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MORTGAGE ACCELERATION: THE LENDER'S PRESCRIPTION FOR AVOIDING THE COMPREHENSIVE ENVIRONMENTAL RESPONSE CLEANUP AND LIABILITY ACT (CERCLA)

Congress enacted the Comprehensive Environmental Response, Cleanup and Liability Act (CERCLA)¹ to charge potentially responsible parties² with the duty of cleaning up hazardous waste. The United States Environmental Protection Agency (EPA) recently sought to recover the costs of environmental cleanup from banks that foreclosed on land containing hazardous wastes. In effect, the EPA reasoned that a secured lender who forecloses upon property is a potentially responsible party liable for the cleanup expense.³

The EPA's actions caused panic among the nation's bankers. Legal experts advised banks to avoid accepting potentially hazardous security.⁴ Unfortunately, thousands of banks have already extended such

1. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified in part as amended at 42 U.S.C.A. §§ 9601-9657 (West 1986 & Supp. I 1987)).

2. See *infra* notes 29-31, 33, 52 and accompanying text.

3. See *infra* notes 133-41 and accompanying text.

4. See generally Andresky, *Cover Your Assets*, 137 FORBES, Mar. 24, 1986, at 117; Bohannon, *Superfund and the Banking Industry*, 50 TEX. B.J. 1215 (1987); Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets*, 103 BANKING L.J. 509 (1986); Shea, *Protecting Lenders Against Environmental Risks*, PRAC. REAL EST. LAW, May 1987, at 11; *General Policy, Banks Increasingly at Risk From Liability for Pollution Problems, Banking Official Says*, 17 Env't Rep. (BNA) 1624 (1987); Comment, *Fear of Foreclosure: United States v. Maryland Bank & Trust Co.*, 16 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,165 (1986) [hereinafter Comment, *Fear of Foreclosure*]; Note, *When a Security Becomes a Liability: Claims Against Lenders in*

loans. In addressing this problem, this Note advances a theory to avoid EPA cost recovery actions for lenders who have unknowingly⁵ extended credit secured by hazardous property.⁶

Part I discusses the legislative history of CERCLA. Part II synthesizes this legislative history with the statutory structure of CERCLA. Part III examines how the courts apply CERCLA's liability scheme to the nation's lenders and the congressional response. Part IV reviews the principles behind acceleration. Part V investigates the use of acceleration as a method of avoiding lender liability for hazardous collateral.

I. CERCLA: THE LEGISLATIVE HISTORY

In 1942,⁷ the Hooker Chemical Company began dumping waste into an abandoned canal. In 1953, an elementary school was built atop the canal site. Signs of trouble were largely ignored until the spring of 1978.⁸ By then, highly toxic chemicals had infiltrated many area

Hazardous Waste Cleanup, 38 HASTINGS L.J. 1261 (1987) [hereinafter Note, *When a Security Becomes a Liability*]; Note, *United States v. Maryland Bank & Trust Co.: Liability Under CERCLA of a Post-Disposal Toxic Waste Site Purchaser*, 8 J. ENERGY L. & POL'Y 179 (1987) [hereinafter Note, *Liability Under CERCLA*]; Comment, *The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment*, 41 U. MIAMI L. REV. 879 (1987) (these articles warn banks to avoid potentially hazardous loans).

5. See *infra* notes 60-61 and accompanying text discussing the lender's duty to investigate the collateral before using it as security. This Note applies to those lenders who accepted possibly hazardous security before this duty arose.

6. See *infra* note 72 and accompanying text.

7. Brown, *Love Canal USA*, N.Y. Times, Jan. 21, 1979, § 6 (Magazine), at 23. Apparently, no one knows exactly when Hooker dumped the chemicals. See S. REP. NO. 848, 96th Cong., 2d Sess. 8-10 (1980) [hereinafter S. REP. NO. 848] (citing Brown's article, *supra*).

8. S. REP. NO. 848, *supra* note 7, at 4. Several events happened in 1978. For example, amid assurances from government officials that their water was safe to drink, citizens in Toone, Tennessee found their water supply contaminated by a chemical facility that closed six years earlier. *Id.* Later in 1978, the EPA found that the Cedar River, near Charles City, Iowa, contained poisons that leached from a nearby dumpsite. *Id.* at 5. Finally, near the close of 1978, about 25 miles south of Louisville, Kentucky, chemical manufacturers disposed of 17,000 drums at a seven-acre site. *Id.* Six thousand drums in this area, which became known as the "valley of the drums," oozed toxic chemicals into the ground. *Id.* See Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 25 (1982). Senator Moynihan was especially concerned with the Love Canal and other events of 1978 and wanted to prevent any reoccurrences. *Id.* See 126 CONG. REC. S14,965, 14969-73 (daily ed. Nov. 24, 1980) (remarks of Sen. Moynihan).

homes and startling health problems developed.⁹ Subsequently, President Carter declared a state of emergency,¹⁰ and the state evacuated neighborhoods along the polluted land known as the Love Canal.¹¹

Motivated by public concern¹² over the Love Canal, Congress hastily fashioned a bill to address this environmental problem.¹³ The only controlling legislation in effect at the time, the Resource Conservation and Recovery Act (RCRA),¹⁴ could not cure the problem because it established no liability for wastes dumped prior to its enactment.¹⁵ Senate leaders were eager to create retrospective legislation.¹⁶ The

9. S. REP. NO. 848, *supra* note 7, at 9. The New York Health Department investigated and discovered birth defects, miscarriages, epilepsy, liver abnormalities, sores, rectal bleeding, headaches — not to mention undiscovered, but possibly latent illnesses. *Id.* All of these illnesses presumably were caused by Hooker's release. For an examination of the health hazards imposed by toxic wastes, see TOXIC TORTS: PROPOSALS FOR COMPENSATING VICTIMS OF HAZARDOUS SUBSTANCES, AMERICAN ENTERPRISE INSTITUTE LEGISLATIVE ANALYSIS (1984); Note, *Developments in Victim Compensation Legislation: A Look Beyond the Superfund Act of 1980*, 10 COLUM. J. ENVTL. L. 271 (1986) (strategies for victim compensation).

10. 126 CONG. REC. 30,938 (1980). On August 7, 1978, President Carter declared a state of emergency. *Id.* The United States Senate approved by a voice vote a "sense of Congress" which accepted that a serious environmental disaster occurred and that federal aid should be forthcoming. *Id.*

11. S. REP. NO. 848, *supra* note 7, at 9. See also L. GIBBS, LOVE CANAL, MY STORY (1982) (Lois Gibbs recounts her life as a former Love Canal resident).

12. The events surrounding Love Canal prompted many people to organize in an effort to prevent similar occurrences. See Freudenberg, *Citizen Action for Environmental Health: Report on a Survey of Community Organizations*, 74 AM. J. PUB. HEALTH 444 (1984) (several citizen groups evolved from the Love Canal disaster).

13. See Grad, *supra* note 8, at 2. See also 1A F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.04[2] (1981) (only 11 days passed between the bill's introduction and presidential approval); *United States v. Northeastern Pharmaceutical Co.*, 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984) ("CERCLA is . . . a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions. . . ."); *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142 (E.D. Pa. 1982) ("[CERCLA] is vague and its legislative history indefinite."); J. MERINGOLO, LEGISLATIVE HISTORY OF CERCLA (1981).

14. *Resource Conservation and Recovery Act*, PUB. L. NO. 94-580, §§ 1001-8007, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6987 (1976)).

15. See Dore, *The Standard of Civil Liability for Hazardous Waste Disposal Activity, Some Quirks of Superfund*, 57 NOTRE DAME L. REV. 260 (1981) (RCRA a prospective regulatory statute). See *supra* note 8 and accompanying text.

16. Congress successfully drafted retrospective legislation. See *St. Louis Post-Dispatch*, Feb. 24, 1988, at A1, col. 5 (although Congress passed CERCLA about 27 years after Hooker dumped the waste, the court held its parent, Occidental Petroleum, liable); Marcotte, *Toxic Blackacre: Unprecedented Liability for Landowners*, 73 A.B.A. J. 66, 67 (1987) (quoting Roger Schwenke) ("In many of these sites the hazardous waste

Senate also recognized that there was a shortage of cleanup resources.¹⁷ Moreover, insufficient legal remedies for collecting cleanup costs from the owners of hazardous waste sites plagued RCRA.¹⁸

Senator Robert C. Byrd moved for consideration of Senate Bill 1480 during a Democratically controlled lame-duck Congress.¹⁹ He offered the bill as the last effort by the Ninety-Sixth Congress to address hazardous waste.²⁰ As a revenue measure, this bill had to originate in the House of Representatives.²¹ Many House members considered the bill seriously flawed²² but conceded it was the best solution. Less than a week after its passage in the House,²³ President Carter signed the bill into law.²⁴

II. CERCLA: THE STATUTORY SCHEME

Public Law 96-510 is known as the "Superfund" because it reserves

was deposited 40 or 50 years ago. . . but if the contamination is discovered in 1987. . . the present owner is one of the legally responsible parties." See *infra* note 123.

17. S. REP. NO. 848, *supra* note 7, at 10. Funds are insufficient for the expensive remedies needed to solve hazardous chemical contamination problems. The Senate Report offers an example: "The EPA has spent a total of \$30 million at Love Canal . . . [but] the total costs of Love Canal alone are expected to reach \$125 million." *Id.* at 11.

18. *Id.* There is no general federal law establishing liability for accidents or other incidents involving hazardous substances. *Id.* So, even when a responsible company is identified, recovering cleanup costs and damages can be extremely difficult or impossible. *Id.*

19. 126 CONG. REC. S14,929 at 14,948 (daily ed. Nov. 24, 1980).

20. See Note, *Liability Under CERCLA*, *supra* note 4, at 168 (Republican domination of the Senate following 1980 election created an insensitivity toward environmental issues).

21. See Grad, *supra* note 8, at 25 (recognizing that the bill was a revenue measure); R. NADER, THE RALPH NADER CONGRESS PROJECT, THE REVENUE COMMITTEES (1975) (for no particular reason, other than tradition, the House Appropriations Committee acts first on all spending bills); R. FENNO JR., THE POWER OF THE PURSE (1966) (the House is not only the first legislative body to act on revenue measures, but the most important one as well).

22. 126 CONG. REC. H11,790 (daily ed. Dec. 3, 1980). See 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.03[8], at 3-158.16(1) (1981) (noting the remarks of Congressman Broyhill). The floor leader asserted several flaws, including spending, evidence, damages, and executive discretion. He was concerned that the tax would create a bottomless trust fund giving the EPA unlimited spending authority.

23. 126 CONG. REC. H11,802 (daily ed. Dec. 3, 1980).

