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"The Sins of the Son Should be Visited upon the Father": Lender Liability Under CERCLA and New York State Law

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"THE SINS OF THE SON SHOULD BE VISITED UPON THE FATHER":[1] LENDER LIABILITY UNDER CERCLA AND NEW YORK STATE LAW

I. INTRODUCTION

Over the years when lenders have loaned money to borrowers, the borrower's potential harm to the environment was never considered and was not an issue in determining whether a loan was to be approved or denied. Recently, as the dimensions of the hazardous waste problem[2] are becoming more evident, the environmental report[3] of a potential borrower is a major factor when making a loan secured by real property.

This change is primarily due to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[4] (CERCLA or Superfund). The Act created a $1.6 billion dollar trust fund[5] that the government could use to clean up hazardous substances[6] immediately, and

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1. United States v. Kayser-Roth Corp., 724 F. Supp. 15, 17 (D.R.I. 1989) (holding parent company liable under CERCLA), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991); *cf. Exodus* 20:5 (King James) ("[F]or I the Lord thy God *am* a jealous God, visiting the inequity of the fathers upon the children . . . .") (emphasis in original).

2. Hazardous waste is produced at the rate of 700,000 tons per day in this country. That is 250 million tons per year—enough to fill the Superdome in New Orleans 1500 times over. OFFICE OF PUBLIC AFFAIRS, U.S. ENVIRONMENTAL PROTECTION AGENCY, PAMPHLET NO. OPA-87-007, SUPERFUND: LOOKING BACK, LOOKING AHEAD 1 (Dec. 1987), *reprinted in* EPA JOURNAL (Jan.-Feb. 1987) [hereinafter EPA, SUPERFUND].

3. For a further discussion of the environmental report, see Leonard, *Conducting Pre-Acquisition Audits*, in NYSBA ENVIRONMENTAL DUE DILIGENCE 297 (1989) [hereinafter ENVIRONMENTAL DUE DILIGENCE].

4. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

5. 42 U.S.C. § 9631 (1988), *repealed by* Superfund Amendments Reauthorization Act of 1986, 26 U.S.C. § 9507 (1988).

6. Hazardous substances are defined under CERCLA to include the following: (1) any substance designated under 33 U.S.C. § 1321(b)(2)(A); (2) elements, compounds, mixtures, solutions and substances designated under 33 U.S.C. § 9602; (3) "hazardous wastes" identified under § 3001 of the Solid Waste Disposal Act, 42 U.S.C. § 6921 (excluding those of which Congress has suspended regulation under the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992(k); (4) "toxic pollutants" identified under 33 U.S.C. § 1317(a); (5) "hazardous air pollutants" defined under § 112 of the Clean Air Act, 42 U.S.C. § 7412; and (6) imminently hazardous chemical substances or mixtures that the EPA has taken action on under 15 U.S.C. § 2606. 42 U.S.C. § 9601(14) (1988). This Note will use the

then hold the responsible parties liable for the cleanup costs.[7] Alternatively, the Environmental Protection Agency (EPA) may compel legally responsible parties to clean up a hazardous substance site.[8] CERCLA was amended by the Superfund Amendments Reauthorization Act of 1986 (SARA),[9] adding $8.5 billion to the Superfund account to combat the increasing number of actual and potential Superfund sites.[10]

The wastes at Superfund sites consist mainly of industrial chemicals posing various threats to human health and the environment.[11] In most instances, the contamination at the sites is a result of poor disposal practices.[12] Thousands of abandoned or inactive sites containing hazardous waste have been identified across the country.[13] Unfortunately, many of these sites are located in environmentally sensitive areas, such as floodplains or wetlands.[14] Consequently, rain and melting snow seep through the sites, carrying away chemicals that contaminate streams,

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terms hazardous and toxic interchangeably, as well as substance and waste. *But see* Stevens Creek Assoc. v. Barclays Bank, 915 F.2d 1355, 1365 (9th Cir. 1990) (hazardous substance does not include asbestos products); Wilshire Westwood Assoc. v. Atlantic Richfield Corp., 881 F.2d 801, 802 n.2 (9th Cir. 1989) (hazardous substance does not include petroleum).

7. CERCLA defines responsible parties as (1) present owners or operators of a vessel or facility; (2) past owners or operators of a facility, who owned the facility at the time hazardous substances were disposed; (3) those who arrange for the disposal of such waste; and (4) transporters who selected sites from which there is a release or threatened release of any hazardous substance which causes the United States government to incur response costs. 42 U.S.C. § 9607(a)(1)-(4) (1988).

8. *Id.* § 9606. The discretionary functions of the President under subsection (a) of this section have been delegated to the Administrator of the EPA. Exec. Order No. 12,316, §§ 3(b), 8(f), 46 Fed. Reg. 42,237 (1981).

9. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

10. In December 1982, the first National Priorities List (NPL) had a total of 418 sites. 47 Fed. Reg. 58,476 (1982). As of October 1989 that number had risen to 981 final sites plus 238 proposed sites, for a total of 1219. 54 Fed. Reg. 41,000, 41,015 (1989). Once listed on the NPL, a site is eligible for CERCLA cleanup funds. However, the NPL contains only those sites which pose the greatest threat to human health and the environment. The problem is better illustrated by the EPA's hazardous waste site inventory, which includes approximately 20,000 sites that may pose a threat to human life or the environment. *See CERCLA Enforcement Figures Called Low for Fiscal 1986*, 25 Env't Rep. (BNA) 473 (Nov. 28, 1986).

