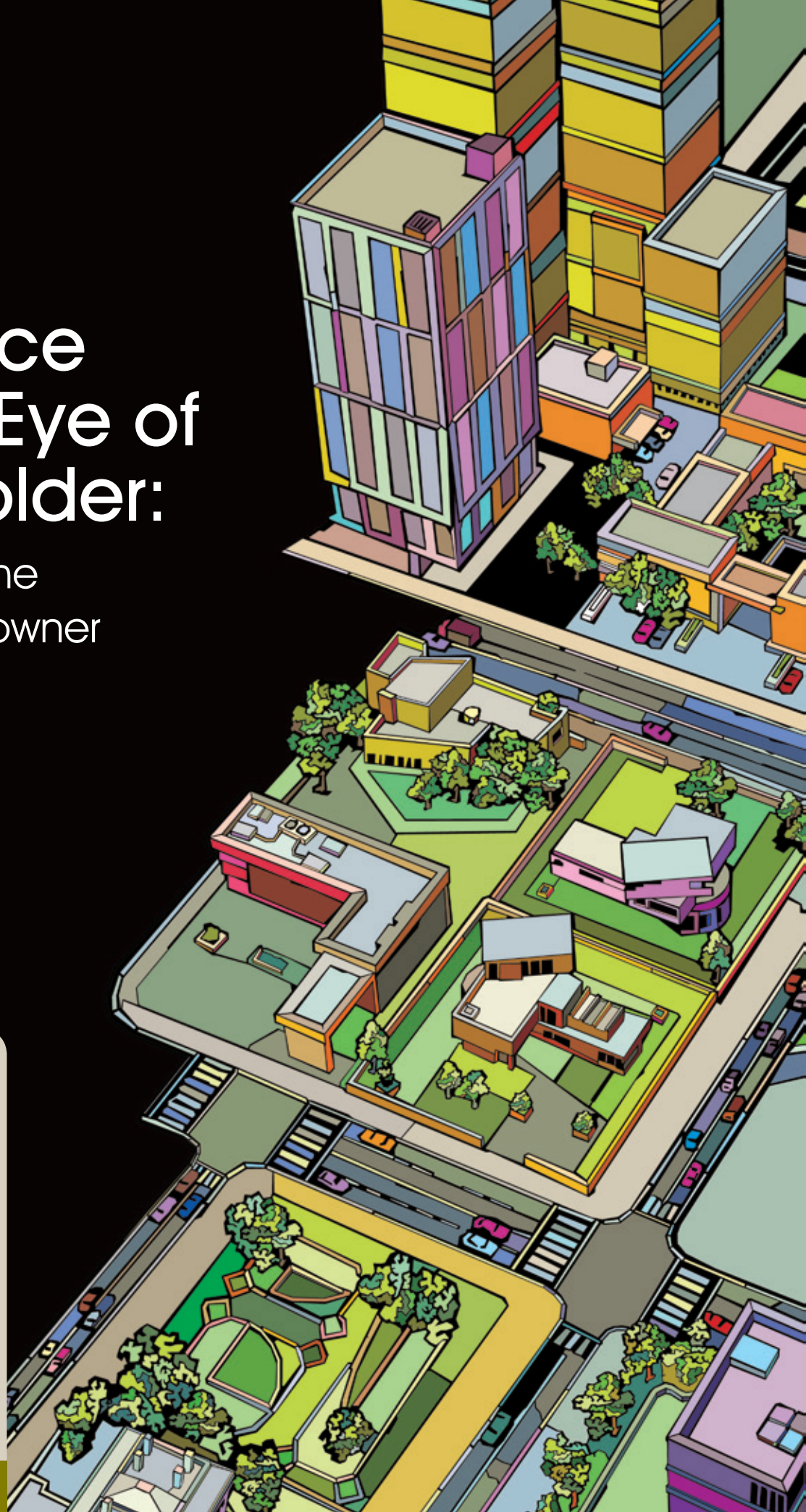
Innocence Is in the Eye of the Beholder:

An Analysis of the Innocent Landowner Defense under CERCLA

By Dean M. Cordiano and Daniella M. Azevedo



Attorney Dean M. Cordiano is a partner in the environmental and commercial litigation departments of Day Pitney LLP in Hartford. He practices in the areas of complex environmental and commercial litigation and is a member of the CBA's Environmental Law Section, Litigation Section, Lawyer-to-Lawyer Dispute Resolution Committee, and *Connecticut Lawyer* Advisory Committee.

