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Cercla and Lender Liability: Why the Search for "Deep Pockets" Leads to Small Change

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CERCLA AND LENDER LIABILITY: WHY THE SEARCH FOR "DEEP POCKETS" LEADS TO SMALL CHANGE

Over the last fifteen years, public awareness of hazardous waste problems has increased in proportion to the increase in hazardous waste sites requiring environmental cleanups.[1] Nationally publicized incidents, such as Love Canal,[2] graphically illustrate the dangers posed by hazardous waste site mismanagement.[3] When the cata-

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[1] In 1979, the United States Environmental Protection Agency [hereinafter EPA] estimated that there were between 30,000 and 50,000 hazardous waste sites in existence, and that between 1,200 and 2,000 of these sites posed a serious risk to public health and the environment. H.R. Rep. No. 1016(I), 96th Cong., 2d Sess. 18 [hereinafter House Report], reprinted in 1980 U.S. Code Cong. & Admin. News 6119, 6120. By 1980, the EPA estimated that the number of problem hazardous waste sites had increased to 9,000. Superfund: Looking Back, Looking Ahead, EPA J., Jan.-Feb. 1987, 13, 17. By 1987, the EPA had included 703 sites on its National Priorities List, which "identifies the worst abandoned or uncontrolled hazardous waste sites in the United States." The EPA had also proposed 248 additional sites for listing. Id. Once listed on the National Priorities List, a site is eligible for cleanup funds pursuant to federal law. See EPA Seeks Comments on 64 Proposed Sites to be Added to the National Priorities List, 17 Env't Rep. (BNA) No. 41, at 1725 (Feb. 6, 1987). These 951 listed or proposed sites represented only a fraction of the estimated 15,000 sites the EPA found might pose a threat to public health and the environment. See Fiscal 1986 Superfund Enforcement Figures Reflect Program's Disruption, Official Says, 17 Env't Rep. (BNA) No. 30, at 1220, 1221 (Nov. 21, 1986) (preliminary assessment by either state or EPA officials of over 20,000 sites ruled out only 5,476 sites as posing no threat to public health and the environment). In fact, the General Accounting Office indicated that there could be as many as 378,000 facilities requiring response actions. 132 Cong. Rec. S14,896 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).

The extent of hazardous waste problems is also illustrated by the remedial costs estimated to alleviate the problems. In calculating its 1988 fiscal budget request, the EPA estimated average cleanup costs at $10-$12 million per site. Justice Official Tells BNA Conference that PRPs Deserve Access to Superfund Sites, 17 Env't Rep. (BNA) No. 49, at 2049, 2050 (Apr. 3, 1987). The EPA has estimated that "the total price tag for cleaning up the nation's worst abandoned hazardous waste sites could run as high as $46 billion." H.R. Rep. No. 253, 99th Cong., 2d Sess. 278, reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 2953.

[2] From 1942 to 1953, the Hooker Chemical and Plastics Corporation dumped on the Love Canal site an estimated 352 million pounds of an industrial chemical waste, including TCP, which is often contaminated with dioxin, and lindane, a highly toxic pesticide product. House Report, supra note 1, at 18. On May 21, 1980, President Carter declared a federal emergency at the Love Canal in Niagara Falls, New York. Molotsky, President Orders Emergency Help for Love Canal, N.Y. Times, May 22, 1980, at A1, col. 2. Seven hundred and ten families were evacuated, and both New York and the federal government provided funds to buy out contaminated properties from residents. Id. In a 1980 report, the House noted: "Cleanup cost [sic] at the Love Canal have already exceeded $27 million. . . . It is estimated that a properly secured disposal site would have cost only $4 million (in 1979 dollars) in 1952 when the site was closed." House Report, supra note 1, at 20.

[3] The Love Canal incident is by no means the only event which heightened public awareness to the problems of hazardous waste site mismanagement. In 1980, Congress noted incidents at sites in Montague, Michigan (barrels of hazardous waste dumped off the backs of

strophic effects of hazardous waste site mismanagement were first publicized,[4] there was a call for a more cohesive federal environmental response policy to police and clean up dangerous hazardous waste sites.[5] In 1980, Congress responded to the public's outcry and enacted the Comprehensive Environmental Response, Compensation

