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Superfund - Your Friendly Hometown Lender? The Liability of Financial Institutions under the Comprehensive Environmental Response, Compensation and Liability Act

INTRODUCTION

In 1980 Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or Act) and appropriated badly needed funds in order to deal with growing problems of hazardous waste.¹ The Act made responsible parties, particularly those who generate or transport hazardous waste, liable for cleanup costs.² Courts which have interpreted the Act, however, have not only imposed CERCLA liability on the apparent "responsible parties"³ but have, in some instances, imposed liability on lending institutions which foreclosed on contaminated property.⁴ Although the Act exempts from liability a person who holds indicia of ownership primarily to protect a security interest,⁵ some courts have narrowly construed the exemption.⁶ Thus, if a bank forecloses on contaminated property, it may become liable for cleanup costs.

Lenders need to be aware of the potential for liability when property in which they hold a security interest is used for hazardous waste disposal or other similar activities. This comment examines the possible liability faced by banks and other lending institutions for hazardous waste cleanup under CERCLA. Following a discussion of CERCLA legislation and case law impacting lenders, this comment makes several recommendations which lenders should consider when dealing with interests in hazardous waste properties in order to reduce their exposure to liability.

1. Comprehensive Environmental Response, Compensation and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C.A. §§ 9601 to 9675 (West 1983 & Supp. 1988)). See H.R. Rep. No. 1016, 96th Cong., 2d. Sess., *reprinted* in 1980 U.S. CODE CONG. & ADMIN. NEWS, 6119, 6120.

2. 42 U.S.C.A. § 9607(a) (West 1983 & Supp. 1988).

3. See, e.g., *New York v. Shore Realty Co.*, 759 F.2d 1032 (2d Cir. 1985).

4. See, e.g., *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 577-78 (D. Md. 1986).

5. 42 U.S.C.A. § 9601(20)(A) and 42 U.S.C.A. § 9607(a)(1) (West 1983 & Supp. 1988). 42 U.S.C.A. § 9601(20)(A) (West 1983 & Supp. 1988) states:

"[O]wner or operator" means . . . (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, hold indicia of ownership primarily to protect his security interest in the vessel or facility.

Id.

6. See, e.g., *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1569 (5th Cir. 1988).

BACKGROUND

The Environmental Protection Agency (EPA) recently estimated that American industries generate approximately 266 million metric tons of hazardous waste each year.⁷ That estimate is up from 150 million metric tons in 1981.⁸ The average cost to clean up a single hazardous waste site is now twelve million dollars.⁹ Projections indicate that cleanup costs will grow substantially in the near future.¹⁰

In 1980, Congress responded to the growing problem of hazardous waste by enacting the Comprehensive Environmental Response, Compensation and Liability Act.¹¹ The purposes of the Act were to take control of hazardous waste¹² by encouraging cleanup of abandoned hazardous waste sites,¹³ and to prevent further contamination of the environment.¹⁴ Under CERCLA, parties responsible for production, transportation, and storage of waste may be liable to the federal government, to a state agency, or to private parties for the cleanup of waste.¹⁵

CERCLA authorizes the EPA to target waste sites across the nation through the development of a National Priority List (NPL).¹⁶ Using the NPL, the EPA prioritizes the sites according to the seriousness of the hazard which they create,¹⁷ and thus determines the order in which the sites will be cleaned up.¹⁸

7. Quentel, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WIS. L. REV. 139, 140 (1988). Industry is not the only source of hazardous waste. For example, during the 1930s and 1940s a University of Pennsylvania professor, using the basement of his home in Lansdowne, Penn., to process radium, managed to contaminate his own house and lawn, as well as the lawns of four other houses. When the hazard was discovered in 1984, the EPA estimated cleanup costs to be in the neighborhood of two million dollars. The cleanup effort which began in 1984 using federal Superfund money, however, continues today, but the estimated cost has jumped to over nine million dollars. An estimated 2,200 tons of radioactive waste must be shipped to a hazardous waste dump in Utah. *Radioactive house cleanup will cost \$9.5 million*, Laramie Sunday Boomerang, Jan. 8, 1989, at 3, col. 1.

8. Quentel, *supra* note 7, at 140.

9. McMahon, *Lender's Perspectives on Hazardous Waste and Similar Liabilities*, 18 ENVTL. L. REP. (Envtl. L. Inst.) 10,368 (1988).

10. *Id.*

11. Comprehensive Environmental Response, Compensation and Liability Act, Pub. L. No. 96-510, *supra* note 1.

12. H.R. Rep. No. 1016, *supra* note 1.

13. *Id.* at 6130-31.

14. *Id.* at 6133.

15. 42 U.S.C.A. § 9607(a) (West 1983 & Supp. 1988). (Section also includes costs incurred by Indian tribes.) 42 U.S.C.A. § 9607(a)(1-4)(B) places liability for any necessary costs incurred by any other person consistent with the national contingency plan. CERCLA defines a person as:

[A]n individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or interstate body.

42 U.S.C.A. § 9601(21) (West 1983 & Supp. 1988). See 42 U.S.C.A. § 9605 (West 1983 & Supp. 1988) (National Contingency Plan).

16. 42 U.S.C.A. § 9605 (West 1983 & Supp. 1988).

17. *Id.* 40 C.F.R. § 300.66.

18. 42 U.S.C.A. § 9605(c). 40 C.F.R. § 300.66-300.70.

The Act originally created a trust fund,¹⁹ often referred to as the Superfund,²⁰ to be used specifically for the cleanup of hazardous waste.²¹ The fund is largely subsidized by excise taxes levied upon the chemical and petroleum industries.²² In 1986 Congress amended CERCLA with the Superfund Amendments and Reauthorization Act of 1986 (SARA).²³ Among SARA's provisions was an \$8.5 billion increase in the Superfund²⁴ to allow for a more aggressive effort to combat the waste problem.²⁵

CERCLA authorizes the EPA to initiate cleanup of hazardous waste if responsible parties refuse to do so. The three alternatives available to the EPA include 1) issuing an administrative order, enforceable through fines of up to \$25,000 per day, directing a responsible party to implement either removal or remedial action;²⁶ 2) applying for an injunction in the district court to compel the responsible party to clean up or abate the release;²⁷ or 3) cleaning up the waste itself using Superfund money.²⁸ If the EPA cleans up the waste, the Act then requires the EPA to sue the responsible parties in order to reimburse the fund.²⁹

When Congress enacted CERCLA, it attempted to place the primary responsibility for waste cleanup and its associated costs upon those who created the problem.³⁰ Although legislative history of the statute is incomplete and vague,³¹ courts have identified two essential purposes that Con-

19. Pub. L. No. 96-510, Title II, § 221, 94 Stat. 2801 (1980). *Formerly* 42 U.S.C.A. § 9631, *repealed* Pub. L. No. 99-499, Title V, § 517(c)(1), 100 Stat. 1774 (1986).

20. Under current legislation the fund is labeled the "Hazardous Substance Superfund." 42 U.S.C.A. § 9601(11) (West 1983 & Supp. 1988).