11. EPA, SUPERFUND, *supra* note 2, at 1.

12. *Id.*

13. *Id.*

14. *Id.*

lakes, and underground waters.[15]

A lender that forecloses on and takes title to the property of a borrower may be liable for the cost to clean up the hazardous waste disposed of by the borrower.[16] The costs for a cleanup are substantial.[17] In the past few years, thirty-nine states have passed legislation similar to the statutory scheme of CERCLA to aid in the war on hazardous waste.[18] Moreover, five states currently have legislation that allows the imposition of priority or superliens on the contaminated property.[19] The state statutes provide for such liens to supersede existing perfected liens, and to burden the property of a responsible party that was not the subject of the cleanup.[20]

This Note reviews lender liability under CERCLA.[21] It analyzes the statutory provisions creating secured creditor liability,[22] and a provision exempting lenders from liability,[23] as well as case law interpreting those provisions.[24] In addition, it discusses proposed legislation to address the predicament faced by lenders.[25]

The Note also examines the statutes[26] and case law[27] of New York State, including the implications of proposed superlien legislation.[28]

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15. *Id.*

16. *See infra* notes 58-109 and accompanying text.

17. For example, the Singer Corporation spent $1.2 million to remove polychlorinated biphenyls (PCBs) from the New Jersey site where it had manufactured sewing machines for over a century. EPA, SUPERFUND, *supra* note 2, at 20.

18. For a list of the 39 states who have enacted Superfund-type legislation, see Note, *The Impact of State "Superlien" Statutes on Real Estate Transactions*, 5 VA. J. NAT. RESOURCES L. 297, 297 n.1 (1986).

19. *See* CONN. GEN. STAT. §§ 22a-451, -452a (1985 & Supp. 1990); ME. REV. STAT. ANN. tit. 38, § 1371 (1989); MASS. GEN. LAWS ANN. ch. 21E, § 13 (West Supp. 1990); N.H. REV. STAT. ANN. § 147-B:10-b (Supp. 1989); N.J. STAT. ANN. § 58:10-23.11f, subd. f. (West 1982 & Supp. 1990). Arkansas and Tennessee repealed the superpriority provisions of their lien laws, leaving only a nonpriority environmental lien. Hamel, *Is the Great Superlien Scare Finally Over?*, 21 Env't Rep. (BNA) 853, 853 (Aug. 31, 1990).

20. *See infra* notes 143-73 and accompanying text.

21. *See infra* notes 30-109 and accompanying text.

22. *See infra* notes 30-41 and accompanying text.

23. *See infra* notes 42-50 and accompanying text.

24. *See infra* notes 58-109 and accompanying text.

25. *See infra* notes 186-98 and accompanying text.

26. *See infra* notes 110-29 and accompanying text.

27. *See infra* notes 130-39 and accompanying text.

28. *See infra* notes 143-64 and accompanying text.

Finally, it concludes by setting forth precautions a lender may take to avoid liability when dealing with debtors' facilities that are contaminated with hazardous substances.[29]

II. LIABILITY UNDER CERCLA

A. *Statutory Scheme*

CERCLA imposes strict liability[30] based on standards under the Clean Water Act of 1977.[31] The courts have generally held that a CERCLA defendant[32] may be held jointly and severally liable for EPA cleanup costs.[33] As a result, the EPA may go after any single liable party, realistically the one with the "deepest pockets," which typically includes lenders. Though a CERCLA defendant may implead other responsible parties, it will bear the burden and cost of doing so.[34]

The basis for the liability of lenders is CERCLA section 107(a).[35] Superfund imposes liability on four groups of parties: present owners

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29. *See infra* notes 174-98 and accompanying text.

30. Although the language of CERCLA itself does not impose strict liability, it has been interpreted to do so. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (Congress intended responsible parties to be held strictly liable); United States v. Conservation Chem. Co., 589 F. Supp. 59, 62 (W.D. Mo. 1984) (strict liability standard is consistent with legislative intent); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982) (quoting remarks of Sen. Randolph and Rep. Florio from Congressional Record to demonstrate Congress' intent to impose strict liability).

31. *See* 33 U.S.C. § 1321 (1988); 42 U.S.C. § 9601(32) (1988).

32. The term "CERCLA defendant" is used in this Note to indicate a party the court deems responsible for cleaning up a contaminated site.

33. *See, e.g.*, United States v. Shell Oil Co., 605 F. Supp. 1064, 1083-84 n.9 (D. Colo. 1985) (joint and several liability under common law principles may be imposed on a case-by-case basis); United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984) (a court has the power to impose joint and several liability whenever a defendant cannot prove his contribution to an injury).

34. There is legislative history which indicates the rationale for imposing joint and several liability:

> [T]he effect of the decision was to require the defendants, rather than the plaintiff, to show that other tortfeasors contributed to the harm and in what quantities they so contributed. This incentive to locate all responsible parties is one of the prime considerations underlying use of joint and several liability in pollution suits.

126 CONG. REC. 26,784 (1980) (statement of Rep. Gore).

35. 42 U.S.C. § 9607(a) (1988).

and/or operators of the vessels or facilities,[36] past owners and/or operators of facilities,[37] those who arrange for the transportation of hazardous substances,[38] and the transporters of such materials.[39] The term "owner and operator" of a facility is defined as "any person owning or operating such facility."[40] Nevertheless, the same section goes on to provide: "[s]uch [a] term does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."[41] This section is commonly known as the "secured lender exemption clause."

B. *Secured Lender Exemption*

A person who satisfies the requirements of the secured lender exemption clause is not liable under the Act. Consequently, lenders have argued that they acquired the toxic property to protect their security interest[42] and are not liable because of this clause.[43] The legislative history indicates that this exemption is to apply only under certain circumstances.[44] The Act does not encompass certain persons possessing ownership (such as financial institutions) who, without participating in the management or operation of a vessel or facility, hold title to secure a loan. Also exempted are those individuals whose participation is limited to holding lease financing arrangements.[45] Thus, a distinction is drawn between ownership of land versus ownership of a mortgage. The secured lender exemption clause ensures that all lenders will be treated the same

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36. *Id.* § 9607(a)(1).

37. *Id.* § 9607(a)(2).

38. *Id.* § 9607(a)(3).

39. *Id.* § 9607(a)(4).

40. *Id.* § 9601(20)(A).

41. *Id.*

42. The term security interest is used to mean an interest in real or personal property which secures the payment of an obligation. *See* U.C.C. § 1-201(37) (1989). The Uniform Commercial Code treats all secured interests in personal property simply as "security interests." *See id.* § 9-102.

