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Possession is not Nine-Tenths of the Law: An Exploration of the Ninth Circuit's Decision in San Pedro Boatworks. City of Los Angeles v. San Pedro Boatworks

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Possession is Not Nine-Tenths of the Law: An Exploration of the Ninth Circuit's Decision in *San Pedro Boatworks*

City of Los Angeles v. San Pedro Boatworks[1]

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") was introduced by Congress in 1980, its purpose being to provide a "Superfund" for the cleanup of contaminated lands.[2] CERCLA provides the Environmental Protection Agency ("EPA") with the ability to bring an action to collect for the cost of cleanup against potentially responsible parties, and allows private citizens to bring suit to recover cleanup costs caused by contamination on their private property.[3] Courts have interpreted the goals of CERCLA to be twofold: "to ensure the prompt and effective cleanup of waste disposal sites and to assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions that they have created."[4] On their face, these goals appear noble and sensible. But, through litigation the courts have found CERCLA to be a "hastily conceived compromise statute" that "members of Congress might well have not had time to dot all the i's or cross all the t's."[5] This hasty drafting is likely the cause of the circular definitions, which have caused much confusion among persons potentially affected by the statute,[6] as well as argument among the courts.[7]

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[1] 635 F.3d 440 (9th Cir. 2011).

[2] Robert T Stafford, *Why Superfund Was Needed*, EPA JOURNAL (June 1981) http://www.epa.gov/aboutepa/history/topics/cercla/04.html.

[3] 42 U.S.C § 9613(g)(2)(A-B) (2006).

[4] Carson Harbor Vill. Ltd. v. Unocal Corp., 270 F.3d 863, 880 (9th Cir. 2001).

[5] United States v. Md. Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986).

[6] *See* Daniel E. Feder, *The Undefined Parameters of Lessee Liability Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): A*

The following comment explores *City of Los Angeles v. San Pedro Boat Works*, a Ninth Circuit Court of Appeals decision which found a permit holder was not liable as an owner under CERCLA.[8] The main issue to be analyzed here is whether the Ninth Circuit's decision adequately meets the dual goals of CERCLA.

II. FACTS AND HOLDING

In October 2002, the City of Los Angeles ("City") brought suit against BCI Coca Cola, Pacific American and San Pedro Boat Works, among others, alleging the defendants were accountable for contamination at Berth 44 under CERCLA.[9] The City first began investigating the soil and groundwater at Berth 44 in 1995.[10] Multiple contaminates were discovered, including volatile organic compounds, petroleum hydrocarbons, copper, lead, mercury and more.[11] In 2003, the City removed most of the pollutants by dredging the sediment at Berth 44.[12] The City filed suit, seeking reimbursement for the cost of cleaning the site.[13]

Before delving into the theories of recovery sought by the City, it is necessary to have an understanding of the transactional history

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Trap for the Unwary Lender, 19 ENVTL. L. 257, 258 n.15 (1988) (stating that lenders needed to be wary of liability when the borrower is the lessee of real property).

[7] *See* Russell Prugh, *Ninth Circuit Rules CERCLA Liability Does Not Extend to Permit Holder*, MARTEN LAW (Apr. 27, 2011) http://www.martenlaw.com/newsletter/20110427-permit-holder-cercla-liability (demonstrating the circuit split in regards to CERCLA owner liability).

[8] 635 F.3d 440, 452 (9th Cir. 2011).

[9] *Id,*

[10] *Id.* at 445.

[11] *Id.*

[12] *Id.* The dredging did not eliminate all of the contaminates, but reduced them to an acceptable level. *Id.*

[13] *Id.* at 443.

regarding Berth 44 and the defendants. Berth 44 is located within the Port of Los Angeles and is owned by the City and run by the Board of Harbor Commissioners ("Board").[14] According to the Charter of the City of Los Angeles ("Charter"), the Board has the control, management, and supervisory responsibility for the waters and tidelands of Los Angeles Harbor.[15] In 1965, the Board issued Revocable Permit 936 to Los Angeles Harbor Marine Corporation ("L.A. Harbor Marine") for the limited function of operating a boatworks.[16] L.A. Harbor Marine operated a boatworks at Berth 44 from 1965 to 1969.[17] During this period, Pacific American pursued negotiations with L.A. Harbor Marine to purchase Revocable Permit 936.[18] In the course of these negotiations, Pacific American incorporated Pedro Boat Works, which then became a wholly owned subsidiary of Pacific American.[19] Pacific American and L.A. Harbor Marine came to terms, and in August 1969, Pacific American purchased the permit in an asset sale, with the necessary prior approval of the sale by the City.[20]

