Hanousek, *Hong*, and *Hansen*: Pushing the Envelope of the Criminalization of Environmental Law

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Introduction

The criminalization of environmental law continues to be one of the fastest growing components of the U.S. Environmental Protection Agency's (EPA) enforcement program. During fiscal year 2001, the EPA initiated 482 criminal cases and referred 256 of such cases to the U.S. Department of Justice for prosecution.[2] With a total of 372 defendants charged, those prosecutions provided the government with nearly $95 million in fines and restitution and led to 256 years of imprisonment for those convicted – over a 75% increase in jail time from fiscal year 2000. The Bush Administration has continued this emphasis on environmental criminal enforcement and has stated that the prosecution of crimes will be a primary focus of its environmental enforcement policy.[3]

This paper reviews three recent appellate decisions that highlight the importance and implications of the increased criminal enforcement of environmental laws: *United States v. Hanousek*,[4] *United States v. Hong*,[5] and *United States v. Hansen*.[6] These decisions evidence not only the government's continued interest in pursuing criminal enforcement of environmental statutes, but also demonstrate the steadily decreasing proof required for conviction. In light of these cases, and the enforcement climate they typify, individuals and entities under investigation for the alleged commission of an environmental crime should, more than ever, engage experienced defense counsel early in the process to conduct an appropriate internal investigation and properly defend their interests.

United States v. Hanousek

In *United States v. Hanousek*, a roadmaster for an Alaskan railroad company was convicted under the misdemeanor provision of the federal Clean Water Act for negligently discharging a harmful quantity of oil into a navigable water.[7] The applicable provision of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A), makes it a crime to "negligently" violate certain provisions of the Act, including 33 U.S.C. § 1321(b)(3), which prohibits the discharge of oil into or upon the navigable waters of the United States or adjoining shorelines.[8] The discharge at issue in *Hanousek* resulted from a backhoe operator's accidental rupture of an oil pipeline; however, the defendant was off duty and at home when the accident occurred.[9] On appeal, Hanousek contended that the trial court erred in failing to instruct the jury that 33 U.S.C. § 1319(c)(1)(A) required the government to prove that he acted with "criminal" as opposed to "ordinary" negligence.[10] Hanousek also argued that, to the extent 33 U.S.C. § 1319(c)(1)(A) permitted a criminal conviction for ordinary negligence, the provision violated his due process rights.[11]

The Ninth Circuit flatly rejected Hanousek's arguments. The court first held that the plain language of the misdemeanor provisions of the Clean Water Act allow for the imposition of criminal liability based on "ordinary" negligence – the "failure to use such care as a reasonably prudent and careful person would use under similar circumstances."[12] Second, construing the Clean Water Act as public welfare legislation "designed to protect the public from potentially harmful or injurious items," the court rejected Hanousek's argument that the statute, as interpreted by the trial court, violated due process: "It is well-established that a public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process."[13] The court found significant Hanousek's failure to dispute "that he was aware that a high-pressure petroleum products pipeline . . . ran close to the surface next to the railroad tracks" and his failure to contest "that he was unaware of the dangers a break or puncture of the pipeline by a piece of heavy machinery would pose."[14] Consequently, the court concluded that Hanousek "should have been alerted to the probability of strict regulation."[15]

The *Hanousek* decision appears to be an extreme example of criminal prosecution for negligence where a defendant was wholly unaware of the underlying activities giving rise to the criminal charges. While the Clean Water Act punishes such crimes as misdemeanors and provides for up to one year of imprisonment, sentences may be aggregated for a conviction involving multiple counts.[16] As a result, jail time for multiple negligent violations of the Clean Water Act can be substantial.[17] Indeed, while the U.S. Supreme Court declined to review the Ninth Circuit's decision in *Hanousek*, in a rare dissenting opinion to a denial of certiorari, Justices Thomas and O'Connor expressed their disfavor with the appellate court's reliance on the public welfare doctrine:

> Although provisions of the CWA regulate certain dangerous substances, this case illustrates that the CWA also imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities. This fact strongly militates against concluding that the public welfare doctrine applies . . . I think we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations.[18]

United States v. Hong

Like *Hanousek*, the U.S. Court of Appeals for the Fourth Circuit's decision in *United States v. Hong* involved a prosecution under the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A).[19] There, James Hong, the sole shareholder of Avion Environmental, appealed his conviction on thirteen counts of negligently violating pretreatment requirements under the Clean Water Act.[20] The government successfully prosecuted Hong on each count under the "responsible corporate officer" doctrine, which provides that "all who had 'a responsible share' in the criminal conduct" can be held accountable for corporate violations of the law.[21]

