Potential Responsibility under CERCLA: Canadyne-Georgia Corp. v. Nationsbank, N.A. (South) - An Illustration of Why We Need a Common Federal Rule Defining Owned and Operated

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POTENTIAL RESPONSIBILITY UNDER CERCLA: CANADYNE-GEORGIA CORP. v. NATIONS BANK, N.A. (SOUTH)—AN ILLUSTRATION OF WHY WE NEED A COMMON FEDERAL RULE DEFINING "OWNED" AND "OPERATED"

I. Introduction

Although the "C" in CERCLA\(^1\) stands for "comprehensive," it is debatable whether the Comprehensive Environmental Response, Compensation and Liability Act of 1980 in fact lives up to its name.\(^2\) The uncertain meaning of "comprehensive" in CERCLA is particularly important to those courts who operate in the face of Congress' silence on issues surrounding non-uniform treatment in the courts and in doing so, struggle to pursue Congress' intent.\(^3\)

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2. See Webster's Third New Int'l Dictionary 467 (1986) (defining comprehensive as "covering a matter under consideration completely or nearly completely" and as "accounting for or comprehending all or virtually all pertinent considerations"). This Comment considers two coverage issues - the completeness of subject matter covered in CERCLA text and the extent to which CERCLA brings parties into CERCLA control through its potential responsibility provisions. Accordingly, on one hand, "comprehensive" may be construed as meaning "thorough" or "self-descriptive." Yet another understanding of the term "comprehensive" is "broad in coverage."

In the sense that comprehensive means "broad in coverage," some believe CERCLA is too comprehensive. See S. Rep. No. 103-349, at 39-41 (1994) (Senate Reform Act of 1994) (listing three areas of criticism, including: (1) liability system of CERCLA, applying jointly, severally, strictly and retroactively, as unfair; (2) transaction costs are too onerous and (3) liability scheme is too broad and includes certain parties never intended to be included).

This Comment visits the third category listed in the Senate Reform Act of 1994 and joins Blake A. Watson in questioning whether lower courts have taken a good thing too far in liberally construing CERCLA. See generally Blake A. Watson, Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?, 20 HARV. ENVTL. L. REV. 199 (1996) (discussing remedial purpose canon). In doing so, this Comment specifically focuses on Eleventh Circuit precedent, including Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (11th Cir. 1996) and Canadyne-Georgia Corp. v. NationsBank, N.A. (South), 183 F.3d 1269 (11th Cir. 1999).

3. See, e.g., Canadyne-Georgia Corp. v. NationsBank, N.A. (South), 183 F.3d 1269, 1275, n.9 (11th Cir. 1999) (considering argument regarding liability based on pursuit of Congress' intent). An example of an area where courts have differed and Congress has not indicated how to deal with such a discrepancy is whether to use state law in defining ownership for purposes of CERCLA. See United States v.
Amendments to CERCLA may have remedied some of the ambiguities in the statute but inconsistent outcomes are still likely in certain circumstances. This is particularly true given the Supreme Court’s decision in United States v. Bestfoods, which held that there need not be a single federal standard for defining ownership under CERCLA. In so holding, the Supreme Court has reinforced Congress’ legacy of allowing inconsistent resolution of CERCLA litigation.

The Court of Appeals for the Eleventh Circuit accepted the Supreme Court’s invitation to use applicable Georgia law in

Bestfoods, 524 U.S. 51, 63 (1998) (noting that Congress has not specifically stated intent that entire body of state law be replaced with common federal law). The alternative is to resort to a common federal rule. See id. Congress’ intent that responsible parties be held liable is a goal courts often attempt to effectuate when assigning CERCLA liability. See, e.g., Canadyne, 183 F.3d at 1269. There is criticism, however, that courts are going too far in holding parties liable who were never intended to be held potentially responsible. See, e.g., Douglas M. Garrou, Note, The Potentially Responsible Trustee: Probable Target For CERCLA Liability, 77 Va. L. Rev. 113 (1991) (discussing criticisms of overly-broad interpretation of potential responsibility under CERCLA which includes trustees). Hence, there is some question as to how comprehensive and broad in scope CERCLA was meant to be. See id. at 123-26 (discussing ambiguity in CERCLA of whether all title holders should be accountable as owners). The source of much of this confusion lies with the statutory definition of “owner and operator,” which is circularly defined as “anyone owning or operating a facility.” See id.; see also Long Beach Unified School District v. Dorothy B. Godwin California Living Trust, 32 F.3d 1364, 1368 (9th Cir. 1994) (asserting that circular definition of “owner or operator” is as helpful as ‘defining ‘green’ as ‘green;’” and looking to ordinary meaning of terms).


6. See id. at 63 (quoting Burks v. Lasker, 441 U.S. 471, 478 (1979) in holding in case dealing with corporate veil piercing that “CERCLA is like many other congressional enactments in giving no indication ‘that the entire corpus of state corporation law is to be replaced simply because a plaintiff’s cause of action is based upon a federal statute’”). The Supreme Court noted that there was no clear legislative intent with respect to the need for uniformity and thus concluded that “[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.” Id. (citing United States v. Texas, 507 U.S. 529, 534 (1993)) (internal quotation marks omitted).

Many circuits were already in the practice of applying state law. See, e.g., Red-wing Carriers, 94 F.3d at 1498 (stating that “[i]n the absence of any unique definition of “ownership” in CERCLA, we look to Alabama law . . . .”); Long Beach United Sch. Dist., 32 F.3d at 1364 (applying common law of easements, looking to case law from California, Texas, and Kentucky). Thus, the Supreme Court’s permissive language essentially bound federal courts to their own precedent of applying state law. See Bestfoods, 524 U.S. at 51. In this regard, it is not surprising the Eleventh Circuit chose to apply state law in Canadyne. See Canadyne, 183 F.3d at 1273.
Canadyne-Georgia Corp. v. NationsBank, N.A. (South). The Eleventh Circuit, in Canadyne, developed a rule for defining prior ownership which is even more unclear than the definition provided in CERCLA. It is clear, however, that Canadyne cast a vast net of potential responsibility pertaining to the meaning of prior owner. In doing so, Canadyne added to CERCLA’s overall comprehensiveness in a way that holds parties no longer having ties to an environmental cleanup site potentially responsible, who if analyzed under current state law, would escape liability. It is impossible to definitively as-

7. See Canadyne, 183 F.3d at 1269. Canadyne dealt with partnership law and it is in this context that this Comment argues a common federal law may be necessary. See id. The common federal law proposed in this Comment would determine prior ownership according to current state laws but would render inoperative state law that allows entities’ ownership to be determined according to non-current standards.

8. See Canadyne, 183 F.3d at 1273 (applying state law to find party potentially responsible even though that party would not be found potentially responsible under current state law). The rule creates ambiguity because each case involving an alleged prior owner will require analysis of state law, some of which may be overruled, either through subsequent case law or statutorily. See Canadyne-Georgia Corp. v. NationsBank, N.A. (South), 982 F. Supp. 886, 888-89 (M.D. Ga. 1997), rev’d, 183 F.3d 1269 (11th Cir. 1999) (applying Georgia law from 1893 and 1946). Although the extent to which the Eleventh Circuit used Georgia case law is unclear, it is clear the Eleventh Circuit used a version of Georgia law which differs from current Georgia law. See Canadyne, 183 F.3d at 1273. It is also clear that the Eleventh Circuit regarded its finding of ownership, “anachronistic.” Id. at 1273, n.7. The Eleventh Circuit, nonetheless, justified its use of state law by the precedent of Bestfoods, which affirmed the Eleventh Circuit’s holding in Redwing Carriers. See id.

9. See Canadyne, 183 F.3d at 1273 (holding party responsible whose ties to environmental cleanup site had long been severed and who, if analyzed under current partnership law, would not be labeled potentially responsible).

10. See id. Current law is discussed throughout this Comment in contrast to historical law. The difference is best illustrated by partnership law. Partnerships are generally dealt with according to state adopted versions of uniform partnership laws. See Blyth, supra note 4 at 133 (stating for example that uniform partnership laws pertaining to limited partnerships have been adopted in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming). These partnership statutes are generally written such that entities are governed according to laws in effect at the time of entity formation. See id. at 131. Hence, current state law may hold that a limited partnership formed prior to July 1, 1991, will be governed by the Revised Limited Partnership Act (“RLPA”) and those formed thereafter are governed by the Revised Uniform Limited Partnership Act (“RULPA”). See id. Additionally, some states have adopted RULPA without repealing RLPA. See id. Moreover, state case law in operation at the time of partnership formation would be looked to in order to interpret ownership statutes in operation at that time, even if such case law has since been reversed. See id. at 191-93. It is obvious that uniformity in partnership
sert that Georgia’s broad CERCLA responsibility is contrary to Congress’ intent because of the paucity of legislative history on the matter.\textsuperscript{11} This Comment argues that the reasoning in other Eleventh Circuit decisions and the Supreme Court precedent fails to support the conclusion reached in Canadyne. Additionally, this Comment supports the creation of a common federal law, which if in operation, would have vindicated the defendant in Canadyne.\textsuperscript{12}

In reaching the above conclusion, this Comment in section I discusses the complexity involved in defining prior ownership under CERCLA and more specifically addresses the problems arising for individuals and entities, such as trustees and corporations, for whom legal and equitable ownership may not necessarily converge.\textsuperscript{13} In law increases as more states adopted ULPA and RULPA. \textit{See id.} at 131. Naturally, therefore, there is increasingly less uniformity the further back in time ownership occurred. In short, there is an inverse relationship between year of ownership and the need for a common federal rule (i.e., the farther back in time of ownership, the more the need for a common federal rule). A common federal rule requiring a uniform method for determining ownership will provide uniformity to the assessment of potential responsibility under CERCLA and eliminate confusion generated from analyzing potentially overruled state case law.


12. \textit{See} Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489, 1489 (11th Cir. 1996) (providing analysis for determining whether federal common law should be formed for ruling on federal statute); see also United States v. Kimbell Foods, Inc., 440 U.S. 715, 717 (1979) (providing test for determining whether to adopt a common federal law). The common federal law proposed would repeal dated state statutes pertaining to ownership which operate as non-repealed statutes under existing state law.

line with the Eleventh Circuit's prior adjudication, this topic is analyzed by focusing on partnerships.14

Section II of this Comment presents pertinent statutory language of CERCLA, as well as a discussion of the underlying goals and statutory amendments to CERCLA legislation. Section III discusses judicial interpretations of the meaning of "owner" and "prior owner." Section IV describes the rule adopted by the Eleventh Circuit in Canadyne.15 Congress' likely response to the Canadyne rule is discussed in section V. Section VI presents an argument for the use of a common federal law for determining prior ownership for purposes of CERCLA. In conclusion, section VII describes the benefits derived from having such a federal rule.

Congress has made some headway toward increasing CERCLA's comprehensiveness with its adoption of subsequent amendments, but it has not gone so far as to define ownership within the statute.16 Although statutory definitions would be the ideal method on those who benefit from activity rather than leaving liability with taxpayers, the general rule against holding parent responsible for sins of its child has been altered, sometimes radically, by courts).

The prototypical "ownership" case is a party who holds legal title and helps run a chemical manufacturing plant that disposes of hazardous substances. See id. In short, this prototypical owner owns and operates a facility by holding legal title and serving in a fiduciary capacity while simultaneously exhibiting a level of control substantial enough to empower him to prevent the release of hazardous substance. See id.

14. See Redwing Carriers, 94 F.3d at 1498-1500 (discussing whether to use state law or federal common law in case dealing with partnership owners). While it is true that increasingly more states have adopted versions of uniform partnership laws, partnerships formed earlier in time were not usually subject to the uniform partnership laws. See Blyth, supra note 4, at 133. This problem presents itself because courts look to partnerships at the time of partnership formation in assessing ownership for purposes of CERCLA. Thus, if Company A (current owner of site X) is forced to clean-up site X, Company A is likely to seek contribution from Company B (prior owner of site X). If Company B, however, was involved with Company C as a partner in co-ownership of site X, a court will have to analyze partnership law from the time when Company B and C entered into their partnership agreement to ascertain whether it could be said that Company B owned site X.

Since the law in effect at the time of partnership formation governs the assessment of prior ownership and since fewer states had adopted versions of the UPA prior to the most recent revision, there is a greater likelihood that application of state law for determining prior ownership will yield inconsistent results than will the use of current state law for determining current ownership. See id.; see also Canadyne, 183 F.3d at 1273.

15. See Canadyne, 183 F.3d at 1273 (holding that state law and not federal common law would apply).

16. See Derek Mohr, On The Application Of CERCLA To Noncorporate Entities: An Analysis of the Redwing Decisions, 47 CASE W. RES. L. REV. 1157, 1163 (1997) (stating "[a] significant aspect of the controversy surrounding CERCLA arises . . . from the expansive judicial interpretation given it"). In fulfilling Congress' goal of making responsible parties pay, an expansive interpretation has been made to give effect
for achieving additional comprehensiveness in CERCLA, a federal common law defining ownership may be the best alternate option.

II. CERCLA: GOALS, LANGUAGE AND AMENDMENTS

A. A Description of CERCLA

CERCLA is a federal statute that provides regulations for environmental cleanups. CERCLA not only supplies funding for cleanups, but also provides a means for determining potential responsibility and ultimate liability for repayment of funds into CERCLA. This system involves a bifurcated analysis: (1) whether an

to the Superfund’s remedial purpose. See Watson, supra note 2, at 271-74 (discussing courts applying remedial purpose canon). Since most of this extension of liability has occurred without much intervention by Congress, CERCLA has been described as much judicially created law as much as statutory law. See id. “Because of the heavy influence of judicial interpretation and the apparent low probability that Congress will clarify the law on its own, individual decisions can immediately reshape the contours of CERCLA law.” Mohr, supra, at 1159.

17. See CERCLA §§101-175, 42 U.S.C. §§9601-9675 (1996). There are also state statutes similar to CERCLA, which operate independently from CERCLA. See Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1250 (6th Cir. 1991) (stating “[m]ost states have their own counterparts to CERCLA and EPA and they share a complementary interest with the United States in enforcement of laws like CERCLA that are used to remedy environmental contamination”). Some state provisions, however, are broader. See, e.g., M.G.L. c. 21E, §2 (defining “person” broader than that of CERCLA which does not include, inter alia, trusts or agents). Thus, while state statutes may vary a bit, most are quite similar to the Superfund in purpose and function. See generally Zygmunt J.B. Plater, Robert H. Abrams & William Goldfarb, ENVIRONMENTAL LAW and POLICY: NATURE, LAW, and SOCIETY 259 (1992) (discussing state versions of CERCLA). Court’s have generally accepted that Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created. See id.; see also Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (noting that CERCLA and similar state laws seek to protect public health and environment by facilitating cleanup of environmental contamination and imposing costs on parties responsible for pollution); see generally CERCLA §114(a), 42 U.S.C. §9614(a) (stating “[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State”). Thus, States may enact legislation overlapping with the purpose of CERCLA but such statutes must contain identical terms or additional and more stringent measures. See id.

18. See Oswald, supra note 11, at 224 (discussing CERCLA broadly). For a further discussion of CERCLA’s bifurcated liability structure, see infra notes 19-20 and accompanying text. A potentially responsible party is referred to in the short hand as a “PRP.” See id. They are deemed to merely be “potentially” responsible because of the bifurcated nature of CERCLA liability. See id. Once a party is first deemed to be a PRP, their liability is then determined under CERCLA’s strict liability scheme. See id. For a discussion of CERCLA’s strict liability scheme, see infra note 20 and accompanying text. For a discussion of multiple party liability and cost allocation under CERCLA, see Superfund in the 106th Congress, 90 ENVT’L. L. REPTR. 10648 (August 2000).
entity is responsible and (2) whether that entity is liable. Because CERCLA is a strict liability statute, once a party is classified as a "potentially responsible party" ("PRP"), it is probable that ultimate liability will follow.  

In the sense that "comprehensive" can be understood to imply "broad coverage," a quintessentially comprehensive statute would

19. See CERCLA §107(a)(4), 42 U.S.C. §9607(a)(4); see generally Oswald, supra note 11, at 224. A plaintiff must prove the following to establish a prima facie case of liability in a CERCLA action: (1) the site in question is a "facility" as defined in 42 U.S.C. §9601(9); (2) a release or a threatened release of a "hazardous substance" has occurred on the site; (3) the defendant is a responsible person under 42 U.S.C. §9607(a); and (4) the release or threatened release has caused the plaintiff to incur response costs. See Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 347-48 (6th Cir. 1998) (using four-factor prima facie case); see also ABB Indus. Sys. v. Prime Tech., Inc., 120 F.3d 351, 356 (2d Cir. 1997) (using four-factor prima facie test); Kehr-McGee Chemical Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 325 (7th Cir. 1994) (pointing to four-prong approach needed to constitute prima facie case); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989) (deciding matter at issue by employing four-point analysis to establish prima facie case).

CERCLA has been interpreted to impose joint and several liability upon responsible parties. See Soo Line R. R. Co. v. B.J. Carney & Co., 797 F. Supp. 1472, 1486 (D. Minn. 1992) (stating that since both individuals and partners are statutorily defined as "persons" under CERCLA, both may be held jointly and severally liable and "[a]s a general rule, CERCLA imposes joint and several liability upon responsible persons except where they can show that the harm is divisible"); see also United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 844 (W.D. Miss. 1984) (holding that joint and several liability should be imposed under CERCLA).


