toxic tort actions, typically under state common law, and by government agencies or others who sue under the federal Comprehensive Environmental Response, Compensation, and Liability Act[1] or its

1. *See* Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980), *as amended by* the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-75 (West 1993-94)). In President Clinton's State of the Union Address to the joint session of Congress on February 17, 1993, the President noted his concern with CERCLA. Steven A. Herman, *A Fundamentally Different Superfund Program*, 12 NAT. RESOURCES & ENV'T 196 (Winter 1998). President Clinton stated: "Some things work and some things don't. We ought to be subsidizing the things that work and discouraging the things that don't. I'd like to use that Superfund to clean up pollution for a change and not just pay lawyers."

state equivalents.[2]

As the owner, and possibly operator, of the contaminated property,[3] the purchaser could be held liable pursuant to CERCLA. Popularly known as the Superfund Act,[4] CERCLA was enacted by Congress to provide the nation with a compre-

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Id. quoting President Clinton. By early 1997 there had been three Environmental Protection Agency (EPA) reforms, but not a legislative reform. See *id.* for a discussion of EPA's reform efforts. There have been numerous legislative reform attempts as evidenced by the various Bills introduced before the United States' House and Senate in the 104th, 105th, and 106th Congressional Sessions. *See <http://rs9.loc.gov/cgi-bincpquery>*. These Bills have proposed the various amendments to CERCLA including revisions to the statute's innocent landowner defense provision. *See infra* note 85. Where appropriate, this Article will make reference to Senate Bill S. 20, the Brownfields and Environmental Cleanup Act of 1999 which is the most recent Bill introduced at the time this Article was submitted for print. Since it cannot be predicted whether Senate Bill S. 20 or some other Bill amending the innocent landowner provision will be approved by Congress, the analysis contained within this Article is based on CERCLA as amended by SARA.

2. *See* Michael B. Gerrard & Deborah Goldberg, *Interaction of Toxic Tort and CERCLA Litigation*, N.Y. L.J., July 26, 1996, at 3. For example, Title 13 of the Environmental Conservation Law represents New York State's equivalent to CERCLA. N.Y. ENVTL. CONSERV. LAW §§ 27-1301 to 1321 (McKinney 1984). The response fund created by Title 13 for cleaning up inactive hazardous waste disposal sites does not reimburse those costs covered by CERCLA. *See* Weinberg, *Practice Commentaries*, N.Y. ENVTL. CONSERV. LAW following § 27-1301. Title 13 also explicitly states that response actions taken pursuant to it "shall [not] duplicate federal actions for funding removal costs, damages or claims with respect to the release of hazardous substances within the state" and that "no payments to the hazardous waste remedial fund . . . shall be used for compensation of claims, costs of response or damage which may be funded under federal law." 1982 N.Y. ENVTL. CONSERV. LAW ch. 857, at 19. Thus, it would appear that CERCLA does not preempt New York's equivalent state law.

3. *See* 42 U.S.C. § 9607(a) (1993-94). The term "property" is encompassed within CERCLA's broad definition of facility which means any building, structure, installation, equipment, pipe or pipeline, well, pit, pond lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any site where a hazardous substance has been deposited, stored, disposed of, placed, or otherwise come to be located. *See* 42 U.S.C. §§ 9601(9)(A), (B) (1993-94).

4. Taxes levied on major petroleum and chemical facilities as well as general funding create a "Superfund." *See* 26 U.S.C. §§ 59A, 4611-12 (1993-94). The Superfund is used to finance the clean-up of hazardous waste sites if no responsible parties can be identified by the government or the responsible parties do not agree to pay at which time the government will finance the clean-up and subsequently sue the responsible parties to recover the clean-up costs. *See* U.S.C. § 9611 (West 1993-94).

hensive mechanism for the cleanup of hazardous waste sites, hazardous spills and the release of hazardous substances into the environment.[5] One of the primary purposes of the Superfund Act is to facilitate government cleanup of hazardous waste discharge and impede future releases in order to prevent, minimize, or mitigate damage to the public health, welfare, or to the environment, which may otherwise result from a release or threat of a release.[6] CERCLA imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation.[7] While neighbors can bring an action against the property owner under CERCLA, Superfund money may not be used to compensate personal or property injury caused by hazardous substances.[8] Thus, if neighbors suffer personal injury or property damage as a result of hazardous substances deposited at the subject property, they must resort to the common law tort theories of trespass, negligence, nuisance, or strict liability for recovery. In many cases, the plaintiff-neighbor will seek to apply multiple theories of common law liability.[9] Should the plaintiff-neighbor assert both CERCLA and common law claims against the defendant property-owner, the plaintiff "will typically bring a CERCLA claim in federal court and then seek pendent jurisdiction over the state claims."[10] Most courts have granted such pendent jurisdic-

5. *See also* Prudential Insurance Company v. U.S. Gypsum, 711 F. Supp. 1244, 1251 (D.N.J. 1989).

6. *See* Exxon Corp. v. Hunt, 475 U.S. 355, 360 (1986). *See also* 42 U.S.C. § 9601(23).

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

8. *See* Exxon Corp., 475 U.S. at 359. A private party is restricted to seeking reimbursement from the Superfund for response costs incurred as a result of carrying out the federal government's national contingency plan (NCP) provided, however, the costs are expressly authorized by the federal government. *See id. See also* 42 U.S.C. § 9611(a)(2).

9. *See* Merry v. Westinghouse Elec. Corp., 684 F. Supp. 852 (M.D. Pa. 1988) (plaintiffs alleging that defendant contaminated their well water brought suit under the theories of negligence, trespass, nuisance and strict liability for abnormally dangerous activities).

10. *See* Gerrard & Goldberg, *supra* note 2, at 3 (*citing* 28 U.S.C. § 1357 (1994)).

tion,[11] although a few have refused it where state law issues predominate.[12]

Toxic tort actions and CERCLA actions interact in complex ways, creating both opportunities and perils for defendants.[13] Issues of potential benefit or concern to the defendant include: health risk studies performed by the Agency for Toxic Substances and Disease Registry (ATSDR),[14] confidentially issues, compliance issues, and attorney-client privilege issues.[15] The purchaser of a contaminated piece of property can find these issues intertwined in his defense of both CERCLA and multiple toxic tort claims, in a single lawsuit or multiple lawsuits, with a single claimant or multiple claimants.

In defense of a CERCLA claim, the purchaser of a contaminated piece of property may find relief by asserting the statutory "innocent landowner" defense.[16] If successful, the defendant would then be able to focus on the toxic tort claims arising from the same cause of action. Since, however, CERCLA has grown out of general tort ideas, such as products liability and liability for ultrahazardous activities,[17] and CERCLA has been criticized for being duplicative of state toxic tort law provisions,[18] why shouldn't the successful assertion of the innocent landowner defense for the CERCLA claim bar the defendant from being subject to toxic tort claims arising from a common nucleus of operative facts?

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11. *See id.* (*citing* Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp., 737 F. Supp. 1272 (W.D.N.Y. 1990), *aff'd*, 964 F.2d (2d Cir. 1992)); Piccolini v. Simon's Wrecking, 686 F. Supp. 1063 (M.D. Pa. 1988)).

12. *See* Gerrard & Goldberg, *supra* note 2, at 3 (*citing* Lykins v. Westinghouse Elec., U.S. Dist. LEXIS 3609, at *1 (E.D. Ky. 1988); Dublin Scarboro Improvement Assoc. v. Hartford County, 678 F. Supp. 129 (D. Md. 1988)).

13. *See* Gerrard & Goldberg, *supra* note 2, at 3.

14. *See* 42 U.S.C. § 9604(i) (1992-93).

15. *See* Gerrard & Goldberg, *supra* note 2, for a more thorough discussion of these issues.

16. *See* 42 U.S.C. § 9601(35)(A).

17. *See* Jill D. Neiman, *Easement Holder Liability Under CERCLA: The Right Way to Deal with Rights-of-Way*, 89 MICH. L. REV. 1233, 1240 (1991) (*citing* S. REP. NO. 96-848, at 14 (1980), *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, at 186 (1982)).

18. *See id.* (*citing* H.R. REP. NO. 96-1016, pt. 1, at 67 (1980), *reprinted in* 1 SUPERFUND: A LEGISLATIVE HISTORY, at 232).

Part II of this Article develops the relationship between common law tort theories and CERCLA. The foundation of the innocent landowner defense is laid in Part III by discussing the defense's origin and purpose. Part IV of the Article examines a representative number of cases in which the purchasers of contaminated property have attempted to assert the innocent landowner defense. The cases represent court holdings which have broadly construed the statutory provisions in order to establish an evidentiary threshold that has developed via case law.

The elements of the various common law tort theories, which a plaintiff must prove, are then contrasted in Part V with the evidentiary threshold required for the successful assertion of the innocent landowner defense. As a result of this analysis, the issue of whether the innocent landowner defense should defeat toxic tort claims on a summary judgment motion made by the property owner is answered. Part VI concludes the Article by speculating why there are no published cases in which the owner of a contaminated piece of property has asserted the underlying premise of the innocent landowner defense as a defense in a related toxic tort claim.

II. The Toxic Tort-CERCLA Relationship

Common law tort principles have generally imposed liability upon property owners responsible for environmental pollution that caused injury to persons or neighboring property.[19] Similarly, during the Ninety-sixth Congress, a "toxic waste bill" was introduced which contained provisions for the private recovery for injury to property, economic loss, and personal injury caused by environmental pollution.[20] The bill sparked a heated debate in both Houses of Congress about the need for establishing a "toxic tort" or a federal cause of

19. *See* John Copeland Nagle, *CERCLA, Causation and Responsibility*, 78 MINN. L. REV. 1493, 1503 (1994).

