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Can Equity and CERCLA Co-Exist - Blasland v. City of North Miami

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CAN EQUITY AND CERCLA CO-EXIST? *BLASLAND V. CITY OF NORTH MIAMI*

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I. INTRODUCTION

Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act[1] (CERCLA) in 1980 to achieve prompt clean-up of polluted lands and make those responsible for the pollution pay for the clean-up.[2] When an innocent party seeks to recover from a wrongdoer in a CERCLA recovery action, a wrongdoer may only assert the three defenses enumerated in section 107(b),[3] which states that the pollution was caused solely by either: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party unconnected with the defendant.[4]

Restricting the defenses in a CERCLA recovery action may lead to harsh results.[5] In *Blasland, Bouck & Lee, Inc. v. City of North Miami*[6] (*Blasland*), the U.S. Court of Appeals for the Eleventh Circuit held that North Miami's equitable estoppel argument was not a valid defense to Blasland's CERCLA suit to recover money for work performed on North Miami's polluted site.[7] The *Blasland* court stated in dicta that the result seemed unfair to North Miami because Blasland was able to circumvent a pay-when-paid clause in its contract with North Miami even though Blasland performed substandard work[8] and engaged in environmental cleanup for profit.[9] Regardless, the court's decision was correct because

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[1] 42 U.S.C.A. §§ 9601 - 9675 (2002).

[2] *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (citing *U.S. v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)).

[3] 42 U.S.C.A. § 9607(a) (2002).

[4] 42 U.S.C.A. § 9607(b) (2002).

[5] *See* Monica Conyngham, *Robbing the Corporate Grave: CERCLA Liability, Rule 17(b), and Post Dissolution Capacity to be Sued*, 17 B.C. Envtl. Aff. L. Rev. 855, 862 - 863 (1990) (quoting *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1056 (D. Ariz. 1984)).

[6] *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286 (11th Cir. 2002).

[7] *Id.* at 1304 - 1305.

[8] *Id.* at 1305 - 1306.

[9] *Id.* at 1306.

North Miami's equitable estoppel argument was not allowed under CERCLA.

Blasland, however, was not a typical CERCLA recovery action.[10] Normally the innocent party is either the U.S. Environmental Protection Agency (EPA) or some other government entity that cleans up someone else's hazardous waste.[11] In *Blasland* the innocent party was Blasland itself, an environmental engineering firm. Notwithstanding this abnormality, the court still reached the right conclusion by ordering North Miami to pay Blasland. This note examines why the decision in *Blasland* was both correct and important. Part II of this note summarizes the facts, relevant procedural history, and the court's reasoning. Part III analyzes: (1) CERCLA liability and defenses; (2) incorporation of state law; (3) why the court characterized the holding as seemingly unfair or harsh; and (4) suggested reasons why courts should not force innocent parties to bear the costs of cleanup. Part IV summarizes why *Blasland* is correct.

II. FACTS, PROCEDURAL HISTORY, AND THE COURT'S REASONING

A. Facts

The City of North Miami acquired a strip of land along Biscayne Bay in 1970 and leased it to Munisport Inc. for development of a golf complex in 1972.[12] To make the golf complex economically viable, Munisport sought permission from North Miami to operate a landfill on the Munisport site to generate income for the complex.[13] North Miami granted permission and the landfill accepted solid waste from 1974 to 1980. As a result of the dumping, in 1983 the EPA put the Munisport site on its National Priorities List of hazardous release sites and conducted tests that showed the site was releasing ammonia into the underlying ground water.[14] Consequently, the ground water contaminated an adjacent mangrove preserve on Biscayne Bay.[15]

The EPA filed a CERCLA complaint against North Miami to compel the City to clean up the site. These two parties then entered into a consent

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[10] *Id.* at 1302.
[11] *Id.*
[12] *Id.* at 1289.
[13] *City of North Miami v. Berger*, 828 F. Supp. 401, 404 (E.D. Va. 1993).
[14] *Blasland*, 283 F.3d at 1289 - 1290.
[15] *Id.* at 1290.

