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# Conditional Innocence and the Myth of Consent: The Subtle Coercion of CERCLA's Contiguous Property Owner Protection

Trayce Hockstad\*

## INTRODUCTION

The roots of environmental regulation of private property for the benefit of the public began, for the Western world, more than 400 years ago in the form of personal litigation.<sup>1</sup> It was the lone plaintiff who, through particular use of the nuisance suit, began to expand the scope of available legal remedies for ecological grievances – sometimes in defiance of procedural formalities of the English feudal court system.<sup>2</sup> For centuries, common law courts remained the chief legal avenue for resolving environmental disputes between private parties.<sup>3</sup> American courts eventually labeled these suits as either nuisance<sup>4</sup> or trespass actions.<sup>5</sup> With the exception of a rare quarrel over interstate pollution,<sup>6</sup> the burden of pursuing environmental regulation was largely left to the individual disgruntled plaintiff and the extent of his annoyance with his neighbor.

At the close of the nineteenth century, however, political and social policies began to influence the course of environmental litigation. Judicial opinions began to engage in equitable balancing between environmental and economic concerns, with a heavy bias in favor of promoting a profitable national

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\* Special thanks to Regional Counsel at Environmental Protection Agency, Region III and Office of General Counsel for including me on a challenging, rewarding exploration of this issue in my final year as a law student.

1. *See* *Cantrel v. Church* (1601) 78 Eng. Rep. 1072 (establishing that a nuisance action for interference with a right of way could be brought and successfully argued “by a stranger, who hath nothing to do with the Land”).

2. *See* *Aldred’s Case* (1611) 77 Eng. Rep. 816 (Lord Coke). William Aldred brought suit to prevent the spread of “corrupted air” emanating from a neighbor’s pig-gery. *Id.* Although this type of suit was generally brought by a “*novel disseisin*” action, which provided a successful plaintiff with the remedy of a return to the status quo, Aldred successfully brought “an action on the case” so that he might be awarded damages. DANIEL R. COUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE* 245 (2004).

3. Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 161.

4. *See, e.g.,* *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268 (1890) (“[N]o place can be convenient for the carrying on of a business which is a nuisance, and which causes substantial injury to the property of another.”).

5. *See, e.g.,* *Keppel v. Lehigh Coal & Navigation Co.*, 200 Pa. 649 (1901).

6. *See* *New Jersey v. City of New York*, 284 U.S. 585 (1931); *New York v. New Jersey*, 256 U.S. 296 (1921); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906).

market.<sup>7</sup> Instead of following the traditional rule of granting injunctions for established nuisance activities,<sup>8</sup> courts weighed the plaintiffs' property interests against the social utility of the defendant's action.<sup>9</sup> This new method of analysis for common law nuisance actions, combined with the public health crises of the Industrial Revolution, released a wave of federal regulatory legislation across the United States.<sup>10</sup> The first decade of the twentieth century saw the introduction of laws aimed as equally at regulating trade as guarding public health, such as the Lacey Act of 1900,<sup>11</sup> the Pure Food and Drug Act of 1906,<sup>12</sup> and the Insecticide Act of 1910.<sup>13</sup> But after World War II, Congress began to target private industries solely on the basis of environmental concerns, specifically for pollution control.<sup>14</sup> A fear that the world had become a nuclear test zone filled with untold amounts of seeping radioactive waste fanned the flame of federal regulatory legislation.<sup>15</sup>

In the late 1960s and early 1970s, the modern notion of environmental regulation began to take shape. New statutes like the National Environmental

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7. See, e.g., Robert G. Bone, *Normative Theory and Legal Doctrine in America Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101, 1159, 1177–84 (1986) (describing the development of the “balancing of conveniences” doctrine in Pennsylvania courts). Bone criticizes the application of the doctrine as follows: “Damages could not adequately compensate for a residential plaintiff’s injury since the value of plaintiff’s property right could not be measured in monetary terms. Denying injunctive relief in residential plaintiff cases in effect reduced the value of the nonfungible residential use to a fungible quantity.” *Id.* at 1178.

8. Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 493 (2010) (noting that abatement was “ordinarily required” after establishing a nuisance “regardless of how profitable or important the nuisance-making activity was”).

9. See, e.g., *Richard’s Appeal*, 57 Pa. 105, 107, 114 (1868) (holding that injunction was not appropriate to prevent an iron smelter from discharging soot over a plaintiff’s land because the iron works represented a \$500,000 investment and employed more than 1,000 men).

10. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1189–90 (1986) (crediting the rise of administrative law in the 1960s and 70s and increasing federal regulation to a “response to unanticipated economic crises, emerging risks to public health and safety, and shifting public sentiments towards disadvantaged classes”); see also the White Phosphorous Matches Act, Pub. L. No. 62–118, 37 Stat. 81 (1912) (taxing the use of white phosphorous in match manufacturing to prevent disease outbreak).

11. 16 U.S.C. §§ 3371–78 (2018).

12. Pub. L. No. 59-384, 34 Stat. 768 (1906).

13. Pub. L. No. 61-152, 36 Stat. 331 (1910).

14. See Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948).

15. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1157 (1995).

Policy Act,<sup>16</sup> Endangered Species Act,<sup>17</sup> Clean Air<sup>18</sup> and Clean Water<sup>19</sup> Amendments, Toxic Substances Control Act,<sup>20</sup> and Resource Conservation and Recovery Act (“RCRA”)<sup>21</sup> established clear precautionary measures for protection of natural resources and public health. But these acts did little to address the thousands of sites, scattered across the United States, already filled with chemical byproducts from years of experimental technological testing. In response to a growing national concern after events like the Love Canal disaster,<sup>22</sup> Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) in 1980.<sup>23</sup>

Since its adoption, CERCLA has been the subject of substantial, ongoing litigation. The original legislative purpose of CERCLA was to empower the government to apportion liability among parties responsible for the thousands of abandoned landfills that threatened public health and safety.<sup>24</sup> Perhaps the most controversial aspect of CERCLA is its imposition of strict liability on a wide range of individuals who previously owned or currently own polluted land.<sup>25</sup> The broad sweep of this liability has been tempered, in some respects, by subsequent additions of affirmative defenses. While the statute imposes strict liability on those who have caused or may have caused the release of hazardous waste into the environment, it also correctly exempts otherwise innocent contiguous landowners whose property has become contaminated by migrating pollution.<sup>26</sup> This exemption is conditioned, however, on the property owner’s guarantee of “full cooperation, assistance, and access” to persons conducting response actions on site for the duration of the operation.<sup>27</sup> Refusal

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16. Pub. L. No. 91-190, 83 Stat. 852 (1970).

17. Pub. L. No. 93-205, 87 Stat. 884 (1973).

18. Pub. L. No. 91-604, 84 Stat. 1676 (1970).

19. Pub. L. No. 92-500, 86 Stat. 816 (1972).

20. Pub. L. No. 94-469, 90 Stat. 2003 (1976).

21. Pub. L. No. 94-580, 90 Stat. 2795 (1976). RCRA sets out a framework for proper management of solid waste, both hazardous and non-hazardous. *Id.*

22. In 1978, a canal, which had been converted by the Hooker Chemical Company to a landfill for hazardous waste, exploded after the area received a record amount of rainfall. Eckardt C. Beck, *The Love Canal Tragedy*, EPA J. (Jan. 1979), <https://archive.epa.gov/epa/aboutepa/love-canal-tragedy.html>. Hazardous waste leaked into the groundwater causing chemical burns, birth defects, and widespread environmental destruction. *Id.*

23. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. ch. 103 (2018)); *see also* 42 U.S.C. ch. 103 [hereinafter CERCLA].

24. H.R. REP. NO. 99-253, pt. 1 (1985).

25. Christopher D. Man, *The Constitutional Rights of Non-Settling Potentially Responsible Parties in the Allocation of CERCLA Liability*, 27 ENVTL. L. 375, 376 (1997) (“[CERCLA] is widely criticized as unfair because it imposes retroactive, strict, and joint and several liability upon a broad class of persons whom Congress has deemed ‘responsible’ for hazardous waste contamination.”).

