application of CERCLA and other strict liability environmental statutes to fiduciary relationships - putting City of Phoenix in context, The

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I. INTRODUCTION

On April 15, 1993, the United States District Court for the District of Arizona rendered the most important ruling to date on the environmental liability of fiduciaries. City of Phoenix v. Garbage Services Co.(1) (City of Phoenix III) directly addressed the personal liability of a trustee under CERCLA.(2) While the C of Phoenix III analysis was both good and bad for fiduciaries, the court in effect repudiated its prior suggestion in City of Phoenix v. Garbage Services Co.(3) (City of Phoenix II) that trustees who own environmentally contaminated property in their fiduciary capacity are always personally liable under CERCLA as owners.(4)

Any understanding of a fiduciary's environmental liability must begin with an understanding of the difference between a fiduciary's fiduciary capacity and a fiduciary's personal capacity. A fiduciary, in its fiduciary capacity, is acting with respect to property in which others own the beneficial interest (i.e., the fiduciary is only a representative of others).(5) In contrast, a fiduciary, in its personal capacity, is acting with respect to its own property. Accordingly, a fiduciary defending a claim in its fiduciary capacity is defending a claim made against the estate's assets, whereas a fiduciary defending a claim in its personal capacity is defending a claim made against its own assets.

City of Phoenix III clearly holds that a trustee, although not at fault, sometimes can be held liable in its personal capacity under CERCLA in connection with property owned by the trustee in its fiduciary capacity.(6) In other words, the trustee's personal assets can be taken to clean up environmental contamination on property held in trust. Although fiduciaries hoped that the case law under CERCLA would develop otherwise (and it ultimately may so develop), they for some time recognized the possibility of the result in City of Phoenix III. Nonetheless, the reality of a court's having ruled that such potential liability exists sent shock waves throughout the community of fiduciaries.

Despite the negative, City of Phoenix III has positive aspects for fiduciaries. The court recognized that the personal liability of a trustee should be decided within the framework of trust law.(7) Fiduciaries will rely on much of the City of Phoenix II analysis as a shield against assertions of personal environmental liability.

In the future, City of Phoenix III allows for a greater understanding of the applicable legal principles governing the owner liability of trustees under CERCLA by setting out a long-awaited, careful judicial analysis of the issues. This Article discusses the common law foundation laid by the court in City of Phoenix III. Much of that foundation is fundamentally sound; however, the conclusion reached by the court is doubtful because of the evolving nature of an important trust law issue.

Despite the importance of City of Phoenix III, there is only limited guidance as to how strict liability environmental statutes, such as CERCLA should be applied in the context of a fiduciary relationship.(8)

Without legislative or regulatory clarification, the issues raised by CERCLA and other strict liability environmental statutes with respect to fiduciary relationships will be resolved only by years of expensive and complex litigation. As demonstrated by City of Phoenix III, unfortunate fiduciaries have already found themselves litigating and sometimes losing these issues, and there is every reason to believe that the process has only begun.

The obvious question is how the courts ultimately will resolve the unique issues confronting those who are in fiduciary relationships. This Article searches for an answer by concentrating on CERCLA, which, of all the strict liability environmental statutes, has the greatest impact on fiduciary relationships. Because the same issues are present under other federal and state strict liability environmental laws, the analysis in this Article will often be equally as applicable to those laws.

This Article examines the City of Phoenix(9) rulings and considers how CERCLA may be applied to fiduciary relationships in the future. After a brief CERCLA primer, the Article explores the CERCLA "owner" liability of the various parties to a fiduciary relationship, with particular attention to the personal liability of a trustee. The Article then considers the CERCLA "operator" and "arranger" liability that may arise in connection with a fiduciary relationship. After identifying the considerable degree of uncertainty that currently exists regarding the personal liability of fiduciaries under CERCLA, the Article explores the practical consequences of such uncertainty. Finally, the Article suggests clarification through codification of the existing common law rules and analyzes the benefits of statutorily limiting the personal liability of fiduciaries under CERCLA.

II. A CERCLA PRIMER

CERCLA was passed by Congress in 1980, during the closing days of the Carter administration. Prior to that time, the Resource Conservation and Recovery Act(10) had been enacted to regulate the handling and disposition of hazardous substances from "cradle to grave." Congress believed that a program was needed to protect public health and the environment from the dangers of abandoned hazardous waste sites.(11) CERCLA authorizes the Environmental Protection Agency (EPA) and others to bring suit to force the cleanup of hazardous waste sites and to recover response costs.(12) Response costs include, but are not limited to, the costs incurred in site cleanup.(13) In addition, CERCLA allows the federal government to recover damages for "injury to, destruction of, or loss of natural resources."(14)

The scope and application of CERCLA might be clearer today if its original enactment had been different. In 1980, while the Senate considered one early version of CERCLA, the House considered and passed a different version.(15) The version finally passed by both the Senate and the House was a hastily drafted "eleventh hour compromise put together primarily by Senate leaders and sponsors of the earlier Senate version"(16) during "a lame-duck Congressional session."(17) There are no committee reports on the final version of CERCLA as enacted in 1980. The drafting of the statute reflects the haste with which it was cobbled together. Congress simply did not have time to consider many of the issues that have arisen under CERCLA, including most of the issues relating to fiduciary relationships, resulting in a great deal of uncertainty and litigation.

To establish a prima facie case of liability under CERCLA, plaintiffs must establish:

(1) the [relevant] site is a "facility";

(2) a "release" or "threatened release"(18) of a "hazardous substance" from the [relevant] site has occurred;

(3) the release or threatened release has caused [either the government or a private party] to incur response costs; and

(4) the defendants fall within at least one of the four classes of responsible persons described in section 9607(a).(19)

CERCLA imposes strict liability;(20) concepts of intent and negligence are not part of the prima facie case. The defined terms comprising the elements of the prima facie case generally have broad definitions, which do little to limit the potential reach of CERCLA.(21) The only defenses to liability under CERCLA are statutory, and those statutory defenses are limited in their scope.(22)

CERCLA is far reaching because the definitions of its four classes of responsible persons are broad; however, the reach of CERCLA is not unlimited. If a person is not included within the definition of one of the classes, the party has no CERCLA liability.(23) Essentially, the four classes are:

(1) present owners and operators of the facility;(24)

(2) persons who owned or operated the facility at the time of the disposal of the hazardous [substances];

(3) persons--commonly called "generators"--who "arranged" by contract or otherwise for the disposal or treatment at the facility of a hazardous [substance] they owned or possessed; and

(4) persons who transported a hazardous [substance] to the facility ["transporters"].(25)

Accordingly, the scope of each of these classes is an important element in determining a person's potential for incurring liability under CERCLA. This Article will discuss owner liability under CERCLA for persons in fiduciary relationships before turning to an examination of operator and arranger liability.(26)

III. "OWNER" LIABILITY FOR CONTAMINATED TRUST PROPERTY

There are three possibilities as to who is liable under CERCLA as an "owner" when contaminated property is owned in trust.(27) One possibility is the beneficiary of the trust, who holds equitable title to the property, making all the beneficiary's assets reachable to satisfy the CERCLA liability. A second possibility is that the trust, which owns the contaminated property, might be treated as if it were an entity and an owner, making all the trust assets subject to being taken to satisfy the CERCLA liability.(28) The third possibility is that the person(29) serving as trustee of the trust, who holds legal title to the contaminated property in its fiduciary capacity, might be treated as an owner in its personal capacity, making all the trustee's own assets subject to being taken to satisfy the CERCLA liability.(30) None of the three possibilities excludes the others.

A. The Broad Sweep of CERCLA

The analysis of who bears the owner's liability under CERCLA when a trust owns contaminated property begins with the assumption that all three of the categories of possible owners are liable unless they can show why they should not be held liable. "Superfund was not designed to be a fair system; it was designed to clean up waste sites."(31) CERCLA generally has a broad sweep to catch as many parties as possible to pay for all or part of the costs associated with a contaminated property. The

premise is that the broader the sweep of CERCLA, the less likely that the government's monies raised under Superfund will have to be used.(32)

The possibility of multiple owners is consistent with the structure of CERCLA. Under CERCLA, the government usually can collect in full from one or more of the responsible parties.(33) The responsible parties held liable may then proceed separately to seek contribution from other potentially responsible parties (PRPs) that have not settled with the government.(34) Accordingly, in the absence of further analysis, CERCLA would tend to make the beneficiary, the trust, and the trustee all owners, and to allow them to sort out their liabilities with other PRPs in a subsequent proceeding.(35)

B. The Common Law Controls

Despite the broad sweep of CERCLA, Congress intended that traditional and evolving principles of common law determine issues of liability under CERCLA.(36) As Congress intended, common-law principles are applied by the courts to resolve issues on which CERCLA is silent.(37) This process has resulted in the development of a federal common law to supplement CERCLA.(38)

City of Phoenix III demonstrated this development by recognizing the applicability of principles from the common law of trusts.(39) In developing the federal common law on the issue of a trustee's CERCLA owner liability, the court decided to apply a nationally uniform federal rule of decision, rather than to incorporate state law as the federal rule of decision.(40) Thus, the court would come to the same result based on the facts before it, regardless of the applicable state law. In fashioning a nationally uniform federal rule of decision, the court relied on existing common law on the issues of trustee liability.(41) The court used the Restatement (Second) of Trusts(42) as a well-settled and fair representation of such law.(43)

Accordingly, the potential owner liability of beneficiaries, trusts, and trustees must be examined in light of the applicable common-law trust principles to determine whether such liability exists under CERCLA.(44)

C. Are Beneficiaries Liable?

CERCLA liability generally should not be borne by the beneficiaries of a trust that owns contaminated property. The common-law rule of general application with respect to trust beneficiaries is set forth in section 277 of the Restatement (Second) of Trusts,(45) which provides that a trust beneficiary is not liable to third persons for obligations that are imposed on the holders of the title to property.(46) The reason for the general common-law rule is that a trustee is not usually empowered to act on behalf of the beneficiaries personally and is not subject to the control of the beneficiaries.(47) As a result, the beneficiaries of a trust generally are not personally liable for obligations incurred by the trustee in the administration of the trust.(48) This common-law rule clearly controls. CERCLA does not override traditional concepts of limited liability to impose owner liability on economic owners.(49)

An exception to the general rule regarding beneficiary liability applies if the trustee is the agent of the beneficiaries. In that case, and apparently only in that case,(50) the beneficiaries would have personal liability for CERCLA obligations to the same extent as the trustee in either its fiduciary or its personal capacity. The common-law rule on the exception is that beneficiaries are personally liable for obligations incurred by the trustee in the administration of the trust when the trustee has undertaken to act for the beneficiaries and is under their direction and control; that is, the exception only applies when

the trustee is the beneficiary's agent.(51) Under the doctrine of respondeat superior, a principal is bound by the acts of its agent and liable under CERCLA for the results of those acts.(52)

Many common trust situations invoke the application of this exception to the general rule. Courts have held the beneficiary of an "Illinois land trust" personally liable under CERCLA as the owner of the trust's contaminated property.(53) The courts are correct because the trustee of a land trust is the agent of the beneficiary.(54) Likewise, the settlor of a revocable management trust may be personally liable for the CERCLA liabilities of the trust as an owner of the contaminated property.(55)

D. Are Trusts Liable?

A trust that owns contaminated property is liable under CERCLA like any other owner.(56) Thus, subject to the same defenses available to any other owner, all the assets of a trust that owns contaminated property may be taken to satisfy CERCLA liability, just as all the assets of a corporation that owns contaminated property may be taken to satisfy CERCLA liability.(57) Prior to City of Phoenix II,(58) the EPA had said that those advocating regulatory coverage for fiduciaries had "almost uniformly declared" that trusts were so liable.(59) The EPA agreed that, in most instances, the trust's assets are available for cleanup of trust property.(60)

E. Are Trustees Liable?

1. INTRODUCTION

The best analysis of applicable legal principles leads to the conclusion that CERCLA owner liability should not be borne by the trustee of a trust that owns contaminated property. In other words, the assets that the trustee owns in its personal capacity should not be taken to satisfy CERCLA owner liability that results from the trustee's ownership of contaminated property in the trustee's fiduciary capacity. However, as is discussed below (and regardless of the authors' view to the contrary), the court in City of Phoenix III(61) carved out an exception to this rule.(62)

