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Lender Liability Under Pennsylvania Environmental Law

Joel R. Burcat
*Linda J. Shorey**

I. INTRODUCTION

Over the centuries, creditors have had many things to fear, including inflation, bankruptcy, military conflict, ayatollahs, and pestilence. Of all of the problems that have caused nightmares for creditors, arguably the most frightening is lender liability.¹ This is because previous attacks on the assets of creditors (i.e. the debt of their debtors) at worst would have resulted in the loss of the debt. Utilizing the theory of lender liability, parties have successfully sued creditors for amounts well in excess of the loan.² Recent environmental cases and statutes utilizing lender liability theories have added to the sleepless nights faced by many creditors.³ Creditors now are confronting not only the loss of their asset, but also the responsibility for paying hundreds of thousands of dollars, or more, to clean up hazardous waste dump sites.⁴ Ironically, secured credi-

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1. The term "lender liability" applies equally to all creditors, including lenders, mortgagees, parties that have extended credit, judgment creditors, and factors.

2. See, e.g. *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985)(\$13.5 million judgment awarded against creditor). For an excellent survey of the topic of lender liability, see Note, *The Doctrine of Lender Liability*, 40 U. FLA. L. REV. 165 (1988).

3. See statutes and cases as developed in this article.

4. See, e.g., *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986)(summary judgment granted in favor of U.S. Environmental Protection Agency and against bank-defendant for EPA's costs of cleaning up a hazardous waste site contaminated by mortgagor, where EPA had spent \$551,713 to clean up hazardous wastes from mortgaged

tors, who always expected special protection and consideration regardless of the financial condition of their debtors, now find themselves facing scrutiny from state and federal environmental regulators, other creditors, and neighbors of environmental disaster sites.⁵

On the national scene, federal courts have failed to examine the traditional grounds for lender liability in analyzing environmental lender liability cases.⁶ Partly, this is a result of inadequate guidance from Congress.⁷ Although the federal cases have focused on the relatively narrow theory of lender liability under hazardous waste laws, nothing in the federal statutes limits suits against creditors under any other federal environmental law.⁸ The states, likewise, have enacted environmental legislation that contains traps for unwary creditors and this legislation is worthy of reexamination by creditors and their counsel.⁹

Pennsylvania, a perennial leader in the field of environmental law and protection of the environment, has laws that bear directly on the value of debts to creditors. Some of the Pennsylvania environmental laws have been on the books for many years. Other laws are relatively new. The older laws have been copied by other states and the federal government when enacting new environmental leg-

premises).

5. See *Guidice v. BFG Electroplating & Mfg. Co.*, 30 Env't Rep. Cas. (BNA) 1665 (W.D. Pa. 1989) (bank-creditor sued by neighbor of hazardous waste disposal site).

6. See cases as developed in this article. The federal courts see the Federal Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (1982 & Supp. 1986) (CERCLA) as mandating the development of federal common law, rather than the application of the law of any particular state, when determining who may be liable under CERCLA for cleanup costs associated with a hazardous waste site. See *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15 (D.R.I. 1989). The *Kaiser-Roth* case dealt with the factors to be considered in determining whether a parent corporation could be held responsible for the activities of its subsidiary at a hazardous waste site. Six different theories of liability were offered by the plaintiff. The court found the parent could be held liable under two—"parent as operator" and "piercing the corporate veil"—and did not address the other four proposed theories. Of interest is the court's analysis of the parent as operator, which focused on the control the parent asserted over the activities of the subsidiary. *Id.* at 22-23.

7. See *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988) ("It is not surprising that, as a hastily conceived and briefly debated piece of legislation, CERCLA failed to address many important issues. . . . The meager legislative history available indicates that Congress expected the courts to develop a federal common law to supplement the statute.")

8. See Gieser, *Federal and State Environmental Law: A Trap for the Unwary Lender*, 1988 B.Y.U. L. Rev. 643.

9. See Gieser, *supra* note 8.

islation.¹⁰ Pennsylvania's newer laws are modelled on existing federal laws.¹¹ In several cases, the Pennsylvania Department of Environmental Resources (DER) has gone beyond seeking liability merely under the hazardous waste laws. In bankruptcy and administrative proceedings DER has suggested the extension of lender liability to mining¹² and oil and gas cases.¹³ As Pennsylvania's administrative agencies and courts interpret these laws, lenders will feel a significant impact on how they conduct business in the Commonwealth. Other states and the federal courts will, no doubt, take notice of the decisions that are focusing on Pennsylvania. This article examines and discusses the various Pennsylvania environmental statutes and cases interpreting those statutes under which creditors may be held liable for environmental harm caused by their debtors.

II. ENVIRONMENTAL LIABILITY OF CREDITORS

The genesis of the theory of environmental liability of creditors began in 1980 with the enactment of the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund).¹⁴ The uninitiated reader may not be aware that the theory of environmental liability of creditors was not successfully asserted or reported until after the enactment of CERCLA.¹⁵ The theory of environmental lender liability springs from

10. The Federal Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 - 1328 (1982) is based, in part, on an early version of the Pennsylvania Surface Mining Conservation and Reclamation Act, PA. STAT. ANN. tit. 52 §§ 1396.1 - 1396.31 (Purdon Supp. 1989).

11. The Pennsylvania Hazardous Sites Cleanup Act, PA. STAT. ANN. tit. 35 §§ 6020.101 - 6020.1305 (Purdon Supp. 1989) is based on the federal Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 - 9675 (1982).

12. *Ford Motor Credit Co. v. S. E. Barnhart & Sons*, 664 F.2d 377 (3d Cir. 1981).

13. *Pennbank v. DER*, No. 88-281-M (Pa. EHB Feb 15, 1989), 1989 Pa. Environ. LEXIS 39.

14. 42 U.S.C. §§ 9601-9675 (1982 & Supp. 1986). As a number of commentators have already addressed in detail the general issue of liability of creditors under federal environmental laws, this article will summarize the basis of the theory of liability, but will not describe in detail matters that have been addressed more fully elsewhere. See Comment, *Interpreting the Meaning of Lender Management Under Section 101(20)A of CERCLA*, 98 YALE L.J. 925 (1989); Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WISC. L. REV. 139; Gieser, *supra* note 8; Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors and other Deep Pockets*, 103 BANKING L.J. 509 (1986).

15. See Burcat, *supra* note 14, at 509. The first case that discussed environmental liability of a creditor was *In re T. P. Long Chem. Inc.*, 45 Bankr. 278, 288-89 (Bankr. N. D. Ohio 1985)(dicta).

judicial interpretations of CERCLA.

CERCLA establishes four categories of persons, known as "responsible persons," who may be held responsible for paying the cost of cleaning up environmentally contaminated sites.¹⁶ These categories include the current owners and operators of an environmentally contaminated facility, the owners and operators of such a facility at the time of disposal of hazardous substances, generators of hazardous waste materials disposed at the facility, and persons who transported hazardous waste materials to the facility.¹⁷ Under CERCLA, the government or a private party is permitted to recover from responsible persons certain costs incurred in responding to releases or threats of releases of hazardous substances from facilities.¹⁸

CERCLA did not single out creditors for special liability. In fact, creditors were granted a special exception from liability, known as the "security interest exemption."¹⁹ This exemption excludes certain secured creditors from the definition of "owner" or "operator" under CERCLA. Ironically, the security interest exemption suggested to the courts and some litigants that creditors could be held liable for environmental damages caused by their debtors. Subsequent court decisions have solidified the theory of environmental liability of creditors.²⁰

Separate from the exemption for secured creditors, CERCLA also contains three separate statutory defenses to liability.²¹ These provisions provide responsible parties with statutory defenses from liability for acts of God, acts of war, and the acts of third parties

16. 42 U.S.C. § 9607(a) (1982).

17. *Id.*

18. *Id.*

19. 42 U.S.C. § 9601(20)(a) (1982). The security interest exemption states: "Owner or operator" means. . . (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility. . . . *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.*

Id. (Emphasis added).

20. *Guidice v. BFG Electroplating & Mfg. Co.*, 30 Env't Rep. Cas. (BNA) 1665 (W.D. Pa. 1989); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193 (E.D. Pa. 1989); *Coastal Casting Serv., Inc. v. Aron*, No. H-86-4463 (S.D. Tex. Apr. 8, 1988); *United States v. Fleet Factors Corp.*, 724 F. Supp. 955 (S.D. Ga. 1988); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986); *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. 1985). See *Polger v. Republic Nat'l Bank*, 709 F. Supp. 204 (D. Col. 1989) (bank's motion to dismiss CERCLA claim granted in part, no reference made to security interest exemption).

21. 42 U.S.C. § 9607(b) (1982).

(the "third party defense"). These defenses were relied on infrequently during the early years of the act.²²

In 1986, Congress amended CERCLA when it enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA).²³ SARA did not change the language of the security interest exemption, but it did add additional, and very stringent, requirements for making out the so-called "third party defense" to liability.²⁴ To obtain the benefit of this defense, the claimant is required to prove that the contamination was caused by a third party who did not have a "contractual relationship" with the claimant, that the claimant exercised due care with respect to the hazardous substances, and that the claimant took precautions against foreseeable acts or omissions of the third party.²⁵ Since the enactment of SARA to prove a lack of a contractual relationship, the claimant must establish that if the contamination occurred before he owned the property, he did not know and had no reason to know of the contamination at the time he acquired the facility.²⁶ Proof that the claimant had no knowledge of the contamination includes evidence of an "appropriate inquiry,"²⁷ which may include an environmental audit.²⁸ From a public policy perspective, the en-

22. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1049 (2d Cir. 1985)(third party defense dismissed by court).

