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I. Introduction

In 1980, the ninety-sixth Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[1] Since CERCLA's inception, commentators and judges have complained about the inherent difficulty in interpreting the statute.[2] For many, the interpretive problem stems from the context of CERCLA's enactment. CERCLA was passed during "the waning days" of the ninety-sixth Congress just prior to the Reagan Administration.[3] On December 3, 1979 "[t]he House cleared the measure (HR 7020) . . . when it grudgingly adopted the Senate-passed version of the bill in a cliff hanger 274-94 vote under suspension of the rules."[4]

Although congressional intent in CERCLA has never been clear (due primarily to the sparse legislative record available on the statute),[5] it is widely believed that CERCLA was a congressional

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1. 42 U.S.C.A. § § 9601 *et. seq.* (1994).

2. *See generally* John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1405-1411 (1997), *quoting* Ohio ex. rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1310 (N.D. Ohio 1983) ("CERCLA was rushed through a lame-duck session of Congress, and therefore, might not have received adequate drafting."). *See also* HRW Sys., Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 327 (D. Md. 1993) ("[T]he legislative history of CERCLA gives more insight into the 'Alice-in-Wonderland'-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature."); United States v. A&N Cleaners & Launderers, Inc., 854 F. Supp. 229, 239 (S.D.N.Y. 1994) ("CERCLA is now viewed universally as a failure."); United States v. Cordova Chem. Co., 113 F.3d 572, 578 (6th Cir. 1997) ("[I]t is difficult to divine the specific, as opposed to the general, goals of Congress with respect to CERCLA liability since the statute represents an eleventh hour compromise.").

3. 36 CONG. Q. ALMANAC 584, 584 (1980).

4. *Id.*

5. *Id.* at 588.

HR 7020, which had been expected to produce fiery controversy,

reaction to environmental disasters "such as the 1977 discovery in Niagara Falls, N.Y., that the Love Canal subdivision had been built on top of a former chemical dump and that chemicals leaking from the discarded drums were poisoning residents."[6] CERCLA gave the federal government the power and the money "to act in emergencies to clean up spilled or dumped chemicals threatening public health or the environment. The government could sue the persons or companies responsible for the damages—if they could be found—to recoup cleanup costs."[7] With the government's power to sue came broad and far stretching liability for polluters, both present and past. In fact, under CERCLA, a polluter's "only defenses to liability are an act of God, an act of war or the act of a third party,"[8] suggesting Congress intended to give the federal government a powerful ally in its fight against latent pollution.

Nonetheless, if one owns polluted property, there are ways, limited though they are, to sidestep CERCLA liability; one is the "innocent landowner defense."[9] To receive "innocent landowner" protection under CERCLA, a person who owns polluted property must demonstrate, by a preponderance of the evidence, that he meets the four prongs of the basic third-party defense.[10] In determining whether the four prongs are met, a court must ask whether the innocent landowner has shown that he was not in a contractual relationship with the prior owner of the polluted property.[11] Innocent landowners include only people who acquired

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> received broad bipartisan support with only minimal floor debate when the measure reached the House floor Sept. 19 .... Sponsors said the lack of opposition was due to constituent pressure and last-minute endorsements by the chemical and oil industries. Environmental and consumer groups charged that the House superfund bills were so weak that all opposition had been compromised away.

Id.

6. *Id.* at 584.
7. 36 CONG. Q. ALMANAC at 584 (1980).
8. *Id.* at 585.
9. 42 U.S.C.A. § 9607 (b) (3); *see also* 42 U.S.C.A. § 9601 (35) (A).
10. *See* Patricia G. Copeland, *Ownership of Contaminated Property Raises Estate Planning Concerns*, 81 J. TAX'N 50, 51 (1994).
11. *Id.* Under 42 U.S.C.A. § 9601 (35) (A) of CERCLA, the term "contractual relationship,"

> for purpose of section 9607(b) (3) of this title, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, *unless* the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence: (i) At the time the defendant acquired the facility the defendant did not know and had no

property, without reason to know of a hazardous substance, after the substance entered the land, or who acquired the property through inheritance or bequest.[12] The implications of the defense would seem to be that the surest way to protect oneself from CERCLA liability is to inherit property. As it stands, "a person who receives the property through bequest after it has been contaminated will not be liable as an owner solely because of the inheritance."[13] This should provide some comfort to the innocent inheritor.

Yet, a court's inquiry does not end here, and to say that to inherit is to preclude the possibility of liability as an innocent landowner is inaccurate. In reality, a party who has acquired property through bequest and claims innocent landowner status is not entirely free from CERCLA liability.[14] By virtue of their inheritance, beneficiaries are not "potentially responsible parties" ("PRPs") under CERCLA.[15] But, PRPs who acquire property through inheritance do not receive wholesale protection from liability.[16] In order to successfully claim innocent landowner status,

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reason to know that any hazardous substance that was the subject of the release or threatened release was disposed of on, in, or at the facility. (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation. (iii) The defendant acquired the facility by inheritance or bequest.

12. *See* Copeland, *supra* note 10, at 51. To say that one "had no reason to know" that a hazardous substance was on the property is not merely to say that because one is an unsophisticated party he or she *ipso facto* had no reason to know. CERCLA has been interpreted to require a deeper and more probing inquiry than this:

> To establish that the defendant had no reason to know, the defendant must have undertaken, at the time of the acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. Under this standard, a court must take into account any specialized knowledge or experience of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

Id.

13. *Id.*

14. *Id.* (noting that "the inheritance exclusion is not automatic or absolute").

15. *Id.*

16. Copeland, *supra* note 10, at 52.

a PRP who has acquired polluted property by inheritance must affirmatively demonstrate the following: (1) the release was solely the act of a third party; (2) due care was exercised with respect to the hazardous substance; and (3) precautions were taken against foreseeable acts caused by a third party and the consequences that could result from those acts.[17]

The complexities of the innocent landowner defense and the problems interpreting CERCLA have led courts to furcated applications. Additionally, there are different views on the reason for the existence of the defense. While some courts say the defense protects innocent landowners and the state's interest in settling title to estate assets, others only pay it lip service, pointing out that it interferes with a federal court's duty to apportion liability to polluters. State property rights competing with federal environmental concerns point courts in different directions.[18] What's clear is that while being the recipient of polluted property entitles one to raise the innocent landowner defense, such a person's dealings with the property prior to the transfer may eliminate the possibility of the defense being effective.

Thus, a subjective standard or a "'sliding scale' of appropriate knowledge and inquiry" is applied when determining whether one is an innocent landowner.[19] The sophisticated corporate beneficiary is not treated the same as the unsophisticated party.[20] This "sliding scale" has the potential to create dire consequences for the beneficiary and the estate planner alike.[21] The conundrum is that

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17. *Id.*; *see also* 42 U.S.C.A. § 9607 (b) (3).

18. *See* Nagle, *supra* note 2, at 1408 ("[T]ime has failed to remedy the mistakes resulting from Congress's haste. The lower federal courts remain split concerning numerous issues raised by CERCLA. The Supreme Court rarely has intervened to resolve this confusion in the lower courts.").

19. *See* Copeland, *supra* note 10, at 52.