At the close of the asset sale, Pacific American conveyed all of its interest in the physical assets of L.A. Harbor Marine, not including Revocable Permit 936, to San Pedro Boatworks.[21] As a result, San Pedro Boat Works became the sole owner of the facilities and machinery of Berth 44 and at no time did Pacific American own the boatworks.[22] But, regardless of its attempt to make San Pedro Boat Works solely responsible for the activity at Berth 44, Pacific American still had the assignment of Revocable Permit 936.[23] Furthermore, in April of 1970, Pacific American

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[14] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 444 (9th Cir. 2011).
[15] *Id.*
[16] *Id.* A boatwork is a facility for the maintenance and repair of boats and ships.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 444 (9th Cir. 2011).
[21] *Id.* Recall that San Pedro Boat Works is the wholly owned subsidiary corporation of Pacific American.
[22] *Id.* at 444-45.
[23] *Id* at 445. Pacific American, not San Pedro Boat Works, accepted the assignment of the revocable permit in August of 1969. *Id.*

obtained Revocable Permit 1076 from the Board to replace Revocable Permit 936.[24] It was not until June 1970 that Pacific American cut ties with Berth 44 by assigning Revocable Permit 1076 to San Pedro Boat Works.[25] Therefore, Pacific American was the permittee of the revocable permits for a total of ten months, but San Pedro Boat Works operated the facilities of the berth at all times, including those ten months.[26]

In 1974, Marin Vincent purchased the facilities and machinery from San Pedro Boat Works and assumed the role of assignee of Revocable Permit 1076.[27] Vincent then sold the assets to Billfish, Incorporated who then entered into Revocable Permit 1737, replacing Revocable Permit 1076, with the City.[28] Subsequently, in 1993 BCI Coca Cola purchased Pacific American's remaining assets and liabilities.[29]

The City sought relief against BCI Coca Cola based on four theories of CERCLA liability, founded on Pacific American's relationship with the berth as well as claims for private and public nuisance.[30] First, the City claimed that Pacific American was an owner under CERCLA because it held title to the assets used at the berth.[31] Secondly, the city claimed Pacific American was an owner because it held revocable permits from the city to do business at the berth. Thirdly, Pacific American was derivatively liable as an operator because its wholly-owned subsidiary, San Pedro Boat Works, was liable as an operator.[32] Lastly, the City argued Pacific American itself was an operator under CERCLA.[33] The last two theories of liability were not at issue because the City did not

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[24] *Id.*

[25] *Id.* The Board of Harbor Commissioners approved this assignment.

[26] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 445 (9th Cir. 2011).

[27] *Id.*

[28] *Id.*

[29] *Id.* Since BCI Coca Cola purchased the liabilities of Pacific American it stands in the shows of Pacific American for the purposes of this case.

[30] *Id.* at 445-46.

[31] *Id.* at 446.

[32] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 446 (9th Cir. 2011).

[33] *Id.*

appeal the district court's decision regarding the operator theories.[34] The defendants argued there could be no CERCLA liability because they were not owners by CERCLA's definition, and moved for summary judgment.[35] The district court agreed with the defendants and granted summary judgment, stating the defendants were never owners of the berth.[36] The district court also granted summary judgment to the defendants on the state public and private nuisance claims and denied the plaintiff leave to amend its complaint to add a contracts claim.[37] The City appealed the district court's decisions on the issues of "owner" liability, the nuisance claims, and the court's decision to not grant the City leave to amend.[38] The Ninth Circuit Court of Appeals affirmed the district court's grant of summary judgment, holding that the revocable permits did not constitute ownership under state common law.[39] The City did not raise a triable issue regarding whether Pacific American knew or should have known of the contamination at Berth 44,[40] and the district court did not abuse its discretion when it denied the City's motion to amend.[41]

III. LEGAL BACKGROUND

A. *CERCLA History*

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") was passed in 1980 and at the time was considered the premier preventative health and environment law of its

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[34] *Id.*
[35] *Id*
[36] *Id.* The issue of whether any of the assets of the boatworks were ever owned by the defendants was determined by the jury and they found that Pacific American never owned any of the assets. *Id.*
[37] *Id.*
[38] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 446 (9th Cir. 2011). This note will focus on the appeal of the CERCLA claims.
[39] *Id.* at 450.
[40] *Id.* at 453-54.
[41] *Id.* at 455.

time.[42] The purpose of CERCLA is to create a "Superfund," which supplies the EPA with funding to clean up contaminated areas and performs the function of a depository for monies recovered by the government against liable parties.[43] Along with the EPA having the ability to bring an action to collect for the cost of cleanup against potentially responsible parties, CERCLA allows private citizens to bring suit to recover cleanup costs caused by contamination on their private property.[44] CERCLA also provides standards to determine who is liable for the cost of the cleanup.[45] With these standards has come much litigation, as the definitions of owner in CERCLA have been criticized for being cyclical.[46]

