"TANKS FOR THE MEMORIES:"[1] ABANDONING CAVEAT EMPTOR FOR THE TRANSFERS OF RESIDENTIAL PROPERTY CONTAMINATED WITH PETROLEUM FROM LEAKING UNDERGROUND STORAGE TANKS

INTRODUCTION

The purchase of a house is more than a transaction in fungible goods. It embodies emotional commitment to a new home and aspirations of security and privacy within the ownership of four walls, a floor beneath your feet, and a roof above your head. The transaction is time consuming, expensive, and legally complicated. Unfortunately, land sale transactions are governed by caveat emptor, a doctrine by which the buyer accepts liability for defects in the absence of an agreement.[2] Fortunately, there is a trend in the courts and state legislatures to restrict the application of caveat emptor to protect innocent buyers from unfair liability.[3] The trend, however, has focused on commercial and industrial real estate purchasers, and has not come far enough to protect residential property buyers from acquiring properties contaminated with petroleum from leaking underground storage tanks (USTs).

This Note addresses the problems of assigning liability and rescinding residential property transfer agreements when both the buyer and seller learn of petroleum contamination after an inspection clause has expired, but before the closing.[4] The author believes that the buyer should not be forced to accept title to a contaminated property if the buyer has been diligent in performing an inspection.[5]

Part I explains why residential USTs are a problem and why a buyer is not likely to learn of their existence. Part II presents a discussion of different mechanisms of land sale contract rescission including the inspection clause, and the common law remedies of mistake of fact, frustration, fraud, and unmarketable title. The author discusses the deficiencies of each mechanism as they are presented. In addition, the author identifies statutes which protect buyers from acquiring contaminated properties, and state disclosure requirements which educate buyers about property conditions so that they may

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1. Jim Mayer, *Old Tank Proves Hazardous to Sale of Land Park Home*, SACRAMENTO BEE, April 24, 1993, at B1 (quoting Joan Clark of Sacramento, California, regarding the experience of removing a leaking underground storage tank from her home prior to sale).

2. *See* RESTATEMENT (SECOND) OF TORTS § 352 cmt. a (1965). "Under the ancient doctrine of caveat emptor . . . in the absence of an express agreement, the vendor of land [is] not liable . . . for the condition of the land existing at the time of transfer." *Id.*

3. *See* Johnson v. Davis, 480 So. 2d 625, 628 (Fla. 1985).

4. This Note does not address deed warranties or other means by which the buyer may recover from the seller after the closing.

5. If the buyer accepts the property "as is," then the author believes he has not been diligent researching potential environmental problems.

make more informed real estate purchasing decisions. Part III presents Margaret Radin's theory of "Property as Personhood" and how the author believes this theory should be applied to reverse caveat emptor for residential transactions.[6] The author concludes that residential property sellers should affirmatively declare the presence or absence of USTs to reverse unequal bargaining positions. Even when the seller did not contribute to the contamination, between two equally innocent parties, the seller should bear the burden, and the buyer should be released from the Purchase and Sales (P&S) Agreement.

The following hypothetical case outlines the inequity in current residential property law where the buyer does not accept the property "as is," but inspects the property prior to purchase.[7] In this case, the buyer has earned money to purchase a home, has spent time finding the home and researching the neighborhood, and has made the emotional and physical break from his current residence to move into a new one. He approaches the seller to inquire about the condition of the property. The seller has lived in the house for the past twenty years. The seller states that the home is cool in the summer and, since the entire neighborhood switched over to natural gas twenty-five years ago, the home is warm in the winter. The seller further states that the home may need some new siding, and the floors may need resurfacing, but otherwise, it is in excellent condition. He knows of no defects that would materially affect the value of the home. The buyer believes the seller, but wants to bring in a professional to inspect the home for defects.

The buyer and the seller sign a P&S Agreement which contractually binds their intent to buy and sell the property, respectively. The buyer gives the seller a ten percent down payment. To accommodate the buyer's concern about defects, the agreement contains an inspection clause which allows the buyer to have the property inspected. The agreement allows the buyer to rescind the contract and regain his down payment if the inspection identifies material defects in the property. The buyer has two weeks to conduct the inspection, after which the inspection clause expires. The sale will be final when the seller transfers title to the property at the closing, which is a mutually agreed upon time some weeks or months later.

The buyer has the property inspected and the inspector does not identify any material defects. Days pass and the inspection clause expires. A few days

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6. Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

7. The author identified no cases where a residential property buyer found petroleum contamination after signing a P&S Agreement. This is not surprising because a residential property buyer is financially strapped when he purchases the home and is probably mortgaging the property in order to afford it. It is not likely that the buyer would have funds to bring a lawsuit through an appeal. Since written opinions are typically only issued for cases on appeal, it is unlikely that any residential petroleum contamination lawsuit opinions would be written.

later, the buyer and seller learn that the property is contaminated with heating oil from an on-site leaking UST that predates the extension of natural gas pipelines to the area.[8] The buyer and seller learn that heating oil has leaked around the outside walls of the basement and that the house must be demolished at a cost of about $200,000; removal of 420 tons of contaminated soil is also required.[9]

Between the buyer and seller, two equally innocent parties, who should assume responsibility for the clean-up? Would it be equitable to force the buyer, who does not yet hold title, to accept the property when he could not have contributed to the contamination? Why should caveat emptor apply? Under this hypothetical case the buyer cannot rescind the P&S Agreement, and must accept title to the contaminated property with all its liabilities because the inspection clause has expired, and current property law favors the seller.[10]

This outcome is inefficient and inequitable. Why drag an additional party into the clean-up of a property? Why force a party who did not contribute to the contamination, who does not yet have title to the property, and who has not benefited from the property, to contribute funds to the clean-up effort? Finally, why treat the purchase of a home the same as any other business transaction when the home is not a fungible good, but rather embodies individual security and privacy? The law is already shifting away from "buyer beware" to requiring seller disclosures.[11] This shift, however, is not sufficient to protect the buyer in the hypothetical case. More is required.

I. WHY RESIDENTIAL USTS ARE A PROBLEM

Residential USTs create problems because they are typically unregistered, their contents are flammable and dangerous to human health, and they corrode and their contents leak over time. Further, small amounts of petroleum can impose disproportional amounts of liability.

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8. The parties could learn of the contamination in a number of ways: the seller could notice a furnace malfunction as water entered a broken fuel line; neighbors could identify a petroleum odor in their drinking water; the seller could notice a petroleum sheen on ponded water on the property after a heavy rainfall; or a contractor could find the contamination when pumping out and inspecting the home's septic tank.

9. *See* Andrew Blake, *Coalition Trying to Postpone New Oil-Tank Charges*, BOSTON GLOBE, Aug. 28, 1994, at 1 (providing a factual situation from news story, although owner had possession of home for six months before contamination was identified).

10. *See infra* notes 45-153 and accompanying text.

11. *See* discussion *infra* Part II.F.

A. Residential USTs Are Not Registered

The typical residential UST does not need to be registered. Congress enacted subtitle I of the Resources Conservation and Recovery Act (RCRA) of 1976 to regulate USTs.[12] RCRA defines an UST as a tank and its piping, of which at least ten percent is below ground, and which is used to store a regulated substance.[13] A large number of USTs are exempt from RCRA registration requirements. For example, RCRA does not require the registration of USTs used to hold heating oil for on-site consumption.[14] RCRA also does not regulate farm or residential USTs with a capacity of less than 1100 gallons used to store motor fuels (i.e., gasoline or diesel fuel) for non-commercial purposes.[15] Although approximately 1.8 million USTs are registered with the federal government, approximately 3 million USTs are not listed in federal or state databases because they fall under the exempted categories.[16]

The rationale behind exempting residential USTs is that homeowners have both limited technical expertise and financial resources to comply with federal registration regulations.[17] Also, it would be an administrative nightmare to register every residential UST in the country.[18] This job would fall mainly on northeastern states because, although only twelve percent of American homes are heated by fuel oil, seventy-five percent of these are located in the northeast.[19]

Under RCRA, a residential property buyer is less likely than a commercial or industrial property buyer to learn of the current or former presence of USTs on a property. Buyers of commercial and industrial properties are given constructive notice of USTs because the USTs at such properties must be registered, unless they contain fuel oil for on-site heating.[20] Residential property buyers are not given this constructive notice because,

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12. *See* Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6991-6991(I) (1994).

13. *See id.* § 6991(1).

14. *See id.* § 6991(1)(B).

15. *See id.* § 6991(1)(A)-(B). Eleven hundred gallons is also the threshold capacity for UST registration in Vermont. *See* VT. STAT. ANN. tit. 10, § 1928 (1996).

16. *See Underground Storage Tanks: Biggest Pollution Threat of All*, WASH. BUS. J., July 27, 1992. [hereinafter *Biggest Pollution Threat*].

17. *See id.*

18. *See, e.g.*, Ann McGuire, *Town News: Granby Selectmen Mired in Plans for Regulating Fuel Line & Tanks*, HARTFORD COURANT, Sept. 5, 1995, at B1. The City of Granby, Connecticut attempted to pass a registration ordinance, but it encountered too much resistance and too many complications. The city could not identify an economically feasible way to pay for and distribute registration forms, determine how to get the data into an accessible data bank, or detect those who don't comply. *See id.*

19. *See Cable News Network Headline News*, (CNN television broadcast, Oct. 18, 1996).

