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## Avoiding an Environmental Surprise: Steps Which the Consumer Real Estate Purchaser Should take to Avoid Environmental Liability

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# AVOIDING AN ENVIRONMENTAL SURPRISE: STEPS WHICH THE CONSUMER REAL ESTATE PURCHASER SHOULD TAKE TO AVOID ENVIRONMENTAL LIABILITY

by Tyler D. Tennent\*  
Sean M. Higgins\*\*

## I. Introduction

Imagine that you have just purchased a home. After you have closed the deal, you learn that the soil under your home is contaminated and the Environmental Protection Agency ("EPA") is holding you responsible for the exorbitant costs of cleaning up the contamination. You are liable despite the fact that you did absolutely nothing to contaminate the property and had no idea about the contamination when you purchased the property.

As disturbing as this scenario may be, it is entirely plausible. Under a major Federal environmental statute, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")<sup>1</sup> and various state laws,<sup>2</sup> landowners can be liable for the cost of cleaning up environmental contamination even where they are not at fault for the contamination. The possibility that a party who did not contribute to environmental contamination may be subject to extensive environmental clean-up liability raises important issues for consumer real estate purchasers ("consumers"). Consumers are less likely to possess the financial resources necessary to meet environmental liabilities and are less likely to possess sophisticated knowledge of environmental laws and defenses than are commercial real estate purchasers. At the same time, consumers are less likely to engage in activities that cause or exacerbate environmental contamination.

This Article will examine steps which the consumer should take in order to avoid environmental clean-up liability under CERCLA. The Article also touches upon the issues which a consumer must consider in avoiding liability under various state environmental laws. First, the Article begins by provid-

ing an overview of CERCLA's liability scheme and describing the defenses available to landowners against CERCLA liability and the regulatory provisions which might mitigate an owner's liability. Second, the Article describes these defenses in more detail along with the steps which a consumer purchaser should take to insure that the defenses will be available. Next, the possible contractual steps which a consumer should take to minimize potential environmental liability are examined. Finally, the Article concludes with a discussion of the additional legal remedies which the liable consumer might pursue.

## II. BACKGROUND

### A. CERCLA's Liability Scheme

Federal statutes and various state laws create the possibility of environmental liability for pur-

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... any consumer who purchases contaminated property may be held liable for the costs of cleaning up the contamination that prior owners created.

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chasers of property, even where the purchasers do nothing to contribute to environmental contamination. The major federal statute, which will be the focus of this Article, is CERCLA, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA").

CERCLA provides that various parties, known as Potentially Responsible Parties ("PRPs"), may be held liable for the costs of cleaning up environmental con-

tamination. PRPs include, most importantly, landowners. Even those owners who did not create or contribute to the contamination may be held liable for clean-up costs.<sup>3</sup> Thus, any consumer who purchases contaminated property may be held liable for the costs of cleaning up the contamination that prior owners created.<sup>4</sup>

Also, owners are jointly and severally liable for cleanup costs.<sup>5</sup> As a result, a party who unknowingly purchases contaminated property, without exacerbating or contributing to the contamination, may be found liable for the full amount of the clean-up costs. The party might be able to recover part of the full amount through contribution if the other liable parties are solvent and available.

### B. Defenses To Liability Under CERCLA

CERCLA, and its 1986 SARA amendments, however, provide various defenses to liability. Two of the minor and basic defenses are Act of God and Act of War.<sup>6</sup> As their titles indicate, these defenses are out of the consumer's control and insignificant for purposes of this Article. There are two other defenses of which the consumer real estate purchaser should be aware. The first of the defenses is known as the third-party defense. The second defense is the innocent landowner defense.

#### 1. Third Party Defense

Under the third-party defense, a landowner is not liable for environmental contamination that is solely caused by the act or omission of

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a third party who has no contractual relationship with the landowner.<sup>7</sup> CERCLA broadly defines the term "contractual relationship" to include any instrument transferring title.<sup>8</sup> As a result of this expansive definition, a landowner cannot establish the third-party defense if a prior owner of the property caused the environmental contamination. If the landowner establishes that a third party caused the contamination, the owner must also prove, by a preponderance of the evidence, that

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. . . a purchaser may establish the innocent landowner defense if the purchaser undertakes what is known as a Phase One Environmental Assessment before purchasing the property.