On appeal, Hong argued that the government could not rely on the responsible corporate officer doctrine because (i) "the Government failed to prove that he was a formally designated officer of Avion," and, alternatively, (ii) "the Government failed to prove that he extended sufficient control over the operations of Avion to be held liable for the improper discharges."[22] While he controlled Avion's

finances and played a substantial role in company operations, Hong contended that he avoided any formal association with the corporation and was not identified as an officer of the company.[23]

The Fourth Circuit rejected Hong's arguments and affirmed his convictions. Importantly, the court held that the government was not required to prove that Hong was formally designated as a corporate officer of Avion to successfully prosecute Hong under the responsible corporate officer doctrine:

> The gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for *failing to prevent* the charged violations of the CWA.[24]

The court concluded that the evidence presented at trial was sufficient to convict Hong under this expansive application of the responsible corporate officer doctrine. According to the court, Hong was aware that a carbon-filter wastewater treatment system purchased by Avion would not function properly unless preceded by an additional filtration mechanism. Nonetheless, Avion used the system as its sole means of processing untreated wastewater.[25] Moreover, Hong controlled Avion's finances and refused to authorize the purchase of the necessary additional filtration media for the treatment system.[26] Finally, Hong was aware of the treatment system's inadequacy as a result of his presence at the Avion facility during times of improper wastewater discharges.[27]

Defense counsel should not overlook the implications of the *Hong* decision. The Fourth Circuit's expansive reading of the responsible corporate officer doctrine could inadvertently establish precedent for charging criminal negligence when a company official or shareholder had no actual knowledge of, or control over, the activities in question. The decision also demonstrates the government's ability to successfully prosecute a corporate defendant or responsible official for criminal negligence arising out of fiscal decisions that may not have appeared significant or controversial at the time they were made. While Mr. Hong arguably was an unsympathetic defendant, it is not difficult to imagine a corporation or

a corporate official facing charges under the Clean Water Act for an innocent, yet mistaken, decision involving the purchase, repair, or replacement of pollution control equipment.

United States v. Hansen

The Justice Department and the EPA also have aggressively applied the "knowing endangerment" provision of the Resource Conservation and Recovery Act (RCRA), which imposes criminal liability upon any person who "knowingly transports, treats, stores, disposes of, or exports any hazardous waste" and "knows at that time that he thereby places another person in imminent danger of death or serious bodily injury."[28] In *United States v. Hansen*,[29] the first decision by the Eleventh Circuit interpreting this provision of RCRA, the court affirmed the convictions of three corporate officers of LCP Chemicals and Plastics, Inc. ("LCP") for federal environmental violations at a former chemicals plant.

In January 1999, three former officers of LCP were tried on forty-two counts charging multiple violations of the Clean Water Act, RCRA, Endangered Species Act, and CERCLA at LCP's chlor-alkali plant located in Brunswick, Georgia.[30] The defendants were Christian Hansen, founder and former Chairman and CEO of LCP, his son, Randall Hansen, former acting CEO, and Alfred Taylor, the former Brunswick plant manager. The jury found all three officers guilty on thirty-four to forty-one counts.[31] The district court sentenced Christian Hansen to nine years in prison, Randall Hansen to forty-six months imprisonment, and Alfred Taylor to six and a half years in prison.[32] All three officers subsequently filed a consolidated appeal to the Eleventh Circuit.

Before the Eleventh Circuit, Christian Hansen and Randall Hansen challenged their respective convictions, particularly the jury's determination that they had violated RCRA's knowing endangerment provision. A jury may convict a defendant of knowing endangerment only if the government proves that the defendant knowingly caused the illegal treatment, storage, or disposal of hazardous waste and knew that such conduct placed others in imminent danger of death or serious injury.[33] Here, however, neither

defendant was even physically present at LCP's Brunswick plant when the endangerment allegedly occurred. Instead, both Christian Hansen and Randall Hansen worked at LCP's corporate headquarters in New Jersey. From there, they oversaw operations of six clor-akali plants located across the eastern United States, including the Brunswick plant. Defense counsel argued that the district court had erroneously permitted the jury to convict the Hansens of knowing endangerment based solely upon their corporate positions within the company and without any regard to whether they had actual knowledge of any alleged endangerment.

