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## Shared Responsibility

Decision Ensures That No One Owner of Contaminated Land  
Will Be Left to Bear Full Burden

In a major victory for current owners of property forced to pay environmental cleanup costs of contamination they did not cause, the 9th U.S. Circuit Court of Appeals recently held that parties that owned the property in the interim between the initial disposal of hazardous materials and the present may also be liable. *Carson Harbor Village Ltd. v. Upocal Corp.*, 227 F.3d 1196 (9th Cir. 2000).

In a decision now being considered for en banc review by the 9th Circuit, and potentially to be reviewed by the U.S. Supreme Court due to a split among the circuits, the court held that active human participation in the release of hazardous substances is not an essential element for a "disposal" to occur under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq.

As a result, property owners forced to pay the costs of contamination removal and remediation merely because they own the property when enforcement is initiated may seek contribution from prior owners who similarly did not actively cause the contamination.

Although the decision has been criticized as unfair and inconsistent, *Carson Harbor* is in fact truer to the basic principles underlying CERCLA, better supported by the language of that statute and more fair than the alternative interpretation.

In *Carson Harbor*, the court found that the "passive migration" of hazardous substances constitutes a "disposal" for purposes of a former owner's liability under CERCLA. In other words, an owner of property during a period in which prior contamination spreads or causes greater harm may be held responsible along with the current owner and the owner of the property when the contamination first occurred.

Critics of the opinion have relied on the contention that a primary underlying principle of CERCLA is that the "polluter" should pay, a comment that only begs the question. More important and to the contrary, however, CERCLA "generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed" without regard to the conduct of the owner. *3550 Stevens Creek Ass'n v. Barclays Bank of Cal.*, 915 F.2d 1355 (9th Cir. 1990).

Congress enacted CERCLA to "provide for liability, compensation, cleanup and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites." Pub. L. No. 96-510, 94 Stat. 2767 (1980). As *Carson Harbor* notes, a strict-liability regime was imposed in place of traditional causation requirements in order to create a mechanism for prompt cleanup where many directly responsible parties are insolvent or no longer exist.

Accordingly, one who owns property when the hazardous substance is first introduced is liable irrespective of traditional elements of tort liability, as are current owners who may have purchased the property long after the initial introduction of hazardous materials. See, e.g.,

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*United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988).

Moreover, to the extent issues of "fault" are or should be relevant to CERCLA liability, the level of culpability of an owner during a period of passive migration is at least equal to that of an innocent current owner. In fact, a prior owner's culpability is far greater if it knew or should have known that contamination was present and spreading. Yet if "disposal" did not include the passive migration of hazardous substances, such prior owners would be immune.

Furthermore, the prior owner at the time of active disposal would be potentially responsible even if it did not in any way cause or even have knowledge of the disposal, but a later owner

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with full knowledge of the spreading contamination would be immune merely because it purchased the property after its initial introduction.

As the court observed, Congress certainly did not intend such an irrational distinction between prior owners. One commentator has suggested that prior owners be held liable only if there was an intentional failure to act. However, there is no support for such a distinction in the language or intent of CERCLA.

Although it does not justify or explain the irrational distinction found by some courts between prior owners, it has nonetheless been suggested that a distinction between a current owner and an owner of property during a period of passive migration is rational because the current owner will receive a benefit from the cleanup of its property. Yet, any "benefit" arising from being held liable under CERCLA is questionable at best, especially where the cost of cleanup is often higher than the value of the property itself.

Lack of involvement in disposal and any benefits obtained by cleanup are equitable factors a court can consider when allocating liability. 42 U.S.C. Section 9613(f)(1). Only if all of the owners from the time of the first disposal to the present are potentially responsible parties, however, may a court have before it all parties with which to balance the equities of culpability and benefit.

Despite the clear inequity in failing to interpret passive migration as "disposal," three circuits have done exactly that. See *United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000); *ABBD Indus. Sys. Inc. v. Prime Technology Inc.*, 120 F.3d 351 (2nd Cir. 1997); *United States v. CDMG Realty Co.*, 96 F.3d 706 (3rd Cir. 1996).

The view of those circuits has been misleadingly labeled the majority view. However, not only does the 9th Circuit join the 4th Circuit in finding that "disposal" includes passive migration (see *Nurad Inc. v. William Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992)), but the 5th Circuit, although it has not directly considered the issue of passive migration, also has held that disposal should not be limited solely to the initial introduction of hazardous substances onto the property but should be read broadly to include the subsequent movement, dispersal or release

of such substances, at least during landfill excavation. See *Tanglewood East Homeowners v. Charles-Thomas Inc.*, 849 F.2d 1568 (5th Cir. 1988); see also *United States v. Fleet Factors Corp.*, 821 F. Supp. 707 (S.D. Ga. 1993) ("disposal" not limited to initial introduction of hazardous material onto property); *Pantry Inc. v. Stop-N-Go Foods Inc.*, 796 F. Supp. 1171 (S.D. Ind. 1992) (same).

The view of the 4th, 5th and 9th Circuits is consistent with the broad reach CERCLA was designed to have, as well as with the established principle that remedial statutes are to be broadly construed to effect their salutary purposes.

In arriving at its holding, the 9th Circuit relied primarily on the plain meaning of the words of the statute. CERCLA incorporates the definition of "disposal" found in the Resource Conservation and Recovery Act, 42 U.S.C. Section 9603(3), as "the discharge, deposit, injection, dumping, spilling, leaking or placing" of hazardous materials.

*Carson Harbor* notes that at least three of the listed terms have well-recognized passive meanings: "spill," "leak" and the particularly broad "discharge." A requirement of active human participation as a prerequisite to liability would deprive these words of their passive element. Furthermore, to do so would be inconsistent with CERCLA's strict-liability emphasis.

A rejection of passive-migration liability would place the burden of cleanup in the hands of a current owner merely because of the happenstance that hazardous materials were discovered after its purchase rather than before. In many cases, the entire burden and cost would be borne by the current owner alone. Not only have many active polluters long since ceased to exist, a current owner would be forced to pinpoint at what precise instance a leakage or dumping had taken place in order even to determine who owned the property at the time of initial disposal.

As the 4th Circuit correctly noted, "Congress knew of the synergistic and migratory capacities of leaking chemical waste, and the technological infeasibility of tracing improperly disposed waste to its source. ... To require a plaintiff under CERCLA to 'fingerprint' waste is to eviscerate the statute." *Nurad* (quoting *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983)).

In order that hazardous substances be promptly cleaned up without draining public funds, Congress clearly rejected a causation-based liability framework when drafting CERCLA. Its intent was to draw within its broad reach all potentially responsible parties, leaving the burden on each party to establish any of the affirmative defenses provided within CERCLA or to prove that equity requires that it bear very little or no responsibility for the contamination.

Only if CERCLA's broad reach is preserved can Congress' intent be implemented to bring forward all parties with potential responsibility so that liability may be properly apportioned and so that resort to the Hazardous Substance Superfund be avoided or minimized.

By interpreting "disposal" to include within its meaning the passive migration of hazardous substances, *Carson Harbor* ensures that no party connected to the contamination by ownership of the property escapes its responsibility for the current state of the property and that no owner is left to bear the full burden and cost of remediation due merely to the happenstance of timing.