43. *See, e.g.*, United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578-80 (D. Md. 1986); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,996 (E.D. Pa. 1985).

44. H.R. REP. NO. 1016, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6181.

45. *Id.*

under the conflicting state laws. A mortgage does not convey title to the land in lien theory states.[46] In contrast, title theory states convey ownership when the lender takes a security interest.[47]

The secured lender exemption was significantly narrowed by the Eleventh Circuit's decision in *United States v. Fleet Factors Corp.*[48] The court stated:

> Under the standard we adopt today, a secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable . . . .[49]

As the Supreme Court denied certiorari,[50] it remains to be seen how other courts will construe and limit this exemption.

C. *Affirmative Defenses*

Even though courts have interpreted CERCLA to impose strict liability,[51] three affirmative defenses are available to a CERCLA defendant.[52] Liability will not be imposed if the defendant can demonstrate that the contamination was caused by an act of God, an act of war, or an act of a third party, other than an agent of the defendant, and other than one whose act or omission occurs in connection with a contractual relationship, if the defendant establishes that he exercised due care and took precautions to guard against foreseeable acts or omissions of the third party.[53] The first two defenses, by their nature, are clear and

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46. J. DUKEMINIER & J. KRIER, PROPERTY 589 n.10 (2d ed. 1988). In lien theory states, the borrower retains legal title and the lender has only a lien on the property. *Id.*

47. *Id.* In title theory states, the borrower gives the deed in fee simple to the lender, with a condition subsequent clause providing that if the borrower pays back the sum owed on the due date, the deed will become void. *Id.* at 589.

48. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991); *see infra* notes 92-109 and accompanying text.

49. *Id.*

50. 111 S. Ct. 752 (1991).

51. *See supra* notes 30-34 and accompanying text.

52. *See* 42 U.S.C. § 9607(b) (1988).

53. *Id.* Nor will liability be imposed if the damage results from any combination of

used only in limited circumstances. It is the latter that has caused much confusion. SARA, however, added a lengthy description of the phrase "contractual relationship,"[54] which created the "innocent landowner" defense.[55]

A "contractual relationship" includes, "but is not limited to, land contracts, deeds or other instruments transferring title or possession."[56] However, a contractual relationship will not exist if the property where the facility is located was acquired by the defendant after the contamination occurred and, if at the time the property was acquired, the defendant did not know or have reason to know the property contained hazardous substances.[57]

If the defendant discovers the contamination after taking ownership of the property, he is put in a formidable situation. The defendant may not use the innocent landowner defense when transferring the property despite the fact that he did not cause the contamination. Therefore, he will be liable if he does not disclose, and if he does disclose, he will arguably have a difficult time selling the tainted property.

D. *Case Law*

United States v. Mirabile[58] held that a secured creditor is not liable for Superfund cleanup costs if he does not participate in the management of the facility. *Mirabile* was an action brought by the EPA for the recovery of $249,792.52 spent in removing 550 drums of hazardous waste from the site of an insolvent paint manufacturing business.[59] The EPA filed its claim against Anna and Thomas Mirabile, the owners of the site at that time. The Mirabiles joined American Bank, claiming that they were potentially responsible parties under CERCLA.[60]

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these causes. *Id.*

54. *Id.* § 9601(35)(A).

55. *Id.*

56. *Id.*

57. *Id.* § 9601(35)(A)(i).

58. 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992 (E.D. Pa. 1985). *See also In re* T.P. Long Chem. Co., 45 Bankr. 278 (Bankr. N.D. Ohio 1985). The bank which held a security interest in the contaminated property was found not liable because it did not benefit from the cleanup and did not participate in the management of the property. The court found that the bank already suffered a loss and felt that it was inequitable for the bank to bear an even larger loss. *Id.* at 288-89.

59. *Mirabile*, 15 Envtl. L. Rep. at 20,993.

60. *Id.* at 20,996.

In the 1970s, American Bank made a loan to Turco Coatings, Inc. (Turco) that was secured in part by a mortgage on the site. During the course of manufacturing paint, Turco had generated hazardous waste that was stored in drums on the site.[61] Turco continued to manufacture paint until 1980, when it filed for protection under Chapter 11 of the Bankruptcy Code.[62]

In 1981, Turco's Chapter 11 petition was dismissed, and American Bank initiated a foreclosure action. American Bank was the highest bidder at the sheriff's sale held on August 21, 1981.[63] On December 15, 1981, American Bank assigned its bid to the Mirabiles who accepted a sheriff's deed to the property.[64]

Throughout the four months between the sheriff's sale and the assignment to the Mirabiles, American Bank officials visited the property several times to show it to prospective buyers. Additionally, the bank took steps to protect the property against vandalism.[65]

To determine if the bank had exercised enough control in the management of the property to impose liability, in *Mirabile* the court looked at cases that addressed whether an individual hazardous waste site owner could hide behind a corporate veil.[66] In those cases, the courts held that if stockholders were active in the management of the corporation creating toxic waste, such stockholders may be held liable for the cleanup costs.[67]

The *Mirabile* court drew a distinction between creditors who focused solely on financial matters of the corporation and those creditors who also participated in the "day-to-day production aspects of the business."[68] Finding that the bank was only involved in the financial aspects of the business, the court granted its motion for summary judgment.[69] From the *Mirabile* decision, however, it remains unclear how much control a lender

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61. *Id.*

62. *See* 11 U.S.C. §§ 1101-1174 (1988).

63. *Mirabile*, 15 Envtl. L. Rep. at 20,996.

64. *Id.*

65. *Id.*

66. *Id.* at 20,995. In the cases discussed, the court imposed personal liability on individuals active in corporate management and control. *See* New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. Carolawn Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,699 (D.S.C. 1984).

67. *See Shore Realty*, 759 F.2d at 1032; *Carolawn*, 14 Envtl. L. Rep. at 20,699.

68. *Mirabile*, 15 Envtl. L. Rep. at 20,995.

