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I. Introduction

In 1988, the Pennsylvania Legislature passed, and Governor Casey signed into law, the Hazardous Sites Cleanup Act (HSCA).[1] Modeled in part on federal "Superfund" legislation,[2] HSCA is a broad regulatory statute having as its primary purpose the cleanup of dump sites, landfills, and other hazardous waste sites that may cause dangerous pollution of the groundwater and, eventually, the drinking water of the Commonwealth.[3] Owners and operators of dump sites and landfills, as well as generators and transporters of hazardous waste, will undoubtedly find that experience with federal Superfund legislation and Environmental Protection Agency (EPA) regulation will help them deal with cleanup efforts and related litigation initiated by the Pennsylvania Department of Environmental Resources (DER). HSCA is unique, however, because it can indirectly, but significantly, regulate the activities of persons who are not owners, operators, generators, or transporters of hazardous waste.

This Article examines several aspects of HSCA, and suggests ways in which it may affect such persons. The Article first considers the statutory definition of "owner or operator." It then explores the DER's investigatory authority, HSCA changes in lien procedure, and new burdens imposed by the statute on buyers and sellers of commercial real estate. The Article concludes that bankers, businessmen, real estate owners, developers, managers, and broker-dealers must be highly sensitive to this new statute, even though they feel confident that they have no hazardous waste sites in their portfo-

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1. Act No. 108, 1988 P.L. 756 (codified at PA. STAT. ANN. tit. 35, §§ 6020.101-.1305 (Purdon Supp. 1989)). Governor Robert J. Casey signed the bill into law on October 18, 1988, and it became effective sixty days thereafter, on December 17, 1988, pursuant to § 6020.1305.

2. 42 U.S.C. §§ 9601-9675 (1982 & Supp. 1987).

3. PA. STAT. ANN. tit. 35, § 6020.101(1)-(5), (12) (Purdon Supp. 1989).

lios. HSCA can significantly affect commercial real estate transactions and management, and can prove troublesome to the business community.

II. The HSCA Definition of "Owner or Operator"

Commercial banks, mortgage companies, surety bond companies, and other financial institutions may find that they are designated as statutory owners or operators of hazardous waste sites without being aware of the designation. A person who controls or manages activities at a facility is an owner, even if he possesses no fee or leasehold interest in the property.[4] Three hypotheticals will help illustrate this proposition. Consider the primary yard of a major construction contractor undergoing financial difficulties. Over the past several decades, the contractor has disposed of wastes in a remote corner of the yard. As part of a loan workout agreement, an employee or agent of the lender spends several days a week at the contractor's office managing day-to-day operations. Alternatively, the lender may acquire the yard through foreclosure, and may send in interim resident managers to ensure that the yard does not completely deteriorate while a buyer is being sought. As another possibility, the contractor may default on several bonded jobs and, pursuant to agreement, a surety may take over regular management of the yard until the contracts are completed.

In each of the foregoing scenarios, the bank, mortgage company, or surety could be considered an "owner or operator" because they arguably "controlled activities" of a hazardous waste site. The "owner or operator" becomes a "responsible person"[5] who, among other responsibilities, could be held strictly[6] and jointly and severally[7] liable for the costs of cleaning up that remote corner of the

4. *Id.* § 6020.103. The term owner or operator encompasses anyone who "controlled activities at a site," and who does not meet one of the definitional exceptions. Furthermore, a statutory, as well as "real" owner/operator, may have a liability defense under § 6020.701(b)(1). *See infra* note 12 and accompanying text.

5. *Id.* § 6020.701(a)(1). *But see* § 6020.103, which excludes a financial institution from becoming a "responsible person" solely by reason of supervision or other involvement with the financial operation of some other responsible person, "in connection with a loan, obligation, or other service provided." *Id.*

6. HSCA clearly imposes strict liability for response costs and clean-up actions. *See* PA. STAT. ANN. tit. 35, § 6020.702(a) (Purdon Supp. 1989).

7. HSCA does not expressly state that responsible parties are jointly and severally liable for response costs or clean-up actions. However, the Act does provide an explicit right of contribution between responsible persons, *id.* § 6020.705(a), and it is not apparent how a right of contribution could exist without joint and several liability. Although a court deciding such a contribution action is empowered to allocate liability among responsible parties, the Act ominously states that "[a]llocation shall not affect the parties' liability to the department [DER]."

yard.

