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## State Superfund Superliens: Who Do They Lean On

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# Comment

## STATE SUPERFUND SUPERLIENS: WHO DO THEY LEAN ON?

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### I. INTRODUCTION

#### Improper disposal of toxic substances and hazardous wastes<sup>1</sup>

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1. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or "Superfund"), 42 U.S.C. §§ 9601-75 (1982 & Supp. 1987), defines hazardous substances broadly by reference to the definition of the term in other environmental statutes, including the Solid Waste Disposal Act, 42 U.S.C. § 6921 (1982 & Supp. 1987), the Clean Water Act, 33 U.S.C. § 1317(a) (1982 & Supp. 1987), and the Clean Air Act, 42 U.S.C. § 7412 (1982 & Supp. 1987). CERCLA, 42 U.S.C. § 9601(14). CERCLA specifically excludes "petroleum, including crude oil or any fraction thereof which is not otherwise

has created a monumental problem for society.<sup>2</sup> In response to the problem the Federal government passed the Resource Conservation and Recovery Act (RCRA)<sup>3</sup> which created a "cradle to grave" system of regulation for hazardous waste.<sup>4</sup> RCRA did not address the problem of threats associated with abandoned hazardous waste disposal sites. To address this issue, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or "Superfund").<sup>5</sup>

Many hazardous waste sites do not qualify for cleanup under CERCLA<sup>6</sup> because they still pose a substantial threat to the public health, safety, and welfare. To fill in the gaps left by CERCLA, numerous states have enacted state hazardous waste cleanup statutes.<sup>7</sup> Furthermore, CERCLA provides states with numerous op-

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specifically listed or designated as a hazardous substance" under the other subsections of section 101(14). *Id.*

2. It has been estimated that there may be as many as 10,000 sites requiring cleanup of hazardous chemicals at a potential cost of as much as \$100 billion over a period of decades. H.R. Rep No. 2431, 99th Cong. 1st Sess. 55, (1985), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2837.

3. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified at 42 U.S.C. §§ 6901-6991(i) (1982 & Supp. 1987)).

4. For a general description of the RCRA regulatory program, see J. QUARLES, FEDERAL REGULATION OF HAZARDOUS WASTES (1982).

5. 42 U.S.C. §§ 9601-75 (1982 Supp. 1987) (CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1617 (1986)). This article will refer to CERCLA as amended by SARA.

6. *See, e.g.*, The Pennsylvania Hazardous Sites Cleanup Act, 35 PA. CONS. STAT. ANN. § 6020.102(8) (Purdon Supp. 1989). Section 102(8) provides the following declaration of policy:

Many of the hazardous sites in this Commonwealth which do not qualify for cleanup under the Federal Superfund Act pose a substantial threat to the public health and environment. Therefore, an independent site cleanup program is necessary to promptly and comprehensively address the problem of hazardous waste in this Commonwealth, whether or not these sites qualify for cleanup under the Federal Superfund Act.

*Id.*

7. *See, e.g.*, CAL. HEALTH AND SAFETY CODE § 25,330 (West 1984 & Supp. 1990); CONN. GEN. STAT. ANN. § 22a-451 (West Supp. 1989); ILL. ANN STAT. ch. 111 1/2, § 1022.2 (Smith-Hurd, Supp. 1989); MD. HEALTH-ENVT. CODE ANN. § 7-218 (1987); MASS. GEN. LAWS ANN. ch. 21A § 10 (West 1981); The Minnesota Environmental Response and Liability Act (MERLA), MINN. STAT. ANN. § 115B.20 (West Supp. 1990); N.H. REV. STAT. ANN. § 147-B:3 (Supp. 1988); N.J. STAT. ANN. § 58:10-23.11i (West Supp. 1989); N.Y. STATE FIN. LAW § 97-b (McKinney 1989); OHIO REV. CODE ANN. § 3734.06 (Anderson 1988); Pa. Hazardous Sites Cleanup Act; 35 PA. CONS. STAT. ANN. § 6020.901 (Purdon Supp. 1989); TENN. CODE ANN. § 68-46-204 (1987).

For a list of 39 state superfund statutes, see Note, *The Impact of State "Superlien" Statutes on Real Estate Transactions*, 5 VA. J. NAT. RESOURCES L. 297, 297 n.1 (1986).

portunities to participate in the federal cleanup program and, in some areas, mandates state participation.<sup>8</sup> Due to CERCLA's provisions for state cooperation and requirements for participation, many states enacted superfund statutes which provide mechanisms for state coordination with the federal program as well as providing a mechanism for cleanup of sites that cannot be included in the federal cleanup program.<sup>9</sup>

The basic purpose and structure of the state and federal statutes are similar, although the specific provisions of the statutes vary considerably. Each statute identifies the agency responsible for implementing the statutory scheme,<sup>10</sup> and then gives that

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Initial questions concerning preemption of state superfund programs seem to have been resolved in favor of permitting state superfunds to exist. In *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986), the Supreme Court struck down portions of the New Jersey state cleanup tax law on the grounds that CERCLA preempted the state action. *Id.* at 376. However, section 114(c) of CERCLA was deleted by SARA, effectively eliminating the preemption issue with a resolution in favor of the states. See 132 CONG. REC. S14912 (daily ed. Oct. 3, 1986) (statement of Sen. Lautenberg). See also Hayes & Mackerron, *Superfund II: A New Mandate*, 17 ENV'T. REP. (BNA) 1735 (Feb. 13, 1987).

Notably, CERCLA section 114(a)-(b) permits a state to impose additional liability with respect to releases of hazardous substances within the state but precludes any person from recovering compensation for removal costs and damages under both CERCLA and other federal or state laws. 42 U.S.C. § 9614(a)-(b) (1982). Therefore, CERCLA provides for a flexible and cooperative relationship between federal and state superfund programs.

8. See 42 U.S.C. § 9604(d) (1982 & Supp. 1987) (providing for federal-state cooperative agreements). CERCLA section 104(c)(3) prohibits the President from providing quick remedial actions unless the State in which the release occurs first enters into a contract or cooperative agreement providing that: (A) the State will assure all future maintenance; (B) the State will assure the availability of adequate hazardous waste disposal facilities; and, (C) the State will pay or assure payment of 10% of the cost of the remedial action. *Id.* § 9604(c)(3) (Supp. 1987). Section 104(c)(9) prohibits the President from providing remedial actions for three years after October 17, 1986, unless the State enters a contract or cooperative agreement assuring the availability of hazardous waste treatment or disposal facilities that are within the state or are in accordance with an interstate agreement. *Id.* § 9604(c)(9). The facilities must have sufficient capacity to dispose of the hazardous wastes that can reasonably be expected to be generated within the State for a period of twenty years. *Id.* The incentives for a state statute to provide the means for coordination of the federal-state relationship are indeed large.

9. States are also bearing an increasing burden of the environmental cleanup costs. In 1979 states received 28% of the Environmental Protection Agency's (EPA) \$1.8 billion operating budget but within ten years the states received only 18% of a \$1.7 billion EPA operating budget. Long, *States Bear Growing Share of Environmental Cleanup Costs*, CHEMICAL & ENGINEERING NEWS, Sep. 11, 1989 at 19. Funding of state superfunds through taxes is one mechanism that states have used to help meet increased financial burdens created by the reduction in federal funds. See *id.*

10. CERCLA section 104 designates the President as the responsible authority for cleanup actions. 42 U.S.C. § 9604(a) (Supp. 1987). Section 115 authorizes the President to delegate any duties or powers that he is given by the

agency responsibility to identify and establish the priorities for cleanup of hazardous waste sites.<sup>11</sup> The agency may then choose from alternative procedures to ensure that particular sites are cleaned up.<sup>12</sup>

The preferred method for site cleanup is usually to identify the responsible parties and encourage (or coerce) them to perform the cleanup.<sup>13</sup> If the responsible parties cannot be readily identified, are recalcitrant, or the situation presents an emergency,<sup>14</sup> then the agency is authorized to proceed with the cleanup using funds from the established Hazardous Substance Superfund.<sup>15</sup> When superfund funds are used for a cleanup, the agency is empowered to pursue the responsible parties for reimbursement of the fund for the response costs.<sup>16</sup>

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Act. 42 U.S.C. § 9615. See Exec. Order No. 12580, 3 C.F.R. 193 (1987-88), reprinted in 42 U.S.C. 9615 (Supp. 1987) (delegating powers to Environmental Protection Agency and other administrative bodies). The states have generally designated the state Department of Environmental Resources (or its equivalent) as the administrator of the state program. See, e.g., PA. CONS. STAT. ANN. § 6020.301 (Purdon Supp. 1989).

11. See, e.g., CERCLA, 42 U.S.C. § 9605 (Supp. 1987) (mandating creation of National Priority List); PA. CONS. STAT. ANN. § 6020.502 (Purdon Supp. 1989) (mandate to publish priority list of sites). The New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11-23.11z (West 1982 & Supp. 1989), does not provide for the listing of priority sites, but requires response action for any release of hazardous substances. See *id* § 58:10-23.11f(a).

12. See, e.g., CERCLA, 42 U.S.C. § 9604 (1982 & Supp. 1987) (authorizing President to take response action or allow any responsible party to take response action); CERCLA, 42 U.S.C. § 9606 (1982 & Supp. 1987) (President authorized to require Attorney General to obtain relief in appropriate district court); N.J. STAT. ANN. § 58:10-23.11f(a) (West Supp. 1989) (agency may, at its discretion, direct discharger to perform response actions or may undertake response actions itself); PA. CONS. STAT. ANN. § 6020.501(a) (Purdon Supp. 1989) (agency may permit owner/operator of site to perform response actions or may undertake response actions that agency deems necessary and appropriate).