decree that forced North Miami to clean up the site in return for the EPA's promise not to sue.[16] This decree contained a document labeled "scope of work" that stated how the City should analyze the problem, create a plan for the cleanup, and implement that plan. The scope of work document provided that the City: (1) construct a causeway between the preserve and Biscayne Bay to allow more tidal water to flow; (2) construct a hydraulic barrier between the site and the preserve by installing water pumps to keep the contaminated ground water from entering the preserve; (3) construct a treatment system for the contaminated ground water; and (4) execute studies to properly design the hydraulic barrier and contaminated water treatment system.[17] Each step of the process was subject to the EPA's approval.

North Miami also entered into an agreement with the Florida Department of Environmental Regulation (DER), which provided that the DER would reimburse North Miami for the expenses of the cleanup upon DER approval of the cleanup process.[18] In 1992, North Miami hired Blasland to conduct the studies and clean up the site. The contract between North Miami and Blasland referenced the agreements between North Miami, the EPA, and the DER.[19] Because the DER reimbursed North Miami only upon approval by DER, the contract with Blasland included a "pay-when-paid" clause that stated North Miami would only become liable for payment to Blasland when the DER paid North Miami. The contract also included an extra work clause by which North Miami could have Blasland perform other work at the site not affiliated with the EPA cleanup. While performing this extra work at the site pursuant to a subcontract with Blasland, another contractor illegally dumped fill into the wetlands thereby increasing cleanup costs.

However, most of the work at the site was pursuant to the scope of work agreement between the EPA and North Miami.[20] This work progressed until Blasland incorrectly conducted the hydraulic barrier test to determine how many pumps were needed to block the seepage of pollution.[21] Blasland then utilized the incorrect results of this test to design the barrier. At that time, the EPA determined the existence of a

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[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 1291.
[21] *Id.*

design flaw. The EPA then informed Blasland and North Miami that they must revise the hydraulic barrier design.

About one month after the EPA informed North Miami of the design flaw, North Miami terminated its contract with Blasland.[22] North Miami then hired SECOR International, Inc. to finish the job. In the meantime, North Miami brought two CERCLA contribution lawsuits against the former operators of the landfill and the municipalities and entities that dumped their waste at the site.

B. Procedural History

In 1997, Blasland brought suit alleging that North Miami failed to pay Blasland for the work it performed. The causes of action included breach of contract, quantum meruit, and a CERCLA direct recovery action. North Miami counterclaimed alleging professional malpractice and breach of contract. North Miami also counterclaimed with a CERCLA contribution action. The jury returned a verdict on all claims except the two CERCLA claims.

The U.S. District Court for the Southern District of Florida tried the two CERCLA claims and ruled in favor of Blasland.[23] The court awarded Blasland $375,000, not including the $110,000 North Miami owed Blasland because of the pay-when-paid clause of the contract. DER had not yet paid North Miami the money; therefore, the District Court held that the clause prevented the court from awarding Blasland the $110,000.

The Eleventh Circuit Court of Appeals reversed with respect to Blasland's CERCLA direct recovery action. The Circuit Court concluded that CERCLA section 107(a) bars equitable defenses.[24] The Circuit Court also concluded that the pay-when-paid clause defense sounded like an equitable estoppel defense, and therefore did not preclude North Miami from CERCLA liability.

C. Reasoning

The Eleventh Circuit characterized North Miami's argument as an equitable estoppel defense. The court paraphrased North Miami's argument as follows: "Although Blasland did not release the City from CERCLA liability, it did release it from contractual liability, and it would

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[22] *Id.*

[23] *Blasland*, 96 F. Supp.2d 1375 (S.D. Fla. 2000).

[24] *Id.* at 1304.

be unfair to allow Blasland to circumvent that release with a CERCLA suit."[25] The court said North Miami's argument was an equitable estoppel[26] defense because the CERCLA action was an "off the contract" action and Blasland was using it to evade the pay-when-paid clause. North Miami argued this was not fair and Blasland should be estopped from asserting its claim.

