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Can You Trust a Trust? The Potential CERCLA Liability of Trustees and Beneficiaries

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I
INTRODUCTION AND IMPETUS

Some baby boomers, and those who will follow them, will face estate planning issues that no other generation has had to concern itself with: transfers, via trusts, of real property impacted by hazardous substances and the long liability reach of modern environmental laws.[1] These laws can transform the potential boon of real property held in trust for one's benefit into a nightmare of ongoing or potential litigation and liability. Those who advise on estate and environmental issues must therefore understand the risks involved in transferring or holding impacted property in trust and the types of structures and advance planning that will best benefit and protect those to whom the settlors[2] intend to gift. This Article addresses these issues, as well as many of the questions raised by the need to structure gifts of impacted real property in a manner that carries

1 Note that we are careful here to avoid mentioning the *inheritance* of impacted property. For reasons discussed herein, specific rules may apply to property transferred through inheritance or bequest. While these transfers are important, and therefore discussed extensively, the main focus of this Article is the potential liability implications of lifetime transfers of property interests through trusts.

2 The terms "settlor" and "trustor" are synonymous and refer to the creator of a trust. These terms are used interchangeably throughout this Article.

out the settlor's intent without imposing additional personal liability on those gifted.

In particular, and with a focus on California law, this Article addresses the question of under what circumstances, if any, can trustees and/or beneficiaries be held liable as "owners?" This question is crucial because owners are strictly liable under the Superfund Law—the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).[3] Other questions addressed in this Article include: If the beneficiary or trustee is potentially liable, is such liability personal or limited to trust assets? What steps can be taken to reduce or eliminate exposure of the trust assets and the beneficiary and/or trustee's own personal assets to clean-up liability? What potential defenses are available to trustees and beneficiaries?

CERCLA is a notoriously difficult statute to interpret, and most CERCLA cases and opinions are convoluted and complex. Many of the questions addressed here drift into uncharted waters with no appellate opinions directly on point. Our purpose, therefore, is to mark known shoals and sandbars, graph known or reasonably expected channels, explore safe harbors, and chart what now seems to be the optimum course, recognizing as we go that the current is swift, and we don't control the weather.

II
THE QUICK-AND-DIRTY ON PASSING OFF DIRTY PROPERTY

A. Trustee Liability

As a general rule, trust law precludes holding trustees personally liable under CERCLA without malfeasance of some sort. There is, however, some authority for holding trustees personally liable if they engage in "misfeasance."[4] In the absence of either malfeasance or misfeasance, trustees are only liable as trustees and therefore are only liable to the extent that trust assets are available to indemnify them. They have no

3 42 U.S.C. §§ 9601–9675 (2006). Congress amended CERCLA with the Superfund Amendments and Reauthorization Act of 1986 (SARA). These statutes are referred to collectively herein as CERCLA.

4 Malfeasance is the act of doing a bad thing. Misfeasance is failing to stop a bad thing from happening.

personal exposure, absent malfeasance or misfeasance. Trustees can take actions to protect themselves by prudently managing property and handling environmental issues in an attentive, well-advised manner.

B. Beneficiary Liability

No statutory protection exists to protect beneficiaries from liability under CERCLA. There is scant case law on the potential liability of beneficiaries where that liability is derived from their status as beneficiaries. Many unanswered legal questions exist, in particular, whether beneficiaries are owners and, therefore, potentially responsible parties (PRPs) under CERCLA, with all of the far reaching liability implications of that status. Based on current case law and statutory interpretation, there is more than just a reasonable argument that beneficiaries are owners under CERCLA because beneficiaries' possession of equitable title appears sufficient to establish owner liability. If they are owners, beneficiaries, absent a defense, will face potential personal liability for environmental conditions on real property held in trust for their benefit. Owners are also strictly liable for any actions of third parties, such as tenants, although those parties also remain liable.

Beneficiaries do have certain defenses to CERCLA liability, including the "inheritance or bequest defense," a subset of the "third-party defense."[5] However, the scope of the inheritance or bequest defense is uncertain. Further, as in all CERCLA cases, if beneficiaries are liable, CERCLA entitles them to contribution from other responsible parties, and there may be many other contractual rights and/or common law theories that may present an opportunity to recover damages.[6]

C. Caveats

It is important to note that owners of contaminated property must always clean up owned property that poses a threat to human health or the environment, regardless of whether or not they are liable under CERCLA, and that third parties have

5 42 U.S.C. § 9607(b)(3); *see also id.* § 9601(35)(A)(iii).

6 *Id.* § 113(f); *see, e.g.*, CAL. CIV. CODE § 3479 (West 1997) (defining nuisance).

many rights not dependent upon CERCLA liability. For example, without obtaining a judgment under CERCLA, regulatory agencies may require cleanup through the issuance of orders containing stiff penalties for noncompliance, and adjacent and nearby property owners may bring an action for damages caused by migration regardless of CERCLA liability.

III
THE LANDSCAPE OF THE LAW AND SOME HISTORICAL PERSPECTIVE

A. CERCLA in General

CERCLA imposes liability on covered persons and provides a mechanism for the recovery[7] or contribution[8] of response costs incurred in remediating properties impacted with hazardous substances.[9] CERCLA plaintiffs can include private individuals as well as state and/or federal entities. Covered persons that are potentially liable include all present owners and/or operators,[10] past owners and/or operators,[11] arrangers (also called "generators" or "disposers"),[12] and acceptors (also called "disposal facilities").[13]

Operator, arranger, and acceptor liability turns on whether defendants performed certain acts, such as generating a waste containing a hazardous substance, that bring them within the defined class of covered persons. By comparison, potential liability for owners turns only on a defendant's status as an owner. Though CERCLA case law does nuance ownership liability in certain circumstances, such as where interim owners are considered innocent interim owners if they did not

7 Cost recovery actions are covered by CERCLA section 107 and are available to reimburse voluntarily incurred response costs. United States v. Atlantic Research Corp., 127 S. Ct. 2331, 2338 (2007).

8 Section 113(f) of CERCLA addresses contribution actions which are only available to responsible parties and only after these parties have been sued under section 106 or 107 or otherwise have resolved their liability with the government. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 162–63 (2004).

9 42 U.S.C. § 9607(a) (defining covered persons).

10 *Id.* § 9607(a)(1).

11 *Id.* § 9607(a)(2).

12 *Id.* § 9607(a)(3).

13 *Id.* § 9607(a)(4).

exacerbate contamination, it is never favorable to be a CERCLA owner without reasonable certainty of a defense.

B. The Law as Applied to Trustees

1. History and Overview of Trustee Liability Under CERCLA

a. Quadion Corp. v. Mache[14]

Quadion is the seminal case involving allegations of CERCLA liability leveled at a trustee.[15] The case is historically significant because it presented for the first time the possibility of naming trustees as defendants in CERCLA cases.[16] However, *Quadion* is unclear as to whether the plaintiffs sought to reach only the trust assets or whether they attempted to reach the trustee's personal assets. The case therefore sheds little light on the potential personal liability of trustees.

