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The Availability of the Affirmative Defenses of Assumption of Risk and the Sale Defense against Common Law Public Nuisance Actions: United States v. Hooker Chemicals & (and) Plastics Corp.

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NOTE

THE AVAILABILITY OF THE AFFIRMATIVE DEFENSES OF ASSUMPTION OF RISK AND THE "SALE DEFENSE" AGAINST COMMON LAW PUBLIC NUISANCE ACTIONS: *UNITED STATES v. HOOKER CHEMICALS & PLASTICS CORP.*[1]

INTRODUCTION

Pollution control laws have become increasingly tougher, but the courts have not let go of old common law approaches for punishing polluters. The courts are allowing plaintiffs to use common law public nuisance actions against polluters while at the same time limiting the traditional affirmative defenses available to defendant polluters.

The common law of public nuisance is an ancient cause of action. A public nuisance is a low-grade criminal offense involving an interference with the rights of the community as opposed to an individual. The remedy for a public nuisance must be pursued by the appropriate state agency.[2] Such actions are generally brought against landowners on whose property a nuisance exists, but, with increasing frequency, these actions are also being brought against the party responsible for the creation of the nuisance even if that party is not also the landowner. The recent expansion of the common law public nuisance concept and concurrent restriction of available affirmative defenses makes this additional cause of action highly desirable and relatively easy to win for environmental plaintiffs.

FACTUAL HISTORY

The construction of Love Canal began in 1894 as an attempt to connect the upper and lower portions of the Niagra River. The construction was halted with only three-quarters of a mile completed.[3] The site, which was owned by the Niagra Power and Development Corp (NPDC), remained intact until the early 1940s when Hooker Electrochemical Company (a predecessor of Hooker Chemicals & Plastics Corp.) (Hooker) sought to purchase it for use as a waste disposal site.[4] Hooker signed an agreement with NPDC allowing it to use the site from 1942 until it finalized purchase of the site in 1947.[5] Hooker continued to dispose of waste in the Love Canal until 1953, when it sold the site to the City of Niagra Falls Board of Education.[6] In the eleven year period, Hooker had disposed of 21,800 tons of liquid and solid chemical waste in the Love Canal site.[7] The City

1. 722 F.Supp. 960 (W.D.N.Y. 1989).
2. W. Prosser and W. Keeton, The Law of Torts 618 (5th ed., 1984).
3. 722 F.Supp. at 961.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

of Niagra Falls also disposed of municipal wastes at the site. Several of the substances disposed of at this site are designated as hazardous under the Clean Water Act[8] and the Comprehensive Environmental Response, Compensation and Liability Act (CERLCA).[9]

Hooker sold the 16 acre site to the Board of Education for only one dollar. The deed contained a "nonliability clause" which was intended to put the grantee on notice of the condition of the site and to relieve the grantor of liability for any future injury caused by the buried wastes.[10] The Board of Education and the State did some work on the site: they built a school, installed sanitary sewer lines, and removed some of the topsoil (which originally had been put there by Hooker to cover the wastes disposed therein). The State also condemned a small portion of the site to expand a state highway.[11]

In the 1970s, "[h]azardous substances were . . . detected in the surface water, groundwater, soil, the basements of homes, sewers, creeks, and other locations in the area surrounding the Love Canal landfill."[12] In June 1978, the New York Commissioner of Health ordered the Niagra County Board of Health to abate the public health nuisance.[13] In August 1978, the Commissioner declared the site a public health emergency. Five days later, President Carter declared the site a federal emergency.[14] The state emergency order was kept in full force and effect by an order in February 1979; a second federal emergency order was issued by President Carter in May 1980.[15]

On December 20, 1979 the state and federal governments filed this action in the federal district court to recover costs incurred while pre-

8. 33 U.S.C. §§ 1317(a) and 1321(b)(4).

9. 42 U.S.C. § 9601(14)(1988).

10. The nonliability clause stated:

> Prior to the delivery of this instrument of conveyance, the grantee herein has been advised by the grantor that the premises above described have been filled, in whole or in part, to the present grade level thereof with waste products resulting from the manufacturing of chemicals by the grantor at its plant in the City of Niagara Falls, New York, and the grantee assumes all risk and liability incident to the use thereof. It is, therefore, understood and agreed that, as a part of the consideration for this conveyance and as a condition thereof, no claim, suit, action or demand of any nature whatsoever shall ever be made by the grantee, its successors or assigns, against the grantor, its successors or assigns, for injury to a person or persons, including death resulting therefrom, or loss of or damage to property caused by, in connection with or by reason of the presence of said industrial wastes. It is further agreed as a condition hereof that each subsequent conveyance of the aforesaid lands shall be made subject to the foregoing provisions and conditions. United States v. Hooker Chemicals & Plastics Corp., 722 F.Supp. 960, 962 (W.D.N.Y. 1989).

