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TRUSTEE LIABILITY IN CERCLA: CONFRONTING THE PROBLEMS AND PROPOSING SOLUTIONS

W. CARTER SANTOS*

In passing the Comprehensive Environmental, Response Compensation, and Liability Act ("Superfund" or "CERCLA"),¹ Congress intended to make "those responsible for problems caused by the disposal of chemical poison" pay for the cleanup cost.² Unfortunately, Congress established a liability scheme which imposes liability on any entity that fits into the vague definition of terms such as the current "owner" or "operator" of a facility where a disposal has occurred³ or the "owner" or "operator" of a facility at the time of disposal.⁴ CERCLA does not define these terms. An expansive reading could result in liability for parties who are not responsible because they did not actually cause the disposal or accept the risks associated with disposal (by purchasing the real estate). Because CERCLA may impose staggering liability for the cost of cleaning up property contaminated with hazardous substances and other "response costs,"⁵ the apprehension over liability has caused tremendous concern for entities who do not fit neatly into these definitions.

Inter vivos trustees and bankruptcy trustees are entities whose liability status is uncertain. For instance, although an inter vivos trustee holds title to trust real estate which could cause him to be labeled an "owner," he does not benefit from the property or necessarily hold other indicia of ownership.⁶ A bankruptcy trustee has the power to operate the debtor's business which could cause him to be labeled an "operator," but

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1. 42 U.S.C. §§ 9601-9675 (1988).

2. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989) (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)).

3. 42 U.S.C. § 9607(a)(1) (1988).

4. *Id.* § 9607(a)(2).

5. "Response costs" can include site inspections, mitigation efforts and government litigation costs. See Roy M. Adams et al., *Liability for Environmental Hazards: The Saga Continues*, 132 Tr. & Est. 30 (Jan. 1993).

6. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

he cannot refuse to operate the business if doing so advances the reorganization and liquidation purposes of the federal Bankruptcy Code ("Code").⁷ These two different forms of trustees have certain traits which could bring them into the liability scheme of CERCLA, but they also possess other traits and fulfill certain legal purposes which suggest they should not incur CERCLA liability.

Congress did not fully consider the trustee's status when drafting CERCLA. CERCLA was a "hurriedly drafted"⁸ statute, and trustees were not even mentioned in the Senate bill which introduced the strict liability standard to CERCLA or in the committee report accompanying it.⁹ Furthermore the Environmental Protection Agency ("EPA"), which was delegated enforcement power by the Act, until recently had "never given a moment's thought" to a trustee's potential liability for contaminated property.¹⁰

Congress should be very concerned about trustees being held personally liable under CERCLA. Trustees provide invaluable services to Americans by managing trusts for many different purposes such as group financial investments (one example being Real Estate Investment Trusts or "REITS") and estate planning. Trustees are also the main operators of the Code which was federally enacted to balance the complicated tension between the debtor's interest in rehabilitation and the creditor's right to payment.¹¹ The entire Code revolves around the bankruptcy trustee and would collapse without his guidance and decision making.¹² If trustees are held personally liable solely due to their status as a trustee or for their

7. 11 U.S.C. §§ 721, 1108 (1988).

8. Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 34 (1982) (quoting 126 CONG. REC. H11, 790 (daily ed. Dec. 3, 1980)).

9. See *infra* notes 45-48 and accompanying text.

10. *Superfund: Environmental Cleanup Liability for Trustees Next Land Mine in CERCLA Field*, 22 Env't. Rep. (BNA) 2862 (Apr. 24, 1992) (quoting Michelle Corash, former general counsel of EPA) [hereinafter *Land Mine*].

11. See 11 U.S.C. §§ 101-2075 (1988).

12. E.g., *id.* §§ 323 (official representative of estate), 327 (power to employ professional persons), 345 (power to deposit or invest estate money), 363 (power to use, sell or lease property of estate), 364 (power to obtain credit), 365 (power to assume or reject executory contracts), 366 (power to demand utility services), 501 (power to file a claim on behalf of a creditor), 544-51 (power to avoid certain transfers and liens), 554 (power to abandon property), 704 (duty to account for property, monitor the debtor's performance, investigate debtor's financial affairs, object to debtor's discharge, file periodic financial reports), 1108 (power to operate debtor's business).

performance of routine trust services, the entire trust industry could be substantially altered. Many qualified trustees would step down from their positions rather than face the risk of unlimited personal liability. Others would charge outrageous fees in order to reflect the burden of potential CERCLA liability. Bankruptcy judges would be faced with rejections when attempting to appoint persons to be trustees of estates containing real estate. In the extreme situation that no trustee would accept the position, the debtor could be faced with the loss of his federal right to file bankruptcy. Due to the possibility of harming an entire industry which benefits so many Americans, Congress should reevaluate CERCLA in light of the special problems posed by trustees.

This paper attempts to draw some straight lines into trustee liability and to suggest legislative solutions in order to negative the uncertainty. Trustees should not be held strictly liable (1) for merely holding title to contaminated property or (2) for merely possessing the capacity to manage trust property. Trustees should also (3) not be held strictly liable as operators but should instead be held accountable on a negligence theory, and (4) trustees should not be forced to choose between breaching fiduciary duties or complying with CERCLA. Finally, this paper will consider preventative measures.

I. NO TRUSTEE LIABILITY FOR MERELY HOLDING TITLE

Under state law the creation of a trust requires the conveyance of trust property to the trustee.¹³ A trustee could incur personal liability under CERCLA on the theory that the trustee is the "owner" because he holds the title to the real estate. Yet, unlike other title holders who have been held liable under CERCLA, the trustee serves a legal purpose which makes it inherently unfair to hold him liable merely due to his status as title holder. First, a trustee only holds legal title to enable him to manage property on another's behalf (the beneficiary) and not for himself.¹⁴ Although trustees are compensated for their services, they are not paid to

13. RESTATEMENT (SECOND) OF TRUSTS § 32 (1959). "[I]f the owner of property makes a conveyance inter vivos of the property to another to be held by him in trust for a third person and the conveyance is *not effective* to transfer the property, no trust of the property is created." *Id.* (emphasis added). "The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract." *Id.* § 197 cmt. b.

14. *Id.* § 170. The trustee is under a duty of loyalty to the beneficiary; that is, he must administer the trust solely in the interest of the beneficiary. *Id.*

carry the burden of potential liability. Permitting one who does not benefit from the fruits of the property to bear all the burdens of the property would be unfair, especially when that person is not compensated for bearing such a risk. Second, trustees only receive title due to a hoary convention of common law which predates the coming of CERCLA and is oblivious to its consequences.¹⁵ A trustee could just as easily fulfill the various fiduciary and management duties under the trust instrument without holding title. Although a trustee could incur operator status as a manager of a hazardous waste facility without holding title, most trustees manage only the estate's finances and defer other physical management powers to more capable persons.¹⁶ Most importantly, holding trustees strictly liable due to their status as title holders does not further the goal of CERCLA which is to make those responsible for the problems caused by the disposal of hazardous waste pay for the cost of cleaning up the contaminated property. One could argue that current owners who buy contaminated property are also not at fault but can still be held liable under CERCLA. Current owners, however, accept the risk that they are buying contaminated property when they pay for it, while the trustee accepts no such risk in providing his services. Furthermore, an owner probably paid a much lower price for the property if any red flags were raised from an environmental audit, while a trustee's fees do not increase when such risks are present.

These policies illustrate the unfairness of holding trustees liable solely for holding title to contaminated real estate. Yet, because Congress did not define the term "owner," the trustee is left in the precarious position of deferring his fate to the courts' interpretation of this term.

The courts have been inconsistent as to whether merely holding title constitutes ownership under CERCLA. The ambiguous distinction between title and ownership surfaced in *United States v. Carolawn Co.*,¹⁷ where the defendant corporation moved for summary judgment on the issue of its liability as an owner under section 107(a)(2) of CERCLA on the basis that it was merely a "conduit" in a brief transfer of title between a bankruptcy trustee and three individual defendants.¹⁸ The court dismissed the motion

15. Joel S. Moskowitz, *Trustee Liability Under Cercla*, 21 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,003, 10,004 (Jan. 1991).

16. See Steven L. Leifer & Nancy E. Allin, *Trustee Executor Liability Under Superfund*, 20 Env't. Rep. (BNA) 1786, 1787 (Feb. 16, 1990).

17. 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,698 (D.S.C. June 15, 1984).

18. Douglass M. Garrou, *The Potentially Responsible Trustee: Probable Target for CERCLA Liability*, 77 VA. L. REV. 113, 124 (1991) (quoting *Carolawn*, [1984] 14 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,698).

stating that there was "room for controversy" on the issue.¹⁹ The court stated: "Possession of title, or the lack thereof, is not necessarily dispositive with respect to the questions of ownership 'While a certificate of title is an indicium of ownership. . . [it] is not conclusive evidence of ownership.'"²⁰ Under *Carolawn* then, a trustee may be free from CERCLA liability.

In *In re Bergsoe Metal Corp.*,²¹ however, the court implied that holding title by itself can establish owner status in stating "There is no question that, in at least one sense, the Port owns the Bergsoe recycling plant: the deed to the property is in the name of the Port."²² The court found the defendant not liable due to the applicability of the secured creditor exemption which excludes from the owner and operator definition any person who, without participating in the management of a facility, holds indicia of ownership primarily to protect his security interest in the facility.²³ Because the court held that the Port possessed title only to secure a debt owed to them, the Port was exempted. The court stated: "That the Port holds paper title to the Bergsoe plant does not, alone, make it an owner of the facility for purposes of CERCLA; under the security interest exemption the court must determine *why* the Port holds such indicia of ownership."²⁴ The implication is that if the defendant had not held title for the purpose of securing an interest in the facility, liability as an owner would have attached. Under *Bergsoe*, holding title would constitute ownership.

