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## LENDER LIABILITY UNDER CERCLA: AN OVERVIEW FOR BUSINESS LAW COURSES

by

Peter A. Martin\* and Susan Lorde Martin\*\*

### *INTRODUCTION*

In 1980 Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>1</sup> The statute created a stir within the lending institution community that, despite various changes in the law, still exists today. This paper discusses the lender liability provisions of CERCLA. It is concerned with the mortgage lender who, without actively participating in the management of a company, forecloses on the company's property when the company declares bankruptcy after having contaminated the property with hazardous waste. Under current law, it is possible, but by no means definite, that such a lender would be held liable for the costs of cleaning up the contaminated site. That situation is not in the best interests of either lenders or the environment. This paper advocates a return to a sensible but voided 1992 EPA rule in order to achieve a greater consistency in the law, a better business climate for lenders, and a cleaner environment. The importance of these three goals and their interaction makes CERCLA a suitable topic for inclusion in survey business law or legal environment courses.

This paper traces the history of lender liability law under CERCLA. The first section notes the relevant statutory language of CERCLA itself, case law, the significant EPA regulation, and some state statutes. Then the paper shows how current law applies to the potentially liable lender who forecloses and suggests actions a lender can take to avoid CERCLA liability. In so doing, it points out the flaws in the current law and suggests alternative amendments. The next section concludes that for the good of lending institutions, businesses, and the environment, Congress should amend CERCLA's secured creditor exemption so that it resembles the now voided EPA rule. The final part discusses how and why this topic fits into the business law curriculum.

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### CERCLA

CERCLA was enacted in 1980 to provide a means to clean up contaminated hazardous waste sites and to hold those parties deemed responsible for the contamination, liable for cleanup costs.<sup>2</sup> This statute immediately changed how creditors evaluate the risk in making mortgage loans to companies that produce hazardous wastes. Normally, a lender will evaluate market risk, that is, the risk that interest rates will go up, and credit risk.<sup>3</sup> Credit risk is the risk that the borrower will fail to perform its contractual obligation to repay the loan.<sup>4</sup> To assess the credit risk of a commercial borrower, the mortgage lender would ordinarily consider such factors as cash flow, payment history, and a business history of stability or growth.<sup>5</sup> After the enactment of hazardous materials. Such risks are difficult to calculate, especially when the lender does not become significantly involved with the company's decision making or ownership unless and until the company enters bankruptcy and the lender then forecloses on its contaminated site. The difficulty exists because the statutory language of CERCLA does not clearly indicate under which specific circumstances such a lender should be liable for cleanup costs.

CERCLA imposes liability upon the following general categories of responsible parties: (1) present owners and operators of a facility in which hazardous substances are located; (2) owners and operators of the facility at the time of disposal of hazardous substances; (3) generators of hazardous substances; and (4) persons who accept hazardous substances for transport to disposal sites or treatment facilities.<sup>6</sup> In addition, CERCLA creates a security interest exemption, stating that an "owner" or "operator" "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."<sup>7</sup> By failing to define vague terminology like "indicia of ownership," and "participation in the management," Congress left it to the courts to determine if and when lenders are "owners" who are liable for cleanup costs.

### Early Cases under CERCLA

With such vague statutory language, it is not surprising that different courts interpreted the statute differently, confusing a lender's risk calculation process even more.<sup>8</sup> Several well known cases illustrate the problem.

In *United States v. Maryland Bank & Trust Co.*,<sup>9</sup> the United States District Court in Maryland focused on the "owner and operator" language of CERCLA and determined that Congress intended to hold liable owners of contaminated sites who were not operators, that is, owners who were not involved in the management of the company, as well as owner/operators.<sup>10</sup> Therefore, the court concluded that a bank which had foreclosed on a contaminated site primarily to protect its security interest was an owner, and was liable for cleanup costs under CERCLA.<sup>11</sup> The court noted that if the bank were exempted from liability, the federal government would have to pay for the cleanup and then the bank would enjoy a windfall, profiting from the increased value

of the decontaminated property.<sup>12</sup> The court pointed out, however, that in the instant case, the foreclosing bank had held the property for nearly four years, suggesting that it was the length of time that made this lender a liable party under CERCLA.<sup>13</sup>