Attorney Daniella M. Azevedo is an associate in Day Pitney's real estate, environmental, and land use department and practices in the areas of acquisition, development, sale, and financing of real property. She is a member of the CBA's Real Property and Young Lawyers Sections.

The Beginning of Innocence: CERCLA[1]

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[2] as amended, was enacted "to provide for liability, compensation, cleanup, and emergency response to hazardous substances released into the environment."[3] This article will address one of the defenses available to "potentially responsible persons" (PRPs)[4] who are liable simply due to their ownership of contaminated property.

The "innocent landowner defense" is available to an otherwise liable person who can establish that the release of hazardous substances was caused *solely* by:

> …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 [purchaser] …, if the [purchaser] 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… (emphasis added).[5]

The term *contractual relationship* "includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, *unless* the real property on which the facility concerned is located was acquired…after the disposal or placement of the hazardous substance…".[6] Additionally, … "[a]t the time [it] acquired the facility the [purchaser] 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…"(emphasis added).[7] Finally, where contamination is discovered [purchaser] must provide "full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions… [, maintain] compliance with any land use restrictions…[, and]…not impede the effectiveness or integrity of any institutional control employed at the facility...."[8]

To establish that the purchaser had *no reason to know* of the contamination, purchaser must demonstrate that "on or before the date on which [it] acquired the facility, [it] carried out all *appropriate inquiries*… into the previous ownership and uses of the facility in accordance with generally accepted *good commercial* and *customary standards and practices*…" (emphasis added).[9] Additionally, to maintain eligibility for the defense, once a purchaser is aware of any release or threatened release, the purchaser must demonstrate it "took reasonable steps to: (aa) stop any continuing release; (bb) prevent any threatened future release; and (cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance."[10]

The question of what constitutes *appropriate inquiry* continues to be highly litigated. However, CERCLA now provides specific considerations to address the issue. These include:

> (a) The results of an inquiry by an environmental professional; (b) Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility; (c) Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed; (d) Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law; (e) Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility; (f) Visual inspections of the facility and of adjoining properties; (g) Specialized knowledge or experience on the part of the defendant; (h) The relationship of the purchase price to the value of the property, if the property was not contaminated; (i) Commonly known or reasonably ascertainable information about the property; (j) The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation….[11]

Since 2003, a "bona fide prospective purchaser defense" is available to parties acquiring title to a site with knowledge of the contamination so long as the additional statutory requirements are met.[12]

To Be or Not to Be Innocent: Acquiring Contaminated Property

The first element of the defense appears to preclude property owners who acquired the contaminated property through a land purchase agreement from availing themselves of the defense. Courts have given different meanings to the term "contractual relationship" resulting in inconsistent application of the innocent landowner defense.

In agreement with federal district courts in Florida, California, and Illinois, the Second Circuit in *N.Y. State Elec. & Gas Corp.* held that as long as the additional elements of the defense are met, "a land purchase agreement is not the type of contract contemplated as precluding assertion of the third-party defense; instead,…for the landowner to be barred from raising the third-party defense under such circumstances, the contract between the landowner and the third party must either relate to the hazardous substances or allow the landowner to exert some element of control over the third party's activities."[13]

This position is squarely at odds with the Ninth Circuit and federal district courts in Rhode Island, California, and Pennsylvania. In *Carson Harbor Village*, the Ninth Circuit

stated that "…one who purchases land from a polluting owner or operator cannot present a third-party defense…"[14] The courts following this line of reasoning take the position that the contamination must have resulted from the actions of persons who have no relation to the landowner, such as in the case when contamination has migrated from neighboring properties.

An examination of the legislative history, however, supports the position that a contract for the purchase of land in and of itself should not preclude the innocent landowner defense. In fact, the legislative history addressing the term "contractual relationship" states that, if able to satisfy the remaining requirements of the defense, "[a] person who acquires property through a land contract or deed…may assert that an act or omission of a third party should not be considered to have occurred in connection with a contractual relationship as identified in section 107(b) and therefore is not a bar to the defense."[15]

Guilty Until Proven Innocent: Inquiry Necessary

An important element of the innocent landowner defense is meeting the "all appropriate inquiries" test. The legislative history indicates that this "standard was intended to evolve over time and [purchasers are] to be held to higher standards as public awareness of environmental hazards grows."[16] The application of this standard is invariably fact-specific, and requires a determination as to what "good commercial or customary standards" were at the time the property was purchased.