26. CERCLA § 9607(q)(1)(A).

27. *Id.* § 9607(q)(1)(A)(iv).

to grant access to government agents necessarily results in the loss of the affirmative defense and the possibility of CERCLA liability for any cleanup costs or damages from the hazardous waste.<sup>28</sup>

This Article examines the relationship between the conditional status of innocence CERCLA offers under the contiguous property owner provision and the Fifth Amendment right of landowners to receive just compensation for governmental taking of private property. It specifically argues that, under current law, innocent landowners pay a high price for release from CERCLA liability. Access to property of contiguous landowners is generally obtained through the consent of the owner. But while consenting to government access for response actions preserves the shield to CERCLA liability, it also often prevents the landowner from successfully bringing a suit for just compensation if the use and enjoyment of his or her land are destroyed by the government's continued access.<sup>29</sup> In other words, a property owner whose land is contaminated through no personal fault (and potentially through the fault of the government itself) may be forced to choose between liability for the hazardous waste under CERCLA and the loss of the right to exclusive control of the land, even if the owner is not compensated for the government's occupation of the property. Consequently, CERCLA's contiguous property owner defense requires innocent landowners to surrender their constitutional rights to bring Fifth Amendment compensation claims against the United States. The conditions of this affirmative defense create a subtle coercion that may technically survive judicial scrutiny but contradicts the public policies of both waivers of constitutional rights and the unconstitutional conditions doctrine.<sup>30</sup>

The easiest solution to this problem is to amend CERCLA's requirements for the contiguous property owner defense to exclude the grant of full, perpetual access to contaminated property. It is unlikely that many landowners will refuse to cooperate with the Environmental Protection Agency's ("EPA's") remedial procedures, even without compensation, but removing the coercive conditions of the statute would allow the statutory defense to serve its intended purpose of protecting innocent property holders without compelling them to surrender ownership rights. Owners would be free to entertain other options for remedial action, negotiate access agreements with the government, and – perhaps most importantly – accurately assess the cost of unrestricted government access as cleanup efforts perpetuate.<sup>31</sup>

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28. *See id.*

29. *See infra* Section III.A.

30. The unconstitutional conditions doctrine restricts the government's ability to condition the receipt of benefits generally held out to the public or qualifying individuals on surrender or compromise of a constitutional right. Such situations are prone to amount to government coercion. *See B&G Enters. v. United States*, 43 Fed. Cl. 523, 527 (1999).

31. The diminution in the value of private property by loss of the right to exclude the government has been recognized by the federal government many times. *See, e.g., Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) ("In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession –

## I. CERCLA'S COERCIVE REPUTATION: THE HUNT FOR PRPs

*A. From CERCLA to Superfund*

Almost as soon as CERCLA was adopted, legislators realized they had underestimated the problem posed by hazardous waste sites across the nation. The initial scope of the statute was a five-year, \$1.6 billion program to address “orphan” dump sites – which, by EPA estimates in 1980, affected one in six groundwater systems serving less than ten thousand persons and one of every three larger systems.<sup>32</sup> By 1985, however, some estimates put the number of abandoned hazardous waste sites in the United States as high as 20,000.<sup>33</sup> The House Committee on Energy and Commerce described the issue as follows:

[In 1980,] most believed that cleaning up a site was relatively inexpensive and involved removing containers or scraping a few inches of soil off the ground . . . .

Today, five years later, our understanding of the problem posed by abandoned hazardous chemicals is entirely different. The [EPA] Office of Technology Assessment now estimates there may be as many as 10,000 Superfund sites across the Nation, or an average of 23 sites per Congressional district . . . . We now understand that a cleanup frequently goes far beyond simple removal of barrels. It often involves years of pumping contaminated water from aquifers.<sup>34</sup>

In light of the discovery of the magnitude of hazardous waste sites and the expense of remedial action, Congress enacted the Superfund Amendments and Reauthorization Act (“SARA”) of 1986.<sup>35</sup> SARA extended certain CERCLA initiatives and authorized extra funding over the next eight years.<sup>36</sup> Furthermore, SARA established the right of potentially responsible parties (“PRP”)s to seek contribution from other PRPs, thus opening the door for third party interpleading.<sup>37</sup> Just as the scope and term of CERCLA’s applicability expanded to match the unanticipated gravity of the nation’s pollution situation, so too the nature of CERCLA liability began to expand.

CERCLA was a departure from the traditional model of twentieth-century federal regulatory legislation in at least one crucial way: it was not truly regulatory. Instead of establishing a supervisory program, Congress created a

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the right to *exclude* strangers, or for that matter friends, but especially the Government.” (alteration in original); *In re Etter*, 756 F.2d 852, 859 (Fed. Cir. 1985) (“The essence of all property is the right to exclude . . .”).

32. S. REP. NO. 99-11, at 2 (1985).

33. *Id.*

34. H.R. REP. NO. 99-253, pt. 1, at 54–55 (1985).

35. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

36. *Id.* at 1645.

37. *Id.* at 1647–48.

framework for imposing strict liability for past and present hazardous substance releases.<sup>38</sup> The ultimate goal of CERCLA was to promote expedient and efficient remediation of polluted sites.<sup>39</sup> Accordingly, the statute provided EPA with a range of options to motivate response efforts. For instance, EPA may issue an administrative order to direct a responsible party to abate the danger of a hazardous substance release,<sup>40</sup> obtain injunctive relief to order the abatement, or undertake the abatement itself using Superfund resources and then sue the responsible party for reimbursement.<sup>41</sup> The federal government is also permitted to delegate cleanup decisions to the states or to impose state standards for remedial procedures when “applicable” or “relevant and appropriate.”<sup>42</sup> But federal to state delegation rarely happened in the early years of CERCLA enforcement,<sup>43</sup> perhaps because of the all-encompassing nature of the statute’s liability scheme.

There are four categories of PRPs contemplated under CERCLA: (1) current owners and operators of sites responsible for the release of hazardous waste; (2) former owners or operators of the sites at the time waste disposal occurred; (3) any person who arranged for the disposal of the waste; and (4) any person who accepted the hazardous waste for transport.<sup>44</sup> Essentially, any party who participated in the process of creating or disposing of hazardous waste is on the hook for the cost of cleanup, whatever that may be.<sup>45</sup> Furthermore, current owner liability exists regardless of whether the owner had anything to do with the original pollution; a person who purchases property contaminated sixty years ago is still potentially liable today for that hazardous waste.<sup>46</sup>

Liability for hazardous waste pollution under CERCLA is not only strict but also, in some cases, joint and several. Unless the harm is divisible, liability for cost recovery actions brought under § 107(a) is joint and several,<sup>47</sup> while

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38. Percival, *supra* note 15, at 1163.

39. Jasmine M. Starr, Note, *Making Good Neighbors: Liability for Passive Migration of Hazardous Waste Under CERCLA*, 31 *ECOLOGY L.Q.* 435, 439 (2004).

40. CERCLA § 9606 (2018).

41. *Id.* § 9607.

42. *Id.* § 9621(d).

43. Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 *MD. L. REV.* 1516, 1534–35 (1995).

44. CERCLA § 9607(a).

45. See Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy over CERCLA Claims Brought by Potentially Responsible Parties*, 21 *HARV. ENVTL. L. REV.* 83, 90–92 (1997) (noting two types of actions for enforcing liability on PRPs: (1) cost recovery claims of a non-PRP cleanup agent against a PRP under § 107(a) of CERCLA and (2) contribution claims of one PRP against another under § 113(f)). Some courts have further delineated the allocation of liability in various claims of PRPs brought against other PRPs. See *id.* at 106–13.

46. See Starr, *supra* note 39, at 440.

47. See *United States v. Monsanto Co.*, 858 F.2d 160, 171–72 (4th Cir. 1988).

liability for contribution actions brought under § 113(f) is several only.<sup>48</sup> In 1983, the United States sought reimbursement from twenty-four defendants for the costs of remedial action at the disposal site of the Chem-Dyne treatment facility.<sup>49</sup> The defendants, who were collectively involved in different stages of the generation and transport of hazardous waste, argued that they should not be held jointly and severally liable for cleanup costs.<sup>50</sup> The court held, instead, that the deletion of references to joint and several liability in the final version of Superfund was not intended to reject joint and several liability but “to have the scope of liability determined under common law principles, where a court . . . will assess the propriety of applying joint and several liability on an individual basis.”<sup>51</sup>

In 1986, CERCLA was held to be retroactive in its imposition of liability.<sup>52</sup> In *United States v. Northeastern Pharmaceutical Co.*, the government brought an action, under RCRA, against a pharmaceutical company for illegally disposing of drums containing hazardous waste.<sup>53</sup> The disposal took place in 1979 and the government’s action was originally commenced in August of 1980.<sup>54</sup> However, in August of 1982, the government amended its complaint to allege retroactive liability under CERCLA, which had been enacted after the commencement of the suit.<sup>55</sup> Despite the defendant’s contention that its conduct was neither negligent nor unlawful at the time it occurred in 1979, and the fact that nothing in the statute expressly provided for retroactivity, the court found that CERCLA liability applied to pre-enactment conduct.<sup>56</sup>

In the late 1980s and early 1990s, CERCLA’s reputation was solidified as a coercive imposition of inescapable liability on an enormous pool of PRPs. In 1986, the U.S. Court of Appeals for the Eighth Circuit found that suits for recovery of costs of removal and remedial actions were regarded as actions for restitution and, consequently, no right to jury trial attached to these proceedings.<sup>57</sup> District courts subsequently split as to whether a right to jury trial existed for contribution claims under CERCLA § 113(f).<sup>58</sup> The only appellate court that addressed the issue held that a § 113(f) claim was essentially equitable and no right to jury trial attached.<sup>59</sup>

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48. Hernandez, *supra* note 45, at 84.

49. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

50. *Id.* at 804.

51. *Id.* at 808.

52. *United States v. Ne. Pharm. Co.*, 810 F.2d 726 (8th Cir. 1986).

