THE THIRD-PARTY DEFENSE TO HAZARDOUS WASTE LIABILITY: NARROWING THE CONTRACTUAL RELATIONSHIP EXCEPTION

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I. INTRODUCTION

It is only within the past decade that generation, transportation, disposal, and storage of hazardous substances have been subjected to comprehensive regulatory controls. Enactment of the Resource Conservation and Recovery Act of 1976 (RCRA)[1] ushered in a new era of federal regulation of hazardous waste.[2] By imposing various requirements

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1. 42 U.S.C. §§ 6901-87 (1982). The RCRA replaced the Solid Waste Disposal Act of 1965, 42 U.S.C. §§ 3251-54f, 3256-59 (1970) (omitted 1976).

2. The term "hazardous waste" is defined as:

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
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> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5) (1982). This definition has been implemented by the United States Environmental Protection Agency (EPA) through a listing of industrial waste streams and chemi-

on persons handling hazardous waste,[3] the RCRA implemented a cradle-to-grave regulatory regime. The RCRA, however, was an inadequate tool for the supervision of hazardous waste after such waste had reached the grave.[4] This regulatory gap was largely closed with the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[5] CERCLA granted authority to the United States, the states, and private parties to clean up designated hazardous waste disposal sites that pose a threat to the environment or public welfare. Amendments to CERCLA, signed by President Reagan on October 17, 1986, helped strengthen and clarify the authority.[6]

Like the RCRA, CERCLA reaches owners and operators of disposal facilities, transporters of regulated substances destined for disposal, and anyone who generates or arranges for the transport, storage, treatment, or disposal of regulated substances.[7] Through a variety of admin-

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cals deemed hazardous under the parameters set forth in the statute. *See* Identification & Listing of Hazardous Waste, 40 C.F.R. § 261.1 (1986).

3. The statutory management standards apply to generators and transporters of hazardous waste and owners and operators of hazardous waste treatment, storage, and disposal facilities. RCRA §§ 3002-05, 42 U.S.C. §§ 6922-25 (1982).

4. In 1984, the statute was amended. Hazardous and Solid Waste Amendments Act of 1984, 42 U.S.C. §§ 6901-91 (Supp. 1986). These amendments expanded the RCRA to provide for corrective action authority by the EPA, allowing the EPA to order the cleanup of hazardous contamination existing at operating, RCRA-permitted sites. *See* RCRA §§ 3004(u), 3004(v), 3008(h), 42 U.S.C. §§ 6924(u), 6924(v), 6928(h) (Supp. 1986).

5. 42 U.S.C. §§ 9601-57 (1982 & Supp. 1986). The legislative history of the 1980 enactment is contained in ENVIRONMENTAL AND NATURAL RESOURCES POLICY DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS FOR THE SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97th CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENT RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), Pub. L. No. 96-510, (Comm. Print 1983) [hereinafter CERCLA LEGIS. HIST.]. CERCLA has been the subject of much controversy. *See* Alexander, *CERCLA 1980-1985: A Research Guide*, 13 ECOLOGY L.Q. 311 (1987) (collecting and describing over 100 scholarly commentaries organized within an outline of 24 topics under CERCLA). Prior to the 1986 CERCLA amendments, the most comprehensive and up-to-date overview of the law under CERCLA's hazardous waste liability provisions was provided in Note, *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458 (1986).

6. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986). The SARA text and Joint Explanatory Statement of the Committee of Conference are set forth in H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. (1986) [hereinafter SARA CONF. REP.].

7. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982), *as amended by* SARA, Pub. L. No. 99-449, 100 Stat. 1613, 1692 (1986). Liability is imposed upon:

> (1) the owner and operator of a vessel . . . or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or

istrative and private response provisions,[8] these entities may be identified as potentially responsible for the release[9] of a regulated substance[10] from a disposal or storage facility. In addition, they may be required to pay others for its removal[11] or remedy[12] or to remove or remedy it themselves.[13]

Like the problem it addresses, the scope of liability under CERCLA can be extensive and ominous. Virtually any person having any connection with the disposal of a regulated substance at a facility, or having any

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entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. . . .

Id.

8. *See* CERCLA §§ 104(a)-(c) (federal government), § 104(d) (state governments), § 106 (federal government), § 107(a)(1)-(4)(A) (federal and state governments), § 107(a)(1)-(4)(B) (private response), 42 U.S.C. §§ 9604(a)-(c), 9604(d), 9607(a)(1)-(4)(A), 9607(a)(1)-(4)(B) (1982 & Supp. 1986), *as amended by* SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1617-18 (1986) (amending CERCLA § 104). After SARA, the opportunity for private persons to engage in cleanup measures, independent of governmental approval and supervision, is greatly limited. *See* CERCLA §§ 104(a)(1), 112(e)(6), 113(h), 42 U.S.C. §§ 9604(a)(1), 9612(e)(6), 9613(h) (1982 & Supp. 1986), *as amended by* SARA, 100 Stat. 1613, 1617-18, 1650, 1683 (1986) (requiring president's approval for certain private measures and limiting judicial jurisdiction of private pre-enforcement challenges to administrative measures). Nevertheless, private actions for recovery of costs associated with such measures can be brought against other responsible parties "after such costs have been incurred." CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2) (1982 & Supp. 1986), *as amended by* SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1648 (1986). For convenience, this article focuses on enforcement actions by the government; however, the discussion of defenses is equally applicable to private cost recovery actions.

9. The term "release," with certain enumerated exclusions, is defined to include virtually any exposure of a hazardous substance to the environment, even the discarding of closed containers containing any such substance. *See* CERCLA § 101(22), 42 U.S.C. § 9601(22) (1982 & Supp. 1986), *as amended by* SARA, Pub. L. No. 99-499, § 101(C), 100 Stat. 1613, 1615 (1986).

10. Hazardous substances as defined in CERCLA (42 U.S.C. § 9601(14) (1982)) include hazardous wastes identified by the EPA under the RCRA. 42 U.S.C. § 6903(5) (1982). The definition also includes other chemicals designated under other federal environmental laws. Additionally, in some instances, CERCLA covers releases of any other pollutant or contaminant. *See* CERCLA § 101(33) (definition), § 104(a)(1) (coverage), 42 U.S.C. §§ 9601(33), 9604(a)(1) (1982), *as amended by* SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1616 (1986).

