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# GUILTY FOR HAVING DONE NOTHING: PASSIVE PAST OWNERS FACE CERCLA LIABILITY

by Lisa A. Lee

Passive past owners (PPOs) who once owned contaminated property and who did not contribute to or even know of the contamination may be potentially responsible parties (PRPs) under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).<sup>2</sup> As a PRP, the PPO can be responsible for thousands or even millions of dollars of cleanup costs.<sup>3</sup> So holds the *Nurad* court.

## I. FACTS AND HOLDING

Nurad, Inc. (Nurad), the current owner of contaminated land, was required by the Maryland Department of the Environment to remove underground storage tanks (USTs) and the hazardous wastes they contained.<sup>4</sup> Nurad subsequently sued previous owners for reimbursement of costs sustained.<sup>5</sup>

From 1905 to 1963, the property was owned by William E. Hooper & Sons Co. (Hooper).<sup>6</sup> Prior to 1935, Hooper installed USTs to store mineral spirits for use in its textile finishing plant.<sup>7</sup> Hooper used these USTs until 1962 when it shut down the plant and abandoned the USTs which contained unused mineral spirits.<sup>8</sup> In 1963, Hooper sold the property to Property Investors, Inc., whose president and principal shareholder was Frank Nicoll.<sup>9</sup> Property Investors and its successor, Monumental Enterprises, Inc., leased to various tenants.<sup>10</sup> Neither Property Investors, Monumental Enterprises nor any of their tenants used the USTs.<sup>11</sup> In 1976, Monumental Enterprises sold to Kenneth Mumaw, who subdivided the property and sold a portion of it to Nurad.<sup>12</sup> Nurad manufactured antennae on the property and never used the USTs.<sup>13</sup>

In 1987, the Maryland Department of the Environment required Nurad to remove the tanks and clean up the released mineral spirits.<sup>14</sup> In this cleanup, Nurad incurred response costs and, in 1990, filed this suit seeking reimbursement under CERCLA for \$226,000 in cleanup costs from former owners Hooper, Nicoll, Mumaw and Monumental Enterprises.<sup>15</sup>

The district court held that Hooper alone was liable to Nurad for reimbursement under CERCLA<sup>16</sup> because the other former owners were neither "operators" nor "owners" at the time of disposal.<sup>17</sup> Contrary to the holding of the Fourth Circuit in *United States v. Waste Indus.*, a pre-CERCLA action,<sup>18</sup> the *Nurad* district court held that "disposal" required affirmative action and that only Hooper, as the original owner, actively released hazardous wastes at the site.<sup>19</sup> The district court held that defining disposal as including passive migration was necessary prior to the enactment of CERCLA to close a loophole in the statutory scheme of the Resource Conservation and Recovery Act (RCRA) and preserve the government's ability to force cleanups.<sup>20</sup> However, the court noted that this expansive definition was not necessary in this CERCLA action because all prior owners were defendants to this suit and, in some cases, liable for costs under other CERCLA provisions.<sup>21</sup> Thus, the district court granted summary judgment against Hooper and in favor of the other defendants.<sup>22</sup> Both Nurad and Hooper ap-

1 966 F.2d 837 (4th Cir. 1992), cert. denied, 113 S. Ct. 377 (1992).

2 Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 9601-75 (West 1983 & Supp. 1991).

3 In fiscal year 1992, the Department of Justice recovered \$2 billion from civil and criminal penalties, Superfund cost recoveries, and natural resource damages from enforcement of environmental laws. U.S. Department of Justice, Environment and Natural Resources Division: Department of Justice Announces \$2 Billion Year for Environmental Enforcement (October 29, 1992), 1992 WL 355365 (D.O.J.), \*1. E.P.A. cleanup cost recoveries under Superfund alone amounted to \$202,967,554. *Id.* at \*2. Court-ordered cleanups by private parties amounted to \$761,904,116. *Id.* A Superfund lawsuit is filed every two and one half days of the year. *Id.*

4 *Nurad*, 966 F.2d at 840.

5 *Id.* at 840.

6 *Id.* Lawrence L. Hooper and James E. Hooper, Jr. were also sued as directors of the Hooper Co. As their liability is not at issue in this article, "Hooper" as used in this article refers only to the Hooper Co. as a corporation, and not to Lawrence or James Hooper. The mineral spirits disposed of at the site are designated as a hazardous substance under § 102 of CERCLA and 40 C.F.R. § 300.5 (1993).

7 *Id.* These mineral spirits are designated as a hazardous substance under § 102 of CERCLA, 42 U.S.C. § 9602 (1993) and 40 C.F.R. § 300.5 (1993).

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 841. Nurad also sued the previous tenants and James and Lawrence Hooper, shareholders and directors of the Hooper Company. *Id.* These suits, however, are not the subject of this note and the issues surrounding them will not be discussed further. This note will be limited to discussion of the suit against the former owners of the property and, more particularly, to the issue of liability based solely upon passive migration of hazardous wastes at the time of ownership.