The Eleventh Circuit disagreed and affirmed the Hansens' convictions. Importantly, the Court, decided that the government may establish that a defendant acted "knowingly" merely by showing that the defendant had knowledge of the "general hazardous character" of the chemical and knew that the chemical had the "potential to be harmful" to others.[34] The Eleventh Circuit concluded that the testimony of several former employees sufficiently demonstrated that the Hansens knew that the Brunswick plant did not comply with various environmental standards and also knew that this failure to comply posed a danger to the plant's employees.[35] Former employees testified that they had discussed the plant's deteriorating condition and the environmental compliance problems with both Christian and Randall Hansen.[36] These employees further testified that Randall Hansen had received reports detailing that hazardous wastes were improperly present at the plant and the danger associated with their presence.[37]

Finally, the Court rejected the Hansens' contention that plant employees consented to the environmental risks present at the Brunswick plant.[38] A defendant may successfully defend a charge under RCRA's knowing endangerment provisions if the conduct charged was consented to by the person endangered and that the danger and conduct charged were foreseeable hazards of an occupation, business, or profession.[39] The Court decided that the Brunswick plant's environmental violations, which endangered the employees, were not typical to chlor-akali plants.[40] Therefore, the Court affirmed the

Hansens' convictions, concluding that the evidence was sufficient to show that Christian and Randall Hansen knew that the Brunswick plant was incapable of complying with environmental standards and that plant employees were endangered while working within that environment without consenting to the risk.[41]

This decision, like the Fourth Circuit's decision in *Hong*, may establish precedent for charging criminal misconduct where a defendant had no actual knowledge or control over the activities in question. Indeed, *Hansen* demonstrates that a director, officer, or employee may be deemed to possess the requisite knowledge for a RCRA criminal violation merely from receiving reports on environmental compliance issues prepared for a facility located hundreds or even thousands of miles from corporate headquarters. Finally, *Hansen* likely is the harbinger of a new effort to enforce the "knowing endangerment" provision of RCRA. Prosecutors consider charging defendants with this crime because conviction can result in fines up to $250,000 and/or imprisonment up to fifteen years.

The Importance of Early Intervention

Hanousek, *Hong*, and *Hansen* demonstrate that a lawyer representing a client accused of committing an environmental crime should engage experienced defense counsel early in the process to conduct an appropriate internal investigation and properly defend their interests. An estimated ninety percent of criminal cases settle before trial.[42] This fact, along with the relatively strict sentencing template imposed by the United States Sentencing Guidelines, makes it vitally important for defense counsel to engage prosecutors as early as possible in the government's investigation and prosecution of a client. Early communication maximizes the likelihood that defense counsel can favorably influence whether charges are filed against the defendant, and, if so, minimize the client's consequent exposure to prison, criminal fines, and other consequences of conviction.

One of the most important decisions counsel will make when defending a client under investigation for environmental crimes is whether and to what extent the target should cooperate with the prosecution. This question is extremely important when defending a corporate entity, because the degree to which a corporation cooperates with the prosecution can influence the government's decision regarding whether to bring charges against the organization for the actions of its employees or agents. A July 16, 1999 guidance memorandum issued by former Deputy Attorney General Eric Holder, Jr., "Bringing Criminal Charges Against Corporations" (the "Holder Memo"), underscores the importance the government attaches to cooperation by a corporation under investigation.[43] The Holder Memo sets forth eight factors a prosecutor may consider when deciding whether to charge a corporation in a given case. One critical factor discussed in the Holder Memo is the extent to which a corporation cooperates with the prosecution. The Memo provides that, in plea agreements in which a corporation agrees to cooperate,

> the prosecutor may request that the corporation waive the attorney-client and work product privileges, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted.[44]

Increasingly, federal prosecutors are demanding that corporations waive the attorney-client and work product privileges as a condition to plea agreements. For example, two recent high-profile environmental criminal plea agreements involving British Petroleum and Royal Caribbean Cruises respectively required these corporations to waive much of the attorney-client and work product privileges and to reveal substantial portions of their internal investigations.[45] This, in turn, has generated heated criticism to the Holder Memo's prosecutorial guidance on seeking waivers of privilege.[46] Critics contend that such a waiver threatens the effective communication on which a attorney-client relationship depends, further complicating the already difficult task of internal investigations, in which defense

counsel attempt to obtain information from corporate employees while ensuring that those workers understand that counsel represents not the employee but the organization.[47]