The three cases which directly confront the trustee's status as title holder are themselves ambiguous. In *United States v. Burns*,²⁵ the defendant was the sole trustee and beneficiary of a trust that owned contaminated property. The trustee moved to dismiss himself from liability on the grounds that he had never owned the property and had never personally participated in conduct prohibited by CERCLA.²⁶ In denying the motion, the court noted that as trustee and beneficiary, the defendant "possessed at least some evidence of ownership" of the property.²⁷ The

19. *Carolawn* at 20,699.

20. *Id.* (quoting *Justice v. Fabey*, 541 F. Supp. 1019, 1023 n.4 (E.D. Pa. 1982)).

21. 910 F.2d 668 (9th Cir. 1990).

22. *Id.* at 671-72. See also Garrou, *supra* note 18, at 125.

23. 42 U.S.C. § 9601(20)(A) (1988).

24. *Bergsoe Metal*, 910 F.2d at 671.

25. No. 88-94-L, 1988 U.S. Dist. LEXIS 20837, at *1 (D.N.H. Sept. 12, 1988).

26. *Id.*

27. *Id.* at *4.

court failed to clarify whether holding title as trustee or the fact that the trustee was also the beneficiary was the evidence of ownership to which it referred.²⁸ The court shed some light on the issue by stating "Congress did not intend for a responsible party to be able to avoid liability through the use of a trust or other forms of ownership."²⁹ Because the trustee was also the beneficiary when the contamination occurred, the court must have felt that the trustee was using the trust solely to shield himself from potential personal liability which he undoubtedly would have incurred had he simply been the fee simple owner of the property. Although *Burns* can be interpreted as holding a trustee liable for mere possession of title, it may be limited to the situation in which the trustee is also the beneficiary.³⁰

Another case confronting trustee liability, *United States v. Petersen Sand and Gravel*,³¹ concentrated on other indicia of ownership and de-emphasized that the trustee held title.³² In that case, a land trust had previously owned a contaminated site, and the current owner sued the former trustee bank of the land trust for contribution as a potentially responsible party.³³ On the issue of its status as owner, the bank was granted summary judgment.³⁴ The court stated that, although the trustee of a land trust did possess title, the beneficiary possessed the incidents of ownership that dealt with the use of the property such as the right to manage, control and possess the property.³⁵ The court felt that actual control of the property was more important than holding title to it.³⁶

Petersen, however, may also have limited application. First, by retaining complete power to control the property, the beneficiary seemed to be using the trust merely as a shield from liability. The court may have found against the beneficiary and for the trustee on that point. Second,

28. See Adams et al., *supra* note 5, at 32.

29. No. 88-94-L, 1988 U.S. Dist. LEXIS 20837, at *4 (D.N.H. Sept. 12, 1988).

30. See Adams et al., *supra* note 5, at 32.

31. 806 F. Supp. 1346 (N.D. Ill. 1992).

32. It is important to distinguish between indicia of ownership, which can include those powers associated with owning property, and operator activities, which include those decisions and activities relating to the operation of a facility. Because this case grapples with the issue of what powers and rights constitute ownership, the former is at issue.

33. *Petersen*, 806 F. Supp. at 1346. CERCLA expressly provides that if the government holds a party liable under the Act, that party may seek contribution from other potentially responsible parties ("PRPs"). 42 U.S.C. § 9613(f)(1) (1988).

34. *Petersen*, 806 F. Supp. at 1359.

35. *Id.* at 1358.

36. *Id.* at 1358-59.

conventional trusts, unlike land trusts, usually allocate a significant amount of power to the trustee over the trust assets. Had the trustee had the power to manage and control the property, the court may have found the trustee liable for possessing sufficient ownership indicia. In other words, the trustee would have possessed a sufficient amount of the powers and rights associated with owning property to be labeled an owner. More importantly, however, under *Petersen* a trustee would not incur liability merely for holding title without any other indicia of ownership.

The most recent case to address the issue of a trustee as an owner for holding title is *City of Phoenix v. Garbage Services Co.*³⁷ This case involved a trust which executed a repurchase option on a piece of real estate in 1966.³⁸ At that time, Garbage Services Company ("GSC") managed the site as a landfill.³⁹ The trustee continued to permit GSC to operate the landfill until 1972 when it was shut down.⁴⁰ The trustee paid the landfill's property taxes and insurance fees but did not participate in the daily operation of the facility.⁴¹ In 1980 the City of Phoenix condemned the property and in 1989 it alleged that the trustee was liable for response costs under CERCLA as a matter of law because the trustee held title to the property.⁴² The court agreed but was reluctant in doing so:

It may seem unjust to subject trustees that are not involved in the contamination of the property to liability for cleanup that, in some cases, may far exceed the value of the trust's assets. But, . . . a defendant's degree of culpability has nothing to do with owner/operator liability under CERCLA. If Congress had meant to exempt uninvolved trustees from liability as "owners" under CERCLA, it would have said so in the statute.⁴³

The court conceded the unfairness in holding an irresponsible trustee liable for merely holding title but believed that Congress must have intended trustees to be liable because Congress did not exempt them like

37. 816 F. Supp. 564 (D. Ariz. 1993).

38. *Id.* at 566.

39. *Id.*

40. *Id.*

41. *Id.* at 566-67.

42. *Id.* at 566.

43. *Id.* at 568.

the secured creditors.⁴⁴ However, the court, by assuming Congress was speaking by being silent, was misled in its analysis.

Congress probably did not consider trustees when drafting the Act. Senate bill 1480 introduced the strict liability section to the bill which ultimately passed as CERCLA.⁴⁵ In S. 1480 and in the report issued on it by the Committee on Environment and Public Works,⁴⁶ trustees are not discussed or even mentioned.⁴⁷ The only logical reason secured creditors received an exemption, and trustees did not, is because the lending industry was better represented during CERCLA's drafting. The industry's greater lobbying effort likely was due to the fact that lenders had more reason to fear CERCLA liability as an obvious deep pocket "owner."⁴⁸ Lenders finance most real estate purchases, giving them varying degrees of control over the real estate through loan conditions and foreclosure rights when purchasers become insolvent due to environmental liability or otherwise. Thus, lenders would take title at the worst time, when contamination had already occurred. By contrast, a trustee is not usually involved with the purchase or foreclosure of real estate but instead manages trust property which may include real estate with hazardous waste problems. Furthermore, the trust industry probably never considered a trustee to be the actual "owner" of trust property because a settlor or beneficiary would *always* be the benefitting party.

To confuse the issue further, the decision on ownership liability in *Garbage Services* was, in effect, reversed on a later motion to limit the liability of the trustee.⁴⁹ The court agreed that a trustee was liable as title

44. *Id.*

45. See Grad, *supra* note 8, at 7.

46. S. REP. NO. 848, 96th Cong., 2d Sess. (1980).

47. S. 1480, 96th Cong., 1st Sess. (1979), 126 CONG. REC. S14,938-48 (daily ed. Nov. 24, 1980). The report justifies the imposition of strict liability on the theory that the creation of hazardous waste is an ultrahazardous activity. At common law a person owning property on which ultrahazardous activities were performed was strictly liable for damages resulting therefrom. See Grad, *supra* note 8, at 9. It does not necessarily follow, however, that the trustee holding title for the benefit of another would be liable for damages associated with ultrahazardous activity at common law any more than the trustee would be liable for hazardous waste activities under CERCLA. In both cases, the issue is the same, and Congress has not resolved it.

48. "Lender Liability" has become increasingly prominent in the last decade as lenders have been held liable under a variety of statutes including the Bankruptcy Code, RICO, the U.C.C. and environmental statutes. RAYMOND T. NIMMER & INGRID M. HILLINGER, COMMERCIAL TRANSACTIONS: SECURED FINANCING 28-32 (1992).

49. See *City of Phoenix v. Garbage Servs. Co.*, 827 F. Supp. 600 (D. Ariz. 1993).

holder but found that CERCLA was silent on the extent of such liability, noting that "It is not surprising that, as a hastily conceived and briefly debated piece of legislation, CERCLA failed to address many important issues."⁵⁰ The court decided to create a federal common law rule which reflected the common law of trusts in order to avoid disrupting existing commercial relations predicated on state law.⁵¹ The federal rule was based on section 265 of the Restatement (Second) of Trusts which stated that, where liability is imposed on a trustee *because he is the title holder of the property*, a trustee is liable only to the extent to which the trust estate is sufficient to indemnify him.⁵² The court then held that as title holder of the property, a trustee could only be held liable to the extent of the trust assets.⁵³ Thus, the teeth of the prior ruling, which called for unlimited personal liability, were pulled. *Garbage Services* illustrates the uncertainty courts face in having to reconcile the vague, undefined terms of CERCLA with the irresponsible trustee who merely holds title to contaminated property. In sum, the judicial and governmental position on whether holding title constitutes ownership is inconsistent and, at best, very ambiguous.

