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As Congress and the White House focus on the reauthorization of the federal Superfund law (CERCLA or "Superfund"),[1] there will be considerable discussion about the fairness and efficiency of the current standards of liability in the law. This article focuses on two of the most important categories of liability: parties who generated and disposed of the hazardous waste originally and the current owners or operators of the contaminated property. With respect to the first category, the so-called "polluter," this article argues that the application of retroactive liability to this party creates a fundamental unfairness and inefficiency in the law. Furthermore, this article contends that the liability standard for current owners and operators is also unfair and inefficient, except with respect to post-1980 disposals.

I. RETROACTIVITY

The so-called "retroactivity" doctrine in CERCLA[2] imposes liability on responsible parties for actions such as waste disposal which occurred before 1980, the effective date of CERCLA. Many parties affected by CERCLA have argued, without much success, that the retroactivity doctrine of CERCLA is unfair and

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[1] CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675 (1980).

[2] *Id.*

inefficient.[3] This article proposes a new argument against retroactivity which is more persuasive than past arguments and should lead to a major reform of the retroactivity doctrine.

Under CERCLA, a number of categories of parties are liable for the costs incurred by the government or private parties to investigate and remediate releases of hazardous materials.[4] These categories of responsible parties include current owners or operators of the contaminated site, prior owners or operators who owned or operated the site at the time the hazardous material was disposed of, transporters who selected the site for waste disposal, and parties who generated or arranged for the disposal of the material.[5] Responsible parties are strictly liable; in other words, disposals in compliance with the law and disposals which occurred despite reasonable standards of care may still result in liablility. Moreover, where harm is indivisible, each responsible party is jointly and severally liable for all response costs.[6]

The core of the CERCLA liability scheme is embodied in the catch-phrase "the polluter pays." Few question this starting point of environmental liability; for most, the hard questions of fairness and efficiency arise when one debates "who else should pay?" This article questions "the polluter pays" starting point itself, and argues that, at least with respect to pre-1980 contamination, it is the unfairness and inefficiency inherent in the core liability principle which undermines the entire liability allocation process.

What could possibly be wrong with the core principle "the polluter pays?" On its face, it appears to be the ultimate fair principle of environmental liability. But this superficial appearance of fairness is deceptive. While "the polluter pays" principle works well in most environmental laws, it collapses when examined in terms of retroactive liability.

Many environmental laws require parties to "retrofit" pollution control devices onto hazardous waste processes. But virtually no environmental law other than CERCLA (and its state-law equivalents) allocates potentially massive liabilities to activities performed *entirely* in the past and completed before the law took

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[3] *See e.g.*, United States v. Kramer, 757 F. Supp. 397 (D.N.J. 1991); United States v. Dickerson, 640 F. Supp. 448 (D. Md. 1986); United States v. Conservation Chemicals Co., 619 F. Supp. 162 (D.C. Mo. 1985).

[4] 42 U.S.C. § 9607(a).

[5] *Id.*

[6] *Id.*

effect. Arguably, this retroactivity is fair and even necessary given that the consequences of the past acts still threaten health and safety.

Ironically, many important environmental laws which are less retroactive than CERCLA incorporate distinctions designed to soften their potential impact on investment-backed expectations, such as the distinction made in the Federal Clean Air Act[7] between "existing" sources of air pollution and "new" sources, with the latter generally receiving far harsher controls than the former. This distinction may be more reasonable in the context of the Clean Air Act than in CERCLA because air pollution dissipates over time, whereas the hazardous waste disposals regulated under CERCLA remain potentially hazardous for longer.