If the Maryland court was indicating that a lender would not be an "owner" if it sold the foreclosed property more quickly, then its decision is consistent with the ruling of the United States District Court for the Eastern District of Pennsylvania in *United States v. Mirabile*,<sup>14</sup> a case decided several months before *Maryland Bank*. In *Mirabile*, the bank that foreclosed, held title to the contaminated site for four months before assigning it. Although the Pennsylvania court's opinion focused primarily on determining what constitutes participation in management, it also asserted that mere foreclosure does not necessarily impose liability upon a lender.<sup>15</sup> As long as the lender limited its involvement with the property to the "financial aspects of management" without managing the quotidian production aspects of the business, then the lender would escape CERCLA liability.<sup>16</sup> This formulation recognized the legitimate protection of a security interest by foreclosing and taking title.

Other CERCLA cases concerning lender liability emphasized the lender's behavior in the period of time before foreclosure and the issue of participation in management, arriving at varied conclusions about whether or not mere foreclosure was enough to impose liability.<sup>17</sup> However, these issues of pre-foreclosure behavior on the one hand, and foreclosure followed by some post-foreclosure behavior on the other, overlapped in *United States v. Fleet Factors Corp.*<sup>18</sup> That case arose after Fleet agreed to lend money to Swainsboro Print Works obtaining as collateral a security interest in Swainsboro's textile facility and all of its equipment.<sup>19</sup> Five years later Swainsboro entered into bankruptcy, and Fleet foreclosed on its security interest in some of the inventory and equipment.<sup>20</sup> Approximately two years later the Environmental Protection Agency (EPA) inspected the facility, found large amounts of toxic chemicals and asbestos on the premises, and incurred \$400,000 in clean-up costs.<sup>21</sup> The EPA then sued the principal officers and stockholders of Swainsboro and Fleet to recover the cost of cleaning up the toxic materials.<sup>22</sup> The district court denied Fleet's motion for summary judgment and Fleet appealed to the United States District Court for the Eleventh Circuit.<sup>23</sup>

The Eleventh Circuit determined that the critical issue was "whether Fleet participated in management sufficiently to incur liability" or was an "operator" under the statute and would, therefore, not be entitled to CERCLA's exemption for a holder of "indicia of ownership primarily to protect his security interest."<sup>24</sup> This case was the first federal appellate court case to consider this issue.<sup>25</sup> The Eleventh Circuit rejected as too permissive the *Mirabile* court's approach of exempting from liability lenders who were involved in financial management of a facility but not in operational management.<sup>26</sup> Instead, the Eleventh Circuit held that a secured creditor would be liable for environmental clean-ups if it was sufficiently involved in the financial management of the facility "to influence the corporation's treatment of hazardous wastes."<sup>27</sup>

Although this case strictly focused upon the time period before foreclosure, its holding could have ramifications for lenders whose involvement in management takes place post-



foreclosure, therefore, this decision caused a certain wariness in lenders of all levels of involvement at all times. The standard articulated in *Fleet* has the potential for being extended to incorporate a lender whose "capacity to influence" occurs only post-foreclosure, when the lender actually "owns" the site.

#### *EPA's Lender Liability Rule*

In 1992 the EPA promulgated its own lender liability rule.<sup>28</sup> It clarified CERCLA's security exemption rule, undercutting the strictness of the *Fleet Factors* rule, and specifically shielding from liability lenders who had minimal roles in the bankrupt company's operations until foreclosure. The rule explicitly defined, *inter alia*, the terms "indicia of ownership"<sup>29</sup> and "primarily to protect a security interest."<sup>30</sup> Most importantly for a lender, the rule stated that the lender can avoid liability when foreclosing on a contaminated site,

provided that the holder [i.e., lender who forecloses] undertakes to sell, re-lease property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of the property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant and appropriate with respect to the vessel or facility, taking all facts and circumstances into consideration, and provided that the holder did not participate in management.<sup>31</sup>

This rule had some vague terminology of its own, such as "reasonably expeditious manner," but nevertheless went far in clarifying what actions a lender could take in foreclosure proceedings without incurring liability. It provided more structure and better guidelines for lenders than did most of the case law existing at the time of its promulgation. It specifically described the procedures a lender can and must take before, during and after the foreclosure process in order to preserve the exemption.

