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Lincoln Properties, Ltd. V. Higgins, Responsibility for Costs of Environmental Remediation Shifts from Property Owners to Polluting Tenants

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LINCOLN PROPERTIES, LTD. V. HIGGINS RESPONSIBILITY FOR COSTS OF ENVIRONMENTAL REMEDIATION SHIFTS FROM PROPERTY OWNERS TO POLLUTING TENANTS.

The United States District Court for the Eastern District of California made a landmark decision in *Lincoln Properties, Ltd. v. Higgins*[1] by ruling that a property owner can take direct action against its polluting tenants, forcing the financial burden of investigation and environmental remediation costs upon the tenants. A significant departure from precedent occurred in the *Lincoln* decision. Previous caselaw had traditionally held the statutorily liable property owner responsible for clean-up costs.[2] Thus, in the past, the property owner's remedy was to initiate a law suit against its polluting tenants to recover costs.[3] The *Lincoln* decision, however, benefits property owners by providing a direct route for cost recovery.

By construing The Comprehensive Environmental Response, Compensation and Liability Act[4] (CERCLA) and The Resource Conservation and Recovery Act[5] (RCRA) in a broad fashion, the *Lincoln* court decided to shift liability from the property owners to the polluting tenants. This Note agrees that the *Lincoln* court's reasoning followed emerging caselaw trends in granting relief to landowners involved in toxic waste litigation. "As numerous courts have observed, CERCLA is a remedial statute which should be construed liberally to effectuate its goals."[6] In particular, one CERCLA goal is to force polluters to pay for costs involved in cleaning up their own pollution.[7] Finally, this Note concludes that, since liability often follows control, the *Lincoln* court was correct in deciding that the tenants should pay for the costs associated with the contamination they created.

The plaintiff was Lincoln Properties, Ltd. (Lincoln), owner of a San California, shopping center (Lincoln Center) which had leased space to three dry cleaning establishments.[8]

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1. No. CIV-S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *2 (E.D. Cal. Jan. 21, 1993).

2. *See* United States v. Price, 668 F.2d 204 (3rd Cir. 1982) (injunctive relief is an inappropriate remedy for the issue of who should bear the costs of investigation and remediation of a toxic hazard).

3. *Id.*

4. 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991).

5. Resource Conservation and Recovery Act of 1976, amended by the Solid Waste Disposal Act Amendments of 1984 (SWDA), 42 U.S.C. §§ 6901-6992 (1988 & Supp. III 1991). The citizen suit provision contained within a RCRA § 7002(a), 42 U.S.C. §6972(a).

6. United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3rd Cir. 1992) (liability under CERCLA is not dependant upon quantity of hazardous substance present).

7. *Id.*

8. *Lincoln Properties, Ltd. v. Higgins*, No. CIV-S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *2 (E.D. Cal. Jan. 21, 1993).

In 1985, the San Joaquin Local Health District detected tetrachloroethylene (PCE) in concentrations exceeding California action levels in water from a county well adjacent to the Lincoln Center.[9] The Health District notified Lincoln, at which time Lincoln hired an environmental engineering firm to investigate.[10] Scientific findings indicated that Lincoln Center had PCE in its surrounding groundwater and soil.[11]

One use of PCE, a hazardous chemical compound, is as a dry cleaning solvent.[12] The three dry cleaners in Lincoln Center admitted using PCE and occasionally spilling it into their floor drains which led to the sewer system.[13] In fact, none of the cleaners disputed that spills of PCE or PCE laden waste water had occurred. As corroborating evidence, water samples taken from the sewer laterals running underground from each of the cleaners had shown detectable levels of PCE.[14] Because each dry cleaning facility was leased to more than one party, and because of technological limitations, it was impossible to make a determination as to what percentage of PCE contamination each dry cleaner had contributed to the various groundwater levels.[15]

Although the expert testimony varied,[16] it appeared that PCE had leaked through the joints of the sewer system and subsequently migrated towards several private and public wells.[17] Plaintiff's experts predicted an increased rate of cancer among the residents living near Lincoln Center because PCE is a known carcinogen.[18] To determine the extent of PCE contamination, proposed work plans included installation of monitoring wells and sampling of groundwater and soil.[19] In order to recover the costs of investigation, remediation and other expenditures Lincoln incurred in excess of $3,000,000; Lincoln sued all past and present owners of the dry cleaning establishments.