69. *Id.* at 20,996.

can maintain over the borrower's business while still avoiding liability.

In *United States v. Maryland Bank & Trust Co.*,[70] a federal district court in Maryland avoided the management participation issue by holding a lender liable when it foreclosed on a loan and took title to the contaminated property.[71] The court held that the secured lender exemption did not apply once the lender foreclosed and took title to the property.[72]

Maryland Bank involved a 117 acre farm in California, Maryland owned by Herschel McLeod and his wife.[73] The McLeods operated two trash and garbage disposal businesses at the site.[74] During the 1970s Maryland Bank & Trust Co. loaned money to the McLeods for their business operations.[75] In 1980, their son, Mark, borrowed $335,000 from Maryland Bank to buy the family farm. In 1981, Mark McLeod defaulted on the loan, and Maryland Bank began the foreclosure process.[76] On May 15, 1982, Maryland Bank purchased the property at a foreclosure sale.[77]

In June 1983, the EPA inspected the site and found improperly disposed hazardous waste that had been there since approximately 1972.[78] The EPA ordered the bank to clean up the area. When the bank refused, the EPA began removing the wastes.[79] The United States filed suit when Maryland Bank refused to reimburse the EPA for the $551,713.50 incurred as response costs to the hazardous waste problem.[80]

The court focused on whether Maryland Bank was an "owner and operator" under CERCLA.[81] The court felt the statute was unclear about

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70. 632 F. Supp. 573 (D. Md. 1986).

71. *Id.* at 579.

72. *Id.*

73. *Id.* at 575.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. The EPA inspection revealed two disposal areas containing deteriorated or leaking drums, some of which had been buried. Testing identified several hazardous substances including: chromium, lead, mercury, cyanide compounds, ethylbenzene, toluene, and xylenes. 15 Envtl. L. Rep. (Envtl. L. Inst.) 65,847 (1985).

79. *Maryland Bank & Trust*, 632 F. Supp. at 575.

80. *Id.* at 576.

81. *Id.* at 578-80.

whether persons had to be both owners and operators to be held liable.[82] Since CERCLA was a quickly drafted compromise statute,[83] the court reasoned that it was highly probable that Congress forgot to put a "the" before the term "operator" as it had before "owner."[84] As a result, the court found that a defendant need not be both an owner and operator to be held liable under CERCLA.[85]

Maryland Bank also claimed that it was simply protecting its security interest and was therefore entitled to the secured lender exemption. The court disagreed, stating that the security interest exemption covered only those persons who hold a security interest at the time of the cleanup.[86] Since Maryland Bank did not hold the requisite security interest at the time of the cleanup, it was not entitled to the exemption.[87] The court reasoned that allowing Maryland Bank to escape liability would go against the policy of CERCLA.[88] If Maryland Bank's argument prevailed, it would mean that it could sell the land for a profit after the EPA paid to clean it up.[89]

In addition to *Maryland Bank*, other cases have interpreted CERCLA to impose liability on lenders. A federal district court in South Carolina held a finance company liable for cleanup costs despite its holding title for only one hour.[90] In New Mexico, a federal district court imposed liability on a lessor of property, holding him responsible for the hazardous waste of his tenant.[91]

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82. *Id.* at 578.

83. 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6119-20; Gurd, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 J. ENVTL. L. 1, 1 (1982).

84. *Maryland Bank & Trust*, 632 F. Supp. at 578.

85. *Id.* at 577.

86. *Id.* at 579.

87. *Id.*

88. *Id.* at 580.

89. *Id.*

90. United States v. Carolawn Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,699 (D.S.C. 1984). The EPA sued the defendant to recover cleanup costs of a hazardous site in Fort Lawn, South Carolina. The defendant, who acted as a strawman for transfer of property between two other defendants, was held liable because it had retained an ownership interest in the property after the transfer. *Id.* at 20,699-700.

91. United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1354 (D.N.M. 1984). The EPA cleaned up the leased property after a spill occurred. The court relied on the legislative history of CERCLA in holding the lessor liable as an owner. The lessor's third party act or omission defense was held to be inapplicable because the lessor and lessee were in a contractual arrangement (the lease). *Id.* at 1358.

United States v. Fleet Factors Corp.[92] is one of the more recent cases regarding CERCLA lender liability.[93] Fleet Factors Corporation (Fleet) loaned money to Swainsboro Print Works, Inc. (SPW) from 1976 to 1981, secured by security interests in inventory, equipment and a mortgage on the plant property.[94] During that period, Fleet approved SPW's customers' credit prior to shipment of goods, and applied a portion of the sales income to the debt.[95] SPW went bankrupt in 1981, and Fleet foreclosed its security interest on the inventory and equipment, but not on the real property.[96]

In denying the government's motion for summary judgment,[97] the court divided Fleet's activities into two periods:[98] the time prior to the foreclosure, and the time after the foreclosure sale.[99] The court ruled as a matter of law that Fleet was not a "current owner or operator" because Fleet did not foreclose on the mortgage of the property, just on the equipment and inventory.[100] In deciding whether Fleet was an owner or operator at the time the toxic waste was disposed, the court interpreted the secured lender exemption of section 9601(20)(A) to mean that

> 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

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92. 724 F. Supp. 955 (S.D. Ga. 1988), *aff'd*, 901 F.2d. 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

93. There since have been additional cases that follow the *Fleet Factors* decision. *See, e.g., In re* Bergsoe Metal Corp., 910 F.2d 668 (9th Cir. 1990) (secured creditor participating only in the financial management is not excluded from secured lender exemption); Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556, 553 (W.D. Pa. 1989) ("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."). *See also* United States v. Nicolet, Inc., 712 F. Supp. 1193, 1205 (E.D. Pa. 1989) (mortgagee can be held liable under CERCLA only if the mortgagee participates in the managerial and operational aspects of the facility in question).

94. *Fleet Factors*, 724 F. Supp. at 957.

95. *Id.* at 958.

96. *Id.*

97. *Id.* at 961.

98. *Id.* at 960-61.

99. *Id.* at 960.

