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Helms and Jefferies, *Liabilities of Landlords and Tenants under CERCLA*

# LIABILITIES OF LANDLORDS AND TENANTS UNDER CERCLA

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Traditionally, landlords and tenants under leases of commercial property have been able to determine their respective rights, duties and liabilities, to each other and to third parties, by using the common law of the jurisdiction in which the demised premises are located and local statutes applicable to the subject matter of their lease contract. Having thus determined those rights, duties and liabilities, the landlord and tenant could then, by contractual provision in their lease, alter or vary those rights and duties and shift liabilities to the extent allowed by the law governing the lease contract.

Consequently, when entering into a lease for commercial property, prospective landlords and tenants generally were aware that, unless otherwise provided in the written lease contract, the landlord would have responsibility only for delivering possession of the premises and for delivering to the tenant a leasehold interest that would not be disturbed by persons with paramount title.<sup>1</sup>

Subject to statutory provisions, no implied warranty of habitability or fitness for a particular purpose and no obligation on the part of the landlord to make repairs or improvements to the premises covered by the lease existed.<sup>2</sup> Commercial tenants recognized that, in the absence of a contrary lease provision, they would bear all responsibility for repair and maintenance of the property. They also realized that unless otherwise provided in the lease, no abatement in rent would be justified by claims of untenantable conditions or destruction of the premises.<sup>3</sup>

Each party recognized that if a nuisance or dangerous condition existed or developed on the premises, liability to third parties for any

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1. See 49 AM. JUR. 2D *Landlord and Tenant* §§ 1, 280 (1977).

2. *Id.* § 774.

3. See *id.* §§ 309, 768.

injuries caused by that nuisance or dangerous condition would fall upon the landlord if the condition existed at the inception of the lease. Otherwise, parties expected courts to impose liability upon both the landlord and the tenant if the tenant was responsible for the development of the condition and the landlord allowed the condition to exist.<sup>4</sup>

Because the common law governing commercial leases generally favors landlords, leaving tenants to bear most of the responsibilities and liabilities, parties entering into such leases frequently negotiate the terms of the lease to allocate responsibilities and liabilities in order to vary contractually the obligations imposed by the common law. Typical provisions in a commercial lease may provide for: (1) abatement of rent in certain circumstances; (2) limitations on permissible uses by the tenant; (3) division of responsibilities for maintenance and repair; (4) assignment of responsibility for payment of taxes and maintenance of insurance coverage; (5) specific limited warranties of title and condition and covenants of quiet enjoyment; and (6) allocation of liability for certain damages to the property and to third parties, together with an agreement of the party assuming such liability to indemnify and hold the other harmless for any costs or expenses incurred by the nonindemnifying party in connection with the allocated liability. In short, commercial leases have developed into documents intended to be all-inclusive, leaving nothing to be determined by reference to general rules of the common law governing landlord and tenant relationships. Because of the freedom which contracting parties ordinarily have to vary liabilities imposed by law, courts ordinarily have upheld these lease provisions altering the rules of the common law, unless presented with public policy reasons for refusing to enforce certain provisions.<sup>5</sup>

As a result of the development of commercial leases as complete statements of the rights, duties and liabilities of landlords and tenants, the parties to such leases have, until recently, felt secure in the knowledge of the extent of their rights and liabilities under any particular lease. In recent years, however, the development of a body of federal statutory law dealing with environmental hazards and the imposition of liability for the existence of these hazards has imposed upon land-

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4. *Id.* § 898; see *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1984), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989).

5. See generally 49 AM. JUR. 2D *Landlord and Tenant* § 227 (1987) (no right of landlord to enter and make repairs unless provided in lease); *id.* § 230 (lease provisions limiting permitted uses of property); *id.* § 600 (provisions for abatement of rent); *id.* § 768 (express warranty of suitability or fitness); *id.* § 771 (express warranty as to defects); *id.* § 774 (express covenants to make repairs); *id.* § 922 (provisions varying tenant's obligations to maintain premises).

lords and tenants an additional group of liabilities that the parties cannot always avoid by contractual provision.

The Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)<sup>6</sup> gives the Environmental Protection Agency (EPA) the power to recover its costs in cleaning up a hazardous waste site from, among others, the "owners and operators" of the facility.<sup>7</sup> Under CERCLA (also commonly called the "Superfund") as amended by the Superfund Amendment and Reauthorization Act of 1986 (SARA),<sup>8</sup> both the federal and state governments have authority to respond to releases and threatened releases of hazardous substances and thereby protect the public health and environment. The term "hazardous substance" is broadly defined under CERCLA and the regulations promulgated thereunder, and includes toxic pollutants, hazardous air pollutants under the federal Clean Air Act and any "imminently hazardous chemical substance or mixture . . . ."<sup>9</sup> CERCLA authorizes the EPA to target hazardous waste sites for cleanup and either compel the responsible parties to conduct and pay for the cleanup or perform the cleanup itself and seek reimburse-

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6. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987)).