23. Pub.L. No. 99-499, 100 Stat. 1613 (1986).

24. 42 U.S.C. § 9601(35) and 9607(b) (1982). See Marcus, *The Price of Innocence: Landowner Liability Under CERCLA and SARA*, 6 TEMP. ENVTL. L. & TECH. J. 117 (1987).

25. 42 U.S.C. § 9607(b) (1982).

26. 42 U.S.C. § 9601(35)(A) (Supp. 1986). An individual claimant may be entitled to the defense if he can establish that he acquired the facility by inheritance. A governmental claimant may escape liability if it establishes that it acquired the facility through escheat, involuntary transfer, or eminent domain. *Id.*

27. The full text of the CERCLA provision requiring an appropriate inquiry takes into consideration the relative level of sophistication of the claimant:

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.

42 U.S.C. § 9601(35)(B) (Supp. 1986).

28. Environmental audits are the best way to protect against unforeseen liability. Such audits, however, are expensive and not infallible. See *BCW Assoc., Ltd. v. Occidental Chem. Corp.*, No. 86-5947, 1988 U.S. Dist. LEXIS 11275, 75 (E.D. Pa. Sept. 30, 1988)(plaintiff and former owners not entitled to assert third party defense even though two environmental

actment of SARA reemphasized the intent of Congress to transfer the cost of cleaning up hazardous waste sites from the public to the private sector of the economy.²⁹

Four cases are of especial significance to an understanding of the environmental liability of creditors: *United States v. Mirabile*;³⁰ *United States v. Maryland Bank & Trust Co.*;³¹ *United States v. Fleet Factors Corp.*;³² and *Guidice v. BFG Electroplating & Mfg. Co.*³³

*United States v. Mirabile*³⁴ was the first case to directly address the issue of environmental lender liability. In *Mirabile*, three lenders were joined as third party defendants by the original defendant in a CERCLA cost recovery action. One lender had foreclosed on a mortgage it held on the site without taking title and, four months later, transferred its interest in the property to a third party, it also had taken minimal action to protect the site from depreciation. The second lender had a second position security interest in the real and personal property of the owner but took no action at the site other than to visit the site to monitor liquidation of assets. The third lender, who held a first position security interest in the personal property of the owner, became involved in the management of the owner to assist the owner in working out the debt and in paying off the loan.³⁵ The court granted motions for summary judgment made by the first two lenders but not that of the third

audits had been conducted that failed to show the presence of hazardous lead). Creditors, purchasers of real estate and lessors may find added protection through the use of indemnification agreements, representations and warranties contained in loan documents, agreements to allocate costs of cleanup, escrowing of funds, and other means. See Davidson, *Environmental Considerations in Loan Documentation*, 106 BANKING L.J. 308 (1989); Burcat, *Environmental Liability of Creditors under Superfund (with Forms)*, 33 PRAC. LAW., Mar. 1987, at 13, 19-23.

29. Commentators disagree on whether Congress intended to hold liable under CERCLA mortgagees that foreclose on contaminated sites. See Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 926 (1989)(Congress intended that mortgagees that foreclosed on real property would be liable); Tupi, *Guidice v. BFG Electroplating: Expanded CERCLA Liability for Foreclosing Lenders*, 4 TOXICS L. REP. (BNA) 844, 848 (1989)(Congress intended that mortgagees that foreclosed on real property would not be liable). At least one commentator has argued that "SARA cripples the foreclosure process." Comment, *SARA Slams the Door: The Effect of Superfund Amendments on Foreclosing Mortgagees*, 34 WAYNE L. REV. 223, 239 (1987).

30. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20994 (E.D. Pa. 1985).

31. 632 F. Supp. 573 (D.Md. 1986).

32. 724 F. Supp. 955 (S.D.Ga. 1988).

33. 30 Env't Rep. Cas. (BNA) 1665 (W.D. Pa. 1989).

34. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20994 (E.D. Pa. 1985).

35. 15 Env'tl. L. Rep. at 20996-97.

lender.³⁶ The *Mirabile* court never examined the well established body of lender liability law, but based its ruling on its interpretation of CERCLA. The court ruled that "prudent and routine steps to secure the property against further depreciation" did not warrant the imposition of liability.³⁷ To be found liable, a secured creditor "must, at a minimum, participate in the day-to-day operational aspects of the site."³⁸

In *United States v. Maryland Bank & Trust Co.*,³⁹ the court granted a motion for summary judgment against a bank defendant that was the secured creditor of an individual who had created a hazardous waste site. The creditor had foreclosed on the mortgage and taken title to the property in response to its debtor's failure to pay the underlying debt. The court reasoned that the security interest exemption protected only those parties holding security interests and nothing more.⁴⁰ Once the bank foreclosed and took title, it lost both its security interest and its protection.⁴¹

In *United States v. Fleet Factors Corp.*,⁴² the creditor defendant had taken a security interest in equipment, fixtures and inventory and a mortgage on the facility. The creditor had executed on a judgment against the personalty.⁴³ The facility was later discovered to contain hundreds of drums of hazardous wastes. The court held that the creditor's activities, prior to the time it took possession of the property to conduct an auction of the collateral, did not give rise to a cause of action under CERCLA.⁴⁴ During the six

36. *Id.* The court specifically ruled that the following activities of the lenders did not expose the creditors to CERCLA liability: protecting the subject property from vandalism by boarding up windows and changing locks; making inquiries as to the cost of removal of drums of hazardous wastes located on the property; having a loan officer visit the property on several occasions to show the property to prospective purchasers; visiting the property to monitor the liquidation of assets; monitoring cash collateral accounts, ensuring that receivables went to the proper account; and establishing a reporting system between the debtor and the bank. *Id.* at 20996-97. The court also ruled that a bank that foreclosed on a mortgage, purchased the property at a sheriff's sale, and then transferred its right to the title before accepting the deed, was not liable as an owner under CERCLA. *Id.* at 20996.

37. *Id.*

38. *Id.* This holding has been followed by the court in *United States v. Nicolet, Inc.*, 712 F. Supp. at 1204-05.

39. 632 F. Supp. 573 (D. Md. 1986).

40. 632 F. Supp. at 579. Some controversy exists regarding the court's interpretation of the extent of the security interest exemption. See Burcat, *supra* note 14, at 522-23.

41. *Maryland Bank & Trust Co.* has been followed by the court in *Guidice v. BFG Electroplating & Mfg. Co.*, 30 Env't Rep. Cas. (BNA) 1665, 1670-71.

42. 724 F. Supp. 955 (S.D. Ga. 1988).

43. The creditor never foreclosed on the real property. 724 F. Supp. at 957.

44. *Id.* at 959-60. The pre-auction activities included holding the security interests in the real and personal property, consultations with the debtor, financing the debtor, collect-

months that the creditor's representatives occupied the facility to conduct the auction and to remove the remaining collateral, however, the court ruled that the creditor may have conducted activities giving rise to CERCLA liability. The court denied the creditor's motion for summary judgment.⁴⁵ In determining whether the creditor could rely on the security interest exemption, the court followed the *Mirabile* reasoning on control of a facility:

I interpret the phrases "participating in the management of a . . . facility" and "primarily to protect his security interest," to permit secured creditors to provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation.⁴⁶

The most recent of the significant environmental lender liability cases is *Guidice v. BFG Electroplating & Mfg. Co.*⁴⁷ In *Guidice*, a bank, over an 11 year period, made loans to an industrial enterprise and obtained security interests in the company's real and personal property. When the debtor failed to pay on the loan, the bank confessed judgment on the loans and later foreclosed on the mortgage. The bank bid on the property at the sheriff's sale and subsequently accepted a sheriff's deed. It held title to the property for eight months before conveying the property to a trustee. While the bank owned the property, its tenant may have allowed hazardous substances to leak into the ground or drain onto an adjacent alley.⁴⁸ Several years later, the bank was joined as a third party defendant to a personal injury action relating to an *adjacent* property as a result of its prior involvement with the mortgaged premises. In ruling on the bank's motion for summary judgment, the court held that the bank's pre-foreclosure activities did not amount to control of the facility but "were prudent measures undertaken to protect its security interest in the property."⁴⁹ As to

ing on accounts receivable that had been assigned by the debtor, and checking the credit of the debtor's customers. *Id.*

45. *Id.* The creditor's representatives, or buyers of the collateral, may have moved drums of hazardous wastes from one part of the facility to another and may have knocked loose asbestos from coated pipes. In addition, the creditor's representative was required to leave the facility in a "broom clean" condition. *Id.* at 958.

46. *Id.* at 960 (emphasis in original).

47. 30 Env't Rep. Cas. (BNA) 1665 (W.D. Pa. 1989).

48. *Id.* at 1671.

49. *Id.* at 1669. The acceptable activities included holding a mortgage and other security interests, receiving periodic financial statements, meeting with officials of the debtor, actively assisting the debtor to obtain an SBA loan, communicating with DER and the local

the time period after foreclosure, the court examined the impact of the SARA amendments and concluded that Congress did not intend to "create a special class of otherwise liable landowners."⁵⁰ "When a lender is the successful purchaser at a foreclosure sale, the lender should be liable to the same extent as any other bidder at the sale would have been."⁵¹ The bank was held to be liable under CERCLA for any releases of hazardous substances that occurred during its nine month ownership of the property.