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due care was exercised in preventing the release of the hazardous substance and that precautions against the contamination by foreseeable acts of third parties were taken.<sup>9</sup>

Thus the third party defense is aimed at the party who owns land which is contaminated by a non-owner without the owner's knowledge. The third party defense is not available where the property was contaminated by an earlier owner. The defense is unavailable even if the current owner did not know that the property was contaminated.

## 2. Innocent Landowner Defense

The 1986 SARA amendments to CERCLA, however, provide a defense to purchasers who acquire land contaminated by a prior owner, who do not know, and have no reason to know, about the contamination. The SARA amendments accomplish this by expanding the third-party defense. SARA provides that a contractual relationship does not exist where a party acquires property after contamination and does not know and has no reason to know about the contamination.<sup>10</sup> If an owner can establish these elements, then the owner will

not be liable for environmental clean-up costs.

SARA makes it clear that the purchaser must take certain steps in order to fulfill the elements of this defense. In order for the owner to establish that he or she does not know, and has no reason to know, about the contamination, the owner must, before acquiring the property, undertake "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice."<sup>11</sup> To determine whether a purchaser has made an appropriate inquiry, SARA mandates that courts consider whether the defendant possesses specialized knowledge or experience, the relationship between the purchase price and the value of the property if uncontaminated, "commonly known or ascertainable information about the property" and the obviousness and ease of detecting the contamination.<sup>12</sup>

This defense, known as the innocent landowner defense or innocent purchaser defense, raises important questions for the consumer because it focuses on the purchaser's knowledge. In determining the availability of this defense, SARA calls for the consideration of commercial or customary practices and the purchaser's knowledge. This language opens the possibility that the consumer, who is likely to be less knowledgeable than the commercial real estate purchaser, will be held to a lower standard of knowledge.<sup>13</sup>

Notwithstanding the issue of the purchaser's knowledge, it is now widely accepted that a purchaser may establish the innocent landowner defense if the purchaser undertakes what is known as a Phase One Environmental Assessment before purchasing the property. A Phase One Assessment entails inquiry about the prior uses to which the property was put, review of government records regarding use and ownership of the property and environmental compliance on the property, and physical review of the property for signs of contamination. The Phase One Assessment does not include taking soil samples on the property.<sup>14</sup>

While the Phase One Assess-

ment is currently the standard environmental inquiry, increasing environmental knowledge may eventually render it inadequate.<sup>15</sup> Courts have raised questions as to whether it is necessary for consumers to undertake a Phase One Assessment.<sup>16</sup>

The Phase One Assessment raises an important issue: too much knowledge. The goal of the Assessment is to fulfill SARA's reasonable inquiry requirement. Unless the Phase One Assessment is itself suggestive, the purchaser should not go beyond it to gather additional data which suggests that contaminants might be present. For example, a purchaser should not conduct soil tests unless the Phase One Assessment indicates that contamination is present. Unnecessary soil tests may indicate a minimal presence of a possible

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contaminant. The presence of the contaminant may be natural. However, if environmental contamination is later found, the tests may lead the EPA or a court to conclude that the purchaser should have known about the contamination and should have undertaken a more extensive inquiry. As a result, the owner may lose the benefit of the innocent purchaser defense.

## C. Statutory & Regulatory Provisions To Mitigate Liability

CERCLA also provides for settlement, for a nominal amount, of claims against parties who are potentially liable because of property ownership but who are not responsible for the contamination. In order to take advantage of this provision, the owner must not have caused, exacerbated or contributed to the contamination.<sup>17</sup> This provision seeks to protect the

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landowner who has not caused or contributed to environmental contamination but who has not met the reasonable inquiry requirements of the innocent purchaser defense.<sup>18</sup>

Finally, a recent EPA policy statement provides that residential

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The consumer real estate purchaser may need to refrain from conducting a Phase One Assessment in order to preserve the innocent landowner defense.

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real estate purchasers will not be held liable under CERCLA.<sup>19</sup> The statement provides that the EPA will not require residential property owners to pay environmental remediation costs so long as their activities have not caused or exacerbated environmental contamination and the owners have cooperated with the EPA's remediation efforts.<sup>20</sup> The policy statement defines a residential property owner as a person who owns residential property and uses the property in a manner consistent only with residential purposes.<sup>21</sup>

The EPA's policy statement does not entirely relieve the consumer of concerns about environmental liability. First, the EPA states that the policy statement serves only as administrative guidance and does not create a right in residential property owners.<sup>22</sup> The policy is therefore subject to change. The consumer who buys land relying on this pronouncement and accordingly does not take the steps required to establish the innocent purchaser defense, may later find that the EPA has changed its policy and the owner is therefore subject to environmental liability.

