
REFINING CALIFORNIA'S "CONSENT" DEFENSE IN ENVIRONMENTAL NUISANCE CASES: DETERMINING THE PROPER SCOPE OF LIABILITY FOR RESPONSIBLE FORMER OWNERS

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In September 1975, Alan Meghrig sold property located on Western Avenue in Los Angeles to KFC Western, Inc., which intended to operate a Kentucky Fried Chicken franchise on the site.¹ KFC Western paid \$152,000 for the property. At the time of purchase, KFC Western was unaware that the property had been contaminated by the release of refined petroleum products during operation of a gas station on the site by Mr. Meghrig.² KFC Western did not detect the elevated levels of lead and benzene on its property until October 1988, when its engineer discovered the contamination in the process of improving the property.³

After becoming aware of the contamination, the City of Los Angeles Department of Building and Safety issued a corrective notice ordering that all construction on the property cease pending a cleanup supervised by the County of Los Angeles Department of Health Services.⁴ The cleanup was completed in 1989, at a total cost of over \$200,000 to KFC Western.⁵

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1. KFC Western, Inc. v. Meghrig, 28 Cal. Rptr. 2d 676, 678 (Ct. App. 1994).

2. *Id.*

3. Jean Buo-lin Chen Fung, KFC Western, Inc. v. Meghrig: *The Merits and Implications of Awarding Restitution to Citizen Plaintiffs Under RCRA § 6972(a)(1)(B)*, 22 ECOLOGY L.Q. 785, 799 (1995).

4. *KFC Western*, 28 Cal. Rptr. 2d at 678.

5. *Id.* at 679.

After the former owner, Alan Meghrig, refused to reimburse the cost of the cleanup, KFC Western instituted a cost recovery action in California Superior Court under state environmental statutes and asserting common law claims of nuisance and trespass.⁶ The court dismissed KFC Western's statutory claims but granted leave to amend the complaint to state the common law causes of action.⁷

Prior to the evolution of California nuisance doctrine in the early 1990s, property holders such as KFC Western were incapable of recovering their cleanup costs from a potentially responsible party (PRP), including past owners who contaminated their former property. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) did provide for a private right of action for current owners to obtain reimbursement or contribution from other PRP's for the costs of cleanup.⁸ In addition, many states, including California, passed laws similar to CERCLA in order to govern the cleanup of contaminated property.⁹ As a result of significant holes in the statutes, however—most importantly the exclusion of petroleum-related products from the definition of “hazardous wastes”—many landowners, including KFC Western, were left without a remedy. Such landowners eventually turned to the common law doctrine of nuisance to recover cleanup costs.

In response to the efforts of property owners to use common law doctrines to address environmental contamination, California courts have expanded traditional nuisance doctrine to encompass their claims. In one respect, defining the environmental contamination of property as a nuisance does not appear to be a significant doctrinal leap. Traditional nuisance doctrine, however, was designed to address problems between neighboring, contemporaneous land uses, whereas current California nuisance law has evolved to include claims by current property owners against parties who no longer have an interest in the property but are responsible for having created the contamination at some point in the past.¹⁰ In addition, such actions are not limited to neighboring land uses, but rather include claims for the contamination of the land formerly held by

6. *Id.*

7. *Id.* at 685–86.

8. 42 U.S.C. § 9613(f)(1) (1994). *See also* Quinn Scallon, Comment, *Hazardous Waste: Liability of Predecessors in Title*, 29 SAN DIEGO L. REV. 93, 99 & n.40 (1992) (discussing private right of action against PRP's).

9. *See* Carpenter-Presely-Tanner Hazardous Substance Account Act, CAL. HEALTH & SAFETY CODE §§ 25,300–25,395 (West 1999).

10. *See, e.g.,* Mangini v. Aerojet-General Corp., 281 Cal. Rptr. 827 (Ct. App. 1991) (holding that California nuisance law encompasses claims against former property owners).

the defendant and now owned by the plaintiff.¹¹ In other words, plaintiffs in nuisance claims against former interest holders can be either owners of nearby property impacted by the contamination or subsequent purchasers of the property formerly held by the defendant. For this reason, the evolution of California nuisance law to encompass these types of claims has important implications for the law governing both environmental contamination and transfers of real property.

This Note will address the emergence of nuisance law in California as a means for current property owners to recover their cleanup costs and other damages from prior owners or lessees deemed responsible for the contamination of the property. Specifically, this Note concerns the recent decision of the California Court of Appeal in *Beck Development Co. v. Southern Pacific Transportation Co.*, which allows prior property owners responsible for contaminating their former property to avoid liability under the doctrine of consent.¹² Under *Beck*, a former owner who acted lawfully (at the time) in contaminating their property should not be liable for nuisance if the subsequent purchaser “consented” to the former owner’s use of the property.¹³ This Note argues that the decision in *Beck*, although reflecting important concerns as to the continuing potential liability of former owners after the transfer of property, represents a potentially significant threat to the survival of nuisance law as a means of addressing past environmental contamination in California. To balance the legitimate concerns raised by the facts of *Beck* with the need to provide a remedy to current owners, the decision in *Beck* should be repudiated in favor of equitable doctrines that are better suited to reaching a fair result.

Part I will introduce the existing statutory regulations governing the ability of current owners to recover their cleanup costs from potentially responsible former owners and lessees in California. Specifically, this section will be concerned with the statutory liability of landowners responsible for contaminating their former property and the problems with existing statutes that have led to the expansion of nuisance law in this area. Part II will address the evolution of nuisance law in California during the 1990s to encompass claims by current owners against former interest holders for contamination. Part III will discuss the decision in *Beck* and the use of a consent defense on the part of former landowners who acted lawfully in contaminating their former property. This section will argue that earlier nuisance cases refused to extend the consent defense to former

11. *See, e.g., id.*

12. 52 Cal. Rptr. 2d 518, 555 (Ct. App. 1996).

13. *Id.*

property owners (as opposed to lessees) and that the decision in *Beck* represented a significant break from existing doctrine. Part IV will address some of the concerns raised by the decision in *Beck*, arguing that current owners should still be able to recover the costs of contamination from responsible parties. To this end, the Note argues that California courts should abandon the doctrine of consent in favor of the use of other equitable doctrines, such as waiver, which would bar suits against former owners only when the former owner obtained a clear, informed release from liability for the specific contamination at issue in the claim. In cases where a purchaser seems to have been aware of the contaminated condition of the property but does not explicitly waive his or her rights, California courts should not eliminate the liability of the former owner; rather, the available damages should be limited to contribution for cleanup costs.

I. STATUTORY LIABILITY OF FORMER INTEREST HOLDERS FOR CONTAMINATION

A. THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Prior to the emergence of nuisance law as a means of addressing environmental contamination in the 1990s, the liability of former property holders for the contamination of their property was largely defined by statute. Foremost among the statutes governing such liability was CERCLA.¹⁴ The public concern with environmental contamination that arose in the 1970s led to its enactment in 1980.¹⁵ CERCLA created a private right of action for current owners to recover cleanup costs from potentially responsible former interest holders.¹⁶ Commonly known as the "Superfund Law," CERCLA has clearly been the most important federal statute governing the liability of property owners for environmental contamination.¹⁷

For current property owners, the most significant aspect of CERCLA is the imposition of liability to clean up contaminated property.¹⁸ Under CERCLA, current owners of contaminated property are strictly liable for

14. 42 U.S.C. §§ 9601–9675 (1994).

15. See Roger Armstrong, Comment, *CERCLA's Petroleum Exclusion: Bad Policy in a Problematic Statute*, 27 LOY. L.A. L. REV. 1157, 1159 (1994).

16. 42 U.S.C. § 9613(f)(1).

17. 9 HARRY D. MILLER & MARVIN B. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 29:58 (2d ed. 1990).

18. 42 U.S.C. § 9607(a)(4)(A).

the contamination, including cases in which the owner had no knowledge of the contamination or the contamination occurred prior to the time that the current owner acquired the property.¹⁹ In addition, the defenses afforded current owners under CERCLA are quite limited.²⁰ Because the potential scope of CERCLA liability afforded current owners seems excessive in cases where the owner did not create the contamination at issue, however, CERCLA also creates a private right of action for current owners to receive contribution for cleanup costs from statutorily defined responsible parties.²¹ Parties potentially liable under CERCLA include those who owned or operated the property at the time hazardous substances were released at the site.²²

To establish the right to contribution under CERCLA, a current owner must prove, *inter alia*, that the defendant is responsible for the release of hazardous waste covered by the statute and that the resulting contamination has forced the plaintiff to incur response costs.²³ The statute of limitations on actions against responsible parties is three years from the date of completion of all environmental response actions.²⁴ If the plaintiff is successful in establishing his or her right to contribution from the defendant, the court allocates the costs of the cleanup equitably between the parties. Any individual who obtains compensation for costs expended in removing hazardous substances from property is precluded from recovering the same removal costs in other state or federal claims.²⁵

Although most owners with contamination problems are likely to meet the required elements for contribution, other provisions of CERCLA have severely limited its use as a means of compensating owners of contaminated property. First, and probably most significantly for many property owners, CERCLA specifically excludes petroleum and all related products from its definition of "hazardous substances."²⁶ Although

19. *Id.* § 9607(a).