16 *Nurad, Inc. v. William E. Hooper & Sons Co.*, 22 *Env'tl. L. Rep.* 20079, 20082 (D. Md. 1991).

17 *Id.* at 20088.

18 *Id.* at 20087 (distinguishing *United States v. Waste Indus.*, 734 F.2d 159, 164-65 (4th Cir. 1984)). See *infra*, text accompanying notes 66-71.

19 *Id.* at 20087.

20 *Nurad*, 22 *Env'tl. L. Rep.* at 20087.

21 *Id.* at 20087.

22 *Id.* at 20088.

pealed.<sup>23</sup>

The Fourth Circuit affirmed the grant of summary judgment against Hooper, but reversed the district court's denial of Nurad's motion for summary judgment as to Mumaw.<sup>24</sup> The court held that "disposal" under CERCLA is not limited to active conduct, but includes passive migration, such as "leaking," under the language of the statute, circuit precedent, and policy considerations of CERCLA.<sup>25</sup> Thus, any owner at the time of passive migration of contaminants is strictly liable for cleanup costs under CERCLA.<sup>26</sup>

## II. LEGAL BACKGROUND

### A) The Statute

CERCLA subjects certain governmental and private parties to liability for cleanup costs associated with the release or threatened release of hazardous substances.<sup>27</sup> A prima facie case under CERCLA has four elements: (1) the site is a "facility" (2) on which a "release" or "threatened release" of hazardous substances has occurred (3) which caused the plaintiff to incur response costs for cleanup and (4) the defendants are PRPs under 42 U.S.C. § 9607(a).<sup>28</sup> PRPs fall into four categories under § 9607(a): (1) the owner and operator of a facility; (2) "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;" (3) any person who arranges for disposal, treatment or transportation of hazardous substances; and (4) any

person who transports hazardous substances to any site selected by such person.<sup>29</sup>

According to the statute, a release or threatened release alone is sufficient to hold a present owner liable; a past owner is liable only if disposal occurred during the time of ownership. The additional requirement of disposal in subsection 2 creates the possibility of a PPO, who would not have liability absent affirmative conduct.<sup>30</sup>

The definitions of "release" and "disposal" thus become important. CERCLA defines "disposal" by incorporating by reference the definition outlined in the Solid Waste Disposal Act, more commonly known as the Resource Conservation and Recovery Act (RCRA).<sup>31</sup> RCRA defines "disposal" as:

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.<sup>32</sup>

"Release," as defined by 42 U.S.C. § 9601(22) includes all of these components as well as "escaping" and "leaching."<sup>33</sup> The addition of these two criteria, neither of which are associated with active human conduct, may indicate Congressional intent that disposal include only events of direct human origin, while release include both

events resulting from direct human action and those without such involvement.<sup>34</sup> This "intent," however, is ambiguous at best, leaving room for disagreement on PPO liability.<sup>35</sup>

Further, the definition of "disposal" requires that the event be one by which contaminants may "enter the environment or be emitted into the air or discharged into any waters..."<sup>36</sup> This definitional wording contemplates active conduct. "Release," in contrast, requires spilling, leaking, etc. simply "into the environment."<sup>37</sup> This definitional difference may indicate that disposal does not include passive migration, although release does.<sup>38</sup>

CERCLA provides PRPs with only limited defenses. Two of these defenses may indirectly illuminate Congressional intent as to PPO liability: (1) the third party defense provision of § 9607(b)(3) and § 9601(35)<sup>39</sup> and (2) the de minimis settlement provision of § 9622(g)(1).<sup>40</sup>

Section 9607(b)(3) provides that a PRP is not liable if: (1) the release was caused solely by an unrelated third party whose act or omission did not occur due to a contractual relationship with the PRP and (2) the PRP can establish that he exercised due care with respect to the hazardous substance and took precautions against foreseeable harm caused by the third party.<sup>41</sup>

The 1986 amendment to § 9601(35) explains that "contractual relationship" in § 9607(b)(3) can mean land contracts or

23 *Nurad*, 966 F.2d at 841.

24 *Id.* Frank Nicoll did not move for summary judgment and, thus, is not a party to the appeal. *Id.* at n.1.

25 *Id.* at 845.

26 *Id.* at 840.

27 See Quinn Scallon, *Hazardous Waste: Liability of Predecessors in Title*, 29 SAN DIEGO L. REV. 93, 97-8 (1992).

28 *CPC Int'l, Inc. v. Aerojet-General Corp.*, 731 F. Supp. 783, 786 (W.D. Mich. 1989).

29 42 U.S.C. § 9607(a).

30 J.B. Ruhl, *The Plight of the Passive Past Owner: Defining the Limits of Superfund Liability*, 45 S.W. L.J. 1129, 1133 (1991).

31 42 U.S.C. §§ 6901-6992k (1988 & Supp. I 1989).

32 42 U.S.C. § 6903(3).

33 42 U.S.C. § 9601(22) (1988).