It is worth noting that none of the environmental lender liability cases have examined the well established law of lender liability.⁵² In particular, the courts have failed to utilize this existing body of law to determine whether the creditor has involved itself to such an extent as to be liable as an owner or operator. For example, while generally, creditors are not liable for the debts of their debtors, under certain circumstances a creditor may be liable for his debtor's debts and obligations. Creditors have been held liable for exerting excessive control over their debtors.⁵³ Under the alter ego or instrumentality theory a creditor may be liable for all of the debtor's obligations.⁵⁴ Creditors have also been found liable for breach of contract and breach of good faith.⁵⁵ These lender liability theories have emerged as an outgrowth of common law tort, contract and agency principles. Nevertheless, nothing in CERCLA or SARA indicates any intent on the part of Congress to abrogate or even limit this body of law.⁵⁶

All of the federal cases on environmental lender liability have dealt with liability under CERCLA. There is no restriction, how-

municipality regarding wastewater discharge compliance and discussing with company officials the status of its accounts, personnel changes and the presence of raw materials. The bank also had a representative visit the property and make a report and referred a potential lessee to the owner of the facility. *Id.*

50. *Id.* at 1671. In criticizing this decision, one commentator has noted that "[i]n asserting the secured creditors exemption to avoid CERCLA liability, a foreclosing lender is not asking the court to 'create a special class' for its benefit; Congress has already done so." Tupi, *supra* note 29, at 846.

51. *Guidice*, 30 Env't Rep. Cas. (BNA) at 1671.

52. See Chaitman, *The Ten Commandments for Avoiding Lender Liability*, 22 U.C.C.L.J. 3 (1989); Note, *supra* note 2; Burcat, *supra* note 14, at 524-531. Creditors would be well advised to examine the traditional grounds for so-called "lender liability" when making risky loans, foreclosing on potentially contaminated facilities, or litigating environmental liability cases.

53. See Note, *supra* note 2, at 169-86.

54. *Id.* at 186-89.

55. *Id.* at 189-200.

56. It is up to counsel for creditors facing environmental liability claims to reassert this well established body of law as a defense to a CERCLA claim.

ever, on the application of this theory of liability under other environmental laws.⁵⁷ The Pennsylvania Department of Environmental Resources (DER) has suggested the extension of this theory in cases involving The Clean Streams Law,⁵⁸ the Surface Mining Conservation and Reclamation Act,⁵⁹ and the Oil and Gas Act.⁶⁰ Other Pennsylvania laws likewise contain language that suggests potential pitfalls for creditors. With this background in mind, the various significant environmental laws of Pennsylvania will be examined.

III. THE CLEAN STREAMS LAW

The Clean Streams Law⁶¹ was enacted in 1937.⁶² Section 3 of The Clean Streams Law declared discharges of sewage and industrial wastes into the "clean" waters of the Commonwealth to be public nuisances. The Clean Streams Law established a permit system whereby treated sewage and industrial wastes could be discharged into waters⁶³ but exempted acid mine drainage and silt from coal mines from its requirements until a "practical" means for removing the "polluting properties" of these substances became known.⁶⁴ Amendments to The Clean Streams Law in 1945 added restrictions on the discharge of acid mine drainage, prohibiting it into "clean" waters, and prohibited the discharge of silt from coal mines into any waters.⁶⁵ In 1965, the General Assembly, recognizing that The Clean Streams Law had not prevented an increase in polluted waters in the Commonwealth, again amended the law, providing for regulation of all discharges into any waters of the

57. See Gieser, *supra* note 8.

58. Act of June 22, 1937, P.L. 1987, *as amended*, PA. STAT. ANN. tit. 35, § 691.1 - 691.1001 (Purdon Supp. 1989). See *e.g.* Western Pennsylvania Water Co. v. DER, 1988 Pa. EHB 715, *aff'd* ____ Pa. Commw. ____, 560 A.2d 905 (1989).

59. Act of May 31, 1945, P.L. 1198, *as amended*, PA. STAT. ANN. tit. 52, §§ 1396.1-1396.31. (Purdon Supp. 1989). See *e.g.*, Ford Motor Credit Co. v. S. E. Barnhart & Sons, 664 F.2d 377 (3rd Cir. 1981).

60. Act of December 19, 1984, P.L. 1140, *as amended*, PA. STAT. ANN. tit.58, §§ 601.101-601.605 (Purdon Supp. 1989). See *e.g.*, Pennbank v. DER, No. 88-281-M (Pa. EHB Feb 15, 1989), 1989 Pa. Envirn. LEXIS 39.

61. Act of June 22, 1937, P.L. 1987, *as amended*, PA. STAT. ANN. tit. 35, § 691.1-691.1001 (Purdon Supp. 1989).

62. For a brief description of the common law and predecessor legislation dealing with water pollution, see R.T. Weston and J.R. Burcat, *Legal Aspects of Pennsylvania Water Management*, in *Water Resources in Pennsylvania: Availability, Quality and Management* 219, 230-37 (S.K. Majumdar, E.W. Miller and R.R. Parizek eds. 1990).

63. Section 206, 207 and 306 of the Act of June 22, 1937.

64. Section 310 of the Act of June 22, 1937.

65. Sections 6 and 7 of the Act of May 8, 1945, P.L. 435.

Commonwealth.⁶⁶ Mine discharge was classified as industrial waste and received no special treatment.⁶⁷ A significant change made by the General Assembly was the addition to The Clean Streams Law of section 316, which required owners and occupiers of land to allow the Commonwealth to enter onto the land to remedy pollution causing conditions.⁶⁸ Current section 316 of The Clean Streams Law,⁶⁹ grants broad authority to DER, potentially including authority to proceed against secured creditors.

Section 316 is entitled: "Responsibilities of landowners and land occupiers."⁷⁰ The section gives DER the authority (1) to order the landowner or occupier to correct a condition causing or having the potential to cause pollution or (2) to correct the condition and recover the cost by assessing a civil penalty against the landowner or occupier. For the purposes of section 316, "landowner" is defined as "any person holding title to or *having a proprietary interest in either surface or subsurface rights.*"⁷¹ The constitutionality of permitting DER to place the responsibility for correcting a condition causing water pollution on landowners or occupiers who did not cause the condition was addressed by the Pennsylvania Supreme Court in *National Wood Preservers, Inc. v. DER.*⁷² The owners of property on which there existed a condition causing water pollution argued that a DER order, issued pursuant to section 316, was an unconstitutional exercise of the police power. The court concluded that section 316 was not an unconstitutional exercise of the

66. Act of August 23, 1965, P.L. 372. Section 2 of that act contains the General Assembly's findings supporting the need for amendment.

67. *Id.*, section 2.

68. *Id.*, section 316.

69. PA. STAT. ANN. tit. 35, § 691.316 (Purdon Supp. 1989).

70. Section 316 of The Clean Streams Law, in pertinent part, states:

Whenever the department [DER] finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.

....

If the department finds that the pollution or danger of pollution results from an act of God in the form of sediment from land for which a complete conservation plan has been developed by the local soil and water conservation district and the Soil Conservation Service, U.S.D.A. and the plan has been fully implemented and maintained, the landowner shall be excluded from the penalties of this act.

71. PA. STAT. ANN. tit. 35, § 691.316 (Purdon Supp. 1989)(emphasis added).

72. 489 Pa. 221, 414 A.2d 37, *appeal dismissed*, 449 U.S. 803 (1980).

police power. In reaching its decision, the court stated: "It is also clear that the validity of an exercise of police power over land depends little upon the owner or occupier's responsibility for causing the condition giving rise to the regulation."⁷³

Justice Flaherty, in a concurring opinion, went to great lengths to specify that the court was not establishing a strict liability standard of liability for landowners.⁷⁴ Nevertheless, both the Commonwealth Court of Pennsylvania⁷⁵ and the Environmental Hearing Board (EHB)⁷⁶ have subsequently held that landowners may be liable for conditions on their property "without fault."

DER has also issued orders to clean up contamination to a landowner and an occupant of contaminated property, located adjacent to property that actually caused the contamination.⁷⁷ The commonwealth court, in the same decision in which it upheld the orders at issue in *National Wood Preservers*, sustained the adjacent landowners' appeals of the DER orders. The adjacent landowner and occupier were not liable, held the court, because they had never "engaged in any affirmative conduct" that would indicate "an association with or an adoption of the condition."⁷⁸ The supreme court dismissed, as being improvidently granted, DER's appeals of the commonwealth court's order sustaining these appeals because DER's appeals to the supreme court were untimely filed. The supreme court therefore, did not directly address the situation where the landowner or occupier does not own or occupy the land on which the condition causing the pollution was created.⁷⁹

In *Western Pennsylvania Water Co. v. DER*,⁸⁰ the EHB held that Western Pennsylvania Water Co. (WPW) was a landowner within the meaning of section 316 because of its installation of a

73. 489 Pa. at 238, 414 A.2d at 45 (footnote omitted).

74. 489 Pa. at 240-43, 414 A.2d at 47-48.

75. *Western Pa. Water Co. v. DER*, ___ Pa. Commw. ___, 560 A.2d 905 (1989); *Bonzer v. DER*, 69 Pa. Commw. 633, 452 A.2d 280 (1982); compare *William J. McIntire Coal Co. v. DER*, 108 Pa. Commw. 443, 452, 530 A.2d 140, 144 (1987) ("[B]efore liability will attach it must be shown that the owner or occupier knew of the polluting condition and positively associated with the engaging in some affirmative conduct, indicating an intent to adopt the condition.").