21. Pub. L. No. 96-510, Title II, § 221, 94 Stat. 2801. *Formerly* 42 U.S.C.A. § 9631(b)(1), *repealed* Pub. L. No. 99-499, Title V, § 517(c)(1), 100 Stat. 1774.

22. 42 U.S.C.A. § 9611(p) (West 1983 & Supp. 1988). 26 U.S.C.A. § 9507 (West 1983 & Supp. 1988). *See also* Pub. L. No. 96-510, Title II, § 221. *Formerly* 42 U.S.C.A. § 9631(b)(2), *repealed* Pub. L. No. 99-499, Title V, § 517(c)(1), 100 Stat. 1774.

23. Pub. L. No. 99-499, 100 Stat. 1615, 1652, 1692, 1774 (1986).

24. Pub. L. No. 99-499, Title I, § 111, Title II, § 207(d), 100 Stat. 1642, 1706 (1986).

25. H.R. Rep. No. 253, 99th Cong., 2d. Sess., *reprinted* in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2836.

26. 42 U.S.C.A. § 9606(a)-(b) (West 1983 & Supp. 1988). *See, e.g.,* United States v. Conservation Chemical Co., 619 F. Supp. 162, 193 (W.D. Mo. 1985) (Administrative authority to remedy must vest early enough to prevent a potential hazard from materializing.)

27. 42 U.S.C.A. § 9606(a). *See Conservation Chemical*, 619 F. Supp. at 192 (Congress intended injunctive relief to issue whenever any aspect of the nation's interest in a clean environment may be endangered.)

28. 42 U.S.C.A. § 9604 (West 1983 & Supp. 1988). The question of the extent of the government's power here is currently unresolved. In *Outboard Marine Corp. v. Thomas*, the court held CERCLA granted the government the right to enter a waste site to take remedial actions necessary and to seek response costs from the responsible party. 610 F. Supp. 1234, 1239 (N.D. Ill. 1985). The Seventh Circuit reversed this decision on the government's right to enter. *Outboard Marine Corp. v. Thomas*, 773 F.2d 883 (7th Cir. 1985). However, the United States Supreme Court vacated the Seventh Circuit's judgment and remanded the question back to the Seventh Circuit for further consideration. 479 U.S. 1002 (1986).

29. 42 U.S.C.A. § 9607.

30. H.R. Rep. No. 1016, *supra* note 1, at 6136. The purpose of § 9607(a) is to "provide a mechanism for prompt recoveries of monies expended for the costs . . . from persons responsible therefore and to induce potentially liable persons to pursue appropriate environmental response actions voluntarily."

31. Numerous courts have seen fit to comment upon the lack of legislative history. *See, e.g., Shore Realty*, 759 F.2d at 1040 (The court is without benefit of committee reports to

gress had in mind when enacting CERCLA.³² As the Court of Appeals for the First Circuit explained:

First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.³³

Those who may be liable for cleanup costs under CERCLA include (1) current owners and operators of a hazardous waste site or facility,³⁴ (2) those who owned or operated a site or facility at the time of waste disposal,³⁵ (3) those who arrange for transportation, disposal, or treatment of hazardous waste,³⁶ and (4) transporters of hazardous substances.³⁷ Thus, any party who owns or operates a facility, as well as those who generate, transport, treat, store, or dispose of hazardous waste may be liable under CERCLA.³⁸

CERCLA liability is not necessarily based upon fault,³⁹ but is attributed to those who create or magnify the risks of hazardous waste.⁴⁰ Nor does the Act expressly make responsible parties strictly liable; however, courts have interpreted the standard of liability, which is tied to the Clean Water Act,⁴¹ to impose strict liability⁴² unless the party is able to successfully assert one of the CERCLA defenses.⁴³ Responsible

determine the reason for compromise between Senate and House versions of the Act.); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (CERCLA's legislative history is "shrouded with mystery."); *Maryland Bank*, 632 F. Supp. at 578 (The legislative history is "sparse.").

32. See, e.g., *Dedham Water Co.*, 805 F.2d at 1081; *State ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1312 (N.D. Ohio 1983); *Fishel v. Westinghouse Elec. Corp.*, 617 F. Supp. 1531, 1534 (M.D. Penn. 1985).

33. *Dedham Water*, 805 F.2d at 1081.

34. 42 U.S.C.A. § 9607(a)(1) (West 1983 & Supp. 1988).

35. 42 U.S.C.A. § 9607(a)(2) (West 1983 & Supp. 1988).

36. 42 U.S.C.A. § 9607(a)(3) (West 1983 & Supp. 1988). Courts have construed this language to include generators of hazardous wastes. See, e.g., *United States v. Bliss*, 667 F. Supp. 1298, 1310 (E.D. Mo. 1987). See e.g., *United States v. A & F Materials Co., Inc.* 578 F. Supp. 1249, 1252-57 (E.D. Ill. 1984) (Sections 9606 and 9607 construed together allow liability to reach off-site generators.).

37. 42 U.S.C.A. § 9607(a)(4) (West 1983 & Supp. 1988).

38. *Shore Realty*, 752 F.2d at 1043.

39. 42 U.S.C.A. § 9607(a). See, e.g., *Shore Realty*, 752 F.2d at 1044 (Current owner of facility liable when there is a release or threat of release).

40. 42 U.S.C.A. § 9607(a)(1-4).

41. 33 U.S.C.A. § 1321(b)(6)(A) (West 1983 & Supp. 1988). CERCLA states: "The terms 'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33." 42 U.S.C.A. § 9601(32) (West 1983 & Supp. 1988). For standard of liability under 33 U.S.C.A. § 1321, see, e.g., *Burgess v. M/V Tamano*, 564 F.2d 964 (1st Cir. 1977), cert. denied, 435 U.S. 941 (1978) (Owners of vessel discharging oil are liable without fault to the government for cleanup costs.).

42. *Shore Realty*, 759 F.2d at 1042; *Bliss*, 667 F. Supp. at 1304 ("Liability under CERCLA is strict, without regard to the liable party's fault or state of mind."). *Id.*

43. 42 U.S.C.A. § 9607(b) (West 1983 & Supp. 1988).

parties are also jointly and severally liable.⁴⁴ A party who is assessed costs greater than his proportionate share may, however, seek contribution from other responsible parties.⁴⁵ The amount of damages which the government may recover from a private party is not limited,⁴⁶ and the costs may include both "removal"⁴⁷ and "remedial"⁴⁸ action, as well as health assessment costs,⁴⁹ and even up to \$50 million for damages to natural resources.⁵⁰

In addition to liability for cleanup costs, a party may be fined for continuing violations of the Act.⁵¹ Violations of Class I Administrative Penalties are punishable by a fine of up to \$25,000 *per violation*.⁵² The fines are imposed for violating sections of CERCLA relating to notice, destruction of records, failure to abide by the CERCLA financial responsibility requirement, failure to abide by an order generated under a settlement

44. *State of Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1487 (D. Colo. 1985).