2. SECTION 265

The well-settled law(63) with respect to property-owner liabilities is set forth in section 265 of the Restatement (Second) of Trusts:

Where a liability to third persons is imposed upon a person, not as a result of a contract made by him or a tort committed by him but because he is the holder of the title to property, a trustee as holder of the title to the trust property is subject to personal liability, but only to the extent to which the trust estate is sufficient to indemnify him.(64)

Stated differently, a "trustee as holder of the title to the trust property [is] liable to third persons only as trustee."(65)

3. CITY OF PHOENIX III

In City of Phoenix III, the court relied on section 265 in setting forth two rules of broad application.(66) The court ruled that if the trustee is found liable under CERCLA as the current owner of contaminated property (i.e., under 42 U.S.C. Q 9607(a)(1)),(67) the trustee liable only in its fiduciary capacity, and

not in its personal capacity.(68) This holding was a direct repudiation of the suggestion previously made by the same court that trustees have unlimited personal liability for merely holding title to contaminated property.(69) The court further ruled that if a trustee is held liable as the owner of property as of the time it became contaminated (i.e., under 42 U.S.C. sec 9607(a)(2)), but the trustee did not have the power to control the use of the trust property, the trustee is liable only in its fiduciary capacity and not in its personal capacity.(70)

City of Phoenix III is a landmark ruling. The issue of a trustee's personal liability was directly before the court and was well briefed by both the parties and the amici, who filed four amicus curiae briefs.(71) Unlike City of Phoenix II, City of Phoenix III was, for the most part, well reasoned. Interestingly, the court went to considerable effort to reconcile City of Phoenix III to: (1) the Illinois federal court decisions,(72) (2) the EPA's previously issued and helpful statements on fiduciary liability,(73) and (3) the concerns raised by various amici.

Despite recognizing the general applicability of the rule in section 265,(74) the court carved out a limited exception and held that the trustee could be liable in its personal capacity as an owner, regardless of fault, if the trustee, in its fiduciary capacity, owned the trust property at the time it became contaminated, had the power to control the use of the trust property, and knowingly allowed the property to be used for the disposal of hazardous substances.(75) As discussed below, this exception is doubtful or duplicative of operator liability.(76) Regardless of the merits of the exception set forth in City of Phoenix III, the court clearly limited the exception and noted that it would apply the rule in section 265 to all other circumstances.(77)

4. THE ILLINOIS CASES

At least three Illinois federal courts are in accord with section 265.(78) All three courts expressly rejected the rationale that bare legal title is enough to make a trustee an owner for purposes of imposing CERCLA owner liability on the trustee personally.(79) Each of the cases considered the personal liability of a trustee of an Illinois land trust.(80) Such trustees hold title to, but have no control over, real property.(81)

5. UNITED STATES V. CAUFFMAN

The general applicability of the rule in section 265(82) also has been recognized in an unreported decision. In United States v. Cauffman,' the court noted, "If [being the holder of the title of a facility] is the only basis of liability on [the trustee] individually, then it would appear under trust law that he would only be personally liable to the extent that the trust could indemnify him" e., only as trustee).(84)

6. THE EPA'S STATEMENTS

The EPA implicitly recognized the rule in section 265(85) when it expressed its view on the personal liability of trustees in the preamble to the lender liability rule.(86) The EPA stated: "A trustee is not personally liable for CERCLA cleanup costs solely because a trust asset is contaminated by hazardous substances."(87) The EPA correctly noted that no case has held a trustee so liable(88) and that no principle of law would command such a result.(89) These statements by the EPA are a carefully considered and persuasive expression of the EPA view on this issue. As such, these statements are important and will continue to be influential in the courts.(90) Nonetheless, these statements are in the preamble to vacated regulations addressing a different topic and are not controlling authority.(91)

7. THE SIMPLE, BUT ERRONEOUS, ARGUMENTS TO THE CONTRARY

The interaction between CERCLA and trust law frequently is misunderstood. Some articles on trustees' CERCLA owner liability state that a trustee has personal liability under CERCLA as an owner if it holds title to contaminated property in its fiduciary capacity.(92) This argument is based on the CERCLA definition of the term "owner" as "any person owning" the subject facility.(93) Because a trustee, of course, is the holder of the legal title to the trust property,(94) some parties argue that a trustee is personally liable under CERCLA as the owner.(95) This simplistic argument is usually asserted by, and might seem like the right answer to, those who do not recognize the importance of the trust law distinction between a trustee's fiduciary capacity and a trustee's personal capacity. This argument should fade away now that the well-reasoned analysis in City of Phoenix III(96) shows the error of the argument.

Another argument is that the absence of an express exemption in CERCLA for trustees, similar to the exemption for certain landowners(97) and secured parties,(98) means that Congress intended to impose CERCLA owner liability on trustees. This argument relies on the maxim of statutory construction that the mention of one thing implies the exclusion of another.(99) The maxim, however, has its limits. One court, considering the personal liability of a trustee as an owner under CERCLA, expressly declined to apply the maxim, in part because CERCLA "was hastily and inadequately drafted"(100) and because application of the maxim requires a negative implication.(101) The court ruled that application of the maxim was inappropriate because "it is not clear that the Trustee must rely on an exception to liability under CERCLA."(102) The court observed: "The question can be properly categorized as an interpretation of the scope of the liability provision rather than the scope of the exemption"(103) Indeed, trustees only need an exemption from CERCLA owner liability if the courts interpret the CERCLA owner liability provision to have the broadest possible meaning, in derogation of the applicable common-law rules and Congress's well-established intent that issues of liability under CERCLA be determined by applying those common-law rules.(104)

8. UNITED STATES V. BURNS

A single sentence in United States v. Burns(105) (Burns I), an unreported New Hampshire district court opinion ruling on a motion to dismiss, has caused much confusion regarding the personal liability of a trustee as an owner. The holding in the Burns I case should be limited to its facts because the only relevant sentence in the decision is very misleading as to the applicable common-law principle.

Burns I arose after a tenant went out of business and abandoned barrels containing hazardous substances at a building owned by a "realty trust" which subsequently went bankrupt.(106) Two individuals, Crowley and Friedberg, originally declared themselves to be the trustees of the trust "for the sole benefit of the Gonic Realty Trust Associates," a partnership between Crowley and Friedberg.(107) Under the terms of the Declaration of Trust, Crowley and Friedberg (1) each owned one-half of the beneficial interests of the trust,(108) (2) could terminate or amend the trust at any time, (3) could remove a trustee by majority vote, and (4) retained the power to direct how principal and income were to be distributed.(109) After Friedberg(110) had terminated his interest in the realty trust, the EPA alleged that Crowley was the sole trustee and beneficiary of the realty trust.(111) Relying on the allegation, the EPA asserted that Crowley was an owner, and therefore a PRP who was responsible for the cost of removing the barrels.(112) Crowley contended that he was not an owner in his personal capacity and moved for dismissal of the action against him.(113) Asserting that the term "owner" should be construed broadly, the court determined that, as trustee and beneficiary, Crowley possessed enough of the attributes of ownership to prevent a summary dismissal of the claims against him personally.(114)

Because the case was before the court on a motion to dismiss, "the material facts alleged in the complaint [were] construed in the light most favorable to" the government.(115) The court could have relied on section 277.1 of Scott on Trusts(116) , authority for its ruling, which readily supports the court's refusal to dismiss Crowley as a party.(117) Instead, the court relied on sections 265 and 265.1 of Scott on Trusts, which do not support the court's ruling, thereby misstating the law and causing a great deal of concern and confusion. The court wrote that "as trustee, Crowley held legal title to the trust property and under trust law could be liable for obligations as the owner of the property."(118)

For whatever reason, the Burns I court did not recognize the cross-reference in section 265.1 to section 265.4, which contains the qualification that completely undermines the Burns I court's reliance on sections 265 and 265.1. Section 265.4 of Scott on Trusts sets forth the rule found in section 265 of the Restatement (Second) of Trusts(119) and discusses the theoretical justification for the rule.

Despite the Burns I court's misunderstanding of Scott on Trusts, the court ultimately did not impose CERCLA owner liability on the trustee in his personal capacity because of his ownership of contaminated property in his fiduciary capacity. When the Burns II court subsequently ruled on the merits, it applied New Hampshire law and found Crowley liable because the business arrangement was "a partnership governed by a trust agreement."(120) As a state law partner, Crowley had unlimited personal liability for the CERCLA liability of the partnership."

9. PROFESSOR SCOTT'S ANALYSIS OF THE UNDERLYING ISSUE

A court otherwise inclined to impose personal liability on a trustee as a CERCLA owner should first consider the analysis set forth by Professor Scott(122) as to whether personal liability should be imposed on a trustee solely because of the trustee's ownership of property in its fiduciary capacity. Under the old common-law rule, which dated from feudal times, a trustee could be held personally liable for obligations arising solely from holding title to property.(123) The old common-law rule is severe in that it imposes liability on a trustee personally as though it were the beneficial as well as the legal owner of the property.(124) In considering whether this feudal rule still has vitality, Professor Scott said, "[T]he real question is whether the hardship to the person who seeks to enforce the liability, in being denied a recovery against the trustee personally, is sufficient to outweigh the hardship that would be imposed upon the trustee if he were made personally liable."(125) Professor Scott concluded that it generally was not.(126)

Professor Scott's analysis is the theoretical justification for the modern rule in section 265.(127) In the last fifty years, no court has ruled, in any reported decision, that the hardship suffered by the plaintiff in being denied a recovery outweighed the hardship that would be imposed upon the trustee if it were made personally liable merely because it owned trust property. Likewise, section 265 should be applied in CERCLA cases.(128)

10. IS THERE AN EXCEPTION TO THE APPLICATION OF SEC 265?

In City of Phoenix: III,(129) the court relied on section 264 of the Restatement (Second) of Trusts(130) as the authority for carving out an exception to section 265 of the Restatement (Second) of Trusts to impose personal CERCLA owner liability on the trustee.(131) The court held that a trustee could be held liable in its personal capacity as an owner under CERCLA, regardless of fault, if: (1) the trustee, in its fiduciary capacity, owned the trust property at the time of disposal of the hazardous substances at issue; (2) the trustee had the power to control the use of the trust property; and (3) the trustee knowingly allowed the property to be used for the disposal of hazardous substances.(132)

Section 264 of the Restatement provides that a trustee is subject to personal liability for torts committed in the administration of the trust to the same extent the trustee would be liable if it held the property free of trust. The court justified applying Restatement section 264, instead of section 265, by finding that CERCLA is "a type of environmental tort."(133) The court found that CERCLA "in effect codified the common law rule of strict liability for ultrahazardous activities, and classified the disposal of hazardous substances as an ultrahazardous activity."(134) Applying section 264, the court held the trustee personally liable under CERCLA as an owner for the trustee's tortious conduct, because the trustee had knowingly engaged in the disposal of hazardous substances, conduct for which the court said CERCLA imposes strict liability.(135) The court expressly imposed personal liability under section 264 without regard to fault.(136) The court imposed the personal liability, even though the decision to allow trust property to continue to be used as a landfill was made before CERCLA was enacted, because the court believed that Congress intended CERCLA to apply retroactively.(137)

The extent of the exception to the application of section 265 that the City of Phoenix III court carved out is not clear because of a gap between two of the rules stated by the court regarding the CERCLA liability of trustees as owners of contaminated property.(138) Apparently, the court assumed that, with respect to property that a trustee controlled, hazardous substances could come to rest on the property during the trustee's ownership only if the trustee affirmatively decided to allow the property to be used for the disposal of hazardous substances. Such an assumption is not sound. For example, a tenant may contaminate trust property without the trustee's knowledge or consent and despite the exercise of all reasonable care by the trustee.

