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ALL APPROPRIATE INQUIRY & CERCLA'S INNOCENT PURCHASER DEFENSE: 
THE NEED FOR A LEGISLATIVE STANDARD

R. Patrick Quinn*

A small manufacturing company, XYZ Corporation, sought to purchase a warehouse facility outside of a major urban center in the Northeast. The price was right and XYZ was ready to close upon obtaining a satisfactory report that the site was free of environmental contamination. A leading environmental consultant was hired to perform a “Phase I site assessment,” which included: (1) a walkthrough inspection of structures, disposal facilities, vegetation, and soil at the property; (2) a comparison of aerial photographs of the site going back twenty years to determine whether any suspect structures ever existed; (3) an “on-line” check of federal and state computer databases to examine whether a release had ever occurred on or near the property; and (4) an examination of the county land records to determine if there were any owners in the chain of title who were likely to have produced hazardous waste on the site, such as a dry cleaning company, electronics manufacturer, or chemical company.

This was a standard job for the consultant, similar to the work of other environmental consultants in the area but with some variations. The consultant’s report told of nothing that would suggest the possibility of contamination; relying on that news, XYZ purchased the property. Nine weeks later, during excavation of the site, an abandoned underground storage tank was discovered and testing revealed that the surrounding soil and groundwater beneath the site had become contaminated by cadmium, which would cost at least $2,000,000 to remediate.

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In a subsequent cost recovery action under Section 107 of the Comprehensive Environmental Responses, Compensation, and Liability Act (“CERCLA”), XYZ argued that it should not be responsible for the clean up bill because it did not cause the spill, had no actual knowledge that the tank even existed, and it did all that was required in its attempt to uncover any contamination before taking title to the property. Basically, XYZ’s argument was that it should be excused from liability under CERCLA’s “innocent purchaser defense” because its consultant performed “all appropriate inquiry consistent with good commercial practice.”

The Environmental Protection Agency (“EPA”), however, presented the testimony of an expert who stated that consultants in that particular area of the country would have also performed a magnetometer survey as a part of a Phase I site assessment, which would have revealed the existence of the tank.

The court agreed with the EPA that XYZ did not qualify for the defense because its inquiry was not “consistent with good commercial or customary practice.” For its “mistake” the company was stuck with a $2,000,000 clean up bill (twice the amount they had paid for the property).

INTRODUCTION

CERCLA was enacted in 1980 as an amendment to the Solid Waste Disposal Act “to provide for a national inventory of inactive hazardous waste sites and to establish a program for appropriate environmental response action to protect public health and the environment from the dangers posed by such sites.” In order to achieve its goals, CERCLA authorized the EPA to take those actions necessary to clean up and contain contaminated sites. Congress established a fund, the “Superfund,” to finance the costs of such clean up actions

by the EPA.\textsuperscript{7} To recover those expenses incurred by the fund for remediation of environmental contamination, CERCLA imposes a strict liability scheme for parties defined as liable under the Act.\textsuperscript{8}

To protect purchasers and other innocent parties from the ruthless indifference of CERCLA’s strict, joint and several liability scheme, Congress created the “innocent purchaser” defense.\textsuperscript{9} The defense exists for purchasers who can prove that they did not know of the contamination, did not contribute to it, and could not have discovered it after reasonable investigation.\textsuperscript{10} To qualify, a purchaser must (before taking title) make a diligent investigation of the property for contamination by making “all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice.”\textsuperscript{11} The law does not require that a purchaser \textit{know} that his property is clean in order to avoid liability.\textsuperscript{12} Congress did not intend that a purchaser examine every grain of earth on his property — an undertaking which is, of course, impossible.\textsuperscript{13} To qualify for the defense, one is required only to perform
that amount of investigation which is reasonably sufficient to uncover contamination.\textsuperscript{14} To accomplish this, the inquiry process is bifurcated, beginning with a rudimentary search for "red flags" or clues that some contamination may exist and then following up on these red flags with more intensive testing.\textsuperscript{15}

In order to minimize the cost of environmental investigations, the basic due diligence inquiry has evolved into a search for triggers, or red flags.\textsuperscript{16} The search begins with the least invasive and least expensive inquiries and proceeds to more complicated tests only if the superficial examination uncovers a sign of trouble.\textsuperscript{17} If the site has no history of use by industrial or commercial facilities, no record of contamination, and no noticeable contamination, no further inquiry should be required. On the other hand, if a review of the chain of title reveals that the site was once owned by a fuel company or electronics manufacturer (typical red flags), more intensive testing should be pursued.\textsuperscript{18}

The first step in the investigation is referred to as a "Phase I site assessment,"\textsuperscript{19} which typically includes a check of historic records to determine past uses and a walk-through examination of the physical attributes of the site.\textsuperscript{20} When the record check reveals a

\textsuperscript{14} Id. at 187; reprinted in 1986 U.S.C.C.A.N. at 3280.


\textsuperscript{17} See Martella, \textit{supra} note 15, at 18.

\textsuperscript{18} See id. at 17-18.

\textsuperscript{19} There is wide disparity among environmental experts as to what tests and investigations are to be performed in a typical "Phase I site assessment." Ann M. Flaherty & Luanne Laemmerman, What Is the Purpose of Phase I, in PROCEEDINGS OF ENVIRONMENTAL SITE ASSESSMENTS: CASE STUDY & STRATEGIES 3, 5 (National Ground Water Association, Ground Water Management Series No. 12).

[T]he scope of work involved in an ESA is not always consistent, nor are the consulting firms performing them always providing the needed due diligence or continuity with the other environmental firms. With the varying scopes of work and differing levels of investigative effort and professional experience that exist among firms, the end product — the Phase I ESA — may vary to a great degree.

\textit{Id.}

\textsuperscript{20} A typical Phase I site assessment may include the following: (1) review of topographic, hydrogeologic, and fire insurance maps, as well as aerial photographs; (2) search of regulatory databases (including the National Priorities List, CERCLA Liability Information system maintained by the EPA, state underground storage tank registration inventories, and other state and federal lists) for records of known and suspected spills or hazardous waste sites, and environmental violations under various state and federal environmental laws; (3)
suspect use, such as the existence of a gasoline filling station on the property, or there is physical evidence on the property of a spill (e.g., stressed vegetation found during a walk through), there is reason to be concerned and more exacting tests are required.

If more tests are required, the next step would involve a so-called "Phase II site assessment," which may include soil sampling tests, leak testing of underground storage tanks, and other more sophisticated (and expensive) analysis. The law assumes that a purchaser who conducts this kind of investigation with sufficient care and expertise will discover any contamination that exists, and if none is found at the time of the acquisition the purchaser will not be liable.

However, the defense does not always work. As the law is presently written, no one can know when their investigation is sufficient, because no one knows what constitutes "all appropriate inquiry" under the Act. For example, a five-minute jog through the property may be sufficient investigation for some, but nothing short

examination of ownership records (e.g., a basic chain of title search and, if available, search of records regarding property uses); (4) site inspection, and, possibly (5) interviews with neighboring property owners. The site inspection is often the most important element of the Phase I, and includes an examination of owner's on-site records regarding present and past operations on the property, material and waste handling, storage and disposal practices, interviews with company personnel, visual inspection of vegetation, soil, and other physical characteristics of the site, and, possibly, a magnetometer survey to locate other underground storage tanks or other metal objects. See Flaherty & Laemmerman, supra note 19, at 13; Martella, supra note 15, at 15-17; Daniel T. Rogers, The Importance of Site Observations and Follow-up Environmental Site Assessments—A Case Study, in PROCEEDINGS OF ENVIRONMENTAL SITE ASSESSMENTS: CASE STUDY AND STRATEGIES 563, 564-567 (National Ground Water Association, Ground Water Management Series No. 12, 1992).

21. Stressed vegetation indicates soil conditions which are insufficient to support the plant life which is possibly a result of hazardous waste contamination. See generally, Daniel G. Bradfield & William J. Cole, Unregulated Environmental Site Assessments: A Case Study, in PROCEEDINGS OF ENVIRONMENTAL SITE ASSESSMENTS: CASE STUDY AND STRATEGIES 221, 225 (National Ground Water Association, Ground Water Management Series No. 12, 1992).

22. See Martella, supra note 15, at 18.

23. Id. at 17-18.


Lenders are required to conduct a careful inquiry as to the existence of contamination, but if it is found, the [innocent purchaser] defense is not available. If it is not found, the inquiry was not thorough enough. Thus, as a practical matter, the defense does not work.

Id.
of an hour-long walk sufficient for others. Some may believe invasive testing of any kind is unnecessary for a Phase I site assessment, whereas others might hold that "good commercial or customary practice" requires at least some soil sampling be performed.  