Proper amendments to CERCLA or state trust law could establish safe harbors for trustees while still fulfilling the objectives of CERCLA. In 1990, New York Representative John La Falce introduced a bill⁵⁴ into the House of Representatives that would have exempted "corporate trustees" from ownership status under CERCLA.⁵⁵ There seemed to be two reasons for its death in the Energy and Commerce Committee.⁵⁶ First, the exemption of corporate trustees is illogical since there is little difference in the purposes behind corporate and inter vivos trusts.⁵⁷ Second, the bill would have exempted the trustee without the corollary right of holding the estate liable.⁵⁸ The bill's effect would have been that if contaminated trust

50. *Id.* at 602 (quoting *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989)).

51. *Id.* at 603. This is also consistent with *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 n.26 (3d Cir. 1992), in which the Restatement (Second) of Torts rule of divisibility was applied to CERCLA.

52. *Garbage Servs.*, 827 F. Supp. at 605.

53. *Id.*

54. H.R. 4494, 101st Cong., 2d Sess. (1990).

55. Moskowitz, *supra* note 15, at 10,005.

56. *See id.*

57. *Id.*

58. *See id.*

property could not be used for cleanup, the estate would receive a windfall remediation from the Superfund or not ever have to clean up the property.⁵⁹ The bill may have had a chance at passing if it had included all inter vivos trustees and clarified the right to reach trust assets for cleanup liability even if the title lie elsewhere.

The court in *Burns* mentioned one danger in passing this modified version of the bill. The bill may create a loophole for landowners to escape liability by transferring contaminated property to a trust while keeping liquid assets and uncontaminated property out of trust.⁶⁰ An exception should be made in the amendment for conveyances made by the transferor in bad faith; that is, those which were designed to avoid CERCLA liability. If the transferor conveyed the property to a trust because he knew disposal was likely, then liability would attach to the transferor. If the disposal occurred before the conveyance to the trustee, then the transferor should be held *solely* liable under section 107(a)(2) as the owner at the time of disposal. Under either scenario the entity responsible for the disposal would be punished and not the innocent trustee.

An alternative would be to amend state law by providing that the trust, rather than the trustee, takes title to the real estate.⁶¹ Although this offends conventional trust law, trustees should be willing to bend this convention rather than face the prospect of unlimited liability under CERCLA.

The other entity, the bankruptcy trustee, need not confront the issue of whether holding title constitutes ownership. In *In re T.P. Long Chemical, Inc.*,⁶² the bankruptcy trustee was held not liable as a title holding owner because under section 541 of the Bankruptcy Code, the bankruptcy estate, and not the trustee, holds title to property of the estate.⁶³ The court then noted that property of the debtor's estate could be used to

59. *Id.*

60. *Id.*

61. *Id.*

62. 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,635 (Bankr. N.D. Ohio Jan. 3, 1985).

63. *See id.* at 20,637. The filing of a bankruptcy petition creates an estate separate from the debtor and trustee. The estate itself holds title to all of the debtor's property. The trustee's only relation to the estate is that he manages the property. *See id.* "The commencement of a case under § 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:" 11 U.S.C. § 541(a) (1988).

satisfy CERCLA claims.⁶⁴ Bankruptcy courts have continued to follow this precedent, and the issue has not been subsequently raised.

II. NO TRUSTEE LIABILITY FOR MERELY POSSESSING THE CAPACITY TO MANAGE

Even if a trustee can persuade a court that he is not an owner for merely holding title to contaminated trust property, the trustee may be deemed an owner for possessing other indicia of ownership; that is, having the authority to control the use of the property. These management powers include the power to lease, possess or control the property.⁶⁵ Under trust instruments, trustees are often given significant power over both the management and financial affairs of trust property. In virtually all situations, however, trustees only exercise their financial powers relating to matters regarding property taxes, financing, investments, insurance liability and liquidation efforts, while actual management activities, like those mentioned above, are deferred to those who were in control prior to the creation of the trust agreement.⁶⁶ This occurs simply because the trustee usually knows very little about effective management or about the specific operations and activities of the trust property. When trustees only manage the financial affairs of the trust and are not involved in the actual management of the trust property, trustees should not be held liable as owners for holding unexercised powers incident to ownership.

First, holding trustees liable in such a scenario will not advance the purpose of CERCLA which is to force those who cause the disposal or who accept the risk of disposal to pay for the cost of cleaning up the property. Trustees do not accept the risk of CERCLA liability when they provide trustee services (as current owners do when they purchase real estate) nor do their fees increase when they become a trustee of a trust

64. *T.P. Long Chemical*, [1985] 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,638.

65. In *United States v. South Carolina Recycling and Disposal*, 653 F. Supp. 984 (D.S.C. 1984), *aff'd in part and vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989), a lessee, who did not hold title to the property, incurred owner liability for subletting the property to a sublessee who contaminated it. *Id.* at 1002-03. Leasing, notwithstanding the absence of title, can by itself be seen as an incident of ownership which can serve as a basis for owner liability. *See id.* at 1003.

66. *See Liefer & Allin*, *supra* note 16, at 1787.

holding real estate.⁶⁷ Furthermore, trustees who are not participating in the daily activities which resulted in the disposal did not cause the disposal in fact and could not have prevented it. Holding them liable would encourage trustees to take over the operations of the property or facility immediately upon becoming trustee without having the necessary skills or knowledge to do so. Imprudent decision-making in these types of cases could lead to CERCLA violations or at least to an increased risk of such violations. Furthermore, under *State of New York v. Shore Realty Corp.*⁶⁸ a trustee could incur liability for "a threat of release" if he took over the operations of the facility without the requisite expertise in handling hazardous waste.⁶⁹ Such time-consuming activity would also lead to the neglect of the traditional purpose of trustees which is to handle the financial affairs of trust property for the beneficiary.

Second, a secured creditor receives an exemption from ownership status when its only involvement with the entity is in assisting in its financial affairs.⁷⁰ There is a strong argument that the trustee should be entitled to similar protection because his normal role is one of financial facilitator.⁷¹ The *Mirabile* decision held that a secured creditor would be exempt where he did not exercise day-to-day or operational control over the management of the entity causing the disposal.⁷² The court noted: "the participation which is critical [to incur liability] is participation in operational, production, or waste disposal activities. Mere financial ability to control waste disposal practices . . . is not . . . sufficient for the imposition of liability."⁷³

67. Trustee fee arrangements do not reflect higher charges for administering trusts with real estate because trustees are not aware of their potential liability and, even if they are, consider the risk very low. However, as this paper suggests, the risk is very real, and as EPA, state environmental agencies and private parties search for deeper pockets, actions against trustees will increase dramatically.

68. 759 F.2d 1032 (2d Cir. 1985).

69. *Id.* at 1045. Liability can be incurred by an owner or operator for the release or threat of release of hazardous substances. Corroding and deteriorating tanks, the operator's lack of experience or the failure to license a facility could all result in a "threat of release."

70. See 42 U.S.C. § 9601(20)(A) (1988).

71. Leifer et al., *supra* note 16, at 1787.

72. *United States v. Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,995 (E.D. Pa. 1985).

73. *Id.*

Although the infamous Eleventh Circuit case *Fleet Factors*⁷⁴ held differently, its holding has been denounced by EPA,⁷⁵ and other courts have consistently followed *Mirabile* rather than *Fleet Factors*.⁷⁶ The trustee and lender entities are similar in two important ways which should result in treating them the same under CERCLA. First, their relations to the principal are the same in that their objective is to ensure financial stability for the principal—the trustee so that the trust makes money for the beneficiary and the lender so that the loan obligations of the debtor are fulfilled. Second, both often have the capacity to influence the operation's decisions; the trustee by the powers delegated in the trust instrument and the lender by its ability to cut the purse strings for environmental noncompliance as loan conditions. These similarities support the assertion made earlier that the only reason lenders received an exemption and trustees did not is that the lending industry was better represented during the drafting of CERCLA. Not being able to enjoy the safe harbor of an exemption from liability for mere financial assistance to the trust enterprise, the trustee must depend on whether the court's interpretation of owner will include those possessing the power to control management operations.

In the *Petersen* case mentioned above, the court held the beneficiary who did not hold title to the contaminated property liable as an owner for possessing other indicia of ownership which theoretically gave him the capacity to control disposals on the site.⁷⁷ Because the trustee often possesses the same powers which the beneficiary held in *Petersen*—the

74. *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) (holding that a secured creditor may incur § 107(a)(2) owner liability by participating in the financial management of a facility to a degree indicating a capacity to influence the entity's treatment of hazardous waste).

75. EPA denounced the *Fleet Factors* decision by issuing a Lender Liability Rule in 1992 which provided safe harbors for secured lenders which were explicitly prohibited under the *Fleet Factors* decision. The U.S. Court of Appeals for the District of Columbia recently ruled that EPA exceeded its statutory authority, which is limited to regulatory authority, in promulgating a rule which affects the liability of parties. *EPA's Lender Liability Rule Held Invalid Under Superfund Law*, 62 U.S.L.W. 1117 (Feb. 15, 1994). Because the decision is at the appeal level in a district court, it is not certain what affect it will have in other districts where the decision is not controlling. If Congress agrees with EPA's rule, it may decide to enact it legislatively.

76. In *Ashland Oil v. Sanford Prod. Corp.*, 810 F. Supp. 1057 (D. Minn. 1993), the court held that a lender engaging in normal lending activities is shielded from liability under CERCLA, *Mirabile*, and EPA's 1992 lender liability rule.

77. See *supra* notes 31-36 and accompanying text.

power to possess, control and manage the property—via the trust agreement, the case is troubling for trustees. Under *Petersen*, a trustee could be held personally liable if the trust instrument gives him management powers, even if the trustee never engaged in any decision-making whatsoever regarding the management of the property.

