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*By Alison Shlom**

I. INTRODUCTION

Under federal law, a tenant who subleases a property to a sublessee who contaminates the site may be liable for cleanup costs depending on which federal court hears the case.[1] The Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) circular definition of a property "owner" has resulted in a circuit split on this issue.[2] In the Second Circuit, courts rely on a five-factor test to determine owner liability.[3] In sharp contrast, the Ninth Circuit incorporates state-specific law to assign owner liability.[4]

The Second Circuit recently decided *Next Millennium, LLC v. Adchem Corp.*,[5] where Pufahl Realty, which changed its name to NSR Corp. and assigned all of its assets to NSR Company (NSR), leased a building located at 89 Frost Street, North Hempstead, New York.[6] NSR subleased the property from 1973 to 1976 without the landlord's consent or notice.[7] The sublessee, Lincoln, installed a commercial dry cleaner that used large amounts of perchloroethylene (PCE) in its daily operations, which resulted in groundwater contamination and required on-site remediation.[8] Twenty years later, between 1997 and 1998, Next Millennium and 101 Frost (Next Millennium) purchased the contaminated property, confident that they could recover upcoming cleanup expenses from the previous sublessor and sublessee as liable parties.[9]

Next Millennium claimed that NSR was a *de facto* owner at the time of contamination under a site control theory of ownership.[10] The Court of Appeals rejected all claims, referring to the precedent set in *Commander Oil v. Barlo Equipment Corporation*,[11] the controlling ownership test at the time of the decision.[12] In *Commander Oil*, the Second Circuit established a five-factor test to determine ownership.[13] The five factors are: (1) the length of the lease and rights of the owner/lessor to determine use of the property; (2) the terms of the lease allowing the owners to terminate the lease before it expires; (3) the right of the lessee to sublet the property without notifying the owner; (4) the lessee's responsibility to pay taxes, assessments, insurance, and operation and maintenance costs; and (5) the lessee's responsibility to make repairs.[14] The court found that NSR was not an owner under the *Commander Oil* test, and Lincoln, the original tenant corporation, had dissolved by the time of suit.[15] Therefore, the sublessor and sublessee escaped contribution and joint and several liability.[16]

Next Millennium filed a petition for certiorari with the Supreme Court, challenging the *Commander Oil* five-factor test.[17] The petitioners argued that a sublessor should be liable for costs of cleaning up contamination when the sublessor satisfies the state-specific common law definition of "owner," had exclusive site control, and polluted the site through its operations.[18] The Supreme Court denied certiorari.[19]

The *Commander Oil* test diverges from use of state-specific common law in assigning owner liability under CERCLA, yet it remains the law in the Second Circuit.[20] Consequently, a subsequent buyer such as Next Millennium—which had no site control at the time of the polluting event, did not sublease the property to polluting sublessees, and did not profit from the contamination—potentially bears the burden of paying for all cleanup costs without contribution from other parties.[21]

This comment argues that the Second Circuit's divergence from the state-specific common law regarding owner liability under CERCLA is inconsistent with Congress's clear intent, unlike the Ninth Circuit's approach, because it does not incorporate state-specific common law and it separates "owner" from "operator." Part II describes Congress's intent for CERCLA liability.[22] Part II also explains the creation of the Second Circuit's ownership test, the Ninth Circuit's state-specific common law approach to ownership, and the common law in New York and California, respectively, regarding ownership.[23] Part III argues that the Second Circuit ownership test is inconsistent with Congress's intent for strict owner liability by deviating from the state common law definition of "owner," while the Ninth Circuit approach provides a clear guideline, using state common law to assign owner liability under CERCLA.[24] Part IV recommends that the Supreme Court or Congress overturn the Second Circuit ownership test because it is inconsistent with the remedial purposes of CERCLA.[25] This comment concludes that the Second Circuit ownership test deters investors from purchasing contaminated land due to the likelihood of litigation on the indicia of ownership.[26]

II. BACKGROUND

Hazardous waste sites pose a serious threat to the environment and human health.[27] In 1980, prior to an administrative change, Congress acknowledged the significance of these harms and enacted CERCLA.[28]

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A. CERCLA

1. Background and Congressional Intent

Congress enacted CERCLA in 1980 to facilitate prompt cleanup of hazardous waste sites and place the financial burden of environmental contamination on those responsible and benefitting from the externalized cost of the waste.[29] Congress enacted CERCLA to impose liability for clean-up of land and water retroactively, lay out a process for identifying priority sites, and determine the appropriate response actions.[30]