Furthermore, the rule gave lenders greater leeway in dealing with foreclosed property without risking CERCLA liability as an owner. Provided that the lender did not "participate in management" prior to foreclosure,<sup>32</sup> the rule allowed the lender to engage in procedures to liquidate or transfer the property, or wind up operations on the site without subjecting itself to CERCLA liability.<sup>33</sup>

#### *Kelley v. EPA*

The EPA rule was judicially challenged in 1994 in *Kelley v. EPA*.<sup>34</sup> In that case the United States Court of Appeals for the District of Columbia Circuit held that Congress had not granted the EPA the authority to identify specific circumstances under which a lender should be deemed an owner or operator under CERCLA.<sup>35</sup> The court explained that CERCLA specifically authorizes the EPA to promulgate rules and regulations concerning various activities,<sup>36</sup> and these activities do not include further definition of CERCLA terminology to determine lender liability.<sup>37</sup>

Thus, the court voided the EPA lender liability rule, and with it any decisions which had relied

upon the EPA rule. In 1995 the EPA removed the rule from the Code of Federal Regulations.<sup>38</sup> The *Kelley* decision created a general uncertainty like that existing prior to the promulgation of the EPA rule. Of most concern to lenders, it potentially returned the state of the law back to the vagueness, and possible strictness, of the *Fleet Factors* rule that suggested that any financial management by lenders might create CERCLA liability.<sup>39</sup>

#### *Pro-lender Law Despite Kelley*

Despite this setback for lenders, recent case law has signified a trend towards more favorable rulings for lenders. There had been several decisions favoring lenders before *Kelley* that did not rely upon the EPA rule. Therefore, despite *Kelley*, the following pro-lender cases are still persuasive.

In *United States v. McLamb*<sup>40</sup> the United States Court of Appeals for the Fourth Circuit held that although a bank "owns" a property when it forecloses on it, if the bank takes swift action to place the property on the market, does not use or manage the property during its ownership, and sells the property promptly, the bank is acting "primarily to protect its security interest" and, therefore, is not liable under CERCLA.<sup>41</sup> In this case the Wachovia Bank & Trust Company had taken a security interest in 217 acres of land as collateral for a loan it had made to the land's owner, Otto Skipper.<sup>42</sup> When Skipper defaulted on the loan the following year, Wachovia purchased the land as the sole bidder at a foreclosure sale.<sup>43</sup> Prior to Skipper's borrowing from Wachovia, he had allegedly disposed of toxic waste on the land which was subsequently cleaned up by the United States Coast Guard.<sup>44</sup> Wachovia asserted that the only reason it bought the property at the foreclosure sale was to protect its security interest.<sup>45</sup> Several days after the purchase, Wachovia signed a contract with local realtors to sell the property, and it was sold shortly thereafter.<sup>46</sup> Following the foreclosure, Wachovia made no attempt to develop or manage the property.<sup>47</sup>

In the court's opinion, the bank's actions indicated that the bank had no profit motive for acquiring the property through foreclosure.<sup>48</sup> The court's rationale is significant because it relied directly upon the language of CERCLA to formulate its holding. The EPA rule, still valid at the time this case was decided, was mentioned and addressed merely as a supporting argument.<sup>49</sup>

The United States Court of Appeals for the First Circuit has ruled on this subject twice.<sup>50</sup> In *Waterville Industries v. Finance Authority* the court opined that the maturation of ownership of a holder of a security interest does not cause the holder/owner to lose CERCLA's security interest exemption as long as the lender/owner divests itself of ownership within a reasonable time.<sup>51</sup> The court explained that although CERCLA does not explicitly sanction a safe divestiture period, such a "safety zone" must be implicit in the statute otherwise lenders with unwanted ownership thrust upon them would be subject to a sudden CERCLA liability.<sup>52</sup> In so ruling, the First Circuit acknowledged that the EPA regulations comported with its own decision, but emphasized that the court reached its own conclusion "independently of the regulations."<sup>53</sup> The court mentioned the dearth of case law on the subject, noting that the United States District Court for the Eastern



