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Lender Liability under CERCLA: A Game of Chance or a Game of Skill

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LENDER LIABILITY UNDER CERCLA: A GAME OF CHANCE OR A GAME OF SKILL?

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I. INTRODUCTION

As with any game, avoidance of lender liability under the Comprehensive Environmental Response, Compensation and Liability Act, (CERCLA)[1] cannot properly be played with expectations of success until the players familiarize themselves with the rules. Unlike many games, however, CERCLA's rules are lacking in definite clarity and subject to varying judicial interpretation. As a result, avoiding lender liability under CERCLA is always challenging and often treacherous.

While it is perhaps flippant to analogize lender liability under CERCLA with a game, the gravity of the analogy comes into play when one considers the importance of knowing the rules before playing. One cannot hope to achieve success until one knows and understands those rules and appreciates the risks involved.

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1. CERCLA, 42 U.S.C. §§ 9601-9675 (1988), also known as Superfund, is by no means the only environmental law with which a lender needs to be concerned. However, this article is confined to a discussion of it. Other environmental laws which might adversely affect a lender and its borrowers are: Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1976) (RCRA); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988) (CWA); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1988) (FIFRA); Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-1276 (1988) (FHSA); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988); Rivers and Harbors Act, 33 U.S.C. §§ 401-467e (1988); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2671 (1988) (TSCA); Safe Drinking Water Act, 42 U.S.C. §§ 300(f)-300j-10 (1988) (SDWA); and Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k (1988) (SWDA).

For that reason, the purpose of this article will be to discuss the ways in which a lender can suffer liability under CERCLA; to discuss ways in which a lender can seek to avoid liability under CERCLA; and to discuss pending federal legislation which might in some way impact lender liability.

II. LENDER LIABILITY UNDER CERCLA

A. Background

CERCLA was enacted in 1980 to address the serious problem of improper, negligent, and reckless hazardous waste disposal practices which had only recently begun to surface.[2] The intent of CERCLA is to provide a means for the Environmental Protection Agency (EPA) to remediate old and abandoned hazardous waste sites so that they no longer pose a threat to health and public safety.[3] It also allows the EPA to seek reimbursement of these costs from those parties who are considered liable under the CERCLA definitions.[4]

There are four categories of liable parties under CERCLA. These categories can be found in 42 U.S.C. § 9607(a) (1988)[5] and are as follows:

1. The current owner and operator[6] of the site;[7]
2. past owners or operators if they owned or operated the site at the time the hazardous substances were disposed of at the site;[8]
3. generators of hazardous waste who arrange to have it disposed of or treated at the site;[9] and
4. any transporter of hazardous substances to the site.[10]

Liability under CERCLA does not depend on fault. Liability is possible when a party fits into one of these categories. This liability is joint and several,[11] although

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2. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 1980 U.S. CODE CONG. & ADMIN. NEWS (96 Stat.) 6119. In particular, the subcommittee investigation cited five significant problem locations: Hooker Chemical's three disposal sites in the Niagara Falls, New York area (Love Canal) which contained an estimated 352 million pounds of industrial chemical waste, including TCP (containing dioxin) and lendane, a pesticide; Occidental Chemical Company's site in Lathrop, California where thousands of gallons of pesticide formulation wastes were dumped into the ground; the millions of pounds of hazardous wastes dumped by Hooker in the municipal dumps of Long Island, New York; the Valley of the Drums in Shepardsville, Kentucky which contained over 17,000 barrels of hazardous waste; and the chemical control site in Elizabeth, New Jersey which contained over 40,000 barrels of hazardous waste and approximately 100 pounds of picric acid, a powerful explosive. *Id.* at 6121.

3. *Id.*

4. 42 U.S.C. § 9607(a) (1988).

5. This is reprinted in full in the Appendix.

6. For purposes of judicial interpretation, courts have held that the phrase "owner and operator," found in 42 U.S.C. § 9607(a)(1) (1988), must be read in the disjunctive and not in the conjunctive as legislatively worded. For a good discussion of this see United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986); *see also* United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

7. 42 U.S.C. § 9607(a)(1) (1988).

8. 42 U.S.C. § 9607(a)(2) (1988).

9. 42 U.S.C. § 9607(a)(3) (1988).

10. 42 U.S.C. § 9607(a)(4) (1988).

11. United States v. Chem Dyne Corp., 572 F. Supp. 802, 805-08 (S.D. Ohio 1983).

any person may seek contribution from any other person who is liable or potentially liable.[12]

Using this as a backdrop, this article will explore the various ways in which a lender may be at risk as a result of these environmental laws. Generally speaking, there are two avenues by which a lender can be adversely affected by CERCLA. The first avenue adversely affecting a lender under CERCLA is indirect liability. The second avenue is direct liability. Unfortunately, the two can often merge.

B. Indirect Liability

To say that a lender can be indirectly liable under CERCLA is a bit of a misnomer. However, a lender can face economic adversity as a result of CERCLA without being liable itself. This economic adversity finds its way to the lender by virtue of CERCLA liability which might be imposed on the lender's borrower.[13] Thus, if the borrower has the potential of becoming a responsible party under CERCLA, there is a substantial likelihood that, at some point in time, the borrower will be required to pay costs of remediation or damages to third parties. This, in turn, translates into a risk for the lender because the borrower would then have less money remaining from which he could repay his loan, thereby increasing the risk of default.[14]

A lender should also be concerned with the types of businesses in which a borrower's subsidiaries are engaged. Should a borrower's subsidiary be a potentially responsible party under CERCLA, the borrower may also be called upon to pay

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12. 42 U.S.C. § 9613(f) (1988).

13. J. MOSKOWITZ, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS: LAW AND PRACTICE 77-79 (1989).

14. *Id.*

costs of remediation or damages to third parties.[15] Again, this could cause the borrower some financial difficulty and increase the risk of default.

The third pathway to indirect liability for the lender concerns whether or not the borrower has succeeded to the assets and liabilities of another corporation. If the previous corporation is a liable party under CERCLA then the borrower, as a successor corporation, may be called upon by the EPA to pay for the liabilities of its predecessor.[16] This, in turn, would threaten the lender's investment.

The final pathway through which a lender can be adversely affected has to do with a lender's collateral. If a lender's collateral is determined to have hazardous waste upon it and the EPA is looking to the borrower to pay the costs of remediation, not only will the lender suffer the possibility of a default by its borrower but the lender may also face the financial burden of having its collateral greatly devalued. This one-two punch of loan default followed by worthless collateral can greatly affect the lender, depending on the size of its loan. However, it will not be as devastating as when the lender is held directly liable under CERCLA.

C. Direct Liability

The second avenue of lender liability under CERCLA is direct liability. This will occur if a lender is deemed to be a liable party under any of the four specific categories of liable parties under CERCLA.[17] Unless it is a highly unusual situation, the typical lender will never have to be concerned with liability under either section 9607(a)(3) or section 9607(a)(4) because a lender is generally not going to generate, transport, engage in the treatment of, or dispose of any hazardous sub-

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15. For an example of a parent corporation being held liable under CERCLA for the actions of its subsidiary, see Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990). The court held that the corporate veil would not be pierced unless there was a showing that the subsidiary corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the parent corporation. 893 F.2d at 83-84. The Fifth Circuit looked to the factors set forth by the court in *In re* Acushnet River & New Bedford Harbor Proc. *Re* Alleged PCB Pollution, to determine this. These factors are:

> (1) inadequate capitalization in light of the purposes for which the corporation was organized; (2) extensive or pervasive control by the shareholder or shareholders; (3) intermingling of the corporation's property or accounts with those of its owners; (4) the failure to observe corporate formalities and separateness; (5) siphoning of funds from the corporation; (6) absence of corporate records; and (7) nonfunctioning officers and directors.