7. 42 U.S.C. § 9607(a) (1982 & Supp. V 1987). In addition to CERCLA, Congress enacted amendments in 1984 to the Resource Conservation and Recovery Act (RCRA), Pub. L. No. 98-616, 98 Stat. 3224 (1984) (codified as amended at 42 U.S.C. §§ 6901-6992 (1982 & Supp. V 1987)), to regulate the operation, installation and removal of underground storage tanks (UST) containing petroleum or hazardous substances. RCRA §§ 9001-9010, 42 U.S.C. §§ 6991-6991i (Supp. V 1987). The federal government enacted UST regulations which became effective December 22, 1988. See 40 C.F.R. § 280 (1989). South Carolina also has adopted a program to regulate underground storage tanks. S.C. CODE REGS. 61-92.1 to -92.15 (Law. Co-op. 1976). The state's regulations were adopted prior to implementation of federal regulations and are now outdated as a result of the 1988 federal regulations.

The South Carolina Department of Health and Environmental Control currently is seeking General Assembly approval, as required by the Administrative Procedures Act, S.C. CODE ANN. § 1-23-120 (Law. Co-op. 1986 & Supp. 1989), to modify South Carolina's UST regulations to adopt the federal requirements so that South Carolina can be delegated authority from the EPA to supervise the UST program.

The regulatory program for UST regulation focuses on the owner or operator of underground tanks. The owner or operator of a UST can be held liable for failure to properly operate the tank or for failure to clean up a spill or a leak from an underground tank or its associated piping. In the case of tanks no longer in use as of November 8, 1984, the owner or operator of the tank immediately prior to the discontinuance of the tank's use may be held liable for violations of the UST regulations. 40 C.F.R. § 280.12 (1989).

8. Pub. L. No. 99-499, 100 Stat. 1612 (codified as amended in scattered sections of 42 U.S.C. (1982 & Supp. V 1987)).

9. CERCLA § 101(14), 42 U.S.C. § 9601(14) (Supp. V 1987). Interestingly, petroleum releases are excluded from the definition of a "hazardous substance." See *id.*

ment from any "potential responsible party" (PRP).<sup>10</sup> Under CERCLA, past and present hazardous waste site owners and operators, hazardous waste generators, and hazardous waste transporters are considered PRPs potentially liable for costs incurred by the EPA as the result of a release or threatened release of hazardous substances.<sup>11</sup>

Courts interpreting CERCLA have concluded that the statute allows for the imposition of joint and several liability among all PRPs.<sup>12</sup> As a result, each PRP is potentially liable for the entire cost of cleaning up a site, even though some of the parties may be responsible for more waste disposal or transportation than others. When SARA was passed in 1986, it codified the judicially interpreted federal common law right to contribution among PRPs.<sup>13</sup> Accordingly, if a court imposes joint and several liability for hazardous waste cleanup on several PRPs, the EPA may elect to seek full recovery from one PRP, who in turn may seek contribution from other PRPs. This authority may prove to be especially useful to the EPA in the frequently encountered situation in which one or more of the PRPs are insolvent, bankrupt or otherwise unavailable for recovery of costs.

Furthermore, courts construing CERCLA have held that parties identified as responsible persons in CERCLA section 107(a) are strictly

10. See generally 42 U.S.C. §§ 9601-9675 (detailing powers of EPA under CERCLA).

11. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982 & Supp. V 1987). This section provides in pertinent part:

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel . . . or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . .

(4) . . . shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . .

*Id.*

12. *E.g.*, *Chemical Waste Management, Inc. v. Armstrong World Indus.*, 669 F. Supp. 1285 (E.D. Pa. 1987); *United States v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal. 1987); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162 (W.D. Mo. 1985); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

13. See SARA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1982 & Supp. V 1987).

liable for the release of a hazardous substance.<sup>14</sup> There are, however, three limited affirmative defenses to liability provided in CERCLA section 107(b):

- 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 . . . if the defendant establishes by a preponderance of the evidence that: (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .<sup>15</sup>

Accordingly, if there is a "contractual relationship" with the third party who caused the release, section 107(b)(3) is not applicable and liability follows.

Section 101(35) of CERCLA<sup>16</sup> provides, *inter alia*, what is commonly known as the "innocent landowner defense." Pursuant to portions of that section, the term "contractual relationship" includes land contracts, deeds or other instruments transferring title or possession *unless* the property was acquired after the disposal or placement of the hazardous substance occurred *and* the defendant can establish by a preponderance of the evidence that "[a]t the time the defendant acquired the facility the defendant did not know and *had no reason to know* that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility."<sup>17</sup> To establish that the defendant "had no reason to know" for the purposes of section 101(35), the defendant "must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability."<sup>18</sup>

While section 101(35)(B) clearly envisions that the courts will determine the scope of the defense and the level of due diligence required, it does set forth the following five factors a court should take

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14. *E.g.* *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *Colorado v. Idarado Mining Co.*, 707 F. Supp. 1227 (D. Colo. 1989); *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986).