A second major issue concerning plea negotiations is the fact that many environmental criminal matters are accompanied by parallel civil proceedings, and defense counsel must therefore be extremely careful of the collateral effects of any plea on civil litigation. Most importantly, a finding on an issue of liability may collaterally estop a defendant from litigating that issue in a civil proceeding and provide a civil litigant, be it the Government or a private individual or entity, an easy path to summary judgment. Conversely, facts developed during civil proceedings may lead the government to initiate a criminal prosecution. To avoid these pitfalls, defense counsel often seek a "global settlement" of all issues raised in both the criminal and civil litigation. Unfortunately, because of Government concerns with global resolutions, such settlements may be difficult to obtain. It is therefore important that defense counsel consult with the government in the early stages of the investigation or prosecution whenever proposals for a possible global settlement are anticipated.

The Environmental and Natural Resources Division of the Department of Justice and the Environmental Protection Agency have each issued a "Global Settlement Policy" to address the appropriateness of a global settlement in a given case.[48] The Justice Department's policy provides that the approval of the Assistant Attorney General of the Environment and Natural Resource Division must approve all global settlements, and that such settlements must satisfy five conditions:

1. Criminal plea agreements must be handled by criminal attorneys and civil settlements by civil attorneys;

2. Each part of the settlement must separately satisfy the appropriate criminal and civil criteria;

3. With respect to a civil settlement, all effected client agencies must approve the settlement;

4. There should be separate documents memorializing the criminal plea agreement and the civil settlement; and

5. A defendant may not trade civil relief in exchange for a reduction in criminal penalty.

EPA's policy contains similar provisions. Both policies make clear that early consultation is necessary whenever proposals for a possible global settlement are anticipated. Counsel facing a criminal environmental investigation that may also give rise to parallel civil proceedings should therefore begin to lay the groundwork for a global resolution at the early stages of the litigation.

Conclusion

As a result of its increased criminal enforcement efforts, EPA has concluded several successful and widely publicized criminal prosecutions. For example, on April 19, 2002 the U.S. District Court for the Southern District of Florida ordered Carnival Corp. – the world's largest passenger cruise ship operator – to pay $18 million as a result of the cruise line pleading guilty to falsifying records regarding oil discharges at sea.[49] More recently, on May 13, 2002, Kentucky-based oil and chemical company Ashland Inc. pleaded guilty to Clean Air Act violations of negligent endangerment and submitting a false certification to environmental regulators and agreed to pay approximately $11 million in fines, restitution, and equipment upgrades.[50]

Further, federal agencies (and states) have the authority to suspend and debar companies from receiving future contracts and grants when the contractor's responsibility is deemed compromised, even if there ultimately is no criminal conviction. Suspension is an interim refusal to deal with a contractor pending receipt of further information. Debarment is the disqualification of a contractor for a set period of time, typically from one to three years. Imposition of such sanctions is virtually assured *(and in some circumstances is automatic)* if a company is convicted of an environmental crime.

The high stakes involved in criminal environmental litigation highlight the need for individuals and entities under investigation for the alleged commission of an environmental crime to engage experienced defense counsel early in the investigative process. Early intervention by counsel will

facilitate the performance of an internal investigation that may place the entity or individual under investigation in a better position to influence charging decisions, seek dismissal of any charges, and conduct effective plea negotiations.

ENDNOTES

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[2] U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance, *Compliance and Enforcement Progress in FY 2001, Detailed Summary* (visited May 27, 2002) <http://es.epa.gov/oeca/main/2001eoy/2001progress.pdf>.

[3] *Administration Will Focus on Prosecuting Environmental Crimes, Justice Official Says*, Env't Rep. (BNA) No. 15, at 807 (Apr. 12, 2002).

[4] *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000).

[5] *United States v. Hong*, 242 F.3d 528 (4th Cir. 2001).

[6] *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001).

[7] *Hanousek*, 176 F.3d at 1119-20. Hanousek was convicted under 33 U.S.C. §§ 1319(c)(1)(A) and 1321(b)(3).

[8] 33 U.S.C. § 1319(c)(1)(A). Such a crime is punishable "by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both." *Id.*

[9] *See Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting).

[10] Hanousek defined "criminal" negligence as "'a gross deviation from the standard of care that a reasonable person would observe in the situation.'" *Hanousek*, 176 F.3d at 1120.

[11] *See id.* at 1118.

[12] *Id.* at 1120-21.

[13] *Id.* at 1121-22.

[14] *Id.* at 1122.

[15] *Id.*

[16] *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(d) (2001). The United States Sentencing Commission's website is located at <http://www.ussc.gov>.