100. *Id.*

> participate in the day-to-day management of the business or facility . . . .[101]

Applying this analysis, the court ruled that Fleet's activities[102] prior to foreclosure did not rise to the level of an owner or operator.[103] The court, however, denied Fleet's motion for summary judgment.[104] In doing so, it focused on the activities at the time of foreclosure and afterward at the auction sale, concluding that an issue of material fact existed about whether Fleet actually caused the hazardous chemicals to be released during the auction sale.[105] This would make Fleet an operator of the facility at the time of disposal of the hazardous waste.[106]

This decision is in line with *Mirabile*.[107] It allows a lender to provide financial assistance and management advice to a debtor without incurring CERCLA liability. However, just as in *Mirabile*, the *Fleet Factors* court is not clear about what would constitute "day-to-day" business activities. Moreover, lenders must note that the *Fleet Factors* court was willing to expose Fleet to liability based on its activities on the property during the foreclosure which may have caused chemicals and dyes to leak from the fifty-five gallon drums.[108] Additionally, in affirming the district court's decision, the Eleventh Circuit noted that the district court construed the secured creditor exemption too broadly.[109]

III. LIABILITY UNDER STATE LAW

A. *New York State Law and Cases*

In recognizing the great danger to the public posed by hazardous waste, one New York court noted that "[t]he unlawful possession and disposal of hazardous wastes, with the long-term toxicity that is inherent in these substances, may pose a greater threat to the health and safety of

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101. *Id.*

102. *See supra* notes 99-101 and accompanying text.

103. *Fleet Factors*, 724 F. Supp. at 960.

104. *Id.* at 961.

105. *Id.*

106. *See* 42 U.S.C. § 9607(a)(2) (1988).

107. *See supra* notes 58-69 and accompanying text.

108. *See supra* notes 105-06 and accompanying text.

109. United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990) ("we find its construction of the statutory exemption too permissive towards secured creditors who are involved with toxic waste facilities."), *cert denied*, 111 S. Ct. 752 (1991).

the citizens of this State than street crime."[110] In 1981, the state legislature created a comprehensive criminal enforcement scheme to increase the sanctions for violations of these laws.[111] The legislature amended the Environmental Conservation Law, establishing felony and misdemeanor offenses for unlawful possession,[112] unlawful disposal,[113] and unlawful dealing in hazardous wastes.[114] However, those statutes that impose civil liability are of more interest to lenders.

Three civil titles address the emerging problems of hazardous waste. One deals with industrial hazardous waste management,[115] another creates a procedure for reporting hazardous waste treatment,[116] and the third, title 13, regulates inactive hazardous waste disposal areas.[117] It is title 13 that is similar to CERCLA and is of the most concern to lending institutions.

This title establishes a State Superfund Management Board to oversee the state fund created in 1982 by State Finance Law,[118] known as the Hazardous Waste Remedial Fund (Fund). The Fund, financed by assessments on hazardous waste generators,[119] is available for cleanup and remedial programs under title 13.[120] The Fund, however, may not be used to reimburse costs covered by CERCLA.[121]

The State Superfund law has two principal components: (1) site identification and ranking[122] (site listing); and (2) site remediation.[123] The site listing process is relatively informal. The Department of

110. People v. J.R. Cooperage Co., 72 N.Y.2d 579, 581, 531 N.E.2d 1285, 1287, 535 N.Y.S.2d 353, 355 (1988).

111. *See infra* notes 112-14 and accompanying text.

112. N.Y. ENVTL. CONSERV. LAW §§ 71-2707, -2709 (McKinney 1991).

113. *Id.* §§ 71-2711, -2713.

114. *Id.* §§ 71-2715, -2717.

115. *Id.* §§ 27-0900 to -0923.

116. *Id.* §§ 27-1101 to -1107.

117. *Id.* §§ 27-1301 to -1321.

118. N.Y. STATE FIN. LAW § 97-b(1) (McKinney 1989).

119. N.Y. ENVTL. CONSERV. LAW § 27-0923(4)(b) (McKinney 1984

120. *Id.* § 27-1313.

121. *See* N.Y. STATE FIN. LAW § 97-b (McKinney 1989) (reprinting § 19, stating that the Fund may not be used to duplicate or cover expenses by federal law).

122. N.Y. ENVTL. CONSERV. LAW § 27-1305

123. *Id.* § 27-1313.

Environmental Conservation (DEC) has the discretion to classify a disposal site as a hazard if it believes that the hazardous wastes at the site present a significant threat to the public health or the environment.[124] Site remediation, however, can be ordered only after a hearing at which the DEC must prove by a preponderance of the evidence that the site is a significant threat to the public health or the environment.[125] Moreover, the hearing is necessary before the state can deem a party to be responsible for the cleanup costs.[126] Title 13 has language similar to the owner or operator language of CERCLA.[127] Under this title the DEC may

> order the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site (i) to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the department, at such site, and (ii) to implement such program within reasonable time limits specified in the order.[128]

The use of the word "or" would seem to mean that the owner would not have to be the cause of the hazardous waste to be held liable, but must simply be an owner of the contaminated property. Nowhere in the trio of statutes dealing with hazardous waste is there a definition of owner. Even so, similar to CERCLA, the legislative history of title 13 suggests, that the provisions of the statute should be generously construed by the courts because cleaning up hazardous waste sites is so important to protecting public health.[129] Therefore, the New York courts have interpreted title 13 to impose strict liability.[130]

In a recent case,[131] the Appellate Division, Third Department, overturned the DEC's inactive hazardous waste disposal site

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124. *Id.* § 27-1305(4)(b)(1)-(5).

125. *Id.* § 27-1313(4).

126. *Id.*

127. *See* 42 U.S.C. §§ 9607(a)(2)-(3) (1988).

128. N.Y. ENVTL. CONSERV. LAW § 27-1313(3).

129. *See id.* § 1301 (practice commentary).

130. *See, e.g.*, State v. Schenectady Chem., Inc., 117 Misc. 2d 960, 459 N.Y.S.2d 971 (1983), *aff'd*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (1984).