Section 101 of CERCLA states that liability under CERCLA "shall be construed to be the standard of liability which obtains under §311 of the Federal Water Pollution Control Act." CERCLA §101 (89), 42 U.S.C. §9601 (89). Despite the fact that §311 of the Federal Water Pollution Control Act ("FWPCA") does not clearly discuss strict liability, courts have interpreted the language of the FWPCA to include strict liability because, unless a party asserts one of the specified defenses, they are subject to such liability. See Zygmunt, supra note 17, at 264 (noting that Congress’ reference to FWPCA §311 makes sense because same defenses available in FWPCA appear in §107 of CERCLA).
be like the one provided for in CERCLA, under which nearly all who are considered controlled by the statute are found liable.21 While it is fairly uncontested that CERCLA’s extensive liability scheme is well within the purview of Congress’ intent, the question of how far to go in determining potential responsibility is much more uncertain.22 In pursuing Congress’ intent, courts invariably turn to the goals espoused within the legislative history of CERCLA.23

1. Congress’ Goals, the Basis for Interpretation

One of the goals underlying CERCLA was to provide the federal government with the necessary tools to implement a prompt and effective response to the problems resulting from hazardous waste disposal.24 An additional goal was to ensure that those responsible for the disposal of hazardous waste would be accountable for their actions.25 While CERCLA is to be broadly interpreted to

21. See Zygmunt, supra note 17, at 263 (discussing extensive reach of CERCLA as strict liability statute).


24. See generally Town of New Windsor v. Tesa Truck, Inc., 919 F. Supp. 662, 665 (S.D.N.Y. 1996) (stating that two primary goals of CERCLA are enabling EPA to respond efficiently and expeditiously to toxic spills and holding those parties responsible for releases liable for costs of cleanup); see also Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (discussing that Congress’ intent when passing CERCLA was to enable government to respond quickly and efficiently to national problem of hazardous waste disposal). Congress enacted CERCLA with the intent of “initiate[ing] and establish[ing] a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.” H. Rep. No. 96-1016, pt. 1, at 22 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6125.

25. See H. REP. NO. 99-253, pt. 3, at 15 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3038 (noting that Congress’ goals in enacting CERCLA were: “(1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups”). These potentially responsible parties are referred to in the short form as PRPs, standing for potentially responsible parties. See Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990) (commenting on CERCLA’s purposes, one of which was to ensure that PRPs are held respon-
effectuate the goals for which it was established, the courts' interpretations of the statute must be supported either by the statute's plain meaning or its legislative history.\textsuperscript{26}

2. \textit{The Language of CERCLA}

A party may not be held liable under CERCLA unless they are first found potentially responsible, or "covered."\textsuperscript{27} Once an entity is found to be potentially responsible and classified as a PRP, it is covered by CERCLA.\textsuperscript{28} There are four categories of PRPs.\textsuperscript{29} If particular

\textsuperscript{26} See also Watson, \textit{supra} note 2, at 272-73 (arguing that remedial purpose canon of judicial interpretation heavily influences the application of CERCLA). The remedial purpose canon simply refers to lower courts' willingness to broadly define terms of potential responsibility and ultimate liability under CERCLA based on the perception that this furthers Congress' goal of holding responsible parties responsible. See id. The effect of this liberal interpretation has lead to the current situation in which one third of all cleanup sites involve more than one hundred PRPs, and another third involves between twenty and one hundred PRPs. See S. Rep. No. 103-549, at 40-41 (1994).

\textsuperscript{27} See 3550 Stevens Creek Associates v. Barclays Bank of California, 915 F.2d 1355, 1363 (9th Cir. 1990) (recognizing remedial purpose of CERCLA and noting need for broad interpretation of CERCLA but requiring construction of statute not supported on statute's face and unsupported by legislative history); see also United States v. Alcan Aluminum Corp., 964 F.2d 252, 255 (3d Cir. 1992) (construing CERCLA liberally).

The Supreme Court has also recognized that just because a situation appears to be within the literal language of a statute does not mean that the statute should necessarily be interpreted to include it. See George Schatzki, \textit{United Steelworkers of America, v. Weber: An Exercise in Understandable Indecision}, 56 Wash. L. Rev. 51, 66-67 (1980). The Court stated that courts must consider legislative history to pursue Congress' intent behind the text of legislation. See id.

Courts must balance alternative interests when analyzing cases under CERCLA. See e.g. In re Jensen, 995 F.2d 925, 930 (9th Cir. 1993). An example of the need for a delicate median that can be accomplished by specific liability limiting provisions is protecting public health on one hand by enacting broadly defined potential responsibility provisions and simultaneously, assuring that only "responsible" parties are held liable. See id. (balancing competing interests of EPA policy and individual rights in bankruptcy).

\textsuperscript{28} See United States v. Ward, 618 F. Supp. 884, 893 (E.D.N.C. 1985) (describing four categories of covered persons per §107 together as "PRPs"). Because Superfund moneys are limited, CERCLA provides for recovery of costs from "responsible parties," as set out in §107. Id. at 892; see also CERCLA §107, 42 U.S.C. §9607 (1982).

\textsuperscript{29} See Aaron Cooper, \textit{Understanding Causation and Threshold of Release in CERCLA Liability: The Difference Between Single- and Multi-Pollutor Contexts}, 52 Vand. L. Rev. 1449, n.30 (1999) (stating that "[a] PRP is a party that falls within the category of a covered person, including any present or past owner of a hazardous waste site, a party who has arranged for disposal of waste at the site, or a person who has transferred waste to the site"); see also CERCLA §107 (a)(1)(A), 42 U.S.C. §9607 (a)(1)(A) (1994).

\textsuperscript{29} See Ward, 618 F. Supp. at 893 (listing four categories of PRPs as: 1) current owners and operators of hazardous waste facilities; 2) past owners and operators of hazardous waste facilities; 3) persons who arranged for disposal of hazardous substances; and 4) transporters of hazardous substances).
lar defendants are not within one of the categories, they will not be liable for §107 cleanup costs.30 "This can be a multi-million dollar issue in the case of extensive or hard-to-clean releases."31 This Comment deals only with categories one and two, present and past "owners and operators" respectively, and further limits its discussion to ownership involving on-shore facilities.32

30. See Zygmunt, supra note 17, at 264 (discussing significance of PRP question).
31. See id. (discussing significance of PRP question).
32. See CERCLA §107(a)(1), 42 U.S.C. §9607(a)(1) (listing "owners and operators" as PRPs) (emphasis added). Because owners and operators are different from each other and since prior owners are different from current owners, it is appropriate to discuss owners while not discussing operators and to discuss prior owners separately from current owners. See New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (holding that current owners, even those who were not "operators" of site at the time of disposal of any hazardous substance, were liable under CERCLA). The word "and" has caused some discussion of whether owners, not also being operators, can be potentially responsible. See id.; see also Cadillac Fairview/California Inc. v. Dow Chemical Co., 14 ENVTL. L. INST. 20376 (C.D. Cal. 1984) (holding that prior owners and operators are only liable if they owned or operated facility "at the time of disposal of any hazardous substance"). See Shore Realty Corp., 759 F.2d at 1044. The court explained that Shore's reliance on this holding was inappropriate because the Cadillac Fairview court was concerned with a prior owner and predicated its holding solely upon the words of section 9607(a)(2). See id. Despite this feasible construction, it is generally accepted that an entity need not be both owner and operator to be held liable under CERCLA. See United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577-78 (D. Md. 1986) (analyzing meaning of use of word "and," stating that "[n]otwithstanding the language "owner and operator", a party need not be both an owner and operator to incur liability under this subsection"); see also Guidice v. BFG Electroplating and Mfg. Co., 732 F. Supp. 556, 561 (W.D. Pa. 1989) (holding that entity need not be both owner and operator to be liable under CERCLA); Artesian Water Co. v. Government of New Castle County, 659 F. Supp. 1269, 1280 (D. Del. 1987) (finding liability despite party not both owner and operator); Briggs & Stratton Corp. v. Concrete Sales & Services, 29 F. Supp. 2d 1372, 1378 (M.D. Ga. 1998) (finding defendant responsible as operator "based on his exercise of control" but not holding responsible as owner because "[o]perator liability under CERCLA is not sufficient to establish the ownership of property"); Fleet Factors Corp., 901 F.2d at 1550 (stating that creditor may incur §107(a)(2) liability without being operator, by participating in financial management of facility to degree indicating capacity to influence corporation's treatment of hazardous wastes).

Unlike Category One PRPs, Category Two PRPs are described, in liability terms, as any person who "owned or operated" any facility at the time of disposal of any hazardous substance as a prior owner. See CERCLA §107(a)(2), 42 U.S.C. §9607(a)(2). Prior ownership alone is sufficient for holding a party potentially responsible under CERCLA. See id. A party may be held liable as either an owner or a prior owner, so it is not essential that the party be classifiable as an owner at the time of litigation. See id. The PRP prior ownership classification holds parties responsible under CERCLA whose interest in sites may have passed but who, nonetheless, could have been regarded as owners at the time of release of hazardous substance. See id.

A party can be a Category One owner simultaneously to being a Category Two prior owner. See id. In such cases, the party who is both owner and prior owner will be no more or less liable than a party fitting only one classification. See id.
B. The Non-Comprehensiveness of CERCLA as Originally Enacted

Courts have struggled to define "owners and operators" according to the perceived intent of Congress because CERCLA lacks settled statutory definitions. Gaps and circular definitions pertaining both to potential responsibility and ultimate liability cause confusion within CERCLA, rendering it subject to varying judicial interpretations regarding the statute's underlying intent. Thus,

Like current owners, prior owners will face strict liability once determined to be a PRP. See id.

33. See CERCLA §101(20) (A), 42 U.S.C. §9601(20) (A) (defining "owner" and "operator" together at section 101 of CERCLA as follows: "[t]he term 'owner or operator' means . . . in the case of an onshore facility or offshore facility, any person owning or operating such facility"). CERCLA does not define the term any further except that in subsection (D) of section 101, an exclusion is provided for state or local governments who acquire property by virtue of its function as sovereigns, which neither cause nor contribute to the release or threatened release of hazardous substance from the facility. See CERCLA §101(20)(D) (providing exclusion to state or local government when site involuntarily acquired by virtue of its function as sovereign).

Those courts which interpret CERCLA ownership broadly, base their conclusion on legislative history and concepts of statutory construction. See Philadelphia v. Stephan Chem. Co., 1987 WL 15214, Civ. A. Nos. 81-0851, 83-5493 (E.D. Pa. July 30, 1987); 1 THOMPSON ON REAL PROPERTY 4 (stating that when used without restriction in statutes, the term "owner" includes one who has use, control of occupation of land with claim of ownership of title or of some other estate or interest); Tomme R. Young, THE LAW OF DISTRESSED REAL ESTATE: FORECLOSURE, WORKOUTS, PROCEDURES. Ch. 30B Environmental Concerns in Purchase and Sale of Real Property, n.41; H.R. 85 as introduced May 15, 1979, 20 CERCLA Legislative History at 546.

34. See Allan J. Topol & Rebecca Snow, SUPERFUND LAW AND PROCEDURE § 3.6 (1999) (citing Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp., 976 F.2d 1338, 1341 (9th Cir. 1992) (stating "[t]he circularity of [owner] renders it useless")); see also Lincoln Properties, Ltd. v. Higgins, No. S-910760DFL/GGH, 1993 WL 217429 (E.D. Cal. Jan. 21, 1993) (noting that circularity of definition of owner has rendered definition useless); United States v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317, 1319 (S.D.N.Y. 1992) (stating that circularity of definition "precludes its use as an interpretive device"); United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1358 (N.D. Ill. 1992) (stating that CERCLA does not define ownership, and that court would therefore look to the common law) (citation omitted); Long Beach Unified School District v. Dorothy B. Godwin California Living Trust, 32 F.3d 1364, 1367-68 (9th Cir. 1994) (noting circular definition of "'owner or operator' is as helpful as 'defining 'green' as 'green';" and looking to ordinary meanings of terms, and noting that 'owner' is distinct concept from 'operator,' otherwise Congress would not have used two words").

"Prior owner" is an example of a term defined circularly in CERCLA. The statute's failure to describe what body of law to use in defining "owner" is an example of a gap causing inherent ambiguity in CERCLA. See supra notes 27-30 and accompanying text.
in the sense that CERCLA is not self-descriptive, it is somewhat non-comprehensive.  

Prior to its recent amendments, CERCLA left many questions pertaining to ultimate liability unanswered. Specifically, it left open the issue of whether fiduciaries could be held personally liable for the release or the threatened release of hazardous substances. Despite these unanswered questions, Congress has attempted to clarify CERCLA by amending various sections of the statute. Assessing Congress' success in achieving a truly comprehensive CERCLA turns on an understanding of Congress' goals re-


"[T]he terms ‘owner’ and ‘operator’ do not include a person that, without participating in the management of an underground storage tank and otherwise not engaged in petroleum production, refining, or marketing, holds indicia of ownership primarily to protect the person’s security interest." Id. Further, the 1996 CERCLA amendments altered the Lender Liability Rule. See id. at §2504, 110 Stat. at 3009-468-69 (1996) (holding portion of final rule issued by EPA Administrator prescribing 40 C.F.R. §300.1105 shall be deemed validly issued under CERCLA of 1980 and effective according to terms of final rule). Finally, Congress declared the 1996 CERCLA amendments applicable to any claim not finally adjudicated as of their enactment date. See id. at §2505, 110 Stat. at 3009-469 (1996).
garding each piece of CERCLA legislation as well as CERCLA generally.\textsuperscript{39}

C. Amendments to CERCLA: Congress' Efforts to Improve the "Comprehensiveness" of CERCLA

1. The 1986 Amendments & Reauthorization Act

Under The 1986 Superfund Amendments & Reauthorization Act ("SARA"), Congress instituted a far-reaching set of amendments, re-authorizing the continued operation of the Superfund system.\textsuperscript{40} As one scholar noted, the "Reauthorization Act confirms how everyone is liable."\textsuperscript{41} Thus, if comprehensiveness is understood to mean "broad in scope," SARA may be characterized as a significant step toward Congress' goal of achieving a comprehensive CERCLA program.\textsuperscript{42} If comprehensiveness is defined by thoroughness, however, SARA may have been a failure.\textsuperscript{43} SARA did very


\textsuperscript{40} See id. at 390 (reporting that considerable congressional attention turned toward amending and reauthorizing CERCLA in 1984 and 1985). Because the substance of CERCLA was controversial, authorization to collect taxes to fund CERCLA programs was scheduled to automatically expire on September 30, 1985. See id. Thus, in 1984 and 1985, Congress turned its attention toward amending and reauthorizing the Act. See id. In 1986, a conference committee examined the divergent House and Senate reauthorization bills. See id. The conference committee finally passed a compromise bill in July, 1986. See id. While the two houses of Congress agreed upon the substantive issues of the reauthorized bill, the two did not agree on the finance provisions of the bill until October 2, 1986. See id. Despite Presidential threats to veto the imposition of a broad-based business tax to fund the new CERCLA program, both the House and the Senate enacted the reauthorized CERCLA bill by overwhelming margins. See id. On October 17, 1986, President Ronald Reagan signed the Superfund Amendments and Reauthorization Act of 1986 ("SARA") into law. See id.

\textsuperscript{41} See id. (depicting courts' modern treatment of CERCLA as ultimately holding nearly anyone characterized as PRP liable under CERCLA). Another commentator corroborated this point, describing a CERCLA trial as "requiring only that the Justice Department lawyer stand up and recite: 'May it please the Court, I represent the government and therefore I win'". Roger Mazulla, \textit{Superfund 1991: How Insurance Firms Can Help Clean up the Nation's Hazardous Waste}, 4 TOXICS L. REP. 685 (Nov. 8, 1989). If comprehensiveness is thus defined by the number of parties held potentially responsible, SARA may be determined a colossal success. Glass, supra note 39, at 390.

\textsuperscript{42} See id. at 461 (stating that "[o]perating in a zealous atmosphere, the EPA has systematically sought the expansion of Superfund liability which the courts have granted almost completely").

little to bridge the broad gaps or to clarify the circular definitions, such as the meaning of "owned," in CERCLA.\textsuperscript{44} In 1991, Douglas M. Garrou, a CERCLA commentator, posed a hypothetical lawsuit to illustrate some of the gaps remaining after SARA.\textsuperscript{45} Given the confusion illustrated in his hypothetical, Garrou appealed to Congress to clarify the meaning of CERCLA terms and to elucidate the ambiguities in CERCLA liability provisions.\textsuperscript{46} This would enable courts to be better prepared to further the purposes of the statute. While CERCLA was found to be somewhat more comprehensive

\textsuperscript{44} See Garrou, supra note 3, at 130 (observing that SARA broadly defined "contracts," but failed to clearly define other statutory terms such as "owned").

\textsuperscript{45} See id. at 117 (illustrating trustees' potential liability as owner under CERCLA through hypothetical lawsuit). Garrou's hypothetical lawsuit portrayed a situation where EPA attempted to hold a trustee liable as a current owner under CERCLA for the clean up costs of a hazardous waste site. See id. at 117-18. Garrou evaluated the extent to which the expertise and activities of the hypothetical trustee characterized her as a PRP. See id. at 120-21. He warned that the trustee would have a difficult time determining the likelihood that she could be held ultimately liable or even potentially responsible. See id. Garrou attributed the lack of clarity to CERCLA's unclear language regarding the scope of fiduciary liability. See id. at 121.