District of Pennsylvania<sup>54</sup> and the United States Bankruptcy Court for the Northern District of Ohio<sup>55</sup> supported their approach while the United States District Court for the Western District of Pennsylvania<sup>56</sup> opposed their position, choosing a stricter interpretation of CERCLA.<sup>57</sup> The court distinguished their case from *Maryland Bank* because the lender in the latter case failed to promptly resell the property after foreclosure.<sup>58</sup>

#### *State Statutes*

Recently enacted state statutes assessing liability for clean-up costs caused by the state-prohibited release of hazardous materials also reflect a pro-lender trend. For example, New Jersey has passed a lender liability statute similar to that of the now voided EPA rule.<sup>59</sup> It specifically delineates the procedures a lender must take after foreclosure in order to escape toxic waste cleanup liability when attempting to divest itself of the property.<sup>60</sup> Delaware law simply exempts any "commercial lending institution which acquires ownership or control of a property to realize a security interest,"<sup>61</sup> while Texas law exempts lenders who own a security interest in a storage tank unless the state determines that the lender's control is a contributing cause of the release of contaminants from the tank.<sup>62</sup>

#### *ANALYZING CURRENT LAW*

##### *Strategies for Lenders to Avoid CERCLA Liability*

Considering the law as it stands, there are several courses of action lenders can take to avoid CERCLA liability. They could take the extreme position of avoiding dealing with any industry group that generates hazardous wastes, or at least those known to be likely to contaminate above specified levels. This would, however, result in the loss of many potentially profitable business opportunities. Yet, in many circumstances and for many lenders, avoiding the CERCLA situation may be the most economically viable option.<sup>63</sup> The cost of cleanup could far outweigh the value of a contaminated site.

Alternatively, because cases in certain jurisdictions have demonstrated that lenders who foreclose can escape liability, a careful lender who accurately calculates the risks might be able to successfully transact business with industry groups known to contaminate. A lender that passes on too many of these business opportunities may find itself in poor financial condition.

A wise lender, even under the current law, might be able to take necessary steps to avoid liability except in the strictest jurisdictions. First and foremost, prior to any initial agreement with a company, the lender should conduct an environmental site assessment. This environmental audit requires a physical inspection of the site in order to find out if there is any present contamination or risk of potential future violations. If there is none, an adequate environmental assessment could provide the basis of an "innocent purchaser" defense under CERCLA.<sup>64</sup> CERCLA provides that there will be no liability for a person "who can establish by a preponderance of the evidence that the release . . . of a hazardous substance . . . [was] caused solely by . . . an act or omission of a

third party [and that] he exercised due care . . . and he took precautions against foreseeable acts or omissions of any such third party."<sup>65</sup> The foregoing defense may not be available if the guilty third party was acting in connection with a contractual relationship with the asserted "innocent purchaser."<sup>66</sup> However, CERCLA also provides that such a contractual relationship (as would exist between a bank and its borrower) would not preclude the "innocent purchaser" defense as long as the person asserting the defense "did not know and had no reason to know [at the time of acquiring the property] that any hazardous substance . . . was disposed of on, in, or at the [property]."<sup>67</sup> In order to establish that he had no reason to know about any contamination, the "innocent purchaser" would have to "have undertaken . . . all appropriate inquiry into the previous ownership and uses of the property."<sup>68</sup>

Thus, the lender should review the company's files for indications of contamination problems. The lender should also review the law in the relevant jurisdiction. If the environmental inquiries indicate contamination or the potential for contamination then the lender would have crucial information for making an informed decision whether to proceed with the transaction. Furthermore, and very importantly, the lender should be sure to carefully structure the language of the loan agreement, so that it clearly excludes the type of involvement or day-to-day management of the company that would deem the lender liable under strict interpretations of CERCLA, such as that in *Fleet Factors*. A wise lender could make a case by case analysis of the environmental risks to arrive at an informed business decision concerning whether or not to proceed with the loan transaction.