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trucks and hacked open by men armed with axes); Elizabeth, New Jersey (storage of highly toxic, explosive, and flammable materials); Denver, Colorado (radioactive waste products from radium industry operation discovered throughout the Denver area); Lathrop, California (pesticide formulation waste products placed in lagoons threatening drinking and irrigation waters); Glen Cove and Bethpage, Long Island (contaminated groundwater); and Hardeman County, Tennessee (contaminated groundwater). House Report, supra note 1, at 18-19. The economic effects of hazardous waste problems were staggering. In addition to the heavy costs incurred at the Love Canal site, discussed supra at note 2, the State of Michigan estimated $100 million cleanup costs on the Montague site; New Jersey estimated $10 million cleanup costs on the Elizabeth site; and Colorado estimated $25 million costs on the Denver site. Id. at 20. The cleanup costs required, however, were merely incidental compared to the dangers posed to the public health. Congress noted that the Love Canal health data showed elevated miscarriage and birth defect rates. Id. at 19. In Colorado and Florida, radioactive waste products posed serious risks of latent cancer and genetic damage. Id. Similar dangers were discovered at the sites in Michigan, Long Island, Tennessee, and New Jersey. Id. It is estimated that six percent of all cancer deaths in California are caused by toxic chemical exposure. 131 Cong. Rec. H11,111 (daily ed. Dec. 5, 1985) (statement of Rep. Fazio).

Throughout the 1980s, the public was continually reminded of hazardous waste site problems. For example, on February 23, 1983, the federal government announced its intention to buy out all homes in Times Beach, Missouri for an estimated $33 million. In the 1970s, Times Beach had been contaminated by dioxin-containing oil sprayed on its unpaved streets. Reinhold, U.S. Offers to Buy all Homes Tainted by Dioxin, N.Y. Times, Feb. 23, 1983, at A1, col. 6. More recently, the Union Carbide Corporation experienced two leaks in one month at its plant in Institute, West Virginia. Although the plant is considered among the most modern in the nation, 500 gallons of muriatic acid leaked from a hose there, forcing authorities to order 15,000 residents to remain indoors. West Virginia Toxic Leak Keeps 15,000 Inside, N.Y. Times, Feb. 17, 1990, at 28, col. 1. An earlier leak involving methyl isocyanate revived memories of Union Carbide's plant in Bhopal, India which received international attention after a leak of the same chemical killed 3,500 people in 1984. Id.

[4] Love Canal is seen as the high-water mark for those calling for federal legislation to deal with the growing problems associated with hazardous waste site mismanagement. See, e.g., United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 835 (W.D. Mo. 1984) ("In reviewing the legislative history of . . . CERCLA, it appears that Congress and the American public became more aware of the magnitude and expense of the problems associated with inactive sites as the Love Canal and similar sites came to the forefront."), aff'd in part, rev'd in part, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

[5] In considering the need for new environmental legislation, Congress recognized the inadequacies of prior federal environmental laws:

> Over the past two decades, the Congress has enacted strong environmental legislation in recognition of the danger to human health and the environment posed by a host of environmental pollutants. . . .
>
> Since [1976], a major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices known as the "inactive hazardous waste site problem." The unfortunate human health and environmental consequence of these practices has received national attention amidst growing public and Congressional concern over the magnitude of the problem and the appropriate course of response that should be pursued. *Existing law is clearly inadequate to deal with this massive problem.*

and Liability Act ("CERCLA").[6] CERCLA has two goals.[7] First, and foremost, CERCLA seeks to provide a quicker and more efficient response to dangerous hazardous waste sites.[8] Second, CERCLA attempts to transfer cleanup costs[9] to responsible parties[10] when a third party initiates cleanup measures.[11]

Initially, courts did not treat lenders, mortgagees, or other secured creditors (collectively, "lenders") as responsible parties within the meaning of CERCLA.[12] Lenders were shielded from liability pur-

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House Report, supra note 1, at 17-18 (emphasis added).

Speaking specifically about the deficiencies with the Resource Conservation and Recovery Act, the House Report noted that that Act was "prospective and applies to past sites only to the extent that they are posing an imminent hazard. Even there, the Act is of no help if a financially responsible owner of the site cannot be located." Id. at 22.

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

7 First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982). On CERCLA's goal to shift response costs to those parties responsible for the hazardous waste problem, see House Report, supra note 1, at 29.

8 "It is the intent of the [House] Committee in this legislation to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." House Report, supra note 1, at 22.

9 Under CERCLA, response costs include:

(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) of this title.