20. *Id.* § 9607(b).

21. *Id.* § 9613(f)(1). See also Louis C. Klein, Comment, *California's Nuisance Laws and Petroleum Underground Storage Tank Contamination: Will the Ten-Year Statute of Limitations for Construction Defects Change the Playing Field?*, 17 WHITTIER L. REV. 107, 111 & nn. 18-19 (1995) (discussing "responsible parties" under CERCLA).

22. 42 U.S.C. § 9607(a)(2).

23. See *CP Holdings, Inc. v. Goldberg-Zoino & Assocs.*, 769 F. Supp. 432, 436 (D.N.H. 1991) (applying the relevant CERCLA provisions).

24. See 42 U.S.C. 9613(g)(1).

25. *Id.* § 9614(b). See also Tom Kuhnle, Note, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 STAN. ENVTL. L.J. 187, 212 (1996) (discussing ban on double recovery).

26. 42 U.S.C. § 9601(14).

Congress initially considered a version of CERCLA that would have covered petroleum-related substances, it abandoned such efforts in hopes of passing the legislation.²⁷ The petroleum exclusion has become particularly problematic for plaintiffs because courts have interpreted it broadly to include “petroleum, . . . crude oil or *any fraction thereof*.”²⁸ The exclusion of petroleum-related products acts as a bar to claims by numerous landowners facing contamination from leaking underground storage tanks that are often used to store motor fuel and chemical products.²⁹

Another significant factor limiting the attractiveness of CERCLA contribution actions is the limited damages available to private litigants. Under CERCLA, property owners may only recover the costs of the cleanup.³⁰ Punitive damages and compensation for the often diminished value of the property are not available to private parties.³¹ In addition, the Supreme Court has ruled that attorneys’ fees are not recoverable from the responsible party.³² The limitations on attorneys’ fees may be especially significant because CERCLA cases often involve large numbers of lawyers and may impose significant costs on plaintiffs.³³

B. CALIFORNIA’S HAZARDOUS SUBSTANCE ACCOUNT ACT

Most states, including California, have passed environmental legislation substantially similar to CERCLA. In California, the counterpart to CERCLA is the Carpenter-Presley-Tanner Hazardous Substance

27. Legislative history on CERCLA is scant, primarily because Congress was under significant time pressure to pass the bill in 1980. See Armstrong, *supra* note 15, at 1170 (“The exclusion’s existence appears counterintuitive because it incompletely addresses the health concerns associated with certain releases of known and otherwise prohibited hazardous chemicals. Moreover, there is no stated reason in the statute of legislative history for its development.”). Most commentators, however, agree that a legislative compromise was the reason for the exclusion of petroleum from the bill. Carol F. Barry, *CERCLA’s Petroleum Exclusion: Whose Burden Is It Anyway?*, 26 ENVTL. L. REP. 10,479, 10,484 (1996). See also Daniel L. McKay, *RCRA’s Oil Field Wastes Exemption and CERCLA’s Petroleum Exclusion: Are They Justified?*, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 41, 70 (1995) (arguing that the petroleum exclusion was a “legislative compromise”).

28. *S. Pac. Transp. Co. v. California*, 790 F. Supp. 983, 984 (C.D. Cal. 1991) (citing 42 U.S.C. § 9601(14) (1994)) (emphasis added).

29. See James B. Brown & Glen C. Hansen, *Nuisance Law and Petroleum Underground Storage Tank Contamination: Plugging the Hole in the Statutes*, 21 ECOLOGY L.Q. 643, 649 (1994).

30. See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535 (10th Cir. 1992) (stating that other types of damages are not recoverable under CERCLA).

31. See *id.*; Kuhnle, *supra* note 25, at 210. The leading Senate predecessor bill to CERCLA provided for a private cause of action to recover damages for economic loss and personal injury. It was not adopted, and these features were ultimately rejected in the Act’s final form. Scallon, *supra* note 8, at 100.

32. See *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994).

33. See Kuhnle, *supra* note 25, at 209.

Account Act (HSAA).³⁴ As under CERCLA, the liability for cleanup costs is imposed on statutorily defined responsible parties following the release of a hazardous substance.³⁵ Current owners of the property are strictly liable for the costs of cleanup, and the statute incorporates the limited defenses available under CERCLA.³⁶

California's HSAA authorizes a private right of action for the recovery of response costs by a property owner who voluntarily or under order cleans up the contaminated site.³⁷ A current owner may recover cleanup costs from statutorily defined responsible parties, including former interest holders in the property. As is the case with CERCLA, however, damages are limited to the cost of cleanup, and current owners are not allowed to recover lost income or the diminution in value of the property.³⁸ Perhaps more significantly, HSAA also contains CERCLA's exclusion of petroleum from the definition of "hazardous substances" under the statute.³⁹ The California Court of Appeal for the Second District has broadly interpreted the Act's exclusion of petroleum so as to bar recovery in the case of refined petroleum products, including gasoline.⁴⁰ The decision brought HSAA into line with the scope of hazardous substances covered by CERCLA and thus has added little or nothing to the statutory remedies available to property owners seeking to recover their cleanup costs from responsible parties.

C. THE RESOURCE CONSERVATION AND RECOVERY ACT

Until recently, the failure of CERCLA and state statutes to include petroleum-related products in their definitions of "hazardous substances" may not have been fatal to a plaintiff's federal claims, because such substances are addressed in another federal environmental law, the Resource Conservation and Recovery Act (RCRA).⁴¹ RCRA, passed by Congress in 1976, was designed to regulate the creation, transportation, treatment, storage, and disposal of hazardous substances by the owners or operators of hazardous waste facilities.⁴² RCRA requires owners and

34. CAL. HEALTH & SAFETY CODE §§ 25,300–25,395 (West 1999).

35. *See id.* § 25,301(a).

36. *See id.* § 25,363(d).

37. *Id.* § 25,363(e). *See also* Scallon, *supra* note 8, at 101.

38. *See* CAL. HEALTH & SAFETY CODE § 25,363(e) ("Any person who has incurred removal or remedial action costs . . . may seek contribution or indemnity . . .").

39. *Id.* § 25,317.

40. *KFC Western, Inc. v. Meghriq*, 28 Cal. Rptr. 2d 676, 682 (Ct. App. 1994).

41. 42 U.S.C. §§ 6901–6992 (1994).

42. *Id.* § 6901. *See also* 9 MILLER & STARR, *supra* note 17, § 29:67.

operators of hazardous waste facilities to obtain a permit for the treatment of hazardous waste and grants the Environmental Protection Agency the power to compel the cleanup of contaminated sites.⁴³ In addition, RCRA contains a private right of action that allows any person to sue any property owner or operator who may have violated the Act.⁴⁴ In such cases, the private plaintiff must establish that the action is necessary to abate an imminent and substantial endangerment to health or the environment and provide the EPA with sixty days' notice of the violation.⁴⁵ Private parties successful under the Act may recover attorneys' fees, but the Act does not expressly provide for the recovery of environmental response costs.⁴⁶

In suits brought for RCRA violations, current property owners or operators may be liable under two standards. First, an owner may face an injunctive order to clean up the property if, while disposing of hazardous substances, the Act was violated.⁴⁷ Second, a property owner or operator may be forced to clean up the property if the site poses an "imminent and substantial endangerment of health or the environment."⁴⁸ In each case, the owner or operator is strictly liable for the cleanup costs and defenses are limited.⁴⁹

Unlike CERCLA, RCRA defines "hazardous waste" broadly to include any waste which, because of its quantity, concentration, or physical or chemical characteristics, may (1) cause or contribute to an increase in mortality or illness or (2) pose a substantial hazard to health or the environment when improperly managed.⁵⁰ Importantly for many property owners, RCRA does not contain a petroleum exemption.⁵¹ In addition, federal courts in California have found that the leakage of petroleum-related products into the soil constitutes the disposal of "waste" under the Act.⁵²

Despite the broad definition of hazardous substances in RCRA, a recent decision by the U.S. Supreme Court has virtually eliminated the usefulness of RCRA for current property owners seeking to recover past

43. 42 U.S.C. §§ 6925(a), 6928(a). *See also* 9 MILLER & STARR, *supra* note 17, § 29:67.

44. 42 U.S.C. § 6972(a).

45. *Id.* § 6972(a)(1)(B).

46. *Id.* § 6972(e).

47. *Id.* §§ 6928(a), 6972(a).