Unfortunately, because of the gap between the rules, City of Phoenix III can be cited to support an argument that, even if the contamination occurred without the trustee's knowledge, the trustee should be personally liable under CERCLA.(139) The predicate for such an argument would be an assertion that owners have an absolute responsibility to control the use of their property at all times and in all aspects. If a court in the future were to assess personal liability of a trustee under those circumstances, liability would be without regard to the trustee's knowledge, the trustee's conduct, or the trustee's fault. Such a situation would be entirely different from City of Phoenix III, where the trustee had contemporaneous knowledge that the contamination was occurring. Such a holding would be inconsistent with the assertion in City of Phoenix III that "[t]he only trustees that need fear liability beyond the extent that the trusts assets can indemnify them are those that possess control over the use of trust property and knowingly allow the property to be used for the disposal of hazardous substances."(140)

Absent fault, the propriety of imposing personal liability under any circumstances on a trustee as an owner under CERCLA is questionable. In formulating a uniform federal rule of decision, the City of Phoenix: III court intended to apply the rules in operation in most states to govern the personal liability of trustees.(141) The court mistakenly thought that section 264 was still the rule of decision in most states and thus adopted the wrong approach. The rule that the court should have applied is in the Uniform Probate Code: "A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he personally at fault."(142)

The Brief by the trustee in City of Phoenix III noted that section 7-306, or comparable language, has been adopted in thirty-two states, including California and New York.(143) Thus, the language of section 7-306(b), rather than Restatement section 264, should have been the source of the uniform federal rule of decision the court was attempting to fashion in City of Phoenix III. The difference between section 7-306(b) and section 264 is that section 264 ignores fault in imposing personal liability on the trustee for torts, while the more modern section 7-306(b) requires a finding of fault before

personal liability can be imposed. The language of section 264 was last updated in 1957.(144) As demonstrated by section 7-306(b), the trend in the law has been to abolish personal liability of a trustee in situations in which the trustee is not personally at fault This trend was recently noted by the Ninth Circuit in a case deciding that trustees under an ERISA plan do not have personal liability with respect to a contract executed on behalf of the trust.(145)

Despite the refusal of the court in City of Phoenix II to hold the trustee liable as an operator, and regardless of whether fault is an element of liability in determining a trustee's liability as an owner, the same facts that might cause a court to impose personal liability on a trustee as an owner might also lead a court to find the trustee personally liable under CERCLA as an operator.(146) If the liability of a trustee turns on the trustee's conduct, the better analysis for testing the trustee's liability would be an operator-analysis rather than an owner-analysis.

II. CONCLUSION

Although there is no direct statutory or regulatory authority and only limited case authority, based upon the above analysis, owner liability for trusts under CERCLA can be summarized in three rules:

1. A beneficiary is not personally liable for CERCLA obligations imposed on the beneficiary's fiduciary estate as an owner under CERCLA, except in cases where the trustee is the agent of the beneficiary;

2. A trustee in its fiduciary capacity is liable under CERCLA as an owner, just as is any other owner; and

3. A trustee in its personal capacity is not liable under CERCLA as an owner with a possible exception along the lines set out in City of Phoenix III.(147)

These rules (except for the City of Phoenix III exception) regarding owner liability for those in fiduciary relationships are both functional and even-handed, as is expected of common-law rules developed over many years of experience. However, City of Phoenix III demonstrates that trustees have ample reason to be concerned about personal liability as owners under CERCLA.

IV. FIDUCIARY "OPERATOR" AND "ARRANGER" LIABILITY

Even if a fiduciary's liability as an owner under CERCLA is limited to the assets of the trust, the fiduciary may face unlimited personal liability if it is found to be an operator or an arranger under CERCLA.(148) The concepts of operator and arranger are distinct concepts that should not be confused.(149) However, both concepts pose similar problems for fiduciaries in that fiduciaries may incur personal liability as operators or arrangers solely because of their relationship to property held in trust.(150)

A. THE CORPORATE ANALOGY

There is no statutory or regulatory authority as to the scope of either operator or arranger liability with respect to fiduciaries under CERCLA. However, the court in City of Phoenix II ruled that the fiduciary was not liable as an operator because the fiduciary did not have "control over the day-to-day management and administration of the facility."(151) In making the ruling, the court relied on analogous authority, which has developed in the corporate context.(152)

Fiduciary relationships are analogous to corporate relationships. A corporate entity is comparable to a fiduciary estate. The economic owners of a corporation are its shareholders. The economic owners of a fiduciary estate are its beneficiaries. Management of a corporation is vested in its officers and directors. Management of a fiduciary estate is vested in its fiduciary.

There are no statutory or regulatory rules under CERCLA that directly address the liability of corporate managers. Common-law rules apply where CERCLA is silent.(153) The general common-law rule is that corporate managers do not have personal liability for acts performed on behalf of a corporation.(154) Nevertheless, an exception to the general common-law rule of nonpersonal liability applies when the corporate manager has personally committed a tort.(155) Thus, the common law lends support for the numerous cases in which personal CERCLA liability was imposed on a corporate manager that personally participated in the improper handling and disposal of hazardous substances.(156)

Fiduciaries probably will be treated similarly to corporate managers.(157) If a fiduciary is held liable as an operator or an arranger because of personal participation in wrongdoing committed while acting in its fiduciary capacity, the fiduciary likely would be liable in both its personal capacity and in its fiduciary capacity.(158)

What is not clear is the degree of involvement, short of personal participation in wrongdoing, that can result in the imposition of operator or arranger liability on corporate managers, and, by analogy, on fiduciaries.(159) Some courts have held that a corporate manager will be liable as an operator or an arranger only if the manager personally participated in wrongful conduct.(160) Other courts have held that a corporate manager need only to have the capacity to control to be liable as an operator or an arranger; however, even these courts have clearly noted that they would not impose strict liability on a corporate manager.(161) Indeed few cases can be found in which personal CERCLA liability has been imposed on a corporate officer or director when the individual's personal participation in wrongdoing could not be readily identified.(162) However, the comparison of fiduciaries to corporate management can only be taken so far. Unlike fiduciaries and their fiduciary estates, corporate management usually does not have a higher net worth than their corporation. Thus, corporate managers are rarely preferred over their employers as PRPs. Fiduciaries are often preferred over their fiduciary estates as PRPs.(163)

B. THE COMMON LAW OF TRUSTS

Common law trust principles also support the proposition that a fiduciary should not be held liable in its personal capacity as an operator or an arranger unless the fiduciary personally participated in wrongful conduct. This is so even if the fiduciary, in its fiduciary capacity, held liable as an operator or an arranger.

In some situations, operator or arranger liability can be imposed on fiduciaries in the absence of personal wrongdoing.(164) In almost all fiduciary situations, operator and arranger liability arises from direct or indirect property ownership. A trustee who owns contaminated property in its fiduciary capacity should be held liable under CERCLA as an owner only in its fiduciary capacity, not in its personal capacity.(165) This common-law trust rule should also immunize fiduciaries from personal liability as operators or as arrangers in the absence of personal participation in wrongdoing.

On the other hand, City of Phoenix III(166) holds that a trustee, in certain circumstances, can be liable as an owner regardless of fault. This indicates that, at least, the City of Phoenix III court would impose operator or arranger liability regardless of fault, if the court believed that the facts warranted such a

holding.(167) Further, there is some risk that a court will resurrect feudal law and hold a fiduciary personally liable for operator and arranger liability resulting solely from the ownership of property.(168)

C. A CATCH-22

Environmental attorneys frequently advise their clients to avoid exercising control if possible, because the imposition of operator and arranger liability may relate to control. If this advice were followed by a fiduciary,(169) the fiduciary would likely defend a CERCLA claim by asserting that the fiduciary did not actually exercise responsibility for the hazardous substances disposal practices or exercise other control that would make it an operator or an arranger. Even if the fiduciary avoided personal liability, the fiduciary estate might be held liable under CERCLA, with its assets being taken to satisfy CERCLA liability. In making those assertions to avoid personal financial liability under CERCLA, the fiduciary would have admitted that it was not involved in control of the matter that was crucial to the financial well-being of the fiduciary estate. By doing so, the fiduciary of such a diminished fiduciary estate may well be admitting delegation of the fiduciary's nondelegable duties, thus establishing a breach of its duty to exercise reasonable care and skill and leaving only the amount of damages to be determined.(170)

Accordingly, in situations in which a trust or estate is involved with the disposal of hazardous substances, a fiduciary may find itself in a "Catch-22." The more the fiduciary shows that it was attentive to the hazardous substances' disposal, the more the fiduciary looks like an operator or an arranger. The more the fiduciary shows that it was uninvolved with the hazardous substances' disposal, the more likely the beneficiaries will be able to show that the fiduciary breached its fiduciary duty and delegated its nondelegable duties by neglecting a matter that was very important to the fiduciary estate. As a result, the problem of potential CERCLA liability as an operator or an arranger may best be dealt with by a fiduciary, that has already accepted a fiduciary position, doing its best to face and discharge its responsibility. Alternatively, such a fiduciary may consider resigning.

V. THE PRACTICAL CONSEQUENCES OF UNCERTAINTY UNDER CURRENT LAW

A. THE POTENTIAL FOR INCURRING FIDUCIARY LIABILITY

Currently, the full scope of a fiduciary's potential personal liability under CERCLA as an owner, operator, or arranger is unclear. Fiduciaries have the additional concern of handling all issues and expenditures relating to the contaminated or potentially contaminated properties without breaching the state-law fiduciary duties owed to the beneficiaries. A fiduciary is not spending its own money, and its fiduciary duty to the beneficiaries prohibits it from spending the assets of the fiduciary estate for a public benefit, unless clear]y required to do so. A fiduciary owes its beneficiaries a duty of loyalty and cannot serve other interests to the detriment of the beneficiaries' interests.(171) The duty of loyalty typically focuses on the beneficiaries' economic interests, and, except when a contrary legal obligation is imposed on the fiduciary, all expenditures made by the fiduciary must be in furtherance of the economic interests of the beneficiaries. Accordingly, fiduciaries find themselves required to reconcile two systems that are in inherent conflict.

In virtually every other situation when the law imposes a duty on a fiduciary that is contrary to the economic interests of the beneficiaries, the inherent conflict is resolved by clearly articulating the compliance requirements imposed on the fiduciary. For example, in the reporting and collection of taxes, the scope of the tax obligation and the rules for compliance are carefully articulated so that the fiduciary is reasonably certain of how to comply with the law and avoid personal liability. Actions by the fiduciary that are necessary to comply with the law are not a breach of the fiduciary's duty of loyalty

to its beneficiaries. Accordingly, paying properly assessed taxes on the fiduciary estate is not a breach of the fiduciary's duty of loyalty to the beneficiaries. On the other hand, the fiduciary would breach the duty of loyalty by voluntarily sending an additional fifty dollars with the tax payment to reduce the federal debt.

CERCLA stands in stark contrast to the tax laws. A fiduciary cannot be certain what it must do to avoid CERCLA liability. Clearly, if the fiduciary does too little it faces unlimited personal liability under CERCLA; if it does too much, it faces the possibility of unlimited personal liability (including possible punitive damages) for breaching the duty of loyalty to the beneficiaries. Without appropriate guidance regarding CERCLA, fiduciaries are between the proverbial rock and a hard place with these two liability structures, each pressing from a different direction. At best, it is very difficult for fiduciaries to know how to avoid liability. At worst, fiduciaries find it practically impossible to conduct themselves in a manner that will not give rise to liability under CERCLA, state fiduciary law, or perhaps both.(172)

B. AVOIDING FIDUCIARY LIABILITY

In light of the uncertainty surrounding a fiduciary's potential personal liability under CERCLA, the only sure way to avoid such liability is to refuse to serve as a fiduciary in any situation in which CERCLA problems are anticipated. That advice is widely given by legal counsel, and fiduciaries are following it. Before prudent fiduciaries accept a fiduciary appointment, they conduct an initial environmental review of the prospective fiduciary estate's real property and business interests and decline to serve if significant environmental problems are suspected.

CERCLA-motivated environmental reviews are common]y conducted by potential purchasers of commercial and industrial property in the hope that the purchaser will qualify for the innocent landowner defense under CERCLA.(173) However, the environmental reviews conducted by fiduciaries before accepting fiduciary appointments generally have no social utility with respect to involuntary transfers of property.(174) Fiduciary relationships most often arise in situations in which the transfer is involuntary due to circumstances beyond the control of the parties, such as death. Death and other involuntary transfers cannot be delayed while environmental problems are discovered and remedied. Inspecting property for environmental problems may affect whether a knowledgeable and capable fiduciary will serve, but it will not change the necessity for a fiduciary to serve.