Through his hypothetical, Garrou surmised that while CERCLA should be construed broadly, innocent individuals should escape liability. See id. at 129 (outlining elements of innocent landowner defense). Similarly, Representative Barney Frank has stated "[p]art of having a tough and comprehensive [CERCLA] program is having provisions that allow innocent individuals to be treated as innocent individuals. In other words, ... nothing is more damaging to a good regulatory scheme than having anything in it that could inadvertently sweep out within its coils innocent individuals." \textit{Id.} at 113 (quoting 131 CONG. REC. H11, 158 (daily ed. Dec. 5, 1985) (statement of Rep. Frank)). Garrou concluded that:

\textit{[T]he courts, the legislature, and the potentially responsible trustee herself all may have an important role to play in a future attempt to hold a trustee personally liable as a CERCLA owner. The ambiguity of the relevant CERCLA liability provisions and the paucity of congressional guidance will challenge a reviewing court in its attempt to further the purposes of the statute. The legislature, meanwhile, is faced with important and far-reaching choices in its attempt to fine-tune the CERCLA statute; its decisions will affect the extent to which the CERCLA framework is able to respond to its original goals.}

\textit{Id.} at 147-48.

\textsuperscript{46} See id. In other words, while Garrou challenged Congress to close some gaps and expand some definitions within the Superfund statute for the sake of improving the statute's clarity, he affirmed that SARA was successful in making CERCLA more comprehensive in the sense that it provided for broader liability. See id. at 129-30.
than it formerly was, the statute continued to lack clarity and failed to be truly comprehensive.47

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

The most recent amendments to CERCLA, enacted as Subtitle E of the Omnibus Consolidated Appropriations Act, are entitled "The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996" ("ACA").48 ACA significantly added to CERCLA by providing trustees and other fiduciaries with protection from personal liability beyond personal assets held in their respective capacities.49 This amounted to a significant declaration of Con-

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47. See G. Van Velsor Wolf, Jr., The Impact of Environmental Law on Real Estate and Other Commercial Transactions, Lenders, Trustees and Bankruptcy, SD21 ALL-ABA 573, 576-77 (1998) (discussing continued lack of clarity of CERCLA). Wolf specifically discussed the Fleet Factors, stating that "[t]he danger of Fleet Factors was that a subsequent court could use the language aggressively or less carefully than the author may have intended." Id. In short, CERCLA remained unclear and despite judicial guidance giving CERCLA's clauses additional meaning, courts continue to have room to diverge in interpreting the Statute. See id.

The issue in Fleet Factors was whether the lender's "involvement [was] sufficiently broad to support the inference that it could affect hazardous waste decisions if it chose." Id. A divided panel of the Eleventh Circuit Court of Appeals concluded that a secured creditor may incur liability "without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes." Id. The Eleventh Circuit continued, stating "[i]t is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable . . ." Id.


49. See CERCLA §107(n)(5)(A)(i)-(I-XI), 42 U.S.C. §9607(n)(5)(A)(i)-(I-XI) (including as "fiduciaries" the following, as well as any representative in any other capacity that Administrator determines to be similar to: trustees, executors, administrators, custodians, guardians of estates or guardians ad litem, receivers, conservators, committee of estates of incapacitated persons, personal representatives, or trustees (including successors to trustees) under indenture agreements, trust agreements, leases, or similar financial agreements).

Subsection (n) of CERCLA §107 does not provide a defense to liability but statutorily limits liability of fiduciaries. See CERCLA § 107(n), 42 U.S.C. § 9607(n). Thus, the nature of one's relationship to a site, although a party may be found to be a PRP, may allow a defense to become available to limit or remove liability. See id. For a discussion of the bifurcated liability system employed in CERCLA, see supra notes 19-20 and accompanying text. Where the decedent would be liable were he alive, the plaintiff should be allowed to look to the decedent's assets, in the hands of the estate or the estates beneficiaries, to satisfy that liability. This is referred to as a trust fund theory. See Steego Corp. v. Ravenal, 830 F. Supp. 42, 49 (D. Mass. 1993) (applying trust fund theory to trust as well as corporation) (citing Soo Line R.R., Co. v. B.J. Carney & Co., 797 F. Supp. at 1484-85) (allowing a claim against estate beneficiaries and certain testamentary trusts of the deceased former president of a polluting corporation). The beneficiary is deemed to hold the as-
progress' intent with respect to the issue of personal liability. In sum,

sets received from a liable party's estate in trust for the benefit of satisfying liabilities of a deceased, responsible person. See Sut line R.R., 797 F. Supp. at 1484-85.

50. Compare City of Phoenix, 816 F. Supp. at 600 (holding that trustee is "owner" under CERCLA even though it may only hold bare legal title and liability for cleanup may far exceed value of trust's assets) with United States v. Mirabile, 15 ENVTL. L. REP. 20994, 20996 (E.D. Pa. Sept. 4, 1985) (holding that bank was exempt as inactive security interest holder under §101(20)(a)). In Mirabile, the court concludes that possession of title was not dispositive evidence of ownership. See id. at 20994. In sum, ACA is a significant declaration of Congress' intent with respect to personal liability because decisions made prior to adoption of ACA would come out differently under CERCLA containing ACA provisions.

Prior to adoption of ACA, many courts found trustees personally liable for the cleanup of sites. See, e.g., Wisconsin v. Better Brite Plating, Inc., 483 N.W.2d 574, 579 (Wis. 1992) (dismissing for lack of jurisdiction case in which circuit court and appeals court had found trustee of bankrupt trust personally liable for cleanup of site). In contrast, other courts limited fiduciary liability. See, e.g., United States v. Bliss, 667 F. Supp. 1298, 1304 (E.D. Mo. 1987) (holding that statutory trustees were liable in capacity as trustees, but only to extent of corporate property and effects which came into their hands). The difference in judicial treatment was primarily accounted for by the courts' variable treatment of control as an element of determining ownership. See id. at 1306.

Control has not been a relevant factor to finding ownership for all courts but has clearly been important to some. See, e.g., Kelley v. Thomas-Solvent, 727 F. Supp. 1532, 1545-44 (W.D. Mich. 1989) (holding that since trustee had "authority to control" waste-handling practices and prevent hazardous waste damage, trustee could have CERCLA liability); see also United States v. Pesses, 794 F. Supp. 151, 155 (W.D. Pa. 1998) (exempting savings and loan from CERCLA liability where it did not participate in management of facility and merely held title to property as security for loan); Atlantic Richfield Co. v. Bloenski, 847 F. Supp. 1261, 1276 (E.D. Pa. 1994) (holding that defendant would not be liable as owner if co-defendant put defendant's name on deed without his knowledge or consent, and defendant continued to be ignorant of fact that his name was on deed, but took action as soon as he found that his name was on deed). See generally John M. Scagnelli, Acquiring or Selling the Privately Held Company: Environmental Issues and Liability Considerations, 1125 PLI/Corp 703, 709-10 (1999).

A court deciding a case like City of Phoenix today, however, would be bound by CERCLA to limit contribution to assets held in the trustee's fiduciary capacity, irrespective of any finding of control. See CERCLA §107(n), 42 U.S.C. §9607(n). As a result, even a fiduciary who engages in certain activities traditionally associated with control will be subject to limited liability. See id.

In general, subsection (n)(1) is subject to qualifying provisions. See CERCLA §107(n)(2), (4), (5). Subsection (n)(2) states that "[p]aragraph (1) does not apply to the extent that a person is liable under this Act independently of the person's ownership of a vessel or facility as a fiduciary or actions taken in a fiduciary capacity." CERCLA §107(n)(2), 42 U.S.C. §9607(n)(2). Section (n) will be invoked by a defendant who has been found to be otherwise liable under CERCLA (e.g., an "owner"). Section (n)(2) prevents use of this limitation for activities taken by a fiduciary independently of the person's ownership as a fiduciary or actions taken in a fiduciary capacity. See id. Thus, a defendant cannot avoid personal liability solely because he can be characterized as a fiduciary. See id. A person may still be personally liable if his involvement with the site in question extends beyond functions required as fiduciary. See id.

Activities which do not expand liability beyond those held in the fiduciary capacity include: covenants, warranties, or other provisions concerning environmental compliance in the fiduciary documentation; monitoring or enforcing provisions of those documents; inspecting the facility; providing financial or other
while Congress intended ACA to make CERCLA more self-descriptive, ultimately, ACA proved to be a significant, but incomplete step.\textsuperscript{51}

Although ACA was a positive step toward clarifying Congressional intent with respect to fiduciary liability, ambiguities continue to confound the clarity of CERCLA, particularly subsection (n).\textsuperscript{52}

Additionally, while ACA has elucidated Congress’ intent with re-

advice to the parties; restructuring the relationship; terminating the relationship; administering a facility that was contaminated before the relationship began; or conducting a response action under CERCLA or otherwise at the direction of the EPA. See CERCLA §107(n)(4)(A-I), 42 U.S.C. §9607(n)(4)(A-I).

51. See generally Marc L. Fleischaker & Lawrence E. Blatnik, The Law of Distressed Real Estate: Foreclosure, Workouts, Procedures §30.04 (1999) (discussing utility of ACA); Lisa G. Dwyer, Relief From CERCLA’s ‘Rock and a Hard Place’: The Asset Conservation, Lender Liability and Deposit Insurance Protection Act, 3 E

V. Law. 859 (1998) (explaining ACA particularly in context of lender liability); Macchione, supra note 36, at 81 (discussing impact of ACA).

In short, ACA clarified fiduciary liability under CERCLA, making CERCLA more self-descriptive. See CERCLA §107(n)(4)(A-I), 42 U.S.C. §9607(n)(4)(A-I). By simply reading the statute, courts can now confidently know the extent of fiduciaries’ liability. See id. Nonetheless, CERCLA remains incomplete because gaps and circular definitions remain. See Garrou, supra note 36, at 130 (noting circular definitions and gaps replete in CERCLA).

52. See, e.g., Canadyne, 183 F.3d at 1275-76 (discussing what may be required to show negligence in §(n) of CERCLA). The Eleventh Circuit required supplemental briefs filed on the matter of defining the meaning of negligence. See id. The court was specifically concerned with whether the failure to act could amount to negligence as meant by subsection (n). See id. The court ultimately held that “[h]ere, the negligence exception requires some action because the Bank had no duty to prevent someone else from releasing hazardous substances.” Id. at 1275.

The Eleventh Circuit did not dismiss the claim for want of proof of negligence but the court noted that “we merely state that the complaint satisfies the very low threshold of sufficiency prescribed by the Federal Rules of Civil Procedure . . .” Id. at 1276. Specifically, the Eleventh Circuit stated that “[w]e are compelled by precedent to hold that ‘[i]t is sufficient against a motion to dismiss to allege that defendant acted negligently.’” Id. (quoting Augusta Broadcasting Co. v. United States, 170 F.2d 199, 200 (5th Cir. 1948)). The Eleventh Circuit is the first to have interpreted ACA and Congress’ meaning of negligence. See id. at 1275. While a full discussion of this aspect of ACA is beyond the scope of this Comment, the case’s significance as an opinion analyzing the meaning of negligence on first impression is worth noting. See id. Moreover, the Eleventh Circuit’s difficulty in determining the meaning of negligence emphasizes the point that both the amendment and CERCLA remain non-comprehensive as far as self-description is concerned. See id.

The Eleventh Circuit stressed that “[t]he Bank will have an opportunity to move for summary judgment at the appropriate time.” Id. The Eleventh Circuit also advised that “simply because [the plaintiff’s] complaint surviv[ed] a motion to dismiss does not authorize [the plaintiff] to engage in wholesale discovery” but rather that “the district court may limit discovery to determining whether the [defendant], through its negligent action, caused or contributed to release of hazardous substances at the cite.” Id. (citing CERCLA §107(n)(3), 42 U.S.C. §9607(n)(3)) (emphasis added); see also William W. Buzbee, CERCLA’s New Safe Harbors for Banks, Lenders, and Fiduciaries, 26 E

V. L. Rep. 10656 (1996) (discussing ACA and describing it as “the first significant amendment to CERCLA in a decade”).
speak to fiduciary liability, it has done little to define the terms that establish potential responsibility under the statute. 53 Nevertheless, ACA may have indirectly succeeded in broadening the scope of CERCLA responsibility through the Eleventh Circuit’s expanded interpretation and application of ACA in cases like Canadyne. 54 Whether the term “comprehensive” is understood to mean self-descriptive or broad in scope, as a general proposition, Congress achieved comprehensiveness through ACA. 55

In summary, if the PRP is a trustee, there is a presumption that liability will be limited to assets held in the party’s fiduciary capacity. See id. This exception, however, is subject to exclusion and limitation clauses in addition to express exemptions of CERCLA. See CERCLA §107(n), 42 U.S.C. §9607(n). A fiduciary may be personally liable even if he is acting in a fiduciary capacity. See CERCLA §107(n)(3), 42 U.S.C. §9607(n)(3) (stating that liability is not limited if “negligence of a fiduciary causes or contributes to the release or threatened release”).

53. See CERCLA §107(n), 42 U.S.C. §9607(n). The Act does not change the definitions of owner or operator but does define what is meant by “participating in the management.” See CERCLA §101(20)(A)(ii); 42 U.S.C. §9601(20)(A)(ii). Owner or operator is defined in section 101 of CERCLA as: “in the case of an onshore facility . . . , any person owning or operating such facility. . . . [S]uch term does not include a person who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.” Id. Following enactment of ACA, in revised section 101(20) of CERCLA, the term “participate in management” means actually participating in the management or operational affairs of a vessel or facility; and does not include merely having the capacity to influence, or the un-exercised right to control, vessel or facility operations. See id. This revision does little to define owner or operator.

54. See Canadyne, 183 F.3d 1269. The Canadyne court, among others, has interpreted CERCLA provisions in reaching their conclusions. See id.; see also Red-wing Carriers, 94 F.3d 1489. It is not always clear, however, that these conclusions are consistent with Congress’ intent. See generally United States v. USX Corp, 68 F.3d 811, 822 (3d Cir. 1995) (looking at statutory basis to support conclusion reached by court but noting difficulty in surmising Congress’ intent with regards to CERCLA). Nonetheless, Congress’ failure to legislatively correct erroneous or undesirable judicial interpretations of CERCLA, which operate against the legislatures’ intent, could be construed as tantamount to Congress affirming the judicial interpretation as adequately stating Congress’ intent. See generally Robin C. Tureworthy, Retrospective Application of the Anti-Terrorism and Effective Death Penalty Act of 1996 to Pending Cases: Rewriting a Poorly Written Congressional Statute, 75 Wash. U. L.Q. 1707, 1730-31 (1997) (generally discussing process of interpreting Congress’ silence). To criticize the judicial interpretation of ACA as broadening the scope of CERCLA liability is akin to criticizing Congress’ acquiescence and arguably akin to criticizing Congress for the policy it ostensibly adopts as underlying ACA. See generally id. Nonetheless, since Congress has not expressly adopted judicial interpretations, it reserves the ability to enact legislation without needing to reverse itself in the process. See id. at 1733-34. The issue of whether to use state or federal law in defining “own” and “owned” certainly qualifies as a victim of Congress’ silent treatment. Courts seeking to apply ACA, coupled with other courts’ interpretations of ACA, must individually answer the question of whether judicial interpretation of ACA, operates against Congress’ intent. See id.

55. See CERCLA §107(n), 42 U.S.C. §9607(n). The ACA can be perceived as achieving comprehensiveness in the sense of textual completeness in that CERCLA now addresses fiduciary personal liability. See id. Following the enactment of ACA, CERCLA is perceived as broader in scope because courts such as the Canadyne
Given the significance of ACA, and despite prior congressional debate on the issues underlying the Act, ACA experienced extremely limited congressional review prior to its adoption. Moreover, it was inconspicuously presented on fewer than ten pages within the voluminous Omnibus Consolidated Appropriations Act, which dealt primarily with defense appropriations. Scholars questioned Congress' motive and duly noted the inherent difficulty in ascertaining Congress' intent due to the sparse debate contained in the record. As a result, it is not surprising if interpretive errors have been made by the courts.

court tend to find more parties potentially responsible, believing that particular provisions will vindicate those whom Congress does not wish to be held liable. See Canadyne, 183 F.3d at 1273-76. See generally Dwyer, supra, note 51, at 873 (stating that "[t]he purported goal of the Act, therefore, was to "fill the void in an unsettled area of law") (citing Lender Liability Rule, 57 Fed. Reg. 18.373 and Lender Liability Act § 2502(b), 110 Stat. 3009-464 to -466, codified at 42 U.S.C. §9601(20)(E), (F)). Dwyer concluded that "[b]ecause the Act adopts the Rule's interpretation of the Secured Creditor Exemption, it is proper to assume that this was also a goal of the Act." Id. at n.131. Courts like the Canadyne court reason that if Congress did not like the reach of potential responsibility, they would fill the gap and provide express limitations. See id.

56. See Buzbee, supra note 52, at 10656 (citing Telephone Interview with Randy Deitz, EPA Legislative Superfund Counsel, Office of Congressional and Legislative Affairs (Oct. 18, 1996)) (stating "[t]he amendments were passed with little contemporaneous public debate or discussion and, in fact, were generated out of congressional banking committees, instead of the usual environment committees and subcommittees"). Buzbee also notes the paucity of legislative discussion pertaining to Subtitle E prior to its integration with the 1996 Omnibus Appropriations Act. See id. (citing H.R. Conf. Rep. No. 104-863 on H.R. 9610, 104th Cong., 2d Sess., 142 Cong. Rec. H11644, (daily ed. Sept. 28, 1996)).

There are similar criticisms of CERCLA itself. See Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. Envtl. L. 1, 1 (1980) (stating that paucy of useful legislative history further complicates task of interpreting CERCLA); see also Brian O. Dolan, Misconceptions of Contractual Indemnification Against CERCLA Liability: Judicial Abrogation of the Freedom to Contract, 42 Cath. U.L. Rev. 179, 179-82 (1992) (stating that CERCLA was enacted by "a 'lame duck' Congress, partially in response to inadequacy of existing hazardous substance laws").