The court stated that the equitable estoppel defense did not fall within the three enumerated defenses in section 107(b). Therefore, the court was unwilling to recognize a defense not enumerated in CERCLA because it would frustrate Congress' intent. The Congressional intent behind CERCLA was to have pollution cleaned up promptly and force those responsible to pay for the cleanup.[27] The court noted that it should not disrupt Congress' intent even if it thought it might be good policy to do so.[28] The court also stated that if it were to recognize more defenses, polluters would have reason to postpone cleanups and search for ways to "escape liability."[29] Moreover, recognizing any defenses not in the statute would increase the exemptions from CERCLA liability.[30] However, the court did recognize the ambiguity in the CERCLA statute.[31] In particular, other sections of the statute allow for defenses that include: (1) a different statute of limitations for each claim;[32] (2) an innocent owner exception;[33] (3) a petroleum exclusion;[34] (4) a pesticide exclusion;[35] (5) indemnification or hold-harmless agreements between plaintiff and defendant in a contribution action;[36] and (6) allowing the defendant to show it has already resolved its liability with the government.[37] The court went on to conclude that the pay-when-paid clause did not fit into any of these other enumerated defenses either, but it never addressed the

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[25] *Id.* at 1303 - 04.

[26] 28 Am. Jur. 2d *Estoppel and Waiver* § 28 (2002).

[27] *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992).

[28] *Blasland*, 283 F.3d at 1305.

[29] *Id.* at 1304 - 1305.

[30] *Id.*

[31] *Id.* at 1303.

[32] 42 U.S.C.A. § 9613(g) (2002).

[33] 42 U.S.C.A. § 9601(35) (2002).

[34] 42 U.S.C.A. § 9601(14) (2002).

[35] 42 U.S.C.A. § 9607(i) (2002).

[36] 42 U.S.C.A. § 9607(e) (2002).

[37] 42 U.S.C.A. § 9613(f)(2) (2002).

ambiguity. The court was simply unwilling to enlarge the number of defenses available to a defendant.

III. ANALYSIS

A. Overview of CERCLA

In a CERCLA action there are two basic schemes for recovery: a direct cost recovery action and a contribution action. Both schemes require a prima facie showing of liability. The direct cost action usually involves an innocent party, such as the EPA, cleaning up a polluted site and seeking recovery from the liable party. The contribution action allows liable parties to sue each other for each other's respective share of the total liability. The CERCLA statute allows the court to take into account equitable factors in determining the extent to which each party is responsible in a contribution action but typically not in a direct recovery action.

B. Defenses Under CERCLA

Authorities are split on the subject of what defenses are available under a CERCLA action. Some courts have relied on *Weinberger v. Romero-Barcelo*,[38] which ruled that equitable defenses are assertable under the Clean Water Act (CWA).[39] For example, in *U.S. v. Mottolo*,[40] the court noted that the liability standard was the same for both CERCLA and CWA, and since equitable defenses were allowed under CWA, it was logical to allow an equitable defense under CERCLA. The court also opined that since the plaintiff was essentially seeking restitution, which sounds in equity, the defendant should not have been precluded from asserting equitable defenses.[41] The U.S. Court of Appeals for the Seventh Circuit in *Town of Munster, Ind., v. Sherwin Williams Co.*,[42] rebutted the argument that *Weinberger* allowed an equitable defense. Specifically, the Seventh Circuit noted that *Weinberger* recognized that Congress could

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[38] *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

[39] *Id.* at 318; 33 U.S.C.A. §§ 1251 - 1387 (2000).

[40] *U.S. v. Mottolo*, 695 F. Supp. 615, 626 - 627 (D.N.H. 1988).

[41] *Id.* at 626.