11. The term "removal" is defined to include not only actual cleanup and removal of hazardous substances, but also such protective actions as installing security fencing, provision of alternative water supply, and temporary evacuation or permanent relocation of threatened individuals. *See* CERCLA § 101(23), 42 U.S.C. § 9601(23) (1982 & Supp. 1986), *as amended by* SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1615 (1986).

12. The term "remedy" is defined to include virtually any actions, short of or in addition to removal of hazardous substances, which "prevent or minimize the release of hazardous substances so that they do not migrate." CERCLA § 101(24), 42 U.S.C. § 9601(24) (1982 & Supp. 1986), *as amended by* SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1615 (1986).

13. *See supra* note 8.

ownership interest in the facility, may be a responsible party under section 107(a) of CERCLA.[14] Such liability is retroactive in that it extends to conduct occurring prior to enactment.[15] Liability is also joint and several among the responsible parties;[16] and because strict liability is imposed,[17] the responsible party is virtually without a defense.[18]

This article focuses on one of the defenses to CERCLA liability, specifically, the third-party defense set forth in section 107(b)(3) of the Act.[19] Under that provision, which remained unchanged by the 1986 CERCLA amendments,

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14. *See supra* note 7.

15. *See* State *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1314 (N.D. Ohio 1983) (CERCLA applies retroactively to transporters). *But see* Caldwell v. Gurley Ref. Co., 755 F.2d 645, 652 (8th Cir. 1985) (SARA not applied retroactively to impose new obligations on landowner and former tenant). The constitutionality of the retroactive application of CERCLA has been both supported and questioned. *Compare* Note, *Retroactive Application of Superfund: Can Old Dogs Be Taught New Tricks?*, 12 B.C. ENVTL. AFF. L. REV. 1 (1985) (supported) *with* Freeman, *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 BUS. LAW. 215 (1986) (questioned).

16. *See* United States v. A & F Materials Co., 578 F. Supp. 1249, 1254 (S.D. Ill. 1984) (legislative history does not preclude joint and several liability); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983) (scope of liability to be determined under common-law principles).

17. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (even though not expressly stated, strict liability imposed); Violet v. Picillo, 648 F. Supp. 1283, 1290 (D.R.I. 1986) ("universally acknowledged" that Congress intended strict liability); United States v. Cauffman, 21 Env't Rep. Cas. (BNA) 2167, 2168 (C.D. Cal. 1984) (current and former owners strictly liable).

18. In addition to the third-party defense that is the subject of this article, the only defenses provided by CERCLA are for releases caused solely by acts of God or war. *See* CERCLA § 107(b)(1)-(2), 42 U.S.C. § 9607(b)(1)-(2) (1982). Some courts have implied the existence of equitable defenses. *See, e.g.*, Violet v. Picillo, 648 F. Supp. 1283, 1294-95 (D.R.I. 1986) (restitution); Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1056 n.9 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986) (settlement agreement and release); United States v. Conservation Chem. Co., 619 F. Supp. 162, 204-06 (W.D. Mo. 1985) (laches, unclean hands and estoppel). *But see* Pinole Point Properties v. Bethlehem Steel Corp., 596 F. Supp. 283, 286 (N.D. Cal. 1984); United States v. Price, 577 F. Supp. 1103, 1113-14 (D.N.J. 1983) (the only defenses are those listed in the statute); United States v. Reilly Tar & Chem. Co., 546 F. Supp. 1100, 1118 (D. Minn. 1982) (statutory defenses enumerated in CERCLA § 107(b) are exclusive). Provisions expressly allowing for contribution between jointly responsible parties and settlement by persons responsible for de minimus portions of a release were added by SARA. *See* CERCLA §§ 113(f), 122(g), 42 U.S.C. §§ 9613(f), 9622(g) (1982 & Supp. 1986), *as amended by* SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1647-48, 1685-86 (1986). Finally, CERCLA preserves such contractual agreements as indemnification and hold harmless terms that may exist as to liability between private parties, but such private contract agreements are ineffective as defenses against a CERCLA cost recovery suit. CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1) (1982). State law governs in situations where indemnification terms are sought to be enforced. *See* Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1460 (9th Cir. 1986) (applying New York law to issue of validity of releases under CERCLA).

19. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1982).

(b) DEFENSES

There shall be no liability . . . for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

. . . .

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance . . . in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.[20]

The particular concern of this article is with the meaning of the contractual relationship exception contained within the third-party defense provision. Although a partial definition of the term "contractual relationship" was added by the 1986 CERCLA amendments,[21] this exception, if misapplied, could make the already narrow third-party defense overly narrow. Potential for such misapplication by the courts is present because the contractual relationship exception remains inadequately defined even after the 1986 CERCLA amendments. The position taken in this article is that the contractual relationship exception has in-

20. *Id.*

21. CERCLA § 101(35)(A) provides:

The term "contractual relationship", for the purpose of section 107(b)(3), includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous susbstance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence.

(i) At 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.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

CERCLA § 101(35)(A), Pub. L. No. 99-499, 42 U.S.C. § 9601(35)(A) (1982 & Supp. 1986), *as amended by* SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1616 (1986). *See infra* text accompanying notes 58-66.

deed been misapplied by a number of courts and that the interpretation given the exception by these courts is *unnecessarily* and *unfairly* broad.

While this article may seem to be devoted to a narrowly framed minutia of the overall CERCLA program, the topic is not unimportant to the vast number of individuals and companies dealing with hazardous substances or with property on which hazardous substances are being or were disposed.[22] The basic issue presented is this: If the term "contractual relationship," as used in the statute, was applied to mean literally *any* relationship involving a direct or indirect contract between the potentially responsible party and the sole-cause third party, the exception would swallow the defense. The statute requires *first* a finding that the third party was the sole cause of the release—a demanding burden, to say the least—and *then* an analysis of the contractual relationship between the defendant and the third party.[23] An excessively broad interpretation of the contractual relationship exception thus renders the sole-cause test nearly superfluous. Only in rare circumstances—for example, criminal acts by an intervening third party or leachate runoff onto an innocent neighbor's property—could a defendant show absolutely no direct or indirect contractual relationship with the sole-cause third party. Nevertheless, this broad interpretation of the exception to the defense appears to be the interpretation favored by the courts, at the expense of the two-step analysis contemplated by the statute.