11. The condemned portion was approximately 2% of the total 16-acre site. 722 F.Supp. at 970.

12. United States v. Hooker Chemicals & Plastics Corp., 680 F.Supp. 546, 549 (W.D.N.Y. 1988).

13. 722 F.Supp. at 962.

14. *Id.*

15. *Id.*

venting further migration of wastes, relocating families and other actions taken in response to the emergency orders. In February 1988, the court granted plaintiffs' motion for partial summary judgment as to Hooker's liability under section 107(a) of CERCLA.[16] The instant motion, made by the State of New York, is for partial summary judgment as to Hooker's liability under the common law of public nuisance and for recovery of costs incurred during clean up of the site. As a matter of law, the court dismissed Hooker's affirmative defenses of assumption of risk and the "sale defense" as they relate to Hooker's nuisance liability, but stated that the assumption of risk defense may be used to mitigate damages.[17] The court granted plaintiff's motion for partial summary judgment, finding Hooker liable as a matter of law under the New York common law of public nuisance.[18] This note will analyze the affirmative defenses of assumption of risk and the "sale defense" in light of the common law of public nuisance.

BACKGROUND

I. Public Nuisance Liability

Before considering affirmative defenses, a court must first determine if public nuisance liability exists. Public nuisance

> is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency . . . [and] . . . consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all . . . in a manner such as to . . . interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.[19]

The Second Circuit Court of Appeals in *State of New York v. Shore Realty Corp.*[20] applied this theory of public nuisance liability "irrespective of negligence or fault."[21] *Shore Realty* involved the acquisition of a hazardous waste dump site for condominium development.[22] Prior to purchasing the site, Shore Realty hired an environmental consultant to prepare a detailed report on the condition of the site.[23] The report revealed that many hazardous substances were stored at the site in unsafe containers

16. 680 F.Supp. at 546.
17. 722 F.Supp. at 971. CERCLA is codified at 42 U.S.C. §§ 9601-9657(1988).
18. *Id.*
19. Copart Industries, Inc. v. Consolidated Edison Co., 41 N.Y.2d 564, 568, 362 N.E.2d 968, 971, 394 N.Y.S.2d 169, 172 (1977).
20. 759 F.2d 1032 (2d Cir. 1985).
21. *Id.* at 1051.
22. *Id.* at 1038.
23. *Id.*

and dilapidated facilities. The report also indicated that there had been spills in the past and that there was groundwater contamination due to persistent seepage of toxic substances buried there.[24] The report concluded that the site was a "potential time bomb" and recommended that the current tenants halt their operation.[25] Prior to purchasing the site, Shore Realty also applied to the State Department of Environmental Conservation (DEC) for a waiver of liability as landowners. The DEC denied the waiver.[26] Nevertheless, Shore Realty took possession of the site without receiving a waiver of liability and after the tenants left without doing any clean up.[27] The State of New York brought suit against Shore Realty in federal district court under the CERCLA[28] and under New York public nuisance law. Under New York law, a landowner is liable for a public nuisance on its property after discovering the nuisance and having a reasonable opportunity to abate it.[29] The court therefore found Shore Realty liable, stating that "[w]e have no doubt that the release or threat of release of hazardous waste into the environment unreasonably infringes upon a public right and thus is a public nuisance as a matter of New York law."[30]

Strict liability will apply to a public nuisance created by abnormally dangerous activities. New York courts since *Doundiulakis v. Town of Hempstead*[31] have applied the Restatement (2d) Torts section 520 guidelines when determining whether an activity is "abnormally dangerous."[32] In *Doundoulakis*, private landowners filed a negligence action against the town for property damage resulting from a hydraulic landfilling project.[33] The principal issue was whether hydraulic dredging and landfilling con-

24. *Id.*

25. *Id.* at 1039.

26. *Id.*

27. *Id.*

28. 42 U.S.C. §§ 9601-9657.

