

CHAPTERS

CONTRACTUAL RELATIONSHIPS UNDER CERCLA: RESTORING CERCLA'S INNOCENT LANDOWNER DEFENSE, ONE CIRCUIT AT A TIME

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First passed in 1980, the Comprehensive Environmental Response Compensation Act (CERCLA) has served as a robust tool for responding to environmental contamination and promoting remediation efforts. Because the singular purpose of the statute is to address and remediate hazardous contamination, the statute as written applies strict liability broadly with only a few narrow exceptions. Two of these exceptions, the third-party liability defense and related “innocent landowner defense,” allow landowners to avoid liability for contamination if the landowner satisfies specific criteria. These defenses will not apply if the polluting activities occur “in connection with a contractual relationship[.]” Starting in 1992, this language was interpreted to require that the contractual relationship relate directly to the polluting activity, not any contractual relationship between polluter and landowner generally. This served to greatly expand the availability of these landowner defenses by allowing any purchaser or landowner to avoid liability by simply omitting polluting activity from any contract. Recently, the Ninth Circuit in California Department of Toxic Substances Control v. Westside Delivery, correctly held that this interpretation was not in accordance with the statute and rightly determined that

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the “in connection with a contractual relationship” language required a contractual relationship generally, whether or not it specifically pertained to the contamination. This interpretation restored the third-party liability defense and the innocent landowner defense in particular to their original narrow application, in line with the plain meaning of the statute, CERCLA’s purpose, the statute taken as a whole, and Congress’s intent.

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I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act,¹ as amended by the Superfund Amendments and Reauthorization Act² (collectively CERCLA), is arguably the closest thing to capitalistic environmental justice in our modern scheme of environmental legislation. Liability is draconian and exceptions are specific and limited.³ This scheme is supported by the statute's purpose: "to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."⁴ Liability is thus designed to generate remediation and cost recovery, which often exceeds millions of dollars.⁵ By forcing polluters to supply considerable funds to remedy their contamination, this statute aims to hit polluters where it counts—in the proverbial pocketbook. Companies have thus sought to avoid CERCLA's reach, and one of the last undecided grounds involves what sort of property acquisition could lead to liability.

CERCLA liability centers on contaminated property and an entity's relationship to that contamination or property.⁶ Because property ownership, including acquisition, is the groundwork for liability, several affirmative defenses revolve around the context behind property acquisition. This article will focus on the third party liability defense from CERCLA liability, for when contamination of the property occurs after acquisition,⁷ and the innocent landowner defense, for when the property was already contaminated at the time of purchase.⁸ The innocent landowner defense in particular asks if the purchase of the contaminated property involved a contractual relationship between the former, polluting landowner and the present owner.⁹ Following the Ninth Circuit's recent opinion in *California Department of Toxic Substances Control v. Westside Delivery*,¹⁰ a clear, if perhaps subtle, circuit split

¹ 42 U.S.C. §§ 9601–9675 (2012).

² Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613.

³ *United States v. Domenic Lombardi Realty, Inc.*, 204 F. Supp. 2d 318, 330 (D.R.I. 2002) ("By its terms, CERCLA is a strict liability statute with limited and narrow defenses").

⁴ H.R. 7020, 96th Cong. (1980) (the official title as enacted of H.R. 7020).

⁵ S. REP. NO. 96-848, 96th Cong., 2d Sess. 2 (1980), *reprinted in* 1 LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980, at 309 (1983).

⁶ 42 U.S.C. § 9607(a).

⁷ *Id.* § 9607(b)(3).

⁸ *Id.* §§ 9607(b)(3), 9601(35). The innocent landowner defense is considered a form of the third-party liability defense because it applies specifically to contamination occurring prior to acquisition rather than the activities of an independent third-party during the time of ownership.

⁹ *Id.*

¹⁰ 888 F.3d 1085 (9th Cir. 2018) (the State of California Department of Toxic Substances Control (Department) brought suit in the United States District Court for the

arose on the issue of what satisfies the “in connection with a contractual relationship” language under CERCLA’s often unforgiving structure of strict liability.¹¹ This language is important because it establishes whether a defendant landowner has the requisite relationship to a previous polluting landowner such that the current owner is liable for the previous owner’s contamination.¹² The Ninth Circuit opinion directly and openly refuted the Second Circuit’s holding in *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*¹³ The Second Circuit’s holding had gone undisturbed for over 20 years.¹⁴ Unlike the Second Circuit’s cases, which involved traditional property contracts, the Ninth Circuit faced a much narrower issue in *Westside Delivery*. In that case, the previous owner was a government entity that transferred the property through a state-run tax sale.¹⁵ This is important because of an express carveout for government entities that acquire contaminated property involuntarily.¹⁶ This carveout exempts government entities from status liability as a landowner based on the involuntary nature of its acquisition of contaminated property.¹⁷ One could thus interpret the *Westside Delivery* rationale to apply only in those circumstances. However, the language of the *Westside Delivery* opinion is much broader and would clearly reach both involuntary and voluntary transfers.¹⁸

In finding that the property transaction at issue in *Westside Delivery* did not qualify for the third party liability defense, the Ninth Circuit correctly determined that the Second Circuit’s holding was untenable.¹⁹ The Second Circuit essentially rendered the “innocent landowner” defense superfluous based on its interpretation of the statutory language “in connection with a contractual relationship.”²⁰ The innocent landowner defense is an alternative type of third party liability defense because it applies in limited circumstances to a current

Central District of California under CERCLA for recovery of cleanup costs against defendant *Westside Delivery*).

¹¹ *Id.* at 1100–01. Although strict liability is not mandated through the statute, courts generally apply strict liability in CERCLA actions. *See, e.g.,* *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983).

¹² *See* 42 U.S.C. §§ 9601(35), 9607(a)–(b).

¹³ 964 F.2d 85, 91–92 (2d Cir. 1992); *New York v. Lashins Arcade Co.*, 91 F.3d 353, 360 (2d Cir. 1996) (reaffirming the *Westwood* rule).

¹⁴ An earlier Ninth Circuit opinion, *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), addressed this same question without reference to the Second Circuit’s standing precedent of *Westwood Pharmaceuticals* and *Lashins Arcade*.

¹⁵ *Westside Delivery*, 888 F.3d at 1089–90.

¹⁶ *See* 42 U.S.C. § 9601(35).

¹⁷ *Id.*

¹⁸ *See Westside Delivery*, 888 F.3d at 1101.

¹⁹ *Id.* at 1100–01.

²⁰ 42 U.S.C. § 9607(b)(3).

owner whose land was contaminated by a previous owner.²¹ The “in connection with a contractual relationship” language found in CERCLA should be interpreted to mean that this language applies to the general relationship of the parties to the transaction, not the presence of contamination, per the Ninth Circuit’s reasoning in *Westside Delivery*.²²

In this paper, I aim to show the Ninth Circuit’s reasoning regarding the “in connection with a contractual relationship” language is both a proper reading of the statutory language and follows the plain meaning and purpose of CERCLA.²³ In Part II, I introduce the relevant statutory language of CERCLA. Because CERCLA is an incredibly complex statute, looking first at the plain language of the statute helps set the groundwork for an in-depth analysis of this circuit split. Part III then delves into the circuit split and where exactly the Second and Ninth circuits stand on this issue. Part IV advocates for future courts to apply the logic and reasoning of the Ninth Circuit in *Westside Delivery* over that of the Second Circuit. Finally, Part V concludes with a review of the arguments in favor of the Ninth Circuit’s holding and encourages future courts to follow this same rationale. This paper does not tackle the additional question of indirect transfers, such as the tax sale transfer at issue in *Westside Delivery*.

II. BACKGROUND

This section is designed to elucidate the relevant statutory language for CERCLA’s traditional third party liability defense and the innocent landowner defense. Although these defenses share similarities and are borne out of the concept of third party culpability, they operate and attach differently. The traditional third party liability defense is available where a truly innocent landowner’s property is contaminated solely by acts or omissions of an unrelated third party.²⁴ The innocent landowner defense, on the other hand, applies where a landowner purchases property that was contaminated by a previous owner.²⁵ The innocent landowner defense is thus an alternative form of third party exoneration but it only applies to past pollution, and, importantly, the purchaser must have failed to discover the contamination while undertaking due care prior to purchase.²⁶

²¹ *Id.* § 9601(35). An important distinction between the traditional third party defense and the innocent landowner defense is that for the innocent landowner defense to apply, the contamination must have pre-dated the land transfer transaction. *See infra* Part II.

²² *Westside Delivery*, 888 F.3d at 1101.

²³ There are really two arguments, one broad and one narrow. Broadly, all that the statute requires for CERCLA liability to attach is any contractual relationship, regardless of that contract’s mention of contamination. More narrowly, excluding a government entity from the liability chain and attaching liability to the future purchaser does not frustrate the purpose of the statute because defenses still exist for that future purchaser.

²⁴ 42 U.S.C. § 9607(b)(3).

²⁵ *Id.* §§ 9607(b)(3), 9601(35).