15. CERCLA § 107(b), 42 U.S.C. § 9607(b) (1982 & Supp. V 1987).

16. CERCLA § 101(35), 42 U.S.C. § 9601(35) (Supp. V 1987).

17. CERCLA § 101(35)(A)(i), 42 U.S.C. § 9601(35)(A)(i) (1982 & Supp. V 1987) (emphasis added).

18. CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B) (1982 & Supp. V 1987).

into consideration in determining whether the inquiry was appropriate:

[1] any specialized knowledge or experience on the part of the defendant, [2] the relationship of the purchase price to the value of the property if uncontaminated, [3] commonly known or reasonably ascertainable information about the property, [4] the obviousness of the presence or likely presence of contamination at the property, and [5] the ability to detect such contamination by appropriate inspection.<sup>19</sup>

The precise level of due diligence necessary to invoke the innocent landowner defense is difficult to ascertain.

As previously mentioned, any person who is the current owner or operator of a hazardous waste site or facility is potentially liable under CERCLA.<sup>20</sup> Courts have construed this liability provision to mean that the current owner or operator of a site or facility containing hazardous waste may be held liable even though the pollution occurred during a previous ownership.<sup>21</sup> Thus, a person who knowingly or unknowingly purchases or operates a site on which hazardous substances are discovered and is the owner or operator at the time of cleanup is potentially liable to the EPA for the total cost of cleaning up the site.

Recent judicial decisions construing CERCLA have dealt with a range of factual situations evidencing broad application of the statute in imposing liability upon landlords and tenants as "owners and operators". In determining who is liable for cleanup or response costs under CERCLA, the federal district courts and courts of appeal have looked exclusively to section 107(a) of CERCLA.<sup>22</sup> These courts often have determined liability in response to a motion for summary judgment,<sup>23</sup> thus demonstrating their interpretation that liability under CERCLA is strict liability,<sup>24</sup> without regard to causation or fault.<sup>25</sup>

19. *Id.*

20. See *supra* notes 6-7 and accompanying text; see also *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269 (D. Del. 1987) (discussing "covered persons" under 42 U.S.C. § 9607(a)), *aff'd*, 851 F.2d 643 (3d Cir. 1988); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1986) (discussing liability of waste generators, operators, owners, and lessors), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985) (current and former owners held jointly and severally liable).

21. See, e.g., *Artesian Water Co.*, 659 F. Supp. at 1279-81.

22. The courts uniformly have rejected arguments against liability based upon contractual provisions or equitable considerations. See, e.g., *Monsanto Co.*, 858 F.2d 160; *Artesian Water Co.*, 659 F. Supp. 1269; *Ottati & Goss, Inc.*, 630 F. Supp. 1361.

23. See, e.g., *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984; see also cases cited *supra* note 14.

24. See, e.g., *Monsanto Co.*, 858 F.2d 160; *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *Colorado v. Idarado Mining Co.*, 707 F. Supp. 1227 (D. Colo. 1989); *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988); *Idaho v. Bunker Hill Co.*, 635 F.

As discussed earlier, CERCLA section 107(a) imposes liability upon both current owners and operators and past owners and operators of facilities on which a release of hazardous substances has taken place.<sup>26</sup> The provisions of this section are those under which the courts have held landlords and tenants liable for cleanup costs.

Courts have interpreted "facility" to mean virtually anywhere a hazardous substance is found.<sup>27</sup> No requirement exists that the facility be a waste treatment or storage facility.<sup>28</sup> "CERCLA defines the term 'facility' broadly to include any property at which hazardous substances have come to be located."<sup>29</sup>

Owners or operators at the time cleanup costs are incurred have been considered to be owners or operators for purposes of section 107(a)(1).<sup>30</sup> Some current owners of property have argued that the statute is not intended to impose liability upon an owner who did not own the property at the time of the disposal of hazardous substances. The courts uniformly have rejected that argument, however.<sup>31</sup> In contrast, past owners and operators of the property are liable under CERCLA only if they were owners or operators of the facility at the time of disposal of a hazardous substance.<sup>32</sup> In any case, the only defenses to the strict liability imposed by section 107(a) are the limited affirmative defenses set forth in section 107(b).<sup>33</sup>

The United States relied on CERCLA section 107(a) in *United States v. Argent Corp.*<sup>34</sup> when it brought an action against the landlord-owner and the tenant of property on which the tenant disposed of hazardous substances. The landlord moved for summary judgment, asserting that his mere ownership of the property, without any connection to the business of the tenant, did not constitute ownership for purposes of CERCLA liability. The United States District Court for the District of New Mexico rejected this argument, finding no require-

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Supp. 665 (D. Idaho 1986).