20. *See* H.R. 7020, 96th Cong., 2d Sess. § 5(a), 126 CONG. REC. 7490 (1980). The bill was introduced by Representative Florio on Apr. 2, 1980. The first hazardous waste bill which passed in the House of Representatives on September 19, 1980 provided for the recovery of, among other items, injury to property but not for personal injury. H.R. 85, 96th Cong., 2d Sess. § 301(b) (1980).

action for personal injury and property damages resulting from the release of hazardous substances to the environment.[21]

Under the common law of torts, the plaintiff must demonstrate the defendant's activity was a direct cause of the resulting personal injury or damage to property regardless of the theory of liability under which the tort claim is brought.[22] During the Ninety-sixth Congress, while the House of Representatives proposed that those who "caused or contributed" to environmental contamination be held liable, the Senate desired that CERCLA impose liability on the "responsible parties."[23] The repercussion of the Senate's triumph was that the traditional tort concept of causation remained for the courts to discern.[24]

CERCLA, enacted in December 1980, allows for neither the private recovery of injury to persons or property nor does it explicitly delineate the element of causation. Had the sponsors of CERCLA not restricted the Act's purview in order to enact it before the Reagan Administration entered office in 1981, it is conceivable that CERCLA may have contained the tort principles of causation and private party recovery.[25] As evidenced by the legislative history, CERCLA is unquestionably modeled after common law tort liability rules which seek to influence the behavior of landowners and other relevant actors.[26]

The reauthorization of CERCLA[27] saw a renewed attempt to integrate common law torts into the federal statute. An amendment would have granted those personally injured by the release of hazardous substances a right to sue in fed-

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21. *See* Frederic M. Mauhs, *Judicial Limitations on the CERCLA Private Right of Action*, 15 ENVTL. L. 471, 476 (1985).

22. *See* GERALD W. BOSTON & M. STUART MADDEN, LAW OF ENVIRONMENTAL AND TOXIC TORT 7 (1994).

23. *See* Nagle, *supra* note 19, at 1493-94.

24. *See id.*

25. *See* Mauhs, *supra* note 21, at 475 (*citing* H. NEEDHAM & M. MENEFEE, SUPERFUND: A LEGISLATIVE HISTORY 1-3 ENVTL. L. INST. (1983)).

26. *See generally* Nagle, *supra* note 19, at 1503.

27. *See supra* note 1.

eral court under Superfund.[28] Opponents argued that common law tort remedies were adequate and that the federal courts would become inundated with personal injury claims.[29] In passing SARA,[30] however, Congress inextricably linked toxic tort law with CERCLA by creating the Agency for Toxic Substances and Disease Registry (ATSDR).[31] Congress designed ATSDR to provide the public with toxicological information and risk potentials to help plaintiffs meet their burden of proof in lawsuits.[32]

III. Statutory Provisions of the Innocent Landowner Defense

The enumerated defenses in CERCLA[33] do not explicitly provide a defense for the innocent landowner.[34] Congress' work product is consistent with "the definition of a strict liability standard [in] that innocence is not a defense."[35] In CERCLA's early years, many property purchasers who were

28. The amendment was submitted by Representative Barney Frank. H.R. 3852, 99th Cong., 1st Sess., 131 CONG. REC. H11, 574 (1985).

29. *See id.* at H11, 575-85.

30. *See supra* note 1.

31. *See supra* note 14, CERCLA authorized the establishment of the Agency for Toxic Substances and Disease Registry (ATSDR) which reports directly to the Surgeon General of the United States. In part, the ATSDR maintains inventories of literature, research and studies of the health effects of toxic substances and hazardous substances most commonly found at Superfund sites. 42 U.S.C. § 9604(i).

32. *See* Rory A. Valas, *Comments: Toxic Palsgraf: Proving Causation When the Link Between Conduct and Injury Appears Extraordinary*, 18 B.C. ENVTL. AFF. L. REV. 773, 777 (*citing* H.R. REP. NO. 253(I), at 84-90 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2866-72).

33. There shall be no liability for a person otherwise liable who can establish beyond a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by: (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant.

42 U.S.C. § 9607(b).

34. *See* Aaron Gershonowitz & Miguel Padilla, *Superfund's Innocent Landowner Defense: Elusive or Illusory?* 6 TOXICS LAW REP. (BNA) 626 (Oct. 16, 1991).

35. *Id.*

not responsible for causing the release of hazardous substances could not establish the innocent landowner defense because the purchase and sale agreement by which they acquired the property gave them a contractual relationship with someone who played a role in the release of hazardous substances.[36]

The innocent landowner defense was created in 1986,[37] when Congress decided to define "contractual relationship" to exclude land contracts, deeds, or other instruments transferring title of the real property, for the purpose of CERCLA's third-party defense.[38] By statute, a defendant could only avail himself of the innocent landowner defense if:

1. The property was acquired by the defendant after the disposal or placement of the hazardous substances on, in, or at the property;[39]
2. At the time the defendant acquired the property, the defendant did not know and had no reason to know that any hazardous substances, which was the subject of the release or threatened release, was disposed of on, in, or at the property;[40] and
3. The defendant can establish by a preponderance of the evidence that the release, or threat of release of a hazardous substance, and the damages resulting therefrom,
   (i) were caused solely by the act or omission of a third party who was not in a contractual relationship with the defendant;[41] and
   (ii) they exercised due care with respect to the hazardous substances[42] and took precautions against

36. *See* Aaron Gershonowitz, *When is a Superfund Property Owner Innocent Enough to Establish the Innocent Landowner Defense?* TOXICS L. REP., July 17, 1996, at 215. *See also* 131 CONG. REC. 34,714-24 (1985) (House members were troubled by the fact that CERCLA's strict liability was inequitable to innocent purchasers of contaminated property.).

37. *See supra* note 1.

38. *See* 42 U.S.C. § 9601(35)(A).

39. *Id.*

40. 42 U.S.C. § 9601(35)(A)(i).

41. 42 U.S.C. § 9607(b).

42. 42 U.S.C. § 9607(b)(3)(a).

> foreseeable acts or omissions of any third party[43] and the consequences that could foreseeably result from such acts or omissions.[44]

In order to establish the lack of knowledge, with regard to the presence of hazardous substances on, in, or at the property required by the second statutory provision, the defendant must undertake at the time of acquisition an "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.[45] CERCLA does not define an "all appropriate inquiry,"[46] however, Congress has provided the courts with a non-inclusive list of factors to consider when determining whether a prospective purchaser/property owner made an "all appropriate inquiry."[47] As such, the successful assertion of the innocent landowner defense compels the proof of lofty requirements that are subject to the discretionary powers of the court due to the vagueness of the statutory language.

IV. Application of the Innocent Landowner Defense

While the innocent landowner defense "would appear to be an oasis"[48] for the truly "innocent" purchaser of contami-

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43. The third party cannot be an employee or agent of the defendant. *See* 42 U.S.C. § 9607(b)(3)(b).

44. *Id.*

45. *See* 42 U.S.C. § 9601(35)(B).

46. In Senate Bill S. 20, The Brownfields and Environmental Cleanup Act of 1999 provides a standard for an "all appropriate inquiry." *See infra* note 85, and accompanying text.

47. In determining whether a prospective purchaser/property owner made "all appropriate inquiry," the court shall take into account

> any specialized knowledge or experience on the part of the [prospective purchaser/property owner], 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.

42 U.S.C. § 9601(35)(B).

48. L. Jager Smith, Jr., Note, *CERCLA's Innocent Landowner Defense: Oasis or Mirage?* 18 COLUM. J. ENVTL. L. 155, 157 (1993).

nated property, "it frequently turns out to be a mirage for those who seek to assert it."[49] Case law has rebuffed the successful assertion of the innocent landowner defense for noncompliance with each of the statutory provisions.

This section briefly examines the provisions of the innocent landowner defense in the context of case law. The objective is to demonstrate what actions, or lack thereof, will cause a property owner to lose the ability to assert the statutory defense. By selecting cases that have broadly interpreted the statutory provisions, the discussion attempts to define the evidentiary threshold courts have set forth for each statutory defense.

A. Defendant Must Acquire Property After the Disposal of Hazardous Substances

The plain language of the statute indicates that a defendant, who is truly "innocent" of harmful disposal activities, could demonstrate that they acquired the property after discovery of hazardous substances on their property. More often than not the extremely broad definition of "disposal,"[50] or the theory of disposal accepted by courts, precludes such a result.

CERCLA borrows the definition of "disposal" from the Solid Waste Disposal Act.[51] Due to the breadth of the definition, the purchaser of property who commences operation upon acquiring title can be guilty of disposing hazardous substances if his operation does not implement good manufacturing practices. A leaking pump seal, for example, or the

49. *Id.*

50. The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any [hazardous substances] into or on any land or water so that such [hazardous substances] or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters. 42 U.S.C. § 6903(3) (1993-94).

51. *See* 42 U.S.C. § 9601(29). In part, the purpose of the Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act (RCRA) of 1976, is to assure that hazardous waste management practices are conducted in a manner which protects human health and the environment thereby reducing the need for corrective action, via CERCLA or state statute. 42 U.S.C. § 6902(a)(4), (5) (1993-94).

careless loading/unloading of hazardous substances, can defeat the innocent landowner defense for the purchaser.