²⁶ *Id.*

A. CERCLA and SARA Amendments

In 1980, Congress enacted CERCLA in response to the serious environmental and health risks posed by industrial pollution and contamination.²⁷ CERCLA was thus the manifestation of Congress's goal that hazardous waste contamination be cleaned up and that those responsible for the contaminated site bear the costs.²⁸ CERCLA imposes strict liability for cleanup costs on four classes of potentially responsible parties (PRPs).²⁹ Further, CERCLA often imposes joint and several liability, meaning that a responsible party may be held liable for the entire cost of cleanup even where other parties contributed to the contamination.³⁰ The party saddled with the cleanup costs may, in turn, sue other PRPs for contribution or cost recovery.³¹

In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA), the first major amendments to CERCLA.³² The legislative history of SARA shows SARA's passage was fueled by a desire to clarify perceived ambiguities in CERCLA liability.³³ For example, members of Congress expressed unease on the question of whether an innocent purchaser could be held liable for a previous owner's contamination.³⁴ To answer this question, SARA added the innocent landowner defense by introducing the definition of "contractual relationship" as it relates to third party liability.³⁵ The addition of the "contractual relationship" definition was designed to provide a defense for purchasers of contaminated property who could not have reasonably discovered the contamination prior to purchase.³⁶ The traditional third party liability defense relates to the first clause of 42 U.S.C. § 9607(b)(3)

²⁷ Act of Dec. 11, 1980, Pub. L. No. 96-510, 94 Stat. 2767; *see also* *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009).

²⁸ SUPERFUND: A LEGISLATIVE HISTORY (Helen C. Needham & Mark Menefee eds., 1982); *Marsh v. Rosenbloom*, 499 F.3d 165, 178 (2d Cir. 2007).

²⁹ *Burlington N. & Santa Fe Ry. Co.*, 556 U.S. at 607.

³⁰ *Id.*; *Cal. Dep't of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910, 912 (9th Cir. 2010).

³¹ 42 U.S.C. § 9613(f) (contribution); 42 U.S.C. § 9607(a)(4)(B) (cost recovery).

³² Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1615 (1986). CERCLA was further amended in 2002 by the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002), and in 2018 by Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348 (2018).

³³ H.R. CONF. REP. NO. 99-962, at 186-87 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3279-80.

³⁴ 131 CONG. REC. H11158 (daily ed. Dec. 5, 1985) (statement of Rep. Frank).

³⁵ *See* 42 U.S.C. § 9601(35); *see also* 131 CONG. REC. H11158 (daily ed. Dec. 5, 1985) (statement of Rep. Frank).

³⁶ Craig N. Johnston, *Current Landowner Liability Under CERCLA: Restoring the Need for Due Diligence*, 9 FORDHAM ENVTL. L.J. 401, 437 (1998) ("Congress created an 'out' that neither the EPA nor any court had previously advanced: the purchaser can avoid liability under SARA by having engaged in an appropriate investigation, assuming the investigation did not verify the presence of contamination.").

while the innocent landowner defense is embodied in the definition of “contractual relationship” found in the second clause of the section.³⁷

As the Ninth Circuit described in *Chubb Custom Insurance Co. v. Space Systems/Loral, Inc.*,³⁸ the United States Environmental Protection Agency (EPA) may, on its own initiative, clean up a polluted site or it may compel responsible parties to either perform cleanups or reimburse the government for EPA-led cleanups.³⁹ Just as private parties have the right to seek cost recovery, so too does the government.⁴⁰ In the *Westside Delivery* case, the government sought contribution from the current landowner of a contaminated chemical recycling plant, as will be discussed more fully below.⁴¹

B. Third Party Defense

Section 107(b)(3) of CERCLA⁴² provides a defense for current owners of contaminated property where the contamination was caused solely by acts of a completely unrelated third party.⁴³ This section reads:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

....

(3) *an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions[.]*⁴⁴

Essentially two requirements must be satisfied to successfully assert the third party defense. First, the defendant must adequately show that the contamination was caused solely by acts or omissions of

³⁷ 42 U.S.C. §§ 9607(b)(3), 9601(35).

³⁸ 710 F.3d 946, 956–57 (9th Cir. 2013).

³⁹ 42 U.S.C. §§ 9604(a), 9607(a).

⁴⁰ *Chubb Custom Ins.*, 710 F.3d at 956–57.

⁴¹ *Westside Delivery*, 888 F.3d 1085, 1089–90 (9th Cir. 2018).

⁴² 42 U.S.C. § 9607(b)(3).

⁴³ *Id.*

⁴⁴ *Id.* (emphasis added).

an unrelated third party.⁴⁵ Second, “the defendant must demonstrate that he took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances.”⁴⁶ This requirement is derived from the statute’s requirements that one take precautions both before and undertake due care after the discovery of contamination, as described in CERCLA’s legislative history.⁴⁷

Like all of the available CERCLA defenses, this defense has limited application.⁴⁸ The language of the original statute, however, was not explicit as to the potential liability of current owners who were not responsible for pre-existing contamination.⁴⁹ The subsequent passage of SARA served to clarify that an unrelated third party could in fact include a previous owner or other entity whose acts or omissions occurred in the past.⁵⁰ Thus, SARA’s primary contribution was the included definition of “contractual relationship,” as found in the third party liability defense, which became known as the innocent landowner defense.

C. Innocent Landowner Defense

Unlike the third party defense, the innocent landowner defense owes its existence to the SARA amendments.⁵¹ SARA left the majority of CERCLA unchanged with a few important additions and clarifications.⁵² Congress also left the basic structure of CERCLA liability untouched, with full knowledge that the courts had interpreted it as imposing strict and, in appropriate cases, joint and several liability on PRPs.⁵³ The most significant change was the introduction of the innocent landowner defense. Rather than through express language, Congress created this defense by defining a previously undefined term in CERCLA: contractual relationship.⁵⁴ For a defendant to be eligible to raise the innocent landowner defense, the contamination must be present without the property purchaser’s knowledge prior to acquisition. Additionally, the contamination must go undiscovered after undertaking prospective due diligence to determine whether contamination was present.⁵⁵

⁴⁵ *Id.*

⁴⁶ H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 34 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6137.

⁴⁷ *Id.*

⁴⁸ The other original defenses being an act of god, 42 U.S.C. §9607(b)(1), an act of war, *id.* § 9607(b)(2), or any combination of the available defenses, *id.* § 9607(b)(4).

⁴⁹ *Westside Delivery*, 888 F.3d 1085, 1092 (9th Cir. 2018).

⁵⁰ *Carson Harbor Vill.*, 270 F.3d 863, 887 (9th Cir. 2001).

⁵¹ Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1615 (1986).

⁵² Johnston, *supra* note 36, at 427–28.

⁵³ *Id.* at 429.

⁵⁴ *Carson Harbor Vill.*, 270 F.3d at 877.

⁵⁵ 42 U.S.C. § 9607(b)(3).

Per CERCLA, “contractual relationship” is defined as:

The term “contractual relationship” . . . 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 or have reason to know that any hazardous substance which is 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 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.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of [§ 107(b)(a) and (b) of CERCLA (relating to due care and foreseeable precautions, respectively)].⁵⁶

The addition of this language, as described in the legislative history, aimed to alleviate the harsh liability imposed on purchasers who did not know, or have reason to know, of existing contamination.⁵⁷ With the addition of the innocent landowner defense, Congress made clear that liability under CERCLA was, by design, otherwise hard to avoid.⁵⁸ For example, the innocent landowner defense is available to a private purchaser only if that purchaser did not have actual or constructive knowledge of the contamination at the time of purchase.⁵⁹ The added language also clarified that government entities are excluded from liability for contaminated land acquired involuntarily. Ultimately, as the Ninth Circuit stated in *Carson Harbor Village, Ltd. v. Unocal Corp.*,⁶⁰ “Congress intended the defense to be very narrowly applicable, for fear that it might be subject to abuse.”⁶¹

⁵⁶ Definition of “contractual relationship” found in 42 U.S.C. § 9601(35) as used in 42 U.S.C. § 9607(b)(3) (emphasis added).

⁵⁷ L. Jager Smith, *CERCLA’s Innocent Landowner Defense: Oasis or Mirage?*, 18 COLUM. J. ENVTL. L. 155, 156–57 (1993).

⁵⁸ Johnston, *supra* note 36, at 431.

⁵⁹ *Westside Delivery*, 888 F.3d 1085, 1092 (9th Cir. 2018).

⁶⁰ 270 F.3d 863 (9th Cir. 2001).

⁶¹ *Id.* at 883.

III. CIRCUIT SPLIT

As outlined above, the Ninth Circuit's approach to interpreting CERCLA's "in connection with a contractual relationship" language is stricter than the Second Circuit's interpretation. Unlike the Ninth Circuit, the Second Circuit essentially reads in a requirement that the contractual relationship relate to the contamination at issue.⁶² The Ninth Circuit, however, held that all that the statute requires is a contractual relationship transferring ownership of contaminated property from a previous owner to a current owner.⁶³ Thus, following the Ninth Circuit's recent decision in *Westside Delivery*, a clear circuit split arose on the issue of what sort of contractual relationship necessarily imputes CERCLA liability. The express language of CERCLA makes clear that the relevant contracts include land contracts, deeds, or other instruments that transfer title or possession.⁶⁴ What is not clear from the statute is what these contracts, deeds, or other instruments must contain.