The only case to confront the issue of trustee liability based on the trustee's capacity to control management activity of the facility is *Garbage Services*.⁷⁸ The defendant was the trustee of a trust which included a landfill.⁷⁹ The trustee took a "hands-off" approach with regard to the daily management of the landfill and concerned itself only with the financial matters of the trust, which included paying the landfill's property tax and liability insurance.⁸⁰ GSC was the sole party managing the operations of the landfill and had been doing so years before the trust purchased the landfill.⁸¹ During the tenure of the trustee and while GSC was managing the property, a disposal in violation of CERCLA occurred.⁸² The district court held the trustee personally liable as an owner for holding title.⁸³ On a motion by the trustee to limit his damages to the assets of the trust, however, the court issued a federal common law rule which, in effect, altered the basis for liability.⁸⁴ The court first stated that a trustee could be held liable for merely holding title as an owner under section 107(a)(1) or (2) but only to the extent the trust assets were sufficient to indemnify him.⁸⁵ The court then stated that the trustee could be held personally liable, in excess of the trust assets, under section 107(a)(2) as an owner at the time of disposal if: (1) the trustee had the power to control the use of the trust property and (2) the trustee knowingly allowed the property to be used for the disposal of hazardous wastes.⁸⁶ Because the trust instrument provided that the trustee "shall have full power to hold, manage, operate, control, lease, improve and repair" trust property, there was little doubt as to the trustee's capacity to control the operations at the landfill.⁸⁷ In light of the trust instrument and the trustee's knowledge of the landfill activity,

78. See *Garbage Servs.*, 827 F. Supp. at 600.

79. *Id.* at 602.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 603.

85. *Id.* at 605.

86. *Id.*

87. *Id.* at 607.

the court concluded as a matter of law that the trustee could be held personally liable for response costs.⁸⁸

In an effort to avoid disrupting commercial relationships predicated on state trust law, the court tried to fashion this rule in a way consistent with section 264 of the Restatement (Second) of Trusts which subjected the trustee to personal liability for torts committed in the course of the administration of the trust.⁸⁹ The court believed that the trustee had committed a strict liability tort in that the disposal of hazardous wastes could be classified as a violation of the common law claim of ultrahazardous activity.⁹⁰ Therefore, if the trustee possessed the requisite incidents of ownership and control (the capacity to operate the property) and the trustee knew that ultrahazardous activity was occurring (a tort if released), then holding the trustee liable would be consistent with section 264 and CERCLA.⁹¹

This test provides some protection to the trustee. If the trustee is completely ignorant of any hazardous waste disposal on the land, then the second prong of the *Garbage Services* analysis will not be satisfied. If the trust instrument does not give the trustee power to control the operation of the property, then the first prong will not be satisfied. However, there are two problems with the court's analysis. First, a trustee can still be severely punished by incurring unlimited liability under this standard even though he has committed no wrong. Section 264 of the Restatement does not confront the issue of strict liability when a trustee is not at fault and is a mere title holder; rather, it discusses liability when the trustee is at fault. The court's connection between CERCLA and the Restatement is, at best, tenuous. Second, the trustee should not be labelled an owner for merely holding the unexercised capacity to control the management of the trust property. It does not satisfy the goal of CERCLA—to make responsible parties pay for cleanup costs—to punish a party who did not participate in the activity which caused the disposal.

Amending the owner definition of CERCLA to include an exemption for trustees could remedy the problem. Of course, the exemption would have to be limited to situations where the trustee participated only in the financial affairs of the trust estate and did not participate in the daily management of the facility. If evidence showed

88. *Id.*

89. *Id.* at 603.

90. *Id.*

91. *Id.* at 604.

that the trustee did exercise management powers with regard to the trust property containing the facility, the exemption should not apply. In the meantime, before contracting to become a trustee of trusts holding real estate, a trustee should strike any language in the trust instrument which delegates any control or managerial power over that real estate to himself.

Although a bankruptcy trustee does not possess title to the property of the bankruptcy estate, the bankruptcy trustee does possess certain incidents of ownership which could bring him into the ambit of owner liability. Pursuant to section 363 of the Code, the trustee can "use, sell or lease" property of the estate.⁹² The trustee can also operate the debtor's business.⁹³ Under *Petersen*, the beneficiary incurred liability. Like the bankruptcy trustee, the beneficiary did not possess title to the property where the disposal occurred but did possess certain powers evidencing ownership of the property such as the power to control, possess or manage the property. Likewise, in *Garbage Services*, the court held the trustee liable for the unexercised capacity to manage the trust property where the disposal occurred.⁹⁴

However, out of the many bankruptcy cases where the bankruptcy trustee could have been charged with owner liability, *In re T.P. Long, Inc.*⁹⁵ is the *only* case to question the bankruptcy trustee's status as a *nonowner*. After T.P. Long Chemical Company filed for bankruptcy, a trustee was appointed under Chapter 7 to liquidate the property of the estate.⁹⁶ Although most of the property of the estate was sold at an auction, a tank containing sulfur monochloride⁹⁷ remained on the site.⁹⁸ Through an act of vandalism, a former associate opened a valve on the tank resulting in the release of hazardous substances.⁹⁹ The trustee argued that since the bankruptcy estate held title to the property of the estate, the estate and not the trustee was the owner. The court agreed but noted that:

92. 11 U.S.C. § 363 (1988).

93. A Chapter 7 trustee can operate the debtor's business for the purpose of facilitating liquidation under § 704 of the Code. *See id.* § 704. A Chapter 11 trustee or the debtor in possession may operate the business of the debtor under § 1108 for the purpose of rehabilitating the debtor. *See id.* § 1108.

94. *Garbage Servs.*, 827 F. Supp. at 607.

95. *T.P. Long Chemical*, [1985] 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,635

96. *Id.* at 20,636.

97. Sulfur monochloride is a hazardous substance as defined by § 101(14) of CERCLA. *See* 42 U.S.C. § 9601(14) (1988).

98. *T.P. Long Chemical*, [1985] 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,636.

99. *Id.*

In the sense that the trustee did not acquire title to the property of the estate, he is technically correct that he is not the owner of the Long facility. [However] . . . the Bankruptcy Code does provide him with certain powers associated with ownership. Chief among these powers is the power to use, sell or lease property of the estate. . . .¹⁰⁰

This remark suggests that the absence of title may not, in all instances, be conclusive as to the question of owner status. The court seems to indicate that if these powers had been exercised, there would have been a stronger case for liability.

Under *T.P. Long*, it appears that a bankruptcy trustee could incur liability as an owner due to the powers incident to ownership that he possesses under the Code. However, a bankruptcy trustee doubtfully would ever be held liable on an ownership theory. In actions against bankruptcy trustees, courts have consistently extended greater protection to bankruptcy trustees than that afforded common law trustees.¹⁰¹ There are several basic reasons for this added protection. First, although the unsecured creditors can elect a trustee,¹⁰² the trustee is usually appointed by the U.S. Trustee.¹⁰³ Because the U.S. Trustee is a constant fixture in the bankruptcy court, bankruptcy trustees are often seen as “arms of the court”;¹⁰⁴ that is, their actions and decisions are regarded as an extension of the court’s judicial power. Second, the demands of public policy as

100. *Id.* at 20,637.

101. See generally *Sherr v. Winkler*, 552 F.2d 1367 (10th Cir. 1977); *Ziegler v. Pitney*, 139 F.2d 595, (2d Cir. 1943); *Riedell v. Stuart*, 2 P.2d 929 (Okla. 1931).

102. 11 U.S.C. § 702 (1988). If requested by a sufficient number of creditors at the § 341 meeting, an election for a trustee can take place.

103. *Id.* § 701. After the order for relief an interim trustee is appointed by the U.S. Trustee. If the unsecured creditors do not elect a trustee at the 341 creditor’s meeting, the interim trustee becomes the trustee in the case. *Id.* § 702(d).

104. *Sherr*, 552 F.2d at 1376. Trustees were appointed by the court before the enactment of the present Bankruptcy Code in 1979 and this 1977 court’s statement reflects that scenario. However, the “arm of the court” analogy still holds some weight today when one considers that the U.S. Trustee is a constant fixture of the bankruptcy court. When two parties, not adversarial in nature, are forced to work closely together for a common goal, the two parties are perceived to be on the same team and a structural bias is likely to occur.

described in the Code limit a bankruptcy trustee's degree of discretion;¹⁰⁵ that is, a bankruptcy trustee must follow the demands of the Code in meeting the objectives for the chapter under which the debtor files. Common law trustees are not restricted in this manner; in fact, they can negotiate the terms of the trust agreement which controls the types of power that the trustee possesses over the trust property. Third, when a trustee is appointed in a Chapter 11 Reorganization, the proceedings are so complicated that extra protection is often warranted.¹⁰⁶ Fourth, if bankruptcy trustees are held liable regardless of fault under the ownership-like powers given to them by the Code for merely being appointed to administer an estate, many trustees would refuse appointments. Without trustees the bankruptcy code could not work, and the system would collapse. Surely, in enacting CERCLA, Congress did not intend to take even one small step down this road.