34 Ruhl, *supra*, note 30, at 1134.

35 See generally Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response Compensation and Liability (Superfund) Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

36 42 U.S.C. § 6903(3) as incorporated into CERCLA through 42 U.S.C. § 9601(29).

37 42 U.S.C. § 9601(22).

38 See *United States v. Petersen Sand and Gravel, Inc.*, 806 F. Supp. 1346, 1351 (N.D. Ill. 1992).

39 42 U.S.C. § 9607(b)(3) and 42 U.S.C. § 9601(35).

40 42 U.S.C. § 9622(g)(1).

41 A PRP will not be liable if the release was caused solely by "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, 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[.]" 42 U.S.C. § 9607(b)(3).

deeds unless the disposal occurred before the defendant acquired the land.<sup>42</sup> The PRP must also establish one of the following: that at the time of acquisition, the PRP did not know and had no reason to know of the contamination; that the PRP is a governmental entity which acquired the land by any type of involuntary transfer, including eminent domain; or that the PRP acquired the facility through inheritance or bequest.<sup>43</sup>

It has been argued that the provision in § 9601(35), "the innocent purchaser defense," indicates that PPOs are not PRPs under CERCLA.<sup>44</sup> First, if PPOs were PRPs under CERCLA, the distinction between present owners in § 9607(a)(1) and past owners in § 9607(a)(2) would be superfluous, as § 9601(35) "would provide the distinction through the definition of the defense."<sup>45</sup>

Second, § 9601(35)(C) indicates that the provisions of § 9601(35) apply only to present owners.<sup>46</sup> If PPOs were PRPs under CERCLA, it seems logical that the defense would apply equally to both.<sup>47</sup> The section is

intended to exclude from liability those who acquired the property after contamination and were unaware of the contamination. If disposal is given passive content, that plain purpose would be denied.<sup>48</sup>

Third, the statutory reference to a period "after" disposal which is "the subject of" (i.e. during) a release, seems to indicate that disposal "refers to a discrete human act with a discrete ending."<sup>49</sup>

Finally, § 9601(35)(A) likens disposal to placement, which requires active conduct.<sup>50</sup>

The de minimis settlement provision of § 9622(g)(1) also indicates that PPOs are not PRPs because if PPOs are PRPs, de minimis settlement would be available only to present owners and not to PPOs under the terms of the statute.<sup>51</sup> The de minimis settlement provision allows a PRP to settle if the settlement involves only a minor portion of the response costs at the facility and either (1) the amount and effects of hazardous substances contributed by the PRP are minimal in comparison with other hazardous substances at

the facility, or (2) the PRP owns the real property where the facility is located and did not create or contribute to the contamination.<sup>52</sup>

Passive past owners thus could prove that they did not create or contribute to the contamination, but could not meet the condition of Subsection (B)(i), which by its terms applies only to the "owner of the real property," presumably the present owner.<sup>53</sup> Passive past owners and present owners both can seek settlement under § 9622(g)(1)(A), but only present owners could seek settlement under § 9622(g)(1)(B).<sup>54</sup>

Both the de minimis settlement provision and the innocent purchaser defense indicate that PPOs could be liable for response costs once they obtained knowledge of the release and transferred ownership without disclosing that information.<sup>55</sup> In such a case, the defendant would be liable under § 9607(a)(1).<sup>56</sup> This is consistent with the premise that a PPO with knowledge of the release is not a true PPO.

42 The term "contractual relationship," for the purpose of § 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 clause (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.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to the foregoing, the defendant must establish that he has satisfied the requirements of § 9607(b)(3)(a) and (b) of this title. 42 U.S.C. § 9601(35).

43 *Id.*

44 See Ruhl, *supra*, note 30, at 1142.

45 *Id.*

46 "Nothing in this paragraph or in § 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under § 9607(a)(1) of this title and no defense under § 9607(b)(3) of this title shall be available to such defendant." 42 U.S.C. § 9601(35)(C).

47 See Ruhl, *supra* note 30 at 1142.

48 *Petersen Sand & Gravel*, 806 F. Supp. at 1352.

49 *Id.*

50 *Id.*

51 Ruhl, *supra*, note 30, at 1143-44.

52 "Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under § 9606 or 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned, and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:

(A) Both of the following are minimal in comparison to other hazardous substances at the facility:

(i) The amount of the hazardous substances contributed by that party to the facility.

(ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

(B) The potentially responsible party -

(i) is the owner of the real property on or in which the facility is located;

(ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(iii) did not contribute to the release of a hazardous substance at the facility through any action or omission.

This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance." 42 U.S.C. § 9622(g)(1) (1988).

53 Ruhl, *supra*, note 30, at 1143-44.

54 *Id.*

55 42 U.S.C. § 9601(35)(C) and 42 U.S.C. § 9622(g)(1)(B).

53 Ruhl, *supra*, note 30, at 1143-44.

54 *Id.*

55 42 U.S.C. § 9601(35)(C) and 42 U.S.C. § 9622(g)(1)(B).

56 42 U.S.C. § 9601(35)(C).