Under CERCLA, the government is authorized to respond to a release of a hazardous substance and then recover cleanup costs from potentially liable parties.[31] Congress intended that courts hold liable those who are responsible for the contamination so long as the interpretation is supported expressly by the statute or by the legislative history.[32]

CERCLA lacked clarity, and in 1986, Congress clarified CERCLA with the Superfund Amendments and Reauthorization Act (SARA).[33] Ten years later, in 1996, Congress made a second attempt at clarification with the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act (ACA).[34] However, neither set of amendments clarified the basic meaning of the word "owner."[35]

For three decades, plaintiffs persuaded the courts that CERCLA's remedial purpose mandates a liberal interpretation and broad application of the statute.[36] However, in *CTS Corp. v. Waldburger*,[37] the Supreme Court explicitly urged lower courts to honor the statutory text.[38] It is still unclear, however, whether lower courts are ready to accept *Waldburger* as the proverbial nail in CERCLA's broad remedial purpose's coffin.

2. Liable Parties Under Section 107

CERCLA liability under Section 107 extends to four classes of potentially liable parties (PRPs).[39] These classes include current owners and operators of a property, certain past owners and operators, arrangers of disposal of hazardous waste, and transporters of hazardous waste.[40] Congress rejected a general causation formula that would assign liability for contamination based on a party's connection to the site.[41] This distinction holds owners and operators liable for contaminated facilities and facilities that show a threat of contamination regardless of whether the owner or operator caused the contamination.[42]

The statutory language is circular and vaguely defines an owner and operator as "any person owning or operating" contaminated property.[43] The circular definition of owner and operator gave courts the discretion to assign meaning to the statutory language and therefore govern CERCLA liability.[44] Congress intended that courts decide the circumstances under which a holder of a less-than-fee-simple interest in real property is subject to owner liability, but the definition remains indeterminate and creates confusion in the enforcement of the statute.[45]

Ownership of land under CERCLA is a property issue, and property law questions are traditionally a matter of state law.[46] The Supreme Court established that state courts determine property interests based on their own rules.[47] The Supreme Court clarified in *United States v. Bestfoods*[48] that when Congress gave the word "operator" a circular definition, the definition should be based on the plain meaning of the word and state common law.[49] The Second Circuit interpreted *Bestfoods* to distinguish "owner" and "operator," while the Ninth Circuit interpreted *Bestfoods* as direction to follow the state common law definition of "owner."[50]

3. Joint and Several Liability Under CERCLA

CERCLA is a strict liability statute and imposes liability on some parties who may not have acted culpably.[51] By the time Congress enacted CERCLA, courts had established that in pollution cases where two or more defendants cause indivisible harm, the defendant could seek contribution from their joint tortfeasors.[52] Harm at a CERCLA site is usually indivisible,[53] and therefore courts hold defendants jointly and severally liable under CERCLA.[54]

Congress deleted CERCLA's original joint and several liability section, saying that the standard should be the same as the Clean Water Act Section 311.[55] However, Courts have determined that Congress intended that courts incorporate joint and several liability principles in judicial interpretation.[56] Congress envisioned that doctrines of federal common law govern liability issues of federal government interest that are not resolved expressly in CERCLA.[57]

The Second Restatement of Torts makes joint and several liability the presumption.[58] When the Environmental Protection Agency (EPA) immediately cleans up a CERCLA site, courts assign joint and several liability to the liable parties.[59] On the other hand, when the harm is less immediate, a private party may clean up the CERCLA site, and courts assign either joint and several or several liability to parties who are liable.[60]

4. The Right to Seek Contribution Under Section 113(f)

Congress amended CERCLA in 1986 with SARA to permit private persons to sue to recover at least some of their cleanup costs from other PRPs under Section 113(f).[61] This amendment created a separate federal cause of action and eased the burden of the original defendant sued by the EPA.[62] A defendant who is found liable under Section 107 is entitled to relief under Section 113(f) by seeking contribution from other PRPs if the defendant can demonstrate divisibility of the environmental harm.[63] The court may allocate costs as it determines appropriate.[64] In *Cooper Industries, Inc. v. Aviall Services, Inc.*[65] and *United States v. Atlantic Research Corp*,[66] the Supreme Court held that a private party who has not been sued under CERCLA 106 or 107(a) may not obtain contribution under 113(f)(1) from other liable parties.[67] These cases modified the extent of contribution rights and limited the ability of private parties to recover response costs.[68]