The situation changes, however, if unexpected contamination on the site occurs after the loan agreement has been made, and the company enters bankruptcy<sup>69</sup> forcing the lender, under ordinary circumstances, to foreclose on the property. In this event, the lender should follow the now voided EPA rule's guidelines: it should immediately put the property on the market and demonstrate a serious effort to transfer the property, selling it upon receiving the first fair offer. By so doing, a lender would be able to show that it was acting primarily to protect its security interest, and would most likely escape liability, except in jurisdictions like the D.C. Circuit which choose to use the stricter interpretations of CERCLA. The problem with this course of action is that a lender making a good faith effort to sell the property might have difficulty in doing so because buyers would be wary of acquiring title to a contaminated site, and running the risk of liability. A potential buyer might much prefer to spend more money to operate a facility on a new, uncontaminated site rather than pay less for the contaminated site and assume cleanup costs. With this potential situation, it would be wise for the lender to have another environmental audit performed before foreclosing. If the assessment indicates that the site is severely contaminated, the lender might choose not to foreclose at all, but to cut its losses and abandon the property.

Such a sequence of events creates serious environmental concerns. CERCLA's liability scheme certainly serves as a deterrent to toxic contamination; however, it also serves to force industries to make economically justifiable decisions to contaminate new sites ("greenfields") instead of reusing already contaminated sites ("brownfields").<sup>70</sup> This results not only in an inefficient use of land, but it also contributes to urban decay. As contaminated sites in urban areas



become abandoned, industries flock to greenfields, risking contamination to previously untainted properties.<sup>71</sup> CERCLA does not address this negative effect. As long as it remains economically sound, companies will continue this process, thereby putting the public surrounding these abandoned brownfields at risk as well as continuing to further contaminate greenfields.

### *Problems with the Current Law*

Because the cost of cleaning up a hazardous waste site is so high, it takes only a very minimal risk of contamination to deter a lender from doing business with any industry group that might create hazardous waste. This might seem beneficial: if lenders refuse to do business with hazardous waste producing companies and choose to deal only with low risk industries, these high risk groups would be forced to find ways to reduce their risk of contamination. However, for many industries, it is technologically and/or economically impossible to rid themselves completely of their hazardous waste products. Because some of these industries are vital, it is necessary for them to be able to receive fair loans. CERCLA, by requiring hazardous waste producers to clean up contaminated sites, usually at great cost, already creates enough of an incentive for these high risk groups to reduce their potential risk of contamination without putting additional pressure on the lenders.<sup>72</sup>

A survey conducted by the American Bankers Association, a trade association of commercial banks, after the *Fleet Factors* decision indicated that eighty-eight percent of the commercial bank respondents changed their lending practices to avoid CERCLA liability by making fewer loans to companies generating hazardous waste.<sup>73</sup> More than sixty-two percent reported rejecting loan applications if there was any possibility of hazardous environmental liability.<sup>74</sup> More than forty-five percent stopped making loans to any business that used chemicals, such as dry cleaning establishments, gas stations, and, ironically, environmental cleanup firms.<sup>75</sup> This is not a desirable outcome. These businesses provide necessary services, and they cannot do so without using chemicals that are potential contaminants. The threat of having to pay to clean up any land they contaminate should be enough to get these businesses to use environmentally sound procedures for disposing of their byproducts. Putting them out of business by denying them financing is not an appropriate means for achieving a safe environment. Current law unnecessarily deters lenders from transactions that would be beneficial to both the lender and the borrower, without achieving a concomitant environmental benefit.

The current law also creates problems because of its encouragement of using greenfields instead of reusing brownfields. Moreover, the inconsistency in various courts' interpretations of CERCLA creates problems of its own. A lender could have entirely different risk calculation strategies depending upon the location of the transaction. The law concerning CERCLA liability should be changed. At the very least, it should create some consistency in this area of the law.

### CORRECTING CERCLA'S PROBLEMS

The simplest and most reasonable alternative is a return to the now voided EPA rule.

Either Congress should specifically authorize the EPA to promulgate this rule through an amendment to CERCLA, or it should amend CERCLA's secured creditor exemption so that it resembles the EPA's lender liability rule. Either amendment would encourage lending to companies with small risks of potential contamination that might be denied capital under the current law. At the same time, although the amendment would be giving more deference to lenders, it would not encourage lenders to make environmentally detrimental business transactions. Lenders would not want to undertake the difficulties of foreclosing on contaminated property that would have to be transferred expeditiously.