With regard to CERCLA liability, a separate reason for not holding the trustee liable, except where the Code permits, is that the Code is federal law. As such, the Code must be treated on an equitable basis with other federal laws such as CERCLA. If there is a conflict, equal weight must be given to the intent of Congress in passing both laws before a decision can be reached. This analysis does not apply when state trust law is involved because state law, under the Supremacy Clause,¹⁰⁷ must yield to federal law when a conflict exists. In sum, although it is theoretically possible to hold a bankruptcy trustee liable as owner due to the indicia of ownership he possesses under the Code, such a holding is not likely considering the policy reasons against such a finding and the fact that only one bankruptcy case has even considered the possibility. To foreclose the issue, CERCLA could be amended to exclude bankruptcy trustees completely from the definition of "owner."

105. *Ziegler*, 139 F.2d at 596. Under Chapter 7 the trustee must liquidate the estate in an orderly fashion so as to provide creditors with the maximum amount of payment for their claims. In Chapter 11 the trustee must operate the business, cut losses and manage the affairs of the business in a manner which allows for rehabilitation and reorganization. See D. Ethan Jeffrey, *Personal Liability of a Bankruptcy Trustee Since Midlantic National Bank v. New Jersey Department of Environmental Protection: The Environmental Law and Bankruptcy Code Conflict Threatens to Engulf Bankruptcy Trustees* 2 VILL. ENVTL. L.J. 403, 405-407 (1991).

106. *Sherr*, 552 F.2d at 1376. "[T]he distinction between trustees in bankruptcy and ordinary trustees or fiduciaries in terms of degree of discretion is based on public policies recognizing the complications of bankruptcy proceedings." *Id.*

107. U.S. CONST. art. VI, cl. 2.

III. TRUSTEE LIABILITY AS AN OPERATOR BASED ON A NEGLIGENCE STANDARD

Even if a trustee can persuade a court that he is not an owner for purposes of CERCLA, the trustee may come into the ambit of the definition of operator. Although CERCLA does not define operator, a House Report accompanying one of the versions of the Act defined it as "a person who is carrying out the operational functions for the owner of the facility pursuant to an appropriate agreement."¹⁰⁸ In *Edward Hines Lumber Co. v. Vulcan Materials Co.*,¹⁰⁹ the court elaborated: "The decisions uniformly hold that Congress intended to impose [operator] liability. . . only on those parties who actually operate or exercise control over the facility."¹¹⁰ If an entity fits into the definition of an operator, the entity is held strictly liable. Yet, the legal purpose of the trustee entity and the historical tenets of trust law make it unfair and undesirable to hold trustees liable absent some standard of fault. First, holding trustees strictly liable would be a gross departure from orthodox trust law which insulates trustees from personal liability absent negligence.¹¹¹ Such a rule could severely limit the use of a trust as a form of real estate ownership, and the potentially large cleanup cost might well dissuade trustees from ever becoming involved. Second, in the traditional scenario a trustee could insure against personal liability and thus control the risks of his trustee capacity. Today, however, the staggering cost of CERCLA liability renders the trustee's position virtually uninsurable.¹¹²

A consideration of how courts have treated similarly situated defendants illustrates how the courts may treat trustees faced with potential operator liability. The courts have struggled with the idea of holding individuals personally liable as operators who are shielded from liability

108. H.R. REP. NO. 85, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6181.

109. 685 F. Supp. 651 (N.D. Ill. 1988).

110. *Id.* at 657.

111. William L. Hoey, *Personal Liability of Trustees Under the Comprehensive Environmental Response, Compensation and Liability Act*, 68 U. DET. L. REV. 73 (Fall 1990). Restatement (Second) of Trusts, § 264 (1959) provides: "The trustee is subject to personal liability to third persons for torts committed in the course of the administration of the trust to the same extent that he would be if he held the property free of trust." Under § 265, absent fault, "Where a liability to third persons is imposed [on the trustee]. . . because he is the holder of the title to property, a trustee. . . is subject to personal liability, but only to the extent to which the trust estate is sufficient to indemnify him."

112. Hoey, *supra* note 111, at 73.

under conventional state law. For corporate officers, the courts have designed what has been called a "judicial fault" test which could apply to trustees who, like corporate officers, are not mentioned specifically by CERCLA and are shielded under state law absent fault.¹¹³ In *Kelly v. Thomas Solvent Co.*¹¹⁴ the court explained the problem:

Imposing liability on a corporate individual is a serious matter, and because CERCLA provides no explicit way to distinguish among corporate actors, the courts should respond with proper standards. Strict liability may be too harsh and too broad-sweeping a standard to apply to all corporate 'owners' in all cases. . . . [a] more definitive standard seems appropriate.¹¹⁵

Thus, for an entity similar to that of the trustee in which a broad range of defendants with varying degrees of culpability as *operators* are present and face potentially unlimited liability, the *Kelly* court decided to form a standard of its own.¹¹⁶

The test looks to evidence of the individual's responsibility to control the waste-handling practices of the facility and the degree of authority over the corporation vested in the officer.¹¹⁷ Responsibilities for waste disposal which were neglected would support the finding of liability.¹¹⁸ In order to encourage CERCLA compliance, "active, direct, knowing efforts to prevent or abate" contamination would militate against finding the corporate officer liable.¹¹⁹ This analysis would give officers an incentive to face waste problems when they occur rather than ignore them in the hopes that their ignorance will preclude liability. In sum, the standard requires more accountability for those with more authority over the control of hazardous waste decisions.

The trustee could face a similar test for operator liability. The trustee's responsibility to control the operations of the facility will depend on the duties allotted the trustee and the powers given to the trustee in the trust instrument. If such duties and powers are nonexistent or slight, then

113. Garrou, *supra* note 18, at 136.

114. 727 F. Supp. 1532 (W.D. Mich. 1989).

115. *Id.* at 1543.

116. See Garrou, *supra* note 18, at 137.

117. *Id.*

118. *Id.*

119. *Id.* (quoting *Kelly*, 727 F. Supp. at 1544).

the trustee should not be held liable because he could not have prevented the disposal from occurring. In the other extreme scenario, if the trustee has the duty under the trust agreement to control such operations and actively participates to prevent or abate any disposal, these acts will serve to preclude or limit the trustee's liability. Under the latter situation, if the trustee does not participate in the operation of the facility to prevent disposal, the trustee should be held accountable for his negligent omission to act where a duty was present. However, if the trustee does not possess such a duty but the trust instrument gives the trustee the power to operate the facility, the trustee should not be held liable where the trustee has not participated in preventing a disposal. Holding the trustee liable here would essentially result in holding him liable for his unexercised capacity to control the facility. As discussed in the section above, this would be unfair. Although the "fault inquiry" provides some protection, the trustee could still face liability where he has not been at fault.

The one case confronting the issue of operator liability for a trustee, *Garbage Services*, provides the trustee with more protection than would the "fault inquiry" test.¹²⁰ The City of Phoenix relied on this statement in the *Kaiser Aluminum* case¹²¹ as a basis for trustee liability as an operator: "the defendant was not liable under CERCLA as an operator because he had no authority to control the day-to-day operation of the plant."¹²² Because the trust instrument provided the trustee with ample authority to control the operation of the facility, the City of Phoenix asserted that mere authority to control operations was sufficient to impose operator liability.¹²³ The court did not agree.¹²⁴ It held that liability as an operator attaches *only* where the defendant had *actual* control over the day-to-day management and administration of the facility.¹²⁵ The evidence showed that the trustee was not involved at all in the day-to-day administration of the landfill but that the landfill's manager, GSC was in charge.¹²⁶ The trustee did not enter into or negotiate contracts for the disposal of wastes at the landfill, the trustee did not know the identity of GSC's customers, and the trustee's communication with GSC employees was limited to matters involving the

120. See *City of Phoenix v. Garbage Servs. Co.*, 816 F. Supp. 564, 567 (D. Ariz., 1993).

121. *Kaiser Aluminum & Chem. Corp. v. James L. Ferry & Son, Inc.*, 22 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,020 (9th Cir. 1992).

122. *Garbage Servs.*, 816 F. Supp. at 567.

123. See *supra* notes 74-83 and accompanying text.

124. *Id.*

125. *Id.*

126. *Id.*

financial affairs of the estate.¹²⁷ *Garbage Services* would preclude operator liability in all situations except where the trustee was involved in the day-to-day management of the facility. On the other hand, under the "fault inquiry" test, liability could theoretically be incurred on a lesser threshold; that is, if the trustee had the capacity to control operations of the facility.¹²⁸ *Garbage Services* is more consistent with the House Report definition of owner, in that it requires actual involvement on the part of the trustee.¹²⁹

Because the "fault inquiry" has not yet been applied to trustees, and the validity of the *Garbage Services* test is in question due to the federal common law rule established on a subsequent motion to limit the trustee's liability,¹³⁰ the trustee again does not know what act or failure to act can cause liability. Proper legislation could remedy this situation. By codifying the *Garbage Services* test, Congress would protect a trustee unless he participated in the daily management of the facility. However, a broader protection could be given which is consistent with state common law by requiring some degree of fault before the trustee can incur personal liability. The following language may suffice: "The term 'operator' shall not include trustees except to the extent that a trustee's act, or failure to act where there is a duty under the trust agreement, causes or increases contamination or results in a threatened release."¹³¹ Although the former solution provides some protection, the latter would be consistent with state trust law. It will protect the trustee where the trustee is involved with the daily management of the facility but does not act negligently in causing a disposal. Although a trustee could be an operator under present law, an argument exists that only the trust's assets should be used to clean up the site. Otherwise, who would accept a trustee position to a trust which contains property with a landfill on it?