The scope of the term "disposal" as employed in CERCLA matters is unsettled in the courts. The contrasting theories embraced by the courts are a "passive theory" of disposal[52] which is generally premised on the migration of contamination during one's ownership, and the opposite viewpoint that "disposal" requires active disposal of hazardous substances.[53] A number of courts use the policy argument that a passive migration defense would allow a property owner to avoid liability by failing to take corrective action on environmental contamination that exists on his property.[54] The counter argument used by a seemingly equal number of courts is that the use of the "passive" theory to define "disposal" in CERCLA matters controverts the plain language of CERCLA.[55]

The struggle of the courts with regard to how to best define "disposal" in CERCLA matters can be illustrated by

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52. *See, e.g.*, CPC Int'l Inc. v. Aerojet-General Corp., 759 F. Supp. 1269, 1278 (W.D. Mich. 1991) (the unchecked migration of contaminated groundwater constitutes disposal under CERCLA); Stanley Works v. Syndergeneral Corp., 781 F. Supp. 659, 662-64 (E.D. Cal. 1990) (ongoing migration of hazardous substances constitutes disposal under CERCLA); State of New York v. Almy Brothers, Inc., 866 F. Supp. 668, 676-77 (N.D.N.Y. 1994) (CERCLA disposal includes the gradual leaking from drums buried prior to the purchaser's ownershi); Nurad, Inc v. William E. Hooper & Sons Co., 966 F.2d 837, 844-46 (4th Cir. 1992) ("passive" is enough for CERCLA liability); United States v. Waste Indus;, Inc;, 734 F.2d 159, 164 (4th Cir 1984) (disposal includes "passive"disposal under RCRA); United States v. Price, 253 F. Supp 1055, 1071 (D.N.J. 1981), aff'd, 688 F. 2d 204 (3d Cir. 1982) (standing for the proposition that the term "disposal" in CERCLA may include passive insertion since RCRA's definition of "disposal" encompasses "leaking" which does not normally through an affirmative action, but rather as a result of inaction).

53. *See* United States v. Peterson Sand and Gravel, Inc., 806 F. Supp. 1346 (N.D. IL. 1992).

54. *See* Nurad, Inc., v. William E. Hopper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992).

55. See United States v. Peterson Sand and Gravel, Inc., 806 F. Supp. 1346, 1352 (N.D.Il. 1992) reaching an "inescapable conclusion" that a passive meaning of "disposal" controverts the plain language of CERCLA); Ecodyne Corp. v. Shah, 718 F. Supp. 1454, 1455-57 (rejecting "passive" disposal in the grammatical construction of CERCLA); Snediker Developers Ltd. Partnership v. Evans, 773 F. Supp. 984, 988-89 (E.D. Mich. 1991) ("the mere migration of hazardous waste, without more, does not constitute disposal within the meaning of § 6903(3)."

United States v. CDMG Realty Co.[56] In CDMG Realty, a purchaser acquired an undeveloped tract of land that was once part of a larger tract of land that was a landfill suspected of containing hazardous substances.[57] During the purchaser's ownership, the tract of land remained vacant and was not actively used in any manner.[58] Approximately six years later, the original purchaser sold the tract of land to a subsequent buyer who was eventually named as a defendant in a CERCLA lawsuit commenced by the federal and state authorities.[59] The subsequent buyer then filed a third party suit against the original purchaser seeking contribution for potential liability under CERCLA.[60] On cross motions for summary judgment, the United States District Court of New Jersey held that "there must be some element of active human participation before owner liability for disposal can attach under CERCLA."[61] On appeal, the Third Circuit stated that the passive migration of contamination from hazardous substances that were dumped in the landfill prior to the purchaser's ownership does not constitute disposal under CERCLA as the neither the terms "leaking" or "spilling" within the definition of "disposal" denotes the gradual spreading of contamination.[62] This conclusion was based on the Third Circuit's examination of the text of CERCLA, which the court found to be supported by the structure of the statute as well as being consistent with CERCLA's intended purpose.[63] The court, however, was very careful in stating that this holding was not to be broadly construed or did not preclude the use of the "passive theory" of disposal. According to the Court, "the language of CERCLA's 'disposal' definition

56. 875 F. Supp. 1077 (D.N.J.) vacated and remanded 96 F. 3d 706 (1996) (on the grounds that the subsequent buyer may proceed on its "active" theory of disposal).

57. 875 F. Supp. 1077, 1079-80.

58. *Id.* at 1080.

59. *Id.*

60. *Id.*

61. *Id.* at 1077. The original purchaser's motion for summary judgment was granted by the District Court.

62. 96 F. 3d 706, 718.

63. *Id.* at 711.

cannot encompass the spreading of waste at issue here [,]"[64] but [we] find [ ] it unnecessary to [address the issue] whether the movement of contaminants unaided by human conduct can ever constitute 'disposal,'" in a CERCLA matter.[65] Thus, while on the surface one may think he is acquiring property after the disposal of hazardous substances, he can never be assured of the fact due to the potential of passive migration of contaminants and the murkiness of the courts' opinions on this issue.

B. The Requirement of No Causation, Due Care and Foreseeability on the Part of the Purchaser

In order to assert the innocent landowner defense, CERCLA requires that defendant establish by a preponderance of the evidence that the release of hazardous substances, and the resulting damages, were caused solely by the act or omission of a third party.[66] Limited guidance, as to the interpretation of the sole cause requirement, is provided in the legislative history or the CERCLA statute.[67] Case law, however, illustrates that the term "solely" has been interpreted by courts quite strictly so that any involvement, no matter how insignificant, can destroy the defense.[68]

In *Louisiana-Pacific Corp. v. ASARCO*,[69] the court would not allow USGI, a third-party defendant, from asserting that the contamination at a landfill was caused solely by ASARCO even though their relatively small contribution of waste may not have caused the release of the hazardous substances that prompted the lawsuit.[70] USGI produced an insulation prod-

64. *Id.*

65. *Id. See* Michael S. Caplan, *Escaping CERCLA Liability: The Interim Owner Passive Migration Defense Gains Circuit Recognition*, 28 ENVTL. L. REP. 10121, 10121 (1998) (advocating the position that the "disposal" of hazardous substances requires an active process to invoke CERCLA liability).

66. *See* 42 U.S.C. § 9607(b).

67. *See* Lincoln Properties, Ltd. v. Higgens, 823 F. Supp. 1528, 1539 (E.D. Cal. 1992).

68. *See* Gershonowitz, *supra* note 34, at 215.

69. Louisiana-Pacific Corp. v. ASARCO, 735 F. Supp. 358 (W.D. Wash. 1990).

70. *See id.* at 362.

uct called "shot" during the manufacturing process of wool.[71] "Shot" was used to build a road into a landfill which required clean-up due to the release of hazardous substances by other companies, principally Louisiana-Pacific Corporation and ASARCO.[72] USGI only discarded 1.5% of the waste sent to the landfill, some of which became mixed with other materials deposited at the landfill.[73] Laboratory analyses on several samples of shot indicated that the shot contained "extremely small concentrations of hazardous [substances] . . . which may be below the levels government agencies consider to be hazardous."[74] Nevertheless, the court held that since the small volume of USGI's shot may have threatened a release at the landfill, "even minimally," USGI could not assert the defense that the damages were caused solely by a third party.[75]

Moreover, negligent acts as well as a failure to act contribute to the release of hazardous substances. For example, prior to acquiring the property, the purchaser performs "all appropriate inquiry"[76] which may include a soil investigation to determine whether the property is contaminated. If the soil investigation is conducted negligently and, as a result, causes the spread of contaminants, the prospective purchaser may not be able to claim that the release of hazardous substances was caused solely by third parties in a subsequent CERCLA action.[77] Moreover, the soil investigation may not identify the presence of subsurface contamination, but contamination may be discovered years later by other means.[78] In this instance, if the owner does not act by taking a proper response and remedial action, the purchaser can be consid-

71. *See id.* at 360.
72. *See id.*
73. *See id.*
74. *Id.* at 362.
75. 735 F. Supp. 358, 363 (W.D. Wash. 1990).
76. *See* discussion *infra* part C.
77. *See* United States v. CDMG Realty Co., 96 F.3d 706 (3d Cir. 1996).
78. Contamination resulting from historical activities can be discovered years later whether or not the property owner took an affirmative action. For example, contamination can be discovered via development of the property in whole or in part, including the sudden presence of contamination in well water, etc.

ered to have contributed to the release of hazardous substances.[79]

The lack of good manufacturing practices by existing tenants have been imputed to the purchaser as not exercising due care. In *Washington v. Time Oil Co.*,[80] the court found Time Oil Co. (Time Oil) liable for not exercising due care or taking precautions with respect to the hazardous substances that had been released to the environment by Time Oil's sublessee.[81] The court said that it was "clear [that] Time Oil allowed [the sublessee] to run a sloppy operation."[82] A similar result can be found where the purchaser acquires title of the property and continues his predecessor's operation which does not adhere to good manufacturing practices. The standard for due care has been explained by one court as the duty by a property owner to investigate and if an area of environmental concern is identified, "due care would . . . require that [the property owner] take some steps to ascertain the nature of any environmental threats associated with [the release]."[83]

Closely related to the obligation of the purchaser to exercise due care with regard to hazardous substances after they are discovered is the requirement of foreseeability. In *New York v. Shore Realty*,[84] the defendant purchased land for development purposes and, upon closing, evicted the existing tenants.[85] The court held that Shore Realty was aware of the nature of the tenants' activities before closing on the title and, hence, the releases and threats of release from these activities were neither "caused solely" by the tenants nor did

79. *See, e.g.*, Shapiro v. Alexanderson, 741 F. Supp. 472, 478 (S.D.N.Y. 1990) (holding that since it took Shapiro almost five years to adequately respond after discovering contamination, the delay contributed to the release of hazardous substances and, thus, the release was not caused solely by third parties).