With this ambiguous statutory language, the courts are sharply divided: some holding that disposal includes passive occurrences, such as leaching, by the plain words of the statute, others holding that passive events cannot be disposal because such a definition of disposal would be inconsistent with Congressional intent and with other provisions of CERCLA.

## B) Conflicting Case Law

### 1) The RCRA Decisions

Before CERCLA was enacted, the EPA tried to compel cleanup of severely contaminated sites under RCRA by enjoining persons contributing to any "handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste [that] may present an imminent and substantial endangerment to health or the environment."<sup>57</sup> RCRA, however, was designed for prospective injunctive relief. Accordingly, the EPA's attempts met with only partial success.<sup>58</sup> CERCLA was enacted to close the holes left by RCRA, and to provide a liability mechanism for past generation of toxic waste.<sup>59</sup> CERCLA provides for strict liability for response costs with only limited defenses.<sup>60</sup>

Both RCRA and CERCLA require disposal. For the purposes of this article, "disposal" is the key definitional term, as disposal must occur during the ownership of interceding landowners for them to be liable under CERCLA § 9607(a)(2). Both statutes

use the same disposal definition, which has spawned litigation under both RCRA and CERCLA.

In *United States v. Price*, the EPA sought to compel cleanup of an abandoned landfill from which hazardous chemicals were contaminating groundwater.<sup>61</sup> The defendants argued that they were not liable for response costs because they did not engage in any active disposal but rather purchased the property after all dumping had occurred.<sup>62</sup> The district court held that disposal could be passive because "[t]he gravamen of a § 7003 [RCRA] action . . . is . . . the present imminent hazard posed by the continuing disposal (i.e. leaking) of contaminants . . ."<sup>63</sup> Since the PPOs were aware when they bought the land that it had been used as a landfill, the court held the PPOs liable because of their "studied indifference to the hazardous condition."<sup>64</sup> Thus, the court imposed a duty on buyers to investigate or to accept the property as is, complete with cleanup responsibilities.<sup>65</sup>

In *United States v. Waste Indus.*<sup>66</sup>, another RCRA case, the Fourth Circuit duplicated the reasoning of the *Price* court. The district court in *Waste Indus.* held that disposal required "active human conduct."<sup>67</sup> The court of appeals, however, declined to follow "a strained reading of that term limiting its § 7003 meaning to active conduct [which] would so frustrate the remedial purpose of the Act as to make it meaningless."<sup>68</sup> The statute was held to regulate not conduct

but "endangerments."<sup>69</sup> The court relied on Congress' inclusion of "leaking" within the definition of disposal.<sup>70</sup> The defendants in *Waste Industries*, however, would have been liable for the cleanup without this inclusion because they collectively built, owned and operated the contaminated landfill in question.<sup>71</sup>

Other RCRA cases also have held that passive disposal is sufficient to trigger RCRA liability for PPOs.<sup>72</sup> Commentators have argued that courts interpreting RCRA were straining the statute to fill a perceived need for cleanup of hazardous wastes. However, by the time the RCRA cases were decided, Congress had enacted CERCLA to empower the courts to order such cleanup.<sup>73</sup> If these RCRA cases had been decided before CERCLA was enacted, Congress might not have incorporated the court-expanded RCRA "disposal" definition into CERCLA.<sup>74</sup>

### 2) CERCLA Cases

*Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.* was the first case deciding the PPO issue after CERCLA was enacted.<sup>75</sup> The court granted a motion to dismiss a PPO who had been an owner of the property after Dow Chemical and others had disposed of waste thereon.<sup>76</sup> The court stated that all but a "strained reading" of CERCLA dictated a dismissal<sup>77</sup> for any "party who merely owned the site at a previous point in time, who neither deposited nor allowed others to de-

57 42 U.S.C. § 6973 (1993). See generally Richard G. Stoll, *RCRA versus CERCLA – Choice and Overlap*, C778 ALI-ABA 141 (1992).

58 Ruhl, *supra*, note 30 at 1135.

59 See 1980 U.S.C.A.N. 6119, 6120; Joel Moskowitz, ENVIRONMENTAL LIABILITY & REAL PROPERTY TRANSACTIONS: LAW & PRACTICE 5 (1989). For a comparison of the factors triggering liability under CERCLA and RCRA, see Richard G. Stoll, *Hazardous Wastes, Superfund & Toxic Substances*. Cosponsored by the Envtl. L. Inst. RCRA versus CERCLA – Choice and Overlap, Oct. 29, 1992.

60 CERCLA provides that "[t]he term 'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under § 1321 of Title 33 [Clean Water Act]." 42 U.S.C.A. § 9601(32) (West Supp. 1991). The standard under the Clean Water Act is strict liability. 33 U.S.C.A. §§ 1251-1387 (West 1983 & Supp. 1991). For available defenses under CERCLA, see 42 U.S.C. § 9607(b) (West 1983).

61 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (1982).

62 *Id.* at 1070.