The Second Circuit's holding in *Westwood Pharmaceuticals* interpreted the term "contractual relationship" to mean that, for CERCLA liability to attach, the relevant contractual relationship must relate directly to the contamination at issue.⁶⁵ The *Westwood Pharmaceuticals* court grappled with the question of what sort of contractual relationship is required between a contaminating former owner and the current owner such that an otherwise innocent owner would become liable under CERCLA.⁶⁶ The Second Circuit upheld the District Court for the Western District of New York's holding that more than a mere contractual relationship is required for CERCLA to apply.⁶⁷ Otherwise, the court reasoned, the language "in connection with" would be rendered "superfluous."⁶⁸ This reasoning was reaffirmed four years later in *New York v. Lashins Arcade Co.*⁶⁹ The *Lashins Arcade* court again stressed that more than the mere existence of a contractual relationship is required to implicate CERCLA liability.⁷⁰

The Ninth Circuit, however, had no difficulty finding that the "in connection with" language was not as narrow as the Second Circuit had previously held.⁷¹ When defendant *Westside Delivery* raised the Second Circuit's *Lashins Arcade* precedent, the Ninth Circuit stated simply:

⁶² See *Lashins Arcade*, 91 F.3d 353, 360 (2d Cir. 1996).

⁶³ See *Westside Delivery*, 888 F.3d at 1101.

⁶⁴ 42 U.S.C. § 9601(35) (2012).

⁶⁵ *Westwood Pharm.*, 964 F.2d 85, 91–92 (2d Cir. 1992); *Lashins Arcade*, 91 F.3d 353, 360 (2d Cir. 1996) (reaffirming the *Westwood* rule).

⁶⁶ *Westwood Pharm.*, 964 F.2d at 88.

⁶⁷ *Id.* at 88–89.

⁶⁸ *Id.* at 89.

⁶⁹ 91 F.3d at 360.

⁷⁰ *Id.*

⁷¹ *Westside Delivery*, 888 F.3d 1085, 1100 (9th Cir. 2018).

If the “in connection with” condition were construed so narrowly as to allow a defendant-purchaser to assert the third-party defense in all cases in which the relevant land contract, deed, or other instrument did not “relate to . . . hazardous substances,” there would have been little need for Congress to add the innocent-landowner defense, because most innocent purchasers would have been covered already by the “traditional” third-party defense.⁷²

Although one could argue that the holding in *Westside Delivery* should be construed narrowly to apply where an otherwise exempt government entity or involuntary transfer is involved, the Ninth Circuit’s language is hardly so limited.⁷³ These conflicting interpretations of what constitutes the requisite contractual relationship will likely continue to surface in CERCLA litigation. It is strongly urged that the reasoning of the Ninth Circuit be established as superior precedent because the Ninth Circuit’s interpretation comports with Congress’s intent, and the plain text and purpose of the statute.⁷⁴

The cases and reasoning for the Second and Ninth Circuits are discussed below, starting with the Second Circuit.

A. Second Circuit

The Second Circuit’s precedent originated out of *Westwood Pharmaceuticals*. Westwood Pharmaceuticals purchased land from National Fuel Gas Distribution Corp. where petroleum-related contamination was stored in underground pipes and structures, the existence of which was not disclosed to Westwood Pharmaceuticals prior to purchase.⁷⁵ Waste began to leak out of the receptacles after Westwood Pharmaceuticals began construction activities.⁷⁶ Thus, although the waste was present at the time of purchase, the actual release of the waste happened after purchase.⁷⁷ Westwood Pharmaceuticals brought an action against National Fuel Gas for cost recovery of the cleanup efforts, arguing that National Fuel Gas’s predecessor was responsible for the contamination.⁷⁸ National Fuel Gas asserted the third party liability defense, arguing that the contamination was caused solely by Westwood Pharmaceuticals’ post-purchase construction efforts so National Fuel Gas was not a cause.⁷⁹ National Fuel Gas argued that,

⁷² *Id.* (citing *Domenic Lombardi Realty*, 204 F. Supp. 2d 318, 332 (D.R.I. 2002)).

⁷³ *See id.* at 1101.

⁷⁴ *See infra* Part IV.

⁷⁵ *Westwood Pharm.*, 964 F.2d 85, 87 (2d Cir. 1992). The previous contaminating owner was actually National Fuel Gas’s predecessor-in-interest but for simplicity’s sake, no distinction is made here.

⁷⁶ *Id.* at 87–88.

⁷⁷ *Id.* at 87.

⁷⁸ *Id.* (National Fuel Gas was the successor in interest to the company that had placed the contamination on the site).

⁷⁹ *Id.*

although the sales contract was a “contractual relationship” within the meaning of CERCLA, Westwood Pharmaceuticals’ construction efforts were not part of that relationship.⁸⁰ National Fuel Gas further argued, for the sake of satisfying the third party liability defense, that due care had been used in the storage of the waste prior to Westwood Pharmaceuticals’ construction efforts.⁸¹

The district court held that the mere existence of a contractual relationship between Westwood Pharmaceuticals and National Fuel Gas did not preclude National Fuel Gas from invoking the third-party defense, and rejected Westwood Pharmaceuticals’ contention that the innocent landowner defense foreclosed a prior owner like National Fuel Gas from asserting the third-party defense.⁸²

The Second Circuit noted that § 107(a)(2) of CERCLA makes “any person who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed of” liable for the response costs incurred by another who undertakes cleanup efforts.⁸³ The Second Circuit further discussed interpretations advanced by other courts that had addressed the issue of “in connection with a contractual relationship” under CERCLA, finding that most courts agreed more than a mere contractual relationship was needed to bar the third-party liability defense.⁸⁴ The Second Circuit’s ultimate holding stated that “[i]n order for the landowner to be barred from raising the third-party defense under such circumstances, the contract between the landowner and the third party must either relate to the hazardous substances or allow the landowner to exert some element of control over the third party’s activities.”⁸⁵

The Second Circuit hardly needed to address the issue of the contractual relationship at all, considering the construction activities post-dated the land contract between the parties.⁸⁶ *Westwood Pharmaceuticals* essentially involved a previous owner seeking to avoid liability based on activities of the subsequent purchaser because, hypothetically, the release of contaminants would not have occurred but for the purchaser’s construction activities.⁸⁷ Instead, the Second Circuit’s broad holding implied that, absent clear language in a land transfer agreement, a prospective purchaser, in addition to a previous owner, could avoid liability if there was no contractual relationship

⁸⁰ *Id.*

⁸¹ *Id.* at 87–88.

⁸² *Id.* at 88.

⁸³ *Id.* at 87.

⁸⁴ *Id.* at 89.

⁸⁵ *Id.* at 91–92.

⁸⁶ Professor Craig Johnston noted of this holding, “[e]ven assuming that the court should have addressed the ‘contractual relationship’ issue, all it needed to say was that Westwood’s activities . . . post-dated the existence of the contractual relationship. That alone should have rendered the contract irrelevant for purposes of the traditional third-party defense.” Johnston, *supra* note 36, at 445.

⁸⁷ See *Lashins Arcade*, 91 F.3d 353, 360 (2d Cir. 1996).

regarding the release of contamination specifically.⁸⁸ The *Westwood Pharmaceuticals* holding was reaffirmed in 1996 by another Second Circuit case, *Lashins Arcade*.⁸⁹

Lashins Arcade involved groundwater contamination at a shopping center caused by dry cleaning chemicals.⁹⁰ All contaminating activities occurred prior to Lashins coming into ownership of the property.⁹¹ Unlike *Westwood Pharmaceuticals*, where the seller sought to avoid liability based on the purchaser's actions after the sale, Lashins sought to avoid liability for contamination caused by the previous owner prior to purchase.⁹² The State of New York sought to impose CERCLA liability on Lashins based on its status as the current owner.⁹³ Lashins, as the current owner of contaminated property, was exactly the type of party CERCLA aims to hold liable, unlike National Fuel Gas, which was a previous owner that did not contribute to the release of contamination. Lashins claimed it had no knowledge of the contamination prior to the purchase and asserted the third party liability defense.⁹⁴

The District Court for the Southern District of New York held that Lashins had satisfied the third party defense because there was “no direct or indirect contractual relationship with either of the third party dry cleaners who released the VOCs, or with the owners of the Shopping Arcade at the time the dry cleaners operated and when the pollution occurred”⁹⁵ The district court further held that Lashins had done “everything that could reasonably have been done to avoid or correct the pollution”⁹⁶ The Second Circuit affirmed the district court's ruling.⁹⁷

Although New York had properly established liability against Lashins as the current owner of the contaminated property, the Second Circuit followed the holding of *Westwood Pharmaceuticals*.⁹⁸ Because the contractual relationship between Lashins and the prior owner did not involve the presence or release of contamination, Lashins was able to successfully assert the third party defense.⁹⁹

The holding in *Westwood Pharmaceuticals* is admittedly easier to digest than its application to the facts of *Lashins Arcade*. The *Lashins Arcade* court summarily stated that the distinction between a seller seeking exoneration from a buyer's future conduct (*Westwood*

⁸⁸ Johnston, *supra* note 36, at 445.