76. *Western Pa. Water Co. v. DER*, 1988 Pa. EHB 715, 726, *aff'd* ___ Pa. Commw. ___, 560 A.2d 905 (1989).

77. *Philadelphia Chewing Gum Corp. v. DER*, 35 Pa. Commw. 443, 387 A.2d 142 (1978), *aff'd in part and dismissed in part*, *National Wood Preservers, Inc., supra*.

78. *Philadelphia Chewing Gum Corp. v. DER*, 35 Pa. Commw. Ct. 443, 461, 387 A.2d 142, 151 (1978), *aff'd in part and dismissed in part*, *National Wood Preservers, Inc., supra*.

79. There appears to be no subsequent decision by either the Commonwealth or the Supreme Court directly addressing this issue.

80. 1988 Pa. EHB 715, *aff'd*, ___ Pa. Commw. ___, 560 A.2d 905 (1989).

water line on property over which WPW had a permanent easement. The EHB determined that DER could order WPW to abate a pollution causing condition existing on the property over which WPW owned an easement if the means chosen by DER were not unduly oppressive on WPW. In reaching its decision the EHB relied on *National Wood Preservers*. The EHB ruled that a landowner "includes those who have only a partial proprietary interest" and an easement was such an interest.⁸¹

WPW appealed the EHB's decision to the Commonwealth Court of Pennsylvania, which affirmed the EHB.⁸² The court agreed with the EHB, holding that WPW fell within the purview of section 316, because "a permanent easement for the installation of a water pipe line is a sufficient interest in land to bring the owner of the easement within the scope of Section 316 of the Clean Streams Law."⁸³

Relying on the landowner definition, DER has attempted to use section 316 as the authority for orders prohibiting the removal of equipment by a secured creditor at a strip mine site and from an oil well. No Pennsylvania courts have addressed the propriety of such a use of section 316, however, the issue has been addressed by the Environmental Hearing Board.

*Associates Commercial Corp. v. DER*⁸⁴ involved an attempt by DER to prohibit Associates from repossessing mining equipment located at surface mining operations operated by the Becker Coal Company. DER had issued an order prohibiting the equipment's removal based in part on section 316. The EHB concluded section 316 was inapplicable because Associates had not caused the nuisance DER was attempting to abate by ordering the equipment to remain. The EHB noted that no one has a duty to act merely because he possesses the ability to act and prevent harm. Associates had not previously and did not currently own the mine nor operate it. Therefore it had no duty to use the equipment in which it had a security interest to abate the nuisance resulting from the un-restored mine site.⁸⁵

81. 1988 Pa. EHB at 727.

82. *Western Pa. Water Co. v. Dept. of Environmental Resources*, ___ Pa. Commw. ___, 560 A.2d 905 (1989).

83. *Id.* at ___, 560 A.2d at 908 (footnote deleted).

84. 1979 Pa. EHB 158.

85. The EHB's reliance on the fact that Associates had not caused the nuisance should be examined in light of the subsequent ruling in *National Wood Preservers*. The remainder of the rationale of the EHB in *Associates* is valid.

A reference to the propriety of using section 316 to support an order prohibiting the removal by a secured creditor of production equipment from an oil well was made by the EHB in *Pennbank v. DER*.⁸⁶ The EHB noted that the reach of section 316 was limited where a party did not own or possess the land in question:

DER's Orders . . . cited certain sections of the Clean Streams Law (CSL). . . . The CSL was not included in the stipulated issues, however, and has not been alluded to in the briefs. As a result, our decision is not based upon the CSL. *Nonetheless, we note in passing that, since [Pennbank, the secured creditor] did not own or possess the land on which the wells were located, they would not fall within the scope of Section 316 of the CSL*⁸⁷

It appears very doubtful that DER can prohibit, on the basis of section 316, a secured creditor's removal of its collateral from a site containing a condition causing or capable of causing pollution. Likewise, the EHB has ruled against DER's position that section 316 applies to secured creditors. It is unlikely that DER will give up its contrary position. As the case law indicates, once the creditor becomes an owner of the site, DER's position becomes stronger.

IV. SOLID WASTE MANAGEMENT ACT

Pennsylvania enacted the Solid Waste Management Act (SWMA)⁸⁸ in 1980 as a means of managing solid and hazardous wastes from cradle to grave.⁸⁹ SWMA provided a means by which DER could regulate the disposal of municipal, residual, and hazardous wastes. The statute established a permit and enforcement system that required the operators of most waste facilities to obtain permits or face stiff penalties. In addition, the generation, transportation, storage, treatment and disposal of hazardous wastes were strictly regulated.⁹⁰ Violations of SWMA may result in a response from DER ranging from enforcement orders to civil fines to criminal penalties.⁹¹ SWMA is the primary vehicle utilized

86. No. 88-281-M (Pa. EHB Feb. 15, 1989), 1989 Pa. Environ. LEXIS 39.

87. *Id.* at 24 n. 2 (emphasis added).

88. Act of July 7, 1980, P.L. 380, PA. STAT. ANN. TIT. 35, §§ 6018.101-6018.1003 (Purdon Supp. 1989).

89. See Katcher, *Hazardous Waste Management Under Act 97*, 86 DICK. L. REV. 665 (1982).

90. The hazardous waste provisions of SWMA paralleled the provisions of the federal Resource Conservation and Recovery Act. 42 U.S.C. §§ 6901-6991 (1982).

91. PA. STAT. ANN. tit. 35, §§ 6018.601-6018.614 (Purdon Supp. 1989). See e.g., *Commonwealth v. Parker White Metal Co.*, 512 Pa. 74, 515 A.2d 1358 (1986); *Waste Conversion, Inc. v. Commonwealth*, — Pa. Commw. —, 568 A.2d 738 (1990).

by DER for pursuing those persons who have unlawfully disposed of waste substances.

Section 501 of SWMA makes it unlawful for "any person. . .to use, or continue to use, their land or the land of any other person or municipality as a solid waste processing, storage, treatment or disposal area without first obtaining a permit from the department [DER]. . . ."92 Provisions regarding municipal waste and residual waste are similar to the aforementioned provision. The act defines "person" very broadly to include virtually any entity and "any other legal entity whatsoever which is recognized by law as the subject of rights and duties."⁹³ No provisions mention financial institutions or creditors. Thus, while the definition of person is broad, the operative language of SWMA appears sufficiently narrow to exclude creditors from liability except in those instances when they would be exposed to liability as a result of traditional grounds for lender liability.⁹⁴

V. HAZARDOUS SITES CLEANUP ACT

On October 18, 1988, the Pennsylvania General Assembly enacted the Hazardous Sites Cleanup Act⁹⁵ (HSCA or Pennsylvania Superfund). The General Assembly found HSCA to be necessary to permit the Commonwealth to take full advantage of opportunities for state participation in the clean up of hazardous waste sites identified under CERCLA⁹⁶ ("Superfund sites") and to enable action to be taken at hazardous sites that are not placed by the United States Environmental Protection Agency (EPA) on the list of sites identified as priority sites for cleanup under CERCLA.⁹⁷ HSCA establishes a number of mechanisms whereby DER, or municipalities, may recover from persons deemed responsible the costs of abating public nuisances, costs incurred for responding to releases of hazardous substances, costs related to damages to natu-

92. PA. STAT. ANN. tit. 35 § 6018.501(a) (Purdon Supp. 1989).

93. PA. STAT. ANN. tit. 35, § 6018.103 (Purdon Supp. 1989).

94. The EHB has held, relying on dicta in the commonwealth court opinion in *Dept. of Environmental Resources v. O'Hara Sanitation Co.*, ___ Pa. Commw. ___, 562 A.2d 973 (1989), that SWMA does not authorize DER to hold a person responsible for pollution on his property solely on the basis of ownership. *Blumenthal v. Dept. of Environmental Resources*, No. 89-230-F (Pa. EHB March 6, 1990).

95. Act of October 18, 1988, P.L. 756, PA. STAT. ANN. tit. 35, §§ 6020.101-6020.1305 (Purdon Supp. 1989).

96. 42 U.S.C. §§ 9601-9675 (1982).

97. See PA. STAT. ANN. tit. 35, § 6020.102 (Purdon Supp. 1989).

ral resources, and civil penalties.⁹⁸ No Pennsylvania court has ruled on whether HSCA provides a private cause of action for damages; however, at least one federal court has ruled that HSCA does not provide a private cause of action for damages.⁹⁹

HSCA establishes three classes of so-called "responsible persons" that are liable for cleaning up hazardous waste sites: site owners or operators; generators of the hazardous substances; and, transporters of the hazardous substances.¹⁰⁰ As with many of the provisions of HSCA, this provision closely resembles CERCLA.¹⁰¹ As was pointed out in Section II of this article, creditors have been found to be responsible parties and liable under CERCLA, as owners or operators, for cleanup costs at hazardous waste sites.

As a result of the adverse rulings under CERCLA, financial institutions concluded that HSCA, as it was first proposed as a bill in the General Assembly,¹⁰² would have an adverse impact on the lending market in this state. Members of the General Assembly were convinced that a special exception for lending institutions from the definition of responsible person should be incorporated into the act, and HSCA as enacted contains such an exception.¹⁰³ Nevertheless, a review and analysis of this new Pennsylvania environmental law discloses areas of potential concern for creditors, including possible liability as a responsible person.