5. The Bona Fide Prospective Purchaser Defense to CERCLA Liability

Investors that conduct Environmental Site Assessments may be exempt from CERCLA liability under the "bona fide prospective purchaser" (BFPP) exemption.[69] The application

of the BFPP provision became clearly enforceable for tenants under the Brownfields Utilization, Investment, and Local Development Act of 2018.[70] A tenant whose lease of a property began after January 11, 2002 can establish a BFPP defense to CERCLA owner liability, and thereby escape liability when leasing previously-contaminated property.[71]

B. Circuit Split in Approaching Owner Liability under CERCLA

The circular definition of a property "owner" under CERCLA has resulted in a circuit split.[72] In the Second Circuit, courts depend on a five-factor test to determine owner liability.[73] The Ninth Circuit, on the other hand, incorporates state-specific law to assign owner liability.[74]

1. The Second Circuit Ownership Test

Under New York common law, tenants (and not landlords) are held responsible for injury caused by the condition of use of leased property.[75] To interpret state environmental statutes, New York courts follow the principle that tort liability concerning property depends on occupation and control.[76] However, the Second Circuit framework for CERCLA owner liability does not follow this principle.[77]

In *Commander Oil*, the Second Circuit generated a new five-factor factor test to determine de facto ownership of a lessee under CERCLA.[78] Commander Oil owned a lot that Barlo subleased to Pasley.[79] The subleased lot housed petroleum storage tanks, and Pasley used the lot to repackage solvents purchased in bulk and to reclaim and revitalize used solvents.[80] The EPA discovered contamination and remediated the site, and Commander Oil agreed to reimburse the EPA for costs.[81] Commander Oil sought contribution under CERCLA from Barlo and Pasley as potentially liable parties.[82] The court found that Barlo did not possess sufficient "attributes of ownership" because all factors showed that Barlo did not have the rights and obligations of an owner.[83]

The Second Circuit's definition of "owner" is not determined by state law.[84] In *Bestfoods*, the Supreme Court differentiated "owner" from "operator."[85] As the Supreme Court clarified, Congress intended that the court use plain meaning of the word "operator" and state common law as bedrock principles.[86] The Second Circuit interpreted *Bestfoods* to define "owner" and "operator" as disjunctive.[87] Disjunctive definitions lead to a limited interpretation of liability and the Second Circuit framework incentivizes litigation.[88]

2. The Ninth Circuit Common Law Ownership Test

By contrast, the Ninth Circuit follows the Supreme Court's guidance in *Bestfoods* and uses state common law to determine owner liability under CERCLA.[89] California common law distinguishes between possessory interests, such as revocable permits and ownership interests.[90]

The Ninth Circuit used state common law when examining whether an easement constitutes ownership for CERCLA liability in *Long Beach Unified School District v. Dorothy B. Goodwin California Living Trust*.[91] The easement holders (M&P) ran a non-polluting pipeline across a parcel of land.[92] The local school district sued the tenant who maintained a waste pit that contaminated the land, and the tenant settled.[93] The local school district also sued M&P under CERCLA for contribution, even though the pipeline had no connection to the waste pit.[94] The court found that holding an easement does not itself constitute "ownership" in relevant civil state property law because an easement is merely a limited right to use property that is possessed by another entity.[95]

In *City of Los Angeles v. San Pedro Boat Works*,[96] Pacific American, whose successor-in-interest was BCI Coca-Cola, possessed revocable permits from the City of Los Angeles for Berth 44 boat works.[97] The City found contamination on the site and claimed that BCI Coca-Cola was liable as an owner under CERCLA.[98] The Ninth Circuit held that BCI Coca-Cola merely held possessory interests and therefore was not an owner.[99] The court limited owner liability to those who hold the "sticks in the bundle of rights."[100]

In *El Paso Natural Gas Co. v. United States*,[101] the District Court of Arizona recognized that a party holding a fee title could have less than absolute ownership.[102] However, it also held that a fee title holder with plenary and supervisory powers is liable as an owner under CERCLA.[103] The United States maintained power over the reservation land at the time of the contamination and thus was deemed liable under CERCLA as an owner.[104]

III. ANALYSIS

A. The Second Circuit Diverged from Congressional Intent by Creating a Federal Test for Ownership and Separating "Owner" from "Operator."