53. *Id.* at 729–30.

54. *Id.* at 730.

55. *Id.*

56. *Id.* at 732–33.

57. *Id.* at 729.

58. *Compare* *Am. Cyanamid Co. v. King Indus., Inc.*, 814 F. Supp. 209, 213–15 (D.R.I. 1993) (finding no right to jury trial), *with* *United States v. Shaner*, No. 85–1372, 1992 WL 154618 (E.D. Pa. June 15, 1992) (finding a right to jury trial).

59. *Hatco Corp. v. W.R. Grace & Co. Conn.*, 59 F.3d 400, 414 (3d Cir. 1995).



*B. Conditional Innocence Under the Small Business Liability Relief  
and Brownfields Revitalization Act*

At the end of the twentieth century, environmental legal scholars increased their outcry against CERCLA for unfairly penalizing anyone who owned or had ever owned land contaminated by hazardous waste disposal sites.<sup>60</sup> The result was that many of these sites, known as “brownfields,” were largely neglected by the private developers who could most afford to purchase and rehabilitate them.<sup>61</sup> In 2002, Congress addressed the rising concern that the far reach of CERCLA’s liability scheme had set back the original legislative purpose of cleaning up and restoring hazardous waste sites across the United States by enacting the Small Business Liability Relief and Brownfields Revitalization Act (“Small Business Liability Protection Act”).<sup>62</sup> The Small Business Liability Protection Act instituted a variety of exemptions to Superfund accountability.<sup>63</sup>

Although SARA had established an innocent purchaser defense, the defense did not promote investment in brownfields because it only applied to owners who had neither actual nor constructive knowledge of the polluted nature of the property at the time of purchase.<sup>64</sup> The Small Business Liability

60. See *Reichhold Chems., Inc. v. Textron, Inc.*, 888 F. Supp. 1116, 1129 (N.D. Fla. 1995) (“While it may seem inequitable, the mere migration of contaminants from adjacent land constitutes disposal for the purposes of CERCLA, and passive downstream landowners are liable for the cleanup costs resulting from their neighbors’ activities.”); Colin Crawford, *Medical Monitoring and the Future of CERCLA: Reinvigorating the Superfund Law’s Consequentialist Purpose*, 28 ARIZ. ST. L. J. 839, 840 (1996) (“People with different political philosophies and divergent views on the appropriate role of environmental protection nonetheless often agree that various CERCLA provisions, and in particular its imposition of joint and several liability, are an unjust practice.”); Melody A. Hamel, Comment, *The 1970 Pollution Exclusion in Comprehensive General Liability Policies: Reasons for Interpretations in Favor of Coverage in 1996 and Beyond*, 34 DUQ. L. REV. 1083, 1122 (1996) (“The strict liability scheme of CERCLA is often criticized as flawed and unfair.”).

61. David A. Dana, *State Brownfields Programs As Laboratories of Democracy?*, 14 N.Y.U. ENVTL. L. J. 86, 92 n.19 (2005) (noting that voluntary brownfields programs existed “in the shadow of – and substantially because of the threat of – coercive regulation such as CERCLA”); Larry Schnapf, *Sweeping CERCLA Amendments Will Affect Brownfields, Prospective Purchasers*, 33 ENVTL. REP. 264, 266 (2002) (“The CERCLA definition of a ‘facility’ includes any area where hazardous substances have come to be located. As a result, property owners have been concerned that they could be held liable for contamination that has migrated onto their property . . . . This potential liability has discouraged development of brownfield sites.”).

62. Pub. L. No. 107–118, 115 Stat. 2356 (2002) [hereinafter *Small Business Liability Protection Act*].

63. See *id.*

64. See Starr, *supra* note 39, at 442–43.

Protection Act created new defenses for brownfield redevelopers and contiguous property owners<sup>65</sup> to “provide incentives for investors to purchase and redevelop . . . usually vacant or mothballed parcels of industrial or commercial property in economically depressed downtown urban areas that sit idle out of fear by potential investors that the property is possibly contaminated.”<sup>66</sup> Section 221 of the Small Business Liability Protection Act amended § 107 of CERCLA by exempting landowners whose property is contiguous to and contaminated by a release of a hazardous substance from the property of another from PRP status.<sup>67</sup>

The contiguous property owner defense, however, requires that the contiguous landowner (1) not have caused the contamination; (2) not be affiliated with the contaminating party in any type of agency capacity; (3) exercise due diligence at the time of purchase and be unaware of contamination; and (4) take reasonable steps to stop any continuing release and prevent future release.<sup>68</sup> Nestled in the middle of these expected and unremarkable qualifications, however, is a requirement that the landowner cooperate with the response actions ordered by the government. Section 107(q)(1)(A)(iv) conditions the availability of the defense on whether

the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility).<sup>69</sup>

Shortly after CERCLA was amended to include the contiguous property owner defense, commentators speculated that the new language actually expanded the liability of adjacent landowners.<sup>70</sup> Instead of relying on what appeared to be the common interpretation of the statute – that an otherwise innocent landowner could not be held accountable for his neighbor’s pollution – the Small Business Liability Protection Act planted a legal minefield through which a landowner must successfully navigate (or, alternatively, fail) to qualify for the affirmative defense. Whereas a PRP attempting to install monitoring wells on a neighbor’s contaminated contiguous property had previously been

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65. See Small Business Liability Protection Act § 221.

66. *AMCAL Multi-Hous., Inc. v. Pac. Clay Prods.*, 457 F. Supp. 2d 1016, 1028 (C.D. Cal. 2006).

67. CERCLA § 107(q)(1)(A).

68. *Id.* § 107(q)(1)(A)(i)–(iii), (v)–(viii). Compliance with information requests and reporting requirements is also a condition of the defense. *Id.*

69. *Id.* § 107(q)(1)(A)(iv).

70. See Schnapf, *supra* note 61, at 267 (“It has been a rare instance when a property owner whose property has been impacted by a plume migrating from an off-site source has been held liable under CERCLA.”).

required to pay for such access as part of its good faith requirements under an administrative or consent order, the amended language placed the burden on contiguous landowners to exercise “appropriate care” in preserving their defenses – a phrase many believed coerced a grant of access.<sup>71</sup> This necessary grant of access to the contiguous landowner’s property to avoid liability for hazardous waste pollution immediately aroused Fifth Amendment concerns.<sup>72</sup> These concerns are justified based on the applicable law and policy of cases at the intersection of Fifth Amendment takings and environmental regulatory jurisprudence.

## II. A BRAND NEW GAME: ACCESSING AN INNOCENT OWNER’S LAND

### *A. Carefully Constructed Consent*

Sections 104(b) and (e) of CERCLA are designed to enable EPA easy access to a PRP’s property for purposes of both gathering information required to assess response actions and carrying out such actions.<sup>73</sup> PRPs are required to provide EPA with requested information and to permit EPA to enter contaminated sites, inspect them, and to take samples of soil, water, and other things.<sup>74</sup> In the event a PRP denies required access, EPA may either issue an administrative order to prohibit interference with entry or go to court to obtain compliance with its request for entry.<sup>75</sup> Should the court determine that non-compliance with a request for access has been “unreasonable,” it may assess a civil penalty of up to \$25,000 for each day that access was denied to the government.<sup>76</sup> In short, CERCLA compels access to the contaminated properties of PRPs to conduct response and remedial actions and to prevent the release of hazardous waste.

Contiguous property owners who do not fall under PRP status, and whose land does not contain the source (or “plume”) of contamination, cannot challenge a remediation order in federal court once access to land is granted and a

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71. *Id.*

72. *See id.*

Presumably, a contiguous owner will have to allow access to PRPs to conduct response actions in order to be deemed to have exercised “appropriate care” and no longer be able to demand compensation as a condition for access to the property. It is quite possible that a court may conclude that a contiguous property owner who denies access to PRPs to conduct response actions or refuses to allow institutional controls to be placed on property because of inadequate compensation may have not exercised “appropriate care” and be liable under CERCLA.

*Id.*

73. *See* CERCLA § 9604(b), (e) (2018).

74. *Id.* § 9604(e).

75. *Id.* § 9604(e)(5).

76. *Id.* § 9604(e)(5)(B)(ii).

remedial plan of action is issued.<sup>77</sup> Historically, courts have held that § 104(e) authorizes entry on adjacent properties in order to reach a contaminated site and to carry out an approved response activity.<sup>78</sup> However, if the purpose of the access is to determine whether remedial action is warranted at all, and no emergency circumstance allows for response agents to enter,<sup>79</sup> the authority of EPA to access property hinges on the consent of the landowner.<sup>80</sup>

CERCLA requires EPA to request the consent of landowners before pursuing other options to access property.<sup>81</sup> Although EPA retains the more time-consuming option of issuing a unilateral demand for access if it is reasonable to believe that the contiguous property poses a threat of rerelease of the hazardous substance into the environment,<sup>82</sup> the reasonableness of such demands may then be challenged in court.<sup>83</sup> EPA guidance documents specifically explain the importance of consent as follows:

Consent is the preferred means of gaining access for all activities because it is consistent with EPA policy of seeking voluntary cooperation from responsible parties and the public . . . .