45. *Id.* at 1489; *c.f.* *United States v. Westinghouse Elec. Corp.*, 22 Env't Rep. Cas. (BNA) 1230, 1234 (S.D. Ind. 1983).

46. 42 U.S.C.A. § 9607(c) (West 1983 & Supp. 1988).

47. 42 U.S.C.A. § 9607(a)(4)(A) (West 1983 & Supp. 1988). 42 U.S.C.A. § 9601(23) (West 1983 & Supp. 1988) states:

The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. . . .

Id.

48. 42 U.S.C.A. § 9607(a)(1)-(4)(A) (West 1983 & Supp. 1988). 42 U.S.C.A. § 9601(24) (West 1983 & Supp. 1988) states:

The terms "remedy" or "remedial action" means those actions consistent with the permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

Id.

49. 42 U.S.C.A. § 9607(a)(4)(D) (West 1983 & Supp. 1988).

50. 42 U.S.C.A. § 9607(f) (West 1983 & Supp. 1988).

51. 42 U.S.C.A. § 9609 (West 1983 & Supp. 1988).

52. 42 U.S.C.A. § 9609(a) (West 1983 & Supp. 1988).

agreement, or failure to abide by administrative orders, consent decrees or agreements.⁵³ Class II Administrative Penalties are imposed for the same violations, but are punishable by a fine of up to \$25,000 *per day* for each day that a violation continues.⁵⁴ Repeated Class II violations are punishable by a fine of up to \$75,000 per day.⁵⁵

CERCLA provides only three defenses to those who are charged with costs under the Act.⁵⁶ The defenses include:

- (i) an act of God; or
- (ii) an act of war; or,
- (iii) *an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . , if the defendant establishes . . . that (a) he exercised due care with respect to the hazardous substances, . . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . (emphasis added).*⁵⁷

The first two defenses are rarely invoked by defendants in CERCLA actions.⁵⁸ The "third party" defense, however, provides the possibility for relief in cases where no "contractual relationship" existed with the third party alleged to be liable.⁵⁹ The defense is available where the defendant exercised "due care" with regard to the hazardous substance and took precautions against any foreseeable acts or omissions by the third party.⁶⁰ SARA added a "contractual relationship" definition to the third party defense, thereby creating an "innocent landowner" exception within the defense.⁶¹ The definition eliminates liability against landowners who

53. 42 U.S.C.A. § 9606(a)(1)(A-E) and (b)(1-4) (West 1983 & Supp. 1988).

54. 42 U.S.C.A. § 9609(b) (West 1983 & Supp. 1988).

55. This higher penalty is imposed for a second or subsequent violation. 42 U.S.C.A. § 9609(b) (West 1983 & Supp. 1988).

56. 42 U.S.C.A. § 9607(b) (West 1983 & Supp. 1988).

57. 42 U.S.C.A. § 9607(b)(1-4) (West 1983 & Supp. 1988). Section 9607(b)(4) provides for a defense using any combination of the other three defenses.

58. Defendants unsuccessfully asserted the "act of God" defense (42 U.S.C.A. § 9607(b)(1)) in *U.S. v. Stringfellow*, where defendants alleged that heavy rainfall caused contamination of a hazardous waste site. 661 F. Supp. 1053, 1061 (C. D. Cal. 1987). Apparently, no defendant has asserted in court the "act of war" defense (42 U.S.C.A. § 9607(b)(2)).

59. 42 U.S.C.A. § 9607(b)(3).

60. 42 U.S.C.A. § 9607(b)(3).

61. 42 U.S.C.A. § 9601(35)(A) states:

The term "contractual relationship," for the purpose of section 9607(b)(3) of this title includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more circumstances described in clause (i), (ii), or (iii) is also established by a preponderance of the evidence:

- (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in or at the facility.

acquired title to real property with hazardous substances located thereon if they attempted to discover the waste before buying, but were nonetheless ignorant of its presence.⁶² To successfully assert the defense, the defendant must show that he "did not know and had no reason to know that any hazardous substance . . . was disposed of on, in, or at the facility."⁶³ In order to prove that he "had no reason to know," the purchaser must have undertaken "at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial and customary practice."⁶⁴ The section also provides that a court shall take into consideration:

Any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.⁶⁵

As is apparent, the "innocent landowner" provision offers little protection in the absence of an extensive investigation before purchase of the property.⁶⁶

In addition to CERCLA defenses, banks and other private parties may take affirmative steps by bringing a private cause of action under CERCLA prior to any governmentally authorized cleanup program.⁶⁷ In a Ninth Circuit decision the California Department of Health informed the owner of a site containing over one million metric tons of smelter slag that he must clean up the site.⁶⁸ The owner had just recently purchased the site, however, and was not responsible for depositing the slag on the property.⁶⁹ After the owner spent \$150,000 for testing to determine the seriousness of the hazard, he brought an action against the former owner

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.

62. 42 U.S.C.A. § 9607(b)(3) and § 9601(35)(B).

63. 42 U.S.C.A. § 9601(35)(B) (West 1983 & Supp. 1988).

64. 42 U.S.C.A. § 9601(35)(B).

65. 42 U.S.C.A. § 9601(35)(B).

66. Schwenke, *An Overview of Issues of Landowner and Lender Liabilities*, 18 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,361, 10,363 (1988).

67. CERCLA provides liability for: "[A]ny other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C.A. § 9607(a)(4)(B). 42 U.S.C.A. § 9601(21) (person defined). CERCLA contains no "citizen suit" provision which would allow any person to bring suit. *See, e.g., Solid Waste Disposal Act*, 42 U.S.C.A. § 6972 (West 1983 & Supp. 1988). Instead, standing under CERCLA is based on the private party spending money in responding to a hazardous waste problem. *See Walls v. Waste Resource Corp.*, 761 F.2d 311, 317-18 (6th Cir. 1985).

68. *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 889 (9th Cir. 1986).

69. *Id.*

to recover his costs.⁷⁰ The owner also asked the court for a declaration that, as between the two parties, the former owner was solely and entirely liable under CERCLA for the cleanup.⁷¹ The plaintiff further requested the court to order the former owner to initiate cleanup.⁷² After the district court dismissed the claims for failure to state a cause of action under CERCLA,⁷³ the Ninth Circuit reversed. The court held that the owner could recover his costs from the former owner,⁷⁴ and that the owner's claim for declaratory relief was ripe even though the government had not authorized cleanup of the site.⁷⁵ The court also found that the trial court could properly order the former owner to begin cleanup.⁷⁶

Bringing a private cause of action will not necessarily absolve a party of all liability. However, it will perhaps identify responsible parties and force initiation of the cleanup.