63 *Id.* See also Report on Hazardous Waste Disposal by the Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 31-32 (1979) (cited by the *Price* court at 1072.)

64 *Price*, 523 F. Supp. at 1073.

65 *Id.*

66 734 F.2d 159 (4th Cir. 1984).

67 *Id.* at 164.

68 *Id.*

69 *Id.*

70 *Id.* at 164-65.

71 *Id.* at 161-62.

72 See, e.g., *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1399-1400 (D.N.H. 1985); *United States v. Vertrac Chem. Corp.*, 489 F. Supp. 870, 885 (E.D. Ark. 1980).

73 Ruhl, *supra*, note 30, at 1136.

74 *Id.*

75 14 ENVTL. L. REP. 20376 (C.D. Cal. 1984), *rev'd on other grounds*, 840 F.2d 691 (9th Cir. 1988).

76 *Id.* at 20378-79.

77 *Id.* at 20378.

posit hazardous wastes on the site."<sup>78</sup>

The PPO liability issue also was raised in *Emhart Indus., Inc. v. Duracell Int'l, Inc.*<sup>79</sup> In that case, the current owner of a contaminated manufacturing plant sued Duracell, the previous owner, for contribution of cleanup costs.<sup>80</sup> The court held that the continued leaking and seepage from earlier spills constituted a release or threatened release.<sup>81</sup> The court also stated that the passive migration of chemicals might constitute disposal.<sup>82</sup> This holding was unnecessarily broad, however, as the court found that because Duracell had engaged in active dumping and spilling during its ownership, it was engaged actively in the disposal of hazardous waste.<sup>83</sup> Thus, Duracell was not a true PPO.<sup>84</sup>

In *In re Hemingway Transport, Inc. v. Kahn*,<sup>85</sup> plaintiff sued the trustee in bankruptcy for Hemingway, the former owner, for recovery of response costs.<sup>86</sup> The court held that hazardous chemical leaking alone was sufficient to impose CERCLA liability upon PPOs.<sup>87</sup> Evidence indicated that although Hemingway did not participate actively in the disposal, it knew of the contamination during its ownership.<sup>88</sup> This knowledge removes Hemingway from the category of true PPOs; PPOs must not be aware of nor contribute to the contamination.

The PPO liability issue again was addressed in *Ecodyne Corp. v. Shah*.<sup>89</sup> During its ownership of the property in question, Ecodyne had built water tower tanks, using wood treated with a hazardous chemical.<sup>90</sup> Ecodyne sold to Shah, who contractually

assumed responsibility for cleanup.<sup>91</sup> Shah later sold to another party.<sup>92</sup> Ecodyne was ordered to clean up the property and brought suit for contribution under CERCLA.<sup>93</sup> The district court dismissed Ecodyne's suit because allowing the definition of disposal to include passive migration would conflict with "the limited scope of § 9607(a)(2)."<sup>94</sup> The court read § 9607(a)(2) as "only providing an action against prior owners or operators who owned the site at the time the hazardous substances were introduced into the environment."<sup>95</sup>

The Court relied heavily on a statutory interpretation to limit the definition of disposal:

"The meaning of a word is or may be known from the accompanying words...In ascertaining what disposal means, the Court looks at its definitional components and finds that these three nouns (discharge, deposit, and injection) and four gerunds (dumping, spilling, leaking, and placing), when read together, all have in common the idea that someone do something with hazardous substances . . . For plaintiff solipsistically to read, for example, "leaking" as meaning the general migration of chemicals and, as such, a disposal under § 9607(a)(2), renders not only the definitional phrase of § 6903(3) "into or on any land or water" superfluous, but would also conflict with the general structure of § 9607(a)."

*Ecodyne*, 718 F. Supp at 1457.

In *CPC Int'l, Inc. v. Aerojet-General Corp.*, the district court held that "leaking" fell within the definition of disposal.<sup>96</sup> The court went on to overrule a motion for dismissal on the grounds that the plaintiff had adequately stated a claim by alleging that the defendant agreed to operate "purge wells" to remove the hazardous waste, but failed to do so.<sup>97</sup> The court found that this failure "caused or contributed to the spread or migration of hazardous substances" and that "this constitute[d] a 'disposal' and 'release' under the statute."<sup>98</sup> Thus, again, the defendant was not a true PPO.

In *In re Diamond Reo Trucks, Inc.*, another district court held that disposal requires active conduct.<sup>99</sup> *Diamond Reo* involved a suit by a bankruptcy trustee to collect for response costs incurred at the debtor's business site.<sup>100</sup> At the time of their ownership, the debtor operated an automotive manufacturing plant on the property, which included a number of underground fuel storage tanks.<sup>101</sup> The court, agreeing with *Ecodyne*, held that disposal must be limited to active conduct.<sup>102</sup> "Otherwise, the liability imposed by § 9607(a) could have been drafted to simply include all owners or operators in the chain of title subsequent to the contamination."<sup>103</sup> The court held that "[w]hile it would be financially desirable and perhaps ethically correct to hold all owners of record liable," CERCLA and its amendments have "not only ends but also limits. Born of compromise, laws such as CERCLA and SARA do not pursue their ends to their

78 *Id.*

79 665 F. Supp. 549 (M.D. Tenn. 1987).

