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Editor's Note: This issue analyzes the Ninth Circuit Court of Appeal's decision in *City of Los Angeles v. San Pedro Boat Works*, addressing whether a holder of a possessory interest in real property can be held liable as an "owner" under CERCLA.

We have reproduced the entire article below. Any opinions expressed in this article are those of the author alone. For those who prefer to view this article in PDF format, a copy will be posted on the Section's website: <http://www.osbenviro.homestead.com/>.

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Holders of Possessory Interests in Real Property are not "Owners" under CERCLA

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In *City of Los Angeles v. San Pedro Boat Works*, No. 08-56163 (March 14, 2011), the Ninth Circuit Court of Appeals held that a holder of a possessory interest in real property is not an "owner" of that property for purposes of imposing liability under CERCLA.

Facts

In 1995 the City of Los Angeles discovered contamination in soil, groundwater and sediments at a Port of Los Angeles berth. Contaminants included volatile organic compounds, petroleum hydrocarbons, polychlorinated biphenyls, polycyclic aromatic hydrocarbons, copper, lead, mercury, and chromium. The City removed contaminated sediments, and filed a lawsuit against several parties, seeking to recover its cleanup costs. The City alleged claims under the Comprehensive, Environmental, Response, Compensation, and Liability Act ("CERCLA") and state law.

One of the defendants was a Coca Cola bottling entity, BCI Coca Cola. The City sued BCI Coca Cola because a predecessor, whose liabilities Coca Cola acquired, had held a revocable permit that granted possessory rights to use the berth. The predecessor held the permit for approximately ten months in 1969-1970. During these ten months a different entity had operated a boatworks at the berth. BCI Coca Cola's predecessor did not operate the boatworks, it only held the revocable permit for possession of the berth, which it then assigned to the entity that operated the boatworks.

Issue presented and Ninth Circuit Analysis

The City advanced four theories before the district court as to why BCI Coca Cola should be held liable under CERCLA as an “owner” or “operator” of a contaminated facility.¹ The district court ruled in favor of BCI on all four theories. The City appealed with regard to one of its CERCLA theories – that BCI Coca Cola was liable for the clean-up of the berth as an “owner” because its predecessor had held the revocable permit that granted possessory rights to use the berth.

Because the definition of “owner” in CERCLA was not helpful² the Ninth Circuit stated that it would look to common law – including the state law of the property’s location for guidance in determining whether a party was an “owner” for purposes of CERCLA liability. *City of Los Angeles v. San Pedro Boat Works*, No. 08-56163, 3506 (March 14, 2011). The Court examined California law, under which the holder of a revocable permit has only a possessory interest in the real property governed by the permit, an interest “which exists as a result of possession, exclusive use, or a right to possession or exclusive use of land *unaccompanied by the ownership of a fee simple or life estate in the property*” (e.g., leasehold interest, easement holder, permittee or licensee). *Id.* at 3507, (quoting *Bd. of Supervisors v. Archer*, 96 Cal. Rptr. 379, 386 (Cal. App. 1971)). The Ninth Circuit further noted that California is not alone in distinguishing between possessory interests and title ownership, and cited to rulings by Texas, Maryland, Colorado, and Florida courts. *Id.* at 3519.

The Ninth Circuit observed that distinguishing between holders of possessory interests and owners is logical, given “the narrow bundle of rights” that BCI Coca Cola’s predecessor had during its ten-month possession of the revocable permit. *Id.* at 3520. For example, the revocable permits it held in 1969 and 1970 “could be terminated by the City, at its pleasure, with thirty and ninety days notice respectively. [BCI Coca Cola’s predecessor] could not convey the permit to another entity without permission of the City, nor could it change the use of the installations on the land from boatworks to commercial development without the City’s prior written approval. Nor could [it] pledge the land and structures to a lender to secure a loan. Each of these core attributes of ownership were absent in the bundle of rights which [BCI Coca Cola’s predecessor] enjoyed as a holder of revocable permits.” *Id.* at 3520.

Boiled down, the Ninth Circuit held that, “‘owner’ liability under CERCLA does not extend to holders of mere possessory interests in land, such as permittees, easement holders, or licensees, whose possessory interests have been conveyed to them by the owners of real property, which owners continued to retain power to control the permittee’s use of the real property.” *Id.* at 3507.

As a result of this decision, plaintiffs in the Ninth Circuit should not be able to hold a party liable as an “owner” under CERCLA merely because the party had a possessory interest in the contaminated property at issue.

¹ CERCLA imposes liability on “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.” (42 USC §9607(a)(2)).

² In the case of an onshore or offshore facility, CERCLA defines “owner and operator” to mean: “any person owning or operating such facility.” 42 U.S.C. § 9601(20(A)(ii).

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