57. See Buzbee, supra note 52, at 10656.

58. See id. (citing 142 Cong. Rec. S11919, S11920-21 (daily ed. Sept. 30, 1996) (statement of Sen. D'Amato)) (stating that public or environmental groups usually involved in drafting and review of environmental laws were "notably absent" from list of participants in legislative process). Senator D'Amato had discussed ACA on the day the amendments were enacted, stating that new provisions "were the result of extensive negotiations among the administration, the lending industry and the interested committees of both Houses." 142 Cong. Rec. S11919 (daily ed. Sept. 30, 1996) (statement of Sen. D'Amato).
Lacking clear statutory language defining CERCLA terms or helpful legislative history or amendments, courts have consistently looked to judicially crafted common law to determine Congress’ intent.59 The resolution of Canadyne illustrated this point, presenting an issue of potential responsibility similar to that discussed in Garrou’s hypothetical lawsuit.60 Unlike Garrou’s hypothetical court, however, the Eleventh Circuit was guided by ACA.61

Despite Congress’ minor success in increasing the self-descriptiveness of CERCLA through ACA, CERCLA’s definition of “ownership” remained ambiguous.62 As a result, the Eleventh Circuit relied on judicial precedent to interpret the meaning of “owned” within the context of CERCLA.63 Specifically, the Eleventh Circuit relied on the Supreme Court’s decision in Bestfoods, confirming that state law, as opposed to a common federal law which, if created, would preempt state law, could be used in defining the term.64 The phrasing of the Supreme Court’s holding was permissive.65 As a result, it became incumbent upon each circuit to apply a common federal rule or state law for determining the rules for ascribing ownership.

59. See Grad, supra note 56, at 1 (discussing how courts pursue Congress’ intent underlying CERCLA).
60. See Canadyne, 183 F.3d at 1269. Canadyne is an Eleventh Circuit case decided in the summer of 1999 involving a trustee whose trust was a general partner in a limited partnership owning polluted land. See id. As discussed below, it is not clear the extent state law played at the time of the release of hazardous substances (hereinafter “historical state case law”). Compare Canadyne, 982 F. Supp. at 888-89 (applying state common law), with Canadyne, 183 F.3d at 1272-73 (applying state statutory law but not clearly incorporating state common law).
61. See Canadyne, 183 F.3d at 1273-74 (noting that ACA had already been enacted prior to this case). For a discussion of ACA, see supra notes 48-58 and accompanying text. Thus to the extent that ACA provided increased comprehensiveness to CERCLA, the Eleventh Circuit was better off than was Garrou’s hypothetical court, because of the fact that ACA was enacted prior to the Eleventh Circuit’s decision. See id.
62. See Canadyne, 183 F.3d at 1275 n.10 (discussing continuing ambiguity in discerning meaning of words used in CERCLA).
63. See id. at 1273 (noting that whether defendant can be deemed “owner” under CERCLA depends on application of state law, therefore, conclusions may vary from state to state).
64. See id. at 1272 n.4 (discussing and applying Bestfoods).
Following Eleventh Circuit precedent established in *Redwing Carriers, Inc. v. Saraland Apartments, Ltd.*, which held that state law rather than federal law would apply when ascertaining ownership for CERCLA purposes, the Eleventh Circuit applied Georgia state law. There is some question, however, as to whether the Eleventh Circuit’s decision in *Canadyne*, to apply state law to determine prior ownership, is as sound as the Eleventh Circuit’s same decision in *Redwing Carriers*. The answer to this question hinges on the Eleventh Circuit’s use of *United States v. Kimbell Foods*.

A. **Kimbell Foods**

In the 1979 *Kimbell Foods* decision, the Supreme Court addressed the circumstances in which it would be necessary to adopt a federal common law, preempting state law in cases dealing with federal statutes. In *Kimbell Foods*, a private lien holder brought suit to

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66. 94 F.3d 1489 (11th Cir. 1996) (describing how owner of property responsible for clean-up costs under CERCLA brought actions against general and limited partners of current owner, contractor which built apartment complex, and managing agent of complex).


68. See Canadyne, 183 F.3d at 1269, 1273 n.5. The Eleventh Circuit’s reasoning used in *Canadyne*, like *Maryland Bank & Trust Co.*, is generally not clear because it fails to provide a sufficient analytical structure for deciding prior ownership cases similar to the situation presented in *Canadyne*. See id.; see also United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577-78 (D. Md. 1986). *Canadyne* specifically lacks clarity because it fails to describe the role of state case law in determining prior ownership. See *Canadyne*, 183 F.3d at 1269, 1272. While the *Canadyne* Court may have achieved the right result, it, nonetheless, based its reasoning on superficial reasoning, and, thus, like *Maryland Bank and Trust Co.*, is too contorted to be the authoritative precedent for determining prior ownership for partners. See Wolf, supra note 47, at 576 (discussing criticisms of *Maryland Bank & Trust*). Whether or not the Eleventh Circuit reached “the right result” obviously turns on how the Eleventh Circuit reached its conclusion (e.g., whether the court overstepped the bounds of its role in procedure) and how one defines “right.” Assuming *arguendo* that the Eleventh Circuit reached “the right result,” in that its decision was legally sound, it still is arguable that its result is not necessarily the best result. See *Canadyne*, 183 F.3d at 1274 n.7 (admitting result was “anachronistic”). Not only does the *Canadyne* rule lead to an “anachronistic” result, but its superficial reasoning opens the door to assaults on CERCLA’s strict liability scheme. See *Canadyne*, 982 F. Supp. at 890 (applying state law in manner which considered element of control when determining ownership). Since Congress intends for CERCLA to be a strict liability statute, an impermissible rule would be one exempting from liability parties otherwise considered PRPs due to a lack of control. See United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 (11th Cir. 1990) (stating standard of strict liability appropriate under CERCLA).


foreclose on personal property in which the United States also claimed an interest resulting from a lien on a federal guaranteed loan.\textsuperscript{71} In resolving this case, the Supreme Court held that: (1) federal law governs the priority of liens stemming from federal lending programs; (2) a uniform national rule was unnecessary to protect the federal interests underlying the Small Business Administration and the Federal Housing Authority's loan programs, and (3) the relative priority of private liens and consensual liens arising from the federal loan programs was to be determined under non-discriminatory state laws, absent a congressional directive to the contrary.\textsuperscript{72}

In the \textit{Kimbell Foods} opinion, Justice Marshall indicated that federal courts should consider three factors when deciding whether to craft a uniform Federal common law rule or, in the alternative, adopt an applicable state law rule as the federal standard.\textsuperscript{73} Specifically, the federal courts must consider: (1) the extent to which there is a need for a nationally uniform body of law; (2) whether application of state law would frustrate specific objectives of the federal programs; and (3) the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.\textsuperscript{74} With regards to a CERCLA prior ownership case, no court has specifically applied the \textit{Kimbell Foods} test for determining

\textsuperscript{71} See id. (attempting to specifically resolve question "whether contractual liens arising from certain federal loan programs take precedence over private liens, absent a federal statute that sets priorities").

\textsuperscript{72} See id. (rendering decision which considered facts such as uniformity and determinations of whether state law would frustrate specific objectives of federal program).

\textsuperscript{73} See id. at 727-28 (stating that controversies governed by federal law "do not inevitably require resort to uniform federal rules"). The Supreme Court, however, did note that the adoption of federal law is sometimes appropriate. See id. at 728 (quoting United States v. Standard Oil Co., 332 U.S. 301, 310 (1947)) (stating that "[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law"); see also David E. Dopf, \textit{Federal Common Law or State Law?}, 10 Vill. Envtl. L.J. 171 (1999) (discussing whether courts should adopt common federal law in context of successor liability under CERCLA).

\textsuperscript{74} See \textit{Kimbell Foods}, 440 U.S. at 727-29 (noting considerations federal courts must take into account in order to decide whether to create uniform common law rule, or to adopt applicable state rule as federal standard); see also Redwing Carriers, Inc. v. Saraland Apts., Ltd., 94 F.3d 1489, 1501 (11th Circuit 1996) (stating that it is necessary to apply \textit{Kimbell Foods} test to issue of whether federal common law or state law should govern when limited partner can be held accountable for CERCLA liability of partnerships).
whether to use state versus federal law. The Eleventh Circuit, however, has applied *Kimbell Foods* in similar ways.  

B. **Redwing Carriers**

In *Redwing Carriers* the Eleventh Circuit applied the *Kimbell Foods* test, holding that "CERCLA does not require that federal law displace state laws governing the liability of limited partners unless these laws permit action prohibited by the Act, or unless their application would be inconsistent with the federal policy underlying the cause of action." 

Essentially, *Redwing Carriers* affirmed that in the Eleventh Circuit, partnership issues under CERCLA would be decided by state law.

Specifically, the Eleventh Circuit held that limited partners in a partnership owning an apartment complex were not owners for purposes of liability under §107(a) of CERCLA because the limited partners’ interest was personal property. In this case, the original owner, who had been determined to be responsible for cleanup costs under CERCLA, brought actions against both general and limited partners of the current owner, the contractor who built the apartment complex, and the managing agent of the complex. Although the limited partners were permitted to share the profits and losses, receive distributions of assets and obtain income, gain, loss, deduction, credit or similar items, the *Redwing Carriers* court noted that limited partners do not, by virtue of being limited partners, own what the limited partnership owns. The Eleventh Circuit rec

75. See *Redwing Carriers*, 94 F.3d at 1489 (applying *Kimbell Foods* to current partnership issue under CERCLA and deciding that state law would govern).  

76. *Redwing Carriers*, 94 F.3d at 1502 (internal quotations omitted). The Eleventh Circuit further held that only in the absence of "any unique definition of 'ownership' in CERCLA, we look to [state] law to define the ownership interest of the limited partnership." *Id.* at 1498. The Eleventh Circuit was also concerned that adoption of a federal standard would upset the expectations of investors. *See id.* at 1502 (stating "'[g]iven the popularity of the limited partnership structure as a means of organizing businesses and attracting investment in this country, we hesitate to upset the expectations investors have under current state law rules by adopting a federal common law rule").

77. See *id.* at 1502 (noting that *Kimbell Foods* factors weigh against crafting common law rule). Specifically, the court stated that "federal law governing liability under CERCLA should incorporate the applicable state law rule for determining when a limited partner looses its limited liability status so as to become accountable for the CERCLA liability of the partnership". *Id.*

78. See *id.* at 1498.  

79. See *id.* at 1489 (noting supplementary background information regarding parties involved).  

80. See *id.* at 1498 (citing CERCLA §107(a), 42 U.S.C. §9607(a)). In *Redwing Carriers*, the court held that exercising rights was an essential element to finding "ownership" for limited partners under CERCLA - merely possessing the right to
ognized a difference between general and limited partners but "did not express an opinion concerning the ruling of the lower court that the general partners were not responsible parties within the meaning of section 107(a)."\textsuperscript{81} Instead, they found that the lower court had been correct in ruling that the third party defense of section 107(b)(3) shielded the general partners from liability.\textsuperscript{82} Thus, while it appears that the Eleventh Circuit treats general and limited partners differently with regard to CERCLA ownership status, the extent of that difference is not clear.

\textit{Redwing Carriers} is central to an analysis of \textit{Canadyne} because the Eleventh Circuit set a precedent for itself, holding that state law, rather than federal law, would be used in resolving ownership questions under CERCLA.\textsuperscript{83} Based on the \textit{Kimbell Foods} test, the Eleventh Circuit was convinced that there was no need for a common federal rule under this test because: 1) state limited partnership law was substantially uniform; 2) applying liability to limited partners who took too many control actions was adequate to meet CERCLA’s goal of making the polluter accountable; and 3) the problem with creating a federal common law was that it is the very concept of limited liability that attracts investors to limited partnerships.\textsuperscript{84} In the end, investors’ expectations are upset if a federal common law applies instead of a defining state statute.\textsuperscript{85}

\textsuperscript{81} See id. at 1503. The court in \textit{Redwing Carriers}, interpreted state law to determine whether limited partners could be “owners” under CERCLA because CERCLA did not provide a unique definition of the term. See id. at 1498.

\textsuperscript{82} See id. (finding that third party defense of section 107(b)(3) shielded general partners from liability).

\textsuperscript{83} See id. (concluding in case similar to \textit{Canadyne} that state law, rather than federal law, would be used in resolving ownership questions under CERCLA).

\textsuperscript{84} See id. (adopting \textit{Kimbell Foods} to CERCLA ownership question and forming coherent test where ownership involves partnership).

\textsuperscript{85} See \textit{Redwing Carriers}, 94 F.3d at 1500-02. With regard to investors’ expectations, the Eleventh Circuit stated that “[g]iven the popularity of the limited partnership structure as a means of organizing businesses and attracting investment in this country, we hesitate to upset the expectations investors have under current state law rules by adopting a federal common law rule.” Id. at 1502.
C. **Bestfoods**

In 1998, the Supreme Court in *Bestfoods* upheld the use of state law to define “ownership” under CERLA. The Court determined that in the absence of a specific definition of “owner” in the statute, the ordinary meaning is to be used in the place of any unusual or technical meaning. The “ordinary” meaning of “owner,” however, varies from state to state because “owner” carries legal implications such as CERCLA liability.

The Supreme Court interpreted Congress’ silence, with respect to defining “owner,” to mean that ownership could be determined on a case-by-case basis according to state law. In the wake of *Bestfoods*, courts have reasonably interpreted Congress’ silence to be an endorsement of the liberty granted by the Supreme Court to use state law.

86. See *Bestfoods*, 524 U.S. at 63 (stating in context of prior ownership “[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law”) (quoting United States v. Texas, 507 U.S. 529, 534 (1993)). The Supreme court has not ruled on the issue of what body of law must be used when determining prior ownership. See id. The Supreme Court has, however, held that state common law may be used to fill in CERCLA’s gaps. See id. at 62. Because use of state law is permissive, rather than mandatory, it is reasonable that a common federal law may be appropriate in instances where Kimbell Foods counsels in favor of such a rule.

87. See *Bestfoods*, 524 U.S. at 63 (holding that “[n]othing in CERCLA purports to rewrite . . . well settled rule[s]” established in state case law).

88. See Blyth, supra note 4, at 119 (comparing ownership laws of states).

89. See *Bestfoods*, 524 U.S. at 63 (stating “CERCLA’s failure to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that, to abrogate a common-law principle, a statute must speak directly to the question addressed by the common law”) (citation omitted). In *Bestfoods*, the Supreme Court was deciding a “conflict among the Circuits over the extent to which parent corporations may be held liable under CERCLA for operating facilities ostensibly under the control of their subsidiaries.” Id. at 60.

Like veil piercing, the rules for ownership are not clearly spelled out in CERCLA. See id. at 56 (citing CERCLA §101(2)(A)(ii), 42 U.S.C. §9601(2)(A)(ii)) (stating “[t]he phrase ‘owner or operator’ is defined only by tautology, however, as ‘any person owning or operating a facility’”). The Supreme Court stated that “it is this bit of circularity that prompts our review.” Id. Specifically, the Supreme Court dealt with prior operator liability. The Supreme Court, however, specifically stated that they were not ruling over whether, in enforcing CERCLA’s indirect liability, courts should borrow state law, or instead apply a federal common law. See id. at 63-64 n.9. Although Bestfoods involved the common law of veil piercing, subsequent cases have read the Court’s holding beyond that context. See, e.g., Redwing Carriers, 94 F.3d 1489 (citing Bestfoods in support of conclusion that state law should apply in situation not involving veil piercing).

As stated above, a prior owner is not necessarily a current owner. It is possible that state laws for ownership will change over time, as they have in the past. See, e.g., Larry E. Ribstein, *An Analysis of Georgia’s New Partnership Law*, 36 Mercer L. Rev. 443 (1985) (comparing current Georgia law to prior Georgia law and UPA). It is not clear from *Bestfoods* whether courts are to use current state law or historical state law for assessing prior ownership in cases where state law conflicts with itself. See *Bestfoods*, 524 U.S. at 51.
interpret "owner" under state law. The Eleventh Circuit has not only embraced this liberty but, as in Canadyne, employed it in such a way described by the Court as "anachronistic." 

IV. THE ELEVENTH CIRCUIT'S RULE IN CANADYNE

Following Congress' enactment of ACA and the Supreme Court's ruling in Bestfoods, the Eleventh Circuit revisited the state versus federal choice-of-law issue. In short, Canadyne asked the Eleventh Circuit whether NationsBank could properly be construed as a prior owner under §107(a)(2) as a person who owned or operated the site in question when the disposal of hazardous substances occurred.