80. 687 F. Supp. 529 (W.D. Wash. 1988).

81. *See id.* at 533.

82. *Id.*

83. United States v. A & N Cleaners and Launderers, Inc., 854 F. Supp. 229, 243-44 (S.D.N.Y. 1994) (where the property owner had reason to suspect his tenant was contaminating his property but failed to ask his tenant about his operations).

84. 759 F.2d 1032 (2d Cir. 1985).

85. *See id.* at 1048.

Shore Realty take "precautions against" these "foreseeable acts or omissions."[86]

In sum, the statutory requirements of no causation, due care and foreseeability appear to place a burden on the property owner to affirmatively act upon the identification of a potential release of hazardous substances to the environment. "The requirement that the contamination be 'solely' the result of a third party most often dooms efforts to evoke this defense because of the defendant's possibly tangential involvement at the site."[87] In addition, an otherwise innocent landowner who identifies contamination on his property caused by others and does not react in a timely or appropriate manner, or who does not foresee the resultant consequences will lose his ability to assert the affirmative defense of being an innocent landowner. The reach of the "foreseeability" imposed on the property owner for the actions of third parties after the acquisition of the property is unclear, but it may well be as broad as the property owner's duty to inquire.[88]

C. Lack of Knowledge Required Upon Acquisition of the Property

The innocent landowner defense requires that, at the time of acquisition, the purchaser of property did not know, and had no reason to know, that any hazardous substances, which was the subject of the release or threatened release, was disposed of on, in, or at the property.[89] In order to satisfy the lack of knowledge element, the defendant must undertake, at the time of acquisition, an "all appropriate inquiry" into the previous ownership and uses of the property consis-

86. *See id.* at 1049. *But see* New York v. Lashins Arcade Co., 856 F. Supp. 153, 157 (S.D.N.Y. 1994) (holding that the release of hazardous substances was caused solely by the tenants (who operated the dry cleaners in the strip mall that Lashins purchased and who had disposed of the hazardous substances fifteen years before Lashins purchased the property) and that Lashins had done everything it could have reasonably done to avoid or correct the problem).

87. Nagle, *supra* note 19, at 1538.

88. *See* James M. Strock, *The Genesis of the 'Innocent Landowner' Defense*, 10 TOXICS L. REP. (BNA) 592, 592 (Oct. 5, 1988).

89. *See* 42 U.S.C. § 9601(35)(A)(i).

tent with good commercial or customary practice in an effort to minimize liability.[90]

The requisite standard of inquiry is not defined by CERCLA, and the legislative history indicates that one does not exist.[91] What the legislative history reveals is "a shifting standard where more sophisticated purchasers will be held to a higher standard and the standard will change over time so that all defendants will be held to a higher standard as public awareness of environmental concerns grows."[92] Federal legislators[93] as well as professional organizations have attempted to define the requisite standard of inquiry.

After several draft versions and a prolonged comment period, the American Society for Testing and Materials (ASTM)

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90. *See* 42 U.S.C. § 9601(35)(B). For the purposes of this statutory provision, 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. *See id.*

91. Pursuant to the House Conference Report, public awareness at the time of acquisition of the property will determine the requisite standard of inquiry. H.R. REP. NO. 962 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3280.

92. Gershonowitz, *supra* note 36, at 215 (*citing* 1986 U.S.C.C.A.N. 3276, 3280).

93. In introducing H.R. 570, 103d Cong. (1993), Representative Curt Weldon (R-PA) stated that "Congress . . . should, at a minimum, define the scope of the required [appropriate inquiry] investigation." 139 CONG. REC. H218 (Jan. 25, 1993) (statement of Rep. Weldon). Section 301, Innocent Landowners of the Brownfields and Environmental Cleanup Act of 1999, Senate Bill S. 20, proposes to provide such a standard of inquiry. Senate Bill S. 20 would amend CERCLA 42 U.S.C. § 9601(35)(B) by inserting a "Knowledge of Inquiry Requirement." According to the proposed legislation, a person who has acquired real property shall be considered to have made an "all appropriate inquiry" if, within 180 days prior to the date of acquisition, an environmental site assessment of the real property was conducted. S. 20, 106th Cong. (1999). The proposed legislation requires an environmental site assessment to be conducted in accordance with the standards set forth in the American Society for Testing Materials (ASTM) Standard E1527-94, titled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" or with any alternative standards issued by regulation by the President or issued or developed by other entities and designated by regulation by the President. *See id.* The proposed Bill would also provide a definition for contamination to mean "an existing release, past release, or the threat of a release of a hazardous substance." *Id.*

published a comprehensive blueprint[94] for conducting environmental site assessments.[95] The objective of ASTM's publication, as explicitly stated in its purpose, is to define good commercial and customary practice in order to allow the user of the standard to satisfy the "all appropriate inquiry" requirement of CERCLA § 101(35)(B).[96] Although widely recognized in industry and required by most lending institutions, there are no published cases that address whether adherence to ASTM's standards satisfy the requisite knowledge element of the statutory defense.[97]

Until such time Congress amends CERCLA to provide an "all appropriate inquiry" standard, a potential purchaser should refer to New Jersey's version of CERCLA, which supplies an "all appropriate inquiry" standard,[98] for guidance.

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94. STANDARD PRACTICE FOR ENVTL. SITE ASSESSMENTS: PHASE I ENVTL. SITE ASSESSMENT PROCESS, E 1527-94 (1994). This standard has been written into, by reference, the proposed Senate Bill S. 20, The Brownfields and Environmental Cleanup Act of 1999. *See supra* note 85.

95. Many terms are utilized to denote the activities that are undertaken by a potential purchaser who is attempting to satisfy the "all appropriate inquiry" language of CERCLA's innocent landowner defense. Two of the more commonly used phrases are "environmental due diligence" and "environmental site assessment" (ESA). Both phrases can be used interchangeably, however, the performance of environmental due diligence will typically include the performance of an ESA. A review of historical records and data as well as interviewing potentially informative persons will typically be done during an environmental due diligence and an ESA. The phrase "ESA" indicates that a physical visit to the subject property was performed in an attempt to identify potential areas of environmental concern. ESAs are performed in phases. A Phase I ESA includes record review, conducting interviews and a visual observation of the subject property and surrounding properties. A Phase II ESA involves limited sampling in order to confirm or refute the Phase I ESA observations as to whether the potential areas of environmental concern warrant further investigation. A Phase III ESA, or a remedial investigation, involves more extensive sampling by intrusive methods such as the installation of sampling wells and subsurface soil investigations via drill rigs.

96. *See supra* note 82, and accompanying text.

97. This will surely change if Senate Bill S. 20 is passed, as currently written, designating ASTM standard E1527-94, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" as the standard to determine whether a prospective purchaser made an "all appropriate inquiry" prior to closing on the real property transaction. *See supra* note 85.

98. New Jersey's version of CERCLA is the Spill Compensation and Control Act (Spill Act) enacted in 1977 and is considered to be the legislation on which

To establish the lack of knowledge regarding the discharge of hazardous substances, the potential purchaser "must have undertaken, at the time of acquisition, an 'all appropriate inquiry' into the previous ownership and uses of the property."[99] "The Spill Act defines an 'all appropriate inquiry' as the performance of a preliminary assessment,[100] and site investigation[101] (if the preliminary assessment indicates that a

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CERCLA was modeled. However, the New Jersey legislatures did not incorporate an innocent landowner defense into the Spill Act until 1993. N.J.L. 1993, *c.* 139 Sect. 44. The Spill Act's lack of knowledge clause within its innocent landowner defense provision is substantially the same as that of CERCLA's lack of knowledge clause. *Compare* " . . . at the time the person acquired the real property, the person did not know and had no reason to know that any hazardous substance had been discharged at the real property . . . ." N.J. STAT. ANN. § 58:10-23.11(g)(d)(2)(b)(i) (1998) *with* " . . . at the time the defendant acquired the property, the defendant did not know and had no reason to know that any hazardous substances, which was the subject of the release or threatened release, was disposed of on, in, or at the property . . . ." 42 U.S.C. § 9601(35)(A)(i). The second portion of the Spill Act's lack of knowledge clause provides a conditional defense for persons acquiring real property by devise or succession. N.J. STAT. ANN. § 58:10-23.11(g)(d)(2)(b)(ii) (1998).

99. Spill Act, N.J.L. 1993, *c.* 139 Sect. 44.

100. New Jersey's Brownfields and Contamination Site Remediation Act defines a "preliminary assessment" to mean

> the first phase in the process of identifying areas of concern and determining whether hazardous substances or hazardous wastes are or were present at an industrial establishment or have migrated or are migrating from the industrial establishment, and shall include the initial search for and evaluation of, existing site specific operational and environmental information, both current and historic, to determine if further investigation concerning the documented, alleged, suspected or latent discharge of any hazardous substance or hazardous waste is required.

N.J. STAT. ANN.§ 58:10B-1. The evaluation of historic information shall be conducted from 1932 to the present, except that the [New Jersey Department of Environmental Protection] may require the search for, and evaluation of, additional information relating to ownership and use of the site prior to 1932 if such information is available through diligent inquiry of public records. P.L. 1997, Ch.278, C13:1K-8. A preliminary assessment is the equivalent of a Phase I ESA. *See supra* note 87.

101. New Jersey's Brownfields and Contamination Site Remediation Act defines a "site investigation" to mean "the collection and evaluation of data adequate to determine whether or not discharged hazardous substances or hazardous wastes exist at the industrial establishment or have migrated or are migrating from the site at levels in excess of the applicable remediation standards. A site investigation shall be developed based upon the information col-

site investigation is necessary) . . . ."[102] Although a defined standard is provided, potential purchasers have found New Jersey courts to require not only performance of the activities specified by the standard, but appropriate, pro-active follow-up as well.