20. *See* 42 U.S.C. § 6991(1)(B); *see also Biggest Pollution Threat*, *supra* note 16.

barring the presence of a motor fuel UST used for commercial purposes that is greater than 1100 gallons, there will be no record of the UST in state or federal registration databases.[21] Further, in states where seller disclosure is required, the seller must only reveal the presence of any *known* UST.[22] Thus, residential property buyers will not learn of an on-site UST through registration databases, and they may not learn of an UST's existence through a disclosure statement.

A local registration ordinance would also not help the buyer in the hypothetical case. If the current owner/seller does not know an UST exists on the property because the UST predates the owner/seller's purchase, then the owner/seller will not know to register it, and the buyer will not be informed that an UST exists on the property. Additionally, in some circumstances, soil or groundwater contamination may remain even though the UST was removed by a prior owner.[23] In both situations, the buyer who finds the leaking UST or contamination from a former UST after signing a P&S Agreement, absent fraud, cannot void the transaction.[24]

B. Small Amounts of Petroleum Are Dangerous and Create Disproportional Liability

The typical contents of residential USTs are dangerous substances which can contaminate well water and produce noxious and explosive fumes in septic tanks, sewers, and basements.[25] Residential USTs exempt from registration contain heating oil (fuel oil) and less than 1100 gallons of motor fuel (gasoline or diesel fuel).[26] Heating oil is a combustible clear brown petroleum distillate which is a liquid at room temperature.[27] It usually contains trace amounts of hydrogen sulfide.[28] Acute exposure affects the central nervous system and causes skin irritation in humans.[29] Chronic skin

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21. *See id.*
22. *See* discussion *infra* Part II.F.
23. *See* discussion *infra* Part I.B.
24. *See* discussion *infra* Part II.D.
25. *See* Jeffrey Steele, *Your Place: Buried Trouble Detecting and Removing Underground Storage Tanks*, CHICAGO TRIB., Oct. 14, 1994, at 3; *see also* U.S. ENVTL. PROTECTION AGENCY, OFFICE OF UNDERGROUND STORAGE TANKS, Pub. No. EPA/530/UST-88-008, MUSTS FOR USTS 2 (July 1990) [hereinafter MUSTS FOR USTS].
26. *See* 42 U.S.C. § 6991(1)(A)-(B).
27. *See* CANADIAN CENTRE FOR OCCUPATIONAL HEALTH & SAFETY, MATERIAL SAFETY DATA SHEET FOR TEXACO BRAND FUEL OIL (1995) [hereinafter FUEL OIL MSDS].
28. *See id.*
29. *See id.*

exposure to fuel oil also causes skin cancer in mice.[30] Acute exposure by ingestion in mice is lethal.[31]

Gasoline is a petroleum distillate which is an extremely flammable liquid at room temperature.[32] Its vapor is also highly flammable.[33] Gasoline contains benzene, toluene, ethylbenzene, and xylene (BTEX) as well as polycyclic aromatic hydrocarbons (PAHs), which are known carcinogenic compounds.[34] Diesel fuel is a petroleum distillate with a chemical weight between the fuel oil and gasoline range of organics, and a similar mix of hazardous and carcinogenic components.[35]

Small amounts of petroleum can create a large amount of liability. Approximately fifty percent of the United States uses groundwater as its primary drinking water supply,[36] and one gallon of gasoline can contaminate the drinking water supply of 50,000 people.[37] Some rural areas may not have an alternate drinking water supply, and if a residential tank contaminates groundwater in these areas, many neighbors are likely to sue the tank owner to provide an alternate source of drinking water. Thus, the buyer may have liability for on-site remediation as well as liability for off-site contamination of drinking water supplies for UST leakage of less than one gallon.

C. Many USTs Fail

USTs were first installed in this country around 1920,[38] and approximately ten to twenty percent of homes built between 1920 and 1950 still have heating oil tanks.[39] Most residential USTs are constructed of steel and fail after fifteen to twenty years due to corrosion.[40] Thus, a large number of tanks installed prior to 1980 have likely failed. The United States Environmental Protection Agency (EPA) estimates that twenty-five percent

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30. *See id.*

31. *See id.*

32. *See* CANADIAN CENTRE FOR OCCUPATIONAL HEALTH & SAFETY, MATERIAL SAFETY DATA SHEET FOR TEXACO BRAND UNLEADED REGULAR GASOLINE (1992) [hereinafter GASOLINE MSDS].

33. *See id.*

34. *See id.*

35. *See id.*

36. *See* MUSTS FOR USTS, *supra* note 25, at 1.

37. *See* M. ITALIANO, LIABILITY FOR UNDERGROUND STORAGE TANKS 3 (1987).

38. *See* Steele, *supra* note 25.

39. *See id.* Some of these tanks may be in the basements of homes and thus, not considered USTs. *See id.*

40. *See* Underground Storage Tank Technical Requirements, 52 Fed. Reg. 12,664 (1987). Tank failure from corrosion varies with the presence of water, cathodic protection, wall thickness of the tank, and acidity of soils. However, 15 to 20 years is the typical failure time for steel USTs with no corrosion protection. Most residential USTs do not have corrosion protection. *See id.* at 12,666-67.

of *registered* USTs are leaking.[41] This estimate is probably accurate for unregistered residential tanks as well, especially since some have been buried for seventy years.[42] Leaking tanks can contaminate drinking water supplies and require the destruction of an entire home.[43] With between 7.5 and 8.5 million residential properties sold each year,[44] a large number of buyers could be purchasing homes with leaking USTs.

II. MECHANISMS OF LAND SALE CONTRACT RESCISSION

The prevalence of USTs and the dangerousness of their contents, coupled with the difficulty of identifying their presence, should compel courts or legislatures to craft contract rescission mechanisms for leaking residential USTs. This Part describes six contract rescission mechanisms afforded to real estate purchasers, although not exclusively to residential property buyers: P&S Agreement inspection clauses, mistake of fact, fraud, frustration, unmarketable title, and state statutory provisions. All of these mechanisms negate caveat emptor and could allow a buyer to rescind or renegotiate a land sale contract. Thus, a buyer could avoid the liability of petroleum contamination if he could use one of these mechanisms to rescind the land sale contract. Unfortunately, these mechanisms do not protect all residential property buyers who discover soil or groundwater contamination from a leaking UST.

A. The P&S Agreement Inspection Clause

The general but changing rule in real estate transactions is caveat emptor.[45] Most residential P&S Agreements embody caveat emptor by requiring the buyer to accept the property "as is." "Use of an 'as is' provision

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41. *See* MUSTS FOR USTS, *supra* note 25, at 2.

42. *See* Steele, *supra* note 25.

43. *See* Blake, *supra* note 9.

44. *See Market Radar*, 1 ENVTL. SITE ASSESSMENT REP. (Envtl. Data Resources, Inc.), Apr., 1996, at 2.

45. *See* Johnson v. Davis, 480 So. 2d 625, 628 (Fla. 1985) (stating that the "tendency of the more recent cases has been to restrict rather then extend the doctrine of caveat emptor"). Courts have not, however, abandoned caveat emptor. For example, in *In re Schenck Tours*, the buyer could not rescind his sales contract despite the presence of hazardous waste on the property. *See In re* Schenck Tours, 69 B.R. 906, 907-08 (Bankr. E.D.N.Y. 1987). On the other hand, the seller could not require specific performance because the sales contract stipulated that the seller's sole and exclusive remedy was retention of the buyer's down payment. *See id.* Thus, the buyer did not have to take possession of the contaminated property. Unfortunately, the buyer did lose his ten percent down payment of $255,000. *See id.* The outcome of *In re Schenck Tours* is disturbing because the buyer would have acquired the contaminated property, but for the exclusive remedy clause.

in a real estate sales contract is generally intended to negate the existence of any warranty as to the particular fitness or condition of the property."[46] Under this principle, a buyer could not rescind a P&S Agreement if he identified a leaking UST on the property unless he and the seller had contracted around the "as is" provision, or the seller acted fraudulently.[47]

1. Protection Under the Inspection Clause

A P&S Agreement inspection clause provides some protection to the buyer from accepting a property "as is." The inspection clause allows the buyer to inspect for defects which could reduce the property's value and limit its future use. The wording of the inspection clause ultimately determines how much protection the buyer receives. The inspection clause may only cover structural or mechanical defects, however, the clause may be more generous and cover environmental or health related defects as well. The parties could always negotiate an inspection contingency to cover USTs. Most people, however, are not aware that USTs pose problems.

The language of the inspection clause must provide the buyer's remedy, should an engineer find a defect. If the seller identifies defects before the inspection clause expiration date, the parties can allocate the risk by either rescinding the agreement, renegotiating the sale price to accommodate the defect, or indemnifying the buyer from liability associated with the defect.

2. Practical Application Makes the Inspection Clause Illusory

At first glance, the insertion of an inspection clause into the P&S Agreement appears to solve most of the buyer's problems identifying abandoned USTs and associated soil or groundwater contamination. Practically applied, however, inspection clauses are not useful for identifying such problems because they are not meant to identify subsurface contamination, and there are usually no signs that contamination is present on the surface.[48]

The inspector hired by a home buyer is a civil, mechanical, or structural engineer. For about $300, these engineers will conduct a "walk-through" of the home; they will not conduct intrusive work.[49] For example, if the

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46. Bryant v. Willison Real Estate Co., 350 S.E.2d 748, 752 (W. Va. 1986).