48. *Id.* § 6973(a).

49. *See* United States v. Bliss, 667 F. Supp. 1298, 1304 (E.D. Mo. 1987).

50. 42 U.S.C. § 6903(5)(A)-(B).

51. *Id.* § 6903. *See also* Brown & Hansen, *supra* note 29, at 656.

52. *See* Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991).

response costs.⁵³ At first glance, the private right of action provided for under RCRA seems broad, allowing a private citizen to sue for civil penalties for acts that may not amount to a violation of existing environmental statutes.⁵⁴ The Act, however, did not specifically provide for past owners to recover past cleanup costs from responsible parties. The petroleum exclusion in CERCLA thus left some innocent owners without a remedy under federal law. For this reason, the Ninth Circuit Court of Appeals addressed RCRA in the context of the federal statutory claims brought in *KFC Western, Inc. v. Meghrig*, holding that the RCRA's citizen suit provision allowed plaintiffs to recover their past environmental response costs.⁵⁵

The decision of the Ninth Circuit in *KFC Western* represented a significant victory for innocent landowners seeking to recover a portion of their cleanup costs under federal law. The decision was quickly met with disapproval by the Eighth Circuit, however, which split with the Ninth Circuit in its interpretation of RCRA in *Furrer v. Brown*.⁵⁶ In *Furrer*, the Eighth Circuit held that RCRA did not explicitly grant plaintiffs the right to recover past cleanup costs and that Congress did not intend to create such a right by implication under the Act.⁵⁷ Relying primarily on the express cause of action present in other environmental statutes such as CERCLA, the Eighth Circuit reasoned that Congress clearly understood how to create such a right of action and chose not to do so under RCRA.⁵⁸

The circuit split was resolved by the Supreme Court in *Meghrig v. KFC Western, Inc.*⁵⁹ The Court unanimously reversed the Ninth Circuit, holding that RCRA's private right of action requires the existence of a current danger at the time of suit and does not allow for the recovery of past response costs.⁶⁰ Following the Eighth Circuit, the Court relied primarily on the inclusion of a private right of action to recover past cleanup costs in CERCLA as evidence that Congress did not intend such a provision to be applicable in RCRA.⁶¹ The Court did not address whether

53. See *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996).

54. See Randall James Butterfield, Note, *Recovering Environmental Cleanup Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem*, 49 VAND. L. REV. 689, 693 n.13 (1996).

55. 46 F.3d 518, 521 (9th Cir. 1995).

56. 62 F.3d 1092 (8th Cir. 1995).

57. *Id.* at 1101-02.

58. See *id.* at 1096-97.

59. 516 U.S. 479 (1996).

60. See *id.* at 488.

61. See *id.* at 485.

citizen suits could recover cleanup costs expended after a lawsuit was initiated against a responsible party.⁶²

The decision of the Supreme Court in *KFC Western* leaves many innocent property owners without a means of recovering their cleanup costs from responsible parties under statutory law. Under CERCLA, a private right of action against prior interest holders responsible for the contamination is available, but important substances, including petroleum, are outside the reach of the statute as a result of legislative compromise. The broad exclusion of petroleum-related products is mirrored in California's HSAA. In contrast, RCRA includes petroleum products in its definition of "hazardous substances," but it provides no private right of action for innocent owners to recover costs expended in cleaning up contaminated property where that contamination was caused by the actions of a predecessor in interest. As a result of the large holes in federal and state environmental statutes, many courts have allowed plaintiffs to bring claims under traditional common law doctrines in order to recover from responsible parties.⁶³ Foremost among these common law doctrines has been nuisance law.

II. NUISANCE LAW AS A MEANS OF ADDRESSING ENVIRONMENTAL CLEANUP COSTS

A. TRADITIONAL NUISANCE LAW CLAIMS

Until recently, nuisance law has been limited to claims by a plaintiff against a neighboring landowner for an offensive, contemporaneous use of a nearby property.⁶⁴ In contrast to trespass, which addressed actual physical invasions of the plaintiff's property, nuisance claims usually involved problems such as odors or noises produced on property nearby

62. *See id.* at 488.

63. There are persuasive arguments that state common law should not be preempted by the existing federal statutes regarding environmental contamination. First, as is clear from the discussion of CERCLA and RCRA, there remain holes in the statutes that would leave some innocent plaintiffs without a remedy under the law if such statutes were interpreted to occupy the field. Second, CERCLA specifically provided for state law actions. 42 U.S.C. § 9652(d) (1994) ("Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law including common law, with respect to releases of hazardous substances . . .").

64. *See Phila. Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 314 (3d Cir. 1985) (denying a claim for private nuisance against a previous landowner, stating that "the historical role of private nuisance law [is that of] a means of efficiently resolving conflicts between *neighboring* contemporaneous land uses. . . . [It is] not . . . an additional type of consumer protection for purchasers of realty.") (citations and footnotes omitted).

that of the plaintiff. Courts have been hesitant to use nuisance law to address environmental contamination disputes between successive owners of the same property for fear that such a use may subject sellers to excessive future liability.⁶⁵ Nevertheless, nuisance law has been used to address some forms of environmental contamination as far back as the early part of the twentieth century, when some courts declared dangerous gases, fumes, and vapors to be nuisances.⁶⁶

In California, a nuisance is defined by statute as “anything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to free use of property, so as to interfere with the comfortable enjoyment of life or property. . . .”⁶⁷ To state a claim for nuisance, a plaintiff must allege that the defendant intentionally or negligently created a condition that unreasonably and substantially interfered with the plaintiff’s use and enjoyment of his or her property.⁶⁸ In determining whether a particular activity constitutes a nuisance, California courts weigh the harm caused against the utility derived from the activity.⁶⁹ If a court deems the defendant’s activity a nuisance, several forms of damages are available to the plaintiff, including economic damages, the reduction in property and rental values, the costs of minimizing future harm, and some

65. *See id.*

66. *See Kuhnle, supra* note 25, at 193.

67. CAL. CIV. CODE § 3479 (West 1997). The entire statute reads as follows:

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Id.

68. *See, e.g., San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 695–97 (Cal. 1996). Although California law is clear that a property owner who unintentionally creates a nuisance is liable under a negligence standard, there is more ambiguity in cases where the responsible party used due care. The language of some California cases suggests a form of strict liability. *See Snow v. Marian Realty Co.*, 299 P. 720, 721 (Cal. 1931) (“Nor does it make any difference whether the defendants, as they contend, exercised ordinary care. . . . The injury to the property itself gives rise to liability, irrespective of care or lack of care.”); *Sturges v. Charles L. Hamey, Inc.*, 331 P.2d 1072, 1079 (Cal. 1958) (“[I]t is well settled in this state that an owner of land may not do even nonnegligent acts on his property with impunity where they create a nuisance as to his neighbor.”). In these cases where liability appears strict, however, the facts indicate that the landowner producing the nuisance was made aware that his or her action was causing injury to the plaintiff’s property prior to the filing of the suit. *See Snow*, 299 P. at 721 (plaintiff made several complaints to the defendants as to the results of their actions so that they were fully aware of the consequences of their acts); *Sturges*, 331 P.2d at 1077 (plaintiff wrote to the defendant in order to inform him of the water damage caused by the construction of a fill on the defendant’s property).

69. *See, e.g., Anderson v. Souza*, 243 P.2d 497, 509 (Cal. 1952); *McIntosh v. Brimmer*, 230 P. 203, 204 (Cal. Ct. App. 1924).

recovery for personal injuries or annoyance.⁷⁰ In addition, courts may permit punitive damages when the defendant's actions constitute malice or fraud.⁷¹

B. CALIFORNIA NUISANCE LAW EVOLVES TO FILL
THE HOLES IN THE STATUTES

The failures of existing statutes have led some landowners to pursue claims against responsible parties on theories of common law nuisance. The first California decision to allow a private suit for nuisance between successive owners of the same property was *Mangini v. Aerojet-General Corp.*⁷² In *Mangini*, the plaintiff, owner of the property at issue, had been compelled by the Sacramento County Air Pollution Control District to undertake testing of the property and abate the dangerous condition caused by the contamination of her property.⁷³ The plaintiff was unaware of the contamination at the time she purchased the property from the estate of the former owners, the Cavitts. Mangini believed the contamination was a result of the actions of the defendant, Aerojet-General Corporation, which had leased the property from the Cavitts between 1960 and 1970. Mangini alleged that Aerojet had "failed to remove millions of pounds of waste rocket fuel materials . . . which it [had] burned, buried, or otherwise disposed of" during its lease term.⁷⁴

Aerojet argued that the plaintiff had failed to state a cause of action for nuisance under California law, asserting that "conduct committed *on* a piece of land cannot be attacked as a nuisance to that land or the owner of it."⁷⁵ Marshaling traditional theories of nuisance, Aerojet essentially argued that nuisance law addressed only violations of land by a neighbor or another individual without a property interest in the land injured. Furthermore, Aerojet claimed that the land uses at issue must be contemporaneous and that a defendant who did not hold an interest in the

70. See Kuhnle, *supra* note 25, at 198–99. The numerous types of damages available to plaintiffs in nuisance actions makes them extremely popular as compared to CERCLA-type actions, in which only the costs expended to remediate the property are recoverable from a responsible party.