24. *Id.* President Carter signed the bill on December 11, 1980, and the measure was marked as Public Law No. 96-510. *Id.* See 42 U.S.C. §§ 9601-9657 (1980) (codification of PUB. L. No. 96-510).

1.6 billion dollars for cleanup activities.²⁵ Industry taxes and general federal appropriations supply most of the money.²⁶ By financing the fund through industry taxes, the Senate sought to convey a message of responsibility to industrial polluters.²⁷

CERCLA imposes liability²⁸ for cleanup expenses upon three broadly defined classes of persons connected to the waste disposal: site owners or operators,²⁹ generators,³⁰ and transporters.³¹ Courts gener-

25. 42 U.S.C. § 9631(b) (1980), 126 CONG. REC. 30,935 (1980). Congress initially authorized \$220 million of general revenues and \$1.38 billion of excise taxes on petroleum products and certain inorganic chemicals to fund the program. *Id.*

26. 126 CONG. REC. 30,935 (1980).

27. S. REP. NO. 848, *supra* note 7, at 72. Financing the fund through industry taxes presents the most equitable and rational method of broadly spreading the costs of past, present, and future releases of hazardous waste. This method of financing tells the polluters that the longer they allow hazardous waste to appear, the longer they will be financially responsible for the result. See Garrett, *Superfund: Apportionment of Liability*, NAT. RESOURCES & ENV'T 25 (Fall 1985) (the "polluter pays" principle).

28. See *infra* note 123 discussing the statute's imposition of strict liability. See generally Note, *CERCLA Defendants: The Problem of Expanding Liability and Diminishing Defenses*, 31 WASH. U.J. URB. & CONTEMP. L. 289 (1987) (general overview of CERCLA's liability scheme).

29. 42 U.S.C. § 9607(a)(1)-(2) (1980 & Supp. I 1987). This section provides in pertinent part:

(a) Covered persons; scope

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) 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.

Several cases have addressed the scope of this term. See, e.g., *N.Y. v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (current owner of facility responsible even if owner not in possession at time of release); *Artesian Water Co. v. Gov't of New Castle County*, 659 F. Supp. 1269 (D. Del. 1987) (county can be a covered person); *State v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986) (definition of owner includes parent company's liability for its subsidiary); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162 (W.D. Mo. 1985) (a person need not be both owner and operator to assume liability).

30. 42 U.S.C. § 9607(a)(3) (1980). This section provides in pertinent part:

(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 owned or operated by another party or entity and containing such hazardous substances. . .

31. 42 U.S.C. § 9607(a)(4) (1980). This section provides in pertinent part:

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which

ally have found that a bank can be a site owner under CERCLA.³² Few loan officers could have imagined potential environmental liability arising out of a mortgage agreement. Relying on the "security interest exemption,"³³ bankers believed that they could foreclose on hazardous waste sites with impunity.³⁴ Nevertheless, because of the tremendous costs³⁵ associated with environmental cleanup, the nation's lenders face

there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

- (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
- (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

32. See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579-80 (D. Md. 1986) (bank liable upon foreclosure); *but see United States v. Mirabile*, 15 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,994, 20,996 (E.D. Pa. 1985) (bank not liable upon foreclosure if it promptly transferred possession). See generally *Murphy, The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities*, 41 *BUS. LAW.* 1133, 1138-45 (1986); Comment, *Fear of Foreclosure*, *supra* note 4, at 16.

33. 42 U.S.C. § 9601(20)(A) (1980). This section provides in pertinent part:

(20)(A) "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment. *Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility* (emphasis added).

Id.

34. See *Burcat*, *supra* note 4, at 509; *Hinds, Liability Under Federal Law for Hazardous Waste Injuries*, 6 *HARV. ENVTL. L. REV.* 1, 24 (1982); *Lotz, Liability Issues Under CERCLA*, 1982-1983 *A.F.L. REV.* 370, 407 (parties acted under belief their actions in accord with law and no liability would result). *Burcat* notes that none of these articles indicates that anyone believed the courts would hold a bank liable for the hazardous security. See *infra* note 130 and accompanying text, indicating banks knew that control in the debtor's affairs could create liability.

35. The EPA estimates that the average expenditure per CERCLA site is roughly \$12 million. See Amendment to National Oil and Hazardous Substances Contingency Plan: The National Priorities List, 49 *Fed. Reg.* 40,320, 40,325 (1984). EPA projections show that the cost of remedying 1800 of the most threatening sites will require an expenditure of \$23 billion. See EPA OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, EXTENT OF THE HAZARDOUS RELEASE PROBLEM AND FUTURE FUNDING NEEDS CERCLA § 301(a)(1)(C) STUDY, FINAL REPORT (Dec. 1984). The Congressional Office of Technology Assessment estimates that cleaning up the 10,000 existing CERCLA sites could cost \$100 billion and require 50 years to accomplish. See CONGRESSIONAL OFFICE OF TECHNOLOGY ASSESSMENT, SUPERFUND STRATEGY 3 (1985).

liability under CERCLA, sometimes in less than obvious circumstances.³⁶

Initially, the courts accepted a bank's argument that it was not an owner because the security interest exemption protected the security interest.³⁷ Consequently, a secured lender was not liable upon foreclosure for cleanup costs. In April 1986, however, the court in *United States v. Maryland Bank & Trust Co.*³⁸ shocked bankers across the country by holding that foreclosing lenders are subject to CERCLA liability.³⁹ The lender became an "owner" by foreclosing and taking title to the distressed site.⁴⁰ "Control" principles⁴¹ increased lenders' uncertainty about the extent of their liability. The speed with which Congress drafted Superfund legislation left it unsupported by legislative history on this issue.⁴²

On October 17, 1986, the Superfund Amendment and Reauthorization Act (SARA)⁴³ became the first amendment to CERCLA. Congress recognized that the original 1.6 billion dollars allocated to the

36. See, e.g., *State v. Bunker Hill Co.*, 635 F.Supp. 665, 671 (D. Idaho 1986) (parent liable for its subsidiary); *United States v. S.C. Recycling & Disposal, Inc.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,895, 20,897 (D. S.C. 1984) (sublessor liable for hazardous waste disposal caused by sublessee); *United States v. Carolawn Co.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,698, 20,698-99 (D. S.C. 1984) (defendant may be liable when it acted as "conduit" in transfer of CERCLA property and held title for one hour); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 849 (W.D. Mo. 1984), *reh'g denied en banc*, 810 F.2d 726 (8th Cir. 1987) (vice president and major shareholder responsible for wastes disposed by corporation).

37. See, e.g., *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992, 20,995 (E.D. Pa. 1985). The *Mirabile* court found little difficulty in construing the security interest exemption in favor of the bank. Judge Newcomer felt that the exemption plainly allows a secured creditor to foreclose, provided that he does not become overly entangled in the day-to-day management of the business. *Id.* See also Lundgren, *Liability of a Creditor in a Control Relationship with Its Debtor*, 67 MARQ. L. REV. 523 (1984). See *supra* note 33 for the text of the security interest exemption.

38. 632 F. Supp. 573 (D. Md. 1986).

39. *Id.*

40. *Id.* at 579.

41. Rather than basing their decisions upon the exact point in time in which title passes, both the *Long* court and the *Mirabile* court relied upon the lender's control of the day-to-day operations of the facility. Although *Maryland Bank* took a conservative approach placing primary emphasis upon passage of title, elements of "control" were still present in the court's analysis. See Part III of this Note for a discussion that title is the only appropriate consideration.

42. See *supra* note 13 and accompanying text.

43. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9675 (1980 & Supp. I 1987)).

“Superfund” was insufficient⁴⁴ and through the amendments allocated 8.5 billion dollars for cleanup action.⁴⁵ In CERCLA’s first six years, poor management⁴⁶ destroyed public confidence in the EPA.⁴⁷ To restore public confidence, the EPA adopted a “get tough” attitude against potentially responsible parties.⁴⁸

Congress apparently agreed with EPA’s approach to cost recovery actions.⁴⁹ Congress went one step beyond *Maryland Bank*⁵⁰ by removing the “security interest exemption”⁵¹ from the definition of

44. See Moskowitz & Hoyt, *Enforcement of CERCLA Against Innocent Owners of Property*, 19 LOYOLA L.A.L. REV. 1171 (1986); See also S. REP. NO. 73, 99th Cong., 1st Sess., at 12 (1985) where the Senate Committee on Finance noted:

It is now clear that the current Superfund program [CERCLA] will not be adequate to achieve the goals of the 1980 act. The EPA estimates that only 15 of the 538 sites not on the National Priority List will be cleaned by September 30, 1985, and that the unobligated balance of the Superfund will be less than \$10 million on that date.

Id. at 12.

45. See Mays, *Settlements with SARA: A Comprehensive Review of Settlement Procedures Under the Superfund Amendments and Reauthorization Act*, 17 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,101, 10,102 (1987) (noting probable effects of increased capital upon the EPA).

46. See Rogers & Darrah, *RCRA Amendments Indicate Hill Distrust of EPA*, *Legal Times*, Nov. 19, 1984, at 28.

47. See 13 *Env’t Rep. (BNA)* 1435 (1982). Charges of mismanagement led to the resignation of Anne Burford, the EPA Administrator. *Id.* Congress held her in contempt for withholding hazardous waste enforcement documents. *Id.* See also 14 *Env’t Rep. (BNA)* 1417 (1983) (Congress investigated political manipulation and conflict of interest problems in top EPA officials).

48. Prior to SARA’s enactment, the EPA’s regional offices were reluctant to utilize the imminent and substantial endangerment provisions of CERCLA § 106 to compel potentially responsible parties to initiate cleanups. With \$8.5 billion to spend, and the EPA’s management pushing for cleanups, the EPA is likely to clean up the site. Following the cleanup, the EPA recovers its expenses under CERCLA § 107. Because the cornerstone of strict liability is still intact, the EPA’s “get tough” policy is assured reimbursement.

See Memorandum from J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, EPA, to Regional Administrators, et. al., Re: Implementation Strategy for Reauthorized Superfund: Short Term Priorities for Action (Oct 24, 1986) (on file with author).

49. Congress adopted the EPA’s Interim CERCLA Settlement Policy of December 5, 1984, and many of the Agency’s other settlement procedures. See Mays, *supra* note 45, at 10,101. See also EPA Interim CERCLA Settlement Policy, 50 *Fed. Reg.* 5034 (1985); Atkeson, *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986*, 16 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,360 (1986).

50. 632 *F. Supp.* 573 (D. Md. 1986).