13. See, e.g., CERCLA, 42 U.S.C. § 9604 (1982 & Supp. 1987).

14. See, e.g., *id*.

15. See, e.g., 42 U.S.C. § 9611(a)(1) (Supp. 1987). The Hazardous Substance Superfund is established by 26 U.S.C. § 9507 (Supp. 1987). See also Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets*, 103 BANKING L. J. 509, 512 (1986).

16. See CERCLA, 42 U.S.C. § 9607(a)(4)(A) (Supp. 1987). Potentially responsible parties are enumerated in CERCLA section 107(a)(1) - (4). 42 U.S.C. § 9607(a)(1) - (4). Private parties that incur necessary response costs consistent with the National Contingency Plan are also authorized to recover those costs from other responsible parties. *Id.* § 9607(a)(4)(B). While CERCLA does not define response costs many courts have defined the term broadly. See *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1429 (S.D. Ohio 1984) (removal and subsequent safe disposal costs); *Velsicol Chemical Corp. v. Reilly Tar & Chemical Corp.*, 21 Env't Rep. Cas. (BNA) 218 (E.D. Tenn. 1984) (monitoring, assessing and evaluation of release or potential release); *New York v. General Elec. Co.*, 592 F. Supp. 291 (N.D.N.Y. 1984). But see *Environmental Defense Fund, Inc. v.*

The procedures and mechanisms for recapture of fund expenditures vary greatly among the various state and federal statutes. The federal Superfund Amendments and Reauthorization Act (SARA)<sup>17</sup> added a provision to CERCLA providing for the creation of a lien against the property of responsible parties where that property was subject of a cleanup action.<sup>18</sup> The federal lien is subordinated to the rights of any security interest, judgment lien, or other property interest that is perfected before notice of the lien has been filed in the appropriate office within the state.<sup>19</sup> Most states that have enacted superfund statutes have included some form of lien provision to help ensure the collection of fund expenditures.<sup>20</sup> Some state statutes provide for "superliens," whereby the lien for the expenses of response actions is superior even to previously perfected liens.<sup>21</sup>

This article will analyze and compare the simple lien<sup>22</sup> and superlien provisions in the federal and state statutes that assist the government in collecting response costs. The imposition of liens on property owned by responsible parties or the property subject to a cleanup action (if that property is not owned by a responsible party) can be an effective method of securing the payment of response costs from the parties that caused the contamination or of ensuring that non-responsible parties do not reap a windfall after the government has expended money in a cleanup action. The question that this article will address is whether a superlien imposes an undue burden upon an arguably non-responsible party, such as creditor with a valid security interest in the contaminated property who was neither directly nor indirectly responsible for the contamination or the truly innocent owner of

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Lamphier, 714 F.2d 331 (4th Cir. 1983) (not investigative costs because they are different in kind from costs associated with containment of treatment actions).

17. Pub. Law. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9675 (Supp. 1987)). See *supra* note 5.

18. 42 U.S.C. § 9607(1) (Supp. 1987).

19. *Id.* § 9607(1)(3).

20. See, e.g., ARK. STAT. ANN. § 8-7-516 (Supp. 1989); CONN. GEN. STAT. ANN. § 22a-452a (West Supp. 1989); MASS. GEN. LAWS ANN. ch. 213 § 13 (West Supp. 1989); N.H. REV. STAT. ANN. § 147B:10-b (Supp. 1988); N.J. STAT. ANN. 58:10-23.11f.f (West Supp. 1989); PA. CONS. STAT. ANN. § 6020.509 (Purdon Supp. 1989); TENN. CODE ANN. § 68-46-209 (Supp. 1989).

21. See, e.g., ARK. STAT. ANN. § 8-7-516 (Supp. 1989); CONN. GEN. STAT. ANN. § 22a-452a (West Supp. 1989); MASS. GEN. LAWS ANN. ch. 21E § 13 (West Supp. 1989); N.H. REV. STAT. ANN. § 147B:10-b (Supp. 1988); N.J. STAT. ANN. 58:10-23.11f.f (West Supp. 1989).

22. For the sake of clarity, this article will refer to nonsuperliens generically as simple liens.

contaminated land. The financial interests of the parties involved must be understood before an assessment can be made as to whether a superlien allocates response costs in an appropriate manner.

This article will then address the allocation of response costs under the statutory framework of the federal and various state superfund laws, with particular emphasis on the definitions of responsible party. Finally, the article will identify other political and economic considerations that affect the appropriateness of lien and superlien provisions for allocating the costs of environmental decontamination.

## II. STATUTES

The impact of various lien provisions is determined by the definition of "responsible party." The relationship between the provisions of various statutes, which define "responsible party", will demonstrate how costs are allocated among various interested parties.

### A. CERCLA

The 1986 amendments to CERCLA included a provision providing that all costs and damages to which a person is liable under the act shall constitute a lien in favor of the federal government.<sup>23</sup>

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23. 42 U.S.C. § 9607(l) (Supp. 1987). Section 107(l) provides:

(1) In General

All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a) of this section) shall constitute a lien in favor of the United States upon all real property and rights to such property which—

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) Duration

The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this chapter.

(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 9613 of this title.

(3) Notice and Validity

The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of

The lien is imposed on "all real property and rights to such property" which: 1) belong to a responsible party; and, 2) is the subject of the cleanup activities.<sup>24</sup> While the lien does not take priority over mortgagees or other secured creditors who have perfected their interest under state law, it will take priority over liens filed subsequent to the federal lien.<sup>25</sup>

However, the CERCLA lien is contingent on the liability of

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the lien has been filed in the appropriate office within the State . . . as designated by State law, in which the real property . . . is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection.

*Id.*

24. *Id.* It is unclear what the phrase "and rights to such property" in section 107(1)(1) is intended to cover. CERCLA liability has been imposed on operators as well as owners (see *infra* notes 26-45 and accompanying text for a discussion of liability). Operators that are not owners may have some interest in the land such as a lease. In other cases, creditors have been held to be potentially liable as a result of either foreclosure on contaminated properties (see *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986)), or due to involvement in day-to-day operations, (see *United States v. Mirabile*, 15 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,994 (E.D. Pa. 1985)). It seems possible that liens could be used to encumber interests other than ownership if the phrase is read broadly by the courts. For example, if a bank with a mortgage on contaminated property was held to be a responsible party, then the bank's rights under the mortgage might be encumbered by the CERCLA lien.

25. 42 U.S.C. § 9607(l)(3) (Supp. 1987). Congress specifically considered the needs of "commercial interests" in deciding not to make the lien provision take priority over existing interests. See H.R. 253, 99th Cong., 1st Sess., p. 3, 17-18, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3040-41. In further consideration of commercial interests, the lien will only be effective against other interests when filed in accordance with state law so that a title search of the affected property will notify other potential creditors of the existence of the lien.

*Id.*



the party.<sup>26</sup> CERCLA liability is strict, joint, and several.<sup>27</sup> One exception to liability is established by section 101(20)(A).<sup>28</sup> This section narrows the definition of "owner of operator" by excluding a party who does not "participate in the management or operation of a . . . facility [and] holds indicia of ownership primarily to protect his security interest."<sup>29</sup> Notwithstanding section 101(20)(A), courts have broadly interpreted the definition of responsible parties under CERCLA.<sup>30</sup> Landowners and other parties that were not responsible for the creation of hazardous waste have been included in the universe of responsible parties.<sup>31</sup>

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26. 42 U.S.C. § 9607(a) (Supp. 1987). CERCLA imposes liability for removal and remedial costs and any other necessary response costs at a facility from which there has been a release or threatened release upon the following:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person . . . .

*Id.* See generally Glass, *The Modern Snake in the Grass: An Examination of Real Estate & Commercial Liability Under Superfund & SARA and Suggested Guidelines for the Practitioner*, 14 B.C. ENVTL. AFFAIRS L. REV. 381 (1987).

27. See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983). The *Chem-Dyne* standard of liability is cited with approval in the legislative history of the 1986 amendments to CERCLA. See H.R. 253, 99th Cong., 1st Sess., pt. 1, at 74, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2856. See also *New York v. Shore Realty Corp.* 759 F.2d 1032 (2d Cir. 1985); *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*, 579 F. Supp. 823 (W.D. Mo. 1984).

28. 42 U.S.C. § 9601(20)(A) (Supp. 1987). Three other affirmative defenses to liability may be asserted where the release or threatened release results solely from: 1) an act of God; 2) an act of war; or, 3) an act or omission of a "third party," not an agent of the landowner, where that act or omission does not occur in connection with a contractual relation with the landowner. *Id.* § 9607(b). The "third party" defense is often referred to as the "innocent landowner" defense. For a detailed discussion of the innocent landowner defense, see Comment, *The Impact of the 1986 Superfund Amendments and the Reauthorization Act on the Commercial Lending Industry: A Critical Analysis*, 41 U. MIAMI L. REV. 879 (1987) [hereinafter *Superfund Amendments of 1986*]; Comment, *The Hazardous Waste Abatement Liability of Innocent Landowners: A Constitutional Analysis*, 17 PAC L.J. 185, 190 (1985).

29. 42 U.S.C. § 9601(20)(A) (Supp. 1987). See *Superfund Amendments of 1986*, *supra* note 28, at 886, n. 33.

30. 42 U.S.C. § 9607(a) (Supp. 1987). See generally *Superfund Amendments of 1986*, *supra* note 28.