20. *Id.* (explaining the innocent landowner defense as applied in United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp 1341 (D.C. Idaho 1989)).

> Although the court seemed somewhat confused about the difference between the innocent landowner defense and the basic third-party defense, it did hold that, because the children who received stock by gift had no real involvement with the company or any specialized knowledge about the business of the company, their level of inquiry – i.e., none – was appropriate for their circumstances, and therefore they were not liable as owners.

Copeland, supra note 10, at 52.

21. *See id.*; *see also* Thomas A. Packer & James W. Miller, Jr., *Inheritance of Contaminated Property: Blessing or Curse?*, 10-OCT PROB. & PROP. 13, 13 (1996).

> British novelist Samuel Butler said that when you tell someone you have left him a legacy, the only decent thing to do is die at once. If a legacy includes contaminated real property, however, one might want to first warn their heir. . . . Because the scope of pollution liability for decedents'

while a number of courts have said that CERCLA does not preempt nonclaim statutes and does not reach a closed and distributed estate,[22] if a beneficiary is a professional fiduciary with intitmate knowledge of the property, a compelling argument exists for such a person's liability.[23] A fundamental conflict exists between the state's interest in settling title and the federal government's interest in refusing to recognize the defense when the beneficiary raising the defense is a sophisticated party.[24]

By looking to state environmental policy, this comment will resolve the dissension in federal courts over the primacy of nonclaim statutes versus the preemptive nature of CERCLA.[25] Part II will place the preemption question in context by providing background cases from the two strains of conclusions that federal courts have reached when confronted with the innocent landowner defense. Part III analyzes the preemption question through two cases that are representative of the dual objectives of the environment and estate administration and argues that the solution lies in the state environmental policy controlling the probate question. Lastly, Part IV concludes and explains that allowing state environmental policy to control the federal question is the best objective solution to a balanced policy issue.

> estates and trusts is growing, those who intend to make a testamentary transfer of contaminated property need to consider the environmental liability that may be transferred with it. Those who administer decedents' assets should realize that they also may be exposed to CERCLA liability.

Id.

22. *See* Witco Corp. v. Beekhuis, 38 F.3d 682 (3d Cir. 1994); *see also* Chesapeake & Potomac Tel. Co. of Va. v. Peck Iron & Metal Co., Inc., 814 F. Supp. 1285 (E.D. Va. 1993); Norfolk S. Ry. Co. v. Shulimson Bros. Co. Inc., 1 F. Supp.2d 553 (W.D.N.C. 1998). *Compare with*, Steego Corp. v. Ravenal, 830 F. Supp. 42 (D. Mass. 1993); Soo Line R.R. Co. v. B.J. Carney & Co., 797 F. Supp 1472 (D. Minn. 1992); Freudenberg-NOK Gen. P'ship v. Thomopoulos, No. C-91-297-L, 1991 WL 325290 (D.N.H. Dec. 9, 1991), all courts holding that preemption is proper.

23. *See* Copeland, *supra* note 10, at 52 (highlighting that "professional corporate defendants are held to a higher standard than private parties").

24. *Id.*

25. The Comment will center on the disparate applications of the innocent landowner defense and later move into a discussion of state environmental policy as a solution to the dissension.

II. Nonclaim Statutes, The Innocent Landowner Defense, and The Preemptive Nature of CERCLA: Two Conclusions

A. The Primacy of Nonclaim Statutes

To illustrate the "inherently unworkable" results that would follow from preempting nonclaim statutes with CERCLA, the Third Circuit in *Witco v. Beekhuis* offers a hypothetical illustrating that court's position.[26] The court asks the reader to imagine a situation in which a decedent dies today, his estate is settled within eight months, and twenty years later the decedent is named a PRP in a CERCLA suit.[27] After this, CERCLA's three-year limitations period for contribution claims begins to run,[28] and the plaintiff has three years, on top of the twenty years since the decedent's demise, to obtain a judgment against the decedent's estate.[29] For the plaintiff to collect on the judgment, the court announces that the estate's previously distributed assets will have to be traced and retrieved.[30] As the court notes, "[T]he possibility of a CERCLA claim arising long after the settlement of the estate would hang as a dark cloud over any such settlement, thereby compromising the goals of certainty and promptness in the settlement and distribution of decedent's estates."[31] For courts following the Third Circuit's position, CERCLA threatens certainty and promptness, which are both fundamental parts of property law's goal of settling title.[32] As

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26. 38 F.3d at 690, *citing* Witco Corp. v. Beekhuis, 822 F. Supp. 1084, 1090 (D. Del. 1993), *aff'd*, 38 F.3d 682 (3d Cir. 1994).

27. *Id.*

28. 42 U.S.C.A. § 9613 (g) *et. seq.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *See* Thomas A. Packer & James W. Miller, Jr., *supra* note 21, at 16.

> *Witco* provides a decedent's estate with perhaps the best overall argument in considering the congressional intent aspect of the "conflict" analysis—that probate law has historically been the sole province of the individual states. 25 Envtl. L. Rep. at 20011. If Congress had intended for CERCLA to disturb long settled estates, the court added, "pandemonium in the descent and distribution of descendents' estates" could ensue. [*Id.*] The court also pointed to the availability of the innocent landowner defense to those who received contaminated property by inheritance as further evidence that Congress intended to allow state law to control the descent and distribution of property. The court in *Witco* also found that a non-claim statute simply governs the capacity of a party to be sued and that Congress intended for state law to govern this issue. This is consistent with Rule 17 (b) of the Federal Rules of Civil Procedure, which requires that state law determine the capacity of an individual to be sued. Also, several courts have held that the

the court points out, "[I]t is untenable that Congress intended to reach so deep into the domain of state probate administration and use the heavy hand of CERCLA to disturb and upset long-settled estates."[33]

The Third Circuit finds support for this position in several aspects of CERCLA,[34] but the most telling aspect, for purposes of this discussion, is the existence of the innocent landowner defense.[35] This defense indicates to the court "strong congressional intent not to modify state probate law."[36] For the Third Circuit, the innocent landowner defense exists because Congress did not want "to disturb state law controlling the descent and distribution of property."[37] In other words, the innocent landowner serves the goal of the states in their nonclaim statutes, namely preserving a clean title. On this theory, the innocent landowner defense is a concession to common law property rights rather than a concern with innocence, as the courts who endorse preemption might argue.

The Third Circuit is not alone among courts that have found preemption to be an unworkable hypothesis in light of the concession explanation for the innocent landowner defense. For example, the Eastern District of Virginia concluded much as the Third Circuit did,[38] although reaching its outcome along a different

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capacity of a dissolved corporation to be sued under CERCLA is determined by state law. *See* Levin Metals Corp. v. ParrRichmond Terminal Co., 817 F.2d 1448 (9th Cir. 1987); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

Id.

33. *Witco*, 38 F.3d at 690.

34. *See id.* at 688-691.

> First, and most significantly, a state's interest in the prompt settlement of its citizens' estates is particularly strong. Probate law, like real estate law and domestic relations law, has traditionally been within the province of the individual states .... Second, by analogy, we can infer strong congressional intent not to modify state probate law. Congress expressly endorsed traditional rule of property descent by creating an exception to the CERCLA liability scheme called the "innocent landowner defense" under 9607 (b) (3) .... Third, we agree with the analysis of the district court that Congress did not intend to modify state law governing capacity of a party to be sued .... Last, we conclude that for pragmatic reasons, Congress could not have intended for CERCLA to preempt state nonclaim statutes.