Bankruptcy trustees could fall into the ambit of operator liability by exercising their power to operate the debtor's business.¹³² Although CERCLA cases have not specifically addressed the issue, state cases interpreting state strict liability law have, and these cases provide some guidance as to how CERCLA would be applied. In *State of Wisconsin v. Better Brite Plating, Inc.*,¹³³ the court rejected a strict liability standard as

127. *Id.*

128. See Garrou, *supra* note 18, at 137.

129. See *supra* notes 78-91 and accompanying text.

130. *Id.*

131. This language was created by the author.

132. See 11 U.S.C. § 363 (1988).

133. 466 N.W.2d 239 (Wis. Ct. App. 1991).

it applied to a bankruptcy trustee. Better Brite had been operating a chrome and zinc plating shop in violation of the Wisconsin Hazardous Waste Management Act ("WHWM") since 1978 by discharging untreated waste water into the city's sewer system.¹³⁴ In 1985 Better Brite filed bankruptcy under Chapter 11 before converting to Chapter 7 and appointing a new trustee.¹³⁵ During both the Chapter 7 and Chapter 11 trustees' tenures, the trustees exercised the Code's power to operate the business, and the WHWM violations continued.¹³⁶ The trial court held the trustees personally liable for waste generated during their tenure as trustees. The Wisconsin Court of Appeals reversed, holding that a bankruptcy trustee could not be held personally liable for his actions unless the trustee "knowingly and intentionally" violated the statute.¹³⁷ The court adopted this standard from the Tenth Circuit's test in *Sherr v. Winkler*¹³⁸ which was based on the policy considerations mentioned earlier favoring greater protection for bankruptcy trustees. The court specifically noted that the standard reflects "a tacit recognition that federal bankruptcy law must be accommodated when it conflicts with areas covered by the state's environmental laws."¹³⁹

Better Brite provides bankruptcy trustees great protection with regard to state environmental law, but CERCLA, as a federal law, may treat them differently. An "intentional" standard is unlikely to apply because the strong public policy underlying CERCLA of cleaning up the environment cannot be properly fulfilled if trustees are protected except when they intentionally violate CERCLA. To accommodate CERCLA's policies, the bankruptcy trustee should be held to a negligence standard.

Bankruptcy trustees may have certain defenses inherent in the Code, however, which prevent them from being held responsible, notwithstanding their negligence. Because the Chapter 7 trustee cannot operate a debtor's business without prior approval by the bankruptcy court,¹⁴⁰ liability will depend on the extent to which the court authorized the activity resulting in

134. Jeffrey, *supra* note 105, at 428.

135. *Id.*

136. *Id.* See also *Better Brite*, 466 N.W.2d at 246.

137. *Better Brite*, 466 N.W.2d at 242.

138. 552 F.2d 1367 (10th Cir. 1977).

139. *Better Brite*, 466 N.W.2d at 246.

140. 11 U.S.C. § 721 (1988). "The court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate." *Id.*

a disposal.¹⁴¹ If the court authorizes the bankruptcy trustee's activity, then surely the court cannot then hold the trustee personally liable for resulting contamination. A Chapter 11 trustee needs no approval from the court to operate the business and therefore cannot use the court approval defense.¹⁴² By the nature of the Code, however, the Chapter 11 bankruptcy trustee enjoys limited liability.¹⁴³ If a debtor is able to file bankruptcy under Chapter 11, the entity has, in the judgment of the court, enough funds and assets to remain operational and attempt reorganization.¹⁴⁴ If a bankruptcy trustee is negligent, he could be found personally liable. However, due to the trustee's protected status, the trustee will more likely only be held liable to the extent that property of the estate cannot cover the bill.¹⁴⁵ Because the estate must have significant value to file Chapter 11, a trustee's liability should be limited.

CERCLA's treatment of bankruptcy trustees remains unclear when the trustee exercises the operation provision in the Code. The strong public policy behind CERCLA should demand a negligence standard rather than the "intentional" standard applied in *Better Brite*. A negligence standard could be established by adding bankruptcy trustees to the common law trustee negligence provision stated above.

IV. NO TRUSTEE LIABILITY WHEN CERCLA AND FIDUCIARY DUTY CONFLICTS

Trustees should not be forced to choose between incurring liability for breach of fiduciary duty or for violation of CERCLA. Powerful rationale exists for exempting trustees from CERCLA liability where fiduciary duties would conflict. First, not exempting trustees under CERCLA would place the trustee in a no-win situation and undoubtedly would damage the trust and estate industry to the extent that persons capable of being trustees would refuse to serve. Trustees would also dramatically raise the cost of their services to offset the added liability risk. Second, a common tenet of fiduciary law is that, absent any wrongdoing,

141. Jeffrey, *supra* note 105, at 417.

142. *See id.* at 419.

143. *Id.*

144. *Id.*

145. *Id.*

the fiduciary should not be placed in a position adverse to the beneficiary.¹⁴⁶ Compliance with CERCLA could force the trustee to breach a fiduciary duty owed to the beneficiary. Third, by hiring a trustee the beneficiary expects the trustee to fulfill all the traditional fiduciary duties owed him. Because the beneficiary agreed that these duties should be performed on his behalf, the beneficiary should bear the cost of any burden arising from their fulfillment. Because only one court has addressed the issue, the trustee again must proceed with little guidance on how to reduce his liability in situations where fiduciary duties and CERCLA conflict.

*In re Apco Oil Corp.*¹⁴⁷ explored the potential conflict between trustees and beneficiaries with regard to CERCLA. The beneficiaries of the Apco Oil Liquidating Trust petitioned the Delaware Court of Chancery to compel the trustees to make liquidating distributions from the trust.¹⁴⁸ Although the trust contained eighteen million dollars, the trustees would not even distribute interest income over a three year period due to alleged CERCLA violations at an oil refinery.¹⁴⁹ EPA had listed the refinery as a Superfund site and had identified Apco Oil as a potentially responsible party. The trustees' attorneys advised the trustees that the trust could be liable for the cleanup costs of the refinery which could exceed the assets of the trust.¹⁵⁰ The trustees were concerned about personal liability under the Federal Priority Act¹⁵¹ which allows for trustees to be held liable for claims brought by the U.S. Government if the trust's assets are insufficient because the trustees previously distributed funds.¹⁵²

The trustees were also concerned about complying with their duty of loyalty to the beneficiaries of the trust which required them to distribute assets when requested.¹⁵³ Holding beneficiary funds in the interest of another party would result in a breach. The court ordered the funds distributed on the grounds that a distribution would not result in liability under the Federal Priority Act because EPA's listing of Apco Oil as a

146. RESTATEMENT (SECOND) OF TRUSTS, § 204 (1959). The trustee is not liable to the beneficiary for a loss to the trust property not resulting from a breach of a fiduciary duty. The trustee also owes a duty of absolute loyalty to the beneficiary. *Id.* § 170.

147. Civ. Action No. 5718, 1989 Del. Ch. LEXIS 170 (Del. Ch. Dec. 15, 1989).

148. Adams et al., *supra* note 5, at 38.

149. *Id.*

150. *Id.*

151. 31 U.S.C. § 3713(a) (1988).

152. Adams et al., *supra* note 5, at 38.

153. *Id.*

potentially responsible party did *not* constitute the *assertion of a claim*.¹⁵⁴ Under *Apco Oil*, the fiduciary must comply with his fiduciary duties unless a CERCLA claim has been filed against the estate with the proper court.¹⁵⁵ In most cases, this offers little protection for the fiduciary; he will only be allowed to disregard his fiduciary duties where his actions or another's would clearly violate CERCLA. Moreover, a trustee cannot always know the legal implications of his or another's acts, especially with regard to CERCLA, where liability can be incurred for non-negligent acts.

Although only *Apco Oil* has confronted this issue, it can arise in several other contexts. For example, does the duty of loyalty require a trustee to argue that the trust has no cleanup liability?¹⁵⁶ If so, then the trustee may be arguing against himself where he is charged with breach of a fiduciary duty after the trust wins its case.¹⁵⁷ Where a trustee could be held personally liable, does a trustee's use of trust assets to pay for the cleanup suggest self-dealing? Perhaps it should to the extent he cleans up the property with trust assets. As a trustee, he is proportionately limiting his risk of liability. In a portfolio-trust driven by profit from real estate investments, does the trustee breach his fiduciary duty of loyalty by foregoing the purchase of high investment yield real estate with a minute chance of CERCLA liability due to his fear of incurring personal liability? If the fear was speculative, the land turned out to be not in violation of CERCLA and the property value accrued, the beneficiary certainly has a strong argument that the trustee's acts were driven by self-interest and resulted in a detriment to the beneficiary.

Congress should adopt legislation so that these types of conflicts do not arise. CERCLA should be amended so that a trustee will not be found liable for acting in good faith and in accordance with traditional duties applicable to trustee fiduciaries. If the trustee knows or should have known that fulfilling his fiduciary duty would result in liability under CERCLA, however, the trustee should be held liable for the results of his act. This latter provision is consistent with the general principle that fiduciary duties do not have to be performed where the act itself is illegal or criminal.¹⁵⁸ Instead, in these cases, the trustee should have a duty to inform the beneficiary of the risk of liability involved in fulfilling the duty.

154. *Apco Oil Corporation*, 1989 Del. Ch. LEXIS 170 at *8.

155. *Id.*

156. *Land Mine*, *supra* note 10, at 2862.

157. *Id.*

158. HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* § 90(b) (2d ed. 1990).

If a competent beneficiary knowingly accepts the risk, the trustee should be allowed to perform the duty but should be exempt from liability resulting from such performance. The total risk of liability, after disclosure, should fall on the beneficiary.