In *Newhan Properties and Management v. Spill Compensation Fund*,[103] Newhan Properties retained an inspection firm to perform the equivalent of a preliminary assessment on a four story retail building it intended to purchase. The inspection firm reported the existence of an underground storage tank (UST) that was "buried and not inspected" and that additional information about the UST should be gathered and a pressure test should be performed.[104] In addition, the inspection firm reported that a leaking oil tank should be thoroughly evaluated and that soil and materials in and around the property had not been tested and there should be additional independent evaluations for possible contamination, i.e., a Phase II ESA or a site investigation.[105] An attorney for Newhan Properties prepared the conditions for the transaction that included the repair of the leaking oil tank, the cleanup of soil adversely impacted by the leaking oil tank, and a certification that repairs to the oil tank had been completed.[106] In response, the seller represented in a letter that all repairs had been completed. Representatives of Newhan Properties re-visited the real property to confirm the seller's representations.[107] These representatives observed that the subject area was "newly paved" with no oil stains and that an above-ground oil tank was installed to replace the leaking oil tank.[108]

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lected pursuant to the preliminary assessment." P.L. 1997, Ch.278, C13:1K-8. A site investigation is the equivalent of a Phase II ESA. *See supra* note 87.

102. N.J. STAT. ANN. § 58:10-23.11(g)(d)(2)(a)(d) (1998).

103. 97 N.J. Admin., 2d (EPE) 37, May 8, 1997, *cert. denied*, 152 N.J. 363 (1998).

104. *See id.* at 40.

105. *See id.* at 39-40; *see supra* note 87.

106. *See id.* at 40.

107. *See id.*

108. *See id.* 97 N.J. Admin., 2d (EPE) 37, 43, May 8, 1997, *cert. denied*, 152 N.J. 363 (1998).

Four years later, Newhan Properties placed the subject property for sale and a prospective purchaser, as a condition of securing a mortgage, performed a preliminary assessment.[109] Suspicious of the observation of oil pumps, the prospective purchaser performed a site investigation which included the excavation of the area that had been "newly paved" prior to Newhan Properties closing on the property.[110] The excavation revealed the presence of four USTs and contaminated soil.[111]

The Appellate Division of New Jersey's court system ruled that Newman Properties failed to perform an adequate site investigation and, hence, did not sufficiently perform an "all appropriate inquiry." According to the Appellate Division, "Newhan should have done more than merely accept a representation by the seller that the necessary remediation was complete."[112] The court stated that "based upon the advice received from its professionals, Newhan should have taken reasonable steps to discover the extent of the problem. Newhan failed to take such steps"[113] and, thus, failed to meet the lack of knowledge provision required to assert an innocent landowner defense.

Case law has also broadened the "requisite knowledge of hazardous substances" clause of CERCLA's innocent landowner defense to include knowledge of substances or waste regardless of whether the purchaser knew the substances were hazardous. In *Wickland Oil Terminals v. Asarco Ltd.*,[114] Wickland purchased property which had stockpiles of slag containing heavy metals deposited by Asarco, Ltd.[115] Although Wickland knew the slag contained lead, they were not aware that the stockpiled material was characterized as

109. *See id.*

110. *See id.* at 44.

111. *See id.*

112. *See id.* at 52.

113. *See* 97 N.J. Admin., 2d (EPE) 37, 43, May 8, 1997, *Cert. denied*, 152 N.J. 363 (1998).

114. Wickland Oil Terminals v. Asarco Ltd., 590 F. Supp. 72 (N.C. Cal. 1984).

115. *See id.*

hazardous waste.[116] The court found that Wickland, by virtue of its awareness of the piles of slag on the site and its knowledge that the slag contained lead, was not entitled to the innocent landowner defense since it "knew or had reason to know" of the hazardous substances on the site.[117] More importantly, the court in *Wickland* refused to acknowledge the defendant's claim that the Phase I ESA performed by their consultants indicated that the slag piles did not present a risk to the environment.[118] Rather, the court examined the content and magnitude of the publicly available information about the site and concluded that a failure to review the state agency's files on the property meant that Wickland did not perform an adequate inquiry.[119]

At least one court appears to have gone a step further than the *Wickland* holding with regard to a property owner's reliance on their consultant's Phase I ESA. In *BCW Associates, Ltd. v. Occidental Chemical Corp.*,[120] BCW Associates, Ltd. (BCW) leased a warehouse to Knoll International (Knoll) to store furniture.[121] BCW had two independent ESAs performed on the property before they purchased the property from Occidental Chemical Company (Occidental).[122] Similarly, Knoll had an independent ESA performed on the property before they entered into a lease agreement with BCW.[123] Upon use of the storage space, Knoll hired a cleaning company to clean the furniture in storage.[124] Without Knoll's knowledge, the cleaning company had the dust that accumulated on the furniture analyzed for the presence of chemical

116. *See id.* at 74.

117. *See id. See also* Jersey City Redevelopment. Auth. v. PPG Indus., Inc., 866 F.2d 14011 (3d Cir. 1988) (where the court held that mere knowledge (or reason to know) of the presence of waste, not whether the waste is hazardous, will result in a loss of the affirmative defense).

118. *See Wickland Oil Terminals*, 590 F. Supp. at 74.

119. *See* Gershonowitz, *supra* note 34, at 626.

120. No. 86-5947, 1988 U.S. Dist. LEXIS 11275, at *1 (E.D. Pa. Sept. 29, 1988).

121. *See id.* at *4.

122. *See id.* at *8.

123. *See id.* at *8.

124. *See id.* at *9.

contaminants.[125] The laboratory analysis revealed the presence of lead in the dust.[126]

BCW and Knoll sued Occidental and Firestone Tire Company (Firestone), Occidental's predecessor, for the recovery of testing and cleanup costs in the warehouse as the lead dust had originated from Firestone's operations.[127] Although the opinion did not indicate that the Phase I ESAs performed by BCW and Knoll's consultants were an inadequate "all appropriate inquiry," the court held BCW and Knoll responsible for two thirds of the response and clean-up costs.[128] The only logical rationale appears to be that if the cleaning company had the wherewithal to analyze the dust, BCW and Knoll would have had reason to know of its hazardous quality either through their dealings with Occidental or from the history of the property developed by their consultants.[129]

D. Successful Assertion of the Innocent Landowner Defense

The innocent landowner defense provision "has not functioned effectively."[130] There are limited published cases where the court has upheld the assertion of the innocent landowner defense,[131] especially in the case where a purchaser of property attempts to assert the affirmative defense.[132] Based on the foregoing discussion, it would appear

125. *See BCW Assoc. Ltd.* at *9.
126. *See id.* at *9.
127. *See id.* at *13.
128. *See id.* at *57-59.
129. *See supra* note 85, and accompanying text.
130. *Proposals to Reauthorize the Superfund Program: Hearings before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 103d Cong., 2d Sess. (1994) (statement of Carol Browner, U.S. EPA Administrator).
131. *See* United States v. Pacific Hide Fur Depot, Inc., 716 F. Supp. 1341 (D. Idaho 1989) (where the shareholders in a corporation were entitled to the innocent landowner defense since they acquired stock in the corporation without any knowledge of environmental problems); Westwood Pharm., Inc. v. National Fuel Gas Distrib. Corp., 964 F.2d 85 (2d Cir. 1992) (where the seller of property was allowed to assert the innocent landowner defense because the purchaser's activities, with regard to waste left in sealed containers by the seller's predecessor, caused the release of hazardous substances).
132. *See, e.g., Lashins Arcade Co.*, 856 F. Supp. 153 (S.D.N.Y. 1994).

that until CERCLA is amended to provide a definitive standard, a purchaser of property would need to convince the trier of fact that the following evidentiary thresholds, where applicable, have been exceeded:

1. The purchaser of the property did not have a contractual relationship with the seller.
2. Prior to the time of the acquisition, the purchaser performed an "all appropriate inquiry" with regard to potential environmental concerns at the subject property and the "all appropriate inquiry" adhered to the comprehensive standards (preliminary assessment (Phase I ESA) and site investigation (Phase II ESA)) enunciated by New Jersey law and ASTM Standard E1527-94.
3. The "all appropriate inquiry" was performed by competent personnel (i.e. experienced consultants) who did not perform the investigation in a negligent fashion.
4. The purchaser performed timely and appropriate follow-up for all areas of environmental concern identified during the ESA, regardless of whether the concern was identified in the consultant's summary, recommendations and/or conclusion section of his report or merely discussed throughout the report.
5. The purchaser evaluated all areas of potential environmental concern identified, and based on the professional judgement of the environmental consultant, the level of knowledge appropriate for the purchaser of the property, and prudent reasoning on the part of the purchaser and his consultant, concluded that no further investigation was warranted.
6. If the consultant merely recommends that further data gathering and/or investigative activities should be performed, the purchaser pro-actively performed an independent, in-depth follow-up rather than relied on corrective action representations made by the seller and/or a cursory observation of the altered site conditions.
7. The purchaser analyzed all potential areas of environmental concern identified by the environmental consultant, the level of knowledge appropriate for

that of the purchaser of the property, and prudent reasoning on the part of the potential purchaser and his consultant, concluded that no consequences could foreseeably result from the acts or omissions of a third party.

8. Upon acquisition, the purchaser ensured that the operations he acquired do not result in the "disposal" of hazardous substances.
9. The property was acquired after the disposal of hazardous substances.
10. Any contamination that existed at the time of the acquisition did not migrate off-site.