[17] *See*, *e.g.*, *Hong*, 242 F.3d at 530 (upholding thirty-six month prison sentence for thirteen counts of negligently violating the Clean Water Act).

[18] *See Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting).

[19] *United States v. Hong,* 242 F.3d 528 (4th Cir. 2001).

[20] *See id.* at 530.

[21] *Id.* at 531 (quoting *United States v. Dotterweich*, 320 U.S. 277, 284 (1943)).

[22] *Id.*

[23] *See id.* at 529.

[24] *Id.* at 531 (emphasis added).

[25] *See id.* at 530.

[26] *See id.* at 531.

[27] *See id.* at 532.

[28] 42 U.S.C. § 6928(e).

[29] *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001).

[30] *See id.* at 1231.

[31] *See id.* at 1231-32.

[32] *See id.* at 1232.

[33] *See* 42 U.S.C. § 6928(e).

[34] *See Hansen*, 262 F.3d at 1243.

[35] *See id.* at 1243-44.

[36] *See id.*

[37] *See id.*

[38] *See id.* at 1245.

[39] *See id.*

[40] *See id.* at 1245-46.

[41] *See id.* at 1246.

[42] *See* 25 AM. JUR. TRIALS 69 at § 4 (2000).

[43] Eric Holder, Jr., *Bringing Criminal Charges Against Corporations* (June 16, 1999)

http://www.usdoj.gov/04foia/readingrooms/6161999.htm [hereinafter the "*Holder Memo*"].

[44] *Holder Memo* § XII.B.

[45] *See United States v. BP Exploration (Alaska) Inc.*, No. A99-0141 CR (D. Alaska 1999) and *United States v. Royal Caribbean Cruises Ltd.*, No. 98-0103-CR-Middlebrooks (S.D. Fla. 1999).

[46] *See*, *e.g.*, Judson W. Starr and Brian L. Flack, *DOJ Must Address White Collar Prosecutors' Disrespect for Privileged Communications*, Andrews White Collar Crime Rep. (June 2001); Jonathan D. Polkes and Renee' L. Jarusinsky, *Waiver of Corporate Privilege in a Government Investigation: Reaction to the New DOJ Policy*, Compendium of the ABA White Collar Crimes Comm. Annual Meeting (Mar. 2001); Joseph F. Savage, Jr., and Melissa M. Longo, *"Waive" Goodbye to Attorney-Client Privilege*, CORP. COUNS. (Mar. 2001); David M. Zornow and Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. LAW REV. 147 (Spring 2000).

[47] *See* ABA Model Rule 1.13 (Organization as Client); *see also*, 1 GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, THE LAW OF LAWYERING Chapter 17 (3d ed. 2001) (discussing generally where a lawyer represents an organization or entity); ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 91:2001 (2001) (same).

[48] *See* ERND Directive 99-20, Global Settlement Policy (Apr. 20, 1999) <http://www.usdoj.gov/enrd/global.htm>; Environmental Protection Agency, *Coordinated Settlement of Parallel Proceedings: Interim Policy and Procedures* (June 9, 1997) <http://www.epa.gov/oeca/ore/rcra/cmp/060997.pdf>.

[49] *Passenger Cruise Line to Pay $18 Million After Plea on Falsifying Discharge Records*, Env't Rep. (BNA) No. 17, at 919 (Apr. 26, 2002).

[50] *Oil Company to Pay $11 Million in Fines, Restitution, Upgrades After Refinery Fire*, Env't Rep. (BNA) No. 20, at 1096 (May 17, 2002). According to Thomas Sansonetti, Assistant Attorney General for Environment and Natural Resources, the case embodied "the Justice Department's commitment to holding accountable environmental offenders for their criminal deeds that harm both people and the environment." *Id.*

LIABILITY OF PROPERTY OWNERS FOR POLLUTION CLEANUP COSTS

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1. Applicable Statutes.

a. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 et seq. ("CERCLA"). CERCLA Sections 107(a) and 113(f) extend cleanup liability to current and former "owners and operators" of a facility contaminated with a hazardous substance. 42 U.S.C. §§ 9601(20)(A), 9607(a), 9613(f).

b. Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq. ("RCRA"). RCRA Section 7001 generally renders liable anyone who has contributed to, or is contributing to, the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to the public health or environment. 42 U.S.C. § 6972(a); see also 42 U.S.C. §§ 6925 and 6928 (regarding enforcement of treatment, storage and disposal permits); 42 U.S.C. § 6934(a).

c. Chapter 403, Florida Statutes. Section 403.727, Florida Statutes, extends cleanup liability to current and former "owners and operators" of sites contaminated with hazardous substances or pollutants, as well as to any RCRA facility owner or operator who fails to comply with Florida Department of Environmental Protection ("FDEP") rules and orders or a

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[1] This outline is based on materials prepared by Kirk L. Burns, formerly of counsel to White & Case LLP.