47. *See* discussion *infra* Part II.D.

48. Unless otherwise noted, Mr. Geoff Back, Vice President, and Lewis Beardsley, Environmental Engineer of ICF Kaiser Engineers, Inc., Fairfax, Virginia, provided the author with technical and cost-estimate information [hereinafter Back & Beardsley].

49. *See* CRITERIUM-LALANCETE ENGINEERS, COMPREHENSIVE BUILDING INSPECTION SERVICES BY PROFESSIONAL ENGINEERS (1994) (stating that their "building evaluations are based on visual evidence

inspector saw dust in a corner, he might recommend you have the home inspected for carpenter ants. If the buyer asked if the septic tank was operating properly, the inspector would look to see if the leach field were discharging to the surface.[50] However, instead of opening the septic tank and intrusively inspecting it himself, the inspector would recommend that the buyer have the septic tank pumped out and inspected.[51] The inspector will not conduct intrusive sampling or laboratory analyses to assess the presence or absence of contamination below the surface of the property.[52]

It is also not economically practical for a residential property buyer to retain an environmental specialist to inspect the property, even though such an individual could identify soil and groundwater contamination. A non-intrusive environmental assessment of a residential property costs approximately $1500.[53] This type of assessment identifies *potential* contamination at a site. However, the presence, concentrations, and lateral extent of contamination cannot be identified without intrusive sampling, which can cost an additional $3500-$5000.[54] An intrusive assessment is not economically practical for a home purchaser who has so many other closing costs.

There was hope when, in the summer of 1993, the American Society for Testing & Materials (ASTM) released an environmental assessment screening protocol for residential property.[55] Consulting firms charge only between $750 and $1000 to conduct this new type of assessment. The ASTM protocol,

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reasonably available during our inspection"). "Intrusive" is defined as anything beyond a visual inspection. *See* Telephone Interview with Prescilla Foster, Administrative Assistant, Criterium-Lalancete Engineers, Rutland, Vt. (Jan. 16, 1997).

50. *See* Telephone Interview with Prescilla Foster, *supra* note 49.

51. *See id.*

52. *See id.* There is a chance that the inspector may identify the presence of an abandoned UST through a visual inspection. The UST's vent pipe or fill port may remain aboveground. However, this is extremely speculative because it assumes the vent pipe or fill port has not corroded away or been removed. It also assumes that there is no snow, leaves, or other items obstructing the view during the inspection.

53. *See* H. Glenn Boggs, *Real Estate Environmental Damage, The Innocent Residential Purchaser and Federal Superfund Liability*, 22 ENVTL. L. 977, 984 (1992). This estimate includes an environmental database search, review of historical Sanborn Fire Insurance Maps and construction and renovation plans filed with the local building department, a visual (non-intrusive) inspection of the property, interviews with current and former owners/employees of the property and local regulatory agency officials, asbestos and radon sampling and analysis, and analysis of drinking water samples for dissolved lead. *See* Back & Beardlsey, *supra* note 48.

54. *See* Boggs, *supra* note 53, at 984. This estimate assumes the buyer will conduct subsurface soil and groundwater sampling using a GeoProbe rig with one geologist on-site, soil and groundwater field screening for total petroleum hydrocarbons (TPH), and off-site laboratory analyses for some samples. *See* Back & Beardsley, *supra* note 48.

55. *See* American Society for Testing & Materials (ASTM), Transaction Screen Standard E 1528-93 (1993); *see also Low Cap Loans: An Emerging Market*, 1 ENVTL. SITE ASSESSMENT REP. (Envtl. Data Resources, Inc.), Sept., 1996, at 1.

however, is an environmental checklist which can be completed by anyone and does not include intrusive sampling.[56] Unfortunately, there is little value in the ASTM protocol other than identifying areas of *potential* contamination.[57]

3. Most Buyers Do Not Know to Look for USTs

Even if a buyer could afford to hire an environmental consultant, most buyers probably would not think to do so. Most buyers are concerned with the condition of the home first, then with issues such as the location of the nearest public transportation or the quality of the local school system. If the buyer is environmentally conscious, he is likely to request information about the presence of lead paint, asbestos, radon, or dissolved lead in the drinking water, all of which are easily and inexpensively identified.[58] The buyer is not likely to be aware that abandoned USTs and petroleum contamination are potential problems with residential property, unless a real estate broker disclosure form requires the seller to list their potential presence.

Inspection clauses are somewhat helpful if the contamination and UST can be visually identified without intrusive work. The ASTM residential screening protocol is equally helpful under such circumstances. Further, both types of inspections educate the buyer about potential contamination issues at the property even when contamination is not visible. However, both inspection clauses and the ASTM screening protocol are flawed because they do not indicate actual presence or absence of contamination. Regardless, the buyer is in a better position to have these inspection and screening tools because they provide limited inexpensive education and, thus, limited protection for the buyer. They fall short, however, of providing the buyer with guaranteed protection from unwanted liability.

B. Mistake of Fact

In the hypothetical case, both the buyer and seller first learned of the contamination after the expiration of the inspection clause, but before the closing.[59] Although it would seem equitable to allow the buyer to rescind the P&S Agreement based on this material defect, since both parties were

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56. *See* ASTM, *supra* note 55.

57. *See id.*

58. *See, e.g.*, Vt. Dept. of Health Lab., Water Testing Order Form (May 1995) (on file with the author). An owner can identify each of these materials through inexpensive home testing kits. *See id.* The Vermont Department of Health provides radon detectors free, lead-paint testing for $30, and dissolved lead in drinking water testing for $20. *See id.*

59. *See supra* INTRODUCTION.

mistaken about the property condition when they signed the agreement, the common law defense of mistake of fact is limited to egregious environmental contamination.

A mistake of fact is a mutual "belief that is not in accord with the facts,"[60] which must have been present at the time the agreement was executed,[61] and is "material and fundamental so as to defeat the object of the contract."[62] Examples of material defects include: the presence of soil and groundwater contamination from leaking USTs at a gasoline station with remediation costs of between $100,000 and $1,000,000;[63] a defective on-site septic system which rendered a multi-tenant apartment complex purchased for rental income, uninhabitable;[64] the presence of subsurface fill material on an undeveloped lot slated for development, which prevented the site from passing a percolation test;[65] and the presence of chlordane (pesticide) soil contamination requiring $50,000 in remediation for a $325,000 residential home.[66]

Once the parties show a mutual mistake of fact, however, the court may use its discretion to determine whether to rescind the contract.[67] Courts determine whether to rescind the contract based on which party assumed the risk of unforeseen events. In most cases, if the contract provides that the buyer will take the property "as is" without an inspection clause contingency, the court will allocate the risk to the buyer.[68] Thus, even if both parties were ignorant of a defective septic system or environmental contamination, if the parties agreed to an "as is" contract, the court will probably place the burden of loss on the buyer and refuse to rescind the contract.

The outcome could be identical for parties who have inspection clauses in their P&S Agreement. Courts refuse to find a mistake of fact when the buyer examined and is familiar with the property's physical condition, and the seller made no representations regarding the same.[69] Thus, if the parties had an inspection clause *and the inspector reports that there are USTs on the*

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60. RESTATEMENT (SECOND) OF CONTRACTS § 151 (1981).

61. *See* Garb-Ko, Inc. v. Lansing-Lewis Servs., Inc., 423 N.W.2d 355, 357 (Mich. Ct. App. 1988).

62. Copland v. Nathaniel, 624 N.Y.S.2d 514, 518 (1995).

63. *See Garb-Ko*, 423 N.W.2d at 358.

64. *See* Lenawee County Bd. of Health v. Messerly, 331 N.W.2d 203, 205 (Mich. 1982).

65. *See* Atkins v. Kirkpatrick, 823 S.W.2d 547, 551, 553 (Tenn. Ct. App. 1991). The local government requires a successful percolation test to install a septic system. *See id.*

66. *See Copland*, 624 N.Y.S.2d at 517-18.

67. *See Garb-Ko*, 423 N.W.2d at 356.

68. *See Lenawee County Bd. of Health*, 331 N.W.2d at 211 (stating that "[i]f the 'as is' clause is to have any meaning at all, it must be interpreted to refer to those defects which were unknown at the time that the contract was executed").

69. *See generally In re* Schenck Tours, 69 B.R. 906 (Bankr. E.D.N.Y. 1987).

property, the buyer who accepts the deed to the property has assumed the risk that those tanks might have leaked.

But what should happen to the buyer in the hypothetical case who has an inspection conducted that reveals no current or former USTs, yet petroleum contamination is identified before closing?[70] Has the buyer assumed the risks under those conditions? Has the buyer been negligent in reasonably attempting to identify potential contamination on the property? Is the buyer getting what he bargained for? The answer to these questions is "No," and the defense of mistake of fact should apply under the facts of the hypothetical case.

It is unclear how a court would respond to a mistake of fact defense in the hypothetical case. The mistake of fact of a leaking UST easily satisfies the first two parts of the mistake of fact definition: the mistake was not "in accord with the facts,"[71] and the leaking UST was present at the time the contract was executed.[72] The third element, however, poses a problem because no court has quantified the contamination necessary to "defeat the objective of the contract."[73] The buyer's objective is to purchase a habitable home and avoid bankruptcy from defending law suits filed by contaminated neighbors. These objectives could be defeated by a large or small amount of contamination.