29. 759 F.2d at 1050. *See also*, Pharm v. Lituchy, 283 N.Y. 130, 27 N.E.2d 811 (1940); Conhocton Stone Road v. Buffalo, New York & Erie Railroad Co., 51 N.Y. 573 (1873); New York Telephone Co. v. Mobil Oil Corp., 99 A.D.2d 185, 473 N.Y.S.2d 172 (1984).

30. State of New York v. Shore Realty Corp., 759 F.2d 1032, 1051 (2d Cir. 1985). *See also*, State of New York v. Schenectady Chemicals, Inc., 117 Misc.2d 960, 459 N.Y.S.2d 971 (Sup Ct. 1983) (Schenectady I), *aff'd as modified*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (App. Div. 3rd Dept. 1984) (Schenectady II); State of New York v. Monarch Chemicals, 90 A.D.2d 907, 456 N.Y.S.2d 867 (App. Div. 3rd Dept. 1982).

31. 42 N.Y.2d 440, 398 N.Y.S.2d 401, 368 N.E.2d 24 (1977).

32. The Restatement 2d Torts, § 520 (1976) guidelines are:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes. *Id.*

33. Hydraulic dredging and landfilling involves "the introduction by pressure of a continuous flood of massive quantities of sand and water" in order to raise the level of the land. 42 N.Y.2d at 444, 398 N.Y.S.2d at 402.

stitutes an abnormally dangerous activity for which the defendants could be held strictly liable. While an insufficient record prevented the court from making a determination as to whether the challenged activity was abnormally dangerous, the court did suggest that strict liability would be appropriate.[34] In ordering a new trial, the Court of Appeals held that the Restatement criteria should be considered in addition to the plaintiffs' original negligence action.[35]

Strict liability may be imposed when the conduct creating the nuisance occurred many years prior to the manifestation of any harm. The creator does not also have to be the landowner in order to apply strict liability for the public nuisance. In *State of New York v. Schenectady Chemicals, Inc.*,[36] an action was brought by the State to force the chemical company to pay for clean up of a hazardous waste dump site where that company's wastes had been disposed of by an independent contractor. Although disposal had occurred fifteen to twenty years prior to institution of the action, the court found that there was a right to maintain a public nuisance action as long as the nuisance persisted.[37] The court also found it irrelevant that Schenectady Chemicals did not own the dump site at any time because "everyone who creates a nuisance or participates in the creation or maintenance . . . of a nuisance are liable jointly and severally for the wrong and injury done thereby."[38] Thus, the creation of the hazardous waste alone, without any act in the disposal of such wastes, was at least contributing to the creation of a nuisance for which the creator could be held liable.

II. The "Sale Defense"

The Restatement (2d) of Torts section 840A states that a vendor is liable for any nuisance condition upon the land which he sells (subsection (1)), but that his liability continues only until such time as the vendee has knowledge of the condition and has had a reasonable time to abate it (subsection (2)).[39] This is the so-called "sale defense." New York courts

34. 42 N.Y.2d at 448, 398 N.Y.S.2d at 404.

35. *Id.* at 448-449, 398 N.Y.S.2d at 404-405.

36. 459 N.Y.S.2d 971 (Sup.Ct. 1983) (*Schenectady I*), *aff'd as modified*, 479 N.Y.S.2d 1010 (3rd Dept. 1984) (*Schenectady II*).

37. *Id.* at 977.

38. *Id.* at 976.

39. Restatement 2d of Torts § 840A provides:

(1) A vendor or lessor of land upon which there is a condition involving a nuisance for which he would be subject to liability if he continued in possession remains subject to liability for the continuance of the nuisance after he transfers the land.

(2) If the vendor or lessor has created the condition or has actively concealed it from the vendee or lessee the liability stated in Subsection (1) continues until the vendee or lessee discovers the condition and has reasonable opportunity to abate it. Otherwise the liability continues only until the vendee or lessee has had the reasonable opportunity to discover the condition and abate it. *Id.*

historically have followed the approach of both subsections of the Restatement, but no New York court has specifically adopted the defense as contained in section 840A(2). In *Pharm v. Lituchy*,[40] a 1940 case, the court held that an owner's liability for a nuisance persisted beyond conveyance only until such time that the new owner had a reasonable opportunity to inspect the property, discover the condition, and take the necessary steps to remedy the situation.[41] The court did not mention the Restatement at all, but the language used is very similar to that found in section 840A(2).