⁸⁹ 91 F.3d 353 (2d Cir. 1996).

⁹⁰ *Id.* at 365.

⁹¹ *Id.* at 357.

⁹² *Id.* at 360.

⁹³ *Id.* at 359.

⁹⁴ *Id.*

⁹⁵ *Id.* (quoting *New York v. Lashins Arcade Co. (Lashins I)*, 856 F. Supp. 153, 157 (S.D.N.Y. 1994)).

⁹⁶ *Id.* (quoting *Lashins I*, 856 F. Supp. at 157).

⁹⁷ *Id.* at 362.

⁹⁸ *Id.* at 359–60.

⁹⁹ *Id.* at 360.

Pharmaceuticals) versus a buyer seeking exoneration from the seller's past activities (*Lashins Arcade*) is "immaterial" for the application of the *Westwood Pharmaceuticals* reasoning.¹⁰⁰

District courts within the Second Circuit continue to apply the *Westwood Pharmaceuticals/Lashins Arcade* precedent. In *Delaney v. Town of Carmel*,¹⁰¹ the District Court for the Southern District of New York summarily stated that *Lashins Arcade* is the controlling ruling of the Second Circuit.¹⁰² *Delaney* involved land that had been used as a sewage dump site for decades before being purchased and subdivided into a housing development.¹⁰³ The *Delaney* court stated that the facts at issue were virtually indistinguishable from the facts of *Lashins Arcade*.¹⁰⁴ After finding that the contamination occurred prior to the defendant coming into possession, and that there were no reasonable precautions that could be taken against past conduct, the court stated "the duty to detect the contamination prior to purchasing the property (so-called 'pre-purchase due care') has been rejected repeatedly by courts confronted with the same argument in § 9607(b)(3) third-party defense cases."¹⁰⁵ Ultimately, this reasoning made clear that it was now irrelevant whether a defendant undertook due care to detect pre-existing contamination in order to claim the third party liability defense, regardless of the plain text of the statute.¹⁰⁶ The *Lashins Arcade* ruling essentially rendered the third party liability defense available to any defendant landowner who purchased contaminated property without undertaking reasonable efforts to detect contamination, as long as the contractual relationship with the previous polluting owner did not reference contamination.¹⁰⁷

Other courts in the Second Circuit have abided by this controlling authority, even if reluctantly. In *Major v. Astrazeneca, Inc.*,¹⁰⁸ the District Court for the Northern District of New York held that

[t]his Court has no authority to overrule clearly controlling Second Circuit decisions, even if they espouse a 'minority' position. Furthermore . . . although Congress has . . . amended § 9601 four times and § 9607 twice, the amended text does not bring into question the holdings of *Westwood Pharmaceuticals* and *Lashins Arcade*.¹⁰⁹

¹⁰⁰ *Id.*

¹⁰¹ 55 F. Supp. 2d 237 (S.D.N.Y. 1999).

¹⁰² *Id.* at 253.

¹⁰³ *Id.* at 241–42.

¹⁰⁴ *Id.* at 254.

¹⁰⁵ *Id.* at 255.

¹⁰⁶ See 42 U.S.C. § 9607(b)(3) (2012).

¹⁰⁷ See *Westside Delivery*, 888 F.3d 1085, 1100 (9th Cir. 2018).

¹⁰⁸ No. 500CV1736 FJS/GJD, 2006 WL 2640622 (N.D.N.Y. Sept. 13, 2006).

¹⁰⁹ *Id.* at *27.

In *New York State Electric & Gas Corp. v. FirstEnergy Corp.*,¹¹⁰ the District Court for the Northern District of New York again noted that “the Second Circuit’s position as articulated in *Lashins Arcade* and *Westwood Pharmaceuticals* is not universally held and has been criticized by at least one court as essentially rendering academic the requirements of § 101(35).”¹¹¹ The *FirstEnergy Corp.* court also noted that “the Second Circuit’s view also appears to be squarely at odds with the Ninth Circuit’s posture as set forth in *Carson Harbor Village*. ”¹¹² The *FirstEnergy Corp.* court cited to *Astrazeneca*,¹¹³ and reluctantly concluded:

Despite criticisms of its position, the Second Circuit’s determination concerning the first element of the third-party defense, as articulated in *Lashins Arcade* and *Westwood Pharmaceuticals*, has not been reversed or overruled, and appears to permit a purchaser of polluted property to avail itself of the third-party defense regardless of whether it knew or should have known of the existence of hazardous substances on the property at the time of purchase or its inability to otherwise meet the requirements of § 101(35)(A). Because I am bound by those decisions, I therefore conclude that I.D. Booth has met the first element of the § 103(b)(3) defense.¹¹⁴

Ultimately, *Westwood Pharmaceuticals* and *Lashins Arcade* still stand in the Second Circuit and, as the defendant in *Westside Delivery* attempted, this line of reasoning will likely continue to be employed by otherwise liable parties seeking exemption from CERCLA liability.¹¹⁵

B. Ninth Circuit

This section involves a discussion of the Ninth Circuit’s precedent on the issue of interpreting CERCLA, as well as an introduction to the facts and reasoning of the *Westside Delivery* opinion and the Ninth Circuit’s discussion of CERCLA’s “in connection with a contractual relationship” language.

As noted by the *FirstEnergy Corp.* court, the Ninth Circuit has held a contrary view of the third party liability defense since its decision in *Carson Harbor Village*.¹¹⁶ This case was decided in 2001, after the current owner of a contaminated wetland sought cost recovery from

¹¹⁰ 808 F. Supp. 2d 417 (N.D.N.Y. 2011).

¹¹¹ *Id.* 516–17 (citing *Goe Eng’g Co., Inc., v. Physicians Formula Cosmetics, Inc. (Goe)*, No. CV 94-3576-WDK, 1997 WL 889278, at *10 n.7 (C.D. Cal. June 4, 1997)).

¹¹² *FirstEnergy Corp.*, 808 F. Supp. 2d at 516–17 (referencing *Carson Harbor Vill.*, 270 F.3d 863 (9th Cir. 2001)).

¹¹³ Nos. 5:01-CV-618 (Lead) (FJS/GJD), 5:00-CV-1736 (Member) (FJS/GJD), 2006 WL 2640622 (N.D.N.Y. Sept. 13, 2006).

¹¹⁴ *FirstEnergy Corp.*, 808 F. Supp. 2d at 516–17.

¹¹⁵ See *Westside Delivery*, 888 F.3d 1085, 1099–100 (9th Cir. 2018).

¹¹⁶ *Carson Harbor Vill.*, 270 F.3d 863 (9th Cir. 2001).

previous owners and contaminators.¹¹⁷ One of the key issues of that case was whether a purchaser could successfully raise the third party defense when it purchased property directly from the contaminating previous owner.¹¹⁸ The *Carson Harbor Village* court stated:

In a single stroke, SARA first clarified that one who purchases land from a polluting owner or operator cannot present a third-party defense, then set conditions under which this limit would not apply—that is, if the property were purchased after disposal or placement, and the purchaser did not know and had no reason to know that hazardous substances were disposed of there.¹¹⁹

This narrow reading of the innocent landowner defense is consistent with the statute's purpose, the legislative history, and the statutory text's plain meaning.¹²⁰

Prior to *Carson Harbor Village*, the District Court for the Central District of California's holding in *Goe Engineering Co., Inc. v. Physicians Formula Cosmetics*¹²¹ (*Goe*) also interpreted "contractual relationship" broadly and the innocent landowner defense narrowly.¹²² There, the court found that "contractual relationship" for the purposes of third party liability "includes . . . land contracts, deeds or other instruments transferring title or possession," unless the purchaser can show it satisfies the requirements for the innocent landowner exception.¹²³ The *Goe* court did not restrict "contractual relationship" to the contents of the contract but rather merely its existence.¹²⁴ Thus, it restricted the application of the innocent landowner defense to those who did not know and had no reason to know of the pre-existing contamination at the time of purchase.¹²⁵

1. Westside Delivery Analysis

Westside Delivery involved a contaminated chemical recycling facility purchased by the current owner, Westside Delivery, through a state tax sale.¹²⁶ The previous owner, Davis Chemical Co. (Davis), was responsible for hazardous waste contamination at the facility.¹²⁷ In 1990, the California Department of Toxic Substances Control ordered Davis to cease and desist all hazardous-waste-related activities.¹²⁸ After

¹¹⁷ *Id.* at 867.

¹¹⁸ *Id.* at 887.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 878–88.

¹²¹ No. CV 94 3576-WDK, 1997 WL 889278 (C.D. Cal. June 3, 1997).

¹²² *Id.* at *10.

¹²³ *Id.* (quoting 42 U.S.C. § 9601(35)(A)(i) (2012)).

¹²⁴ *Id.*

¹²⁵ *Id.* at *30.

¹²⁶ *Westside Delivery*, 888 F.3d 1085, 1089 (9th Cir. 2018).