The *effects* of the contamination should determine whether mistake of fact applies to residential petroleum contamination. For example, one gallon of gasoline can contaminate the drinking water supply of an entire town.[74] If the neighborhood uses groundwater as its potable water supply, the buyer may find himself in an uninhabitable house with the neighbors suing for an alternate source of drinking water. That same gallon would have little effect on a home connected to a municipal water supply.

On the other hand, a home with a municipal water supply may have to be demolished as the result of a large petroleum release, even though the water is safe to drink. For example, the petroleum could leak around the basement walls, fill the house with noxious vapor, and require the demolition of the home and excavation of contaminated soil. If the buyer is not able to live in the home or would expend more than the fair market value of the home defending law suits, then the mistake of fact should be sufficient to rescind the contract. It is unclear how courts would handle this issue consistently. A better and more consistent method, other than mistake of fact, is required to protect the buyer.

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70. *See supra* INTRODUCTION.
71. RESTATEMENT (SECOND) OF CONTRACTS § 151 (1981).
72. *See Garb-Ko*, 423 N.W.2d at 357.
73. *Copland*, 624 N.Y.S.2d at 518.
74. *See* ITALIANO, *supra* note 37, at 3.

C. Supervening Frustration

Discharge by supervening frustration is another mechanism of contract rescission available to the buyer. The frustration doctrine is outlined in the *Restatement (Second) of Contracts* § 265:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate to the contrary.[75]

Courts will allow frustration of a land sale contract when three conditions are met: (1) an unanticipated event occurs; (2) the risk of the unanticipated event was not allocated in the contract; and (3) both parties could perform the contract, but as a result of the unanticipated event, performance by one party would prevent the other party from getting the item which induced him to enter into the contract in the first place.[76] "In essence, then, excuse of performance by reason of . . . frustration represents a judicial allocation of risk, recognizing and enforcing what can reasonably be inferred to be the intent of the parties at the time of the contract."[77]

The most significant element of the three part test is foreseeability or assumption of the risk.[78] If the occurrence is foreseeable and one party assumed the risk, the court will not rescind the contract.[79] In such instances, the court will assume the parties could have prepared a contingency for the event, thus, no frustration occurred.[80]

Courts are not receptive to a buyer's presence-of-contamination argument to void P&S Agreements under the frustration doctrine.[81] For example, in *In re Schenck Tours, Inc.*, an industrial property buyer sought the return of his $255,000 down payment after he learned of "serious environmental problems and potential cleanup costs equal to the contract purchase price" of $2.5

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75. RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

76. *In re Schenck Tours*, 69 B.R. at 911 (relying on United States v. General Douglas MacArthur Senior Village, Inc., 508 F.2d 377 (2d Cir. 1974), to expand upon the theory of commercial frustration.) The author would argue that it need not be commercial to allow for relief.

77. *Id.*

78. *See id.*

79. *See In re* North Broadway Funding Corp., 6 B.R. 133, 135 (Bankr. E.D.N.Y. 1980).

80. *See id.*

81. *See General Douglas*, 508 F.2d at 381 (denying corporations frustration claim against municipality); Megan v. Updike Grain Corp., 94 F.2d 551, 553 (8th Cir. 1938) (denying frustration because leased grain elevator was not totally destroyed and tracks could still carry trains to the property).

million.[82] In addition, the buyer feared lawsuits arising from migration of contamination off-site.[83] The property had been an automotive maintenance facility for approximately fifty years.[84] The buyer claimed that the serious decrease in value of the property caused by the contamination, the associated liability, and the cost to remediate the site frustrated his purpose to enter the contract.[85]

The court believed, however, that the contamination was foreseeable.[86] Unwilling to apply the frustration doctrine, the court refused to rescind the contract and force the seller to return the buyer's down payment.[87] The court opined that because the seller had operated a public transportation repair and refueling facility at the site for fifty years, "[t]he existence of subsurface contamination . . . was *clearly* foreseeable and [the buyer] was surely aware of that possibility."[88]

It is not clear whether petroleum contamination from a leaking UST would frustrate the purpose of purchasing a home because although the first and third elements of the doctrine are easily proven, satisfying the second element is problematic. In the hypothetical case, heating oil leaked around the outside walls of a basement, and the buyer had to demolish his home at a cost of about $200,000 and dispose of 420 tons of contaminated soil at additional cost. In that situation, the first element of the frustration doctrine is satisfied because the unanticipated event occurred when both parties learned of the contamination after the expiration of the inspection clause. The second element of the defense is more problematic. Under the hypothetical case, the seller will claim that the risk of the environmental contamination was allocated to the buyer through the inspection clause; the risk was mitigated by the inspection. The buyer, however, did not accept the risk because, in the absence of exceptional circumstances, a non-intrusive building inspection can not identify subsurface petroleum contamination.[89]

Finally, the buyer can satisfy the third element of the frustration doctrine because, although both parties could perform the contract despite the unanticipated event of identifying the contamination, the buyer would not receive a habitable property if he performed the contract. The buyer would

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82. *In re Schenck Tours*, 69 B.R. at 911-12. The seller could not require specific performance of the contract because the P&S Agreement provided the seller with the exclusive remedy of retaining the buyer's down payment. *See id.* at 908.

83. *See id.* at 911-12.

84. *See id.* at 908.

85. *See id.* at 912.

86. *See id.* at 913.

87. *See id.*

88. *Id.* at 912 (emphasis added).

89. *See supra* notes 48-52 and accompanying text.

also likely pay more for clean-up and home reconstruction than the original contract because it is more expensive to remove and dispose of contaminated soil, and demolish and rebuild a home, than move into an existing, uncontaminated residence. It would clearly be equitable to extend this doctrine to the transfer of petroleum contaminated residential property.

In a typical residential property transfer, the purpose of entering into the contract is frustrated when unforeseeable remediation costs comprise a large percentage of the contract sale price. Courts should allow rescission of contracts under such circumstances. Thus, a buyer who contracts to purchase a site where hazardous substances have *never been used*, but learns before closing that the property is contaminated, should be permitted to rescind the P&S Agreement. To require him to do otherwise would be inequitable.

The answer to how much contamination and associated liability should frustrate a land-sale contract is elusive. The plaintiff in *In re Schenck* implied that when the contract price is equal to or less than the remediation and liability costs, frustration occurs.[90] But what is the threshold, which, when surpassed, frustrates a contract? Should the contract be frustrated if the property is sold for $100,000 but it will cost $10,000 to remediate the contamination?

Although a court could determine a threshold requirement, it is unclear how the courts would handle this analysis. It would be better for the legislature to create a blanket protection for residential property buyers rather than limit contract rescission to extreme cases of contamination.

D. Fraud

A buyer may rescind the P&S Agreement if the seller or his agent acted fraudulently when disclosing property contamination.[91] Courts assess whether to rescind a contract for fraud by determining what the seller knew at the time of the signing; actual notice rather than constructive notice is required.[92] For example, in *Gopher Oil Co. v. Union Oil Co.*, although the seller informed the buyer that 10,000 gallons of turpentine and 300 gallons of oil had spilled on the property, he fraudulently assured the buyer on three separate occasions that no contamination remained on the property.[93] Although the buyer conducted an inspection of the property, he could not identify contamination because the seller hid it from view by deliberately covering the contaminated

90. *See In re Schenk Tours*, 69 B.R. at 911.
91. *See* Gopher Oil Co. v. Union Oil Co., 955 F.2d 519 (8th Cir. 1992).
92. *See id.* at 527.
93. *See id.* at 523.

areas with gravel.[94] The buyer was able to rescind the contract because the seller purposefully concealed the contamination.[95]

In contrast, the seller in the hypothetical case did not act fraudulently. Although the seller knew that his home used fuel oil twenty-five years earlier—before the extension of natural gas pipelines to the area—the seller was ignorant of the contamination beneath his home. Thus, even if the seller should have known about the former presence of an UST, the buyer cannot use fraud as a defense because the seller did not have actual knowledge. However, it is important to remember that if a seller does act fraudulently by concealing the presence of an UST, the buyer will probably be able to rescind the P&S Agreement or at least renegotiate the contract price. Fraud will begin to play a more important role in P&S Agreement rescission as more states pass statutes which require sellers to disclose the presence of radon, asbestos, lead paint, and USTs.[96]

E. The Marketable Title Doctrine

A buyer may rescind the P&S Agreement if the seller cannot convey marketable title. Marketable title to real estate is title which is free from encumbrances and any reasonable doubt as to its validity which a person "guided by competent legal advice, would be willing to take and for which they would be willing to pay fair value."[97] Marketable title is based on the notion that a real estate buyer should not purchase a law suit when he buys the property. While the mere possibility of a law suit will not void marketable title, increased probability will.

Marketable title is implied in every real estate contract.[98] Therefore, a buyer may rescind the P&S Agreement if the seller does not have marketable title to the property even if the P&S Agreement is silent regarding marketable title.[99] The seller, however, need not have marketable title when signing the P&S Agreement. With few exceptions, the seller need only present marketable title at the closing.[100] Thus, a seller may use the time between the P&S Agreement signing and the closing to cure defects in the title.[101]

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94. *See id.* at 522-23.