A. *Establishment of the Environmental Lien*

HSCA establishes a lien which may attach upon certain property of responsible persons, as described below.¹⁰⁴ (The lien is referred to herein as the "environmental lien.") The lien is *not* a "super-

98. PA. STAT. ANN. tit. 35, § 6020.509 (Purdon Supp. 1989).

99. *Lutz v. Chromatex, Inc.*, No. 88-1764 (M.D. Pa. Jan. 26, 1990), 1990 U.S. Dist. LEXIS 1568. The district court had previously permitted the plaintiff to amend his complaint to include a HSCA claim and invited a motion to dismiss. *Lutz v. Chromatex, Inc.*, 725 F. Supp. 258, 267 (1989).

100. PA. STAT. ANN. tit. 35, § 6020.701(a) (Purdon Supp. 1989).

101. See 42 U.S.C. § 9607(a) (1982). Because of the numerous similarities between HSCA and CERCLA the Pennsylvania courts will likely turn to interpretations of the federal law when seeking precedent or other guidance. Litigants should note, however, that corresponding provisions are not identical and significant differences exist.

102. See House Bill 1852, Printer's No. 2321, sections 103 and 701(b). The original bill contained, in its definition of "owner or operator," the same "security interest exemption" found in CERCLA. See Section 103 of HB 1852, Printer's No. 2321 at 10.

103. See PA. STAT. ANN. tit. 35, §§ 6020.103 and 6020.701(b)(1)(D) (Purdon Supp. 1989). As is described in the text following this footnote, the exemption finally adopted by the General Assembly is far broader than that contained in CERCLA.

104. PA. STAT. ANN. tit. 35, § 6020.509 (Purdon Supp. 1989).

lien."¹⁰⁵ Rather, the lien "has priority from the day of the filing of the notice of the lien over all subsequent claims and liens against the property."¹⁰⁶ The lien is established as a result of a judgment against a "responsible person."¹⁰⁷ Such a judgment results from an award of response costs, assessment of damages to natural resources, or assessment of civil penalties.¹⁰⁸

The award of response costs appears to be an award pursuant to a judgment in a court of common pleas or the EHB.¹⁰⁹ However, the assessment of damages to natural resources and the assessment of civil penalties are administrative assessments.¹¹⁰ The statute is unclear as to whether the assessment must be final pursuant to Pennsylvania administrative law in order for the lien to be perfected.

For the lien to be established against a responsible person's real or personal property, HSCA requires DER to send a notice of the lien, setting forth the amount of the judgment, to the prothonotary of the county in which the responsible person has real or personal property.¹¹¹ The prothonotary is required to enter upon the civil judgment or "order docket" the name and address of the responsible person and the amount of the lien as set forth in the notice of lien.¹¹² Once the prothonotary has entered the lien, "the lien shall attach to the revenue and all real and personal property of the responsible person, whether or not the responsible person is insol-

105. A superlien is a lien that grants the state a lien on property to ensure repayment of funds utilized by a state for environmental cleanup. The superlien usually subordinates previously filed liens, including mortgage liens. Gieser, *supra* note 8, at 690. The following states have environmental superlien statutes: Arkansas, ARK. STAT. ANN. § 8-7-516 (1987); Connecticut, CONN. GEN. STAT. ANN. § 22a-452a (West Supp. 1989); Massachusetts, MASS. ANN. LAWS ch. 21E, § 13 (Law. Co-op. Supp. 1989); New Jersey, N.J. STAT. ANN. § 58.10-23.11f (West Supp. 1989); New Hampshire, N.H. REV. STAT. ANN. § 147-B:10b (Supp. 1989); and, Tennessee, TENN. CODE ANN. § 68-46-209 (1987).

106. PA. STAT. ANN. tit. 35, § 6020.509(c) (Purdon Supp. 1989).

107. PA. STAT. ANN. tit. 35, § 6020.509(a) (Purdon Supp. 1989).

108. *Id.*

109. PA. STAT. ANN. tit. 35, § 6020.507(a) (Purdon Supp. 1989).

110. See PA. STAT. ANN. tit. 35, §§ 6020.507(d), 6020.1104(a) (Purdon Supp. 1989). The assessment of natural resources damages is *implied* by the act. While HSCA describes the *effect* of a natural resources damage assessment, it does not describe the manner by which such an assessment will be made. See PA. STAT. ANN. tit. 35, § 6020.507(d) (Purdon Supp. 1989). DER will, no doubt, argue that the assessment takes place when it issues an assessment letter. A responsible party (or the responsible party's creditors) will argue that the assessment does not take place until the Court of Common Pleas or EHB has issued its final ruling.

111. PA. STAT. ANN. tit. 35, § 6020.509(a) (Purdon Supp. 1989).

112. *Id.*

vent."¹¹³ Thus, in searching titles it will now be necessary to search both the civil judgment and order dockets to determine whether an environmental lien has attached.

HSCA also establishes a central registry of all environmental liens. The Commonwealth, presumably DER, is required to file a notice of lien with the Department of State in addition to the filings with a prothonotary.¹¹⁴ While the statute does not create any penalty for failure to register the lien with the Department of State, it would be prudent to check with the Department of State for the existence of an environmental lien.¹¹⁵

B. "Responsible Persons" and Exceptions Applicable to Financial Institutions

Under HSCA, the term "responsible person" is defined in a manner that attempts to exempt financial institutions:

"Responsible person." A person responsible for the release or threatened release of a hazardous substance as described in Section 701 [Pa. Stat. Ann. tit. 35, § 6020.701]. In no case shall a financial institution or its affiliate or a corporate instrumentality of the Federal Government be deemed to be a responsible person or to be jointly or contingently liable for the actions of a responsible person by virtue or supervision of, or other involvement with, the finances and operations of a responsible person in connection with a loan, obligation or other service provided.¹¹⁶

As previously noted, HSCA further defines "responsible person" to include three classes.¹¹⁷ The first is the owner or operator of the site, either at the time of the disposal, prior to the release of the hazardous substance, or during the release or threatened release. The second is the generator of a hazardous substance. The third is the transporter of the hazardous substance.

"Owner or operator" is defined in a manner that provides a broad security interest and general exemption for financial institutions, going well beyond the security interest exemption found in CERCLA:

113. *Id.*

114. PA. STAT. ANN. tit. 35, § 6020.509(b) (Purdon Supp. 1989).

115. In light of HSCA's close relationship to CERCLA, a recent order by Judge McCune of the Western District of Pennsylvania is of interest. On September 19, 1989, Judge McCune ordered a property lien, imposed pursuant to CERCLA, be removed because the federal government had not paid to clean up the site. *Superfund Lien Removed by Court*, Pennsylvania Law Journal-Reporter, Oct. 30, 1989 at 11.

116. PA. STAT. ANN. tit. 35, § 6020.103 (Purdon Supp. 1989).

117. PA. STAT. ANN. tit. 35, § 6020.701(a) (Purdon Supp. 1989).

A person who owns or operates or has owned or operated a site, or otherwise controlled activities at a site. The term does not include a person who, without participating in the management of a site, holds indicia of ownership primarily to protect a security interest in the site nor a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The term also shall not include a financial institution, an affiliate of such financial institution, a parent of a financial institution, nor a corporate instrumentality of the Federal Government, which acquired the site by foreclosure or by deed in lieu of foreclosure as a result of the enforcement of a mortgage or security interest held by such financial institution, parent of such financial institution, affiliate of such financial institution or a corporate instrumentality of the Federal Government before it had knowledge that the site was included on the National Priority List or corresponding State list and did not manage or control activities at the site which contributed to the release or the threatened release of a hazardous substance. For the purposes of this subsection, the term 'management' shall not include participation in or supervising the finances or fiscal operations of a responsible person or an owner or operator in connection with a loan to, services provided for or fiscal obligation of that responsible person or owner or operator or actions taken to protect or preserve the value of the site or operations conducted on the site. This exclusion does not apply to a political subdivision which has caused or contributed to the release or threatened release of a hazardous substance from the site.¹¹⁸

It is clear that the drafters attempted to counter the adverse opinions under CERCLA in *Mirabile*¹¹⁹ and *Maryland Bank & Trust*¹²⁰ by the use of the sweeping language contained in the definition of owner or operator. The definition, however, also makes it clear that the creditor's protection still hinges on his knowledge and the degree of management he has exerted.

HSCA contains a significant exemption for financial institutions, which become owners as a result of foreclosure, in the list of exceptions to liability for owners of real property.¹²¹ The exception in which the "financial institution exemption" is included states:

An owner of real property is not responsible for the release of threatened release of a hazardous substance from a site in or on the property when the owner demonstrates to the department that all of the following are true:

(i) The real property on which the site concerned is located was acquired by the owner after the disposal or placement of a hazardous substance on, in or

118. PA. STAT. ANN. tit. 35, § 6020.103 (Purdon Supp. 1989).

119. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. 1985). See *supra*, note 30 and accompanying text.

120. 632 F. Supp. 573 (D. Md. 1986). See *supra* note 31 and accompanying text.

121. PA. STAT. ANN. tit. 35, § 6020.701(b)(1) (Purdon Supp. 1989). This exemption is akin to the third party defense under CERCLA.

at the site.

(ii) The owner has exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances.

(iii) The owner took precautions against foreseeable acts or omissions of any third party and the consequences that could foreseeably result from such acts or omissions.