This article proposes an interpretation of the contractual relationship exception consistent with the statute and its policy objectives. Without sacrificing a significant degree of enforcement authority, the exception could be applied more narrowly to encompass only those direct or indirect contractual relationships under which the potentially responsible party could exercise, or should have exercised, sufficient control over the third party so as to have avoided the release. Moreover, where appropriate, a person should be obligated to include reasonable control provisions in the contract so that there would be no incentive to draft vague contracts leaving the question of control open. The question of when such reasonable control provisions are appropriate should be left to the courts to decide, and a person's decision not to include reasonable control provisions in contracts would preclude that person from claiming the defense. This application of the defense would lend more certainty to the liability provisions at the time contracts are made and would restore

22. Although CERCLA has been the subject of much scholarly analysis, *see supra* note 5, the topic dealt with in this article has been treated only superficially by commentators. *See, e.g.*, Note, *supra* note 5, at 1543-48.

23. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1982).

the two-step analysis—a sole-cause finding first, followed by an analysis of the contractual relationship—demanded by the statute.

Part II of this article examines the original language of CERCLA as a whole to determine the appropriate interpretation of section 107(b)(3) of CERCLA. Part III reviews the existing case law applying section 107(b)(3). Part IV discusses what little legislative history there is for use in interpreting the scope and intent of the defense. Part V assesses the effect of the 1986 CERCLA amendments on the scope of the contractual relationship exception. Part VI examines the third-party defense as it is applied under the analogous oil spill provisions of the Federal Water Pollution Control Act. Finally, Part VII examines some of the policy considerations that operate in this context. The conclusion of this article is that, even after the 1986 CERCLA amendments, the contractual relationship exception to the CERCLA third-party defense is subject to excessively broad applications and should be limited in scope to situations where the contractual relationship includes, or reasonably should have included, the element of control.

II. ORIGINAL STATUTORY LANGUAGE

As originally enacted, CERCLA implied that control is a relevant criterion for determining the scope of the third-party defense. The defense provision excluded and still excludes from the category of the term "third party" any employee or agent[24] of the defendant. If the language following that exclusion, that is, the contractual relationship language, were not read so as to refer to similar control-based relationships, the employee or agent exclusion would be superfluous; any employee or agent of the defendant necessarily would be involved in a direct or indirect contractual relationship with the defendant. Thus, the contractual relationship language should be interpreted as referring not literally to *any* contractual relationship, but rather, consistent with the scope of the employee or agent exclusion, to any analogous contractual relationship extending a sufficient degree of control to the defendant over the third party's treatment of the regulated substance so as to have allowed the defendant to intervene and prevent the release.

Moreover, the defendant must prove the use of due care[25] and that "precautions against foreseeable acts or omissions of any . . . third

24. *Id.*

25. *Id.* ("due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances").

party"[26] were taken. These requirements clearly contemplate that some form of a contractual relationship could exist between two entities without subjecting the contracting defendant to liability for releases caused solely by the other party. For example, if a hazardous waste generator exercised due care in choosing and verifying the performance of a transporter and disposal facility, should the generator be held liable for fraudulent concealment of criminal acts committed by these other entities?[27] In the absence of a control relationship between the generator and the transporter, what meaningful due care or precautions can the generator take against such conduct besides investigating the transporter's reputation? And what about criminal acts committed by that third party's contractors?[28] An extreme view of the contractual relationship exception prevents reaching fair results in such cases. Thus, the element of control would lend meaning to the due care and reasonable precautions requirements.

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26. *Id.*

27. *See, e.g.*, Violet v. Picillo, 648 F. Supp. 1283, 1292, 1294-95 (D.R.I. 1986). In *Violet*, the State brought suit against a hazardous waste generator and 35 other defendants under the CERCLA cost recovery provision. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982). The generator argued that it could not be held liable for illegal acts of its transporter. The generator had contracted with the transporter to remove wastes from its plant and deposit them at a designated, certified landfill. Instead of complying with the contract, and unbeknownst to the generator, the transporter diverted the wastes to an illegal hazardous waste dumping ground where approximately 10,000 other barrels of hazardous chemical wastes had been deposited. On cross-motions for summary judgment, the court ruled that it was not necessary for the generator to have known of, or to have in any way caused, the transporter's illegal disposal in order to be held liable for the State's response costs under CERCLA. Violet v. Picillo, 648 F. Supp. 1283, 1292 (D.R.I. 1986). The court also implied that exercise of due care by a generator would require "adequate supervision to ensure the waste's disposal at the specified site." *Id.* Short of actually hiring someone to accompany the transporter from pickup to delivery and investing in that person the authority to supersede the transporter's actions, which for any generator of substantial size would require a sizeable team of employees, it is not clear how a generator can positively "ensure the waste's disposal at the specified site." *Id.* Under the *Violet* court's reasoning, hazardous substance generators, transporters, storers, processors, and disposers all would have to supervise one another from the cradle to the grave and thereafter in order to establish due care. Hence, the question of control, and how much exists or reasonably should exist by one party over the other, seems to lie at the heart of the third-party defense contractual relationship exception. *See, e.g.*, United States v. Tyson, 25 Env't Rep. Cas. (BNA) 1897, 1907 (E.D. Pa. 1986) (defendant which had direct or indirect contractual control relationship with sole-cause third party held liable because it "knew the consequences of [third party's] dumping were harmful . . . and illegal [and] should have taken some precautions to prevent this dumping").

28. Ordinarily, a contractual provision requiring the transporter to obtain the generator's approval of any subcontractors would be reasonable and would provide for some degree of control by the generator. If the generator engages in a responsible review of a subcontractor and gives its approval, however, there is little opportunity for the generator to control the subcontractor thereafter. The relationship therefore becomes much like that existing between the generator and the primary contract transporter. *See supra* note 27 and accompanying text.