71. See *Farmy v. Coll. Hous., Inc.*, 121 Cal. Rptr. 658, 665 (Ct. App. 1975) (stating that punitive damages may be available for nuisance where the defendant acted with "callous disregard" for the rights of another) (emphasis omitted).

72. 281 Cal. Rptr. 827 (Ct. App. 1991).

73. *Id.* at 831.

74. *Id.*

75. *Id.* at 831–32.

land at the time of injury could not later be subject to a nuisance claim for such harm.⁷⁶

The California Court of Appeal rejected Aerojet's claims, holding that the plaintiff had stated a cause of action for nuisance under California law.⁷⁷ In so doing, the court favored a broad definition of nuisance that encompassed claims against former interest holders for contamination of their former property. In support of its ruling, the court relied upon the fact that California nuisance law is based on a statute that is broad enough to include claims such as those made by the plaintiff.⁷⁸ In particular, the court responded to Aerojet's claim that nuisance required an offensive use of neighboring lands by recognizing that "[t]he statutory definition of nuisance appears to be broad enough to encompass almost every conceivable type of interference with the enjoyment or use of land or property."⁷⁹ In addition, the court held that it was not material that Aerojet created the nuisance in the past and did not currently have a possessory interest in the property. Instead, the court held that those who maintain and those who create a nuisance are both responsible for the ensuing damages.⁸⁰

The *Mangini* decision also addressed important statute of limitations issues for nuisance claims brought against former interest holders by rejecting Aerojet's argument that the plaintiff's claim was time-barred.⁸¹ In a holding that was later refined by the California Supreme Court on appeal,⁸² the court held that the plaintiff could amend her complaint to allege a continuing nuisance so as to satisfy the statute of limitations.⁸³ To do so, the plaintiff must allege facts indicating that the contamination can be abated.⁸⁴

76. *Id.* at 832. In traditional nuisance law, such arguments seem to be very persuasive. See *supra* text accompanying notes 64–65.

77. *Mangini*, 281 Cal. Rptr. at 836.

78. See *id.* at 832. For the full text of the relevant statutory provision, see *supra* note 67.

79. *Mangini*, 281 Cal. Rptr. at 833 (quoting *Stoiber v. Honeychuck*, 162 Cal. Rptr. 194, 201 (Ct. App. 1980)).

80. See *id.* at 834.

81. *Id.* at 841.

82. See *Mangini v. Aerojet-Gen. Corp.*, 912 P.2d 1220 (Cal. 1996).

83. See *Mangini*, 281 Cal. Rptr. at 841.

84. See *id.* at 840. Although it is outside the scope of a paper discussing the recent growth of environmental nuisance claims, it should be noted that plaintiffs facing contamination caused by a predecessor in interest often face statute of limitations concerns. California courts have developed a standard based on whether the nuisance at issue is considered permanent or continuing. A nuisance is permanent if a permanent injury is done so that damages can be assessed "once for all." *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 870 (Cal. 1985) (quoting *Williams v. S. Pac. R.R.*, 89 P. 599, 599 (Cal. 1907) (quoting *Beronio v. S. Pac. R.R.*, 24 P. 1093, 1094 (Cal. 1890))). For

The decision in *Mangini* allowing current owners to state a cause of action for nuisance against former interest holders has been supported by the subsequent holding in *Newhall Land & Farming Co. v. Superior Court*.⁸⁵ In *Newhall*, the plaintiffs acquired the property at issue in 1984 without any visible evidence of prior contamination.⁸⁶ In 1989, however, the plaintiffs discovered contamination when they found petroleum-stained soil after removing the concrete foundations from their property. The plaintiffs conducted further environmental testing on the soil that revealed contamination in the form of heavy metals. As a result of the contamination, the plaintiffs were unable to sell their property.⁸⁷

Newhall Farming Company brought a claim for nuisance against Mobil Oil Corporation, which had built and operated a gas processing plant on the property until its sale of the land in 1970, and Amerada, which continued the operation of the plant for one year thereafter. Mobil and Amerada responded by arguing that Newhall's nuisance claim failed because it did not allege an interference with a property interest contemporaneous with the creation of the nuisance.⁸⁸ The court responded that this argument was simply a variation on that raised by the defendant in *Mangini*, who claimed that one cannot be liable for nuisance unless the defendant has a current possessory interest in the land.⁸⁹ In rejecting the claim, the court stated that "[o]nce Mobil and Amerada sold their interests without disclosing the contamination, other parties became involved who, upon discovery of the contamination, could bring a claim against Mobil and Amerada"⁹⁰

Several cases have followed the reasoning of *Mangini* and *Newhall* to solidify California's use of nuisance law to address environmental contamination caused by former property owners or lessees.⁹¹ In most

permanent nuisances, the statute of limitations runs for three years from the creation of the nuisance. See *Mangini*, 912 P.2d at 1230. By contrast, a continuing nuisance is one that is viewed as "reasonably abatable" so that each repetition is considered a separate wrong for which a new statute of limitations period commences. See *id.* at 1229. Because most often plaintiffs face contamination created many years in the past, a plaintiff must plead facts that show the nuisance is "reasonably abatable," and hence "continuing," so that the claim is not barred by the statute of limitations. See Robert E. King, Comment, *Chemical Contamination in California: A Continuing Nuisance?*, 1997 U. CHI. LEGAL F. 483, 486-89, 499.

85. 23 Cal. Rptr. 2d 377 (Ct. App. 1993).

86. *Id.* at 380.

87. *Id.*

88. *Id.* at 381.

89. See *id.* at 382.

90. *Id.* at 383.

91. See, e.g., *Beck Dev. Corp. v. S. Pac. Transp. Co.*, 52 Cal. Rptr. 2d 518 (Ct. App. 1996) (holding that the contamination caused by a predecessor in interest satisfies the definitional

cases, the plaintiff-current owner was under some government directive to remediate the condition of the property and was barred by the petroleum exclusion in CERCLA and California law from pursuing statutory claims against the prior interest holder.⁹² For plaintiffs, the increasing popularity of nuisance actions pointed to both the failure of existing statutes and the larger scope of damages recoverable under the common law. For California courts, the decisions marked an effort to use state common law doctrines to fill the gaps in existing statutes that often left innocent owners without a remedy under the law.

C. THE ATTRACTIVENESS OF NUISANCE CASES TO PLAINTIFFS

The use of nuisance law to address environmental contamination caused by predecessors in interest has two important advantages to potential plaintiffs. First, and perhaps most importantly for many plaintiffs, nuisance law does not categorically exclude contamination from any source. This is especially important as both CERCLA and California's HSAA specifically exclude the petroleum-related contamination that is at issue in many of California's nuisance cases. When viewed in combination with RCRA's failure to include a private right of action for plaintiffs, the exclusion of petroleum from both CERCLA and California statutory law creates a significant hole that California courts have filled with nuisance law.⁹³

Second, the scope of damages recoverable under nuisance law is far greater than that available under federal or state statutes. Common law nuisance claims allow plaintiffs to recover nearly all economic and personal injury costs, including the reduction in property value and the decrease in rental income.⁹⁴ In addition, punitive damages may be available.⁹⁵ In contrast, CERCLA-related actions allow solely for recovery of the response costs associated with cleanup, excluding recovery for the reduction in value of the property.⁹⁶ Because damages from contamination

requirements of a private nuisance); *KFC Western, Inc. v. Meghrig*, 28 Cal. Rptr. 2d 676 (Ct. App. 1994); *Wilshire Westwood Assocs. v. Atlantic Richfield Co.*, 24 Cal. Rptr. 2d 562 (Ct. App. 1993) (holding that the opinion in *Mangini* was well reasoned and that plaintiffs are entitled to pursue a nuisance claim against former lessees of the property for contamination that occurred during the lessees' operation of a gas station on the site).

92. See, e.g., *KFC Western*, 28 Cal. Rptr. 2d at 678-79; *Mangini v. Aerojet-Gen. Corp.*, 281 Cal. Rptr. 827, 831 (Ct. App. 1991).

93. See *supra* note 63 and accompanying text.

94. See *Santa Fe P'ship v. ARCO Prods. Co.*, 54 Cal. Rptr. 2d 214, 217 (Ct. App. 1996).

95. See *Farmy v. Coll. Hous. Inc.*, 121 Cal. Rptr. 658, 665 (Ct. App. 1975).

96. See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535 (10th Cir. 1992).

often remain despite adequate cleanup, plaintiffs have turned to nuisance law for more complete compensation for their losses.