¹²⁷ *Id.*

¹²⁸ *Id.*

EPA conducted a preliminary investigation and determined there was significant contamination at the facility, the California Department of Toxic Substances Control undertook extensive cleanup efforts at the site.¹²⁹ Meanwhile, Davis failed to pay property taxes resulting in the seizure and sale of the property at auction under California's tax-sale system.¹³⁰

Under CERCLA, the California Department of Toxic Substances Control had a cause of action against any PRP for recovery of cleanup costs.¹³¹ Here, however, Westside Delivery did not purchase the facility from Davis, the previous owner and operator, but rather from the State at the tax sale.¹³² Thus, the issue arose as to whether the deed from the tax sale created a contractual relationship between Westside Delivery and Davis such that Westside Delivery could be held as a liable PRP under CERCLA.¹³³

2. So Does a Tax Deed Really Create a "Contractual Relationship"?

The Ninth Circuit noted that the key question was whether Westside Delivery had the requisite contractual relationship with Davis, the previous contaminating owner, by virtue of the tax sale.¹³⁴ If not, Westside Delivery could successfully assert the third party liability defense.¹³⁵ Further, CERCLA expressly exempts from liability government entities that acquire contaminated property involuntarily, such as the situation in *Westside Delivery*.¹³⁶ There was no disagreement that a traditional conveyance of property between Davis and Westside Delivery would bring Westside Delivery within CERCLA's liability net, but what about a transfer from an exempt government entity?¹³⁷

The Ninth Circuit analyzed this question from the standpoint of an indirect relationship between Davis and Westside Delivery as under a single transaction, and a direct relationship between Davis, the state, and Westside Delivery as under two transactions. In beginning its analysis, the Ninth Circuit construed "contractual relationship" based on its statutory language, stating that statutory interpretation necessarily begins with the statutory text.¹³⁸ The language found in 42 U.S.C. § 9601(35)(A) contains both an "includes, but is not limited to"

¹²⁹ *Id.*

¹³⁰ CAL. REV. & TAX. CODE §§ 126, 3436, 3691(a)(1)(A); *Westside Delivery*, 888 F.3d at 1093.

¹³¹ 42 U.S.C. § 9607(a)(4)(A).

¹³² *Westside Delivery*, 888 F.3d at 1089.

¹³³ *Id.* at 1089–90.

¹³⁴ *Id.* at 1088.

¹³⁵ *See* 42 U.S.C. § 9607(b)(3).

¹³⁶ *Id.*

¹³⁷ *Westside Delivery*, 888 F.3d at 1095.

¹³⁸ *Id.* (citing *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1658 (2017) (stating that courts start with the statutory language)).

clause and a “catch-all” clause.¹³⁹ Based on the presence of both clauses, the Ninth Circuit reasoned that this indicates that Congress intended the statute be broadly construed.¹⁴⁰ The plain language of the statute thus demonstrated Congress’s intent to capture any instrument reflecting a voluntary or involuntary transaction resulting in a change of ownership or possession.¹⁴¹ Regardless of whether the transfer was considered a single, indirect transaction or two transactions, the result was the same: Westside Delivery was ineligible for the third party liability defense.¹⁴²

a. One-Transaction View

Under the single transaction analysis, the *Westside Delivery* court held that the tax deed fit into the definition of “contractual relationship” because it was an instrument that transferred possession of property.¹⁴³ Because the state never took a possessory interest in the property, the deed reflected the transfer of the legal right of possession from Davis to Westside Delivery.¹⁴⁴ The Ninth Circuit stated that it did not matter that the transfer was effectuated through the tax system.¹⁴⁵ This fact only rendered Davis’s transaction involuntary, but involuntary transfers are properly included in the definition.¹⁴⁶

The Ninth Circuit further reasoned that the exception necessarily implies that the transactions and instruments describing methods of government acquisition such as “escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority” would otherwise create “contractual relationships” if a government entity were not involved.¹⁴⁷ Thus, “[b]efore the execution of the tax deed, Davis had the legal right to possess the Davis Chemical Site. The tax deed divested Davis of its interest and vested the right to possession in Defendant. That is the definition of a ‘transfer’ in the law of property.”¹⁴⁸

¹³⁹ 42 U.S.C. § 9601(35)(A).

¹⁴⁰ *Westside Delivery*, 888 F.3d at 1095 (citing *San Luis & Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1229 (9th Cir. 2017)).

¹⁴¹ *Id.* at 1093–94.

¹⁴² *Id.* at 1097–98.

¹⁴³ *Id.* at 1095.

¹⁴⁴ *Id.* Under California’s tax sale system, the state never holds title to the tax defaulted property. *Id.* at 1094.

¹⁴⁵ *Id.* at 1095.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (citing *Penn Terra Ltd. v. Dep’t of Env’tl. Res.*, 733 F.2d 267, 272 (3d Cir. 1984) (“[T]he fact that Congress created an exception to the automatic stay for certain actions by governmental units itself implies that such units are otherwise affected by the stay.”)).

¹⁴⁸ *Id.* (citing RESTATEMENT (FIRST) OF PROPERTY § 13 (AM. LAW INST. 1936) (“The word ‘transfer,’ as it is used in this Restatement, when applied to interests in land . . . , means the extinguishment of such interests existing in one person and the creation of such interests in another person.”)).

Ultimately, the tax deed transfer fit squarely within the meaning of “contractual relationship” regardless of the involuntary nature of the process.¹⁴⁹ For the simple reason that Davis was the former owner and Westside Delivery was now vested with ownership rights, there was clearly a transfer of property within the statutory meaning of “contractual relationship.”¹⁵⁰

b. Two-transaction View

The *Westside Delivery* court next analyzed the transaction as if it were two separate transactions.¹⁵¹ Under this view, the tax deed constituted a direct contractual relationship between Westside Delivery and the State.¹⁵² The State’s acquisition of the property from Davis through tax delinquency constituted an involuntary transfer from Davis to the State.¹⁵³ Because the State acquired the property involuntarily, it did not become liable as an owner.¹⁵⁴ And because the State did not become liable under the involuntary transfer from Davis, the contractual relationship of the deed existed only between Davis and Westside Delivery after Westside Delivery’s purchase from the State.¹⁵⁵

The Court thus concluded that under the two-transaction view, a contractual relationship existed between Davis and Westside Delivery such that Westside Delivery would still be liable under CERCLA as a current owner.¹⁵⁶

c. Ninth Circuit Finds the Existence of Contractual Relationship Regardless of One or Two Transactions

The Ninth Circuit could have easily concluded that a contractual relationship existed between Davis and Westside Delivery without going through its multiple transaction analyses. The Ninth Circuit had previously held that each CERCLA provision is to be read in light of the statute as a whole, including its purpose.¹⁵⁷ The purpose of CERCLA is

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1096.

¹⁵² *Id.*

¹⁵³ *Id.* at 1095.

¹⁵⁴ 42 U.S.C. § 9601(35)(A)(ii) (2012). Read as a whole, this statute is targeted at situations in which the government acquires property through methods that only the government can employ, such as through tax default. The purpose is to protect the government from liability when it involuntarily acquires contaminated property. *Westside Delivery*, 888 F.3d at 1096.

¹⁵⁵ *Westside Delivery*, 888 F.3d at 1096. See *infra* Part II(C) for an explanation of the statutory language found in 42 U.S.C. § 9601(35)(A)(ii) that provides a liability shield to a government entity that acquires contaminated property involuntarily.

¹⁵⁶ *Westside Delivery*, 888 F.3d at 1097.

¹⁵⁷ *Carson Harbor Vill.*, 270 F.3d 863, 880 (9th Cir. 2001).

expressly to assign liability and work toward remediating contaminated properties.¹⁵⁸ Based on this purpose, liability should be avoided only in rare and clearly defined cases.¹⁵⁹ Further, in *James v. City of Costa Mesa*,¹⁶⁰ the Ninth Circuit held that Congress often includes exceptions in statutes that serve to undermine broader statutory purposes, but when Congress does so, its intent is generally clear.¹⁶¹ Because there is no express exception for a purchaser of property from a tax sale, one should not be read into the statute by a court.¹⁶²

3. Should a Tax Sale Create the Requisite Contractual Relationship?

To date, little analysis exists on the future effects of the *Westside Delivery* ruling. An early argument raised against the Ninth Circuit's ruling relates to the implications for local governments' abilities to sell contaminated tax-defaulted properties. As one commentator stated, "[i]f this decision is not reversed by the Supreme Court, the consequences for local taxing authorities will be terrible. They will be stuck (perhaps forever) with poisoned properties, which will generate no tax revenue."¹⁶³ One critic argues that it makes little sense for a government entity involuntarily acquiring property to avoid liability, only to have liability attach to the following purchaser.¹⁶⁴

Let us fall back on common sense: is it logical to assume that Congress intended CERCLA liability to disappear when a governmental agency acquires the property, only to magically re-attach whenever the property is reconveyed by that agency? As a practical matter, does this mean that the local government can acquire a polluted parcel but can never sell it and is stuck with it forever because of the specter of "springing" CERCLA liability? If that really were the intent of Congress, isn't it likely that there would have been an express provision to that effect, along with some unmistakable legislative history?¹⁶⁵

These doubts about the Ninth Circuit's logic may seem rational on their face. Yet, CERCLA leaves other important issues untouched. For

¹⁵⁸ Act of Dec. 11, 1980, Pub. L. 96-510, 94 Stat. 2767.