To a certain extent, the potential for overly broad application of the contractual relationship exception is also limited by the requirement that the sole-cause third party's act or omission cause the release to occur in connection with the contractual relationship.[29] Thus, not all of the third party's business partners will have the sort of contractual relationship contemplated by the exception. Surely, a company that contracts to deliver food to a manufacturing plant's employee cafeteria cannot be held to be in a contractual relationship connected with the plant's illegal disposal of hazardous chemicals. It is unclear, however, just how loose the connection can be for the exception still to apply. Suppose, for example, Company A supplies its neighbor Company B with petroleum products used in a manufacturing process resulting in a hazardous by-product. That manufacturing process is poorly managed by Company B resulting in releases of the by-product onto Company A's property without Company A's knowledge. Is Company A's contract sufficiently connected with Company B's improper by-product management so as to deny Company A the third-party defense? There may be many such instances where a person arguably fits the category of a potentially responsible party yet was not a causal factor in the release and is only tenuously connected to the disposal of hazardous substances by a contractual relationship. Such contracts ought not to be captured by the contractual relationship exception because they do not occur in connection with the manner of disposal. To construe the statute otherwise would cause CERCLA liability to virtually permeate the economy and cause unintended liability.

By contrast, the contractual relationship between a generator and a transporter of hazardous wastes would be sufficiently connected to the transporter's handling of the waste so as to satisfy this element of the contractual relationship exception. Indeed, whenever the purpose or subject matter of the contract expressly or by reasonable implication encompasses the handling of hazardous waste, the contract should be deemed to be in connection with the acts or omissions of either party which are the sole cause of a release. Of course, this element should be considered separately from the control criterion suggested in this article. A contract that is connected with the acts or omissions causing a release could also contain the element of control necessary to have avoided the release.

Finally, one provision of CERCLA mandates the approach suggested herein. Under section 101(32) of CERCLA,[30] liability "shall be

29. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1982).
30. 42 U.S.C. § 9601(32) (1982).

construed to be the standard of liability which obtains under section 1321 of title 33."[31] The referenced provision establishes liability for oil pollution under the Federal Water Pollution Control Act (FWPCA)[32] for releases of oil and hazardous substances from onshore and offshore facilities and vessels.[33] Section 311(f) of the FWPCA[34] sets forth the liability provisions of this regulatory program. Framed in much the same way as CERCLA, these provisions contain a third-party defense like CERCLA section 107(b)(3); but they contain no express contractual relationship exception.[35] It is clear from the FWPCA and its case law, however, that an implied contractual relationship exception to the defense does apply, and that it is based on the degree of *control* that the defendant had over the third party under the contract. Under section 101(32) of CERCLA, then, the FWPCA standard of liability should be applied to CERCLA.

III. CASE LAW

Only a handful of cases involve circumstances raising the CERCLA third-party defense. No court has found the defense applicable.[36] For

31. *Id.*

32. Federal Water Pollution Control Act (FWPCA) §§ 241-366, 33 U.S.C. §§ 1251-1376 (1982).

33. FWPCA § 311 establishes a response and liability scheme for accidental or intentional discharges of petroleum products and hazardous substances on land or into navigable waters. 33 U.S.C. § 1321 (1982). The enactment of CERCLA considerably expanded the EPA's authority to deal with hazardous substances; however, FWPCA § 311 remains the principal source of the EPA's authority to regulate and respond to spills of petroleum products. *See also* RCRA § 9001, 42 U.S.C. § 6991 (1982 & Supp. 1986), *as amended by* SARA, Pub. L. No. 99-499, § 205, 100 Stat. 1613, 1696-1703 (1986) (establishing EPA's authority under the RCRA to regulate underground petroleum storage tanks and to order cleanups of leaks therefrom).

34. FWPCA § 311(f), 33 U.S.C. § 1321(f) (1982).

35. The FWPCA Oil Pollution Liability defenses apply "where an owner can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing." *Id.*

36. On January 5, 1987, the trial court, in Olin Corp. v. Texas Water Comm'n, No. 394086 (Dist. Ct. of Travis County, 200th Judicial Dist. of Texas, Jan. 5, 1987), entered summary judgment orders dismissing several third-party defendants who had been joined as defendants in a suit under Texas' hazardous waste response statute, which contains a third-party defense provision identical to and modeled on CERCLA's. *See* Texas Solid Waste Disposal Act, TEX. REV. CIV. STAT. ANN. art. 4477-7, § 8(g)(3)(C) (Vernon Supp. 1986). In that case, the Olin Corporation brought suit challenging the Texas Water Commission's emergency order directing the company to remove pesticide-contaminated soil from a railroad right-of-way adjacent to land once owned and used by the company for a pesticide blending facility. Olin joined its two successors in title and the right-of-way owner as potentially responsible parties. Characterizing themselves respectively as innocent landowners and an innocent neighbor, the

example, in *United States v. Argent Corp.*,[37] the landowner who leased his property to the operator of a silver recovery business was found liable under CERCLA for releases of sodium cyanide at the facility. Denying the defendant's motion for summary judgment, the court found that the owner of land who leases it to a facility operator and who has no further connection to the facility whatsoever is nonetheless an owner within the meaning of section 107(a)(2). In addition to the plain language of section 107(a)(2), the court pointed to prior precedent[38] and to legislative history[39] in support of its ruling.