HSCA contemplates the hypothetical scenarios set forth above, and attempts to provide certain safe harbors that an owner may utilize to avoid potentially draconian liabilities. For instance, section 103[8] defines owner or operator and indicates three defenses to liability. The definition excludes: (1) a person who holds indicia of ownership primarily to protect a security interest in the site, and does not participate in "management"[9] of the site; (2) a governmental unit that acquires ownership of a site involuntarily, such as through escheat or a tax delinquency;[10] and (3) a private or public financial institution that acquires title by foreclosure on a security interest before it had knowledge of the listing of the site by the EPA or DER but did not manage or control activities at the site.[11]

Section 103 provides a fourth defense in the definition of "responsible person." It provides that no public or private financial institution may be deemed a "responsible person" merely because it supervises or is otherwise involved in the financial operation of a responsible person in connection with a loan "or other service provided."[12]

Finally, HSCA provides a fifth liability defense for owners in section 701(b)(1),[13] the "ignorant and absent owner" rule. The statute contains a list of qualifying factors, which include the owner's acquisition of the site after the hazardous substance disposal thereon, the owner's exercise of due care with respect to the hazardous substances concerned, and the owner's precautions against foreseeable acts by a third party. In addition, this section considers whether the owner obtained actual knowledge of the hazardous substance and then conveyed the site without full disclosure to the buyer, whether the owner did anything to cause or contribute to a hazardous substance release on the site, and whether the owner's liability rests solely on ownership, and not on actual operation, of the site.

In order to qualify for the section 701(b)(1) defense, the owner

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Id. § 6020.705(b). Although definitive analysis of this issue is beyond the scope of this Article, the reader should be aware that legislative history on this point provides support for both arguments.

8. *Id.* § 6020.103.

9. Under the definition of "owner or operator," the term "management" excludes purely fiscal operations in connection with a loan to a responsible person or to preserve the value of the site. *See* PA. STAT. ANN. tit. 35, § 6020.103 (Purdon Supp. 1989).

10. *Id.*

11. *Id.*

12. *Id.* (definition of "responsible person").

13. *Id.* § 6020.701(b)(1).

must also demonstrate that one of the following applies: (1) when the owner acquired the site, he did not know and had no reason to know of hazardous substances on the site, despite making all appropriate inquiries to the seller; (2) the owner is a governmental unit that acquired title involuntarily or by eminent domain or through escheat; (3) the owner acquired title by inheritance or bequest (and not, apparently, by inter vivos gift); or (4) the owner acquired title by foreclosure.

These sections of the Act provide similar and overlapping exceptions to liability, with just enough difference in language to ensure litigation. Application of these provisions to the three hypotheticals will illustrate their operation. The lender who starts managing the contractor's affairs as part of a loan workout will be subject to liability unless the lender can prove that its agents' activities were limited to loan-related *fiscal* operations or to preservation of the site's value. In the second hypothetical, the lender might appear better off because it acquired the site by foreclosure. This lender, however, cannot qualify for the "ignorant and absent owner" rule because its agents are "operators" present at the site. Nor can this lender qualify under the definitional exceptions if the "interim management" provided goes beyond purely fiscal concerns. Finally, the surety bonding company that assumes management of the yard to complete defaulted contracts cannot escape liability because there has been no foreclosure. The company probably does not qualify as a "financial institution," and cannot argue that its involvement is limited to fiscal oversight. The surety company clearly "controlled activities at a site," and therefore falls within the statutory definition of "owner or operator."

In summary, before assuming the management of another's property for fiscal reasons, the manager should first do an environmental audit of the premises. In addition, the manager should consult with an attorney to determine the parameters of permissible management activities that do not give rise to liability.

III. Investigatory Authority of the DER

The DER has expansive investigative authority to uncover hazardous waste disposals. Thus, the agency plays a major role in the HSCA enforcement scheme. For example, consider a commercial real estate company that manages a multiple-use complex with a variety of tenants. Across the street there is an apparently inoffensive high-tech plant which, unknown to the manager of the complex,

manufactures specialty chemicals. One day tenants at the complex complain that government agents have stormed their offices, asking many questions and taking samples of tap water, all to the great consternation of the tenants' employees and customers. The manager of the complex eventually determines that the excitable tenants were actually visited by DER field investigators. There have been toxic chemical spills next door, and DER wants to find out how far the release has spread. The complex manager contacts the chief investigator, who advises of the schedule of visits to the rest of the tenants, and asks when he can start tearing up the southwest corner of the complex parking lot to take soil samples.