131. New York State Superfund Coalition, Inc. v. New York State Dep't of Envtl. Conservation, 144 A.D.2d 72, 536 N.Y.S.2d 886, *aff'd*, 75 N.Y.2d 88, 550 N.E.2d 155, 550 N.Y.S.2d 879 (1989).

regulations[132] dealing with liability under the Fund. The court held the criteria for deciding whether hazardous waste at a site constitutes a "significant threat to the environment,"[133] created by the DEC to fill in gaps in the legislation, were vague and overbroad, and contrary to the intent of the legislature.[134] The court found that the list of subclass sites which pose a significant threat was too broad because the regulation requires only that the hazardous waste at a particular site hold the potential for hazards to human health or the environment.[135] Under this standard, every site where hazardous wastes exist would constitute a significant threat, since hazardous waste always holds the "potential" for harm to humans or the environment.[136] This decision appears beneficial to lenders because it suggests that the courts will be reluctant to enforce title 13 as liberally as the DEC may have intended. The New York Court of Appeals affirmed this case.[137]

The DEC, however, has responded to this setback by proposing a bill to the New York State Assembly Legislative Commission on Toxic Substances and Hazardous Wastes.[138] In its current form, the bill incorporates the challenged regulations in *New York State Superfund Coalition,* making them part of the statutory scheme in title 13.[139]

B. *Preemption by CERCLA*

The United States Supreme Court has held that New Jersey's hazardous waste legislation, financed by a tax on the oil and chemicals industry, is preempted by CERCLA from being used for cleaning up sites covered by the Superfund.[140] Although the New York State Legislature

132. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 375 (McKinney 198

133. *Id.* § 375(c).

134. *Superfund Coalition,* 144 A.D.2d at 76, 536 N.Y.S.2d at 889.

135. *Id.*, 536 N.Y.S.2d at 889.

136. *Id.*, 536 N.Y.S.2d at 889.

137. New York State Superfund Coalition, Inc. v. New York State D Conservation, 75 N.Y.2d 88, 550 N.E.2d 155, 550 N.Y.S.2d 879 (1989).

138. Governor Cuomo's Program Bill No. 133.

139. *Id.*

140. Exxon Corp. v. Hunt, 475 U.S. 355, 376 (1986) (the state fund n pay for cleanup of oil spills not covered by CERCLA). The decision was U.S.C. § 9614(c): "no person shall be required to contribute to any fund, t which is to pay compensation for claims of any costs of response or dama which may be compensated under this subchapter." *Exxon Corp.*, 475 U.S.

attempted to avoid the preemption problem,[141] it was unnecessary because of SARA. In enacting SARA, Congress implicitly overruled the Court's decision in *Exxon Corp. v. Hunt*.[142] Therefore, states are now free to enact legislation that affects sites already covered under CERCLA.

C. *New York Proposed Superlien Legislation*

Many states, like New York, have enacted statutes governing the disposal of hazardous waste by creating state superfunds.[143] State superfund lien legislation authorizes the state environmental regulatory agency to place a lien on the real and/or personal property of a person found responsible for hazardous waste cleanup costs.[144] Most liens, including CERCLA's,[145] take their priority from the order in which they are filed or recorded. Beyond this, five states currently have "superlien" statutes.[146] Superliens give the state a priority lien on the contaminated property to recover all costs of cleaning up the site, and supersede the claims of all creditors with existing liens against the property.[147] Recently, a trend has developed away from superliens and is heading towards the more moderate nonpriority liens.[148] At one time, seven states had adopted superlien statutes, and many others had considered implementing one. However, two of the seven, Arkansas and Tennessee,

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141. *See supra* notes 112-30 and accompanying text.

142. SARA amended generally 42 U.S.C. § 9614(c), which had barred states from imposing taxes or fees to pay costs covered by CERCLA. *See supra* note 9 and accompanying text.

143. In addition to New York, 17 other states have such legislation: Arkansas, Connecticut, Illinois, Iowa, Kentucky, Louisana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Oregon, South Dakota, Tennessee, Texas, and Virginia. Witmer, *Environmental Factors in Business and Real Estate Transactions*, in ENVIRONMENTAL DUE DILIGENCE, *supra* note 3, at 235.

144. *See supra* notes 118-30 and accompanying text.

145. CERCLA's lien is not "super" because it is subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable state law before notice of the federal lien has been filed. 42 U.S.C. § 9607(l)(3) (1988).

146. *See supra* note 19 and accompanying text.

147. *See infra* notes 156-59 and accompanying text.

148. There are several possible reasons to explain this trend away from superliens. First, lenders have mounted significant lobbying efforts to eliminate these laws. *See* Hamel, *supra* note 19, at 853. Another possibility is that the superpriority is not needed with the existence of CERCLA and similar state legislation. Additionally, superliens may do more damage to the state in terms of tightening credit markets, than they do in financing cleanups. *Id.*

repealed their superliens, leaving only a nonpriority environmental lien.[149]

In New York, a superlien bill was first introduced in 1986,[150] and was reintroduced in 1987.[151] Although the bill was unsuccessful, another one was introduced in the 1988 legislative session.[152] In 1988, the bill passed in the Assembly, but not in the Senate. It was automatically reintroduced during the current session[153] with some technical corrections.

Under the current bill, whenever expenditures are incurred by the Fund pursuant to New York State Finance Law section 97-b,[154] "the state will be entitled to a lien upon the real and personal property of any person from whom the state may recover . . . for any and all expenditures."[155] The lien will be a superpriority lien and will take precedence over all other claims against the contaminated property, whether secured or unsecured.[156] In respect to the other property that falls under the bill, the lien shall take precedence only over claims which are subsequently perfected.[157] The lien will be for all the expenditures plus interest,[158] and must be recorded to be effective.[159] Sources within the New York DEC indicate that because of the budget and solid waste issues, it is unlikely that serious attention will be paid to the bill until next year.[160]

The rationale behind the proposed legislation is to help the state to recover money spent to remedy hazardous waste sites.[161] Also, by strengthening the bargaining position of the DEC to secure voluntary

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149. *See id.* at 855.