B. *Litigation Regarding the Definition of "Owner" Under CERCLA*

Since CERCLA's inception in 1980, one of the most prominent issues concerning the legislation has been defining "owner." CERCLA defines the terms "owner and operator" as "in the case of an onshore facility or an offshore facility, any person owning or operating such facility."[47] Since being considered an owner under CERCLA subjects one to great liability for costly environmental cleanup,[48] the issue of what constitutes an owner has been litigated often. In *United States v. Bestfoods, et al.*, the Supreme Court criticized CERCLA's definition of

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[42] Stafford, *supra* note 1.
[43] Melissa A. McGonigal, Comment, *Extended Liability Under CERCLA: Easement Holders and the Scope of Control*, 87 NW. U. L. REV. 992 (1993).
[44] 42 U.S.C. § 9613(f)(1) (2006).
[45] *See* 42 U.S.C. § 9607 (2000).
[46] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 447 (9th Cir. 2011) (citing United States v. Bestfoods, et al., 524 U.S. 51, 66 (2006)("The Supreme Court has recognized that this definition [of CERCAL] is entirely tautological, and thus useless.")).
[47] 42 U.S.C. § 9601(20)(A)(ii) (2006).
[48] *See* Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75340-01 (Dec. 11, 2008).

owner as repetitive and thus ineffectual.[49] This cyclical definition of "owner" has led to litigation to determine what types of property interest qualify as an ownership interest under CERCLA.

CERCLA's liability extends to four categories: "(1) current owners and operators of the hazardous waste facility; (2) past owners or operators of the facility at the time of disposal; (3) generators of the hazardous waste disposed of at the facility; and (4) transporters of hazardous substances."[50] The courts have construed these categories broadly and have enlarged the scope of liability to parties that have not customarily been considered owners, including lessees.[51] But, until *San Pedro Boat Works*, no court had considered whether the owner of a revocable permit would be liable as an owner under CERCLA. That being said, there have been several cases that have considered the issue of whether similar possessory interests fall under CERCLA's definition of owner.

First, in *U.S. v. South Carolina Recycling & Disposal, Inc.*, the district court of South Carolina held that if a holder of a possessory interest in land held "site control" over the facility, it would be liable as an owner under CERCLA.[52] In *South Carolina Recycling*, the possessory interest at issue was a lease.[53] In the case, the president of the Columbia Organic Chemical Company, the lessee, negotiated a verbal contract with the owners of the land to use the site to store raw chemicals.[54] Later, individuals associated with Columbia Organic Chemical Company began using the land to store their own hazardous materials.[55] Eventually, these individuals, along with Columbia Organic Chemical Company, formed a new organization, South Carolina Recycling & Disposal, and continued to

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[49] *Bestfoods,* 524 U.S. at 55, 66.

[50] MCGONIGAL, *supra* note 42, at 994.

[51] United States v. S.C. Recycling & Disposal, Inc., 653 F. Supp. 984, 1033 (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,* 490 U.S. 1106 (1989).

[52] *See S.C. Recycling*, 653 F.Supp. at 1003, *aff'd in part, vac'd in part sub nom; Monsanto*, 858 F.2d 160.

[53] *S.C. Recycling*, 653 F.Supp. at 989.

[54] *Id.* at 990.

[55] *Id.*

store hazardous waste on the land and to manage the waste operations.[56] The South Carolina district court found that the lessee corporation was an owner for CERCLA purposes because it "maintained control over and responsibility for the use of the property and, essentially, stood in the shoes of the property owners[,]" emphasizing site control as an important factor in determining ownership.[57]

The only Federal Circuit to consider the issue of lessee liability under CERCLA's owner provision was the Second Circuit in *Commander Oil Corp. v. Barlo Equip. Corp.*[58] While the Second Circuit did not focus on site control, as the district court did in *South Carolina Recycling*, it did find that a lessee could be liable as an owner under CERCLA.[59] In that case, Commander Oil bought two lots, a clean office space and a polluted petro depot.[60] Lot 1, the clean office space, was leased to Barlo Equipment Corporation and Lot 2, the polluted petro depot, was leased to Pasley Solvent and Chemicals.[61] Commander Oil then consolidated the leases and leased both lots to Barlo, who then subleased Lot 2 to Pasley.[62] The local Department of Health eventually became aware of the pollution on Lot 2 and charged Commander Oil to clean the lot.[63] In response, Commander Oil filed suit, requesting contribution under CERCLA from both Barlo and Pasley.[64] The district court found, by virtue of the consolidated leases, that Barlo was an owner and ordered it to pay one-fourth cleanup costs.[65]

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[56] *Id.*

[57] United States v. S.C. Recycling & Disposal, Inc., 653 F. Supp. 984, 1003 (D. S.C. 1984).