. . .

If practicable under the circumstances, consent to entry should be memorialized in writing . . . . Although oral consents are routinely approved by the courts, a signed consent form protects [EPA] by serving as a permanent record of a transaction which may be raised as a defense or in a claim for damages many years later. If a site-owner is unwilling to sign a consent form but nonetheless orally agrees to allow access,

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77. *United States v. Tarkowski*, 248 F.3d 596, 601 (7th Cir. 2001).

78. *United States v. Charles George Trucking Co.*, 682 F. Supp. 1260, 1273 (D. Mass. 1988).

79. *See* CERCLA § 9606(a); *B.F. Goodrich Co. v. Murtha*, 697 F. Supp. 89, 95–96 (D. Conn. 1988) (discussing the “imminent and substantial endangerment” standard).

80. *Tarkowski*, 248 F.3d at 601 (“[D]istinguishing between cases in which the agency either is rightfully on the land to perform remedial measures or does not have to be on the land because the order is directed to the landowner . . . and cases in which the agency must get access to the land to execute remediation.”). The court denied the request based on “very limited evidence of an environmental hazard that . . . [EPA] has put forward to justify its request for an access order,” because if the “ground for going on the property is to undertake remedial measures, the court cannot perform its duty of determining whether the agency’s proposed action is arbitrary or capricious without considering whether the measures proposed are a reasonable basis for authorizing what would otherwise be a trespass.” *Id.* at 601–02.

81. *Reeves Bros. v. EPA*, 956 F. Supp. 665, 673 (W.D. Va. 1995) (citing CERCLA § 9604(e)(5)(A)).

82. *See* CERCLA § 9604(e)(3)(C).

83. *Tarkowski*, 248 F.3d at 601 (“[W]hen an access order is sought, judicial jurisdiction clicks in; the arbitrary and capricious standard clicks in”).

EPA should document this oral consent by a follow-up letter confirming the consent.<sup>84</sup>

For the vast majority of cases involving preliminary investigations of properties, EPA relies on simple, one-page consent forms signed by landowners.<sup>85</sup> These documents include both general grants of property access to EPA personnel for the purpose of taking samples and drilling boreholes for soil and groundwater collection, as well as catch-all provisions for “other inquiry actions at the property as may be necessary to determine nature, extent and potential threat to human health and the environment.”<sup>86</sup> EPA guidance documents reject attempts to negotiate the terminology and conditions of entry because of the risk of imposing compensation obligations on EPA.<sup>87</sup> If consent is denied, EPA personnel are instructed to “explain EPA’s statutory access authority, the grounds upon which this authority may be exercised, and that the authority may be enforced in court.”<sup>88</sup>

In the event that EPA agents are successful in persuading a landowner to sign a consent form (a high likelihood if the discussion includes the loss of the contiguous property owner defense and potential imposition of liability for thousands of dollars in cleanup costs or fees for denial of access), the form will reflect that the owner “g[a]ve this written permission voluntarily with the full knowledge of [his or her] right to refuse and without threats or promises of any kind.”<sup>89</sup> Two parts of this statement are likely to be untrue for contiguous property owners. First, while a property owner may have had “full knowledge” of the right to not sign the form, it is much less likely that he or she knowingly signed away the ability to bring a successful claim for compensation against

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84. Memorandum from Thomas L. Adams, Jr., Assistant Admin’r EPA, to RPA Regional Admin’rs 4, 6 (June 5, 1987), <https://www.epa.gov/sites/production/files/2013-09/documents/cont-access-mem.pdf> [hereinafter OSWER Directive].

85. See e.g., EPA, CONSENT FOR ACCESS TO PROPERTY, <https://www.epa.gov/sites/production/files/2015-08/documents/tba-access-form.pdf> (last visited Mar. 10, 2019).

86. *Id.*

87. OSWER Directive, *supra* note 84, at 7.

Persons on whose property EPA wishes to enter often attempt to place conditions upon entry. EPA personnel should not agree to conditions which restrict or impede the manner or extent of an inspection or response action, impose indemnity or compensatory obligations on EPA, or operate as a release of liability. The imposition of conditions of this nature on entry should be treated as denial of consent and a warrant or order should be obtained.

*Id.*

88. *Id.* at 6.

89. CONSENT FOR ACCESS TO PROPERTY, *supra* note 85.

the government for any damage to, or prolonged use of, the property.<sup>90</sup> Second, if the property owner did sign the consent form with such knowledge, it is highly unlikely that the permission was truly given voluntarily.<sup>91</sup>

### B. Why Waiver Won't Work

The policy behind waiver of constitutional rights is essential to understanding whether an innocent landowner has been coerced into granting access that destroys his or her right to bring a compensation claim against the government. For several reasons, EPA's consent to access forms signed by property owners cannot be construed as waivers of a right to later sue the government for, specifically, the right to demand just compensation from the government if private property is taken for public use.<sup>92</sup>

Although parties may validly contract to waive due process rights in both civil and criminal contexts, an agreement to surrender a fundamental right is never presumed.<sup>93</sup> In both civil and criminal matters, courts must indulge "every reasonable presumption against waiver" of a constitutional right.<sup>94</sup> Accordingly, courts must be able to positively determine the presence of language surrendering a known right<sup>95</sup> and should avoid finding an implicit waiver of any constitutional privilege.<sup>96</sup>

In *Cienega Gardens v. United States*, the U.S. Court of Appeals for the Federal Circuit addressed whether a waiver of a takings claim was implicit in a use agreement entered into between the government and private parties pursuant to a housing project.<sup>97</sup> The government argued that the private parties waived their right to bring a takings claim by acknowledging the receipt of valuable and sufficient consideration as part of an alleged release agreement.<sup>98</sup>

90. See Roger D. Schwenke, *Regulatory Access to Contaminated Sites: Some New Twists to an Old Tale*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 749, 750 (2002) ("Many landowners also probably believe that when an agency demanding access goes too far, they are protected by their right to assert a claim of there being a 'taking' of their property. However . . . that right and opportunity is very limited.").

91. *Id.* at 750 n.4 ("[T]here is very little real voluntary 'consent' associated with many such documents received by EPA.").

92. U.S. CONST. amend. V.

93. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 186 (1972).

94. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

95. *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (finding no waiver when "the contractual language relied upon does not, on its face, even amount to a waiver"). "[W]aiver of constitutional rights in any context must, at the very least, be clear." *Id.* (emphasis added).

96. *Krieg v. Seybold*, 481 F.3d 512, 517 (7th Cir. 2007) ("In any event, waiver of a constitutional right must be clear and unmistakable."); *Ricker v. United States*, 417 F. Supp. 133, 139–40 (D. Me. 1976) ("To be effective, waiver of a constitutional right must be voluntary, knowing, and intelligently made.").

97. 503 F.3d 1266, 1273–74 (Fed. Cir. 2007).

98. *Cienega Gardens v. United States*, 67 Fed. Cl. 434, 463–64 (2005), *vacated by* 503 F.3d 1266 (Fed. Cir. 2007).

The court rejected the government's argument and refused to find that there was an implicit waiver of the private parties' right to bring takings claims contained in the use agreements.<sup>99</sup>

Similarly, other circuit courts have held that, to be effective, a waiver must purposefully release a right one knows that he or she possesses and that it is highly unlikely that a valid release can be inferred absent any express manifestation.<sup>100</sup> An effective waiver requires actual and complete knowledge of the nature of the right and also of the consequences of surrender.<sup>101</sup> Therefore, a valid waiver cannot occur if the party does not understand that consenting to government access will bar any claim for compensation if remedial measures destroy the value of the property.

Furthermore, any ambiguity concerning a waiver of a constitutional right is strictly construed in favor of preserving the right.<sup>102</sup> Contractual waivers are assessed on a number of factors, including whether (1) unequal bargaining power exists between the parties; (2) both parties appreciated the importance and full impact of the waiver; and (3) the party waiving its right received consideration in return.<sup>103</sup> Courts will also examine the clarity and precision of the contractual provision in determining whether the waiver was knowingly

99. *Cienega Gardens*, 503 F.3d at 1273.

100. *See, e.g.*, *Hatfield v. Scott*, 306 F.3d 223, 229 (5th Cir. 2002) ("Constructive consent to a waiver is not generally associated with the surrender of constitutional rights."); *Lake James Cmty. Volunteer Fire Dep't v. Burke Cty.*, 149 F.3d 277 (4th Cir. 1998). The Fourth Circuit qualified valid contractual waivers of constitutional rights as follows:

The contractual waiver of a constitutional right must be a knowing waiver, must be voluntarily given, and must not undermine the relevant public interest in order to be enforceable. Under these principles, courts have routinely enforced voluntary agreements with the government in which citizens have, for example, given up the right to sue through releases and covenants not to sue the government.

*Id.* at 280.