95. *See id.* at 527.

96. *See* discussion *infra* Part II.F.

97. Seligman v. First Nat'l Inv., Inc., 540 N.E.2d 1057, 1060 (Ill. 1989).

98. *See* RALPH E. BOYER, SURVEY OF THE LAW OF PROPERTY 381 (3d ed. 1981).

99. *See* LaSalle v. LaPointe, 102 A.2d 761 (N.J. 1954).

100. *See* BOYER, *supra* note 98, at 383. If the parties have contracted otherwise, or the property is mortgaged, the buyer may rescind without waiting for the closing. *See id.*

101. At closing, the contract merges with the deed. The buyer is no longer able to sue the seller on promises contained in the contract which are not contained in the deed because the deed supersedes the contract. *See* BOYER, *supra* note 98, at 382.

Many types of defects void marketable title. Some of these include reserved and unexcepted rights to enter and mine on the property,[102] superior title vested in a third party,[103] existence of restrictive covenants,[104] outstanding reverter rights,[105] encumbrances (such as liens and easements) which the seller does not remedy and the buyer cannot remedy,[106] existence of easements on public property,[107] and outstanding mortgages.[108] The defect must be substantial to render the title unmarketable. The buyer may not rescind the contract for "immaterial defects which do not diminish in quantity, quality or value the property contracted for."[109] For example, a deed missing a seal or a witness' signature would be considered an immaterial defect if a number of years had passed since the recording of the deed.[110]

Although marketable title is also related to physical defects in the property, a court will not void a contract under the marketability of title doctrine for physical defects alone. For example, in *Holmes v. Alabama Title Co.*, fractures developed on property which contained an abandoned coal mine which threatened to release methane gas.[111] The landowners brought suit against the title insurance company claiming unmarketable title.[112] The court denied recovery stating that "[t]he purpose of title insurance is not to protect the insured against loss arising from physical damage to the property; rather, it is to protect the insured against defects in the title."[113] Thus, the owners had marketable title and could not recover damages from the insurance company even though they owned a physically defective property.

Further, marketable title does not encompass the property's market value, although it is related to that value. "One can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable."[114] For example, in *Hocking v. Title Insurance & Trust Co.*, the plaintiff purchased two subdivided plots of unimproved land.[115] When she attempted to develop the plots, she learned that the subdivider had not

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102. *See* Southern Title Ins. Co. v. Oller, 595 S.W.2d 681 (Ark. 1980).

103. *See* Nebo, Inc. v. Transamerica Title Ins. Co., 98 Cal. Rptr. 237, 239 (Cal. Ct. App. 1971).

104. *See* BOYER, *supra* note 98, at 382.

105. *See id.*

106. *See id.*

107. *See* Mertens v. Berendsen, 1 P.2d 440 (Cal. 1931).

108. *See* BOYER, *supra* note 98, at 382.

109. Peatling v. Baird, 213 P.2d 1015, 1017 (Kan. 1950). "If vendor's title is only slightly imperfect, equity may not rescind the contract but may require a reduction in the purchase price." BOYER, *supra* note 98, at 383.

110. *See* BOYER, *supra* note 98, at 383.

111. *See* Holmes v Alabama Title Co., Inc., 507 So. 2d 922, 924 (Ala. 1987).

112. *See id.* at 925.

113. *Id.*

114. Hocking v. Title Ins. & Trust Co., 234 P.2d 625, 629 (Cal. 1951) (quotation omitted).

115. *See id.* at 625.

complied with local ordinances.[116] As a result, the municipality refused to give her building permits and she could not develop the property.[117] She brought suit against the title insurance company claiming unmarketable title.[118] The court held that the plaintiff had no cause of action against the title insurance company because her title was not defective, even though the property's market value decreased because it could not be developed.[119]

On the other hand an encumbrance can void marketable title even though it does not affect the market value.[120] Some encumbrances include mortgages, liens, easements, and covenants.[121] For example, the court in *Rhodes v. Astro-Pac, Inc.* held that the presence of an easement for a common driveway voided marketable title even though the easement did not diminish the value of the property.[122] Thus, the buyer could rescind the P&S Agreement even though the easement did not affect the market value and there was no physical defect to the property. So how does or should contamination affect marketable title?

1. CERCLA and Updating the Theory of Marketable Title

Historically, courts have held that contamination is a defect to the land and not a defect to the title.[123] Consequently, contamination does not void marketable title. One author has argued that the doctrine of marketable title should be updated based on the 1980 passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[124] and the associated liability and possible environmental liens which follow the title of a hazardous waste-contaminated property.[125] This theory would be useful to buyers of commercial and industrial property where hazardous materials were historically used. However, the theory would not be very useful for residential property buyers because those properties are typically

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116. *See id.* at 626.

117. *See id.*

118. *See id.*

119. *See id.* at 629-30.

120. *See* J. DUKEMINIER & J. KRIER, PROPERTY 597 (3d ed. 1993).

121. *See* BOYER, *supra* note 98, at 382.

122. *See* Rhodes v. Astro-Pac, Inc., 363 N.E.2d 347, 348 (N.Y. 1977).

123. *See, e.g.*, Cameron v. Martin Marietta Corp., 729 F. Supp. 1529 (E.D.N.C. 1990); South Shore Bank v. Stewart Title Guaranty Co., 688 F. Supp. 803 (D. Mass. 1988); Chicago Title Ins. Co. v. Kumar, 506 N.E.2d 154 (Mass. App. Ct. 1987); United States v. Allied Chem. Corp., 587 F. Supp. 1205 (N.D. Cal. 1984).

124. *See* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1994).

125. *See* Pamela A. Harbeson, Comment, *Toxic Clouds on Titles: Hazardous Waste and the Doctrine of Marketable Title*, 19 B.C. ENVTL. AFF. L. REV. 355, 355-56 (1991).

contaminated by petroleum from leaking tanks[126] and the clean-up of petroleum is excluded from CERCLA liability.[127]

a. CERCLA Liability Follows the Title

Congress enacted CERCLA and authorized a Superfund of $1.6 billion to remediate contaminated sites.[128] Implemented by the EPA, CERCLA holds current and former owners of contaminated property jointly and severally liable for the remediation of hazardous wastes on their property.[129] Practically applied, the liability for clean-up follows the property title from one owner to the next. As a result, a buyer who identifies hazardous wastes after signing a P&S Agreement will be equally responsible with the prior owners and operators for the remediation costs once he acquires title to the property. The buyer will logically bring suit against the seller (as a former owner) for contribution. Thus, under CERCLA, purchasing a property contaminated with hazardous waste is equivalent to purchasing a law suit. The chance of the buyer filing a lawsuit is not a mere possibility, but rather a strong probability. Thus, the presence of hazardous waste contamination should void marketable title because the buyer would not be getting a title to a property which is free from the reasonable doubt of litigation.[130]

b. CERCLA's Petroleum Exclusion and its Effect on Marketable Title

The residential property buyer in the hypothetical case would not benefit from an expansion of the doctrine of marketable title because heating oil and gasoline contamination from leaking USTs are not covered under CERCLA.[131] Even though CERCLA applies to the remediation of hazardous substances,[132] Congress excluded petroleum from CERCLA despite its hazardous nature.[133] "The term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance . . . ."[134] Hazardous substances which are components of petroleum products are not regulated under CERCLA even

126. *See supra* notes 25-37 and accompanying text.

127. *See* discussion *infra* Part II.E.1.b.

128. *See* Hazardous Substance Superfund, 26 U.S.C. § 9507 (1994).

129. *See* 42 U.S.C. § 9607(a)(1). Other parties, such as hazardous waste generators, transporters, and disposers are also held joint and severally liable. *See id.* § 9607(a)(2)-(4).

130. *See* Harbeson, *supra* note 125.

131. *See* 42 U.S.C. § 9601(14).

132. *See id.*

133. *See* FUEL OIL MSDS, *supra* note 27; GASOLINE MSDS, *supra* note 32.

134. 42 U.S.C. § 9601(14).

though the substances by themselves would be regulated under CERCLA.[135] Petroleum contaminated soil is also not regulated under CERCLA unless the soil itself contains a regulated hazardous substance.[136] The inapplicability of CERCLA to petroleum contamination also hampers a buyer from being protected under federal environmental lien provisions.

c. Environmental Liens as Encumbrances

The possibility of the EPA attaching an environmental remediation lien to the title of a contaminated property has also been argued as another reason to update the doctrine of marketable title.[137] The presence of environmental liens, like other liens, voids marketable title.[138] Congress amended CERCLA in 1986 with the Superfund Amendments and Reauthorization Act (SARA) which gave the EPA authority to recover funds expended during remediation through a lien on the property's title.[139] The legislatures of forty-six states have passed environmental clean-up laws comparable to CERCLA.[140] Of these, approximately twenty-five have environmental lien provisions similar to SARA, with some of the liens implemented under state nuisance statutes.[141]

Courts are reluctant to void marketable title due to the presence of hazardous waste and an impending environmental lien. In both *Lick Mill Creek Apartments v. Chicago Title Insurance Co.*[142] and *Chicago Title Insurance Co. v. Kumar*,[143] hazardous wastes were present on the property and the owners were held jointly and severally liable for the remediation costs. Despite the *threat* of attachment of an environmental lien to the title of the properties, both courts concluded that the threat of a lien was insufficient to void marketable title; without a lien actually attached to the title, the hazardous waste by itself was not found to be an encumbrance on the title.[144]

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135. *See* Wilshire Westwood Ass'n. v. Atlantic Richfield Corp., 881 F.2d 801, 802 (9th Cir. 1989); *see also* Niecko v. Emro Mktg. Co., 769 F. Supp. 973, 982 (E.D. Mich. 1991) (holding that benzene, toluene, ethylbenzene, xylene (BTEX) and lead in gasoline are excluded from CERCLA).