The statutory language creates more questions than it answers. What level of inquiry is appropriate? If the appropriate level of inquiry is determined by "good commercial or customary" practice, then what is "good commercial or customary" practice? What is the difference between "good commercial practice" and "good customary practice"? These questions have not been satisfactorily answered by the regulatory authorities, the courts, or the industry, and the result is that no one can be sure that their investigation will allow them to qualify for the innocent purchaser defense.  

To many, the risk of overlooking some contamination might be too great given the overwhelming price tag for an environmental clean up under CERCLA.  

It is these uncertainties which undermine the very purpose of CERCLA. Due to the ambiguities of CERCLA, purchasers will investigate to the extent they think the standard requires, and then go a little bit further to provide an extra level of assurance.  

This dynamic results in continuously escalating the standard for assessment to the point where the costs of assessment exceed the benefits of purchasing the property. As a result of this uncertainty, property owners may be avoiding otherwise viable transactions, thus disrupting the real estate industry and commerce generally, and, con-  

26. See, e.g., United States v. A & N Cleaners and Launderers, Inc., 788 F.Supp. 1317, 1329 (S.D.N.Y. 1992) (issue of due care is a triable issue of fact which will depend upon the circumstances of the contamination); United States v. Pacific Hide & Fur Depot, Inc., 716 F.Supp. 1341, 1348 (D. Idaho 1989) (Congress intended "all appropriate inquiry" to mean that inquiry which is appropriate under the circumstances); United States v. Serafini, 706 F.Supp. 346, 353 (M.D.Pa. 1988) (issue of due care is determined by the customary practice in the ordinary purchase of property with a similar plot size and to be used for a similar purpose as the subject property in the CERCLA action).  

27. See discussion infra part II.  

28. The average clean up cost for a federal Superfund site is $25 million dollars. Lender Liability Under Hazardous Waste Law, supra note 25, at 33.  


30. Where an otherwise viable transaction is avoided due to unknown environmental risks, the impact on commerce is real: at least in theory, commercial or industrial property owners buy property because it makes economic sense to do so (e.g., increasing demand drives production beyond the capacity of existing facilities, making a move to new space economically
trary to CERCLA’s goals, concealing serious environmental problems as contaminated properties remain unsold and unassessed.

What follows is an analysis of the “all appropriate inquiry” standard on which the innocent purchaser defense is based, including (I) a brief summary of the CERCLA liability scheme, (II) a discussion of the innocent purchaser defense, (III) a survey of the cases interpreting the innocent purchaser defense, and (IV) a discussion of the particular problems which must be overcome in developing a uniform standard and a call for further congressional action.

I. LIABILITY UNDER CERCLA

Under Section 107(a) of CERCLA, any owner or operator of a facility that is contaminated with hazardous substances can be held liable for all costs associated with the investigation and remediation of such contaminants. The purpose for such a severe liability program is to assure that hazardous substances are cleaned up. Although the Act does not mandate strict liability, the courts have construed CERCLA as imposing strict liability based merely upon one’s status in relation to the property, regardless of whether the person held liable is the actual generator of the waste. In addition, when the responsibility for the environmental harm can not be apportioned amongst several defendants based upon their individual contribution towards the contamination, CERCLA liability is joint

32. Id.
35. See 42 U.S.C. § 9607(a) (1988); see also Nurad, Inc. v. William E. Hooper & Sons, [1991] 22 Envtl. L. Rep. (Envtl L. Inst.) 20,079, 20,083-84 (D. Md. 1991), aff’d in part, 966 F.2d 837 (4th Cir. 1992). In Nurad, the officer and principal shareholder of a corporation that formerly owned the subject property was found to be an owner even though he was not involved in managing the hazardous substances handled by the tenants, nor able to control tenant’s activities. Id. at 20,083-84. In reaching its decision, the District Court stated “it is clear that absentee landlords can be held liable under Section 107(a)(2) of CERCLA as prior owners at the time of disposal even though they have not participated in conduct resulting in the release of hazardous substances.” Id.
and several. It comes as no surprise, therefore, that the liability scheme under CERCLA is viewed as fundamentally unfair by some, and has left property owners stunned and exasperated when they must pay huge sums to clean up contamination they did nothing to cause.

CERCLA lists only three affirmative defenses under section 107(b), and a fourth, the innocent purchaser defense, is created by definition under section 101(35)(A). Under section 107(b), a party will have no liability if they can establish that the release or threat of release was caused solely by: (1) an act of God; (2) an act of


37. Some commentators have argued that imposing strict liability on “innocent” purchasers of contaminated property is not only unfair but unconstitutional as well. See, e.g., Ken Purviance, Comment, The Hazardous Waste Abatement Liability of Innocent Landowners: A Constitutional Analysis, 17 PAC. L.J. 185 (1985) (arguing that CERCLA's requirement that innocent property owners pay abatement costs is contrary to the takings clause of the Fifth Amendment of the United States Constitution).

There have been some attempts to mitigate the unfair impacts of CERCLA. See, e.g., Sunnen Products Co. v. Chemtech Indus., Inc., 658 F. Supp. 276 (E.D. Mo. 1987) (holding that where the contamination was caused by chemicals released prior to the transferee taking title and the transferee undertook clean up efforts pursuant to a state ordered remedial action, the transferee could recover response costs from the transferor). See also Wickland Oil Terminals v. ASARCO, [1988] 19 Envtl. L. Rep. (Envtl. L. Inst.) 20,855 (N.D. Cal. 1988); Pinhole Point Properties v. Bethlehem Steel Corp., 596 F. Supp. 283 (N.D. Cal. 1984); Wehner v. Syntex Corp., 622 F.Supp. 302 (E.D. Mo. 1983). However, the possibility of being made whole is unlikely. The task of finding the guilty party, who may by then be insolvent or non-existent, makes such recovery extremely difficult for the non-governmental party. Sandra E. Marcus, The Price of Innocence: Landowner Liability Under CERCLA and SARA, 6 TEMP. ENVTL. L. & TECH. J. 117 (1987).


40. Id. § 101(35)(A), 42 U.S.C. § 9601(35)(A) (1988). Furthermore, the innocent purchaser defense is available to those who subsequently sell the property, provided they made appropriate inquiry at the time of their acquisition and did not learn of the contamination during the period of their ownership. Westwood Pharmaceuticals, 964 F.2d at 91. “[I]t would make little sense for Congress to provide a defense for an ‘innocent’ land purchaser but fail to provide corresponding protection for that same landowner when he or she becomes an ‘innocent’ seller . . . .” Id. Likewise, a prior owner of property is not precluded from invoking the third party defense by a land sale contract with the party responsible for the release. Id.

41. CERCLA § 9607(b)(1), 42 U.S.C. § 9607(b)(1) (1988). However this defense is limited to “exceptional” natural phenomenon. See United States v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (using traditional tort concepts the court found that damage
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war,\textsuperscript{42} or (3) an act or omission of a third party other than an 
employee or agent of the defendant or an act or omission of a third 
party outside the scope of a direct or indirect contractual relation-
ship with the third party (the "third party defense").\textsuperscript{43}

CERCLA also offers property owners a last chance to escape 
liability under the Act by reaching a \textit{de minimis} settlement with the 
EPA. Section 122(g)(1)(B) authorizes the EPA to enter into \textit{de 
minimis} settlements with potentially responsible \textit{de minimis} owners 
of real property\textsuperscript{44} if the settlement of "involves only a minor portion 
of the response costs" and either: (a) that their contribution to the 

waste at the site is minimal; or (b) that they are purchasers who did 
not conduct, permit, or contribute to the contamination of the 

property.\textsuperscript{46} The latter category is relevant to this discussion in that it 
offers a \textit{de minimis} property owner who fails the "all appropriate 

inquiry" test a second shot at innocence under CERCLA; in other 

words, the property owner can escape liability despite failure to 

properly examine the property pursuant to 101(35)(B)).\textsuperscript{46}

However, the EPA's Guidance Document for \textit{de minimis} settle-
ments indicates that the Agency will not consider such settlements 
for those who purchase "with actual or constructive knowledge that 
the property was used for the generation, transportation, storage, 
treatment, or disposal of any hazardous 

substance."\textsuperscript{47} Thus, even the 
safeguard of an opportunity for a \textit{de minimis} settlement is not 
enough to provide the level of comfort and certainty that innocent

from heavy rains did not satisfy the act of God defense because the damages were foreseeable, 
the harm could have prevented through planning, and the heavy rains were not the sole cause 
of the damage).