Id. at 33. Thus, as long as the corporate formalities and separateness are observed, the corporate veil will not be pierced under CERCLA.

For other examples where the parent corporation has been held liable under CERCLA for the actions of its subsidiary, see *In re* Acushnet River & New Bedford Harbor Proc. *Re* Alleged PCB Pollution, 675 F. Supp. 22 (D. Mass. 1987); FMC Corp. v. Northern Pump Co., 668 F. Supp. 1285 (D. Minn. 1987); State of Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986); City of New York v. Exxon Corp., 112 Bankr. 540 (S.D.N.Y. 1990). *But see* United States v. Kayser-Roth, 724 F. Supp. 15 (D.R.I. 1989), *aff'd*, 910 F.2d 241 (1990) (holding that a parent could be held liable for its subsidiary's CERCLA liability without piercing the corporate veil if the parent corporation's control was all pervasive); *see also* United States v. Nicolet, 712 F. Supp. 1193 (E.D. Pa. 1989) (disregarding a parent corporation's separate corporate existence where, at the relevant time, the subsidiary was a responsible party under CERCLA, the parent had a substantial financial or ownership interest in the subsidiary and the parent controlled the management and operations of the subsidiary).

16. *In re* Acushnet River & New Bedford Harbor Proc. *Re* Alleged PCB Pollution, 712 F. Supp. 1010 (D. Mass. 1989); *see also* Ametec, Inc. v. Pioneer Salt & Chem. Co., 709 F. Supp. 556 (E.D. Pa. 1988); Solomon, *Successor Corporate Liability for Improper Disposal of Hazardous Waste*, 7 W. NEW ENGLAND L. REV. 909 (1985); Barnard, *EPA's Policy of Corporate Successor Liability Under CERCLA*, 6 STAN. ENVTL. L.J. 78 (1987).

17. 42 U.S.C. § 9607(a) (1988).

stance in its ordinary course of business. What does concern the lender is whether or not it currently owns or operates a hazardous waste site or has done so in the past during the time when hazardous substances were disposed of on that site.[18] Of particular importance to any lending institution is the statutory definition of the term "owner or operator." Excluded from this definition is any "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."[19] Generally speaking, this exemption was designed to make it clear that a secured creditor who held a mortgage or deed of trust covering a hazardous waste site was not to be considered an owner or operator for purposes of CERCLA liability.[20] However, if the lender is holding a security interest in a hazardous waste site and is deemed to have "participated in the management" of that site, that lender will lose this exemption.

1. Owner or Operator

If the bank is an owner or operator of a hazardous waste site at the appropriate time, it will be liable for the costs of remediation. This will occur when a lender purchases or leases some property for its own purposes that turns out to be contaminated. The most common way in which a lender would encounter this, however, would be for a lender to foreclose on or take a deed in lieu of foreclosure on some contaminated collateral.

The seminal case on this type of direct liability is *United States v. Maryland Bank & Trust Co.*[21] In this case the bank foreclosed on property which contained hazardous waste. The EPA asked the bank to clean up the property and remove the hazardous waste, but the bank refused. Thereafter, the EPA undertook to clean up the land itself and then looked to the bank to recover over $500,000 in remediation costs which the EPA had incurred. The bank contended that it was not an owner and operator under 42 U.S.C. § 9607(a)(1) in that it did not own the property and operate it simultaneously. Noting that the structure of section 9607(a) was not a model of statutory clarity,[22] and that Congress does not always follow the rules of grammar when enacting laws, this court held that Congress did not intend for someone to be liable under section 9607(a)(1) unless they both owned and operated the site.[23] Therefore, the fact that the bank was not an operator of this facility at this time was not dispositive of anything.

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18. 42 U.S.C. § 9607(a)(1)-(2) (1988).

19. 42 U.S.C. § 9601(20)(A) (1988). This is reprinted in full in the Appendix.

20. Brown, *Superfunds and Superliens: Super Problems for Secured Lenders*, 2 TOXICS L. REP. (BNA) 1131, 1132 (Mar. 16, 1988) (Though unclear, the legislative history of the Superfund law, taken together with traditional principles of commercial lending, suggest that a lender with a security interest in contaminated property would need to possess some additional evidence of ownership or be totally responsible for operation of the facility before it became an owner or operator who was responsible for clean up costs.).

21. United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986).

22. *Id.* at 578.

23. *Id.*

The bank further raised a defense based on the exemption from the definition of owner or operator found in 42 U.S.C. § 9601(20)(A). The bank argued that its foreclosure on this facility constituted an indicia of ownership "primarily to protect its security interest in the . . . facility."[24] Declining to grant the bank this exemption, the court held that the bank's security interest had terminated at the time of the foreclosure sale "at which time it ripened into full title."[25]

Another court has held that if a secured party purchased its collateral at the foreclosure sale and then promptly sold it to a third party, it would not lose its exemption.[26] However, there is no guidance as to what length of time could pass before the court would cease to allow the bank to retain its exemption.[27]

Recently a Michigan bankruptcy court refused to hold a strawman or conduit owner liable under section 9607(a)(2) where the entity in question merely acted as a conduit through which ownership of the site immediately passed.[28] In this instance the conduit, which was not a bank, held the property for only a day before transferring title to the new owner. The court reasoned that this situation was simply too tenuous to hold the conduit liable and that to hold otherwise would pervert the statutory intent of CERCLA.[29]

While this rationale seems appropriate for the type of situation which faced the *Diamond Reo Trucks* court, it is doubtful that this situation would be encountered by many lending institutions. Most lenders who know to whom they will sell this collateral upon foreclosure will simply make sure that the purchaser is present to purchase the collateral at the foreclosure sale. In addition, the entity which was deemed to be a conduit in *Diamond Reo Trucks* held title to the property on two occasions.[30] The first occasion, which lasted only one day, was discussed above. The second occasion lasted for approximately three months. While the court also decided that this entity was not liable under CERCLA as an owner or operator for this three-month period, the court's decision was not based on the length of time the entity held title. Rather, this decision was due to the fact that no hazardous wastes had been disposed of on the property during this time.[31] In other words, the court did not deem this entity to be simply a conduit or strawman when it held the property for three months. Although the conduit rationale espoused in *Diamond Reo Trucks* makes good sense given the very narrow facts upon which it was based, the correct area of inquiry should be ownership. Since ownership occurs as soon as the bank acquires title to the property, it would seem totally irrelevant to

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24. *Id.* at 579.

25. *Id.*

26. United States v. Mirabile, No. 84-2280 (E.D. Pa. 1985) (available on Westlaw at 1985 WL 6082) (In this case the secured party held the property for a few months before selling, whereas the creditor in *Maryland Bank & Trust* held it for four years.).