This DER activity is permitted under HSCA section 503.[14] The statute grants the DER sweeping powers to access information in business records,[15] enter onto private property,[16] and seize and impound property for analysis.[17] As the above hypothetical suggests, this includes the taking of samples and excavation of land.[18] HSCA imposes a statutory duty to cooperate with the DER in its investigations, and this duty extends not only to owners of the hazardous waste site, but also to "a person who owns or occupies land which is near the site of a release or threatened release."[19]

No provision mandates the granting of pre-inspection warrants or permits before the DER acts.[20] The statutory standard is "reasonableness" for every exercise of authority.[21] If the complex manager

14. PA. STAT. ANN. tit. 35, § 6020.503 (Purdon Supp. 1989).
15. *Id.* § 6020.503(b)(2).
16. *Id.* § 6020.503(c).
17. *Id.* § 6020.503(d)(2). The DER must leave a receipt for any property seized. *Ia.*
18. *Id.* § 6020.503(d)(1).
19. PA. STAT. ANN. tit. 35, § 6020.503(e)(1)(ii) (Purdon Supp. 1989).
20. Oddly enough, HSCA does provide for a warrant procedure, *see* PA. STAT. ANN. tit. 35, § 6020.1106 (Purdon Supp. 1989), together with detailed probable cause requirements. The warrant procedure, however, is permissive and not mandatory: "An agent or employee of the department *may* apply to any Commonwealth official authorized to issue a search warrant. . . ." *Id.* (emphasis added). The closest provision to a mandatory warrant procedure is when the DER wishes to use force to access information or enter onto property. *Id.* § 6020.503(i)(1). Even then, the DER may enter without a warrant if "immediate action is needed to protect the public health or safety of the environment," *id.* § 6020.503(i)(2), something presumably determined by the DER itself.

In the face of the extensive investigatory powers granted to the DER, why was use of a warrant system made optional? A clue may be provided by the limitation of warrant-giving powers to Commonwealth officials already authorized to issue search warrants, such as magistrates and judges. *See id.* § 6020.1106. Nowhere does HSCA empower the Commonwealth's Environmental Hearing Board to issue search warrants, and the Act keeps issues involving the DER's investigative powers out of the courts altogether. *See infra* notes 28-36 and accompanying text. The enabling legislation of the Environmental Hearing Board, PA. STAT. ANN. tit. 35, §§ 7511-7516 (Purdon Supp. 1989), provides that the Board may issue subpoenas, *see id.* § 7514(f), but does not give the Board the authority to issue warrants.
21. PA. STAT. ANN. tit. 35, § 6020.503(a) (Purdon Supp. 1989).

and the DER disagree about the reasonableness of the parking lot excavation, the DER may, without judicial intervention, decide that its conduct is reasonable. If the manager persistently refuses, he may receive a DER order[22] costing a minimum civil penalty of $5,000 for each day[23] the parking lot remains intact. The manager may appeal the order to the Environmental Hearing Board,[24] but the Board will uphold the order and any civil penalties unless it finds that the DER order is not "reasonable."[25] The only way a citizen such as the hypothetical complex manager can get into court is to give the DER thirty days written notice of intention to file for an injunction restraining the threatened action prior to any DER order, and the DER fails to issue an order in the next thirty days.[26] In other words, the DER can keep the matter on the administrative side if it so chooses, thereby avoiding judicial review of the exercise of its investigative powers.

The DER's investigative authority under HSCA creates an unacceptable potential for administrative abuse, which appears particularly unfair to innocent neighbors of hazardous waste sites, the very victims the statute was designed to protect. It seems incongruous to provide for a warrant system, and then to make its use permissive at the option of the investigatory authority. The legislature appears to have constructed the entire statutory framework to limit judicial intervention in the investigatory process, unless the DER chooses to involve the courts. This asymmetrical right of access to the courts may become a fertile breeding ground for federal court litigation over the constitutionality of warrantless DER investigative activity amounting to searches and seizures of private property.[27]

IV. HSCA Changes in Lien Procedure

In addition to the aforementioned concerns, HSCA has generated controversy over its treatment of personal property liens. Environmental lawyers in Pennsylvania are already debating the meaning and effect of the lien provisions stated in section 509 of HSCA.[28]

22. *Id.* § 6020.503(f)(1).
23. *Id.* § 6020.503(f)(6).
24. *Id.* § 6020.503(f)(1). HSCA does not give citizens the right to seek judicial review of DER orders. The DER, however, may seek judicial enforcement of its orders. *Id.* § 6020.503(f)(2).
25. PA. STAT. ANN. tit. 35, § 6020.503(f)(4) (Purdon Supp. 1989).
26. *Id.* § 6020.503(f)(5).
27. *See* U.S. CONST. amend V. This observation raises questions of constitutional law that are beyond the scope of this Article, but which deserve scholarly research and analysis.
28. PA. STAT. ANN. tit. 35, § 6020.509 (Purdon Supp. 1989).