51. See *supra* note 33 for the text of the exception.

"owner or operator."⁵² The overall effect of this removal is uncertain, but it clearly eliminates the only proven method for the nation's lenders to avoid CERCLA's liability.⁵³ The EPA considers any bank that forecloses and takes title to be liable as an owner under CERCLA.⁵⁴

Section 107(b) of CERCLA provides an affirmative defense for the foreclosing lender.⁵⁵ Defendants may assert this affirmative defense by establishing a complete lack of causal nexus between their actions, or inactions, and the actual or threatened hazardous waste release at issue.⁵⁶ This defense is virtually unavailable to banks⁵⁷ for two reasons.

52. See *supra* note 33 for the old definition of owner or operator. The new definition provides:

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand.

42 U.S.C. § 9601(20)(A) (Supp. I 1986).

53. See *infra* notes 55-61 indicating that essentially no affirmative defense is available to the bank.

54. 632 F. Supp. at 540. See *infra* notes 134-41 and accompanying text. See also Comment, *Fear of Foreclosure*, *supra* note 4, at 10,166 (lenders should not foreclose or title will vest, resulting in liability).

55. 42 U.S.C. § 9607 (b)(1)-(4) (1980). The statute provides in part:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazard concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

See *supra* note 29 for the text of section (a) of the statute.

56. The following cases have examined the scope of the § 107 (b)(3) defense: *N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1048 (2d Cir. 1985) (defense available only if hazardous waste was dumped during defendant's ownership); *United States v. Argent Corp.*, 14 *Envtl. L. Rep.* (*Envtl. L. Inst.*) 20,616 (D. N.M. 1984) (lessor held contractu-

First, the defense requires that the lender be someone “other than an employee or agent of the defendant, or one whose act or omission occurs directly or indirectly with the defendant.”⁵⁸ The mortgage agreement creates a “contractual relationship” that abrogates the “innocent owner defense.”⁵⁹ Second, in the context of successor landowner liability, the scope of this defense is extremely limited. The defendant must show that he had neither actual nor constructive knowledge of the hazardous condition at the time he acquired the property.⁶⁰ This places an affirmative duty upon lenders to inquire into the previous ownership and uses of the property. A lender who failed to inquire—as most have—will be unable to raise the defense.⁶¹

ally related to lessee); *United States v. S. C. Recycling & Disposal Co.*, 14 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,272, 20,275 (D. S.C. 1984) (site owner contractually related to generator); *but see United States v. Mirabile*, 15 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,992, 20,994 (E.D. Pa. 1985) (successor landowners may be able to use the defense); Cyphert & Key, *Hazardous Waste Facility Successor Liability: The Ultimate Guilt by Association*, 27 *FOR THE DEF.*, Nov. 1985, at 18.

57. To claim the defense, the defendant must show that it exercised reasonable care with regard to the hazardous substances, and took precautions against the acts or omissions of third parties. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1980). *See Note, Liability Under CERCLA*, *supra* note 4, at 193-95 (noting lender held to higher duty of care).

58. *See supra* note 55 for text of the statute.

59. *See generally* Marcus, *The Price of Innocence: Landowner Liability Under CERCLA and SARA*, 6 *TEMP. ENVTL. L. & TECH. J.* 117, 130 (1987); *see also* Marcotte, *Toxic Blackacre: Unprecedented Liability for Landowners*, 73 *A.B.A. J.*, Nov. 1, 1987, at 68 (land contracts are included within SARA's definition of contractual relation).

60. 632 F. Supp. at 580. The Court in *Maryland Bank* had little compassion for the lender's argument that it did not know about the hazardous waste. Judge Northrop noted:

Mortgagees, however, already have the means to protect themselves, by making prudent loans. Financial institutions are in a position to investigate and discover potential problems in their secured properties. For many lending institutions such research is routine. CERCLA will not absolve them from responsibility for their mistakes in judgment.

Id. (footnotes omitted). *See* 42 U.S.C. § 9601(35)(a)(i) (Supp. 1987). *See* Vanderver, *Environmental Auditing*, in *ENVIRONMENTAL LAW HANDBOOK* 437 (J. Arucke ed. 1983); Bleicher & Stonebake, *Caveat Emptor: The Impact of the Superfund and Related Laws on Real Estate Transactions*, 14 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,017 (1984) (both publications explain general auditing procedures). *See also* Shea, *supra* note 4, at 14 (checklist for compliance with CFR regulations regarding environmental auditing).

61. The defendant must establish that no hazardous waste existed when he accepted the mortgage. The commercial lender must make reasonable efforts to investigate the security. *See* 42 U.S.C. § 9601(35)(A)(i) (Supp. 1987). The lender's duty is outlined in 42 U.S.C. § 9601(35)(B) (Supp. 1987) which provides in pertinent part:

III. CERCLA AND THE LENDING INSTITUTION

The CERCLA amendments removing the security interest exemption⁶² placed lenders in a position where foreclosure is practically unavailable.⁶³ Few loan officers will foreclose when unlimited liability exists should the property prove to be contaminated. The principle underlying the security interest exemption still remains, however: liability exists when title vests and the lender accepts this vesting.⁶⁴ By comparison, title does not vest in an accelerating lender, and no liability attaches as a result. Acceleration also avoids the *Maryland Bank*⁶⁵ implication of liability.

In *In re T.P. Long Chemical Co.*,⁶⁶ the Bankruptcy Court for the Northern District of Ohio concluded that costs incurred to clean up a waste site under CERCLA were not recoverable from property in which another creditor held a security interest.⁶⁷ The court reasoned

(B) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

Id.

See CONFERENCE REPORT, SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, H.R. REP. NO. 962, 99th Cong., 2d Sess., 186-88 (1986) (parties to commercial transaction held to higher standard).

62. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613. See *supra* note 52 for the new definition of "owner."

63. See *infra* text accompanying notes 132-41. See also Letter from Samuel L. Nott, Chief of the Superfund Branch to Ralph Ridlinghafer, Executive Vice President, MBank Abilene, N.A. (Feb. 22, 1985) (MBank withdrew foreclosure after recognizing that liability would attach).

64. For a synopsis of when title passes, see G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW §§ 4.1-4.3 (2d ed. 1985).

65. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986). Because Judge Northrop emphasized passage of title as one consideration for determining liability, acceleration becomes an available remedy for the bank to escape liability. By accelerating, title will not vest in the lender. See G. NELSON & D. WHITMAN, *supra* note 64, at §§ 7.6, 7.7 (generally discussing acceleration and limitations on its use). See also Parts IV and V of this Note discussing the use of acceleration.

66. 45 Bankr. 278, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,635 (N.D. Ohio 1985).

67. *Id.* at 287-89.

that, as a security holder, the bank was not an insurer of the risks the collateral might cause.⁶⁸ By way of dictum, the court hypothesized that even if the bank had repossessed the property, it would not be an owner or operator under CERCLA so long as it did not participate in the management of the facility.⁶⁹ As evidenced by *Maryland Bank*,⁷⁰ courts have retreated from this dictum, however.⁷¹

The T.P. Long Chemical Company, owned by T.P. Long, stored hazardous substances⁷² at its facility.⁷³ Long eventually sought Chapter 11 reorganization under the Bankruptcy Code⁷⁴ and listed Banc Ohio as a secured creditor.⁷⁵ As a secured creditor, Banc Ohio perfected its security interest in Long's accounts receivable, fixtures, waste

68. *Id.* at 288.

69. *Id.* at 288-89.

70. 632 F. Supp. at 573.

71. When SARA amended CERCLA, much of the *Long* holding lost its validity. Nevertheless, the court proposed one idea that still remains: A creditor is under no obligation to assume possession of the collateral. 45 Bankr. at 288. By refusing to assume possession of the collateral, the bank will not acquire liability for a subsequent cleanup. Similarly, a lender that accelerates has equally refused to assume possession of the collateral. Thus, *Long* stands in support of this proposition. *See also* *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 580 n.6 (D. Md. 1986) (citing with approval dictum from *Long*).

72. 126 CONG. REC. 30,910, 30,911 (1980) (listing chemicals considered hazardous and therefore subject to industry taxation). *See* 42 U.S.C. § 9601(14) (1980 & Supp. I 1987) (defining "hazardous substances"). Thomas, *What Business Clients Should Know About the New Superfund*, PRAC. REAL EST. LAW., July 1987, at 588 (growing recognition that household trash contains numerous "hazardous substances" under Superfund).

73. 42 U.S.C. § 9601(9) (Supp. 1987) defines facility as follows:

(9) The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel;

Id. *See* *United States v. Ward*, 618 F. Supp. 884, 895 (E.D. N.C. 1985) ("facility" includes roadsides where polluter dumped hazardous waste); *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143, 1148 (D. Ariz 1984) (real estate subdivision can be waste facility).

74. 45 Bankr. at 280.

75. *Id.* *See also* D. COWANS, BANKRUPTCY LAW AND PRACTICE § 3.10 (1987) (effect of scheduling debts); 5 NORTON, NORTON BANKRUPTCY LAW AND PRACTICE § 301:4 (1987) (forms for scheduling the priorities of creditors).

barrels, and other personal property at the site.⁷⁶ The trustee sold all the personal property of the estate to the Tompkins Corporation at an auction.⁷⁷

While Tompkins' employees were removing barrels of waste at the facility, they inadvertently opened one barrel, resulting in the release of a hazardous substance.⁷⁸ The EPA determined that the release warranted immediate action⁷⁹ and initiated cleanup of the site.⁸⁰ Unknown to Banc Ohio,⁸¹ there were drums of hazardous waste buried at the site that were subject to Banc Ohio's security interest. During the cleanup the EPA discovered the buried drums.⁸² One issue⁸³ was whether the EPA could recover the cost of removing the hazardous

76. 45 Bankr. at 280. *See also* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 23-11 (2d ed. 1979) (perfection by filing).

77. 45 Bankr. at 281.

78. *Id.* Included in the property purchased was a tank containing sulfur monochloride. Workers opened a valve on the tank, releasing the chemical. *See supra* note 72.

79. 45 Bankr. at 281. *See* 42 U.S.C. § 9604(b)(1) (Supp. 1987) ("If the [EPA] believes that a release is about to occur, [they] may conduct an investigation to enforce the provisions of this chapter.").

80. 45 Bankr. at 281. *See* 42 U.S.C. § 9604(a)(1) (Supp. 1987). Whenever the threat exists of a hazardous waste release, the EPA is authorized to arrange for remedial action unless the owner or operator conducts the action himself. *Id.*

81. 45 Bankr. at 281. This lack of knowledge indicates that the § 107(b)(3) defense is unavailable to the bank. *See supra* notes 57-61 discussing the bank's duty to inquire regarding the debtor's activities at the site.