[58] 215 F.3d 321, 326 (2d Cir. 2000).

[59] *Id.* at 330.

[60] *Id.* at 324.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 325.

[64] Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 325 (2d Cir. 2000).

[65] *Id.* at 325-26. The amount Barlo's fourth of the cleanup costs amounted to $802,915 plus 25% of "any future restoration costs. *Id.*

On appeal the Second Circuit reversed the district court and found Barlo not to be an owner for CERCLA purposes.[66] That is not to say that the Second Circuit found that a lessee is not capable of being an owner under CERCLA. Instead, the court found that CERCLA owner liability applied to lessees only when the lessee was the de facto owner, such as in the case of the "proverbial 99 year lease."[67] The Second Circuit then went on to put forth a five-factor test to determine whether a lessee was a de facto owner:

> "(1) whether the lease is for an extensive term and admits of no rights in the owner/lessor to determine how the property is used; (2) whether the lease cannot be terminated by the owner before it expires by its terms; (3) whether the lessee has the right to sublet all or some of the property without notifying the owner; (4) whether the lessee is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and (5) whether the lessee is responsible for making all structural and other repairs."[68]

After applying the test to Barlo, the court found it did not "possess sufficient attributes of ownership" to be liable as an owner.[69]

In stark contrast to both *South Carolina Recycling* and *Commander Oil* is *Long Beach Unified Sch. Dist. v. Dorothy B. Goodwin Cal. Living Trust*.[70] In *Long Beach*, the school district purchased land from the Goodwin Trust.[71] The Trust had previously leased the land to a piano moving company, which maintained a waste pit on the property.[72] Mobil Oil and Powerine Oil ("M & P") also had an easement to run a non-

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[66] *Id.* at 330, 332.
[67] *Id.* at 330.
[68] *Id.* at 330-31.
[69] *Id.* at 331.
[70] *See* 32 F.3d 1364, 1368 (9th Cir. 1994).
[71] *Id.* at 1365-66.
[72] *Id.* at 1366.

polluting pipeline across the land at issue.[73] After the Goodwin Trust and the piano moving company settled, the school district alleged that M & P was liable as an owner or operator because of the easement.[74] The pipeline had no correlation with the waste pit, and as a result the district court granted M & P's motion to dismiss.[75]

On appeal to the Ninth Circuit Court of Appeals, the court found holding an easement to a non-polluting pipeline did not subject M & P to liability as an owner or an operator under CERCLA.[76] The court first noted that, since CERCLA did not provide a workable definition of "owner," common law should guide the court in defining owner.[77] After examining California law, the court found that the common law definition of "owner" did not include an easement holder and that extending CERCLA liability to M & P would be unjustifiable. [78]

IV. INSTANT DECISION

In the instant case, the Ninth Circuit Court of Appeals was called to determine, as an issue of first instance, whether the holder of a revocable permit to use real property is an owner for reason of imposing liability under CERCLA.[79] The Ninth Circuit found that the common sense reading of the statute and the existing California state law persuaded a finding that the holder of a mere possessory interest could not be an

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[73] *Id.*
[74] *Id.*
[75] *See id.*
[76] Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1366 (9th Cir. 1994).
"Having an easement does not make one an 'owner' for purposed of CERCLA liability." *Id.*
[77] *Id.* at 1368.
[78] *Id.* at 1368-69.
[79] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 442 (9th Cir. 2011).

owner under CERCLA.[80] The court was also asked to determine whether there was a triable issue as to the City's nuisance claim and whether the trial court abused its discretion in denying the City's request to amend its complaint.[81] The court found that the district court did not err in granting summary judgment on the nuisance claim and that there was no abuse in discretion in not allowing the City to amend its complaint.[82]

A. *The CERCLA Claims*

The first claim the court of appeals examined was the City's claim that Pacific American was liable because it possessed revocable permits for ten months from 1969 to 1970; it was the owner of the physical assets of the berth when the pollution was released; and BCI Coca Cola assumed Pacific American's CERCLA owner liability in the 1993 asset-liabilities purchase.[83] The issue turns on the question of whether Pacific American would be considered an owner under the CERCLA statute. In order to answer this question, the court of appeals looked at both the primary purpose of the statute and how state law had defined the term owner.[84]

First, the court explained the primary goals of CERCLA are: "(1) to ensure the prompt and effective cleanup of waste disposal sites, and (2) to assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created."[85] The court then quoted from the statute stating that liability is imposed against "any person who at the time of disposal of any hazardous substance owned or operated any

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[80] *Id.*

[81] *Id.* at 452, 454.