[42] *Town of Munster v. Sherwin-Williams Co., Inc.*, 27 F.3d 1268, 1272 (7th. Cir. 1994).

restrict a court's equity jurisdiction through clear and valid legislation.[43] The court reasoned that since CERCLA contained clear and unambiguous language that limited the court's equity jurisdiction,[44] *Weinberger* did not allow equitable defenses.

Other courts, however, have allowed equitable and contractual defenses to a CERCLA action. In *Mardan Corp. v. C.G.C. Music, Ltd.*,[45] Mardan purchased a music manufacturing facility from C.G.C.[46] The two parties entered into a purchase agreement that purportedly released C.G.C. from any claims or issues based upon or arising out of the purchase agreement.[47] After the purchase, Mardan brought a CERCLA action to recover the cost of cleaning up a "filling pond" previously used by C.G.C. In response, C.G.C. argued it was not liable because of the release contained in the purchase agreement. Mardan argued that a purchase agreement was not one of the defenses enumerated in section 107(b).[48] The U.S. District Court for Arizona concluded that state law was applicable and that the contractual release was valid.[49] The court also accepted C.G.C.'s equitable defense of "unclean hands." The court reasoned that since CERCLA was a restitution action, equitable defenses were allowed. In sum, *Mardan* allowed both a contractual and an equitable defense to a CERCLA action.[50]

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[43] *Id.*

[44] *Id.* at 1272 - 1273.

[45] *Mardan Corp. v. C.G.C. Music Ltd.*, 600 F. Supp. 1049 (D.C. Ariz. 1984) *aff'd in part, Mardan Corp. v. C.G.C. Music Ltd.*, 804 F.2d 1454 (9th Cir. 1986).

[46] *Id.* at 1057.

[47] The purchase agreement did not specifically mention CERCLA. However, the District Court noted that Mardan had constructive notice of the potential CERCLA claim and released that claim by entering into the purchase agreement. Therefore, the contract barred Mardan from bringing a CERCLA claim. *But cf. Blasland*, 283 F.3d at 1304, where a pay-when-paid clause in a contract also did not mention CERCLA, the court concluded that the clause did not bar liability because Blasland, the party against whom the clause was charged, did not assume the "'burden' of foregoing [a] CERCLA recovery." Thus, the contract did not bar Blasland from bringing a CERCLA claim.

[48] 42 U.S.C.A. § 9607(a) - (b) (2002) states that liability is subject only to three defenses listed in subsection (b): (1) an act of God; (2) an act of war; or (3) an act or omission of a third party not affiliated with defendant. 42 U.S.C.A. § 9607(a) - (b) (2002). However, the court rejected the argument that the list is not exhaustive because collateral estoppel, res judicata, and accord and satisfaction defenses would also not be allowed. *Mardan*, 600 F. Supp. at 1056 n. 9.

[49] *See Am Intern., Inc. v. Intl. Forging Equip.*, 982 F.2d 989, 995 (6th Cir. 1993) (holding a contractual release barred a CERCLA claim).

[50] *Mardan Corp., v. C.G.C. Music Ltd.*, 804 F.2d 1454, 1457 - 1460 (9th Cir. 1986). Upon appeal, the Ninth Circuit affirmed holding the release was valid. The court

Given the compelling legal and equitable arguments on both sides, the *Blasland* court reached the correct result because a pay-when-paid clause in a contract that does not mention or reference CERCLA liability should not release a party from liability under CERCLA. North Miami's equitable estoppel defense is not one of the enumerated defenses in the statute. Courts should not substitute what they deem to be good policy for the public policy Congress intended to set by passing CERCLA legislation.

Blasland briefly discussed CERCLA's ambiguity,[51] which indicates the list of defenses is not exhaustive, but concluded that the pay-when-paid clause is nevertheless simply not an allowable defense. Additionally, when a statute is ambiguous a court should look to Congressional intent and basic rules of statutory construction.[52] Congress intended CERCLA to speed the cleanup of polluted lands and make those responsible pay the expenses. Allowing an equitable estoppel defense would undermine Congressional intent because it would convey a message to defendants that there may be defenses they could assert thereby prompting them to delay cleanup. Moreover, section 107(a) clearly states: "[N]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b)."[53] This language combined with Congress not enumerating equitable defenses in the statute strongly indicates Congress did not intend any defenses other than those in the statute.

