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The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] was passed in 1980 in response to increasing concerns about hazardous waste in America. CERCLA is essentially a strict liability statute,[2] assigning joint and several liability[3] for the costs of hazardous substance cleanup to four classes of potentially responsible parties (PRPs): those who are current owners or operators of a facility contaminated by hazardous substances, those who owned or operated the facility at the time hazardous substances were disposed, those who arranged for transport of hazardous substances, and those who accepted hazardous substances for transport.[4] Significantly, because liability is joint and several, one PRP may bear the entire financial burden of cleaning up a hazardous waste site if other PRPs are insolvent or otherwise unable to contribute to the cleanup costs.

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[1] 42 U.S.C. §§ 9601-9675 (1988 & Supp. 1993).

[2] *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (finding Congressional intent for strict liability in the absence of a specific provision).

[3] Courts have consistently held that liability is joint and several. *See, e.g.*, County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1515 (10th Cir. 1991) (per curiam) (stating that joint and several liability is imposed upon resposible parties regardless of fault). However, if a potentially responsible party can demonstrate to the court's satisfaction that the harm is divisible, then the party will be made to pay only for its share. *See, e.g.*, O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989) ("The rule adopted by the majority of courts, and the one we adopt, is based on the Restatement (Second) of Torts: damages should be apportioned only if the *defendant* can demonstrate that the harm is divisible.") (citing United States v. Monsanto Co., 858 F.2d 169, 171-73 (4th Cir. 1988); United States v. Bliss, 667 F. Supp. 1298, 1312-13 (E.D. Mo. 1987); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809-11 (S.D. Ohio 1983)) (emphasis added).

[4] 42 U.S.C. § 9607(a)(1)-(4)(1988).

Institutional trustees[5] should exercise caution before agreeing to administer a trust holding real property. If hazardous waste cleanup is initiated at the property, trust assets will be utilized to satisfy CERCLA liability. However, due to the unsettled nature of the trustee's CERCLA liability and the view of financial institutions as "deep pockets," the institution may be required to cover any cleanup costs which cannot be satisfied by the trust's assets.[6]

Congress provided an exception to the strict, joint and several liability of owners and operators of hazardous waste sites. CERCLA specifically exempts from liability an owner or operator who "without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."[7] During the early years of CERCLA implementation, secured creditors assumed, in reliance on this security interest exemption, that they would not be held liable for cleanup costs if they held indicia of ownership but did not participate in the management or control of the facility. As time passed, however, secured creditors realized that because CERCLA did not define what constituted participation in the management of the facility, the judiciary was called upon with increasing frequency to interpret and define the scope of "management" and determine the situations under which a secured creditor, holding indicia of ownership, would remain within the security interest exemption.[8]

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[5] This article focuses on the potential liability of institutional trustees operating pursuant to the terms of a trust agreement or under a will. The potential liability of individual trustees under a will, bankruptcy trustees, or other court-appointed trustees is beyond the scope of this article.

[6] *See generally Trustee Liability Under CERCLA* , [21 News & Analysis] Envtl. L. Rep. (Envtl. L. Inst.) 10,003 (Jan. 1991).

[7] 42 U.S.C. § 9601(20)(A)(1988).

[8] *See, e.g.*, Bergsoe Metal Corp. v. East Asiatic Co., LTD., 910 F.2d 668 (9th Cir. 1990) (finding that the port authority was not the "owner" under CERCLA because the port did not participate in management of the property where a lead recycling plant was located and only held the deed as part of a transaction to finance the plant); United States v. Fleet Factors Corp., 901 F.2d 1550, 1558 (11th Cir. 1990) ("[A] secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose."), *cert. denied*, 498 U.S. 1046 (1991); Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556 (W.D. Pa. 1989) (holding that the security interest exemption does not apply to a lender that purchases the property at the foreclosure sale); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986) (finding a bank which purchased property it previously held the mortgage on at a foreclosure sale liable for CERCLA cleanup costs).

As a result, lenders found themselves increasingly at risk for bearing the costs of their borrowers' hazardous waste problems.