Arguably, the lack of knowledge is irrelevant because 42 U.S.C. § 9607 imposes strict liability. *See, e.g.,* United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984); United States v. Price, 577 F. Supp. 1103 (D. N.J. 1983); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135 (E.D. Pa. 1982) (all impose strict liability). *See infra* note 137 for further discussion of strict liability.

82. 45 Bankr. at 281. Because Banc Ohio perfected a security interest in these drums, the EPA argued that Banc Ohio should be liable for the cleanup expenses. *Id.*

83. *Id.* The other issue addressed by the *Long* court was whether the cleanup expenses are allowable as an administrative expense in bankruptcy. *See* 11 U.S.C. § 506(c)(1978) ("The trustee may recover the property securing an allowed claim [the mortgage], the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.").

Several cases have examined whether cleanup expenses are allowable administrative expenses. *See, e.g., In re Mowbray Eng'g Co.*, 67 Bankr. 34 (S.D. Ala. 1986) (EPA claim allowed as administrative expense having first priority); *In re Charles Stevens, Inc.*, 15 Bankr. Ct. Dec. (CRR) 556 (D. Me. 1987) (cost of postpetition cleanup of prepetition environmental hazard entitled to first priority as an administrative expense); *but see Southern R.R. v. Johnson Bronze Co.*, 758 F.2d 137 (3d Cir. 1985) (cleanup costs not allowable as administrative expense). This issue is not within the scope of this Note.

material from the property in which the bank has a security interest.⁸⁴

Relying upon the now-defunct security interest exemption,⁸⁵ the court held that even if Banc Ohio had repossessed its collateral pursuant to its security agreement, it would not be an "owner or operator" as defined under CERCLA.⁸⁶ Banc Ohio's recognized lack of participation in the control of the company reinforced this finding.⁸⁷

The *Long* case lost significance with the congressional demise of the security interest exemption. Only one portion of the opinion is unhampered by subsequent statutory changes.⁸⁸ The *Long* court recognized that a creditor takes a security interest in property to secure an obligation.⁸⁹ Yet, if the collateral becomes worthless or poses a risk to the public, the creditor is under no duty to assume possession of the

84. 45 Bankr. at 282.

85. SARA § 101 (20)(A), CERCLA § 101 (20)(A), 42 U.S.C. § 9601 (20)(A)(1980) (security interest exemption removed). See *supra* note 52 for text of the new definition.

86. 45 Bankr. at 288-89. By way of dictum, Judge White stressed that a bank could repossess its collateral without the assumption of liability. *But see* *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986) (under no circumstances may a bank repossess hazardous collateral without assuming liability); Note, *When a Security Becomes a Liability*, *supra* note 4, at 1285 (discussing and adopting the *Maryland Bank* result).

87. 45 Bankr. at 278. Control in the day-to-day operations of the debtor was a factor that the *Long* court emphasized. *Id.* In accord with this idea, one author asserts that CERCLA liability is really an advanced form of principal-agency theory. See *Burcat*, *supra* note 4, at 528; *In re MBank Abilene*, Administrative Order Docket CERCLA, VI-4-85. (MBank not an owner because it did not participate in management of debtor). See also *Plymouth Rock Fuel Corp. v. Leucadia, Inc.*, 100 A.D.2d 842, 474 N.Y.S.2d 79 (1984) (mortgagee became principal of mortgagor and liable for agent's debts); *A. Gay Jensen Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981) (creditor, by control over debtor, became principal liable for transactions entered into by agent, the debtor). See generally *Lundgren, Liability of a Creditor in a Control Relationship With its Debtor*, 67 MARQ. L. REV. 523 (1984); *Douglass-Hamilton, Creditor Liabilities Resulting From Improper Interference with the Management of a Financially Troubled Debtor*, 31 BUS. LAW. 343 (1975); see also *Krivo Ind. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1109 (5th Cir. 1973), *modified and petition for reh'g denied*, 490 F.2d 916 (5th Cir. 1974) (if lender becomes actively involved in debtor's affairs liability may be imposed); cf. *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992, 20,996 (E.D. Pa. 1985) (no liability for lender with power to direct management of debtor).

88. See *supra* note 85 and accompanying text.

89. 45 Bankr. at 288. See U.C.C. § 1-201(37)(1986), which defines a "security interest" as any "interest in personal property or fixtures which secures payment or performance of an obligation." *Id.* The Uniform Commercial Code applies to mortgage arrangements. See, e.g., *In re Equitable Dev. Corp.*, 20 U.C.C. Rep. Serv. (Callaghan) 1349 (Bankr. S.D. Fla. 1976) (security interest in land sale contract within scope of U.C.C. art. 9).

collateral or insure against the risk.⁹⁰ In effect, a lender can walk away from a bad loan without incurring liability.⁹¹ The court indicated that where there is title, there is liability.⁹² Banc Ohio did not hold title, so it could escape liability by declining to foreclose.⁹³

Nearly eight months after *Long*,⁹⁴ in *United States v. Mirabile*,⁹⁵ the United States District Court for the Eastern District of Pennsylvania held that a lender may foreclose on hazardous property and assign such property to a third party and avoid environmental liability.⁹⁶

Prior to 1976, Arthur C. Mangels, Inc. owned a site containing hazardous wastes⁹⁷ generated by Mangels' paint manufacturing business.⁹⁸ Because it was stored in drums, the waste seemed harmless, so without considering possible liability, American Bank & Trust (ABT) accepted a mortgage and a note secured by the real estate.⁹⁹

In 1976, Turco Coatings, Inc. purchased Mangels¹⁰⁰ and produced and stored waste in the same fashion as its predecessor. The business was not prosperous and, to remain in business,¹⁰¹ Turco sought and received the help of other lenders.¹⁰² Turco, still beset by financial dif-

90. 45 Bankr. at 288. In a footnote, Judge Northrop in *Maryland Bank* agreed, stating, "The mortgagee also has the option of not foreclosing and not bidding at the foreclosure sale. Both steps would apparently insulate the mortgagee from liability." 632 F. Supp. at 580 n.6.

91. See 2 C. WILTSIE, MORTGAGE FORECLOSURE §§ 827-833 (5th ed. 1939) (lender has no interest in the property other than as security and may release its security with impunity).

92. By avoiding such issues as control and knowledge, and relying upon the passage of title, banks will be able to predict when liability is and is not assumed. See, e.g., Burcat, *supra* note 4, at 528. See *infra* note 130.

93. 45 Bankr. at 288. See *supra* note 91 and accompanying text.

94. 45 Bankr. 278, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,635 (N.D. Ohio 1985).

95. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. 1985). This Note refers only to the second *Mirabile* opinion.

96. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,994.

97. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,992.

98. *Id.* at 20,993. The waste included benzene, ethylbenzene, naphthalene, toluene, and mercury. See 42 U.S.C. § 9601(14) (Supp. 1987) (defining hazardous substances).

99. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996.

100. *Id.* Turco acquired 95% of the shares of Mangels. *Id.* This gave Turco control over Mangels and, therefore, assumption of the note and mortgage. *Id.*

101. *Id.* at 20,996. Turco filed a petition under Chapter 11 of the Bankruptcy Code. This petition granted Turco a stay against all creditors, giving Turco a "breathing spell" in which to reorganize its business. See generally D. COWANS, BANKRUPTCY LAW AND PRACTICE § 11.3 (1987) (scope of automatic stay).

102. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996. In 1976, Girard Bank, the prede-

facilities, subsequently ceased operations at the facility.¹⁰³

In 1980, ABT gave notice of foreclosure upon the property.¹⁰⁴ ABT took title to the property after purchasing it at a sheriff's sale.¹⁰⁵ ABT officials secured the building against vandalism, inquired as to the cost of proposed cleanup, and occasionally showed the property to prospective purchasers.¹⁰⁶

Four months after taking title,¹⁰⁷ Thomas A. Mirabile, taking through ABT, accepted a sheriff's deed to the property.¹⁰⁸ Shortly after he acquired the property, the Pennsylvania Department of Environmental Resources asked Mirabile to remove the drums.¹⁰⁹ His efforts proved inadequate,¹¹⁰ prompting the EPA to examine the site and con-

cessor in interest of Mellon Bank, entered into a financing arrangement with Turco whereby Girard would advance working capital to Turco. *Id.* Additionally, in July 1979, the Small Business Administration (SBA) loaned \$150,000 to Turco for the retirement of specified debts. *Id.*

103. *Id.*

104. *Id.* Most states have their own statutes governing the notice of foreclosure procedure. Generally, the notice informs the public that the bank intends to sell the property. See C. WILTSIE, *supra* note 91, at § 853.

105. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996. See *infra* note 127 (when title vests, "ownership status" is imputed, and liability exists).

106. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996.

107. *Id.* The *Mirabile* court emphasized the transient nature of ABT's title as evidence that no ownership was intended. *Id.* See *infra* note 123 arguing that intent of the mortgagee is irrelevant.

108. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996.

109. *Id.* at 20,993. The powers of the Pennsylvania Department of Environmental Resources are similar to those of the EPA. Nevertheless, states lack one important resource, the Superfund. Without access to the Superfund, many states acquiesce to EPA control of the cleanup. See generally Funk, *Federal and State Superfunds: Cooperative Federalism or Federal Preemption*, 16 ENVTL. L. 1, 6 (1985) (section 114(c) prevents states from establishing a fund that pays compensation similar to the Superfund); but see Freeman, *CERCLA Reauthorization: The Wise Demise of 114(c) and Exxon v. Hunt*, 16 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,286 (1986) (states may, but not likely to, create own Superfund). See also Selmi, *Enforcing Environmental Laws: A Look At the State Civil Penalty Statutes*, 19 LOYOLA L.A.L. REV. 1279 (examining state environmental enforcement powers); *Current Developments, Cuomo Signs Legislation to Create New York Hazardous Waste Management Plan*, 18 Env't Rep. (BNA) 1111 (1987). F. ANDERSON, D. MANDELKER & A. TARLOCK, *ENVIRONMENTAL PROTECTION LAW AND POLICY* 321 (1984) ("The states have the first opportunity and primary responsibility and are continuously involved in scores of environmental actions.").

110. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,993. Mirabile limited his efforts to consolidation of the drums into a central location. *Id.* Furthermore, he solicited quotations from various firms as to the cost of removing the drums, but took no action. *Id.*

clude that immediate actions were necessary.¹¹¹

The EPA disbursed Superfund dollars and filed the necessary cost recovery action against Mirabile.¹¹² He joined ABT and other lenders as third-party defendants to the action and alleged that, by virtue of certain actions taken during their financial dealings, the lenders became liable for the hazardous conditions at the site.¹¹³

The court granted ABT's motion for summary judgment,¹¹⁴ acknowledging that CERCLA liability will attach only to a potentially responsible party,¹¹⁵ which the statute defines as either an owner or an operator.¹¹⁶ On the strength of the security interest exception, the court found that a creditor who does not become overly entangled in the operation of the property may not be held liable for cleanup costs.¹¹⁷ The court held that ABT lacked the requisite control relationship necessary to establish "ownership."¹¹⁸ Citing legislative his-

111. *Id.*

112. 42 U.S.C. § 9607(a)(1) (1980) allows the EPA to recover against those who owned or operated the site at the time the cleanup activities occurred. 42 U.S.C. § 9607(a)(2) (1980) allows similar recovery against those who owned or operated the site at the time of disposal. *See supra* notes 29, 79-80 for text of the relevant provisions.

113. 15 *Envtl. L. Rep.* at 20,996. Mirabile alleged that Mellon Bank should be liable by virtue of its advances secured by the inventory and assets of Turco. *Id.* Similarly, Mirabile alleged that the lender should be liable because of its secured debt. In connection with both lenders, Mr. Mirabile argued that they exhibited "control" characteristics sufficient to justify liability. *Id.* *See supra* note 87 regarding "control" factor.

114. 15 *Envtl. L. Rep. (Envtl. L. Inst.)* at 20,996. The court also granted the other lender's motion for summary judgment. *Id.* at 20,997. Note the apparent confusion in the court's holding. Earlier in the court's opinion, the court based its decision in regard to ABT's motion for summary judgment solely upon lack of "control" rather than passage of title. *See infra* note 128. Yet, the court reverses its logic when addressing SBA's motion for summary judgment by explaining that "[u]nlike ABT, the SBA never took legal or equitable title to the site. In this respect, its case for summary judgment is stronger than that of ABT." 15 *Envtl. L. Rep. (Envtl. L. Inst.)* at 20,997. The inconsistency, and resulting need for a clear test is apparent. *See infra* note 130.

Mellon Bank was less fortunate. Again, by placing primary reliance on the lender's control of its debtor, the court found that a genuine issue of fact existed as to Mellon's liability. 15 *Envtl. L. Rep. (Envtl. L. Inst.)* at 20,997. This is found even though no title to the distressed property had or ever could have passed to Mellon. Arguably, this court extends the scope of liability well beyond that permitted by the statute.

115. *Id.* at 20,996.

116. *See supra* notes 29 and 33 (discussing the scope of the statute).

117. 15 *Envtl. L. Rep. (Envtl. L. Inst.)* at 20,996. The court not only adopts the "control" theory, but it adopts it by clearly dismissing the applicability of title. *See supra* note 87 and *infra* note 130 discussing the agency theory.

118. 15 *Envtl. L. Rep. (Envtl. L. Inst.)* at 20,996. Although ABT did come in and

tory,¹¹⁹ the *Mirabile* court found that Congress intended to impose liability only upon those who were responsible for, and profited from, improper disposal practices.¹²⁰

Because title vested in ABT, the court's logic is questionable.¹²¹ The court characterized the prompt exchange of title as evidence that ABT did not intend to own the property.¹²² A fair reading of the statute, however, gives no indication that a party's intent is relevant.¹²³ The court's acceptance of intent as a factor opens the statute to abuse by lenders. Lenders could foreclose, promptly transfer the property, and remain free from liability by claiming lack of intent. Certainly, passage

"close up" the site, the court noted that this does not constitute participation in the management of the facility.

119. H. R. REP. NO. 172, 96th Cong., 2d Sess., reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6180. The legislative history provides, "In the case of the facility, an "operator" is defined as a person who is carrying out operational functions for the owner of the facility pursuant to an appropriate agreement." *Id.*

120. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996.

121. Compare the court's language in *infra* note 128 with the language in *supra* note 114. Clearly the two statements are contradictory.

122. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996.

123. See *supra* notes 29 and 52 for the relevant provisions. Persuasive evidence that the court should not consider intent comes from the statute's strict liability posture. See 126 CONG. REC. 31,965 (1980). Rep. Florio, the sponsor of the bill, responded, "Liability [is] 'subject only to the defenses' provided in the bill. . . . Thus, the absence of negligence is not a defense to liability." *Id.* But see 126 CONG. REC. 30,986 (1980). Senator Stafford remarked:

We intend that the phrase "sufficient cause" would encompass defenses such as the defense that the person who was the subject of the President's order was not the party responsible under the act for the release of the hazardous substance. It would be unfair to assess punitive damages against a party who for good reasons believed himself not to be the responsible party.

Id.

Nevertheless, most courts have interpreted CERCLA to impose strict liability. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (Congress intended that responsible parties be strictly liable, even though Congress did not include explicit provision for strict liability); *Stewart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir. 1979) (Congress intended strict liability); *Sunnen Prod. Co. v. Chemtech Ind., Inc.*, 658 F. Supp. 276, 278 (E.D. Mo. 1987) (transferor is strictly liable to transferee for the necessary costs of response); *City of Philadelphia v. Stephan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982) (legislative history establishes Congress' understanding that CERCLA imposes strict liability).

See also 126 CONG. REC. 31,966 (1980), reprinted in 1 CERCLA LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 780-81 (Comm. Print 1983) (Department of Justice view that CERCLA contemplates strict liability). See F. ANDERSON, D. MANDELKER & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 576 (1984).

of title is a better indicator of ownership. Because title vests at a distinct time,¹²⁴ the presence of title is a more reliable test than the presence or absence of control.¹²⁵

While the result seems fair,¹²⁶ the logic is flawed.¹²⁷ As a lender, ABT held title to the debtor's property following foreclosure.¹²⁸ Noting the lack of control over the debtor's affairs, the *Mirabile* court refused to impose liability upon ABT.¹²⁹ This control analysis distorted the picture of lender liability.¹³⁰ In an effort to clarify this picture for

124. Title vests once the mortgage debt is satisfied, or the mortgagee forecloses upon the property. See generally G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 4.1 (2d ed. 1985). See also *infra* note 131. See *supra* note 130 (examining the amorphous nature of control analysis).

125. Compare *supra* note 52 for the text of the new definition of "owner or operator" with the earlier definition found *supra* note 33. Arguably, Congress took away any consideration of intent or control by removing the words "primarily to protect his security interest in the vessel or facility." Under the new statute, no inquiry is made into the creditor's primary purpose or intent. See 42 U.S.C. § 9601(20)(A) (Supp. I 1986).

126. The result is fair, provided the reader agrees that the mortgagee's intent rather than the acceptance of title should determine liability. Such a view comports with *Mirabile* but conflicts with *Maryland Bank*.

127. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996. Not only was American Bank & Trust Company, the lender, the highest bidder at the sale, it subsequently informed the Chester County Sheriff and Tax Department that it intended to take title to the property. *Id.* This title would impute ownership and liability. See *Artesian Water Co. v. Gov't of New Castle County*, 659 F. Supp. 1269, 1280 (D. Del. 1987) ("[A]fter the Site was closed, title was transferred from the State to the County . . . ; [f]or purposes of liability under § 107(a)(1), the County is therefore the current owner of the Site.").

128. The *Mirabile* court completely avoided the title issue. Instead, the court felt that the security interest exemption plainly applied to the case at bar. Judge Newcomer stated:

Regardless of the nature of the title received by ABT, its actions with respect to the foreclosure were plainly undertaken in an effort to protect its security interest in the property. ABT made no effort to continue Turco's operations on the property, and indeed foreclosed some eight months after all operations had ceased.

15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996.

129. *Id.*

130. Control analysis involves intangible theories such as instrumentality, alter-ego, and principal-agency. See, e.g., *Krivo Ind. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973), *modified and reh'g denied*, 490 F.2d 916 (5th Cir. 1974) (control analysis makes it difficult to define precise point at which liability will attach); *Chicago Mill & Lumber Co. v. Boatmen's Bank*, 234 F. 41 (8th Cir. 1916) (a lender may be liable as alter ego of corporation); *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981) (liability arises under agency law); *but see* *Buck v. Nash-Finch Co.*, 78 S.D. 334, 102 N.W.2d 84 (1960) (liability does not arise under agency law). The *Jenson* and *Buck* cases are irreconcilable. If the courts have difficulty applying these concepts, a clearer test should be sought.

lenders, the sole criterion should become the tangible concept of title vesting.¹³¹ Ostensibly, that was the position Congress adopted when enacting the CERCLA amendments.¹³²

Approximately six months after *Mirabile*¹³³ the Federal District Court in Maryland addressed a similar issue in *United States v. Maryland Bank & Trust Co.*¹³⁴ The court defined the issue as:

Whether a bank, which formerly held a mortgage on a parcel of land, later purchased the land at a foreclosure sale and continues to own it, must reimburse the United States for the cost of cleaning up hazardous wastes on the land, when those wastes were dumped prior to the bank's purchase of the property?¹³⁵

The court answered in the affirmative,¹³⁶ and this case is now the leading opinion in this trilogy.¹³⁷ The court held that the Maryland Bank & Trust Company (MBT) could be liable for cleanup costs because MBT converted a security interest into full ownership.¹³⁸ Essentially, the title vested in MBT, making the lender the complete owner of the property.¹³⁹ Not only does *Maryland Bank* reach the correct result,¹⁴⁰

131. Title vests and ownership evolves at a specific, identifiable time. See 3 J. POWELL, TREATISE ON THE LAW OF MORTGAGES § 1006(a)(1828) (mortgagee can convey good title immediately following foreclosure).

132. See *supra* note 52 for the text of the new definition of owner. With the security interest exemption removed, Congress most likely concluded that ownership was the valid consideration. Thus, one need not look beyond the point where title and therefore "ownership" can be imputed to the lender. See *supra* note 127.

133. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992 (E.D. Pa. 1985).

134. 632 F. Supp. 573 (D. Md. 1986).

135. *Id.* at 574.

136. *Id.* at 579-82.

137. See Comment, *Fear of Foreclosure*, *supra* note 4, at 10,168. (of the three cases, *Maryland Bank* provides the best support for its analysis); Burcat, *Foreclosure and the United States v. Maryland Bank & Trust Co.: Paying the Piper or Learning to Dance to a New Tune?*, Env'tl. L. Rep. (Env'tl. L. Inst.) 10,098, 10,099 (1987) (through poor reasoning, *Maryland Bank* reaches the right result).

138. 632 F. Supp. at 574. See *Miami Beach v. Smith*, 551 F.2d 1370 (5th Cir. 1977) (interest of mortgagee ripened into full title after purchase at foreclosure sale); see also 55 AM. JUR. 2d *Mortgages* § 785 (1971) (security terminated at foreclosure sale when it ripened into full title).