136. *See* Southern Pacific Trans. Co. v. California, 790 F. Supp. 983, 986-87 (C.D. Cal. 1991).

137. *See* Harbeson, *supra* note 125, at 382.

138. *See* BOYER, *supra* note 98, at 382.

139. *See* 42 U.S.C. § 9607(*l*)-(m) (1994).

140. *See* Elizabeth G. Geltman, *Recycling Land: Encouraging Redevelopment of Contaminated Property*, 10 A.B.A. NR&E, Spring 1996, at 4.

141. *See id.*; *see, e.g.*, OHIO REV. CODE ANN. §§ 3734.22, .28 (Anderson 1989); OR. REV. STAT. §§ 466.670-.680 (1995); Harbeson, *supra* note 125, at 373 n.161 (citing other states).

142. Lick Mill Creek Apartments v. Chicago Title Ins. Co., 283 Cal. Rptr. 231 (Cal. Ct. App. 1991).

143. Chicago Title Ins. Co. v. Kumar, 506 N.E.2d 154 (Mass. App. Ct. 1987).

144. *See Lick Mill Creek Apartments*, 283 Cal. Rptr. at 236-37; *Chicago Title*, 506 N.E.2d at 156.

d. Environmental Liens Are Not Very Helpful to Property Buyers

In general, property buyers do not benefit from either state or federal environmental liens. An environmental lien may be grounds to rescind the P&S Agreement by a property buyer if the lien is pre-existing or the lien is placed on the title after the P&S Agreement signing but prior to the closing. If the lien is pre-existing, the buyer is protected since the seller cannot convey marketable title. If the lien is not pre-existing, the chances are slim that a lien will be placed on the property during the few weeks or months between the signing of the P&S Agreement and the closing. Thus, it is unlikely that a buyer will be protected by environmental lien statutes.

It is statistically unlikely that property buyers will be protected by federal environmental liens under CERCLA.[145] Since 1980, the EPA has listed over 1400 sites on the National Priorities List (NPL) of hazardous waste sites which require remediation under CERCLA.[146] The EPA has expended funds on the remediation of approximately thirty percent of these sites.[147] The EPA can place environmental liens on the titles of these properties only when the EPA has expended funds for remediation costs.[148] As a result, the EPA could only attach environmental liens to the titles of approximately 450 NPL sites. The remediation of the remaining seventy percent of NPL sites will be paid for by the potentially responsible parties designated by the EPA.[149] Thus, there is only a thirty percent likelihood that a listed site will have an environmental lien placed on it.

A residential property buyer benefits less than a commercial or industrial property buyer under the environmental lien statutes. One reason is that a residential property is less likely than commercial or industrial property to be contaminated with hazardous wastes because the types of operations which generate hazardous wastes are not typically conducted on residential property. Additionally, any petroleum constituents used by a residential property are generally stored in USTs. If a residential property is contaminated from any on-site source it is more likely to be contaminated by petroleum. Since CERCLA excludes petroleum, a residential property could not be cleaned up under CERCLA. Thus, a CERCLA environmental lien to recover remediation

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145. The author could not acquire statistics regarding state environmental liens, thus, only federal lien statistics are discussed.

146. Telephone Interview with Bill Ross, Reform Advocate, Hazardous Site Control Division, United States Environmental Protection Agency (Jan. 15, 1997). The 1400 sites includes those which have been delisted, those which have been fully remediated, and those which are slated for future remediation. *See id.*

147. *See id.*

148. *See* 42 U.S.C. § 9607(*l*).

149. *See* Telephone Interview with Bill Ross, *supra* note 146.

costs could not be imposed on the title of a residential property contaminated by petroleum.

The use of an environmental lien to protect a residential buyer is further frustrated by inadequate environmental lien recording requirements. For example, in Tennessee, "a lien may be recorded up to one year after the state completes cleanup."[150] This type of law creates a notice problem to property buyers. If the state does not attach the lien to the deed in a timely manner, a buyer will not have notice that the property was contaminated. The buyer could take title to the property only to learn later that he must pay the remediation cost to clear the title, even though he had no knowledge or notice that that state was going to impose a lien.

Further, the buyer could become liable for additional remediation costs long after the state has declared the property clean. The state may submit a closure letter, known as a "comfort letter," declaring that the property is fully remediated.[151] However, some clean-up statutes do not require the implementing agency to write a comfort letter to the owner saying that the site is clean.[152] In these situations, the agency reserves the right to require the current owner (whomever that may be) to spend more money remediating the property if additional contamination is identified in the future.[153] Thus, the buyer may never have repose.

The doctrine of marketable title will not protect a residential property buyer from acquiring a petroleum contaminated property. Whatever expansion this doctrine undergoes as the result of CERCLA and hazardous waste remediation liens, it will not cover the hypothetical case. Statutory protections are the only solution which will provide consistent protection to the residential property buyer.

F. Statutory Protections

A number of states circumvented the problem of forcing a buyer to accept a contaminated property once he has signed a P&S Agreement by enacting environmental property transfer laws.[154] Some environmental transfer statutes require that "contaminated property be cleaned up before it is abandoned, sold, or leased," while others require a seller to make an affirmative declaration that there is no contamination on the property.[155] State legislatures

150. TENN. CODE ANN. § 68-46-209(a)-(b) (1996).
151. Geltman, *supra* note 140, at 7.
152. *See id.*
153. *See id.*
154. *See infra* notes 155-160 and accompanying text.
155. Harbeson, *supra* note 125, at 373.

created the laws to promote the identification and remediation of contaminated properties.[156] These environmental property transfer laws resolve some of the problems that other land sale contract rescission mechanisms fail to address.

Unfortunately, these laws, like CERCLA, apply explicitly or implicitly only to commercial or industrial property. For example, New Jersey's Industrial Site Recovery Act (ISRA) requires the sellers of *industrial* property—upon which hazardous waste was manufactured, stored, or handled—to warranty that the property is free from contamination.[157] Connecticut requires a seller of a property which has generated more than 100 kilograms of hazardous waste per month to file a certification of "no discharged hazardous wastes."[158] Illinois has a similar statute which does not apply to residential property.[159] Pennsylvania industrial property transfer law requires the seller to describe the hazardous waste areas of the property in the deed.[160] In this manner, a normal title deed search will alert the buyer that such materials have been used or disposed of on the property.

Though the aforementioned statutes are not helpful for residential property buyers, other states do protect residential property buyers through real estate broker or seller disclosure requirements.[161] Although these requirements will not prevent a buyer from acquiring contaminated property, they counteract the common law caveat emptor rule by shifting to the seller the burden to provide information. With this information the buyer can make a more informed decision. For example, in thirty-four states the seller has an obligation to disclose defects.[162] California, Wisconsin, and Virginia all have property transfer notification statutes which include a requirement for the disclosure of the presence of an UST (along with asbestos and radon).[163] California and Wisconsin laws require sellers to disclose defects that could materially affect the value of the property.[164] In the northeast, Maine and New

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156. *See id.*

157. *See* N.J. STAT. ANN. § 13:1K-9(a)(2) (West 1996) (formerly the New Jersey Environmental Cleanup Responsibility Act (ECRA)).

158. CONN. GEN. STAT. ANN. §§ 22a-134 to 22a-134a (West 1995). It is not likely that a residential property generates any amount of regulated hazardous waste.

159. *See* 765 ILL. COMP. STAT. ANN. 90/1-7 (West 1993).

160. *See* 35 PA. CONS. STAT. ANN. § 6018.405 (West 1993).

161. *See, e.g.*, DEL. CODE. ANN. tit. 6, § 2572 (1974); IDAHO CODE § 55-2502 (1994); MD. CODE ANN., REAL PROP. § 10-702 (1996).

162. *See* Geltman, *supra* note 140, at 4.

163. *See* CAL CIV. CODE §§ 1102.6, 1102.6a (West Supp. 1997); VA. CODE ANN. § 55-519 (Michie 1995); WIS. STAT. ANN. § 709.03 (West Supp. 1996). The California Real Estate Transfer Disclosure Statement must be completed when property with one to four housing units is transferred. *See* CAL CIV. CODE § 1102(a).

164. *See* CAL CIV. CODE § 1102.6; WIS. STAT. ANN. § 709.03.