The bankruptcy trustee must also face the tension between fiduciary duty and CERCLA liability. This tension arises in the bankruptcy context when the trustee breaches a Code-based duty, triggered by a violation of CERCLA or state hazardous waste law. In *Midlantic National Bank v. New Jersey Department of Environmental Protection*,¹⁵⁹ the Court held that a bankruptcy trustee had a duty to maintain contaminated property of the estate in order to protect the public health and safety from an imminent and identifiable harm.

The debtor in *Midlantic*, the operator of two waste oil treatment facilities, filed bankruptcy after the discovery of over 400,000 gallons of oil contaminated with a toxic carcinogen.¹⁶⁰ The debtor had stored the contaminated oil on one of the facility's properties.¹⁶¹ With no one to buy the property, the trustee sought to abandon it under section 554 of the Code¹⁶² which allows for the abandonment of "any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."¹⁶³ When property of the estate is invaluable or burdensome, the trustee then has a fiduciary duty to abandon it before it can become a drain on the estate's assets. In *Midlantic*, the bankruptcy court approved the abandonment of the debtor's property over the objections of the State and City of New York who argued that abandonment would threaten the public's health and safety in violation of state and federal environmental laws.¹⁶⁴

The Supreme Court, however, in affirming a Third Circuit opinion, found otherwise. The Court noted that, before the passage of the Code, any power to abandon was given to the trustee by the courts, but only in those situations where state or federal law would not be contravened.¹⁶⁵ The Court believed that Congress intended the concept to be followed in its entirety: "In codifying the judicially developed rule [abandonment] . . . Congress also presumably included the established corollary that a

159. 474 U.S. 494 (1986).

160. *Id.* at 497.

161. *Id.*

162. *Id.*

163. 11 U.S.C. § 554(a) (1988).

164. *Midlantic*, 474 U.S. at 498.

165. *Id.* at 501.

trustee could not exercise his abandonment power in violation of certain state and federal laws."¹⁶⁶ By prohibiting abandonment and requiring the trustee to maintain the contaminated property in a manner that protected the public health and safety, the trustee was forced to expend all the assets of the estate and an additional \$20,000 which he personally borrowed and never recovered.¹⁶⁷ By implication, the Court forced the trustee to act against the interest of the debtor (and his creditors) in that the trustee failed to abandon burdensome property and drained the estate assets in the process. The Code's duty, which can be triggered by CERCLA or state law, drives a wedge through the relationship of the debtor and the bankruptcy trustee who are supposed to be working together for the purpose of achieving a Chapter 11 financial "rehabilitation" or a Chapter 7 "fresh start."

Other decisions have illuminated the tension between the abandonment duty and the duty to maintain. In *In re Stevens*,¹⁶⁸ the trustee attempted to abandon twenty-nine corroding drums of contaminated oil so that the debtor's estate would not be drained by the cost of removing and storing the drums.¹⁶⁹ Although the bankruptcy court approved the abandonment, the district court overruled on the basis of *Midlantic* and ordered the trustee to properly store the drums.¹⁷⁰ Because the debtor was insolvent when he filed bankruptcy under Chapter 7, the court asked the trustee to pay for an expensive temporary storage facility in order to hold the improperly stored contaminants.¹⁷¹ Clearly the cost of such a facility would be a heavy burden to place on the trustee who would have no hope for indemnification from a bankrupt Chapter 7 estate.

When a bankruptcy trustee has done nothing to cause the contamination, it is unfair to make him choose between breaching a fiduciary duty to act in the trustee's best interest to abandon the property

166. *Id.* The Court also added that the absence of any Code provision suggesting that a trustee could abandon in violation of state law further supports this interpretation. *Id.*

167. Joseph L. Cosetti & Jeffrey M. Friedman, *Midlantic National Bank, Kovacs, and Penn Terra: The Bankruptcy Code and State Environmental Law—Perceived Conflicts and Options for the Trustee and State Environmental Agencies*, 7 J.L. & COM. 65, 70 (1987).

168. 68 B.R. 774 (Bankr. D. Me. 1987).

169. *Id.*

170. *Id.* at 775.

171. *Id.* at 776. The Maine Department of Environmental Protection told the trustee that the 29 drums containing toxins had to be placed in a storage facility that had "an adequate roof and walls to protect the drums from rain [plus] an adequate floor with a 6" curbing made of impervious material." *Id.*

or breaching the duty to maintain property in a safe condition for the public. In this situation, CERCLA's goal to make those who caused the disposal or accepted the risk of disposal pay for the cleanup is not satisfied. On the one hand, the trustee has a duty to protect the debtor from property that can drain the estate's assets, such as property which has incurred CERCLA liability. On the other hand, the bankrupt who was responsible for the disposal can shift his liability to the trustee by filing bankruptcy. His debts, including costs for cleanup, will be discharged, while the trustee is left burdened with the duty to maintain the property in a safe condition. If these cases become frequent, a serious blow will be dealt to the bankruptcy system because trustees will simply refuse appointments when the debtor's estate holds real estate. Why should a bankruptcy trustee take even a minimal risk of incurring the costly duty to maintain?

Some courts have attached limits to the duty to maintain which has lessened the conflict to some degree. In *In re Southern International Co.*,¹⁷² the court narrowly construed the duty as one which attaches only when there is a clearly imminent and identifiable harm. If the harm is speculative or uncertain to have occurred, the trustee can abandon the property without fear of liability, even if great harm actually occurred or occurs later.¹⁷³

172. 165 B.R. 815 (Bankr. E.D. Va. 1994). Southern International Company ("Southern") used a toxic substance to produce home construction products. *Id.* at 818. Southern's trade creditors filed an involuntary Chapter 7 petition against it, and the trustee subsequently abandoned the facility at which the toxic substance was used. *Id.* Less than two months later a major rain fall caused the tanks containing the solution to overflow and contaminate the surrounding property. *Id.* At trial the issue arose as to whether the trustee had the power to abandon the facility in light of *Midlantic*. The court stated that the duty to maintain property was very narrow and applied only when there was a serious health risk to the public. *Id.* at 822. Here, when the trustee abandoned the property, the debtor had the authority to use the facility and the toxic substance, there had been no spill and there was no threat of contamination. *Id.* at 823. Thus, the court ruled that the duty did not apply in this case due to a lack of an imminent danger at the time of abandonment. *Id.* The court did seem concerned that the spill could have been avoided had the trustee simply kept the machinery in working order. *Id.* Perhaps, if the trustee's abandonment power is used in the face of an obvious potential danger, even though not imminent, the duty will be enforced anyway through the court's equity powers under § 105. 11 U.S.C. § 105 (1988).

173. *S. Intl. Co.*, 165 B.R. at 823.

In *In re Franklin Signal Corp.*¹⁷⁴ the court narrowed the extent of the duty by only requiring the trustee to "take at least minimal steps to protect the public."¹⁷⁵ The trustee took "minimum steps" by hiring an environmental specialist to determine the content of the drums and the cost of cleanup.¹⁷⁶ Under *Franklin*, the trustee's duty was limited to establishing the scope of the problem at hand and did not require physical acts to mitigate the problem. Yet, by not requiring the trustee to protect the public from the property by taking preventative measures, the holding is completely inconsistent with the clear wording of the duty in *Midlantic* which calls for actual protection. Thus, it is doubtful other courts will adopt the "minimum steps" approach.

In *In re Microfab*¹⁷⁷ the court asserted that the financial ability of the trustee must play a limiting role on the duty in stating that "the trustee cannot be ordered to comply with a cleanup obligation that he does not have the financial resources to satisfy."¹⁷⁸ Yet, basing the extent of an entity's duty on its ability to pay is inherently unfair; the law establishes duties based on certain relationships, not on wealth. In sum, both limiting factors reflect the court's sympathy for the trustee's unfortunate position, but neither are based on any provision or underlying logic in CERCLA, state hazardous waste law or the Code. To clear up the extent of the duty and to prevent this conflict between the Code and hazardous waste law from destroying the trustee position in the Code, Congress must fix the problem.

One possible solution would be to amend CERCLA so that the duty to maintain could not be attached to the bankruptcy trustee except where he intentionally exercised certain powers with knowledge that a release of hazardous substances was likely. Another possibility would be to create a Code section which establishes standards for when property can be abandoned and who must pay cleanup costs when property of the estate cannot be abandoned.¹⁷⁹ Any potential liability for the trustee would be known ahead of time, and the risk could be factored into the cost of providing the service. Congress could also solve the problem by amending the Code to prevent the discharge of debts under Chapter 7 or the acceptance of a reorganization plan under Chapter 11 until the debtor has

174. 65 B.R. 268 (Bankr. D. Minn. 1986).

175. *Id.* at 273.

176. *Id.*

177. 105 B.R. 161 (Bankr. D. Mass. 1989).

178. *Id.* at 169.

179. Jeffrey, *supra* note 105, at 436.

established cleanup plans.¹⁸⁰ Until a solution is found, unnecessary litigation over the duty to maintain and the abandonment provision will continue.