Among those who may be liable as "responsible parties" are "owners and operators." Although CERCLA defines "owner and operator,"⁷⁷ there still appears to be some confusion as to who is or is not an "owner and operator" for purposes of CERCLA liability. When Congress enacted CERCLA,⁷⁸ its use of the terms "owners and operators"⁷⁹ and "transporters"⁸⁰ to define responsible parties, indicated its intent to place the costs of cleaning up the environment upon those parties involved in the hazardous waste industry.⁸¹ However, because of the rising costs of hazardous waste cleanup, a new trend to apportion those costs over a broad range of parties has emerged.⁸² Congress, as well as some courts, has expanded certain provisions of CERCLA to include others within the scope of liable parties. SARA broadened the scope of liable parties to include contractors, consultants, and real estate brokers.⁸³ At least two

70. *Id.*

71. *Id.* 28 U.S.C.A. § 2201 (West 1983 & Supp. 1988) states in pertinent part: [A]ny court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C.A. § 2201. The res judicata effect of the issue determination applies against the government. *Ma Chuck Moon v. Dulles*, 237 F.2d 241, 243 (9th Cir. 1956), *cert. denied*, 352 U.S. 1002 (1957).

72. *Wickland*, 792 F.2d at 889.

73. *Id.*

74. *Id.* at 893.

75. *Id.* The issue was ripe for declaratory relief because the disposal of hazardous waste had occurred, making the controversy real and not remote and hypothetical. *Id.* See *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1430 (S.D. Ohio 1984) (Once some expenditure has been made, the controversy is sufficiently real to permit the court to issue a declaratory judgment on the defendant's liability. A complete cleanup of the site is not required.).

76. *Wickland*, 792 F.2d at 893.

77. 42 U.S.C.A. § 9601(20)(A).

78. Comprehensive Environmental Response, Compensation and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1986) (codified as amended at 42 U.S.C.A. §§ 9601 to 9675 (West 1983 & Supp. 1988)).

79. 42 U.S.C.A. § 9607(a)(1).

80. 42 U.S.C.A. § 9607(a)(3).

81. H.R. Rep. No. 1016, *supra* note 1, at 6137.

82. *Schwenke*, *supra* note 66, at 10,362.

83. 42 U.S.C.A. § 9601(35)(A). *Schwenke*, *supra* note 66, at 10,362.

recent court decisions may reflect a new trend by courts to find lending institutions and other parties having very little contact with the hazardous substances liable for cleanup costs under CERCLA.⁸⁴ The courts have accomplished this expansion of liability in part by interpreting "owner and operator" broadly, and by construing CERCLA defenses narrowly, particularly the security interest exemption.⁸⁵

LIABILITY OF FINANCIAL INSTITUTIONS UNDER CERCLA

Although lenders have faced liability under various theories, foreclosure and repurchase of a property at judicial sale alone, absent any exercise of control over the borrower, have generally been insufficient to impose liability on lenders.⁸⁶ However, a lender who exercises excessive control over a borrower may become liable as a principal for the debtor's obligations.⁸⁷ Lenders generally retain the right to make certain financial decisions by way of the loan agreement.⁸⁸ If a lender oversteps his bounds while exercising those rights, his actions may be deemed control.⁸⁹ The line distinguishing appropriate precautions from excessive control, however, is not well defined.⁹⁰ Clearly, when a creditor takes over the business of a troubled borrower, making decisions typically left to the borrower, he crosses over the line and becomes liable as a principal.⁹¹ A creditor who enters into a joint venture with a debtor may also be liable as a principal.⁹² Interfering with minor management decisions and other less intrusive steps, however, lie somewhere in between.

When Congress enacted CERCLA, it recognized that lenders are sometimes inclined to participate in the control and management of a borrower,

84. *Tanglewood*, 849 F.2d 1569. See notes 162 to 172 and accompanying text. *Maryland Bank*, 632 F. Supp. 573. See notes 136 to 161 and accompanying text.

85. 42 U.S.C.A. § 9601(20)(A). See, e.g., *United States v. Carolawn Co.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,696 (D.S.C. 1984) (company found liable after holding title for one hour).

86. E.g., *Flintridge Station Assoc. v. American Fletcher Mortgage Co.*, 761 F.2d 434, 441-42 (7th Cir. 1984) (Lender justified in foreclosing, even though it expressed concern over management of borrower). Lenders are, of course, required to follow statutory procedures in foreclosure and repurchase. See, e.g., Wyo. Stat. §§ 34-4-101, 34-4-113 (1977). See, e.g., *Williams v. First Wyoming Bank*, 742 P.2d 197 (Wyo. 1989) (Foreclosure held valid when notice of sale contained statutorily required items, despite imperfections). Lenders can face liability for wrongful repossession and bad faith setoff. See generally A. CAPPELLO, *LENDER LIABILITY*, at 79-87 (1987).

87. Cappello, *supra* note 86, at 148.

88. *Id.*

89. *Id.* See, e.g., *A. Gay Johnson Farms Co. v. Cargill Co.*, 309 N.W.2d 285 (Minn. 1981) (Creditor kept books of debtor, controlled debtor's bank drafts and sent official to supervise creditor's operations.).

90. Cappello, *supra* note 86, at 149-50.

91. *In Re American Lumber Co.*, 5 Bankr. 470 (Bankr. Minn. 1980) (creditor hired and fired employees of debtor, controlled its mail, approved its contracts with third parties and liquidated its assets); *State National Bank of El Paso v. Farah Manufacturing Co., Inc.*, 678 S.W.2d 661 (Tex. App. 1984) (Creditor controlled naming of debtor's board of directors and officers.).

92. *Minute Maid Corp. v. United Foods, Inc.*, 291 F.2d 577 (5th Cir. 1961) (Creditor shared in profits from debtor's wholesale frozen food operation.).

particularly if the borrower is having financial difficulty.⁹³ CERCLA's definition of "owner-operator" exempts from liability "a person who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest . . ."⁹⁴ Consequently, lending institutions considered themselves beyond CERCLA liability as long as they did not participate in the management and control of a hazardous waste site, and as long as they held indicia of ownership only to protect a security interest. The question that arises is, to what lengths may a secured creditor go to protect its security interest before it becomes an "owner or operator." If a bank forecloses on secured property and places the high bid at the foreclosure sale, does it become an owner as defined by CERCLA, or is it merely protecting its security interest?

One of the first cases to interpret the security interest exemption was *In Re T.P. Long Chemical, Inc.*,⁹⁵ a bankruptcy case. In *Long Chemical*, BancOhio held a security interest in the debtor's equipment, fixtures, inventory, and other personal property.⁹⁶ The debtor, unbeknownst to the bank, had buried drums of hazardous waste toward the back of the property.⁹⁷ When the barrels were discovered, the EPA requested the trustee in bankruptcy to clean up the waste.⁹⁸ After the trustee refused, the EPA cleaned up the site with Superfund money.⁹⁹ The EPA then sued the trustee and BancOhio, which held a security interest in the debtor's personal property.¹⁰⁰ Because the estate had insufficient assets to pay the costs of cleanup, the EPA sought reimbursement from the trustee's funds, which were subject to BancOhio's security interest.¹⁰¹

93. H.R. Rep. No. 1016, *supra* note 1, at 6181:

[A] financial institution which held title primarily to secure a loan but also received tax benefits as the result of holding title would not be an "owner" as long as it did not participate in the management or operation of the vessel or facility.

Id.

94. 42 U.S.C.A. § 9601(20)(A).