While the statutory defense provision was a congressional effort to provide relief for a defined group of "innocent" landowner purchasers, the result is a provision which provides none of the direct relief sought and instead expands the responsibilities and obligations of prospective purchasers of real property.[133]

V. A Comparative Analysis: The Affirmative Defense of an Innocent Landowner Verses the Prima Facie Case of a Toxic Tort Plaintiff

The basis of this Article is that a purchaser of commercial or industrial property may be subject to at least two types of legal claims if the subject property is purchased without the performance of adequate environmental due diligence. The potential liability of a purchaser of real property can be in the form of a neighborhood citizen who files a toxic tort based complaint in state court and, secondly, in the form of a government agency who brings a CERCLA based complaint in federal court.[134] Assume arguendo that a property owner successfully asserts the innocent landowner defense relieving him of statutory liability for environmental harm in the fed-

133. *See* Strock, *supra* note 80, at 592. These increased responsibilities and obligations will not be diminished in the Brownfields and Environmental Cleanup Act of 1999 (Senate Bill S. 20), or a similar Bill, since the proposed standard, to prove compliance with the "all appropriate inquiry," requires a significant undertaking by prospective purchasers. *Id.*

134. *See supra* part I.

eral, CERCLA based complaint. Having proved his innocence by a preponderance of the evidence that the environmental harm was caused solely by a third party and that due care was exercised on his part, the "innocent landowner" should move for summary judgment[135] in the toxic tort based claim filed in state court. The issue to be answered by the analysis contained herein is whether the court would grant the motion after oral arguments.

This section demonstrates that a plaintiff would not be able to establish a prima facie case for the various toxic tort theories if the property owner is an innocent landowner pursuant to CERCLA. The prima facie elements for each toxic tort theory are analyzed in the context of the previously discussed case law which establishes an evidentiary threshold for prospective purchasers/property owners wishing to avail themselves of the innocent landowner defense. Since causation is a necessary prerequisite under each of the tort theories, the causation element is discussed apart from the analysis performed on each tort theory.

A. The Theory of Trespass

To establish a prima facie case for trespass, the plaintiff-neighbor must prove that there was a physical invasion of the plaintiff's real property, that the property owner intended to bring about the invasion, and the physical invasion of the real property was legally caused by the property owner's act.[136] The applicable part of the Restatement (Second) of Torts to the instant case states that one is subject to liability to another for trespass if he intentionally causes a hazardous substance to enter land in possession of another.[137] The "intent" of the property owner denotes that he knew the conse-

135. Summary judgment may be granted as long as no genuine issue of material fact exists and the movant must be entitled to judgment as a matter of law. Chipollimi v. Spencer Gifts, Inc., 814 F. 2d 893, 896 (3d Cir.), cert dismissed, 483 U.S. 1052, 108 S.Ct. 26, 97 L.Ed.2d 815 (1987). "The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L.Ed. 265 (1986).

136. *See* RESTATEMENT (SECOND) OF TORTS § 158 (1965).

137. *See id.*

quences of his act, or that he believed that the consequences are substantially certain to result from it.[138]

In a toxic tort action, the "act" of the property owner would equate to the release or threatened release of hazardous substances to the environment. The innocent landowner defense requires that the property owner acquire the property after the release or threatened release of hazardous substances. Case law has shown that a property owner can lose innocent landowner affirmative defenses if the operations he acquires do not adhere to good manufacturing practices or passive migration takes place subsequent to acquiring the property.

The potential purchaser of the property, via his "all appropriate inquiry," would know the likelihood of a release or potential release from the existing operations and should know whether the property is contaminated. During the performance of a due diligence investigation, the identification of environmental liabilities will be from four sources: (i) lack of good manufacturing practices from an existing operation that is creating a threat of a release of hazardous substances to the environment; (ii) existing contamination that is present as a result of historical operations and activities; (iii) contamination on, in, or underlying neighboring properties that has the potential of adversely impacting the property under consideration via migration; and/or (iv) operations and activities being conducted on surrounding properties that have the potential to adversely impact the subject property in the future (e.g., neighboring underground storage tanks).

The sole purpose for a potential purchaser of property to commission an environmental due diligence is to identify potential and existing environmental liabilities, both on-site and off-site. It would be unrealistic for a plaintiff-neighbor to allege the potential purchaser intended to cause hazardous substances to migrate from the subject property, since the potential purchaser himself seeks to avoid the consequences of

138. *See id.* § 8A.

the historical acts[139] of the previous property owners as related to the release of hazardous substances to the environment. This avoidance includes refusing to purchase contaminated property which has the potential to adversely impact neighboring properties.[140]

Similarly, if the plaintiff was determined by the courts to be an innocent landowner, he or she would not meet the burden of persuasion regarding "knowing" with certainty, or substantial certainty[141] that the plaintiff's property would be invaded by contamination emanating from the property under consideration. In *Louisiana-Pacific Corp. v. ASARCO*,[142] the court would not allow a third party defendant to assert the innocent landowner defense even though the laboratory analyses performed on the limited amount of material sent to the landfill contained "extremely small concentrations of hazardous [substances]."[143] The court held that "even a minimal" threat of a release is sufficient to defeat an innocent landowner defense claim. In *United States v. A & N Cleaners & Launderers, Inc.*,[144] the court stated that once an environmental concern is identified, due care requires one to undertake the necessary activities to ascertain the nature of any "environmental threats" associated with the release.[145]

Lastly, such an assertion by the plaintiff-neighbor is at direct odds with the lack of knowledge provision in the innocent landowner defense. Hence, given the high bar courts

139. *See id.* Cmt. a."Intent," as it is used in the RESTATEMENT (SECOND) OF TORTS, refers to the consequences of an act rather than the act itself. *See id.*

140. This is not to imply that contaminated property is not transferable in the real estate market. Commercial and industrial properties that have had hazardous substances stored and used at the property prior to the promulgation of the Resource Conservation Recovery Act of 1976 (42 U.S.C. § 6901) and its state counterparts are likely to have some degree of contamination. Such transactions are caveated with indemnification clauses and a delineation of which party is responsible for the clean-up of existing contamination.

141. *See* RESTATEMENT (SECOND) OF TORTS § 158 cmt. b.

142. 735 F. Supp. 358 (W.D. Wash. 1990).

143. *Id.* at 160.

144. 854 F. Supp. 229 (S.D.N.Y. 1994).

145. *See id.* at 243-44.

have established for this provision,[146] if the courts acknowledge that the potential purchaser is an innocent landowner, the potential purchaser would not have known with substantial certainty that the plaintiff's property would become contaminated. As a result, the plaintiff-neighbor would not be able to make a prima facie case for trespass since he would not be able to prove the common law intent element.

B. The Theory of Strict Liability

In enacting CERCLA, "Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the [legislative] compromise. . . ."[147] CERCLA "unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation."[148] "The overwhelming body of precedent . . . has interpreted [CERCLA] as establishing a strict liability scheme" subject only to the statutory defenses for damages caused solely by acts of God, war, or third parties.[149]

Under the common law tort theory, some courts have proclaimed that the use, storage and/or disposal of hazardous substances is an abnormally dangerous activity and the keeper of such substances should be held strictly liable.[150] Most courts, however, have consistently determined that haz-

146. *See Wickland Oil Terminals*, 590 F. Supp. at 74; Newhan Properties and Management v. Spill Compensation Fund, 97 N.J. Admin., 2d (EPE) 37, May 8, 1997 *cert. denied*, 152 N.J.363 (1998).

147. *Shore Realty Corp.*, 759 F.2d at 1042.

148. *Id.* at 1044.

149. United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

150. *See* Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293, 1307-08 (5th Cir. 1982); State, Dep't of Envtl. Protection v. Ventron Corp., 468 A.2d 150, 157 (N.J. 1983). The general principle of an abnormally dangerous activity states that: (1) one who carries on an abnormally dangerous activity is subject to liability for harm to person, land or chattels of another resulting from the activity, although he exercised the utmost care to prevent, and (2) this strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous. RESTATEMENT (SECOND) OF TORTS § 519 (1976). In deciding whether to hold that the use, storage and/or disposal of hazardous substances is an abnormally dangerous activity, the *Ashland* and *Ventron* courts considered the factors enumerated in § 520 of the Restatement.

ardous waste generation or disposal is either not an abnormally dangerous activity, or does not involve the requisite intent to invoke the application of strict liability.[151] Without a statutory strict liability scheme for personal injuries caused by hazardous substances, these courts have refused to apply strict liability.[152]

Assuming the more restrictive approach holds for common law strict liability as applied to hazardous substances, it would seem absurd for a property owner-defendant to be relieved of tort liability simply because he was successful in asserting an affirmative defense granted by a statute to which Congress explicitly would not permit redress for a neighbor subject to hazardous substance-induced injury to his person or property. This theory, however, does not seem so preposterous when one examines CERCLA's strict liability in relation to the common law.

The application of strict liability is broader under CERCLA than it is under the common law.[153] In *State, Department of Environmental Protection v. Ventron Corp.*,[154] the leading case espousing the Restatement (Second) of Torts §§ 519-20, the court's holding makes clear that liability attaches when a release of hazardous substances to the environment occurs.[155] Conversely, CERCLA liability can arise whenever "there is a release, or threatened release which

151. *See* Rory A. Valas, *Toxic Palsgraf: Proving Causation When the Link Between Conduct and Injury Appears Highly Extraordinary*, 18 B.C. ENVTL. AFF. L. REV. 773, 778 (1990-1991) (*citing* Anderson v. W.R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986), *aff'd sub nom.;* Anderson v. Cryovac, 862 F.2d 910 (1st Cir. 1988); Ewell v. Petro Processors, Inc., 364 So. 2d 604 (La. Ct. App. 1978), *cert. denied*, 366 So. 2d 575 (La. 1979)).