Perhaps the permanency of hazardous ground waste explains why CERCLA has no "grandfather clauses" protecting parties who disposed of hazardous materials long before 1980 and often long before the disposers knew that the materials were hazardous or that the materials were being disposed. Section 9607 of CERCLA imposes generally the same strict liability standard on all "responsible parties," past, present, or future.[8]

For the purposes of assessing liability fairly and efficiently, there is an important difference between a pre-1980 polluter and a post-1980 polluter. Assuming that the original effective date of CERCLA, 1980, is a reasonable approximation of when parties who generated hazardous wastes reasonably began to appreciate the true costs involved in disposing of such wastes, the essence of "the polluter pays" principle is the fair and efficient policy that businesses should internalize their costs. Only by fully internalizing the costs of its operations can a business be forced to operate efficiently. Consider a business which produces widgets which are worth up to $5 each to consumers. Suppose also that, fortunately for society, competition drives the market price down to $4 per

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[7] CAA §§ 101-327, 42 U.S.C. §§ 7401-7626 (1983).

[8] 42 U.S.C. § 9607 does make one interesting distinction between current and past owners and operators. Subject to certain defenses, current owners and operators are liable for response costs incurred for threatened or actual releases of hazardous materials on their property, regardless of when the hazardous materials were first disposed of on the property, *id.* By contrast, past owners and operators are only liable if hazardous materials were disposed of on their property during the period of their ownership or operations, *id.* But as argued *infra*, text accompanying note 11, this added criteria for past owners and operators does not cure the fundamental unfairness and inefficiency inherent in the retroactivity doctrine.

widget. This result could occur when the cost of production per widget is $3 and when $1 profit per widget is a sufficient return to attract enough capital to construct and operate a widget factory. Other things being equal, market pressures will drive the price of the widget to $4, and consumers who value the widget at $4 or more may buy one. Companies which try to charge more than $4 will be forced down to $4 by competition.[9] Now assume that cleanup costs drive the cost of disposing of the hazardous wastes which result from the production of the widgets from $0 per widget up to $1. Assuming the price of the widget is elastic, manufacturers will be forced to increase the price of the widget to $5.

This hypothetical represents the ideal cost internalization scenario. Making the polluter pay simply makes the price of the widget a more accurate reflection of the true, full cost of its production. This result is both efficient and fair. The social efficiency can be demonstrated by increasing the waste disposal cost to $2 per widget. In that case, the widget can no longer be sold profitably and will no longer be worth mass-producing. Long term, the factory would shut down or retool for other products. The costs associated with the widget would exceed its benefits for virtually all consumers. The widget would become extinct. One could say that the CERCLA liability standard shut down the factory, but at least in this example the shutdown is the right (that is, fair and efficient) result.

The ideal cost internalization does not apply to the typical pre-1980 manufacturer. Assume the old manufacturer based his or her widget prices on the pre-1980 waste disposal cost of $0 per widget. The widget could be produced for $3 and sold for $4. Consumers would acquire the widget happily, keeping for themselves the excess value, if any, of the widget. What results from making the pre-1980 polluter pay for post-1980 cleanups? Suddenly future widgets, which cost $3 to produce plus $1 necessary profit, must internalize an extra $2 of disposal costs. The cost cannot be added to the pre-1980 price of the widget because all of those widgets have already been sold. Now a product which consumers want and will pay up to $5 for cannot profitably be priced for less than $6. The company may go bankrupt. Newcomers may attempt to fill the void, perhaps by buying the old factory (subject

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[9] *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.1 (3d. ed. 1986) (comprehensive discussion of the application of economics to various legal fields).

to the risks of successor liability[10]) or else will waste valuable resources building a duplicate widget factory merely to make a fresh start, without the extra burden of the CERCLA costs.

Empirically, it is not clear to what extent these market inefficiencies are now occurring. What is probably more common is that large companies are finding their profits arbitrarily depressed by CERCLA. Theoretically, this effect might reduce the value of the company, which might be considered appropriate if the value of the company had been inflated by its historically, artificially depressed costs. But if the free market drove the price of the pre-1980 widget down to $4, as suggested above, any excess value was distributed to consumers long ago. It was not kept in the company. In other words, a fairer tax would be one imposed on the pre-1980 *customers* of the widget company. To the extent future widget buyers are the same persons as past buyers this may, in fact, be occurring.