RCRA permit. The statute of limitations under Section 403.727 does not begin to run until after the cleanup is completed. Florida Dept. of Env. Protection v. CTL Distribution, Inc., 715 So.2d 262 (Fla. 3d DCA 1998).

d. Chapter 376, Florida Statutes. Section 376.302 generally prohibits the discharge of "pollutants" to waters of the State. Section 376.308, Florida Statutes, further provides that any person who owns a facility at the time of discharge of "pollutants," or the current or former owner of property contaminated with "hazardous substances," is liable for remediation costs. See also Fla. Stat. § 376.313.

e. Local Ordinances. Local ordinances, such as Metropolitan Dade County Code Section 24 or Broward County Code Section 27, generally render owners and operators strictly liable for cleanup costs, as well as anyone who causes, suffers or permits the release of hazardous substances. Dade County Code Section 24-57(a) further provides that in addition to property owners, anyone "who has a legal, beneficial, or equitable interest" in a site is jointly and severally liable for cleanup costs.

2. Potentially Liable Parties.

a. Property owners. As indicated supra, CERCLA, RCRA, Chapters 376 and 403, and local ordinances extend cleanup liability to the current property owner, as well as any person who owned the property when hazardous substances were released. Marriott v. Simkins Industries, Inc., 825 F. Supp. 1575 (S.D.Fla. 1996); Bunger v. Hartman, 797 F. Supp. 968, 970-971 (S.D. Fla. 1992); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (11th Cir. 1996); New York v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d Cir. 1985) (current owner liable); Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992)(past owners liable for releases occurring during period of ownership, which includes subsurface migration

and leaching); Seaboard Systems R.R. v. Metropolitan Dade County, 467 So.2d 348 (Fla. 3d DCA 1985) (construing Dade County Code Section 24). Under CERCLA, past owners are liable only if hazardous substances were "disposed" during the period of his ownership. See CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2); but see, Seaboard Systems, supra (prior owner liable under Dade County Code for allowing contamination to remain on property).

b. Lessees. A lessee may be liable as an owner for contamination that it causes. United States v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317 (S.D.N.Y. 1992); A & N Cleaners, see, e.g., Caldwell v. Gurley Refining Co., 755 F.2d 645, 652 (8th Cir. 1985) (lessor held entitled to full indemnity from lessee for cleanup costs associated with pollution caused by the lessee); but see, Nurad, supra., ("facility" narrowly defined to mean UST only, therefore, tenants without control over USTs, or which didn't participate in disposal, not liable).

c. Parent corporation and shareholder liability. In order for a parent corporation or shareholder to be held liable as an “owner,” traditional concepts of limited shareholder liability still apply and the corporate veil must be pierced. United States vs. Bestfoods, 118 S.Ct. 1876 (1998); Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984).

d. “Operators.” Persons who do not own or lease property contaminated with hazardous substance may nonetheless be liable if “they themselves actually participate in the wrongful conduct,” or managed or conducted the affairs of the facility relating to hazardous wastes. See, Redwing Carriers, 94 F.3d at 1504; Bestfoods, 118 S.Ct. at 1887. This would also include cleanup contractors which exacerbate existing contamination. See e.g., Ganton Technologies, Inc. v. Quadion Corp., 834 F. Supp. 1018 (N.D. Ill. 1993).

e. Successor companies. Generally, an entity that purchases the assets of another company will not assume pollution cleanup liability unless: (1) the purchasing company expressly or impliedly agrees to assume the liability; (2) the transaction amounts to a "de facto" merger; (3) the purchasing entity is merely a continuation of the selling corporation; or (4) the asset sale was fraudulently entered into in order to avoid liability or creditors. See North Shore Gas Co. v. Salomon, Inc., 152 F.3d 642 (7th Cir. 1998); Atchison Topeka and Santa Fe Ry. Co. v. Brown & Bryant, 132 F.3d 1295 (9th Cir. 1997); Bernard v. Kee Manf. Co., 409 So.2d 1047 (Fla. 1982); Ocala Breeders' Sales Co. v. Hialeah, Inc., 24 Fla.L.Weekly 1243 (Fla. 3d, DCA May 26, 1999).