42 U.S.C. § 9607(a) (1988).

10 See infra note 43 and accompanying text.

11 Under CERCLA, response actions include (1) measures designed to prevent further environmental damage, "removal actions," and (2) those measures designed to act as a permanent remedy to remove all hazardous waste, "remedial actions." Removal actions include those measures "necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release [of a hazardous substance]." 42 U.S.C. § 9601(23) (1988). Remedial actions include those measures designed "to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment," such as confinement, storage, or destruction of the hazardous waste. Id. § 9601(24).

12 United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992 (E.D. Pa. Sept. 4,

suant to CERCLA's security interest exemption ("the exemption") under section 9601(20)(A).[13] The exemption provides that an "owner or operator" of a hazardous waste site "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."[14] The exemption of lenders from liability contrasted with the widespread imposition of CERCLA liability on private individuals and corporations involved in hazardous waste activities.[15]

On April 9, 1986, in *United States v. Maryland Bank & Trust Co.*,[16] a federal district court held that a lender who foreclosed on property was not entitled to the exemption.[17] This marked the first time that a lending institution was held liable under a federal environmental statute.[18] With other courts' acceptance of *Maryland Bank*'s

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1985) (lender who took title to property but sold property four months later before EPA initiated cleanup procedures held not liable for response costs under CERCLA).

13 42 U.S.C. § 9601(20)(A) (1988) [hereinafter the exemption]. CERCLA's legislative history does not address the liability of lenders as owners or operators. The exemption, however, demonstrates Congress's belief that those financing the operation of a facility, but not involved in actual management, are not "responsible parties" under CERCLA. See, e.g., Hill v. East Asiatic Co. (*In re* Bergsoe), No. 89-35397, slip op. 8627, 8637 ("Were [the negotiation of a loan agreement] sufficient to remove a creditor from the security interest exception, the exception would cease to have any meaning."); *Mirabile*, 15 Envtl. L. Rep. at 20995 ("The exemption plainly suggests that provided a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be held liable for cleanup costs.").

14 42 U.S.C. § 9601(20)(A) (1988) (emphases added).

15 See, e.g., Dedham Water Co. v. Cumberland Farms Dairy, 805 F.2d 1074 (1st Cir. 1986) (corporation unlawfully discharging volatile organic compounds on its facility held liable for response actions initiated by third party); J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263 (6th Cir. 1985) (current and past owners and operators of industrial waste storage facility held liable for response costs); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (holding corporation and individual officer liable as current landowners); United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985) (oil company held liable as owner and operator of off-shore facility discharging hazardous waste); United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124 (D.S.C. 1984) (chemical company that held title to hazardous waste site for one hour not precluded from liability even if the company served only as a conduit in the transfer of the property); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983) (corporation may be held liable as generator and transporter of hazardous substances).

16 632 F. Supp. 573 (D. Md. 1986).

17 The court in *Maryland Bank* held that a lender who foreclosed on property divested itself of the exemption and could be held liable for response costs as an owner if it purchased the property. Id. at 579-80. For a discussion of *Maryland Bank* and the court's reasoning, see infra notes 80-82 & 97-99 and accompanying text.

18 As one commentator noted: "Although other federal and state environmental acts and regulations include a list of potentially liable parties that is similar to that contained in CERCLA, no reported decision exists in which the Environmental Protection Agency (EPA) or another authorized plaintiff has pursued a lender inside or outside the courtroom." Burkhart, Lender/Owners and CERCLA: Title and Liability, 25 Harv. J. on Legis. 317, 321-23 (1988) (footnotes omitted).

interpretation,[19] the protection initially afforded to lenders by the exemption waned.[20] As one commentator noted, after the *Maryland Bank* decision, "[b]usiness journal articles and continuing legal education programs have since warned lenders of [the] unexpected [CERCLA] liability and have counseled methods for attempting to avoid it."[21]

Although lenders making loans after the *Maryland Bank* decision ("current lenders") could, and still can, protect themselves from potential liability,[22] lenders who made loans prior to the decision ("prior lenders") were often unable, or unaware of the need, to protect themselves. Consequently, prior lenders have pursued alternative