Another alternative that is used in other countries and has been advocated by industry groups would be to amend CERCLA's rule of joint and several liability that holds all potentially responsible parties liable for one hundred percent of the cleanup costs, and create instead a "fair share" liability scheme in which parties would be liable only to the extent that they are actually responsible.<sup>76</sup> This plan, however, would tip lenders' risk calculations too far the other way, encouraging lenders to make some loans they would not under the current law or the proposed return to the EPA rule. To remove all lender liability would create fewer incentives to be diligent about creating a safe environment. Congress should amend the secured creditor exemption of CERCLA and incorporate the language of the EPA rule into it. The EPA rule would create circumstances under which both economic and environmental interests would be satisfied.

### USING CERCLA'S LENDER LIABILITY PROVISIONS IN THE BUSINESS LAW CURRICULUM

Today's American college students have known about, and been concerned about, environmental issues since elementary school. Often, however, their ideas on the subject are rather absolute and unsophisticated. They know that the air and water should be the cleanest they can be and all hazardous waste should be cleaned up. They have given little thought, however, to what "cleaning up" hazardous waste actually entails, what it costs, and who should pay for it. Considering the issues involved in lender liability created by CERCLA gives students the opportunity to think about the ramifications of environmental legislation for the business community, and the desirability of aligning business interests and environmental interests.

A review of the circumstances of the enactment of CERCLA, following the debacle at Love Canal, gives students a feel for the legislative process: that major legislative changes generally are a response to major societal crises. A discussion of why Congress decided to hold responsible for cleanup costs parties who may not be morally responsible at all, can encourage consideration of the economics of environmental health. Comparing court opinions that use similar facts to arrive at disparate conclusions should suggest to students that it is difficult to arrive at "right" answers in the law; it is the well reasoned response we are seeking. The CERCLA statute and the EPA rule provide opportunities to view the relationship between Congress and administrative agencies, as well as the relationship between a statute, an administrative regulation, and court opinions. Finally, considering the role of lenders in the business community and the role they should play in environmental situations can provide an opportunity for critiquing current law and creating a new and better statute.



ENDNOTES

1.42 U.S.C. § 9601 (1992).

2 *Walls v. Waste Resource Corp.*, 823 F.2d 977, 980 (6th Cir. 1987) (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F.Supp. 1100, 1112 (D. Minn. 1982)).

3. See, e.g., Grant E. Buerstetta, Notes and Comments, *Creating a Flexible Fiduciary Duty Rule for Banks Entering into Proprietary Derivatives Contracts*, 15 *Ann. Rev. Banking L.* 395, 408, 431 n. 91 (1996).

4. *Id.* at 431 n. 90.

5. See, e.g., Rosemary C. Kehr, *Policies for Rating of Commercial and Residential Real Estate*, in *Securitization of Commercial Real Estate 1988*, at 69, 73-78 (PLI Real Estate Law & Practice Course Handbook Series No. N4-4484, 1988).

6.42 U.S.C. § 9607(a) (1992).

7.42 U.S.C. § 9601(20)(A) (1992).

8. For a detailed discussion of relevant cases see e.g., Nill V. Toulme and Douglas E. Cloud, *The Fleet Factors Case: A Wrong Turn for Lender Liability under Superfund*, 26 *Wake Forest L. Rev.* 127 (1991); David Shanks, *Comment, Lenders Seek Safe Harbor from CERCLA Liability after Eleventh Circuit Fleet Factors Decision*, 35 *St. Louis U. L.J.* 733 (1991).

9.632 F. Supp. 573 (D. Md. 1986).

10. *Id.* at 578.

11. *Id.*

12. *Id.* at 580.

13. *Id.* at 579 ("The exclusion does not apply to former mortgagees currently holding title after purchasing the property, at least when, as here, the former mortgagee has held title for nearly four years. . . .").

14.15 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,994 (E.D. Pa. 1985).

15. *Id.* at 20,996.

16. *Id.* at 20,995.

17. Compare *Guidice v. BFG Electroplating and Mfg. Co.*, 732 F. Supp. 556 (W.D. Pa. 1989) (focusing on "participation in management" issue, but noting that foreclosure itself was enough for lender to be liable; bank had held title to property for eight months) with *Kemp Ind., Inc. v. Safety Light Corp.*, 857 F. Supp. 373 (D. N.J. 1994) (holding that holder of paper title is not necessarily owner of facility for CERCLA purposes; that security interest exception requires determination of why titleholder has indicia of ownership).