C. THE COST OF UNCERTAINTY

Thus far, experience under CERCLA has shown that the threat of imposing personal liability on fiduciaries for environmental problems, without any clear guidance on how to avoid that liability works contrary to the goal of accomplishing speedy cleanups.(175) The threat of personal liability encourages knowledgeable and capable fiduciaries to avoid those situations in which a CERCLA problem may exist.(176) In such situations, the only fiduciaries that are willing to serve may be less informed, less able, and, thus, less likely, unintentionally or intentionally, to comply with CERCLA.

Knowledgeable and capable fiduciaries could play an important role in promoting compliance with CERCLA. However, they are discouraged from serving by the threat of strict joint and several, and for practical purposes, unlimited personal liability under a law with vague standards. This threat of personal liability discourages knowledgeable and capable fiduciaries from agreeing to serve. A fiduciary's maximum benefit is limited to reasonable compensation for the services performed, while the potential burden is personal liability under CERCLA for the cleanup of property in which the fiduciary does not own a beneficial interest. To the extent that knowledgeable and capable fiduciaries do not voluntarily

agree to serve, the contribution that they could make in the cleanup of contaminated fiduciary properties is lost. Thus, the present uncertainty under CERCLA, with respect to fiduciaries, works to the detriment of CERCLA's goals.

VI. STEP 1--CODIFY THE APPLICABLE COMMON LAW RULES

The unfortunate consequences of the uncertainty existing under current laws should be resolved by legislation.(177) Building on the foundation laid by the court in City of Phoenix III,(178) the first step to resolving the issues legislatively would be to codify the common-law rules as they would be expected to apply to CERCLA.

A. THE FIRST PROVISION

The first provision of the suggested legislation would provide that a fiduciary is liable in its personal capacity under CERCLA only if the fiduciary is personally at fault.(179) Quashing the threat that a fiduciary, by virtue of its position, might personally be held strictly liable under CERCLA, even in the absence of personal fault, would help alleviate the consequences of the existing uncertainty.(180) It is also important to avoid the social costs of needless litigation and uncertainty. If such a provision had been part of CERCLA, the EPA and others would not have wasted effort litigating and losing cases such as United States v. N.L. Industries.(181) Such a provision would be an effective response to President Clinton's request for reform of CERCLA to minimize litigation expenses.

To promote clarity, two corollaries to the first provision might be added. First, a fiduciary should not be held personally liable under CERCLA if the property was contaminated before the fiduciary's period of service began.(182) Second, a fiduciary should not be held personally liable under CERCLA if the fiduciary did not have the power to control the use of the property, even if the property was contaminated during the fiduciary's period of service.(183) Both corollaries flow from the common law.(184)

B. THE SECOND PROVISION

The second provision of the suggested legislation would provide that a beneficiary is liable only if the fiduciary is acting as the agent of the beneficiary.(185) However, simple codification of the common-law rule of the exception for agency would do little to relieve the uncertainty of applying that rule in various situations. In those situations, more specific rules will need to be developed, which may be done best by the courts on a case-by-case basis.(186)

C. THE THIRD PROVISION

The third provision of the suggested legislation would provide that a fiduciary acting in a fiduciary capacity (i.e., the fiduciary estate) is liable under CERCLA to the same extent that any other person would be liable under CERCLA. This provision would merely codify the existing common-law rule.(187)

Setting forth both the second and third provisions in the statute might clarify to those who are not familiar with the principles of fiduciary law that trusts and estates do not pose a serious threat of being used to create loopholes in CERCLA.

VII. STEP 2--FURTHER LIMIT A FIDUCIARY'S PERSONAL LIABILITY

As an alternative to the codification of the first provision described in Part VI of this Article, legislation could clearly limit a fiduciary's personal liability in those situations in which a fiduciary was held to be personally at fault.(188)

In furtherance of the country's environmental goals, well-advised fiduciaries should be induced to accept fiduciary responsibilities in situations in which those responsibilities may include dealing with hazardous substances. A fiduciary should know that, in undertaking to administer a fiduciary estate with hazardous substances, it is not risking its personal net worth if someone subsequently accuses the fiduciary of performing less than perfectly.

Two issues must be considered in limiting a fiduciary's personal liability under CERCLA. First is the standard of liability--intentional,(189) grossly negligent,(190) negligent, or strict--to which a fiduciary should be held personally under CERCLA. Second is the measure of the liability when CERCLA liability is imposed on a fiduciary personally. House Bill 2462 addresses the first issue by providing that a fiduciary would incur personal liability under CERCLA only if the fiduciary willfully, knowingly, or recklessly causes, in a direct and active manner, a release of a hazardous substance for which a federal or an authorized state government determines that response action is necessary. House Bill 2462 addresses the second issue by limiting the fiduciary's personal liability to the cost of the response that is directly attributable to the fiduciary's activities. Furthermore, the fiduciary would not be personally liable for response action costs that arise from a release which commenced before the fiduciary acquired ownership or control of the property and continues afterward.

A. THE STANDARD OF LIABILITY

Which standard of liability will allow fiduciaries to serve without becoming de facto CERCLA-guarantors? State fiduciary law already provides a separate liability scheme to insure a fiduciary's compliance with applicable laws, unlike those persons who own and manage property for their own accounts and may be constrained only by CERCLA. Whatever standard of liability is chosen for fiduciaries in their personal capacity, fiduciaries in their fiduciary capacity (i.e., the fiduciary estate) will still be liable under CERCLA the same as any other person.(191) Under state fiduciary law, the fiduciary is at risk of being held personally liable to the extent that the fiduciary estate is diminished by the fiduciary's failure to conduct the affairs of the fiduciary estate as a prudent person would conduct his or her own affairs he combination of a fiduciary estate's CERCLA liability and a fiduciary's state law fiduciary liability would seem to provide adequate incentive for fiduciaries to police the environmental practices within their control. Thus, there is no compelling need for imposing direct personal liability on fiduciaries under CERCLA.

In contrast, a fiduciary who intentionally (i.e., willfully or knowingly) causes in a direct and active manner a serious release of a hazardous substance should be subject to direct personal CERCLA liability. Holding a fiduciary personally liable under CERCLA for an intentional act that causes a release of hazardous substances, for which the federal government or an authorized state government determines that response action is necessary, is reasonable in light of the national policies underlying CERCLA and fiduciaries' expectations of managing their direct and conscious acts. The analysis applicable to intentional acts generally extends to similar grossly negligent acts.

The same analysis does not and should not extend to acts that are merely negligent. A fiduciary's ability to manage its conduct to avoid liability under a negligence standard is questionable, particularly in light

of the considerable uncertainty of matters related to CERCLA. Holding fiduciaries to a standard of simple negligence keeps knowledgeable and capable fiduciaries from serving in situations likely to involve environmentally troubled assets. The same is even more true with respect to strict liability. Although recovery under a strict liability standard might occur in a few instances when fiduciaries are caught unaware, fiduciaries cannot be expected to knowingly volunteer to assume strict liability risks under CERCLA.

B. THE MEASURE OF LIABILITY

The next consideration is the measure of the direct CERCLA liability to be imposed on a fiduciary personally. A fiduciary knows that, despite its best efforts, the fiduciary or its employees occasionally might fail to exercise good judgment. Accordingly, there is a serious risk that, at some point, a fiduciary will, in a direct and active manner, intentionally or recklessly cause a release of a hazardous substance. Such a lapse in a fiduciary's judgment can cause the fiduciary to become jointly and severally liable for all of the harm, even if the consequence of the fiduciary's lapse in judgment is de minimus. Given the enormous amount of money that it can take to clean up a Superfund site, and the fact that a fiduciary often has the deepest pocket of all the defendants, even a very small risk of incurring CERCLA liability often will be unacceptable. At the same time, policy considerations suggest that a fiduciary should be exposed to personal liability to the extent that its intentional or reckless actions cause damage.

House Bill 2462 addresses this issue by imposing direct, personal liability on a fiduciary under CERCLA only to the extent that the release is directly attributable to the fiduciary's activities. For example, although current law is unclear, a fiduciary that accepts a position where there is an on-going leak from an underground storage tank may incur joint and several personal liability for all the contamination, even if the fiduciary has no knowledge of the leak.(192) This liability is particularly likely if the fiduciary is subsequently judged not to have acted aggressively enough, with the benefit of hindsight, to remedy the situation. The fiduciary could incur joint and several liability even if the marginal harm caused by the fiduciary's conduct is de minimus. House Bill 2462(193) expressly provides that the fiduciary would have no personal liability in this situation. Providing relief from the general rule concerning divisibility of harm would encourage fiduciaries to become involved in difficult situations that are in need of corrective action. The fiduciary estate will still be liable, as would a corporation or partnership, and under state fiduciary law, the fiduciary will still be liable to the extent that its actions are not excusable.

C. ENCOURAGING CONSTRUCTIVE FIDUCIARY PARTICIPATION WITHOUT CREATING A "LOOPHOLE"

The goal of legislation should be to encourage the constructive participation of fiduciaries without opening a loophole in CERCLA. House Bill 2462(194) would further the goals of CERCLA by allowing fiduciaries, with a healthy interest in self-preservation, to become involved in situations that might involve hazardous substances. Furthermore, a thoughtful analysis shows that House Bill 2462 does not open a loophole in CERCLA.(195)

The general objection to legislative or regulatory relief for fiduciaries is that such relief will be abused to shield polluters from liability. Because the interaction between fiduciary law and CERCLA is little understood, concerns arise that any application of CERCLA with respect to fiduciaries that is not harsh will create a loophole.(196) Consider the following quotation of an official for The Natural Resources Defense Council, explaining why innocent trustees should not be assured that they would avoid personal liability under CERCLA if they voluntarily became trustees for a court-approved CERCLA remediation

effort: "Everybody will decide they are some sort of trustee. You can take a hazardous waste company and turn it into a trust. It's a good way to get out of liability."(197)

Anyone who structures an enterprise as a trust in reliance on trust law to shield the trust assets from CERCLA liability is destined to be sadly disappointed. Trust law will not protect the trust assets from being taken to satisfy any liability incurred by the trust under CERCLA, whether as an owner, operator, arranger, or transporter.(198) House Bill 2462 states that it does not change the liability of a fiduciary in its fiduciary capacity, meaning that the provisions of House Bill 2462 provide no shelter of trust assets from any CERCLA liability that the trust might incur.

A trust will not provide any shield from personal liability for its beneficiaries if the trustee is the agent of the beneficiaries.(199) Typically, when a trust is used for the conduct of an enterprise, the beneficiaries will be exposed to personal liability because, as the economic owners of the enterprise, they will have failed to yield to the trustee enough control over the enterprise to avoid liability for the trust obligations as the principals of the trustee/agent.(200) Even when the beneficiaries have yielded enough control to the trustee to avoid being held liable as the trustee's principals, in some jurisdictions, conducting a business in the form of a trust will always subject the trust beneficiaries to liability as general partners of the enterprise.(201) Owning an interest in a trust rather than a corporation provides no advantages with respect to CERCLA liability and has numerous disadvantages. Because House Bill 2462 would not change beneficiary liability, neither House Bill 2462 nor similar legislation can reasonably be viewed as creating a loophole in the CERCLA liability system.

Just as CERCLA does not have a loophole with respect to the trust assets or beneficiaries, it lacks a loophole regarding the liability of fiduciaries. Limited to reasonable compensation and subject to state law liability for any breach of fiduciary duties,(202) fiduciaries have much to lose and little to gain personally from allowing poor environmental practices to go uncorrected. House Bill 2462 would not change this.

D. COSTS

A legislative change in CERCLA relating to fiduciary relationships along the lines of House Bill 2462(203) could reduce the costs borne by the government and other private parties. If this seems counter-intuitive, consider the fact that fiduciaries regularly remit up to fifty-five percent of a decedent's assets to tax collectors for death taxes. Involvement of knowledgeable and capable fiduciaries would likewise promote voluntary CERCLA compliance. Such a fiduciary would be using the decedent's assets to address the environmental responsibilities of the decedent. Because most individually owned assets will pass through a fiduciary estate at least once every generation, fiduciary administration offers an opportunity for environmental cleanup that should be encouraged. However, most fiduciaries capable of recognizing environmental problems and willing to address them simply refuse to serve under the present uncertainties of CERCLA and the threat of personal liability. As a direct result, much of this opportunity for environmental cleanup is undoubtedly being lost, increasing the costs borne by government and private parties under CERCLA.