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9. *Id.* at *9.

10. *Id.*

11. PCE was found along with TCE and DCE which are degradation products of PCE. For the purposes of this Note, only "PCE" will be written to designate the pollutant. *Id.*

12. *Id.* at *4.

13. Lincoln Properties, Ltd. v. Higgins, No. CIV-S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *2, 5-8 (E.D. Cal. Jan. 21, 1993).

14. *Id.*

15. Expert testimony states, "given the technology available today, it is scientifically impossible to determine which portion of the groundwater has been contaminated with PCE by particular sources of PCE." *Id.*

16. See Lincoln Properties, Ltd. v. Higgins, No. CIV-S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *2, 8-11 (E.D. Cal. Jan. 21, 1993).

17. *Id.* at *9.

18. One estimate is that if 4000 people use the water for seventy years, the sum of excess cancer risk from PCE exposure is 0.03 to 10 cancers. *Id.* at *11.

19. *Id.* at *12.

The United States District Court for the Eastern District of California permitted Lincoln's amended complaint that included one claim under RCRA and three claims under the CERCLA. Under RCRA, Lincoln sought response cost recovery, contribution and declaratory relief.[20] The court granted Lincoln summary judgment for the RCRA and CERCLA claims, and injunctive relief for the RCRA claim.[21]

Both the RCRA and CERCLA sections of the *Lincoln* opinion open with a discussion of the Congressional intent behind these statutes. The *Lincoln* court recognized Congress' goal that "waste that is nevertheless generated should be treated, stored, or disposed of, so as to minimize the present and future threat to human health and the environment."[22] Mindful of the Congressional intent that these statutes "invigorate citizen litigation,"[23] the court dissected the § 6972 RCRA[24] citizen suit provision and the § 9607 CERCLA[25] provision in order to assess the potential liability of the defendants.

By following the three prong test set forth in *United States v. Conservation Chemical Co.*,[26] the court examined Lincoln's RCRA claim.

> Lincoln must establish (1) that the conditions at Lincoln Center may present an imminent and substantial endangerment to health or the environment, (2) that the endangerment stems from the handling, storage, treatment, transportation or disposal of any solid or hazardous waste, and (3) that the dry cleaners have contributed or are contributing to such handling, storage, treatment, transportation or disposal.[27]

The court commenced by scrutinizing the language of the first prong. As did the court in *Dague v. City of Burlington*,[28] the *Lincoln* court pointed out that the choice of the word

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20. *Id.*

21. Lincoln Properties, Ltd. v. Higgins, No. CIV-S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *2, 12 (E.D. Cal. Jan. 21, 1992). The plaintiff also asserted sixteen state law claims, including various nuisance and negligence claims. For the purposes of the Note, only the CERCLA and RCRA claim will be discussed.

22. *Id.* at *13.

23. Section B of 42 U.S.C. § 6972 (1980) was added in 1984 to "invigorate citizen litigation." *Lincoln Properties, Ltd. v. Higgins*, No. CIV-S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *2, 13 (E.D. Cal. Jan. 21, 1993) (quoting *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1158 (9th Cir. 1989)).

24. 42 U.S.C. § 6972 (1993).

25. 42 U.S.C. § 9607 (1980).

26. 619 F. Supp. 162 (W.C. Mo. 1985) (injunctive relief awarded under RCRA § 7003 against several defendants for the clean up of a hazardous waste site).

27. *Conservation Chemical Co.*, 619 F. Supp. at 199-200.

28. 935 F.2d 1343 (2nd Cir. 1991) (proof of actual harm is not required in order to hold that an activity may present an imminent and substantial endangerment).