Two years after *Quadion*, and perhaps in light of it, commentators asked the Environmental Protection Agency (EPA) to exempt trustees from potential personal liability. The EPA refused.[17]

b. City of Phoenix v. Garbage Services Co.[18]

City of Phoenix brought the issue of trustee personal liability to a head by imposing personal liability on a bank trustee for contamination resulting from the use of trust property as a landfill.[19] This landfill property was ultimately owned by a testamentary trust.[20] The trustee, Valley National Bank, administered the trust, but not the site, and never involved itself

14 Quadion Corp. v. Mache, 738 F. Supp. 270 (N.D. Ill. 1990).

15 *See id.* The government actually named an individual trustee as a defendant in the earlier case of *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1365 (D.N.H. 1985). The court granted summary judgment in the individual's favor; the government did not appeal.

16 *Quadion*, 738 F. Supp. at 272–73.

17 Lender Liability Under CERCLA, 40 C.F.R. pt. 300 (2008). The EPA failed to come right out and express what was likely the agency's primary concern: that if such an exception existed, unscrupulous polluters would simply create trusts, name themselves as trustees, and then thumb their noses at the regulators while violating every environmental law on the books.

18 City of Phoenix v. Garbage Servs. Co., 827 F. Supp. 600 (D. Ariz. 1993).

19 *Id.* at 607.

20 *Id.* at 601.

in the landfill operations.[21] The City of Phoenix eventually condemned and remediated the site.[22] More than twenty years after the bank acquired the landfill, the City of Phoenix filed suit against the bank, seeking to recover its response costs pursuant to section 107 of CERCLA.[23] The bank argued that trustees were not owners for purposes of CERCLA.[24] Moreover, given the role of trustee, the bank argued that even if a trustee was an owner for CERCLA purposes, the trustee could not be held personally liable.[25] The court rejected both arguments.[26]

The court breezed by the first question, quickly ruling that trustees could be owners subject to CERCLA claims,[27] then turned to the more difficult question of trustee personal liability under CERCLA.[28] The court attempted to fashion a uniform federal rule that maintained both the congressional intent behind CERCLA (that is, to make anyone other than the taxpayers pay for cleaning up impacted sites) and general legal principles regarding personal liability for trustees.[29] After considering the Restatement of Torts[30] and other authority, the court announced the following rules:

> (1) Where a trustee is held liable under subsection 107(a)(1) as the current owner of contaminated property, the trustee's liability is limited to the extent that the trust assets are sufficient to indemnify him.

21 *Id.* at 602.

22 *Id.*

23 *Id.*

24 *See id.* at 601. Whether trustees fall into any of the other classes of potential CERCLA defendants is a more straightforward question. The analysis for operator, arranger, and disposer liability turns on questions of actions, not status, as owner liability does. Where a trustee acts as operator, arranger, or disposer under the CERCLA cases, the trustee will be a covered person under CERCLA. The issue then becomes whether the acts creating such liability are such that the protection afforded trustees by section 107(n) of CERCLA will not apply. *See infra* Parts III.B.1.c–e.

25 *See City of Phoenix*, 827 F. Supp. at 602.

26 *Id.* at 601, 604–05.

27 *Id.* at 605. This point is now settled law such that the answer to the "owner" question turns on governing state law. For a more detailed discussion of this rule, see *infra* Part III.B.2.

28 *City of Phoenix*, 827 F. Supp. at 602–07.

29 *Id.* at 603.

30 *Id.* (considering RESTATEMENT (SECOND) OF TRUSTS §§ 264–265 (1959)).

> (2) Where a trustee is held liable under subsection 107(a)(2) [as the owner or operator of a facility at the time of disposal], but the trustee did not have the power to control the use of trust property, the trustee's liability is limited to the extent that the trust assets are sufficient to indemnify him.
>
> (3) Where a trustee had the power to control the use of trust property, and knowingly allowed the property to be used for the disposal of hazardous substances, then the trustee is liable under subsection 107(a)(2) to the same extent that he would be liable if he held the property free of trust.[31]

Thus, the *City of Phoenix* rule allowed for personal CERCLA liability for malfeasant and misfeasant trustees.[32]

c. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996

City of Phoenix was a rallying cry for the banking lobby. Three years later, Congress passed the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, which eventually became section 107(n) of CERCLA.[33] Section 107(n)(1) proclaims that, in general, a fiduciary's liability "for the release or threatened release of a hazardous substance at, from, or in connection with a . . . facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity."[34] Section 107(n)(4) also provides fiduciaries a "safe harbor" from personal liability when they undertake certain activities that might otherwise raise the specter of CERCLA liability.[35]

It is critical to recognize that neither the limitation on liability nor the safe harbor provision applies if the fiduciary is negligent and that negligence "causes or contributes to the release or threatened release."[36] By its own terms, section 107(n) excludes fiduciaries from its protection where the fiduciary is liable under CERCLA as an individual—for example, as a generator—as

31 *Id.* at 605.

32 *Id.* at 606–07.

33 Pub. L. No. 104-208, sec. 2501-2505, § 107, 110 stat. 3009-462 to 469 (codified as amended at 42 U.S.C. §§ 6991, 9601, 9607 (2006)).

34 42 U.S.C. § 9607(n)(1) (including trustees in the list of covered fiduciaries).

35 *Id.* § 9607(n)(4).

36 *Id.* § 9607(n)(3).

opposed to only as a fiduciary.[37] The safe harbor provision also does not apply where a fiduciary acts in a manner other than as a fiduciary, such as acting as a beneficiary or benefiting as a result of that behavior.[38] The safe harbor is not safe where the individual or entity is both fiduciary and beneficiary and the fiduciary benefits in a manner that exceeds "customary or reasonable compensation[] and incidental benefits"[39] or acts in his or her own self-interest.[40] Section 107(n) also excludes certain classes of fiduciaries from the definition of "fiduciary"[41] and therefore from protection of the section.[42]

d. *The First Interpretation of 107(n):* Canadyne-Georgia Corp. v. NationsBank[43]

In *Canadyne*, the defendants included the bank trustee of the settlor's testamentary trust, as well as an inter vivos trust

37 *Id.* § 9607(n)(2). Thus, if the trustee committed acts such that the trustee is an operator, arranger, or acceptor, the trustee could be liable in their individual capacity as operator, arranger, or acceptor, as opposed to their capacity as trustee.

38 *Id.* §§ 9607(n)(2), (7). Section 107(n)(7) uses "and" in subsection (B)(i), while the analogous California Health and Safety Code, section 25548.5, discussed at footnote 60, does not. No appellate opinion discusses this difference, but superficially, it appears that to maintain the protection afforded by state law one only has to satisfy the requirements of a single subsection of section 25548.5, while one would have to satisfy every subsection of CERCLA section 107(n)(7) in order to maintain the protection afforded under federal law.

39 42 U.S.C. § 9607(n)(7)(B)(ii). This rule appears to apply even if receipt of the benefits would be legal under other applicable law.