The point of this analysis is that it is both unfair and inefficient to impose the cost of pre-1980 pollution on pre-1980 polluters, especially if the polluters reasonably did not internalize the true hazardous waste disposal costs in their pre-1980 prices because they did not anticipate them.[11] And yet this is the *core* liability on which CERCLA's liability scheme builds and expands. Certainly it is the liability allocation which has been perceived as the fairest and most efficient.

II. LIABILITY OF CURRENT OWNERS AND OPERATORS

Let us now move to the next category of liability: liability of the current owner or operator which, not surprisingly, is arguably no more fair or efficient than "the polluter pays" rule. One ration-

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[10] *See* Daniel H. Squire et al., *Corporate Successor Liability Under CERCLA: Who's Next*, 43 Sw. L.J. 887 (1989).

[11]

> Government should generally avoid imposition of retroactive liability: that legislation which creates a new obligation, imposes a new duty, or attaches a new disability, for past activities, . . . is unfair and presents an additional major risk to business decisions because present activities which are legal may have uncertain legal consequences. This added risk tends to discourage new investment.

Strock Supports Measure to Reform Superfund in Speech to Lawyers, 6 CAL. REPORT No. 6 (Environmental Protection Agency) Feb. 11, 1994, at 6 (citing Standing Comm. on Envtl. L., Tort & Ins. Section, Section of Nat. Resources, Eng. & Envtl. L., Bus. L. Section, *Report to the House of Delegates: Recommendation*, 1994 A.B.A. Item No. 108, at 2 (Midyear Meeting, Kansas City, Mo.)).

ale for the liability of the current owner or operator is that after 1980 businesses and individuals knew about CERCLA, were able to address the issue of hazardous waste disposal, and should have internalized any waste disposal costs. Unfortunately, the majority of CERCLA cleanups do not involve post-1980 waste disposals. Indeed, by the time CERCLA was enacted, there was already a federal law in effect, the Resource Conservation and Recovery Act (RCRA),[12] which was designed to ensure that hazardous waste generators would dispose of their wastes in a manner which would minimize the need for future cleanups.

Partly to address the inequity of holding current owners liable for past contamination, CERCLA includes an innocent landowner defense, which provides in relevant part that a current owner is not liable for contamination caused by a prior owner or operator if the current owner reasonably failed to discover the contamination notwithstanding commercially reasonable due diligence performed prior to acquisition.[13] The innocent landowner defense has been widely debated in the literature, with many saying it is largely illusory and practically unobtainable. However, such objections are outside the scope of this article.[14] Instead, for the purposes of this article, it is only relevant to discuss the fairness and efficiency of the current owner and operator liability which is not voided by the innocent landowner defense. Such liability would involve one of three types of contamination: (1) contamination occurring during the current owner or operator's ownership or operation (pre-1980 or post-1980); (2) contamination occurring prior to the acquisition of the property and which the current owner discovered prior to acquisition; or (3) contamination occurring prior to acquisition, which the landowner failed to discover but would have discovered if it had conducted reasonable due diligence inquiries prior to acquisition.

As for the first category, this article argues that liability for pre-1980 contamination is unfair and inefficient because it could be internalized in the responsible parties' costs. Liability for post-1980 contamination is fair and efficient but probably involves only a very small fraction of total CERCLA contamination.

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[12] RCRA §§ 201-210, 42 U.S.C. §§ 6901-6992 (1988).

[13] CERCLA § 107, 42 U.S.C. § 9607(b)(1980).

[14] *See e.g.*, L. Jager Smith, Jr., *CERCLA's Innocent Landowner Defense: Oasis or Mirage?* 18 COLUM. J. ENVTL. L. 155 (1993).