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[19] See, e.g., United States v. Fleet Factors Corp., 901 F.2d 1550, 1559 (11th Cir. 1990) (recognizing *Maryland Bank*'s balancing of competing policy interests between lenders and the government in interpreting the exemption); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988) (recognizing validity of decision in *Maryland Bank*); United States v. Nicolet, Inc., 712 F. Supp. 1193, 1204 (E.D. Pa. 1989) (recognizing decision in *Maryland Bank* with respect to a lender land-owner's liability); United States v. Serafini, 706 F. Supp. 346, 350 (M.D. Pa. 1988) (recognizing *prima facie* case for owner liability under *Maryland Bank*); United States v. Moore, 698 F. Supp. 622, 624 (E.D. Va. 1988) (recognizing view in *Maryland Bank* that owner need not be both an owner and operator to incur CERCLA liability); Artesian Water Co. v. Gov't of New Castle County, 659 F. Supp. 1269, 1280-81 (D. Del. 1987) (same), aff'd, 851 F.2d 643 (3d Cir. 1988).

[20] Prior to *Maryland Bank*, the exemption applied to a lender, provided the lender did not become overly entangled in the operation of the facility. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20996 (E.D. Pa. Sept. 4, 1985). In United States v. Fleet Factors Corp., Judge Bowen, writing for the Federal District Court for the Southern District of Georgia, stated:

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

United States v. Fleet Factors Corp., 724 F. Supp. 955, 960 (Bowen, J.), aff'd, 901 F.2d 1550 (11th Cir. 1990).

While the Court of Appeals for the Eleventh Circuit affirmed the district court's denial of summary judgment, it implied, unlike the district court's opinion, the exemption should be construed to favor liability "[i]n order to achieve the 'overwhelmingly remedial' goal of the CERCLA statutory scheme." United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990). As a result, Judge Bowen's broad interpretation of permissible conduct for a lender offers little precedential value to lenders, particularly as the costs for environmental cleanups increase and the search for "deep pockets" expands accordingly. For a discussion of the *Fleet Factors* decisions, see infra notes 103-19.

[21] Burkhart, supra note 18, at 323 & n.13.

[22] In a sense, the *Maryland Bank* decision was a form of constructive notice to lenders, informing them of the potential liability they might face if they foreclosed on a mortgagor involved in hazardous waste activities. Accordingly, after the *Maryland Bank* decision, lenders realized the value of precautionary measures such as environmental audits, on-site inspections, and compliance requirements for the mortgagor throughout the loan process, and should have implemented such precautionary measures into the framework of subsequent financing agreements.

means to avoid CERCLA liability, such as opting not to foreclose on property involved in hazardous waste activities.[23] Recent federal circuit court decisions, notably *United States v. Fleet Factors Corp.*[24] and *In re Bergsoe Metal Corp.*,[25] take opposite views on how involved in the management of a facility a lender may be without incurring liability.[26] A uniform approach to the issue seems unlikely in the near future.

Expanding liability to lenders has two rationales. First, imposing liability on lenders increases the potential pool of private parties able to pay for response actions and thus promotes CERCLA's goal that private parties pay for such costs. The second rationale behind lender liability is that lenders, faced with potential liability, will encourage owners to use safe hazardous waste treatment programs and prevent owners from taking actions which might lead to a hazardous waste problem. In effect, the lender would act as an instrument of the United States Environmental Protection Agency ("EPA") in monitoring an owner's actions on hazardous waste sites and reporting a problem which may arise.

There is a problem, however, that results from the expansion of lender liability. CERCLA's principal goal is to clean up dangerous sites. This goal can only be achieved if a responsible party cleans up the site or reports the problem to the EPA. Given the number of hazardous waste sites in the United States, and the limited federal and state enforcement resources, the EPA must rely heavily on private parties to report potential problems.[27] Property owners have a continued financial interest in a hazardous waste site. This interest is limited, however, because of the fear of liability. Since it may not be in an owner's economic interests to clean up the property or report a problem to the EPA, the owner may not respond to the problem at all. Consequently, contaminated land will not be cleaned up and CERCLA's primary goal will be defeated. In addition, the delay in

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23 See Reed, Fear of Foreclosure: *United States v. Maryland Bank & Trust Co.*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,165, 10,169 (1986); Solomon, Poison Pills: In the Takeover Game, Hidden Waste Dumps Haunt Buyer and Seller, Wall St. J., Apr. 2, 1990, at A4, col. 3.

24 901 F.2d 1550 (11th Cir. 1990).

25 No. 89-35397, slip op. 8627 (9th Cir. Aug. 9, 1990).

26 For a discussion of the opposite views reached by the Ninth and Eleventh Circuit Courts in *Bergsoe* and *Fleet Factors*, see infra Part III.