40 *Id.* § 9607(n)(7).

41 *Id.* § 9607(n)(5).

42 Specifically, under CERCLA, a trustee is not a "fiduciary" for the purpose of the safe harbor provision where they are the trustee of a trust that engages in a business for profit, or is organized to engage in a business for profit, unless the reason for the trust was the facilitation of an estate plan or plans, due to the incapacity of the estate owner. *Id.* § 9607(n)(5)(A)(ii)(I). Also excluded are fiduciaries of trusts that would be considered fraudulent in that they were created specifically and intentionally to avoid liability. *Id.* § 9607(n)(5)(A)(ii)(II). Again, there are less than a handful of cases that interpret and/or apply CERCLA section 107(n). *See*, *e.g.*, United States v. Newmont USA Ltd., 504 F. Supp. 2d 1050, 1057 (E.D. Wash. 2007) ("[Section 107(n)] limits a fiduciary's liability to the value of the trust assets . . . but does not, as the United States suggests, require that the payment for potential liability be from the trust assets."); *see also* Canadyne-Georgia Corp. v. NationsBank, 183 F.3d 1269 (11th Cir. 1999); Briggs & Stratton Corp. v. Concrete Sales & Servs., 20 F. Supp. 2d 1356 (M.D. Ga. 1998); Norfolk Southern Ry. Co. v. Shulimson Bros., 1 F. Supp. 2d 553 (W.D.N.C. 1998).

43 *Canadyne*, 183 F.3d at 1269.

established for the benefit of the settlor's daughters.[44] When sued for response costs under CERCLA, the trustee bank moved to dismiss on the grounds that it was not a "person" for purposes of CERCLA liability and that section 107(n) excluded it from liability.[45] The district court dismissed the matter on the first grounds and failed to address the bank's section 107(n) argument.[46] On appeal, however, the U.S. Circuit Court of Appeals for the Eleventh Circuit determined that, as a general principle of Georgia law, trustees could be owners of real property and therefore subject to CERCLA liability.[47] However, without more than the mere fact of being a trustee, fiduciaries had no personal liability exposure and were only liable as trustees.[48]

Canadyne raised other questions, however, because the individual trustees in that case held an interest in the property other than the interest they held as trustees; the bank was also a lender.[49] As such, the Eleventh Circuit reached some aspects of the section 107(n) question regarding under what circumstances personal liability could be imposed on trustees with other roles.[50] While the section 107(n) inquiry in *Canadyne* was necessarily fact specific, the court did make some helpful legal generalizations. Specifically, the court rejected the contention that the combination of a lending relationship and a fiduciary duty would exclude an entity from section 107(n) protection.[51] Thus, a bank trustee who also acted as mortgagor, for example, is still able to assert section 107(n) as a defense to personal liability.[52] The court also refused to find the trustee negligent, within the meaning of the negligence exception in section 107(n)(3), based on the fiduciary's vicarious liability for acts of employees,[53] even though the partnership would be vicariously

44 *Id.* at 1271.

45 Canadyne-Georgia Corp. v. NationsBank, 982 F. Supp. 886, 888 (M.D. Ga. 1997), *rev'd*, 183 F.3d 1269.

46 *Id.* at 891.

47 *Canadyne*, 183 F.3d at 1273–74.

48 *Id.* at 1274 n.7.

49 *Id.*

50 *Id.* at 1274.

51 *See id.* at 1275 n.9.

52 *See id.*

53 *Id.* at 1275 n.10.

liable for the actions of its employees under general negligence principles.[54] Finally, the Eleventh Circuit refused to find negligence and apply the negligence exception to section 107(n) protection based on the fiduciary's failure to act.[55] The court reasoned that, because CERCLA is a strict liability statute, CERCLA does not impose a duty to prevent others from acting.[56] As such, a failure of the fiduciary to prevent the release of a hazardous substance could never support a negligence theory and therefore could never bring a fiduciary within the negligence exception in section 107(n)(3).[57] Thus, the defendant trustee was entitled to the protection of section 107(n).

e. California Health and Safety Code Section 25548

The California legislature, like Congress, also took action in 1996 and enacted California Health and Safety Code section 25548—the California law analogous to CERCLA section 107(n).[58] The stated intent of section 25548 is "to specify the type of lender and fiduciary conduct that will *not* incur liability for hazardous material contamination."[59] As such, section 25548 provides exemptions and limitations to potential fiduciary liability under the environmental laws.[60] Thus, section 25548

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54 *Id.*

> [E]ven assuming *arguendo* that the Bank was a general partner, Canadyne must show the Bank itself negligently caused or contributed to the pollution. Just because under state partnership law a partnership and its partners may be vicariously liable for the negligence of any one partner or employee of the partnership does not mean every partner herself negligently caused the accident. Vicarious liability, or "imputed negligence," is not the same as saying negligence of a fiduciary caused or contributed to the release, as required under [section 107(n)].

Id. (internal quotation and citation omitted).

55 *Id.* at 1275.

56 *Id.*

57 *Id.*

58 Hazardous Materials Liability of Lenders and Fiduciaries, ch. 6.96, 1996 Cal. Legis. Serv. 612 (West) (codified at CAL. HEALTH & SAFETY CODE § 25548 (West 1999)).

59 CAL. HEALTH & SAFETY CODE § 25548(b) (emphasis added) (defining fiduciary); *see also* CAL. PROB. CODE §§ 83–84 (West 2002) (defining "trust company" and "trustee" respectively).

60 CAL. HEALTH & SAFETY CODE § 25548(b). Fiduciaries may endure exposure to liability for myriad sorts of things. However, in the interest of conciseness, hereinafter, wherever this Article refers to trustee or fiduciary liability or potential

residually identifies the universe of potential liability for fiduciaries. Specifically, section 25548 addresses the exceptions to and limitations on "the liability of trustees, executors, and other fiduciaries for hazardous material contamination involving property that is part of the fiduciary estate."[61]

Section 25548.3 eliminates personal liability for fiduciaries by confining their potential liability to the estate assets.[62] The caveats come in section 25548.5, which makes it clear that fiduciaries do not have blanket immunity from liability under the environmental laws.[63] The protection of the limitation of liability in section 25548.3 will not apply where (1) that liability results from the fiduciary's negligence or recklessness;[64] (2) the fiduciary conducts a removal or remedial action without providing proper notice to the appropriate agency;[65] (3) the potential liability results from acts outside the scope of the fiduciary duties;[66] (4) the fiduciary relationship is fraudulent in that its *raison d'être* is to avoid liability;[67] or (5) the fiduciary is also a beneficiary, or benefits from acting as fiduciary, in a manner over and above that considered customary or reasonable for a fiduciary.[68]

The courts have yet to interpret or apply section 25548 in an appellate decision. There is therefore little to guide parties and counsel with respect to when personal liability will, or will not, result under California law. It is likely that the example set by the federal courts in interpreting CERCLA section 107(n) would be highly persuasive. The federal courts, as discussed above, have held that trustees can have other roles and still be protected, that trustees won't be held liable where liability is solely vicarious, and that failure to prevent a release will not necessarily remove the trustee's protection.[69] California courts have, however, been mavericks in the past. As the law currently

liability, such liability is confined to that which might result from suit or action pursuant to state or federal environmental laws and/or regulations.