Jersey do not have such laws,[165] however, in other states in the northeast, e.g. Vermont, real estate agents may require the seller to complete a disclosure form which includes knowledge of on-site USTs.[166]

At first glance, these affirmative disclosure statutes and broker disclosure requirements appear to educate and protect residential property buyers from acquiring petroleum-contaminated properties. However, the wording of the statutes and disclosure forms does not protect a buyer when the seller is unaware of the presence of an UST. For example, the Vermont Association of REALTORS, Inc. broker disclosure form begins with a disclaimer that the information provided is "based on the Seller's personal knowledge" and the seller should "[d]isclose *known* conditions affecting the property."[167] The disclosure form requires the seller to answer either "yes," "no," or "unknown," to the existence of any current or former USTs on the property.[168] If the seller is unaware of an UST he can simply state that the presence or absence of an UST is unknown. The Illinois Association of Realtors[169] and Caldwell Banker[170] have similar knowledge requirements in their respective disclosure forms.

Similarly, state disclosure statutes are unhelpful when the seller is ignorant of an UST or of contamination on his property. Most seller disclosure statutes do "not require a seller to disclose a defect in residential property of which he is not aware."[171] Further, most state disclosure requirements are not warranties.[172] Thus, the seller is not liable for omissions if he has no knowledge of the error.[173] Although well intentioned, these seller disclosure requirements do not protect the seller from liability, they merely force the seller to educate the buyer when the seller has environmental information to convey.

As evidenced by the discussion above, it is apparent from the aforementioned statutes and case law that legislatures and judges are beginning to shift the burden from caveat emptor toward a seller's duty to disclose environmental information. The trend falls short, however, of solving the predicament where both the buyer and seller learn of the contamination

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165. *See* Geltman, *supra* note 140, at 4.

166. *See, e.g.*, Vermont Association of REALTORS, Inc., Seller's Property Information Report (June 1991).

167. *Id.* (emphasis added).

168. *Id.*

169. *See* Steele, *supra* note 25, at 3.

170. *See* Caldwell Banker Residential Affiliates, Inc., Caldwell Banker-Redpath & Co. Notification And Seller Disclosure Form Information Report (1997) (on file with author).

171. NEV. REV. STAT. § 113.140(l) (Michie 1995); *See also*, R.I. GEN. LAWS § 5-20.8-2 (1995).

172. *See* NEB. REV. STAT. § 76-2,120(3)(e) (1996); OKLA. STAT. ANN. tit. 60, § 833.B.2.c (West 1996); 68 PA.CONS. STAT. § 1025 (West 1997); TEX. PROP. CODE. ANN. § 5.008 (West 1997).

173. *See, e.g.*, NEV. REV. STAT. § 113.140.l (Michie 1995); R.I. GEN. LAWS § 5-20.8-2 (1995).

after the expiration of the inspection clause but before the closing. The restrictive statutes which require remediation prior to transfer of the property appear to be the most helpful to the buyer. Yet, these statutes assume that the seller is aware of the contamination before the sale. Further, these statutes are currently restricted to commercial and industrial properties. Similarly, the state statutes which require the seller to disclose the presence of USTs also assume that the seller is aware of their presence. These more lenient disclosure statutes suffer the same deficiencies as the inspection clause and the ASTM screening protocol because they educate the buyer, but do not prevent the buyer from acquiring a contaminated property.[174] The environmental property transfer statutes, like the screening protocol and inspection clause, are a step in the right direction, but they are not a cure.

III. A BETTER SOLUTION: REQUIRING AFFIRMATIVE DECLARATIONS OF THE PRESENCE OF USTS AND RELATED CONTAMINATION

If residential property buyers have all these traditional legal mechanisms working against them, what more can be done besides encouraging additional and more detailed disclosure laws? Even with more detailed disclosure laws the seller cannot disclose the presence of an UST if he is unaware of its existence. One alternative is to reverse the common law doctrine of caveat emptor by requiring the seller to make an affirmative statement that no USTs or petroleum contamination exist on the property. The buyer can then rescind the contract if such conditions are identified at anytime before the closing, thereby avoiding the problem of an expired P&S Agreement inspection clause. The author suggests using Margaret Radin's theory of "Property as Personhood"[175] to support this alternative.

A. Margaret Radin's "Property as Personhood" Theory

Why do people feel secure in their homes? People treat their homes differently than any other piece of property they own. Homes provide emotional and legal protection.[176] People seek refuge from work and the hectic pace of life in their homes. People are able to relax at home. People raise children, teach values, and celebrate cultural heritage in their homes. People place themselves within society by where they live. The home is "inextricably part of the individual, the family, and the fabric of society,"[177]

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174. *See* discussion *supra* Part II.A.
175. Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).
176. *See id.* at 991.
177. *Id.* at 1013.

and "[it] is a moral nexus between liberty, privacy, and freedom of association."[178]

Margaret Radin, a renowned theorist on property law issues, proposed a "property as personhood" perspective which creates a hierarchy of property entitlements to protect home owners and tenants.[179] Property rights are measured on a continuum within this hierarchy.[180] The "continuum . . . ranges from a thing indispensable to someone's being to a thing wholly interchangeable with money."[181] For example, a wedding ring in a jewelry store is wholly interchangeable with money and can be considered fungible property to the jeweler.[182] The jeweler can replace the ring if it is stolen with insurance money.[183] However, the same wedding ring worn by a married individual for twenty years is indispensable to that person and is considered personal property. If the ring is stolen, insurance money cannot replace its personal value to the owner.[184] Thus, under Radin's theory, owners of fungible property have weaker entitlements to property than owners of personal property.[185] Radin proposed that the moral or emotional claim to personal property provides greater protection to that owner than to the owner of fungible property.[186] In other words, the rights of the personal property owner should override the rights of the fungible property owner.

Radin's theory emphasizes that an individual using a residence as his home should have the greatest property rights of any real property owner because "in our social context a house that is owned by someone who resides there is generally understood to be toward the personal end of the continuum."[187] Thus, the homeowner's personal property right would be greater than a commercial or industrial land owner right, and even greater than a landlord using a residential property for business purposes. Radin finds support for her hierarchy in the U.S. Constitution and in legal protections, e.g., the homesteading and special mortgage redemption rights that are not provided to commercial or industrial property owners.[188]

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178. *Id.* at 991.
179. *See id.* at 986.
180. *See id.*
181. *Id.* at 987.
182. *See id.* at 959.
183. *See id.*
184. *See id.*
185. *See id.* at 986.
186. *See id.* at 1014-15.
187. *Id.* at 987.
188. *See id.* at 987 n.104.

1. Radin's Theory Supports Greater Rights for Buyers

Under Radin's theory, residential property buyers should not be treated like other buyers. Commercial and industrial property buyers do not have personal property rights in their properties. Their personal property rights, as well as their identities as persons in society, are in their residences rather than in their places of business. Further, commercial and industrial property buyers have sophisticated financial and legal resources to enter into contracts and properly inspect properties, including the use of expensive intrusive sampling and analysis.[189] These are reasons to place liability with a commercial or industrial property buyer, while, under the same circumstances, the law should not place liability with a residential property buyer.

Further, applying Radin's theory, a residential property buyer who identifies contamination should be allowed to rescind a P&S Agreement because his property right is greater than the seller's rights. "Where we can ascertain that a given property right is personal, there is a prima facie case that that right should be protected to some extent . . . against cancellation by conflicting fungible property claims of other people."[190] Once an owner offers his home for sale, his property interest slides down the continuum from personal property to fungible property because the seller is willing to trade his home for cash. In contrast, the buyer gains a personal property right when he chooses the residence as a place to live and call "home," even though he had no property rights to the residence prior to signing the P&S Agreement. The buyer bound his intent by signing the P&S Agreement. Accordingly, the fungible property right of the seller should yield to the personal property right of the buyer, and the buyer should not be required to pay for remediation if contamination is later identified.

Counter arguments to this alternative, though valid, should not outweigh its application. Radin's theory applies on a property-specific level. Only the personal property rights of the buyer and seller of the specific property are examined. This microeconomic view places the seller at a disadvantage. The seller appears to have the single motive of receiving cash for the sale of the home, while the buyer is investing more than money. However, it is rare that a seller is merely exchanging the property for money.

It is difficult to justify application of Radin's theory to home sales on a macroeconomic level. We live in a mobile society—people sell homes and move into new ones. Thus, for the majority of sellers, cash from the sale will be used to purchase a new home. If Radin's theory is applied and the buyer

189. *See Biggest Pollution Threat*, *supra* note 16; *see also* discussion *supra* Part II.A.

190. Radin, *supra* note 175, at 1014-15.

can rescind the contract, what is to become of the seller's down payment and personal property right in *his* new home? Perhaps Radin's theory should only apply if the seller is going to rent an apartment or move in with the in-laws. When viewing Radin's theory from a macroeconomic standpoint, it seems absurd that the law should differentiate between a seller renting an apartment and a seller moving into another home. Despite these counter arguments, between two equally innocent parties, it is better to view Radin's theory on a microeconomic level in order to protect the buyer.

2. Between Two Innocent Parties, Liability Should Fall on the Seller

There are a number of reasons why Radin's theory should be used to place liability on the seller in situations where the parties are equally innocent. Two of these reasons are taken by analogy from the property law of equitable conversion and mis-indexing of deeds.[191] Equitable conversion is the common law default whereby the buyer bears the risk of loss in an executory land sales contract: "[t]he buyer is viewed in equity as the owner from the date of the [signing of the] contract."[192] However, some jurisdictions reject this common law view as based upon *illogical* reasoning[193] and instead place the risk of loss on the seller.[194] The rationale for this is that the seller has more control over the property than the buyer until the title is transferred. These jurisdictions follow the common law rule only when the buyer has possession of the property when the loss occurs.