The court's decision is correct because to hold otherwise would force the innocent party, Blasland, to finance the environmental cleanup plan, without the truly liable party having to pay. However, there is the strong argument that Blasland knew it would have to finance the cleanup until the DER paid North Miami. The court felt the unfortunate result for North Miami should not prohibit the court from enforcing Congressional intent.[54]

Although the decision was correct, the Eleventh Circuit in *Blasland* did not set a clear guide as to whether a defendant may assert an equitable or legal defense in the future. The court did conclude that an equitable

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concluded that the release barred the CERCLA action because state contractual law decided the issue. Since the release was enforceable the court did not reach the equitable defense of "unclean hands."

[51] *See supra* n. 31 - 37 (The Eleventh Circuit noted that § 107(a) stated that § 107(b) contained the only defenses allowed under CERCLA. However, in other subsections of the statute there are a number of other defenses available for different factual situations.).

[52] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 300 (1988).

[53] 42 U.S.C.A. § 9607(a) (2002).

[54] *Blasland*, 283 F.3d at 1305 - 1306.

defense is invalid in a CERCLA action. However, it gave no clear indication of how it would treat an accord and satisfaction, res judicata defense, or any other defense that in essence stated, "we have settled the matter." *Blasland* quoted the Seventh Circuit in *Town of Munster* saying it doubted that CERCLA would allow such defenses.[55] However, the court never made any statements in dicta or otherwise on the validity of *Town of Munster*.[56] Nevertheless, the decision was correct because to allow a defense of a pay-when-paid clause would cause much uncertainty as to whether a defendant was liable. After all, courts have considered CERCLA a strict liability statute.[57] The pay-when-paid clause was not the type of defense that in essence said, "we have settled the matter." *Blasland* never stated why the DER had not paid the City. However, it could be reasonably inferred that Blasland performed the work and the City, therefore, owed payment. Thus, one could argue that the contractual liability in *Blasland* had been settled but, as the court pointed out, the CERCLA liability had not been settled.

The *Blasland* court should have set guidelines as to when an equitable defense could be maintained. One such guideline should be to allow a defense that protects the defendant once the CERCLA matter has been settled, such as the previously mentioned accord and satisfaction[58] or res judicata[59] defenses. For example, P commences a CERCLA action against D to recover costs associated with cleaning up pollution. P and D are both private entities. P owes D money from a prior contract. P and D negotiate and agree that the prior obligation wipes out D's current obligation. Thus, per their negotiations, D believes that it is relieved of the liability and proceeds to invest capital and labor into another project. Suppose that later P determines that it did not negotiate the deal favorably to itself or is unable to finance the cleanup because of a budget crunch. P potentially could still sue D to recover the money. However, this would be

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[55] *Blasland*, 283 F.3d at1305 n. 14 (*See Town of Munster*, 27 F.3d at 1272, where the Seventh Circuit noted that CERCLA allows defenses that do not pertain to the causation element. Thus, the Seventh Circuit speculated that there were equitable defenses that also did not pertain to the causation element that a defendant might logically raise.).

[56] *See Blasland*, 283 F.3d at 1305 (The court specifically stated, "We offer no views on the persuasiveness of the Seventh Circuit's musings . . . .").

[57] *See U.S. v. Price*, 577 F. Supp. 1103, 1113 - 1114 (D.N.J. 1983) (stating that the term "strict" was deleted from CERCLA at the last minute) (However, the court also stated that "it still appears [that] Congress intended to impose strict liability subject only to the affirmative defenses listed in § 107(b).").

[58] 1 Am. Jur. 2d *Accord and Satisfaction* § 1 (2002).