When enacting CERCLA, Congress empowered courts to interpret liability.[105] However, a court must follow Congress's intent to develop the common law for CERCLA ownership liability, place the financial burden of environmental contamination on those responsible and benefitting from the activities that caused the waste, and interpret the statute broadly and liberally so long as the interpretation is supported expressly in the statute or through legislative history.[106] The Second Circuit's five-factor test for determining ownership does not follow state common law and does not allow Congress's goals for CERCLA to manifest.[107] In contrast, the Ninth Circuit uses the state-specific property law definition of "ownership."[108] The Ninth Circuit's interpretation of CERCLA liability offers clear guidelines for investors in land and therefore incentivizes early settlements, as intended by Congress.[109]

1. The Second Circuit's Ownership Test Factors are Susceptible to Manipulation in Litigation Which Creates a Barrier for Investment.

The Second Circuit created a five-factor ownership test to limit the site control ownership test and to separate "owner" from "operator."[110] The judge-made test for ownership applies to both Section 107 and Section 113(f) of CERCLA, which allow the government to recoup financial losses and for private

parties to split the costs of contamination cleanup among other PRPs.[111] The *Commander Oil* test is an expanded version of the site-control test, which Second Circuit courts rejected for being overbroad.[112]

While the Ninth Circuit follows a state common law approach, as instructed by both legislative history and the Supreme Court in *Bestfoods*, the Second Circuit diverged from the state common law definition of ownership when deciding *Commander Oil* by creating this five-factor ownership test.[113] Congress's remedial goals in enacting CERCLA were to facilitate prompt cleanup of hazardous waste sites and to hold parties liable who were ultimately responsible for the contamination, dependent on the facts of the case.[114] In particular, Congress intended the principles of state common law govern liability issues not resolved expressly in CERCLA because common law principles are traditional and evolving.[115] While presenting the final, compromised CERCLA bill, Senator Randolph and Representative Florio expressly encouraged the development of common law in determining the liability of joint tortfeasors who are responsible for the costs of cleanup under CERCLA, which would, in turn, promote uniformity of interpretation of the statute.[116] The Second Circuit's five-factor test expands on the site control test rather than following the state-specific definition of "owner," and therefore, the Second Circuit's method for defining ownership under CERCLA is inconsistent with Congressional intent.[117]

In addition to applying state common law, Congress intended that CERCLA incentivize quick clean-up of contaminated land, which requires that courts grant incentives for investors to buy and clean contaminated land efficiently, such as a streamlined path to receive contribution from other PRPs.[118] The Second Circuit's five-factor *Commander Oil* ownership test is easily manipulated, thereby incentivizing litigation.[119] Due to this manipulation, a party who seeks contribution from other PRPs may not be able to obtain such contribution.[120] This test goes against the purpose of CERCLA and does not provide a sufficient incentive to avoid contamination of land.[121] As evidenced in *Next Millennium*, the Second Circuit holds a subsequent purchaser solely liable based on a federal judge-made law that contradicts the state property law, which may have required contribution from the prior lessee that sublet the facility to a contaminating sublessee.[122]

Congress enacted CERCLA to place the financial burden of environmental contamination on those responsible and benefitting from the activities that caused the waste.[123] As a result of the *Commander Oil* ownership test, a subsequent owner in the Second Circuit who had no site control, did not sublease the property to the polluting sublessees, and did not profit from the contamination bears the burden of providing all cleanup costs.[124] Meanwhile, sublessors who had site control and occupation of the facility at the time of contamination escape ownership liability because the lease is designated as typical and does not transfer ownership to the lessee.[125] The *Commander Oil* ownership test does not follow the Congressional intent to put the financial burden of cleanup on all parties who are responsible for the land contamination.[126] Additionally, *Commander Oil* diverges from congressional intent because the test relieves sublessors from owner liability despite acting as an owner.[127] The Ninth Circuit has discredited and rejected *Commander Oil* as improper in determining ownership liability under CERCLA, demonstrating the Second Circuit's divergence from the intended common law application of owner liability.[128]

Rather than defining "owner" under CERCLA as determined by state law, the Second Circuit's federal judge-made law merely expanded the site-control test.[129] Under New York Common Law, tenants and not landlords are generally held responsible for injury caused by leased property.[130] Additionally, New York courts follow the principle that liability in tort concerning property generally depends on occupation and control.[131] In *Commander Oil*, the Second Circuit declined to follow the settled principles of New York common law, which provide an easy standard to meet "ownership" and therefore is a more expansive approach and holds more PRPs liable for cleanup costs.[132] The Second Circuit's approach to ownership liability has more factors to consider, which results in a narrower framework for owner liability under CERCLA.[133]