Although this issue was not new to the Eleventh Circuit, it was slightly different. Unlike Redwing Carriers, the primary issue in Canadyne was ownership status, as opposed to operator status. Despite this difference, the Eleventh Circuit held that state law should apply. The issue to be discussed in analyzing the propriety of the Eleventh Circuit's decision is whether prior ownership, which was at issue in Canadyne, is sufficiently different from the operator status presented in Bestfoods, to require a full-blown Kimbell Foods analysis in adopting its rule. The answer to this question is "no" if the

90. See Bestfoods 524 U.S. at 62 (stating "[s]ilence is the most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely") (citing Edmonds v. Campagne Generale Transatlantique, 443 U.S. 266, 266-67 (1979)).
91. See Canadyne, 183 F.3d at 1274 n.7 (stating "the result in this case is somewhat anachronistic"). The Eleventh Circuit explained that under UPA, which Georgia adopted in 1984, the partnership, not the individual partners, owns real property titled to the partnership. See id. (citing O.C.G.A. §14-8-8(f) (Michie Version)). The Eleventh Circuit stated this was anachronistic because if there were a release of hazardous substances at a partnership property today, the general partners would not own the property and therefore would not be directly liable under CERCLA. See id.
92. See Canadyne, 183 F.3d at 1274. Prior to Canadyne, the Eleventh Circuit decided the similar case of Redwing Carriers. See Redwing Carriers, 94 F.3d at 1489.
93. See Canadyne, 183 F.3d at 1272-73 (focusing on "owned" language in §107(a)(2) of CERCLA).
94. Compare Redwing Carriers, 94 F.3d at 1489, with Canadyne, 183 F.3d at 1269. Although these cases are potentially distinguishable, the issues discussed in those opinions were so similar that for all practical purposes, it can be said that the issue before the Canadyne court was not new.
95. Compare Redwing Carriers, 94 F.3d at 1503 (discussing nature of operator liability), with Canadyne, 183 F.3d at 1273 (finding Bank owned general partnership in trust).
96. See Canadyne, 183 F.3d at 1273 (holding under Georgia law possession of legal title established ownership).
97. See generally Paul Lund, The Decline of Federal Common Law, 76 B.U. L. Rev. 895, 975 n.370 (1996) (discussing parameters which courts must follow when de-
issues presented in Redwing Carriers and Canadyne are sufficiently similar. 98 A full-blown Kimbell Foods analysis, however, is required if the facts underlying Canadyne are excessively dissimilar to those underlying Redwing Carriers. 99

The mere proposition that NationsBank could be construed as an owner in Canadyne demonstrated the comprehensiveness of CERCLA following SARA and ACA. 100 While the district court

98. See Martin H. Redish, Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective, 83 NW. U.L. Rev. 761, 801-03 (1989) (discussing doctrine of stare decisis within context of federal common law). In the context of Canadyne, stare decisis applies because the Eleventh Circuit had already held in Redwing Carriers that state law would apply. See Redwing Carriers, 94 F.3d 1489. Following Bestfoods, the Eleventh Circuit would be bound to its own precedent unless the court either decided to break from its holding in Redwing Carriers or was able to distinguish Canadyne. See generally Margaret Gilhooley, The Availability of Decisions and Precedents in Agency Adjudications: The Impact of the Freedom of Information Act Publication Requirements, 3 ADMIN. L.J. 53, 55 (1989) (describing alternatives available to courts in using precedent, such as distinguishing cases and overruling prior precedents of same tribunal) (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)) (“overruling League of Cities and finding application of federal minimum wage and maximum hour provisions to employees public authority constitutional”), reh’g, National League of Cities v. Usery., 426 U.S. 833 (1976)); Li v. Yellow Cab Co., 532 P.2d 1226 (1975) (replacing contributory negligence doctrine with comparative negligence doctrine in California”); John Paul Stevens, The Life Span of a Judge-Made Rule, 58 N.Y.U.L. REV. 1, 4-7 (1983) (“listing legitimate reasons for court to overrule or decline to follow prior precedent”). Assuming Redwing Carriers and Canadyne are sufficiently similar, the Eleventh Circuit could reasonably adopt in Canadyne the rule established in Redwing Carriers. See Redwing Carriers, 94 F.3d at 1489.

99. See Redwing Carriers, 94 F.3d at 1489 (holding state law determines liability of limited partners in such contexts).

100. See Canadyne, 183 F.3d at 1273-74. “Comprehensiveness” as used here means broad in scope. The scope of potential responsibility is best illustrated by the facts that threatened to bind the Bank to CERCLA liability in Canadyne.

John W. Woolfolk founded the J.W. Woolfolk Company in 1921 and reorganized it in 1941 as a limited partnership named Woolfolk Chemical Works, Ltd. (WCW), to manufacture pesticides. See Brief of Appellant at 6, Canadyne-Georgia Corporation v. NationsBank, N.A. (South) (11th Cir. 1999) (No. 97-9357). WCW was located in Fort Valley, Georgia (the “Site”).

Mr. Woolfolk was a general partner in WCW at that time and held an ownership interest in excess of 50%, which he subsequently used in developing three
agreed state law was appropriate, the court was not convinced that NationsBank could be construed as an owner under Georgia law. Consequently, the district court granted NationsBank's motion to dismiss Canadyne's amended complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure because it failed to state a claim for which relief could be granted.

*inter vivos* trusts. See id. Fulton National Bank of Atlanta was named co-trustee of these trusts. See id. Mr. Woolfolk continued as general partner in WCW until his death in 1945. See id.

Woolfolk's will named Fulton co-executor of his estate, which included his general partnership interest in WCW. See id. The Bank became a trustee for his general partnership interest in WCW in 1950; WCW incorporated in 1972; the corporation was purchased by a corporate affiliate of Canadyne in 1977; and Canadyne sold the pesticide business and most of its assets in 1984. See id. Shortly thereafter, Fulton resigned as trustee of both the 1942 and 1950 trusts and delivered the trust assets to new trustees. See id.

Sometime between 1990 and 1995, the Environmental Protection Agency ("EPA") determined that the Site had been excessively polluted by the release of hazardous substances (e.g., arsenic) into the land, air and water. See id. As a result, EPA ordered Canadyne, as current owner of the Site, to clean up the Site. See id. Canadyne complied at a cost exceeding $15 million. See id. (stating that Canadyne expects to incur another $10-35 million before cleanup is complete). In 1996, following Fulton's resignation as trustee of the 1942 and 1950 trusts, Fulton merged with the Bank. See id.

Canadyne brought this action in 1996 against the Bank under CERCLA and the Georgia Hazardous Site Response Act ("HSRA") to recover some or all of the costs it had incurred as a result of its cleanup of the area surrounding the Woolfolk chemical plant. See id.


102. See id. at 891. The district court began its analysis by considering CERCLA's statutory language. See id. Based on that language, the court reasoned that if the Bank could have been characterized as an owner at the time of the disposal of a hazardous substance, the Bank would be responsible as a prior owner. See id. To determine if this characterization was appropriate, the district court considered the Bank's predecessor's role with regards to the Site at the time Fulton National served as trustee. See id. All parties agreed that Bank's predecessor was a co-trustee of a trust which was a general partner which held an ownership interest in the Site. See id. The district court analyzed the Bank's involvement as a partner and as a trustee separately. See id.

The district court began by contrasting current Georgia law to Georgia law at the time Fulton National held a general partnership interest in Woolfolk Chemical Works. See id. The district court noted that under current Georgia law "the partnership and not the individual partners owns real property titled to the partnership under current law." Id. at 888 (citing O.C.G.A. §14-8- 8(d)). The court stated, however, that "this was not the case at the time Fulton National held a general partnership interest in Woolfolk Chemical Works." Id. (citing Bloodworth v. Bloodworth, 178 S.E.2d 198, 200 (Ga. 1970)) (stating "[l]egal title to real property can never vest in a partnership as such; legal title is in the partners as tenants in common").

The district court concluded that under Georgia law at the time of release "ownership of the facility was split between the individual partners, who owned the real property, and the partnership, which owned everything else." Id. In short, the district court held that the partners of the 1950 Trust were all owners and consequently, the Bank could be regarded as a prior owner. See id. Nonetheless, the
Canadyne appealed to the United States Court of Appeals for the Eleventh Circuit in 1999.\textsuperscript{103} Canadyne asserted that the district court erred in concluding that NationsBank was not a "covered person" under CERCLA.\textsuperscript{104} Additionally, because NationsBank was negligent in causing an environmental hazard, it was personally liable as a fiduciary.\textsuperscript{105} In short, Canadyne argued that these issues clearly state a claim on which relief can be granted.\textsuperscript{106}

The Eleventh Circuit held that NationsBank was an "owner" for purposes of CERCLA and that Canadyne stated a claim upon which relief could be granted, negating the 12(b)(6) portion of the district court's order.\textsuperscript{107} Having met these burdens, the Court of

district court noted that the Bank's partnership interest was held as trustee (i.e., the trust was the partner). \textit{See id.} The district court concluded that under the laws of Georgia, ownership responsibilities of a trustee were limited. \textit{See id.}

The district court followed \textit{Redwing Carriers} and applied Georgia law at the time of release of hazardous substance, stating "Georgia trust law prohibited liability for the obligations of the partnership." \textit{Id.} at 890. Based on this restriction, the district court concluded that Fulton National could not be considered owners under CERCLA. \textit{See id.}

The district court first defined "general partner" under current Georgia law. \textit{See id.} After establishing that a trust is included within the meaning of general partner, the district court assessed the extent of a trustee-general partner's liability under historical Georgia law. \textit{See id.} The court concluded that the statute in effect at the time Fulton National owned the partnership interest in trust was very limited in scope. \textit{See id.} Consequently, the district court looked to common law to determine whether Georgia law would have barred the liability of a trustee for an action in tort. \textit{See id.}

The district court cited several Georgia cases to conclude that Georgia law stood for the proposition that "[w]here the privileges of ownership are restricted, the obligations of ownership should be limited accordingly." \textit{Id.} at 890. The district court interpreted these cases to mean fiduciaries were afforded protection from liability by not fully regarding the fiduciary as owner to begin with. \textit{See id.}

Specifically, the district court equated the effect of Mr. Woolfolk's instructions in his will to the directions from the settlor in Beaudry, Inc. v. Freeman, 73 Ga. App. 736 (1946). \textit{See id.} at 889. Accordingly, the district court concluded that the Bank lacked control over the Site. \textit{See id.} In short, the district court determined that the issue of control was central to Georgia's understanding of ownership. \textit{See id.}

However, the district court did not discuss Canadyne's second claim that the Bank was protected from liability by ACA because ACA is applicable only to protect owners from liability under CERCLA. \textit{See id.} Since the court found the Bank was not a covered person, the Bank could not be characterized as an owner for purposes of CERCLA. \textit{See id.} Thus, district court concluded that the protection afforded by ACA was neither necessary nor applicable. \textit{See id.}

\textsuperscript{103} \textit{See Canadyne-Georgia Corp. v. NationsBank, N.A. (South), 183 F.3d 1269 (11th Cir. 1999) (hearing appeal from lower district court in case of Canadyne).}

\textsuperscript{104} \textit{See id.} at 1275 (presenting claim that Bank was PRP).

\textsuperscript{105} \textit{See id.} (discussing claim that negligence exception to liability exemption applied).

\textsuperscript{106} \textit{See id.} (presenting argument that lower court improperly dismissed case).

\textsuperscript{107} \textit{See id.} at 1269 (holding that plaintiff did state claim upon which relief could be granted).
Appeals reversed the District Court’s resolution of NationsBank’s motion to dismiss. The Eleventh Circuit essentially ruled that a court should look to state law in defining ownership or prior ownership for purposes of CERCLA. If ownership involves a statutory law, such as partnership law, that statutory law should be referenced. If that particular statute involves earlier non-repealed earlier statutory law, the court should use the earlier law.

108. See Canadyne 183 F.3d at 1276. Both the district court and the Eleventh Circuit agreed that historical state common-law was appropriately used at the partner level. See id. Setting aside the issue of vicarious liability, use of this body of law permitted the Eleventh Circuit to classify the Bank as “owner” even though contemporary state and federal law would not have. See id. Unlike the district court, however, the Eleventh Circuit concluded that the Bank remained an “owner” even at the trustee level of the ownership question. See id. The Eleventh Circuit noted that its result was “anachronistic” but, nonetheless, found its resolution of Canadyne to be consistent with precedent. See id.

The Eleventh Circuit agreed with the district court that “[t]he question of whether a particular defendant can be deemed an ‘owner’ under CERCLA turns on application of state law . . . .” Id. at 1275. The Eleventh Circuit also noted that because of this “the answer [of liability] may vary from state to state.” Id. The Eleventh Circuit further agreed that it was specifically to look to state law “at the time of the release of hazardous substances at the Site to determine whether the Bank was an owner for purposes of CERCLA liability.” Id. (emphasis added).

Based on this point of agreement, the Eleventh Circuit’s outcome mirrored the reasoning of the district court up through the adoption of the individual liability rule of Bloodworth. Hence, the Eleventh Circuit agreed that partners were to be individually liable as tenants in common. See id. Also like the district court, the Eleventh Circuit claimed to apply Redwing Carriers. See id. Unlike the district court, however, the Eleventh Circuit did not apply Beaudry, or if it did, disagreed with the district court’s interpretation of Beaudry. See id. Thus, the district court and the Eleventh Circuit differed in their resolution of the trustee level of the ownership question.

The Eleventh Circuit departed from the district court in its analysis of the trustee level of the ownership question. See id. The Eleventh Circuit reasoned that since current Georgia law holds that trustees hold legal title to real property, the fact that the Bank held legal title to the trust required that the Bank be regarded as an “owner” under CERCLA because the holding of title is equivalent to owning real property. See id.

The Eleventh Circuit does not explain its non-use of Beaudry nor does it address the issue of control discussed by the district court. Nonetheless, the Eleventh Circuit found that the Bank could be classified as a PRP and therefore proceeded to analyze the negligence question. See id.

109. See Canadyne, 183 F.3d at 1269 (stating that state law should apply in determining CERCLA ownership question).

110. See id. (applying state partnership statute to determine CERCLA ownership question).

111. See id. (looking at state partnership law in effect at time defendant partnership was formed). It is certain that the Eleventh Circuit looked to current state statutory law and analyzed the Bank’s ownership according to that law. See id. at 1273. Since RULPA did not repeal prior versions of the Act, the Eleventh Circuit looked to the older version of the Act (i.e., the one the Bank formed its partnership under). See id. This rule, without further speculation, can be thought of as the Canadyne “historical state statutory law” rule.
The differences between "owner" and "operator" become significant once it is decided that state law is applicable. Regardless of whether NationsBank "owned" or "operated" the site, its relationship to the cleanup site was at issue in determining NationsBank's status as a PRP. In this sense, there is no difference between the requirements to establish an entity as an owner and those necessary to establish it as an operator. As a result, there is no significant

While it is clear that the Eleventh Circuit looked to historical state statutory law, it is not clear whether the Eleventh Circuit also looked to historical state case law. The district court clearly did. See Canadyne, 982 F. Supp. at 889. If the Eleventh Circuit did look to historical state case law in interpreting historical state statutory law, the Eleventh Circuit's rule can be thought of as the Canadyne "historical state statutory and case law" rule. Similarly, the Eleventh Circuit may have looked at historical state case law but concluded that applying such law would be inconsistent with the federal policy underlying the cause of action and thus per Redwing Carriers, could not be applied (perhaps because such case law considered control as an element of ownership, which would threaten Congress' ostensible intent that CERCLA be a strict liability statute). If the Eleventh Circuit in fact found this, the Canadyne rule can be considered a "partial preemption" rule. Finally, the Eleventh Circuit may have rejected the use of historical state case law all together and only looked to historical state statutory law.

Aside from the primary theme of this Comment, each of the above mentioned theories presents its own set of problems. Discussion of these theories is beyond the scope of this Comment, and they will be dismissed here with little discussion. Generally speaking, however, the problem presented with not using case law in construing a statute is that statutes rely on case law for giving effect to the intent of the framers of such legislation. Just as Congress relies on case law like Bestfoods for giving CERCLA effect, so too may the Georgia legislature have intended case law such as Beaudry to have been used in conjunction with its partnership statute. If the legislature never intended for its statute to apply as it would without Beaudry, then applying the statute without Beaudry could result in a non-owner being described as an owner. If ownership is the basis for responsibility and one of Congress' goals is to hold responsible parties responsible, then applying such a statute without case law operates against Congress' intent. Both as a matter of precedent in the Eleventh Circuit and as a general matter of preemption, such a rule would be improper.

The alternative offers little relief from the problem. If historical state case law is used, the problem of non-uniformity emerges. Three basic property rights have been recognized in the common law to give rise to ownership: title (the right to dispose of property), occupancy (the right to use property) and control (the right to direct or affect the use of or benefits from property). See I THOMPSON, ON REAL PROPERTY 8 (1977); see also PROSSER & KEETON ON TORTS, §57 (5th ed. 1984); Restatement (2d) Torts §928E. While it may be true that uniformity has increased over the years with respect to ownership laws, the opposite is also true. The earlier ownership occurs, the less uniform state laws tend to be. Thus, the uniformity which compelled the Eleventh Circuit in Redwing Carriers to reject the need for a common federal law may not exist in a Canadyne-type context. See Redwing Carriers, 94 F.3d 1489. Earlier non-repealed state statutory law is referred to hereinafter as "historical state statutory law."

difference between Redwing Carriers and Canadyne.\textsuperscript{113} Moreover, as
the Eleventh Circuit stated in Redwing Carriers, there is substantial
agreement within current state law for determining ownership.\textsuperscript{114}
Thus, as far as determining ownership is concerned, there is no real
need for a common federal rule.\textsuperscript{115} It, therefore, appears that the
Eleventh Circuit may have been correct in applying Redwing Carriers
to Canadyne without engaging in a full Kimbell Foods analysis.