18. *Fleet Factors II*, 901 F.2d 1550 (11th Cir.), reh'g denied, 911 F.2d 742 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991).

19. *Id.* at 1552.

20. *Id.*

21. *Id.* at 1553.

22. *Id.*

23. *Id.*

24. *Id.* at 1555-56.

25. *Id.* at 1556.

26. *Id.* at 1557.

27. *Id.*

28.40 C.F.R. § 300.1100 (1992) (removed from C.F.R., 60 Fed. Reg. 33,912 (1995)).

29.40 C.F.R. § 300.1100(a) (1992). Indicia of ownership means evidence of a security interest including title to property acquired incident to foreclosure, mortgages, liens, and assignments. *Id.*

30.40 C.F.R. § 300.1100(b) (1992). "Primarily to protect a security interest does not include indicia of ownership held primarily for investment purposes." *Id.*

31.40 C.F.R. § 300.1100(d) (1992). "Participate in management" is defined in §300.1100(c). It means "actual participation in . . . management or operational affairs . . . and does not include the mere capacity to influence." *Id.* To participate in management a lender would have to exercise decisionmaking control over the borrower's environmental compliance, such that the [lender] has undertaken responsibility for the borrower's hazardous substance handling or disposal practices; or . . . has assumed . . . responsibility for the overall management of the enterprise. . . . actions that are consistent with holding ownership indicia primarily to protect a security interest do not constitute participation in management.



Id. A lender will be considered to be merely protecting a security interest by listing the property with a broker within twelve months following foreclosure or by advertising that the property is for sale. Id. If the lender acts upon an offer of fair consideration within ninety days of receiving it or within six months following foreclosure, the lender will also not incur CERCLA liability. Id.

32.Id.

33.40 C.F.R. § 300.1100(d)(2) (1992).

34.15 F.3d 1100 (D.C. Cir.), reh'g denied, 25 F.3d 1088 (D.C. Cir. 1994), cert. denied 115 S.Ct. 900 (1995).

35.25 F.3d 1088, 1089.

36.E.g., 42 U.S.C. § 9603(d) (1992) (permitting EPA to promulgate rules and regulations specifying record keeping requirements for facilities which contain, use, or generate hazardous substances).

37.25 F.3d 1088, 1089 (rehearing dealing specifically with this issue in response to concerns of dissent in original opinion).

38.60 Fed. Reg. 33,912 (1995).

39.Since that time the EPA has been encouraging Congress to grant it the authority to promulgate such rules and regulations including, where necessary, definitions. See e.g., The Superfund Reform Act of 1994, S.1834, 103d Cong., 2d Sess. (June 17, 1994).

40.5 F.3d 69 (4th Cir. 1993).

41.Id. at 73.

42.Id. at 70.

43.Id.

44.Id. at 70-71.

45.Id. at 71.

46.Id.

47.Id.

48.Id.

49.Id. at 73. It is interesting that although the lender had full knowledge that the site was contaminated, the lender neglected to disclose this information to the buyer. The court held that this had no bearing on whether or not the bank was liable under CERCLA. Id.

50.Northeast Doran, Inc. v. Key Bank, 15 F.3d 1 (1st Cir. 1994); Waterville Indus. v. Finance Auth., 984 F.2d 549 (1st Cir. 1993).

51.984 F.2d at 553.

52.Id.

53.Id.

54.United States v. Mirabile, 15 Env'tl. L. Rep. 20994, 20996 (E.D. Pa. 1985).

55.In re T.P. Long Chem., Inc., 45 B.R. 278, 288-89 (Bankr. N.D. Ohio 1985).

56.Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556 (W.D. Pa. 1989).

57.984 F.2d at 553 & n. 7.

58.Id.

59.N.J. Stat. Ann. § 58:10-23.11g1 to 6 (West 1994).

60.Id. The New Jersey statute is similar to the EPA regulations not only in substance, but also in language, such as the use of the terminology "reasonably commercial" to describe the permissible time period for completing a sale of foreclosed property, and to describe the lender's general efforts to transfer the property. Id.