[59] 46 Am. Jur. 2d *Judgments* § 516 (2002).

tremendously unfair to D because D considered the matter settled and moved on with business. P should not be allowed to turn around and go after D. To hold otherwise would cause needless uncertainty in litigation. This is a result Congress surely did not intend. Allowing parties to shift the liability in no way interferes with the Congressional intent behind CERCLA, which *Blasland* deemed important, because liability cannot be avoided, only allocated.[60] Other defenses that protect the defendant should not be denied only when the issue or matter has been previously settled.

Shifting the financial liability under CERCLA by an agreement inevitably leads to an interpretation of section 9607(e)(1) and (2)[61] of the United States Code Annotated which states:

> (1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.
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> (2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

The Sixth Circuit in *Am Intern. Inc. v. Intl. Forging Equip. Corp.*, concluded that section 9607(e) does not allow liability shifting when the claimant is the government but does allow private parties to shift liability.[62] The court stated that this interpretation was both logical and

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[60] *See generally* Thaddeus Bereday, *Contractual Transfers of Liability Under CERCLA Section 107(E)(1): For Enforcement of Private Risk Allocations In Real Property Transactions*, 43 Case W. Res. L. Rev. 161, 179 - 180 (noting that a majority of courts allow "private risk allocation").

[61] 42 U.S.C.A. § 9607(e)(1) - (2) (2002).

[62] *Am Intern. Inc. v. Intl. Forging Equip. Corp.*, 982 F.2d 989, 994 (6th Cir. 1993) (quoting *Niecko v. Emro Mktg. Co.*, 973 F.2d 1296 (6th Cir. 1992)).

good public policy because it did not allow parties to escape government liability. Allowing parties to shift the financial liability did not interfere with the purpose of holding polluters accountable. This interpretation is sound because it prevents actions against parties who have legitimately settled the CERCLA matter. However, there is still the issue of what to do when the release is broadly stated and does not expressly reference CERCLA. The issue becomes whether the party intended to release the CERCLA claim. *Am Intern. Inc.* handled this by applying state law factors to decide whether the party intended to release the CERCLA claim.

Other courts have concluded the release need not mention CERCLA. In *Mardan*,[63] the U.S. Court of Appeals for the Ninth Circuit upheld a contractual release that did not mention CERCLA as a defense to a CERCLA action. However, as *Blasland* pointed out, an agreement purporting to release or limit liability, without mentioning CERCLA liability, should not bar a subsequent CERCLA action.[64] If an agreement does not specifically refer to the release or satisfaction of a CERCLA claim, that CERCLA claim should still be actionable.[65]

C. State Law

Some courts have held that state law should be incorporated into a federal rule of decision governing the release of claims under CERCLA. In *Mardan*, one issue was whether to incorporate state law or create a federal rule that required an express release of CERCLA liability. *Mardan* held that creating a federal rule requiring parties to specifically mention CERCLA was analogous to a situation in which a federal statute was aimed to give historically disadvantaged parties equal bargaining power. The *Mardan* court found that the parties were not at any disadvantage, therefore, the rule was unnecessary.

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[63] *Supra* n. 50.

[64] *Supra* n. 47.

[65] In *Mardan*, 804 F.2d at 1464, the dissent argued for a federal rule that required any releases to specifically mention CERCLA liability. Combining the federal rule with the rule in *Am Intern. Inc.* would yield a new federal rule that would allow liability shifting between private parties as long as they expressly release CERCLA liability. It would allow liability shifting but would protect the unsuspecting smaller firms from bigger firms' heavy-handed negotiating. This rule would provide valuable information to firms in deciding whether the risk level would be tolerable. This information forced on the parties could increase environmental clean-up efficiency and speed because firms would know their liability up front. Hopefully, this would reduce delay in cleanup because of the decreased potential for litigation.