There is a significant fact distinguishing Redwing Carriers from
Canadyne, however. Canadyne involved prior owners while Redwing
Carriers involved current operators.\textsuperscript{116} This difference is significant
because prior ownership cases sometimes involve ownership stat-
tutes (e.g., Uniform Partnership Acts).\textsuperscript{117} These statutes often in-
clude in their current language, provisions incorporating non-
repealed prior versions of that statute.\textsuperscript{118} Ownership standards of
this variety are less uniform and hence, create a greater need for a
common federal rule than where historical state law is relied on
less.\textsuperscript{119} Where uniformity is compromised in application of a fed-
eral statute such as CERCLA, there is generally grounds for adopt-

\textsuperscript{113} See Redwing Carriers, 94 F.3d at 1489 (applying Alabama state law to deter-
mine whether term “partner” created obligation as “owner” or “operator” for CER-
CLA purposes); see also Canadyne, 183 F.3d at 1269 (applying Georgia state law to
determine whether general partnership interest was “owner” as defined by CERCLA).

\textsuperscript{114} See, e.g., Blyth, supra note 4, at 119 (stating that uniform partnership laws
have been adopted in Alabama, Alaska, Arizona, Arkansas, California, Colorado,
Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illi-
nois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan,
Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire,
New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio,
Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota,
Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and
Wyoming).

\textsuperscript{115} See generally Gilhooley, supra note 98, at 55. Gilhooley stated:
[c]ourts are not inflexibly bound by precedent. They may distinguish
earlier cases and, thereby, reach an alternative result in a particular case
by finding that the precedent dealt with a significantly different situation
than the case at hand. Courts also can overrule prior precedents of
the same tribunal in subsequent decisions by explaining the reasons warrant-
ing a change.

\textit{Id.}

\textsuperscript{116} See Canadyne, 183 F.3d at 1269 (dismissing complaint in district court for
costs incurred in clean up of waste site under CERCLA against defendant trustee
bank, whose trust assets included partnership interests in previous owner).

\textsuperscript{117} See \textit{id}. (applying state partnership statute which was in effect at time of
partnership formation but which has since been changed).

\textsuperscript{118} See O.C.G.A. §14-8-8(f).

\textsuperscript{119} See generally Daniel C. K. Chow, Limiting Erie in a New Age of International
(1988) (generally discussing lack of uniformity as reason for developing federal
common law).
ing a common federal law, which will re-establish uniformity.\textsuperscript{120} This difference merits a full-blown \textit{Kimbell Foods} analysis for determining if state law should have been applied.\textsuperscript{121}

Based on the Eleventh Circuit's reasoning in \textit{Redwing Carriers}, it seems clear that the Eleventh Circuit was predisposed to analyzing the state law versus federal law choice-of-law issue according to \textit{Kimbell Foods}.\textsuperscript{122} It is not clear, however, that the Eleventh Circuit intended its holding in \textit{Redwing Carriers} to stand for the general proposition that state law would always be used in determining ownership questions under CERCLA. To the contrary, the Eleventh Circuit's analysis seems to indicate that if a \textit{Kimbell Foods} analysis were to come out differently, a common federal rule would be appropriate.\textsuperscript{123}

In \textit{Canadyne}, the Eleventh Circuit claims to have followed their own precedent set in \textit{Redwing Carriers}.\textsuperscript{124} The question remains, however, as to whether in \textit{Canadyne}, the Eleventh Circuit actually expanded the \textit{Redwing Carriers} rule, which used the \textit{Kimbell Foods} test.\textsuperscript{125} The \textit{Canadyne} court has arguably forged a new, more expansive, yet relatively non-laudable rule, which Congress will not likely take notice of and therefore fail to correct.\textsuperscript{126} The ultimate ques-

\footnotesize{\textsuperscript{120} See Cynthia Nance, \textit{Affiliated Corporation Liability Under the Warn Act}, 52 RUTGERS L. REV. 495, 518 (2000) (discussing need for common federal law when use of state law results in inconsistent treatment of federal statutes).

\textsuperscript{121} See United States v. Kimbell Foods, Inc., 440 U.S. 715, 720 (1979) (analyzing question of whether state law should apply). See generally Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, \textit{Federal Practice and Procedure Jurisdiction and Related Matters} 2000 Pocket Part §4514 (2000) (discussing federal common law and role of uniformity in determining whether courts should forge such law). While the Eleventh Circuit may be justified in applying \textit{Redwing Carriers} to circumstances that are similar to \textit{Redwing Carriers}, the court is less justified in broadly applying that case when circumstances differ. See Gilhooley, supra note 98, at 55. As the court noted in \textit{Redwing Carriers}, uniformity is a serious consideration. See \textit{Redwing Carriers}, 94 F.3d at 1501. Thus, by the Eleventh Circuit's own rule, \textit{Canadyne} should have been carefully analyzed according to \textit{Kimbell Foods}. See Gilhooley, supra note 98, at 55.

\textsuperscript{122} See \textit{Redwing Carriers}, 94 F.3d 1489 (applying \textit{Kimbell Foods} test to CERCLA ownership question). The Eleventh Circuit in \textit{Redwing Carriers} applied \textit{Kimbell Foods} and held that there was no need for a common federal law. See id. The Supreme Court later failed to strike down the use of state law in a similar context and, in effect, affirmed \textit{Redwing Carriers}. See \textit{Bestfoods}, 524 U.S. at 56.

\textsuperscript{123} See \textit{Redwing Carriers}, 94 F.3d 1489. The Eleventh Circuit reached its conclusion to apply state law in \textit{Redwing Carriers} because the \textit{Kimbell Foods} criteria were met. See id.

\textsuperscript{124} See \textit{Canadyne}, 183 F.3d 1269 (citing and claiming to follow \textit{Redwing Carriers}).

\textsuperscript{125} See \textit{Redwing Carriers}, 94 F.3d 1489 (discussing \textit{Kimbell Foods} but not explicitly going through elements).

\textsuperscript{126} See \textit{Canadyne}, 183 F.3d 1269 (holding that state law should apply, as did \textit{Redwing Carriers}, but extending rule beyond facts of \textit{Redwing Carriers}).}
tion arising from Redwing Carriers, as seen in light of Canadyne, is whether the issue presented in Canadyne is sufficiently different from Redwing Carriers as to lead to the conclusion that a common federal law is needed. To determine whether to adopt the Canadyne rule, courts may be left to analyze for themselves the soundness of the Eleventh Circuit’s reasoning in Canadyne.

V. CONGRESS’ LIKELY RESPONSE TO CANADYNE

Due to modern uniformity in current state law regarding property ownership, the Eleventh Circuit reasoned that using state law for defining ownership would not likely be problematic. The Supreme Court appears to have been correct because there has not been any sign of state legislatures rearranging ownership laws to frustrate goals underlying CERCLA. Similarly, the judiciary has not widely discussed the problem because facts such as those presented in Canadyne are uncommon.

Given the rare occurrences of such litigation, it is not surprising that Congress failed to further define “own” or “owned” in its most recent amendment to CERCLA. Nonetheless, this issue has emerged in the Eleventh Circuit and will likely emerge again over time. In the absence of legislative guidance, it is in the hands of

127. See Gilhooley, supra note 98, at 55 (discussing precedent and ways of distinguishing cases).

128. See Redwing Carriers, 94 F.3d at 1501-02 (describing as “groundless” any fears that states will engage in a “race to the bottom”). The Eleventh Circuit continued, stating “[s]tates have a substantial interest in protecting their citizens and state resources. Most states have their own counterparts to CERCLA and EPA and they share a complementary interest with the United States in enforcement of laws like CERCLA that are used to remedy environmental contamination.” Id. The Eleventh Circuit then concluded that there was “no necessity to create federal common law in this area to guard against the risk that states will create safe havens for polluters” because they did not “foresee states enacting more protective statutes in an effort to defeat CERCLA’s goal of having the polluter pay.” Id.

129. See Bradford C. Mank, SHOULD STATE CORPORATE LAW DEFINE SUCCESSOR LIABILITY?: THE DEMISE OF CERCLA’S FEDERAL COMMON LAW, 68 U. Cin. L. Rev. 1157, 1160 (2000) (stating in context of successor liability that “[t]here is no evidence that states are engaging in a ‘race-to-the-bottom’ . . . to protect corporations from CERCLA liability”) (quoting Anspec Co. v. Johnson Controls, Inc. 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., dissenting).

130. See Canadyne, 183 F.3d 1269 (deciding case where party’s ownership was determined by both past state common law, which differed from current state common law, and current state statute, which incorporated prior state statute).


132. See Canadyne, 183 F.3d 1272-73 (deciding case similar to Redwing Carriers).
courts to apply CERCLA according to legislative intent. Given the paucity of legislative history, the task is not easy. In light of the Court's holding in Bestfoods, however, the Supreme Court is likely to uphold the use of state law as far as practicable. In the context of Canadyne, the Supreme Court would most likely be inclined to adopt a partial-preemption rule wherein state law is applied to the extent that such law does not frustrate congressional purpose. This is the rule adopted by the Eleventh Circuit in Redwing Carriers and hence, probably the rule affirmed in Canadyne.

If Congress finds that any of the courts have incorrectly applied CERCLA or one of its two subsequent amendments, it must acknowledge and correct the misconception or risk having Congressional silence taken to mean approval. In the case of Canadyne, the gratuitous increase to CERCLA's comprehensiveness achieved by the Eleventh Circuit's application may have to be surrendered and Congress may have to settle for leaving ACA as it was created.


134. See Oswald, supra note 11, at 223 n.3 (discussing paucity of legislative history to CERCLA and its amendments).

135. See Bestfoods, 524 U.S. 62-64 (holding that courts could choose to apply state law, rather than crafting federal common law); see also United Steelworkers of America v. Weber, 443 U.S. 193, 216 (1979) (Blackmun, J., concurring) (showing reasoning behind Court's tendency to affirm its own precedent). The Weber Court stated that when a question is statutory, the Court has the assurance that Congress may set a different course if it chooses and will likely do so if the Court misperceives the political will. See id.

136. See Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 469-81 (1957) (Frankfurter, J., dissenting) (discussing usurpation of state law and noting Court's value of finding "least intrusive federal approach imaginable"). Thus, if it can be shown that a congressional purpose is the uniform application of CERCLA with regard to finding PRPs, the Supreme Court would still prefer a partial-preemption scheme over a full preemption scheme because partial-preemption is less intrusive.

137. See Redwing Carriers, 94 F.3d at 1501 (choosing to apply state law when determining whether federal common law or state should govern when limited partners can be held accountable for partnerships CERCLA liability).

138. See 42 U.S.C. §§9601(2), 9607(n), 6991(b)(h)(9). ACA has been described as a less than conspicuously passed piece of legislation furthering the intent of some stealthy legislatures. See Buzbee, supra note 52, at 10656. Essentially, it is asserted that the ACA was specifically meant to exempt certain fiduciaries from personal liability but that Act does not validly imply that Congress intends for anyone and everyone to be included as PRPs, especially if in doing so uniformity is sacrificed. See Garrou, supra note 3, 113 (quoting Rep. Barney Frank as stating "nothing is more damaging to a good regulatory scheme than having anything in it that could inadvertently sweep out within its coils innocent individuals").
The reality of the situation is that Congress is not likely to expand the definition of "own" or "owned" under CERCLA. By default, it is thus up to the courts to interpret CERCLA, including SARA and ACA.\(^{139}\) Regardless of how the Eleventh Circuit reached its decision, the end result is anachronistic.\(^{140}\) Moreover, Canadyne displayed the reality that using state law can lead to the inconsistent application of CERCLA.\(^{141}\) For these reasons, Kimbell Foods advised in favor of adopting a common federal law for determining prior ownership under CERCLA.\(^{142}\)

Advocates argue that a fully comprehensive CERCLA is clearly consistent with Congress' goal of holding responsible parties liable.\(^{143}\) These parties also advocate that courts read CERCLA in such a way as to cause as many PRPs as possible to pass through the first layer of CERCLA's bifurcated liability structure.\(^{144}\) These advocates are likely to perceive the Canadyne rule as positive.\(^{145}\) Those who more moderately prescribe to the remedial purpose canon may, however, argue that the Eleventh Circuit has made CERCLA overly comprehensive.\(^{146}\) These critics would argue Congress never


\(^{140}\) See Canadyne, 183 F.3d at 1273-74 n.7 (admitting "the result in this case is somewhat anachronistic").

\(^{141}\) See id. at 1273 (noting that "[u]nder current Georgia law, the partnership, not the individual partners, owns real property held in the name of the partnership" but that "[a]t the time the Bank held a general partnership interest in WCW . . . the individual partners owned the real property of the partnership" (citations omitted)).

\(^{142}\) See Kimbell Foods, 440 U.S. at 715 (1979) (providing test for determining whether common federal law should be formed).

\(^{143}\) See United States v. Reilly Tar & Chem. Co., 546 F. Supp. 1100, 1112 (D. Minn. 1982) (stating "CERCLA should be given a broad and liberal construction . . . to limit the liability of those responsible for cleanup costs . . .").

\(^{144}\) See id. (arguing for liberal construction of potential responsibility provisions under CERCLA).

\(^{145}\) See, e.g., Anspec Co. Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991) (stating "the remedial nature of CERCLA's scheme requires the courts to interpret its provisions broadly to avoid frustrating the legislative purposes"); see also Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (stating "we are . . . obligated to construe [CERCLA] liberally to avoid frustration of the beneficial legislative purposes").

\(^{146}\) See generally Lisa M. Schenck, Liability of Municipalities Under the Comprehensive Response, Compensation, and Liability Act (CERCLA): Is This a Legal Hazard to the Environment?, 23 SETON HALL LEGIS. J. 1 (discussing recent opinions that CERCLA has been stretched too far, including individuals as PRPs which was not Congress' intention).
intended potential responsibility to reach parties such as NationalBank in Canadyne.\textsuperscript{147}

The Canadyne rule has permitted a party to be held potentially responsible under CERCLA who otherwise might have escaped potential responsibility had the Kimbell Foods rationale been applied.\textsuperscript{148} This arguably furthers Congress' goals of comprehensively covering as many parties as possible. Nonetheless, the analytical framework presented in Canadyne pales in comparison to the analysis of Redwing Carriers.\textsuperscript{149} In fact, in failing to follow Kimbell Foods, it is arguable that the Eleventh Circuit has failed to follow its own precedent. If the Eleventh Circuit followed judicial precedent, there would be a good argument for adopting a common federal law for determining prior ownership when historical state law is implicated.

VI. AN ARGUMENT FOR A COMMON FEDERAL LAW

The Eleventh Circuit presumably would conclude that a common federal law would be appropriate when three factors are met: (1) state law is not sufficiently uniform; (2) applying state law would threaten Congress' goal of holding only responsible parties liable; and (3) having a common federal law would not disrupt the numerous commercial relationships predicated on state law.\textsuperscript{150} Redwing Carriers formerly held that there was no need for a common federal law for determining prior ownership and status as a prior operator.\textsuperscript{151} The same issue presented itself in Canadyne.\textsuperscript{152} In Canadyne,

\textsuperscript{147} See, e.g., 138 CONG. REC. S8629 (daily ed. June 23, 1992) (Statement of Sen. Lautenberg) (stating with reference to categories other than attenuated owners that "the original statute never intended such parties be sued").

\textsuperscript{148} See Canadyne, 183 F.3d at 1273 (finding Bank potentially responsible due to interpretation and application of dated and since repealed Georgia state statutory law); O.C.G.A. §53-12-2(11) (2000) (stating trustee holds legal title to property in trust).

\textsuperscript{149} Compare Canadyne, 982 F. Supp. at 888 (stating simply that "the Court looks to Georgia law to define the ownership interest of general partners in the Site" (citing and applying rule of Redwing Carriers, 94 F.3d at 1498)) with Redwing Carriers, 94 F.3d at 1500-02 (quoting and analyzing Kimbell Foods according to situation posed in that case).

\textsuperscript{150} See Redwing Carriers, 94 F.3d at 1500-02 (listing opposite reasons with respect to why Kimbell Foods supports conclusion that no common federal rule should apply in Redwing Carriers); see also Kimbell Foods 440 U.S. at 740 (fashioning a three-prong test for determining whether to create a uniform common law or to adopt applicable state law rule as federal standard).

\textsuperscript{151} See id. at 1501 (stating that after applying Kimbell Foods test, applicable state laws should determine when limited partner can be held accountable under CERCLA).

\textsuperscript{152} See Canadyne, 183 F.3d 1269, 1273 (discussing whether to apply state law or to use federal common law).
however, a prior version of state statutory law was at issue. An analysis of that rule revealed that Canadyne should have set a different rule. According to the Eleventh Circuit's own reasoning, a common federal rule should be adopted that overturns that part of state statutory law which would cause courts to analyze non-repealed versions of ownership statutes.

The first prong of Kimbell Foods ascertained whether a need for a common federal law existed. The Eleventh Circuit determined that no federal common law would be necessary if uniform state law existed. When there is not consistency, however, a preliminary question must be asked, specifically whether Congress intended for CERCLA to be uniformly applied.

Numerous law review articles and alternative secondary sources illustrate the problem areas of CERCLA. These issues are likely to catch Congress’ eye and may, where Congress deems a court rule contrary to Congressional intent, legislatively overrule them. As

153. See id. (applying Georgia statutory law from 1940’s).
154. See id. (citing Kimbell Foods as supporting conclusion but not engaging in Kimbell Foods analysis to extent Eleventh Circuit did in Redwing Carriers).
155. See Kimbell Foods, 440 U.S. at 727-28 (providing analysis of whether federal common law should be formed).
156. See Redwing Carriers, 94 F.3d at 1500-02 (discussing importance of achieving Congress’ intent).
157. See Kimbell Foods, 440 U.S. at 728 (discussing test for determining whether there is need for common federal law).
158. See Redwing Carriers, 94 F.3d at 1501 (discussing importance of uniformity in state law if state law is to apply).
159. See id. at 1501-02 (discussing preliminary question of whether uniformity in state law is required).
discussed above, one area receiving sufficient press is CERCLA's vague definition of ownership for entities such as partnerships.162

On one hand, Congress' silence in the face of conflicting laws indicates its ambivalence to non-uniformity, and perhaps, the absence of a need for a common federal law.163 On the other hand, less obvious issues may not face wide enough debate to impress on Congress the need for an additional amendment.164 Since Congress' silence on the Canadyne issue of whether to apply state law is not laudable, lower courts faced with similar issues must decide for themselves if the rule set by the Eleventh Circuit in Canadyne is worth adopting.