¹⁵⁹ *Carson Harbor Vill.*, 270 F.3d at 883.

¹⁶⁰ 700 F.3d 394 (9th Cir. 2012).

¹⁶¹ *Id.* at 403 ("Congress could not have intended to create such a capacious loophole, especially through such an ambiguous provision.").

¹⁶² Congress's failure to indicate an exception for a tax sale purchaser is discussed later in terms of one commentator's argument against the Ninth Circuit's holding. See *infra* Part IV(B)(1)(c) and accompanying discussion.

¹⁶³ Dan Schechter, *Tax Sale Purchaser Faces CERCLA Liability Because Purchaser Is In "Contractual Relationship" With Polluter, Even Though Grantor at Tax Sale is Governmental Entity* [Calif. Dept. of Toxic Substances Control vs. *Westside Delivery*, L.L.C. (9th Cir.)], COMM. FIN. NEWSL., NL 39, May 14, 2018. It is worth noting that Certiorari was not sought in *Westside Delivery*.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

example, the question of what liability attaches. The statute does not state that liability is strict or joint and several.¹⁶⁶ This interpretation was left to the courts, which determined through common law principles that this is the appropriate structure of liability.¹⁶⁷ Similarly, an issue like conveyance of contaminated property from an exempt government entity to a private citizen, a scenario that is realistically quite rare, would likewise logically be left to the courts. And that determination is exactly what the Ninth Circuit undertook in *Westside Delivery*.

This particular argument raises another issue. Will local authorities ever be able to sell contaminated properties if the “specter” of CERCLA liability hangs over such a transaction?¹⁶⁸ This “specter” seems unlikely. These concerns fail to acknowledge the existence of another method by which a purchaser may avoid liability for a previous owner’s contamination: the bona fide prospective purchaser exclusion.¹⁶⁹ This exclusion applies to bona fide prospective purchasers who do not impede the performance of a contamination response.¹⁷⁰ Additionally, although the traditional third party defense may not be available to these defendants, the innocent landowner defense may be.¹⁷¹ Thus, this critic’s fears may apply, if at all, outside of the involuntary transfer context. Like the property at issue in *Westside Delivery*, cleanup efforts had already begun before *Westside Delivery* acquired the property.¹⁷² The fate of contaminated properties held by exempt government entities does not seem quite as bleak as some critics imply.¹⁷³

Ultimately, at this time, little commentary on the Ninth Circuit’s ruling in the *Westside Delivery* case exists. The court’s ruling can also be seen as fairly limited in scope in that the primary issue addressed was whether a tax sale transaction can create a “contractual relationship”

¹⁶⁶ See 42 U.S.C. § 9607(b) (2012); H.R. REP. NO. 99-253(I), at 74 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856.

¹⁶⁷ H.R. REP. NO. 99-253(I), at 74 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856.

¹⁶⁸ Schechter, *supra* note 163.

¹⁶⁹ This exception arises out of the Brownfield Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. No. 107-118, 115 Stat. 2356 (codified as amended at 42 U.S.C. §§ 9601, 9604, 9605, 9607, 9622). This exception applies to purchasers who do not impede the performance of a contamination response action. 42 U.S.C. § 9607(r)(1).

¹⁷⁰ 42 U.S.C. § 9607(r)(1).

¹⁷¹ Again, the innocent landowner defense is available to a defendant property owner where contamination predates the purchase of the property and the defendant did not know or have reason to know of the contamination. *Id.* § 9601(35)(A)(i).

¹⁷² *Westside Delivery*, 888 F.3d 1085, 1089 (9th Cir. 2018). The California Department of Toxic Substances Control and the EPA approved a cleanup plan for the Davis site in 2008 and undertook cleanup efforts from 2010 through 2015. *Westside Delivery* purchased the site at auction in 2009. Depending on *Westside Delivery*’s conduct during the cleanup efforts, *Westside Delivery* may have satisfied the bona fide prospective purchaser exception.

¹⁷³ Perhaps Professor Schechter’s failure to acknowledge the possible availability of the innocent landowner defense was related to the Second Circuit’s essential elimination of that defense through its overly broad application of the traditional third-party liability defense.

for purposes of CERCLA liability. One could argue that this holding should only serve to extend the definition of “contractual relationship” to involuntary transfers, such as a state tax sale. The application of this holding has yet to unfold.

As discussed in more detail below, Westside Delivery’s reading of the statute to exclude similarly situated purchasers from CERCLA liability would create anomalous results that Congress would have expressly indicated its intent to create—which it has not.¹⁷⁴

IV. NINTH CIRCUIT VIEW IS CORRECT

The Ninth Circuit’s reasoning in *Westside Delivery* was deliberate, reasoned, and authoritative. This Part begins by outlining the process by which courts undertake to interpret statutory language generally. Part B looks more closely at the Ninth Circuit’s reasoning in relation to CERCLA’s statutory language.

A. Overview

When courts undertake to interpret statutory text, the traditional method is to begin with the actual language of the statute.¹⁷⁵ Unlike the Second Circuit’s cases that have analyzed the complexities of CERCLA, the Ninth Circuit makes a point of utilizing extensive statutory construction to ground its reasoning in Congress’s presumed intent.¹⁷⁶ For example, in *Carson Harbor Village*, the Ninth Circuit carefully examined the language of CERCLA’s third party and innocent landowner defenses, starting with its plain meaning.¹⁷⁷ Next, the Court looked at CERCLA as a whole.¹⁷⁸ “Complex regulatory statutes, in particular, often create a web—or, in the case of CERCLA, perhaps a maze—of sections, subsections, definitions, exceptions, defenses, and administrative provisions. Thus, we examine the statute as a whole, including its purpose and various provisions.”¹⁷⁹ The Ninth Circuit then found Congress’s purpose in enacting CERCLA was “to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created.”¹⁸⁰ While laboring to avoid internal inconsistency and illogical results, the Ninth Circuit stated “[c]learly, neither a logician nor a grammarian will find comfort in the world of

¹⁷⁴ *Westside Delivery*, 888 F.3d at 1098; see *infra* Part IV(B)(1)(b).

¹⁷⁵ *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)).

¹⁷⁶ See, e.g., *Carson Harbor Vill.*, 270 F.3d 884, 878–88 (9th Cir. 2001); *Westside Delivery*, 888 F.3d at 1095–99.

¹⁷⁷ *Carson Harbor Vill.*, 270 F.3d at 878–81.

¹⁷⁸ *Id.* at 880.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

CERCLA.”¹⁸¹ It went on to say, however, “we can only conclude that Congress meant what it said” when it enacted CERCLA as written.¹⁸² The Ninth Circuit concluded with the legislative history of CERCLA and SARA.¹⁸³ “Although the Supreme Court has advised that recourse to legislative history is not necessary where a statute’s plain meaning is clear, the Court does suggest that we review the legislative history to ensure that there is no clearly contrary congressional intent.”¹⁸⁴ The Ninth Circuit concluded that, although searching “CERCLA’s legislative history is somewhat of a snark hunt,”¹⁸⁵ CERCLA’s reach was broad and SARA’s innocent landowner defense was narrow.¹⁸⁶

Similarly, in *Pakootas v. Teck Cominco Metals, Ltd.*,¹⁸⁷ the Ninth Circuit performed a detailed analysis of its statutory interpretation of CERCLA.¹⁸⁸ After describing the statutory text and framework along with looking at the statute’s plain meaning, the Court noted that its interpretation of a statutory term in one area of the statute would cause “ripple effects throughout the rest of the statute, even though the only provision technically in dispute is § 9607(a)(3).”¹⁸⁹ The court thus realized the importance of analyzing the statute as a whole.¹⁹⁰

Again, in *Westside Delivery*, the Ninth Circuit looked at its canons of statutory interpretation to arrive at the result it did.¹⁹¹ The Ninth Circuit started with the statutory definition of “contractual relationship” and analyzed it against the statutory scheme as a whole to reach its conclusion that a tax sale deed should qualify as a “contractual relationship” for purposes of CERCLA.¹⁹² The Ninth Circuit held that “the ‘in connection with’ condition is intended to filter out those situations in which the previous owner’s polluting acts or omissions were unrelated to its status as a landowner,” not instances where the contract itself does not speak of contamination.¹⁹³

All of this demonstrates that, unlike the Second Circuit’s analysis in *Westwood Pharmaceuticals* and *Lashins Arcade*, the Ninth Circuit’s interpretation of CERCLA’s terms is based on a careful analysis of the

¹⁸¹ *Id.* at 883.

¹⁸² *Id.* at 883–84.

¹⁸³ *Id.* at 884 (citing *Salinas v. United States*, 522 U.S. 52, 57–58 (1997); *Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465, 471 & n.8 (1997); *Darby v. Cisneros*, 509 U.S. 137, 147 (1993); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155 (1989)).

¹⁸⁴ *Carson Harbor Vill.*, 270 F.3d at 884.

¹⁸⁵ *Id.* at 885.

¹⁸⁶ *Id.* at 886–87.

¹⁸⁷ 830 F.3d 975 (9th Cir. 2016).

¹⁸⁸ *Id.* at 980.

¹⁸⁹ *Id.* at 982–83.