In addition to its inconsistency with Congressional intent to follow state common law, the Second Circuit's interpretation of CERCLA liability in *Commander Oil* limits the reach of owner liability by defining "owner" as separate from "operator."[134] In determining whether Barlo was an "owner" and therefore liable for contribution, the Second Circuit's *Commander Oil* ownership test rejected the common law site control test for ownership liability, reasoning that this definition of "owner" is too similar to "operator."[135] The Second Circuit looked to *Bestfoods*, and interpreted the Supreme Court's decision to mean that courts should distinguish "owner" and "operator."[136] In *Commander Oil*, the court reasoned that control over a facility could establish operation, so if site control could also establish ownership, then operation would be merely a subset of ownership.[137] However, the rule of decision for the term "operator" in *Bestfoods* is analogous to the term "owner" because Congress gave both terms circular definitions in CERCLA.[138] Therefore, the Second Circuit did not follow the Supreme Court's precedent and rely on state common law to define "owner" when the statute provides a circular definition of the term.[139] The Second Circuit's ownership test does not support the New York common law principle in determining ownership under CERCLA and is inconsistent with legislative history.[140]

Furthermore, the Second Circuit misinterprets Sections 107(a)(1) and (2) of CERCLA by separating owner and operator liability.[141] Congress assigns liability to owners, operators, or both under CERCLA.[142] Sections 107(a)(1) and (2) of CERCLA use "and" and "or" interchangeably.[143] Owner and operator substantially overlap in the language of the statute; thus courts are instructed by the language to interpret them overlapping rather than as alternatives.[144] If Congress intended owners and operators to be separate and not overlapping, they would always use "or" or would write "the owner and the operator" rather than "the owner and operator."[145]

2. The Ninth Circuit's Construction of Owner Liability Holds Liable Both the Passive Title Owner of Real Property who Acquiesces in Another's Contamination and the Active Operator of the Facility.

Congress intended for courts to develop a state common law definition of "owner."[146] The Ninth Circuit applies the common law definition of "owner" to determine whether to assign liability under CERCLA Sections 107 and 113(f).[147] The Ninth Circuit, but not the Second Circuit, has uniformly applied CERCLA owner liability as intended by Congress by developing the state common law definition of "owner."[148]

The Ninth Circuit has followed legislative intent by incorporating the state-specific definition of "owner" from relevant property law cases.[149] The Ninth Circuit focuses on case law rather than the immediate and unique facts of each case, and questions the role of "indicia of ownership."[150] The Ninth Circuit courts continue to develop a consistent common law definition of "owner" to determine owner liability under CERCLA by relying on principles such as expansions and adaptations of the site control test to determine ownership.[151]

The Ninth Circuit has developed the common law distinction of whether an easement holder is an owner, thereby honoring Congressional intent to apply the state-specific definition of "owner."[152] The Ninth Circuit's potential "bundle of rights" exception to the common law distinction between possessory and ownership rights differs from the *Commander Oil* test because the bundle of rights exception limits liability to those who enjoy the rights of ownership, while the *Commander Oil* test is an expanded version of the site control test.[153]

The Ninth Circuit's framework for assigning owner liability has developed by incorporating state common law, as Congress intended.[154] In *Long Beach*, the Ninth Circuit looked to both federal and California common law to determine the definition of "owner" in regards to CERCLA liability.[155] The court noted that circular definitions within a statute show Congressional intent for courts to apply "ordinary meanings" rather than unusual or technical alternative meanings.[156] The common law clearly states that there is a distinction between holding an easement and owning the contaminated land.[157] Therefore, the court applied this definition and found that merely holding an easement is not sufficient to constitute "ownership" for purposes of CERCLA liability.[158] In *San Pedro*, which also took place in California, the court continued to build upon the California common law, including the holding from *Long Beach*, and further distinguished between ownership interests and possessory interests.[159] In *San Pedro*, the court found that site control was not enough, and built upon the site control test with state common law regarding a fee title owner's control over a permittee's use of the property.[160]