27. *Id.*

28. Diamond Reo Trucks, Inc. v. Lansing, 115 Bankr. 559 (W.D. Mich. 1990).

29. *Id.*

30. *Id.*

31. *Id.*

consider how long the bank owned the property before selling it.[32] Therefore, barring certain unusual circumstances such as the conduit situation in *Diamond Reo Trucks*, a lender who takes title to contaminated property will become liable under CERCLA if it holds title at the fateful moment, regardless of how long it holds that title.

2. Participation in Management

A lender can also become directly liable under CERCLA if it loses its exemption from the definition of "owner or operator" found in 42 U.S.C. § 9601(20)(A).[33] Although the phrase "holds indicia of ownership primarily to protect his security interest" has generated some interesting discussion,[34] the phrase "without participating in the management" has caused the most difficulty.

Until recently, the majority of the courts which have addressed this issue seemed to follow the rationale first espoused in *United States v. Mirabile*.[35] That court interpreted this language to mean that the participation in management "which is critical is participation in operational, production, or waste disposal activities. Mere financial ability to control waste disposal practices . . . is not . . . sufficient for the imposition of liability."[36] The court later concluded that "before a secured creditor . . . may be held liable, it must, at a minimum, participate in the day-to-day operational aspects of the site."[37] Many other courts, all of which were district courts, have followed the logic of *Mirabile*.[38]

The Eleventh Circuit Court of Appeals recently handed down a decision addressing this very issue at great length. However, the court chose to reject the holding in *Mirabile* in *United States v. Fleet Factors Corp.*[39] Since the Eleventh Circuit is the highest court to decide the issue of secured creditor liability, its rejection of the holding of *Mirabile* warrants a detailed discussion of its *Fleet Factors* decision.

Fleet Factors had entered into a factoring agreement with Swainsboro Print Works (SPW) and had received as collateral a security interest in SPW's textile factory, equipment, inventory, and fixtures.[40] SPW ceased its printing operation in February of 1981. Prior to the factoring agreement, the only involvement Fleet Factors had with the facility was when it regularly advanced funds to SPW, took back an assignment of SPW's accounts receivable, and paid for utility security de-

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32. Klotz & Siakotos, *Lender Liability Under Federal and State Environmental Law: Of Deep Pockets, Debt Defeat and Dead-Beats*, 92 COM. L.J. 275, 313 (1987).

33. *See* Appendix.

34. *See Maryland Bank & Trust Co.*, 632 F. Supp. at 578-79.

35. United States v. Mirabile, No. 84-2280 (E.D. Pa. 1985) (available on Westlaw at 1985 WL 6082).

36. *Mirabile*, No. 84-2280, slip op. at 4 (available on Westlaw at 1985 WL 6082).

37. *Id.* at 15.

38. *See* Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556 (W.D. Pa. 1989); United States v. New Castle County, 727 F. Supp. 854, 866 (D. Del. 1989); United States v. Fleet Factors Corp., 724 F. Supp. 955 (S.D. Ga. 1988); United States v. Nicolet, Inc., 712 F. Supp. 1193 (E.D. Pa. 1989); Rockwell Int'l v. IU Int'l Corp., 702 F. Supp. 1384 (N.D. Ill. 1988).

39. United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

40. *Id.* at 1553.

posits. Fleet Factors finally refused to advance any more money to SPW when Fleet Factors determined that the advanced sums exceeded the value of SPW's accounts receivable.[41]

After SPW ceased operations in 1981, Fleet Factors' involvement increased dramatically. Fleet Factors

> required SPW to seek its approval before shipping its goods to customers, established a price for excess inventory, dictated when and to whom the finished goods should be shipped, determined when employees should be laid off, supervised the activity of the office administrator at the site, received and processed SPW's employment and tax forms, controlled access to the facility.[42]

In 1982, after having foreclosed on some of its collateral, Fleet Factors contracted with Baldwin Industrial Liquidators (Baldwin) to auction off the foreclosed collateral. This was done "as is" and "in place" on June 22, 1982, with the responsibility for removal falling on the purchaser.[43] Afterwards, Fleet Factors contracted with another third party by the name of Nix to remove the remaining unsold equipment and thoroughly clean the premises.[44] A few weeks after Nix completed this task, the EPA inspected the facility and found large quantities of toxic chemicals and material containing asbestos.[45] After incurring approximately $400,000 in clean up costs, the EPA sought recovery from Fleet Factors and the two principal officers and stockholders of SPW. Fleet Factors was sued under 42 U.S.C. § 9607(a)(1) and § 9607(a)(2). After denying Fleet Factors' motion for summary judgment, the district court certified the issue for interlocutory appeal to the Eleventh Circuit.[46]

In deciding Fleet Factors' liability under section 9607(a)(2),[47] the court of appeals identified the issue as "whether Fleet participated in management sufficiently to incur liability under the statute."[48] This question was said to be comprised of two separate but related courses of liability. According to the Eleventh Circuit, the first course of liability under section 9607(a)(2) concerned whether Fleet Factors had operated the facility within the meaning of the statute.[49] The second course of liability occurred if Fleet Factors "had an indicia of ownership in SPW and managed the facility to the extent necessary to remove it from the secured creditor liability exception."[50]

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41. *Id.* at 1559.

42. *Id.*

43. *Id.* at 1552.

44. *Id.* at 1553.

45. *Id.*

46. *Id.*

47. Although the court discussed issues under 42 U.S.C. § 9607(a)(1), only the court's ruling with respect to liability under § 9607(a)(2) will be explored.

48. *Fleet Factors*, 901 F.2d at 1556.

49. *Id.* at n.6.

50. *Id.*

As expected, Fleet Factors argued for the adoption of the standard set forth in *Mirabile*. However, the Eleventh Circuit reasoned that the *Mirabile* court's construction of this exemption was too permissive and ignored the plain language of the exemption, rendering it meaningless.[51] Observing that anyone involved in the "operations" of a facility was already liable as an "operator" under section 9607(a)(2), the court reasoned that the participation in management necessary for a secured creditor to incur liability must be something less than the actions of an operator.[52] The court stated that had Congress intended to absolve secured creditors from ownership liability, it would have done so. Rather, Congress chose to explicitly hold them liable if they participated in the management of the facility.[53] As a result, the Eleventh Circuit held that involvement in the day-to-day operations of the facility was not necessary to incur liability. Instead, the court held that a secured creditor would be liable *"if its involvement with the management of the facility was sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose."* [54]

What exactly is the plain meaning of this exemption? It is respectfully suggested that the Eleventh Circuit's interpretation of this "plain meaning" is incorrect and that the better interpretation is found in *Mirabile*.[55]

After recognizing that in certain situations the holder of a deed of trust may be considered as holding title,[56] and thus possibly deemed as an owner under CERCLA, Congress intended to correct this potential problem by legislating the above exemption. This exemption was necessary to make it clear that such a secured creditor is not considered an owner or operator of that facility, unless that secured creditor did something more than hold title.[57] The contingency Congress selected as a means by which a secured creditor would lose its exemption from liability as an owner or operator was "participating in the management" of the facility.[58] Congress chose not to use a phrase such as "with the ability to participate in the management" of the facility, or "with the opportunity to participate in the management" of the facility. Nor did Congress say "who are otherwise affiliated" with the facility. On the contrary, the selection of this particular language seems to denote that a secured creditor must actually be involved in the management of that facility before it will lose its exemption. To read into this exemption anything short of actual involvement would constitute a gross mischaracterization of the plain grammatical construction of the statute.