[82] *Id.* at 444.

[83] *Id.* at 447. In there initial complaint to the district court, the City brought four CERCLA claims against the defendants. This is the only claim that the brought on appeal. *Id.*

[84] *Id.* at 442.

[85] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 447 (9th Cir. 2011) (citing Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 880 (9th Cir. 2001)).

facility at which such hazardous substances were disposed of."[86] The court went on to state the problem with CERCLA's definition of the term "owner."

Given the fact that Congress had given a redundant definition of the term "owner," the court of appeals turned to state law to determine the definition of the term. The court had examined the term under CERCLA on just one previous occasion, the case of *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Living Trust,* and *Mobil Oil Corp., Powerine Oil Co.*[87] Using the precedent established by *Long Beach*, the court began to analyze whether holding a revocable permit equated to ownership under California law for CERCLA liability. The court stated *Long Beach* established the principle that the court should examine common law, including the law of the state where the pollution at issue occurred, to determine whether a party is an owner under CERCLA.[88] The court further stated that, while *Long Beach* is not conclusive to the issue of a holder of a revocable permit, it does show the relevant distinction between a fee simple absolute titleholder and the holder of a less than fee simple possessory interest.[89]

Before coming to its conclusion as to whether a holder of a revocable permit is an owner, the court examined two cases which held a holder of a possessory interest was held liable as an owner under CERCLA, *U.S. v. South Carolina Recycling and Disposal, Inc.*[90] and *Commander Oil Corp. v. Barlo Equipment Corp.*[91]

After examining these two decisions, the Ninth Circuit rejected both of them stating, "[i]nstead of applying a nebulous and flexible analytical framework such as "site control" or *Commander Oil*'s five-factor balancing test—tests which do not clearly call out what an investor in land can expect and which factors are themselves susceptible to endless

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[86] *San Pedro Boat Works*, 635 F.3d at 447 (quoting 42 U.S.C. § 9607(a)(2) (2006)).
[87] *Id.* (citing Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1365 (9th Cir. 1994).
[88] *San Pedro Boat Works*, 635 F.3d at 448 (citing *Long Beach*, 32 F.3d at 1368).
[89] *San Pedro Boat Works*, 635 F.3d at 448 (citing *Long Beach*, 32 F.3d at 1368).
[90] 653 F.Supp. 984, 999 (D. S.C. 1986).
[91] 215 F.3d 321 (2d Cir. 2000).

manipulation in litigation—we follow our court's methodology in *Long Beach*."[92] Applying the methodology of *Long Beach*, the court found that in the situation where there is a holder of a permit for the specific use of property, and the fee title holder retains power to control the use of the real property, the permit holder is not the owner and is therefore not liable as an owner under CERCLA.[93] After making this holding, the court went on to further describe the difference between a possessory interest and title ownership, citing a multitude of California cases. The court also stated that its interpretation of owner is particularly appropriate in the context of imposing CERCLA liability because if Congress intended to impose no-fault, no-cause liability on the holder of a possessory interest, it could have stated so in the statute.[94]

B. *The Nuisance Claim and Amended Complaint*

After a lengthy discussion of the CERCLA claim, the court quickly dismissed both the City's nuisance claim and its claim that the district court abused its discretion in not allowing the City to amend its complaint for a fourth time.

In regard to the nuisance claim, the district court granted summary judgment to the defendants because the City failed to raise a triable issue as to whether Pacific American knew or should have known of the pollution at the berth.[95] On this issue, the Ninth Circuit stated California law followed the Restatement in regards to public and private nuisance.[96] The Restatement Second of Torts sets forth two provisions for the requirements for nuisance liability.[97] Both of the provisions state the possessor either must have or should have known of the nuisance in order

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[92] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 449 (9th Cir. 2011).
[93] *Id.*
[94] *Id.* at 451.
[95] *Id.* at 452.
[96] *Id.* (citing People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 604 (1997)).
[97] Restatement (Second) of Torts §§ 838-39 (1979).

to be liable for the nuisance.[98] The City claimed that Pacific American had actual notice of the pollution based on the testimony of a San Pedro Boat Works employee, who testified that toxic paint was routinely scraped off the hulls of boats during the time Pacific American held the revocable permits.[99] But, there was no testimony that this practice was reported to Pacific American, and the court held such knowledge could only be imputed to San Pedro Boat Works and not to Pacific American.[100]

After affirming the district court's summary judgment for the nuisance claim, the Ninth Circuit held that the district court did not abuse its discretion in not allowing the City's motion for leave to file a Fourth Amended Complaint.[101]