Unlike the Second Circuit, the Ninth Circuit follows state common law and thus imposes liability only on parties responsible under state law providing clear guidelines for investors in land.[161] In enacting CERCLA, Congress intended to place the financial burden of contamination on those who were actually responsible, based on the four categories under CERCLA Section 104 rather than by causation.[162] In *El Paso Natural Gas*, the Ninth Circuit recognized that a party holding the fee title could have less than absolute ownership, but that a fee title holder with plenary and supervisory powers constitutes an owner that is liable under CERCLA, and therefore the court held the supervisor of the facility liable for the contamination.[163] The defendants, who held fee title and substantial powers over the land, contributed to the costs of cleanup.[164] This interpretation of CERCLA liability under Sections 107 and 113(f) supports the statute's remedial purpose of holding liable those who were ultimately responsible and who may have benefitted from the externalized cost of contamination, or who were otherwise connected with the contaminated site.[165]

The Ninth Circuit has taken an approach that focuses on applying state common law and fulfilling the remedial purposes of the CERCLA statute.[166] By following the state common law definition of "owner," a sublessor in the Ninth Circuit who has site control and otherwise acts as an owner of the facility is likely to be liable as an owner under CERCLA for the remedial costs of contamination by their sublessees.[167]

B. The Sublessor in Next Millennium Would have been Held Liable if the Second Circuit used the Ninth Circuit Framework for CERLCA Owner Liability.

In *Department of Toxic Substances Control v. Hearthside Residential Corp.*,[168] the Ninth Circuit defined current owner and operator status under CERCLA at the time cleanup costs are incurred rather when a recovery lawsuit seeking reimbursement is filed.[169] Subsequent purchasers who incur the cost of cleanup, therefore, are considered current owners of a property.[170] Following this precedent, Next Millennium was held liable as the current owner in *Next Millennium* rather than the original polluter.[171] However, Next Millennium could have sought contribution from the previous owners under Section 113(f).[172]

The Second Circuit tried *Next Millennium* and, as a result, the subsequent purchaser of the property—who had no site control at the time of the contamination, did not sublease the property, and did not profit from the contamination—bore the burden of providing all cleanup costs.[173] Next Millennium sought contribution from the sublessors for cleanup costs of the contamination to 89 Frost Street under CERCLA Sections 107 and 113(f).[174] The Second Circuit did not have the authority to overrule the *Commander Oil* test, and as a result, the tenants, who sublet the property to a contaminating subtenant, escaped ownership liability.[175]

When Congress enacted CERCLA, it intended the statute to facilitate prompt cleanup of hazardous waste sites and place the financial burden of environmental contamination on those responsible for and benefitting from the activities that caused the waste.[176] Furthermore, Congress intended that courts consider legislative history while interpreting the plain language of the statute.[177] If the Second Circuit ruled consistently with

congressional intent and applied New York's common law in *Next Millennium*, the sublessor may have been held liable as an owner.[178]

The Second Circuit misinterpreted the statutory language of CERCLA Sections 107(a)(1) and 107(a)(2) in *Next Millennium* by defining "owner" and "operator" as completely separate terms.[179] The court would not have distinguished between owner and operator if it had followed Congress's intent and the language of the statute because the statute uses "owners and operators" and "owners or operators" interchangeably.[180] By using these terms interchangeably, Congress intended that the terms overlap.[181]

The *Next Millennium* sublessor would have likely passed the common law test for ownership because the sublessor leased to the sublessee without notice or consent of the landowner.[182] *San Pedro Boat Works* shows that the "bundle of rights" exception in the Ninth Circuit covers this type of control over land.[183] Under New York common law, courts generally look to occupation and control of the site.[184] The sublessor in *Next Millennium* exercised control over the facility at 89 Frost Street at the time that the sublessee contaminated the facility, and therefore the Second Circuit would have likely held the sublessor liable if it applied New York common law to assess the sublessor's ownership status.[185] This is unlike *3550 Stevens Creek Associates v. Barclays Bank*,[186] where the Ninth Circuit did not extend owner liability to past and present owners of commercial buildings containing asbestos.[187] However, contamination of PCE is commonly tried in CERCLA cases and is at the heart of CERCLA.[188] The limitation in *3550 Stevens Creek Associates* would likely not apply to *Next Millennium* because there was more relevant common law regarding PCE contamination than there was common law for commercial buildings containing asbestos.[189] The Second Circuit did not follow a state common law approach and instead followed the *Commander Oil* five-factor test, which is judge-made law.[190] Despite there being no authority that limits ownership to one party, the Second Circuit's interpretation focused on whether the sublessor was either an operator or an owner.[191]