152. *See id.* at 779 (*citing*, Anderson v. W.R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986); Ewell v. Petro Processors of La., 364 So. 2d 604 (La. Ct. App. 1978), *cert. denied*, 366 So. 2d 575 (La. 1979); Bagley v. Controlled Env't Corp., 503 A.2d 823 (N.H.1986)).

153. *See* Michael J. Gergen, *The Failed Promise of the Polluter Pays Principle: An Economic Analysis of Landowner Liability for Hazardous Waste*, 69 N.Y.U.L. REV. 624, 644 (1994).

154. 468 A.2d 150 (N.J. 1983).

155. *See id.* While activities associated with the disposal of hazardous waste [substances] may benefit society, "the law of liability has evolved so that a property owner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others." *Id.* at 157.

causes the incurrence of response costs, of a hazardous substances."[156] In *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*,[157] the district court holding was reversed for failing to consider "whether defendant's releases (or threatened releases) might nevertheless have caused the plaintiff to incur 'response costs' even though those releases did not in fact contaminate the wells."[158] Thus, CERCLA liability is broader than that found under common law because an actual release is not required to create CERCLA liability.[159]

Moreover, under the common law concerning abnormally dangerous activities, which the *Ventron* court has held to include past and present disposal of hazardous substances, the property owner would be found liable only if he intentionally brought the hazard onto his property.[160] CERCLA liability, on the other hand, attaches to the property owner regardless of the lack of an affirmative act on the part of the property owner.[161]

Conceding the absence of a vehicle for the recovery of compensatory damages, CERCLA casts a wider net than the common law does to capture those responsible for environmental harm.[162] The effect is that those truly responsible for causing harm to the property or person of neighbors are a subset of those subject to strict liability under CERCLA. If a property owner can prove his innocence under the broad strict liability scheme of CERCLA, he should surely be allowed to impart this innocence in a toxic tort action employing the theory of strict liability. This approach is consistent with a corrective justice model advocating the system of tort law to "respond to ordinary views on individual blame and accountability" and that a defendant should not be held re-

156. 42 U.S.C. § 9607(a)(4)(B).
157. 889 F.2d 1146 (1st Cir. 1989).
158. *Id.* at 1157.
159. *See Monsanto Co.*, 858 F.2d at 167.
160. *See Ventron*, 468 A.2d at 150.
161. *See* Gergen, *supra* note 145, at 651.
162. *See id.*

sponsible unless it can be shown that he created a dangerous condition which "resulted in" harm to another.[163]

C. The Theory of Nuisance

Nuisance does not signify any particular kind of conduct on the part of the defendant.[164] Rather, a private nuisance can be described as a "nontrespassory invasion of another's interest in the private use and enjoyment of land."[165] In the context of this Article's analysis, the property owner would be subject to liability for a private nuisance "if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is . . . unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities."[166] Thus, the analysis of whether a property owner could successfully assert his court acknowledged status as an innocent landowner to defend a nuisance claim arising from the same cause of action, is a hybrid of this Article's strict liability and causation analyses.[167]

An element of the Restatement's general principle, which is not previously discussed, is the role of negligent or reckless conduct in the theory of nuisance. As in all negligence or recklessness cases, an unreasonable risk of harm must be created by the defendant.[168] In order to establish a prima facie case for negligence, the plaintiff-neighbor would need to prove that the property owner breached his duty to conform to a specific standard of conduct for the protection of the

163. BOSTON & MADDEN, *supra* note 22, at 104 (*citing* Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973)).

164. *See* RESTATEMENT (SECOND) OF TORTS § 821A cmt. b. "The word has reference to two particular kinds of harm – the invasion of two kinds of interests" public nuisance and private nuisance. For the purposes of this Article, only private nuisance will be examined.

165. *Id.* § 821.

166. *Id.* § 822.

167. *See* discussions *supra* Parts V.B. and *infra* Part V.D. respectively.

168. *See* BOSTON & MADDEN, *supra* note 22, at 77.

plaintiff against an unreasonable risk of injury.[169] What, then, is the property owner's duty during the performance of a pre-purchase environmental due diligence so that the potential purchaser does not cause unreasonable risk of injury to the plaintiff?[170]

The plaintiff would not be able to claim the existence of negligence per se.[171] First, the negligence per se doctrine has recognized that courts should only adopt those standards of conduct that are explicit in statutes intended to protect a particular class of individuals and not the interests of the state or the public at large.[172] The purpose of CERCLA is to expedite the clean-up of hazardous waste sites in order to protect the general public.[173] Secondly, the standard of conduct must be clearly defined in the statute or regulation in order to apply the negligence per se doctrine.[174] In a memo dated April 14, 1994, from the Office of Solid Waste and Emergency Response to EPA's regional offices, the EPA wrote that it would not clarify the meaning of "all appropriate inquiry" in Section 101(35) of CERCLA.[175]

Without the availability of a statutorily defined standard of conduct, the general duty to act as an ordinary, prudent, reasonable person is applicable.[176] Statutory defenses including due diligence, reliance on expert opinion, and lack of

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169. *See* discussion *infra* Part V.D. The plaintiff would also need to prove damage to the plaintiff's person or property and actual and proximate cause.

170. *See* discussion *supra* Part IV. It is assumed that if the owner acted in a negligent or reckless fashion with regard to the use, storage and/or disposal of hazardous substances/wastes subsequent to his acquisition of the property, he would not qualify for the innocent landowner defense.

171. *See* W. PAGE KEETON ET. AL, PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 227-31 (5th ed. 1984).

172. *See* Sheila Bush, *Can You Get There From Here? Noncompliance with Environmental Regulations as Negligence Per Se in Tort Cases*, 25 IDAHO L. REV. 469, 473 (1988-89).

173. 42 U.S.C. § 9601(1)-(38).

174. *See* Bush, *supra* note 164, at 474.

175. *See Standard for Innocent Landowner Defense Will Not Be Clarified, EPA Says in Memo*, 8 TOXICS L. REP. (BNA) 1340 (Apr. 27, 1994). *But see* proposed Senate Bill S. 20, Brownfields and Environmental Cleanup Act of 1999, *supra* note 85; *supra* note 82 and accompanying text discussing the statutorily defined meaning for an "all appropriate inquiry" under New Jersey law.

176. *See* W. PAGE KEETON, *supra* note 162 § 32, at 173.

causation are classic reasonable person defenses in the vein of common law negligence.[177] The provisions of CERCLA's innocent landowner defense incorporates each of these concepts.[178]

Moreover, in the absence of a statutorily defined standard, case law has defined due care on the part of a purchaser/property owner to include an investigation of the subject property, (i.e., a Phase I ESA) an area of environmental concern is identified the purchase/property owner must then take the necessary steps to ascertain the nature of environmental concern and associated impact to the environment (i.e., Phase II/Phase III ESA).[179] Thus, the court-defined duty of care is nothing more than a rewording of the "all appropriate inquiry" language that is contained in the statutory innocent landowner defense.[180] It follows that CERCLA's statutory provision imposes an obligation on the purchaser/property owner that is equivalent to the duty of care to determine whether the parties were negligent in the context of a common law nuisance cause of action.

CERCLA liability exceeds common law nuisance liability because the latter requires "some causal connection . . . between the nuisance and the landowner beyond mere ownership of the property on which the nuisance originates."[181] Hypothetically, if an "innocent landowner" obtains title of a vacant parcel of land for investment purposes which, unbeknownst to him, emanates contaminated groundwater as a result of prior midnight dumping, the "innocent landowner"

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177. *See* Jack E. Karns, Edwin A. Doty & Steven S. Long, *Accountant and Attorney Liability as "Sellers" of Securities Under Section 12(2) of the Securities Act of 1933: Judicial Rejection of the Statutory, Collateral Participant Status Cause of Action*, 74 NEB. L. REV. 1, 34 (1995) (discussing the Securities Act of 1933 which regulates the initial disclosure of information regarding the sale and transfer of securities).

178. *See supra* Part III.

179. *See supra* notes 87, 92, 93 and accompanying text.

180. This is supported by the meaning of "all appropriate inquiry" as defined by the New Jersey legislatures which is consistent with the duty of care imposed upon a prospective purchaser/property owner by the courts. *See supra* note 85.

181. John J. Lyons, *Deep Pockets and CERCLA: Should Superfund Liability be Abolished?* 6 STAN. ENVTL. L. J. 271, 297 (1986-87).

will be subject to CERCLA liability solely due to his ownership of the vacant parcel of land from which the nuisance originates. Conversely, the "innocent landowner" would not be liable in a private nuisance action as his conduct, mere ownership, was not the legal cause of invasion upon the neighboring property.[182] Hence, the liability provisions of CERCLA "exploits the model of nuisance law by strengthening the legal hand of the owner whose property is polluted . . . ."[183] This broader liability scheme, along with the foregoing analysis and read in conjunction with Part V.B. and Part V.D. of this Article, illustrates the fact that if a property owner is deemed to be an innocent landowner by the courts, neighboring property owners or residents would not be able to establish a prima facie case for negligence against the innocent landowner.