Id.

35. *Id.*; *see also* 42 U.S.C.A. § 9607 (b) (3); 42 U.S.C.A. § 9601 (35) (A).

36. *Id.*

37. *Witco*, 38 F.3d at 689.

38. *See* Chesapeake & Potomac Tel. Co. of Va. v. Peck Iron & Metal Co., Inc., 814 F. Supp. 1285, 1292 (E.D. Va. 1993) (holding that "fully disseminated and closed estates, whose beneficiaries do not remain involved in the decedent's

path. In *Chesapeake & Potomac Telephone Co. v. Peck Iron & Metal Co., Inc.*, the defendants were businesses that had made a sale of lead batteries discharging pollutants onto the property subject to CERCLA liability.[39] The current owners of the property had named "66 defendants . . . all of whom allegedly made at least one direct sale of spent lead-acid batteries to C&R Battery Company [the prior owner]."[40] The defendants all sought to avoid joint and several liability for cleanup of the site, and virtually all of these attempts were denied with the exception of one.[41] A company called "Hyman Viener & Sons" had admittedly "sold spent lead acid batteries to C & R Battery."[42] Maurice and Reuben Viener were general partners to the company at the time the batteries were sold.[43] Since the sale of the batteries and the commencement of Chesapeake's action, however, both Maurice and Reuben had died.[44] The court announced that "there appears to be no dispute over the fact that Maurice and Reuben Viener are jointly and severally liable as a result of the sales,"[45] but whether their estates would be liable was another issue altogether.[46]

Rather than approach the problem as the Third Circuit did in *Witco*, the Virginia court examined the issue in light of the way

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activities which gave rise to CERCLA liability—except by virtue of inheritance—are not covered under CERCLA and are not subject to liability").

39. *See id.* at 1285 (the following host of defendants raised motions for summary judgment: Alexandria Scrap Corp., Bruce Iron & Metal, Inc., Cambridge Iron & Metal Co., Coiners' Scrap Iron & Metal, Inc., Cox Armature Works, Inc., Exxon, Robert Fannin t/a Tri-State Copper, H.J.C. Penney Co., Inc., Master Metals, Midwest Corp., New Castle Battery Mfg. Co., Pocket Money Recylcing Co., Inc., Solotken, Thomas and S&T, Union Corp. All motions were denied).

40. *Id.* at 1286-1287.

41. *See id.* at 1287-1293 (stating that "despite the exhaustive rebriefing the Court has received on the issue of joint and several liability, it will not be revisited . . . the law of this case is that the harm visited upon C&R Battery site is indivisible and that the liability of responsible defendants will be joint and several."). The only party against whom plaintiff was not entitled to summary judgment was the Viener Estates. 814 F. Supp. at 1292.

42. *Id.*

43. *Id.* Whether CERCLA preempts the dissolution of a corporation under state corporate law is a question not unlike that of whether it preempts state nonclaim statutes. Interestingly, the defendants made the argument that since they were the beneficiaries of the Viener estate they were "analogous to fully dissolved —or 'dead and buried'—corporations which, as the Court has already held, are not liable under CERCLA."

44. *Id.*

45. 814 F. Supp. at 1292.

46. *Id.* ("Both parties stipulate that that the Viener Estates have been closed and their assets fully distributed. Furthermore, both parties agree that neither the Viener Estates nor their beneficiaries were involved in the operations of the Hyman Viener & Sons partnership [defendant] following the death of Maurice and Reuben Viener.").

CERCLA defines "person."[47] The Viener's argument, surprisingly, made no mention of the innocent landowner defense.[48] Instead, they argued "they [were] analogous to fully dissolved—or 'dead and buried'—corporations which, as the Court already [had] held, are not liable under CERLCA."[49] This argument was successful, and the court analogized the Viener's closed estate to that of a closed and dissolved corporation.[50] The court, however, following the reasoning of the Third Circuit, said on its own "the explicit provisions in CERCLA creating an 'innocent landowner defense' for parties who merely acquire contaminated property by inheritance demonstrate Congress'[s] intent that a person should not be subjected to CERCLA liability merely because property has been inherited."[51]

Clearly, there is an inferential step between saying a party is an innocent landowner under CERCLA and saying the same party is not liable, because Congress could not have intended for him to be. Finding congressional intent in CERCLA is a taxing ritual, because, at best, Congress knew broad policy reasons for in its enactment, most of which it did not record.[52] To say that Congress intended for CERCLA to eschew liability for beneficiaries on the grounds that they are successors and there is a provision called the innocent landowner defense is an inferential leap. So, even though the reasoning behind both the Third Circuit and the Virginia court's

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47. *See id.*, *comparing* Bowen Eng'g v. Estate of Reeve, 799 F. Supp. 467. (D.N.J. 1992) *aff'd*, 19 F.3d 642 (3d Cir. 1994) *with* Snediker Developers Ltd. P'ship v. Evans, 773 F.Supp. 984 (E.D. Mich 1991). A liable person under CERCLA includes "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 [emphasis added]." 42 U.S.C.A. § 9607(a)(2). In *Bowen*, the court reasoned, "[T]he provisions of § 9607(a), including the definition of a 'person,' must be read broadly to impose the costs of cleanup upon those responsible for the release of hazardous materials." 799 F. Supp. at 475. The court held that "a decedent's estate may be held liable for cleanup costs." *Id.* In *Snediker*, on the other hand, the court held that "an operator of a facility may not be liable for cleanup costs under § 9607(a)(2) unless there is some nexus between his or her role as operator and the decision to dispose the hazardous waste." 773 F. Supp. at 990. The differing interpretations in the courts reflect the conflicting assumptions that are brought to the table when interpreting CERCLA.

48. *Chesapeake & Potomac,* 814 F. Supp. at 1292.

49. *Id.*

50. *See id.* (noting "the estates position is meritorious, and the Court will deny summary judgment as it pertains to them"). The court further noted that "the beneficiaries do not become covered persons under CERCLA simply because they inherited from someone else who was such an entity." *Id.*

51. *Id.*, *citing Snediker*, 773 F. Supp at 990.

52. *See* Nagle, *supra* note 2, at 1405-1411; *see also* 36 CONG. Q. ALMANAC at 588 (1980).

interpretation may be logically sound, to say that Congress intended what these courts have posited may be to attribute an intent that was never there. What's more, the interpretation that these cases have given CERCLA has caught on in other jurisdictions.