1 827 F. Supp. 600 (D. Ariz. 1993) [hereinafter City of Phoenix III]. In the introduction to City of Phoenix III, the court referred, without citation, to its order issued less than three months earlier in the same case, City of Phoenix v. Garbage Servs. Co., 816 F. Supp. 564 (D. Ariz. 1993) [hereinafter City of Phoenix II]. Two years before City of Phoenix III, a different judge in the same case addressed the issue of the fiduciary's liability in City of Phoenix v. Garbage Servs. Co., No. CIV. 89-1709 PHX PGR, 1991 WL 294636 (D. Ariz. Apr. 5, 1991) [hereinafter City of Phoenix I]. Although the court in City of

Phoenix II indicated that City of Phoenix II and City of Phoenix I were not inconsistent, the court granted the City of Phoenix's motion to reconsider City of Phoenix I to the extent that it was inconsistent. City of Phoenix II, 816 F. Supp. at 568 n3. While City of Phoenix I foreshadowed City of Phoenix III, portions of City of Phoenix II cannot be taken at face value.

2 CERCLA refers to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. secs 9601-75 (1988 & Supp. IV 1992) and is commonly known as the Superfund statute.

3 816 F. Supp. 564.

4 Compare City of Phoenix III, 827 F. Supp. at 605, with City of Phoenix II, 816 F. Supp. at 568.

5 In this Article, the term "fiduciary estate" refers to a fiduciary in its fiduciary capacity.

6 827 F. Supp. at 607.

7 Id at 603.

8 Another strict liability environmental statute is the Resource Conservation Recovery Act (RCRA), 42 U.S.C. secs 6901-92 (1988 & Supp. IV 1992). Various states have enacted their own strict liability environmental statutes, many of which track the provisions of CERCLA and RCRA.

9 See supra note 1.

10 42 U.S.C. secs 6901-92 (1988 & Supp. IV 1992).

11 CERCLA also provides for emergency responses to spills 42 U.S.C. sec 9604(a) (1988).

12 Id. sec 9607(a)(4)(A)-(B).

13 See, e.g., United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1499 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990).

14 42 U.S.C. sec 9607(a)(4)(C), (f) (1988).

15 New York v. Shore Realty Corp., 759 F.2d 1032, 1039-40 (2d Cir. 1985) (discussing H.R. 7020, 96th Cong., 2d Sess. (1990)).

16 Id at 1040.

17 Riverside Mkt Dev. Corp. v. International Bldg. Prods., 931 F.2d 327, 330 (5th Cir.), cert. denied, 112 S. Ct. 636 (1991).

18 CERCLA is not a model of statutory drafting. For example, the statute uses the term "threatened release" to refer to the threat of a release. Obviously, there cannot be both a threat and a release.

19 United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1378-79 (8th Cir. 1989) (footnote added).

20 New York v. Shore Realty Corp., 759 F.2d at 1042

21 The term "facility" includes "(A) any building, structure, installation, equipment,...ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. sec 9601(9) (1988). The term "release" is broadly defined to include "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of [closed containers])." Id. sec 9601(22). The term "hazardous substances" is broadly defined to include generally any substances or wastes considered hazardous under other federal environmental statutes. See id sec 9601(14).

22 See id sec 9607(b) (1988).

23 Some courts have been willing to interpret these classes expansively. For example, the Eleventh Circuit held in dicta that possessing an unforeclosed security interest in contaminated property through a deed of trust gives a lender an "indicia of ownership" that can make the lender an "owner" of the property for purposes of CERCLA, unless the lender can qualify for the statutory exemption for secured creditors. United States v. Fleet Factors Corp., 901 F.2d 1550, 1556 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991); but see United States v. McLamb, 5 F3d 69 (4th Cir. 1993); Waterville Indus., Inc. v. Finance Auth., 984 F.2d 549 (1st Cir. 1993).

24 A person is a potentially responsible party (PRP) if the person is either a present "owner" or a present "operator" of "the facility at the time the plaintiff initiated the lawsuit by filing a complaint." Id at 1554.

25 United States v. Pacific Hide & Fur Depot, 716 F. Supp. 1341, 1346 (D. Idaho 1989) (summarizing 42 U.S.C. sec 9607(a) (1988)).

26 Fiduciaries conceivably could incur CERCLA liability as transporters. However, such liability seems unlikely to happen inadvertently because a person incurs liability only by actually accepting "hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person." 42 U.S.C. sec 9607(a)(4) (1988); see, e.g, United States v. Conservation Chem. Co., 619 F. Supp. 162, 191 (W.D. Mo. 1985). Accordingly, this Article does not discuss transporter liability.

27 "The question here is whether[,] when stock is held in trust for another..., [is] the trustee...or is the trust estate or [the] beneficiary [liable]?" Bates v. Atlantic Nat'l Bank, 101 F.2d 278, 280 (5th Cir. 1939) (interpreting a statute providing for the assessment of the stockholders of a failed bank).

28 A trust (i.e., a fiduciary estate) is not an entity; thus, technically, the analysis should be that the trustee is an owner in its fiduciary capacity. Despite the common law rule, thinking of a trust as an entity has a practical utility. Trusts are treated as entities for federal income tax and transfer tax purposes and for financial accounting purposes. Likewise, in CERCLA cases, courts may characterize a trust as an entity distinct from both the trustee and the beneficiary. In one CERCLA case, the John Mache Declaration of Trust was named as a party, was described in the opinion as having sold the contaminated property, and was joined in a motion, all as if the trust were an entity. Quadion Corp. v. Mache, 738 F. Supp. 270 (N.D. Ill. 1990). Having courts treat trusts as if they were entities in CERCLA cases might be beneficial to trustees. In fact, it has been suggested that treating trusts as entities would solve the problem of charging trustees in their personal capacity with "owner" liability under CERCLA. See Joel S. Moskowitz, Trustee Liability Under CERCLA, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10003,

10005 (Jan. 1991) (opining that if the trust held the title to the real estate, the problem of the trustee's potential personal liability perhaps would be solved).

29 CERCLA defines the term "person" to include both individuals and corporations. 42 U.S.C. sec 9601(21) (1988). Accordingly, this Article will refer to trustees using the pronoun "it Also, the trustee's "personal" capacity refers to the trustee's nonfiduciary capacity.

30 In order to distinguish in this Article between a trustee in its fiduciary capacity and a trustee in its personal capacity, the former sometimes will be referred to as a trust and the latter as a trustee.

31 Marianne Lavelle, Setting Sights on Superfund, NAT'L L.J., Feb. 18, 1991, at 1, 36 (quoting industry lawyer David B. Graham). Some people in our society appear to be quite willing to sacrifice fairness in an effort to achieve environmental goals. Consider the following report:

Thirteen-year-old Tom Cochran of Denton [Texas] has gotten word that he was a $100 winner in a contest sponsored by Target Stores and the Kimberly-Clark Corp. The contest asked children to submit suggestions on how best to save the environment. Tom's $100 winning answer: "Hang a few corporate executives until they get the message."

Hang 'em, DALLAS MORNING NEWS, Apr. 25, 1993, at 1J.

32 See, e.g., Smith Land & Improvement Corp. v. Celotex Corp., 851 F2d 86, 91-92 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989). In the view of some appellate courts, the goals of CERCLA are "overwhelmingly remedial" and justify construing ambiguous statutory terms "to favor liability or the costs incurred by the government in responding to the hazards at" contaminated properties. United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991); see also United States v. Northeastern Pharmaceutical & Chem. Co., 810 F2d 726, 733 (8th Cit. 1986) (advocating retroactive application of CERCLA), cert. denied, 484 U.S. 848 (1987). Other appellate courts approach the question of liability under CERCLA from a different perspective.

To the point that courts could achieve "more" of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits....A court's job is to find and enforce stopping points no less than to implement other legislative choices.

Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988); see also Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990) (holding that CERCLA did not impose direct liability on a parent corporation for acts of a wholly owned subsidiary and that the corporate veil should not be pierced), cert. denied, 498 U.S. 1108 (1991).

33 O'Neil v. Picillo, 883 F.2d 176, 178-79 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990). The only way that a responsible party can avoid joint and several liability under CERCLA is if the party can prove divisibility of harm. Id. at 178. As a practical matter, under the standards imposed by most courts, a party cannot normally show that its actions resulted in a harm that can be separately identified from the harm caused by all other PRPs. This makes proving divisibility of harm under CERCLA an incredible burden. Therefore, liability under CERCLA is almost always joint and several. See id. at 178-79. However, a recent Fifth Circuit case appears to have eased this burden in some situations by noting that a responsible party can avoid joint and several liability if the party can prove a reasonable basis for apportionment of liability. Se EPA v. Sequa Corp. (In re Bell Petroleum Services, Inc.), 3 F.3d 889, 904 (5th Cir. 1993). The Fifth Circuit noted that defendants rarely succeed in so proving "where

commingled wastes of unknown toxicity, migratory potential, and synergistic effect are present." Id. at 901. On the other hand, if such factors are not present, the Fifth Circuit applied a standard of reasonableness as a means of apportioning liability that appears to be easier to meet than the standard applied by other courts' addressing the issue. Id. at 902-04.

34 42 U.S.C. sec 9613(f) (1988). In resolving such a contribution claim, "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." Id. sec 9613(f)(1). Before a responsible party held liable can recover from other PRPs, it must identify them, obtain a judgment against them, and find assets against which to enforce the judgment. See O'Neil, 883 F.2d at 179.

35 "Slay them all. God will know His own." Attributed to Simon de Montfort, circa 1250 A.D., putting down the Albigensian heresy.

36 Edward Hines Lumber Co., 861 F.2d at 157 (citing Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1489 . Colo. 1985)).

37 See, e.g., United States v. Alcan Aluminum Corp., 964 F.2d 252, 268-69 (3d Cir. 1992) (fashioning a federal common-law rule of divisibility of harm from Restatement (Second) of Torts sec 433A (1965)); Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 82-83 (5th Cir. 1990) (discussing factors that justify piercing the corporate veil), cert. denied, 498 U.S. 1108 (1991); O'Neil v. Picillo, 883 F2d at 178(deciding when damages under CERCLA should be apportioned among defendants); Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d at 157 (turning to common law analogies in applying the term "operator"); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d ir. 1988) (deciding when corporate successor liability should be imposed), cert. denied, 488 U.S. 1029 (1989); United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1358-59 (N.D. Ill. 1992) (applying non-CERCLA case law in determining whether the trustee of an Illinois land trust was an owner for purposes of CERCLA); United States v. Burns, No. C-88-94-L, 1988 U.S. Dist. LEXIS 17340, at *4 (D.N.H. Sept. 12, 1988) (citing to 3A AUSTIN W. SCOTT & WILLIAM F. FRATCHER, SCOTT ON TRUSTS sec 265, 265.1 (4th ed. 1988) (in discussing the similarity between a property owner and a trustee)); Colorado v. ASARCO, Inc., 608 F. Supp. at 1490-92 (deciding that a common-law right of contribution existed for CERCLA liability before such a statutory right was added to CERCLA in 1986); United State v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1004-05 (D.S.C. 1984) (applying the doctrine of respondeat superior and the theory of joint venture), aff'd in part, vacated in part sub nom. United States v. Monsanto Co., 858 F.2d 160 (4th Cit. 1988), cert. denied, 490 U.S. 1106 (1989).

38 See Louisiana-Pacific Corp. v. ASARCO, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) (discussing Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d at 92).