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51. *Id.* at 1557.

52. *Fleet Factors*, 901 F.2d at 1557.

53. *Id.*

54. *Id.* at 1558 (emphasis added).

55. *Id.*

56. 55 AM. JUR. 2D *Mortgages* § 15 (1971); see, e.g., United States v. Nicolet, Inc., 712 F. Supp. 1193 (E.D. Pa. 1989).

57. Brown, *supra* note 20, at 1132.

58. 42 U.S.C. § 9601(20)(A)(iii) (1988).

Moreover, the Eleventh Circuit seems to put an extraordinary amount of misplaced weight on the legislative history behind CERCLA to support its rationale. In particular, it is respectfully suggested that the Eleventh Circuit became unduly fixated on one phrase made by one representative in the introduction of this exemption.[59] According to the Eleventh Circuit, the use of the word "affiliated" by Representative Harsha indicated a more peripheral degree of involvement with the affairs of a facility than that necessary to be held liable as an operator, and thus supported their opinion.[60]

The statement made by Representative Harsha and relied upon by the Eleventh Circuit is as follows: "This change is necessary because the original definition inadvertently subjected those who hold title to a . . . facility, but do not participate in the management or operation *and are not otherwise affiliated* with the person leasing or operating the . . . facility, to the liability provisions of the bill."[61]

However, to get a better understanding of what was said and perhaps what was meant, this statement must be read in the context in which it was made. Thus, the relevant portions of Representative Harsha's remarks should be read in their entirety, as follows:

> Mr. Chairman, I would like to discuss two provisions for the purpose of establishing legislative history. The first is the definition of "owner" contained in title I of H.R. 85[62] [Sec. 101(2)]. During consideration of this measure by the Public Works Committee I offered an amendment to clarify the definition, as reported by the Committee on Merchant Marine and Fisheries. This change was necessary because the original definition inadvertently subjected those who hold title to a vessel or facility, but do not participate in the management or operation and are not otherwise affiliated with the person leasing or operating the vessel or facility, to the liability provisions of the bill.
>
> While the Merchant Marine Committee report indicated this situation was not intended, the statutory language is unclear. Therefore, I offered clarifying language to truly exempt those who hold title but do not participate in the operation or management activities. My amendment also requires that those that hold title cannot be affilated [sic] in any way with those who lease or charter the vessel or facility. This was done to prevent the establishment of "dummy" corporations, with few assets, which would be the responsible party for the purpose of the act.[63]

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59. *See* Comments made by Representative Harsha reprinted in 2 SENATE COMM. ON ENVIRONMENTAL AND PUBLIC WORKS, 97th Cong., 2d Sess., Legislative History of the CERCLA 945 (Comm. Print 1983), as cited in *Fleet Factors*, 901 F.2d at 1558, n.11.

60. *Fleet Factors*, 901 F.2d at 1558, n.11.

61. *Id.* (emphasis added).

62. H.R. 85, to which the remarks of Representative Harsha refer, was one of three bills introduced in the Ninety-Sixth Congress which contributed to the final legislation passed as CERCLA. These bills were: H.R. 7020, H.R. 85 and S. 1480. H.R. 85 was never enacted, but some of its features were incorporated in CERCLA. *See* Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 2-4 (1982).

63. *See* Comments made by Representative Harsha contained in STAFF OF COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, 97th Cong., 2d Sess., *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund)*, P.L. 96-510, 944-45 (Comm. Print 1981).

From reading these complete remarks in context it should be clear that Representative Harsha used the word "affiliated" not to temper the degree of participation in management in which a secured creditor might have engaged before losing its exemption, but instead to prevent a subterfuge by owners or operators who set up dummy corporations to insulate themselves from liability.

This is further substantiated by the definitions of "owner" and "affiliated" contained in H.R. 85.[64] Thus, one would be hard-pressed to argue that this word "affiliated," contained in the remarks of one representative concerning one bill (H.R. 85), could have the broad-reaching ramifications attributed to it by the Eleventh Circuit. Such an argument is inconceivable because this commentary was never itself enacted into law nor was one word ever made a part of CERCLA.

Moreover, for the Eleventh Circuit to substantially base its opinion on the remarks of a single legislator, even the sponsor, is something which the United States Supreme Court has consistently discouraged.[65] Indeed, the Supreme Court cautions that one congressman's statement must be considered with the reports of both houses and the statements of other congressmen.[66] Presumably this is to guard against precisely what the Eleventh Circuit has done, i.e. rely upon the statement of one individual taken out of context.

For these reasons, it is suggested that the Eleventh Circuit's ruling does not have a sound basis. Therefore, it is now necessary to explore what level of participation in management should be required. It is respectfully submitted that the Eleventh Circuit seems to gloss over the language in the secured creditor exemption by ruling that it does hold a secured creditor liable, per se, if it participated in the management of a facility. Instead, Congress stated that if a secured creditor participated in the management of the facility it would be deemed an owner or operator. Consequently, a secured creditor's liability comes about not as a result of its status as a secured creditor but rather by virtue of being considered an owner or operator. Does it not seem reasonable to conclude that the level of participation in management required to designate a secured creditor as an owner or operator un-

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64. *Id.* at 953. For purposes of this title, the term

(x) "owner" means any person holding title to, or in the absence of title, any other indicia of ownership of, a vessel or facility, but does not include a person who (either directly or through a trust or singly or in combination with others) holds title to or any indicia of ownership of a vessel or facility and without participating in the management or operation of such vessel or facility, leases or charters to any other person (with whom such person is not otherwise affiliated), or holds indicia of ownership primarily to protect his security interest in the vessel or facility;

(y) "affiliated" means a relationship in which a person owns (in whole or in part), is owned by (in whole or in part), or is under common control with, another person;

(z) "operator" means –

(1) in the case of a vessel, a charterer by demise or any other person, except the owner, who is responsible for the operation, manning, victualing, and supplying of the vessel, or

(2) in the case of a facility, any person, except the owner, responsible for the operation of the facility by agreement with the owner;

Id. at § 101.

65. Regan v. World, 468 U.S. 222 (1984); Weinberger v. Rossi, 456 U.S. 25 (1982); Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

66. Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979).

der section 9607(a)(2) should be the same as that required to hold any individual or entity liable as an owner or operator?[67] To hold otherwise would create a separate class of liable parties, secured creditors, with a separate standard of liability. This is exactly what the Eleventh Circuit accomplished in its *Fleet Factors* opinion. Had Congress intended to create a separate class of liable parties, it would have explicitly stated so. Also, if a change of this magnitude is to be instituted, it should come about as a result of legislative amendment and not by judicial interpretation.