\textsuperscript{42} Id. § 107(b)(2), 42 U.S.C. § 9607(b)(2) (1988).
\textsuperscript{43} Id. § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1988). The additional defense is available 
under 42 U.S.C. § 9601(35)(A), which allows a landowner to avoid liability if he or she ac-
quires contaminated property by escheat or other involuntary transfer (as where the Resolution 
Trust Corporation acquires property held by a bank which it takes into receivership), or 
by inheritance or bequest.

\textsuperscript{44} The EPA has defined \textit{de minimis} owners as:

\[T\]hose landowners who, in the Judgment of the Agency (as delegatee of the Presi-
dent) during the term of ownership did not conduct or permit the generation, trans-
portation, storage, treatment, or disposal of any hazardous substance at the facility, 
which substance is the subject of the response action.

Superfund Program; De Minimis Landowner Settlements, Prospective Purchaser Settlements, 

\textsuperscript{45} CERCLA § 122(g)(1)(B), 42 U.S.C. § 9622(g)(1)(B) (1988). \textit{See also} Superfund 
Program, \textit{supra} note 44, at 34237 (EPA guidance for \textit{de minimis} settlements under § 
122(g)(1)(B)).

\textsuperscript{46} Superfund Program, \textit{supra} note 44, at 34,296.
\textsuperscript{47} Id. at 34,237.
purchasers require. When the stakes are as high as they are under the Superfund, it would seem that few would want to gamble on winning a *de minimis* settlement offer from the EPA. Their safest bet would appear to be under the innocent purchaser defense.

II. THE INNOCENT PURCHASER DEFENSE

As originally enacted, CERCLA provided an escape from liability for those dragged into its web by the conduct of an unknown third party.48

There shall be no liability under subsection (a) of this section [section 107] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by —

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant ... if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions ... 49

Prior to the Superfund Amendment and Reauthorization Act ("SARA"),50 which became effective in October 1986,51 CERCLA had been interpreted to limit the third party defense of Section

49. Id. (emphasis added).
51. The initial proposal to adopt an innocent purchaser defense was put forth in the House by Representative Frank; it created an affirmative defense for property owners who could prove that they "did not acquire the property without actual or constructive knowledge that was used prior to the acquisition for the generation, transportation, storage, treatment, or disposal of any hazardous substance." 131 Cong. Rec. H11,157-01 (1985). The House and Senate conference adopted a slightly different provision, opting not to add an additional defense but to expand the third party defense by developing a protective definition of "contractual relationship" in § 101(35). See Conference Report, Superfund Amendments and Reauthorization Act of 1986, H.R. Rep. No. 962, 99th Cong., 2d Sess., at 186-88 (1986). See generally Marcus, supra note 37, at 117.
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107(b)(3) by not allowing purchasers off the hook merely because their predecessors in title were responsible for the contamination.\(^5\)

The EPA took the position that a deed to convey real property constituted a "contractual relationship" and therefore the third party defense did not apply.\(^6\)

Clearly, Congress wanted to encourage purchasers to play a role as environmental policemen and examine properties for environmental contamination before purchasing.\(^4\) However, Congress intended that the polluter should pay,\(^5\) not innocent purchasers. In the 1986...

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However, an innocent purchaser is not disqualified from invoking the third party defense merely because he contracts for the removal of the hazardous waste. See, e.g., Westwood Pharmaceuticals, Inc. v. Nat'l Fuel Gas Distrib. Corp., 964 F.2d 85, 91 (2d Cir. 1992). "[A]n innocent purchaser who subsequently may contract with a third party for the removal or disposal of hazardous wastes that he discovers on his property, without surrendering the third-party defense provided by § 107(b)(3). Id. Cf. Shapiro v. Alexanderson, 743 F.Supp. 268 (S.D.N.Y. 1990) (in an agreement with a landowner to operate a landfill, the established contractual relationship does not preclude party from attempting to prove a third-party defense).

54. Lenders would also be expected to play a vital policing role in their capacity as conduits for the transfer of real property. See 57 Fed. Reg. 18,344, 18,377 (1992).

Further evidence of the Congressional intent to rely on lenders as toxic contamination policemen lies in a bill proposed bill by Rep. LaFalce. H.R. 1450 102d Cong., 1st. Sess. (1991). This bill provides that completion of an environmental site assessment is probative evidence that the lender acted consistently with the secured creditor exception in § 101(20). See also Lender Liability Under Hazardous Waste Laws, supra note 25, at 220 (written comments of Massachusetts Mutual Life Insurance Company supporting H.R. 1450).

Another method for policing toxic contamination is to absolutely require environmental investigation and remediation with the transfer of property, as is the practice in New Jersey. New Jersey Environmental Cleanup Responsibility Act, N.J. STAT. ANN. §§ 13:1K-6 to 13:1K-35 (West 1983).

55. "[C]ongress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982). For other cases which also discuss Congress' intent that those responsible for the pollu-
amendments to CERCLA, for example, Congress recognized that too often the polluter escaped and the innocent purchaser was forced to pay. As a result, the third party defense was modified under SARA to expand the protection of innocent purchasers.

The prospect that a borrower could incur multi-million dollar liability under CERCLA compels a lender to undertake an environmental site assessment to determine the credit risk of a particular loan. See Banks, Bankers Still Need Protection from Environmental Risk, Expert Says, 59 Banking Report (BNA) No. 15, at 597 (October 26, 1992). The simple truth is that if the borrower is forced to pay hundreds of thousands of dollars to clean up his property, he will have little left over to pay the mortgage. The impact of this truth is documented in the comments of lenders and others before the House. See generally Hearings Report, Lender Liability Under Hazardous Waste Laws, H.R. REP. No. 46, 102d Cong., 1st Sess. 502 (1991); see also Lenders Hopeful Clinton, Congress Will Resolve Lender Liability Under Pollution Cleanup Laws, THE MORTGAGE MARKETPLACE, December 21, 1992, at 3.

An additional, and not inconsequential, benefit to the lender who undertakes an environmental site assessment is the availability of the innocent purchaser defense to the lender directly. Should the lender foreclose on contaminated property which is later discovered to be contaminated and the secured creditor exemption is not available the lender may acquire liability as an "owner" under 42 U.S.C. § 9607(a)(1) (1988). See generally Charles F. Speer, Environmental Risks in Real Estate and Loan Transactions, in ENVIRONMENTAL SITE ASSESSMENTS: CASE STUDY AND STRATEGIES 251 (National Ground Water Association, Ground Water Management Series No. 12, 1992). By conducting an environmental site assessment prior to foreclosure the lender will be able to invoke the innocent purchaser defense for its own right — assuming, of course, the lender has not already qualified for CERCLA's "secured creditor exemption." CERCLA § 101(2), 42 U.S.C. § 9601(20) (Under the secured creditor exemption, term "owner or operator" specifically excludes from liability one who, "without participating in the management of the facility . . . holds indicia of ownership primarily to protect his security interest in the vessel or facility.").

The secured creditor exemption allows a party to escape liability for environmental clean up if its conduct is consistent with one who only acts to protect its security interest (e.g., after foreclosure, the lender holds the property only for so long as is necessary appropriately divest itself of ownership. See 57 Fed. Reg. 18,344, 18,383-18,385 (1992) (codified at 40 C.F.R. § 300.1100(d)). As soon as the secured creditor begins to act like an owner or operator — at
In drafting the 1986 amendments to CERCLA, Congress ap-

The use of the innocent purchaser defense by lenders as a back-up to the secured creditor exemption was clearly supported by the EPA in the much heralded lender liability rule it promulgated in April, 1992. See 57 Fed. Reg. 18,382, 18,383 (1992), 40 C.F.R. § 300.100. [The] EPA notes that even though there is no requirement for an inspection to be conducted or required by a lender to accompany the creation of a security interest, a person seeking to establish an "innocent landowner" [sic] defense is obligated by section 101(35)(B) to undertake "all appropriate inquiry" into the condition and previous uses of the property being acquired. . . .

Whether an inspection is undertaken in conjunction with the creation of a security interest or not, a foreclosing holder may itself be able to assert an "innocent landowner" defense if the holder conducts an inspection when taking title incident to foreclosure. By asserting [the innocent purchaser] defense, however, the foreclosing holder is not acting within the security interest exemption as an exempt owner under section 101(20)(A) but is instead relying on a defense under section 107(b)(3) as an "innocent" owner of the property. Nevertheless, a decision to perform an environmental audit or inspection for the purpose of preserving the capacity to assert the "innocent landowner" defense does not void or in anyway compromise a holder’s eligibility for the section 101(2)(A) exemption. 57 Fed. Reg. 18,353.