Once it had established that the defendant lessor was an owner within the meaning of the liability provision, the court had to contend with the defendant's assertion of the CERCLA third-party defense. The court disposed of the defense as follows:

> Bishop contends that the release which is the subject of this lawsuit was caused solely by an act or omission of the third party Argent Corp. Section 107(b) provides, however, that a defendant may not assert the third-party defense if the act or omission of that third party occurred in connection with a contractual relationship, existing directly or indirectly, with the defendant. It is undisputed that defendant Bishop and defendant Argent Corp. were parties to a lease agreement with regard to the Rio Rancho site. Because of this contractual link, defendant Bishop cannot show, as required by [section] 107(b), that the release was caused *solely* by a third party which did not share a contractual relationship with him.[40]

This *result* undoubtedly was correct under the circumstances presented; however, the troubling aspect of the ruling is the court's failure to resolve the issue under the two-step analysis required by the statute and to define the parameters of the contractual relationship exception. The *Argent* court collapsed the analysis required under the third-party defense into one question: whether a contractual relationship *of any sort* existed between the defendant and the third party. Finding such a relationship—the lease—the court concluded that "the release was [not] caused *solely* by a third party which did not share a contractual relationship with [the defendant]."[41] This analysis does not make sense.

The fact that a contractual relationship existed between the two en-

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defendants prevailed under the third-party defense. Olin Corp. v. Texas Water Comm'n, No. 394086 (Dist. Ct. of Travis County, 200th Judicial Dist. of Texas, Jan. 5, 1987).

37. 21 Env't Rep. Cas. (BNA) 1354 (D.N.M. 1984).

38. *Id.* at 1356.

39. *Id.* ("deliberate omission from the Act of language in the proposed House version which would have required participation in management or in operation as a prerequisite to owner liability").

40. *Id.* (emphasis in original).

41. *Id.* (emphasis in original).

tities should not have determined whether the third party was the sole cause of the release. Otherwise, either the sole-cause language or the contractual relationship language of section 107(b) could be eliminated as superfluous. Rather, the sole-cause test should focus separately and exclusively on a causation analysis, whereby the defendant must show that it did not commit or set into motion any of the acts leading up to the release. A lessor possibly could satisfy this burden, since the mere act of leasing a piece of property cannot be said to be a causative factor in a subsequent release (though the leasing of unsafe or damaged facilities could be such a causative factor). The third-party operator in *Argent* thus could have been the sole cause of the release, and the court should have decided that question before proceeding to the contractual relationship exception.

If the *Argent* court had determined that the lessee was the sole cause, it would have confronted the contractual relationship exception. A lease relationship might provide a sufficient degree of control by the lessor over the lessee to qualify for the contractual relationship exception to the defense. Leases covering industrial lands and/or facilities typically require the lessee to comply with environmental laws and often prescribe sound industrial practices. A lessor can demand and enforce such provisions if reasonable in scope and thus could be said to control the lessee for purposes of the third-party defense in certain circumstances. It may depend upon whether the lessee's practices were open and regular rather than concealed, or whether the release was gradual versus sudden. In other words, the control analysis should be conducted on a case-by-case basis. This type of analysis was not conducted by the *Argent* court.

A case similar to *Argent* in this respect is *United States v. South Carolina Recycling & Disposal, Inc.* (*SCRDI*),[42] which also involved a lease of land upon which a response facility was located. There the court denied the defense on the ground that "[b]ecause there is no question of the contractual link between the landowners and SCRDI, whose liability is admitted, the landowners cannot *under any circumstances* prove that the release was caused 'solely' by a third party which did not share a contractual relationship with them."[43] This reasoning suffers from the same flaws as that applied in *Argent*. The *SCRDI* court engaged in no separate causation analysis and did not consider the parameters of the contractual relationship with regard to the degree of control involved. SCRDI very possibly was the sole cause of the release, and the contractual relationship may have exhibited sufficient control so as to make the

42. 20 Env't Rep. Cas. (BNA) 1753 (D.S.C. 1984).
43. *Id.* at 1758 (emphasis added).

defense unavailable; but these are questions that should have been separately raised and resolved by the court.

The *Argent* and *SCRDI* cases thus exhibit the short-circuited approach to the application of the CERCLA third-party defense that results from an overbroad interpretation of the contractual relationship exception. Neither court recognized the difference between the causation analysis and the contractual relationship analysis. Indeed, neither court explained why the subject contracts satisfied the exception to the defense. The courts instead applied the exception as broadly as possible, rendering the sole-causation analysis superfluous and leaving the application of the third-party defense to cases where absolutely no express or implied contractual relationship exists (that is, to cases of criminal intervention).

By contrast, a more recent case illustrates the proper analytical framework for applying the third-party defense and the contractual relationship exception. In *New York v. Shore Realty Corp.*,[44] the court denied the third-party defense to a purchaser of a closed hazardous waste disposal site. The court found the sole-cause standard unjustified because the purchaser knew of the potential for a release from the site when he bought the property:

> Shore argues that it had nothing to do with the transportation of the hazardous substances and that it has exercised due care since taking control of the site. Who the "third part(ies)" Shore claims were responsible is difficult to fathom. It is doubtful that a prior owner could be such, especially the prior owner here, since the acts or omissions referred to in the statute are doubtless those occurring during the ownership or operation of the defendant. Similarly, many of the acts and omissions of the prior tenants/operators fall outside the scope of section 9607(b)(3), because they occurred before Shore owned the property. In addition, we find that Shore cannot rely on the affirmative defense even with respect to the tenants' conduct during the period after Shore closed on the property and when Shore evicted the tenants. Shore was aware of the nature of the tenants' activities before the closing and could readily have foreseen that they would continue to dump hazardous waste at the site. In light of this knowledge, we cannot say that the releases and threats of release resulting of these activities were 'caused solely' by the tenants or that Shore 'took precautions against' these 'foreseeable acts or omissions.'[45]

With respect to the contractual relationship exception, the court stated: "While we need not reach the issue, Shore appears to have a contractual relationship with the previous owners that also blocks the defense. The purchase agreement includes a provision by which Shore assumed at

44. 759 F.2d 1032 (2d Cir. 1985).
45. *Id.* at 1048-49.

least some of the environmental liability of the previous owners."[46]

By treating the sole cause and contractual relationship issues as separate analytical steps, the *Shore Realty* court acted consistently with the statute. The court did not have to reach the contractual relationship issue because the defense failed under the first step—the sole-cause test. Moreover, the result reached by the court was correct in that the defendant clearly should have been held to have assumed responsibility for the release. Since it knew of the potential for a release, the purchaser should have demanded that the seller perform the work necessary to prevent a release. If the seller refused and the purchaser still desired the property, he would purchase at his own peril and without the benefit of the third-party defense. *Shore Realty* thus illustrates that the third-party defense can remain narrow enough to serve the enforcement purposes of CERCLA and simultaneously be applied in a sensible, orderly, and fair manner.