139. 632 F. Supp. at 579. The mortgage was no longer in force, thus the mortgagee took title through foreclosure. See *Ritz v. Fitzsimmons*, 57 A.D.2d 922, 395 N.Y.S.2d 49 (1977) (effect of a foreclosure sale is to vest entire interest in purchaser).

140. 632 F. Supp. at 575. Following foreclosure, a lender holds full title and is liable for cleanup expenses. See *supra* note 138 explaining that the lender receives full title upon foreclosure. See *supra* note 132 and accompanying text examining Congressional intent.

it does so in a fashion that accommodates the new amendments to CERCLA.¹⁴¹

From 1944 to 1980, Herschel McLeod owned property dubbed the California Maryland Drum (CMD) Site.¹⁴² MBT loaned money to McLeod for two of his businesses, both located on the CMD site.¹⁴³

During 1972, McLeod permitted the dumping of hazardous wastes on the CMD site.¹⁴⁴ Eight years later, McLeod's son Mark obtained a 335,000 dollar loan from MBT to purchase the CMD site.¹⁴⁵ The son acquired the property in December 1980, was soon in arrears, forcing MBT to foreclose on the site in 1981.¹⁴⁶ MBT purchased the property at the foreclosure sale.¹⁴⁷ MBT took title to the property and continued as the record owner of the CMD site.¹⁴⁸

Four years later, the EPA learned of the wastes dumped on the CMD site.¹⁴⁹ Because MBT refused to clean the site,¹⁵⁰ the EPA spent

141. See *supra* note 53 for the new statutory language. The Maryland Bank court placed minor emphasis upon the security interest exemption; thus, its subsequent removal will not affect the validity of the opinion.

142. 632 F. Supp. at 575.

143. *Id.*

144. *Id.* The wastes included such heavy organics as toluene, ethylbenzene, and total xylenes, and such heavy metals as lead, chromium, mercury, and zinc. *Id.*

145. 632 F. Supp. at 575. Maryland Bank & Trust sent the Farmers Home Administration (FmHA) a request for loan guarantees relating to this loan. Pursuant to 7 C.F.R. § 1980.101(B) (1980) the FmHA issued loan note guarantees for 90% of the loan.

By requesting a guarantee for the note, the accelerating lender assumes one additional burden. Specifically, the Federal Housing Administration (FHA) placed limits upon the acceleration of loans they have guaranteed. Nevertheless, the burden is small and probably of no consequence to a lender that forecloses or accelerates in good faith. See HUD HANDBOOK 4330.1 (formerly 4191.02) (FHA mortgage insurance operations).

146. 632 F. Supp. at 575.

147. *Id.*

148. *Id.* The case does not indicate whether MBT was able to transfer the property following its payment for the cleanup. Yet, even if MBT could, the property is worth only a fraction of its original value. See Brown, *Superfund National Contingency Plan: How Dirty is "Dirty?" How Clean is "Clean?"*, 12 *ECOLOGY L.Q.* 89 (1984) (Superfund cleanups will not require responsible parties to return site to completely clean condition).

149. 632 F. Supp. at 575-76. Mark McLeod actually told Walter Raum, director of Environmental Hygiene for St. Mary's County Department of Health, of the hazardous wastes on the site. Raum contacted the EPA.

150. 632 F. Supp. at 575. Nearly all potentially responsible parties are given the chance to cleanup the site. If liability is unavoidable, the bank should complete the cleanup. Logically, a private sector cleanup will save money over an EPA attempt. See

the funds allocated for cleaning up the property. After the cleanup, the EPA sought to recover the Superfund expenditure.¹⁵¹

As lenders in the two previous cases had argued, MBT claimed it was not an "owner, or operator"¹⁵² under CERCLA because it purchased the property at the foreclosure sale pursuant to the security interest exemption.¹⁵³ The court responded that the security interest exemption covers only those persons who, at the time of cleanup, hold indicia of ownership to protect a then-held security interest in the land.¹⁵⁴ The court reasoned that only during the life of the mortgage did MBT hold indicia of ownership primarily to protect its security interest.¹⁵⁵ Because the mortgage terminated upon foreclosure, title to this property vested in the bank upon foreclosure.¹⁵⁶

The court noted that adoption of the bank's argument would convert CERCLA into an insurance scheme for lenders,¹⁵⁷ forcing the federal government to pay cleanup costs while the mortgage-turned-owner benefited from the cleanup by the increased value of the land.¹⁵⁸ The court also recognized that lenders are in a position to investigate and

Graham & Stoll, *Negotiating Waste Site Cleanups*, PRAC. REAL EST. LAW., Sept. 1986, at 48 (private sector cleanups are cheaper and reduce litigation costs).

Furthermore, courts interpreted CERCLA to allow joint and several liability, thus the lender may seek contribution and or indemnification from proper parties. *See State v. Asarco, Inc.*, 608 F. Supp. 1484 (D.C. Colo. 1985); *United States v. Stringfellow*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,385 (C.D. Cal. 1984); *United States v. Northeastern Pharmaceutical & Conservation Chem. Co.*, 589 F. Supp. 59, 63 (W.D. Mo. 1984); *United States v. Chem Dyne*, 572 F. Supp. 802 (S.D. Ohio 1983) (cases recognizing joint and several liability). *See also Mays, Settlements with SARA: A Comprehensive Review of Settlement Procedures Under the Superfund Amendments and Reauthorization Act*, 17 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,101 (1987) (examining uses of joint and several liability).

151. 632 F. Supp. at 575-76. The EPA removed 237 drums of chemical material and 1,180 tons of soil at a cost of \$551,713.50. Imposing liability upon MBT leaves the bank grossly undersecured.

152. *See supra* note 33 for text of the definition.

153. *See supra* note 33 for text of the security interest exemption.

154. 632 F. Supp. at 579.

155. *Id.* *See supra* note 138.

156. *See supra* notes 127, 138 for a discussion of foreclosure and its effect upon the mortgage. It is because of this result that acceleration becomes such an appealing remedy. *See also Miami Beach v. Smith*, 551 F.2d 1370 (5th Cir. 1977) (interest of the mortgagee ripened into full title after purchase at foreclosure sale).

157. 632 F. Supp. at 580.

158. For a contrary view arguing that lenders will not benefit from the cleanup, see *Brown, supra* note 148, at 91. *See also Comment, The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical*

discover potential problems in their secured properties, and that society should not bear the burden for their mistakes in judgment.¹⁵⁹ Thus, the section 107(b)(3) defense became constructively unavailable to the lender.¹⁶⁰

In spite of policy implications, the court emphasized passage of title.¹⁶¹ This view not only avoids the confused logic of *Mirabile*,¹⁶² but facilitates the removal of the security interest exemption.¹⁶³

Six months after *Maryland Bank*, the Superfund Amendments and Reauthorization Act removed the security interest exemption from the statute.¹⁶⁴ The new definition implies that ownership can be imputed when the title vests in the lender, indicating that a lender's foreclosure upon hazardous property will result in per se liability.¹⁶⁵ Congress en-

Assessment, 41 U. OF MIAMI L. REV. 879, 899 (1987) (addressing the economic ramifications that foreclosure imposes).

159. 632 F. Supp. at 580.

160. *Id.* at 579. See *supra* note 55 for the text of § 107(b)(3), the affirmative defense. Section 101(35)(A) of CERCLA determines to whom the defense applies:

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

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

Id. The *Maryland Bank* court disposed of the case by considering whether the bank was an owner, rather than a party capable of pleading the affirmative defense. Nevertheless, the court noted that the bank must inquire regarding the possible environmental hazards appurtenant to the property. Although reasonable, the bank failed to inquire and is unable to maintain the defense. See Comment, *supra* note 158, at 894; see also *supra* notes 57-61 (discussing the current unavailability of the 107(b)(3) defense).

161. 632 F. Supp. at 579.

162. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992 (E.D. Pa. 1985)

163. Removing the security interest exception should have minimal effect upon the *Maryland Bank* holding. Because the *Maryland Bank* court looked to passage of title, rather than the security interest exemption, the exemption becomes meaningless. One author agrees with this position. See Comment, *supra* note 158, at 894 (the subsequent amendment will promote legislative clarity).

164. See *supra* note 52 for the new definition of "owner or operator."

165. 632 F. Supp. at 579. Because title is the relevant test, foreclosure necessarily vests title in the lender. See *supra* note 127. Title held by the lender will result in classification as owner and a basis for CERCLA liability.

dorsed the *Maryland Bank* holding in all respects.¹⁶⁶ Acceleration nonetheless can assist the lender in avoiding cleanup liability.¹⁶⁷

IV. HOW ACCELERATION WORKS

Most commercial mortgages contain acceleration clauses¹⁶⁸ that protect the lender from unusual swings in the interest rate.¹⁶⁹ Further

166. The 1986 amendments to § 107 added the federal lien provision in the new § 107(1). This provision provides that all costs and damages for which a person is liable to the United States under § 107(a) shall constitute a lien in favor of the United States upon all real property and rights to such property that belong to such person and "are subject to or affected by a removal or remedial action." H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 19 (1986).

The purpose of this change is not only to codify part of *Maryland Bank*, but also to ensure that landowners whose land the EPA cleaned with Superfund dollars are not able to reap windfall profits by selling their decontaminated property. See H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 3, at 17 (1985), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3040.

167. See *infra* note 172 and accompanying text.

168. See A. AXELROD, C. BERGER & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE* (1985). The following is a typical commercial acceleration clause:

If undersigned shall fail . . . in the . . . observance of any of the covenants. . . , the entire principal sum . . . shall at once become due and payable without notice at the option of the holder of this note . . . :

WITH RESPECT TO THE REPAYMENT OF THE INDEBTEDNESS HEREBY SECURED AND PERFORMANCE OF MORTGAGOR'S OTHER AGREEMENTS. . . .

a) That Mortgagor shall promptly . . . perform and comply with . . . to keeping said premises in good order and condition. . . .

Crockett v. First Fed. Sav. & Loan, 289 N.C. 620, 621-22, 224 S.E.2d 580, 582 (1976). See also J. KUSNET & J. ANTOPOL, *MODERN BANKING FORMS* § C1.4.10 (1981).