III. A HURDLE EMERGES FOR PLAINTIFFS IN NUISANCE CASES: THE "CONSENT" DEFENSE AND THE PROBLEM OF *BECK*

Since categorical exclusion of certain wastes is absent from nuisance law and plaintiffs enjoy an opportunity for more complete recovery, California's common law has become an important weapon for property owners to recover the cleanup costs and other damages caused by preexisting contamination. In most cases, this result seems just, as the plaintiff-landowner was completely unaware of the contamination at the time of purchase.⁹⁷ In these cases, California's nuisance law appears to be an appropriate means of addressing environmental contamination because the plaintiff-landowner is "innocent" in that discovering the hidden contamination is not expected. In addition, the defendant in such a case has clearly committed a wrong by either creating the contamination at issue, transferring the property without disclosing the existence of known contamination, or both. It is important to note that in these cases, California's nuisance law does not differ significantly from traditional property law, which departs from *caveat emptor* (buyer beware) doctrine in cases of the nondisclosure of a material fact.⁹⁸ In addition, in these cases, California nuisance does not differ from CERCLA in any way other than closing a major hole in the statute that excluded petroleum-related products from the category of hazardous wastes.

In spite of the logic of applying nuisance law in the majority of environmental cases against former interest holders, the potential liability of former property owners under nuisance may seem unfair in cases where the plaintiff was aware or should have been aware of the contamination at the time of purchase. In these cases, the law may be concerned that the current owner will gain a windfall by receiving the contaminated property

97. See, e.g., *Newhall Land & Farming Co. v. Superior Court*, 23 Cal. Rptr. 2d 377, 380 (Ct. App. 1993) ("When Newhall acquired the property, there was no visible evidence of these prior discharges. At that time, Newhall had no way of knowing and did not suspect the property was contaminated."); *Mangini*, 281 Cal. Rptr. at 831 ("Plaintiffs did not learn of the hazardous conditions until 'recently.'").

98. In cases where the seller does not disclose a material fact, California law treats such an omission as negative fraud or deceit. See *Stevenson v. Baum*, 75 Cal. Rptr. 2d 904, 907 (Ct. App. 1998); *Cooper v. Jevne*, 128 Cal. Rptr. 724, 727 (Ct. App. 1976). A seller must voluntarily disclose the fact, and cannot defend the failure to do so by arguing that the buyer did not inquire. See *Herzog v. Capital Co.*, 164 P.2d 8, 9 (Cal. 1945); *Snelson v. Ondulando Highlands Corp.*, 84 Cal. Rptr. 800, 803-04 (Ct. App. 1970). See generally 9 MILLER & STARR, *supra* note 17, § 1:121.

at a reduced price and then trying to recover from the seller for the same contamination with a nuisance claim. Similar concerns arise in situations where there is an intermediate landowner who did not create the contamination on the property but who knew or should have known of the contamination at the time the property was purchased from the prior owner. In these cases, it may seem unfair to allow the plaintiff-current owner to sue the original owner simply because the intermediate landowner did not disclose the existence of the contamination at the time of sale to the plaintiff. The California Court of Appeal believed that a case exhibiting such problems was before it in *Beck Development Co., Inc. v. Southern Pacific Transportation Co.*⁹⁹ The court's decision seems to complicate severely the future uses of nuisance law to redress environmental contamination in California.

A. THE DECISION IN *BECK*

In 1984, the Beck Development Company, a large, established real estate developer from Central California, purchased land in the City of Tracy from Mitsuo and Elsie Kagehiro at a cost of \$25,000 per acre.¹⁰⁰ From 1926 to 1945, the land purchased by Beck Development Company had been owned by Southern Pacific Transportation Co. (Southern Pacific), which constructed a large, concrete oil reservoir on the property.¹⁰¹ During Southern Pacific's ownership of the property, the reservoir was used for storing "Bunker C" oil, a particularly hazardous fraction of crude oil used as fuel for the company's locomotives.¹⁰² The Bunker C oil was not removed from the reservoir until 1945, when Southern Pacific switched to diesel fuel. Although most of the Bunker C oil was removed by Southern Pacific in 1945, the record indicated that a small amount of residue remained.¹⁰³

In 1945, Southern Pacific sold the land containing the reservoir to John Hachman for \$4,500.¹⁰⁴ Over time, Hachman dismantled the reservoir, eventually burying the concrete used to construct it. At the time of Hachman's sale to the Kagehiros, Mr. Kagehiro was aware of the old storage reservoir and the existence of concrete under the land but did not

99. 52 Cal. Rptr. 2d 518 (Ct. App. 1996).

100. *Id.* at 528.

101. *Id.* at 527. The court described the reservoir as occupying sixteen acres of the property and capable of storing three million barrels of oil. *See id.*

102. *Id.*

103. *Id.*

104. *Id.*

expect any problems.¹⁰⁵ The Kagehiros farmed the property for twenty-five years prior to the sale to the Beck Development Company, and they had forgotten about the reservoir. For that reason, the plaintiff was not made aware of its existence at the time of purchase.¹⁰⁶

After the City of Tracy became aware of the prior existence of an oil reservoir on Beck's property through an investigation into a nearby site, the plaintiff immediately began an investigation. After Beck's investigation confirmed the city's findings, Beck's development plans were blocked by the State Department of Health Services, from which clearance was required under city law. By the time it initiated litigation against Southern Pacific, Beck had expended large sums of money on the repeated testing of its property. At the time of litigation, Beck's property had still not been cleared for development.¹⁰⁷

At trial, the Beck Development Company was awarded both injunctive relief, requiring the abatement of the contamination, and incidental damages totaling over one million dollars against Southern Pacific on its nuisance claim.¹⁰⁸ On appeal, however, the California Court of Appeal reversed the judgment, remanding the case with instructions to enter judgement in favor of Southern Pacific. Although the appeals court found that the contamination at issue met the definition of a private nuisance under California law because it interfered with Beck's free use of the property, the plaintiff was barred from recovery under the doctrine of consent.¹⁰⁹

According to the court, in cases where the defendant had conducted a lawful activity with the consent of the next purchaser, any subsequent purchaser was precluded from pursuing a claim based upon that consensual activity.¹¹⁰ On these facts, the court reasoned that it appeared that Mr. Hachman, who purchased the property from Southern Pacific with the storage reservoir in full view and with full knowledge of the past activities on the property, had consented to the actions of Southern Pacific. Because Mr. Hachman did not acquire a right to sue Southern Pacific for the contamination, he could not pass down such a right to subsequent

105. *Id.* at 528. Mr. Kagehiro's expectation was reasonable considering he had leased the property at issue for two years prior to purchasing it and had not experienced any problems with the old reservoir.

106. *Id.*

107. *See id.* at 529.

108. *Id.* at 526-27.

109. *Id.* at 554-55.

110. *Id.* at 555.

purchasers. Thus, the Beck Development Company's claim was precluded.¹¹¹

Although the court denied the plaintiff's nuisance claim under the doctrine of consent, the decision in *Beck* seems to have been motivated by a concern with the scope of potential liability faced by prior property owners under current nuisance law.¹¹² The court paid particular attention to the fact that Mr. Hachman had purchased the property from the defendant with the oil reservoir in full view and with complete knowledge of the activities of Southern Pacific on the property.¹¹³ Because Mr. Hachman had been aware of Southern Pacific's activities on the property, the court felt it would be unfair to subject the company to further liability for those same actions. The court also seems implicitly to have assumed that Mr. Hachman may have received the land for a reduced price as a result of those activities. Although there was nothing in the factual record to indicate that Mr. Hachman did in fact receive a reduced price or that he legally waived his rights against Southern Pacific, a brief analysis of the past use of the consent doctrine in similar cases illustrates that such factors were important in determining the outcome in *Beck*.

B. EXPOSING THE FLAWED LEGAL REASONING IN *BECK*

The idea that the decision in *Beck* was driven more by a concern with the fairness of further nuisance liability for former property owners than by adherence to existing doctrine is perhaps best illustrated by similar California nuisance cases in which the doctrine of consent has been discussed. When examined in the context of similar case law, *Beck*'s holding appears to be a significant departure from existing case law on the subject. In fact, other similar cases restricted the consent defense to nuisance claims against former lessees, who should be afforded a defense that their operation of the property that created the contamination was undertaken with the prior, knowing consent of the then-owner. Existing California case law before *Beck* held that the consent defense could not be asserted by former property owners to defeat a nuisance claim for environmental contamination.¹¹⁴

111. *Id.* at 555–56.

112. For a discussion of the flawed legal reasoning in *Beck*, see *infra* Part IV.A.

113. See *Beck*, 52 Cal. Rptr. 2d at 555. The court also omitted facts that may have cut against Mr. Hachman's awareness of the contamination, specifically the fact that it was nearly completely removed by Southern Pacific prior to sale.