While New York courts have not directly addressed section 840A(2), two New Jersey cases have specifically addressed this subsection and have adopted it as consistent with New Jersey law. In a 1959 case, *Sarnicandro v. Lake Developers, Inc.*,[42] plaintiffs leased a portion of a house containing a hazardous stairway. The plaintiffs knew of the faulty construction more than two years before the injury was sustained from a fall on the steps. In *Sarnicandro*, the New Jersey court stated as the general rule of vendor liability that "once the vendee has taken possession, the vendor of real estate is not subject to liability for bodily harm caused to the vendee or others while upon the premises by any dangerous condition, whether natural or artificial, which existed at the time the vendee took possession."[43] Although the court recognized that there were exceptions to this general rule which extended a vendor's liability for some period beyond conveyance,[44] it found that under section 840A(2) of the Restatement, such an extension was inappropriate in this case because the vendees had actual knowledge of the nuisance condition and had ample time in which to repair it.[45] Thus, the "sale defense" relieved the vendor of liability for the plaintiff's injuries because the conditions of section 840A(2) were fulfilled.

Cavanaugh v. Pappas,[46] a 1966 New Jersey case, involved injuries sustained when a mother carrying her infant son fell while walking on a sidewalk that was in disrepair. The property, of which the sidewalk passed in front, had been sold five days before the accident. The issue was whether the prior owner or the present owner of the property was liable for the plaintiff's injuries. The vendor had completely divested himself

40. 283 N.Y. 130 (1940).

41. *Id.* at

42. 55 N.J.Super. 475, 151 A.2d 48 (1959).

43. *Id.* at 477, 151 A.2d at 50.

44. Some exceptions include "where the vendor creates a situation which interferes with the rights of the public or with the use or enjoyment of adjoining lands. In cases where the land is transferred in such a condition that it invokes an unreasonable risk of harm to those outside the premises, the vendor has been held liable on the theory of a public or a private nuisance, at least for a reasonable length of time after he has parted with possession." *Id.* at 478, 151 A.2d at 51.

45. *Id.* at 479, 151 A.2d at 52.

46. 91 N.J.Super. 597, 222 A.2d 34 (1966).

of all interest in the property upon conveyance of the deed.[47] The court found that landowner liability ordinarily terminated upon conveyance of the property, but, citing *Sarnicandro*, also found that there are exceptions to this rule.[48] In holding that the vendor was liable to the plaintiffs, the court relied directly on section 840A(2),[49] concluding that "one should not be allowed to create a dangerous condition on property which could cause damage to others and then escape liability for such damages simply because he sells the property on which the dangerous condition exists."[50] The court found that a vendor's liability for nuisance conditions extended for a reasonable time beyond conveyance, and determined that five days was not sufficient time for the vendee to abate the nuisance as required by section 840A(2). Therefore, the "sale defense" did not relieve the vendor of his liability for the plaintiff's injuries.

Although no New York court has specifically addressed section 840A, the court in *State of New York v. Ole Olsen, Ltd.*[51] may have implicitly rejected this so-called "sale defense." *Ole Olsen* involved the installation of faulty sewage systems in recreation homes surrounding a lake. The faulty systems caused serious degradation of and irreparable damage to the lake, but the condition did not manifest itself until after the sale of the homes to private parties. The defendants claimed that their sale of the properties with the faulty sewage systems relieved them of any liability for the resulting nuisance and, therefore, the suit against them should be dismissed. The defendants did not claim, however, that the vendees knew of the nuisance and had had a reasonable opportunity to abate it as required by section 840A(2). In concluding that the plaintiffs did have a cause of action against the developers, the court found that "[a]mple authority exists to the effect that the creator of a nuisance does not, by conveying his property to another, release himself from liability for its continuance."[52] Thus, it appears that, without specific mention of the Restatement, the New York courts have rejected the "sale defense" of section 840A(2) at least as it applies to public nuisances.

III. The Assumption of Risk Defense

At common law, the affirmative defense of assumption of risk was traditionally available to defendants.

> In its most basic sense, assumption of risk means that the plaintiff,

47. *Id.* at 599, 222 A.2d at 36.
48. *Id.* at 600, 222 A.2d at 37.
49. *Id.* at 601, 222 A.2d at 38.
50. *Id.*
51. State of New York v. Ole Olsen, 317 N.Y.S.2d 539 (Sup.Ct. 1971), *aff'd*, 331 N.Y.S.2d 761 (2nd Dept. 1972), *aff'd mem.*, 357 N.Y.S.2d 1016 (1974), *aff'd as modified*, 365 N.Y.S.2d 528 (1975).
52. *Id.* at 541, 331 N.Y.S.2d at 763.