31. See *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d

Under the rationale of these cases, a creditor may be held liable as a responsible party if that creditor participates in the day-to-day business operations of the debtor, exercises control over, or maintains ownership of the property for a significant period of time.<sup>32</sup>

In *United States v. Maryland Bank & Trust Co.*,<sup>33</sup> a bank which acquired a property at a foreclosure sale was held strictly liable for cleanup costs.<sup>34</sup> In *Maryland Bank*, the bank maintained ownership of the property for a period of over one and one-half years after foreclosure and before the cleanup action.<sup>35</sup> The court held that a party did not have to be both an owner *and* an operator to be subject to liability for response costs under CERCLA section 107.<sup>36</sup> Instead, mere ownership was sufficient to subject the bank to liability.<sup>37</sup> The security interest exception was inapplicable because Maryland Bank was the owner at the time of the cleanup, not merely the holder of a security interest.<sup>38</sup>

*United States v. Mirabile*<sup>39</sup> presents a second interesting exception to section 101(20)(A). The American Bank and Trust Company (ABT) foreclosed on a property and bought the property at the sheriff's sale, but before actually acquiring title ABT proceeded to assign their interest in the property to Anna and Thomas Mirabile.<sup>40</sup> Without resolving whether ABT's successful

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1568 (5th Cir. 1988) (lender and developer involved with development of contaminated property denied motion to dismiss); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (owner of land contaminated by prior owner held strictly liable for government cleanup costs); *United States v. Maryland Bank Trust Co.*, 632 F. Supp. 573 (D. Md. 1986) (bank holding mortgage held liable after purchasing property at foreclosure sale).

32. Note that the language in the CERCLA lien covers all real property and "rights to such property." 42 U.S.C. § 9607(1) (Supp. 1987). Perhaps the CERCLA lien could be used to encumber a mortgagor's interest in the property where, as in the case of Mellon Bank, the mortgagor was held to be liable as an operator. See *supra* notes 23-24 and accompanying text.

33. 632 F. Supp. 573 (D. Md. 1986).

34. *Id.* at 582.

35. *Id.* at 575.

36. *Id.* at 577.

37. *Id.* at 578.

38. *Id.* at 579. While Maryland Bank owned the property for a significant period of time before the cleanup, liability premised on ownership may occur from holding title for as little as one hour. See *United States v. Carolawn Co.*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 20,699 (D.S.C. 1984) (summary judgment denied for defendant that held title for approximately one hour). While the security interest exemption may provide some protection for foreclosing creditors, once a creditor takes title to contaminated property liability for response actions is a possibility no matter how quickly the creditor disposes of the property.

39. 15 ENVTL. L. REP. (Envtl. L. Inst.) 20,992, 20,994 (E.D. Pa. 1985).

40. *Id.* at 20,996.

bid at the foreclosure sale vested equitable title in the bank, the court ruled that ABT fell within the purview of section 101(20)(A)<sup>41</sup> as the bank only held a property interest to protect its security interest.<sup>42</sup> However, Mellon Bank (East), another creditor of the company responsible for creation of the wastes, had apparently participated in the day-to-day operations of the business.<sup>43</sup> Without knowing the specific extent of Mellon's involvement, the court was unwilling to grant summary judgment in Mellon's favor.<sup>44</sup>

Considering that CERCLA liability is joint and several, being a responsible party could potentially subject a creditor to liability for the total cleanup costs.<sup>45</sup> The cleanup costs could greatly exceed the amount of the initial security interest that a creditor had in a property. Accordingly, under certain circumstances, lenders with security interests in contaminated property stand to lose even more than the value of their initial investments not to mention their collateral.

## B. STATE LIEN STATUTES

### 1. *Simple Liens*

Simple lien statutes, of various types, exist in several states.<sup>46</sup>

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41. 42 U.S.C. § 9601(20)(A) (Supp. 1989).

42. 15 ENVTL. L. REP. (Envtl. L. Inst.) at 20,996. It should be noted that ABT also took steps to secure the property during the interval between the sheriff's sale and the assignment to the Mirabiles. *Id.*

43. *Id.* at 20,997.

44. *Id.* Creditor liability in control situations is not a new concept. For a discussion of the history of control relationship liability, see *Pennbank v. Pa. Dept. Env'tl. Resources*, No. 88-281-M, Env'tl. Hearing Board, 1989 W.L. 75,391 (Feb 15, 1989). For a discussion of standards of liability under CERCLA for creditors in control situations, see Tom, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925 (1989) (recommending common law standards while avoiding discouraging lenders from "detering reckless disposal practices").

See also *United States v. Fleet Factors Corp.*, 724 F. Supp. 955 (S.D. Ga. 1988) (denial of summary judgment in favor of creditor that allegedly controlled company after closure and during liquidation of assets.).

45. A recent case can be interpreted as extending the possibilities of liability. In *Guidice v. BFG Electroplating & Mfg. Co.*, No. 86-2093, 30 ENV'T REP. CAS. (BNA) 1665 (W.D. Pa. 1989), the federal district court denied summary judgment to a bank that foreclosed on industrial property later found to be contaminated. *Id.* The court held that the "security interest" exception was inapplicable when a lender purchased the property at a foreclosure sale. *Id.* However, the foreclosing bank exercised significant control over the operation of the property. Accordingly, the holding in this case is not surprising and does not necessarily indicate a significant leap in the imposition of CERCLA liability.

46. See, e.g., Pa. Hazardous Sites Cleanup Act, 35 PA. CONS. STAT. ANN. §§ 6020.101 - 6020.1305 (Purdon Supp. 1989); TENN. CODE ANN. § 68-46-201 -

Provisions of selected state lien statutes (both simple liens and superliens) are summarized in Table I. Many state statutes follow the federal model by giving simple liens priority, as of the date of filing, to real estate which is not subject to remedial actions and to personal property owned by responsible parties. The Pennsylvania Hazardous Sites Cleanup Act<sup>47</sup> provisions permit imposition of a lien on the contaminated property, if owned by a responsible party, as well as on all other real property, personal property and revenues of the responsible parties.<sup>48</sup> The Pennsylvania lien will not take priority over "any valid lien, right or interest in the property filed in accordance with established procedure prior to the filing of a notice of lien under this subsection."<sup>49</sup>

Unlike the Pennsylvania lien, the Tennessee lien operates without regard to owner responsibility.<sup>50</sup> The Tennessee lien is imposed for costs incurred by the commissioner for investigation,

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222 (1987 and Supp. 1989). While other states have also passed similar statutes this paper will limit its analysis to Pennsylvania and Tennessee.

47. PA. CONS. STAT. ANN. §§ 6020.101 - 6020.1305 (Purdon Supp. 1989).

48. See PA. CONS. STAT. ANN. § 6020.509. Section 6020.509 provides: An award of response costs, assessment of damages to natural resources or assessment of civil penalties shall constitute a judgment against the responsible person . . . . The department shall send a notice of lien to the prothonotary or equivalent official of the county in which the responsible person has real or personal property, setting forth the amount of the award of costs . . . . Upon entry by the prothonotary, the lien shall attach to all real . . . and personal property of the responsible person, whether or not the responsible party is insolvent.

*Id.*

49. *Id.* § 6020.509(c).

50. TENN. CODE ANN. § 68-46-209(a)-(b) (Supp. 1989). The provision provides that:

(a) Whenever a hazardous substance site is placed on the list of hazardous substance sites . . . or whenever the commissioner otherwise begins to expend money for investigation, identification, containment or clean up of a particular site under this part, the commissioner may file a notice with the office of the register of deeds of the county in which the property lies.

(b) Within one (1) year after completion of a project to contain or clean up the hazardous substance at a particular site under this part, the commissioner shall itemize the money so expended and shall file a statement thereof . . . together with notarized appraisals by an independent appraiser of the value of the property before and after the clean up work performed at the site, if the money so expended shall result in a significant increase in property values. Such statement shall constitute a lien upon such land. The lien shall not exceed the amount determined by the appraisal to be the increase in the market value of the property as a result of the cleanup work.

*Id.*

identification, containment, or cleanup of a particular site.<sup>51</sup> However, the Tennessee lien attaches only to the property that is subject to the remedial actions and is limited to the amount of increased property value resulting from the state cleanup.<sup>52</sup> The Pennsylvania lien covers all of the liabilities to the state, including response costs, assessments of damages to natural resources, and civil penalties. The lien attaches to all revenues and real and personal property of the responsible party.<sup>53</sup>

The Pennsylvania statute provides exceptions to owner liability, hence, exceptions to the lien provisions since the lien is premised on the landowner being a responsible party. The Pennsylvania act establishes an innocent landowner defense similar to the federal provision; however, the Pennsylvania provision that provides additional protection for lenders.<sup>54</sup> A financial institution (or its affiliate) is excluded from the definition of "owner" provided the institution does not have knowledge that the site has been listed on the National Priority List or some corresponding state list<sup>55</sup> and does not contribute to release.<sup>56</sup> The state's inno-

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51. *Id.* § 209(a).

52. *Id.* § 209(a)-(b) This approach has some inherent problems, such as how the increased value will be measured. The statute provides for an independent appraisal, but if the property owner is aggrieved by the amount of the lien (i.e. the increased value) then the owner can have an independent appraisal and submit the matter to the chancery court for determination of the appropriate amount of the lien. *Id.* § 209(c). This will certainly create a new field of superfund related litigation.

53. PA. CONS. STAT. ANN. 6020.509(a) (Purdon Supp. 1989).

54. *Id.* § 6020.701(b)(1).