Finally, *United States v. Maryland Bank & Trust Co.*[47] is the case which has thus far applied the most expansive interpretation of the third-party defense. The court's opinion is most noted for its discussion of the liability a financial institution can incur under CERCLA by foreclosing on property that is contaminated by hazardous substances.[48] The actual holding of the case, however, was to allow the defendant financial institution, charged with liability for its mortgagor's contamination of the foreclosure property, the opportunity to proceed to trial on its third-party defense claim. Apparently agreeing that the financial institution was not causally related to the release of hazardous substances present on the property, the court concluded that issues of fact existed as to: (1) whether they had contractual or business relationships with the causal third parties; (2) if so, what the nature of those relationships were with respect to the disposal activities; and (3) the defendant's exercise of due care.[49] The court's explicit references to the issues of the "nature of the contractual and business relations . . . and the reasonableness of [the de-

46. *Id.* at 1048 n.23. One passage of the *Shore Realty* court's opinion dealing with third-party liability has not been and should not be followed by other courts. The court opined that the third-party defense is available only for a third party's sole-cause "acts or omissions . . . occurring during the ownership or operation of the defendant." *Id.* at 1048. The court thus denied Shore Realty the defense based on prior property owners' acts "because they occurred before Shore owned the property." *Id.* Such a limitation on the third-party defense is unsupported by the general retroactive effect CERCLA has been given (*see supra* note 15 and accompanying text) and would excessively restrict the defense to rare, fortuitous circumstances.

47. 632 F. Supp. 573 (D. Md. 1986).

48. *Id.* at 579-81.

49. *Id.* at 581-82.

fendant's] conduct"[50] provide some hope that a close scrutiny of the contractual relationship exception may be the favored approach of some courts in the future.

IV. LEGISLATIVE HISTORY

During the later stages of the House debate on the original CERCLA, Congressman Gore offered an amendment that was the genesis of the existing contractual relationship exception.[51] His proposed amendment provided that the defendant could invoke the third-party defense only if he or she could demonstrate that the release was "[c]aused solely by . . . an act or omission of a third party if the defendant establishes that he exercised 'due care' with respect to the hazardous waste concerned, taking into consideration the characteristics of such waste."[52] Congressman Gore asserted, in what may have been an overstatement of the law at the time, that the provision would have altered then-existing common-law rules of: "first, strict liability for abnormally dangerous/ultrahazardous activity, and second and alternatively, liability for inherently dangerous activity that would otherwise be applicable to parties dealing with hazardous waste."[53]

Congressman Gore also pointed to explanatory material offered by the Commerce Committee Report[54] in support of the pending third-party defense. Significantly, that material stated that the defense would be applied so that,

> in the case of a defendant generator, shipper, transporter, or disposer, the defendant must demonstrate that he exercised due care in the selection and instruction of a responsible contractor or other third party engaged by such defendant for the transportation, storage, treatment, or disposal of the waste, provided adequate quantity, composition, condition, and characteristics of the waste to such person, and took reasonable measures to assure or verify that such person properly carried out the activities for which he was engaged.[55]

Congressman Gore was correct in saying that strict liability, had it applied, would have prevented assertion of a third-party defense.[56] In other words, if the full effect of strict liability were applied to a contractual

50. *Id.* at 581.
51. *See* 2 CERCLA LEGIS. HIST., *supra* note 5, at 346-350; 3 *id.* at 289.
52. *See* 3 *id.* at 290.
53. *Id.*
54. H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1 (1980), *reprinted in* 2 CERCLA LEGIS. HIST., *supra* note 5, at 47-106.
55. 2 CERCLA LEGIS. HIST., *supra* note 5, at 65.
56. *See* RESTATEMENT (SECOND) OF TORTS § 416 (1977).

relationship of the sort described by the Commerce Committee, no third-party defense would have been available.

Congressman Gore fell short of bringing about a complete eradication of the third-party defense. He offered an amendment injecting the contractual relationship exception into the third-party defense and qualifying the due care standard so as to incorporate the Commerce Committee's explanation of what constitutes due care in connection with the selection of contractors. The latter point is significant. If Congressman Gore had intended for his amendment to cover all contractual relationships, his retention of the Commerce Committee's elaboration upon the due care standard for selection of contractors would have been in direct conflict with his intent. Rather, Congressman Gore contemplated the situation of a third party who is engaged by such a defendant for the transportation, storage, treatment, or disposal of the hazardous waste, and he prescribed the due care criteria applicable to such contractual relationships. Inasmuch as any such engagement would fall under the broad definition of the term "contractual relationships," Congressman Gore must have meant for the contractual relationship exception to have a narrower meaning than that applied by the courts in *Argent* and *SCRDI*. Therefore, not all contractual relationships would have been removed from the third-party defense.

The fact that the final statute retained the contractual relationship test as Congressman Gore had proposed it, but retained only a reference to due care—that is, dropping the proposed additional reference to the Commerce Committee's criteria—does not dictate a different result. Initially, the due care standard was directed at control-based contractual arrangements. It was retained by Congressman Gore in the same respect, and hence must be interpreted that way today.

Based on CERCLA's legislative history, the contractual relationship exception is not to be interpreted as broadly as its literal terms make possible. What then is its proper scope? Congressman Gore's statement suggests an answer: "My amendment would restrict the application of the third-party defense to situations where the third party is not an employee or agent of the defendant, or where the third party's act or omission does not occur in connection with a contractual relationship, direct or indirect, with the defendant."[57] This language, like the final statute, suggests that the third party must be acting on behalf of or under the direction of the defendant for the contractual relationship exception to apply. This may seem to open a large hole in the enforcement authority; but in reality it does not. Under the application of the statute proposed

57. 3 CERCLA LEGIS. HIST., *supra* note 5, at 294.

herein, the contractual relationship exception would be considered only if the defendant was *first* able to show that the third party was the sole cause of the release. That threshold requirement alone will reduce the universe of third-party defenses to a manageable number, and from there the contractual relationship test will preclude all but the truly innocent from claiming the defense.