> in advance, has given his express consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone.[53]

In cases where the plaintiff was found to have assumed the risk, the defendant was not liable for any injuries or damages caused by his conduct. This was so even in cases of strict liability. Then, in 1975, the New York legislature enacted Article 14-A of the Civil Practice Law and Rules (C.P.L.R.) which provided that assumption of risk would no longer act as a complete bar to plaintiff's recovery, but would instead diminish the amount of damages recoverable based upon a comparison of the culpable conduct of the parties.[54] This article is applicable to all negligence actions and also to any other action seeking to recover damages for personal injury or property damage.[55]

A leading New York case interpreting and applying C.P.L.R. Article 14-A—specifically, sections 1411 and 1412—is *Arbegast v. Board of Education*.[56] The plaintiff in *Arbegast* was a high school teacher participating in a school-sponsored donkey basketball game. Prior to the second game she was warned by an employee of the donkey owner that the donkey she was about to mount was known to stop suddenly, thereby unseating its rider. With this knowledge, the plaintiff continued to participate in the games on the unpredictable donkey until she was thrown, as warned, and was injured. She brought suit against the school and the owners of the donkeys. The school reached a settlement with her, but the owners claimed that they were not liable because she had been forewarned, and therefore, had participated in the games at her own risk. Because there was evidence that the plaintiff had expressly assumed the risk of injury, the court had to determine how C.P.L.R. 1411 and 1412 applied. The court, relying on the legislative history of Article 14-A, determined that the article was applicable "to all actions brought to recover damages for personal injury, injury to property or wrongful death whatever the legal theory upon which the suit is based," and that the defendant's culpable conduct does not necessarily have to be negligent

53. W. Prosser and W. Keeton, *supra* note 2, at 480.

54. C.P.L.R., art. 14-A, § 1411 (1975) provides that in any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery. However, the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages. *Id.*

C.P.L.R., art. 14-A, § 1412 provides that the culpable conduct claimed in diminution of damages, in accordance with CPLR 1411, shall be an affirmative defense to be pleaded and proved by the party asserting the defense. *Id.*

55. Arbegast v. Board of Education, 490 N.Y.S.2d 751, 755 (1985).

56. *Id.* at 751.

and may even be conduct ordinarily resulting in strict liability.[57] Essentially, the court determined that C.P.L.R. Article 14-A had a very broad application covering the range of suits brought to recover damages for some act or injury.

The legislative history of C.P.L.R. Article 14-A did not, however, define "assumption of risk." The court, therefore, relied on the common law distinctions between implied assumption of risk and express assumption of risk.[58] Express assumption of risk was an absolute bar to recovery and "resulted from agreement in advance that defendant need not use reasonable care for the benefit of plaintiff" whereas implied assumption of risk was based on "plaintiff's voluntarily encountering the risk of harm from defendant's conduct with full understanding of the possible harm" and was not always an absolute bar to recovery.[59] The court found that section 1411 did not change the existing law as to express assumption of risk, but did act to diminish damages in cases of implied assumption of risk.[60] Specifically, the court held that "CPLR 1411 requires diminishment of damages in the case of an implied assumption of risk but, except as public policy proscribes an agreement limiting liability, does not foreclose a complete defense that by express consent of the injured party no duty exists and, therefore, no recovery may be had."[61]

The court in *Arbegast* granted the defendant's motion for a directed verdict based on the plaintiff's testimony that, prior to participating in the game, she had been advised by a representative of the owner that the donkey had a tendency to stop suddenly, often resulting in unseating of the rider.[62] The court found no public policy reasons for nullifying the plaintiff's agreement. The plaintiff's express assumption of risk therefore acted as an absolute bar to recovery from the defendants.