61 *Id.* § 25548(a)(2).

62 *Id.* §§ 25548(a)–(b).

63 *Id.* §§ 25548.5(c)–(g).

64 *Id.* § 25548.5(c).

65 *Id.* § 25548.5(d).

66 *Id.* § 25548.5(e).

67 *Id.* § 25548.5(f).

68 *Id.* § 25548.5(g).

69 *See supra* Part III.B.1.d.

stands, fiduciaries who act exclusively as fiduciaries, act responsibly, and give sound guidance should be shielded from personal liability.

2. Trustee Ownership Status

State law answers the question of whether a trust is an owner of property under CERCLA. As noted above, owners are generally strictly, jointly, and severally liable for all contamination prior to or during their time of ownership, subject to certain defenses and nuances of case law, such as the "innocent landowner defense."[70]

Decisions in a number of states answer the question affirmatively.[71] Courts in other states, however, reached the opposite conclusion.[72] California courts have yet to rule on the exact question of whether trustees can be owners for CERCLA purposes. However, in *Castlerock Estates, Inc. v. Estate of Markham*, the Northern District of California addressed the closely related question of whether a conservator or executor of an estate could be liable as an owner under CERCLA.[73] The

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70 36 AM. JUR. 2D *Forfeitures and Penalties* § 41 (2001). The innocent landowner defense *basically* provides that, if a party adequately investigates a property's condition prior to purchase and finds nothing, then that party is not liable if hazardous substances are later found to be present. It is important to remember, however, that regulatory agencies can still force a cleanup by the property owners, regardless of CERCLA liability and regardless of the source of contamination.

71 Quadion Corp. v. Mache, 738 F. Supp. 270, 273–74 (N.D. Ill. 1990) (finding that trustees are "persons" for purposes of CERCLA and can therefore be "owners" under the statute if they hold, or held, legal title to a facility or vessel); *see also* Briggs & Stratton Corp. v. Concrete Sales & Servs., 20 F. Supp. 2d 1356, 1367–68 (M.D. Ga. 1998) ("[A]bsent wrongdoing in their individual capacity the Trustees are not liable insofar as their personal assets are concerned but may be held liable in their fiduciary capacity to the extent of the assets held in the . . . [t]rust."). The trustee defendants also attempted to assert the third-party defense in CERCLA section 9607(b)(3). *Briggs & Stratton Corp.*, 20 F. Supp. 2d at 1368–69. The court rejected this argument given the factual history of the case, thereby implying that the defense may be viable in appropriate circumstances. *Id. See also* Cardington Road Site Coal. v. Snyder Props., Inc., No. C-3-88-632, 1994 WL 1631033, at *11 (S.D. Ohio 1994) (finding that trustees are "owners" under CERCLA).

72 United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1358–59 (N.D. Ill. 1992) (applying Illinois law to determine that the beneficiary of a trust is the owner for CERCLA purposes and therefore trustees cannot be liable).

73 Castlerock Estates, Inc. v. Estate of Markham, 871 F. Supp. 360, 364–66 (N.D. Cal. 1994).

Castlerock court discussed the similarities between conservatorships and trusts and noted that

> since a conservator is bound by the laws of the state to seek a court order to sell or convey property, the legal title of a conservator is a lesser form of title than that possessed by a trustee. Conservators and executors hold title by reason of office in contrast to a trustee who holds title by deed. All acts done by a conservator or an executor vis-à-vis property require a court's approval except where additional powers are given by the instrument which created their office. On the other hand, a trustee holds legal title for benefit of beneficiaries who have equitable title. Generally powers of a trustee are greater and broader than those of an executor or conservator. Actions of a trustee require court approval in fewer instances. The trustee obtains written title by the very trust instrument itself.
>
> A stricter test for CERCLA liability should apply to conservators and executors because their title is much lesser than is the title held by trustees.[74]

From cases holding that an easement holder is not an owner for CERCLA purposes, some treatises extrapolate that CERCLA intended to exclude entities that hold anything less than a fee simple interest from liability.[75] This view, however, is contrary to the implications of *Castlerock* and cases addressing related contexts.[76] It seems far more likely that California courts

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74 *Id.* at 366. The court ultimately concluded that, with respect to executors and conservators, "bare legal title to real property" was insufficient to support CERCLA "ownership" liability. *Id.* at 364. Nevertheless, conservators and executors could still be liable as owners under CERCLA if sufficient "indicia of ownership" existed. *Id.* at 364. The language in *Castlerock* quoted above, however, makes clear that the test for "ownership" for conservators and executors is distinct from that of trustees. California courts have yet to articulate the specific test for CERCLA ownership to apply to trustees.

75 8 MILLER & STARR, CAL. REAL ESTATE § 23:35 (3d ed. 2000).

> The term "owner," as used in CERCLA, was probably intended to refer only to the fee simple owner or owners, and not to other persons such as trustees, licensees, remaindermen, easement holders, or the like who might have some interest in the property.
>
> . . . The owner of an easement on polluted property who has not contributed to the contamination is not liable for cleanup costs as an owner or an operator under CERCLA even though the easement owner was in a position to prevent the contamination. The owner of an easement merely holds the right to use the property of another, which is not a sufficient interest for the imposition of liability under CERCLA.

Id.

76 *See, e.g.*, City of Grass Valley v. Newmont Mining Corp., No. 2:04-CV-00149, 2007 WL 4287603, at *4 (E.D. Cal. 2007) (holding that ownership of the mineral

will find trustees of impacted properties to be owners under CERCLA.

C. The Law as Applied to Beneficiaries

Based on the statute itself and existing case law, CERCLA is merciless when it comes to beneficiaries. Future heirs and/or beneficiaries would therefore be well-advised to take steps to ensure that they will be able to satisfy the elements of the statutory defenses within CERCLA section 9607(b) once title vests in them. The elements of the third-party defense and the inheritance or bequest defense, a subdefense of the third-party defense, are discussed below. In addition, there may be other potential options for limiting liability—such as using a limited liability company (LLC) to receive and hold title—that are untested and therefore uncertain as to effectiveness. These are also discussed below.