95. 45 Bankr. 278 (Bankr. N.D. Ohio 1985).

96. *Id.* at 280.

97. *Id.* at 281.

98. *Id.*

99. *Id.*

100. *Id.* at 282. The trustee argued that the barrels had been abandoned pursuant to § 554 of the Bankruptcy Code. *Id.* at 284. However, the court held that the barrels could not be abandoned. *Id.* at 286. Thus, the estate included the barrels when the EPA initiated the cleanup. *Id.* at 287. In a case similar to *Long*, the United States Supreme Court upheld a bankruptcy court's denial of a trustee's abandonment power. *MidAtlantic National Bank v. New Jersey Dept. of Environmental Protection*, 106 S. Ct. 755 (1986). The Court, in a 5-4 decision, held that the trustee's powers must yield to the governmental interest in public health and safety. 106 S. Ct. at 760. Thus, because of the "repeated congressional emphasis on protecting the environment against toxic pollution," the trustee had a restricted power of abandonment. *Id.* at 762. The dissent would have allowed the trustee to abandon the contaminated property, arguing "the City and State are in a better position in every respect than either the Trustee or debtor's creditors to do what needs to be done to protect the public against the dangers posed by the PCB-contaminated facility." *Id.* at 767 (Rehnquist, J. dissenting). The membership of the Court has changed since the Court issued this opinion. Justice Powell, who wrote the opinion, has since retired from the Court. Thus, it is possible that the Court in the future will adopt the view of the dissent.

101. 45 Bankr. at 287.

The court rejected the EPA's argument that BancOhio had become the owner of the barrels and should pay for the costs of cleanup.¹⁰² The court found instead that BancOhio fell within the security interest exemption.¹⁰³ The bank had acted only to protect its security interest and was not, therefore, responsible for cleanup costs incurred by the EPA.¹⁰⁴ The court further noted that, "even if BancOhio had repossessed its collateral pursuant to its security agreement, it would not be an 'owner or operator' as defined under CERCLA."¹⁰⁵

Shortly after *Long Chemical*, the question of ownership arose in the context of a foreclosure action. In *United States v. Mirabile*,¹⁰⁶ the court addressed the issue of whether a financial institution, by foreclosing on a secured property, may become liable under CERCLA as an "owner." In *Mirabile*, the American Bank and Trust Company (American Bank) and the Mellon Bank (East) National Association (Mellon Bank) both held security interests in the property of Turco Coatings, Inc., a paint manufacturing business.¹⁰⁷ American Bank foreclosed on the business and was the high bidder at the foreclosure sale.¹⁰⁸ After foreclosure the bank secured the property to prevent vandalism, showed the property to prospective buyers, and shortly thereafter sold it to the Mirabiles.¹⁰⁹ Sometime later the Mirabiles received notice from the State of Pennsylvania that leaking drums of toxic waste had to be removed from the property.¹¹⁰ The Mirabiles attempted to store the leaking drums but failed.¹¹¹ The EPA eventually cleaned up the site at a cost of \$250,000, and then sued the Mirabiles for reimbursement.¹¹² The Mirabiles joined the American Bank and Mellon Bank as third party defendants. The Mirabiles claimed that the banks acted in a management capacity while financing Turco and thereby helped create the hazardous waste problem.¹¹³

The court granted American Bank's motion for summary judgment. It found that even though the bank had foreclosed and purchased the property before the Mirabiles took possession, it nevertheless was not liable under CERCLA.¹¹⁴ The court ruled that the bank's actions were undertaken only to protect its security interest, and could not be deemed participation in the management of the site.¹¹⁵ The *Mirabile* court recognized that "in enacting CERCLA Congress manifested its intent to impose

102. *Id.* at 288.

103. *Id.* at 289. 42 U.S.C.A. § 9601(20)(A).

104. 45 Bankr. at 289.

105. *Id.* at 288-89. 42 U.S.C.A. § 9601(20)(A).

106. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,993 (E.D. Penn. 1985) (*Mirabile II*).

107. *Id.* at 20,995.

108. *Id.* at 20,996.

109. *Id.*

110. *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992, 20,993 (E.D. Pa. 1985) (*Mirabile I*).

111. *Id.*

112. *Id.*

113. *Mirabile II*, 15 Env'tl. L. Rep. at 20,995.

114. *Id.* at 20,996-97.

115. *Id.* at 20,996.

liability upon those who were responsible for and profited from improper disposal practices.”¹¹⁶ The court found that “the exemption plainly suggests that provided a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be liable for cleanup costs.”¹¹⁷ The court explained that the distinction between participation in purely financial aspects of the operation, as opposed to participation in management of the facility or business itself, is “critical.”¹¹⁸ “Mere financial ability to control waste disposal practices of the sort possessed by the secured creditors in this case is not . . . sufficient for the imposition of liability.”¹¹⁹ The court adopted the defendant’s argument, finding that “a secured creditor’s exercise of financial control over the debtor should not bring the creditor within the scope of CERCLA liability.”¹²⁰ The court also noted that:

Obviously, imposition of liability on secured creditors or lending institutions would enhance the government’s chances of recovering its cleanup costs, given the fact that owners and operators of hazardous waste dumpsites are often elusive, defunct, or otherwise judgment proof. It may well be that imposition of such liability would help to ensure more responsible management of such sites. The consideration of such policy matters, and the decision as to the imposition of such liability, however, lies with Congress. In enacting CERCLA Congress singled out secured creditors for protection from liability under certain circumstances.¹²¹

Although the American Bank in *Mirabile* foreclosed on the hazardous waste property, it did so, as the court found, only to protect its security interest.¹²² Therefore, American Bank was not liable for the cleanup.¹²³

The court did not come to the same conclusion with regard to Mellon Bank.¹²⁴ The court found that Mellon Bank’s predecessor had participated in the management and control of Turco.¹²⁵ The evidence indicated that a former bank officer had joined an advisory board to oversee the Turco operation, and had in fact been involved in the day to day operations of the plant.¹²⁶ Furthermore, the loan officer had made weekly visits to the site.¹²⁷ In light of the evidence, the court held that there was a genuine issue of fact as to whether Mellon Bank had exercised enough control over the operations of Turco to bring it within CERCLA.¹²⁸

116. *Id.*

117. *Id.* at 20,995.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 20,996.

122. *Id.*

123. *Id.*

124. *Id.* at 20,997.

125. *Id.*

126. *Id.* at 20,996-97.

127. *Id.* at 20,997.

128. *Id.*

The *Mirabile* decision illustrates at least one method by which lending institutions may become liable under CERCLA.¹²⁹ The security exemption is to no avail if the lender participates in the management or control of the facility.¹³⁰ If the lender becomes involved in the affairs and operations of the facility, he may then fall within the definition of "owner and operator."¹³¹

The second way in which a lender may become liable under CERCLA is by foreclosing on property which is subject to a security agreement.¹³² Although the language of the Act exempts from liability lenders who institute action "primarily to protect [their] security interest, . . ."¹³³ not all courts agree upon the application of the exemption.¹³⁴ The *Mirabile* court found the American Bank to come within the security exemption after it foreclosed and held legal title to the property.¹³⁵ A 1986 decision, however, concluded that a lender *may* become liable as an "owner" after foreclosing on a secured property.