114. See *Newhall Land & Farming Co. v. Superior Court*, 23 Cal. Rptr. 2d 377, 383 (Ct. App. 1996).

The doctrine of consent is an equitable maxim that any person who consents to an act is not wronged by it.¹¹⁵ Consent generally acts as a complete defense to tort liability.¹¹⁶ In most nuisance cases, a defendant's assertion of consent is generally repudiated either if the plaintiff objects to the defendant's activity causing the nuisance or if the plaintiff merely fails expressly to assent to the nuisance.¹¹⁷ In addition, the consent defense has generally been repudiated in California as it relates to the traditional idea of "coming to a nuisance." That is, a plaintiff in California is not barred from obtaining relief even though the plaintiff had knowledge of the nuisance at the time of purchase.¹¹⁸

The "consent" defense as applied to nuisance claims against former interest holders for contamination was first discussed in *Mangini v. Aerojet-General Corp.*¹¹⁹ In *Mangini*, the defendant contaminated the property during its ten-year lease from the former owner. The California Court of Appeal held that, in cases where a property owner seeks to recover for the creation of a nuisance by a former lessee, the lessee has a defense that the use was lawful and undertaken with the prior consent of the then-owner.¹²⁰ In such cases, the court pointed out, only a consent defense would cure such ludicrous circumstances as an owner's leasing the property for the purpose of operating a quarry and then pursuing a nuisance claim against the lessee at the end of the lease term for having created the inevitable hole that was the object of the lease.¹²¹

In discussing the application of the doctrine of consent in claims against a former lessee, the court in *Mangini* distinguished the consent defense from the generally repudiated "coming to a nuisance" doctrine.¹²² The court reasoned that the "coming to a nuisance" doctrine involved a new property use "coming to" an existing one followed by a claim being brought for nuisance against the older property use. By contrast, the facts of *Mangini* involved the consent of an informed landowner prior to the

115. See CAL. CIV. CODE § 3515 (West 1997); 9 MILLER & STARR, *supra* note 17, § 29:23.

116. See 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 271 (9th ed. 1988).

117. See Brown & Hansen, *supra* note 29, at 701-02.

118. See 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 150 (9th ed. 1990).

119. 281 Cal. Rptr. 827 (1991). It is important to note that the decision to apply the consent defense in *Beck* rests almost entirely on the discussion of the defense in *Mangini*. See *Beck Dev. Co. v. S. Pac. Transp. Co.*, 52 Cal. Rptr. 2d 518, 555 (Ct. App. 1996).

120. See *Mangini*, 281 Cal. Rptr. at 835. Note, however, that the court in *Mangini* did not decide whether the lessee had made out a successful defense of consent despite the fact that the lease had an explicit provision stating that "Lessors acknowledge that they are aware that certain activities of Lessee on the leased premises may be of a hazardous nature . . ." *Id.* at 836.

121. See *id.* at 835.

122. *Id.* at 835-36.

creation of a nuisance. In such cases, the lessee must be afforded a defense that the owner at the time consented to the lessee's activity that created the nuisance on the property.¹²³

The court in *Mangini* did not address the potential liability of the former owner if the lessee successfully established consent under the law. Existing nuisance law, however, would seem to favor holding a former owner liable to a later purchaser for nuisance because he or she later sold the property without disclosing the contamination or obtaining a release for its impact. In this light, the consent defense in *Mangini* did not eliminate nuisance liability for environmental contamination but rather aided in identifying the more responsible party: the landowner who leased the property to a party whose actions the owner knew would cause contamination.

The application of a consent defense in the context of nuisance claims against former property owners (as opposed to lessees) was addressed by California courts in both *Newhall* and *KFC Western*. In *Newhall*, the California Court of Appeal rejected the defendant-property owner's contention that the plaintiff's cause of action was barred because the plaintiff had consented to its own use of the property.¹²⁴ Although the court pointed out that a consent defense was entirely inapplicable because the defendant had allegedly violated the law in creating the nuisance, the court's reasoning turned on the fact that the consent defense discussed in *Mangini* applied solely to claims against former lessees and not to claims against former property owners.¹²⁵ To this end, the court stated that *Mangini* allowed a consent defense in the context of former lessees only in order to avoid a potentially ludicrous result in identifying the proper party for suit.¹²⁶ For this reason, a consent defense could not be used by former property owners to escape liability for nuisances that they created.

The refusal of the California Court of Appeal to allow a consent defense for former property owners was further supported in *KFC Western, Inc. v. Meghrig*.¹²⁷ In *KFC Western*, the defendants argued that they were entitled to a consent defense because, unlike the defendant in *Newhall*, their actions were lawful and did not create a public nuisance.¹²⁸ The court,

123. *Id.* at 836.

124. *See Newhall*, 23 Cal. Rptr. 2d at 383.

125. *Id.*

126. *Id.* Specifically, the court relied on *Mangini*'s discussion of the quarry and inevitable hole example.

127. 28 Cal. Rptr. 2d 676 (Ct. App. 1994).

128. *See id.* at 683–84.

however, correctly reasoned that *Newhall* did not turn on the issue of public versus private nuisance. For that reason, the court held that the defendants could not assert as a defense that they consented to their own use of the property. The court's decision thus followed the holding of *Newhall*, which refused to extend a consent defense to former property owners facing nuisance claims brought by subsequent purchasers.¹²⁹

The holdings of *Mangini*, *Newhall*, and *KFC Western* illustrate that the decision in *Beck* to afford a former property owner a defense of consent was a significant departure from prior California case law on the subject. Both the Second and Fifth Districts of the California Court of Appeal had held that a former owner should not be entitled to a consent defense prior to the decision of the Third District in *Beck*. The fact that *Beck* did not discuss or cite either *Newhall* or *KFC Western* graphically illustrates its break with existing case law.

In addition to its failure to address *Newhall* and *KFC Western*, there are compelling reasons why the *Mangini* decision, on which *Beck* explicitly relied, does not support extending the consent defense to the context of a later purchaser's "consenting" to the seller's contamination of the property. First, *Mangini* discussed at length why the unique circumstances of suits against former lessees required consent as a defense in that context.¹³⁰ There was no discussion in *Mangini* as to whether former property owners should also be entitled to a defense of consent. Second, whereas *Beck* concerned the subsequent consent of the purchaser to preexisting contamination, the facts of *Mangini* involved the owner's prior consent to the lessee's contamination of the property. Because *Beck* addressed the situation in which the next owner consents after the creation of the nuisance by the defendant, its facts seem more similar to those addressed by traditional "coming to a nuisance" doctrine, which was expressly distinguished in *Mangini*.¹³¹ In addition, it seems significant that *Mangini*'s application of a consent defense for lessees implies that the former owner may in fact be more responsible than the later purchaser for the resulting nuisance, because the former owner gave consent prior to the creation of the nuisance. In this light, *Mangini* can be read as strengthening the potential nuisance liability of former owners, who will be the appropriate defendants in cases where they did not create the nuisance but gave a lessee consent prior to its creation. This expansion of nuisance liability to encompass former owners makes it implausible that the consent

129. *See id.* at 684.

130. *Mangini*, 281 Cal. Rptr. at 835–36.

131. *Id.* at 836.

defense discussed in *Mangini* could be used, as in *Beck*, to eliminate the liability of former owners for nuisance in cases where the defendant did not merely consent to another creating a nuisance but created the nuisance through his or her own actions.

IV. HOW BEST TO ADDRESS THE CONCERNS UNDERLYING THE *BECK* DECISION IN NUISANCE LAW

A. THE CONCERNS ILLUSTRATED BY *BECK*

To say that the application of the consent defense by the California Court of Appeal in *Beck* represented a misuse of existing legal doctrine is not necessarily to argue that the decision was unfair. In many ways, it may have been unjust to hold Southern Pacific liable for the contamination it created decades earlier on the plaintiff's property. First, as the court pointed out, there were good reasons for assuming that Mr. Hachman, who purchased the property from Southern Pacific, was aware of the contamination at the time of purchase.¹³² Mr. Hachman was clearly knowledgeable about the type of activity Southern Pacific engaged in on the property, and he therefore may well have been aware of the contaminated condition of the land. In addition, although nearly all of the oil had been removed from the reservoir, Mr. Hachman clearly knew of the presence of the large, concrete reservoir and its former contents.¹³³ To the extent that the condition of the property was reflected in the purchase price, it may have been that Mr. Hachman, and not Southern Pacific, was the more appropriate defendant in a nuisance action brought by a later purchaser, because Mr. Hachman had become the responsible party through his purchase of the property with complete information as to its condition.