Prior uses of the property and the sophistication of the purchaser appear to be two key factors in the analysis of what constitutes appropriate inquiry. As stated by the *Maturo* court "[f]ederal case law and common sense indicate certain uses present real dangers of contamination."[17] Dry cleaning establishments, landfills and gasoline stations are some examples of high-risk uses that would require the purchaser to conduct a very in-depth inquiry into potential existing or threatened contamination.

To determine if an appropriate inquiry was made, a physical inspection and—for properties purchased after the 1990s—an environmental site assessment are a must to maintain the defense. The case law for property purchased between 1980 and 1990 is less clear on whether conducting environmental site assessments had already become common practice.[18] The required thoroughness of such an inspection is informed by the nature of prior uses of both the subject property and neighboring properties.

In addition, an inquiry of past and present users of a facility must also be made. However, there is no clear indication of the required extent and scope of such inquiry. Indeed, speaking with past users in itself is not sufficient. The specific questions asked of particular parties, including which parties are interviewed, will play an important role in a court's determination as to the sufficiency of the inquiry. In *Maturo*, for instance, the purchaser failed to ask all pertinent questions of the seller and failed to interview one particular neighbor who possessed additional knowledge of contamination on the subject property.[19] With respect to the seller, the court reasoned that the purchaser should have asked questions regarding how the seller disposed of liquid waste, including waste oil, in light of the fact that such a by-product is invariably generated in the operation of a gas station, as well as more specific questions regarding potential leaks or spills.[20]

Inquiry into the land records, as well as all relevant local, state and federal agency records that may reveal evidence of any release or threatened release, is equally necessary.[21] CERCLA § 101(35)(B) provides several other considerations to guide the analysis of what actions are necessary to preserve the inquiry element of the defense.

In Defense of Innocence: Affirmative Due Care

To maintain eligibility for the innocent landowner defense, a party must demonstrate that it exercised due care and took all adequate precautions to prevent the release or continued release of hazardous substances "that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances."[22] This requires the party to take steps necessary to protect against threats to human health or the environment, including avoiding the exacerbation of contamination.[23]

Where the existence of contamination is discovered, the party must take affirmative steps to prevent continued release, including notifying the appropriate environmental agencies and commencing response actions with respect to the contamination.[24] Where there is another responsible party engaged in investigation and potential remediation of the contamination, the landowner is not obligated to engage in a duplication of efforts by commencing an investigation of its own.[25] However, the landowner must cooperate in protecting human health and the environment including by providing site access, providing necessary feedback during the investigation, and avoiding an unreasonable stance in requesting compensation for providing such cooperation and access.[26]

Where the release or the threat of release is yet unknown, the landowner must similarly take adequate precaution, including testing for any suspected contamination and preventing any threatened release. In fact, actions in developing the property that cause the exacerbation or release of contamination, even unknowingly or involuntarily, will entirely eliminate the innocent landowner defense.[27] For instance, in excavating a site in preparation for construction, agitation of contaminated soil may occur or buried barrels containing hazardous substances may be pierced causing the release of the substances. In such a scenario, the innocent landowner fails to meet the first element of the defense which requires the release to occur "solely by an act or omission of a third party…other than…in connection with a contractual relationship…."[28] Recourse may be available through a contribution action under section 113 of CERCLA against the party responsible for burying the wast; however, some apportionment of fault would likely be attributed to the landowner who caused the exacerbation or release.[29]

Innocent in Practice

The innocent landowner defense is a narrow defense available to a limited few. The differing approaches among the courts as to whether the land purchase agreement itself precludes the defense demonstrates the vagueness of the defense. The broad inquiry required in order to meet the all appropriate inquiry standard may not entirely comport with actual practice, particularly for property purchased in the past. The fact-intensive analysis of such inquiry invariably leads to differing results among the courts. Finally, the due care standard, also fact-specific, creates an additional affirmative requirement

to prevent the continued release or exposure to the hazardous substance. As our understanding of environmental hazards evolves, the all appropriate inquiry and due care standards may likely become more rigorous precluding the innocent landowner defense in most situations. **CL**