In reviewing those cases which discuss owner/operator liability under CERCLA, most hold that active participation in management or actual involvement in the operation or control over the facility is required.[68] Therefore, to hold that lending institutions will be liable as an owner/operator under CERCLA after some lesser degree of involvement than any other potentially liable party not only seems inconsistent but inequitable. If Congress had so desired this to be the rule under CERCLA, it certainly would have made a specific category of liable parties to cover this. It did not. As such, persuasive argument can be made that legislative intent supports the ruling of *Mirabile* more than it does the very broad interpretation of liability outlined by the Eleventh Circuit in *Fleet Factors*.

It is difficult to imagine how the holding in *Fleet Factors* can have anything other than a chilling effect on lenders and their willingness to extend credit to borrowers with potential hazardous waste problems. The Eleventh Circuit recognizes but discounts the notion that a very broad standard of liability will create reluctance on the part of lenders to extend credit to businesses with potential hazardous waste problems, serving to perpetuate instead of resolve those problems.[69] What the Eleventh Circuit envisions is that potential creditors will be encouraged to investigate the waste treatment system and policies of their potential borrowers. The court reasons that if the creditor sees that the risk of liability is great then it will compensate for that risk in the negotiation of its loan. As the court sees it, once the creditors become aware that they are potentially liable under CERCLA, they will be encouraged to monitor the hazardous waste treatment systems and policies of their debtors, as well as insist upon compliance with acceptable treatment standards as a *prerequisite to continued and future financial support.*[70]

Thus, the court's dicta would seem to indicate that once a lender enters into a loan agreement with a borrower who has or will have a hazardous waste problem, that creditor will automatically have CERCLA liability. This liability would exist

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67. This standard of participation in management has been previously suggested. *See* Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 935-37 (1989) [hereinafter Note, *Interpreting the Meaning*]. This is largely the rationale used by the *Mirabile* court.

68. *See, e.g.*, United States v. Consolidated Rail Corp., 729 F. Supp. 1461, 1468 (D. Del. 1990); Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651, 657 (N.D. Ill. 1988) and cases cited therein. Some cases have suggested that the mere ability to control is adequate. *See* United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd* in part and *rev'd* in part, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1988) (this case involved the individual liability of corporate officers and directors).

69. *Fleet Factors*, 901 F.2d at 1558; *see also* Note, *supra* note 67, at 927-28.

70. *Id.*

by virtue of the loan agreement and the creditor's ability to extend or refuse additional credit as it sees fit. This asserts that the creditor would be in a position to condition continued financial support upon compliance with acceptable hazardous waste treatment standards. Whether the creditor actually seeks to influence the borrower's hazardous waste treatment policies is of no import. What is significant, however, is the fact that the creditor would be in a position to affect hazardous waste disposal decisions if it so chose.[71] The Eleventh Circuit's reasoning is that any creditor realizing this will want to take an active interest in its borrower's environmental policies.[72]

Although the Eleventh Circuit's objective is admirable,[73] the means by which it strives to achieve this objective may not be as effective as the court envisions. Given the breadth of the court's standard of liability, concomitant with the potential economic loss one faces under CERCLA, how can the court genuinely believe that creditors will willingly negotiate into such situations knowing it will fall upon them to either insist upon compliance with proper hazardous waste disposal practices or suffer the consequences? Is it not more logical to assume that lenders are going to shy away from those situations creating potential liability?[74]

With this new standard in place, lenders will be faced with three choices. First, they can elect not to loan any money whatsoever to a borrower with a potential hazardous waste problem. Second, they can elect to make an initial loan to the borrower but make certain that they do not negotiate into the loan agreement any language which might be used to infer that they could control or affect the borrower's hazardous waste disposal decisions if they so chose.[75] Third, a lender can negotiate control features into the loan agreement and continue to police the borrower's hazardous waste disposal practices, insisting upon compliance with prudent policies to insure that there would not be any CERCLA liability against the borrower or the lender. No lender, it is submitted, is going to put so much at risk by voluntarily stepping into the quagmire found behind choice number three. That is unless, of course, the lender happens to be quixotic in nature and completely unconcerned about the imminent economic adversity it would face. To the contrary, the prudent lender will attempt to avoid altogether this potential CERCLA liability. It is respectfully suggested that the Eleventh Circuit's standard would have a chilling effect on loans and probably will exacerbate the hazardous

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71. *Id.* at 1558-59.

72. *Id.*

73. The purpose of this article is not to suggest that the objective which the court is trying to achieve is something different from that which Congress intended when it enacted CERCLA. On the contrary, the purpose of this article is to discuss the court's reasoning and to point out the possibility that the court's reasoning has been misplaced. However, while the court's objective is well-intended, if the means which it uses to implement that objective serve to impede rather than to assist then the means must be reevaluated and changed.

74. Note, *supra* note 67, at 927-28.

75. This, in essence, would require the lender to relinquish any and all control which it might have over its investment. It is suggested that this is something which a prudent lender would not do.

waste problem simply because borrowers will not be in a position to borrow more money to improve their disposal practices.[76]

The better approach would be to broaden the secured creditor exemption so that the lender would be more likely to loan money to borrowers, thus enabling hazardous waste disposal techniques to be improved. If the lender knows that as long as it does not "participate in the management" of the borrower to the extent necessary to consider the lender an "operator," lenders would be more likely to enter into such a relationship. With a more definite standard of CERCLA liability for lenders in place, the game can shift away from a game of chance, as played under the Eleventh Circuit's rules, and move more toward a game of skill. More definitive standards would enable the lender to essentially control its own destiny. This would give the lender the added confidence it would need to enter into this type of loan. Furthermore, the lender would already have adequate incentives to monitor the borrower's hazardous waste problems and correct them as necessary. Keep in mind that if a borrower *develops* a serious hazardous waste problem and *does not* take the necessary steps to correct it, the borrower runs a significant risk of being held accountable *by the EPA* for the costs of remediation. If this occurs, the lender *also* runs a risk of being adversely affected by the fact that the borrower might be forced to default on the repayment of its loan and because the lender's collateral might be rendered worthless. Avoiding this economic adversity should be enough incentive for the lender to monitor its borrower's hazardous waste disposal policies.

For these reasons, a narrower interpretation of the phrase "participating in the management" such as was suggested in *Mirabile* not only makes more sense from an interpretation of the language of the statute, but would serve rather than impede CERCLA's objective. In this way the "game" will have a set of definitive rules which will result in higher levels of skillful play by those parties involved. Thus, lenders, borrowers, and society in general will all benefit and the admirable objectives of CERCLA will be achieved.

III. AVOIDANCE OF LENDER LIABILITY UNDER CERCLA

Initially, in order to avoid liability, the most important thing a lender can do is to make certain that all parties dealing with loan approval, troubled loan work-outs, and defaulted loans have become environmentally aware. To assist in accomplishing this, it is advisable to formulate an environmental policy and procedures manual. This manual should be developed with the assistance of legal counsel as well as environmental consultants. A lender should make certain that at least one individual, or preferably a committee, is designated with the responsibility of determining the level of environmental review warranted by a given situation. That individual or committee should have input regarding loan approval. The stakes of

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76. This has already been suggested by several articles including Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep-Pockets*, 103 BANK. L.J. 509, 539 (1986) and Note, *Interpreting the Meaning*, *supra* note 67, at 928.

this game are high[77] and the chances of success are minimal without a clear understanding of the rules of the game. In these areas an environmental policy and procedures manual can be important.