61.Del. Code Ann. tit. 7, § 9106 (1993).

62.Tex. Water Code Ann. § 26.3514 (West 1994).

63.Compare George A. Nation, Life Without EPA's Rule Interpreting CERCLA's Secured Party Exemption, 111 Banking L.J. 499 (1994) (supporting idea that under current law, lenders should completely avoid all transactions with any company whose facility reveals presence of hazardous substances) with Howard M. Shanker, A Lender's Guide to Environmental Policy Development, 111 Banking L.J. 540 (1994) (suggesting lenders, through careful information gathering process, can avoid liability by calculating risks and making informed business decisions).

64.42 U.S.C. §§ 9607(b)(3), 9601(35) (1996).



65.42 U.S.C. § 9607(b)(3) (1996).

66.Id.

67.42 U.S.C. § 9601(35)(A) (1996).

68.42 U.S.C. § 9601(35)(B) (1996).

69. A company cannot, however, abandon contaminated property that puts the public health or safety in danger. See *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (holding that a bankrupt company could not opt to abandon property which contained 470,000 pounds of highly volatile contaminated oil).

70. See, e.g., Philip H. Gitlen, *Voluntary Clean Up Programs*, 1 *Albany Env'tl. Outlook* 28, 28 (1995); Richard D. Morse & John D. Chirlin, *Environmental Enforcement and Compliance in New York State*, 1 *Albany Env'tl. Outlook* 50, 52 (1995); Terry J. Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 *Conn. L. Rev.* 789 (1995).

71. See generally Douglas A. McWilliams, *Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization*, 21 *Ecology L.Q.* 705 (1994).

72. But see Sara A. Goldberg, *Lender Liability under CERCLA: Shaping a New Legal Rule*, 4 *N.Y.U. Env'tl. L.J.* 61, 74-77 (1995) (asserting that CERCLA should require lenders to monitor borrowers so that lenders have "gatekeeper liability").

73. Id. at 69-70.

74. Id.

75. Id.

76. See Thomas W. Church & Robert T. Nakamura, *Beyond Superfund: Hazardous Waste Cleanup in Europe and the United States*, 7 *Georgetown Int'l Env'tl. L. Rev.* 15, 35 (1994) (noting Dutch statute has "fair share" liability standard); Michael J. Gergen, Note, *The Failed Promise of the "Polluter Pays" Principle: An Economic Analysis of Landowner Liability for Hazardous Waste*, 69 *N.Y.U. L. Rev.* 624, 691 n.195 (1994) (citing *Chemical Mfrs. Ass'n, A "Fair Share" Liability System for Superfund 1-2* (Aug. 17, 1993)).

## EXAMINING THE PRIMA FACIE CASE IN MENTAL DISABILITY DISCRIMINATION CASES and RAISING QUESTIONS ON SHIFTING BURDENS

by

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### *Introduction*

The Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and state disability discrimination laws, all of which prohibit discrimination against persons with handicaps or disabilities, require employers to think twice before taking action against applicants or employees who fall into this legally protected category. Though the common perception that the primary beneficiaries of these laws would be the wheelchair-bound, hearing or vision impaired persons, and others with various physical ailments, a study by the National Center for Health Statistics showed that as of December 1994, psychiatric impairments were the second largest category of complaints to the EEOC--at 11%. The largest category was persons with back-related problems [1]. The numerous forms that mental disabilities take present unique problems to parties concerned with implementation of, or compliance with, those laws. Learning disabilities alone (just one of the many mental disability categories) have had a major impact, not only on educational institutions and employers, but also on professional licensing bodies which administer proficiency tests--for example, in 1994, of the 1,250 applicants who requested accommodations for taking the LSAT test, 62% claimed to have a learning disability [2].

Recent cases alleging discrimination by persons claiming mental disabilities in an employment context are the focus of this paper. After extensive discussion of the prima facie case and what factors are considered by the courts when faced with mental disability discrimination cases, the focus shifts to an examination of the shifting burden of proof in these cases. The author concludes that there is a lack of consistency in court cases on the issue of burden of proof. This inconsistency makes it difficult to predict how any court will decide a particular disability case.

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