The Act radically rewrites established principles and procedures relating to liens, especially liens on personal property.

When a judgment holder records a court judgment for money damages at the appropriate county index, that record creates a lien on any real estate owned by the judgment debtor within the county.[29] Historically, however, to obtain a lien against the debtor's personal property, the judgment creditor must obtain a writ of execution and send the sheriff to levy upon the property.[30] Under HSCA, however, the Environmental Hearing Board may assess and award response costs to the DER, and against responsible persons, for cleanup of a hazardous waste site.[31] The Board's award to the DER constitutes a judgment against the responsible person.[32] The DER need merely send a notice of lien to the prothonotary of a county in which the responsible person has real or personal property, and the prothonotary may enter the lien upon the judgment docket.[33] Upon such docketing, "the lien shall attach to the revenue and all real and personal property of the responsible person[.]"[34] This procedure raises several questions.

First, can a lien on personal property "attach" by mere docketing? This process avoids the writ of execution and sheriff's levy entirely. How does a purchaser know that the DER will not seize the personal property he is buying to satisfy its lien? The Act provides that the Department of State must establish a "central registry" of all HSCA liens.[35] A Commonwealth representative must file the notice of lien with the Secretary of State (presumably in close proximity to the time at which DER sends the notice to the county prothonotary). Although time and experience may demonstrate otherwise, this scheme appears problematic. How many notices will be simultaneously re-recorded at the "central registry" by unknown Commonwealth officials? How many businessmen, contemplating the purchase of personal property in the seller's possession with an invisible lien on it, will first look in this central registry to check out any DER awards against the prospective seller, or even know that such a registry exists? This creation of a lien on personalty without a levy

29. 42 PA. CONS. STAT. § 4303(a) (1988).

30. *See* Pa. R.C.P. Nos. 3102 (writ of execution), 3108 (service of writ), and 3109 (levy procedure); Rush v. First Nat'l Bank, 324 Pa. 285, 188 A. 164 (1936) (lien on personal property attaches on date of levy).

31. PA. STAT. ANN. tit. 35, § 6020.507(a) (Purdon Supp. 1989).

32. *Id.* § 6020.509(a).

33. *Id.*

34. *Id.*

35. *Id.* § 6020.509(b).

will probably place many transactions, large and small, at risk over DER collection policy.

Next, although the notice of lien is supposed to be sent to the county in which the responsible person has real or personal property, nothing in the "attach" language states that a lien recorded in County X attaches only to property within County X.[36] Did the legislature really intend that docketing of a HSCA lien in any one county would make it attach to any property of the responsible person found anywhere in the Commonwealth?

Finally, the docketed lien attaches not only to real and personal property, but also to the "revenue" of the responsible person.[37] Does this include gross receipts, income, and the like? Does it include receivables? Accounts receivable are commonly pledged or assigned for value or security. Imagine the disappointment of an assignee who discovers that his assignor's customers are sending their payments directly to the DER. It appears that assignees of receivables must now join purchasers and search the central registry in Harrisburg.

Inevitably, litigation will ensue over these issues if innocent purchasers and assignees find their transactions with HSCA violators nullified by DER collection activity. The courts will then have to decide whether the statute actually mandates the untoward consequences that appear possible.

V. New Burdens for Buyers and Sellers of Commercial Real Estate

Buying and selling commercial real estate can be an enormously and unnecessarily complicated task. HSCA has placed investigatory burdens on both the buyer and seller which every prudent businessman must undertake before closing a deal.

Traditionally, the buyer would investigate zoning restrictions to determine the limitations on the use of a particular piece of land. The title insurance company would presumably inform the buyer of any unusual restrictive covenant in the deed.

Now, however, under HSCA section 512(a),[38] DER can issue its own order limiting use or activity that DER thinks would be inconsistent with the response action taken at the site.[39] The DER order limiting land use, which may be permanent, is not made a part

36. *See supra* note 33 and accompanying text.
37. *Id.*
38. PA. STAT. ANN. tit. 35, § 6020.512(a) (Purdon Supp. 1989).
39. "A site at which hazardous substances remain after completion of a response action shall not be put to a use which would disturb or be inconsistent with the response action implemented." *Id.* Response action is broadly defined. *See id.* § 6020.103.

of the deed.[40] This differs from a restrictive covenant, which must appear in the deed.[41] Rather, HSCA provides that the order itself shall be recorded "in a manner which will assure its disclosure in the ordinary course of a title search of the subject property."[42] The Act does not define the "manner" by which this is to be accomplished, or indicate whether it will vary from county to county. Much like the "central registry of liens" envisioned at section 509(b),[43] only time will reveal the effectiveness of any chosen "manner." Until the appropriate manner is further defined, alert buyers should check with the seller, the county recorder of deeds, and the DER to rule out the existence of any DER land use order. If any question remains, the absence of such an order should be made part of the seller's warranty of title.