25. *Shore Realty Corp.*, 759 F.2d 1032; *United States v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal. 1987); *Artesian Water Co.*, 659 F. Supp. 1269.

26. See *supra* note 11 and accompanying text.

27. See *Shore Realty Corp.*, 759 F.2d 1032 (property currently used for condominium development is a facility under the Act due to presence of hazardous substances and previous uses).

28. *Id.* at 1037-44.

29. *Id.* at 1043, n.15 (citing 42 U.S.C. § 9601(a) (1982 & Supp. V 1987)).

30. *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285, 1289 (D. Minn. 1987).

31. *Shore Realty Corp.*, 759 F.2d at 1043-44.

32. *Id.* at 1044.

33. See *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1572 n.2 (E.D. Pa. 1988); *United States v. Northern Plating Co.*, 670 F. Supp. 742, 745 (W.D. Mich. 1987), *aff'd sub nom. United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989).

34. 21 Env't Rep. Cas. (BNA) 1354 (D.N.M. 1984).



ment of "participation in management or in operation as a prerequisite to owner liability."<sup>35</sup>

The court also rejected attempts by the landlord to rely on the third-party defense set forth in CERCLA section 107(b)(3).<sup>36</sup> The landlord argued that the release of hazardous substances was caused solely by the act of a third party, in this case the tenant. The court ruled that the landlord could not rely on the affirmative defense because the lease agreement created a contractual relationship between the landlord and the tenant.<sup>37</sup> The court noted that the landlord "cannot show, as required by § 107(b), that the release was caused *solely* by a third party which [sic] did not share a contractual relationship with him."<sup>38</sup> Because he failed to meet the statutory requirements, as a matter of law the landlord could not rely on the third-party defense and the court denied summary judgment.<sup>39</sup>

The United States Court of Appeals for the Second Circuit followed the same reasoning and rejected the third-party defense in *New York v. Shore Realty Corp.*<sup>40</sup> In that case, state of New York obtained an order compelling the corporate owner and its stockholder-officer to clean up a hazardous waste storage site. Neither the owner nor the stockholder-officer generated the waste. The stockholder-officer, however, knew of its existence at the time the property was acquired. Tenants of the previous owner were operating an illegal hazardous waste storage facility on the property and reports obtained by the stockholder-officer before the property transfer indicated that leaking had occurred.<sup>41</sup>

The state eventually supervised the removal of drums of hazardous waste and sought recovery under CERCLA. The corporate owner sought to avoid liability on the basis that it had not caused the damage resulting from the hazardous substance.<sup>42</sup> This argument was rebuked by the court, which held that CERCLA section 107(a)(1)<sup>43</sup> "imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation."<sup>44</sup> The court also rejected the owner's attempt to rely on the third party defense of section 107(b), at least in part because the owner knew of the tenant's

35. *Id.* at 1356.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. 759 F.2d 1032, 1048-49 (2d Cir. 1985).

41. *Id.* at 1038.

42. *Id.* at 1037-40.

43. 42 U.S.C. § 9607(a)(1) (1982 & Supp. V 1987).

44. *Shore Realty*, 759 F.2d at 1044.

activities on the property prior to taking title to the property and took no precautions against the tenant's foreseeable actions in continuing to dump hazardous waste at the site.<sup>45</sup>

The court in *Shore Realty* went even further and held the stockholder-officer liable for the state's response costs under CERCLA as an operator of the facility under CERCLA section 107(a) because of the stockholder-officer's role in managing the corporate owner.<sup>46</sup>

In *United States v. South Carolina Recycling and Disposal, Inc.*,<sup>47</sup> the United States District Court for the District of South Carolina treated the liability of a landlord as a foregone conclusion and clarified that CERCLA liability extended to subtenants as well as to tenants. In that case, the owners of a four-acre site in Columbia, South Carolina verbally leased a portion of the site to a chemical company (Original Tenant) for storage of chemicals and raw materials beginning in 1972. In 1973 or 1974, several individuals connected with the Original Tenant began storing hazardous wastes at the site as part of a waste brokering and recycling operation. In 1976, the waste operation was incorporated as South Carolina Recycling and Disposal, Inc. (SCRDI). SCRDI occupied part of the leased premises under a verbal sublease until 1978, when it assumed the verbal lease with the owners.<sup>48</sup>

During the operations of SCRDI and its predecessors, approximately 7,200 fifty-five gallon drums of hazardous substances accumulated on the site, randomly and haphazardly stacked, without regard to their source or the nature of their contents. Drums were exposed to the elements and many deteriorated to the point that their contents leaked and oozed onto the ground and onto other drums. The exposure of the substances to the elements and the commingling of the substances caused fires, explosions and releases of noxious and toxic fumes.<sup>49</sup>

The United States Environmental Protection Agency (EPA) attempted to remedy the hazardous conditions at the site. After reaching agreements with a number of the generators and transporters associated with the site to perform seventy-five percent of the surface removal work at the site, the EPA financed the remaining twenty-five percent of the surface cleanup with funds from the Hazardous Substance Response Trust Fund (Superfund) established under CER-

45. *Id.* at 1049.