While an environmental site assessment is critical to establishing the innocent purchaser defense, it is of no consequence to the secured creditor exemption. This distinction is entirely logical, given the apparent purposes of the two provisions: the innocent purchaser defense has everything to do with a party’s knowledge of contamination at the time it acquires property; while the secured creditor exemption addresses only the protection of those who have no true connection to the environmental condition of the subject property, whether or not such parties have knowledge of any contamination. The question of whether a lender knew or should have known about environmental contamination effecting property in which it holds a security interest is thus irrelevant; that inquiry is only relevant to the purchaser of contaminated property.

Finally, there is a significant public policy reason for encouraging lenders to perform environmental site assessments: The lender’s obligation to perform due diligence inquiries are critical to CERCLA’s objectives — that of uncovering contaminated property. Little property transfer occurs without some financing, and often it is through the due diligence of the lender’s review process that many contamination problems are uncovered. See Marcus, supra note 36, at A16, Rick Eyerdam, Lenders Would Escape Liability for Environment Under Rule, S. Fla. Bus. J. Oct. 8, 1990, at 1. Furthermore, as lenders generally are more sophisticated than individual purchasers and in most cases have prepared guidelines addressing environmental liabilities, they are more likely to conduct the inquiry that the innocent purchaser defense envisions. See id. at 3.

On Aug. 2, 1990, James Strock, the EPA’s chief of enforcement addressed the subcommittee on transportation and hazardous materials of the committee on energy and commerce. . . . "EPA supports the principle that CERCLA liability needs to be as certain and predictable as possible and should not inhibit financial transactions unnecessarily. In particular we do not want to discourage unduly the redevelopment of old industrial property. . . . We would continue to expect that lenders would act prudently with regard to making loans, including requiring investigations into the condition of the property and cleanups when appropriate.” Id.

peared to recognize that the Act’s liability system as originally cast was unfair and the innocent purchaser defense was devised. This defense was created by defining the term “contractual relationship” as used in section 107(b) to exclude from liability “land contracts, deeds or other instruments transferring title or possession” entered into by one who, at the time he entered into such contractual relationship, “did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.” Thus, an innocent purchaser could still fit within the Section 107(b)(3) defense even though he had entered into a contractual relationship with a party responsible for the contamination, provided he was truly innocent and made “all appropriate inquiry” into the environmental condition of the property finding no hazardous substances.

The purpose of the innocent purchaser defense is twofold: (1) to prevent the transfer of contaminated property, and at the same time (2) to relieve purchasers and lenders from liability for contamination that they could not have discovered with diligent inquiry.

It is important here to distinguish the innocent purchaser defense from the third party defense. The latter is one of the three defenses expressly provided in Section 107(b) and was intended to apply to the “midnight dumper” situation, where, for example, an unknown third party secretly dumps hazardous substances on the innocent property owner’s land. In contrast, the innocent purchaser


61. 42 U.S.C. § 9601(35)(A)(i) (1988). Note that the innocent purchaser defense is not available for those who learn of a release or threatened release of a hazardous substance after acquiring the property and then transfers the property without disclosing this information. Id. § 9601(35)(C).

62. The law assumes that the party knows what substances are hazardous; therefore, it is no defense to argue that the defendant did not know the waste that he found was hazardous. Jersey City Redev. Auth. v. PPG Indus., 655 F. Supp. 1257, 1266 (D.N.J. 1987) (to lose the defense one must merely know or have reason to know of the presence of a substance, not whether the substance is hazardous). See also Wickland Oil Terminals v. ASARCO, 1988 N.D. Cal. (1988); see infra notes 111-124 and accompanying text.


defense is derived from the third party defense and the expanded
definition of the term "contractual relationship" in that defense; it is
intended to apply to the innocent purchaser of property that has al-
ready been contaminated and where contamination was not discov-
ered even after careful investigation.  

The two defenses were recently distinguished by a federal court
in the Southern District of New York. In United States v. A&N
Cleaners and Launderers, Inc., the court stated that the third party
defense requires that the defendants establish by a preponderance of
the evidence that

(1) [A] third party was the sole cause of the release; (2) that third
party was not [the defendant's] employee or agent or one with
whom they had a direct or indirect contractual relationship; (3)
they exercised due care with respect to the hazardous substance;
and (4) they took precautions against the foreseeable acts or omis-
sions of the party causing the release. . . . The innocent purchaser
defense, on the other hand, requires that the defendant have ac-
quired the property after the release occurred and that it did not
know and had no reason to know that any hazardous substance had
been released at that facility.  

Despite the new protection SARA afforded innocent purchasers,
they still face a troubling question as to how much inquiry is "all
appropriate." The party that has acquired an interest in contami-
nated property must prove by a preponderance of the evidence that it
did not know the property was contaminated and had no reason to
know of such contamination. In order to meet this standard, CER-
CLA requires the property owner to have made "all appropriate in-
quiry" at the time of its acquisition. Under the definition of "con-
tractual relationship" in section 9601(35), Congress established in
broad terms what a purchaser must do to demonstrate that he had
no knowledge of the contamination if it is later found on his
property.

To establish that the defendant had no reason to know [of the exis-
tence of hazardous waste on the property, the] defendant must

67. Id. at 1326-1329.
68. 42 U.S.C. § 9601(35)(A) (1988); see also Sunshine Jr. Dep't Stores, Inc. v. Dept. of
Environmental Regulation, 556 S.2d 1177, 1189 (Fla. 1990).
69. CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B) (the "all appropriate inquiry"
standard).
have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.\textsuperscript{70}

Thus, a purchaser will qualify for the defense only if he can demonstrate that he investigated the property in a manner done in "good commercial or customary practice." However, Congress has not defined what constitutes "good commercial or customary practice." Further complicating things is the relatively meager guidance offered by the courts as well as the failure of industry to put forth a workable, uniform standard.\textsuperscript{71}

Although obviously intended to clarify the meaning of the standard of inquiry, the additional language in section 101(35)(B) serves only to further confuse the issue of what constitutes "appropriate inquiry."

For purposes of the preceding sentence [requiring "all appropriate inquiry"] the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.\textsuperscript{72}

This language is filled with ambiguities. For example, there is no definition of what is considered "commonly known or reasonably ascertainable information about the property" or how much inquiry is required to determine what is "commonly known" or what is "reasonably ascertainable." Also, it is not clear how the "specialized knowledge of the defendant" should be applied. It could be argued that a steeply discounted purchase price would suggest to a knowledgeable purchaser that the property is contaminated by hazardous substances; however, in a turbulent market effected by many different factors, it is not always clear that the discount relates to the presence of hazardous substances on the property. Without guidance as to what knowledge shall be presumed to be "common" or what

\textsuperscript{70} Id. \S 101(35)(B), 42 U.S.C. \S 9601(35)(B) (emphasis added).

\textsuperscript{71} Although the environmental testing industry is working to develop a standard, see \textit{infra} note 165, no final standard has been accepted industry-wide, and even that proposed by the most prestigious group has its critics. Rarick, \textit{supra} note 16, at 10505.

\textsuperscript{72} CERCLA \S 101(35)(B), 42 U.S.C. \S 9601(35)(B).
constitutes "specialized knowledge," the agency seeking to impose liability can simply offer the existence of a discount as evidence of the purchaser's knowledge of the contamination and the innocent purchaser will be faced with the arduous task of disproving a negative.

Also ambiguous is the language of section 101(35)(B) which suggests that a purchaser will not fit within the defense if the presence of contamination was "obvious." The law does not indicated what constitutes "obvious" contamination, and not all contaminated properties telegraph their problems by the presence of 55 gallon drums brightly labelled "TOXIC WASTE." Similarly, Congress did nothing to clarify the defense when it added that it will consider "the ability to detect such contamination by appropriate inspection." This language could be rephrased by saying "all appropriate inquiry is inquiry that is appropriate," which language in section 101(35)(B) amounts to little more than a linguistic shell game and does nothing to assist innocent purchasers in determining the level of inquiry which is necessary to qualify for the 107(b)(3) defense.

The problem for the innocent purchaser is not simply that the statutory language is unclear, it is that the defense is elusive. The standard of "appropriate inquiry" is continuously ratcheting upwards in such a way that a level of due diligence that qualified for the defense a month ago may no longer be able to invoke its protection today. As indicated above, the cautious purchaser will play it safe by pushing the inquiry even further to achieve a reasonable comfort level in its decision to buy — driving the standard ever upwards. The inevitable result of this escalation is not the attainment of a high level of scrutiny for site assessments, as Congress intended, but the perceived imposition of a level of inquiry which is simply not cost effective for purchasers.