101. *Hatfield*, 306 F.3d at 229–30 (noting the holder of the right must possess "actual knowledge of the existence of the right or privilege, full understanding of its meaning, and clear comprehension of the consequence of the waiver"); *see also* *Cullen v. Fliegner*, 18 F.3d 96, 105 (2d Cir. 1994) (finding the plaintiff did not waive the right to present his claims to an Article III court unless he "possessed an awareness" that he was waiving that right); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988) (waiver of a constitutional right must be made "with full understanding of the consequences" of the waiver).

102. *Urban Developers LLC v. City of Jackson*, 468 F.3d 281, 306 (5th Cir. 2006); *see also* *Gete v. INS*, 121 F.3d 1285, 1293 (9th Cir. 1997) (stating that principles governing waiver of constitutional rights apply equally in criminal and civil contexts).

103. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, at 187–88 (1972).

made.<sup>104</sup> If a party to the document is not expressly made aware of the significance of a waiver provision in an agreement, the waiver is unlikely to be considered valid.<sup>105</sup>

Combining these factors with the government's burden to prove the propriety of seeking the waiver makes it highly unlikely that a typical EPA consent to access form could be a valid and knowing waiver of a constitutional right.<sup>106</sup> Unfortunately, safeguards against forfeiture of a constitutional right only seem to apply if the agreement is explicitly labeled a "waiver," not if it merely *functions* as one. Therefore, while it may be very difficult for a landowner to waive the right to bring a takings claim based on judicial safeguards, it is fairly easy to accomplish the same result through consent. Most consent to access agreements have been interpreted as providing the government with an affirmative defense rather than as waivers of the property owner's right to sue.<sup>107</sup> Consequently, while a plaintiff may file suit notwithstanding having signed a consent agreement, the government can use the agreement as a bar against recovery.<sup>108</sup> Even though an executed consent to access form will not constitute a knowing relinquishment of the landowner's right to sue the government, this agreement can operate as the functional equivalent of a waiver.

### III. COERCION OR CONTRACT: LOSING THE INVERSE CONDEMNATION CLAIM

#### *A. The Danger of Consent*

What happens if the government's remedial action has destroyed the use and enjoyment of a contiguous property owner's land? If the government has "taken" a landowner's private property for public use, the remedy is to seek

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104. *See, e.g., Weaver v. N.Y. City Emps.' Retirement Sys.*, 717 F. Supp. 1039, 1045 (S.D.N.Y. 1989) (finding a violation of plaintiff's due process rights because a notice of termination of benefits was "so confusing that a reasonable lay person would not have known that he had an opportunity in fact to contest defendants' finding").

105. *See, e.g., Ricker v. United States*, 417 F. Supp. 133, 139–40 (D. Me. 1976) (finding a violation of property owners' due process rights as (1) there was no waiver because a signed mortgage did no more than state the government's right to foreclose on the property and (2) even if the language might be construed as a waiver, the government made no showing that the owners were actually made aware of the significance of the fine print relied on as a waiver of constitutional rights).

106. *Emmert Indus. Corp. v. City of Milwaukie*, 450 F. Supp. 2d 1164, 1178–79 (D. Or. July 7, 2006) ("[T]he government must demonstrate the propriety of seeking a waiver of a constitutional right in light of both its legitimate interest in a waiver, if any, and the benefit to be conferred upon the adverse party.").

107. *See, e.g., Scogin v. United States*, 33 Fed. Cl. 285, 291 (1995); *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 844 (Tex. 2010).

108. *See, e.g., Kirby Lake Dev., Ltd.*, 320 S.W.3d at 844.



just compensation under the Fifth Amendment Takings Clause<sup>109</sup> or the Tucker Act.<sup>110</sup> The Takings Clause is “designed to bar [g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>111</sup> It is not necessary that the government take physical possession of the property for a taking to be found, only that the owner lose most of his or her interest in, or enjoyment of, the property.<sup>112</sup> When the government acts in its eminent domain capacity, the implication is that it has appropriated the private property of an owner for some ulterior purpose without the owner’s consent.<sup>113</sup>

The same is true for inverse condemnation claims in which a landowner seeks compensation for the government’s use of his or her private property before any official condemnation proceedings have been instituted.<sup>114</sup> To avoid potential takings liability, government agencies often try to postpone condemnation by seeking the consent of the landowner to access the property.<sup>115</sup> The landowner’s consent (or lack thereof) to the government’s actions is crucial to the success of the inverse condemnation suit.<sup>116</sup>

Most disputes involving the interplay between landowner consent and inverse condemnation claims have been resolved in state courts. Several state court opinions have held, pursuant to both federal and state takings clauses, that lack of consent is a prerequisite for establishing a successful inverse condemnation or takings claim.<sup>117</sup> In *City of Cibola v. Koehler*, landowners in

109. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

110. 28 U.S.C. § 1491(a)(2) (2018) (providing jurisdiction in the Court of Federal Claims for takings actions against the United States).

111. *Penn Ctr. Transp. Co. v. New York*, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

112. *Aris Gloves, Inc. v. United States*, 420 F.2d 1386, 1391 (Fed. Cl. Ct. 1970). The specifics of what types of governmental actions constitute physical and regulatory takings are beyond the scope of this Article. For a thorough breakdown of the current status of typical EPA response actions and what amounts to a government taking, see *Hendler v. United States*, 952 F.2d 1364 (1991).

113. *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 533 (W.D.N.Y. 2002); *see also Warner/Elektra/Atl. Corp. v. Cty. Of DuPage*, 991 F.2d 1280, 1284 (7th Cir. 1993) (“Laws authorizing condemnation entitle a governmental entity . . . to take private property for its own use *without the owner’s consent*.” (emphasis added)).

114. *United States v. Clarke*, 445 U.S. 253, 257 (1980).

115. *See OSWER Directive*, *supra* note 84, at 4.

116. *See* 8 NICHOLS ON EMINENT DOMAIN § G14E.01 at n.6 (Matthew Bender, 3rd. ed.) (“Implicit in an inverse condemnation claim is the notion that the government action at issue was without the landowner’s consent.”).

117. *See, e.g., Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 844 (Tex. 2010) (“A person who consents to the governmental action cannot validly assert a takings claim.”); *Krambeck v. City of Gretna*, 254 N.W.2d 691, 694 (Neb. 1977) (“Eminent domain is defined generally as the power of the nation or a state, or authorized public agency, to take or to authorize the taking of private property for a

Texas brought a takings claim against the city for construction of a drainage channel across their property.<sup>118</sup> The city claimed that a drainage easement agreement signed by the landowners had “conclusively negate[d] the Koehlers’ takings claim as a matter of law because . . . the easement conclusively establishe[d] that the Koehlers consented to the easement . . . .”<sup>119</sup> The court allowed the Koehlers to present their claim *only* because they had challenged the validity of the easement agreement itself and prevented the city from conclusively establishing consent.<sup>120</sup> The court relied on article 1, § 17 of the Texas Constitution<sup>121</sup> in noting that “if the [d]rainage [e]asement were not *void*, [the Koehlers] would likely be unable to establish absence of consent . . . .”<sup>122</sup>

In *Yamagiwa v. City of Half Moon Bay*, a federal district court followed Supreme Court of California precedent in recognizing that consent is a defense to an inverse condemnation suit but the scope of consent is dispositive of an inverse condemnation suit.<sup>123</sup> The consent defense failed in *Yamagiwa* because the city was unable to prove that the plaintiff consented to the exact use the city made of her property.<sup>124</sup> The court held that while consent functions as a defense to an inverse condemnation claim in much the same way as a trespass or nuisance action, “the applicability of the defense turns on the consent.”<sup>125</sup> The court accordingly based its determination of whether a taking had occurred on the scope of the consent given by the plaintiff – if the government had not acted outside of that scope, the plaintiff would have no right to compensation.<sup>126</sup>

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public use without the owner’s consent . . . .”); *Ponderosa Domestic Water Improvement Dist. v. Van Wyck*, No. 1 CA-SA 15-0251, 2015 WL 6696816, at \*2 (Ariz. Ct. App. Oct. 29, 2015) (“Any waivers or consents the District has obtained may constitute ‘affirmative defenses’ to inverse condemnation claims by [land]owners relating to the taking.”); *V LX Props. v. S. States Utils., Inc.*, 792 So.2d 504, 510 (Fla. Dist. Ct. App. 2001) (finding no taking of pond water for storage when the owner consented to the use); *Rahm v. Mo. Pub. Serv. Co.*, 676 S.W.2d 906, 908 (Mo. Ct. App. 1984) (finding prior property owners had consented to the challenged land use and “any entitlement for damages for trespass or inverse condemnation ceased”).

118. No. 04-11-00209-CV, 2011 WL 5869683, at \*1 (Tex. Ct. App. Nov. 23, 2011).

119. *Id.* at \*5.

120. *Id.* at \*7.

121. TEX. CONST. art. 1, § 17 (“No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . .”). Other state courts have relied on similar language in takings clauses of their constitutions. *See, e.g.*, *Huard v. Town of Pelham*, 986 A.2d 460, 466 (N.H. 2009) (“Under Part 1, Article 12 of the New Hampshire Constitution, ‘[n]o part of a man’s property shall be taken from him, or applied to public uses, without his consent.’”).