55. For a discussion of the listing of hazardous waste sites, see *supra* note 11 and accompanying text.

56. PA. CONS. STAT. ANN. § 6020.103 (Purdon Supp. 1989). Section 6020.103 provides:

"Owner or operator." A person who owns or operates or has owned or operated a site, or otherwise controlled activities at a site. The term does not include a person who, without participating in management of a site, holds indicia of ownership primarily to protect a security interest in the site nor a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The term also shall not include a financial institution, an affiliate of a financial institution, a parent of a financial institution, nor a corporate instrumentality of the Federal Government, which acquired the site by foreclosure or by deed in lieu of foreclosure as a result of the enforcement of a mortgage or security interest held by such financial institution . . . before it had knowledge that the site was included on the National Priority List or corresponding State list and did not manage or control activities at the site which contributed to the release or threatened release of a hazardous substances. For the purposes of this subsection, the term "management" shall not include participation in or supervising the finances or fiscal

cent landowner defense provides that an owner will not be liable if: 1) the site was acquired after disposal; 2) the owner exercised due care; 3) the owner took precautions against foreseeable acts of omissions of others; 4) the owner obtained actual knowledge of the release during ownership and did not subsequently transfer the property without disclosing such knowledge; 5) the owner has not contributed to the release; and, 6) either: A) the owner is a financial institution which acquired the site through foreclosure or deed in lieu thereof; or, B) at the time of acquisition the owner did not know or have reason to know of the hazardous substance, and the owner made all appropriate inquiries consistent with good commercial practices taking into account factors including purchase price and specialized knowledge.<sup>57</sup> The Pennsylvania provisions protect lenders from being held liable under the circumstances that lenders were held to be potentially responsible parties under CERCLA.<sup>58</sup>

The Pennsylvania statute also provides that liability, and hence the lien provision, shall not apply to the owners of "real property if the real property is exclusively used as single or multi-family housing of four units or less or for private non-commercial recreational purposes," provided that the owner did not place the hazardous substance on the property.<sup>59</sup> The Tennessee statute does not provide for an exception for either lenders or residential real estate.

The Pennsylvania and the Tennessee statutes also differ with respect to when the liens can be filed. Under the Tennessee statutes "[w]henever a hazardous substance site is placed on the list of hazardous substance sites . . . or whenever the commissioner otherwise begins to expend money . . . the commissioner *may* file a notice with the office of the register of deeds."<sup>60</sup> Within one year of completion of a project the commissioner must file an

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operations of a responsible person or an owner or operator in connection with a loan to, services provided for or fiscal obligation of that responsible person or owner or operator or actions taken to protect or preserve the value of the site or operations conducted on the site.

*Id.* (emphasis added).

57. *See id.* § 6020.701(b)(1)(i) - (vi). The innocent landowner defense also provides special protection to government entities acquiring property through escheat and owners acquiring property through inheritance. *Id.*

58. For a discussion of lender liability under CERCLA, see *supra* notes 26-45 and accompanying text.

59. PA. CONS. STAT. ANN. § 6020.701(b)(2) (Purdon Supp. 1989). This exception is also repeated in the Defenses to Liability section. *Id.* § 6020.703(d).

60. TENN. CODE ANN. § 68-46-209(a) (Supp. 1989) (emphasis added).

itemized report of the money expended at a site with the register of deeds.<sup>61</sup> In Pennsylvania, the lien does not come into existence until an award of response costs or an assessment of damages has been made and, at that point, the notice of lien must be filed.<sup>62</sup> The Tennessee provision is laudable in that the lien may be filed early in the remedial process. In contrast, the Pennsylvania provision seems to provide for the filing of the lien at the latest possible stage of the process: following the clean up and after any litigation concerning responsibility. The Pennsylvania statute does provide for a central registry for all liens filed pursuant to the statute.<sup>63</sup> The registry could be an extremely useful tool for the purchasers of real estate and commercial lenders as they research the environmental status of a given piece of property.

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61. *Id.* § 209(b).

62. PA. CONS. STAT. ANN. 6020.509(a) (Purdon Supp. 1989). The notice of lien must include the amount of the award and of the assessed damages and penalties. *Id.*

63. *Id.* § 6020.509(c).

**SUMMARY OF LIEN PROVISIONS IN SELECTED STATE  
SUPERFUND STATUTES (TABLE I)**

	Conn.	Tenn.	N.J.	Pa.	Mass.	N.H.	Ark.	CERCLA
<i>Superlien on restored property:</i>								
Responsible Owner			X <sup>64</sup>		X <sup>65</sup>	X <sup>66</sup>	X	
Innocent Owner	X							
<i>Lien:</i>								
Restored Property		X <sup>67</sup>		X				X <sup>68</sup>
Other Real Property			X	X	X	X	X	
Personal Property			X	X	X	X	X	
Revenues			X <sup>69</sup>	X	X	X	X	
<i>Exceptions:</i>								
Residential		X		X		X		
Time	X							
Creditor				X				
Other	X <sup>70</sup>						X <sup>71</sup>	
<i>Lien for:</i>								
All damages				X				
Money Expended	X	X <sup>72</sup>	X			X		X
<i>Filing of Lien:</i>								
Listing of site			X					
Expenditure of Money		X	X					X
Date Debt Due				X		X		
Notice	X	X <sup>73</sup>	X	X	X <sup>74</sup>	X		X

64. The lien affects the "property of the discharger." N.J. STAT. ANN. § 58:10-23.11f.f (West Supp. 1988). Accordingly, the lien seems to depend upon whether the owner of the restored property was responsible.

65. Superlien also applies to all personal property, tangible or intangible, located at the restored facility. MASS. GEN. STAT. ANN. ch. 21E § 13 (West Supp. 1989).

66. Superlien also applies to all business revenues generated and all personal property located at the restored facility. N.H. REV. STAT. ANN. § 147-B:10b III(b) (Supp. 1988).

67. Lien is only effective against the increase in property value resulting from the cleanup. TENN. CODE ANN. § 68-46-209(b) (Supp. 1989). It should be noted that the Tennessee statute was amended in 1988 repealing a superlien provision and replacing it with a simple lien provision. See TENN. CODE ANN. § 68-46-209(d) (1987 & Supp. 1989).

68. The lien is effective only if the property is owned by a responsible party. 42 U.S.C. § 9607(1) (Supp. 1987).

69. Considering that lien affects "all property of the discharger," N.J. STAT. ANN. § 58:10-23.11f.f (West Supp. 1989), it seems likely that this could be interpreted to include revenues.

70. Property transferred pursuant to sections 22a-134 to 22a-134d is exempted from priority liens. CONN. GEN. STAT. ANN. § 22a-452a(a) (West Supp. 1989). Sections 22a-134 to 22a-134d provide for transfers of established facilities which handle hazardous waste.

71. The lien does not take priority over real estate tax liens. ARK. STAT. ANN. § 8-7-516(b) (Supp. 1989).

72. The lien shall be for the money expended but shall not exceed the amount of increased value resulting from the cleanup. TENN. CODE ANN. § 68-46-209(b) (Supp. 1989).

73. Within one year after completing the project the expenditures made must be itemized and filed with the register of deeds. TENN. CODE ANN. § 68-46-209(b) (Supp. 1989).

74. Apparently, the lien is effective as soon as the debt to the state is due.



## 2. Superliens

Superlien provisions,<sup>75</sup> imposed on real estate and other property, serve to ensure reimbursement for costs incurred as a result of cleanup operations.<sup>76</sup> Ensuring reimbursement of government expenditures is designed to ensure sufficient funds for quick and effective response to future releases at sites and provides motivation for purchasers of real property and their lenders to be more cautious about their investments.<sup>77</sup>

State superlien provisions can be categorized into several genres. The most extreme superlien provision would provide for a superlien on all real and personal property, including revenues, of the responsible parties and on the restored property, even if the property was owned by an innocent landowner. No superlien provisions of this severity exist at present.<sup>78</sup> Superlien provisions currently in effect impose the superlien only on the affected property. Two basic variations exist: 1) the superlien will be imposed on the restored land, regardless of the responsibility of the owner,<sup>79</sup> or 2) the superlien is only effective on the restored prop-

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The superlien, however, does not take priority until it has been duly filed. MASS. GEN. LAWS ANN. ch. 21E § 13 (West Supp. 1989).

75. Priority liens are generally referred to as "superliens". See Schwenke & Lockett, *Superlien "Solutions" to Hazardous Waste: Bankruptcy Conflicts*, ENV'T L. (ABA) 1,2 (Winter 83/84).

76. See *id.*

77. See *id.* at 2-3. In connection with ensuring government funds for future cleanups, the superliens provide for preferential treatment of the governments claims in the event that the responsible party seeks protection in bankruptcy. For a discussion of the effect of superliens in bankruptcy, see *infra* notes 95-103 and accompanying text.

78. Prior to amendment in 1985, section 1(f) of the New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11f.f (West 1982), provided for such draconian liens. The provision read: "Any expenditures made by the administrator pursuant to this act shall constitute a *first priority claim and lien* paramount to all other claims and liens upon the revenues and all real and personal property of the discharger. . . ." *Id.* (emphasis added).

79. See, e.g., CONN. GEN. STAT. ANN. § 22a-452a (West Supp. 1989) which provides:

(a) On and after June 3, 1985, any amount paid by the commissioner of environmental protection pursuant to subsection (b) of section 22a-451 to contain and remove or mitigate the effects of a spill shall be a lien against the real estate on which the spill occurred or from which it emanated in accordance with the provisions of this section, except that such lien against real estate which has been transferred in accordance with the provisions of sections 22a-134 to -134d, inclusive, shall not have priority over any previous transfer or encumbrance. . . .