In an attempt to provide guidance to both secured creditors and the judiciary, the Environmental Protection Agency (EPA) issued a final rule ("Rule")[9] in April 1992 which purported to define more clearly the scope and application of the security interest exemption set forth in CERCLA.[10] The Rule set forth a range of activities that lenders, financial institutions, and other secured creditors may undertake while nonetheless falling within the safe harbor afforded by the security interest exemption. The Rule also offered definitions of certain key terms in CERCLA in an effort to assist creditors and the judiciary in interpreting and applying the statute.

However, the Rule did not address the question of whether institutional trustees or fiduciaries fall within the security interest exemption under CERCLA. Consequently, the Rule offered no protection from CERCLA liability to bank trust departments, thereby creating the possibility of great financial losses to institutions should the trust assets be depleted during the cleanup of a hazardous waste site.[11]

During the Rule's comment period, many trust companies and trust departments of lending institutions argued that the Rule governing secured creditors should be extended to explicitly include institutional trustees.[12] In particular, the trustees were concerned that the financial institution acting as a trustee under the terms of a trust or a will could potentially face liability for CERCLA cleanup costs if the trust held real property contaminated with hazardous waste.[13] The trustees further noted that they should not be held personally liable for the cleanup of trust properties because they conceivably could not know whether the trust property were contaminated, nor could they have acted to

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[9] 57 Fed. Reg. 18,343 (1992) (codified at 40 C.F.R. § 300.1100).

[10] After this article was submitted for publication, the United States Court of Appeals for the District of Columbia Circuit, in a 2-1 decision, vacated the EPA's Rule. See 1994 WL 27881 (D.C. Cir. February 4, 1994). Two petitions have been filed for rehearing en banc, and it is expected that the full Circuit Court will rehear the matter.

[11] *See EPA's Proposed Rule on Lender Liability Under CERCLA: No Panacea for the Financial Services Industry*, [21 News & Analysis] Envtl. L. Rep. (Envtl. L. Inst.) 10,618, 10,622 (October 1991). As these commentators wrote: "This potential liability will also likely discourage persons from serving as bankruptcy trustees (or other trustees), positions that have increased significance in the current economic climate." *Id.*

[12] 57 C.F.R. 18,343, 18,349 (1992).

[13] *Id.*

prevent such contamination.[14] Finally, many of the comments urged that liability for hazardous waste cleanup costs should be satisfied from the trust assets and should not be extended to the institution absent some wrongdoing by the trustee.[15]

The EPA justified the Rule's failure to address trustee's liability on the basis that "neither the section 101(20)(A) security interest exemption nor any other section of CERCLA makes any special provision for trustees."[16] The EPA explained that " 'innocent' trustees or fiduciaries are not liable under CERCLA."[17] EPA further explained that it was "incorrect" to assume that "a trustee is personally liable under CERCLA solely because a trust asset is contaminated, even if the trustee had no knowledge of the asset's contamination and was in no way involved in the activities that resulted in the contamination."[18] In most instances, only trust assets would be used for cleanup of the property. The EPA concluded that the personal liablility of trustees already was addressed by existing law and there was no legal basis to extend the security interest exemption to include trustee liability when indicia of ownership is not held primarily to protect a security interest.[19] However, the EPA admitted that a "trustee or other fiduciary with respect to a facility (or any person) who holds indicia of ownership in the vessel or facility primarily to protect a security interest may assert the exemption."[20]

This Article discusses the ways in which the Rule neglects to consider the role of the institutional trustee as a security interest holder and then summarizes the current case law addressing trustee liability. Finally, it suggests certain policies and procedures by which institutional trustees may protect themselves and their trust assets.

I. DEFINITIONS UNDER THE RULE

The Rule has provided several key definitions under CERCLA which may assist in analyzing the potential liability of institutional trustees for hazardous waste cleanup costs. First, the

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] 57 Fed. Reg. 18,343, 18,349 (1992).
[18] *Id.*
[19] *Id.*
[20] 57 Fed. Reg. 18,343, 18,375 (1992).