When the facts are viewed in a different light, however, it may seem that Southern Pacific should be at least partially responsible for the cleanup costs. First, there is no clear indication that Mr. Hachman relinquished his rights at the time of sale so as to preclude a later purchaser, such as the plaintiff, from bringing a claim against Southern Pacific. In addition, Southern Pacific created the contamination at issue and did an incomplete job of cleaning up the land prior to sale.¹³⁴ In addition, Southern Pacific may have been the most responsible party that was capable of covering the cost of remediation. The Beck Development Company, the plaintiff, was

132. See *Beck*, 52 Cal. Rptr. 2d at 555.

133. See *id.*

134. See *id.* at 527.

clearly innocent in that it was unaware of the contamination at the time of purchase, and because the old reservoir had been destroyed and buried, it does not seem possible for Beck to have known about it. Mr. Hachman was innocent in that he disclosed the existence of the reservoir to the next purchaser, the Kagehiros. Although the Kagehiros are responsible for transferring the property to Beck without notice of the former reservoir, their motives in doing so appear to have been innocent, and they are most likely incapable of contributing significantly to the cleanup costs.¹³⁵ For these reasons, if public policy favors holding responsible parties liable for the cost of cleaning up contaminated sites, it may not seem unjust to require Southern Pacific to pay a significant portion of the remediation costs.

B. HOW NUISANCE LAW SHOULD ADDRESS THESE TYPES OF CASES

Regardless of the correct outcome in *Beck*, the case illustrates the problem California nuisance law faces in these contamination cases. California courts have not yet addressed the situation in which a current or intermediate owner has expressly agreed to hold the seller harmless from potential liability caused by the existing contamination. In most cases, this seems unlikely to occur, as much of the contamination at issue occurred far in the past at a time when real estate sellers would not have been aware of the need to secure a contractual release for environmental contamination.¹³⁶ In cases where such a release was secured by a seller, however, it is not clear that the release should necessarily free the seller from liability for the contamination. Because most laws establishing significant liability for environmental contamination did not exist prior to the late 1970s, it is not clear that a purchaser of real estate prior to that time would have been aware of the potential liability that he or she was assuming. For this reason, it may be a complex question whether nuisance law should respect such releases negotiated many years in the past.

Another difficult issue arises in cases where there may or may not be an explicit release, but it appears that the seller or intermediate owner knew or should have known of the contamination at the time of sale. In these cases, there are important reasons that California courts applying nuisance law should be wary of eliminating the liability of the party responsible for creating the contamination. First, public policy clearly favors holding

135. The record indicates that the Kagehiros, who farmed the property for twenty-five years without incident, had forgotten about the destroyed reservoir. *Id.* at 528.

136. *See, e.g., id.* at 527 (contamination occurred prior to 1945); *Mangini v. Aerojet-Gen. Corp.*, 281 Cal. Rptr. 827, 831 (contamination occurred between 1960 and 1970).

parties responsible for contamination liable for the costs of cleanup. As evident from the passage of CERCLA, Congress supports holding the contaminating party at least partially liable for the costs of remediation.¹³⁷ Although it can be argued that this policy should be altered in cases where another party has expressly assumed responsibility for the contamination, courts should refrain from inferring such assent by a purchaser absent specific contractual terms. Second, absent a recently signed, unambiguous contractual release, it is unclear that the buyer relinquished any claims against the seller regarding the contamination. This is especially true in the case of environmental contamination because of the recent expansion in potential liability for property owners. Although it may be argued that a party who released the seller from liability for the contamination assumed the risk of the law changing, absent an explicit release, it appears that the seller bore such a risk and should remain liable.

The concerns discussed above illustrate some of the pressing issues facing nuisance law in environmental claims against past interest holders. As the facts of *Beck* indicate, nuisance law will be best served by developing a clear doctrine for determining the liability of past property owners for the contamination of their former property. In addition to providing guidelines for California courts interpreting nuisance law, a clear nuisance doctrine in such cases will allow parties contractually to allocate the risks of such liability in future transactions.

In general, there are four types of cases in which nuisance law will be forced to address the issue of whether a seller should remain liable for contamination: (1) cases involving recent transfers of property where the seller secured a specific release for the effects of the contamination; (2) cases involving similar release agreements in transfers of property that predated the advent of significant liability for environmental contamination; (3) cases where the defendant asserts that an “as is” clause in a contract of sale should preclude their later liability for nuisance; and (4) cases where the defendant argues that the purchaser was aware of the contaminated condition of the property and implicitly assented to it at the time of sale. This group of cases may overlap with the previous two in that a defendant who obtained a release or an “as is” agreement in a long-past property transfer may also assert that the purchaser was aware of the contamination at the time of sale. Although for the purposes of this discussion, cases involving factual issues as to the awareness of the

137. 42 U.S.C. § 9613(f)(1) (1994) (creating a private right of action against past owners or operators responsible for contaminating the property).

purchaser at the time of sale will be treated separately, it is important to note that any defendant in a nuisance action involving environmental contamination will be able to assert such a claim.

1. *Cases Involving Release Agreements in Recent Transfers of Property*

Because of the scope of liability involved, California nuisance law should favor a standard of clear awareness of the specific contamination by the purchaser before rights against the responsible party (seller) are relinquished. The easiest case for the buyer's awareness would involve a clear contractual release of the seller for the effects of the contamination that was negotiated by the parties after the recent expansions in environmental liability that occurred with the passage of CERCLA. In legal terms, these cases seem better handled through the equitable doctrines of waiver and estoppel as opposed to consent.

The doctrine of waiver requires a clear expression of an intention to waive the right that is made with full knowledge of the facts.¹³⁸ Once a right has been waived, the person is estopped from asserting it.¹³⁹ In addition, once the purchaser has waived such a right against the seller, the purchaser cannot transfer any right to sue the seller for nuisance to later purchasers of the property.¹⁴⁰

In cases involving *recent* transfers of property where a seller has secured an explicit release from liability for the contamination at issue, there are persuasive arguments that nuisance law should find that the subsequent purchaser and, by implication, any later purchaser have waived their rights against the seller with respect to the contamination. First, in cases involving recent transfers of property, especially those that occurred post-CERCLA, it seems clear that a purchaser was aware or should have been aware of the scope of liability for contamination assumed by assenting to a release agreement. For this reason, one can presume that the parties bargained for the release and that the purchaser received adequate consideration for the extent of liability now existing for environmental contamination.¹⁴¹ Second, the acceptance of specific releases from

138. See 30 CAL. JUR. *Estoppel & Waiver* § 22 (3d ed. 1987).

139. See *id.* § 26.

140. See *id.*

141. This may not be the case where a sophisticated party transfers the property to an undercapitalized corporation in order to avoid liability for the contamination. In these cases, however, existing laws for piercing the corporate veil should be used to hold the original owner liable for nuisance. Although this does not follow this Note's general argument supporting an acceptance of release agreements, it seems to be an exceptional circumstance and one in which fairness dictates that the original party remains liable.

environmental liability in nuisance law would allow sellers seeking to gain peace of mind by transferring property a clear means of avoiding future liability for contamination.¹⁴²

In addition to the reasons stated above, an acceptance of release agreements signed after the recent expansion of environmental liability that occurred post-CERCLA would align nuisance law with existing liability under CERCLA. In *Mardan Corp. v. C.G.C. Music, Ltd.*, the Ninth Circuit Court of Appeals approved of specific release agreements regarding hazardous waste liability where the agreements were made after both parties were aware of the contamination and had constructive knowledge of existing CERCLA regulations.¹⁴³ The court reasoned that the acceptance of release agreements was essentially tangential to the enforcement of CERCLA because such agreements did not excuse liability for the contamination but merely determined who ultimately paid for the cleanup.¹⁴⁴ This reasoning applies in nuisance law as well, as one party will remain liable for the costs of cleanup, but an express release agreement will allow parties contractually to allocate the risk of such liability.¹⁴⁵ For these reasons, in cases involving recent transfers of property where a seller has secured a release agreement for the contamination at issue, California law should bar later claims against the original seller for nuisance.

2. *Cases Involving Release Agreements in Older Transfers of Property*

A more difficult case for nuisance law involves release agreements signed and negotiated by the parties during a time when significant environmental liability did not exist for property owners. Although such a scenario seems remote because even the most sophisticated parties would have been unaware of the need to secure a broad release from environmental liability prior to the passage of recent environmental statutes, in the rare instance that such a release was signed, it does not seem

142. Courts have accepted this argument in holding that specific release agreements should be preserved in assessing liability under CERCLA. See *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1460 (9th Cir. 1986) (“A seller will normally wish to wipe its slate clean, making some general release a condition of the sale so that the seller can relieve itself of the headaches as well as the benefits of the old business and move on to new ventures.”).

143. *Id.* at 1463. The position of the Ninth Circuit on this issue has also been adopted by the Sixth Circuit. See *AM Int’l, Inc. v. Int’l Forging Equip. Corp.*, 982 F.2d 989, 994 (6th Cir. 1993).