The legislative history of the contractual relationship exception thus supports the position that the exception is limited to situations where the defendant could exercise or reasonably should have exercised control over the third party under contract. Clearly, an entity not otherwise within the ambit of responsible parties under section 107(a) cannot be implicated merely by the presence of a contractual relationship with a party causing a release. Even a *potentially* responsible party, however, should be able to extricate itself from liability upon a showing of (1) sole cause by a third party and (2) no contractual basis for control over the third party sufficient to have prevented the release.

V. 1986 AMENDMENTS

One of the 1986 CERCLA amendments was "intended to clarify and confirm that under limited circumstances landowners who acquire property without knowing of any contamination at the site and without reason to know of any contamination . . . may have a defense to liability."[58] This was achieved without changing the elements of section 107(b)(3), but instead by partially defining the term "contractual relationship" in a separate provision.[59] The definition is expressly not intended to be exhaustive of all eligible contractual relationships. It embraces all "land contracts, deeds or other instruments transferring title or possession" of land.[60] The definition also provides for the contract transferee to escape liability if, in addition to meeting the other elements of section 107(b)(3): (1) the hazardous substances causing contamination were disposed of on the property prior to transfer of title or possession;[61] (2) the transferee did not know of the presence of such substances prior to transfer of title or possession;[62] and (3) taking into account the trans-

58. *See* SARA CONF. REP., *supra* note 6, at 186.

59. *See* CERCLA § 101(35), 42 U.S.C. § 9601(35) (1982 & Supp. 1986), *as amended by* SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1616 (1986).

60. *Id.*

61. *See* CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A) (1982 & Supp. 1986), *as amended by* SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1616 (1986). The statute is stated in the negative, that is, the purchaser is liable "unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance[s] on, in, or at the facility." *Id.*

62. *See supra* note 21.

feree's specialized knowledge and the characteristics of the contamination, the transferee made a commercially appropriate inquiry into the previous ownership and uses of the property and had no reason based thereon to know of the presence of the contamination.[63]

The amendment is retroactive in that "[t]he duty to inquire . . . shall be judged as of the time of acquisition. Defendants shall be held to a higher standard as public awareness of the hazards associated with hazardous substance releases has grown."[64] Moreover, commercial transferees generally are to be held to a higher standard than residential transferees,[65] and some commercial transferees will have specialized knowledge requiring that yet an even higher standard be applied.[66] Overall, what the standard will be and what constitutes appropriate inquiry are matters left largely to the courts to define.

Thus, the 1986 CERCLA amendments provide little guidance as to the degree of control that must exist in a contractual relationship for it to be a contractual relationship within the meaning of section 107(b)(3). Its limitation to land contracts provides little help with respect to other forms and subjects of contractual relationships. Indeed, even for land contracts, it is difficult to see how the new definition adds anything at all to the third-party defense analysis. Even without the new definition, it would be difficult for any land contract transferee knowing or having reason to know of the presence of hazardous substances on the property at the time of transfer to satisfy the sole-cause and due care elements of section 107(b)(3). For example, although the analysis in cases such as *Argent* and *SCRDI* was flawed, both decisions correctly focused on the defendant's knowledge of the presence of hazardous substances on the property. Indeed, well before the 1986 CERCLA amendments, it had become common practice for transferees to engage in extensive independent audits of property prior to transfer and even to demand full disclosure certification by transferors.[67] As found by the court in *Shore Realty*, the knowledge obtained through such means really has nothing to do with the nature of the contractual relationship, but rather goes directly to the questions of sole third-party cause and due care. The new definition of the term "contractual relationship" thus confirms that such practices

63. *See* CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B) (1982 & Supp. 1986), *as amended by* SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1616-17 (1986). A similar provision was added in 1987 to the Texas statute imposing hazardous waste disposal liability. *See* Tex. S.B. 1446, 70th Leg., § 10 (1987), *amending* § 8(g), Texas Solid Waste Disposal Act, TEX. REV. CIV. STAT. ANN. art. 4477-7, § 8(g) (Vernon Supp. 1987).

64. SARA CONF. REP., *supra* note 6, at 187.

65. *See id.*

66. *See id.*

67. *See, e.g.*, EPA Environment Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986).

are a necessary element of the third-party defense, but does little else to clarify this important area of concern.

VI. THE THIRD-PARTY DEFENSE UNDER THE OIL SPILL PREVENTION STATUTE

In view of the fact that liability under CERCLA is to be construed as the same standard that applies under the FWPCA oil spill prevention provision,[68] the third-party defense provided by the oil spill statute should guide the interpretation of the corresponding CERCLA provision. After all, courts have used the oil spill statute for guidance in interpreting other aspects of CERCLA liability;[69] the same reasoning should apply with respect to the third party.

Section 311 of the FWPCA prohibits discharge of oil or hazardous substances by the owner or operator of a vessel or onshore facility "into or upon the navigable waters of the United States, adjoining shore lines, or into or upon the waters of the contiguous zones . . . or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States."[70] Where the United States is required to expend money to remove the oil spill and to restore or replace damaged natural resources, the discharging party is responsible for these costs without regard to fault unless certain specified defenses apply.[71] To avoid liability, the owner or operator of the facility must prove that the discharge was caused "*solely* by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent."[72]

One interesting aspect of the FWPCA oil pollution liability provisions is the presence of what is, in effect, a built-in control test with respect to owners of the crude oil. The only way a crude oil owner could come within the terms of the Act for a spill of its oil from a vessel would be if the owner had executed a charter by demise for the vessel. In a charter by demise, or bareboat charter, the charterer supplies the captain and crew for the ship and thus controls the ship; whereas, a voyage char-

68. FWPCA § 311(f), 33 U.S.C. § 1321(f) (1982).

69. *See* Violet v. Picillo, 648 F. Supp. 1283, 1290 (D.R.I. 1986); United States v. Medley, 25 Env't Rep. Cas. (BNA) 1315, 1318 (D.S.C. 1986) (discussing the widespread judicial incorporation of FWPCA § 311 strict liability standard into CERCLA pursuant to CERCLA § 101(32)).