The court in *Arbegast* held that public policy considerations might bar the use of express assumption of risk as a complete defense from liability, but the court did not elaborate on this exception. Three New York cases have provided limited examples, all relating to a State's exercise of its sovereign powers.[62] One exception, based on the theory of eminent domain, provides that the state may take "title to land free of all encumbrances and inconsistent proprietary rights."[63] A second exception is that the State will not be completely barred from recovery of costs incurred

57. *Id.* at 755-56.
58. *Id.* at 757.
59. *Id.*
60. *Id.*
61. *Id.* at 757-758.
62. *Id.* at 758.
63. United States v. Hooker Chemicals & Plastics Corp., 722 F.Supp. 960, 971 (N.D.N.Y. 1989), citing Ossining Urban Renewal Agency v. Lord, 39 N.Y.2d 628, 385 N.Y.S.2d 28, 350 N.E.2d 405 (1976).

in the exercise of its "police powers to protect the public health."[64] The third exception is that New York courts will generally show due deference to the state's exercise of its sovereign powers.[65] All these exceptions relate to State actions; further exceptions have yet to be developed.

ANALYSIS

I. Public Nuisance Liability

In *United States v. Hooker Chemicals & Plastics Corp.*,[66] the State of New York contended that it was exercising its police powers, first in abating the existing public nuisance and later in seeking reimbursement for those costs from the responsible party.[67] According to the State, Hooker, as the responsible party, was jointly and severally liable without regard to negligence or fault under New York common law for the public nuisance condition at the Love Canal site.[68] The State argued further that ordinary negligence standards such as proximate cause and foreseeability were inapplicable to public nuisance actions brought under the police powers of a sovereign.[69] The State wanted a "more expansive view of causation" to be applied to cases such as this, so that the creator of the condition would be liable for the resulting nuisance.[70] The State argued in the alternative that there was sufficient factual evidence in the record, such as the nonliability clause in the conveyance deed, to find that Hooker was aware of the hazardous condition and the possibility of resulting harm.[71] Therefore, the State argued, Hooker Chemicals & Plastics was liable under New York common law for the costs incurred by the State in abating the public nuisance at the Love Canal waste disposal site and a partial summary judgment as to Hooker's liability was appropriate.[72]

Hooker, on the other hand, contended that "the disposal of chemical waste is not *per se* abnormally dangerous activity" and, therefore, summary judgment was not appropriate.[73] Also inappropriate for summary judgment, according to Hooker, was an analysis of the *Doundoulakis* guidelines for determining abnormally dangerous activities.[74] Hooker argued that general negligence principles such as proximate cause and foreseeability had to be applied in determining its liability. Hooker also attempted to distinguish "creators" from "maintainers" of nuisance con-

64. *Id.*, citing Carillo v. Axelrod, 88 A.D.2d 681, 450 N.Y.S.2d 909 (3rd Dept. 1982).
65. *Id.*, citing Kohl Industrial Park Co. v. County of Rockland, 710 F.2d 895 (2d Cir. 1983).
66. 722 F.Supp. 960 (W.D.N.Y. 1989).
67. *Id.* at 962.
68. *Id.* at 962-63.
69. *Id.* at 963.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 966.

ditions, arguing that proximate cause is not necessary to establish liability of the latter group, but is necessary for the former group.[75] Referring to its "safe, state-of-the-art disposal of wastes," Hooker argued that there was no causal link to establish its liability for the public nuisance.[76] Because the State had not established liability according to general negligence principles or a causal link between Hooker's conduct and the public nuisance, Hooker contended that summary judgment as to its liability was inappropriate.[77]

The court found it relatively easy to establish Hooker's liability under common law of public nuisance for the condition existing at the Love Canal waste site. It was undisputed that Hooker had created and disposed of tons of chemical wastes in the Love Canal site, that these wastes had combined with water to form a leachate, and that this leachate had exited the Love Canal site and caused the contamination of the surrounding area.[78] The contamination posed a serious health threat as evidenced by the several health advisories issued by both state and federal governments and the federal declaration that a state of emergency existed.[79] The undisputed facts indicated that Hooker was liable for the public nuisance, but the court also held that, at least in cases such as this, the disposal of hazardous wastes constituted an abnormally dangerous activity.[80] The court admitted that no New York court had yet reached such a conclusion, but concluded that the leading cases indicated that such a holding would be reasonable given the appropriate, undisputed facts.[81] In aid of this position is the fact that Hooker had been found strictly liable under section 107(a) of CERCLA.[82] The court had previously determined Hooker's responsibility for the creation of the condition and, therefore, had only to fit those findings into the New York common law of public nuisance. The court, therefore, determined that the undisputed facts indicated Hooker's responsibility for the condition created and that Hooker's disposal of hazardous wastes constituted an abnormally dangerous activity under New York law and required the application of strict liability.[83]