f. Donees/Heirs. A decedent's estate may be held liable for cleanup costs. Bowen Engineering v. Estate of Reeve, 799 F. Supp. 467, 475 (D.N.J. 1992); see also, Jones v. Sun Bank/Miami, 609 So.2d 98 (Fla. 3d DCA 1992) (claim against estate by purchaser of contaminated property time barred). However, good faith bequeaths of property may be excluded under the innocent purchaser defense. Snediker Developers Ltd. Partnership v. Evans., 773 F. Supp. 984 (E.D. Mich. 1991); but see Soo Line R.R. Co. v. Carney & Co., 797 F. Supp. 1472 (D. Minn. 1992). Gifts may also be beyond CERCLA's scope. See generally U.S. v. Pacific Hide & Fur Depot, 716 F. Supp. 1341 (D. Idaho 1989); U.S. v. Martell, 887 F. Supp. 1183, 1188-1189 (N.D. Ill. 1995).

3. Shifting Liability by Contract.

a. Indemnification. Under CERCLA, an indemnification agreement cannot shield an owner from liability in a cleanup action brought by the United States. See CERCLA §107(e)(1), 42 U.S.C. §9607(e)(1); Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988). Indemnification agreements may, however, enable the parties to shift liability among themselves. Mordan Corp. v. C.G.C. Music, 804 F.2d 1454 (9th Cir. 1989); Niecko v. Emro Marketing Co., 769 F. Supp. 973 (E.D. Mich. 1991); aff'd, 973 F.2d 1296 (6th Cir. 1992).

b. "As is" Clauses. Courts have consistently refused to enforce an "as is" provision in a sale agreement to absolve a seller from liability to the EPA. International Clinical Laboratories v. Stevens, 710 F. Supp. 466 (E.D.N.Y. 1989). See also Southland, supra. However, the existence of an "as is" clause may be considered by a court in apportioning cleanup liability among several liable parties. See, Southfund Partners III v. Sears, Roebuck and Co., ___ F. Supp. 2d ____, 1999 WL 557684 (N.D. Ga. July 1999); Niecko v. Emro Marketing Co., 973 F.2d 1296 (6th Cir. 1992).

4. Defenses to Liability.

a. Acts of Third-Parties. CERCLA, and Chapters 376 and 403, Florida Statutes, provide that a potentially liable party may be relieved of cleanup responsibility where it establishes that the release of pollutants was caused by a third-party with whom the owner or operator is not in contractual privity. The "third-party defense" has generated considerable case law -- most of it discouraging from the eyes of a CERCLA defendant.

A defendant seeking to establish the third-party defense must show:

(1) A third-party was the sole cause of the release of hazardous substances;

(2) The third-party was not an employee or agent of the defendant:

(3) The acts or omissions of the third-party did not occur in connection with a direct or indirect contractual relationship with the defendant; and

(4) The defendant exercised due care with respect to the hazardous substances and took precautions against foreseeable acts and omissions of the third-parties.

What type of "contractual relationship" will preclude the third-party defense is not precisely clear. CERCLA defines "contractual relationship" as including "land contracts, deeds, or other instruments transferring title. . . ." However, court decisions have stated that the "contractual relationship" must have some connection with the release of hazardous substances, and, therefore, the mere existence of a contractual relationship between a landowner and a third-party who is responsible for the release does not foreclose use of the defense. See, Westwood Pharmaceuticals, Inc. v. Nat'l Fuel Gas Distribution Corp., 964 F.2d 85 (2d Cir. 1992) ("a landowner is precluded from raising the third-party defense only if the contract between the landowner and the third-party somehow is connected with the handling of hazardous substances"); State of New York v. Lashins Arcade Co., 91 F.3d 353 (2d Cir. 1996); see generally, "Third-party Defenses to Liability under § 107 of CERCLA," 105 A.L.R. Fed. 21 (1991).

b. The "Innocent Purchaser" Defense.

(1) Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 6901 et seq. CERCLA provides that an "innocent purchaser" of contaminated property will not be responsible for its cleanup. In order to qualify as a "innocent purchaser," a defendant in a CERCLA lawsuit must establish by a preponderance of evidence that:

> [a]t the time the defendant acquired the facility the defendant 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.