169. When used in this manner, an acceleration clause is more aptly referred to as a "due on sale" clause. The lender, by preventing the transfer, may demand the mortgage assumption at a higher rate. See, e.g., *LaSala v. Am. Sav. & Loan Assoc.*, 5 Cal.3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971) (lender may enforce clause upon the further encumbering of the property only when reasonably necessary to protect lender's security); *Tucker v. Lassen Sav. & Loan Assoc.*, 12 Cal.3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974) (lender may enforce clause upon mortgagor entering into installment land contract for sale of the security only when one of lender's "legitimate interests" threatened); *Wellenkamp v. Bank of America*, 21 Cal.3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978) (lender may enforce clause upon outright sale of the security only when reasonably necessary to protect against impairment to lender's security or risk of default); *Dawn Inv. Co. v. Superior Court of Los Angeles County*, 30 Cal.3d 695, 639 P.2d 974, 180 Cal. Rptr. 332 (1982) (expanded *Wellenkamp* doctrine to include commercial as well as residential real property, and private as well as institutional lenders). See A. AXLEROD, C. BERGER & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE* (1985). See also Comment, *Acceleration Clauses as a Protection for Mortgagees in a Tight Money Market*, 20 S.D.L. REV. 329 (1975) (use of acceleration clauses in mort-

protection comes from the mortgagee's ability to call the entire debt due and payable in the event of a default.¹⁷⁰ One recognized default that will trigger acceleration is the mortgagor who commits waste.¹⁷¹ A mortgagor who releases hazardous substances upon the property arguably is liable to the mortgagee for waste of the estate.¹⁷² There is substantially no difference between allowing a leaky roof to destroy a building's interior and permitting hazardous waste to accumulate and harm the property. Both acts prejudice the lender's interest.¹⁷³ The mortgagee should be empowered to call the entire debt due upon the discovery of waste.

The appeal of acceleration is in the legal characteristics that are attendant upon its use. Unlike foreclosure, the title remains in the mortgagor during acceleration. Because title remains in the mortgagor,¹⁷⁴

gages to effectuate increase in interest rates); Bonanno, *Due on Sale and Prepayment Clauses in Real Estate Financing in California in Times of Fluctuating Interest Rates - Legal Issues and Alternatives*, 6 U.S.F. L. REV. 267 (1971-72) (interaction of the due on sale clauses and prepayment penalties); Comment, *Holiday Acres v. Midwest Federal Savings & Loan Association: Preemption of Due on Sale Clauses*, 23 WASH. U.J. URB. & CONTEMP. L. 285 (1982) (examining whether Home Owners Loan Act preempts due on sale clauses).

170. Mortgage acceleration is universally accepted. See *David v. Sun Fed. Sav. & Loan*, 461 So.2d 93 (Fla. 1984); *United States Sav. Bank v. Continental Fed. Arms, Inc.*, 338 A.2d 579 (Del. Super. 1975); *Walter v. Kilpatrick*, 191 N.C. 458, 142 S.E. 148 (1926).

171. See *supra* note 168 for the text of the acceleration provision.

172. See *United States v. Angel*, 362 F. Supp. 445 (E.D. Pa. 1973) (in same jurisdiction as *Mirabile*, court finds acceleration permissible for waste); *In re Tremblay*, 43 Bankr. 221 (D. Vt. 1984) (dictum) (waste valid reason to accelerate mortgage); *State Farm Life Ins. v. Town and Country Assoc.*, 85 Ill. App. 3d 319, 406 N.E.2d 923 (1980) (dictum) (waste warrants acceleration in proper circumstances); 78 AM. JUR.2D *Waste* § 13 (1975). A person who has a specific lien against real estate has a right to restrain waste by the owner of the real estate. *Id.*

173. The debtor clearly harmed the interest of Maryland Bank & Trust:

1. Amount of Loan	\$335,000.00
2. Foreclosure sale	\$381,500.00
3. *Apparent profit	\$ 46,500.00 (1 minus 2)
4. Cost of Cleanup	\$551,713.00
5. Loss to Lender	\$216,713.00 (4 minus 1)

*This is not truly profit to the lender as he must return the excess to the unsecured creditors. Most courts allow the lender recovery to the extent of the security and nothing more. Windfalls should return to the debtor to replace lost equity.

632 F. Supp. at 575-76.

174. Assuming that the bank resides in a majority state that follows a lien theory,

the bank will not acquire title,¹⁷⁵ and the lender will not violate the rubric of *Maryland Bank*.¹⁷⁶ If title never passes to the lender, the lender is unlikely to be classified as an owner under the most recent amendments to CERCLA.¹⁷⁷ The appeal of acceleration fades in a few jurisdictions.¹⁷⁸ In jurisdictions that follow title, rather than lien theory, the title is normally in the custody of the mortgagee.¹⁷⁹ As a result, the lender in these jurisdictions already holds title and would become an "owner" whether or not he used acceleration.¹⁸⁰

Courts are wary of acceleration because it is a drastic remedy.¹⁸¹ A

the title remains in the mortgagor with the mortgagee holding the note and mortgage. See *Jaffe-Spindler Co. v. Genesco, Inc.*, 747 F.2d 253, 257 (4th Cir. 1984) (in a lien state mortgagee deemed only to have lien on real property, not actual title); *Bredenburg v. Landrum*, 32 S.C. 215, 10 S.E. 956 (1890) (lien theory state considers mortgagor owner of land); but see *Sturges & Clark, Legal Theory and Real Property Mortgages*, 37 YALE L.J. 691, 713-15 (1928) (neither lien state courts nor title state courts follow consistent "party line"). See also *Leipzigiger, The Mortgagee's Remedies for Waste*, 64 CALIF. L. REV. 1086, 1087 (1976).

175. See 632 F. Supp. at 579. The court recognizes that passage of title is the important feature in establishing ownership.

176. *Id.*

177. See *supra* note 166 noting that the congressional response was in part a codification of the *Maryland Bank* decision.

178. Thirteen states apparently follow the title theory, which holds that title remains in the mortgagee until the mortgagor satisfies the obligation. In the early 19th Century lenders favored this system believing that foreclosure would be unnecessary in the event of default. Nevertheless, courts frowned upon this system and did not make foreclosure any easier. Consequently, lien theory now is the majority rule in the United States. See generally 3 R. POWELL, *THE LAW OF REAL PROPERTY* 439, 454 (1987); G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 4.2 (1979).

179. See generally 59 C.J.S. *Mortgages* § 1, at 23-25; G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 4.1 (1979). See also *Kratovil, Mortgagees-Problems in Possession, Rents and Mortgage Liability*, 11 DE PAUL L. REV. 1, 4-5 (1961) (distinguishing title and lien theory states). Other rights, such as an immediate right to take possession and collect rents, attach to title states. See, e.g., *Wethered v. Alban Tractor Co.*, 224 Md. 408, 168 A.2d 358 (1961).

180. See *supra* note 64 and accompanying text. Liability exists when title vests. In a title theory state, the title vests in the mortgagee when he executes the mortgage.

181. See e.g., *First Commercial Title, Inc. v. Holmes*, 92 Nev. 363, 550 P.2d 1271 (1976) (court will not allow acceleration if it imposes a penalty); *Gunther v. White*, 489 S.W.2d 529 (Tenn. 1973) (acceleration not allowed if inequitable).

Nevertheless, acceleration is a bargained-for element, and courts should comply with the wishes of the parties for two reasons. First, a substantial loan is not obtained for the asking. Lenders run the risk that the security will be totally destroyed. The risk is reduced if the lender knows that the debtor is obligated to keep the property in good repair. Second, permitting acceleration of the due date is an added protection—that is, the lender may take advantage of rising interest rates in the event his borrower transfers

court will not use its equitable powers to enforce acceleration without a showing that the mortgagor violated the agreement.¹⁸² The lender must show good faith when exercising the option to accelerate,¹⁸³ but courts presume an acceleration clause is valid absent a showing of fraud,¹⁸⁴ duress,¹⁸⁵ or inequitable or unconscionable conduct¹⁸⁶ by the lender.

V. ACCELERATION AS A REMEDY

Acceleration allows lenders to avoid the imputation of "ownership" status, but few mortgagors will be willing or able to tender full payment at the demand of the lender.¹⁸⁷ Consequently, acceleration be-

the security. *See* Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013 (Okla. 1977); *See also* Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 578-79, 81 Cal. Rptr. 135, 138 (1969); Roberson v. Williams, 240 N.C. 696, 701, 83 S.E.2d 811, 814 (1954) (parties bound regardless of whether contract wise or foolish).

182. *See* Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1017-18 (Okla. 1977) (quoting Baltimore Life Ins. Co. v. Harn, 486 P.2d 190, 193 (Ariz. Ct. App. 1971)).

183. *See* Crockett v. First Fed. Sav. & Loan Ass'n., 289 N.C. 620, 631, 224 S.E.2d 580, 588 (1976). In *Crockett*, the plaintiff attempted to establish that a Uniform Commercial Code standard of good faith applied. Good faith is defined in the North Carolina statute as "honesty in fact in the conduct or transaction concerned." N.C. GEN. STAT. § 25-1-201(19) (Supp. 1986). The North Carolina court disregarded the UCC standard of good faith because an option to accelerate is one predicated upon a condition rather than "at will." The court applied a common law standard of good faith. *See infra* note 186 addressing equitable conduct.

The good faith standard requires the lender to allege genuine impairment of the security. *See* Freeman v. Lind, 181 Cal. App.3d 791, 226 Cal. Rptr. 515 (1986). *See also* H. TIFFANY, REAL PROPERTY § 1513 (3d ed. & 1973 Supp.) (the debtor must impair the value of the mortgaged property).

184. *See* Mutual Fed. Sav. & Loan v. American Medical Serv., 223 N.W.2d 921 (Wis. 1974) (no acceleration upon showing of fraud); Verna v. O'Brien, 78 Misc.2d 288, 356 N.Y.S.2d 929 (1974) (although mortgagee ungenerous, no fraud alleged and acceleration allowed).

185. *See* Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976) (oppression by mortgagee prevents acceleration); Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 58 Wis.2d 99, 205 N.W.2d 762 (1973) (no acceleration upon finding of duress).

186. *See* People's Sav. Ass'n v. Standard Ind., 22 Ohio App.2d 35, 257 N.E.2d 406 (1970) (no acceleration if inequitable or unconscionable); Malouff v. Midland Fed., 181 Colo. 294, 509 P.2d 1240 (1973) (en banc) (acceleration must comport with public policy).

187. Imagine the debtor's reaction when his lender suddenly asks for the balance of a substantial loan. Besides outrage, most debtors will view the contingency of "full tender" as an impossibility. The lender must prepare some method of refinancing the unpaid balance. It is this refinancing plan that comprises the second step in the accel-

comes a two-step process. The lender must declare an intent to accelerate;¹⁸⁸ then the lender must help the debtor search for the funds to pay the accelerated debt. The lender must be prepared to make refinancing concessions to realize the accelerated debt.¹⁸⁹ The following second-step refinancing options fully exonerate the lender from liability arising out of the collateral.¹⁹⁰

ation hypothetical. In addition to the possibilities listed in the text, the new mortgage agreement should include a clause that absolves the bank of hazardous waste liability. Although this clause will be of no assistance to a mortgagee-turned-owner, it will shield a nonforeclosing mortgagee from possible liability as a result of a mortgagor suit. At least one court allowed private parties to contract out of hazardous waste liability. *See Mardan Corp. v. CGC Music*, 600 F. Supp. 1049, 1057 (D. Ariz. 1984), *aff'd*, 804 F.2d 1254 (9th Cir. 1986). *See also Recent Developments, Generator's Cleanup Liability Excused By Contract Release, Appeals Court Rules*, 17 Env't Rep. (BNA) 1337 (1986) (private parties can contract regarding contribution, but this does not affect EPA right to recover cleanup expenses).