(iv) The owner obtained actual knowledge of the release or threatened release of a hazardous substance at the site when the owner owned the real property, and the owner did not subsequently transfer ownership of the property to another person without disclosing such knowledge.

(v) The owner has not, by act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the response action relating to the site.

(vi) The owner meets one of these requirements:

(A) At the time the owner acquired the site, the owner did not know, and had no reason to know, that a hazardous substance which is the subject of the release or threatened release was disposed of on, in or at the site. For purposes of this subparagraph, the owner must have undertaken, at the time of acquisition, all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. The department shall take into account specialized knowledge or experience on the part of the owner, 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 the contamination by appropriate inspection.

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

(C) The owner acquired the site by inheritance or bequest.

(D) *The owner is a financial institution or an affiliate of a financial institution or a corporate instrumentality of the Federal Government which acquired the site by foreclosure or by acceptance of a deed in lieu of foreclosure.*

(vii) The only basis of liability for the landowner is ownership of the land.¹²²

To qualify for the "financial institution exemption" all of the preconditions of the exception must be met. It is not sufficient that a lender has acquired a property by foreclosure if, for example, the lender has failed to take precautions against the foreseeable acts or omissions of a third party or has failed to meet one of the other provisions of the exemption.

The exemption calls for due diligence on the part of creditors,

122. PA. STAT. ANN. tit. 35, § 6020.701(b)(1)(Purdon Supp. 1989) (emphasis added) (the emphasized language is the "financial institution exemption").

although not to the extent of that required for other persons who unknowingly acquired contaminated property. In addition, the exception applies to *owners* of real property and not to *operators* of real property. Thus, an argument could be made that a bank, foreclosing on real property and allowing operations to continue once it has taken title, would be an operator of a facility and thus not able to qualify for the exception.

Under HSCA, once a bank or other lender has foreclosed on a mortgage and has taken possession of property, it may avail itself of HSCA's protection from liability as an "owner" of a hazardous waste site. This protection was unavailable to the banks described in *United States v. Maryland Bank & Trust Co.*¹²³ and *Guidice v. BFG Electroplating & Mfg. Co.*¹²⁴ An open question is whether DER or other interested parties would attempt to find some other basis of liability for a foreclosing creditor. It would not be surprising to see DER or a plaintiff argue that a lender is a responsible person despite the statutory protection for creditors.

C. Considerations for financial institutions

Regardless of the protection provided by HSCA, a lender may still be liable under the *federal* CERCLA as a result of its ownership of contaminated property as CERCLA does not contain a similar financial institution exemption.¹²⁵ Without further protection from Congress, HSCA's financial institution exemption may be a hollow victory for creditors. Worse yet, it could lull creditors into a false sense of security.

Lenders must be concerned about the lien provisions of HSCA. While the most prudent manner of proceeding would be to conduct a title search prior to entering into a secured transaction with a borrower to determine if an environmental lien has been filed, many types of loan arrangements require the payment of money by the lender to the borrower over a period of time (e.g., purchase money security interest). In such instances, the lender will be faced with the prospect that loans made after the initial loan may be displaced by an environmental lien.

123. 632 F. Supp. 573 (D. Md. 1986).

124. 30 Env't Rep. Cas. (BNA) 1665 (W.D. Pa. 1989).

125. A bill has been introduced in Congress (H.R. 2085) to redefine "owner or operator" under CERCLA to exclude commercial lending institutions that acquire ownership or control of a property to realize on a security interest. 135 Cong. Rec. E1325-26 (daily ed. April 25, 1989) (statement of Rep. LaFalce); See *Update on Lender Liability Under Superfund*, Secured Lending Alert, January 1990, at 2, 3.

HSCA seems to protect lenders from being deemed "operators" under that statute as a result of working with a borrower rather than foreclosing on the loan. Likewise, the exemption from the definition of owner seems to protect those financial institutions that have foreclosed on a mortgage. Neither protection is absolute. The lack of absolute protection in HSCA creates problems for creditors. Also, while financial institutions have some protection in the statute in the exception to the definition of "owner" where the creditor has foreclosed, the creditor must still satisfy six additional requirements to be entitled to this exemption from liability. In addition, there is no exception for a bank that becomes an operator of a hazardous waste site after the foreclosure on the loan.

VI. STORAGE TANK AND SPILL PREVENTION ACT

On July 6, 1989, the General Assembly enacted the Storage Tank and Spill Prevention Act (Storage Tank Act).¹²⁶ The Storage Tank Act regulates both aboveground and underground storage tanks. Consequently, it goes beyond similar provisions found in the federal Resource Conservation and Recovery Act (RCRA)¹²⁷ that are limited to underground storage tanks (USTs).¹²⁸ The Storage Tank Act contains requirements for the design, construction, operation, permitting and registration of most tanks, as well as requirements for insuring the financial responsibility of tank owners.¹²⁹ In addition, the Storage Tank Act contains provisions requiring plans for spill prevention response that must be prepared and submitted by the owners and operators of tanks.¹³⁰ Needless to say, as with virtually all environmental laws, the act contains enforcement provisions containing civil and criminal provisions.¹³¹

The terms "owner" and "operator" are used extensively throughout in the Storage Tank Act. The term "owner" is defined expansively and includes "any person who owns or has an ownership interest in a storage tank used for the storage, containment, use or dispensing of regulated substances."¹³² "Operator" is de-

126. Act of July 6, 1989, P.L. ____ (No.1989-32), PA. STAT. ANN. tit. 35, §§ 6021.101 - 6021.2104, (Pa. Legis. Serv. 133, Purdon 1989).

127. 42 U.S.C. §§ 6901-6991 (1982).

128. See 42 U.S.C. §§ 6991 - 6991i (1982).

129. PA. STAT. ANN. tit. 35, §§ 6021.301 - 6021.506 (Pa. Legis. Serv. 133, Purdon 1989).

130. PA. STAT. ANN. tit. 35, §§ 6021.901 - 6021.904 (Pa. Legis. Serv. 133, Purdon 1989).

131. PA. STAT. ANN. tit. 35, §§ 6021.1301 - 6021.1315 (Pa. Legis. Serv. 133, Purdon 1989).

132. PA. STAT. ANN. tit. 35, § 6021.103 (Pa. Legis. Serv. 133, Purdon 1989).

defined as “[a]ny person who manages, supervises, alters, controls or has responsibility for the operation of a storage tank.”¹³³ Owners are required to register aboveground¹³⁴ and underground tanks.¹³⁵ Owners and operators are also required to meet the financial responsibility requirements.¹³⁶ A special requirement of the Storage Tank Act is that it makes guarantors of financial responsibility directly liable for actions against insolvent or bankrupt owners or operators.¹³⁷ Owners are also required to provide spill prevention response plans,¹³⁸ and owners and operators are required to give notice of spills¹³⁹ and intention to construct new tanks.¹⁴⁰

The term “person” is defined expansively in a manner that is similar to the definition contained in SWMA.¹⁴¹ “Persons” may not “install, construct, erect, modify, operate or remove from service” all or part of an aboveground¹⁴² or underground¹⁴³ tank unless authorized by DER’s regulations or without a permit issued by DER. Persons may be liable for all violations of the act and are subject to all enforcement provisions enumerated in the act.¹⁴⁴

“Landowners” and “occupiers” are also mentioned in the Storage Tank Act. Neither landowner nor occupier is defined in the act. The Storage Tank Act allows DER to order an “owner, operator, landowner or occupier” to take corrective action where a release or threat of a release is occurring from a tank.¹⁴⁵ Where such

133. *Id.*

134. PA. STAT. ANN. tit. 35, § 6021.303(a) (Pa. Legis. Serv. 133, Purdon 1989).

135. PA. STAT. ANN. tit. 35, § 6021.503(a) (Pa. Legis. Serv. 133, Purdon 1989).

136. PA. STAT. ANN. tit. 35, § 6021.701 (Pa. Legis. Serv. 133, Purdon 1989).

137. PA. STAT. ANN. tit. 35, § 6021.701(c) (Pa. Legis. Serv. 133, Purdon 1989).

138. PA. STAT. ANN. tit. 35, § 6021.901 (Pa. Legis. Serv. 133, Purdon 1989).

139. PA. STAT. ANN. tit. 35, § 6021.904 (Pa. Legis. Serv. 133, Purdon 1989).

140. PA. STAT. ANN. tit. 35, § 6021.1101(a) (Pa. Legis. Serv. 133, Purdon 1989).

141. “Person” is defined as:

Any individual, partnership, corporation, association, joint venture, consortium, institution, trust, firm, joint-stock company, cooperative enterprise, municipality, municipal authority, Federal Government or agency, Commonwealth department, agency, board, commission or authority, or any other legal entity whatsoever which is recognized by law as the subject of rights and duties. In any provisions of this act prescribing a fine, imprisonment or penalty, or any combination of the foregoing, the term ‘person’ shall include the officers and directors of any corporation or other legal entity having officers and directors.”

PA. STAT. ANN. tit. 35, § 6021.103 (Pa. Legis. Serv. 133, Purdon 1989).

142. PA. STAT. ANN. tit. 35, § 6021.304 (Pa. Legis. Serv. 133, Purdon 1989).

143. PA. STAT. ANN. tit. 35, § 6021.504 (Pa. Legis. Serv. 133, Purdon 1989).

144. See PA. STAT. ANN. tit. 35, §§ 6021.1304 (public nuisances), 6021.1306 (criminal penalties), 6021.1307 (civil penalties) and 6021.1309 (enforcement orders) (Pa. Legis. Serv. 133, Purdon 1989).