39 City of Phoenix III, 827 F. Supp. at 602-03.

40 Id. at 603.

42 RESTATEMENT (SECOND) OF TRUSTS sec 265 (1957).

43 Id

44 Both the court and the EPA recognized the applicability of common-law trust principles in a CERCLA case, United States v. Cauffman, No. 83-6318-Kn (CD. Cal. June 11, 1984). The EPA said, "Now it's our position that the issue of whether the Trustee is a liable individual under [CERCLA] is something that Congress specifically referred to the Court to make a determination on the traditional and [e]volving principles of the common law." Id. at 6. The court resolved the CERCLA liability issues before it by applying common-law trust principles. Id. at 7-8; see infra text accompanying notes 82-84.

45 RESTATEMENT (SECOND) OF TRUSTS sec 277 (1957).

46 Accord 3A AUSTIN W. SCOTT & WILLIAM F. FRATCHER, SCOTT ON TRUSTS sec 277 (4th ed. 1988).

47 Id. sec 274.

48 Id.

49 An analogy to the beneficiary is found in the corporate shareholder. Both are economic owners. Appellate courts have refused to rule that CERCLA pierces the corporate veil to hold corporate shareholders liable under a standard that differs from that applied for general corporate law purposes. See Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 83 (5th Cir. 1990) ("Without an express Congressional directive to the contrary, common-law principles of corporation law, such as limited liability, govern our court's analysis."), cert. denied, 498 U.S. 1108 (1991); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 744 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). However, courts sometimes have imposed CERCLA liability on shareholders as operators or arrangers because they were personally involved or controlled the corporation. See, e.g., United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F2d at 744 (holding the corporate vice-president, who was also the plant supervisor, individually liable because he personally arranged for the disposal of hazardous substances; noting that "this personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'"); New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985). Confusion exists on this important point because the statute groups owners and operators in the same subsections. This sometimes results in ambiguity when courts do not express whether they are imposing liability on a shareholder under a theory of indirect liability as an owner, which would be done by piercing the corporate veil, or under a theory of direct liability as an operator. See Kayser-Roth Corp., 910 F.2d at 25-27. However, the analyses in the cases that have imposed CERCLA liability on a shareholder consistently focus on the conduct of the shareholder in operating the enterprise and not on what the shareholder owns. See, e.g., id

50 3A SCOTT & FRATCHER, supra not 46, secs 274, 277.

51 Id.

52 See United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1004 (D.S.C. 1994), aff'd in part, vacated in part sub nom. United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

53 Premium Plastics, Inc. v. LaSalle Nat'l Bank, No. 92 C 413, 1992 WL 309561, at *4 (N.D. Ill. Oct. 22, 1992); see also United States v. N.L. Indus., No. CIV. 91-578-JLF, 1992 WL 359986, at *4 (S.D. Ill.

Apr. 23, 1992) (holding that the trustee of an Illinois land trust was not liable under CERCLA because the beneficiary, not the trustee, has all the ownership and control interest).

54 See Anthony Haswell & Barbara B. Levine, The Illinois Land Trust: A Fictional Best Seller, 33 DePaul L. Rev. 277, 280 (1984).

55 See 3A SCOTT & FRATCHER, supra note 46, sec 277.1.

56 See City of Phoenix II, 816 F. Supp. at 567-68; RESTATEMENT (SECOND) OF TRUSTS sec 265 (1957); sec also discussion supra note 28.

57 In City of Phoenix II, 816 F. Supp. at 568, the court said, "The EPA's practice seemingly is to argue that trustees are 'owners' within the meaning of CERCLA." The court cited Lone Star Industries v. Horman Family Trust, 960 F.2d 917, 921 (10th Cir. 1992), as authority for its statement, with the explanation that the case showed that the EPA sent the trustee a formal notice of potential liability. The EPA should send such notices to trustees informing them of potential liability in their fiduciary capacities. On the other hand, nothing in Lone Star Industries suggests that the trustee was a party to the case in his personal capacity or that the EPA was seeking recovery against the trustee personally. Suit was brought against both the Horman Family Trust and against Sidney M. Horman, as Trustee of the Horman Family Trust. This pleading, as to the parties, is repetitious. It is also erroneous because a trust cannot properly be sued in its own name because it is not an entity. Three Bears, Inc. v. TransAmerican Leasing Co., 574 S.W.2d 193, 198 (Tex. Civ. App. 1978), rev'd in part on other grounds, 586 S.W.2d 472 (Tex. 1979). Trusts are properly sued by suing the trustee in its fiduciary capacity.

58 816 F. Supp. at 564.

59 Leader Liability Under CERCLA, 57 Fed. Reg. 18,344, 18,349 (1992); see infra text accompanying note 86.

60 57 Fed. Reg. 18,349.

61 827 F. Supp. at 600.

62 Sec infra part III.E.10.

63 Since the publication of the original Restatement of Trusts in 1935, apparently every court that has considered this issue applied the rule in sec 265 of the Restatement (Second) of Trusts. The earlier rule that had prevailed from feudal times was that "the trustee as holder of the title to the trust property was subject to personal liability to third persons to the same extent that he would have been liable if he had held the property free of trust." RESTATEMENT (SECOND) OF TRUSTS sec 265 cmt. a (1957). This ancient rule was in the draft of the original restatement submitted to the members of the American Law Institute. 3A SCOTT & FRATCHER, supra note 46, sec 265.4. Subsequently, the language was changed because the authorities did not justify the unequivocal statement that the rule from feudal times still prevailed in America. Id. In fact, the only reported application in the twentieth century of the rule from feudal times is McLaughlin v. Minnesota Loan & Trust Co., 255 N.W. 839 (Minn. 1934). Id. Accordingly, sec 265 of the Restatement of Trusts provided: "The trustee as holder of the title to the trust property is subject to personal liability to third persons, at least to the extent to which the trust estate is sufficient to indemnify him." RESTATEMENT OF TRUSTS sec 265 (1935). Perhaps in deference to the Minnesota Supreme Court's adherence to the feudal rule, a caveat was inserted: "It is

not intended to express any opinion on the question whether the trustee is personally liable...where the trust estate is insufficient to indemnify him, and where the trustee was in no way at fault in incurring the liability and was not responsible for the insufficiency of the estate to indemnify him." Id. In considering the question raised by the caveat, in 1939, Professor Scott criticized McLaughlin as being unjust, and be advocated the view that a trustee should not be personally liable as one who held the property free of a trust. 2 AUSTIN W. SCOTT, SCOTT ON TRUSTS sec 265.4 (1st ed. 1939). Thereafter, the view advocated by Professor Scott (who was the Reporter of the Restatement of Trusts) was adopted by all the courts that considered the issue. See, e.g., Girard Trust Co. v. David, 40 Pa. D. & C. 239, 241 (Penn. County Ct. 1940) ("The discussion contained in Scott on Trusts, sec. 265, indicates that the draftsmen of the Restatement carefully considered the common-law conception of a trustee as owner of property and the attendant liability, and concluded upon the established precedent as well as the equity in the matter and the necessities of our modern financial development that the liability should be qualified by the extent to which the trust estate is sufficient to indemnify the trustee.").

64 RESTATEMENT (SECOND) OF TRUSTS sec 265 (1957); cf: id sec 263 (discussing trustee liability arising from contract); id sec 264 (discussing trustee liability arising from tort).

65 Id. sec 265 cmt. a (emphasis added); see also UNIF. PROB. CODE sec 7-306(b) (1990).

66 827 F. Supp. at 603-05.

67 42 U.S.C. sec 9607(a)(1) (1988).

68 City of Phoenix III, 827 F. Supp. at 604. The court actually worded this rule differently, but to the same effect, by holding that a trustee can be held liable as an owner under CERCLA, but only to the extent the trust assets are sufficient to indemnify the trustee. Sec RESTATEMENT (SECOND) OF TRUSTS sec 265 (1957); id. sec 265 cmt. a.

69 See City of Phoenix II, 816 F. Supp. at 568.

70 City of Phoenix III, 827 F. Supp. at 604-05.

71 Id. at 601. The amici were the American Bankers Association, the Arizona Bankers Association, the National Trust Real Estate Association (whose brief was prepared by the authors of this Article), and three trust companies.

72 See discussion infra part III.E.4.

73 See discussion infra part III.E.6.

74 RESTATEMENT (SECOND) OF TRUSTS (1957).

75 City of Phoenix III, 826 R. Supp. at 605-07.

76 See discussion infra part III.E.10.

77 City of Phoenix III, 826 F. Supp. at 606.

78 Premium Plastics, Inc. v. LaSalle Nat'l Bank, No. 92 C 413, 1992 WL 309561, at *3-4 (N.D. Ill. Oct. 22, 1992); United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1358-59 (N.D. Ill. 1992); United States v. N.L. Indus., No. CIV. 91-578-JLF, 1992 WL 359986, at *4 (S.D. Ill. Apr. 23, 1992).

79 Id.

80 It is unclear how some common law trust principles apply to an Illinois land trust. The court in City of Phoenix III noted: "From the traditional point of view it would seem that the trustee is the legal owner of the trust property and is subject to the duties and responsibilities of an owner as far as the outer world is concerned 827 F. Supp. at 605 n.5 (citing to 3A SCOTT & FRATCHER, supra note 46, sec 265.4). However, given its passive role, the trustee of an Illinois land trust generally is not liable or claims that arise from the ownership of property. See Haswell & Levine, supra 54, at 280-81. It would appear that the City of Phoenix III court was unaware that the trustee of an Illinois land trust is not even held liable to the extent the trust is sufficient to indemnify it. This caused the City of Phoenix III court to "disagree" with the analysis, but not the result, of these three Illinois cases. However, the City of Phoenix III court would have been right if Illinois land trusts were like common-law trusts in this regard.

81 Control should not be relevant to the issue of whether the trustee can be held personally liable as an owner under CERCLA, but should be relevant in analyzing whether the trustee is personally liable as an operator under CERCLA. See RESTATEMENT (SECOND) OF TRUSTS sec 265 (1957). See discussion infra part IV (operator liability). But see discussion infra part III.E.10 (exception to the application of sec 265 carved out in City of Phoenix III).

82 RESTATEMENT (SECOND) OF TRUSTS (1957).

83 No. 83-6318-Kn (CD. Cal. June 11, 1984).

84 Id. slip op. at 7-8. The court did hold the trustee personally liable under CERCLA "because of his actions taken in the administration of the trust." Id at 8. That is, it appears the court held the trustee liable as an operator. See discussion infra part IV.

85 RESTATEMENT (SECOND) OF TRUSTS (1957).

86 Sec Lender Liability Under CERCLA, 57 Fed. Reg. 18,344, 18,349 (1992). The EPA comments in the preamble are still influential, even though the rule was vacated. See Kelley v. Environmental Protection Agency, Nos. 92-1312, 92-1314, 1994 WL 27881 (D.C. Cir. Feb. 4, 1994) (holding that the EPA lacked authority to issue such a regulation).

87 57 Fed. Reg. 18,349.

88 Id. See United States v. N.L. Indus., No. CIV. 91-578-JLF, 1992 WL 359986 (S.D. Ill. Apr. 23, 1992) (ruling against the EPA claim that the trustee was personally liable solely because of the contamination of a trust asset).

89 57 Fed. Reg. 18,349.

90 At least one court has relied on these statements. See United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1359 (N.D. Ill. 1992) ("Recognizing that trustee liability does not serve the legislative ends of CERCLA, the EPA does not consider trustees liable."). Seeking to dismiss the EPA comments, some have asserted that the comments refer to the CERCLA innocent-landowner defense. 42 U.S.C. secs 9601(35), 9607(b)(3) (1988). A careful reading of the preamble of the regulations shows that they cannot be correct. The EPA notes that "in most instances, the trust's assets are available for cleanup of a trust property," even though "[a] trustee is not personally liable for CERCLA cleanup costs solely because a trust asset is contaminated by hazardous substances." 57 Fed. Reg. 18,349. The innocent-landowner defense would protect both the trustee's personal assets and the trust assets from CERCLA liability. Further, the EPA statements regarding a trustee's personal liability are not qualified by the limitations that would apply to the CERCLA innocent landowner defense. See 42 U.S.C. secs 9601(35), 9607(3) (1988) (explaining the various limitations).

91 City of Phoenix II, 816 F. Supp. at 568. But see City of Phoenix III, 827 F. Supp. at 605 n.6 (noting that the EPA position on enforcement of the statute entitled to deference by the court).