Second, the policy applies only to purchasers who use their property in a manner consistent with residential purposes. The consumers who transform their property into a non-residential facility may subject themselves to environmen-

tal liability. Therefore, a consumer should take further steps to guard against environmental liability.

### III. Considerations For The Consumer Real Estate Purchaser

#### A. The Consumer Real Estate Purchaser And The Innocent Land Owner Defense

The SARA amendments, which establish the innocent landowner defense, provide that the determination of whether a purchaser knew or should have known about environmental contamination depends on the purchaser's knowledge and experience.

SARA'S text thus suggests that a consumer, who is unlikely to buy and sell property regularly, might be subject to a lower knowledge and inquiry standard than a commercial purchaser. This issue is important because a lower standard may spare the consumer from

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While the purchaser, after learning about contamination, may attempt to adjust the purchase price or simply decide not to purchase the property, a devisee does not have this option. The devisee or gift recipient, therefore, is not as capable of avoiding or defraying environmental liability. . .

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undertaking a Phase One Assessment. A Phase One Assessment can be costly. As a result, the consumer may wish to avoid or minimize the expense of a Phase One Assessment.

One court has explicitly suggested that the knowledge and inquiry standards required to establish the innocent purchaser defense vary according to the type of purchaser involved. In *United States v. Pacific Hide & Fur Depot, Inc.*,<sup>23</sup> the United States District Court for the District of Idaho concluded that SARA's text and legislative history indicate that courts should apply a three-tier standard in determining availability of the innocent purchaser defense. Commer-

cial purchasers are subject to the highest standard, purchasers in private transactions, or consumers, are subject to a mid-level standard, and parties who acquire property through inheritance, bequest, or gift, are subject to the lowest standard.<sup>24</sup>

In *Pacific Hide & Fur*, the court considered the liability of three groups of owners. The owners had each acquired through devise or gift, stock in a corporation which owned land contaminated by PCB laden capacitors.<sup>25</sup> The record indicated that none of the parties actually knew that PCB's were present on the land or that capacitors containing PCB's had been disposed of on the property.<sup>26</sup>

While the court considered the parties more akin to recipients of a bequest than purchasers in a private transaction, and thus subject to the lowest knowledge and inquiry standard, the court's discussion might give some guidance about the knowledge and inquiry standard which a consumer must meet in order to establish the innocent purchaser defense. First, the court held that SARA's legislative history indicates that the distinction between commercial and private transactions is, in itself, significant. Private purchasers and devisees are subject to a lower standard than commercial purchasers.<sup>27</sup>

Second, the court held that a party who conducts no environmental inquiry whatsoever may, in some cases, successfully claim the innocent purchaser defense.<sup>28</sup> Specifically, the court held that the defendants' failure to undertake an environmental inquiry did not bar them from establishing the innocent purchaser defense. The court based this determination on the defendants' lack of experience, lack of involvement in operations on the site, and the fact that the defendants involuntarily obtained ownership of the property.<sup>29</sup>

The court based its conclusion that these circumstances excused the defendants from conducting an environmental inquiry because of SARA's use of the terms "appropriate" and "reasonable."<sup>30</sup> According to the court, these terms indicated that Congress "was not laying down [a] bright line rule"

and that "each case... must be analyzed on its facts."<sup>31</sup> The court determined that if Congress intended to prevent an owner who does not undertake an environmental inquiry from establishing the innocent purchaser defense, SARA would explicitly require purchasers to make an inquiry in every case.<sup>32</sup>

Then the court went beyond this pronouncement. The parties' failure to conduct an environmental inquiry did not bar them from establishing the innocent purchaser defense even though they had reason to know that some contaminants were present. The defendants, while present on the property, found holes eaten in their clothing by battery acid.<sup>33</sup> The court held this knowledge irrelevant because the contaminants at issue were PCB's, not battery acid.<sup>34</sup>

*Pacific Hide & Fur* raises several significant points. First, it strongly suggests that a land owner who is sufficiently lacking in knowledge,

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experience and involvement need not conduct any inquiry in order to establish the innocent purchaser defense. Obviously, this point must be tempered by the fact that the defendants in *Pacific Hide & Fur* did not voluntarily acquire the property. However, the multiple standards adopted by the court indicate that the consumer may not need to conduct a Phase One Assessment to establish the innocent purchaser defense.