In *Norfolk Southern Railway v. Shulimson*, a North Carolina District Court, in the tradition of *Chesapeake*, held that "fully distributed and closed estates whose beneficiaries have not been involved in the activities which gave rise to CERCLA liability by any method other than inheritance are not subject to liability under the statute."[53] In *Norfolk*, the defendants, Benjamin, William, and Morris Shulimson, owned a corporation that operated a sheet metal recycling plant on plaintiff's parcel of land.[54] The plaintiff's predecessor first leased the property to the defendant's partnership in 1956, but by 1958, the partnership had become a corporation.[55] By the time the CERCLA action was initiated in 1997, Benjamin was the sole surviving member of the original partnership.[56] The plaintiff initiated the action against Benjamin and the children of his partners.[57] The only issue before the court in *Norfolk* was "whether or not the distributees of William and Morris under their wills may be included in the definition of 'responsible person' or may be held accountable under a trust fund theory."[58] The court answered this question in the negative, noting that its decision would not preclude cleanup.[59]

Norfolk was an important case, not because of its holding and its impact on clean-up, but because of its policy discussion in which

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53. Norfolk S. Ry. Co. v. Shulimson Bros. Co., Inc., 1 F. Supp.2d 553, 558 (W.D.N.C. 1998).

54. *Id.* at 554.

55. *Id.* ("[B]eginning in 1991, the lease provided that the land could not be used for any purpose other than storage and handling of non-contaminated ferrous and non-ferrous metals and recyclable materials.").

56. *Id.* at 555. William Shulmison died in 1983 leaving "three children, Jack, Natalie and Bernard, who received distributions from his estate." *Id.* Morris died in December 1992 leaving "his widow, Sonja, and one living child, Gina, both of whom received distributions." 1 F. Supp. at 555.

57. *Id.* The defendants, besides the Shulimson Corporation itself, were Benjamin, Sonja, William's three children, Gina, and Morris's Grandson, Alan. They were sued for the express purpose of recovering "the costs of hazardous waste clean-up required by federal (... CERCLA) and state law (North Carolina Oil Pollution and Hazardous Substances Control Act of 1978)." *Id.*

58. *Id.* at 556.

59. *See id.* at 558 (stating "the fact that plaintiff as the property owner may not be able to recoup contribution from all responsible parties in no matter prevents the actual clean-up which has begin and apparently continues at the site").

the *stare decisis* from *Witco* was imbedded in the court's reasoning.[60] Diving immediately into the issue of whether CERCLA preempted the North Carolina nonclaim statute, the court proceeded to invoke the Third Circuit's *Witco* decision.[61] The court found the Third Circuit's reasoning compelling and was also able to draw on the Sixth Circuit's guidance from *United States v. Cordova Chemical Co.*,[62] where that court noted that "the widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue."[63]

So, as *Norfolk* tends to show, the Third Circuit's reading of CERCLA has become authoritative outside of that jurisdiction. If you follow these earlier judgments and their continuing influence, it becomes clear that a court can mount congressional intent in CERCLA to champion opposite views. On the one hand, courts often say Congress contemplated a statute directing courts to find broad liability.[64] On the other hand, courts will say Congress intended to create an exception to liability in these limited cases; otherwise there would not be an innocent landowner defense.[65] These courts caution, "[T]he widest net possible ought not be

60. *See Norfolk*, 1 F. Supp. at 555-558. The court relies on many cases to analyze the question of estate liability under CERCLA, the two most notable being *Witco* and *Chesapeake & Potomac Tel. Co.*. *Id.* Of equal importance to the court's analysis, however, is the Fourth Circuit's decision in Westfarm Assoc., Ltd. v. Washington Suburban Sanitary Comm'n, 66 F.3d 837, 677 *cert. denied* 517 U.S. 1103 (4th Cir. 1996), handed down in 1995. This case, as the North Carolina court notes at the beginning of its discussion, instructs courts "to construe [the CERCLA] provisions liberally to avoid frustrating the legislature's purpose." *Id.* The suggestion that courts must construe CERCLA, the placement of this language at the beginning of the court's opinion, and the limited discussion of specific sections of CERCLA in its analysis are all indications of the great weight courts have given to legislative intent and jurisprudential interpretation as CERCLA has evolved.

61. *Id.* at 555. The *Norfolk* court adopted the propositions that "probate matters traditionally have been nearly the exclusive concern of the states," and Congress created the innocent landowner defense "in order not to disturb state law controlling the descent and distribution of property" from the *Witco* opinion. *Witco*, 38 F.3d at 687-689.

62. 113 F.3d 572, 578 (6th Cir. 1997), *cert. granted*, 522 U.S. 1024 (1997).

63. *Id.* Even though courts have had a tendency to draw on legislative intent as a means for interpreting CERCLA, almost always extolling the virtues of its broad remedial purposes, some still realize that "courts would not be warranted . . . in pointing to the "remedial legislation" litany as a reason for filling in the blanks left by this sketchy legislative history to impose liability under nearly every conceivable scenario." *Id.*

64. *See supra* note 2 (beginning with *Freudenberg* and ending with *Steego*).

65. *See supra* note 2 (beginning with *Witco* and ending with *Norfolk*).

cast."[66] In light of this disagreement, other courts are willing to cast the net.

B. Preempting State Nonclaim Statutes

In a series of opinions from the early nineties, starting with *Freudenberg-NOK v. Thomopoulos* in 1991 and culminating with *Steego Corp. v. Ravenal* in 1993, three district courts held that successors in interest and recipients of polluted property in trust or through bequest could not successfully assert the innocent landowner defense.[67] These courts unanimously found that CERCLA preempted state nonclaim statutes despite CERCLA's innocent landowner defense.

The first *Freudenberg* involved cleanup of the Auburn Road Landfill Superfund Site in Londonderry, New Hampshire.[68] The plaintiff sued to recover the costs of investigating and responding to hazardous contamination at the site.[69] One of the parties whom the EPA designated a PRP was George Thomopoulos, the former owner and operator of the site.[70] The property at Auburn Road had been transferred to George's executor, Charles Thomopoulos, when George's estate was admitted to probate in New Hampshire in 1990.[71] Charles was subsequently named defendant in the suit.[72]

In an opinion denying Charles' motion to dismiss, the court held that "plaintiff is not time-barred by N.H. RSA 556:2 and 556:3 [New Hampshire's nonclaim statute] in bringing the present action pursuant to CERCLA . . . ."[73] At the outset, the court noted that the New Hampshire nonclaim statute and CERCLA's statute of limitations were in conflict, and preemption was the central issue.[74] The court looked to *Jones v. Rath Packing Co.* where the U.S. Supreme Court said, "Congress may preempt state law by expressly providing for preemption."[75] But given that CERCLA did not expressly provide for preemption, this case did not provide a

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66. *Cordova Chem.*, 113 F.3d at 578.
67. *See* Freudenberg-NOK Gen. P'ship v. Thomopoulos, No. C-91-297-L, 1991 WL 325290, *4 (D.N.H. Dec. 9, 1991); Soo Line R.R. Co. v. B.J. Carney & Co., 797 F. Supp. 1472, 1484-1486 (D. Minn. 1992); Steego Corp. v. Ravenal, 830 F. Supp. 42, 46-48 (D. Mass. 1993).
68. *Freudenberg*, 1991 WL 325290 at *1.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Freudenberg*, 1991 WL 325290 at *4.
74. *Id.* at *2.
75. 430 U.S. 519, 525 (1977).