1. Potential CERCLA Owner Liability and Statutory Defenses of Beneficiaries

Even if they are owners and therefore covered persons under CERCLA, beneficiaries can avoid liability if they can successfully assert one of the affirmative defenses in section 9607(b).[77] One such defense is the third-party defense.[78]

Successful assertion of the third-party defense requires a showing that the release or threatened release of a hazardous substance is attributable solely to the "act or omission of a third

estate was sufficient to impose liability as an owner under CERCLA); *see also* United States v. Newmont USA Ltd., 504 F. Supp. 2d 1050, 1061–69 (E.D. Wash. 2007) (concluding, without actually adopting the "indicia of ownership" test in Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364 (9th Cir. 1994), that the United States held sufficient indicia of ownership in an Indian reservation to be held an "owner" under CERCLA); Nestle USA Beverage Div., Inc. v. D.H. Overmyer Co., No. C-96-1207, 1998 WL 321450, at *4 (N.D. Cal. 1998) (concluding that a lessee was an owner under CERCLA). *But see* Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 328–29 (2d Cir. 2000) ("While the typical lessee should not be held liable as an owner, there may be circumstances when owner liability for a lessee would be appropriate.").

77 *See* 42 U.S.C. § 9607(b) (2006) (providing the "statutory" defenses to CERCLA liability).

78 *Id.* § 9607(b)(3). The other defenses are the "act of God" defense in section 9607(b)(1) and the "act of war" defense in section 9607(b)(2). The final defense is section 9607(b)(4), which allows for an amalgam of any of the other three defenses.

party other than . . . one whose act or omission occurs in connection with a contractual relationship."[79] Thus, if a contractual relationship exists between the covered person and the third party, the defense fails. CERCLA section 9601(35)(A) provides the definition of "contractual relationship" as used in the third-party defense.[80] In so doing, this section refines the third-party defense into three subdefenses, referred to here as the innocent landowner defense,[81] the government agency defense,[82] and the inheritance or bequest defense.[83]

a. The Third-Party Defense

Barring an act of war or God, establishment of the third-party defense is the first necessary step for any defendant hoping to find a refuge from liability within CERCLA itself.[84] In order to successfully assert the defense, the defendant must prove all of the following elements by a preponderance of the evidence:

1. The release or threatened release is attributable solely to the acts or omissions of a third party.[85]

2. The defendant "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."[86]

3. The defendant "took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions."[87]

4. The act or omission did not occur in connection with a contractual relationship between the defendant and the third party.[88]

79 *Id.* § 9607(b)(3).

80 *Id.* § 9601(35)(A).

81 *See id.* § 9601(35)(A)(i).

82 *See id.* § 9601(35)(A)(ii).

83 *See id.* § 9601(35)(A)(iii).

84 *See id.* § 9607(b).

85 *Id.* § 9607(b)(3).

86 *Id.*

87 *Id.*

88 *See id.*

In order to show the absence of a contractual relationship with the third party, the defendant must prove that any contract existing between the third party and the defendant at the time of the release or threatened release was something other than an instrument transferring interest in land.[89] By way of the limited examples in section 9601(35)(A), a contract that would defeat the defense "includes, but is not limited to, land contracts, deeds, easements, leases or other instruments transferring title or possession."[90]

If, however, the contract falls within this definition, the defendant can still avoid liability by satisfying the elements of one of the subdefenses within sections 9601(35)(A)(i)–(iii).

b. The Relevant Subdefenses to the Third-Party Defense

(i) The Innocent Landowner Defense

The availability of the innocent landowner defense depends on what a party knew or should have known before they took title to a property.[91] Successful assertion of this defense requires the defendant to show that, "[a]t the time the defendant acquired the facility the defendant did not know and had no 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."[92] Would-be land purchasers cannot avoid liability by sticking their heads in the sand to avoid knowledge because those who seek protection must carry out inquiry sufficient to meet the rigorous due diligence requirements of "all appropriate inquiry."[93] If a purchaser can be proven to be an innocent landowner, they will have no liability under CERCLA as an owner.

89 *Id.* § 9601(35)(A).

90 *Id.*

91 *Id.* § 9601(35)(B). This section sets the standard for what a purchaser must do in order to assert the defense. The requirements of this inquiry are outside of this Article's trust-specific scope. Many cases and scholarly works interpret and analyze this section of CERCLA, however, and interested readers will not want for material on the subject.

92 *Id.* § 9601(35)(A)(i).

93 40 C.F.R. § 312 (2008).

(ii) The Inheritance or Bequest Defense

The inheritance or bequest defense is available to a covered person who can satisfy all of the elements of the third-party defense described above,[94] except that the third party's act or omission occurred in connection with a contractual relationship. In such circumstances, past or present owners can still assert the inheritance or bequest defense as an affirmative defense to CERCLA liability if they satisfy all of the following elements and no other basis for liability applies:

1. The defendant acquired title to the property subsequent to the disposal or placement of the hazardous substance.[95]

2. The defendant acquired title to the property through inheritance or bequest.[96]

3. The defendant "provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility)."[97]

4. The defendant "is in compliance with any land use restrictions established or relied on in connection with the response action at a facility."[98]

5. The defendant "does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action."[99]

As such, the following questions are fundamental to the determination of the potential CERCLA liability for beneficiaries of trusts that include impacted real property:

1. Is a beneficiary, as holder of equitable title, an owner for CERCLA purposes?

94 42 U.S.C. § 9601(35)(A)(i).

95 *Id.*

96 *Id.* § 9601(35)(A)(iii).

97 *Id.* § 9601(35)(A).

98 *Id.*

99 *Id.*

2. Does the beneficiary satisfy the elements of the third-party defense except that a contractual relationship exists between the defendant and the third party?

3. Did the beneficiary take title through inheritance or bequest such that the inheritance or bequest defense might apply?

4. Does the beneficiary satisfy the elements of the innocent landowner defense such that this defense might apply if the inheritance or bequest defense fails?

With respect to beneficiary ownership for CERCLA purposes, creation of an express trust in California historically vested full title of trust property in the trustee or trustees.[100] The California legislature repealed this statute in 1986, so the modern rule now applies.[101] The modern rule holds that creation of a trust divides title such that the trustee or trustees take legal title, and the beneficiary or beneficiaries take equitable title.[102] For purposes of evaluating the potential CERCLA liability of a trust beneficiary based on his or her status as owner, the initial question is whether the equitable interest held by trust beneficiaries is sufficient to support liability.

The court in *United States v. Wedzeb Enterprises, Inc.* concluded that an equitable interest, no matter how small, is sufficient to support CERCLA owner liability.[103] A fire at the site at issue in *Wedzeb* resulted in PCB contamination of the property.[104] Approximately three months before the fire, one of the *Wedzeb* defendants entered into a contract to purchase the site.[105] The defendant argued that, at the time of the fire, he had paid less than ten percent of the purchase price, and the deed was still in escrow at the bank.[106] Therefore, the defendant argued that he was not an owner under CERCLA at the time of

100 CAL. CIV. CODE § 863 (West 2007) (repealed 1986); *see also* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 184 n.25 (2d rev. ed. 1979).

101 CAL. CIV. CODE §§ 863–867 (repealed 1986); *see also* BOGERT & BOGERT *supra* note 100, § 183.

102 Castlerock Estates, Inc. v. Estate of Markham, 871 F. Supp. 360, 366 (N.D. Cal. 1994).

103 United States v. Wedzeb Enters., Inc., 809 F. Supp. 646, 652 (S.D. Ind. 1992).

104 *Id.* at 649.