D. The Principles of Causation

While causation is fundamental in tort law for the apportionment of liability, it is one of the most difficult burdens for a plaintiff to overcome in establishing a prima facie case in a toxic tort matter. The numerous types of hazardous substances that may be present at a site, the varied sources and generators from which a single hazardous substance could derive, and the lack of documentation and potentially informative persons, due to the latency period between the release and injury date, are factors which create difficulties in proving causation. Had Congress adopted the House of Representative's approach to causation, which recommended the imposition of liability on those who caused or contributed to the hazardous waste problems, CERCLA plaintiffs would have faced similar burden of proof obstacles.[184]

182. *See* RESTATEMENT (SECOND) OF TORTS § 822. One is subject to liability for private nuisance if, but only if, his conduct is a legal cause of invasion of another's interest in the private use and enjoyment of land, and the invasion is either: (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities. *Id.*

183. William H. Rodgers, Jr., *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 LOY. L.A. L. REV. 1009, 1021 (1994).

184. *See supra* note 23 and accompanying text.

By enacting the Senate's version which is based on the responsible party theory, CERCLA does not contain any specific causation provision in the statutory language.[185] Hence, the courts have not required those plaintiffs suffering from hazardous substance injuries to prove causation under CERCLA because of the well-noted difficulties in determining the cause of injuries.[186] Rather, Congress' inclusion of the three statutory, causation-based, affirmative defenses[187] shifts the causation burden of proof to the defendant property owner.[188] It has been shown that relatively insignificant involvement by the property owner will defeat the causation-based innocent landowner affirmative defense.[189]

Should CERCLA not fully resolve the issues of liability, legislative history suggests that the traditional and evolving principles of common law should govern.[190] Under traditional tort causation principles, liability will lie where the defendant's actions were both the cause-in-fact and the proximate cause of the plaintiff's injury.[191] The cause-in-fact element requires that the plaintiff-neighbor show that the property owner's actions constituted a "substantial factor in bringing about the harm."[192] The Restatement suggests three considerations in determining whether the property owner's actions amounted to a "substantial factor":

(1) the extent to which the property owner's actions contributed to the harm;

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185. *See supra* note 23 and accompanying text.

186. *See* Nagle, *supra* note 19, at 1495 (arguments by property owners, that CERCLA requires proof of causation by the plaintiff, have not been successful). *See, e.g.*, *Shore Realty Corp.*, 759 F.2d at 1044-45; United States v. Cauffman, 15 ENVTL. L. REP. 20,161 (C.D. Cal. 1984). *See id.* at 1506.

187. *See supra* note 33.

188. *See* Violet v. Picillo, 648 F. Supp. 1283, 1293 (D.R.I. 1986), *aff'd*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

189. *See id.* at 1293.

190. *See* statement of Senator Randolph. S. REP. No. 96-848 at 13 (1980), *reprinted in* 1 U.S. Senate Comm. on Env't & Public Works, A Legislative History of the Comprehensive Envt'l Response, Compensation, and Liability Act of 1980 (Superfund), Pub. L. No. 96-510, 97th Cong., 2d Sess. 320 (1983).

191. *See* W. PAGE KEETON, *supra* note 163, at 173-75.

192. RESTATEMENT (SECOND) OF TORTS § 431(a).

(2) whether the property owner's actions created a force that operated up to the time of the harm; and

(3) the amount of time that elapsed between the property owner's actions and the harm.[193]

The cases examined in Part IV (B) of this Article suggest that: (i) the failure to act,[194] (ii) the failure to act appropriately;[195] (iii) the failure to act promptly;[196] as well as (iv) contributing to a release that may not even migrate and cause harm to a neighboring property in an insignificant manner[197] will result in a loss of the innocent landowner defense.[198] Thus, the notion of imputing CERCLA's innocent landowner defense to common law tort theories survives the cause-in-fact requirement since actions that amount to something less than being a "substantial factor" will defeat the CERCLA defense.

Proximate cause requires that the plaintiff-neighbor's personal injury and/or property damage was a reasonably foreseeable consequence of the property owner's actions. Passive migration,[199] a consequence that would appear not to be reasonably foreseeable as well as the future acts of tenants,[200] which are hardly foreseeable, have denied CERCLA's innocent landowner defense to property owners.

In sum, the property owner has the burden of proving that the release, or threat of release, was caused solely by others.[201] While the courts have strictly construed this requirement, if successful, the property-owner has overcome the threshold that he did not cause the release of hazardous substance and hence did not cause the environmental harm

193. *Id.*

194. *See A & N Cleaners & Launderers* Inc., 854 F. Supp. at 243-44.

195. *See* Newhan Properties and Management v. Spill Compensation Fund, 97 N.J.A.R. 2d (EPE) 37, A-2915-95T1, May 8, 1997, *cert. denied*, 152 N.J. 363 (1998); *Time Oil Co.*, 687 F. Supp. 529 (W.D. Wash. 1988).

196. *See Shapiro*, 741 F. Supp. at 478.

197. *See Louisiana-Pacific Corp.*, 735 F. Supp. at 358.

198. *See id.*

199. *See Nurad*, Inc., 966 F.2d 837, 845.

200. *See Time Oil Co.*, 687 F. Supp. 529; *See also A & N Cleaners & Launderers, Inc.*, 854 F. Supp. at 243-44.

201. *See* Violet v. Picillo, 648 F. Supp. at 1293.

to the subject property and/or neighboring properties. If the court relieves the property owner from CERCLA liability for not causing the release of hazardous substances, the plaintiff-neighbor will not be able to overcome the burden of proof that the property-owner caused injury to his person or property under the common toxic tort theories. Simply put, the property owner did not cause the harm to the environment and, hence, there would be no material issue of fact that would preclude a motion for summary judgment in a subsequent toxic tort action.

VI. Conclusion

Although CERCLA was founded on the principles of common law, the courts have made it clear that "[i]n passing this legislation, . . . Congress did not intend to make injured parties whole or to create a general vehicle for toxic tort actions."[202] Congress did, however, create the ATSDR which gives toxic tort plaintiffs access to toxicological profiles developed under the jurisdiction of CERCLA.[203] Moreover, CERCLA requires that the Administrator of the ATSDR perform a health assessment[204] for each "Superfund site," and gives discretionary authority to the Administrator to perform health assessments where individuals have been exposed to hazard-

202. Versatile Metals, Inc. v. The Union Corp., 693 F. Supp. 1563, 1582-83 (E.D. Pa. 1988) (*citing* Artesian Water Co. v. Gov't of New Castle Cty., 659 F. Supp. 1269, 1299 (D. Del. 1987)); Exxon Corp. v. Hunt, 475 U.S. 355, 375 (1986)).

203. *See supra* note 31.

204. *See* 42 U.S.C § 9604(i)(6)(F). The term "health assessment" means the preliminary assessments of the potential risk to human health posed by individual properties, based on such factors as the nature and extent of contamination, the existence of potential pathways of human exposure (including ground or surface water contamination, air emissions, and food chain contamination, the potential susceptibility of the community within the likely pathways of exposure, the comparison of expected human exposure levels to the short-term and long-term healthy effects associated with identified hazardous substances and any available recommended exposure or tolerance limits for such hazardous substances, and the comparison of existing morbidity and mortality data on diseases that may be associated with the observed levels of exposure. *See id.*

ous substances for which the probable source of such exposure is a release from any site.[205]

Thus, while CERCLA is not a toxic tort statute, its provisions create a powerful device to assist the toxic tort plaintiff.[206] The owners of the property from which the hazardous substances might emanate were not afforded a reciprocating statutory defense by Congress in order to defend themselves in litigation against a plaintiff-neighbor whose case is fortified by CERCLA's provisions.[207] What little Congress did provide to property owners, in defense of claims brought consistent with the purpose of CERCLA, has been rendered practically meaningless by the courts who have strictly construed CERCLA's three statutory defenses.[208]

An examination of relevant case law has demonstrated that the probability of successfully asserting the innocent landowner defense is extremely low.[209] If successful, however, a comparative analysis illustrates that compliance with the innocent landowner defense provisions, as construed by the courts, would prevent a plaintiff-neighbor from establishing a prima facie case for the various toxic tort theories. Given the intimate toxic tort relationship, the benefits that toxic tort plaintiffs receive from the ATSDR, and the exceedingly lofty evidentiary thresholds the courts have established for a prospective purchaser/property owner to overcome in order to assert his status of an innocent landowner, it would seem equitable to allow CERCLA's innocent landowner provision to be used as a defense in a toxic tort suit that arises from the same cause of action.

One can only theorize why such an application of the innocent landowner defense has not been used, and what the reality of this strategy is for the future. First, the innocent landowner defense has only existed since 1986. As a result of the wide discretion given to the courts in interpreting the provisions of this affirmative defense, the subsequent strict

205. *See* 42 U.S.C. § 9604(i)(6)(A), (B).
206. *See Versatile Metals Inc.*, 693 F. Supp. at 1582.
207. *See supra* note 33.
208. *See id.*
209. *See id.*

interpretation of these provisions by the courts, an adequate, evidentiary threshold for the various provisions of the innocent landowner defense only now exists for prospective purchasers. Second, potential purchasers of commercial and industrial real estate must use this evidentiary threshold in the future to design their pre-purchase environmental due diligence. The potential purchasers must realize the proverb "penny wise — dollar foolish" has direct applicability in the environmental and toxic tort liability context. The design of a comprehensive environmental due diligence today will allow a purchaser of property to be an innocent landowner tomorrow. Third, potential purchasers must recognize that certain business objectives (e.g., closing the transaction by a certain date) must be evaluated in conjunction with an understanding of the potential environmental liabilities that may result by failing to act appropriately and thoroughly after the preliminary environmental assessment (i.e., not acting on their consultants' or attorneys' recommendations for subsequent data gathering and investigation). Lastly, timing is everything. An attempt to apply the innocent landowner defense to a toxic tort claim can only materialize when the truly innocent landowner becomes subject to the two legal attacks for environmental liabilities arising from ownership of real property.