Mardan seemed to miss the point of CERCLA. *Mardan* failed to discuss similarity between CERCLA and other statutes such as civil rights legislation. In civil rights legislation, Congress intended to protect the historically disadvantaged from discrimination and rectify past inequalities.[66] Similarly under CERCLA, Congress intended to rectify past wrongs committed against the environment by facilitating quick cleanup of pollution. CERCLA further protects the environment by encouraging entities to take precautions not to harm the environment in the first place. Historically, the environment has been neglected[67] and creating a rule requiring the parties to specifically discuss CERCLA would help remedy past wrongs and protect the environment in the future. Although the environment should not be personified, the beneficiaries of civil rights legislation (i.e. historically disadvantaged persons) and CERCLA legislation (i.e. the historically neglected environment) are notably similar. This new rule would put quick environmental cleanup at the center of the bargaining table. This is in line with Congressional intent.

Blasland is important because it reiterates the importance of quickly cleaning up polluted land by conveying the message to defendants that there is no reason to delay cleanup by attempting to assert equitable defenses. Furthermore, by holding that a city government (cleaning up the site with taxpayer dollars as a public service) would have to pay an environmental engineering firm (which had contractually released the city from liability) the court showed its unwillingness to allow an equitable defense even if allowing it would be fair. Now, at least in the Eleventh Circuit, polluting entities know the court will not be very receptive to any defenses other than those enumerated in the statute.

Nevertheless, the court mentioned that it seemed unfair that Blasland was able to use CERCLA to avoid the burden of its contract with North Miami.[68] This was especially true since Blasland was not the normal innocent party (i.e. a government entity expending taxpayer dollars to perform a public good) but was an environmental firm cleaning up the property for a profit. The court worried, however, that to hold otherwise could lead to innocent parties having to foot the bill for cleaning up pollution. Moreover, the *Blasland* court felt it was compelled to interpret

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[66] *Gamewell Mfg., Inc. v. HVAC Supply, Inc.*, 715 F.2d 112, 114 - 15 (4th Cir. 1983).

[67] See Eric Morgenthaler, *Ecology Effort: A Florida Utility Wins Naturalists' Praise For Guarding Wildlife*, Wall St. J. 1 & 19 (New York, N.Y.) (May 7, 1987) (indicating that only recently has the environment not been neglected).

[68] *Blasland*, 283 F.3d at 1305.

the law as it thought Congress had written it. It may be unfair to disregard equity in some circumstances under CERCLA, however, when Congress expresses its intent to clean up hazardous waste quickly and to hold polluters responsible, it is inevitable that some unfairness will result when enforcing that intent.

IV. CONCLUSION

Blasland concluded that equitable defenses were not allowed under CERCLA. Equitable defenses would have enlarged the exceptions to CERCLA liability and frustrated Congressional intent. Blasland contractually released the City from liability of payment for work performed. However, Blasland did not release the City from CERCLA liability. When the City tried to raise the pay-when-paid clause in the contract as an equitable defense, the court refused to acknowledge any defenses not enumerated in CERCLA.[69]

Other courts have allowed defenses based on theories such as applicability of state law or that CERCLA created a restitutionary action allowing equitable defenses. These theories may result in parties avoiding liability. One way to avoid this split in authority is a federal rule requiring parties to specifically negotiate the release of CERCLA liability to subsequently avoid litigation over that issue. This would make good business and environmental sense because: (1) the firms would properly discount the value of the contaminated land thereby increasing efficient allocation of resources; and (2) the parties would decide at the bargaining table the possibility of CERCLA liability. This latter point would not delay cleanup because of the reduced likelihood of litigation. A good example would be a situation in which a firm inadvertantly released its CERCLA rights through a general release. In that case the firm would have no incentive to clean up because it would be unable to recover its costs.[70] Therefore, to reduce litigation, promote rapid cleanup, and provide uniformity, federal courts should adopt this rule requiring specific negotiation.

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[69] *Id.* at 1304 - 1306.

[70] *Mardan*, 804 F.2d at 1465 (J. Reinhardt dissenting).