92 See, e.g., Moskowitz, supra note 28, at 10003-05.

93 42 U.S.C. sec 9601(20)(A) (1988). See Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1341 (9th Cir. 1992) ("The circularity of this definition renders it useless.").

94 3A SCOTT & FRATCHER, supra note 46, sec 2651.

95 As demonstrated by the City of Phoenix opinions, the EPA and state agencies may not be the most aggressive plaintiffs in asserting claims of personal liability against fiduciaries under CERCLA. Given the remedial nature of CERCLA and the search for deep pockets, the most aggressive plaintiffs often are those looking for someone, anyone, to contribute to the costs of a CERCLA party. See, e.g., Robert Tomsho, Big Corporations Hit by Superfund Cases Find Way to Share Bill, Wall St. J., Apr. 2, 1991, at A1. Such plaintiffs have no concern about policy matters and are likely to feel that it would be more unfair for them to bear the entire burden alone, regardless of the hardship to the trustee.

96 827 F. Supp. at 600.

97 42 U.S.C. secs 9601(35), 9607(b)(3) (1988) (innocent-landowner defense).

98 42 U.S.C. sec 9601(20)(A) (1988).

99 See Cash Currency Exch., Inc. v. Shine (In re Cash Currency Exch.), 762 F.2d 542, 552 (7th Cir.) The general rule of statutory construction is that the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded."), cert. denied, 474 U.S. 904 (1985).

100 United States v. N.L. Indus, No. CIV. 91-578-JLF, 1992 WL 359986, at *3 (S.D. Ill. Apr. 23, 1992) (quoting United States v. A&F Materials Co., 578 F. Supp. 1249, 1253 (S.D. Ill. 1985)).

101 Id.

102 Id.

103 Id.

104 Note how one court addressed the question of a person becoming a PRP by serving as a conduit and holding title to contaminated property for less than a day. The court observed, "It would be tenuous to hold such a constructive owner liable. I decline to find that [the conduit] was an owner for purposes of sec 9607(a)(2), as such a holding would be extending the statutory language to an absurd plateau, thereby perverting congressional intent." Kempf v. City of Lansing (In re Diamond Reo Truck, Inc.), 115 B.R. 559, 568 (Bankr. W.D. Mich. 1990); see also Premium Plastics, Inc. v. LaSalle Nat'l Bank, No. 92 C 413, 1992 WL 309561, at *4 (N.D. Ill. Oct. 22, 1992) ("[T]his court will not subject an innocent party such as [the trustee] to liability in order to assure that plaintiffs have a source of recovery for their expenses related to this matter.").

105 No. C-88-94-L, 1988 U.S. Dist. LEXIS 17340 (D.N.H. Sept. 12, 1988) [hereinafter Burns I].

106 United States v. Burns, No. 88-094-S, slip op. at 2-3 (D.N.H. Aug. 9, 1990) [hereinafter Burns II]. See generally In re Gonic Realty Trust, 50 B.R. 710, 711 (Bankr. D.N.H. 1985) (discussing facts surrounding the Burns case).

107 Declaration of Trust of the Gonic Realty Trust.

108 It is unclear whether the beneficial interest was owned directly or indirectly by the two men. As originally prepared, the Declaration of Trust clearly contemplated that the partnership would hold the beneficial interest in the trust. However, apparently prior to execution, someone typed into the Declaration of Trust that Crowley and Friedberg "each own 1/2 (one-half) of the beneficial interest of the trust." Id.

109 Id.

100 Friedberg was not sued for recovery; perhaps because he had conveyed his interest in the venture to Crowley's wife before the EPA incurred any response costs. Burns II, No. 88-094-S slip op. at 2.

111 Burns I, 1988 U.S. Dist. LEXIS 17340, at *2

112 Id. at *1, *2.

113 Id. at *1.

114 Id. at *3-5.

115 Id. at *1.

116 3A SCOTT & FRATCHER, supra note 46, sec 277.1.

117 See, e.g., id (citing Slaughter v. Quigley, 9 F. Supp. 130 D.N.J. 1934) (discussing an individual who was sole trustee, sole income beneficiary, and settlor of trust and was held personally liable as owner for assessment on bank stock)). It has been said that the Burns I court could have disregarded the trust because the defendant was both trustee and sole beneficiary, but that it chose not to do so. City of Phoenix II, 816 F. Supp. at 568. This is not true. Despite the ambiguous language, Crowley was never

the sole beneficiary of the Gonic Realty Trust. At all times, Crowley directly or indirectly owned only one-half of the trust's beneficial interests. Burns II, No. 88-094-S slip op. at 2; In re Gonic Realty Trust, 50 B.R. 710, 711 (Bankr. D.N.H. 1985).

118 Burns I, 1988 U.S. Dist. LEXIS 17340, at *4-5 (citing 3 SCOTT ON TRUSTS secs 265, 265.1 (3d ed. 1985)).

119 RESTATEMENT (SECOND) OF TRUSTS (1957.

120 Burns II, No. 88-094-S slip op. at 8.

121 Id.

122 3A SCOTT & FRATCHER, supra note 46, sec 265.4.

123 Id.

124 Id.

125 Id.

126 Id. Professor Scott originally wrote sec 265.4 in 1939 to explain the change then taking place in the common law--the adoption of the rule ultimately set forth in sec 265 of the Restatement (Second) of Trusts to replace the antiquated rule that had imposed personal liability on trustees as titleholders since feudal times. See 2 SCOTT, supra note 63, sec 265.4. Section 265.4, as it appears in the latest edition of Scott on Trusts, is essentially unchanged from the first edition, with the exception of minimal updating to reflect the adoption of the Restatement (Second) of Trusts in 1957 and to note the newer authorities cited therein. Any uncertainty that Professor Scott humbly allowed as to the state of the law in 1939 has long since disappeared. See supra note 63. Today, the rule in sec 265 of the Restatement (Second) of Trusts has become the universal rule in American jurisprudence, and sec 265.4 of Scott on Trusts shows why the rule from feudal times was replaced and why it should not be resurrected to impose CERCLA liability on trustees personally as owners.

127 RESTATEMENT (SECOND) OF TRUSTS (1957).

128 Congress has indicated in at least two ways that the hardship to CERCLA plaintiffs in denying them a recovery does not outweigh the hardship that would be imposed on trustees if personal liability were imposed on them as owners under CERCLA. First, Congress enacted a defense to CERCLA liability for certain qualifying real property owners who are viewed as being free of wrongdoing. See 42 U.S.C. secs 9607(b)(3), 9601(35) (1988); supra note 90. Congress decided that the hardship that would be imposed on such real property owners if they were not provided with a defense under CERCLA outweighed the hardship that would be imposed on plaintiffs by denying them recovery from such real property owners under CERCLA. However, the hardship that would be imposed on trustees by making them liable personally as owners under CERCLA is, at the very least, equal to the hardship that would be suffered by such real property owners, but for the statutory defenses to CERCLA liability.

Second, a statutory exemption is provided to secured lenders. Under the laws of thirteen states, a mortgagee actually holds title to the property while a mortgage is in force. United States v. Maryland

Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986). Also, in lease financing arrangements, the party that economically plays the role of lender commonly holds legal title. Congress expressly exempted mortgagees and title holders in lease financing arrangements from CERCLA owner liability by providing that the term "owner" "does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. sec 9601(20)(A) (1988); see David R. Berz & Peter M. Gillon, Lender Liability Under CERCLA: In Search of a New Deep Pocket, 108 BANKING L.J. 4, 10-12 (1991). The hardship that would be imposed on trustees by making them liable personally as owners under CERCLA is, at the very least, equal to the hardship that would be suffered by such secured parties, but for such a statutory defense to CERCLA liability. "Congress could not have intended to create liability for those who become owners merely through a quirk of the common law." Steven L. Leifer & Nancy E. Allin, Trustee Executor Liability Under Superfund, 20 Env't Rep. (BNA) 1786, 1787 (Feb. 16, 1990).

The court in United States v. N.L. Indus., No. CIV. 91-578-JLF, 1992 WL 359986, at *4 (S.D. Ill. Apr. 23, 1992), recognized that such provisions were relevant in deciding whether CERCLA owner liability should be imposed on a trustee: "It is inconsistent to exempt [secured parties] while holding liable a bank which merely administers the title [as trustee of an Illinois land trust] for a nominal yearly fee." The N.L. Industries court also understood that such provisions do not imply that trustees are personally liable under CERCLA. See supra text accompanying notes 100-03.

129 827 F. Supp at 600.

130 RESTATEMENT (SECOND) OF TRUSTS (1957).

131 City of Phoenix III, 827 F. Supp. at 603-05.

132 Id. at 605. Despite the court's three-part test, the third element seems to be the crux of the exception. A trustee cannot knowingly allow trust property to be used for the disposal of hazardous substances if the trustee does not have the power to control the use of the trust property. Likewise, a trustee could only knowingly allow trust property to be used for the disposal of hazardous substances if the trustee then owns the trust property.

133 Id. at 603.

134 Id. at 604.

135 Id. at 605, 607.

136 Id. at 607.

137 Id. at 607 n.9.

138 See id. at 605. Both the second rule and the third rule address a trustee's liability when hazardous substances are disposed of on trust property while the trustee holds the property. The second rule holds that a trustee is not personally liable if it does not have the power to control the use of the trust property. The third rule holds that a trustee is personally liable if it does have the power to control the use of the trust property and if the trustee knowingly allowed the property to be used for the disposal of hazardous

substances. Accordingly, the court did not address the question of personal liability if a trustee does have the power to control the use of the trust property, but did not knowingly allow the property to be used for the disposal of hazardous substances.

139 See id. at 604 ("The rationale of [42 U.S.C. sec 9607(a)(2)], then, is that the owner has both the power and the responsibility to control the use of his property.").

140 Id. at 606.

141 Id. at 603.

142 UNIF. PROB. CODE sec 7-306(b) (1990) (emphasis added).

143 Memorandum of Points and Authorities in Support of Defendant Valley National Bank's Motion for Partial Summary Judgment Limiting Trustee's Liability to the Value of the Assets Held in Trust, at 5 n3, City of Phoenix III, 827 F. Supp. 600.

144 Unlike sec 264, RESTATEMENT (SECOND) OF TRUSTS sec 265 (1957) continues to be a correct statement of the law. Thirty-six years ago, sec 265 was on the leading edge of the trend to abolish personal liability of trustees in situations where the trustee was not personally at fault. See discussion supra note 63.

145 See General Am. Life Ins. Co. v. Castonguay, 984 F.2d 1518, 1523 n.10 (9th Cir. 1993).

146 See discussion infra part IV.A-B.

147 See discussion supra part III.E.10.

148 This section uses the term "fiduciary," which includes personal representatives in addition to trustees, because both are at risk of becoming a PRP if the fiduciary's activities would make it an operator or an arranger. Owner liability should be a concern only for those fiduciaries that hold title, such as trustees. The personal representative of a decedent's estate (who may be either an executor or an administrator) should not be treated as an owner of contaminated property under the laws of most states. Those laws typically provide that the personal representative does not own the real property that is subject to administration. See UNIF. PROB. CODE sec 3-101 (1990).

149 At least one appellate court reversed the holding of a district court that confused operator and arranger liability. See United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 743 (8th Cit. 1986), aff'g in part, rev'g on this point 579 F. Supp. 823 (W.D. Mo. 1984), cert. denied, 484 U.S. 848 (1987). Operator liability can be imposed only if the defendant operated the facility in which the hazardous substances were located Id. In contrast, arranger liability generally can be imposed if the defendants did not own or operate the facility where the hazardous substances were located, but arranged for the disposal of the hazardous substances. Id. at 743-44.

150 Just as with owner liability, a beneficiary should not have personal liability for CERCLA obligations imposed on the beneficiary's fiduciary estate as an operator or an arranger, except in cases where the fiduciary is the agent of the beneficiary. See discussion supra part III.C. Likewise, a fiduciary in its fiduciary capacity is liable under CERCLA as an operator or an arranger like any other operator or

arranger. See discussion supra part III.D. Accordingly, the liability of beneficiaries and fiduciaries in their fiduciary capacity is not discussed further.