Rule defines "indicia of ownership" broadly to include the following as a security interest in real or personal property: a mortgage, deed of trust, lien, surety bond, guarantee of obligation, title held pursuant to a lease-financing transaction, legal or equitable title obtained pursuant to foreclosure, assignments, pledges, and other forms of encumbrances against property that are held primarily to protect a security interest.[21] Clearly, the ownership interests held by an institutional trustee fall within this broad definition; thus, the trustee qualifies as an "owner" of a site.[22] Moreover, an institutional trustee who manages trust portfolios which lease trust property may also face liability under CERCLA as an "operator" if it contracts for workers at a site[23] or if the trust engages in the leasing of its property to others.[24]

The Rule also defines a "holder" of a security interest to include initial and subsequent holders as well as receivers.[25] The Rule interprets the crucial phrase "primarily to protect a security interest" to mean "that the holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation."[26] If indicia of ownership are held primarily for investment purposes, such indicia will not be considered to be held "primarily to protect a security interest" and the secured creditor will fall outside the scope of the security interest exemption.[27]

The Rule clarifies the application of the security interest exemption and sets forth a two-prong test for determining what will constitute "participating in management" of the debtor that will bring a secured creditor within the rubric of CERCLA liability for cleanup costs.[28] However, the Rule left unanswered the extent

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[21] 40 C.F.R. § 300.1100(a) (1992).

[22] *See Trustee Liability Under CERCLA, supra* note 6, at 10,003 (stating that CERCLA section 107(a)(1) "makes trustees directly liable under CERCLA.").

[23] *See* United States v. Fleet Factors Corp., 901 F.2d 1550, (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991)(finding the trustee's liability was predicated on the fact that the trustee had contracted with workers to clean up the site in anticipation of sale).

[24] *Environmental Cleanup Liability for Trustees Next Land Mine in CERCLA Field, Attorney Warns*, 22 Env't Rep. (BNA) 2862 (Apr. 24, 1992).

[25] 40 C.F.R. § 300.1100 (a)(1) (1992).

[26] 40 C.F.R. § 300.1100(b)(1992).

[27] 40 C.F.R. § 300.1100(b)(2)(1992); *See also* 57 Fed. Reg. 18,343, 18,375 (1992).

[28]

> A holder is participating in management, while the borrower is still in possession of the . . . facility encumbered by the security interest, only if the holder either: (i) Exercises decision making control over the borrower's environmental compliance, such that the holder has undertaken responsibility for the borrower's hazardous substance handling or disposal practices; or (ii) Ex-

to which institutional trustees or the trusts which they administer may be held liable for costs incurred in removing hazardous waste from trust-held real property.[29] It remains unclear whether, and to what extent, an institutional trust department may be liable for cleanup costs in the event a trust holds contaminated property.[30]

A trust's acquisition of contaminated property clearly can be fraught with concerns for the institutional trustee. Under CERCLA's strict liability scheme, it is well-settled that a purchaser of contaminated property becomes an owner of that property and thereby liable for hazardous waste cleanup costs. Acquisition of property by other means may permit the new owner to escape liability; in order to do so, however, the new owner must show either that the property was devised to him through inheritance or bequest, or demonstrate that he "did not know and had no reason to know" of the contamination.[31]

The defenses to CERCLA liability which are available to the trustee are limited. An otherwise responsible party may avoid liability by demonstrating by a preponderance of the evidence that the hazardous waste contamination was the result of an act of God, an act of war, or an act of a third person.[32] In 1986, Congress enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA),[33] which further restricted the third party defense. Now, in order to successfully assert the third party defense, the potentially responsible party must demonstrate that he: (1) was contractually unrelated to the third party responsible for the contamination; (2) exercised due care with respect to the hazardous substances; and (3) took precautions against a third party's foreseeable acts or omissions.[34] CERCLA's defenses prove problematic for the institutional trustee because the trustee is burdened with determining all the past and present uses of the real property held in trust. Furthermore, demonstrating to the EPA

> ercises control at a level comparable to that of a manager of the borrower's enterprise . . . with respect to (a) Environmental compliance or (b) All, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise other than environmental compliance.

40 C.F.R 300.1100 (c)(1)(i)-(ii).

[29] The potential liability of bankruptcy trustees is beyond the scope of this article.

[30] *See generally Trustee Liability Under CERCLA*, *supra* note 6.

[31] 42 U.S.C. § 9601(35)(A)(i)(1988).

[32] 42 U.S.C. § 9607(b)(1)-(3)(1988).