46. *Id.* at 1052. The stockholder-officer controlled the corporation and made all the decisions. *Id.*

47. 653 F. Supp. 984 (D.S.C. 1986), *aff'd in part, vacated in part sub nom.* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989).

48. *Id.* at 990.

49. *Id.*

CLA.<sup>50</sup> The United States then sued to recover the expended Superfund monies from a number of defendants, including SCRDI (the subtenant and polluter), four companies that had generated hazardous substances and arranged with SCRDI for their treatment or disposal (Generators), the Original Tenant under the verbal lease, and the owners of the site (Landlords).<sup>51</sup>

The district court, in a series of orders beginning in 1984 and ending in 1986,<sup>52</sup> found that SCRDI, the Generators, the Original Tenant and the Landlords were jointly and severally liable for the response costs incurred at the site.<sup>53</sup> The court held that once the requisite nexus under CERCLA section 107(a) is established between each defendant and the facility where hazardous substances have been released, the defendants are strictly liable “unless [they] can prove that, under the defenses enumerated in CERCLA Section 107(b)(1)-(4), the release or threat of release of hazardous substances was caused solely by unrelated persons or events.”<sup>54</sup> The court granted summary judgment to the United States with regard to liability of the Landlords.<sup>55</sup> Summary judgment was based upon the fact that the Landlords were the owners of the property at the time of disposal and that the affirmative defense under CERCLA section 107(b)(3) was not available to the Landlords “[b]ecause there is no question of the contractual link [the verbal lease] between the landowners and SCRDI, whose liability is admitted . . . .”<sup>56</sup>

After a hearing on the merits, the court in *South Carolina Recycling* held that the Original Tenant stood in the shoes of the owners of the site and, therefore, was liable as an “owner” and an “operator” of the property under CERCLA section 107(a).<sup>57</sup> In reaching the conclusion that a tenant’s control of the site mandates that tenants should be considered “owners” for the purposes of CERCLA liability, the court stated that “[t]o conclude otherwise would frustrate Congress’ intent that persons with responsibility for hazardous conditions bear the cost of remedying those conditions.”<sup>58</sup>

In considering the Original Tenant’s liability as an owner, the court stated that the Original Tenant’s sublease of the property to SCRDI strengthened the case for imposition of owner liability on the

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50. *Id.* at 991.

51. *Id.* at 989-91.

52. *See id.* at 984.

53. *Id.* at 991.

54. *Id.*

55. *Id.* at 993.

56. *Id.*

57. *Id.* at 1003.

58. *Id.* (citations omitted).

Original Tenant, since "[a]s a general rule, a lessor or sublessor who allows property under his control to be used by another in a manner which endangers third parties or which creates a nuisance, is, along with the lessee or sublessee, liable for the harm."<sup>59</sup>

Having determined the liability of all defendants,<sup>60</sup> the court concluded that, because it was impossible to ascertain the degree of relative contribution of each substance to the threatening condition at the site, the harm was indivisible and the defendants were, therefore, jointly and severally liable.<sup>61</sup> In so holding, the court stated that the burden of proving divisibility of the harm, to avoid imposition of joint liability, rests with defendants in CERCLA actions. Absent such proof, liability shall be joint and several.<sup>62</sup>

Upon appeal to the United States Court of Appeals for the Fourth Circuit,<sup>63</sup> the district court's judgment in *South Carolina Recycling* was upheld with regard to the imposition of strict liability,<sup>64</sup> the liability of the Landlords,<sup>65</sup> the unavailability of a third-party defense for the Landlords,<sup>66</sup> and the imposition of joint and several liability.<sup>67</sup>

In another case, the court held a past tenant liable for cleanup on the basis of its role as the polluter. In *United States v. Northern Plating Company*<sup>68</sup> the federal government brought an action to recover the costs of removing hazardous substances located at a site where Northern Plating operated an electroplating business for ten years. Northern Plating was a tenant on this property and the government undertook the cleanup action several years after termination of the Northern Plating's lease.<sup>69</sup> The government sought recovery under CER-

59. *Id.*

60. SCRDI admitted liability as an operator and consented to the entry of summary judgment against it. *Id.* at 993.

61. For the court's discussion as to SCRDI, the Generators, and the Landlords, see *id.* at 994 (citing *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983); *United States v. Chem-Dyne*, 572 F. Supp. 802 (S.D. Ohio 1983). For the court's discussion as to the Original Tenant, see *id.* at 1006.

62. *Id.* at 1006 (citing *Chem-Dyne*, 572 F. Supp. at 811; *Wade*, 577 F. Supp. at 1337-38).