105 *Id.* at 649, 652.

106 *Id.* at 652.

the fire.[107] The court rejected this argument outright, concluding that he was an owner for CERCLA purposes because, under Indiana law, equitable title passed to him when he signed the purchase and sale agreement.[108] Applying the reasoning of *Wedzeb* to trusts, beneficiaries would be owners under CERCLA the moment they take equitable title, which could occur when the trust is created, or, for testamentary trusts, at the time of the settlor's death.[109]

Since ownership status is based on state law, California's rules of ownership changes for purposes of reassessing real property values to determine tax liability may provide a useful analogy for CERCLA liability analysis. Those rules imply that beneficiaries may be liable as owners under CERCLA based on their equitable interest in real property. In *Reilly v. San Francisco*,[110] the issue was whether succession of an income beneficiary of a testamentary trust by another income beneficiary constituted a change in ownership.[111] While not a CERCLA case, *Reilly* may provide some guidance as to how courts will approach the ownership question for trust beneficiaries in CERCLA cases.

In *Reilly*, the settlor, Francis O'Reilly, established a testamentary trust in 1965 for his personal and real property.[112] Upon his death in 1966, his grandniece became the sole income beneficiary of the trust and was entitled to receive all of the net income derived from the trust for the remainder of her life.[113] Should she leave no heirs, a nephew would succeed her as sole income beneficiary for the remainder of his life.[114] The

107 *Id.*

108 *Id.*

109 This moment will vary depending upon the means of trust creation and the type of trust. For example, a settlor may lay the foundation for a testamentary trust when he properly executes his will. However, because testamentary trusts do not exist until death of the settlor, the beneficiary or beneficiaries of testamentary trusts do not actually acquire title until the trust comes into existence upon the settlor's death. In such cases, the beneficiaries may well be able to assert the inheritance or bequest defense. Perhaps this would not be so with irrevocable trusts created during the settlor's lifetime.

110 Reilly v. San Francisco, 48 Cal. Rptr. 3d 291, 291 (Ct. App. 2006).

111 *Id.* at 293.

112 *Id.*

113 *Id.*

114 *Id.*

grandniece died in 2000 and had no heirs.[115] The nephew therefore became the new income beneficiary.[116] The City of San Francisco Assessor determined that the succession of income beneficiaries from the grandniece to the nephew constituted a one hundred percent change in property ownership and that the City correctly reassessed the subject property for purposes of taxation in accord with Proposition 13.[117] The nephew appealed the determination to the Assessment Appeals Board, which agreed with the Assessor.[118] Reilly then appealed to the state courts.[119] The California Court of Appeal for the First District agreed with the City.[120]

For present purposes, the usefulness of *Reilly* is not whether there was a change in ownership from the grandniece to the nephew, but whether they were owners of the real property to which they were only entitled the benefit of income. While all of the discussion in that case is about *changes* in ownership,[121] a logical analysis requires some conclusions about ownership itself. Specifically, in order to have a change in ownership, there must first *be* ownership by at least one entity prior to the change and ownership by at least one different entity subsequent to the change. Thus, in order to conclude that transfer of the beneficial, equitable interest from the grandniece to the nephew constituted a change in ownership,[122] the court must have determined initially that the grandniece, and then the nephew, actually (or at least legally) owned the property. As there are circumstances specified in the California Code of Regulations applicable to taxation in which no change in ownership occurs, despite the transfer of real property interests into a trust,[123] these instances support arguments for trust beneficiaries seeking to

115 *Id.*

116 *Id.* ("Reilly is not a beneficiary of the trust's principal.").

117 *Id.* at 294.

118 *Id.*

119 *Id.*

120 *Id.* at 303.

121 *See id.* at 296. ("The question presented here is whether there is a change in ownership when one trust beneficiary succeeds another.").

122 *See id*.

123 CAL. CODE REGS. tit. 18, § 462.160(b)(1)(A) (2008).

avoid CERCLA owner liability. These specific situations are displayed in Table 1 in the Appendix below.

With respect to whether title was acquired via inheritance or bequest, CERCLA defines neither "inheritance" nor "bequest."[124] CERCLA case law also provides no clear rules or definitions for what exactly constitutes an inheritance or bequest. Reasoning from the dictionary definitions of "inheritance," "bequest," and "devise," property taken through testamentary trusts or intestate succession would likely constitute inherited or bequeathed property, as the property interest transfers upon the death of the prior owner.[125] No federal court opinions addressing this issue of whether inter vivos trusts or lifetime gifts constitute an inheritance or bequest for purposes of the inheritance or bequest defense exist.[126] The only authority on point is *Tamposi Family Investments*,[127] an opinion of the Environmental Protection Agency Appeals Board.

In *Tamposi*, the Appeals Board rejected petitioner's argument that a gift from a father to a real estate investment partnership, in which his children were the exclusive partners, should qualify for the inheritance or bequest defense.[128] Citing Black's Law Dictionary definitions for "inheritance," "bequest," and "devise," the Appeals Board found that the text of CERCLA

124 Black's Law Dictionary does, however, define "inheritance" as (1) "[p]roperty received from an ancestor under the laws of intestacy" or (2) "[p]roperty that a person receives by bequest or devise." BLACK'S LAW DICTIONARY 787 (7th ed. 1999). Black's defines "bequest" as (1) "[t]he act of giving property . . . by will" or (2) "[p]roperty . . . disposed of in a will." *Id.* at 152. Black's also defines "devise" as (1) "[t]he act of giving property . . . by will," (2) "[t]he provision in a will containing such a gift," (3) "[p]roperty . . . disposed of in a will," or (4) "[a] will disposing of real property." *Id.* at 463.

125 *See id.* at 152, 463, 787; *see also* Tamposi Family Invs., 6 E.A.D. 106, 125 (EPA 1995) (concluding that the use of the words "inheritance" and "bequest" evinces an intent to include only those transfers that occur upon death).

126 At first glance it appears that *United States v. Pac. Hide & Fur Depot, Inc.*, 716 F. Supp. 1341 (D. Idaho 1989) addresses this precise question. This is not the case. In dicta, *Pacific Hide* concedes the point that an inter vivos, inter-familial transfer is a contractual relationship without any real discussion on the matter. *Id.* at 1347–48. By implication, *Pacific Hide* is therefore authority for the contention that inter vivos transfers fall outside the scope of inheritances or bequests, but this determination is not part of *Pacific Hide*'s holding. *Id.* at 1348–49.

127 *Tamposi Family Invs.*, 6 E.A.D. at 124–25.