satisfactory answer, and the *Freudenberg* court felt the need to look elsewhere. Looking to its own jurisprudence, the court adopted the proposition that a federal court was not limited to the express language of a statute in deciding whether CERCLA preempted state law.[76] In stark contrast, New Hampshire state case law had long ago provided that the purpose of the state nonclaim statute was to "secure the speedy settlement of estates."[77] Under the nonclaim statute, plaintiff was required to bring his claim against the Thomopoulos estate within six months of its publication; he had not.[78] To counter this point, plaintiff argued that CERCLA preempts the nonclaim period.[79] The *Freudenberg* court accepted this argument.[80] The court also accepted the proposition that CERCLA "should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs beyond those expressly provided."[81]

Subsequently, two courts followed the holding in *Freudenberg*. In 1992, the first court, the U. S. District Court for the District of Minnesota in *Soo Line Railroad Co. v. B.J. Carney & Co.*, agreed with the principle enunciated in *Freudenberg*.[82] The *Soo Line* court was even more emphatic than the *Freudenberg* court, saying, "[T]o the extent that state law purports to release responsible parties from liability for releasing hazardous wastes into the environment,

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76. 1991 WL 325290 at *2, *quoting* Davis v. Britton, 729 F. Supp. 189, 191 (D.N.H. 1989), *quoting* Fid. Fed. Sav. & Loan Assoc. v. De La Cuesta, 458 U.S. 141, 153 (1982) ("[A]bsent an express intention by Congress, courts must consider the federal scheme of legislation, the role of the states in that scheme, and whether the field of legislation is one in which the federal interest is so dominant 'that it precludes enforcement of state laws on the subject.'").

77. Coffey v. Bresnahan, 506 A.2d 310, 314 (N.H. 1986), *citing* Sullivan v. Marshall, 44 A.2d 433, 434 (N.H. 1945).

78. *See* N.H. REV. STAT. ANN. § 556:2, 3 (1919).

79. *See Freudenberg*, 1991 WL 325290 at *3, *citing* Tulsa Prof'l Collection Serv. Inc. v. Pope, 458 U.S. 478, 490 (1987) (holding that actual notice of deadline in nonclaim statute must be given). Based on *Tulsa*, plaintiff argued Charles Thomopoulos's duty to provide actual notice of the deadline and the fact that CERCLA preempts state law trumped the six-month deadline in the nonclaim statute. *Freudenberg*, 1991 WL 325290 at *3.

80. *Id.*, *quoting* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1111-1112 (D. Minn. 1982). The *Freudenberg* court buttressed its holding with the *Reilly Tar* decision where that court said, "Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal." *Id.*

81. *Reilly Tar*, 546 F. Supp. at 1112.

82. *See* 797 F. Supp. at 1485.

CERCLA preempts state law."[83] The second court to follow *Freudenberg*, was the U. S. District Court for the District of Massachusetts, which in 1993, held that "CERCLA preempted the Rhode Island Probate Code statute of limitations."[84] Much like *Soo Line*, the *Steego* court found support for preemption due to "CERCLA's broad remedial purpose and Congress's expressed intent that those responsible for hazardous waste sites bear the cost of cleaning them up . . . ."[85]

The significance of *Steego*, however, was not merely in that it favored preemption. The court also apportioned liability far down the hereditary chain. The court refused to follow Rhode Island Probate Law, and, after a narrow interpretation of CERCLA's innocent landowner defense, the court found that the innocent landowner defense did not apply.[86] In *Steego*, the defendants named in the CERCLA action spanned three generations.[87] From 1945-1968, the Cornell Corporation, consisting of Alan and Mildred Ravenal and their son Earl, owned the site.[88] During the Ravenal's tenure of ownership, the site was contaminated and subsequently sold to the plaintiff.[89] Prior to sale, however, Earl had transferred his interest in the site to his children.[90] Alan and Mildred had executed a will distributing their interest to Earl and his children.[91] In Steego's suit against the Alan and Mildred Ravenal estate, Earl's children claimed innocent land-owner status.[92] The court found that even though Earl's children could demonstrate that the release was caused by the act or omission of a third party, they had acquired their interest through a contractual relationship.[93] Because they had acquired their interest via contract in 1969 and the leakage of chemicals continued through 1974, they were not entitled to claim innocent landowner status.[94] Clearly, the *Steego* court cast a very wide and forward reaching net. The Ravenal grandchildren's connection to the contaminated site was tenuous at best, and when

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83. *Id.*
84. *Steego*, 830 F. Supp. at 47.
85. *Id.*, *quoting* United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1496 (D. Utah 1987).
86. *Id.* at 46-48.
87. 830 F. Supp. at 45.
88. *Id.*
89. *Id.*
90. *Id.* (the children were Cornelia, John, and Rebecca Ravenal).
91. *Id.* at 46.
92. *Id.* at 51-52.
93. 830 F. Supp. at 51-52; *see also* 42 U.S.C.A. § 9601 (35) (A), *supra* note 11.
94. *Id.* at 52.

the hazardous chemical began leaching onto the property, the grandchildren were truly innocent.

Yet, the troubling aspect of *Steego* is that the court's interpretation of the innocent landowner defense is entirely plausible. Given that the Ravenal grandchildren were contractually connected to their forbearers as CERCLA defines "contractual relationship" and the release of chemicals continued past the point of their acquisition,[95] the sins of the father were literally visited on the children's heads. Under the *Steego* interpretation of the defense, the significant event for meeting the "after the disposal or placement of the hazardous substance" prong is not the dumping of waste, but the ongoing leaching of chemicals.[96] Because the leaching was ongoing during the first five years of the grandchildren's possession, the grandchildren were not entitled to reach the latter prongs of the defense where a court might consider subjective elements of innocence.[97]

In sum, the *Steego* court and others who have cast the widest net possible purport not to reach their conclusion through a congressional intent regime. By reading the innocent landowner defense narrowly, these courts appear to have found a textual answer to their conclusion that Congress meant for CERCLA to provide a sweeping solution to the pollution crisis. But upon close examination, they too look to congressional intent.

III. Finding an Objective Starting Point to a Balanced Question

Witco is indicative of the reasoning that says nonclaim statutes have primacy over CERCLA. The Third Circuit has said that complying with both a nonclaim statute and CERCLA is possible but difficult.[98] The court indicates, "[T]here will be instances where a PRP seeking contribution will find it impossible to comply with both a state nonclaim statute and the CERCLA statute of limitations."[99] Yet, the court sees this concern as secondary to "whether a nonclaim statute stands as an obstacle to congressional intent."[100] The court concludes that nonclaim statutes pose no such obstacle, because Congress incorporated the "innocent landowner

95. *See* 42 U.S.C.A. § 9601 (35) (A); *see also supra* notes 11-12 and accompanying text.
96. 42 U.S.C. § 9601; *see supra* notes 11-12 and accompanying text.
97. *See* Copeland, *supra* note 10, at 52.
98. *See Witco*, 38 F.3d at 688.
99. *Id.*
100. *Id.*

defense" in CERCLA.[101] Therefore, because of the primacy of probate law and the "strong congressional intent" not to impugn that law,[102] CERCLA does not preempt state nonclaim statutes. The proponents of preemption seemingly do not need to resort to questions of congressional intent as the *Witco* court did, but this concept is deceptive.