188. *See, e.g., Ogden v. Gibraltar Sav. Assoc.*, 640 S.W.2d 232 (Tex. 1982) (notice of acceleration is required); *but see Spires v. Lawless*, 493 S.W.2d 65 (Mo. Ct. App. 1973) (mortgagee must only perform some overt act evidencing intent to accelerate).

189. Besides the three options listed in the text, the lender could request the borrower to: (1) deposit money in an escrow fund from which the lender could utilize funds to finance any subsequent cleanup; (2) refinance at an interest rate that would cover the possible cleanup expense; or (3) request that the debtor obtain insurance to cover any subsequent loss to the account of the lender. The lender is only limited by his creativity in refinancing the loan.

Options one and two are illusory: Waste cleanups are so unpredictable that the expense is impossible to estimate. Any fund so reserved would be at best speculative and would likely lull the lender into a false sense of security. The lender who chooses options one or two may be subject to liability in excess of the security.

Option three, on the other hand, is worth discussion. A debtor who obtains insurance in favor of the lender, payable upon the occurrence of a waste spill, would satisfy any lender's fear. Unfortunately, the insurance is unavailable. It is unavailable initially because of a clause contained in most Comprehensive General Liability Policies (CGL). The standard pollution exclusion provides in pertinent part:

The CGL policy does not apply to bodily injury or property damage (1) arising out of pollution or contamination caused by oil or (2) arising out of the discharge of . . . [hazardous waste]; but this exclusion does not apply if such discharge, release or escape is sudden and accidental.

Courts have examined this provision and found that it does not apply to reimburse hazardous waste expenditures. *See American Economy Ins. Co. v. Commons*, 26 Or. App. 153, 552 P.2d 612 (1976) (policies not meant to cover damage to property owned by insured); *but see Bankers Trust Co. v. Hartford Accident & Indemnity Co.*, 518 F.Supp. 371 (S.D.N.Y. 1981) (coverage allowed); *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (1983) (percolating water not owned by the owner of the land under which it flows and does not fit within policy's exclusion). *See also Birnbaum, Comprehensive General Liability Insurance Coverage Issues in Hazardous Waste Litigation*, PRAC. REAL EST. LAW., Jan. 1986, at 37.

190. In contrast to the preceding note, these three hypotheticals are recognized

A. *Substitution of the Hazardous Collateral*

Acceleration extinguishes the mortgage and releases the security interest.¹⁹¹ The lender will recover the unpaid balance, and the borrower will hold title to the property.¹⁹² Nevertheless, acceleration without foreclosure is unlikely unless the lender extends the funds to retire the original debt.¹⁹³ After retiring the primary obligation through the new funds, the mortgage is released; but the lender must resecure this refinanced debt. The lender appears in no better position to avoid liability.

The lender nevertheless has vastly improved his position. Most companies own at least one parcel of "clean" real estate that can provide loan security. If the company does not own any "clean" property, the mortgagee may secure the corporate obligation with property held by the corporation's directors. The substitution of collateral means that the lender could foreclose with impunity upon default.

This strategy works well in practice.¹⁹⁴ Acceleration has not yet been utilized in the hazardous waste context, but nothing prevents its application.¹⁹⁵ Any argument that this scenario is against public policy can be dispelled.¹⁹⁶ Nowhere is the EPA guaranteed a deep pocket from which to collect cleanup expenditures.¹⁹⁷ What acceleration

methods of adjusting the collateral. The bank is in a much better position to avoid liability by relying upon the lack of connection to the hazard rather than compensation for a possible hazard.

191. Ideally, the borrower tendered the full amount owed and the mortgage is released. Although the lender may have to tender the acceleration dollars using the debtor as a "straw man," the result is the same. That is, a mortgage will no longer exist when the debt owed is satisfied. See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1979) (foreclosure extinguishes the mortgage). The policies underlying foreclosure and acceleration are similar; consequently, the mortgage terminates upon the successful occurrence of either.

192. See *supra* note 64 and accompanying text.

193. See *supra* note 188 examining the likelihood of refinancing.

194. See *In re O'Neill Ent., Inc.*, 366 F. Supp. 290 (W.D. Va. 1973). The *O'Neill* court recognized that if the mortgage agreement so allows, the lender may request substitution of the collateral. *Id.* at 295. Further, the lender may require the substitute collateral have the average appraised security to satisfy the lender's interests.

195. See *supra* note 172 and accompanying text for an explanation of why waste may be committed when a borrower contaminates the collateral.

196. What public policy is compromised by allowing the lender to restructure his loan? The EPA is not left without a remedy; the EPA will simply have to collect its expenses from the property itself. Furthermore, the chemical manufacturers that create the toxic substances will be liable rather than the third-party lender. Thus cleanups will still occur, cost recoveries will be had, and the lender will properly escape liability.

197. See *supra* note 29 for text of 42 U.S.C. § 9607 (1980 & Supp. I 1987), which

means is that the EPA must collect all deficiencies from the mortgagor rather than the mortgagee, so that the most responsible party will reimburse the EPA.

B. *Substitute Bonds for the Hazardous Collateral*

A lender may also resecure the debt with bonds,¹⁹⁸ which is an appealing solution for both parties. The borrower benefits because bonds usually are sold for less than their face value, and the borrower avoids encumbering additional property.¹⁹⁹ The bonds' complete isolation from the hazardous site makes their use advantageous to the lender, who may sell his bonds upon default without assuming hazardous waste liability.

Again, the bank's reallocation of its security does not compromise any recognized public policy.²⁰⁰ The new arrangement protects both the EPA and the lender in the event of future defaults.

C. *Split the Mortgage into Several Debts*

Splitting the collateral is simply a hybrid of the above approaches.²⁰¹ The mortgagee using this method would break the mortgage into smaller individually secured debts. Ideally, the subsequent loans could be secured by chattels in the debtor's possession.²⁰² Unfortunately,

permits cost recovery actions. Nowhere in the statute is the EPA guaranteed a solvent party from whom to collect the stated amount.

198. See *In re Penn Cent. Transp. Co.*, 333 F. Supp. 77 (E.D. Pa. 1971). In *Penn.*, the court allowed the railroad to substitute bonds for the collateral (trains and track) that wore out before the borrower retired the debt.

199. For example, on March 5, 1970, a Gold Bond of \$379,000.00 face value could be purchased for \$251,776.22, while its market value on that date was \$168,655. See generally 1 S. QUINDEY, *BONDS & BONDHOLDERS RIGHTS & REMEDIES* ch. 1, §§ 1-44 (1934) (section 39 deals with leasehold mortgage bonds).

The distinguishing feature of a bond is that it is an obligation to pay a fixed sum of money in the future.

200. See *supra* note 197 discussing public policy implications.

201. In a split collateral arrangement, the mortgage is usually secured against real property with any additional security taken against personal property of the debtor. One case that involved this method is *Roseleaf Corp. v. Chierighino*, 59 Cal. 2d 35, 378 P.2d 97 (1963) (en banc) (in a loan secured by a chattel mortgage and three notes against real property, lender must enforce rights against real property first).

202. This would reduce the likelihood of the borrower's connection to the hazardous property. See Hetland & Hansen, *The "Mixed Collateral" Amendments to California's Commercial Code—Covert Repeal of California's Real Property Foreclosure and Antideficiency Provisions or Exercise in Futility?*, 75 CALIF. L. REV. 185, 189 (1987) (generally examining the mixed-collateral problem).

part of the loan may have to be secured with real property.²⁰³ The lender who must partially secure upon distressed property is faced with a problem. In many states, such a lender has a "mixed collateral problem."²⁰⁴ Upon the debtor's default, the lender in many jurisdictions must first attempt to satisfy the debt by foreclosing upon real property²⁰⁵—foreclosure that would necessarily create liability.²⁰⁶

The California Legislature addressed this problem.²⁰⁷ Noting the conflict between the real property and personal property foreclosure systems, the legislature amended the Civil Code of California to convert this single obligation into multiple separate obligations.²⁰⁸ As a result, a lender can enforce a personal property remedy before foreclosing on real property.²⁰⁹

VI. CONCLUSION

A lender should not enter into a loan transaction that may create hazardous waste liability. Acceleration then will be unavailable because that lender breached his duty of investigation. Nevertheless, for lenders who unknowingly secured a debt with environmentally hazardous collateral before the duty arose, this Note offers a creative solution to the problem. Through acceleration and refinancing, the lender avoids being classified as an owner. Although environmentalists will characterize this idea as a statutory loophole, the statute clearly does not impose

203. Generally, the funds with which the debtor wants to operate or to purchase real property exceed the value of any chattels on the land. Consequently, the lender must obtain additional security. Real estate is the usual source of further security.

204. See Bernhardt, *The Mixed Multiple Muddle*, 9 REAL PROP. L. REP. 101 (1985).

205. See Hetland & Hansen, *supra* note 202, at 190 (a creditor who takes an interest in even a small quantity of real property subjects the entire debt to the protection of the real property system).

206. This foreclosure would establish the ownership that is clearly undesirable in light of *Maryland Bank*. See *supra* notes 64, 127.

207. See UCC COMM. STATE BAR CAL., REPORT ON PROPOSED AMENDMENT TO CALIFORNIA UNIFORM COMMERCIAL CODE SECTION 9501 (4) [hereinafter UCC COMMITTEE REPORT]. The Committee expressed concern about real and perceived interference with the rights of mixed-collateral secured creditors.

208. See S.B. 1357, 1985 Cal. Legis. Serv. 799 (adding § 9501(4)(c)(iv) & (v)).

209. *Id.* See also UCC COMMITTEE REPORT, *supra* note 207, at 6. The Committee considered whether to eliminate the subordination of the personal property system to the real property system. A lender then could foreclose only the personal property without implicating the real property laws.

liability upon a nonowner — a group to which the accelerating lender belongs.

The lender should not accelerate every loan but should experiment with some of the more troublesome securities. Prudence is essential because acceleration will fail if the debtor can show an absence of good faith, fraud, or unconscionable conduct by the lender.

Eric S. Lipper

COMMENTS

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