¹⁹⁰ *Id.*

¹⁹¹ *Westside Delivery*, 888 F.3d 1085, 1093–95, 1097–98 (9th Cir. 2018).

¹⁹² *Id.* at 1098.

¹⁹³ *Id.* at 1101. For an illustration of the Ninth Circuit’s reasoning supplied in the *Westside Delivery* opinion, see *infra* note 207 and related discussion.

statute and the effects its interpretation of a single term will have on the statute at large.¹⁹⁴

B. Argument

This section begins by applying the typical process courts follow when interpreting statutory language to the Ninth Circuit's reasoning in *Westside Delivery*, followed by why the holding reached by the Ninth Circuit fits the natural reading of the statute and follows the traditional approach of statutory interpretation.

The Ninth Circuit stated in *Westside Delivery* that “[t]he phrase ‘in connection with’ is essentially indeterminate because connections, like relations, stop nowhere. So the phrase ‘in connection with’ provides little guidance without a limiting principle consistent with the structure of the statute and its other provisions.”¹⁹⁵ Thus, “in connection with” language in a statute can pose difficulties for statutory interpretation. Because this phrase necessarily relies on the phrases both before and after, this phrase cannot be considered out of context from the rest of the statutory language.¹⁹⁶

The Ninth Circuit repeatedly acknowledges the importance of viewing the statute as a whole in its CERCLA jurisprudence.¹⁹⁷ CERCLA’s “in connection with a contractual relationship” language is properly read to mean that the current owner must have been in a contractual relationship with the previous contaminating owner.¹⁹⁸ The contractual relationship of CERCLA does not depend on the presence of contamination or the purchaser’s knowledge thereof. Rather, the contamination need only relate to the previous owner’s status *as a landowner*. In this way, when a previous owner contaminates a site through acts or omissions relating to its status as a landowner, the current owner will necessarily form the requisite contractual relationship for CERCLA liability purposes through the contract for land transfer.¹⁹⁹ The non-polluting current owner is then responsible for asserting an available defense. To hold otherwise leads to unforeseen consequences and unintended results.

¹⁹⁴ A brief discussion of legislative history is present in *Westwood Pharmaceuticals* but only to the extent necessary to bolster the court’s summary support for the district court’s interpretation. *Westwood Pharm.*, 964 F.2d 85, 90 (2d Cir. 1992).

¹⁹⁵ *Westside Delivery*, 888 F.3d at 1100 (internal citations omitted).

¹⁹⁶ *Maracich v. Spears*, 570 U.S. 48, 60 (2013) (“The phrase ‘in connection with’ provides little guidance without a limiting principle consistent with the structure of the statute and its other provisions.”).

¹⁹⁷ See, e.g., *Carson Harbor Vill.*, 270 F.3d 884, 882 (9th Cir. 2001); *Westside Delivery*, 888 F.3d at 1097.

¹⁹⁸ *Domenic Lombardi Realty*, 204 F. Supp. 2d 318, 332 (D.R.I. 2002) (“The statutory definition of ‘contractual relationship,’ therefore, expressly includes contracts for the sale of land.”).

¹⁹⁹ See *Westside Delivery*, 888 F.3d at 1101.

In reaching its interpretation of “in connection with a contractual relationship,” the *Westside Delivery* court relied on language from a lower court case out of the District Court for the District of Rhode Island, *United States v. Domenic Lombardi Realty*.²⁰⁰ Domenic Lombardi Realty was a property developer that purchased a large area of land. Shortly after purchase, this property became a focus for the Rhode Island Department of Environmental Management as well as the EPA.²⁰¹ The site was formerly operated as a junkyard that had received and disposed of contaminated electrical transformers.²⁰² Domenic Lombardi argued that it was not aware of the contamination and would not have purchased the site if it had known about the contamination, so it therefore qualified for the innocent landowner defense.²⁰³ Domenic Lombardi encouraged the court to adopt the Second Circuit’s interpretation of the “in connection with” language of the statute when determining a defendant’s eligibility for the third party defense.²⁰⁴ The Rhode Island court declined, however, and stated that adopting the interpretation set forth by the Second Circuit in *Westwood Pharmaceuticals* “would render the explicit language of the statutory definition [of ‘contractual relationship’] inoperative.”²⁰⁵

Utilizing the Rhode Island court’s language, the Ninth Circuit in *Westside Delivery* stated that following the Second Circuit’s analysis of the “in connection with” language would lead to anomalous results.²⁰⁶ The Court expressly decried *Westside Delivery*’s argument in favor of the Second Circuit’s holding:

If the “in connection with” condition were construed so narrowly as to allow a defendant-purchaser to assert the third-party defense *in all cases in which the relevant land contract, deed, or other instrument did not “relate to . . . hazardous substances,” there would have been little need for Congress to add the innocent-landowner defense*, because most innocent purchasers would have been covered already by the “traditional” third-party defense. The innocent-landowner defense would be rendered largely superfluous.²⁰⁷

The Court did acknowledge, however, that the defense is still subject to a limiting principle such that “in connection with” can be constrained in a way consistent with the statute.²⁰⁸

²⁰⁰ *Id.* at 1100 (citing *Domenic Lombardi Realty*, 204 F. Supp. 2d at 318).

²⁰¹ *Domenic Lombardi Realty*, 204 F. Supp. 2d at 321.

²⁰² *Id.* at 322–23.

²⁰³ *Id.* at 323, 331.

²⁰⁴ *Id.* at 331–32.

²⁰⁵ *Id.* at 332.

²⁰⁶ *Westside Delivery*, 888 F.3d 1085, 1100 (9th Cir. 2018).

²⁰⁷ *Id.* (emphasis added).

²⁰⁸ *Id.* at 1101.

The *Westside Delivery* court utilized a helpful example to illustrate its reasoning regarding the traditional third party liability defense for a purchaser:

Imagine, for instance, that an owner, *A*, sold uncontaminated land to *B* and that, years after the sale, a truck owned by *A* happened to overturn near the land, causing contamination with hazardous pollutants. If *B* were to be sued under CERCLA, it could assert a third-party defense notwithstanding its contractual relationship with *A*, because the truck's turning over was in no way related to *A*'s status as the owner of the land—it occurred long after *A* had parted with its interest in the land, and it did not occur while *A* was using the land in its capacity as an owner.²⁰⁹

The Ninth Circuit thus articulated the narrow role the third party defense plays. This defense is available only to those whose property was contaminated by a truly third party, where that contamination was not due to an act or omission related to the previous owner's status as landowner, and, generally, where contamination occurs after purchase.²¹⁰ In the *Westside Delivery* case, the contamination occurred while the previous owner, Davis, operated the chemical recycling facility. The contamination was a result of Davis's status as the owner and operator of the facility. *Westside Delivery* necessarily had a contractual relationship with Davis through the land transfer, and that contractual relationship was in connection with the facility. The facility was the source of contamination, which meant that *Westside Delivery* fell under CERCLA's current owner liability.²¹¹ Thus, *Westside Delivery* could not claim the third party defense, because the "in connection with a contractual relationship" requirement was met.²¹²

V. WHY "IN CONNECTION WITH A CONTRACTUAL RELATIONSHIP" SHOULD NOT BE LIMITED TO ONLY THOSE RELATED DIRECTLY TO CONTAMINATION

The Ninth Circuit was right to reject the Second Circuit's holding on CERCLA's language. The Ninth Circuit's careful analysis of the possible outcomes of following the Second Circuit's reasoning show why future courts should elect to follow the Ninth Circuit. The two strongest arguments in favor of the Ninth Circuit's reasoning are its analysis of statutory interpretation and its illustration of possible anomalous results from following the Second Circuit's holding from *Westwood Pharmaceuticals* and *Lashins Arcade*.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 1101.

²¹² *Id.* It is worth noting that this does not mean *Westside Delivery* did not have other available defenses. The Ninth Circuit's ruling extended only to the application of the third-party defense.

A. Basic Statutory Construction Supports the Ninth Circuit's Reasoning

The primary tools courts look to when interpreting a statute are the plain meaning of the text of the statute, the statute's purpose, and reading the statute as a whole.²¹³ When the statutory text of CERCLA is analyzed under this rubric, as the Ninth Circuit did in *Westside Delivery*, the natural reading of the “contractual relationship” language points to a relationship generally, not one limited to the contamination at issue.²¹⁴ The rubric of interpretation is broken down more fully below.

1. Plain Meaning

In *Carson Harbor Village*, the Ninth Circuit outlined the traditional “plain meaning” analysis:

In examining the statutory language, we follow the Supreme Court's instruction and adhere to the “Plain Meaning Rule”:

‘It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.

Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.’²¹⁵

However, when Congress supplies a definition in the statute, that definition controls over the plain meaning.²¹⁶ And Congress did supply a definition for the term “contractual relationship.”²¹⁷ The statutory definition thus trumped the plain meaning of the words separately.²¹⁸

²¹³ See *Carson Harbor Vill.*, 270 F.3d 863, 877 (9th Cir. 2001) (quoting *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 830 (9th Cir. 1996) (“[W]e look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress.”); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (“Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute”); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citing *Bethesda Hospital Ass’n v. Bowen*, 485 U.S. 399, 403–05 (1988) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”)); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220–21 (1986) (“We conclude that that provision will not bear respondents’ reading when evaluated in light of the language of the Act as a whole, the legislative history of § 7, the congressional purposes underlying the Act, and the importance of uniformity of admiralty law.”).