63. *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989).

64. "We agree with the overwhelming body of precedent that has interpreted section 107(a) as establishing a strict liability scheme." *Id.* at 167; see cases cited at *id.* n.11.

65. *Id.* at 168.

66. *Id.* at 168-69. In response to the Landlords' argument that they were ignorant of the waste disposal activities because they never inspected the site before 1977, the Fourth Circuit stated, "In our view, the statute does not sanction such willful or negligent blindness on the part of absentee owners." *Id.* at 169.

67. *Id.* at 171-73.

68. 670 F. Supp. 742 (W.D. Mich. 1987).

69. *Id.* at 744-45.

CLA section 107(a)<sup>70</sup> from the owner of the property, the tenant (Northernair), and the individual who was the president and sole shareholder of Northernair while the electroplating business was operated at the site.<sup>71</sup>

The United States District Court in *Northernair* granted summary judgment against all defendants, finding them jointly and severally liable for the response costs incurred by the United States.<sup>72</sup> In determining that summary judgment was appropriate, the court stated that the government must prove the following four things in order to establish liability under CERCLA:

- (1) that the . . . site is a "facility" as that term is defined in 42 U.S.C. § 9601(9);
- (2) that a "release" or "threatened release" of a "hazardous substance" from the . . . site has occurred;
- (3) that the release or threatened release has caused the United States to incur "response costs"; and
- (4) that each of the defendants is a "person" as that term is defined in 42 U.S.C. § 9607(a)(1)-(3).<sup>73</sup>

After establishing that the United States had met the requirements of proof with respect to the first three elements of the cause of action, the court then addressed the issue of whether each defendant was a "covered person" liable for response costs. As the owner and the operator of the site, the owner and Northernair were ruled to be persons liable for the costs.<sup>74</sup> With regard to Northernair's president and shareholder, the court stated that "a corporate officer who has responsibility for arranging for the disposal of hazardous waste is personally liable under the provisions of CERCLA."<sup>75</sup> Citing *Argent* and *South Carolina Recycling* as authority, the court stated that the third-party defense under CERCLA section 107(b) was not available to either the owner or Northernair because of their contractual relationship created by the lease.<sup>76</sup>

In its discussion of joint and several liability, the court in *Northernair* acknowledged that Northernair and its president arguably were responsible for causing the entire harm. Because the harm was indivisible, however, and because "Congress clearly intended that

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70. 42 U.S.C. § 9607(a) (1982 & Supp. V 1987).

71. *Northernair*, 670 F. Supp. at 743.

72. *Id.* at 749.

73. *Id.* at 746.

74. *Id.* at 747.

75. *Id.* (citing *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 847-48 (W.D. Mo. 1984); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985)).

76. *Id.* at 748.

the landowner be considered to have 'caused' part of the harm,"<sup>77</sup> the court held all three defendants jointly and severally liable.<sup>78</sup> The court noted that " 'questions of determining "equitable shares of the liability" with respect to an indivisible injury are appropriately resolved in [an] action for contribution after plaintiff has been made whole.' "<sup>79</sup>

The United States District Court for the Western District of Washington made it clear in *Washington v. Time Oil Co.*<sup>80</sup> that the indirect contractual relationship between a landlord and a subtenant was sufficient to support the imposition of CERCLA liability on both. The state of Washington and the United States sought summary judgment in that case on the basis that a landlord could not avoid liability by relying on the innocent landowner defense for the actions of a sublessee.<sup>81</sup> In denying the defense to the landlord, the United States District Court for the Western District of Washington noted that the 1986 amendments to CERCLA added a supplement to the definition of the term "contractual relationship" found in CERCLA Section 107(b).<sup>82</sup> The amended definition provides in pertinent part:

The term "contractual relationship", for the purpose of section 9607(b)(3) of this title includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clauses (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

. . . .

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.<sup>83</sup>

In evaluating the landlord's reliance on the defense as to the ac-

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77. *Id.*

78. *Id.*

79. *Id.* at 749 (quoting *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 995 n.8 (D.S.C. 1984), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989)).

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

81. *Id.* at 529-30.

82. *Id.* at 530.