151 City of Phoenix II, 816 F. Supp. at 567.

152 The court relied directly on Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992) (holding that "operator" liability under CERCLA only attaches if the defendant had the authority to control the cause of the contamination at the time the hazardous substances are released into the environment).

153 See supra text accompanying notes 36-38.

154 Riverside Mkt. Dev, Corp. v. International Bldg. Prods., 931 F.2d 327, 330 (5th Cir.), cert. denied, 112 S. Ct. 636 (1991).

155 United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 744 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

156 See, e.g, Riverside Mkt. Dev. Corp. v. International Bldg. Prods., No. CIV. A 88-5317, 1990 WL 749 (E.D. La. May 23, 1990) (holding that a corporate officer may be held personally liable as an operator because of his actions as an officer), aff'd on other grounds, 931 F.2d 327 (5th Cir.), cert. denied, 112 S. Ct. 636 (1991); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d at 744 (holding a corporate officer personally liable as an arranger because of his actions as an officer).

157 The analogy holds even if an individual corporate manager is compared to a corporate fiduciary. An individual officer of a corporate fiduciary might incur liability as an operator or an arranger; however, the corporate fiduciary generally will be the more appealing defendant. Further, officers might escape liability if they can establish that the ultimate decision-making authority was vested in another person. See Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 844 (4th Cir.), cert. denied, 113 S. Ct. 377 (1992).

158 See City of Phoenix III, 827 F. Supp. at 603-05 (relying on RESTATEMENT (SECOND) OF TRUSTS sec 264 (157) in determining a trustee's owner liability); accord UNIF. PROB. CODE sec 7-306(b) (1990).

159 The federal appellate courts differ considerably on when corporate shareholders and managers should be PRPs. See Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1390 (N.D. Ill. 1988) (noting that parent corporation of the prior owner of a facility can be liable as an operator under CERCLA if it exercised actual control aver the operations of the facility); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 848-49 (W.D. Mo. 1984) holding personally liable president and vice president who had control and supervision duties), rev'd in part, 810 F.2d 7 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). But see Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 83 (5th Cir. 1990) (refusing to hold the parent company liable for the CERCLA violations of a wholly owned subsidiary), cert. denied, 498 U.S. 1108 (1991); Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157-58 (7th Cir. 1988) (holding that an independent construction contractor who built a plant, which was later found to have violated CERCLA, was not liable as an owner or operator). Some of the apparent conflict among the courts might simply be the result of their using broad terms to explain how they reached the results in particular cases; consequently, some of the sweeping language should not be applied literally. To the extent that the courts are in actual conflict with one another,

without a legislative or regulatory resolution, the appellate courts will have to resolve the conflicts over time.

160 See, e.g., Riverside Mkt. Dev. Corp. v. International Bldg. Prods., 931 F.2d 327, 330 (5th Cir.), cert. denied, 112 S. Ct. 636 (1991).

161 See, e.g., Kelley v. Thomas Solvent Co., 727 F. Supp. 1554, 1561-62 (W.D. Mich. 1989) (deciding not to impose strict liability, but rather looking to evidence of an individual's authority to control).

162 A corporate manger, and a fiduciary manager, can be personally at fault due to acts of omission. An example of such is if a manager fails to exercise appropriate care in a situation that it did not create, but in which it has authority to act, and thereby unreasonably endangers the community. See New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (holding a shareholder and officer liable as an operator after the corporation knowingly acquired contaminated property that was in a very hazardous condition and failed to take corrective action).

163 Courts are more likely to impose operator or arranger liability on those who both exercise management control over a corporation and own a significant interest in the corporation. An agency-type analysis may explain this. That is, courts may be imposing such liability on those who direct and control the corporation's activities for their own benefit, such as a corporate parent in an integrated business. See, e.g, Untied States v. Kayser-Roth Corp., 910 F2d (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991). Similarly, fiduciaries who have a beneficial ownership interest are more likely to be held liable under CERCLA. See discussion supra part III.C.

164 Consider the following hypothetical situation. An employee of a fiduciary, who was responsible for routine maintenance of a vehicle owned by the fiduciary estate, disposed of used motor oil, which contained various contaminents that were hazardous substances, in trash hauled to the municipal landfill. The disposal of the oil, which was both legal and common practice at the time, was done without the knowledge or approval of the fiduciary. Subsequently, because of a large quantity and variety of hazardous substances in the municipal landfill, the landfill needed to be remediated and the disposal of the oil became known. Even though the disposal of the oil resulted neither from intentional wrongdoing nor negligence, the fiduciary estate or, more precisely, the fiduciary in its fiduciary capacity, could be held liable as an arranger. See generally Tomsho, supra note 95.

165 See discussion supra part III.E. (regarding the application of RESTATEMENT (SECOND) OF TRUSTS sec 265 (1957)).

166 City of Phoenix III, 827 F. Supp. at 607.

167 Cf. id. (finding that the liability of a trustee, who has the power to control the trust property, is based on the trustee's decision to engage in ultrahazardous activities, not on the trustee's culpability).

168 See 3A SCOTT & FRATCHER, supra note 46, sec 265.

169 The officers of a corporate fiduciary might also follow such advice.

170 3A SCOTT & FRATCHER, supra note 46, secs 171, 174.

171 RESTATEMENT (THIRD) OF TRUSTS sec 170 cmt. q (1990). The Restatement (Third) of Trusts is a partial revision of the Restatement (Second) of Trusts. All citations herein to either the Restatement (Second) of Trusts or the Restatement (Third) of Trusts are to the most recent version.

172 A combination of the current uncertainty relating to fiduciary relationships and the aggressive positions sometimes asserted by plaintiffs can force fiduciaries to make difficult decisions regarding settlement. Failure to accept a settlement of may expose the fiduciary to personal liability for the full amount of the liability under CERCLA. By accepting a settlement offer, the fiduciary may incur liability even though a valid defense might have been established. Second-guessing by the beneficiaries increases the potential for personal liability of the fiduciary.

173 42 U.S.C. secs 9601(35)(A), 9607(b)(3) (1988); see supra note 90.

174 If the transfer is voluntary, fiduciaries may have a state law fiduciary obligation to investigate the property before it is transferred so that the fiduciary estate will be able to establish the innocent landowner defense if the property is contaminated.

175 See, e.g., Lender Liability Under Hazardous Waste Laws: Hearings Before the Subcomm. on Policy Research and Ins. of the House Comm. on Banking Fin and Urban Affairs, 102d Cong, 1st Sess. 420-22 (Comm. Print 1991) (statement of Joseph P. Forte and Michael L Graham of the Section of Real Property, Probate and Trust Law on behalf of the American Bar Association).

176 Id. at 418-23.

177 Several such bills have been introduced in Congress. Senate Bill 543 would have provided statutory relief only or fiduciaries that are insured depository institutions. S. 543, 102d Cong., 1st Sess. sec 1002(a) (1991). CERCLA should not draw such distinctions among fiduciaries because they are not warranted by CERCLA policy considerations. Senate Bill 543 drew such a distinction because of considerations relating to Senate committee jurisdiction. If such legislation is enacted, a court, without the benefit of the political considerations leading to enactment, might conclude that the opposite of the enacted law should be applied to fiduciaries that are not insured depository institutions. Thus, although the law applied to a subset of similarly situated persons in fiduciary relationships, the law might be interpreted to have changed the law in favor of the intended beneficiaries, rather than to have codified the existing common law. Such a misunderstanding could lead to the implementation of the legislation changing the law to the detriment of those who are not the intended beneficiaries. To prevent this, the 1991 report of the Senate Banking Committee contained the following language with respect to Senate Bill 543, which was passed by the Senate, but not the House of Representatives:

[T]itle X does not impose liability on any party. Moreover, by expressly limiting the liability of certain parties under specified conditions, the Committee rejects any inference that other parties are liable. For example, the fiduciary provisions of title X, by their terms, only apply to insured depository institutions. No implication is intended that nondepository institution fiduciaries would be liable under any strict liability environmental statutes.

S. REP. NO. 167, 102d Cong., 1st Sess. 193 (1991).

178 827 F. Supp at 600.

179 The term "only if personally at fault" is found in UNIF. PROB. CODE sec 7-306(b) (1990). See supra text accompanying notes 142-44. However, the meaning of the term is not certain, even though using it may be a vast improvement over the present silence of CERCLA.

180 While CERCLA is generally a strict liability statute, the concept of fault is not foreign. See discussion supra part IV.A.

181 No. CIV. 91-578-JLF, 1992 WL 359986 (S.D. Ill. Apr. 23, 1992).

182 See City of Phoenix III, 827 F. Supp. at 605.

183 See id.

184 See id. at 604-05.

185 See discussion supra part III.C.

186 However, legislative development of more specific rules should minimize litigation costs related to CERCLA.

187 See discussion supra part III.D.

188 House Bill 2462, introduced by Congressman John LaFalce of New York, is one way to implement this alternative. H.R. 2462, 103d Cong., 1st Sess. sec 1 (1993).

189 As used in this Article, the term "intentional" means willful or knowing. The term does not mean an intentional act committed without knowing, or having reason to know, of the act's consequences, which is essentially a strict liability standard.

190 Currently, CERCLA limits the liability of a state or local government that results from actions in response to an emergency created by a release or a threatened release of a hazardous substance generated by or from a facility owned by another person. 42 U.S.C.A sec 9607(d)(2) (West Supp. 1993). Under that provision, liability exists only for costs or damages that result from gross negligence or intentional misconduct. Id. Gross negligence is defined, for that purpose, as reckless, willful, or wanton misconduct. Id.

191 See discussion supra part III.D.; note 150.

192 See supra text accompanying note 139. See generally Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 844-45 (4th Cir.) (imposing liability on owners or leakage occurring during their period of ownership even without knowledge of the leak), cert. denied 113 S. Ct. 377 (1992).

193 H.R. 2462, 103d Cong., 1st Sess. (1993).

194 Id.

195 In 1991 Congressional testimony, The Natural Resources Defense Council asserted that House Bill 1450, which was introduced in the last Congress and generally parallels House Bill 2462, extended

"complete immunity to trustees and fiduciaries...eliminating their incentive to police pollution." Lender Liability Under Hazardous Waste Laws: Hearing Before the Subcomm. on Policy Research and Ins. of the House Comm. on Banking, Fin. and Urban Affairs, 102d Cong, 1st Sess., 341 (Comm. Print 1991). As the discussion above shows, this is simply untrue.

196 Leifer & Allin, supra note 128, at 1787-88 (expressing concern that trusts might be used by an owner of contaminated property to cut off the owner's CERCLA liability). Established trust law principles appear to be adequate to prevent an owner from improperly using a trust to shield the owner from the reach of CERCLA. See 3A SCOTT & FRATCHER, supra note 46, sec 277.1 (discussing when a settlor should be held liable for an assessment on bank stock that could not be satisfied from the trust estate). Consider the property owner who, because of concern about the potential CERCLA liability of a current property owner, contributes the property to a trust and retains all the beneficial ownership. Authority exists for holding the beneficiary liable as the current property owner. See id. In comparison, consider the owner that contributes the property to a corporation in exchange for all the corporation's stock. The owner thus becomes a former owner and, as a former owner, would only be liable under CERCLA if hazardous substances were disposed of on the property during the time of ownership of the property. The corporation seems to provide shelter from CERCLA owner liability, provided that the corporate veil is not pierced and the owner is not held liable as an operator. If corporations are not viewed as being a loophole under CERCLA, trusts cannot be so viewed.

197 Trustee Liability--Federal Court Could Fill Legal Vacuum, Superfund Rep., Aug. 14, 1991, at 19.

198 See discussion supra part III.D.

199 See discussion supra part III.C.

200 Note that under this common law provision, a trustee who was also a beneficiary might incur CERCLA liability as a beneficiary in situations in which it would not be held personally liable as a trustee. Once a person is held liable as a beneficiary, nothing more can be gained from finding such a person also liable as a trustee.

201 See, e.g, Burns II, No. 88-094-S slip op. at 7-8 (holding a trust beneficiary liable under CERCLA as a general partner of the trust).

202 Such fiduciary duties include the duty to manage the fiduciary assets prudently. RESTATEMENT (THIRD) OF TRUSTS sec 227 (1990).

203 H.R. 2462, 103d Cong., 1st Sess. (1993).

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