V. COMMENT

In *San Pedro*, the Ninth Circuit found the holder of a revocable permit, a mere possessory interest, was not an owner for the purposes of CERCLA liability.[102] In its decision, the court directly confronted *Commander Oil*, a contradictory decision coming out of the Second Circuit.[103] In *Commander Oil*, the Second Circuit established a five-factor test to determine whether a lessee could be considered an owner under CERCLA.[104] The Ninth Circuit explicitly rejected this test and found that any estate less than a freehold estate would not qualify for owner liability under CERCLA.[105] The court gave two justifications for this decision. First, the court found any estate less than a freehold estate was merely possessory, and that if Congress wished to "impose no-fault, no-cause

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[98] *Id.*
[99] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 453 (9th Cir. 2011).
[100] *Id.*
[101] *Id.* at 455.
[102] 635 F.3d 440, 452 (9th Cir. 2011).
[103] *Id.* at 449-50.
[104] Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 330-31 (2d Cir. 2000).
[105] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 450-51 (9th Cir. 2011).

liability on the holder of a mere possessory interest in real property, the least it could do is speak clearly."[106] Secondly, the court reasoned that its construction of owner liability is in accordance with Congress's intent because the "authority to control" standard of operator liability addresses situations such as this and there is no reason to unduly expand owner liability.[107] The question to be explored here is whether the Ninth Circuit came to the right conclusion when one considers the goals of CERCLA: "to ensure the prompt and effective cleanup of waste disposal sites and to assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions that they have created."[108]

A. *How the San Pedro Court Could Have Decided*

The Ninth Circuit could have decided the *San Pedro* case on three alternative grounds: using the *Commander Oil* test, distinguishing between a lease and a revocable permit, or by creating its own test to determine ownership liability. Two of these alternatives would not have caused a split between the Ninth and Second Circuits and one would still cause a split but would use a different test than the test established in *Commander Oil*. The options that would not have created a split between the circuits are first, and most obviously, to use the *Commander Oil* test and secondly, to distinguish the permit in *San Pedro* from the lease in *Commander Oil* instead of lumping them together in the category of "mere possessory interest." Finally, the court could have used generally accepted accounting principals to determine if the holder of a possessory interest was an owner; this would still create a split in the circuits but would give

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[106] *Id.* at 451. *But See, Id.* at 447 (citing U.S. v. Bestfoods, et al., 524 U.S. 51, 66 (2006)) (criticizing Congress for defining owner in an "entirely tautological" way; yet, the court expects that Congress would have clearly stated the answer to the complex issue of whether a lessee can be an owner under the statute).

[107] *Id.* at 451-52.

[108] Carson Harbor Village Ltd. v. Unocal Corp., 270 F.3d 863, 880 (9th Cir. 2001) (citing Pinal Creek Grp. v . Newmont Mining Corp., 118 F.3d 1298, 1300 (9th Cir. 1997).

the court some flexibility in determining ownership liability in CERCLA cases.

The most obvious way the Ninth Circuit could have avoided creating a split in the circuits would have been to apply the Second Circuit's *Commander Oil* test to *San Pedro*. Using this five-factor test, the Ninth Circuit would likely have come to the same conclusion it came to in *San Pedro*. The *Commander Oil* test sets forth the following factors to determine whether one is an owner under CERCLA:

> "(1) whether the lease is for an extensive term and admits of no rights in the owner/lessor to determine how the property is used; (2) whether the lease cannot be terminated by the owner before it expires by its terms; (3) whether the lessee has the right to sublet all or some of the property without notifying the owner; (4) whether the lessee is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and (5) whether the lessee is responsible for making all structural and other repairs."[109]

If the court were to apply these factors, it would have likely found that Pacific American was not an owner under CERCLA. The first factor obviously favors a finding of non-ownership. In *Pacific American*, Pacific American held the revocable permit for only ten months before assigning it to San Pedro Boat Works.[110] Also, Pacific American had no right to determine how the property was used, as the revocable permit was for the exclusive use of operating a boatworks.[111] The second factor in the test also supports a finding of non-ownership. The very nature of a *revocable* permit allows for it to be terminated before the term expires.[112] The third

[109] Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 330-31 (2d Cir. 2000).
[110] *San Pedro Boat Works*, 635 F.3d at 445.
[111] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 444 (9th Cir. 2011).
[112] JAMES W. ELY JR. & JON W. BRUCE, THE LAW OF EASEMENTS & LICENSES IN LAND § 1:4 (Westlaw 2012). ("Because permission is the voluntary grant of a personal privilege, the landowner may usually revoke consent at any time and thereby terminate the license.

factor points in favor of finding Pacific American was not an owner as well. The revocable permit at issue in *San Pedro* provided that, in order to convey the permit, permission from the City was required.[113] The *San Pedro* court was silent on the issues involved in the last two factors of the *Commander Oil* test. Regardless of how the court would have decided those two factors, the evaluation of the first three factors makes it clear that the Ninth Court could have found Pacific American was not an owner under the test.