122. *Koehler*, 2011 WL 5869683, at \*5.

123. 523 F. Supp. 2d 1036, 1104 (N.D. Cal. 2007).

124. *Id.*

125. *Id.* at 1104-05.

126. *Id.*

In *McElmurray v. Augusta-Richmond County*, the Court of Appeals of Georgia relied on both state<sup>127</sup> and federal<sup>128</sup> precedent to hold that property owners who consent to government action cannot obtain an inverse condemnation remedy.<sup>129</sup> The federal precedent, *Janowsky v. United States*, held that, for purposes of the Fifth Amendment, a taking never occurs “when the property owner agrees to allow his property to be used by the government.”<sup>130</sup> The judgment in *Janowsky* was vacated in 1998 by the Federal Circuit because the court found that there was evidence that the “consent” at issue had been coerced.<sup>131</sup> The court in *McElmurray* considered this case “reversed in part on other grounds” and still relied on the original *Janowsky* analysis of consent when addressing the takings claim at issue.<sup>132</sup>

Other than the language in *Janowsky*, few federal cases have expressly addressed the role of consent in an inverse condemnation claim. Two opinions from the late 1990s, however, offer conflicting viewpoints on the issue. In *Scogin v. United States*, a landowner operated a wood treatment facility on fifty-three acres of land and 4,000 feet of navigable waterway in the Bayou Bonfouca in Slidell, Louisiana.<sup>133</sup> After the Bayou Bonfouca site was listed on the Superfund National Priorities List (“NPL”) in 1983, EPA asked for access to Scogin’s contiguous, uncontaminated land.<sup>134</sup> Eventually, the plaintiff signed an agreement allowing EPA access to investigate and monitor groundwater readings for two months but would not extend the grant any further.<sup>135</sup>

After a unilateral order compelled access to the property for a length of time beyond the two months necessary to carry out the cleanup remedy, Scogin

127. 618 S.E.2d 59, 63 (Ga. Ct. App. 2005). In *Barwick v. Roberts*, the Supreme Court of Georgia held that a plaintiff’s express consent to the use of his property defeated his claim under the Georgia constitution takings provision; “Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid.” 16 S.E.2d 867, 870 (Ga. 1941). Even though this provision does not expressly state that consent is a part of analysis, the court concluded it was so. *Id.*

128. *McElmurray*, 618 S.E.2d at 63.

129. *Id.* at 63–64.

130. 23 Cl. Ct. 706, 716–17 (1991), *rev’d in part, vacated in part* 133 F.3d 888 (Fed. Cir. 1998). Timothy Janowsky agreed to assist the FBI in an undercover investigation that involved the use of Janowsky’s vending company as a front for the operation. *Id.* at 707. When the government refused to buy the vending company after the conclusion of the project, despite having allegedly promised Janowsky that it would, Janowsky brought an inverse condemnation suit. *Id.* The court held that property owners who voluntarily deliver property to the government and later seek compensation may have a remedy through contract principles but cannot maintain an inverse condemnation claim. *Id.* at 711–12.

131. *Janowsky v. United States*, 133 F.3d 888, 892 (Fed. Cir. 1998).

132. *McElmurray*, 618 S.E.2d at 62 n.2.

133. 33 Fed. Cl. 285, 286 (1995).

134. *Id.*

135. *Id.* at 286–87.

negotiated a lease with a contractor for EPA at the site.<sup>136</sup> Later, when Scogin attempted to bring suit alleging a taking of his land, the court held that the lease agreement “appear[ed] to constitute a consent to the governmental activity on his property” and, consequently, meant that any damages recovered would be reduced by the amount of compensation provided pursuant to the lease.<sup>137</sup> The court, in dicta, stated that an owner’s grant of permission to another to access his property means “the ‘right to exclude’ has been relinquished and not taken.”<sup>138</sup> *Scogin* has been subsequently interpreted to mean that a landowner’s consent to government access and activity on property defeats a later claim for compensation.<sup>139</sup>

In 1997, the U.S. District Court for the Northern District of New York reached the opposite conclusion. In *Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management Authority*, Albert and Judene Juliano brought an inverse condemnation claim against a New York Public Authority (“MOSA”).<sup>140</sup> MOSA had been given the power to condemn real property within its area of operation for the establishment of a solid waste facility.<sup>141</sup> The plaintiffs signed an agreement with MOSA in which they were compensated \$1,000 for a grant of access for entry and testing of their premises.<sup>142</sup> MOSA subsequently installed monitoring wells on the property and designated it as a potential site for a proposed sanitary landfill.<sup>143</sup> The plaintiffs eventually brought suit for both a regulatory taking of their property through MOSA’s designation and a physical taking through the installation of the monitoring wells.<sup>144</sup> The court dismissed the regulatory taking claim as unripe<sup>145</sup> but held that the plaintiffs’ land had been taken through the installation of the monitoring wells.<sup>146</sup>

MOSA argued that the signed testing agreement evidenced valid consent, which limited any subsequent damage claims.<sup>147</sup> The court noted that, although the plaintiffs’ decision to enter into the testing agreement appeared facially voluntary, the fact that New York eminent domain law “deprived [p]laintiffs of the power to refuse” access negated even the possibility of consent.<sup>148</sup> The plaintiffs’ argument was that they had been coerced into signing

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136. *Id.* at 288.

137. *Id.* at 293.

138. *Id.* at 292.

139. See Schwenke, *supra* note 90, at 791; see also *Textainer Equip. Mgmt. v. United States*, 99 Fed. Cl. 211, 218 (2011).

140. 983 F. Supp. 319, 321–22 (N.D.N.Y. 1997).

141. *Id.*

142. *Id.* at 322.

143. *Id.* at 323.

144. *Id.*

145. *Id.* at 324.

146. *Id.* at 328.

147. *Id.* at 329.

148. *Id.*

the testing agreement because they would have been compelled to comply with the request regardless.<sup>149</sup> The court agreed:

A material distinction exists between a consent form freely entered into and an agreement entered into that contemplates activities on [p]laintiffs' property which, but for MOSA's statutory authority to force entry, [p]laintiffs would not have allowed . . . . In the present case[,] New York [e]minent [d]omain [l]aw section 404 authorized a mandatory physical occupation of [p]laintiffs' property. Accordingly, sufficient evidence exists to raise a genuine issue of material fact as to whether [g]overnment compulsion was present, thus obviating [p]laintiffs' consent.<sup>150</sup>

Several scholars have advocated for this distinction between consent granted based on knowledge of the government's ultimate right to compel cooperation and other forms of consent "freely entered into."<sup>151</sup> Unfortunately, however, while *Juliano* clearly calls into question the validity of such consent, most courts have adopted the rationale in *Scogin* – holding that even the most technical and nominal indication of consent defeats an otherwise meritorious inverse condemnation claim.<sup>152</sup> The distinction in *Juliano* has been largely rejected in lieu of holding that a grant of access agreement is a valid contract and not coercive merely because the United States is a party.<sup>153</sup>

### B. How Sovereign Did It Seem?

Beyond the scope of explicit inverse condemnation claims, federal courts have considered whether parties can voluntarily consent to similar agreements with the government. A line of federal case law indicates that the government is generally not liable for a taking when it acts in a proprietary capacity as a

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149. *Id.* at 322 n.1.

150. *Id.* at 329.

151. *See, e.g.*, Schwenke, *supra* note 90, at 750 n.4.

152. *See, e.g.*, BMR Gold Corp. v. United States, 41 Fed. Cl. 277, 283 (1998); *Textainer Equip. Mgmt. v. United States*, 99 Fed. Cl. 211, 218 (2011).

153. *Brace v. United States*, 72 Fed. Cl. 337, 359–60 (2006).

Even were judicial takings cognizable, it is hard to fathom how a consent decree could meet the requirements for a taking, among which is the presence of a compelled acquiescence. Such decrees are hybrids – part order, part contract – and obviously reflect the agreement of the parties, often to provisions that would be beyond the power of the court to impose without the parties' consent.

*Id.*; *see also* *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 519 (1986); *Johnson v. United States*, 49 Fed. Cl. 648, 654 (2001), *aff'd*, 317 F.3d 1331 (Fed. Cir. 2003); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 91 (2d Cir. 2002).

mere party in a contractual relationship.<sup>154</sup> The dispositive determination is the extent to which the government acts in its “sovereign” capacity.<sup>155</sup>

In *Textainer Equipment Management v. United States*, the government leased storage containers from the plaintiffs through a third party but failed to return all of the rented materials by the end of the lease.<sup>156</sup> The lease, however, provided a buyout option at a reduced governmental rate for any containers that were not returned to the plaintiffs.<sup>157</sup> When the buyout condition was activated, the plaintiffs brought a takings claim against the United States for the unreturned containers.<sup>158</sup> Relying on the dicta in *Scogin*,<sup>159</sup> the court held that “[w]here a property owner grants the government permission to use or occupy the plaintiffs’ property by agreement, the government’s use or occupation of that property does not give rise to a taking.”<sup>160</sup> The court concluded that to prove a taking, the plaintiffs had to show that the government had appropriated some property *other than* that which had been addressed in the lease.<sup>161</sup>

When analyzing the sovereign acts doctrine, it is important to distinguish between the government’s role as a party to a consensual agreement acting in

154. See *Textainer*, 99 Fed. Cl. at 218 (“The government has not taken property where it acts in its proprietary capacity pursuant to a contract right; to effect a taking, the government must act pursuant to its sovereign powers or invoke sovereign protections.”); see also *Janicki Logging Co., Inc., v. United States*, 36 Fed. Cl. 338, 346 (1996) (holding that there was no taking when the Forest Service “acted in a proprietary capacity as a party to a contract and purported to exercise its rights for which it bargained”).