145. PA. STAT. ANN. tit. 35, § 6021.1302(a) (Pa. Legis. Serv. 133, Purdon 1989).

a person fails to take action, DER may take the action and assess the costs incurred in responding to the release or threat of a release against the responsible "person."¹⁴⁶

The definitions of owner and operator are more expansive than those found in other Pennsylvania environmental laws. The term "person" is also expansively defined. The terms landowner and occupier appear to have been recycled from section 316 of The Clean Streams Law. It is likely that DER will argue that these terms should be construed in a manner that includes lender liability. It should be noted that there is no "security interest exemption" contained in the Storage Tank Act, so the protection contained in HSCA and CERCLA is not available to secured creditors.¹⁴⁷

VII. SURFACE MINING CONSERVATION AND RECLAMATION ACT AND COAL REFUSE DISPOSAL AND CONTROL ACT

For many years, Pennsylvania has regulated the operation of surface mines¹⁴⁸ and deep mines located in the Commonwealth. Surface mining first came under regulation with the passage of the Bituminous Coal Open Pit Mining Conservation Act (Bituminous Act) in 1945¹⁴⁹ and the Anthracite Strip Mining and Conservation Act (Anthracite Act) in 1947.¹⁵⁰ The reclamation requirements for surface mining operations under these acts were not stringent.¹⁵¹ In 1971, the Anthracite Act was repealed, and the Bituminous Act was amended and renamed the Surface Mining Conservation and Reclamation Act (SMCRA) and made applicable to all surface mining, anthracite, bituminous, and non-coal.¹⁵² The amendments included provisions requiring mine operators to backfill sites to their pre-mining contours, to reestablish permanent vegetation on reclaimed sites and to prevent soil erosion.¹⁵³

146. PA. STAT. ANN. tit. 35, § 6021.1302(b) (Pa. Legis. Serv. 133, Purdon 1989).

147. The analysis in prior sections of this article with respect to these terms applies with equal force under the Storage Tank Act and will not be repeated here. It should go without saying that creditors should take care to avoid becoming owners, operators, persons, landowners or occupiers under the Storage Tank Act.

148. For a detailed description of the regulation of surface mining in Pennsylvania, see Burcat & Geary, *Surface Mining Regulation in Pennsylvania*, 57 TEMP. L.Q. 1 (1984).

149. Act of May 31, 1945, P.L. 1198.

150. Act of June 27, 1947, P.L. 1095.

151. For example, backfilling was required to a height of only 3 feet above the exposed coal seam, at the base of the remaining highwall. Section 10 of the Act of May 31, 1945. Bond requirements were also minimal, requiring only \$200 per acre. Section 4 of the Act of May 31, 1945.

152. Act of November 30, 1971, P.L. 147.

153. Sections 4(b)(5) and (7) of the Act of November 30, 1971, PA. STAT. ANN. tit. 52, §

In 1966, the General Assembly enacted The Bituminous Mine Subsidence and Land Conservation Act¹⁵⁴ to protect surface structures and the land supporting them from damage likely to occur as a result of deep mine subsidences.¹⁵⁵ As discussed in Section III of this article, runoff and discharges from coal mines were originally exempted from the requirements of The Clean Streams Law and did not become fully regulated until amendments to that law in 1965. The current provisions of the SMCRA,¹⁵⁶ and the Coal Refuse Disposal and Control Act (CRDCA),¹⁵⁷ are directed to operators of surface mine sites and coal refuse disposal sites.¹⁵⁸

DER has attempted to use SMCRA and CRDCA, in particular the regulations promulgated pursuant to them, to support orders prohibiting bankruptcy trustees and secured creditors from removing equipment needed for reclamation from a mining site. The specific regulation utilized prohibited the removal of backfilling equipment from a surface mine site until reclamation was complete.¹⁵⁹ It also required the equipment to be kept "operable, in use, and capable of meeting the requirements of the reclamation plan throughout the life of the mining operation."¹⁶⁰ This regulation has been relied on by DER to issue orders prohibiting creditors from repossessing their collateral and requiring creditors to reclaim abandoned strip mines. A brief review of the decisions addressing DER's use of this regulation will show that SMCRA and CRDCA are unlikely vehicles for the imposition of liability on secured creditors.

In *Associates Commercial Corp. v. DER*,¹⁶¹ the EHB ruled that

1396.4(2)(G) and (E) (Purdon Supp. 1989).

154. Act of April 27, 1966, P.L. 31, *as amended*, PA. STAT. ANN. tit. 52, §§ 1406.1-1406.21 (Purdon Supp. 1989).

155. *Id.*, PA. STAT. ANN. tit. 52, § 1406.3 (Purdon Supp. 1989). Pennsylvania regulated deep mines and their surface effects for many years prior to the Act. See *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

156. Act of May 31, 1945, P.L. 1198, *as amended*, PA. STAT. ANN. tit. 52, §§ 1396.1-1396.31 (Purdon Supp. 1989).

157. Act of September 24, 1968, P.L. 1040, *as amended*, PA. STAT. ANN. tit. 52, §§ 30.51-30.66 (Purdon Supp. 1989).

158. Surface mining of minerals other than coal are now controlled by the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, PA. STAT. ANN. tit. 52, §§ 3301-3326 (Purdon Supp. 1989).

159. 25 PA. CODE §77.92(f)(2). This section was rescinded by 12 Pa. Bull. 2382 (effective July 31, 1982). The provisions of section 77.92(f)(2) were virtually identical to those that now appear at 25 PA. CODE §87.141(d).

160. *Id.*

161. 1979 Pa. EHB 158.

DER lacked the authority to prevent the secured creditor from repossessing mining equipment. In reaching this result, the EHB noted that DER's use of this regulation to prohibit the repossession of mining equipment would "impose two irreconcilable duties" upon the secured creditor Associates: Associates would have no control over the equipment until the equipment was repossessed and to repossess the equipment would require Associates to remove the equipment from the site.¹⁶² The EHB also noted that DER's interpretation would place a "duty upon an innocent third person to rectify a condition that he had no part in creating" and permit the operator to use the equipment for his own purposes without any assurance that Associates would receive any value.¹⁶³ The EHB also supported its determination by reference to the principles of statutory construction. The regulation in effect at that time was entitled: "Requirements Accompanying Permits Authorizing The Operation of Surface Coal Mines." It set forth the requirements undertaken by *operators* of coal mine sites when they obtained permits. The EHB noted that it was the operator who violated these requirements when his equipment was repossessed, not the secured creditor.¹⁶⁴ The EHB pointed out that the SMCRA provided many remedies against the operator of a mine who failed to restore mined areas and also provided a mechanism for obtaining the funds for reclamation when the operator did not do the work.¹⁶⁵

In *Matter of Zacherl Coal Co.*,¹⁶⁶ the federal district court addressed DER's appeal of the bankruptcy court's dismissal of DER complaints against the trustees and secured creditors of two coal companies in chapter 7 bankruptcy. DER sought to have the court order the trustees to restore the strip mining sites operated by the companies and to direct that no equipment necessary for the reclamation be removed from the sites. DER based its requests, in part, on a regulation.¹⁶⁷ The bankruptcy court dismissed the complaints. DER appealed.

The district court first noted that the appeals were moot because

162. *Id.* at 161.

163. *Id.* at 162.

164. *Id.*

165. *Id.*

166. 9 Bankr. 952 (W.D. Pa. 1981).

167. 25 PA. CODE §77.92(f)(2). This regulation was rescinded by 12 Pa. Bull. 2382 (effective July 31, 1982). A virtually identical regulation now appears at 25 PA. CODE §87.141(d).

DER had not attempted to have the bankruptcy proceedings stayed and the equipment had been removed from the site, sold and the proceeds distributed. DER argued that because the issue was one of first impression, the court should address it anyway. The court noted that the issue was not one of first impression and referenced *In re Reddale Coal Co., Inc.*¹⁶⁸ The court noted that execution under the bond, required of coal operators under The Clean Streams Law, was the proper course for DER to take to ensure restoration of the mine sites. The court concluded that the bond execution was an adequate remedy for violations alleged in the complaint, making it unnecessary to impose the obligation on the trustee. The court also noted that such a requirement could "frustrate" the purposes of the Bankruptcy Act.¹⁶⁹

*Ford Motor Credit Co. v. S.E. Barnhart & Sons*¹⁷⁰ dealt with an attempt to prohibit repossession of equipment at a strip mining site. Ford Motor Credit Co. brought suit to replevy a wheel loader used in stripping coal at a strip mine site. The district court held that Pennsylvania regulation, 25 Pa. Code §77.92(f)(2), prohibited Ford from removing the equipment until the reclamation work was completed. Ford appealed. The Third Circuit recognized that Pennsylvania state courts had yet to address the issue but noted the decisions in *Associates*, *Reddale*, and *Zacherl*. The Third Circuit noted that SMCRA does not refer to financial institutions. The court doubted that the General Assembly "ever intended the Department to issue regulations impairing the security interest of creditors created by the legislature in the Uniform Commercial Code."¹⁷¹ The court agreed with the EHB decision in *Associates* that the regulation does not apply to creditors whose only connection with the equipment is a security interest.