[33] Pub. L. No. 99-499, 100 Stat. 1613 (1986)(codified as amended in scattered sections of 24 U.S.C.)[hereinafter SARA].

[34] 42 U.S.C. § 9607(b)(3)-(a)(b)(1988).

that the trustee did not have knowledge of the uses when the property entered the trust may prove increasingly difficult as trustees attempt to act with due diligence towards the assets held in trust. In some cases where a trustee's knowledge of the history of the land is inadequate, it may be difficult for the trustee to determine whether real estate held in trust has the potential for a hazardous waste problem. If the property is held distantly by the trust, it may be expensive for the trustee to determine the condition of the property.

The trustee also may avoid liability by demonstrating that the contaminated property was acquired through inheritance or bequest and that it "did not know and had no reason to know" of the presence of hazardous substances.[35] The trustee may have to undertake an environmental audit in order to show that it had made "appropriate inquiry" under CERCLA.[36] The trustee also can avoid liability if it can demonstrate that the contamination occurred after the trust acquired the property.[37]

II. JUDICIAL INTERPRETATION WITH RESPECT TO TRUST HOLDINGS.

Several recent cases have highlighted issues of concern to potential trustees, with the courts addressing both the existence and extent of trustee liability under CERCLA. The rulings on these issues provide little comfort to those persons or institutions nominated as trustees.

In *United States v. Burns*,[38] the United States sued one of the defendants, an individual who was trustee and beneficiary of a

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[35] 42 U.S.C. § 9601(35)(A)(i)(1988).

[36] 42 U.S.C. § 9601(35)(B) provides:

> To establish that the defendant had no reason to know, as provided in [section 9601(35)(A)(i)], the 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.

[37] 42 U.S.C. § 9601(35)(A)(Supp. 1992).

[38] No. C-88-94-L, 1988 WL 242553 (D.N.H. 1988).

trust,[39] for response costs under section 107 of CERCLA.[40] The defendant moved to dismiss the action on the grounds that as trustee he never owned the land subject to the lawsuit and that he did not personally participate in conduct that violated CERCLA. In analyzing the issue of whether or not the trustee was liable as an "owner" under CERCLA, the court found three distinct rationales upon which to base its decision.

First, the court looked to existing case law and found that the courts have uniformly held that the term "owner" should be construed broadly.[41] Then the court turned to the legislative history of CERCLA and found that it suggested "[a] broad meaning for 'owner' which was intended 'to include not only those persons who hold title to a vessel or facility, but those who, in the absence of holding a title, possess some equivalent evidence of ownership.' "[42] Finally, the court directed its attention to trust law and found that the fundamental principles provided that the trustee held legal title to the property and "could be liable for obligations as the owner of the property."[43]

The court seemed determined to address the issue of trustee liability in *Burns*. Since the defendant was both the trustee and beneficiary of the trust, the court could have bypassed the issue of trustee as owner and focused on the issue of beneficiary as owner.[44] Nonetheless, the court found that a trustee who took title was an owner under CERCLA. The *Burns* court held that the trustee/beneficiary

> was as much an "owner" . . . as would be a lessee. Furthermore, as trustee and beneficiary of the Trust that owned the [hazardous waste site], [the trustee] possessed at least some evidence of ownership of the [site]. Congress did not intend for a responsible party to be able to avoid liability through the use of a trust or

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[39] Interestingly, the court did not hold that the trust was fraudulent, despite the fact that the trustee, as beneficiary, was essentially a fiduciary to himself. *See Trustee Liability Under CERCLA, supra* note 6, at 10,004.

[40] Section 107 of CERCLA authorizes any person, state, tribe, or the EPA to bring an action against the responsible parties to recover any response costs incurred during the cleanup of a contaminated site. *See* 42 U.S.C. 9607(a)(1988).

[41] *Burns*, No. C-88-94-L, 1988 WL 242553 at *1.

[42] *Id.* (citing H.R. REP. No. 172, 96th Cong., 2d Sess. 36, *reprinted in* 1980 U.S.C.C.A.N. 6160, 6181).

[43] *Id.*

[44] The significance of this decision by the *Burns* court was not lost on the court in City of Phoenix v. Garbage Services Co., 816 F. Supp. 564, 568 (D. Ariz. 1993) (discussed *infra* note 46).