70. FWPCA § 311(b)(1), 33 U.S.C. § 1321(b)(1) (1982).

71. FWPCA § 311(f), 33 U.S.C. § 1321(f) (1982).

72. FWPCA § 311(f)(1), 33 U.S.C. § 1321(f)(1) (1982) (emphasis added).

ter involves the mere rental of a crew and ship for transport of the oil.[73] No case under the FWPCA has held a voyage charterer liable for a spill of its oil.

Even for vessel owners, the question of control in contractual relationships has proven critical in determining the scope of the FWPCA third-party defense. For example, vessel owners often hire temporary local pilots—pilots familiar with the local navigation hazards—to guide their vessels into port. Courts have denied vessel owners the third-party defense where the local pilot's conduct leads to a release since such local pilots remain under the ultimate control of the ship's master.[74] Similar results have been reached in cases involving releases caused by tugboats hired to assist vessels into port.[75] In all of these cases, the critical factor in denying the vessel owner a third-party defense has been the presence of a control element in the underlying contractual relationship. The mere existence of a contractual relationship was not sufficient to deny the defense in these cases.

Operational responsibility is also relevant in determining ownership of onshore facilities under the FWPCA. The owner of oil who merely leases the space of an onshore storage tank and who exercises no operational control over the tank is not the owner or operator of the facility within the meaning of the FWPCA.[76] In either situation, onshore or vessel, once operational control is assumed over the ship or tank by the crude oil owner, that owner may not invoke the third-party defense for spills caused by a third party.[77] But so long as the owner arranges contractual relationships that give it no control over the third party's handling of the owner's oil, the statute imposes no liability on the owner for the third party's spill of the owner's oil.

In effect, then, the FWPCA third-party defense has a limited implied contractual relationship exception incorporated into it by way of the definition of the term "owner." That exception contemplates *control*

73. *See* International Marine Towing v. Southern Leasing Partners, 722 F.2d 126, 130 (5th Cir. 1983), *cert. denied*, 469 U.S. 821 (1984).

74. *See* Burgess v. M/V Tamano, 564 F.2d 964, 981-82 (1st Cir. 1977), *cert. denied*, 435 U.S. 941 (1978) (compulsory local pilot, though an independent contractor, was not third party within the meaning of the statute because he was at all times under ultimate control of ship's master).

75. *See* United States v. LeBeouf Bros. Towing Co., 621 F.2d 787 (5th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981) (tugs not third parties because ultimate control retained by barge owners).

76. *See* Union Petroleum Corp. v. United States, 651 F.2d 734, 743-45 (Ct. Cl. 1981); *see also* H.R. REP. NO. 1632, 100th Cong., 1st Sess., 9 (1987) (liability under proposed comprehensive, consolidated oil pollution liability and compensation law would apply only to "the responsible party for a vessel or a facility from which oil is discharged").

77. An example of causation by a third party would be faulty construction of the vessel.

of the facility as the determinative factor. Likewise, CERCLA's contractual relationship exception should be restricted to covering only control relationships.

VII. POLICY CONSIDERATIONS

Compared to the interpretation given section 107(b)(3) in *Argent*, the interpretation of the third-party defense suggested herein balances a de minimus sacrifice of enforcement authority against greater certainty and fairness in the application of the statute. A number of policy considerations weigh in favor of this approach.

First, even with the contractual relationship exception narrowed, the scope of the third-party defense will be greatly constrained by the sole-cause test. The universe of potentially responsible parties that will thereby escape liability will remain extremely small. In addition, given the broad definitions of responsible parties, the government and private parties will not be without someone against whom cost recovery actions can be brought. Hence, the overall sacrifice in enforcement authority is small.

Balanced against this small sacrifice is the increased certainty that will arise by a two-step approach to the defense and by application of a control test for contractual relationships. The general uncertainty caused by the open-ended liability provisions has caused concern in related contexts such as indemnification of third-party remedial response efforts.[78] By not knowing how the contractual relationship exception will apply, firms undoubtedly will have difficulty justifying indemnity provisions with their contractual partners. If a control test is applied and given definition by the agency and the courts, however, firms will better be able to distribute risks among themselves at the time of contracting.

Finally, the statutory construction proposed herein is consistent with the scope of strict liability applied under CERCLA, which unlike most other strict liability programs, does not require proof of causation.[79] The third-party defense essentially represents CERCLA's shifting of the burden of proof of causation to defendants. That burden is imposed in part so as to create incentives for firms to choose their business partners carefully.[80] If the sole-cause test can be satisfied under section

78. The fate of response action contractors had become so uncertain and so vital an issue as to require express coverage thereof in SARA. *See* SARA, Pub. L. No. 99-499, § 119, 100 Stat. 1613, 1662-1666 (1986).

79. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985); *see also* Note, *supra* note 5, at 1544.

80. This has been described as the principal economic rationale for placing the burden of proving noncausation on defendants. *See* Note, *supra* note 5, at 1545.

107(b), that burden has been met. Where the defendant can also prove that it exercised due care in its choice of a business partner, that it took all reasonable precautions against the release, and that no control relationship existed, or should have existed, between it and its business partner, it seems reasonable to allow the defendant to avoid liability under CERCLA. The incentive to choose business partners carefully remains nonetheless, since failure to do so would make the due care standard impossible to satisfy.

VIII. CONCLUSION

Overall, there are good reasons for narrowing the contractual relationship exception to the CERCLA section 107(b)(3) third-party defense. In its present form, the exception is susceptible to overbroad application by the courts. Greater certainty and fairness could be brought about by making the element of control necessary for any contractual relationship to fall within the exception. If this is not done by the courts, the statute could be amended so as to read:

> (b) DEFENSES
>
> There shall be no liability . . . for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> . . . .
>
> (3) an act or omissions of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant *if such contractual relationship provided or should have provided a sufficient degree of control to the defendant over the third party's conduct such that the defendant could have prevented the third party's causative act or omission*. . . .