Secondly, the Ninth Court could have distinguished between the revocable permit in *San Pedro* and the lease in *Commander Oil*. While both a lease and a permit are considered mere possessory interests,[114] there are distinctions between the two that are relevant here. A permit is synonymous with a license,[115] and licenses have been found to have important distinctions from leases.[116] The essential difference is "that a lease conveys exclusive possession of the premises to the tenant, and thus, the tenant holds an estate[,]"[117] whereas, in the case of a license, the "licensor retains legal possession of the land, and the licensee has only a privilege to enter for a particular purpose."[118] Based on this difference between what the two legal instruments convey, the Ninth Circuit could have decided Pacific American was not an owner under CERCLA without causing a split with the Second Circuit. The *San Pedro* court could have found that since a licensor retains the legal possession of the land, the holder of the permit could not be an owner under CERCLA. Thus,

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Given their revocable nature, licenses generally are not considered to reach the status of interests in land.").

[113] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 451 (9th Cir. 2011).

[114] *Id.* at 449-50.

[115] 9 McQuillin Mun. Corp. § 26:2 (3d ed. 2012).

[116] Amanda Schlager, Note, *Is the Suite Life Truly Sweet? The Property Rights Luxury Box Owners Actually Acquire*, 8 VAND. J. ENT. & TECH. L. 453, 462 (2006) ("Reasons to differentiate a license from a lease can include property taxation, revocation, and eminent domain concerns.").

[117] ELY & BRUCE, *supra* note 111, at §11:1.

[118] *Id.*

leaving the decision of whether a leaseholder, who holds an actual estate, is an owner under CERCLA for another day.

Finally, the Ninth Circuit could have applied a different test to determine whether the holder of a possessory interest is an owner, instead of drawing a bright line rule that to be an owner one must have a fee simple estate. One such test would be to use generally accepted account principles ("GAAP") to determine whether a lessee had sufficient control over the site to be an owner under CERCLA.[119] GAAP makes a distinction between operation and capital leases by stating capital leases are leases in which the lessee is considered the owner of the leased property for accounting purposes.[120] To be considered a capital lease, the lease must meet only one of the following four criteria at its inception:

> (1) By the end of the lease term, ownership of the leased property is transferred to the lessee.
>
> (2) The lease contains a bargain purchase option.
>
> (3) The lease term is substantially (75% or more) equal to the estimated useful life of the leased property.
>
> (4) At the inception of the lease the present value of the minimum lease payments, with certain adjustments, is 90% or more of the fair value of the leased property.[121]

The facts in *San Pedro* do not supply enough information about the permit to determine whether any of these criteria were met. But, considering the fact that a *revocable* permit was the instrument used, it is unlikely that any of the criteria were met at the inception of the permit.[122]

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[119] Feder, *supra* note 5, at 267-68.
[120] *Id.*
[121] *Id.*
[122] Permits are used to permit activity on the permitor's property and it is unlikely that at its inception it was intended that permittee would have the land transferred to him or her,

B. *What the San Pedro Court Should Have Decided*

It should be noted that the above-mentioned alternative modes of analysis that the Ninth Circuit could have used would have all likely ended in the same decision; Pacific American was not an owner for the purposes of CERCLA liability. So, why should we care if there were alternate paths to get to the same decision? While the court may have reached the right decision, it is still important to inquire as to whether that decision gave proper weight to the goals of CERCLA. Primarily, did this decision meet the goal of assuring that parties responsible for hazardous waste shoulder the burden of fixing the damage they have created? While it may look like the Ninth Circuit has met this goal, it has not.[123]

The Ninth Circuit refused to apply *Commander Oil's* "nebulous and flexible analytical framework."[124] Instead, the court chose to apply a bright line rule that any interest less than a fee simple absolute would not qualify as an ownership interest under CERCLA.[125] The court justified this decision on two grounds: if Congress wanted to impose liability for "de facto" owners it would have clearly stated so, and "[g]iven the permissive 'authority to control' standard for operator liability adopted by this circuit, 'owner' liability need not be unduly expanded to resolve situations the other liability hook was intended to address."[126] But, when one scrutinizes these justifications, they do not pass muster.

First, the court states that Congress would have clearly stated if it wanted to impose liability to "de facto" owners. This argument is unpersuasive considering that earlier in its opinion the Court criticizes the

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that the permittee would have the right to prurchase the land, or that the permitte would have paid 90 percent of the value of the land.