> other forms of ownership. Furthermore, as trustee, [the defendant] held legal title to the trust property and under trust law could be liable for obligations as the owner of the property.[45]

Thus, the court made no distinction with regard to the fact that the trustee in *Burns* was an individual rather than an institution. Clearly, under *Burns*, a trustee who takes title to the property is an owner under CERCLA and liable for hazardous waste cleanup costs.

In *City of Phoenix v. Garbage Services Co.*[46] ("*Phoenix I*"), the plaintiff filed a section 107 cost recovery action[47] against Valley National Bank, the testamentary trustee which had exercised an option to purchase a landfill site in 1966. The defendant moved for summary judgment, arguing that it was not an "owner" under CERCLA.[48] The court undertook an analysis patterned after *Burns*, noting that "[t]he legislative history for CERCLA seems to take for granted that any titleholder is an 'owner' under the statute"[49] and that "[t]he EPA's practice seemingly is to argue that trustees are 'owners' within the meaning of CERCLA."[50]

The court interpreted EPA's then-proposed Rule, disagreeing with the defendant's position that innocent trustees or fiduciaries were not liable under CERCLA. The court stated:

> The EPA's proposed rule deals with the liability of secured creditors only. It is not controlling where a trustee is not also a secured creditor. Indeed the preamble to the proposed rule states that it 'does not address trustees because neither . . . security interest exception nor any other Section of CERCLA makes any special provision for trustees.'[51]

The court reasoned that "if Congress had meant to exempt uninvolved trustees from liability as 'owners' under CERCLA, it

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[45] *Burns*, No. C-88-94-L, 1988 WL 242553 at *2 (citing AUSTIN W. SCOTT & WILLIAM F. FRATCHER, SCOTT ON TRUSTS §§ 265, 265.1 (3d ed. 1985)).

[46] 816 F. Supp. 564 (D. Ariz. 1993)("Phoenix I").

[47] *See supra* note 40.

[48] Other issues in the case were whether the trust was estopped from denying ownership of the site because it had already argued that it was the owner in a condemnation action and whether it had "operator" liability since it had no involvement in the everyday activities on the site.

[49] *Phoenix I*, 816 F. Supp. at 567.

[50] *Id.* at 568 (citing Lone Star Indus., Inc. v. Horman Family Trust, 960 F.2d 917, 921 (10th Cir. 1992)).

[51] City of Phoenix v. Garbage Services Co., 816 F. Supp 564, 568 (D. Ariz. 1993) (citing 57 Fed. Reg. 18,343, 18,349).

would have said so in the statute," and found that a trustee could be liable as an "owner" under CERCLA.[52]

After the court in *Phoenix I* held that the trustee could be liable as an "owner" under CERCLA, the trustee moved for partial summary judgment on the issue of the extent of the trustee's liability.[53] In *Phoenix II*, the trustee argued that its liability under CERCLA was limited to the trust assets and did not extend to the trustee's non-trust assets. Since this issue was one of great concern to banks and trust companies, several filed *amicus curiae* briefs on behalf of the trustee.[54]

In considering the question, the court again looked to the CERCLA statute and legislative history for guidance, but found nothing in the statute or legislative history which addressed the issue.[55] Next, the court looked to existing common law to determine the extent of trustee liability. The court noted that "the law governing trustee liability is well settled, and is nearly uniform throughout all jurisdictions."[56]

Applying the Restatement (Second) of Trusts to CERCLA section 107(a), the court developed the following "general rules governing the CERCLA liability of trustees as owners of contaminated property":

> 1. Where a trustee is held liable under subsection 107(a)(1) as the current owner of contaminated property, the trustee's liability is limited to the extent that the trust assets are sufficient to indemnify him.
> 2. Where a trustee is held liable under subsection 107(a)(2), but the trustee did not have the power to control the use of trust property, the trustee's liability is limited to the extent that the trust assets are sufficient to indemnify him.
> 3. Where a trustee had the power to control the use of trust property, and knowingly allowed the property to be used for the

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[52] *Id.*

[53] City of Phoenix v. Garbage Services Co., 827 F. Supp. 600 (D. Ariz. 1993) ("Phoenix II").