Another reason to place liability on the seller under situations where the parties are equally innocent is illustrated by the rules regarding the faulty indexing of deeds. After the closing, a clerk will index the deed as part of the municipal record. This is in addition to the recording of the deed. If the county clerk mis-indexes the owner's deed, the buyer will not find it when he conducts a title search. Some jurisdictions hold the *seller* liable for fixing this problem because he is more likely to go back and find the error, whereas the buyer could never find the error.[195]

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191. *See* DUKEMINIER & KRIER, *supra* note 120, at 604.

192. *Id.*

193. *See* Skelly Oil Co. v. Ashmore, 365 S.W.2d 582, 588 (Mo. 1963) (emphasis added) (citing Harlan F. Stone, *Equitable Conversion by Contract*, 13 COLUM. L. REV. 369, 386 (1913)).

194. *See generally* Anderson v. Yaworski, 181 A. 205 (Conn. 1935) (excusing buyer from contract performance when building burns down without the fault of either party); Libman v. Levenson, 128 N.E. 13 (Mass. 1920) (forcing seller to pay for loss resulting from a retaining wall collapse due to erosion which caused damage to an entire side of the building); Skelly Oil Co. v. Ashmore, 365 S.W.2d 582 (Mo. 1963) (adopting Massachusetts' rule requiring seller to bear risk of loss when building was destroyed by fire before title was transferred to buyer); Capital Sav. & Loan Ass'n. v. Convey, 27 P.2d 136 (Wash. 1933) (placing risk of loss on seller when internal floor of building collapses before transfer of title).

195. *See* DUKEMINIER & KRIER, *supra* note 120, at 701 (citing Hochstein v. Romero, 268 Cal. Rptr.

The rationale for placing the burden on the seller in the equitable conversion and faulty indexing situations applies to the issues raised in this Note. When an UST exists on a residential property, the seller is more likely to know or learn of the presence of the UST than the buyer. The buyer could not learn of the presence of the UST unless he conducts expensive, intrusive environmental assessments. This is analogous to a purchaser looking through every deed indexed with the municipality to ensure that a deed has not been misfiled. The cost of conducting such a search is too high when compared to the probability of identifying a misfiled deed. Similarly, it is too expensive to find an abandoned leaking UST or petroleum contamination from an UST that formerly existed on the property. It is illogical to place the burden on the buyer unless that buyer had some control over the property, or the parties have specifically allocated the risk in a separate clause in the contract. Otherwise, the burden of making reparations should fall on the seller, and the buyer should be allowed to rescind the contract.

B. Affirmative Declarations are the Solution

Legislative action is required to solve the inequities of a buyer taking title to a petroleum contaminated property. The law should take into account Radin's principles of a buyer's personal property right to reverse caveat emptor.[196] The law could require the seller to investigate the presence or absence of USTs and associated contamination, and make an affirmative declaration of his finding. This affirmative declaration would state that USTs and associated contamination exist (currently or historically), or do not exist, on the property. The seller could not say that the presence or absence of an UST or contamination was unknown, which is allowed under current statutes and voluntary seller disclosure forms.[197]

This affirmative declaration will transfer the risk of loss from the buyer to the seller. If the seller states that an UST exists on the property, the buyer will be free to renegotiate the purchase price or rescind the contract. If the seller identifies no USTs or contamination on the property, then the buyer has assurances that an UST does not exist on the property. If the buyer later identifies an UST prior to closing, he could use the affirmative declaration to rescind the contract based on fraud.[198] This would be the easiest method to prevent unfair buyer liability.

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202 (Cal. Ct. App. 1990); Howard Sav. Bank v. Brunson, 582 A.2d 1305 (N.J. Super. Ct. Ch. Div. 1990)).

196. *See supra* notes 175-188 and accompanying text.

197. *See supra* notes 162-170 and accompanying text.

198. *See supra* Part II.D.

There are many advantages to require affirmative seller declarations about the presence of USTs. Most importantly, the requirement will further the goals of the federal government to protect human health and the environment by forcing the timely investigation and remediation of leaking USTs.[199] The law would require all residential property owners to investigate the presence or absence of USTs and associated contamination on their property prior to sale. If the owner identified an abandoned UST, he could have it removed by a contractor. If the UST leaked petroleum into the subsurface soil or groundwater, the contractor would report the leak to the appropriate agencies. The agencies would delineate the type of remediation required. As a result, more properties are likely to be remediated because the current owner will have incentives to clean-up the property to increase the sale price and to avoid potential fines, if such fines are established by state legislatures.

Requiring affirmative disclosures would protect the buyer from assuming unwarranted liability. An affirmative declaration transfers the risk of loss from the buyer to the seller. This is equitable for a number of reasons. First, a diligent buyer should not bear the loss. A conscientious buyer will attempt to identify environmental problems through the insertion and execution of the inspection clause in the P&S Agreement. Such a buyer will not likely be aware that a walk-through inspection could not identify an abandoned UST or petroleum contamination.[200]

Second, the seller had control and ownership of the property. The seller could have contributed to the contamination by his misfeasance (active misconduct) or nonfeasance (passive inaction).[201] For example, the seller could have inadvertently allowed the USTs to corrode or leak by not identifying its presence. The seller also has control over the UST removal process. On the other hand, the buyer has no control over the property. As a result, unless the buyer was a previous tenant, he does not likely cause or contribute to the contamination. Thus, it is not equitable to allow the buyer to pay for the remediation when the seller benefited from the use and control of the property.

Affirmative disclosures also have disadvantages. However, each of the disadvantages can be mitigated. First, the current landowner of every residential property would be liable for the costs of UST removal and remediation. As a result, the law would hold innocent landowners responsible

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199. *See generally* CERCLA, 42 U.S.C. §§ 9601-9675; Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (1994); Clean Air Act, 42 U.S.C. §§ 7401-7671 (1994); Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (1974).

200. *See* CRITERIUM-LALANCETTE ENGINEERS, *supra* note 49.

201. W. PAGE KEETON ET AL., PROSSER & KEETON, TORTS § 56 at 373-74 (5th ed. 1984).

for both the removal of USTs which they may not have installed and for contamination to which they did not contribute or cause. This is mitigated by the possibility that the current owner *did* install the UST and, through his improper care and maintenance of the tank, caused the UST to leak. Further, some states may reimburse the homeowner's investigation and remediation costs from state trust funds.[202] Even if the current owner is not to blame, as between two equally innocent parties, the seller should retain liability under Radin's "property as personhood" theory.

Another disadvantage is the high administrative cost of implementing such a change. New Jersey learned that "[c]onsiderable manpower and bureaucratic dedication" were necessary to implement land transfer restrictions.[203] State agency personnel will be required to physically inspect and monitor properties containing a leaking UST. The additional administrative cost, however, could be shared by taxpayers. Alternatively, the state could finance its personnel through commercial UST registration, or other registration fees. Despite increased administrative costs, UST investigations and affirmative declarations would protect buyers from assuming liability for contamination for which they were not responsible. Further, the cost would be mitigated by a cleaner environment, identification of polluted aquifers, and fewer frustrated residential property buyers.

CONCLUSION

A residential property buyer invests more than money in the decision to move into a new home. His personal property right should provide him with greater protection against unforeseen and unallocated risks, such as leaking USTs. The common law doctrine of caveat emptor does not recognize this personal property right. The existing common law doctrines of mistake of fact, frustration, and fraud do not protect a buyer from acquiring a petroleum contaminated property where the seller is also unaware of the presence of the UST. Courts may expand the doctrine of marketable title to include commerical or industrial property contaminated with hazardous materials, but it is unlikely they will ever expand it to residential properties contaminated by petroleum. Thus, the residential property buyer cannot rely on common law doctrines for protection. Finally, inspection clauses can never fully protect a diligent buyer. The home inspection is not intrusive and is not meant to

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202. *See Fix-it: Transmitting Sound Wave's Mirror Image Cancels Noise*, STAR-TRIBUNE (Minneapolis-St. Paul), Oct. 30, 1994 at 15E; (stating that Minnesota reimburses owners for remediation costs of removing heating-oil USTs).

203. Wendy E. Wagner, *Liability for Hazardous Waste Cleanup: An Examination of New Jersey's Approach*, 13 HARV. ENVTL. L. REV. 245, 311 (1989).

identify USTs or subsurface contamination. The types of inspections which could identify USTs and petroleum contamination are cost prohibitive for the majority of home buyers. It is unrealistic to expect the buyer to do more.

Fortunately, there is a growing legislative trend to reject caveat emptor. To date, this rejection has been applied to transfers of commercial and industrial property where hazardous materials were used or discharged into the environment. Although there are over one million unregistered petroleum USTs in the country, and between 7.5 and 8.5 million homes transferred every year, courts have not extended their rejection of caveat emptor to residential property transfers.

The personal property right of a residential property buyer should be protected over that of the current owner. Affirmative disclosure requirements by the seller would provide the needed protection. In this manner, a buyer would have an assurance that no USTs or petroleum contamination existed on the property. The seller would essentially indemnify the buyer from any future UST leak because the buyer could always claim fraud if he identified an UST at a later date. If the seller declared that an UST existed on-site, the buyer could rescind the contract or re-negotiate the sale price. In either case, the buyer is protected from unwarranted liability.

Alex Polonsky