Notes

1. The analysis of the innocent landowner defense would follow a similar progression under the Connecticut statute, § 22a-452d, as "the federal criteria basically matches [Connecticut's] for [the] innocent landowner defense." *See Maturo v. Comm'r of Dep't of Envtl. Prot.*, 2008 Conn. Super. LEXIS 763 at *6-17 (Mar. 19, 2008).
2. 42 U.S.C. § 9601 *et seq.*
3. *In re Chateaugay Corp.*, 112 B.R. 513, 517 (S.D.N.Y. 1990) (internal citation omitted).
4. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a) (a "potentially responsible person" (PRP) is a current owner or operator of a facility, a past owner or operator of a facility at time hazardous substance was released, a person who arranged for disposal of hazardous substances to or from a facility, a person who transported hazardous substances to or from a facility).
5. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3).
6. CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A).
7. *Id.*; *see also N.Y. State Elec. & Gas v. FirstEnergy Corp.*, 808 F. Supp. 2d 417, 515 (N.D.N.Y 2011).
8. CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A).
9. CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B).
10. *Id.*
11. *Id.* (See section for a listing of considerations for property purchased prior to 1997).
12. *See* 42 U.S.C. §§ 9601(40), 9607(r); *N.Y. State Elec. & Gas*, 808 F. Supp. 2d at 514 (N.D.N.Y 2011).
13. *N.Y. State Elec.*, 808 F. Supp. 2d at 516 (internal citation omitted); *see American Nat'l Bank & Trust Co. v. Harcros Chems.*, 997 F. Supp. 994, 1001 (N.D. Ill. 1998) (outlining the split among the courts in interpreting the "contractual relationship" provision of CERCLA, § 101).
14. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 887 (9th Cir. Cal. 2001); *see American Nat'l Bank*, 997 F. Supp. 994, 1001 (N.D. Ill. 1998) (outlining the split among the courts in interpreting the "contractual relationship" provision of CERCLA, § 101).
15. *H.R. Conf. Rep. No. 962*, 99th Cong., 2d Sess. 186-87. Note, however, that a Central District of California federal court quotes this very section of the legislative history, but comes to the opposite conclusion. *Goe Eng'g Co. v. Physicians Formula Cosmetics*, 1997 U.S. Dist. LEXIS 23627 (C.D. Cal. June 3, 1997).
16. *Maturo*, 2008 Conn. Super. LEXIS 763 at *21 (Mar. 19, 2008)(citation omitted).
17. *Id.* at *29.
18. *See Id.* (discussing that it might have been the practice of banks to require an environmental site assessment in the financing of commercial property in 1986).
19. *Id.* at *32-35, 80.
20. *Id.* at *32-34 (stating that while the purchaser asked questions "geared to eliciting testimony about prior leaks" the question of whether there were any prior spills or leaks was not specifically asked).
21. *Id.* at *41-45.
22. *N.Y. State Elec. & Gas*, 808 F. Supp. 2d at 517 (N.D.N.Y 2011) (citing to legislative history, *H.R. Rep. No. 1016*, 96th Cong., 2d Sess., Pt. 1, at 34 (1980)).
23. *Id.*
24. *Id.* at 517-519; *see also Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 494 (D.S.C. 2011)(noting that after discovering the contamination the landowners made no effort to inform environmental authorities of the contamination or to take steps to minimize human and environmental exposure).
25. *N.Y. State Elec. & Gas*, 808 F. Supp. 2d at 518 (N.D.N.Y 2011).
26. *Id.* at 518-519 (noting that the landowner's aggressive compensation demands, protracted negotiations, lack of timely response to proposals, and lack of feedback in the remediation process failed to comport with the due care requirements of the statute thereby precluding the innocent landowner defense).
27. *See Ashley II*, 791 F. Supp. 2d at 495 (noting that earth moving construction work, including excavation, asphalting, grading and removing of topsoil, agitated the soil and caused new releases of hazardous substances); *Bd. of County Comm'rs v. Brown Group Retail, Inc.*, 768 F. Supp. 2d 1092, 1121 (D. Colo. 2011) (stating that the demolition of a sediment trap during construction caused the release of the solvents contained in the trap, thus precluding the innocent landowner defense).
28. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3).
29. *See Ashley II*, 791 F. Supp. 2d at 503 (allocating one percent liability to landowner based on numerous considerations including the release and exacerbation of contamination caused by development work at the site); *Brown Group*, 768 F. Supp. 2d at 1122 (D. Colo. 2011) (apportioning 25 percent liability to landowner who unwittingly caused release of hazardous substances during development of the property).