"may" indicated the expansive nature of the statute's scope. The conditions did not *need* to present endangerment, it is only necessary that the conditions "may" present endangerment.[29] Furthermore, a linguistic analysis revealed that "endangerment" connotes something *less than* actual harm, that "imminence" indicates only a risk of harm, and that "substantial" does not require *quantification* of the endangerment.[30]

From there, the court described Lincoln's undisputed evidence: PCE's existence in the water table, groundwater PCE concentrations in excess of federal and state standards, and release of pure PCE from an underground pool.[31] Several nearby wells had been closed, and a significant amount of groundwater had been removed from public use.[32] Data showed that the federal government's maximum contaminant levels for PCE had been exceeded.[33] Bearing these factors in mind, the court concluded that the test's first prong was fulfilled where "present harm to the environment . . . is both imminent and substantial."[34]

Again, definitions determined the court's decision in the second and third prongs of the RCRA claim. In applying the second prong, the court reasoned as follows: the EPA promulgated that PCE is a "listed hazardous waste," thus it was a "hazardous waste" that caused contamination at Lincoln Center.[35] The third prong reasoning also followed a logical structure: according to a dictionary definition, each dry cleaner "handled and disposed" of hazardous waste, Lincoln's undisputed evidence showed that each dry cleaner had spilled PCE into the drains, thus all three dry cleaners had contributed to PCE disposal and are liable under RCRA.[36]

After establishing the dry cleaner's RCRA liability, the *Lincoln* court looked to the reasoning in *Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct and Sewer Authority*[37] (PRASA), for guidance in examining domestic sewage exclusion" defense. In hopes of circumventing RCRA liability, the dry cleaners asserted that their PCE wastes fell under a "domestic sewage" exception since the dry cleaners had toilets and sinks "which

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29. Dague v. City of Burlington, 935 F.2d 1342, 1355 (2nd Cir. 1991) (quoting *United States v. Price,* 688 F.2d 204, 213-14 (3rd Cir. 1982)) (emphasis in Dague), rev'd in part on other grounds, 112 S. Ct. 2638 (1992).

30. Lincoln Properties, Ltd. v. Higgins, No. CIV-S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *2, 19 (E.D. Cal. Jan. 21, 1993.

31. *Id.*

32. *Id.* at *20.

33. *Id.* Maximum Contaminant Levels ("MCL'S") and Maximum Contaminant Level Goals ("MCLG'S") are set by the federal government in order to institute allowable concentration levels for contaminants in drinking water. The MCL for PCE is 5 parts per billion. 40 C.F.R. §141.61.

34. *Id.* at *21.

35. The EPA has determined that PCE is a hazardous waste in 40 C.F.R. § 261.31 and Appendix VII to 42 C.F.R. pt. 261 (1981).

36. *Id.* at *22; 42 U.S.C. § 6972 (a)(1)(B).

37. *Id.* at 21; 888 F.2d 180 (1st Cir. 1989), cert. denied, 494 U.S. 1029, 110 S. Ct. 1476, 108 L. Ed. 2d613 (1990) ("domestic sewage" refers to residential sewage, not industrial waste mixed with untreated sanitary waste from workplace).

discharged into the same sewer that received the hazardous wastes."[38] The court deferred to the *PRASA* decision, gleaning that "domestic" relates to household waste, and that the waste excluded from RCRA liability should come from a domestic source.[39] "It is difficult to believe Congress would wish to exempt large amounts of industrial waste simply because they mix with bathroom sewage."[40] Additionally, the court felt that since RCRA's injunctive relief was meant to be wide reaching, to interpret an exception broadly would weaken the statute's scope.[41] Finally, the *Lincoln* court respected the clout of the EPA who argued against a broad interpretation of "domestic" in *PRASA*.[42] By following *PRASA*, the *Lincoln* court held that RCRA did indeed apply to the dry cleaners since the discharged PCE was not "domestic sewage."[43]

After determining the dry cleaners' liability under RCRA, the court moved on to examine Lincoln's CERCLA claim.[44] Again, the court set out the test, and each of the prongs was examined in turn. Under § 9607, "response costs" may be recovered if the plaintiff establishes four elements:

> (1) the waste disposal site is a 'facility' within the meaning of 42 U.S.C. § 9601(9); (2) a 'release' or 'threatened release' of any 'hazardous substances' from the facility has occurred; (3) such 'release' or 'threatened release' has caused the plaintiff to incur response costs that are 'consistent with the national contingency

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38. Lincoln Properties, Ltd. V. Higgins, No. CIV-S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS, at *2, 15 (E.D. Cal. Jan. 21, 1993. The court stated that solid waste is statutorily defined to include the following:

> Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, commercial, mining, and agricultural operations, and from community activities, *but does not include solid or dissolved material in domestic sewage. . .*

42 U.S.C. § 6903(27).

39. Lincoln Properties, Ltd. v. Higgins, No. CIV-S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *2, 15 (E.D. Cal. Jan. 21, 1993) (citing Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct and Sewer Auth., 888 F.2d 180, 184 (1st Cir. 1989)).