While some of the potential rules forged by the Eleventh Circuit are more sound than others, the most reasonable rule, federal preemption, was not adopted in Canadyne.165 Not even a partial preemption scheme would be as effective because statutes are often dependent on case law to further the drafter's intent.166 Depriving a party of a statute's full effect leads to the possibility that a non-owner will be held potentially responsible on the level of an owner.167 This contradicts Congress' intent of holding responsible


162. See Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp., 976 F.2d 1338, 1341 (9th Cir. 1992) (noting vague definition of owner under CERCLA).

163. See generally Bohemia, Inc. v. Home Insurance Co., 725 F.2d 506, 510 (9th Cir. 1984) (stating in context of admiralty practice, if there is no need for uniformity then state law must be applied).

164. See Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 672 (1987) (Scalia, J. dissenting) (noting that congressional inaction cannot be regarded as acquiescence under all circumstances and concluding that any reliance on congressional failure to act is necessarily a "canard").

165. See Canadyne, 183 F.3d 1269 (applying state law instead of common federal law).

166. See generally Gordon K. Davidson, John F. Platz, Thomas J. Hall, Section 3(a)(10) of the Securities Act of 1933: The Use of State Fairness hearings in Mergers and Acquisitions, 1171 PLI/Corp 777, n.27 (2000) (stating that statutory meaning of fairness "often is derived from case law that interprets and applies the statute(s), rather than from the specific language of the statute(s)); see also Canadyne, 982 F. Supp. at 889 (stating that "[b]ecause the statute in effect at the time Fulton National owned the partnership interest in trust had such a limited scope, the Court must survey the common law to determine whether Georgia law would have barred the liability of a trustee for an action in tort").

167. See Canadyne, 982 F. Supp. at 889. The district court noted in Canadyne that state case law filled gaps in the state statute, which the court determined applied in determining whether the Bank was an owner for purposes of CERCLA. See id. The district court went on to note that Georgia state case law modified the "traditional rule." See id. The result of ignoring that law would be to not fully give effect to the underlying legislature's intent. Such a result is counter to basic procedural law. See Erie Rail Road v. Tompkins, 304 U.S. 64, 66 (1938) (requiring fed-
parties accountable. A more preferable rule would be a single federal rule holding that only current state statutory and case law may be used in defining both ownership and prior ownership. This common federal rule would not only provide uniformity where non-uniform state laws would prohibit a consistent application of CERCLA, but also advances Congress’ goal of holding only responsible parties accountable. This rule would also preserve present commercial relationships predicated on state law. All that is preempted under this proposed rule is non-repealed historical state statutory ownership law, which, by its nature, is not likely uniform among states. This proposed rule furthers Congress’ articulated goals with respect to CERCLA and is, therefore, most consistent with Kimbell Foods and Bestfoods. Such a rule would eliminate the “anachronism” identified by the Eleventh Circuit in Canadyne.

A. Diversity in State Case Law Creates the Need For a Federal Rule

A quick way of assessing ownership under CERCLA would be to equate ownership with holding title. Some courts have held that possession of title, or lack thereof, is dispositive of the question of ownership under CERCLA. The district court in City of Phoenix v. 174

eral courts, when there is no common federal law, to apply state law of state in which the court resides, including that states’ common law).

168. See generally Town of New Windsor v. Tesa Truck, Inc., 919 F. Supp. 662, 665 (S.D.N.Y. 1996) (stating that two primary goals of CERCLA are enabling EPA to respond efficiently and expeditiously to toxic spills and holding those parties responsible for releases liable for costs of cleanup).

169. See Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990) (commenting on CERCLA’s purposes, one of which was to ensure that PRPs are held responsible).

170. See Kimbell Foods, 440 U.S. at 729 (listing as factor to be considered before federal common law is adopted, extent to which application of federal rule would disrupt commercial relationships predicated on state law).


172. See Kimbell Foods, 440 U.S. at 726 (discussing analysis of when federal common law should be adopted) (citing Clearfield Trust Co. v. United States, 318 U.S. 563, 566-67 (1943) which states, “[i]n absence of an applicable act of Congress it is for Federal Courts to fashion the governing rule of law according to their own standard”; Bestfoods, 524 U.S. at 55 (applying Kimbell Foods and concluding that state law could be applied under circumstances of case).

173. See Canadyne, 183 F.3d at 1274.

174. See, e.g., Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261, 1277 (E.D. Pa. 1994) (concluding that defendant whose name had appeared on title to property used as landfill was owner). City of Phoenix, 816 F. Supp. at 568. But see United
Garbage Serv., Co., 175 for example, clearly held that "a trustee is an 'owner' for purposes of §107 of CERCLA, even though the trustee may hold only bare legal title." 176

Other district courts, such as the Northern District of Illinois, emphasize the issue of control when determining if a party is an owner under CERCLA. 177 It is not clear from the statutory lan-

States v. Carolawn Co., 14 Env't L. Rptr. 20698, 20698-99 (Civ. No. 83-2132-0) (D.S.C. 1984) (refusing to dismiss CERCLA claim against one who owned fee interest in site for an hour "as a conduit to others"); see also United States v. Argent Corp., 14 Env't L. Rptr. 20616, 20670 (D. N. M. 1984) (holding that property owner that leased warehouse in which the lessee operated business utilizing hazardous chemicals was "owner" subject to liability under §107(a)(2) of CERCLA, even though owner argued that it had no connection with business); United States v. CKMG Realty Co. (Sharkley Landfill), 96 F.3d 706, 707 (3d Cir. 1996) (holding no liability for former owner whose only connect to site was passive ownership of site). In CKMG Realty Co., a revealing factor considered by the court in denying liability to former owner was the existence of the passive migration of contamination before prior owner's ownership. See id. While using title as the test for ownership may be a convenient method for assessing ownership, courts are divided on whether holding bare legal title is adequate and even necessary. See United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1003 (D.S.C. 1984) (finding nuisance liability based on rights to control property). A non-title holding adverse possessor, for example, may be held potentially responsible based on his right, ability or duty to control some part of the property.


It is true that Burns emphasized legal title in its analysis. See id. Burns, however, arguably does not stand for the holding set forth in City of Phoenix that the holding of bare legal title is enough to find ownership for the purposes of CERCLA liability. City of Phoenix, 816 F. Supp. at 568. Burns involved a motion to dismiss by the defendant based on the grounds that he never owned the land in question. See Burns, 1988 WL 242553, at *1.

In forming its decision, the Burns court mentioned several times that the trustee was not only the trustee but also the beneficiary. See id. at *2 (stating "as trustee and beneficiary of the Trust that owned the Polythene Site, Crowley possessed at least some evidence of ownership of the Polythene site"). The trustee in that case held legal title as trustee and had some control as beneficiary. See id. Since the court emphasized that the trustee "possessed at least some evidence of ownership," it is reasonable to assume the court was influenced by the control element. Id.

As a result, it cannot be asserted with certainty that Burns stood for the City of Phoenix proposition that "a trustee is an 'owner' for the purposes of section 107 of CERCLA, even though the trustee may hold only bare legal title." City of Phoenix, 816 F. Supp. at 568.

177. See, e.g., Quadion Corp. v. Mache, 738 F. Supp. 270, 274 (N.D. Ill. 1990) (holding that since trustee had "authority to control" waste handling practices and prevent hazardous waste damage, trustee could have CERCLA liability and discussing assignment of liability through the "prevention" test (citing Kelley v. Thomas
guage whether elements of control are necessary to find ownership. Courts that have found control to be a relevant factor vary with respect to their treatment of this issue. One Illinois court was willing to find non-title holders owners if that particular party possessed the authority to control the property. A Massachusetts court found ownership if there was any equivalent evidence of ownership. Additionally, a later Illinois case found that even if a party does hold legal title, ownership would not be found if the trustee completely lacked control over what was done with the land.

A Pennsylvania court also found control relevant in the

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178. See United States v. N.L. Indus., No. 91-578-JLF, 1992 WL 359986 (S.D. Ill. April 23, 1992) (noting that the extent of control or benefits necessary to be considered an owner under CERCLA is not clear from this definition).

179. See generally Topol & Snow, supra note 34, at § 3.6, n.48 (discussing treatment of control as element used in determining ownership within corporate veil piercing context). Courts have indicated that they might look to shareholders in assigning corporate liability under CERCLA. See id. at 181. For example, in U.S. v. Mottolo, 695 F. Supp. 615, 624 (D. N. H. 1988), the district court required a plaintiff to allege that a shareholder so dominated a corporation that it did not have separate autonomy. Similarly, in City of N.Y. v. Exxon Corp., 112 B.R. 540, 552-53 (S.D. N.Y. 1990), aff'd in part, 932 F.2d 1020 (2d Cir. 1991), the district court indicated that CERCLA liability could be incurred via a controlled subsidiary's actions, resulting in a piercing of the corporate veil.

180. See Quadion Corp., 738 F. Supp. at 274 (denying motions to dismiss for failure to properly allege ownership and control because trustee may have had sufficient "authority to control" waste-handling practices and capacity to prevent hazardous waste damage, possibly incurring CERCLA liability). Courts have determined that shareholders of a closely-held corporation can incur Superfund liability despite a dearth of evidence warranting a corporate veil piercing. See id. The Quadion court examined the individual's authority to control waste handling practices, the distribution of power within the corporation, including the individual's position in the corporate hierarchy, and the percentage of shares owned. See id.

181. See United States v. DiBiase Salem Realty Trust, 1993 U.S. Dist. LEXIS 20031 at *17 (Mass. Dist. Ct. 1993) (upholding broad meaning of "owner" under CERCLA such that term includes people who possess same evidence of ownership equal to those who hold title); see also United States v. Fleet Factors Corp., 901 F.2d 1550, 1559 (11th Cir. 1990) (stating creditor may incur section 107(a)(2), as amended 42 U.S.C.A. §9607(a)(2) liability without being an operator by participating in financial management of facility to degree indicating capacity to influence corporation's treatment of hazardous wastes). The lender's capacity to influence facility's treatment of waste will generally be inferred from financial management, absent evidence of active waste management control. See id. But either a financial management allegation or an operational management allegation is sufficient as a matter of law to hold a secured creditor liable under CERCLA. See id.

182. See United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1358-59 (N.D. Ill. 1992) (finding no ownership where only connection to land was Northern Trust's capacity as trustee).
sense that the holding of legal title must be by a conscious choice.\textsuperscript{183}

Although most ownership questions are simple, because legal title holders are also often equitable title holders, other ownership situations present a more serious problem.\textsuperscript{184} Parties that are most likely to find themselves in atypical circumstances, where ownership assessment is complicated and control issues are most salient include: fiduciary owners (i.e., trustees) and equity title holders (i.e., partners within partnerships).\textsuperscript{185} As discussed above, courts vary with regard to whether bare legal title is sufficient for proving ownership for such groups.\textsuperscript{186} A discussion of these categories is necessary before analyzing the Canadyne rule.

1. **Trustees as Owners**

Trustees are a particular kind of fiduciary.\textsuperscript{187} There is no question that these fiduciaries can be liable under CERCLA as own-

\textsuperscript{183} See Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261, 1277 (E.D. Pa. 1994) (holding defendant would not be liable as owner if co-defendant put defendant's name on deed without his knowledge or consent and defendant continued to be ignorant that his name was on deed, but took action as soon as he found his name was on the deed). The court found that to be an "owner" under CERCLA, defendant must have manifested some intent to own the property. See id. This intent could be illustrated, for example, by a contribution to purchase price, or by agreement to be a joint owner, or knowledge that another person bought the land under both names. See id. Here, the court held that defendant's control or even knowledge of what went on at the site is not relevant to the inquiry. See id. "In keeping with CERCLA's strict liability . . . the intent required is merely an intent to own, not an intent that hazardous wastes be deposited on the land. . . ." Id.

\textsuperscript{184} See, e.g., Petersen Sand & Gravel, 806 F. Supp. at 1359 (stating title refers to legal relationship to land while ownership is comparable to control and denotes interest in real estate other than holding title). In short, some courts have required some control above and beyond title holding. See id. at 1358. In this case, the court concluded that the beneficiary bears the burden of land ownership. See id. The court further concluded that to hold otherwise would not serve CERCLA's primary goal of making those who are responsible for or who benefit from environmental damage pay the bill. See id. at 1359. The court concluded by stating that Congress might have made owners strictly liable because ownership is generally a good proxy for responsibility, paper ownership like that of an Illinois land trustee is wholly unrelated to responsibility and, therefore, holding of title is not sufficient for determining CERCLA ownership. See id.

Other courts have found ownership even when legal title was not held based on the party's control, an analysis similar to operator analysis. See, e.g., Casterlock Estates, Inc. v. Estate of Fordham, 871 F. Supp. 360, 364 (N.D. Cal. 1994).

\textsuperscript{185} See Petersen Sand & Gravel, 806 F. Supp. at 1358 (deciding case where legal and equitable ownership did not necessarily coexist).

\textsuperscript{186} See id. (distinguishing title and ownership under Illinois law).

\textsuperscript{187} See Gerry W. Beyer, WILLS, TRUSTS, AND ESTATES 399 (1999) (stating that at common law, trustee is holder of legal title to property). See, e.g., GA. CODE ANN. §14-8-8(f) (Michie Version) (stating that partnerships and not individual partners own real property held in name of partnership).
ers.\textsuperscript{188} Although trustees are not listed as a PRP classification under §107(a), they face liability under CERCLA as owners because they hold title to real estate.\textsuperscript{189} As stated above, however, whether or not a party will be deemed an owner based on their relationship to the land will depend on state law.\textsuperscript{190}

Successors to trustees are also potentially liable under CERCLA as owners.\textsuperscript{191} Trust law typically does not hold a successor to a trust liable under a former trustee’s liability.\textsuperscript{192} Nonetheless, ACA holds a successor to a trustee liable as a fiduciary when acting for the benefit of another party, “under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee . . . .”\textsuperscript{193}

Some courts have held that holding legal title amounts to ownership under CERCLA even in situations where title is held for the benefit of someone else.\textsuperscript{194} In such jurisdictions, trustees will be

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\item \textsuperscript{188} See Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts §§265, 265.1 (4th ed. 1988) (stating trustees hold legal title to real property); see also United States v. Burns, 1988 U.S. Dist. WL 242553 at *2. A trustee holds title to real estate in most states, although such title is for the benefit of the trust.
\item \textsuperscript{189} See CERCLA §107(n), 42 U.S.C. §9607(n) (showing although trustees are not specifically mentioned under section 107(a) of CERCLA, they are particularly listed under section 107(n) and as result, clearly intended to be included in CERCLA). For a discussion of PRPs in CERCLA, see supra notes 27-32 and accompanying text.
\item \textsuperscript{190} See generally Johnson, supra note 13, at 181.
\item \textsuperscript{192} See generally Richard F. Chatfield-Taylor, Successors Beware: Expanding the Liability Net Under CERCLA Section 9607(a) Through Application of Successor NonLiability in Asset Acquisitions, 29 Washburn L.J. 442, 445 (1990) (discussing successor liability under state trust law); see also Robert D. Cox, Jr., Environmental Liabilities of Fiduciaries, 35 B. B.J. 17, 19 (March/ April 1999) (stating that generally, “a successor trustee is not liable for the acts of a predecessor trustee” but that they, nonetheless, could be); CERCLA §107(n), 42 U.S.C. §9607(n) (stating that trustees can be potentially liable under CERCLA).
\item \textsuperscript{193} CERCLA §107(n), 42 U.S.C. §9607(n).
\item \textsuperscript{194} See generally United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986) (stating in case where mortgagee foreclosed, acquired mortgaged property and held title for over four years, lender no longer entitled to security interest exemption and liable as owner of contaminated property); see also Lone Star Industries, Inc. v. Horman Family Trust, 960 F.2d 917, 924 (10th Cir. 1992) (ruling action can be maintained against trust and trustee relating to contaminated property owned by trust); State of North Carolina v. W.R. Peele, Sr. Trust, 876 F. Supp. 733, 742-43 (E.D.N.C. 1995) (stating action can be maintained against trust holding assets of decedent who was CERCLA covered person).
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held liable as owners regardless of their control over the trust property.\textsuperscript{195}

Other courts have relied less on title for assessing CERCLA ownership.\textsuperscript{196} For example, a Massachusetts court in United States v. DiBiase Salem Realty Trust\textsuperscript{197} remarked that it was consistent with CERCLA’s legislative history not only to hold those persons who possess title to a vessel or facility liable but also to hold liable those who, in the absence of possessing title, have some equivalent evidence of ownership.\textsuperscript{198}

Still other courts have deviated from the use of title for assessing CERCLA ownership and have held that being a land trustee was not “owning” land for purposes of liability under CERCLA.\textsuperscript{199} The Federal District Court in Illinois in United States v. Petersen Sand & Gravel, Inc.\textsuperscript{200} held that a bank which was determined a trustee and found to hold legal title to the land making up the site during each release at issue still was not an owner under CERCLA.\textsuperscript{201} The court

\textsuperscript{195.} See United States v. DiBiase Salem Realty Trust, 45 F.3d 541, 545 (1st Cir. 1995) (noting that CERCLA’s legislative history suggests broad meaning to term “owner,” intending it to include not only those persons who hold title to vessel or facility, but those who, in absence of holding title, possess some equivalent evidence of ownership, and accordingly, the court entered judgment in favor of government).