This absence of clarity in the courts raises a further and possibly disturbing point. The consumer real estate purchaser may need to refrain from conducting a Phase One Assessment in order to preserve the innocent landowner defense. A Phase One Assessment might yield unnecessary information that could later prevent the consumer from establishing the in-

nocent purchaser defense. This seemingly bizarre result could arise in much the same way that commercial purchasers, who go beyond a Phase One Assessment to conduct unnecessary soil tests, might forfeit the innocent purchaser defense.

The second significant aspect of *Pacific Hide & Fur* is that the court allowed the defendants to assert the innocent purchaser defense despite the fact that they were aware

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that contamination, albeit contamination different from that at issue, was present on the property. The decision thus suggests that only actual knowledge of the specific contamination at issue will prevent a party who purchased property in a private transaction from establishing the innocent purchaser defense.

This conclusion, however, should be tempered by the fact that the defendants in *Pacific Hide & Fur* had involuntarily obtained ownership. A distinction between a purchaser who is aware of some type of contamination and a devisee or gift recipient who is aware of some type of contamination seems appropriate. While the purchaser, after learning about contamination, may attempt to adjust the purchase price or simply decide not to purchase the property, a devisee does not have this option. The devisee or gift recipient, therefore, is not as capable of avoiding or defraying environmental liability after learning of potential contamination.

The *Pacific Hide & Fur* court is not alone in permitting an owner who has not made an environmental inquiry to establish the innocent purchaser defense. In *United States v. Serafini*<sup>35</sup>, the United States District Court for the Middle District of Pennsylvania reached a similar conclusion. In *Serafini*, unlike *Pacific Hide & Fur*, the court resolved a dispute between sophisticated investors. In

*Serafini*, the defendants' partnership purchased a former landfill site which had once been owned by a municipality.<sup>36</sup> The government argued that the defendants were liable because, at the time of purchase, the site was littered with contaminated drums. As a result, a visit to the site would have revealed an environmental problem.<sup>37</sup> The government also argued that the defendants possessed specialized knowledge because the defendant, Serafini, had been a secretary of the corporation which originally purchased the site from the municipality.<sup>38</sup> Thus the government argued that the defendants' failure to conduct an environmental investigation barred them from establishing the inno-

The purchaser should avoid  
restricting indemnification  
to government mandated  
clean-ups.

cent purchaser defense.<sup>39</sup>

The court rejected the government's argument and denied its motion for summary judgment because the government submitted no evidence supporting a conclusion that "failure to inspect or inquire was inconsistent with good commercial or customary practices."<sup>40</sup> The court indicated that the government should have submitted affidavits from commercial real estate developers stating that good commercial practice entailed an environmental inquiry before purchasing a "225 acre tract of land to be developed at a later date."<sup>41</sup>

The significance of the court's decision in *Serafini* is two-fold. First, the *Serafini* court appears to clarify that a land owner's ability to interpose the innocent purchaser defense depends on the practice of similar purchasers. Under this approach, a consumer's liability is determined by whether the consumer undertook a similar inquiry to that undertaken by other consumers.

Second, the *Serafini* court indicated that the inquiry which a purchaser must undertake is determined by the practice of buyers

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purchasing a similar tract of land. This aspect of the court's decision in *Serafini* is potentially significant for the consumer. Under this approach, it appears that some consumers would not need to undertake any inquiry. For example, the consumer who buys a one acre lot in a historically residential subdivision might be able to establish that purchasers of similar parcels do not conduct an environmental inquiry. On the other hand, the consumer who purchases a large parcel of farm land might face a more stringent inquiry requirement in light of the practices followed by purchasers of large land parcels.

*Serafini* thus suggests an additional factor which consumers should consider. Consumers should ascertain the type of environmental inquiry which purchasers of similar types of real estate generally undertake. If purchasers of similar parcels do not undertake a Phase One Assessment, the purchaser may wish to refrain from such an inquiry.