80 *Id.* at 553-55.

81 *Id.* at 574. It is important here to remember the distinction between "release" and "disposal" under CERCLA. See *supra*, text accompanying notes 30-38.

82 *Id.* at 574.

83 *Id.*

84 See also *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988): "[The] definition of disposal does not limit disposal to a one-time occurrence — there may be other disposals when hazardous materials are moved, dispersed, or released during landfill excavations and fillings."

85 108 B.R. 378 (D. Mass 1989).

86 *Id.* It should be noted that because Hemingway leased the property, he fell within the CERCLA definition of "owner" at 42 U.S.C. § 9607(a)(2). *Id.* at 379, 382.

87 *Id.* at 382.

88 *Id.* at 381 (testimony of an employee of the Massachusetts Environmental Protection Agency that he discovered the barrels and reported their existence to Hemingway).

89 718 F. Supp. 1454 (N.D. Cal. 1989).

90 *Id.* at 1455.

91 *Id.* at 1455, 1456.

92 *Id.* at 1456.

93 *Id.*

94 *Id.* at 1457.

95 *Id.*

96 731 F. Supp. 783, 789 (W.D. Mich. 1989).

97 *Id.* at 788-89.

98 *Id.* at 789.

99 115 B.R. 559, 565 (W.D. Mich. 1990).

100 *Id.* at 561.

101 *Id.*

102 *Id.* at 566.

103 *Id.* at 565.

logical limits . . . A court's job is to find and enforce stopping points no less than to implement other legislative choices."<sup>104</sup> The court also noted that the third party defenses of § 9607(b)(3) would be "rendered impotent" if PPOs were held liable.<sup>105</sup>

The split widened in *The Stanley Works v. Snydergeneral Corp.*,<sup>106</sup> in which the district court refused to follow the *Ecodyne* reasoning.<sup>107</sup> The *Stanley Works* court, relying on the precedent set under RCRA cases, accepted plaintiff's arguments against applying *Ecodyne*. The court, in adopting plaintiff's argument, stated that it was consistent with the legislative scheme to hold all owners in the chain liable because all had control over the contaminated property at some time, whether or not they had knowledge or fault.<sup>108</sup> Thus, the court denied the defendants' motion for summary judgment.<sup>109</sup> The court agreed with the plaintiff's argument that Congress' purpose in enacting CERCLA in its strict liability format would be hampered by enforcing the "*Ecodyne* amendment" to impose a fault system on past owners, who purchased property after contaminants were introduced and during their continued release.<sup>110</sup> The court disagreed with the defendant's contention that construing disposal to encompass passive migration would be to write the innocent purchaser defense of § 9607(b)(3) and § 9601(35) out of CERCLA.<sup>111</sup> "While it is no doubt

more likely that the innocent purchaser defense will succeed in circumstances involving passive disposal, this will not always be the case."<sup>112</sup> While the facts in *Stanley Works* are unclear from the court's decision, it appears that defendants were either owners and operators at the time of active disposal or were current owners.<sup>113</sup> Thus, defendants appear not to have been true PPOs and, the court need not have reached the question of whether disposal required active conduct.

In *Snediker Developers Ltd. Partnership v. Evans*,<sup>114</sup> however, the district court held that passive migration is not disposal under CERCLA.<sup>115</sup> The court refused to impose cleanup liability on all owners in the chain of title, holding that "if the drafters of CERCLA had intended such a far reaching consequence, they would have said so explicitly."<sup>116</sup> The court then granted the PPOs' motion for summary judgment.<sup>117</sup>

The above decisions indicate that the question of liability for PPOs is unsettled, largely because it is ambiguous both in its origin and its development, and because the relevant provisions of CERCLA have no clear congressional intent or Supreme Court precedent.

### III. INSTANT DECISION

The Fourth Circuit in *Nurad* held that it was bound by the statutory language, clear precedent, and "the fundamental purposes

of CERCLA" to hold that passive migration is included within the definition of disposal under 42 U.S.C. § 6903(3).<sup>118</sup>

Since the definition of disposal under § 6903(3) includes words which "readily admit to a passive component" (i.e. leaking, spilling), the court refused "arbitrarily[to] depriv[e] these words of their passive element by imposing a requirement of active participation as a prerequisite to liability."<sup>119</sup>

The court followed the holding of *Waste Indus.*, a 1984 Fourth Circuit case which arose under RCRA, in finding that disposal need not involve active conduct.<sup>120</sup> The *Nurad* district court had held that the *Waste Indus.* definition had been necessary to close a loophole in RCRA's statutory scheme and "preserve the EPA's ability to demand cleanup."<sup>121</sup> The Fourth Circuit, however, refused to distinguish the RCRA policy and context from that of CERCLA, stating that both were designed to encourage cleanup of hazardous wastes, and that requiring an affirmative act to impose liability would equally frustrate the policy of both.<sup>122</sup>

The Fourth Circuit held that accepting the district court's requirement of active conduct for disposal would "reward indifference to environmental hazards" by imposing liability on those who undertake to clean up the contamination.<sup>123</sup> Further, current owners who did not create or contribute to the contamination would bear a substantial por-

104 *Id.* at 565-566 (quoting *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988)).