[54] The American Banker's Association, National Trust Real Estate Association, IBJ Schroder Bank and Trust Company, Northern States Trust Company, and United States Trust Company filed or joined in the filing of an *amicus* brief in support of the trustee's position. *Id.* at 602 & n.2.

[55] *Phoenix II*, 827 F. Supp. at 602.

[56] *Id.* at 603. *But see* U.S. v. Peterson Sand and Gravel, Inc., 806 F. Supp. 1346 (D.N.D. Ill. 1992), in which the court found a trustee not an "owner" under CERCLA because under Illinois trust law the trustee has no ownership interest and no control over the *res*.

> disposal of hazardous substances, then the trustee is liable under subsection 107(a)(2) to the same extent that he would be liable if he held the property free of trust.[57]

The court determined that the trustee in *Phoenix II* had the power to control the use of the property and knowingly allowed hazardous waste to be disposed of on the property.[58] Therefore, it reasoned, the trust could be personally liable for response costs. [59]

Although the *amici* argued that a trustee should not be held liable beyond the assets held in trust unless the trustee were somehow at fault, the court rejected this argument, stating that the fault based argument "completely ignores the fact that CERCLA is not a fault based scheme. Liability of property owners is based upon the concept that the disposal of hazardous substances is an ultrahazardous activity. . . . Liability is based on the defendant's decision to engage in ultrahazardous activity, not on the defendant's culpability."[60]

Phoenix II is helpful to trustees because it provides some parameters for predicting whether their potential liability will extend beyond the trust assets with regard to future nominations. However, given the *Phoenix II* court's holding that a trustee is an "owner" under CERCLA, a trustee presently holding trust assets can take little comfort in its title of trustee if it has knowingly or unknowingly allowed the use of trust property for hazardous waste disposal.

III. DEFENSES AND PROTECTIVE STEPS AVAILABLE TO THE INSTITUTIONAL TRUSTEE

It is clear that the EPA Rule does not provide any safe harbor to trustees and that trustees can expect that their potential liability for hazardous waste cleanup costs will continue to evolve along the lines of trust law. Since trust law may vary from state to state, some trustees may be more vulnerable than others for liability for cleanup costs.[61] Clearly, under *Phoenix II*, only those trust-

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[57] *Phoenix II*, 827 F. Supp. at 605.

[58] City of Phoenix v. Garbage Services Co., 827 F. Supp. 600, 607 (D. Ariz. 1993)("Phoenix II").

[59] *Id.*

[60] *Id.* (citing Nurad, Inc. v. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir. 1992)).

[61] Compare *Phoenix II*, 827 F. Supp. at 603 (construing Arizona law) *with* United States v. Peterson Sand and Gravel, Inc., 806 F. Supp. 1346 (D.N.D.Ill. 1992) (construing Illinois law) *with* United States v. Burns, No. C-88-94-L, 1988 WL 242553 (D.N.H.1988).

ees who actually permit disposal of hazardous waste on trust property will be held personally liable for cleanup costs.

As discussed above, the CERCLA defenses, although limited in scope, may provide some relief to the institutional trustee in certain instances. Depending upon the circumstances, the trustee may be able to claim that it is an innocent purchaser of property. Under other circumstances, the trustee may find a safe harbor by arguing that the trust received the property through inheritance or bequest.

Since institutional trustees are viewed as the proverbial "deep pocket," these institutions should adopt a policy which requires the periodic review of every single property in trust portfolios, as well as a review of all property at the time the trustee assumes its responsibilities. In order to avoid potential liability for hazardous waste cleanup, the prudent institutional trustee should inspect any property before it becomes a part of the trust portfolio. As a practical matter, the institutional trustee appointed under the terms of a will may have very little time to ferret out environmental problems before the property becomes part of the trust's assets.

Furthermore, trustees should consider drafting language into trust documents which may protect them from liability for cleanup costs. Such language could provide that no real property would pass under the terms of such documents until the trustee has had a reasonable time to investigate the property and determine whether the trust should hold it. With respect to institutional trustees serving under the terms of a will, it probably is more difficult to draft such protective provisions.