### B. Contractual Protections Against Environmental Liability

#### 1. Indemnity clauses

There is, of course, the risk that a consumer will be unable to establish the innocent purchaser defense. The consumer might, therefore, seek further protection from liability by including an indemnity clause in the purchase agreement. Such a clause would require the seller to indemnify the purchaser for any environmental liabilities that the purchaser will incur.

There are issues that the purchaser should consider before inserting an indemnity clause into a real estate agreement. First, the purchaser should consider whether the seller is financially capable of providing indemnification for environmental liability. This concern seems especially relevant to consumers. Consumer real estate transactions are likely to involve smaller and less expensive parcels of land than in commercial real estate transactions. As a result, the seller might not possess the financial resources necessary to indem-

nify the purchaser for environmental liabilities.

One commentator suggests an alternative which might be useful to the consumer who is concerned that the seller will not be able to provide indemnification. The parties might then enter into a long-term lease of improvements on the property.<sup>42</sup> Such an approach would convey, for example, only the house that a consumer is interested in acquiring. Depending on the type of subdivision and property, such an approach might prove desirable where the seller is not capable of indemnifying the purchaser.

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A second issue that the purchaser should consider is the question of who will conduct any necessary environmental clean-up. The seller, who must finance the clean-up, is likely to seek control over the remediation process.<sup>43</sup> The purchaser, likely to lack specialized knowledge, will probably find this arrangement desirable.

The consumer should also consider what costs are covered by the indemnification agreement. Clean-up costs do not constitute the entire range of expenses. The indemnification agreement, to adequately protect the consumer, should also provide that the seller will cover investigation costs, attorney's fees, governmental fees, and the costs of third-party claims arising from the contamination.<sup>44</sup>

The final issue that the consumer should consider is the question of what event will trigger indemnification. The purchaser should avoid restricting indemnification to government mandated clean-ups. The purchase agreement should require the seller to indemnify the buyer for cleanup costs incurred because of the requirements of lenders and subsequent purchasers as well as those of the state and federal governments.<sup>45</sup>

## 2. Express Environmental Warranties

A purchaser might also seek protection from environmental liability by securing an express warranty that the property is free from potential environmental liabilities. One commentator has suggested the provisions that such a warranty should include. Among the suggested provisions are guarantees that there are no potential or pending litigation or administrative proceedings; no environmental law violations; that prior owners' activities complied with environmental laws and regulations; that hazardous wastes were not "generated," "treated," or disposed of on the property; and that the property is not contaminated by hazardous materials.<sup>46</sup>

The Tenth Circuit Court of Appeals enforced an express environmental warranty in *Nunn v Chemical Waste Management, Inc.*<sup>47</sup> The transaction in *Nunn*, unlike a typical consumer transaction, involved two sophisticated corporate parties of approximately equal bargaining power.<sup>48</sup> The seller in *Nunn* gave warranties which reflected those suggested by the commentators described above.<sup>49</sup> The defendant purchasers had stopped payment on a land contract after the state discovered leakage of environmental contaminants. The defendants interposed the warranties as a defense to the plaintiffs' lawsuit for the amount due under the contract.<sup>50</sup> The trial court found for the defendants and the plaintiffs appealed.<sup>51</sup>

The Tenth Circuit Court of Appeals partially affirmed the trial court. The court found the warranties sufficient although they did not specifically mention leakage of hazardous waste. The court held that a warranty providing that the land contained no violations of state laws and regulations was sufficiently specific to warrant against leakage. Leakage of contaminants was proscribed by state environmental laws. The warranty, therefore, applied to the leakage.<sup>52</sup>

The court also made important points about warranty construction and remedies. Although the purchaser had drafted the warranties, the court refused to construe

ambiguous provisions against the purchaser because both of the parties were sophisticated and possessed equal bargaining power.<sup>53</sup> The court also held that the purchaser was entitled only to remediation costs. Releasing the purchaser from the land contract was inappropriate because traditional warranty principles limit recovery to the difference between the warranted value of the property and the true value of the property. The court concluded that the amount of the remediation costs reflected this difference.<sup>54</sup>

*Nunn* illustrates warranty principles that are important to consumers. First, the consumer will probably find that a general warranty which guarantees that the land complies with environmental laws and regulations is sufficiently protective. At best, the consumer purchaser will possess, as did the parties in *Nunn*, the same amount of knowledge and sophistication as the seller. The consumer, therefore, is unlikely to find that a court will unfavorably construe ambiguous warranty provisions.