105 *Id.* at 566.

106 781 F. Supp. 659 (E.D. Cal. 1990).

107 *Id.* at 663-64.

108 "The owners of the property at the time active disposal occurred are liable without any regard to whether they actively participated in the disposal; the current owner of the property is liable without regard to state of knowledge or fault. It is certainly more consistent with this legislative scheme than not to include within the sweep of liability past owners who owned the property (and thus had control over it - a common element linking all of these categories of liability) during a period in which the property was actively discharging contaminants into the environment." *Id.* (quoting plaintiff's brief).

109 *Id.* at 659.

110 *Id.* at 663 (summarizing plaintiff's brief).

111 *Id.* at 664.

112 *Id.*

113 *Id.* at 661. Plaintiff's First Claim for Relief in the Amended Complaint alleged in pertinent part: "31. The disposal, dispersal, discharge, migration, leaching, leaking and/or release of TCE and other hazardous substances that occurred at the Sunstar Parcel between 1961 and the present, as alleged above, constitutes "releases" of hazardous substances under § 101(22) of CERCLA, 42 U.S.C. § 9601(22). 33. Defendants . . . are jointly and severally liable for the necessary costs of response and remedying the releases alleged above because they were the owners or operators of the Sunstar Parcel, in fact or by operation of law, at the time hazardous substances were disposed of and released there or because they are the present owners and operators of the Sunstar Parcel or SSP Parcel." *Id.*

114 773 F. Supp. 984 (E.D. Mich. 1991).

115 *Id.* at 988-89. The court distinguished *CPC Int'l* and *Emhart Indus.* as not being true PPO cases. *Id.* at 989 n.6.

116 *Id.* at 989.

117 *Id.* at 990.

118 *Nurad*, 966 F.2d at 844-45.

119 *Id.* at 845.

120 *Id.* at 845 (citing *Waste Indus.*, 734 F.2d at 164-65.)

121 *Nurad*, 22 Env't. L. Rep. at 20087.

122 "[T]he aim of both RCRA and CERCLA is to encourage the cleanup of hazardous waste conditions. Whether the context is one of prospective enforcement of hazardous waste removal under RCRA or an action for reimbursement of response costs under CERCLA, a requirement conditioning liability upon affirmative human participation in contamination equally frustrates the statutory purpose." *Id.* at 845.

123 "[A]n owner could avoid liability simply by standing idle while an environmental hazard festers on his property. . . . A more conscientious owner who undertakes the task of cleaning up the environmental hazard would, on the other hand, be liable as the current owner of the facility, since "disposal" is not a part of the current owner liability scheme under 42 U.S.C. § 9607(a)(1). The district court's view thus introduces the anomalous situation where a current owner, such as *Nurad*, who never used the storage tanks could bear a substantial share of the cleanup costs, while a former owner who was similarly situated would face no liability at all. A CERCLA regime which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot be what Congress had in mind." *Id.* at 845-46 (citations omitted).

tion of the cleanup costs while similarly situated former owners would not.<sup>124</sup>

Finally, the court of appeals held that to define disposal as involving active conduct would violate the strict liability format of CERCLA.<sup>125</sup> The court declined to "enraft onto the statute additional prerequisites to the reimbursement of response costs which Congress did not place there."<sup>126</sup>

#### IV. COMMENT

In holding that disposal includes passive migration, the Fourth Circuit overlooked several indications to the contrary.

Although the statutory language of CERCLA conspicuously includes "leaking" within its incorporated definition of disposal, this may be due to the fact that the statute was enacted as the product of apparent congressional compromise before the RCRA disposal definition was given its expansive reading. Admittedly, CERCLA is no model of statutory clarity.<sup>127</sup> Further, as discussed previously, defining disposal to include passive migration would eviscerate the innocent purchaser defense and render the de minimis settlement provision ineffectual and discriminatory against PPOs and in favor of present owners of contaminated property.<sup>128</sup>

The *Nurad* court appropriately was concerned with removing disincentives to pri-

vate action for environmental cleanup.<sup>129</sup> The court failed to consider, however, that the innocent purchaser defense is never available to a party who has actual knowledge of the contamination during its ownership.<sup>130</sup> Further, CERCLA provides criminal sanctions for those who fail to report a "release" promptly.<sup>131</sup> CERCLA also encourages, and practically requires, investigation of possible contamination before purchasing land, thus making transfer of contaminated land more onerous.<sup>132</sup>