III. Survey of Innocent Purchaser Cases

The statutory language of section 101(35) offers the courts very little guidance in applying the innocent purchaser defense. The decisions interpreting this section expose its ambiguities by producing

73. The House Conference report for SARA indicates that "[d]efendants shall be held to a higher standard as public awareness of the hazards associated with hazardous substance release has grown, as reflected by this Act, the 1980 Act, and other federal and state statutes." H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 3276, 3280.

74. See supra note 29 and accompanying text.
results which change the standard of inquiry from case to case. If any common theme emerges, it is that the defendant has a heavy burden in order to qualify for this defense.\textsuperscript{75}

The case law is at least clear about the liability scheme of CERCLA. Like the common law doctrine of caveat emptor, which maintains that, unless otherwise agreed upon between the buyer and seller, the buyer of real property acquires his seller's predicament,\textsuperscript{76} CERCLA extends environmental liability to purchasers of real property.\textsuperscript{77} However, unlike the doctrine of caveat emptor, the seller's liability is not extinguished with the transfer. The general rule is that both purchaser and seller can be held liable under section 107(a).\textsuperscript{78} There are exceptions to the general rule. In Mardan Corp. v. C.G.C. Music, Ltd.,\textsuperscript{79} the court upheld the portion of a settlement agreement which prevented the purchaser of the property from asserting "any cause of action" against the seller.\textsuperscript{80} The Ninth Circuit affirmed this holding, allowing a purchaser of land to contract away his right to recovery for CERCLA liability.\textsuperscript{81}

A. United States v. Serafini: Good and Customary Practice

One of the first cases to deal with the due diligence issue under CERCLA is United States v. Serafini.\textsuperscript{82} There the court faced the question of what standard of inquiry to apply to a purchase of property that had taken place nearly 20 years earlier.\textsuperscript{83} The government argued that the innocent purchaser defense should not apply because at the time of the purchase the property was littered with drums containing hazardous substances and therefore the contamination

\textsuperscript{77} Wolf, supra note 75, at 10,485.
\textsuperscript{79} 600 F. Supp. 1049 (D. Ariz. 1984), aff'd 804 F.2d 1454 (9th Cir. 1986).
\textsuperscript{80} Id. at 1056.
\textsuperscript{81} Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1458 (9th Cir. 1986). The circuit court in Mardan stated that it was not necessary to have the agreement specifically refer to CERCLA as it is assumed that if a party has intentionally waived its right to recovery, it must have certainly considered the extent of its waiver. See id. at 1459.
\textsuperscript{82} 706 F. Supp. 346 (M.D. Pa. 1988).
\textsuperscript{83} Id.
was obvious. 84

The court denied the government's motion for summary judgment because it had not submitted supporting affidavits from real estate developers concerning what was good or customary commercial practice at the time. 86 Even after the government and defendant had submitted affidavits regarding the appropriate standard, the government's motion for summary judgment was denied by the court. 88 Specifically, the court found the facts sufficiently in dispute as to what constituted appropriate inquiry. 87

Although it seems incomprehensible that a property owner would assert the innocence purchaser defense even though he did not properly inspect the property at the time of purchase, CERCLA only requires that the inquiry be "consistent with good commercial or customary practice." 88 The land included 225 acres which the purchaser examined only by way of maps (apparently, the location and dimensions of the site were more critical to the purchaser here than the physical attributes of each acre of the property). 89 The court agreed that if the defendants had offered proof that it was "good commercial or customary practice" in 1969 to inspect only by viewing maps, then the government could not require any more inquiry than that. 90

The decision in Serafini suggests that the due diligence standard is entirely relative and must be measured as of the time that the property is acquired. The result of this approach, then, is to require a separate factual finding in each case as to the appropriate standard of inquiry at the time of the land purchase. It is noteworthy that this finding virtually precludes the possibility of either side of an innocent purchaser issue winning a motion for summary judgment. 91

84. Id. at 352.
85. Id. at 353 n.8.
87. Id.
89. Serafini, 706 F. Supp. at 353.
91. The court in Serafini did note, however, that there is a bottom line to the standard: "landowners cannot avail themselves of the innocent [purchaser] defense by closing their eyes to hazardous waste problems." Id.
B. **International Clinical Laboratories, Inc. v. Stevens:** Defining Innocence

In *International Clinical Laboratories, Inc. v. Stevens,*\(^92\) the court found that the plaintiff ("ICL") was not liable to defendants on a contribution theory because it had met the innocent purchaser defense.\(^93\) However, it was not clear in this case whether ICL had engaged in any inquiry prior to purchasing the property. The court was ambiguous about the steps that the plaintiff took which satisfied the requirements of the innocent purchaser defense, noting only the information that the purchaser did not have: there were no visible problems with the property at the time of the closing, there had been no disclosure to the plaintiff, the plaintiff had no knowledge or suspicions of any environmental problems, and the purchase price of the property gave no indication of potential problems.\(^94\)

Without further description of the nature and extent of the plaintiff's pre-purchase inspection, it is difficult to extract a rule from this case. However, this much is clear: this court considers an apparent discount in the purchase price for a parcel of land as a possible indication that a purchaser is aware of some contamination. Also, the court’s decision implies that a purchaser will be responsible for anything that a seller tells him even where the site assessment is "clean." By giving weight to such random and subjective factors, the court utterly frustrates the prospect for a uniform, reliable standard upon which the innocent purchaser defense can be established.

C. **BCW Associates, Ltd. v. Occidental Chemical Co.:**

Even A Clean Report Is Not Enough

The case which addresses CERCLA’s due diligence standard most comprehensively is *BCW Associates, Ltd. v. Occidental Chemical Co.*,\(^95\) in which the court rejected the innocent purchaser defense because the defendant failed to conduct "all appropriate inquiry."\(^96\)

The unique issue in this case was that the defendant’s environmental consultant had provided a "clean" report on the condition of the property, which the defendant relied upon as his basis for going forward with the purchase.\(^97\) Nonetheless the court found that the

93. *Id.* at 20,561.
94. *Id.*
96. *Id.* at *21.
97. *Id.* at *2.
buyer had an obligation to investigate further on the basis of his own suspicions about the property. 98

Plaintiffs sought to recover costs from the defendants arising from the removal of lead dust from plaintiff's warehouse located within a manufacturing complex. 99 The plaintiffs in the action were the owner ("BCW") and tenant ("Knoll") of the warehouse; the defendants were two previous owners — Firestone Tire and Rubber Company and Occidental Chemical Corporation. 100

Prior to signing a lease with BCW, tenant Knoll inspected the facility several times, well aware of the suspicious condition of the warehouse. 101 The tenant even went so far as to hire an environmental consultant to evaluate the site with an eye towards potential environmental problems. 102 Following that evaluation, the consultant reported that there was "no environmental hazard at the . . . facility likely to affect the health and safety of Knoll employees at the facility." 103 Despite the consultant’s report, Knoll was suspicious about the environmental condition of the facility. 104 However, no further investigation was conducted, 105 and in 1985 Knoll leased the property from BCW for use as a furniture storage and distribution center. 106

Ultimately, the facility was found to contain dust contaminated by lead from the tire grinding operations of Firestone, a previous owner. 107 The court found that at the time of the signing of the lease, "there was a threat that the lead dust would be released into the environment on the clothing and shoes of workers leaving the warehouse and on the furniture Knoll shipped to its customers." 108 Thus it was held that neither BCW nor Knoll was entitled to invoke the innocent purchaser defense. 109

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98. *Id.* at *10.
99. *Id.* at *1.
100. *Id.*
101. *Id.* at *11.
102. *Id.*
103. *Id.* at *2.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at *8. At one point, Knoll's fears about lead contamination caused it to require all employees to wear special protective clothing. *Id.* at *4.
108. *Id.* at *5; *see also id.* at *21.
109. *Id.* at *22.
The holding in BCW Associates helps confirm the greatest fears of innocent purchasers: that due diligence is never going to be enough. The court’s decision states that if a purchaser has suspicions it must follow them up with tests until those suspicions are either absolutely confirmed or refuted. Unfortunately, as this case proves, it may require a multitude of time consuming and expensive tests before a suspicion is confirmed or refuted, and in many cases this kind of proof may be altogether beyond reach. Furthermore, while the buyer can and should be expected to take a hard look at the report and to follow up suspicious items (provided there is clear guidance as to what constitutes a suspicious item), he can not be expected to second guess every detail, and certainly the enforcing authorities should not be permitted to second guess the purchaser from a distance and with the benefit of hindsight. To allow otherwise would reduce the defense to mere legislative lip service.