150. S. 7594, 1986 Sess., N.Y. State Legislature.

151. S. 2997, 1987 Sess., N.Y. State Legislature.

152. A. 6258, 1988 Sess., N.Y. State Legislature.

153. A. 5493, 1989 Sess., N.Y. State Legislature.

154. N.Y. STATE FIN. LAW § 97-b (McKinney 1989).

155. A. 5493, 1989 Sess., N.Y. State Legislature (proposing adding subdivision 16 to N.Y. STATE FIN. LAW § 97-b.

156. N.Y STATE FIN. LAW § 16(a) (McKinney 1989).

157. *Id.* § 16(b).

158. *Id.* § 16(c).

159. *Id.* § 16(e).

160. Witmer, *supra* note 143, at 237.

161. A. 5493, 1989 Sess., N.Y. State Legislature, Memorandum in Support of Legislation at 1.

cleanup, there would be a reduction in demand made on the Fund.[162] Since the proposed superlien legislation in New York attaches to all property of liable persons, the contaminated land may represent a small portion of the liability. Consequently, lenders may be affected in two ways. First, lenders who hold mortgages on the contaminated land may lose the value of the collateral when it is superseded by a subsequent state lien. Second, lenders who hold security interests in the other property of responsible parties may lose their security if an unexpected state lien is given priority. *Kessler v. Tarrats*,[163] brought under the New Jersey Spill Compensation and Control Act (SCC),[164] is illustrative of the latter problem.

D. *New Jersey Case Law*

The SCC is similar to the New York bill in that the lien attaches to both the contaminated property and any other property owned by the responsible party.[165] The plaintiff in *Kessler* was the assignee of a purchase money mortgage who instituted a suit to foreclose his mortgage.[166] However, the Administrator of the SCC moved for summary judgment, claiming the lien for the cost of cleaning up the toxic waste on the land took priority over the City of Patterson's tax lien, Kessler's mortgage, and all other liens.[167] Kessler countered that since the government was taking his property without paying just compensation for it, the priority of the state's lien over his mortgage was unconstitutional.[168]

The court held that the statute was a valid use of the state's police power.[169] The court determined that the objectives of the City of Patterson and the state were to stop an unlawful use of property and to

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162. *See id.*

163. 191 N.J. Super. 273, 466 A.2d 581 (1983), *aff'd*, 194 N.J. Super. 136, 476 A.2d 326 (1984).

164. N.J. REV. STAT. § 58:10-23.11 to :10-35.4 (1982 & Supp. 1990).

165. *See id.* § 58:10-23.11f(f). However, if the property consists of six dwelling units or less, and is used exclusively for residential purposes, then it is exempt from the lien.

166. 191 N.J. Super. at 281, 466 A.2d at 585.

167. *Id.*, 466 A.2d at 585.

168. Plaintiff, Kessler, argued that the statute was unconstitutional for three reasons: (1) it impaired the contract rights arising from the mortgage; (2) it deprived him of due process of law because no notice to the prior lien interests had been required; and (3) it would take his property without just compensation. *Id.*, 466 A.2d at 585.

169. *Id.* at 288, 466 A.2d at 589.

terminate a nuisance which was dangerous to life, health, and adjoining properties.[170]

The Appellate Division affirmed the judgment of the lower court.[171] Again, the court noted the strong police power and public interest rationale underlying the statute.[172] In denying that there was an unlawful taking of property, the court reasoned: "whatever property, if any, was taken by the dischargers of the hazardous substances and not by the State . . . . [t]he State did not take property, but rather assisted in its enhancement by doing what the owners should have done but did not do."[173]

In *Kessler*, the plaintiff lost his security because the state's lien was given priority. As a result of the superlien attaching to all property of the polluter, it is difficult in many circumstances for the lender, or anyone with a security interest, to foresee an environmental lien attaching and taking priority. Since New York's proposed superlien statute is similar to New Jersey's, it is likely that the New York courts will look to the New Jersey case law and arrive at similar results.

IV. ADVICE TO LENDERS

Due to the increased vulnerability under federal and state environmental statutes, lenders must take precautions to protect themselves. It is clear from both the statutes and case law that the lender should identify borrowers that may pose problems to the environment, and should be careful not to become involved in the borrower's daily business affairs.[174] Generally, conducting an environmental audit is the best way to determine future risks.[175] Furthermore, when dealing with environmentally risky borrowers, lenders should take extra precautions before foreclosing. Common sense dictates that a lender should not foreclose if the cost of the cleanup is greater than the value of the property. Beyond this, there are other precautions a lender should take.[176]

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170. *Id.* at 296, 466 A.2d at 595.

171. Kessler v. Tarrats, 194 N.J. Super. 136, 476 A.2d 326 (1984).

172. *Id.* at 146, 476 A.2d at 332.

173. *Id.* at 147, 476 A.2d at 332.

174. *See supra* notes 56-109 and accompanying text.

175. *See infra* notes 178-79 and accompanying text.

176. *See infra* notes 180-85 and accompanying text.

A. *Investigation of the Property*

The lender should treat the property as if it was being purchased by the bank. The lender should go to the state environmental agency and determine if the owner of the property has violated any environmental laws. Furthermore, the lender can determine if the property is on, or on its way to, the state's priority list.[177] The lender can also conduct a visual inspection of the property.

If the preliminary investigation indicates potential contamination, the lender should have an environmental audit performed. The environmental audit is the critical component of the environmental review process.[178] Soil and groundwater samples should be taken and analyzed to determine whether hazardous chemicals have been released on the property. The fact that the property passes inspection at the time of the loan should not preclude the lender from future tests to check for subsequent contamination.[179]

B. *Indemnification Agreements and Covenants*

CERCLA prevents the transfer of liability to the government.[180] In contrast, CERCLA allows indemnification agreements between private parties.[181] The lender, however, should attempt to obtain them from a parent corporation or individuals involved in the business, since indemnification agreements are useless if the borrower is insolvent.