In addition, the institutional trustee should consider inserting express language in trust documents which would permit the trustee to use trust funds to pay for any hazardous waste cleanup which is subsequently discovered. The institutional trustee should also consider including an indemnification clause in the trust document to allow the trustee to recover cleanup costs which exceed trust costs.

While an institution may act affirmatively to reduce or eliminate liabilities in trust portfolios at the time the trustee assumes its trust duties, such steps will not necessarily ensure that the trustee will avoid liability. Certainly, trust departments must undertake zealous due diligence with respect to land held by trusts before the trustee accepts the land as part of the trust portfolio. A trustee may not know the past uses to which a property has been put and may not precisely know the present uses as when, for ex-

ample, the trust holds property in another state or a location which precludes easy access to, and inspection of, the real property. Under some circumstances, the cost of a Phase I examination[62] is easily justified due to the potential for future liability.

Institutional trustees must promulgate and adopt policies to prevent or minimize potential liability for hazardous waste cleanup costs. As a reasonable measure, institutional trustees should begin to subject certain trust holdings, such as commercial properties, to annual inspections. The Federal Deposit Insurance Corporation (FDIC) has instructed banks and institutions to develop procedures to limit exposure to liability for hazardous waste cleanup costs.[63] Although the guidelines were set up to limit liability with respect to loans, it could be expected that the FDIC would encourage lenders to set up internal procedures to assess potential exposure to cleanup costs in the trust context.

Notwithstanding the foregoing, however, if an institutional trustee conducts periodic reviews of trust properties to ascertain whether any contamination problems have occurred and discovers a problem, the trustee still must decide whether the risk of continuing to hold the property in a trust portfolio outweighs the property's benefit to that portfolio. Of course, if the property is contaminated, then the trustee has become an owner of the hazardous waste site. Such ownership status raises the potential for a trustee's conflict of interest. While the trustee has an obligation to its institutional employer, it has a correlating obligation to discharge its fiduciary duty with the best interests of the beneficiaries of the trust in mind. To use trust assets to clean up the property may be in the best interests of the trust beneficiaries; this may not be so if trust assets are completely depleted. Furthermore, using trust assets to finance the hazardous waste cleanup could expose the trustee to suit for breach of fiduciary duty if the beneficiaries argue that the trustee failed to exercise due diligence in investigating the trust property before accepting it into the trust. Certainly, an investigation of the real property comprising a trust should be made

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[62] A Phase I assessment is an initial assessment of a hazardous waste site involving a review of the past and present uses of the property, an on-site inspection and a review of the chain of title and of any state and federal agency reports with respect to the site. Oftentimes, surrounding properties are inspected and records and title are reviewed to assist in determining whether there may be spillage or leakage of hazardous substances from an adjoining property onto the property under investigation.

[63] *See Banks, Thrifts Must Set Up Programs to Limit Environmental Liability, FDIC Says*, 23 Env't Rep. (BNA) 3110 (Apr. 9, 1993).

before the trustee accepts its position. To act otherwise would subject the trust, and perhaps the trustee, to potential liability for hazardous waste cleanup costs.

For the trustees who have held certain trust portfolios for many years, it is far more difficult to avoid liability if property has been contaminated with hazardous waste. If the trustee investigates currently held trust property and discovers contamination, disposal of the property will not affect the trustee's liability as an owner in the chain of title. Under CERCLA's strict liability scheme, the institutional trustee may be liable for hazardous waste cleanup costs no matter how quickly it moves the contaminated property out of the trust portfolio.

CONCLUSION

Some problems posed by the potential liability of trustees for hazardous waste cleanup costs may be avoided through careful drafting techniques. Whether such self-protective provisions themselves pose a conflict of interest between the institutional trustee and the trust beneficiaries should be considered in implementing such provisions.

Institutions should exercise due diligence and investigate the history of real property before accepting the position of trustee. By not accepting responsibility for certain properties and refusing to hold them in trust, the institution will avoid liability for hazardous waste cleanup costs that can extend to both the trust assets and the institution itself.

For those trustees currently holding contaminated property the outlook is bleak. Trust assets will be used, perhaps even to the point of exhaustion, to clean up contaminated property. If those assets prove insufficient, then the institution itself may find itself paying for the balance of the cleanup costs.