It is likely that the Ninth Circuit would distinguish *Next Millennium* from other Ninth Circuit cases that find easement holders are not held liable as owners under CERCLA.[192] In *San Pedro Boat Works*, Pacific American, whose successor-in-interest was BCI Coca-Cola, possessed revocable permits from the City of Los Angeles for ten months for Berth 44 boat works and, after the city investigated the site, found that it was contaminated.[193] The city claimed that BCI Coca-Cola was liable as an owner under CERCLA during the contamination.[194] The court followed *Long Beach* and looked to the common law definition of "owner," including California common law which said that there is a distinction between holding an easement and owning the contaminated land.[195] The court distinguished between ownership interests and possessory interests and held that because Pacific American was a holder of mere possessory interests, BCI Coca-Cola was not an owner and therefore not held liable as an owner.[196] *San Pedro Boat Works* and *Long Beach* would be distinguished from *Next Millennium* because common law differs from New York to California, and New York common law regarding property typically holds tenants liable for tort caused by actions on a property.[197] Unlike in *San Pedro Boat Works* and *Long Beach*, the defendants in *Next Millennium* held ownership interests because they subleased the property without notice or consent from the landlord and were, therefore, owners in effect.[198] The Ninth Circuit rejected the Second Circuit interpretation of owner liability, further showing the contrast of the likely outcome if the Second Circuit tried *Next Millennium* using the Ninth Circuit's reasoning.[199] The Second Circuit, using the same approach as the Ninth Circuit, should have applied New York common law standard when deciding *Next Millennium* by using an occupation and site control test.[200]

The Ninth Circuit would have likely held the sublessor liable as an owner under CERCLA because Congress intended that the courts would broadly and liberally apply CERCLA liability.[201] Setting precedent that holds a sublessor liable would be considered a liberal interpretation of the statute.[202] The Ninth Circuit would have prioritized liberal interpretation of the statute because it follows the Congressional intent for CERCLA liability.[203] This finding would be similar to *El Paso Natural Gas* because the defendants were found liable as owners despite having granted significant property interests to another party.[204] In both cases, the defendants held substantial powers over the property.[205] However, the Second Circuit's *Commander Oil* test narrowly interprets CERCLA liability.[206]

The Ninth Circuit's approach does not focus on the unique facts of a case, unlike the Second Circuit.[207] Therefore, the Ninth Circuit's approach to CERCLA owner liability in *Next Millennium* would have focused on the relevant common law regarding subleases rather than the *Commander Oil* five-factor test.[208] This finding would have turned out differently if tried in the Ninth Circuit; if a court looks to the common law rather than to the unique facts of the case, then the five-factors may not be addressed in considering whether the sublessor is an "owner."[209] In New York, common law for liability in tort generally depends on occupation and control.[210] The sublessor in *Next Millennium* had control over the property, and therefore, the Ninth Circuit would have likely found that the sublessor was an owner under CERCLA Sections 104 and 113(f) to contribute to cleanup costs of the contamination.[211]

The court would have likely placed the financial burden on the sublessor because the sublessor was ultimately responsible for the contamination.[212] Congress intended to hold those responsible for contamination liable to pay for the cleanup.[213] The Ninth Circuit's interpretation of CERCLA liability focuses on the remedial aspect of the statute.[214] The sublessor in *Next Millennium* would ultimately be responsible for the contamination because it subleased the facility to contaminating sublessees without the consent or notice of the landlord and had full control over the facility.[215] Additionally, the sublessor profited substantially from the sublease, which is a significant indicator that it would bear the financial burden of cleanup if the Second Circuit had followed the Ninth Circuit's correct interpretation of the

statute.[216] The original purpose behind CERCLA was to hold parties liable for contamination who are ultimately responsible for the contamination, and so looking to who had control of the site at the time of the contamination is an acceptable means of determining who is liable as an owner under CERCLA.[217]

The Ninth Circuit also would have likely held the sublessors liable as owners, so that the landowner could receive contribution because the Ninth Circuit has previously provided an incentive for private parties to pay for cleanup or to settle with the confidence that they can be recuperated by other potentially liable parties.[218] The Second Circuit's holding in *Next Millennium* sets a precedent for future potentially liable parties to refuse to remediate a site and encourages litigation on the *Commander Oil* five-factor test rather than settlement.[219] The Ninth Circuit knowingly rejected the *Commander Oil* five-factor test and therefore avoided these legislative issues for a statute that is already heavily litigated.[220]