In *United States v. Maryland Bank and Trust*,¹³⁶ the Maryland Bank and Trust (MB&T) loaned money to Herschel McLeod to operate a trash and garbage business.¹³⁷ McLeod permitted hazardous chemicals to be disposed of on the property.¹³⁸ Although the bank knew the general nature of the business, whether the bank knew of the contamination was disputed at trial.¹³⁹ In 1980 MB&T loaned Mark McLeod money to purchase the business from his parents.¹⁴⁰ Not long after the sale the younger McLeod failed to make payments on the loan and the bank foreclosed on the business.¹⁴¹ MB&T then purchased the property at the foreclosure sale.¹⁴² The EPA later told the bank of the hazardous waste on the property and requested that MB&T clean up the site.¹⁴³ After the bank refused to clean up the waste the EPA did so.¹⁴⁴ It removed 237 drums of chemicals and 1180 tons of contaminated soil, at a cost of \$552,000.¹⁴⁵ When MB&T refused to reimburse the EPA for cleanup costs, the EPA sued.¹⁴⁶

At trial, MB&T raised the "third party defense,"¹⁴⁷ and moved for summary judgment based upon the security interest exemption.¹⁴⁸ The

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 20,996.

133. 42 U.S.C.A. § 9601(20)(A).

134. *See, e.g., Maryland Bank and Trust*, 632 F. Supp. at 580.

135. 15 *Env'tl. L. Rep.* at 20,996.

136. 632 F. Supp. 573.

137. *Id.* at 575.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 575-76.

146. *Id.* at 576.

147. *Id.*

148. *Id.* at 575.

government also moved for summary judgment on the third party defense, arguing that MB&T could not meet its burden of proof to assert the defense.¹⁴⁹ The court denied both motions, finding that a factual dispute existed on the issue of whether MB&T knew that hazardous substances were dumped on the property.¹⁵⁰

In determining whether the bank was an "owner," and thus liable under the Act, the court focused upon the meaning of "owner."¹⁵¹ The court concluded that when the bank purchased the property at the foreclosure sale, its security interest ripened into full title.¹⁵² Therefore, when cleanup of the waste began approximately one year later, the bank held legal title to the property.¹⁵³ The court further found that "[o]nly during the life of the mortgage did MB&T hold indicia of ownership primarily to protect its security interest in the land," and that MB&T purchased the property at the foreclosure sale "not to protect its security interest, but to protect its investment."¹⁵⁴ The court also cited both *Long Chemical* and *Mirabile* but distinguished *Mirabile* on the grounds that American Bank promptly assigned the property in that case.¹⁵⁵ It also noted that the legislative history and policies behind the Act counseled against the *Mirabile* court's "generous reading" of the security exemption.¹⁵⁶ Therefore, MB&T was liable as an "owner" under CERCLA.¹⁵⁷

The court also noted several policy reasons for holding the bank liable.¹⁵⁸ It argued that if the federal government had to shoulder the entire financial burden of the cleanup, the bank would be able to sell the land at a profit and would benefit, at the government's expense, from the increased value of the uncontaminated land.¹⁵⁹ Thus, allowing the bank to claim the security exemption would convert CERCLA into an "insurance scheme for financial institutions."¹⁶⁰ The court also reasoned that banks are easily able to protect themselves from CERCLA liability by making prudent loans, by not foreclosing, and by not bidding at the foreclosure sale.¹⁶¹

The most recent decision addressing the question of whether a lending institution may be liable under CERCLA is *Tanglewood East Homeowners v. Charles-Thomas, Inc.*¹⁶² In *Tanglewood*, the Fifth Circuit granted an interlocutory appeal to determine whether a bank could be lia-

149. *Id.* at 575, 581.

150. *Id.* at 581-82.

151. *Id.* at 577. 42 U.S.C.A. § 9601(20)(A). 42 U.S.C.A. § 9607(a).

152. *Maryland Bank and Trust*, 632 F. Supp. at 579.

153. *Id.*

154. *Id.*

155. *Id.* at 580.

156. *Id.*

157. *Id.* at 579.

158. *Id.* at 580.

159. *Id.*

160. *Id.*

161. *Id.*; see also *id.* at n.6.

162. 849 F.2d 1568.

ble for cleanup costs under CERCLA after financing a subdivision development located upon a former creosoting site.¹⁶³

In *Tanglewood*, the United Creosoting Company operated a wood treatment facility from 1946 to 1972 during which time toxic waste accumulated on the property.¹⁶⁴ In 1973 several of the defendants, including contractors, real estate agents, and developers, purchased the property, filled in and graded the areas where the creosote pools had been, and began residential development.¹⁶⁵ Contamination problems became evident in 1980, and in 1983 the EPA placed the site on its National Priorities List.¹⁶⁶ Residents of the subdivision then sued the real estate agents, developers, construction companies, and the financing bank, under CERCLA, for damages and cleanup of the subdivision.¹⁶⁷ The defendants filed a motion to dismiss which the district court denied.¹⁶⁸ The lender, First Federal Savings & Loan Association of Monroe (First Federal), then sought an interlocutory appeal.

On appeal, the Fifth Circuit affirmed.¹⁶⁹ The court held that the bank, real estate agents, and developers could be classified as "past owners" of the facility, and therefore could be strictly liable under the statute.¹⁷⁰ The court did not state, however, whether the basis for the ruling was the bank's exercise of control, or whether it was based upon indicia of ownership by some other means. The court also found that the filling in and grading of the property may have constituted "disposal" or "treatment" of hazardous waste.¹⁷¹ The court therefore denied the motion to dismiss, finding that each of the defendants could be held strictly liable for cleanup costs.¹⁷²

ANALYSIS

In both *Long Chemical* and *Mirabile*, the courts interpreted the security interest exemption in accordance with the apparent plain language of the Act, and in accord with the overall statutory scheme.¹⁷³ The *Mirabile* court recognized CERCLA's dual purpose to be that of cleaning up the environment, and placing the costs of cleanup on "those who were responsible for and profited from improper disposal practices."¹⁷⁴ Although the court recognized that the bank could be liable as an owner if it participated in the management of the facility, it distinguished financial control from managerial control.¹⁷⁵ The court held that the exercise of financial

163. *Id.* at 1576.

164. *Id.* at 1571.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 1576.

170. *Id.* at 1572. 42 U.S.C.A. § 9607(a)(1).

171. *Tanglewood*, 849 F.2d at 1573.

172. *Id.* at 1575.

173. 42 U.S.C.A. § 9601(20)(A). 42 U.S.C.A. § 9601(21). 42 U.S.C.A. § 9607(a).

174. 15 *Env'tl. L. Rep.* at 20,996.