Utilizing the input of environmental consultants, the manual could provide a listing of the types of substances considered hazardous as well as the types of businesses most commonly using these substances. Since it is not always obvious which businesses are involved with hazardous substances, the manual could educate the lender so that it would be able to recognize which borrowers are at risk.[78] Some of the more common hazardous substances a lender should be alerted to are: petroleum products stored in underground storage tanks which are generally located at automobile repair and service station facilities; chlorinated hydrocarbons used in dry cleaning which may also be stored in underground tanks; paint thinners, paint strippers, and degreasing agents; herbicides and pesticides; penta, creosotes, and copper chromium arsenic generally associated with wood treatment facilities; PCB's (polychlorinated byphenals) generally found in older electrical equipment such as transformers and capacitors; and asbestos.[79] Learning to recognize potential problems and evaluate them is one way that a lender can learn to minimize its potential for liability.

An environmental policies and procedures manual could also provide the lender with a checklist of things to investigate. First and foremost, a lender should *never* lose sight of the importance of being familiar with the business of its borrower. If a borrower either generates, transports, engages in the treatment of, disposes of any hazardous substance, or is an owner or operator of any hazardous waste facility, there is a substantial likelihood that the borrower will be required to pay costs of remediation or damages to third parties at some point in time. In addition to this, and for the reasons previously discussed, the lender should make certain that he understands the corporate structure of his borrower and the business of all of his borrower's subsidiaries.[80]

After making an appropriate inquiry with the borrower directly, the lender can take additional steps to significantly reduce its potential responsibility.[81] One of the first things which a lender can do is to arrange to visit the borrower's business

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77. Costs of cleaning up contaminated sites of $10 million, $36 million, or $103 million are not unusual. The EPA estimated in December of 1984 that it will be involved with 2,500 sites at an average clean up cost of $12 million. Frantz, *Minimizing Environmental Liabilities Associated with the Purchase or Sale of Real Property and Business*, 2 TOXICS L. REP. (BNA) 723 (Nov. 25, 1987). These estimates have certainly increased since then.

78. Klotz & Siakotos, *supra* note 32, at 300.

79. Special thanks to Mr. John Morrow, an environmental consultant with Woodward-Clyde Consultants, 405 Briarwood Drive, Jackson, Mississippi 39206, for providing this information.

80. *See supra* note 15.

81. The purpose of this article is not to discuss in great detail all of the various things which a lender can do in the investigative process. These things have been amply covered by numerous other authors to which your reading is commended. For a good source of information on due diligence investigation, see Moskowitz, *supra* note 13, at 207 et seq.; see also Goldstein, *Hazardous and Toxic Waste Clean Up: Who is Responsible for Clean Up Costs After Bankruptcy*, 310 PLI/Real 207 (1988) (available on WESTLAW, May 1, 1988); Smith & Faizone, *Environmental Considerations in Project Financing*, 326 PLI/Real 825 (1989) (available on WESTLAW, February 1, 1989); Brown, *supra* note 20, at 1131; Klotz & Siakotos, *supra* note 32, at 281, 298-99, 301; Frantz, *supra* note 77, at 726.

site. A thorough walk-through of the borrower's site should be completed and personal interviews should be conducted with both past and present employees.[82] If the borrower has more than one site or has a subsidiary with one or more sites, this process should be repeated for each location. A review of adjacent property and its uses should be completed as well.[83]

A lender should also direct an attorney to prepare a chain of title for fifty or more years, depending upon the location of the site. In this way a lender could find out who owned the property in the past while possibly discovering a red flag as to potential liability.[84] To assist in obtaining a site history, the lender might consider retaining the services of someone with a background as an oil and gas landman. This person would be familiar with obtaining statements of possession. By speaking to people who have knowledge of the history of a tract of land or by utilizing the chain of title, this person could attempt to locate and speak to as many people as possible who are knowledgeable with the history of the location. This is important because a chain of title will not always reveal who was operating the property. A leasing transaction, for instance, may not be recorded, yet the lessee may have operated a hazardous waste-related business on the property.[85] An interview of someone having knowledge of the property would reveal this whereas the chain of title would not. Another important source of information are the records of any federal, state or local agencies connected with environmental regulation. The most obvious federal agency would be the Environmental Protection Agency. It should have on file any notice of disposal of hazardous substances filed by the borrower or any of his predecessors[86] and the lender will also be able to check for any compliance permits.[87] Any reports which the borrower might have to file with the Securities and Exchange Commission might also shed some light on the borrower's environmental practices.[88] Many state agencies will also retain information beneficial to the lender.[89]

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82. Cohen, *Hazardous Waste: A Threat to the Lender's Environment*, 19 U.C.C. L.J. 99, 124 (1986); Brown, *supra* note 20, at 1136.

83. Moskowitz, *supra* note 13, at 213-14.

84. Moskowitz, *supra* note 13, at 208.

85. *Id.* at 209.

86. Cohen *supra*, note 82, at 105; Moskowitz, *supra* note 13, at 212.

87. *Id.*

88. Cohen, *supra* note 82, at 105.

89. There are numerous Mississippi state agencies which in one form or another deal with environmental issues. These are: Environmental Health Bureau, University Research Center; Mississippi Oil & Gas Board; Mississippi State Government Environmental Services – Wildlife/Fisheries Division; Geology Bureau; Land and Water Resources Bureau; Pollution Control Bureau; Solid Waste Division; Mississippi Board of Economic Development; and Mississippi Department of Environmental Quality.

Another suggested source of information is historical aerial photographs.[90] If taken at appropriate intervals, these may be used in developing the history of the site.[91]

If any of the preliminary investigation raises suspicions of hazardous waste, the lender will want to move on to a more sophisticated environmental audit. To do this it will probably wish to retain the services of an environmental consultant to analyze the soil, water, and any core samplings which it might deem appropriate.[92]

It cannot be emphasized enough that the lender should insist that the results of any investigation taken by the lender or any of its agents, be submitted to the lender in writing and describe in detail everything that was done to conduct the investigation. These records should be as complete and precise as possible. They should be written as if the Environmental Protection Agency was looking over the author's shoulder, questioning the lender's due diligence in investigating the borrower and its facility. These records should also be retained indefinitely as a lender may be called upon to prove that it adequately investigated this borrower before the loan was made many years after the loan was actually granted.[93]

Once the lender has completed this investigation it must then evaluate the information obtained to see if entering into the loan is worth the risk.[94] If the lender determines that environmental risks exist but are not prohibitive, the lender must decide whether liability for "participating in the management" of the facility, under the standard set by the Eleventh Circuit in *Fleet Factors Corp.*[95] will prohibit it from going forward. If the lender still wishes to go forward it should next, if it does not already know, ascertain whether the state in which its deed of trust or mortgage will be filed has a superlien statute. A superlien statute essentially allows the state agency, roughly the equivalent of the Environmental Protection Agency, to have a lien against the facility for any costs of remediation. This lien is referred to as a "superlien" because it will supersede any other lien including a recorded mortgage or deed of trust. The lender would be affected if it perfected a lien in a state with this type of statute.[96] If fear of potential contamination exists, a

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90. Moskowitz, *supra* note 13, at 213.