IV. POLICY RECOMMENDATION

The disposal of hazardous waste endangers public health and the environment.[221] The United States has many contaminated sites, and Congress enacted CERCLA to quickly and effectively clean these sites by encouraging private parties to voluntarily clean up contaminated sites.[222] The Supreme Court of the United States declined the opportunity to correct the Second Circuit's *Commander Oil* test by denying certiorari in *Next Millennium*.[223] As a result, confusion remains as to what land investors can expect when buying contaminated property in the Second Circuit.[224]

The *Commander Oil* factor test provides an unpredictable outcome which incentivizes litigation rather than early settlement, and this is against CERCLA's remedial purpose.[225] Investors are more likely to buy land if they can be confident that other PRPs will share the financial burden of cleanup.[226] If litigation is required to ensure contribution of other PRPs, investors are less likely to invest, and the contaminated sites will remain contaminated.[227] The Second Circuit's *Commander Oil* test to determine owner liability is flexible and nebulous, creating an unpredictable barrier for investors and therefore investors are less likely to invest in contaminated land.[228]

The Ninth Circuit adhered to the interpretation of owner as found in California common law, which provides clear expectations for investors of land.[229] Unlike the Second Circuit, the Ninth Circuit reached a proper interpretation of CERCLA ownership liability by placing those liable who were responsible for the contamination, because it follows state common law and thus provides clear guidelines for investors in land.[230]

The Second Circuit has stated that it does not have the authority to overturn the *Commander Oil* ownership test itself, so the Supreme Court or Congress must overturn the *Commander Oil* ownership test.[231] Congress quickly drafted the language of CERCLA, and Congress could fix its mistake by amending the statute to set a clear path for establishing CERCLA liability against a tenant of a facility.[232] An easy solution that would still allow states to incorporate state-specific definitions of common law would be to add "and/or" when discussing "owner and operator" and "owner or operator."[233] This solution would clarify Congress's intent to extend liability and would invalidate the Second Circuit's current approach.[234] Alternatively, the Supreme Court should overturn the five-factor test in favor of a definition of "owner" based on state-specific property law.[235]

V. CONCLUSION

Despite a divergence from use of state-specific common law in assigning owner liability under CERCLA, *Commander Oil* remains the law in the Second Circuit.[236] Consequently, a subsequent buyer who has no site control at the time of the polluting event, does not sublease the property to polluting sublessees, and does not profit from the contamination may bear the burden of providing all cleanup costs and may not receive contribution from other potentially liable parties if bringing their case in the Second Circuit.[237] On the other hand, the Ninth Circuit, which follows a clear state definition of "owner" that can predict whether PRPs will settle, fulfills Congress's intent and continues to incentivize private cleanup of contaminated sites.[238]

After *Next Millennium*, it is likely that lawyers in the Second Circuit will advise their clients to beware of purchasing contaminated land due to the likeliness of litigation on the indicia of ownership.[239] As a result, contaminated sites in the Second Circuit on the National Priorities List will remain stagnant, and contamination will continue to damage the environment and create further risks for public health.[240]

ENDNOTES

1 *See* Petition for Writ of Certiorari at 3–4, Next Millennium Realty, LLC v. Adchem Corp., 138 S. Ct. 510 (2017) (No. 17-468) (arguing that the Second Circuit's interpretation of ownership liability does not accomplish the remedial goals of the statute to hold those responsible that created the contamination).

2 *See* 42 U.S.C. § 9601 (2012) (defining "owner or operator" as any person owning or operating); *see generally* Petition for Writ of Certiorari, *supra* note

3 *See* Petition for Writ of Certiorari, *supra* note 1, at 7–8, (casting doubt on the five-factor test for ownership).

4 *See* City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 448 (9th Cir. 2011) (looking to California property law); *see also* Next Millennium Realty, LLC v. Adchem Corp., No. CV 03-5985(GRB), 2016 WL 1178957 (E.D.N.Y. Mar. 23, 2016), *aff'd sub nom.* Next Millennium Realty, LLC v. Adchem Corp., 690 F. App'x 710 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 510 (2017) (describing a circuit divergence in interpretation of the definition of "owner" regarding CERCLA liability for sublessors).

5 690 F. App'x 710 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 510 (2017).

6 *Id.* at 712.

7 *See Next Millennium Realty, LLC*, 2016 WL 1178957 at *2 (failing to address the lack of notice or consent by the landlord in finding the sublessor not liable as an owner).

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