175. *Id.* at 20,995.

control over the debtor does not bring a lender within the scope of CERCLA liability.¹⁷⁶

The *MB&T* and *Tanglewood* courts applied CERCLA more stringently than did the *Long Chemical* and *Mirabile* courts. The *Tanglewood* court simply followed the lead of *MB&T*, providing very little reasoning for its decision. The *MB&T* court did, however, articulate what it considered to be important policy reasons for refusing to allow the security interest exemption.¹⁷⁷ The court held that the bank foreclosed on the property "not to protect its security interest, but to protect its investment."¹⁷⁸ Although the distinction appears to be insignificant, the *MB&T* court, unlike the *Mirabile* court, distinguished foreclosure from sale.¹⁷⁹ The court implied that perhaps a lender could foreclose on property without exposing itself to CERCLA liability.¹⁸⁰ However, once a bank purchases the property at the foreclosure sale, it no longer acts to protect its security interest, but becomes the legal owner of the property. The court suggested that rather than foreclosing and purchasing at the foreclosure sale, a bank would be well advised to exercise its other options which include not foreclosing, and not bidding at the sale.¹⁸¹

The *MB&T* court also suggested that the length of time a lender holds the property after the foreclosure sale might make a difference in whether liability will be imposed.¹⁸² The court noted that in *Mirabile* the bank promptly assigned the property to the *Mirabiles*.¹⁸³ In contrast, *MB&T* held legal title for a full year before the EPA initiated cleanup.¹⁸⁴ The court suggested that holding legal title for such length of time further solidified the bank's ownership.¹⁸⁵

Although the *MB&T* court did not expressly say so, it may have found compelling policy considerations in favor of the deterrent effect of imposing liability on lending institutions. Attempts to clean up hazardous waste after responsible parties have become insolvent, or disappeared altogether, may be less effective than the preventative nature of tightening lending procedures. Placing the burden of cleanup on lenders may very well force lenders to originate loans with greater care. Producers of hazardous substances who are unable to obtain appropriate financing will be unable to

176. *Id.*

177. 632 F. Supp. at 580.

178. *Id.* at 579. The court noted that in Maryland, the mortgagee holds title to the property until the mortgage is paid off. In other words, Maryland is a "title theory" state rather than a "lien theory" state. Thus, the court reasoned that the exemption's purpose was to exclude common law mortgagees from the definition of "owner" since title was in their hands only by operation of the common law. Therefore, the exclusion should not apply to mortgagees who hold title after purchasing the property at a foreclosure sale. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 580.

182. *Id.*

183. *Id.* In *Mirabile*, the bank held legal title for approximately four months. 15 *Env'tl. L. Rep.* at 20,996.

184. *Maryland Bank and Trust*, 632 F. Supp. at 579.

185. *Id.*; see also *id.* at n.5.

pollute the atmosphere. The end result might well be more responsible management of hazardous materials.

The *Mirabile* court did consider the deterrent effect of imposing liability on lenders.¹⁸⁶ It nevertheless determined that "Congress singled out secured creditors for protection from liability under certain circumstances,"¹⁸⁷ and that imposing liability on secured lenders would not be in accord with the overall scheme of the Act.¹⁸⁸ The court stated that "consideration of such policy matters, and the decision as to the imposition of such liability . . . lies with Congress."¹⁸⁹

Although the *MB&T* court contended that the legislative history and policies underlying the Act supported its narrow construction of the security exemption,¹⁹⁰ the court failed to consider the dual purpose of CERCLA. The court did consider the strong policy considerations in favor of cleaning up the environment.¹⁹¹ Nowhere in the opinion, however, did the court consider the equally important policy of placing the costs of cleanup on those parties who profit from the waste industry.¹⁹²

The *MB&T* and *Tanglewood* decisions suggest that courts are beginning to look beyond the obviously responsible parties to others who may not necessarily be involved in the generation, production, or transportation of hazardous waste. Although courts have long recognized the liability of lending institutions for involvement in the control and management of a borrower, imposing liability in the absence of control or management is unique.

As the *Mirabile* court noted, imposing liability on lending institutions would obviously enhance the government's chances of recovering its cleanup costs.¹⁹³ However, equally important is the goal that "responsible parties" shoulder that burden. The entire statutory scheme of the Act attempts to place the costs of cleanup on those who manage or deal in hazardous substances, and thereby profit from the industry. When Congress enacted CERCLA, it no doubt intended to create a broad liability base;¹⁹⁴ however, Congress also recognized, by providing the security interest exemption, that lenders and others who have little to do with the every day operations of a hazardous waste facility, are seldom responsible for generating or transporting the waste, and should not be required to bear the costs of cleanup.¹⁹⁵ When Congress added SARA to the Act,

186. 15 *Env'tl. L. Rep.* at 20,996.

187. *Id.*

188. *Id.* at 20,995.

189. *Id.* at 20,996.

190. 632 *F. Supp.* at 579.

191. *See supra* notes 30-33 and accompanying text.

192. *See supra* notes 35-38 and accompanying text.

193. 15 *Env'tl. L. Rep.* at 20,996.

194. *See* H.R. Rep. No. 1016, *supra* note 1, at 6136. "[A]ny person who caused or contributed to a release or threatened release of hazardous waste into the environment which results in costs being incurred . . . would be strictly, jointly and severally liable for costs." *Id.*

195. *See id.* at 6136-37. In order for liability to attach, "the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action. . . ." *Id.*

it retained the security exemption. Apparently Congress believed, as late as 1986, that lenders should be shielded from liability under CERCLA as long as they did not participate in the management of the site. Creation of the "innocent landowner" exception further indicates Congress' intent to allow an escape hatch for those who are not responsible for creating or magnifying hazardous waste problems.

As the number of hazardous waste sites increases throughout the nation, so too will the number of loans secured by such sites. The result is that lending institutions, which take collateral in the form of real estate to secure a loan, become increasingly vulnerable to CERCLA liability. Therefore, lenders must not only weigh the risks inherent in loan origination, but must also consider potential CERCLA liability, which may very well exceed the value of the property.

Although some have suggested that the Justice Department, under current policy, will not aggressively impose liability on a lender who forecloses and takes immediate steps to dispose of the property,¹⁹⁶ others have disagreed.¹⁹⁷ Speaking on the liability of lenders under CERCLA Gene A. Lucero, Director of the Office of Waste Programs Enforcement at the EPA in Washington D.C., recently stated:

Our objective is to clean up sites. Thus, we take broad, sometimes ambiguous provisions of the law and constantly try to expand them to further that end. In certain areas, the result is that potentially responsible parties will encounter considerable difficulty, in a way that they might not now suspect.¹⁹⁸

In the same article Mr. Lucero further stated that "we hold lenders to a higher standard than others."¹⁹⁹ However, he did not elaborate as to why the higher standard.

Imposing liability on lenders will not only serve to increase lending costs, but may preclude the funding of certain industries. Lenders will of course be forced to pass the costs of environmental audits, on-site inspections, and other precautionary measures onto borrowers. The result will be increased loan origination costs, which will in turn reduce the operating capital available for the actual business venture. Requiring lenders to finance hazardous waste cleanup will also increase the risk that a lender must take in what may already be an uncertain lending transaction.