As *Steego* illustrates, preemption need not be included in a discussion of the innocent landowner defense. The court separates the two discussions favoring one subheading for "timeliness of claims"[103] where the court concludes, "CERCLA preempts state laws which have the effect of limiting the liability of those who Congress intended to be responsible for cleanup costs."[104] Under the subheading "innocent landowner defense," the court engages in an analysis where it strictly construes the statute and holds the proponents liable[105] because the proponents did not acquire the tainted property "after the disposal or placement of the hazardous substance."[106] Oddly, while the more conservative opinion, *Witco*, presents an analysis heavily laden with discussion of congressional intent, the more liberal opinion, *Steego*, purports to offer an opinion that is a strict application of law to facts.[107]

Both positions are misleading, however, because the policy behind each conclusion is heavily laden with speculation on congressional intent. The *Witco* court is more forthright in stating that it believes Congress could not possibly have intended to interfere with probate law.[108] The *Steego* court makes no express mention of congressional intent, but impliedly does so by supposing to know exactly "who Congress intended to be responsible for cleanup costs."[109] Assumedly, the *Steego* court believes Congress intended and public policy is served by holding the Ravenal children responsible as non-innocent PRPs. In reality, both conclusions are flawed as the result of trying to know congressional intent.

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101. *Id.* at 689; *see also* 42 U.S.C.A. § 9607 (b) (3), *supra* note 9 and accompanying text.

102. *Id.*

103. 830 F. Supp. at 46-48.

104. *Id.* at 48.

105. *See generally* 830 F. Supp. at 51-52.

106. *Id.* at 52, *quoting* 42 U.S.C. § 9601 (35) (A).

107. The term "conservative" here means simply that the conclusion in *Witco* is favorable to the federalist notion that the federal government's power should be limited on questions traditionally reserved to the states. The term "liberal," on the other hand, indicates a result favorable to having the federal government intervene in matters of national concern.

108. *See* 38 F.3d at 690.

109. 830 F. Supp. at 48.

Given that both courts, and courts that have followed those courts, seem content on engaging in questions of intent,[110] the solution to the problem is far from clear. Intuitively, the solution would result in an analysis yielding consistent answers to the question: How far down the consanguineous chain does Congress want CERCLA liability to travel? Consistency, however, is not the answer.

Traditionally, on questions of inconsistency in statutory interpretation, lower federal courts have looked to the Supreme Court for uniformity when they have failed to find it. Rationality suggests the same be done here. But the Supreme Court has been scrupulous in not addressing CERCLA,[111] and this is for the best. The clashing views on the innocent landowner defense and the mounting of congressional intent to support opposite positions in factually similar cases should *not* be resolved. By not resolving the conflict, CERCLA and state probate law's dual objectives may be served.

The mechanics of probate law's settling title serves promptness and efficiency, not environmental accountability. The mechanics of CERCLA serves liability and accountability with little concern for promptness and efficiency. As the debate stands, the opposing positions are mutually exclusive. Rather than fighting the exclusivity, courts should make a three-pronged foray into two state policies and one federal consideration.

First, a court should consider what the state legislature and the state judiciary have said concerning the state's commitment to environmental liability and accountability. Second, a court should consider the state's commitment to assuring its residents' timely disposition and closure of estate assets (*i.e.*, how long after the time of death does the law preclude all claims against a decedent's estate?). Finally, the court should consider the purposes of CERCLA. The latter two prongs are already part of a courts' consideration. As the analysis stands, the second and final

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110. *See supra* notes 50-53 and accompanying text.

111. *See* Nagle, *supra* note 2, at 1410 (noting that "because the lower federal courts cannot turn to past Supreme Court cases or to existing administrative interpretations for guidance, CERCLA's drafting problems are magnified"); *see also*, *supra* note 2, at 1426.

> [M]uch of the Supreme Court's statutory interpretation docket consists of issues that divide the lower federal courts, and the Court often declines to consider an issue until such division exists. The problem with CERCLA is that the Court has not been unwilling to decide such questions, even once a division manifests itself. Such unwillingness is understandable when one considers that the Justices have far more interesting issues to decide than whether Congress committed drafting errors . . . .

Id.

considerations are in balance, and courts have been entirely willing to debate whether the second or the final prong contains the more compelling policy. In order to tip the balance, courts must make the additional consideration of a state's environmental interests. This will be the deciding variable. Not requiring national consistency from federal courts and allowing them the freedom to adapt their positions to be consistent with a state's interest will result in the most reasonable answer to the question, how far down the consanguineous chain should CERCLA liability travel?

A. A Foray Into Delaware Environmental Policy as a Way to Balance Equally Compelling Objectives

Turning back to *Witco*, the primary question before the court was whether CERCLA should preempt the Delaware nonclaim statute.[112] The court concluded that it should not, because first, the state has an interest in the prompt settlement of its residents estates; second, there is strong congressional intent not to modify state probate law; third, Congress did not intend to modify state law governing the capacity of a party to be sued; and finally, for pragmatic reasons, Congress could not have intended for CERCLA to preempt state nonclaim statutes.[113]

The Third Circuit's resolution of the issue has support in both federal and state law. On the federal side, CERCLA's innocent landowner defense suggests a congressional predisposition "not to disturb state law controlling the descent and distribution of property."[114] Furthermore, the pragmatic concerns, which the Third Circuit garners from the district court's opinion, are genuine; disturbing a long-settled estate could create havoc in estate administration.[115] On the state side, Delaware has a bedrock case history explaining the legislative purpose of its nonclaim statutes.

As early as 1942, in *Brockson v. Richardson Brothers*,[116] the Superior Court of Delaware explained the clear and evident legislative intent of Delaware's nonclaim statute: "[t]he intent and purpose is to compel claimants with demands against decedent's estate [and] . . . to present their claims within the specified time, and when their claims are rejected to seek prompt enforcement thereof, so that decedent's estates can be settled within a

112. *See* 38 F.3d at 687.
113. *Id.* at 689-690.
114. *Id.* at 689.
115. *See id.* at 691 *citing Witco*, 822 F. Supp. at 1090.
116. 24 A.2d 537 (Del. Super. 1942).

reasonable time."[117] Even more compelling is the 1976 case, *Estate of Thomas Holton*, where the Delaware Court of Chancery denied the state's claim against a closed estate, because allowing the state to maintain the claim would frustrate the "prompt distribution of the assets of the estate[,] . . . the ultimate goal of the statute."[118] In only one case did the Supreme Court of Delaware say that other law might overcome the state nonclaim statute.[119] Thus, on the basis of the Delaware judiciary's statements on its probate law, the Third Circuit was right to conclude that estate administration is of particular importance to Delaware.

Yet, of no less importance is the congressional purpose in CERCLA "to provide the federal government with broad powers to effectively respond to existing and future [environmental] . . . problems and to ensure 'that those responsible for problems caused by the disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created.'"[120] In essence, the two purposes are of equal importance, especially when a state has put environmental concerns at its forefront.

On the one hand, settling title to an estate promptly and efficiently is a compelling state objective, but of equal importance is holding responsible those who pollute the environment. Sometimes this latter concern is as important to the state as it is to the federal government. To break this tie, a federal court's analysis of the issue must go beyond the traditional comparison of federal environmental goals with those of the state's property law. If the two goals are compared, courts resort to questions of legislative intent, favoring the intent the court fortuitously finds more compelling. The state property law goal swayed the *Witco* court, which preferred the state's law over CERCLA. When a court compares the state goal with the CERCLA goal, it always yields a non-objective comparison ending in the question: Is environmental accountability or state probate law more important?