The difficulty in the BCW Associates case is at the heart of the problems highlighted in this article: Congress and the EPA simply cannot expect purchasers to achieve a standard of knowledge that is undefined.

D. Wickland Oil Terminals v. ASARCO: Confirming Purchaser Paranoia

In Wickland Oil Terminals v. ASARCO, the subject property contained a huge pile of smelting slag which was deposited on the site by a previous owner. The current owner, Wickland, took title to the property not knowing that the slag was considered hazardous. The court denied Wickland the use of the innocent purchaser

110. One commentator has observed that the BCW decision may have given the EPA the ultimate authority in this area: the authority to require absolute proof from a purchaser that property is clean before he can qualify for the innocent purchaser defense. Wolf, supra note 75, at 10,485. Wolf noted that the court rejected the defense not because the investigation was insufficient, but because it was inaccurate, suggesting that the site assessment must be correct to qualify a purchaser for the innocent purchaser defense. “Clearly,” Wolfe notes, “there can be no hard objective standard of ‘how good is good.’” Id.

111. BCW Assocs. at *2-5 (the court explains a number of tests that Knolls and BCW conducted after entering into the lease to identify the contaminants in the warehouse dust and determine its origin).


113. “[T]he fused refuse or dross separated from a metal in the process of smelting.” WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1704 (2d ed. 1980).

114. Wickland at 20,855.

115. Id. Wickland’s ignorance of the hazardous nature of the slag was demonstrated in its proposal to the Army Corp. of Engineers that the slag be used for fill material for levees on a nearby river delta. Id.
defense.\textsuperscript{118} In evaluating Wickland’s assertion of the defense, the court noted that Wickland knew that: (1) metal slag was present on the site; (2) the slag contained lead and other heavy metals; (3) the slag was leaching into the nearby bay; and (4) “acid caused the lead deposits in the slag to break down and, consequently, water was carrying the lead into the Bay.”\textsuperscript{7} Although the court’s decision to deny Wickland the use of the innocent purchaser defense was based upon Wickland’s knowledge of the slag and the lead content of that material,\textsuperscript{118} it is significant that three other factors also motivated the court: (1) Wickland’s perception of “a definite risk of future problems resulting from the slag,” (2) the conduct of Wickland’s attorneys and consulting firms in withholding information regarding the risk, and (3) Wickland’s failure to conduct tests on the property.\textsuperscript{119}

The court simply did not believe Wickland was unaware of the risk presented by the smelting slag,\textsuperscript{120} concluding that a property owner’s mere perception of an undefined risk should be considered, at the least, a trigger for further inquiry.\textsuperscript{121} Also, a purchaser will not be deemed to have completed “all appropriate inquiry” if it has not examined information relating to the property held by its own attorneys or consultants.\textsuperscript{122} Perhaps most significant, however, is the court’s disapproval of Wickland’s failure to conduct test borings and other procedures on the site.\textsuperscript{123} A typical Phase I assessment would not include such invasive testing.\textsuperscript{124} If test boring was the only way to discover the contamination, then even a “typical” Phase I site assessment could not be considered “all appropriate inquiry.” The Wickland decision could thus be read as requiring some invasive testing as an element of a Phase I site assessment, and from that

\begin{footnotes}
\footnotetext[116]{Id. at 20,856.}
\footnotetext[117]{Id. at 20,856.}
\footnotetext[118]{Id.}
\footnotetext[119]{Id.}
\footnotetext[120]{Id. “The undisputed facts show that Wickland was aware of the obvious presence of the large slag piles on the site and knew that slag contained lead and other heavy metals which are classified as hazardous substances.” Id.}
\footnotetext[121]{Id.}
\footnotetext[122]{Wickland at 20,863.}
\footnotetext[123]{Id. at 20,862.}
\footnotetext[124]{See, e.g., Richard M. Sheldon, Jr., Phase I Environmental Site Assessments: The Written Report, Its Contents and Associated Concerns, in PROCEEDINGS OF ENVIRONMENTAL SITE ASSESSMENTS: CASE STUDY AND STRATEGIES, 89, 93 (National Ground Water Association, Ground Water Management Series No. 12, 1992).}
\end{footnotes}
reading the inescapable message of the innocent purchaser cases reappears: there is no agreement on the common elements of a Phase I site assessment and therefore there can be no such thing as a "typical" Phase I site assessment.

Furthermore, the Wickland court based its decision in part upon the existence of an investigation performed earlier by the government which included soil testing and resulted in discovery of the contamination. The court concluded, essentially, that if the government found environmental problems by conducting invasive tests, then the purchaser should have conducted such tests in order to qualify for the innocent purchaser defense. Because the court chose to look at what someone else was doing to determine what the purchaser in that case should do, the decision breeds purchaser paranoia by eroding any confidence purchaser's may have in an industry standard. That is, the decision confirms to purchasers that in fact they will have to keep track of what others are doing to assure that they themselves do all that is necessary to qualify for the defense. Prudent purchasers will find the benchmark and exceed it. As noted above, the inevitable result of this paranoia is not a high uniform standard, but an ever-increasing hurdle which constantly eludes even the most committed innocent purchaser.

E. United States v. A&N Cleaners and Launderers, Inc.: Mandating Perfection

A recent decision involving the innocent purchaser defense, United States v. A&N Cleaners and Launderers, Inc., further indicates that there is still no clear answer as to what constitutes "all appropriate inquiry" under section 101(35)(B). The case arose out of the government's remedial actions to clean up certain volatile organic compounds in the groundwater beneath the site of a building occupied in part by a dry cleaning and laundry company ("A&N"). A&N, a sublessee at the site, admitted to disposing of contaminated waste water regularly through a floor drain of the property. Sometime after A&N began its operations at the site, a new owner, the "Berkman Defendants," acquired the property from

125. Wickland at 20,863 (the government had placed the site on the California List of Hazardous Waste Sites so that Wickland knew of the presence of hazardous substances).
127. Id. at 1320.
The EPA alleged that the Berkman Defendants were liable under §§ 107(a)(1) and (2) as the owner of the property. They argued that the "all appropriate inquiry" standard of section 101(35)(B) required the Berkman Defendants to have examined: (a) the disposal activities of its predecessor, (b) the sublessee's use of the floor drain, (c) whether commercial tenants on the property were in violation of environmental laws, and (d) any information communicated to or from state and local health and environmental agencies.

The Berkman Defendants claimed relief from liability under the innocent purchaser defense, alleging that they "had no reason to know [of the contamination, having] undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice . . ." Testimony was offered by a New York realtor, who stated that "the level of inquiry undertaken by the [the purchasers] . . . prior to purchasing the property constituted good commercial practice" at the time they acquired the property. However, the court found that issues of fact remained to be tried regarding whether the defendants had indeed satisfied the requirements of all appropriate inquiry, and the Berkman Defendants' motion for summary judgment was denied.

It is significant that the court held the Berkman Defendants to a higher level of scrutiny due to the fact that they were aware that the local health department had issued a notice to county residents advising of possible contamination at the site and that local newspapers had published articles which addressed the contamination. According to the court, the requirements that the defendant show he exercised due care and under the circumstances and has taken precautions against foreseeable acts or omissions by third parties both demonstrate that the CERCLA requires further investigation "for some degree of awareness" of a problem regardless of what the appropriate standard for assessment was at the time. The essence of

129. *Id.* at 1321.
130. *Id.* at 1326.
131. *Id.* at 1329-30.
132. *Id.* at 1330 (citing 42 U.S.C. § 9601(35)(B) (1988)).
133. *Id.* at 1330.
134. *Id.*
135. *Id.* at 1328.
136. *Id.* at 1329 (analysis of due care/precaution requirements as applied to third party
this holding is that any time a purchaser has even "some degree of awareness," regardless of the appropriate standard of inquiry to be applied at the time the purchasers conducts its inquiry, the defense is not available; a CERCLA defendant will thus not be deemed to have exercised due care if such suspicions are not pursued — apparently, to an indisputable conclusion.

Ultimately, the *A&N Cleaners* decision may be interpreted to stand for the proposition that where a property owner has suspicious, no matter how they are raised and no matter how unfounded they may seem, such suspicions must be examined and positively confirmed or refuted. This case, therefore, does not clarify for purchasers what stones must be overturned, or even what avenues of inquiry must be pursued. Rather, the message here is that a purchaser must look everywhere, smell everything, and listen to everyone to be absolutely assured that no contamination exists. Surely this is not the message that Congress intended to send in enacting the innocent purchaser defense, and the consequences of such a holding are truly damaging: if purchasers think that they are required to pursue such a wide-ranging, comprehensive and conclusive inquiry, they may elect to simply forgo their purchase, make due with a less-than optimum alternative, and ignore a potentially serious environmental threat.