II. The Sale Defense

Hooker argued that, because New York courts had adopted the "sale defense" as stated in section 840A(2) of the Restatement (2d) of Torts,

75. *Id.* at 963-64.
76. *Id.*
77. *Id.*
78. *Id.* at 967.
79. *Id.* at 962.
80. *Id.* at 966-67.
81. *Id.*
82. 680 F.Supp. at 556-59.
83. United States v. Hooker Chemicals & Plastics Corp., 722 F.Supp 960, 967 (W.D.N.Y. 1989).

its liability for any harm was terminated when it conveyed the property to the Board of Education with the nonliability clause included in the deed.[84] Relying primarily on *Ole Olsen*, the State argued that New York courts have rejected the "sale defense," at least with respect to cases involving the State's exercise of its police powers to abate public nuisances.[85]

The court, like the State, relied primarily on *Ole Olsen* in discarding Hooker's sale defense. The court found that *Ole Olsen* implicitly rejected the application of the "sale defense" because several courts had reviewed the case and none of them considered subsection (2).[86] The weakness of this argument is obvious: the court may not have considered section 840A simply because it found it inapplicable. With regard to Hooker Chemical and the Love Canal site, the court held that "the different interests protected by the doctrines of public and private nuisance, as well as the nature of the activity involved, require the application of an exception to the limitation of a vendor's liability found in the Restatement."[87]

Essentially, the court found it inappropriate to relieve the creator of a public nuisance to escape liability simply by selling the property and making the buyer aware of the condition. This is especially true where hazardous wastes are concerned. The court relied on the distinction "between mere negligent maintenance of the property and affirmative acts of negligence in the actual creation of a nuisance or dangerous condition."[88] Because Hooker had taken affirmative actions which resulted in the creation of the nuisance condition, ownership of the property was immaterial and Hooker's sale of the property, even with the nonliability clause, was irrelevant to its liability for the public nuisance.[89]

III. Assumption of Risk

Hooker claims that the Board of Education expressly assumed the risk of injury when it signed the purchase agreement containing the nonliability clause and, therefore, Hooker cannot be held liable for the resulting nuisance.[90] According to Hooker, this express assumption of risk also applied to the State when it condemned a portion of the Love Canal site. The court begrudgingly agreed that, at least arguably, the State had expressly assumed the risk of injury.[91] However, the court, relying primarily on *Arbegast*, concluded that a public policy exception to C.P.L.R. Article

84. *Id.* at 968.
85. *Id.* at 969.
86. *Id.*
87. *Id.*
88. Merrick v. Murphy, 83 Misc.2d 39, 371 N.Y.S.2d 97, 100 (Sup. Ct. 1975).
89. United States v. Hooker Chemicals & Plastics Corp., 722 F.Supp 960, 969 (W.D.N.Y. 1989).
90. *Id.* at 970.
91. *Id.* at 971.

14-A and express assumption of risk should apply.[92] The court found that the theory of eminent domain and a State's right to take land for public purposes without encumberances or other inconsistent proprietary rights[93] provided the necessary exception. The court, therefore, rejected Hooker's assumption of risk defense as it applied to liability, but held that the defense might help mitigate damages.[94]

One very obvious fault with this holding is that the State had condemned only a small portion of the land, but the court seemingly rejected the defense as to liability for the entire Love Canal site. The court does not even discuss the remainder of the Love Canal site, which was owned by the Board of Education and private parties, and how assumption of risk might relieve Hooker of liability, nor does it discuss what policy exceptions might apply, as in the case of state-owned land. This may be the weakest point in the court's opinion, particularly because this was a partial summary judgment rather than a decision rendered at the conclusion of a trial.

CONCLUSION

At a time when there is an ever-increasing amount of environmental legislation enabling parties to bring actions against polluters, environmental plaintiffs are still using common law approaches such as public nuisance. More significantly, courts appear to be sympathetic to these approaches, but not to the traditional common law affirmative defenses, such as the sale defense and assumption of risk. Today's judiciary appears to be more environmentally conscious when ruling in such cases, and therefore, is using public policy exceptions to lessen the harsh consequences of out-dated common law defenses. This could be a very important step in the effort to clean up the environment as well as letting those destroying it know that they will have to pay.

JULIE MAUER

92. *Id.*
93. *Id.*
94. *Id.*