(c) Except as provided in subsection (a), such lien shall take precedence over all transfers and encumbrances recorded on or after June 3, 1985, in any manner affecting such interest in such real estate or any part of it on which the spill occurred or from which the spill emanated,

erty if the owner is a responsible party.<sup>80</sup>

or real estate which has been included, within the preceding three years, in the property description of such real estate and is contiguous to such real estate. This subsection shall not apply to real estate which consists exclusively of residential real estate, including but not limited to, residential units in any common interest community, as defined in section 47-202.

*Id.*

The Connecticut statute is unique in that the superlien only applies for security interests perfected after the effective date of the Act. The Connecticut statute also precludes a superlien if real estate has been transferred in accordance with provisions requiring a transferor of an establishment handling hazardous waste to give a negative declaration of contamination or a certificate of cleanup. See CONN. GEN. STAT. ANN. § 22a-134 to -134d (West Supp. 1989).

80. See, e.g., N.J. STAT. ANN. § 58:10-23.11f.f (West Supp. 1989) which provides:

The notice of lien filed pursuant to this subsection which affects the property of a discharger subject to the cleanup and removal of a discharge shall create a lien with priority over all other claims or liens which are or have been filed against the property, except if the property comprises six dwelling units or less and is used exclusively for residential purposes, this notice of lien shall not affect any valid lien, right or interest in the property filed in accordance with established procedure prior to the filing of this notice of lien. The notice of lien filed pursuant to this subsection which affects any property of a discharger other than the property subject to the cleanup and removal, shall have priority from the day of the filing of the notice the lien [sic] over all other claims and liens filed against the property, but shall not affect any valid lien, right or interest in the property filed in accordance with established procedure prior to the filing of a notice of lien pursuant to this subsection.

*Id.*

N.H. REV. STAT. ANN. § 147-B:10-b (Supp. 1989) which provides:

I. The division of waste management shall have a lien upon the business revenues and all real and personal property of any person subject to liability under RSA 147-B:10, for all costs incurred by the state pursuant to RSA 147-B:10, II. . . .

III. The priority of the lien created by this section shall be as follows:

(a) As to the real property on which the hazardous waste or hazardous material is located, the lien shall constitute a first priority lien against such real property prior to all encumbrances, whether of record or inchoate, when notice of lien is recorded. . . .

(b) As to the business revenues generated from the facility on which hazardous waste or hazardous material is located and personal property located at the facility on which hazardous waste or hazardous material is located, the lien shall constitute a first priority lien against such business revenues or personal property, prior to all encumbrances, whether of record or inchoate. . . .

(c) As to all other property, whether real, personal or business revenues, other than that which is described in subparagraph (a) or (b) of this paragraph, the notice of lien shall constitute a lien that is effective as of the date and time of recording or filing, without priority on antecedent encumbrances of record. . . .

*Id.*

See also ARK. STAT. ANN. § 8-7-516 (Supp. 1989) (Arkansas statute does not impose lien on property other than site of remedial action); MASS. GEN. LAWS ANN. ch. 21E § 13 (West Supp. 1989).

Some differences exist between the superlien provisions. Many contain exceptions for residential real estate.<sup>81</sup> Others, like the Connecticut statute, provide for superliens only over other liens which were perfected after the effective date of the Act.<sup>82</sup> In contrast the New Hampshire provisions are particularly sweeping, providing for a superior lien not only on the restored real estate (if owned by a responsible party), but also on all personal property located at and all revenues generated at the site of the response action.<sup>83</sup>

The superlien statutes also differ with respect to what costs can be included in the lien. Most of the provisions provide for liens only for the amount of money expended in the cleanup and related activities such as investigation and feasibility studies.<sup>84</sup> The Massachusetts provision, however, provides for a superlien covering all debts due to the state which would include damage to natural resources as well as fund expenditures.<sup>85</sup>

Virtually all lien statutes (either superlien or simple lien) require recordation of the lien before it can become effective.<sup>86</sup> Generally, the statutes are vague on when notice of the lien should be filed. Possible interpretations of when a notice may be filed include: 1) As soon as the state anticipates expending money; 2) As soon as some money has been expended; or, 3) not until the cleanup has been completed and a sum-certain has been

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81. See, e.g., CONN. STAT. ANN. § 22a-452a(c) (West Supp. 1989); MASS GEN. LAWS ANN. ch. 21E § 13 (West Supp. 1989); N.J. STAT. ANN. § 58:10-23.11f.f (West Supp. 1989). But see ARK. STAT. ANN. § 8-7-516 (Supp. 1989); N.H. REV. STAT. ANN. § 147-B:10-b (Supp. 1988).

82. CONN. GEN. STAT. ANN. § 22a-452a(c) (West Supp. 1989) ("such lien shall take precedence over all transfers and encumbrances recorded on or after June 3, 1985").

83. N.H. REV. STAT. ANN. § 147B:10-b III (Supp. 1988).

84. See ARK STAT. ANN. § 8-7-516(a) (Supp. 1989); CONN. GEN. STAT. ANN. § 22a-452a(a) (West Supp. 1989); N.H. REV. STAT. ANN. § 147-B:10-bI to II (Supp. 1988); N.J. STAT. ANN. § 58:10-23.11f.f (West Supp. 1989).

85. MASS. GEN. LAWS ANN. ch. 21E § 13 (West Supp. 1989). The Massachusetts lien also includes 12% interest from the date the debt becomes due. *Id.*

86. See, e.g., N.J. STAT. ANN. § 58:10-23.11f.f (West Supp 1989):

Any expenditures made by the administrator pursuant to this act shall constitute in each instance, a debt of the discharger to the fund. The debt shall constitute a lien on all property owned by the discharger when a notice of lien, incorporating a description of the property of the discharger subject to the cleanup and removal and an identification of the amount of cleanup, removal and related costs expended from the fund is duly filed with the clerk of the Superior Court.

*Id.*

ARK. STAT. ANN. § 8-7-516 (Supp. 1989); MASS. GEN. LAWS ANN. ch. 21E § 13 (West Supp. 1989); N.H. REV. STAT. ANN. § 147-B:10-b II (Supp. 1988).

expended. One problem evident with most of the statutes is that expenses will be incurred over time and the administrator will either have to wait until all expenditures are made before filing notice with a definitive value or file notice several times, as the funds are expended. Any delay in the filing of the lien will create problems for the purchasers of real estate.<sup>87</sup>

Analysis of the definition of responsible (or liable) party in conjunction with the lien provision is important to completely understand how a given statute will allocate costs among specific interested parties. Some of the superlien statutes exempt creditors from being held liable for the costs of cleanup beyond the value of the property.<sup>88</sup> However, many of the superlien statutes have no creditor exemption.<sup>89</sup> Presumably, without any additional protection creditors will be exposed to direct liability as owners and operators as has occurred under the federal superfund statute.<sup>90</sup> The Massachusetts provision provides an interesting alternative from completely exempting creditors by limiting the liability for "innocent" owners to the value of the remediated property.<sup>91</sup> This provision would assist creditors that had fore-

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87. *Cf. Simon v. Oldmans*, 203 N.J. Super. 365, 497 A.2d 204 (N.J. Super. Ch. Div. 1985) (action for rescission of tax receipts sale due to alleged non-disclosure of known environmental contamination). See also Note, *The Impact of State "Superlien" Statutes on Real Estate Transactions*, 5 VA. J. NAT. RESOURCES L. 297, 319 (1986) (recommending that superliens not attach until properly recorded).

The New Jersey statute provides that "any expenditure made by the administrator . . . shall constitute a lien . . ." N.J. STAT. ANN. § 58:10-23.11f.f (West Supp. 1989). The total expenditures will not be known until the project is completed. If the Administrator delays filing of any liens, particularly the simple liens on non-contaminated property, dischargers may be encouraged to divest assets before the liens are filed.

88. See, e.g., CONN. GEN. STAT. ANN. § 22a-452b which provides:

Notwithstanding any provision of the general statutes, a mortgagee who acquires title to real estate by virtue of a foreclosure or tender of a deed in lieu of foreclosure shall not be liable for any assessment, fine or other costs imposed by the state for any spill upon such real estate beyond the value of such real estate, provided such spill occurred prior to the date of acquisition of such real estate by such mortgagee.

*Id.*

89. See, e.g., ARK. STAT. ANN. § 8-7-512 (Supp. 1989); N.H. REV. STAT. ANN. § 147-B:10 (Supp. 1988); N.J. STAT. ANN. § 58:10-23.11g.b-d (West Supp. 1982).

90. For a discussion of creditor liability under CERCLA, see *supra* notes 26-45 and accompanying text.

91. The Massachusetts innocent landowner defense is similar to the federal provision and provides that liability will not exist if the landowner can show that the contamination was caused by:

- (1) an act of God;
- (2) an act of war;

closed on property<sup>92</sup> by limiting their liability to the value of the property. Creditors found to be liable as operators due to involvement in the day-to-day business operations of their debtors<sup>93</sup> will not be protected by this provision.

### C. BANKRUPTCY

The federal Bankruptcy Act<sup>94</sup> is structured to provide fair and orderly distribution of a debtor's assets among the creditors, while permitting the debtor to have a fresh start or to reorganize and preserve going concern value.<sup>95</sup> Secured creditors obtain preferred treatment under the Bankruptcy Act.<sup>96</sup> In *Ohio v. Kovacs*<sup>97</sup> the Supreme Court ruled that a state court injunction, re-

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(3) an act or omission of a third party other than an employee or agent of the person, or than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly, with the person, except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail, if the person establishes by a preponderance of the evidence that he exercised due care with respect to the oil or hazardous material, that he took precautions against foreseeable acts or omissions of any third party and the consequences that could foreseeably result from such acts of omissions, and that he complied with all notification requirements. . . .