Also, another important factor is the measure of damages. The consumer will not be able to recover the full purchase price or be

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... *caveat emptor* should not deter the consumer faced with liability under CERCLA from suing for contribution.

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released from its obligations under a real estate contract. However, the consumer should be able to recover remediation costs. An express environmental warranty is thus an alternative method of ensuring that the consumer will not be ultimately liable for clean-up costs.

### C. Lawsuits for Indemnity or Contribution

#### 1. Indemnity

The consumer should be aware that indemnity is best handled contractually rather than through litigation. Without a contractual provision, a party cannot secure indemnity against a party who is not primarily liable. As a result, a

purchaser will not be able to recover any amount of liability from a seller who is not responsible for the environmental contamination. For example, in *Philadelphia Electric Co. v. Hercules, Inc.*,<sup>55</sup> the Third Circuit Court of Appeals stated that indemnity is actionable only against a party who is primarily liable. In *Philadelphia Electric*, neither party was primarily liable. Both parties incurred environmental liability by being successors in interest to the party who caused the contamination.<sup>56</sup> Therefore, a consumer will not be adequately protected by a common law indemnity action. In many cases, the seller will not be primarily liable and thus the purchaser will be unable to seek recovery through a common law action that is based on an indemnity theory.

#### 2. Contribution

CERCLA, however, permits a real estate purchaser to seek contribution from a seller regardless of whether the seller is primarily liable. CERCLA provides that "any person may seek contribution from any other person who is liable or potentially liable"<sup>57</sup> CERCLA further states that, in deciding contribution claims, courts should "allocate response costs... using such equitable factors as the court determines are appropriate."<sup>58</sup>

The consumer who is liable under CERCLA may therefore be able to recover remediation costs from a seller. For example, in *Smith Land and Import Corp. v. Celotex Corp.*<sup>59</sup>, the Third Circuit Court of Appeals interpreted this language to liberally allow purchasers to seek contribution from sellers.

However, courts have treated contribution suits brought by an owner to recover environmental liabilities imposed under state environmental laws less favorably. Specifically, the Third Circuit Court of Appeals, while interpreting Pennsylvania law, in *Philadelphia Electric Co. v. Hercules, Inc.*,<sup>60</sup> held that the doctrine of *caveat emptor*, or buyer beware, bars a land owner from recovering from a seller, pursuant to liability incurred under the state environmental statute.<sup>61</sup> The court noted

that the doctrine of *caveat emptor* still governs land sales.<sup>62</sup> The court characterized the vendor and vendee in the sale of land as possessing equal knowledge. As a result, a buyer is limited to express contractual protections.<sup>63</sup> The court thus concluded that the doctrine of *caveat emptor* prohibits an owner from securing contribution from a prior owner.

The court's decision in *Hercules* illustrates to a consumer real estate purchaser the importance of securing contractual guarantees, either in the form of an indemnification

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clause or of an environmental warranty, from a seller. The *Hercules* court, however, appeared to leave open the possibility that *caveat emptor* might be applied less stringently to a consumer real estate purchaser. The court noted a widely accepted exception to *caveat emptor* which permits implied warranties to arise where new homes are sold by a builder. The court noted that this exception is rooted in the fact that, in such transactions, the seller is in a better position to know of defects.<sup>64</sup>

The *Hercules* court, however, interpreted this exception very narrowly. According to the court, the exception arose from the difference between structures and land. A builder is in a better position to know of defects in a building, while both parties are equally likely to know of defects in unimproved land.<sup>65</sup> The *Hercules* court applied the doctrine of *caveat emptor* in a contribution suit under state environmental laws. *Hercules* does not provide much support for softening the *caveat emptor* doctrine in a real estate transaction involving a consumer under state law.