91. Moskowitz suggests that aerial photographs are particularly helpful in the detection of former rail sidings, land fills, lagoons, and raised production buildings. He also suggests that private companies may have compiled these photographs as a result of mineral explorations, geological studies, mapping, and other related purposes. *See* Moskowitz, supra note 13, at 213.

92. Frantz, *supra* note 77, at 727; Klotz & Siakotos, *supra* note 32, at 299.

93. Cohen, *supra* note 82, at 114.

94. Even if a lender conducted an investigation prior to making a loan, the lender should undertake to reinvestigate the borrower and the facility before foreclosure. This is because once the lender has foreclosed on the property he will be liable under § 9607(a)(1). *See* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986). If the lender completes this investigation prior to foreclosure and discovers that potential problems exist, the lender would be well advised to abort its foreclosure plans and seek other means of satisfying the debt.

95. United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990). Although the Eleventh Circuit's decision is not necessarily controlling in other regions of the country, it is nevertheless the highest court to decide this issue. For that reason, a lender should not find solace in the fact that its business is located in states not covered by the Eleventh Circuit. The risks are simply too great.

96. Mississippi does not have a superlien statute.

lender should diversify the collateral, whenever possible, by taking as much property as it can which is not associated with or endangered by hazardous waste.[97]

A lender can further try to protect itself by drafting indemnification agreements between itself and the borrower.[98] Although these precautions will not serve as a defense to any action against the lender by the EPA, they can be enforced against a private party.[99] The lender should also obtain covenants and warranties requiring the borrower to covenant that neither the borrower nor any prior owners have created conditions which may give rise to liability, as well as requiring the borrower to covenant that it will correct or remedy any contamination that may occur in the future.[100] These indemnifications, covenants, and warranties are only worth as much as the financial wherewithal of the party or parties entering into them. It is possible that they may end up being worthless. However, if the borrower is fortunate enough to have insurance to cover potential environmental problems, the lender should make sure that it is added as an additional insured on the policy.[101]

The purpose for such an extensive inquiry is self-evident; it is much easier to minimize losses on the front end by completing the due diligence work and avoiding problems than it is to combat the problem once you are in it. Even if the lender has done the requisite due diligence work and later finds itself faced with potential CERCLA liability, the documentation of its due diligence investigation can still be a useful defense. The defense is commonly referred to as the third party defense or innocent landowner defense.[102] To succeed in establishing this defense, the defendant must show by a preponderance of the evidence that at the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.[103] In addition to proving that, the lender must prove the elements contained in 42 U.S.C. § 9607(b)(3)(a) and (b).[104]

Factors which the courts look to in determining whether a reasonable inquiry was made by the defendants are: any specialized knowledge or experience on the part of the defendant; the relationship of the purchase price to the value of the

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97. Moskowitz, *supra* note 13, at 90.

98. Klotz & Siakotos, *supra* note 32 at 302-03; Moskowitz, *supra* note 13, at 89, 164-69, 265-67; and Frantz, *supra* note 77, at 729.

99. 42 U.S.C. § 9607(e)(1) (1988).

100. Klotz & Siakotos, *supra* note 32, at 302-03; Moskowitz, *supra* note 13, at 89, 264-65, 295-96; and Frantz, *supra* note 65, at 729.

101. Klotz & Siakotos, *supra* note 26, at 303. This is at best a long-shot, given the fact that insurance coverage for these types of problems may be difficult to acquire. Frantz, *supra* note 77, at 729; Moskowitz, *supra* note 13, at 271-72.

102. These defenses can be found in 42 U.S.C. §§ 9607(b) and 9601(35)(A), both of which are reprinted in the Appendix.

103. 42 U.S.C. § 9601(35)(A)(i) (1988). Since a lender is not going to be considered a governmental entity and is generally not going to have acquired a facility by inheritance or bequest, 42 U.S.C. § 9601(35)(A)(ii) and (iii) respectively will not apply. The legislative history generally shows that there is a three-tier system for determining if parties made a reasonable inquiry into the history of the land. These tiers are commercial transactions (which would encompass a lender), private transactions, and inheritance and bequests. The strictest standard will apply to commercial transactions with the most lenient standard being applied to inheritances and bequests.

104. 42 U.S.C. § 9601(35)(A) (1988); *see also* Appendix.

property if uncontaminated; commonly known or reasonably ascertainable information about the property; the obviousness of the presence or likely presence of contamination of the property; and the ability to detect such contamination by appropriate inspection.[105] Generally speaking, the courts have held parties strictly liable under CERCLA if the party who has asserted the defense fails to prove by a preponderance of the evidence that it did not have a contractual relationship with the third party and that it made all appropriate inquiries before acquiring the property. For this reason it is extremely important for any lender to have conducted a very thorough investigation of the history of property before acquiring it.[106] No stone should be left unturned. Anything of a suspicious nature should be uncovered and examined.

IV. Pending Legislation Affecting Lender Liability

One of the most important pieces of pending legislation affecting lender liability under CERCLA is H.R. 4494. This was introduced in the House by Congressman Lafalce on April 4, 1990 and has some 274 co-sponsors.[107]

If passed into law as it presently reads, H.R. 4494 would possibly eliminate certain aspects of lender liability under CERCLA. The bill seeks to limit the liability of lending institutions acquiring facilities through foreclosures or similar means. The bill will also limit the liability of corporate fiduciaries administering estates or trusts.[108]

The bill seeks to amend the definition of owner or operator under CERCLA to exclude, "any designated lending institution which acquires ownership or control of the facility pursuant to the terms of a security interest held by the person in that facility."[109] This would effectively overrule the decision in *United States v. Maryland Bank & Trust.*[110] However, whether it would affect the "participation in management" question remains uncertain. Is the use of the phrase "or control . . . pursuant to the terms of the security interest" meant to allow a secured creditor to control a facility short of foreclosure, and, if so, is that going to moot the issues generated by the phrase "participation in management" found in 42 U.S.C. § 9601(20)(A)(iii)? The answer is not clear.

Before the bill is passed, amendments and modifications will hopefully clarify these problems. This will not happen without a fight from the EPA, however. The passage of this bill will mean the effective loss of the ability to recover costs of

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105. United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1347 (D. Idaho 1989).

106. For a good discussion of this defense see, Mays, *The Blessed State of Innocence: Landowner Defense Under Superfund*, 20 E.R. 809 (1989) and Comment, *The Liability of Financial Institutions for Hazardous Waste Clean Up Under CERCLA*, 139 Wis. L. Rev. 139, 156-59 (1988); *see also* United States v. Serafini, 706 F. Supp. 346 (M.D. Pa. 1988); New York v. Shore Realty, 759 F.2d 1032 (2d Cir. 1985); BCW Assocs., Ltd. v. Occidental Chem. Corp., No. 86-5947 (E.D. Pa. 1988) (Westlaw Allfeds at 1988 WL 102641); Wickland Oil Terminals v. ASARCO, Inc., No. C-83-5806 SC (N.D. Cal. 1988) (Westlaw Dist. Cts. at 1988 WL 767247); United States v. Hooker Chems. & Plastic Corp., 680 F. Supp. 546 (W.D.N.Y. 1988).