MASS. GEN. LAWS ANN. ch. 21E § 5(c) (West Supp. 1989). The limitation of liability provides that:

Any person whose land has been the site of a release of hazardous material for which the department has incurred costs for assessment, containment and removal . . . and who can establish by a preponderance of the evidence that he is otherwise eligible for the defenses set forth in paragraph (c) shall be liable to the department for such expenses only to the extent of the value of the property following the department's assessment, containment and removal actions.

*Id.* § 5(a).

92. For discussion of lenders liable as owners after foreclosure, see discussion of *United States v. Maryland Bank & Trust Co.* *supra* notes 29-36 and accompanying text.

93. For discussion of lenders liable as operators, see discussion of *United States v. Mirabile* *supra* notes 39-45 and accompanying text.

94. 11 U.S.C. §§ 101-1330 (1982 & Supp. 1987).

95. See Schwenke & Lockett, *supra* note 46, at 1.

96. See 11 U.S.C. § 506 (1982 & Supp. 1987); Note, *Priority Lien Statutes: The States' Answer to Bankrupt Hazardous Waste Generators*, 31 WASH U. J. URBAN AND CONTEMP. LAW 373, 375 (1987). The article states that, "secured creditors, including those with a valid statutory or judicial lien, bypass the Bankruptcy Act's main distribution system. [citation omitted]. The lienholder, however, must make sure that the bankrupt's trustee cannot avoid the lien under any of the provisions of 11 U.S.C. § 545 (1982)."

*Id.* at 375 n. 14.

97. 469 U.S. 274 (1985).

quiring the cleanup of a hazardous waste site, was a "claim"<sup>98</sup> that was dischargeable in bankruptcy because it had been effectively reduced to a monetary judgment.<sup>99</sup> However, as Justice O'Connor pointed out in her concurring opinion, Congress has generally left the determination of property rights and priorities in bankruptcy to the state and therefore, classification of Ohio's interest as either a lien on the property, a perfected security interest, or an unsecured claim depends on Ohio law, thus "a state may protect its interest in the enforcement of its environmental laws by giving cleanup judgments the status of a statutory liens or secured claims."<sup>100</sup> Accordingly, by creating a lien for cleanup cost, superfund statutes preclude liable parties from discharging their liability in bankruptcy.<sup>101</sup> A superlien would provide the state with preference over other secured creditors.<sup>102</sup>

98. For the bankruptcy definition of "claim," see 11 U.S.C. § 101(4)(B) (1982).

99. 469 U.S. at 283. The Bankruptcy Act "exempts actions by governmental units performed pursuant to the police power of the governmental units performed pursuant to the police power of the government, 11 U.S.C. §§ 362(b)(4)-(5)", from the automatic stay provisions. *Penn Terra Ltd v. Dep't of Env'tl. Resources*, 733 F.2d 267, 273 (3d Cir. 1984) (post petition injunction not subject to stay even though compliance would require expenditure of bankruptcy estate). See also A. COHEN, *GUIDE TO SECURED LENDING TRANSACTIONS*, § 8.01(2) (1988). Also, fines and monetary penalties are not dischargeable in bankruptcy. 11 U.S.C. § 523 (a)(7) (1982). See also *Ohio v. Kovacs*, 469 U.S. at 274. Accordingly, courts must distinguish between government actions taken to compensate for past damages to the state and actions taken to insure future compliance or to penalize. If the state government can establish that the action is not an attempt to enforce a money judgment, but rather is an attempt to exercise its police powers, the Bankruptcy Act will not stay proceedings by the state and the obligations will not be dischargeable. See *Penn Terra Ltd. v. Dep't of Env'tl. Resources*, 733 F.2d 267, 272.

100. 469 U.S. at 285-86 (J. O'Connor concurring).

101. The lien would give the state's claim, as determined by the bankruptcy court, the status of an allowed secured claim at least up to the value of real or personal property subject to the lien with the balance of the claim being an unsecured claim. See 11 U.S.C. § 363(d) (1982). In states where at least a simple lien covers all of the property of the debtor, the state would receive all of the property of the debtor except for the value of property with secured claims prior to the state's.

For a discussion of other issues relating to bankruptcy, such as the ability of the trustee to abandon the contaminated property, see Note, *Priority Lien Statutes: The States' Answer to Bankrupt Hazardous Waste Generators*, 31 WASH U. J. URBAN AND CONTEMP. LAW 373 (1987).

102. See Note, *Priority Lien Statutes: The States' Answer to Bankrupt Hazardous Waste Generators*, 31 WASH U. J. URBAN AND CONTEMP. LAW 373 (1987). In Chapter 7 bankruptcy proceedings, the assets of the debtor are liquidated for the benefit of the creditors, in Chapter 11 reorganization proceedings, debtors reorganize and continue their operations and state environmental regulations would remain enforceable. *Id.* at 380-81 n. 51.

Under Chapter 11 the debtor is permitted to retain and use property. See A.

### III. AFFECTED PARTIES

#### A. CREDITORS

An ultimate fear for creditors is being held jointly and severally liable for the response costs at a superfund site.<sup>103</sup> Without some sort of statutory protection lenders should plan carefully to avoid liability.<sup>104</sup> But, even if lenders can avoid superfund liability once contamination is discovered, the lien provisions create new risks for prior secured, unsecured, and all subsequent creditors.

For a secured creditor, lien statutes pose risks of loss of the collateral securing a loan. The greatest potential impact on collateral will be felt in superlien states where the total value of collateral is at risk.<sup>105</sup> Simple lien provisions will, nonetheless, impact on secured creditors because they encumber assets of the responsible party that might otherwise be used to maintain productive business operations, and may hasten the filing of bankruptcy claims because it may become impossible to raise more working capital to sustain operations (or to satisfy superfund obligations).

Unsecured creditors will also feel the impact of liens for cleanup liability. Again, the imposition of either a super or a simple-lien may greatly hinder the ability of a company to continue operations and therefore lead to default on loans. Unsecured creditors, who may be less familiar (or completely unfamiliar) with a debtor's operations, particularly when the operations are either highly diversified or geographically dispersed, may be unpleasantly surprised by the effect of the superfund lien provisions. Finally, in the event of insolvency, as creditors stand in line for funds, lien provisions, whether or not they are superliens, will put the government in line before unsecured creditors.

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COHEN, GUIDE TO SECURED LENDING § 8.02 (1988). Lien provisions might be helpful in ensuring that the state receives repayment of environmental response costs because debtors in possession may have to provide secured parties "adequate protection" as a condition for using the property. 11 U.S.C. § 363(e) (Supp. 1987). See A. COHEN *supra*, at § 8.02.

103. For a discussion of lender liability as an operator, see *supra* notes 26-45 and accompanying text.

104. For a discussion of steps that lenders can take to avoid superfund liability, see *infra* note 113 and accompanying text.

105. Generally, this will be the case only if the owner/debtor is in some way responsible for the contamination, and the contamination affects the collateral, due to the fact that most lien provisions are only effective when the landowner is a responsible party. For discussion of state lien provisions, see *supra* notes 46-95.

Provided that superfund liens are filed in a timely fashion, creditors that lend money subsequent to a superfund incident should have record notice of the pending liabilities. However, if the superfund liens are not filed early in the response process, lenders may be unaware of the potential liability of their borrowers.

#### B. PROPERTY OWNERS

Property owners fall into several categories. Genuinely innocent property owners may be shielded to a large extent when the lien provisions are only applicable against a property when the owner is a responsible party.<sup>106</sup> Innocent landowners may be adversely affected by the superfund liens where the lien provisions apply regardless of owner responsibility<sup>107</sup>

Situations where parties become owners as a result of a foreclosure sale raise significant issues. Absent a statutory exclusion, superfund liability attaches to lenders that foreclose on, successfully bid, and subsequently exercise control over contaminated property or who fail to immediately dispose of such property.<sup>108</sup> However, without a superlien statute, the lender may elect not to foreclose on the property until the government responds to the contamination. The lender may then foreclose, purchase, and dispose of the property in order to recover the value of the collateral that has been restored and enhanced at the taxpayers expense.

With a superlien, a lender will not benefit from the government's response action because the government's lien will take priority. One twist to this scenario could arise where the lender is foreclosing and is completely exempt from liability and the superlien provision is operative only against property owned by responsible parties. In this case, a creditor that obtained title through foreclosure would not be a responsible party and therefore any superfund type lien would not be effective. In states where the liability of an innocent landowner is limited to the value of the land, a foreclosing creditor would not be subject to

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106. See, e.g., ARK. CODE ANN. § 8-7-516 (Supp. 1989); MASS. GEN. LAWS ANN. ch. 21E § 13 (West Supp. 1989); N.H. REV. STAT. ANN. § 147B:10-b (Supp. 1988); N.J. STAT. ANN. § 58:10-23.11f.f (West Supp. 1989); PA. CONS. STAT. ANN. § 6020.509 (Purdon Supp. 1989).

107. See, e.g., CONN. GEN. STAT. ANN. § 22a-452a; TENN. CODE ANN. § 68-46-209 (Supp. 1989).

108. For a discussion of lender liability under Superfund, see *supra* notes 26-45 and accompanying text.



liability for response costs but would be liable up to the value of the land, even if the statute exempted creditors from direct liability.

Responsible parties owning property subject to response actions will feel the effect of lien provisions due to the removal of a potential source of security for funding business operations. It is highly unlikely that potential lenders will want to step in line behind a superfund lien.