The very next provision, section 512(b),[44] imposes upon the seller the burdensome task of listing, in the property description section of the deed, every disposal of a hazardous substance made by the seller, as well as every disposal made by others at the site of which the seller possesses "actual knowledge."[45] The listing for each disposal must include, to the extent the information is available, the surface area size and "exact" location of the disposal, as well as the types of hazardous substances contained there.[46] The statute does not explicitly require a listing of the times of disposal or the quantities disposed. This deed acknowledgement of hazardous substances disposal must be provided for every conveyance, whether or not DER has taken any response action. If DER has undertaken some response action on the property, that must be listed in the deed as well.[47] Finally, a decision by DER to remove a site from its priority list must be recorded on the deed;[48] curiously, there is no requirement that the deed acknowledge DER selection of a site for its priority list.

HSCA broadly defines "hazardous substance"[49] to include any-

40. *Id.* § 6020.512(a).

41. City of Wilkes-Barre v. Wyoming Historical Soc'y, 134 Pa. 616, 19 A. 809 (1890) (condition on use of land must appear in deed of conveyance; public resolution of terms of conveyance insufficient).

42. PA. STAT. ANN. tit. 35, § 6020.512(a) (Purdon Supp. 1989).

43. *See supra* note 35 and accompanying text.

44. PA. STAT. ANN. tit. 35, § 6020.512(b) (Purdon Supp. 1989).

45. *Id.* It is not clear why the Pennsylvania Legislature thought that a hazardous substances disposal listing should be made a part of the deed to a site, but a DER land use order pursuant to this section should not.

46. *Id.*

47. *Id.*

48. *Id.*

49. PA. STAT. ANN. tit. 35, § 6020.103 (Purdon Supp. 1989).

thing designated as hazardous by regulation under the state Solid Waste Management Act[50] or the federal Superfund Act,[51] anything contaminated with a hazardous substance, and anything else DER may determine to be dangerous to public health or the environment.[52] There are clearly many potential candidates for the deed acknowledgement. Must the seller now order an environmental audit of his property to make sure there is nothing to acknowledge, or if there is, that every disposal has been listed? What about disposals by others on the property of which the seller has "actual knowledge?" What if thirty years of business records of the former owner are gathering dust in the basement? Does that constitute "actual knowledge?" If an environmental audit is performed, must the auditors read the basement records? These questions are not trivial, because failure to make a required deed acknowledgement violates HSCA,[53] and any violation of any provision of the Act is subject to a maximum civil penalty of $25,000 per day.[54]

Even assuming that the DER will not review deed acknowledgements for compliance, what are the civil remedies of the buyer who discovers an unacknowledged disposal of hazardous waste on the property? It is not clear whether the buyer would have legal authority to rescind the sale and get his money back. A recent buyer, suddenly unhappy with his acquisition for some legally insignificant reason, may bring in an environmental SWAT team whose precise mission is to document some hazardous substance on the site that was not acknowledged in the deed. HSCA is silent as to whether the section 512(b) mandatory deed acknowledgement rules create civil liabilities.

VI. Conclusion

HSCA is an extremely broad regulatory statute. This Article attempts to indicate ways in which the actual reach of the Act may exceed its intended scope. In several instances, the Act appears to create rather startling burdens and liabilities, and to pose potential problems for real estate dealers, financial institutions, and other bus-

50. *Id.* § 6018.101-.1003.

51. 42 U.S.C. §§ 9601-9675 (1982 & Supp. 1987).

52. PA. STAT. ANN. tit. 35, § 6020.103 (Purdon Supp. 1989).

53. The deed acknowledgement of hazardous substance disposal is mandatory. "The granter . . . *shall* include in the property description . . . ." *Id.* § 6020.512(b).

54. *Id.* § 6020.1104(e). Furthermore, a civil penalty "may be assessed whether or not the violation was willful or negligent." *Id.* § 6020.1104(a). Presumably, any violation of HSCA, including omission of the mandatory deed acknowledgement, is a strict liability offense.

inessmen who have little to do with dump sites or landfills. In the years to come, some sections of HSCA may be repealed, rewritten, or judicially defined or diluted. Actual practice may reveal that DER enforcement of HSCA is unconcerned or noncontroversial with respect to nonpolluters. In the meantime, however, those encountering the Act must be aware of its pitfalls until further definition is provided.