83. *Id.* at 530 (quoting 42 U.S.C. § 9601(35) (Supp. V 1987)).

tions of the subtenant, the court initially noted that the landlord had at least an "indirect contractual relationship"<sup>84</sup> with the subtenant. Furthermore, the court stated that the landlord could not rely on the innocent landowner defense because the landlord allowed the subtenant to "run a sloppy operation"<sup>85</sup> and "did not exercise due care to prevent the property from becoming contaminated by this sublessee."<sup>86</sup>

While the question of fault is not relevant to the issue of liability, a court may consider fault in determining the apportionment of damages in a suit for contribution. *Versatile Metals, Inc. v. Union Corp.*<sup>87</sup> involved a corporate owner of property which, through a separate corporate division, had been the operator of a metal reclamation operation on the site. That owner sold the assets of the metal reclamation division to another corporation and, in connection with the sale of assets, leased the site to the buyer-lessee.<sup>88</sup> Shortly after the inception of the lease, the buyer-lessee discovered that the buildings and grounds of the leased facility contained polychlorinated biphenyls (PCB) contaminants.<sup>89</sup>

After discovery of the contamination, the buyer-lessee notified the owner-lessor of the presence of hazardous substances and vacated the property so that the site could be cleaned up. The owner-lessor undertook the cleanup and then brought an action against the buyer-lessee for contribution for the necessary costs of response under CERCLA section 107(a)(4)(B).<sup>90</sup> In order to reach the question of contribution, the district court first determined that the buyer-lessee, as a former operator of the facility, and the owner-lessor, as the owner and operator of the facility, both were responsible persons under CERCLA and, because the harm was indivisible, ruled that they were jointly and severally liable.<sup>91</sup>

In response to the buyer-lessee's attempts to put forth various equitable defenses to liability, the court reiterated that section 107(a) imposes strict liability subject *only* to the defenses set forth in section

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84. *Id.* at 533.

85. *Id.*

86. *Id.*

87. 693 F. Supp. 1563 (E.D. Pa. 1988).

88. *Id.* at 1570-71.

89. *Id.* at 1571. The owner-lessor, and later the buyer-lessee, were engaged in the processing of used capacitors and transformers to reclaim the copper cores and iron casings. Older capacitors and transformers contain significant amounts of PCBs, which spill out when they are broken or crushed. *Id.*

90. Section 107(a)(4)(B) provides that a responsible party shall be liable for any necessary costs of response incurred by any other person consistent with the national contingency plan. 42 U.S.C. § 9607(a)(4)(B) (1982 & Supp. V 1987).

91. *Versatile Metals, Inc.*, 693 F. Supp. at 1571.

107(b).<sup>92</sup> Thus, the court concluded that equitable defenses simply had no place in a determination of liability. The court noted, however, that "claims of relative fault and innocence relate, if at all, to the apportionment of *damages*"<sup>93</sup> in connection with an action seeking contribution.<sup>94</sup>

In another private action, a current owner of a site brought suit to recover cleanup costs from the former owner, the former owner's tenant, and the principal shareholder of that tenant. Shortly after the purchase of a facility, the purchaser in *International Clinical Laboratories v. Stevens*<sup>95</sup> was informed by state authorities that the site was contaminated with hazardous substances, apparently as a result of the activities of the former owner's tenant. During the testing and cleanup of the property, the purchaser initiated suit against the defendants to recover the costs associated with testing and cleanup.<sup>96</sup> The United States District Court for the Eastern District of New York declined to grant summary judgment in favor of the former owner, stating that the former owner of the property was potentially liable under CERCLA section 107(a) and that the lease between the former owner and the former tenant constituted a contractual relationship which barred the former owner's use of the third-party defense under CERCLA section 107(b)(3).<sup>97</sup>

The former owner in *International Clinical Laboratories* also attempted to establish a defense against liability based upon an "as is" clause in the contract of sale, but the court concluded that under New York law the clause did not bar the CERCLA claim.<sup>98</sup> The court also rejected the former owner's argument of equitable estoppel against the purchaser, which the former owner based upon the purchaser's opportunity to investigate before the purchase.<sup>99</sup> Finally, the court rejected the argument that the former owner should be free from liability because of a statement that the former owner had no knowledge of the

92. *Id.* at 1572.

93. *Id.*

94. Section 9613(f)(1) provides in pertinent part: "Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title . . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1) (1982 & Supp. V 1987).

95. 710 F. Supp. 466 (E.D.N.Y. 1989).

96. *Id.* at 469.

97. *Id.* at 470-71 (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *Violet v. Picillo*, 648 F. Supp. 1283, 1290 (D.R.I. 1986); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983)).

98. *Id.* at 469-70.

99. *Id.* at 471.



contamination caused by his tenant.<sup>100</sup> The court concluded that "if [the former owner's] claim of ignorance of violations of environmental requirements is true, the equities weigh in favor of holding [him] liable since he 'buried his head in the sand' and seeks to impose liability upon an 'unwary purchaser.'"<sup>101</sup> The court noted, however, that equitable principles might be considered if the court chose to do so when determining whether to apportion responsibility for response costs.<sup>102</sup>

Even though the cases establish that landlords and tenants may not be able to escape joint and several liability for cleanup of a facility when they are determined to be PRPs, landlords and tenants, between themselves, can allocate the risks associated with environmental liability.<sup>103</sup>

As with sales contracts, lease agreements sometimes provide that one party will accept the property from the other "as is." Although "as is" clauses have been used to argue that the burden of CERCLA liability shifts, the cases commonly have held that such clauses preclude only claims for breach of warranty and are not sufficient to shift CERCLA liability from one party to another.<sup>104</sup>