The responsible owner may also be prevented from transferring the property. Under a superlien provision, the property owner stands to have foreclosure proceedings initiated by the state. With a simple lien the state cannot effectively force foreclosure because any superior liens would not be displaced by the foreclosure sale.<sup>109</sup> Regardless of which lien is imposed and perfected, a subsequent purchaser would take subject to the lien.<sup>110</sup>

### C. STATE/DER/TAXPAYER

A state's primary interest is the protection of the health and safety of its citizens and environment. As the state proceeds to effectuate response actions due to releases or potential releases of hazardous substances, the state must also try to ensure the availability of financial resources for future projects. A superlien on restored property would ensure that any benefits derived from the expenditure of the state's funds would enure directly to the state.

Most superliens will not accrue the benefits of the response action directly to the state if the property is owned by a truly innocent party. In this case it would be possible for an innocent landowner to derive the benefits of the response action. If the superfund statute exempts foreclosing lenders from liability, then foreclosing lenders will also be able to benefit as innocent parties from the response actions funded by the state. If, however, the superlien is effective regardless of the responsibility of the owner, the state can recover at least the value of the restored land by virtue of the state's response action while still permitting innocent parties (regardless of how title was obtained) to be exempt from further liability.

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109. See, e.g., U.C.C. § 9-504(4) ("When collateral is disposed of by a secured party . . . the disposition . . . discharges the security interest under which it is made and any security interest or lien subordinate thereto").

110. This illustrates the need for early filing of the lien in order to establish a state's interests as well as to protect the interests of subsequent purchasers.

## IV. POLICY

While environmental laws pose potentially huge costs on modern business,<sup>111</sup> environmental cleanup imposes huge costs on state and federal governments. Superlien statutes will force borrowers and lenders to consider the possible impact of a hazardous waste cleanup on a borrowers' ability to satisfy their obligations, as well as the lenders' own potential liability for cleanup costs. As virtually all superfund statutes provide for an innocent landowner defense, truly innocent parties will be protected from liability.

This section will address the preventive measures that may be taken by purchasers and lenders as well as the economic impact on the affected parties.<sup>112</sup>

## A. PREVENTIVE MEASURES

Superlien statutes do not unreasonably increase the burden on potential purchasers and lenders. In fact, superlien statutes will force businesses to consider and plan for the potential responsibility to clean up hazardous waste. Purchasers of commercial property cannot avoid performing some review of potential sources of contamination or else they will be unable to establish an innocent landowner defense to superfund liability.<sup>113</sup> Lenders

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111. See Cohen, *Hazardous Waste: A Threat to the Lender's Environment*, 19 U.C.C.L.J. 99 (1986).

112. Superlien provisions pose constitutional questions. The New Jersey Supreme Court considered whether the imposition of a superlien is a taking of a property interest without due process or just compensation, and whether it interferes with contract rights. *Kessler v. Tarrats*, 191 N.J. Super. 273, 466 A.2d 581 (N.J. Super. Ct. 1983), *aff'd* 194 N.J. Super. 136, 476 A.2d 326 (N.J. Super. Ct. App. Div. 1984).

The court held the New Jersey superlien provision to be a constitutional exercise of the police power. *Id.* The court noted that mortgagees and owners of property are subject to the state's police power. *Id.* at 294, 466 A.2d at 593-94. Typically, a mortgagee insures that taxes and assessments are paid and that the building is sufficiently maintained to avoid state ordered demolition. *Id.* Analogously, the court reasoned that since the property at issue was destroyed by the contamination, the statute did not "recklessly destroy a lien claim." *Id.* at 300, 466 A.2d at 59. Accordingly, in the face of a grave health problem, the statute properly exercises the police power and does not effect a taking. *Id.* at 305, 466 A.2d at 600. Further, since the remedial action taken was necessary and restored economic value to the property, the superlien provision did not impair any contract right. *Id.* at 304, 466 A.2d at 596. The court also found that the original security interest in the property was not destroyed when the fund was given priority. *Id.* at 304-05, 466 A.2d at 600.

113. See, e.g., *supra* notes 28 (CERCLA) and 77 (state provision) and accompanying text.

can also protect their interests by requiring prospective debtors to undertake appropriate investigations.

Lenders may also require inclusion of provisions in lending agreements to preclude or limit the handling of toxic chemicals subsequent to the lending agreement.<sup>114</sup>

## B. ECONOMIC ANALYSIS

A reasonable economic goal for an environmental statute would be to "allocate rights and liabilities in such a way as to minimize the sum of the costs . . . of damage and of avoiding . . . damage."<sup>115</sup> Superlien provisions help to allocate the costs of environmental decontamination among parties that are able to take actions to insure that contamination does not occur, namely the lending industry.<sup>116</sup> Environmental statutes must consider the economic inefficiencies which result when costs are transferred from the actual generators and disposers of hazardous waste substances to third parties.<sup>117</sup> Lenders are reasonably included as responsible third parties because the money loaned helps to finance the activity that generated the hazardous substances.

The main burden of the simple lien provisions will fall on unsecured lenders because prior secured lenders will usually be in a position to recover the value of at least their collateral after a response action. However, the unsecured lender is not in a strong position to affect the behavior of parties responsible for contamination. While the unsecured lender will also be affected by the imposition of a superlien, this is more easily justified. All lenders must assess the risks associated with any borrower. To favor the secured lender over the unsecured lender, however, would impose costs on a segment of society with little or no power to effectuate any change in behavior.

### 1. Innocent Parties

No useful purpose can be served by imposing the burden of environmental decontamination on innocent parties.<sup>118</sup> The be-

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114. See Comment, *Superfund Amendments of 1986*, *supra* note 28 at 899.

115. R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (3rd ed. 1986).

116. The lending industry is in a good position to efficiently spread risk. See Tom, *supra* note 44, at 932.

117. Ulen, Hester & Johnson, *Minnesota's Environmental Response and Liability Act: An Economic Justification*, 15 ENVTL. L. REP. (Envtl. L. Inst.) 10109, 10111 (1986).

118. See generally Note, *Hazardous Waste and the Innocent Purchaser*, 28 U. FLA. L. REV. 253 (1986).

havior of innocent parties cannot be effectively altered by the imposition of the expenses, because their behavior was not the cause of the contamination. The question that needs to be resolved is, "who are the innocent parties?" It would seem that innocent parties are those that cannot effectively modify their behavior in a way to prevent or minimize environmental contamination. Accordingly, in terms of ability to affect future behavior, the lending industry may not be entirely innocent. In terms of past behavior this is less clear.

Could or should banks have been aware of the actions of their borrowers? It does seem that banks should be held partially responsible for the actions of the parties that borrow money from them. Banks must be interested in the business of their borrowers in order to know whether they are of sufficient vitality to produce the funds for repayment of loans. It can be argued that since banks lend funds for specific uses that they should be aware of whether the funds are being used in an environmentally irresponsible manner. Certainly, the potential for significant environmental liability has been well known since the passage of the Clean Air and Water Acts in the early nineteen seventies.

## 2. *Prior Secured Creditors*

The lending industry is structured to assess and evaluate risks, both known and unknown. The potential for environmental liability has been known for sometime. Although in many instances the lender will not be directly responsible for contamination of the environment, some prior secured creditors stand to receive a windfall if the property is cleaned up and they retain a superior secured interest. Therefore, it does not seem unreasonable to impose the costs of cleanup, at least to the extent of the value of collateral that has been subject to cleanup, upon a secured creditor.

State superfunds that impose superliens but do not impose direct liability upon the lender, provide the government with mechanism to recoup part of its costs from the lender (e.g. the value of the property as enhanced by the remedial action) without imposing liability on the lender for the entire cleanup as might occur under CERCLA.<sup>119</sup> The superlien will limit the imposition of costs on lenders to the amount of collateral that they have to secure their loans, while CERCLA presents the possible imposi-

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119. See *supra* notes 26 - 45.

tion of the total costs of cleanup which may greatly exceed the value of the collateral. Between superliens and complete liability, the better policy seems to be the use of the superlien which protects lenders from complete responsibility for response costs, rather than to impose the full cost of cleanup upon a lender merely because it has foreclosed and exercised control over a property in order to protect a security interest.<sup>120</sup>

### 3. *Responsible Parties*

Responsible parties should be held responsible for the costs of cleanup regardless of when the contamination occurs (e.g. before or after the effective date of the statute). Imposition of a superlien on the contaminated property is one effective way of ensuring that the assets of the responsible party will be allocated to replace cleanup costs.

In order for a responsible party to continue operation, the party will have to pay the state the monies due or face foreclosure on their property. The superlien statutes may well prove effective merely by holding the party hostage. If the party refuses to pay the state can foreclose on the property. This form of economic "Sword of Damocles" is not limited to the superlien statutes. With a simple lien statute, the state, as a subordinate lien holder, could still foreclose on the property thereby depriving the owner of his interest in the property.<sup>121</sup>

### 4. *Reduced Economic Growth Resulting from Increased Costs of Capital*

Some commentators have argued that imposition of the costs of superfund liability will increase the cost of working capital and result in recessionary economic effects.<sup>122</sup> This argument seems

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120. Of course, if a lender takes title to a property and fails to take appropriate action to prevent further environmental harm or even exacerbates the problem it may be appropriate to hold the lender fully liable.

121. Foreclosure may be more complicated and would not necessarily net the state that much money if prior, and hence superior, lienholders were involved. However, the threat of foreclosure may scare the responsible party into satisfying the superfund liabilities. It may also inspire the holder of the superior lien to encourage the responsible party to comply, because of the possibility that much less than the actual value may be realized in the foreclosure sale.