128 *Id.*

indicated that the inheritance or bequest defense was inapplicable to inter vivos transfers, as the defense only applied to transfers occurring upon death of the prior owner.[129] Since it is the sole authority on point and an analysis of CERCLA by an arm of the EPA itself, courts considering the issue in the future will likely find *Tamposi* highly persuasive and may defer to the agency's interpretation.[130] Thus, the best option for settlors wishing to protect beneficiaries from CERCLA liability during the lifetime of the settlor is to use testamentary trusts and devises in wills to transfer interests in impacted property. They should then provide bequests to beneficiaries that may enjoy limited liability status due to the form of business (such as an LLC not comprised of beneficiary members). Combining these steps with thoughtful timing of sales or distributions to occur after cleanup, or in an otherwise protective manner, are also optional protective measures. However, there is currently no authority as to what structures will be effective. The most important fact for beneficiaries to keep in mind is that the estate, and therefore any property in trust, will always be fully liable if the settlor was personally liable. The question is how to avoid or minimize the *personal* liability of the beneficiaries. This approach is entirely consistent with the settlor's intent and legal status: the settlor owned the property, the settlor was personally liable, and the settlor intended to give the beneficiary what he possessed during his life.[131]

129 *Id.*

130 Although extremely persuasive, the decision is not a perfect interpretation of CERCLA. *Tamposi*'s primary flaw is on the issue of inquiry. The Appeals Board cites to the congressional comments on CERCLA as support for the contention that individuals who take impacted property by inheritance or bequest must still conduct "reasonable inquiry" into the contamination, even if they have no knowledge of the inheritance or bequest. *Id.* at 125. Perhaps this was the intent of certain individual members of Congress, but this failed to make its way into the text of the statue. Nevertheless, the presence of this language in *Tamposi* raises the possibility that some level of inquiry, albeit a very low level, will be required of owners who take title by inheritance or bequest.

131 Potential beneficiaries may be able to disclaim property placed in trust for their benefit. *See, e.g.*, CAL. PROB. CODE § 15309 (West 2002) ("A disclaimer or renunciation by a beneficiary of all or part of his or her interest under a trust shall not be considered a transfer under Section 15300 or 15301."). While an enticing theoretical solution, practically this is not a good option where the property value exceeds, or will exceed, the cost of remediation.

2. *Other Possible Tools for Limiting Liability*

a. *Change of Ownership Regulations May Eliminate "Unplanned" Ownership Transfers to Beneficiaries*

The California Code of Regulations addresses taxation rules for changes in ownership in title 18, section 462. Section 462.160 pertains to trusts. Subsection (a) of section 462.160 provides the general rule that transfer of real property interests into trusts, by the settlor or anyone else, is a change in ownership;[132] subsection (b) provides instances excluded from this rule.[133] Subsection (c) provides the general rule that termination of a trust or any portion of a trust, constitutes a change in ownership,[134] and subsection (d) provides the exceptions to this second general rule.[135] These rules for exclusions and exceptions—for example, those transfers of interests that do not constitute changes in ownership—are complex and are therefore presented in the Appendix in tabular form in an attempt to simplify comparisons.[136] While untested in the courts, would-be settlors and/or beneficiaries may be able to use these rules as a guide for selecting trusts that will make CERCLA owner liability for the beneficiaries less likely, or at least delay such potential liability until such time as the property may be transferred with less or no risk.

b. *Use of an LLC*

It may be possible to structure a set of circumstances where the beneficiary is an LLC that receives title from the trustor during the trustor's lifetime and funds for remediation, if necessary, from the settlor at the time of trust creation. Parties who would otherwise be beneficiaries could be members of that LLC and be entitled to distribution of LLC assets upon an acceptable sale or other acceptable resolution of the environmental conditions at issue. Another potential structure would be for the LLC to have a manager that was itself a

132 CAL. CODE REGS. tit. 18, § 462.160(a) (2008).

133 *Id.* § 462.160(b); *see also infra* Appendix Table 1.

134 CAL. CODE REGS. tit. 18, § 462.160(c) (stating general rule for termination).

135 *Id.* §§ 462.160(d)–(e) (discussing exceptions to changes in ownership and inapplicable trusts); *see also infra* Appendix Table 2.

136 *See infra* Appendix Tables 1, 2.

fiduciary. The most conservative approach would likely be to designate a third party as the sole member and manager of the LLC until distribution, avoiding a unity of interest among beneficiaries and the owner of the property.[137] This strategy is completely untested, however, and courts may conclude that such arrangements are ruses and pierce the veil of the LLC to hold the members personally liable.

However, so long as the trust remains liable, limiting the liability of the beneficiaries to the extent of trust assets, absent misfeasance or malfeasance, seems equitable and consistent with general legal principles. Without any judicial guidance, the answer to the question as to whether naming an LLC as a beneficiary and appointing a third-party trustee will in fact insulate the ultimate beneficiaries from personal liability, absent some sort of misconduct, is uncertain.

IV
CONCLUSION

The environmental laws, and CERCLA in particular, have incredibly long arms. CERCLA cares not for fault or blame but only for status of ownership of real property. This status exposed trustees to personal liability until 1996. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, subsequently codified as CERCLA section 107(n), took much of the risk out of acting as a trustee where contaminated real estate is part of their fiduciary responsibility. But section 107(n) does not completely eliminate the potential for personal liability on the part of fiduciaries. Trustees face potential personal liability under the environmental laws but only in circumstances typically involving malfeasance. The general legal rules that delineate trustee liability apply to the environmental laws as well. That is, where a trustee acts responsibly in their fiduciary capacity as trustees, they have limited personal liability exposure.[138] Where trustees

137 *See, e.g.*, Minkoff v. Koppelman*,* No. B195081, 2008 WL 217565, at *1 (Cal. Ct. App. Jan. 28, 2008).

138 *See, e.g.*, CAL. PROB. CODE § 18002 (West 1991). Trustees can be liable as trustees, meaning that liability for the trustees' actions may attach to the assets or corpus of the trust. Personal liability for the trustee as an individual will not attach, however, unless the trustee is personally liable as an individual. 60 CAL. JUR. 3D *Trusts* § 258 (1980).

act as trustees and do so with integrity, both California and federal laws work to shield them from personal liability exposure.[139]

In California, this rule is codified as Health and Safety Code section 25548. Under CERCLA, the rule is codified as section 107(n). Both laws contain exceptions, however, and trustees should take care to avoid negligent, reckless, self-serving, and fraudulent acts, as well as acts that fall outside the scope of their fiduciary duties, because such behavior will nullify the protection of these laws.

Beneficiaries have it tougher than trustees. Unlike fiduciaries, no law makes beneficiaries exempt from liability under the environmental laws. Beneficiaries will likely be owners under CERCLA of any real property held in trust for their benefit. Thus, where appropriate, beneficiaries face CERCLA liability as owners, at a minimum, and nothing in the case or statutory law indicates that potential liability of beneficiaries is limited to trust assets. However, beneficiaries of testamentary trusts or who otherwise obtain their beneficiary interest through inheritance or bequest may be able to assert the inheritance or bequest defense. Even if these defenses were found to be inadequate, equity militates in favor of limiting beneficiary liability to that liability that would attach to the trustor, absent another basis for liability on the part of the beneficiary.