Equally important, are covenants between the lender and borrower. The lender should require a covenant that neither the borrower, nor prior owners (to the best of the borrower's knowledge), have created conditions that may give rise to environmental liability, and that no enforcement actions are pending or being threatened.[182] The lender should also compel the borrower to covenant that it will remedy any contamination that occurs as soon as it is discovered, since this will always be less expensive than waiting for the government to remedy the situation. In the

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177. Manewitz, *Environmental Due Diligence*, in ENVIRONMENTAL DUE DILIGENCE, *supra* note 3, at 263.

178. *Id.* at 264.

179. *Id.* at 268.

180. 42 U.S.C. § 9607(e)(1) (1988).

181. *Id.* § 9607(e)(2).

182. Klotz & Siakotos, *Lender Liability Under Federal and State Environmental Law: Of Deep Pockets, Debt Defeat and Deadbeats*, 92 COMM. L.J. 275, 302 (1987).

same vein, the borrower should also contract that it will comply with all federal and state environmental laws. Finally, the borrower should agree that the lender will be allowed to test and monitor the property.[183]

If such covenants are impossible to obtain, the lender should only give recourse mortgages, and should obtain security interests in property the borrower owns in states that do not have superlien statutes.[184] Moreover, a breach of any of the covenants should be cause to accelerate the underlying debt, allowing the lender to recover the loan proceeds before a borrower's assets are expended or attached by a judgment or superlien.[185]

C. *Proposed Federal Legislation to Protect Lenders*

Legislation to protect small businesses and banks from liability was reintroduced[186] by Rep. John J. LaFalce.[187] However, passage does not appear likely in the 101st Congress.[188] Witnesses from the banking, small business, and legal professions told the committee that the imposition of joint, several, and strict liability under CERCLA has had a severe impact on small businesses.[189] Many banks, fearing liability as deep-pocket defendants, now refuse to make loans to any small business that has any possible relation to hazardous wastes.[190]

The original bill provided that commercial lenders foreclosing on real estate to protect their security interests would not be construed as an "owner or operator" under CERCLA.[191] The bill also would provide that financial institutions that acquire contaminated property as a trustee of an estate are not liable for the ensuing cleanup.[192] Rep. LaFalce said

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183. *Id.*

184. Bleicher & Stonelake, *Caveat Emptor: The Impact of Superfund and Related Laws on Real Estate Transactions*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,017, 10,023 (1984).

185. *Id.* at 10,024.

186. H.R. 4494, 101st Cong., 1st Sess. (1990). The original was introduced last year, H.R. 2085, 100th Cong., 1st Sess. (1989).

187. John J. LaFalce (D-NY) is the chairman of the House Small Business Committee.

188. 20 Env't Rep. (BNA) 654, 654 (Aug. 11, 1989). House aides told BNA that the proposed legislation has little chance of being enacted this year or next. However the proposed legislation will be reintroduced again in the 102d Congress.

189. *Id.*

190. *Id.* (testimony of Charles M. Mitschow, representative of the American Bankers Assoc.).

191. 20 Env't Rep. (BNA) 17, 17 (May 5, 1989).

192. *Id.*

he added the provision limiting the liability of banks acting as corporate trustees because they often do not know they will be named a trustee of an estate until shortly before the will is offered for probate.[193] This does not allow banks time to conduct environmental audits. The new bill will expand protection to include public lenders, such as the Small Business Administration, mortgage lenders, and charitable institutions. While restating many of the same arguments he used for the original bill,[194] LaFalce also took into account a number of court opinions extending CERCLA's liability scheme to lenders.[195] Particularly, when discussing *United States v. Maryland Bank & Trust,*[196] LaFalce claimed that the case sent "shock waves through the financial community."[197] Almost no action occurred on LaFalce's original bill, except for an August 1989 hearing before his committee.[198]

V. CONCLUSION

As the federal and state governments gradually became more aware of the dangers that toxic waste presents to the public, they created the Superfund and similar state funds to finance the cleanup of contaminated sites. The government pursues the responsible parties through civil actions to replenish the funds expended on a cleanup. Due to the gravity of the problem and the tremendous amount of money needed to rectify it, the liability schemes of the statutes are extremely broad, and as illustrated by the case law, may encompass lending institutions.

While it is clear that lenders do not cause hazardous waste problems, it is also becoming clear from the broad liability of CERCLA, that the government is shifting some of the burden of policing hazardous waste to lenders. After all, it is their financing that makes it possible for those industries that do generate toxic waste to operate. It becomes a question of where to place the cost for the cleanup. The government could place it directly on society through taxes. This alternative, however, would provide little incentive for industries creating hazardous waste to develop cleaner methods of production or better methods of disposal. Lenders are in a position to affect this situation by withholding financing from those

193. *Id.*

194. 20 Env't Rep. (BNA) 1966, 1966 (Apr. 13, 1990).

195. *See supra* notes 58-109 and accompanying text.

196. *See supra* notes 70-91 and accompanying text.

197. 20 Env't Rep. (BNA) 1966 (Apr. 13, 1990).

198. *Id.*

that do not improve their production methods, effectively driving them out of business.

Furthermore, while all of society benefits from a cleaner environment, it may be argued that lenders directly benefit from CERCLA and similar cleanups. The government's cleanup restores economic value to the contaminated property. Additionally, the owner is protected from common law actions resulting from the hazardous substances on the property. As seen in the *Maryland Bank & Trust* decision,[199] a lender may be considered an owner. On the state level, superliens prevent lenders from enjoying the economic benefit of the states' cleanup at society's expense.

The case law is still developing in this area and remains very unsettled at this point. A lender must obtain expert legal advice to stay abreast of the developing standards which continue to be established. Those in New York must also be aware of the implications the proposed superlien legislation will have if enacted. A careful, informed lender does not have to suffer economic losses at the hands of CERCLA, but may directly contribute to a cleaner, healthier environment.

Robert F. Carangelo, Jr.

199. *See supra* notes 70-91 and accompanying text.