40. *Id.* (quoting Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct and Sewer Auth., 888 F.2d 180, 185 (1st Cir. 1989)).

41. *Id.* (citing *PRASA*, 888 F.2d at 185).

42. *Id.* In *PRASA*, the court decided that as the agency delegated to enforce provisions of RCRA, and EPA should be given "considerable authority to interpret language like 'domestic sewage' and thereby fix, at the boundaries, the precise scope of the exception."

43. Lincoln Properties, Ltd. v. Higgins, No. CIV-S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *2, 16 (E.D. Cal. Jan. 21, 1993).

44. 42 U.S.C. § 9607 (1980).

plan'; and (4) the defendant falls within one of four classes of persons subject to CERCLA's liability provisions.[45]

The court examined the terms "facility," "release," "response costs," and "operator liability," to determine whether Lincoln would be successful on its CERCLA claim. First, the court decided that Lincoln need only show a hazardous substance was present at the dry cleaners in order to designate the dry cleaners as a "facility."[46] Since Lincoln had evidence of PCE being present, each of the dry cleaner sites was considered a CERCLA "facility." Second, to decide whether a "release" had occurred, the court adopted the "liberal" definition established in *United States v. Hardage* rather than accepting an alternative plain language interpretation.[47] In so doing, the *Lincoln* court concluded that the mere presence of PCE in the soil, as well as the fact that PCE had admittedly leaked, constituted a "release."[48] Furthermore, the court decided to keep a broad interpretation by holding that the "release" need not be direct.[49] Third, the assessment of "response costs" was handled by the court in a straight forward manner. Lincoln paid over $3,000,000[50] to an environmental engineering firm; therefore, Lincoln had incurred response costs. Finally, a Ninth Circuit rule was followed to determine "operator liability." So long as a defendant was authorized to control the cause of contamination when the hazardous substances were released, the defendant would be subject to "operator liability."[51] The court reasoned that

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45. The four classes of responsible persons are as follows:

(1) The owner and operator of a vessel or a facility;
(2) Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
(3) Any person who by contract, agreement, or otherwise arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
(4) Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrent of response costs, of a hazardous substance.

42 U.S.C. § 9607 (a)(1)-(4).

46. Lincoln Properties, Ltd. v. Higgins, No. CIV-S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *2, 27 (E.D. Cal. Jan. 21, 1993).

47. 761 F. Supp. 1501, 1510 (W.D. Okl. 1990). "The presence of hazardous substances in the soil, surface water, or groundwater of a site demonstrates a release." *Id.*

48. The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. 42 U.S.C. § 9601(22). *Lincoln Properties, Ltd. v. Higgins*, No. CIV-S-91-760 DFL/GGH, 1993 U.S. Dist. LEXIS 1251, at *2, 27 (E.D. Cal. Jan. 21, 1993).

49. The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. 42 U.S.C. § 9601(22). *Id.* at *28.

50. *Id.* at *29.

51. Lincoln needed to prove that the defendant dry cleaners were within a CERCLA class of responsible persons. The applicable CERCLA section here was 42 U.S.C. § 9607(a)(2). *Id.* at *30.

since the individual dry cleaners had stored PCE, they had the ability to control it, and therefore, the dry cleaners were "operators" under CERCLA.[52]

Ultimately, the court ruled that Lincoln successfully established all three RCRA claim elements and all four CERCLA claim elements. Therefore, "injunctive relief requiring defendants to participate in monitoring and investigating the PCE in groundwater [was] appropriate in the circumstances of this case."[53] Deciding as such, the court held the defendants jointly and severally liable. The court's sympathy towards Lincoln was derived from recognizing Lincoln's substantial financial contribution for remediation. Absent an injunction, Lincoln would have had to bear further investigation and monitoring costs *without* assistance from the polluters themselves. The court also reasoned that the defendants would still remain liable under CERCLA. Thus, the granting of a RCRA injunction would merely expedite the delivery of finances for which defendants were already liable.[54]