[123] This is not to say that Pacific American should have been found liable as an owner in this case.

[124] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 449 (9th Cir. 2011).

[125] *Id.* at 450-51.

[126] *Id.* at 451.

drafting of CERCLA and states that its definitions of owner and operator are "entirely tautological, and thus useless."[127] Also, courts have criticized CERCLA as being a "hastily conceived compromise statute[.]"[128] If the Ninth Circuit admits that the statute is poorly drafted and the courts needed to interpret the statute to give it useful meaning, how can it later say that Congress clearly expressed its intended meaning of "owner?"

Secondly, the court tries to justify its decision by claiming that CERCLA's operator liability would address situations involving holders of possessory interests and there is no reason to expand liability.[129] While it is true operator liability can cover liability for possessory interest holders, one can easily imagine a situation in which the holder of a mere possessory interest would not be liable under the operator standard. For example, the Second Circuit in *Commander Oil* found that the lessee was not an operator because it could not have been said to have "manage[d], direct[ed], or conduct[ed] operations specifically related to pollution..."[130] Thus, under *San Pedro*, lessees like that of *Commander Oil* could not be found liable under either CERCLA's owner or operator standards.

The remaining question is what should the Ninth Circuit have done in deciding *San Pedro*. The court in *San Pedro* made the decision to apply a bright line rule instead of the "nebulous and flexible analytical framework."[131] It is understandable that the court would prefer a bright line rule as opposed to a flexible analytical framework because bright line rules increase certainty and judicial efficiency. But, if the Ninth Circuit would have distinguished between a license and a lease it could have had a bright line rule for licenses and permits and then possibly considered a framework under which leases could be analyzed. The court would have gotten its bright line and would have still met the goals of CERCLA.

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[127] *Id.* at 447.

[128] United States v. Md. Bank & Trust, 632 F. Supp. 573, 578 (D. Md. 1986).

[129] *San Pedro Boat Works*, 635 F.3d at 451-52.

[130] Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 328 (2d Cir. 2000) (citing *Bestfoods,* 524 U.S. 51, 66-67 (1998).

[131] City of L.A. v. San Pedro Boat Works, 635 F.3d 440, 449 (9th Cir. 2011).

As mentioned above, there are pertinent differences between the rights conferred to a lessee compared to the rights conferred to a licensee or permitee.[132] The key distinction is that a lessee gets exclusive possession of the property whereas, in the case of a license, the licensor retains legal possession of the property.[133] Clearly, a lessee has a greater interest in the land than that of a licensee; a licensee is subject to the possibility of revocation and must use the land only as allowed for in the permit.[134] This greater interest is enough for the courts to distinguish between a lease and a license or permit when it comes to owner liability under CERCLA. One can imagine a situation in which a lessee cannot be held liable as an operator but the lease would grant the lessee enough control over the premises to find the lessee was an owner under the *Commander Oil* five-factor test. But, it would be hard to imagine any permit being held to be an ownership interest under the *Commander Oil* test considering the permit holder does not even have the legal possession of the land.

Given that courts have liberally construed the terms of CERCLA,[135] the Ninth Circuit should have distinguished between a permit and a lease in making its decision in *San Pedro*. The court could have set forth a bright line rule stating permits did not give the holder enough interest to be considered an owner, while developing an analytical framework similar to *Commander Oil* or to GAAP to determine whether a leaseholder could be held liable as an owner under CERCLA. This way the court has a bright line rule pertaining to permits, thus increasing certainty and judicial efficiency, while assuring that parties responsible for hazardous waste shoulder the burden of fixing the damage they have created.

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[132] ELY & BRUCE, *supra* note 111, at §1:1.
[133] *Id.*
[134] *Id.*
[135] Idaho v. Bunker Hill Co., 635 F. Supp. 665, 671 (D. Idaho 1986).

VI. CONCLUSION

The alternate modes of analysis proposed in this note would all have led to the same decision the Ninth Circuit made in *San Pedro*. The court's holding was not incorrect, but its reasoning could have set forth a bright line rule without sacrificing an important CERCLA goal: assuring that responsible parties pay for the damage that they create. The court believes that it has met this goal; justifying its position by stating that the operator liability found in CERCLA will assure that potentially responsible parties pay for the harm they cause. But, one can easily imagine a situation, not unlike that in *Commander Oil*, in which a lessee is not liable as an operator and the lease gives lessee significant control over the property to be considered a "de facto" owner. This is why the Ninth Circuit should have created a bright line rule for revocable permits and then created a framework for analysis of leases, similar to the *Commander Oil* test or the generally accepted accounting principles criteria.

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