144. See *Mardan*, 804 F.2d at 1459.

145. It should be noted that this remains true in cases involving intervening landowners who have signed a release holding the original owner harmless from liability for the contamination at issue but have failed to secure such a release upon their later transfer of the property. In these cases, a release agreement will not impact the underlying liability for nuisance but will merely aid the court in assessing the appropriateness of the defendant in the plaintiff’s action.

clear that it should be treated similarly to one made after the advent of significant environmental liability for property owners.¹⁴⁶ The most compelling argument for treating an older release differently is that the release was negotiated and signed at a time when the purchaser would not have been aware of the potential liability he or she was assuming because of the radical change in environmental liability in the last twenty years. In fact, the purchaser may well have thought that a cleanup would never be necessary given the absence of significant environmental legislation at the time.

Because significant environmental liability did not exist at the time of sale, it is unlikely that a purchaser in an older real estate transaction would have received sufficient consideration for the scope of liability assumed for the contamination. Because it is doubtful that the purchaser would have been sufficiently aware of the potential liability to secure adequate consideration, it does not seem that nuisance law should preclude all later claims against the seller. Although one can argue that the purchaser bore the risk of the law changing in this area, it does not seem just to force purchasers to bear the large costs engendered by such a radical change. The Ninth Circuit seemed to favor such an argument in its decision in *Mardan*, in which the court accepted the validity of a release agreement in part because the parties “had constructive knowledge of CERCLA, and . . . were aware of the potential for incurring ‘response costs’”¹⁴⁷ Although the courts have not addressed the validity of release agreements that predate CERCLA, the decision in *Mardan* seems to recognize persuasive reasons for treating them differently from those negotiated after the advent of significant environmental liability. Similarly, nuisance law should recognize such a distinction by refusing to preclude claims against the responsible party on the basis of outdated release agreements.

3. *Cases Involving “As Is” Agreements*

In cases involving transfers of property that occurred pre-CERCLA, the more likely scenario is that a defendant will assert a defense to nuisance liability on the basis of an “as is” agreement negotiated at the time of sale.

146. The issue of whether a release agreement was signed by the purchaser with full knowledge of the scope of liability for environmental contamination is a factual one for the court to decide. Important in making this determination would be whether the agreement was negotiated and signed after the passage of CERCLA and RCRA, which first placed significant liability on property owners for contamination, and whether the purchaser received sufficient consideration for the release in light of the future liability assumed.

147. *Mardan*, 804 F.2d at 1463.

As with older release agreements, however, nuisance law should not preclude claims against the seller who created the contamination at issue on the basis of an “as is” provision in the contract. In these cases, there are strong public policy reasons for continuing to hold the seller liable for the contamination that existed at the time of sale. Foremost among these is that a purchaser of property may still have been unaware that the property was contaminated. Because the contamination may have been hidden from view, simple “as is” agreements should not in any way represent an acceptance of responsibility for the contamination on the part of the purchaser.

In cases where there is evidence that the purchaser was aware of the contamination, it is still not clear that an “as is” clause should preclude a later nuisance claim against the seller. This is especially true in cases where the “as is” clause was negotiated at some point prior to the advent of significant environmental liability for property owners. Because such a purchaser would not have been aware of the potential scope of liability assumed by accepting the contaminated condition of the property, it does not seem just that the purchaser should be precluded from pursuing a nuisance claim against the seller for the contamination.¹⁴⁸ Finally, a rule that does not allow sellers who contaminated their former property to escape liability on the basis of “as is” agreements would align nuisance law with existing doctrine under CERCLA. At least one federal court has rejected the position that “as is” provisions in real estate contracts absolve a seller responsible for the contamination at issue from liability under CERCLA.¹⁴⁹

4. *Cases Where the Defendant Shows That the Purchaser Was Aware of the Contamination at the Time of Sale*

Although neither release agreements nor “as is” clauses should insulate past owners from liability for nuisance when they were negotiated before the advent of significant environmental liability, potential awareness of the contamination on the part of the purchaser should be relevant to nuisance liability. In cases where there is a factual issue as to whether the plaintiff or another intermediate purchaser was aware of the contaminated condition of the property at the time of purchase, courts should place the burden of proof on the defendant to establish that he or she sold the

148. This is not to state that awareness of contamination on the part of the purchaser should be irrelevant. As stated *infra* Part IV.B.4, a purchaser who was aware of the contamination at the time of sale should not be allowed to recover the full scope of damages normally available under nuisance.

149. See *Wiegmann & Rose Int'l Corp. v. NL Indus.*, 735 F. Supp. 957, 959 (N.D. Cal. 1990).

property after disclosing the presence of contamination. In assessing the defendant's claim, the court should consider factors such as the relationship of the purchase price to the value of the property if uncontaminated, common knowledge regarding the property, and the obviousness of the presence of contamination on the property. In these cases, the courts should examine whether the purchaser in fact knew of and assented to the contaminated condition of the property as opposed to merely whether the party was aware of the activities that the seller engaged in on the property.

In cases where the defendant successfully establishes that the property was sold with the purchaser's awareness of the contamination, courts should continue to hold the defendant liable for nuisance but should restrict the scope of damages recoverable by the plaintiff. There are persuasive arguments for continuing to allow a nuisance claim even where the defendant establishes that the next purchaser accepted the contaminated condition of the property. First, defendants in such cases should not escape all liability for the creation of the nuisance, because public policy clearly favors holding responsible parties liable for contaminating their property.¹⁵⁰ Second, absent a contractual release for the contamination signed after the advent of significant environmental liability for property owners, there is no reason to assume that the plaintiff accepted the risk of liability currently imposed for contamination. Third, spreading the cleanup costs among responsible parties encourages cleanup efforts by relieving the plaintiff of the burden of paying the entire cost of remediation.

Although a defendant who establishes that the property was sold with the purchaser's awareness of the contamination may remain liable for nuisance, courts should limit the damages recoverable by the plaintiff in such cases. Whereas in ordinary nuisance cases a plaintiff can recover response costs and damages for the reduction in value of the property, in situations where the purchaser was aware of the contamination at issue, a plaintiff should only recover some form of contribution for the costs of cleanup. The limitation on damages reflects the idea that a defendant who disclosed the contamination on the property prior to sale should be treated as less culpable than should a defendant who both created the nuisance and failed to disclose its existence to the subsequent purchaser. In addition, by eliminating the potential for the plaintiff to recover for damages other than contribution to cleanup costs, nuisance law will substantially reduce the incentive for a party to purchase contaminated property for the purpose of

150. Congress clearly articulated such a policy by passing CERCLA, which created a private cause of action against responsible parties. 42 U.S.C. § 9613(f)(1) (1994).

subsequently bringing a nuisance claim against the former owner. In such cases, a compromise allowing the plaintiff to recover a portion of the cleanup costs seems best suited to promote the goal of cleaning up contaminated properties while finding an equitable allocation of the costs associated with remediation.

V. CONCLUSION

The facts of *Beck* illustrate the difficulty of holding former property owners liable for nuisance on account of contamination that occurred prior to the time of transfer. Not only do such claims depart from traditional real property doctrines such as *caveat emptor*, but they may seem particularly unfair in cases where the purchaser was aware of the condition of the property at the time of sale. For these reasons, in cases involving recent transfers of property where a former owner has secured an explicit release regarding the contamination at the time of transfer, California nuisance law should adopt the equitable doctrines of waiver and estoppel in order to preclude nuisance claims against the seller for the contamination. In these cases, it seems clear that the purchaser had actual or constructive knowledge of the extent of liability that property owners may have for environmental contamination under current law. In addition, the acceptance of such agreements under the law will not impact the underlying liability for the nuisance but will merely allow forward-looking parties to allocate the risk of paying for the cleanup.

By contrast, in cases where a contractual release was not obtained, or where one was signed prior to the advent of major environmental liability for property owners, California courts should not preclude claims against the responsible party (seller) merely because it appears the purchaser may have been aware of the contamination at the time of sale. As the decision in *Beck* failed to realize, important policy objectives favor some form of continued nuisance liability for former owners even where they establish that the subsequent purchaser was aware of the contamination at the time of sale. Foremost among these policy concerns is that a purchaser of land prior to the enactment of comprehensive environmental laws such as CERCLA would have been unaware of the scope of liability assumed by accepting the contaminated condition of the property. Because it is also true, however, that a seller who made the purchaser aware of the contamination at the time of sale should not be treated the same as another who actively hid the presence of contamination, such sellers should not face liability for the loss in rental value or diminution in value of the land. Rather, these former owners should only remain liable for contribution to

the costs of cleanup. Such a compromise both furthers the goal of holding responsible parties liable for contamination and allows nuisance law to survive as a means of addressing environmental contamination for parties who are precluded from bringing statutory claims.