Important breaks with precedent have occurred in the *Lincoln* decision. Usually, property owners pay for remediation,[55] but the *Lincoln* court superseded this trend by forcing the tenants to immediately pay such costs. In *United States v. Price*[56] a lower court's denial of a preliminary injunction was sustained because "a more practical solution was to have the EPA undertake the study without delay, with [r]eimbursement... thereafter be[ing] directed against those parties found to be liable."[57] The *Price* approach was quoted in *Conservation Chemical*, a case in which RCRA and CERCLA claims were brought and the court hesitated whether or not to grant summary judgment for a plaintiff when indivisible injury is involved.[58] Although the *Conservation Chemical* court concluded that the United States was entitled to recovery costs it has incurred for environmental remediation, it declined to grant relief at the summary judgment stage because a defendant contested the indivisibility of harm.[59] However, the *Lincoln* court sidestepped these decisions. Not only did it allow summary judgment in a matter of indivisible harm, it also required the polluters themselves to undertake further monitoring and investigation.

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52. *Id.*

53. *Id.* at *24.

54. *Id.* at *25.

55. *See* United States v. Price, 688 F.2d 204 (3rd Cir. 1982); United States v. Conservation Chemical Co., 619 F.Supp. 162, 201 (D.C. Mo. 1985).

56. 688 F.2d 204 (3rd Cir. 1982).

57. United States v. Conservation Chemical Co., 619 F. Supp. 162, 201 (D.C. Mo. 1985) (citing United States v. Price, 688 F.2d 204, 214 (3rd Cir. 1982)).

58. 619 F. Supp. 162 (D.C. 1985).

59. *Conservation Chemical Co.*, 619 F. Supp. at 201.

The *Lincoln* court's reasoning behind imposing joint and several liability can be compared with the reasoning in the recent case of *United States v. Alcan Aluminum Corp.*[60] The *Alcan* court cited the Government's reasoning that individual defendants need to be held jointly and severally liable because otherwise "each defendant in a multi-defendant case could avoid liability by relying on the low concentrations of hazardous substances in its waste, while the plaintiff is left with the substantial clean-up costs associated with the defendants' accumulated wastes."[61] Nonetheless, the *Alcan* court decided that the defendant should be granted a hearing in order to determine divisibility of harm.[62] The *Lincoln* decision, on the other hand, imposed liability at the summary judgment stage without feeling the need to apportion the harm attributable to each defendant.

Determination of a chemical substance's harm to human health or the environment often involves a degree of scientific uncertainty. Both the language in the CERCLA and RCRA statutes and in the *Lincoln* opinion showed respect for scientific uncertainty. For example, in the statutory definitions,[63] hazardous waste is something that *may* cause harm. Accordingly, the *Lincoln* court did not wait for a conclusive scientific report of harm before assigning liability to the polluting tenants.

Liability follows control. Thus, it makes better sense to hold the polluting tenants directly liable instead of the landlords who merely leased to these tenants. In a shopping complex that houses over 100 stores, it is unrealistic to expect the property owners to have tight control in monitoring the daily activities of their tenants. PCE escaped from accidental spills at the dry cleaners, but Lincoln had relatively little control over such spills. Furthermore, two of the three dry cleaners were no longer in operation. If the court had ruled that Lincoln should be the first financially accountable party, Lincoln may have been burdened with the entire costs of environmental remediation.

The proper way to assign liability for environmental remediation costs is to grant injunctive relief directly against the polluters. To hold a property owner responsible for its polluting tenants thwarts the idea of placing liability on the party who best had control over the contaminants. Thus, the optimal solution is to hold the polluting tenants liable and to construe the RCRA and CERCLA statutes broadly to facilitate environmental cleanup. By following the lead of the *Lincoln* court, other jurisdictions may more equitably allocate the costs of environmental remediation.

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60. 964 F.2d 252 (2nd Cir. 1992).

61. *Alcan Aluminum Corp.*, 964 F.2d at 267.

62. *Id.* at 271.

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

42 U.S.C. § 6903(5) (1980).