V. PREVENTATIVE MEASURES

Until proper legislation passes, trustees must take certain steps in order to reduce their risk of liability. First, before purchasing or accepting title to real estate, trustees should always exercise "due diligence" in order to take advantage of the innocent purchaser defense.¹⁸¹ The defense may be raised by private parties who take title to real estate provided that, among other things: (1) the disposal of hazardous substances on the property occurred prior to the transfer of title and (2) the landowner did not know or have reason to know, at the time of the transfer, that hazardous substances were disposed of at the facility.¹⁸² To establish the latter provision, "due diligence" in investigating the property must be performed. Because trustees will usually take title to property in a commercial context, the strictest standards will be applied.¹⁸³ This necessarily requires a phase I environmental audit which generally includes searching the land records to determine the prior owners and prior uses of the property, a walk-through of the property and a full investigation of anything that may look suspicious, and the taking of limited ground samples to check for traces of hazardous substances.¹⁸⁴ If the audit comes

180. *Id.* at 437.

181. The innocent purchaser defense requires a contractual agreement with a third party. 42 U.S.C. § 9607(b)(3) (1988). However, the trust agreement may not satisfy the elements of a contract. For instance, if the trustee is not given consideration for his services, a contract may not be found. Gratuitous trustee services are not uncommon in noncommercial contexts between families and friends. To the extent a trust agreement does not constitute a contract, the defense cannot be used. *See id.*

182. *Id.* §§ 9601(35), 9607(b)(3).

183. H.R. REP. NO. 962, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 3279, 3280. If the trustee takes the property in a private context or by inheritance or bequest, as is usually the case for testamentary trustees, a lower standard will be applied on the reasoning that the "purchaser" is not as knowledgeable as commercial purchasers, who buy and sell land routinely, on what methods should be used to investigate the property and what certain discovered information ("red flags") should imply about the property. *Id.*

184. Denise Rodosevich, *The Expansive Reach of CERCLA Liability: Potential Liability of Executors of Wills and Inter Vivos and Testamentary Trustees*, 55 ALB. L. REV. 143, 163-64 (1991).

up negative and no red flags are raised, then "innocence" should be established.¹⁸⁵ It should be strongly noted, however, that without such an audit, "due diligence" will be hard to prove, as such audits are now seen as commonplace in the trade.

Second, the trustee should demand risk-shifting provisions in the trust agreement. An indemnification provision from the beneficiary or the settlor for environmental problems which extend beyond the trust assets and a provision requiring the beneficiary or settlor to respond to CERCLA cleanups in the first degree are provisions which can be used to limit or prevent trustee liability. The one drawback is that contractual provisions cannot preclude the initial incurrence of liability for the trustee; that is, they can only be used by the trustee in a later action to enforce the terms of the contract. Furthermore, courts tend to construe narrowly such provisions so that only the most explicit and clear indemnity language will be enforced.¹⁸⁶

Third, after *Garbage Services*, trustees should be wary of the powers granted to them in the trust agreements. If the trustee is only going to manage the financial affairs of the trust estate, any language authorizing him to exercise management power over the property or facility should be omitted. Such language could give the trustee the capacity to operate a facility which, under *Garbage Services*, is sufficient to constitute owner status.

VII. REAUTHORIZATION

Although CERCLA was up for reauthorization in 1994, no action was taken before Congress recessed. In the next congressional session, changes to CERCLA seem probable. Senator Max Baucus (D-Mont.) stated that, due to the problems with the current law, nearly all parties affected by CERCLA "appear to be united in their desire to complete reauthorization."¹⁸⁷ Furthermore, industry who, as the law's target often works hard to delay such legislation, is pushing hard for reauthorization because the new law is expected to result in business savings.¹⁸⁸

185. If red flags are raised, a phase II environmental audit, which is a more comprehensive investigation including a multitude of sampling tests, will be necessary. If all red flags are dismissed after a phase II audit, innocence should be established.

186. Robert Boese, *Indemnity Agreements and CERCLA*, 37 LA. B. J. 36, 37 (1989).

187. *CERCLA Reauthorization Called Possible if Given Push by Clinton Administration*, 24 Env't. Rep. (BNA) 1340 (Nov. 19, 1993).

188. *Id.*

The Interagency CERCLA Reauthorization Policy Committee, a task force including White House officials and representatives from several federal agencies is considering proposals.¹⁸⁹ The committee's purpose is to present a reauthorization bill to Congress.¹⁹⁰ The two major proposals have been submitted by the Treasury Department and EPA.

The Treasury Department has proposed a reformation of the liability scheme. A binding allocation system based on behavior would replace strict, joint and several liability based on status.¹⁹¹ The plan calls for the appointment of administrative law judges ("ALJs") who would hear evidence, determine which parties are responsible for contamination and allocate cleanup costs based on each party's behavior.¹⁹² Superfund would pay for the cost of covering orphan shares¹⁹³ and that of parties absolved of liability.¹⁹⁴ The rationale behind the plan is that the ALJs' allocation would preclude CERCLA litigation and thus would allow more money for cleanups. Not surprisingly, the major criticism of this proposal is that it will require a tax increase to cover the cost of providing more ALJs' and the payment of cleanup costs when parties are absolved or orphan shares are designated.¹⁹⁵

EPA supports an allocation scheme based on responsibility as well but wants it to be non-binding.¹⁹⁶ Responsible parties could either pay the cleanup costs allocated to them or decide not to be bound by the judgment. There would be incentives to participate, though, such as an increased allocation of cleanup costs if the ALJ's decision later proved to be correct. The major criticism of the non-binding allocation scheme is that it may not result in a large decrease in litigation costs, which is a major attraction for Congress.¹⁹⁷ EPA, unlike the Treasury Department, is also considering

189. See *Superfund: Interagency Policy Sets Schedule for Recommending Overhaul of CERCLA*, 24 Env't Rep. (BNA) 1133 (Oct. 15, 1993).

190. *Id.*

191. *Superfund: Treasury Department Liability Proposal Is Criticized by Congressional Leaders*, 24 Env't. Rep. (BNA) 1067 (Oct. 8, 1993)

192. *Superfund: Administration Called Inconsistent on CERCLA Reauthorization*, 24 Env't. Rep. (BNA) 1135 (Oct. 15, 1993) [hereinafter *Superfund: Administration*].

193. A percentage of the cleanup costs for which it is unknown who is accountable.

194. *Superfund: Administration*, *supra* note 192, at 1135.

195. *Id.* EPA conservatively estimates the implementation of the proposal could require a tax increase of 14.4 billion dollars over the next ten years. The critics of the bill include Senator Frank R. Lautenberg (D-N.J.), Congressman Norman Y. Mineta (D-Cal.), Congressman John D. Dingell (D-Mich.) and Congressman Al Smith (D-Wash.).

196. *Superfund Reauthorization*, 24 Env't. Rep. (BNA) 1663, 1664 (Jan. 21, 1994).

197. *Id.*

exemptions for trustees in certain circumstances which have not yet been disclosed.¹⁹⁸

Some groups strongly support the Superfund's present liability scheme. A Department of Justice ("DOJ") representative stated, "we are firmly committed to strict, joint and several liability. Any proposal that does not include these elements will only increase superfund's transaction costs."¹⁹⁹ The DOJ believes that settlement is the largest reducer of transaction costs and that the proposals to eliminate the present liability scheme would discourage settlements.²⁰⁰ Furthermore, Congressman Al Swift (D-Wash.) has stated that eliminating the present liability scheme would outrage and alienate the national environmental organizations, making such proposals difficult to pass.²⁰¹

A top EPA official has stated that the executive proposal presented to Congress will be a compromise of the EPA and Treasury Department proposals.²⁰² The result should be some form of allocation scheme based on responsibility. Should the legislation pass, the trustee would no longer be concerned about whether he fit into the definitions of owner or operator but would instead be concerned with whether he was responsible for the disposal. This scheme would confront all the issues addressed here and decide them in favor of the trustee. Every argument calling for trustee protection in this paper is based on the premise that, although the trustee may tenuously fit into the liability definitions, he should not be held liable because he either is *not responsible* for the contamination or *did not accept the risk of liability*. Of course, the trustee should not be completely exempted from liability. The trustee should be held liable where he is responsible or where he accepts the risk of liability. Because EPA's proposal contains situational exemptions, they most likely address these same concerns.

Trustees have not been hit hard with CERCLA liability yet. However, this will most likely change if clear and comprehensive legislation addressing the problems presented here is not passed. EPA's search for deep pockets to clean up the thousands of existing contaminated sites will undoubtedly lead to many more suits against trustees. When this happens, the trust industry will suffer a serious blow. Trustees will likely

198. *Id.*

199. *Superfund: Administration*, *supra* note 192, at 1135.

200. *Id.*

201. *See CERCLA Reauthorization*, *supra* note 187, at 1340.

202. *Superfund: "Long List" of Liability Changes to Law Being Proposed by EPA*, *Top Official Says*, 24 Env't. Rep. (BNA) 1473 (Dec. 3, 1993).

refuse to serve when the trust contains real estate. Trustees servicing existing trusts will probably step down if asked to purchase real estate, especially if red flags have been raised in an environmental audit or hazardous waste is created on the property. Trustees who do accept such risky positions will demand exorbitant rates to protect against their potential liability.

This type of impact on a commonly used commercial service could have indirect effects on the economy. Trusts commonly used to hold or separate real estate for business and estate planning purposes could cease to exist. The bankruptcy system may have to be altered so that trustees are not used, which could require an entire rewriting of the Code. These consequences may seem far-reaching, but they are realistic developments if clear and comprehensive legislation is not enacted. Congress should be careful not to hurry through a flawed or ambiguous legislative package in the next session, as was done in 1980, in order to prolong debate on more controversial issues such as health care and tax reform, or trustees could be in a situation no better than they are in now.²⁰³

203. *Superfund: Administration*, *supra* note 192, at 1135.