A more effective manner of shifting the ultimate burden for CERCLA liability, as between private parties, may be to include in the lease an indemnification provision that also expressly releases one party from CERCLA liability. While the statute itself need not be referenced,<sup>105</sup> the provision must express clearly an intent to release one party from future CERCLA-type liabilities.<sup>106</sup> The following language in a contract of sale has been held *not* to be sufficient:

Seller shall protect, defend[,] . . . indemnify and save and hold harmless Buyer . . . from and against any and all . . . costs, expenses, damages, losses, obligations, lawsuits, claims, liabilities, fines, or penalties . . . resulting from Seller's acts, alleged acts, omissions, and alleged omissions before the Closing Date . . . arising out of, resulting

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100. *Id.* at 468-71.

101. *Id.* at 471.

102. *Id.* In *International Clinical Laboratories*, the court declined to grant summary judgment to the purchaser against all of the defendants, stating that sufficient facts were not before the court to determine the liability of each of the defendants. The former tenant of the site alleged that its subleasee had caused the contamination on a portion of the property, but because facts regarding these allegations were not before the court, it declined to rule on the question of the tenant's liability as a sublessor. *Id.*

103. See *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994 (D.N.J. 1988); 42 U.S.C. § 9607(e)(1) (1982 & Supp. V 1987).

104. See *International Clinical Laboratories*, 710 F. Supp. at 469-70; *Southland Corp.*, 696 F. Supp. at 1001.

105. *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285, 1292 (D. Minn. 1987) (a release from "all claims, demands and causes of action" was held to be sufficient).

106. *Southland Corp.*, 696 F. Supp. at 1002.

from, relating to, or incident to:

....

(4) the ownership, use, maintenance, or operation of the Assets or the Great Meadows Business, and any action taken or omitted to be taken in connection with or relating thereto, which occurred or arose during, or relates to, any period prior to the Closing.<sup>107</sup>

The redistribution of risk must be clear and unequivocal.<sup>108</sup> The right to indemnification, once established, can be utilized to pursue a private cause of action against the other party when the indemnified party has been found liable under CERCLA.<sup>109</sup>

Other lease provisions potentially beneficial in allocating the risk of environmental damages are clauses specifying how the tenant may use the property and identifying the party responsible for obtaining environmental permits, complying with environmental laws and regulations, and disclosing violations of environmental laws to the regulatory agencies. Since the right of contribution between PRPs is based on the equities involved, these lease provisions can help establish which party undertook the responsibility for meeting the environmental concerns. Arguably, that party should bear the majority of the cleanup costs.<sup>110</sup>

Shifting the burden for cleanup of hazardous substances by contract yields no beneficial results if the party assuming the liability is financially incapable of meeting its obligations. Consequently, at the time the lease is entered into, it is imperative to determine the financial condition of the party undertaking the responsibility for environmental compliance. This determination can be made by a review of financial statements. If a tenant is leasing the property for a purpose that involves the manufacture, storage or use of hazardous substances, the landlord may want to require a parent company to execute a guaranty to cover lease obligations with regard to environmental cleanup costs. Alternatively, the landlord might require a letter of credit upon which the landlord could draw in the event that cleanup costs were later incurred as a result of the tenant's activities on the property.

To determine whether the tenant caused any environmental impact on the property, lease terms could require that pre-lease and post-lease environmental audits of the property be conducted. For example, the tenant could have an audit of the property conducted prior to commencement of the lease term, with the level of the audit determined by

107. *Id.*

108. *Chemical Waste Management, Inc. v. Armstrong World Indus.*, 669 F. Supp. 1285, 1295 (E.D. Pa. 1987).

109. *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1573 (E.D. Pa. 1988); see 42 U.S.C. § 9607(e) (1982 & Supp. V 1987).

110. *Caldwell v. Gurley Ref. Co.*, 755 F.2d. 645 (8th Cir. 1985).

the tenant. At the conclusion of the lease term, the landlord could determine the level of the audit to be conducted and the tenant could be responsible for restoring the property to the condition that existed at the commencement of the lease.

An owner must exercise due care to prevent a tenant from contaminating the property.<sup>111</sup> One of the best protections for the landlord against unwittingly becoming liable for acts of tenants is to know what activity is being conducted on the property. A landlord cannot avoid liability simply because it was unaware of the tenant's particular use of the property. A "lessor or sublessor who allows property under his control to be used by another in a manner which endangers third parties or which creates a nuisance, is, along with the lessee or sublessee, liable for the harm."<sup>112</sup> Through careful drafting and negotiation of lease agreements, the risk of CERCLA liability to landlords and tenants can be lessened or minimized.

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111. *Washington v. Time Oil Co.*, 687 F. Supp. 529, 530 (W.D. Wash. 1988).

112. *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1984), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989).