107. H.R. 4494, 101st Cong., 2d Sess. (1990).

108. *Id.*

109. *Id.*

110. 632 F. Supp. 573 (D. Md. 1986).

remediation from lenders under certain situations. Moreover, this will create the economic windfall situation which the court feared in *Maryland Bank & Trust.*[111] It will allow the bank to cheaply acquire contaminated property at foreclosure, sit back and let the EPA remediate the property at the taxpayers' expense and then sell the property for a profit.[112] Certainly the EPA will strongly oppose this. We will simply have to await the results to see what the end product allows.

The Senate bill which is a companion to H.R. 4494 is S. 2319. It was introduced by Senator Garn on March 22, 1990.[113] The purpose of S. 2319 seeks to limit the liability of depository institutions, credit unions, and other mortgage lenders acquiring real property through foreclosure or similar means.[114] The underlying purpose of S. 2319 is very similar to H.R. 4494. However, the Senate version includes certain exclusions from the exemptions granted to this limited lender liability.

The bill provides that these exemptions from liability do not apply to

> (1) any person that has caused the release or threatened release into the environment of a hazardous substance from property acquired through foreclosure or from property held in a fiduciary capacity; or (2) any person that has benefited from removal, remedial, or other response action, to the extent of the actual benefit conferred by such action.[115]

A lender could acquire a facility free from a fear of CERCLA liability unless the lender causes the release or threatened release of a hazardous substance. A lender would further lose its exemption from liability to the extent of the actual benefit it received as a result of any remediations. Thus, the economic windfall situation which is not addressed in H.R. 4494 is addressed here in what appears to be a fairly satisfactory manner. The lender would only be liable essentially for the increase in fair market value of the property as a result of remediation as opposed to being liable for the actual costs of remediation. This should be more palatable to lenders and Congress alike.[116]

The issue of lender liability for "participating in the management" of a facility does not appear to be addressed by this proposed legislation either. Of course, both this bill and H.R. 4494 were introduced prior to the Eleventh Circuit's decision in *Fleet Factors Corp.*[117] As such, it is still possible that they will be modified to negate some of the onerous breadth of that decision.

Another bill which could have significant impact on lender liability was introduced by Congressman Weld on June 28, 1989 as H.R. 2787.[118] This bill was en-

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111. *Id.* at 580.

112. *Id.*

113. S. 2319, 101st Cong., 2d Sess. (1990).

114. *Id.*

115. *Id.*

116. That is not to say, however, that the EPA would be pleased since they would still be losing a significant deep pocket source of recovery. Nevertheless, it could represent a good compromise measure.

117. United States v. Fleet Factors, 901 F.2d 1550 (11th Cir. 1990).

118. H.R. 2787, 101st Cong., 1st Sess. at 2 (1989).

titled the "Innocent Landowner Defense Amendment of 1989."[119] The bill seeks to amend CERCLA to provide specific requirements with which a purchaser of real property must comply in order to be considered to have made all appropriate inquiries into the previous ownership and uses of the real property under which he can qualify for the "Innocent Landowner" defense.

The bill provides that a defendant who has acquired real property will establish a rebuttable presumption that he has made "all appropriate inquiry"if he establishes that, immediately prior to or at the time of acquisition, he obtained a "Phase One Environmental Audit" of the real property.[120] A "Phase One Environmental Audit" is defined as an "investigation of the real property . . . to determine or discover the obviousness of the presence or likely presence of a release or threatened release of hazardous substances on the real property . . . ."[121] The audit will require a review of several sources of information concerning the previous ownership and uses of the real property. This information should consist of:

> (I) Recorded chain of title documents regarding the real property, including all deeds, easements, leases, restrictions, and covenants for a period of fifty (50) years.
> (II) Aerial photographs which may reflect prior uses of the real property and which are reasonably obtainable through State or local government agencies.
> (III) Determination of the existence of recorded environmental clean up liens against the real property which have arisen pursuant to Federal, State, and local statutes.
> (IV) Reasonably obtainable Federal, State, and local government records of sites or facilities, where there has been a release of hazardous substances and which are likely to cause or contribute to a release or threatened release of hazardous substances on the real property, including investigation reports for such sites or facilities; reasonably obtainable Federal, State, and local government environmental records of activities likely to cause or contribute to a release or a threatened release of hazardous substances on the real property, including landfill and other disposal location records, underground storage tank records, hazardous waste handler and generator records and spill reporting records; and such other reasonably obtainable Federal, State, and local government environmental records which report incidents or activities which are likely to cause or contribute to a release or threatened release of hazardous substances on the real property. In order to be deemed "reasonably obtainable" within the meaning of this subclause, a copy or reasonable facsimile of the record must be obtainable from the government agency by request.
> (V) A visual site inspection of the real property and all facilities and improvements on the real property, and a visual inspection of immediately adjacent properties around the real property, including an investigation of any chemical use, storage, treatment, and disposal practices on the property.[122]

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119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 3-4.

The bill also cautions that no presumption shall arise unless the defendant has maintained a compilation of the information reviewed in the course of the Phase One Environmental Audit.[123] The passage of a bill such as this would greatly assist those parties, including lenders, who try to take advantage of the innocent landowner defense. Currently this bill is in the Energy and Commerce Committee awaiting committee action.[124]

Another bill which deserves mention, although not much discussion, is H.R. 5027 introduced on June 13, 1990, by Congressman McEwen.[125] This bill proposes to require any federal

> department, agency, or instrumentality that is responsible for a release of hazardous substances at a Superfund site to promptly pay for the costs and damages associated with such release, and to provide that other potentially responsible parties may not be required to pay such costs until the department, agency, or instrumentality has made its payments.[126]

V. CONCLUSION

The status of lender liability under CERCLA is precarious. Although the guidelines for avoiding liability as an owner or operator appear to be fairly straightforward at this time, the Eleventh Circuit has essentially destroyed the rule book with respect to liability resulting from participation in the management of a facility. Without better defined rules, it is doubtful that lenders will voluntarily choose to enter this game. If this occurs, nobody will benefit. Also, the objectives of CERCLA will be severely impeded. While there is some pending federal legislation which could, if enacted, significantly reduce some of the apprehension which lenders have under CERCLA, additional legislative amendment is needed to better define lender liability as a result of participating in the management of a facility. Only when the rules of the game are uniform, well-defined, clear, and consistent will this game become a game of skill; and only then can the goals of CERCLA be justly achieved.

APPENDIX

PUBLIC HEALTH AND WELFARE
42 U.S.C. § 9601 (1988)

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit

123. *Id.* at 4-5.
124. [101st Congress House of Representatives 1989-90] Cong. Index (CCH) 28,317.
125. H.R. 5027, 101st Cong., 2d Sess. (1990).
126. *Id.* at 1.

of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

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

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

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

(iii) The defendant acquired the facility by inheritance or bequest. In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b).

ENVIRONMENTAL RESPONSE

42 U.S.C. § 9607 (1988)

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date.

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

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport or disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for–

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section § 9604(i).

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

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

(1) an act of God;

(2) an act of war;

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

(4) any combination of the foregoing paragraphs.