As the goals of the two bodies of law are somewhat balanced in their respective importance depending on a court's ideological starting point, when applying CERCLA, federal courts should

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117. *Id.* at 539.

118. No. 4682, 1976 WL 5206, at *3 (Del.Ch. Aug. 17, 1976).

119. Gwaltney v. Scott, 195 A.2d 247, 248-249 (Del. 1963). In *Gwaltney* the court considered "whether a claim for wrongful death against a decedent's estate must be made within the nine-month period of our so-called 'non-claims [sic] statute,'" and concluded that "[*Brockson*] must be overruled if it was meant to suggest that claims . . . arising *ex delicto* fall within the purview of the 'non-claims' statute." *Id.*

120. *Reilly Tar & Chem. Corp.*, 546 F. Supp. at 1112.

make an additional inquiry. Courts should ask what a given state's government has said regarding environmental accountability and responsibility. This should be considered in addition to and equal to a state's position on estate administration. Federal courts must examine state law controlling the probate question asking how strict are a state's environmental laws and how has the state's judiciary resolved environmental questions. The answer to their questions would allow the court to answer the federal question without having to engage in a comparison leading to haphazard results.

In *Witco*, the court would have looked to Delaware environmental law. In 1990 the Delaware General Assembly passed the Delaware Hazardous Substance Cleanup Act ("DHSCA").[121] The Delaware Assembly passed DHSCA recognizing that "large quantities of hazardous substances are and have been generated, transported, treated, and stored within the [s]tate," "that some hazardous substances have been stored or disposed of at facilities in the State in a manner insufficient to protect public health or welfare or the environment."[122] In light of these findings, the Delaware Assembly believed "the release of a hazardous substance constitutes an imminent threat to public health or welfare or the environment of the State."[123] Thus, the Assembly's purpose in DHSCA was to implement a stringent environmental response plan.[124]

For purposes of this discussion, however, the most telling part of DHSCA is the method by which the Assembly proposes to obtain funds for the cleanup. The statute declares, "[P]rivate parties should be provided with encouragement to exercise their responsibility to clean up the facilities for which they are responsible."[125] In addition, DHSCA provides that "in order to effectuate the purposes . . . [the liability section] shall apply to all responsible parties without regard to the date of enactment of this Act or any amendments thereto."[126] Not only does the Act mirror the pervasive hand of CERCLA, the Act's liability section purports

121. *See* DEL. CODE ANN. tit. 7, §§ 9101-9120 (1990).
122. *Id.* at § 9102.
123. *Id.*
124. *Id.* One of the statute's more notable purposes is to "exercise the powers of the State to require prompt containment and removal of such hazardous substances, to eliminate or minimize the risk to public health or welfare or the environment, and to provide a fund for the cleanup of the facilities affected by the release of hazardous substances." *Id.*
125. tit. 7, § 9102.
126. *Id.*

to reach "any person" who engaged in a limitless number of activities that might have contributed to pollution.[127]

Generally, the statute exudes the strong-arm policy characteristic of CERCLA, making Delaware's environmental law equally pervasive. The existence of DHSCA illustrates Delaware's commitment to cleaning up the environment. But like CERCLA, there still exists the question as to how deep that commitment runs. The case law interpreting Delaware's environmental law is limited. Yet, Delaware's courts have made a pronouncement concerning that state's commitment to environmental liability and accountability.

In *Wilson v. Triangle Oil Co.*, the Delaware Department of Natural Resources and Environmental Control ("DNREC") sued Sun refineries pursuant to the Delaware Underground Storage Tank Act ("DUSTA") when Sun contaminated a town's water.[128] When Sun moved for summary judgment on the grounds that DUSTA did not apply retroactively, the Delaware Superior Court granted the motion, explaining that the legislature designed DUSTA to deal only with underground storage tanks.[129] Of course, the results in *Wilson* were unfavorable from an environmental standpoint.

Regardless, the decision and its timing reflect an attitude for extending state law to hold more polluters accountable for their environmental mistakes. Although DUSTA was not a retroactive law, less than a year after *Wilson*, Delaware's General Assembly passed DHSCA, which would have been directly applicable to the

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127. *See generally* tit. 7, § 9105.

Standard of Liability.

(a) The following persons are liable with respect to a facility from which there is or has been a release or imminent threat of release, except as provided in Subsection (c) of this Section.

(1) Any person who owned or operated the facility at any time.

(2) Any person who owned or possessed a hazardous substance and who by contract, agreement or otherwise arranged for disposal or treatment of a hazardous substance at the facility.

(3) Any person who arranged with a transporter for transport, disposal or treatment of a hazardous substance to the facility.

(4) Any person who generated, disposed of or treated a hazardous substance at the facility.

(5) Any person who accepted any hazardous substance for transport to the facility, when the facility was selected by the transporter.

(6) Any person who is responsible in any other manner for a release or imminent threat of release.

Id.

128. 566 A.2d 1016, 1017 (Del. Super. Ct. 1989).

129. *Id.* at 1018-1020.

defendants in *Wilson*. This factor, along with the 138th General Assembly's 1995 expansion and revision of DHSCA,[130] reflects Delaware's primary and continually growing interest in environmental accountability and responsibility.

This foray into Delaware environmental policy yields a predictable conclusion. The *Witco* decision was proper if a court only compares the state's interests in estate administration with that of the federal government in CERCLA. But if the *Witco* court had considered Delaware's commitment to environmental concerns and the state's growing interest in the remedial correction of latent pollution, it might have concluded differently. In other words, because Delaware has made a genuine commitment to supporting CERCLA, that factor should, in the future, be part of a court's analysis. A court should use it to weigh the importance of estate administration in light of growing environmental concerns. When a court determines that a state has made a genuine commitment to the environment, it should think twice before placing the promptness and efficiency of estate administration above strict accountability and liability for environmental disasters.

B. A Foray Into Rhode Island Environmental Policy as a Way to Balance Equally Compelling Objectives

For comparison, this new analysis I am proposing might be conducted on Rhode Island's environmental policy to determine whether the *Steego* court was right to conclude as it did.[131] In *Steego*, although the court never specifically mentions any congressional intent at play in its decision, the court implies that, in CERCLA, Congress intended to reach closed and distributed estates.[132] Rhode Island has case and statutory law comparatively weak in its commitment to the timely and efficient settlement of estates.

In the case *Chatigny v. Gancz*, the Supreme Court of Rhode Island laid a foundation for that state's probate administration when the court said, "[A] probate court is not warranted in

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130. Delaware Hazardous Substance Cleanup Act, *supra* note 122 at § 9102 (1990) (codified as amended DEL. CODE ANN. tit. 7, § 9102 (c) (1995)). The amendment notes Delaware's additional goal "to remedy contaminated facilities and to promote opportunities and provide incentives to encourage the remedy of such facilities." *Id.*

131. 830 F. Supp. at 47 (the court held, "CERCLA preempts state laws which have the effect of limiting the liability of those who Congress intended to be responsible for cleanup costs").