155. *Textainer*, 99 Fed. Cl. at 218.

156. *Id.* at 212.

157. *Id.* at 212–13.

158. *Id.*

159. 33 Fed. Cl. 285, 291 (1995) (“[A] property owner relinquishes the right to exclude when the owner consents to the entry, use, and occupation of subject property.”).

160. *Id.* at 218; see also *J.J. Henry Co. v. United States*, 411 F.2d 1246, 1249 (Ct. Cl. 1969).

The clear thrust of the authorities is that where the government possesses property under the color of legal right, as by an express contract, there is seldom a taking in violation of the Fifth Amendment. The amendment has limited application to the relative rights in property of parties . . . voluntarily created by contract.

*Id.*

161. *Textainer*, 99 Fed. Cl. at 218–19; see also *BMR Gold Corp. v. United States*, 41 Fed. Cl. 277, 282–83 (1998) (dismissing a plaintiff’s takings claim when he had consented to the Marine Corp’s access to his property because “[a]lthough the right to exclude others from one’s property is a compensable Fifth Amendment interest, a property owner relinquishes the right to exclude when the owner consents to the entry, use, and occupation of the subject property.”).

its proprietary capacity and as a regulator acting in its sovereign capacity.<sup>162</sup> Generally, only sovereign acts are subject to the Takings Clause.<sup>163</sup> Although rights arising out of a contract with the government are “protected by the Fifth Amendment,”<sup>164</sup> if rights are voluntarily created by contract, a takings theory has a limited application. If the government interferes with contractual rights, the appropriate claim is generally one for breach of contract, not a takings claim.<sup>165</sup> Most case law concerning the intersection of contract and takings claims addresses the contractual claims first and holds that if a claimant is successful on a breach of contract claim, he or she cannot then recover on a takings theory.<sup>166</sup> It thus follows that if the government does not perform some action beyond the scope of consent granted in a consent-to-access form, a plaintiff cannot recover for breach of contract. At the same time, the plaintiff may not be able to recover through inverse condemnation or takings claims.<sup>167</sup>

In *Stockton East Water District v. United States*, the plaintiff brought a claim against the government for breach of the contractual terms related to certain water restrictions.<sup>168</sup> After determining that the government had not breached the contract,<sup>169</sup> the court held that the government had acted primarily in its commercial (or proprietary) capacity and not as a sovereign regulator; therefore, the plaintiffs could not assert a takings claim.<sup>170</sup> The same has been held in cases where the issue of the government’s breach was not addressed prior to a dismissal of the takings claim.<sup>171</sup> A minority approach restricts this

162. David W. Spohr, *(When) Does a Contract Claim Trump a Takings Claim? Lessons from the Water Wars*, 2 WASH. J. ENVTL. L. & POL’Y 125, 136 (2012).

163. *Nwogu v. United States*, 94 Fed. Cl. 637, 661 (2010), *aff’d in part, rev’d in part* 497 Fed. App’x 952 (Fed. Cir. 2012); *see also* *Envtl. Safety Consultants, Inc. v. United States*, 95 Fed. Cl. 77, 100 (2010).

164. *Lynch v. United States*, 292 U.S. 571, 579 (1934).

165. *St. Christopher Assocs. v. United States*, 511 F.3d 1376, 1385 (Fed. Cir. 2008); *see also* *Baggett Transp. Co. v. United States*, 969 F.2d 1028, 1034 (Fed. Cir. 1992); *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978).

166. *See* *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1369 (Fed. Cir. 2009); *Castle v. United States*, 301 F.3d 1328, 1341–42 (Fed. Cir. 2002); *Hughes Commc’ns. Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001). No language from these opinions indicates that this prioritization is an application of the constitutional avoidance doctrine.

167. *Hughes Commc’ns. Galaxy, Inc.*, 271 F.3d at 1070 (holding that when parties validly contract with the government “remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights”).

168. 75 Fed. Cl. 321, 324 (2007), *modified in part*, 76 Fed. Cl. 497 (2007), *aff’d in part, vacated in part* 583 F.3d 1344.

169. *Id.* at 363–64 (2007).

170. *Id.* at 373–74.

171. *See, e.g.,* *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 532, 535 (2005) (holding that the “availability of contract remedies is sufficient to vitiate a takings claim, even if it ultimately is determined that no breach occurred” and that the takings claim was “entirely subsumed within the contract claim,” even where the government successfully asserted a defense).

“either/or” constraint of claims to situations where a plaintiff first recovers in contract,<sup>172</sup> but most courts focus on the availability of a claim and not the result.<sup>173</sup>

As long as the relationship between the individual and the government is purely a matter of contract and the government is not believed to be acting in its sovereign capacity, the government acts solely in its proprietary capacity.<sup>174</sup> Recourse for any disagreement will then be limited to pursuing a breach of contract action, not a suit based on a taking.<sup>175</sup>

### C. Finding Fifth Amendment Coercion

The question becomes, in what circumstances has a party validly contracted with the government such that a takings claim is negated? When is the consent in question truly free of coercion from the overbearing threat of CERCLA liability and enforcement? Where coercion exists there cannot be consent.<sup>176</sup> To prove coercion, a party must show (1) that some wrongful act or threat from the other party to the transaction and (2) that the party was overcome by fear and “precluded from using free will.”<sup>177</sup> Courts look at the totality of the circumstances to determine whether consent was truly a product of the individual’s free choice and not a submission to some overbearing force of authority.<sup>178</sup>

For consent to be valid in a Fourth Amendment analysis, the government must usually show that the consent was not only “unequivocal” and “knowingly given” but also given without coercion, “implied or express.”<sup>179</sup> There

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172. *See, e.g.*, *Henry Hous. Ltd. v. United States*, 95 Fed. Cl. 250, 256 (2010); *Consumers Energy Co. v. United States*, 84 Fed. Cl. 152, 158 (2008); *System Fuels, Inc. v. United States*, 65 Fed. Cl. 163, 172–73 (2005); *see also* *Detroit Edison Co. v. United States*, 56 Fed. Cl. 299, 300–02 (2003) (holding that a plaintiff must actually win a breach of contract claim to warrant dismissing a takings claim).

173. Spohr, *supra* note 162, at 146.

174. *Janicki Logging Co., Inc., v. United States*, 36 Fed. Cl. 338, 346 (1996).

175. *Hughes Commc’ns. Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001). “Taking claims rarely arise under government contracts because the [g]overnment acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity.” *Id.*

176. *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968). *See generally* *Gouled v. United States*, 255 U.S. 298, 306 (1921) (holding that misrepresentation, overt coercion, intimidation, fraud, trickery, and deceit vitiate consent).

177. *Hsue Tung v. Peters*, No. AW–09–576, 2009 WL 5206627, at \*3 (D. Md. Dec. 23, 2009).

178. *United States v. Garcia*, 56 F.3d 418, 422 (2d Cir. 1995); *see also* *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (“[T]he question whether a consent . . . was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.”).

179. *United States v. Jeter*, 394 F. Supp. 2d 1334, 1347 (D. Utah 2005).



are many clear acts of coercion, such as threats of detention or arrest.<sup>180</sup> However, in a Fifth Amendment context, the distinction between persuasion and coercion – which determines the presence or absence of a taking – is “highly fact-specific and hardly simple to determine.”<sup>181</sup>

Economic coercion has been held to exist only where the landowner had “no alternative but to submit to it” – even when the government threatens to impose large fines for (allegedly) unreasonable denial of access or the economic liability of CERCLA responsibility for the spread of hazardous waste.<sup>182</sup> Even though the threatening of a judicial penalty for withholding consent has been deemed coercive, the mere presence of a signed consent form is considered to suggest voluntariness to the agreement.<sup>183</sup> For example, in *United States v. Ownbey Enterprises, Inc.*, Ownbey, a small oil company in Georgia, challenged a previously entered into consent order with EPA on the grounds that the owner had signed the agreement under duress and coercion.<sup>184</sup> Ownbey claimed that the threat of “exorbitant fines” prevented him from exercising his constitutional right to challenge the validity of the consent order.<sup>185</sup> The court ruled that the possible imposition of fines could not be considered a form of coercion because the amount and imposition of the fines were at the discretion of the court rather than EPA.<sup>186</sup> Furthermore, the fact that defendant did not understand the scope of EPA’s legal authority to issue unilateral orders did not constitute duress because EPA made no illegal threat of action – a required finding for the presence of duress.<sup>187</sup>

The court ultimately held that a defendant is not coerced into a contract merely because the defendant was reluctant to agree to the terms, the terms were unfavorable for him, or the negotiating process was unfair because of the parties’ unequal bargaining power.<sup>188</sup> Instead, the court held that Ownbey had the viable option of not agreeing to the consent order and forcing EPA to issue a unilateral order that could have been contested in a judicial proceeding.<sup>189</sup>

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180. *Cuviello v. City of Stockton*, No. CIV. S-007-1625 LLK/KJM, 2009 WL 9156144, \*17 (E.D. Cal. Jan. 26, 2009).