Considering current EPA policy it appears, particularly if other parties are insolvent, that lenders will continue to be the pocket from which the EPA seeks to clean up much of the nation's waste. Although the Act exempts from liability those who hold only a security interest in the property, and although the statutory scheme appears to place the respon-

196. Schwenke, *supra* note 66, at 10,364.

197. McMahon, *supra* note 9, at 10,369.

198. Lucero, *EPA's Role in and Perspectives on Property Transfer and Financing Liabilities*, 18 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,366 (1988).

199. *Id.* at 10,367.

sibility for cleanup on the parties who created the problem, courts may continue to find strong policy reasons for spreading the costs of cleanup over a broad range of parties.

PRECAUTIONS FOR LENDERS

Lenders should not wait until a borrower defaults on a loan, or until foreclosure is pending, before taking measures to prevent the imposition of costs under CERCLA. Lenders should anticipate problems which might arise under CERCLA, and develop policies and procedures for originating loans which deal with those problems.

Whenever a lender originates a loan, he must also anticipate the need to foreclose on the collateral at some later date. The greatest preventative measure that a lender can take, therefore, is to investigate properties to determine hazardous waste problems *before making the loan*.²⁰⁰ At that point the lender still has the option of denying the loan, if necessary, and steering clear of the property altogether. Discovery of a hazardous waste problem after the loan is made, or after foreclosure action is taken, is not a defense under CERCLA.²⁰¹

Lenders should not simply rely upon the borrower's knowledge of past or present uses of the property. Rather, lenders should do their own investigation to be sure that the property is being used as represented, and that contamination problems do not exist on the property. Although cleanup costs imposed under CERCLA might well become a lender's greatest liability, the lender also takes an appreciable risk simply by loaning to businesses or industries which deal with hazardous waste. A borrower's noncompliance with federal and state environmental laws alone may increase the risk which a lender takes. Fines, costs, or remedial measures imposed upon a borrower diminish his income or assets and thus reduce his ability to repay the loan. The discovery of hazardous waste on the property may also diminish the value of the property taken as collateral.

Lenders should request from borrowers certification that the borrower has complied with all federal and state environmental laws and regulations.²⁰² They should also request representations as to the existence of any lawsuits or administrative actions relating to environmental matters.²⁰³ A borrower's reluctance to provide such representations should

200. Scott, *Addressing and Minimizing Environmental Risks in Real Estate Transactions, Hazardous Waste and Asbestos: Minimizing Risks and Solving Problems* (Rothgerber, Appel, Powers & Johnson in cooperation with CH2M Hill Engineers seminar materials), June 8, 1988 at 15. Although Scott directs his precautions towards purchasers of property, the precautions are equally applicable to lenders in light of Superfund litigation. *E.g.*, *Maryland State Bank*, 632 F. Supp. 573.

201. 42 U.S.C.A. §§ 9601(35), 9607(a) and (b).

202. In order to assert the third party defense. (*see supra* notes 56 to 66 and accompanying text) one must undertake "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." 42 U.S.C.A. § 9601(35)(B).

203. Scott, *supra* note 200, at 15. *See also*, J. NORTON, *BANKING LAW MANUAL* § 9.12 (1987).

immediately raise a red flag. The lender should also require the borrower to indemnify him from liability arising from any environmental action related to the property.²⁰⁴ Although the indemnification may be of little value if the borrower becomes insolvent, it may provide some protection if the debtor brings an action against the lender.²⁰⁵

If a lender suspects the presence of hazardous waste, information about the property may be obtained by conducting a title search to determine the chain of title, or by a search of tax records or aerial photographs.²⁰⁶ Because a title search may reveal little, however, an on-site inspection may be necessary.²⁰⁷ An on-site inspection should reveal any visual signs of waste material. Things such as barrels, berms, fills, and tanks raise an immediate signal as to the possible presence of hazardous substances.²⁰⁸ Other signs that suggest the need for additional precautions include ponds, stained soil, industrial type buildings, and storage facilities.²⁰⁹ Less obvious signs which might indicate the presence of hazardous substances include odors, distressed vegetation, and indications on neighboring lands.²¹⁰

If an on-site visit reveals the presence of hazardous substances, the lender should require the borrower to provide an environmental audit before loaning money on the property. The audit should include tests of the soil, groundwater, and surface water.²¹¹ Extensive inquiry into former uses of the property and other precautionary measures, however, must be done before the lender enters into a loan agreement with the borrower. If a lender continues to involve himself in the operation of the business after the parties enter into the loan agreement, or to monitor the use of the real estate through follow-up audits or environmental assessments, he may become an "owner" for exercising control over the borrower, and thus become liable under CERCLA.

If a lender finds himself potentially liable for cleanup costs after he has already entered into a loan transaction, and perhaps even after the borrower is insolvent, he may wish to take affirmative steps to determine liability for cleanup costs. Although no reported cases address such affirmative steps by a lender, certainly a lender could bring an action to recover costs and to ask for a declaration as to liability. The action might not absolve a lender of all liability; it would, however, force cleanup by the responsible parties. Of course the EPA is unlikely to pursue less responsible parties as long as those primarily responsible are accessible and remain solvent. Nevertheless, if no action is taken until after responsible

204. Scott, *supra* note 200, at 15. *But see* 42 U.S.C.A. § 9607(e) (limits effectiveness of indemnification agreements for persons liable under Act).

205. Scott, *supra* note 200, at 15.

206. Schwing, *Site Investigation and Cleanup, Hazardous Waste and Asbestos: Minimizing Risks and Solving Problems* (Rothgerber, Appel, Powers & Johnson in cooperation with CH2M Hill Engineers seminar materials), June 8, 1988 at 32, 34.

207. *Id.*

208. *Id.* at 33-34.

209. *Id.*

210. *Id.*

211. *Id.* at 34.

parties sell out or become insolvent, they will be unavailable to contribute to the cleanup, and a greater burden will be placed upon other parties.

A lender also has the options of not foreclosing, as the *MB&T* decision suggested,²¹² or not foreclosing until after cleanup, or not purchasing at the foreclosure sale. If it appears that cleanup costs will exceed the amount of the security interest, a lender might do well to write the loan off. Such a decision, however, would be difficult if cleanup action had not been initiated at the time of default.

CONCLUSION

Judicial interpretation of CERCLA indicates a trend by certain courts which will probably continue in the future. That trend is to impose liability for cleanup costs, under CERCLA, upon those parties having some connection with the contaminated property. Although a lender typically has very little connection to the hazardous waste itself, foreclosing on a security interest alone may be sufficient for a court to impose cleanup costs. A tendency by the courts, as well as the EPA, to broadly construe the definition of "owners and operators," and to narrowly construe the exemptions and defenses, creates a greater risk for lenders. Therefore, lenders should take precautions to reduce their exposure to liability, particularly when foreclosing on property subject to a security interest. The lender who fails to recognize the possibility of liability under CERCLA, and who fails to take adequate precautions to avoid that liability, may find himself facing a large cleanup bill from the EPA.

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