122. See Comment, *Superfund Amendments of 1986*, *supra* note 24 at 900. In a recent article, Wendy Wagner analyzed empirical data from the U.S. Department of Commerce on the number of real estate agents and managers, subdividers and developers, mortgage bankers and brokers, business credit institutions, and chemical industries in Pennsylvania, New Jersey, and New York. Wagner, *Liability for Hazardous Waste Cleanup: An Examination of New Jersey's Approach*, 13 HARV.

to be somewhat exaggerated. The issue is how the economic burden of cleanup should be allocated. Ultimately, the cost of cleanup will be dispersed through various economic and legal devices. The duties and possible costs imposed upon the lending industry will ultimately be passed on to borrowers with the largest fraction of the costs being levied primarily on the industries with the highest risks of creating sites requiring remedial action. This will happen because banks, as prudent lenders, will require that borrowers pay for or perform the necessary environmental assessments. Accordingly, the costs will be borne by the segment of the economy responsible for the problem.

##### 5. *Internalize Costs as an Environmental Policy*

Historically, environmental costs were external to the manufacturing process.<sup>123</sup> Slowly, environmental statutes have shifted these costs back to the manufacturer and ultimately to the consumer of the products. The basic premise of an economic analysis of hazardous waste disposal is that the improper disposal of hazardous waste creates economic inefficiencies by imposing uncompensated costs on society.<sup>124</sup> Public policy should strive to minimize the costs on third parties by imposing those costs on the parties that incur them.<sup>125</sup>

Lenders should also be required to shoulder part of the burden of the increased manufacturing costs associated with environmental protection. Lenders acquiring security interests subsequent to the enactment of a superlien provision could charge marginally higher interest rates, or higher origination fees or force borrowers to perform appropriate investigations in order to compensate for increased risks associated with the potential of losses due to cleanup and subsequent superliens. While interests

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ENVTL. L. REV. 245, 285-97 (1989). Wagner concludes that the data shows that the strict environmental laws in New Jersey, including the superlien provision, do not impact on the industries that were surveyed. *Id.* Ms. Wagner's analysis is a commendable approach and may be a valid demonstration that environmental laws do not seriously impact economic activity. It would be interesting to analyze data concerning interest rates in the state of New Jersey and neighboring states, including if possible, a break down by industry. Such an endeavor is, unfortunately, beyond the scope of this article.

123. See generally W. BAUMOL & W. OATES, *ECONOMICS, ENVIRONMENTAL POLICY, AND THE QUALITY OF LIFE* (1979).

124. See Ulen, Hester & Johnson, *supra* note 117 at 10,111.

125. See *id.* See also W. BAUMOL & W. OATES, *supra* note 123. It should be noted that an economic analysis can also be used to justify the imposition of strict, joint and several liability for hazardous waste cleanup liability. See Ulen, Hester & Johnson, *supra* note 117.

perfected prior to the superlien statutes cannot provide for these potential costs, there is little justification for letting the lender benefit after the government has performed a cleanup of a contaminated property. If the owner of the property is an innocent party, secured creditors of the innocent party will not be affected. The question must be asked however, whether imposing a superlien works as an actual penalty even if the property is owned by an innocent party. If the state did not clean up the contamination, once discovered, the property would be of little or no value to anyone, much less a secured creditor. Even if the secured creditor foreclosed on the property, no recapture of the loan balance would be possible through resale until the property was decontaminated.<sup>126</sup>

## V. RECOMMENDATIONS

Superlien provisions provide a reasonable means for states to ensure that they recover their expenditures for cleanup costs. The superliens should affect only the property that has been the subject of the response actions. To include other property in the superlien's scope would unfairly interfere with the interests of other secured lenders with little or no control over the actions of the borrower at some remote site. Additionally, the lien should be imposed regardless of whether the property is owned by a responsible party.<sup>127</sup> Protection for lenders<sup>128</sup> and for innocent landowners can be achieved by limiting the repayment to the state

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126. It should be noted that even if a party is innocent when contaminated property is acquired, the innocent party status is lost if the party attempts to transfer the property after contamination is discovered and does not inform a purchase of environmental problems at the site. 42 U.S.C. § 9601(35)(C) (Supp. 1987); Tom, *supra* note 44, at 926 n. 16.

127. The legislative history of the Pennsylvania Hazardous Sites Cleanup Act, 35 PA. CONS. STAT. ANN. § 6020.101-1305 (Purdon Supp. 1989) used the analogy of the termite ridden building in a motion to include the superlien provision in the Pennsylvania Act. PA. SUPERFUND HANDBOOK, p. 162. A purchaser whose property is destroyed by termites has recourse only against the seller. The state has no duty to repair the property. Similarly, the owner of a contaminated property should not get the benefit of the state's cleaning the contamination without having to pay for the benefit. Despite the beauty of the logic, the superlien was not adopted in Pennsylvania.

128. On April 4, 1990, Representative John LaFalce (D-NY) introduced a new version of a bill submitted last year. The new legislation (HR 4494) broadens the scope of protection of financial institutions to include public lenders, such as the Small Business Administration, mortgage lenders, and charitable institutions. The prior bill (HR 2085) only referred to commercial lenders. HR 4494 further extends protection to corporate fiduciaries that hold legal trust to property for purposes of administering a trust or estate.

to the value that has been restored to the land by virtue of the state's response actions.

Simple lien provisions should be included for all other property of responsible parties. In this way, the state can ensure that, in the event of bankruptcy, there is a reasonable chance of recovering some of the response costs. Other secured creditors will recover the value of their security interests before the government, because of the infeasibility of requiring lenders to police property in which the lender has no collateral interest. Lenders can be secure in their security interests if they are willing to oversee the security properties and take other necessary steps.

One essential ingredient of a useful lien provision is insuring that the liens are recorded as early as possible. Ideally, the liens should be recorded prior to the commencing of the cleanup. This is certainly true for the superlien on the property subject to the cleanup.<sup>129</sup> The danger with early filing for simple liens on other property of potentially responsible parties is that the lien might preclude that party from effectively carrying on business operations. On the other side, potentially responsible parties will be precluded from disposing of assets during the course of the cleanup but before the filing of the liens. Also weighing on the side of the earliest possible filing is the interests of prospective lenders and purchasers of property. Responsible agencies should be given discretion to file the lien at early periods in the history of a site. This way, agencies can use the threat of the lien provisions as a tool in negotiating with responsible parties. As long as responsible parties can initiate cost recovery actions against other responsible parties equity should be served.<sup>130</sup>

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129. Obviously this could be carried to extremes greater than this author envisions. Often, sites are listed on the EPA Comprehensive Environmental Response, Compensation and Liability Act List (CERCLIS) on a showing that hazardous materials are handled at a site. After a site is listed on the CERCLIS it may be as many as nine years before any site investigation occurs. Certainly, no action should be taken in terms of filing a lien until a site is listed on the national priorities list or the state equivalent or until money has been spent, whichever is earlier.

130. Constitutional concerns may be raised by imposing liens on property before adjudication of liability. However, in the few cases reviewing lien provisions courts have weighed the states interest in remedying environmental contamination heavily against the private interests at stake. See *Kessler v. Tarrats*, *supra* note 113. Furthermore, levying prior to adjudication of liability is not a novel concept. See, also, *Reardon v. EPA*, No. 89-2278-C (D. Mass. Feb. 6, 1990) (1990 WL 15432). *Reardon* challenges the federal lien provision. While the court notes that section 113 of CERCLA prohibits pre-enforcement judicial review, the court rules that Congress cannot completely eliminate review of Constitutional issues. The court holds that the Reardons are still free to use and



## VI. CONCLUSION

The state should not be an insurer for lenders or for innocent parties. Without a superlien the state may well become the insurer for innocent landowners. Furthermore, the absolute exemption of owners that acquire title through foreclosure will also make the state the insurer or guarantor of foreclosing lenders. Free market forces will insure that the value of land reflects that actual care that a landowner takes to insure that no environmental contamination occurs. Taxpayer dollars need to be used for response actions, but the benefit should not enure to private interests. Certainly private interests need to be protected. This protection can be provided by ensuring that lien provisions require filing of the notice of the lien at the earliest possible moment.

The lien provision does not add anything of true novelty to the process of recovering expenses for environmental response actions under superfunds. The true value of the lien provisions is to ensure that the state response actions survive in bankruptcy. Liens do seem to provide the state with a stream-lined means of levying on and attaching the property of a judgment debtor to the state. If drafted correctly, the lien provisions permit the state to attach a debtor's property before a judgment is rendered.

Superliens provide an effective mechanism for states to protect and reserve the funds collected in superfunds for the cleanup of hazardous waste spills. Unlike simple lien provisions superliens provide incentives for secured lenders to take actions to insure that spills and releases do not occur. While a burden may be placed on lenders holding contaminated collateral, the burden can be limited to the amount of the loan secured by liens on properties subject to cleanup actions. Considering that, more likely than not, the loaned money was used to finance the offending activities, the burden of the superlien seems to bear a fair relation to the ability of lenders to take actions to minimize their exposure to loss. In the same vein, the actions that lenders take

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enjoy the property subject to the lien. Also, while the lien may make it more difficult for the Reardons to sell the property for its full value, the Reardons are, nonetheless, free to alienate the property. Accordingly, the court holds that the filing of the lien does not deprive the Reardons of their property in violation of the Due Process Clause.

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**to protect themselves will also help to insure that future hazardous waste spills will not occur.**

*David G. Butterworth*