132. *Id.* at 48.

entertain-ing a petition for leave to file a claim out of time when a final distribution [of an estate] has been made."[133] The court's decision was primarily based on Rhode Island General Law 33-11-5 which requires creditors to file claims within six months of the appoint-ment of the estate executor or administrator (although not called one, it is a nonclaim statute).[134] Seemingly, Rhode Island's laws are as strict as Delaware's.

Yet, in Rhode Island, if a creditor does not meet the six-month deadline, the probate court, in its discretion, may grant leave to the creditor to file a claim up to the point of final distribution of all assets.[135] Unlike many states that rely on the mechanical functioning of a nonclaim statute to determine the last moment estate assets are up for grabs, Rhode Island's legislature allows claims to be filed until there are no assets left. The case law has followed this trend.

In *Smith v. Caterall*,[136] the Supreme Court of Rhode Island declared that an out-of-time claim against an estate, which the administrators had declared closed, must be allowed despite 33-11-5's requirements, because the administrators failed to list that claim in an inventory.[137] The court's decision shows that Rhode Island's

133. 123 A.2d 140, 141 (R.I. 1956).

134. R.I. GEN. LAWS § 33-11-5 (1956).

> Claims shall be filed within six (6) months from the first publication. Claims not filed within six (6) months from the publication shall be barred; provided, that a creditor who, by reason of accident, mistake or any other cause, has failed to file his or her claim, may, at any time, before the distribution of the estate, petition the probate court for leave to file his or her claim, and the probate court, after notice to the executor or administrator of the estate and a hearing on the petition, may in its discretion, grant leave to file the claim upon the terms, if any, as the court shall prescribe, which claim, if allowed, shall be paid out of the assets remaining in the hands of the executor or administrator at the time of the receipt by him or her of notice of the pendency of a petition, and there shall be no appeal from an order or decree granting leave to file the claim. From an order or decree denying leave to file the claim an appeal may only be taken to the superior court where it shall be heard de novo, and without a jury, and neither the rulings of the superior court, nor its order or decree shall be reviewable by an appeal or bill of exception.

Id.

135. *See id.*

136. 271 A.2d 300 (R.I. 1970).

137. *Id.* at 304 (holding that "having in mind the broad and all encompassing language of 33-9-1, the decedent's interest in the automobile insurance policy was a 'right' that should have been listed in the inventory. The estate had not been completely distributed and the probate court had jurisdiction to permit the filing of Smith's petition."). R.I. GEN. LAWS § 33-9-1 (1956), provides:

> [E]very administrator and every executor, shall, within ninety (90) days after his or her appointment or such longer period as may be allowed by the probate court, return to the probate court, under oath, a true

commitment to estate administration is lax compared to others. In terms of whether CERCLA preempts probate law, however, this should only be half of the analysis.

In Rhode Island, the only statute having any semblance to CERCLA is 46-12-21.[138] Although there is no comparison, one case has said, "[T]he federal counterpart to 46-12-21 is CERCLA."[139] This is the extent of environmental accountability in Rhode Island, and it is lacking. The Supreme Court of Rhode Island, when confronted with the argument that 46-12-21 should be applied retroactively because of the "increased public support for safeguarding the environment," declined to apply that law.[140] In addition when a plaintiff attempted to resort to tort and equitable theories to recover costs for pollution cleanup, the court refused to extend the law.[141]

In terms of the preemption question, Rhode Island's laws offer an interesting test case. As the law stands in Rhode Island, courts there have placed their faith in CERCLA for remedying environmental disasters. The judiciary has made it clear that it is unwilling to extend state statutory provisions or the common law for environmental purposes. The judiciary's decision could lead to two possible conclusions. One, Rhode Island's legislature believes the responsibility for facilitating "the prompt clean up of hazardous dumpsites... by placing the financial burden upon those responsible for the danger,"[142] best rests with the federal government. Two, environmental liability is not a major concern in Rhode Island.

If the latter position were true, the result in *Steego* would be problematic. After a consideration of Rhode Island's probate code and the purposes of CERCLA, the *Steego* court found that

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inventory of all the personal property, both tangible and intangible, and of all claims, rights, causes of actions and other assets, other than real property, of the deceased, with an appraisement thereof as of the date of the decedent's death.

138. *See* R.I. GEN. LAWS § 46-12-21 (1956) (providing only that "any person who shall negligently or intentionally pollute groundwater shall be liable to any other person who is damaged by that pollution").

139. Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950, 956 (R.I. 1994). This case was decided several months after the *Steego* opinion. The case, however, illustrates the marked difference between CERCLA and Rhode Island's counterpart, 46-12-21.

140. *Id.* at 954.

141. *Id.* at 956 (holding that "extension of the common law is unwarranted in light of recent state and federal statutory laws that impose liability running from landowners to subsequent remote purchasers").

142. *Id.* at 957, *quoting* City of Phila. v. Stepan Chem. Co., 544 F. Supp. 1135, 1142-1143 (E.D. Pa. 1982).

CERCLA preempted the code. Again, like the *Witco* court, the *Steego* court reached this result by comparing two factors: the purposes of state probate law and the purposes of CERCLA. For the *Steego* court, CERCLA's purposes were more persuasive. Given that Rhode Island's probate code is considerably less draconian than other states in requiring that claims be brought in a specific time, the court was probably right to conclude that CERCLA should preempt Rhode Island's law.

But if the court were to add to its analysis the third factor, for example a consideration of Rhode Island's environmental policy, the state's relatively lax commitment to environmental accountability might lead the court to conclude differently. Based on this analysis, the court might have said estate administration should be favored over environmental concerns. Given that the probate law in Rhode Island is not as strict as in other jurisdictions, this consideration makes the question in *Steego* a closer one. Still, on balance, when a state has made no clear commitment to environmental accountability and the law on estate administration is clear, a court should err on the side of clarity. Therefore, if the court were to adopt an analysis using state environmental policy as the objective standard for balancing the aspirations of CERCLA and estate administration, CERCLA would not have preempted Rhode Island's probate law.

IV. Conclusion

In both *Steego* and *Witco* and in the other opinions that have dealt with CERCLA's preemption of nonclaim statutes, courts have reached a point of stasis. While it is clear that every state has an interest in estate administration and ensuring its citizens timely estate settlement, the federal government has a compelling interest in seeing that polluters are held accountable, even if it means unsettling estates. CERCLA's accountability goals are admirable but so too are the efficiency goals of probate law. Both interests are persuasive, but federal courts disagree as to which goal is more important. As it stands, the policy objectives of the federal government and the state governments are in conflict. Rather than mounting congressional intent to champion one over the other, courts should look to states' environmental policy for an objective answer. This solution is virtuous, because it provides a case-by-case standard with which a court can tip the balance equitably without sacrificing one goal over the other. Looking to states' environmental policy inevitably means a concession of some of CERCLA's

overarching objectives. Yet, if states are truly committed to environmental accountability and if they know that their environmental policy will influence federal courts, they will have an interest in adopting stringent environ-mental standards to make the message clear. In the end, the increasing clarity of states' laws will counter the lack of consistency characteristic of federal decisions. The federal judiciary's inability to answer consistently the question who is an innocent landowner will come to depend on where that "innocent" landowner lives.

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