**F. United States v. Pacific Hide and Fur Depot, Inc.**

The "safest" defendant is the owner who acquires his property interest through inheritance. The legislative history behind the SARA amendments indicates that the drafters established a “three-tier system” to distinguish commercial transactions from private transactions. Under the system: “[c]ommercial transactions are held to the strictest standard; private transactions are given a little more leniency; and inheritances and bequests are treated most leniently.”

In *United States v. Pacific Hide and Fur Depot, Inc.*, shareholders in a corporation, who inherited their stock without any knowledge of the environmental contamination, were entitled to the defense; *id.* at 1330 (innocent purchaser defense analysis of due care/precaution requirements; follows the analysis given for third party defense).


138. *Id.* at 1341.
defense despite not having performed any inquiry into the condition of the property. The court stated that it did not view the “all appropriate inquiry” requirement as a “bright line rule”:

Congress used terms like “appropriate” and “reasonable” in describing the necessary inquiry. The choice of such terms indicates to this Court that Congress was not laying down the bright line rule asserted by the Government [in its argument]. Rather, Congress recognized that each case would be different and must be analyzed on its facts.

While the court’s holding is good news for will and gift beneficiaries, it is not good for innocent purchasers and lenders. Not only is the decision devoid of any guidance as to what constitutes “all appropriate inquiry”, but it states that Congress intended to be unclear on this matter.

The uniform rule which emerges from the above cases is this: if some investigation is done, it better be done correctly. Worse still, it is becoming apparent that if property is ultimately discovered to be contaminated, no matter how diligent the purchaser’s search and no matter how deeply the contamination is hidden, it will be a difficult, if not impossible, burden for a purchaser to convince a court that his inquiry was all that CERCLA required.

Moreover, the above cases suggest that the courts have been unable to agree upon a uniform standard, and, as indicated by the court in Pacific Hide and Fur, there is a perception by at least one court that Congress intended the rule to be applied differently in each case depending upon the particular facts. Whether intentional or not, the uncertainty is doing no one any good.

V. SUGGESTIONS FOR DEVELOPING A WORKABLE STANDARD

It is conceivable that a standard form of site assessment can be developed to allow the innocent purchaser a safe harbor from CERCLA liability. However, in order to achieve that goal certain en-

139. Id. at 1348-49.
140. Id. at 1349.
141. Id. at 1349.
142. Id.
143. The complexity of the issues presented by the innocent purchaser defense and highly technical nature of this field should not deter Congress from attempting such legislation. In other environmental laws Congress and EPA have demonstrated an ability to deal with a myriad of complicated details and exacting standards in a workable body of legislation. See, e.g., The Clean Air Act, 42 U.S.C. §§ 7409, 7412 (1988) (national ambient air quality standards and national emissions standards for hazardous air pollutants); National Primary and
demic and pragmatic problems must first be resolved.

A. Problems Which Must Be Overcome

1. Endemic Problems

Establishing a standard format for environmental site assessments would require the imposition of a uniform, practical rule for a task which is site-specific, dependent upon a complicated array of data of varying reliability, and subject to individual interpretation. Therefore, the standard form of site assessment should be flexible enough to account for the varying conditions found on individual parcels, allowing a purchaser to apply the standard in a manner which will enable him to uncover the environmental problems which are unique to his particular property. At the same time, the standard should maintain sufficient uniformity to function as a safe harbor within the CERCLA framework.

A problem with establishing uniformity in this field is that it can work against the improvement of site assessment methodologies by "locking in" one standard and inhibiting an otherwise natural evolution toward more precise and successful techniques (Clearly, a worthwhile objective under CERCLA). For example, as previously noted, in the current environment the standard of "good commercial practice" continuously ratchets upwards as each wary purchaser performs a site assessment to the extent he perceives to be the industry standard and then goes a step further to achieve an additional level of assurance. However, the problem of stagnation in assessment methodology is endemic to the task of establishing uniformity; once an effective "uniform" standard is established, there is no reason for any one to take the extra step to achieve a higher level of comfort. Comfort (at least a reasonable level of comfort) will be assured by legislation.

It is possible to minimize the negative impact that uniform standards might have on improvements in site testing. This could be...
done by building into the standard a mechanism that would require an upgrading of testing methods as technology improves, such as upgrading the standard every five years.\textsuperscript{146}

Another problem in establishing a standard format for site assessments is the lack of uniformity in the available information and records which are used during the property investigation. Without uniformity of available information, it will be difficult to create uniform standards. This problem could be partially remedied by creating uniform databases, such as a record of property ownership and/or uses which is consistent in depth, content, and form. However, databases cannot provide all the answers and some valuable information sources simply do not lend themselves to uniformity; for example, many recommend that the standard site assessment should include personal interviews with neighboring property owners, whose information about a subject property may not be found elsewhere.\textsuperscript{147} By its nature, this type of information cannot be standardized. Additionally, it is subject to wide latitude in interpretation. The uniform standard must account for this phenomenon; perhaps by requiring certain types of sources be examined when available, but not placing great weight upon the results.

2. Pragmatic Problems

Building the "informational infrastructure" necessary for a workable site assessment standard may present substantial obstacles. Fundamentally, site assessments require information sources such as chain of title records, sources on historic uses of the property, and information about hazardous waste spills on or near the property.\textsuperscript{148} The problem with all of this information is that it rarely exists in a uniform collection, is often incomplete and/or inaccurate, and is frequently outdated.\textsuperscript{149} One state may use a different filing system for

\begin{itemize}
\item \textsuperscript{146} Such periodic revisions of standards already exist under the Clean Air Act and the Clean Water Act. See 42 U.S.C. § 7409 (d)(1988) (prescribing that the criteria and standards for ambient air quality be revised every five years); 33 U.S.C. § 1313(c) (1988) (prescribing that the criteria and standards for water quality standards be revised at least every three years).
\item \textsuperscript{147} See generally, Flaherty & Laemmerman, supra note 19, at 13.
\item \textsuperscript{148} See Ron R. Clark, The Phase I Scope of Work Conflict, in PROCEEDINGS OF ENVIRONMENTAL SITE ASSESSMENTS: CASE STUDY & STRATEGIES 67, 69-71 (NATIONAL GROUND WATER ASSOCIATION, GROUND WATER MANAGEMENT SERIES No. 12, 1992).
\item \textsuperscript{149} Rickeye Lennon, Good Information: Cost Effective Public Records Selection for Environmental Site Assessments, in PROCEEDINGS OF ENVIRONMENTAL SITE ASSESSMENTS: CASE STUDY AND STRATEGIES 733, 734-738 (National Ground Water Association, Ground Water Management Series No. 12, 1992).
\end{itemize}
chain of title data and even the municipal subdivisions within a state may vary the content or presentation of those data.150

In developing a standard form of site assessment, it would be a significant error to assume that all those who perform the assessment will be able to find the same information in the same manner. For example, it would be unfair to deny the innocent purchaser defense for a property owner who failed to investigate records of prior property use where such records are not reasonably available.151 Until the same type of information is available to all purchasers through the same research methods, the standard for site assessments must accommodate for the variance — again, perhaps by assigning a lower weight to those components of the assessment which are most reliable.

Another pragmatic problem in the task of developing a uniform standard for site assessments is the variance in interpretations of raw data which occurs as a result of conscious and/or unconscious influences effecting the interpretation of the raw data which is collected.152 For example, a purchaser who is eager to own a particular property may overlook clues which would suggest the presence of environmental contamination.153 Also, not all who perform site assessments will do so with equal talent. Some will look more carefully at the information they find and will be able to gauge its reliability; others may not be such good detectives.154

However, some quality standards should be established. To assure that environmental red flags are uncovered during the site as-

150. For example, in New York City, substantial records of historic property use are available; whereas, outside of the city such information is usually only found through guesswork. See David C. Eisler, The Role of Historical Directories In Site Assessments, in PROCEEDINGS OF ENVIRONMENTAL SITE ASSESSMENTS: CASE STUDY AND STRATEGIES 717 (National Ground Water Association Ground, Water Management Series No. 12, 1992).

151. Recall that all appropriate inquiry under CERCLA requires only that the purchaser "take into account ... commonly known and reasonably ascertainable information about the property." CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(b) (emphasis added).