²¹⁴ See *Westside Delivery*, 888 F.3d at 1098.

²¹⁵ *Carson Harbor Vill.*, 270 F.3d at 878 (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

²¹⁶ *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (“When a statute includes an explicit definition, we must follow that definition, even if it varies from that term’s ordinary meaning.”).

²¹⁷ See 42 U.S.C. § 9601(35) (2012).

²¹⁸ *Westside Delivery*, 888 F.3d at 1099.

This well-established understanding of statutory language easily defeated Westside Delivery's argument that it could not have a "contractual relationship" with the previous owner because it had no relationship whatever with the previous owner.²¹⁹

2. Purpose

The stated purpose of CERCLA is: "to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."²²⁰ "Congress enacted CERCLA as a comprehensive regulatory response to the growing problem of hazardous waste" and "to provide an array of mechanisms to combat the increasingly serious problems of hazardous substance release."²²¹ The purpose of CERCLA is thus best served by remediating contamination and assigning liability for a speedy recovery.²²²

As the *Westside Delivery* court recognized, in order to fulfill CERCLA's purpose, the innocent landowner defense must be read narrowly.²²³ The Ninth Circuit stated "the breadth of the definition of 'contractual relationship' implies that the Congress that enacted SARA intended the innocent-landowner defense to be the sole defense available to private purchasers of land contaminated by previous owners."²²⁴

It would be contrary to the purpose of the statute to create a blanket defense for any purchaser of contaminated property whose contractual relationship with the previous owner did not reference such contamination.

3. Statute as a Whole

When analyzing the text of a statutory provision, the placement of that provision among the statute's text as a whole must also be considered.²²⁵ The overall structure of CERCLA promotes the assignment of presumptive liability to various statutorily-defined PRPs.²²⁶ Because the goal is to attach liability, the defenses against liability are narrow and specific.²²⁷ It would be contrary to the structure

²¹⁹ *Id.*

²²⁰ Act of Dec. 11, 1980, Pub. L. No. 96-510, 94 Stat. 2767.

²²¹ *Domenic Lombardi Realty*, 204 F. Supp. 2d 318, 328 (D.R.I. 2002) (internal quotation marks omitted).

²²² *Carson Harbor Vill.*, 270 F.3d 863, 880 (9th Cir. 2001) ("CERCLA also has a secondary purpose-assuring that 'responsible' persons pay for the cleanup").

²²³ *Westside Delivery*, 888 F.3d at 1097-98.

²²⁴ *Id.* at 1098.

²²⁵ *Id.* at 1097 (citing *Carson Harbor Vill.*, 270 F.3d at 880).

²²⁶ *Carson Harbor Vill.*, 270 F.3d at 881.

²²⁷ *Domenic Lombardi Realty*, 204 F. Supp. 2d 318, 330 (D.R.I. 2002) ("By its terms, CERCLA is a strict liability statute with limited and narrow defenses.").

of the statute to read the traditional third party defense as applying wherever a contractual relationship did not reference preexisting contamination because it would render Congress's inclusion of the innocent landowner defense superfluous.²²⁸

As the Ninth Circuit has repeatedly held, CERCLA's provisions cannot be read without reference to the statute as a whole.²²⁹ As the *Carson Harbor Village* court stated, "[n]o statutory provision is written in a vacuum Thus, we examine the statute as a whole, including its purpose and various provisions."²³⁰ Reading the "in connection with a contractual relationship" provision without reference to the statute as a whole is contrary to the standards of statutory interpretation.²³¹

B. Loopholes and Anomalous Results Created by the Second Circuit's Interpretation and Westside Delivery's Reading of CERCLA

A further justification for following the Ninth Circuit's reasoning is the anomalous results and possible loopholes created by the Second Circuit's interpretation.²³² As explained by the *Westside Delivery* court, the Second Circuit's reading allows defendants to claim the defense regardless of their knowledge of contamination or their actual innocence in the existence of that contamination.²³³ This is because all that is required to avoid liability, in the eyes of the Second Circuit, is to ensure any contractual relationship remain silent on the topic of contamination.²³⁴

Further, *Westside Delivery* sought to narrow the broad definition of "contractual relationship" so as to avoid liability based on its acquisition of the contaminated site through the tax sale. The Ninth Circuit reasoned on this point that it would create an anomalous result if an "ordinary" purchaser would not be able to escape liability in the same situation.²³⁵

An additional anomalous result the *Westside Delivery* court noted with regards to excluding tax deeds from the definition of "contractual

²²⁸ *Westside Delivery*, 888 F.3d at 1100; *Domenic Lombardi Realty*, 204 F. Supp. 2d at 332.

²²⁹ See, e.g., *Carson Harbor Vill.*, 270 F.3d at 880, 882–83; *Westside Delivery*, 888 F.3d at 1097.

²³⁰ *Carson Harbor Vill.*, 270 F.3d at 880.

²³¹ *Westside Delivery*, 888 F.3d at 1098.

²³² *Id.* ("Defendant's reading thus creates, in effect, a loophole that frustrates the defense's purpose.").

²³³ *Id.* An innocent landowner is one who necessarily had no hand in the placement of the contamination, or, one who is truly innocent.

²³⁴ Johnston, *supra* note 36, at 444.

²³⁵ *Westside Delivery*, 888 F.3d at 1098 ("A typical—that is, non-tax-sale—private purchaser who buys property contaminated by a previous owner or possessor is entitled to the innocent-landowner defense only if the purchaser bought the property without actual or constructive knowledge of contamination," citing 42 U.S.C. § 9601(35)(A)(i) (2012)).

relationship” dealt with the situation where a potential purchaser knows of contamination and tax liens.²³⁶

For example, consider the situation of a prospective purchaser who learns that there are tax liens on a contaminated property that he or she is interested in buying. Under Defendant’s view, the buyer is better off waiting until the owner defaults on the tax liens and the property goes through the tax-sale procedure than buying the property from the owner and risking CERCLA liability or complying with the many requirements of the bona fide prospective purchaser defense: once the property has gone through the tax-sale procedure, the CERCLA liability is “scraped off” and the buyer is not responsible for clean-up costs.²³⁷

This result is easily avoided if the statute is interpreted per its purpose, plain text, and the overall statutory scheme.²³⁸ As the Ninth Circuit stated, “we are confident that Congress did not mean to treat tax-sale purchasers differently from typical purchasers, which is why it defined ‘contractual relationship’ broadly enough to include the relationship between a tax-sale purchaser and the pre-tax-sale owner of tax-defaulted property.”²³⁹

VI. CONCLUSION

Based on the comprehensive analysis undertaken by the Ninth Circuit in formulating its interpretation of CERCLA’s statutory language, future courts should follow this line of reasoning over that offered by the Second Circuit’s line of cases following *Westwood Pharmaceuticals* and *Lashins Arcade*. Further, following the Ninth Circuit’s reasoning breathes life back into the statute as written and furthers Congress’s intent in enacting CERCLA and SARA. The Second Circuit’s reasoning effectively rendered the innocent landowner defense surplusage, a result courts should strive to avoid rather than create. The Ninth Circuit’s reasoning speaks to CERCLA’s purpose and gives meaning to each word of the statute.

Big business may try to limit the Ninth Circuit’s ruling in *Westside Delivery* to situations involving involuntary transfers, such as the transfer involving an exempt government entity at issue in that case. However, the language used by the court related to any defendant-landowner, regardless of the status of the previous owner.²⁴⁰ Further, defendants are not barred from raising any other available defense, only the third party liability defense.²⁴¹ By restricting the application of the third party liability defense, the goal of remediating contaminated

²³⁶ *Id.* at 1098.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 1101.

²⁴¹ *Id.*

property is advanced because it encourages prospective purchasers to undertake a reasonable investigation into the possible presence of contamination and then, if contamination is found, work with authorities on cleanup efforts.²⁴² Restricting the application of the third party liability defense also conforms to what courts have repeatedly stated of the CERCLA defenses: the available defenses are narrow and limited.²⁴³ The Ninth Circuit's ruling in *Westside Delivery* thus restores the role of the innocent landowner defense as an alternative third party liability defense, rather than depriving it of independent meaning like the Second Circuit's reading.

The Ninth Circuit's reading of the language of CERCLA is consistent with the purpose of the statute, the plain language of the text, the statute as a whole, and Congress's intent. As such, little justification exists, if any, for following the alternative analysis offered by the Second Circuit. Thus, future courts should attempt to employ the sound reasoning of the Ninth Circuit and arrive at the same conclusion that the requisite "contractual relationship" means just that, a contractual relationship. Nothing more.

²⁴² See 42 U.S.C. §§ 9601(35), 9607(b)(3), 9607(r)(1) (2012).

²⁴³ See *Domenic Lombardi Realty*, 204 F. Supp. 2d 318, 330 (D.R.I. 2002) ("By its terms, CERCLA is a strict liability statute with limited and narrow defenses.").