As did the EHB in *Associates*, the Third Circuit applied the

168. The district court notes in its opinion that the memorandum decision and order in the *Reddale* case were subsequently vacated at the request of the parties. The court, nevertheless, adopted the *Reddale* rationale. 9 Bankr. at 956 n.1.

169. *But cf., In the Matter of Quanta Resources Corp.*, 739 F.2d 912 (3d Cir. 1984), *aff'd sub nom. Midlantic National Bank v. New Jersey*, 474 U.S. 494 (1986). In *Quanta*, the Third Circuit held that a trustee could not abandon real estate owned by the bankrupt company where the property was extensively contaminated with PCBs. The court balanced the purpose of the bankruptcy provision permitting abandonment with the purpose of state environmental laws and concluded that the environmental concerns outweighed the protection of the bankruptcy estate. New York was the state challenging the abandonment, however, the court addressed the issue generically without referencing any specific environmental law.

170. 664 F.2d 377 (3d Cir. 1981).

171. *Id.* at 381-82.

principles of statutory construction, concluding that the title of the subchapter containing the regulation, "Requirements Accompanying Permits Authorizing the Operation of Surface Coal Mines," shows that the regulation is directed to those required to secure permits—operators. The court was careful to note that its decision was limited to a "party whose only contact with the strip mine operator and the mining operation is its security interest in a piece of mining equipment."¹⁷²

Because no Pennsylvania court has addressed DER's attempted use of SMCRA and CRDCA and the regulations promulgated thereto to prevent repossession of mining equipment and to order secured creditors to perform reclamation, it should be expected that DER will continue to make such attempted use of the acts and regulations. In addition, if a secured creditor, rather than repossessing equipment, opted to become involved in the mining operation itself, the creditor could find itself subject to the permitting requirements.

VIII. OIL AND GAS ACT

Unlike The Clean Streams Law, HSCA, SWMA, the Storage Tank Act, SMCRA, and CRDCA, the initial laws establishing regulation of oil and gas mining were motivated by a desire to conserve oil and gas and not a desire to protect the environment.¹⁷³ However, the impact of abandoned, or non-operating, mines upon water was not ignored. In 1891, Pennsylvania enacted legislation addressing the plugging of oil wells.¹⁷⁴ This legislation included a section making it the "duty of the person or persons interested in such [abandoned or non-operating well] to plug the same" in order to prevent water that could injure or pollute "any spring, water well or stream" from escaping.¹⁷⁵ This section, and the section establishing penalties for its violation, appear still to be in effect, although they do not appear to ever have been utilized.¹⁷⁶

The Oil and Gas Act,¹⁷⁷ enacted in 1984, specifically states that

172. *Id.* at 382.

173. See J. Kaput and J. Carroll, *Pooling and Unitization in Pennsylvania: An Overview*, in *Mineral Resource Development Law* 283, 283, 292-295 (Pennsylvania Bar Institute 1984).

174. Acts of May 6 and 26, 1891, P.L. 41 and 122.

175. Section 1 of the Act of May 26, 1891.

176. See PA. STAT. ANN. tit. 58, §§ 1, 2, and 3 (Purdon 1964).

177. Act of December 19, 1984, P.L. 1140, *as amended*, PA. STAT. ANN. tit. 58, §§ 601.101-601.605 (Purdon Supp. 1989).

one of its purposes is to “[p]rotect the natural resources, environmental rights and values secured by the Pennsylvania Constitution.”¹⁷⁸ Provisions of this act with potential impact on secured creditors are discussed below.

A. *General Liability of Creditors*

DER has attempted to prevent a secured lender from repossessing and removing oil well production equipment and to order the secured lender to plug an abandoned oil well in accordance with section 210 of the Oil and Gas Act.¹⁷⁹ The EHB rejected this attempt in *Pennbank v. DER*.¹⁸⁰

Section 210(a) of the Oil and Gas Act states, in pertinent part:

Upon abandoning any well, the owner or operator thereof shall plug the well in a manner prescribed by regulation of the department in order to stop any vertical flow of fluids or gas within the well bore unless the department has granted inactive status for such well pursuant to section 204.¹⁸¹

DER argued that a secured lender, because of the control rights it had under the loan documents, should be considered an “owner” within the meaning of section 210(a). The EHB concluded that “control” of the production equipment did not constitute the ownership required by section 210(a)—what was required was control of the well. The secured creditor would not fall within the ambit of section 210(a) until “affirmative steps to enter into possession and control of the wells” had been taken. Therefore, even where the secured creditor had the right to take control of the wells, it could not be ordered to plug the wells until it had taken affirmative steps to exercise control.

In its analysis, the EHB discussed other environmental statutes and the instances in which secured creditors had been held to have and not have liability. The EHB also briefly reviewed the legal responsibility of mortgagees and other secured creditors. In reaching its decision, the EHB was careful to note that there might be circumstances in which a secured creditor could be held responsible

178. *Id.*, §601.102(4).

179. Act of December 19, 1984, P.L. 1140, *as amended*, PA. STAT. ANN. tit. 58, § 601.210 Purdon Supp. 1989).

180. No. 88-281-M (Pa. EHB Feb. 15, 1989), 1989 Pa. Ervinn. LEXIS 39. EHB member Robert D. Myers' thoughtful, though short, opinion for the EHB in *Pennbank* is the only opinion that has seriously attempted to analyze the legal rights and obligations of creditors separate and apart from obligations arising from environmental law requirements. *See Id.*, slip op. at 8-18.

181. PA. STAT. ANN. tit. 58, § 601.210(a) (Purdon Supp. 1989).

for environmental problems.

Section 207 of the Oil and Gas Act¹⁸² contains a provision requiring “[e]ach oil or gas well owner or operator” to “restore the land surface within the area disturbed in siting, drilling, completing and producing the well.” On the basis of *Pennbank*, secured creditors should not be classified as owners as long as they have not exercised any right they might have to take control of the well.

B. *Oil and Gas Act Superlien*

Section 210(e) of the Oil and Gas Act,¹⁸³ has a potential impact on secured lenders. When a well is abandoned without plugging, section 210(e) permits DER to enter onto the premises, plug the well, obtain a superlien¹⁸⁴ on any production equipment left on the site, and sell the equipment to recover the cost of plugging. With respect to this lien on equipment for plugging costs, the section 210(e) states: “Said costs of plugging shall have priority over all liens on said equipment, casing and pipe, and said sale shall be free and clear of any such liens to the extent the costs of plugging exceed the sale price.” The seizure and sale of equipment authorized by this section has been upheld against a due process challenge.¹⁸⁵

Any creditor having a security interest in the production equipment left at an abandoned well could very well lose its security if DER elects to utilize this provision. It seems likely that DER will do just that if it continues to be unsuccessful in its attempts to utilize section 210(a) to order the secured creditor to plug the well.

Secured creditors should not have any liability under the Oil and Gas Act for their debtors' failure to comply with its provisions so long as they do not exercise any right of control. However, they face a very real possibility of losing any collateral, consisting of production equipment, left at the site if the debtor fails to plug an abandoned well in conformity with the requirements of the Oil and Gas Act.

182. PA. STAT. ANN. tit. 58, § 601.207 (Purdon Supp. 1989).

183. PA. STAT. ANN. tit. 58, § 601.210(e) (Purdon Supp. 1989).

184. *See supra* note 105.

185. *Pennsylvania Independent Petroleum Producers v. DER*, 106 Pa. Commw. 72, 525 A.2d 829 (1987), *aff'd*, 520 Pa. 59, 550 A.2d 195 (1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1568, 103 L.Ed.2d 935 (1989).

IX. CONCLUSION

Under Pennsylvania law secured creditors may be found liable for environmentally adverse conditions existing at their debtor's property. DER's willingness to assert environmental lender liability against creditors should give creditors pause for concern when making loans, assisting their debtors, or, especially, foreclosing on security interests on environmentally contaminated properties. As this article has demonstrated, the potential for liability exists under more than simply the hazardous waste laws.¹⁸⁶ The greatest areas of concern for creditors are under HSCA, the Storage Tank Act, and Section 316 of The Clean Streams Law.¹⁸⁷ Financial institutions must take care not to be lulled into a false sense of security because of the favorable language found in HSCA. Surely DER, or other potentially responsible parties, will attempt to bypass HSCA and file against creditors under the provisions of CERCLA that do not favor financial institutions.

The best defense available to creditors is a strong offense. Creditors should not become trapped in environmental lender liability through inadequate planning or poor loan management. Lenders may wish to consider requiring environmental audits before making larger loans to customers that have facilities using industrial processes or are purchasing commercial and industrial property.¹⁸⁸ Likewise, lenders should consider obtaining environmental audits prior to assisting these debtors when they are having difficulty repaying their loans and prior to foreclosing on these properties. Indemnification agreements, escrowing of funds, and representations and warranties to protect against environmental liability should become standard forms for all commercial creditors. Those forward thinking creditors that seize the initiative in this area will be the ones that succeed in avoiding this liability.

186. The reader should understand, by now, that such potential liability exists under a plethora of federal environmental laws, as well.

187. Section 316 of The Clean Streams Law is the provision which provides for liability "without fault" of the landowner or occupier. PA. STAT. ANN. tit. 35, § 691.316 (Purdon Supp. 1989).

188. A brief survey of the implications of Pennsylvania and federal law on buying and selling a business may be found in C. Cicconi, C. Kegel, Jr., M. Lieber, S. Pennwell & L. Reznick, *Buying & Selling a Business* 102-20 (1988).