181. *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154 (Fed. Cir. 2014).

182. *Lee v. Wal-Mart Stores, Inc.*, 34 F.3d 285, 290 (5th Cir. 1994).

183. *Eidson v. Owens*, 515 F.3d 1139, 1147–48 (10th Cir. 2008).

184. 789 F. Supp. 1145, 1149, 1151 (N.D. Ga. 1992). The court’s opinion names the company as the defendant, although it addresses the owner’s interactions with EPA in what is presumably an agency capacity. *See id.* at 1147–48. For purposes of its holding, the court made no mention of the degree to which a company’s rights are co-extensive with that of the owner. *See generally id.*

185. *Id.* at 1149.

186. *Id.* at 1152.

187. *Id.*

188. *Id.*

189. *Id.*

The fact that the defendant had two very clear alternatives showed that he was not forced to sign the consent order.<sup>190</sup>

In *Janowsky v. United States*, the Federal Circuit suggested that there may be more to the distinction recognized in *Juliano* between agreements freely entered into and the “coerced consent” in contracts negotiated with the government, which have the power to compel its ultimate desired result.<sup>191</sup> The Janowskys entered into a contract with the government to assist in an FBI investigation, which would involve use of the Janowskys’ vending machine business.<sup>192</sup> The parties exchanged a number of agreements that reflected the fact it would be necessary for Mr. Janowsky to sell his business after the conclusion of the operation.<sup>193</sup> It was agreed that if the business appraised for less than \$300,000, the FBI would pay Janowsky the difference between the appraisal and that amount.<sup>194</sup> Before any agreement was officially signed, but after Janowsky was inadvertently exposed as a FBI informant, his continued cooperation in the investigation was secured through the FBI’s threat that it would withdraw protection of Janowsky and his family if he pulled out of the operation.<sup>195</sup>

The Janowskys sued the FBI, alleging that the government took their vending machine business without just compensation.<sup>196</sup> The trial court found that the Janowskys acted voluntarily and that no takings claim could exist in such circumstances.<sup>197</sup> However, on appeal, the court held the Janowskys were coerced because their protection was conditioned upon Mr. Janowsky’s continued participation in the operation.<sup>198</sup> The court further held that, although the Janowskys did not necessarily have a right to FBI protection, the FBI “coercively interfered with the Janowskys’ property right” in their vending business by threatening to withhold protection.<sup>199</sup>

#### IV. A NOTE ON THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

The conclusion of the *Janowsky* opinion offered one further insight into the takings analysis issue on appeal. In addressing the validity of Mr. Janowsky’s consent, the court recognized that his agreement to work with the FBI in the sting operation had been conditioned on the government’s protection of

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190. *Id.*; see also *United States v. Hajduk*, 396 F. Supp. 2d 1216, 1227 (D. Colo. 2005) (finding defendants’ consent lawful even when the government stated prior to the consent agreement that a sampling box was to be installed on defendants’ property regardless of consent, and defendants did not have an option to refuse).

191. See generally 133 F.3d 888 (Fed. Cir. 1998).

192. *Id.* at 889.

193. *Id.*

194. *Id.* at 890.

195. *Id.*

196. *Id.* at 892.

197. *Id.*

198. *Id.*

199. *Id.*

his family.<sup>200</sup> The court then noted that this situation likely implicated the unconstitutional conditions doctrine.<sup>201</sup> Although no person is entitled to receipt of a government benefit, there are restraints on the government's ability to deny citizens receipt of federal benefits.<sup>202</sup> For instance, the government may not withhold a benefit from a citizen for any reason that infringes on his or her constitutionally protected interests.<sup>203</sup> A person therefore cannot be required to surrender a Fifth Amendment right to receive just compensation for a governmental taking in exchange for a discretionary benefit if the benefit is unrelated to the property.<sup>204</sup>

Regarding benefits that are related to the property, the government may encourage and obtain participation in federal regulatory programs by offering "attractive incentive[s]" or "threatening to withdraw" federal benefits based on participation.<sup>205</sup> Compliance with a condition attached to a federal benefit will not usually be considered federal coercion.<sup>206</sup> Where states or individuals are free to accept or reject the offered benefit, Congress may attach lawful conditions to the benefits.<sup>207</sup> However, when there is a communication of a required condition for receipt of a benefit, courts often examine language of the communication at issue to determine if it is coercive.<sup>208</sup> While documents that use "should" or "may" clearly communicate that "there has been no order compelling the [party] to do anything,"<sup>209</sup> the use of compelling language (such as "must") in government communications suggests coercion.<sup>210</sup>

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200. *Id.*

201. *Id.*

202. *Id.* (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

203. *Id.* (citing *Perry*, 408 U.S. at 597).

204. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

205. *Adolph v. FEMA*, 854 F.2d 732, 736 n.3 (5th Cir. 1988).

206. *Id.* (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 589–90 (1937)).

207. *See B&G Enters. v. United States*, 43 Fed. Cl. 523, 527 (1999) (finding that FEMA could not be charged with an unconstitutional taking because no "unconstitutional conditions [were] attached to the benefits" of the NFIP program and "coercion by the [g]overnment" was not present).

208. *See, e.g., Cmty. Fin. Servs. Ass'n of Am. v. FDIC*, 132 F. Supp 3d 98, 121 (D.D.C. 2015).

209. *Holistic Candles & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012); *see also In re Diamantis*, No. 13-11201, 2014 WL 1203182, at \*6 (U.S. Bankr. N.D. Ohio Mar. 24, 2014) (finding no coercion or duress where a debtor signed an agreement in order to retain disability benefits after communications with employer were found to be "necessary to explain the debtor's options and to solicit his agreement").

210. *See Schwenke, supra* note 90, at 750 n.4 (stating there is "very little real voluntary consent" present in these agreements).

## CONCLUSION

Since its inception, the scope of CERCLA has been expanding in response to the needs and concerns of the nation, but it has been simultaneously plagued by its coercive reputation. The far-reaching scope of its liability scheme has been tempered by a variety of conditional defenses for cooperative landowners. The current state of the contiguous property owner defense adopted in the Small Business Liability Protection Act presents adjacent landowners who are victims of migrating hazardous substances with an unconscionable option. The only way to avoid the imposition of CERCLA liability caused by a third party, including potentially the government itself,<sup>211</sup> is to grant free and unrestricted access to EPA and other response agents for the duration of the approved remedial measures.

However, most landowners do not understand the significance of the one-page, non-negotiable consent-to-access forms they are offered by EPA. Signing one of these forms likely destroys the ability to ever bring a successful takings or inverse condemnation claim, regardless of the nature or duration of the government's occupation of the property. While such a forfeiture of a constitutional right should invoke "full knowledge" requirements and other presumptions against the finding of a valid surrender, these safeguards will likely not apply because the agreement is not technically a waiver.

The landowner is, therefore, pigeonholed into asserting the defense of coercion to challenge the validity of the agreement. However, this defense is not likely to succeed given the voluntary wording contained within the government's grant of access forms and court precedent viewing such agreements as contracts where the government merely acts as one party to a transaction. Unless the landowner is able to prove that the government acted outside of its proprietary capacity, even an objectively unfair agreement will be enforced against the property owner.

The result of this setup is that a contiguous property owner is functionally compelled to grant the government unrestricted access to the owner's land, thereby effectively relinquishing the right to seek just compensation while simultaneously facing the imposition of liability for hazardous waste, which the landowner possibly had no knowledge of or part in disposing. CERCLA's contiguous property owner defense is conditioned on what is, at best, extremely questionable consent in its voluntariness and scope. However subtle, this coercion still haunts the statute and the innocent landowners affected by it.

The simplest correction to avoid setting this trap for innocent landowners is to remove the grant of full and unrestricted access to contaminated properties from CERCLA's list of requirements for the contiguous property owner defense. EPA would still be free to negotiate with landholders for grants of access but would do so without threatening to impose liability for hazardous waste if the access is not given without compensation. While many landowners

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211. See generally *Waverley View Inv'rs, LLC v. United States*, 135 Fed. Cl. 750 (2018).

will likely be willing to grant EPA access to clean up contaminated property even without a promise of compensation, eliminating the statute's coercive land access requirements would give the defense its proper effect of protecting innocent property holders without demanding they surrender their ownership rights.