153. See, e.g., B.C.W. Associates v. Occidental Chemical Co., No. CIV. A. 85-5947, 1988 WL 102641, *2 (E.D.Pa. Sept. 29, 1988) (defendant was anxious to move into its new facility and did not conduct further investigation when it had reasonable suspicions to believe an investigation might be necessary).

essment, accurate interpretation of the information found is at least as important as finding the right information. Thus, the standard form of site assessment should assure that information is interpreted, and not only gathered, in some uniform manner. The standard must not only push purchasers to the highest level of diligence reasonably attainable, but also allow for a reasonable margin of error so that the test is an effective one, but not prohibitively expensive.

A reasonable person standard should be used when evaluating the liability of those who fail to discover contamination during a standard site assessment using the standard format created. However, the defense should not be structured in a manner that would make it available for those who willfully interpret data to overlook contamination in order to benefit from a clean assessment. It should be fair to allow an innocent purchaser defense where contamination is not discovered because unintended bias produces a reasonable differences in interpretation.

**B. Congressional Action In Setting Uniform Standards**

The prospect of establishing a uniform standard for site assessments requires that Congress take action. Because purchasers and lenders simply cannot afford to trust even a widely accepted, but privately developed, methodology, any standard that lacks the imprimatur of congressional authority cannot be uniformly adopted or relied upon.

Congress was headed in the right direction when it created the innocent purchaser defense. However, the law as written falls short of the mark. What is needed is a clear mandate from Congress describing in detail the all appropriate inquiry standard and locking it in place for a defined period.

Some legislative solutions have been proposed. In 1989, for example, Representative Curt Weldon (R.-PA.) introduced H.R. 2787, the “Innocent Landowner Defense Amendment,” a bill that

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156. To achieve uniformity in testing aptitude, the legislative solution could mandate a minimum level of professional education for those who perform site assessments and minimize the subjective elements of the test (by focusing the various elements of the inquiry as much as possible; e.g., multiple choice questions, instead of open-ended essay-type questions).

would provide some clear guidance as to what "all appropriate inquiry" requires. The *Weldon Bill*\(^{158}\) defines a "Phase I Environmental Audit" and provides a list of items to be contained within that report — a checklist of steps to follow when conducting environmental due diligence.\(^{160}\) A purchaser who satisfies each of the items on the checklist would be deemed to have created a rebuttable presumption that he has made "all appropriate inquiry" within the meaning of Section 101(35)(B).\(^{160}\) The bill further provides that:

[T]he term 'Phase I Environmental Audit' means an investigation of the real property, conducted by environmental professionals [defined in the bill] to determine or discover the obviousness of the presence or likely presence of a release or threatened release of hazardous substances on the real property and which consists of a review of each of the following sources of information concerning the previous ownership and uses of the real property:

(I) Recorded chain-of-title documents regarding the real property, including all deeds, easements, leases, restrictions and covenants, for a period of 50 years.

(II) Aerial photographs which may reflect prior uses of the real property and which are reasonably obtainable through State or local government agencies.

(III) Determination of the existence of recorded environmental cleanup liens against the real property which have arisen pursuant to Federal, State, and local statutes.

(IV) Reasonably obtainable Federal, State, and local government records, of sites or facilities where there has been a release of hazardous substances and which are likely to cause or contribute to a release or threatened release of hazardous substances on the real property, including investigation reports for such sites or facilities; reasonably obtainable Federal, State, and local government environmental records of activities likely to cause or contribute to a release or a threatened release of hazardous substances on the real property, including landfill and other disposal location records, un-

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159. *Id.*
160. *Id.*
derground storage tank records, hazardous waste handler and generator records and spill reporting records; and such other reasonably obtainable Federal, State, and local government environmental records which report incidents or activities which are likely to cause or contribute to a release or threatened release of hazardous substances on the real property. In order to be deemed 'reasonably obtainable' within the meaning of this subclause, a copy or reasonable facsimile of the record must be obtainable from the government agency by request.

(V) A visual site inspection of the real property and all facilities and improvements on the real property, and a visual inspection of immediately adjacent properties from the real property, including an investigation of chemical use, storage, treatment and disposal practices on the property.\textsuperscript{161}

In addition, the \textit{Weldon Bill}\textsuperscript{162} would require that the purchaser, or lender, follow up on any red flags that arise in the course of the initial investigation, such as where the investigation disclosed "the presence or likely presence of a release or threatened release of hazardous substances on the real property to be acquired."\textsuperscript{163} Also, the investigation must be conducted by an "environmental professional" with sufficient training and experience to conduct the investigation objectively.\textsuperscript{164}

Although the \textit{Weldon Bill}\textsuperscript{165} is a further step in the right direction, it fails to identify specific issues that would trigger further review, leaves still too much room for variance in methods of inquiry and analysis, and does not sufficiently address the limitations presented by the varying quality and format of data sources. Further, it does not begin to explain what must be done in the event that those triggers are pulled; for example, it does not identify next steps to be taken when further investigation is required.\textsuperscript{166} While the bill

\begin{itemize}
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Supra} note 157.
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Supra} note 157.
\item \textsuperscript{166} \textit{But see} Wolf, \textit{supra} note 75, at 10,485-88.
\end{itemize}

\textit{[T]he requirement for further investigation if the Phase I investigation reveals contamination may not be realistic. Very few sites subject to commercial sale are totally pristine, and there can be technical, legal, and business judgments whether the contamination is sufficient to generate liability. . . . For example, the increasing sophistication of measuring equipment may reveal that trace elements of contaminants do not violate actionable standards. \textit{Id.}}
would bring some certainty to the industry, its shortcomings should be addressed.

C. Private Action In Setting Uniform Standard

The site assessment industry has picked up where Congress left off, developing a uniform due diligence standard which is intended to satisfy Section 107(b)(3). One group whose work in this area is widely recognized is the E50.2 subcommittee of the American Society for Testing and Materials ("ASTM"), an organization which establishes uniform standards for a variety of practices and industries. The ASTM E50.2 subcommittee is preparing a standard for commercial real estate transactions "(1) to define the practices necessary to qualify for the innocent landowner defense to federal Superfund liability, and (2) to outline prudent business practices for the environmental assessment of properties that are the subject of commercial real estate transactions." With its proposed standard, ASTM hopes to establish a benchmark for "good commercial or customary practice" for the courts to rely on in measuring the adequacy of an inquiry by an innocent purchaser. Although the proposal will not be circulated until finalized, commentators have noted benefits and drawbacks to ASTM's early proposals. Until the final report is issued, it is not possible to intelligently comment on ASTM's work; however, given ASTM's reputation for developing widely accepted standards, as well as the sizeable effort of the E50.2 subcommittee, the prospect for a workable standard is likely.

The ASTM, however, faces a problem it can do nothing about; the ASTM standard lacks legislative or even regulatory authority, making it imprudent for anyone to wholly rely on their proposal.
Those who do not rely on the ASTM standard and take it upon themselves to go one step further in their inquiries might generate concern among others that perhaps they should do the same. Before long, whatever uniformity that is achieved will be broken; the industry standard will become obscured, the over-cautious purchaser and lender will reemerge, and the “all appropriate inquiry” standard will continue to rise.

D. Combined Congressional and Private Action

A bill which was proposed in the 102d Congress by former Representative Wayne Owens, of Utah, H.R. 1643, would accomplish what Representative Weldon’s bill missed and what ASTM could not have achieved. The bill clarified the meaning of “all appropriate inquiry” under CERCLA’s innocent landowner defense. Specifically, it provided that the standards for a Phase I Environmental Audit were those recommended by the ASTM. The Owens bill combined legislative and regulative authority with the thoroughness of ASTM. This proposal is precisely the kind of measure that is necessary to create a clear standard for site assessments.

CONCLUSION

Despite the good intentions of Congress in 1986, the innocent purchaser defense does not work. The statutory language which Congress drafted in 1986 under SARA is ambiguous at best. What is needed is a clear congressional mandate as to the steps necessary to conduct “all appropriate inquiry” — as had been proposed by former Congressman Owens. It is vitally important that Congress settle on one uniform approach in order to bring some certainty to the business and lending communities. Neither private industry, the EPA, nor the courts should be left to fashion a rule.

At stake is the functioning of the real estate industry and related businesses. Furthermore, the ability of businesses, and possibly homeowners, to secure credit as well as the continued efforts to

173. Id.
174. Id.
175. See Wolf, supra note 75, at 10,483.
Although no court has considered CERCLA liability and specifically the innocent purchaser defense in the residential context, as opposed to the acquisition of a commercial or industrial property such an extension of the doctrine may not be over-reaching. Congress expressly stated that the defense will be construed more strictly in commercial transactions, but it did not except residential transactions.
uncover and clean up the nation's contaminated property will depend largely upon the role which Congress assumes in clarifying the "all appropriate inquiry" standard.