See, 42 U.S.C. §§ 6907(b)(3) and 9601(35)(A)(i). In order to establish that a defendant had no reason to know of the contamination, CERCLA further provides that:

> [t]he defendant must 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. For purposes of the preceding sentence 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.

42 U.S.C. § 9601(35)(B).

(2) Sections 376.308 and 376.313, Florida Statutes. Much like its federal counterpart, Florida Statutes Chapter 376 authorizes an "innocent purchaser" defense to actions brought by the Florida Department of Environmental Protection ("FDEP") pursuant to Sections 376.30-376.319, or by a private party pursuant to Section 376.313, Florida Statutes.

In the case of a discharge of petroleum, petroleum products, or dry cleaning solvents, Section 376.308(1)(c) generally provides that the current owner of contaminated property will not be liable provided he or she can demonstrate: (i) that the property was contaminated by a previous owner or operator or other third party; (ii) that he or she did not cause or contribute to the contamination; and (iii) that he or she did not know of the pollutive condition at the time of acquisition. Fla. Stat. §376.308(1)(c). If the owner acquired title to the contaminated property after July 1, 1992, or in the case of a dry cleaning facility, after July 1, 1994, the statute further provides that the owner must:

> [e]stablish by a preponderance of the evidence that he or she undertook at the time of acquisition, all appropriate inquiry into the

> previous ownership and use of the property consistent with good commercial or customary practice in an effort to minimize liability.

Id. Section 376.308(1)(c) incorporates the same language found in CERCLA Section 101(35)(B), supra, which states that a court, in determining whether a purchaser made all appropriate inquiry, should consider the specialized knowledge or experience of the purchaser, the relationship between the purchase price to the value of the property if uncontaminated, the accessibility of information about the property, the obviousness of the presence of contamination, and the ability to detect the contamination by appropriate inspection. Id.; see Kaplan v. Peterson, 674 So.2d 201, 204 (Fla. 5th DCA 1996) ("A complete defense to a suit brought by the state is that an owner acquired title to contaminated property without knowledge of the pollution, and without having contributed to it in any way").

(3) Section 403.727, Florida Statutes. Unlike CERCLA and Chapter 376, Section 403.727 does not contain an express innocent purchaser defense. It does, however, provide that a party will be relieved of liability if it can demonstrate: (i) that the release of hazardous substances resulted from the act or omission of a third party other than an employee or agent of the defendant or one with whom the defendant had a contractual relationship; (ii) the defendant exercised due care with respect to the hazardous substances, taking into consideration the characteristics of such hazardous waste in light of all relevant facts and circumstances; and (iii) the defendant took precautions against foreseeable acts or omissions of any such third party and against the consequences that could foreseeably result from such acts or omissions. Fla. Stat. § 403.727(5)(d).

In Sunshine Jr. Stores, Inc. v. Florida Department of Environmental Regulation, 556 So.2d 1177 (Fla. 1st DCA 1990), the First District held that identical third-party defense language in Florida Statute § 376.308 (1985) relieved a purchaser of a contaminated gas station

of cleanup responsibility where it was undisputed that the petroleum contamination occurred prior to purchase.[2] As reflected in Justice Wentworth's dissent, however, the third-party defense applies to acts or omissions of third parties with whom the defendant does not have a contractual relationship. Although Chapter 403 does not define the term "contractual relationship," the term would seem to include deeds and purchase and sale agreements. CERCLA defines "contractual relationship" to include instruments transferring title or possession. But see, Westwood Pharmaceuticals, supra.

(4) Local Ordinances. Generally, local ordinances do not contain "innocent purchaser" defenses.

(5) Legislative History. The legislative history to CERCLA's innocent purchase defense, which was adopted by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), provides that:

> The duty to inquire under this provision shall be judged as of the time of acquisition. Defendants shall be held to a higher standard as public awareness . . . has grown, as reflected by this Act, the 1980 Act and other federal and state statutes. Moreover, good commercial or customary practice with respect to inquiry and an effort to minimize the liability shall mean that a reasonable inquiry must have been made in all circumstances, in light of best business and land transfer principles. Those engaged in commercial transactions should, however, be held to a higher standard than those who are engaged in residential transactions.

H.R. Rep. No. 962, 99th Cong., 2d Sess. 187 (1986); reprinted at 1986 U.S. Code Cong. & Admin. News pp. 2835, 3279-3280.

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[2] After rendition of Sunshine Jr. Stores, the Florida Legislature amended Section 376.308 to include its current "innocent purchaser" provisions. Section 403.727 was not amended.