As for the second category, this liability is often justified by the arguments that the buyer will factor the cleanup costs into the purchase price of the property and that potential liability is an incentive to force the buyer to practice due diligence.[15] However, these arguments are flawed. First, the purchase price discount argument is circular. It assumes current owner liability but does not justify it. In fact, many if not most buyers who find contamination before acquiring the property will not buy the property unless they are indemnified by the seller and receive the seller's covenant to remediate. Whether the seller discounts the price or indemnifies the buyer, the net effect is the same: the seller pays for the liability. This result is strange because often CERCLA would not have imposed the liability on the seller otherwise, such as if the seller had an innocent landowner defense.[16] Of course, if the seller bought the property without knowledge of the contamination, it paid full price. Thus, the net effect of applying the current owner liability standard to buyers is to void the innocent landowner defense for sellers.

The argument for facilitating due diligence is also flawed. First, there are already more than enough incentives for adequate due diligence: no one wants to own contaminated property, whether or not CERCLA also makes one liable for cleanup costs. Contaminated property is difficult to develop and occupy and may expose an owner to toxic tort liability. How can one reasonably argue that the penalty for failure to perform adequate due diligence should be joint and several liability for any contamination on the property? Such overkill causes two inefficiencies: buyers and lenders will overspend on due diligence, and then they will avoid environmentally marginal properties. Consequently, remediation and redevelopment are delayed. Finally, current owners who are liable for their own pre-1980 contamination should be analyzed the same as the pre-1980 polluter discussed above. Admittedly, there is slightly more basis for holding current owners liable than past owners. In many jurisdictions, there is a doctrine that requires owners to abate nuisances on their properties,[17] such as dry plant growth that could fuel fires, even if the owner did not

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[15] *See* Squire, *supra* note 10, at 906.

[16] *See supra* notes 13-14 and accompanying text.

[17] *See generally* John F. Wagner, Jr., Annotation, *Validity and Construction of § 106(a) and (b)(1) of Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9606(a) and (b)(1)), Authorizing Equitable Abatement Actions and*

cause the condition. But query whether such "responsible owner" doctrines can be stretched into strict, joint and several current owner liability for massive contamination caused fifty years earlier by a bankrupt company.

So far we have discussed the strongest cases for CERCLA liability. The other categories of liability in CERCLA's Section 9607, including arrangers, transporters, lenders, trustees, and past owners who merely owned the property at the time of disposal,[18] suffer from the same inefficiency and unfairness discussed in this article, plus several additional ones. Then what should be the rule of liability for past contamination? Unfortunately, the answer is not simple. Normally one would conclude from this article that remediation of historic non-negligent contamination should be a public good funded by taxes, similar to the national defense. But practical public policy experts will object that government bureaucracy is not well-designed for cost-effective cleanups. In fact, the author's experience with large groups of private parties at major Superfund sites closely supervised by governmental agencies is that the efficiency differences between the public and private options are far less than most people believe. That is to say, both options are pretty dismal.

CONCLUSION

We are now led to a final, radical proposal. Perhaps CERCLA's pre-1980, retroactive liability scheme should be scrapped completely and replaced with taxes on insurance companies, businesses and the general public. If nothing else, this suggestion, coming as it does from a practicing environmental attorney, should be given the credibility of a statement against interest. That is because the single biggest advantage of this proposal is the "delawyerization" of CERCLA. If one remembers President Clinton's Inaugural Address, and the bipartisan ovation after his comment on reducing the role of lawyers in the CERCLA process, this result may well be the most widely desired goal today in environmental law.

Of course such a radical step may lead to other, more complex negative factors. But keeping the more radical proposals,

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Administrative Orders and Prescribing Fines for Non-Compliance with such Orders, 87 A.L.R. FED. 217 (1993).

[18] CERCLA § 107, 42 U.S.C. § 9607 (1980).

such as eliminating pre-1980 retroactive liability in CERCLA, on the table for more discussion may lead to more creative and ambitious compromises in the CERCLA reauthorization process. At this point, minor fine-tunings will not address the fundamental flaws in the law.