\textsuperscript{196.} See Louisiana v. Braselman Corp., 78 F. Supp. 2d 543, 553 (E.D. La. 1999) (finding railroad that leased facility that used creosote to treat wood was “owner” of hazardous waste site within meaning of CERCLA). The Braselman court was persuaded that even though the railroad did not have title to property, it executed contracts for construction of creosote works and asserted control over property and hence, was an owner. See id.; see also K.C. 1986 Ltd. Partnership v. Reade Mfg., 35 F. Supp. 2d 1143, 1154 (W.D. Mo. 1998) (indicating that site control constitutes important consideration in determining who qualifies as “operator” under §107(a), and that lessees essentially stand in shoes of property owners by maintaining control over and responsibility for use of site). According to the Reade court, lessees having adequate indicia of control will be considered owners for purposes of determining CERCLA liability. See id. But see Commander Oil Corp. v. Barlo Equipment Corp., 215 F.3d 321, 329 (2d Cir. 2000) (finding that lessee lacked most of bundle of rights associated with ownership).

\textsuperscript{197.} 45 F.3d 541, 543 (1st Cir. 1995) (holding party liable for polluting site although party did not hold title to site).

\textsuperscript{198.} See id. at 545 (discussing liability of owners who fails to mitigate pollution, but who is less culpable than polluting party).


\textsuperscript{200.} Petersen Sand & Gravel, 806 F. Supp. 1358-59 (concluding that holding Illinois land trustee as owner would fail to meet goals of CERCLA).

\textsuperscript{201.} See id. at 1358 (discussing Illinois statutory law regarding land trustees). The land trust in Illinois was created at common law. See id. (quoting People v.
reasoned that under Illinois law, title for a land trust is hardly more than a form of title registration and since CERCLA seeks to impose liability on "responsible parties," finding "ownership" under CERCLA would require elements of control. In sum, that court found a distinction between title and ownership under CERCLA.

The same federal Illinois court in *NutraSweet Co. v. X-L Engineering Corp.* held, in a summary judgment proceeding, that a trustee who was a 90% shareholder of a facility was not an owner for CERCLA purposes, despite having been the land's taxpayer, because a limited partnership was the holder of beneficial title, not the trustee.

2. **Partnerships as Owners**

Partnerships are entities owned by partners. Although somewhat obvious, the significance of the point is paramount. A party who seeks contribution will often wish to hold partners individually liable. Although current general trust law and most modern state statutory law hold that partnerships, rather than individual partners actually hold title, state case law historically has deviated on the issue.

The Eleventh Circuit found that there was no need for a common federal law because there was already relative uniformity

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Chicago Tile & Trust Co., 329 N.E. 2d 540, 543 (1979)). The beneficiary has only a property interest. See *People*, 329 N.E. 2d at 543. All but one of the incidents of ownership, however, remain with the beneficiary. See id. at 545. It is the beneficiary, not the trustee, who has full management and control over the property, thus making the beneficiary an owner. See id. at 545-46.

202. See *Petersen Sand & Gravel*, 806 F. Supp. at 1359 (analyzing ownership in contexts of legal and equitable ownership). The court stated that trustees have no control over the land, and thus concluded that imposing hefty penalties would not improve CERCLA compliance. See id.

203. See id. (distinguishing holding of title and ownership).

204. 933 F. Supp. 1409, 1418 (N.D. Ill. 1996) (discussing parties included as PRPs under CERCLA).

205. See id. (discussing beneficial ownership as element of ownership analysis for CERCLA purposes).

206. See U.P.A. §201 (1994) (stating that partners own partnerships but that partnerships, nonetheless, are entities distinct from their partners).

207. See, e.g., United States v. Ringley, 985 F.2d 185 (Va. Ct. App. 1993) (holding general partners of partnership which owed Federal Government unpaid reclamation fees as required under 30 U.S.C.A. §1232(a) were, as operators within meaning of that section, individually liable for reclamation fees).

208. See, e.g., O.C.G.A. § 14-8-8(f) (stating under Georgia partnership law, partnership, not individual partners, owns real property held in name of partnership). But see Bloodworth v. Bloodworth, 178 S.E.2d 198, 200 (Ga. 1970) (stating older Georgia law that "[l]egal title to real property can never vest in a partnership as such; legal title is in the partners as tenants in common").
among state ownership law.\footnote{209} Although such law is relatively uniform, as shown above, there are differences.\footnote{210} Moreover, uniformity of such law decreases the further back in time one traces. Thus, if consideration of older case law is required in determining prior ownership, a greater need for a common federal law exists.\footnote{211} Given the propensity for non-uniformity among state law the earlier in time one traces, the first prong of the \textit{Kimbell Foods} test is best accomplished through a test that eliminates this diversity.

\section*{B. Applying State Law Threatens Congress’ Goal of Holding Only Responsible Parties Liable}

Any argument for or against an issue involving CERCLA based on a theory supported by Congress’ intent is destined for criticism.\footnote{212} It is generally accepted, however, that Congress intended CERCLA to operate so that responsible parties would ultimately be liable for the cleanup or contribution for cleanup of environmental hazards.\footnote{213} Nonetheless, the scope of the remedial purpose canon is open for debate.\footnote{214} This has lead some courts to broadly apply the canon to sweep as many people as possible into CERCLA’s net.\footnote{215} Other critics, however, claim that courts have gone too far

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  \item \footnote{209} See Redwing Carriers, 94 F.3d at 1489.
  \item \footnote{210} See generally Larry E. Ribstein, \textit{The Illogic and Limits of Partners’ Liability in Bankruptcy}, 32 Wake Forest L. Rev. 31, 34 (discussing different approaches of state partnership law and bankruptcy law to issues concerning partnership debt).
  \item \footnote{211} See United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979) (determining that greater need exists for adopting common federal law where state law differs more among states). It is possible that the Eleventh Circuit did not endorse the use of historical state case law in determining prior ownership. See Canadyne, 183 F.3d at 1269 (looking to old state statutory law but not specifically discussing historical state common law). The Court’s opinion in \textit{Canadyne} does not make the point clear. See \textit{id}. Certainly the district court relied on case law. See \textit{Canadyne}, 982 F. Supp. at 889 (analyzing historical state common law). Nonetheless, even if the \textit{Canadyne} rule is a historical state statutory law rule only, \textit{Kimbell Foods} does not weigh in favor of such a rule. See \textit{Kimbell Foods}, 440 U.S. at 728. The answer to the first prong of the \textit{Kimbell Foods} test, which asks whether diversity in state law raises the need for a common federal law, would be because even state statutory law can vary, especially the further back in time concerned. See \textit{id}.
  \item \footnote{212} See Garrou, supra note 3, at 147-48 (stating paucity of congressional guidance will challenge reviewing courts in attempt to further purposes of statutes).
  \item \footnote{213} See generally Town of New Windsor v. Tesa Truck, Inc., 919 F. Supp. 662, 680 (S.D.N.Y. 1996) (stating one of primary goals of CERCLA was to hold those parties responsible for releases liable).
  \item \footnote{214} See Mohr, supra note 16, at 1157 (describing remedial purpose canon and its role in courts pursuing Congress’ intent in applying CERCLA).
  \item \footnote{215} See, e.g., \textit{Canadyne}, 183 F.3d at 1273 (broadly applying PRP category of prior owner to bring party under control of CERCLA). The Eleventh Circuit felt that because the Bank owned a general partnership interest that owned the site in question, the Bank effectively owned the Site. See \textit{id}. The \textit{Canadyne} Court con-}


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and are holding parties liable who are not even classified as PRPs.\textsuperscript{216}

Even in an expansive application of this canon, however, courts must limit their findings of potential responsibility to the categories listed in §107 of CERCLA.\textsuperscript{217} As far as prior ownership is concerned, Congress’ goal can be restated as holding those who previously owned a site that is now subject to cleanup shall be responsible for cleaning up the site.\textsuperscript{218} Since it is against Congress’ intent that non-owners be held liable, a rule cannot stand which would label non-owners as such.\textsuperscript{219}

If a claim is brought that contends to hold a prior owner liable under CERCLA, the manner in which ownership is determined will have a significant effect on whether or not that entity is ultimately held liable.\textsuperscript{220} The problem is that CERCLA provides little guidance in outlining who qualifies as prior owners.\textsuperscript{221} If the rule is that state law is used in defining ownership, then the term “responsible party” must be understood according to the applicable state law. A rule cannot make someone an owner who is not an owner.

\textsuperscript{216} See generally Mohr, supra note 16, at 1157-59 (discussing criticisms to courts’ over-broad application of CERCLA’s potential responsibility provisions). After pointing out that CERCLA liability can easily exceed the value of the land, Mohr contends that the best way to control this liability is to avoid triggering it in the first place. See id. at 1157-58. Mohr also points to only using land where contractual indemnity can be obtained as a common method to minimize CERCLA liability. See id. at 1158.

\textsuperscript{217} See CERCLA §107, 42 U.S.C. §9607 (setting forth categories of PRPs and manner in which liability is to be determined under CERCLA).

\textsuperscript{218} See H. REP. NO. 253, 99th Cong., 1st Sess., pt. 3, at 15 (1985) (noting that Congress intended that responsible parties be held liable for costs of clean-ups associated with sites relating to that responsibility). In applying CERCLA, the Committee on the Judiciary noted that there were three necessary elements: first, the need for the effective and speedy clean-up of hazardous waste sites in order to protect human life and environment; second, the need to protect the interests and rights of those affected by the sites; and third, the need to protect the interests and rights of those who may be held liable for such clean-up. See id.

\textsuperscript{219} See id. (setting forth PRP categories in which category “non-owners” is not found). See also Garrou, supra note 3, at 113 (quoting Rep. Barney Frank as stating “[p]art of having a tough and comprehensive [CERCLA] program is having provisions that allow innocent individuals to be treated as innocent individuals”). Rep. Frank also pointed out that nothing is more damaging to a regulatory scheme than to inadvertently apply it to innocent individuals. See id.

\textsuperscript{220} See Zygmunt, supra note 17, at 264 (discussing significance of PRP question).

\textsuperscript{221} See, e.g., Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp., 976 F.2d 1338, 1341 (9th Cir. 1992) (stating that “[t]he circularity of [the] definition [of “owner”] renders it useless”). The Ninth Circuit was not convinced that CERCLA’s definition of owner and operator—“any person owning or operating such facility”—provided any guidance as to how to define “owner.” See id.
A state law rule must not be applied so that it creates owners out of non-owners. Because state common law effectuates the intent of legislatures in many cases, a state statutory rule or a partial preemption rule ignoring controlling case law is not satisfactory.  

The most reasonable means of determining prior ownership under CERCLA is to adopt a federal common law holding that current state ownership law applies only to the extent that such law does not incorporate non-contemporary state law. This rule preserves the sovereignty of state law to the fullest extent possible while simultaneously increasing uniform treatment under the federal Superfund Act. Moreover, this proposed rule takes away the conflict that results when state case law interferes with Congress' goal that CERCLA be a strict liability statute. Finally, the proposed rule eliminates the negative effects of the historical "state statutory law only" rule. This rule advances Congress' intent to hold only responsible parties liable, thereby satisfying the second prong of the Kimbell Foods analysis.

C. Having a Federal Common Law Would Not Disrupt Commercial Relationships Predicated on State Law

The Eleventh Circuit's primary concern for rejecting a federal common law in Redwing Carriers was that the expectations of parties entering into partnership agreements might be frustrated. The proposed rule does not have that effect because it applies only to prior owners and operators. For the same reasons that courts uni-

222. See Transportation Leasing Co. v. California, 861 F. Supp. 931, 949 (C.D. Cal. 1993) (holding that, for purposes of liability pursuant to §107(a)(3) of CERCLA, cities "owned or possessed" wastes for which they had "arranged" with transporter for transport for disposal). The district court reasoned in part that the state statutes and case law required the cities to provide waste collection service and that the cities clearly would have owned or possessed the waste collected if they had provided that service themselves. See id. at 955. In so reasoning, the district court implicitly refers to the invaluable nature of state case law in giving effect to state statutory law.

223. See generally Fleet Factors Corp., 901 F.2d at 1554 (stating that standard of strict liability was appropriate under CERCLA); see also CERCLA 107(a)(1), 42 U.S.C. §9607(a)(1) (setting forth strict liability standard under CERCLA).

224. See Canadyne, 183 F.3d at 1269 (failing to apply state common law as did district court). For a discussion of the possibility that the Eleventh Circuit adopted a "state statutory law only" rule, see supra note 111 and accompanying text.

225. See Kimbell Foods, 440 U.S. at 728 (listing as second prong, whether application of state law would frustrate specific objectives of the federal programs); see also Florida Power & Light, 893 F.2d at 1517 (stating that objective underlying federal Superfund Act was to hold PRPs liable).

226. See Redwing Carriers, 94 F.3d at 1502 (noting Eleventh Circuit's rationale for not formulating federal common law).
formally apply CERCLA retroactively, it stands that there would be no commercial relationships in existence to be disrupted.227

The proposed rule would be applicable only to PRPs described in §107(a)(2), namely the owners or operators of a facility at the time the hazardous wastes were disposed.228 Thus, this rule is not applicable for present owners and operators.229 The natural result of this is that at the time of litigation a prior owner subject to this rule would no longer be involved with the entity and therefore, the proposed rule would not effect the expectations of that prior owner. Moreover, in most instances, the proposed rule would benefit prior owners because subsequent versions of ownership statutes tend to place legal ownership in the hands of a partnership and not individuals.230 Thus, even if a party is effected, the result of this rule may not be negatively regarded. The proposed rule, therefore, passes muster under the third prong of the Kimbell Foods analysis.231

VII. CONCLUSION

While ACA was a step toward greater comprehensiveness through its clarification of Congress’ intent of creating fiduciary liability, Congress should not rely on judicial interpretation to broaden the reach of CERCLA’s proverbial “net of potential responsibility.” Instead, Congress should seize this opportunity and clearly define the extent to which state law should apply in defining “potential responsibility.” In doing so, competing values of strict liability and broad potential responsibility must be weighed. Unfortunately, however, it is unlikely that Congress will provide the clarification required. As a result, it is thus up to the courts to fashion rules according to their best guess of Congress’ intent.

227. See generally Johnson, supra note 13, at 265.
228. See CERCLA §107(a)(2), 42 U.S.C. §9607(a)(2) (listing owners and operators as PRPs).
229. See id. (listing owners and operators as PRPs).
230. See, e.g., O.C.G.A. §14-8-8(f) (stating that under current Georgia law, partnership, not individual partners, owns real property held in name of partnership).
231. See Kimbell Foods, 440 U.S. at 728 (listing as third prong, whether application of federal rule would disrupt commercial relationships predicated on state law). Since commercial relationships would not be disrupted any more than they already are as a result of CERCLA’s retroactive application, the rule should pass muster. See id. But see S. REP. No. 103-349, at 39-41 (1994) (listing as area of criticism, that retroactive liability system of CERCLA is unfair). Despite criticisms that the retroactive application scheme is unfair, it continues to be the law. See Fina, Inc. v. ARCO, 200 F.3d 266, 269 (5th Cir. 2000) (noting retroactive liability scheme of CERCLA).
Caselaw often gives meaning to the statutory law and often is accepted as part and parcel of such statutes, much like an indispensable supplement to a book.232 Ignoring such caselaw can lead to a result never intended by the statute.233

Until the Supreme Court rules on the issue of preemption, it is up to the lower courts to juggle these issues and decide for themselves which rule to adopt. Partial preemption may preserve CERCLA’s strict liability scheme but may also lead to the aforementioned non-intended finding of ownership.234 A common federal law for determining ownership for purposes of CERCLA, which would repeal state statutes insofar as such statutes incorporate dated state law, would eliminate this problem. Moreover, it would be consistent with the Supreme Court’s holding in Bestfoods and satisfy the Kimbell Foods test. Thus, where ownership involves a state statute, which exists without repealing former acts, courts should adopt a common federal standard, whereby for purposes of CERCLA, the non-repealed aspect of the state statute is repealed.

The question of whether state case law should be used to broaden potential responsibility under CERCLA should be left for Congress’ consideration. If Congress wants to expand potential responsibility under CERCLA, it should take the initiative to draft language in to CERCLA which would permit such a result. For better or worse, such an amendment would result in a more “comprehensive” CERCLA.

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232. See, e.g., Drye v. United States, 528 U.S. 49 (1999) (standing as example that federal statutes are often related to and sometimes dependent on non-statutory law). Drye shows that once it has been determined that state law creates sufficient interests in the taxpayer to satisfy the requirements of the federal tax lien statute, state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States. See id. (citing 26 U.S.C.A. §6321) (codifying law, commonly known as “federal tax lien statute”).

233. Compare Canadyne-Georgia Corp. v. NationsBank, N.A. (South), 982 F. Supp. 886, 889 (M.D. Ga. 1997) (applying state common law to question of ownership and concluding Bank would not have been regarded as owner under state statutory law in effect at time of Bank’s alleged ownership) with Canadyne-Georgia Corp. v. NationsBank, N.A. (South), 183 F.3d 1269 (11th Cir. 1999) (failing to apply cases as district court did and concluding Bank could be regarded as owner under prior state statutory law).

234. See generally United States v. Fleet Factors, Corp., 901 F.2d 1550, 1554 (11th Cir. 1990) (stating standard of strict liability was appropriate under CERCLA).