Finally, the prior cases holding that disposal includes passive migration are ambiguous in their reasoning and clearly distinguishable from the case in *Nurad*. *United States v. Price* and *In re Hemingway Transport, Inc.* both involved defendants with actual knowledge of the release, removing them from the category of true PPOs and making them liable for response costs under § 9607(a)(1).<sup>133</sup> The remaining cases holding that disposal can be passive unnecessarily reached that conclusion, as defendants in those cases actively engaged in disposal or negligently omitted to remove waste which they had contracted to remove.<sup>134</sup> Thus, the *Nurad* court was not bound to follow the prior Fourth Circuit decision in *Waste Industries*, because it fell into this second category of cases.<sup>135</sup>

#### V. CONCLUSION

"Particularly where the imposition of liability is based on public policy rather than any conception of fairness or culpability, the ultimate question for the court must be not the end but the intended limit."<sup>136</sup> Such is the case with CERCLA generally, and particularly with the question of PPO liability.<sup>137</sup> If true PPOs can be held liable for contamination which they did not create or to which they did not contribute and of which they had no actual knowledge, owners and purchasers of property are placed in a precarious and unenviable position.

If the language of CERCLA is to be interpreted strictly, "disposal" under CERCLA must include the passive conduct found in the RCRA definition. The only option available to PPOs seeking to limit liability would be to consider passive disposal in mitigation of damages. Notably, if PPOs are held liable under § 9607(a), the innocent purchaser defense and the de minimis settlement provision should be expanded to incorporate a PPO so that PPOs have the same defenses and settlement options as present owners.

While a clear congressional directive or Supreme Court decision is needed to clear up the uncertainties regarding PPO liability, neither is immediately forthcoming. Until this area acquires additional definition, passive past owners of land will continue to be subject to liability for having done nothing.

124 *Id.* at 845.

125 *Id.* at 846.

126 *Id.*

127 *See Artesian Water Co. v. Government of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988).

128 *See supra*, text accompanying notes 39-56.

129 *Nurad*, 966 F.2d at 845-46.

130 42 U.S.C. § 9601(35)(C) (1986). *See, generally*, Judith G. Tracy, *Beyond Caveat Emptor: Disclosure to Buyers of Contaminated Land*, 10 STAN. ENVTL. L. J. 169 (1991).

131 42 U.S.C. § 9603 (1980).

132 42 U.S.C. § 9601(35)(B) (1986). *See Petersen Sand & Gravel*, 806 F. Supp. at 1353.

133 *See supra*, text accompanying notes 61-65 and text accompanying notes 85-88 for a discussion of these cases.

134 *Stanley Works*, 781 F. Supp. 659 (E.D. Cal. 1990) (defendants were owners or operators at the time of active disposal or were current owners); *CPC Int'l*, 731 F. Supp. 783 (W.D. Mich. 1989) (defendants failed to operate "purge wells" to remove waste as they had contracted to do); *Emhart Indus.*, 665 F. Supp. 549 (M.D. Tenn. 1987) (defendants actively disposed of chemical manufacturing waste); *Waste Indus.*, 734 F.2d 159 (4th Cir. 1984) (defendants owned, operated and directed the construction of a contaminated landfill at the time it was used as such).

135 734 F.2d 159.

136 *Petersen Sand & Gravel*, 806 F. Supp. at 1353.

137 A recent district court case unwittingly provides two options to the question of PPO liability. In *Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1309 (D. N.J. 1992), the New Jersey district court issued a self-contradictory opinion which held that: (1) passive disposal could not be raised as a defense to CERCLA liability, but was relevant to the mitigation of damages, *Id.* at 1325-26; and (2) the amount of harm caused by each defendant should be considered at the initial liability phase and not at the contribution phase because "precisely relative degrees of liability" are involved. *Id.* at 1329-30. It should be noted that the party asserting the defenses was not a true PPO, but rather was the current owner of the contaminated property. *Id.* at 1314.

In support of its second holding, the court cited the divisibility of harm theory set out in § 433 A of the Restatement (Second) of Torts. *Id.* at 1329-30. This allows apportionment of damages when (1) there are distinct harms or (2) a reasonable basis exists for determining the contribution of each cause to the total harm. *Id.* The court noted that establishing which disposals were solely attributable to one defendant was insufficient without also showing which releases, threatened releases or response costs were attributable to those disposals. *Id.* at 1330. The court concluded that if the harm is divisible, each defendant should be liable only for that portion of the harm which is attributable to that defendant. *Id.*

For other recent cases discussing *Nurad*, see, e.g., *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*, Civ. A. No. 87-2054, 1993 WL 333619, at \*4 (W.D. La. July 8, 1993) (interpreting *Nurad* as requiring active leaking of storage tanks, holding that owners at the time of leaching caused by rainfall are not liable for that reason alone); *HRW Sys., Inc., v. Washington Gas Light Co.*, 823 F. Supp. 318, 340 (D. Md. 1993) (approving of *Nurad* and noting the innocent purchaser defense); *The Reading Co. v. City of Philadelphia*, 155 B.R. 890, 898 (E.D. Pa. 1993) (distinguishing passive release from release through leaking or spilling).