The use of LLCs or other entities as owners remains mostly unexplored. However, CERCLA renders practically any act done for the purpose of limiting liability ineffective.[140] Setting up LLCs made up of parties that already have title, such as a trust or beneficiaries, will likely be ineffective as a means of limiting liability to the assets of that entity—particularly where the entity, such as a trust-owned LLC, has no other function and simply holds title to contaminated property. LLCs contained inside a trust are also unlikely to function effectively as a means of containing exposure of the remainder of the trust assets and

139 Note that trust law allows for the inclusion of clauses limiting the liability of the trustee(s) to the beneficiaries. 76 AM. JUR. 2D *Trusts* § 336 (2005). Such clauses are not favored and must be written with sophistication in order for courts to uphold them. Additional research into this subject would be necessary in order to craft such a clause in any particular case.

140 *See supra* text accompanying note 42.

quite possibly the estate assets, especially where the trust was an owner prior to transfer to the LLC. All of the above structures seem likely to run against the grain of CERCLA's liability scheme, which intentionally leaves little room for liability-limiting devices with no other redeeming social value or function and which are comprised or controlled by those who seek to avoid liability.

Given the foregoing, it appears that the best overall strategy is to anticipate transfers in property, to attempt to structure such transfers to fall within the statutory defenses, and to preserve and pursue rights against other potentially responsible parties.

APPENDIX

TABLE 1 Instances excluded from the general rule that the creation of a trust constitutes a change in ownership of the trust property[141]

TYPE OF TRUST CREATED[142]	TRUSTEE OR TRUSTEES	BENEFICIARY OR BENEFICIARIES	CHANGE IN OWNERSHIP?
Lifetime Irrevocable	Anyone	Settlor only	No[143]
Lifetime Irrevocable	Anyone	Settlor and others	Yes, unless another exclusion applies to the other beneficiary or beneficiaries[144]
Lifetime Irrevocable	Anyone, but trustee has "sprinkle power" to distribute trust income or property among the beneficiaries	Anyone	Yes, unless another exclusion applies to the other beneficiary or beneficiaries[145]
Lifetime Twelve-Year Irrevocable Reversion Trusts	Anyone	Anyone, but the settlor retains a reversion and the beneficial interest of anyone other than the settlor does not exceed twelve years	No[146]

141 *See* discussion *supra* Part III.C.2.a.

142 Including revocable and irrevocable trusts.

143 CAL. CODE REGS. tit. 18, § 462.160(b)(1)(A) (2008).

144 *Id.*

145 *Id.*

146 *Id.* § 462.160(b)(1)(B).

TYPE OF TRUST CREATED	TRUSTEE OR TRUSTEES	BENEFICIARY OR BENEFICIARIES	CHANGE IN OWNERSHIP?
Lifetime Irrevocable Trust in which the trust propety includes an ownership interest in a legal entity that holds an interest in real property	Anyone	Settlor only, or Settlor and others but settlor retains a reversion such that the beneficial interest of any of other beneficiary does not exceed twelve years	No, unless Revenue and Taxation Code section 61(1), 64(c), 64(d) applies[147]
Lifetime Revocable	Anyone	Anyone	No[148]
Lifetime Interspousal Revocable and Irrevocable	Spouse 1	Spouse 2	No[149]
Lifetime Interspousal	Spouse 1	Spouse 2 and others	Yes, unless another exclusion applies to the other beneficiary or beneficiaries[150]
Lifetime Parent-Child Revocable and Irrevocable	Parent/Child	Child/Parent	No[151]

147 *Id.* § 462.160(b)(1)(C).
148 *Id.* § 462.160(b)(2).
149 *Id.* § 462.160(b)(3).
150 *Id.*
151 *Id.* § 462.160(b)(4).

TYPE OF TRUST CREATED	TRUSTEE OR TRUSTEES	BENEFICIARY OR BENEFICIARIES	CHANGE IN OWNERSHIP?
Lifetime Parent-Child Revocable and Irrevocable	Parent/Child	Child/Parent and others	Yes, unless another exclusion applies to the other beneficiary or beneficiaries[152]
Lifetime Grandparent-Grandchild Revocable and Irrevocable	Grandparent/ Grandchild	Grandchild/ Grandparent	No[153]
Lifetime Grandparent-Grandchild Revocable and Irrevocable	Grandparent/ Grandchild	Grandchild/ Grandparent and others	Yes, unless another exclusion applies to the other beneficiary or beneficiaries[154]
Proportional Interest Revocable and Irrevocable	Anyone	Anyone, but the proportional interest of the beneficiaries is the same before and after transfer of the property interest to the trust	No[155]
Other Trusts– Revocable and Irrevocable Transfers of Interest from One Trust to Another	Anyone	Anyone	No, so long as the transfer falls into one of the "non-change" categories described above[156]

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.* § 462.160(b)(5).

156 *Id.* § 462.160(b)(6).

TABLE 2 Exceptions to the general rule that termination of a trust constitutes a change in ownership[157]

TYPE OF TRANSFER RESULTING FROM TRUST TERMINATION	INTEREST HELD DURING TRUST	DISTRIBUTION AT TRUST TERMINATION	CHANGE IN OWNERSHIP?
Prior Change in Ownership	Use or income	Holder of use or income benefit during life of trust	No[158]
Prior Change in Ownership	Remainder or reversionary interest only (i.e., no use or income benefit)	The remainder or reversionary interest becomes possessory	Yes, unless an exclusion applies[159]
Prior Change in Ownership	Remainder or reversionary interest and present beneficiary	The remainder or reversionary interest becomes possessory	No[160]
Revocable Where Settlor Revokes Trust	N/A	N/A	No[161]
Settlor Reversion Trusts	Reversion interest for no more than twelve years	Beneficiary's interest reverts to settlor	No[162]
Interspousal Trusts	Spouse 1	Spouse 2	No, so long as interspousal exclusion applies[163]

157 *See* discussion *supra* Part III.C.2.a.

158 CAL. CODE REGS. tit. 18, § 462.160(d)(1).

159 *Id.*

160 *Id.*

161 *Id.* § 462.160(d)(2).

162 *Id.* § 462.160(d)(3).

163 *Id.* § 462.160(d)(4).

TYPE OF TRANSFER RESULTING FROM TRUST TERMINATION	INTEREST HELD DURING TRUST	DISTRIBUTION AT TRUST TERMINATION	CHANGE IN OWNERSHIP?
Parent-Child or Grandparent-Grandchild	Child/Parent or Grandchild/ Grandparent	Parent/Child or Grandparent/ Grandchild	No, so long as either the parent-child or grandparent-grandchild exclusion applies[164]
Proportional Interests	Beneficiaries' interest in trust property	Trust property interest proportional to the interest held by the beneficiaries during the life of the trust	No[165]
Other Trusts	Interest in property in trust A	Interest in property in trust B	No, so long as an exception applies to the transfer[166]

164 *Id.* § 462.160(d)(5).
165 *Id.* § 462.160(d)(6).
166 *Id.* § 462.160(d)(7).