However, *caveat emptor* should not deter the consumer faced with liability under CERCLA from suing for contribution. In *Smith Land*, the Third Circuit Court of Appeals held that *caveat emptor* is

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a factor which courts should consider in allocating liability under CERCLA rather than a bar to contribution.<sup>66</sup> The *Smith Land* court concluded that applying *caveat emptor* to completely bar recovery based on contribution would be inconsistent with congressional intent.<sup>67</sup> Such an approach would discourage owners from undertaking remedial actions and would cause ill will between the government and the liable party. The court, however, noted that *caveat emptor* type considerations may be a factor in determining the availability of contribution for liability incurred under CERCLA. The court indicated that this consideration would take the form of inquiring into whether the purchase price was reduced by the amount of potential clean-up costs. In such a case, permitting the seller to recover under a contribution theory would result in double compensation of the seller.<sup>68</sup>

Contribution suits are thus available to the consumer who is held liable under CERCLA. Moreover, it is not likely that a court will apply *caveat emptor* to mitigate a seller's liability for contribution to a consumer. A consumer does not appear likely to possess the experience and leverage to negotiate a sale price that reflects potential clean-up costs.

### IV. Conclusion

The consumer who purchases real estate and surprisingly discovers that the land is contaminated may be liable for the cost of an environmental clean-up. This consumer, by taking the right steps, may escape or mitigate environmental liability. The purchaser should act only as a consumer and limit the use of the property to residential purposes. This step will allow a consumer to benefit from the EPA's policy toward residential property owners. However, this policy is not an absolute shield against CERCLA liability. Moreover, the consumer remains potentially liable under state environmental laws.

Therefore, the consumer must take additional steps to seek pro-

tection from possible environmental liability. First, the consumer must, prior to purchasing property, undertake an environmental inquiry sufficient to establish the innocent purchaser defense. Under current law, it is unclear what constitutes a sufficient inquiry for the consumer. A Phase One Environmental Assessment clearly meets the inquiry requirement. However, it appears that the required inquiry depends also on the practice of similar purchasers of similar tracts of land. As a result, consumers might not be required to undertake a Phase One Assessment in order to establish the innocent purchaser defense.

The consumer should also go beyond the steps needed to establish the innocent purchaser defense. The consumer can include an indemnification clause in the purchase agreement. Alternatively, the consumer can secure environmental warranties from the seller. Either approach permits the consumer to recover environmental clean-up costs.

Finally, the consumer can pursue legal remedies such as contribution and indemnity actions against the seller. Common law indemnity will be effective only if the seller is primarily liable. Contribution may or may not be permitted under state law due to the *caveat emptor* doctrine. However, an owner may freely sue a seller for contribution under CERCLA.

### ENDNOTES

- 1 42 U.S.C. §§ 9601-75 (1988).
- 2 For a discussion of various state environmental laws see, David Farer, *Transaction-Triggered Environmental Laws: The New Wave*, in ENVIRONMENTAL ISSUES AFFECTING REAL ESTATE TRANSACTIONS: A PRACTITIONER'S GUIDE 3 (ALI-ABA 1989); David J. Hayes & Catherine J. LaCroix, *Liability Issues Under Federal and State Law Related to Ownership and Possession of Contaminated Property*, in ENVIRONMENTAL ISSUES AFFECTING REAL ESTATE TRANSACTIONS: A PRACTITIONER'S GUIDE 77 (ALI-ABA 1989).
- 3 42 U.S.C. 9607 (1988); Hayes & LaCroix, *supra* note 2, at 80.
- 4 Hayes & LaCroix, *supra* note 2, at 80.
- 5 42 U.S.C. § 9607 (1988); Hayes & LaCroix, *supra* note 2, at 82-83.
- 6 42 U.S.C. §§ 9607(b)(1)-(2) (1988).
- 7 42 U.S.C. § 9607(b)(3) (1988).
- 8 42 U.S.C. § 9601(35)(A) (1988).
- 9 42 U.S.C. § 9607(b)(3) (1988).
- 10 42 U.S.C. § 9601(35)(A)(i) (1988).
- 11 42 U.S.C. § 9601(35)(B) (1988).
- 12 42 U.S.C. § 9601(35)(B) (1988).
- 13 *See infra* part III.A.
- 14 Aaron Gershonowitz & Miguel Padilla, *Superfund's Innocent Landowner Defense: Elusive or Illusory?* 22 TOXICS L. REP. (BNA) 626, 628 (Oct. 16, 1991).
- 15 *Id.* at 628.
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- 45 *Id.* at 5-6.
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- 50 *Id.*
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- 54 *Id.* at 1470.
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- 65 *Id.* at 313 n.4.
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- 67 *Id.*
- 68 *Id.*