27 Owners are required to report a hazardous waste problem. 42 U.S.C. § 9603(c). One expert in the field estimated that there could be as many as two million sites throughout the United States that are directly or indirectly involved with dangerous hazardous substances. Telephone interview with Rick Fichter, Administrator at Advanced Environmental Technological Corp. (Feb. 10, 1990) (AETC is the largest privately-held environmental service organization in the United States). It is therefore difficult for federal or state government resources to monitor every site on a continual basis.

cleanup procedures freezes the property within the marketplace and thus conflicts with traditional judicial policies for keeping property in the stream of commerce.[28]

Prior lenders also have a continued financial interest in a hazardous waste site and thus represent a valuable group who can report a hazardous waste problem to the EPA when the owner fails to do so. Nevertheless, prior lenders are deterred from extensive involvement in a site, rather than encouraged to engage in such involvement, because of potential CERCLA liability under *Maryland Bank* and *Fleet Factors*. As a result, prior lenders have sought to limit the extent of their participation in the management of the facility. Since the expansion of liability on prior lenders may not achieve CERCLA's goal to respond to dangerous sites nor increase private contributions toward cleanups, the resulting "hands-off" policy adopted by prior lenders creates a gap in achieving CERCLA's goals. Accordingly, limits should be placed on the imposition of CERCLA liability on prior lenders.[29]

Part I of this Note looks at CERCLA's definition of responsible parties and the affirmative defenses available to such parties. Part II examines the initial case law involving lender liability and highlights the circumstances under which a lender was potentially liable under CERCLA after *Maryland Bank*. Part III looks at the recent decisions in *Fleet Factors* and *In re Bergsoe* and discusses the resulting uncertainty concerning lender liability. Part IV notes the problems caused by the conflicting judicial interpretations of lender liability, namely prior lenders averting potential liability by choosing not to foreclose on property, and the subsequent problem of inalienable property. Finally, Part V proposes an amendment to CERCLA to overcome the inherent problems with prior lenders' responses to liability, including a cap on a prior lender's contribution to cleanups to achieve CERCLA's principal goal.

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[28] Boyer & Speigel, Land Use Control: Preemptions, Perpetuities, and Similar Restraints, 20 U. Miami L. Rev. 148, 150 (1965) (discussing the negative effects of restraints on alienation); Note, The Fixed-Price Preemptive Right in the Community Land Trust Lease: A Valid Response to the Housing Crisis or An Invalid Restraint on Alienation?, 11 Cardozo L. Rev. 471, 477 & nn.31-32, 483 & nn.65-66 (1990) (discussing the judicial policies against restraints on alienation). For a discussion of the negative effects of restraints on alienation, see infra Part IV(D).

[29] Certainly, given the recent split between the Eleventh and Ninth Circuit Courts, the Supreme Court may be asked to issue a final word on the issue of lender liability. No interpretation of the statute as presently written, however, would produce an actual solution. The interpretation offered by the Ninth Circuit is closer to the mark than the interpretation espoused by the Eleventh Circuit. This Note proposes that a Congressional amendment to CERCLA specifically address the parameters of lender liability. For the text and rationale of the proposed amendment, see infra Part V.

I. CERCLA LIABILITY

A. *The CERCLA Framework*

CERCLA focuses on three areas to achieve its twin goals of quickly responding to hazardous waste sites and making responsible parties liable for the cleanup costs: (1) regulation, (2) response, and (3) reimbursement. To regulate sites engaged in hazardous waste activities, CERCLA vests the President of the United States[30] and the EPA with the authority to establish a National Contingency Plan to oversee hazardous waste activity throughout the nation.[31]

CERCLA requires a person in charge of a site to report hazardous waste activity and the release or threatened release of a hazardous substance to the EPA.[32] In doing so, CERCLA attempts to respond

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[30] Although CERCLA speaks in terms of the President acting as chief executive with respect to CERCLA's enforcement, the statute uses terms "President" and "EPA" interchangeably.

[31] The National Contingency Plan includes at a minimum:

> (1) methods for discovering and investigating facilities at which hazardous substances have been disposed of or otherwise come to be located;
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> (2) methods for evaluating, including analyses of relative cost, and remedying any releases or threats of releases from facilities which pose substantial danger to the public or the environment;
>
> (3) methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by this chapter;
>
> (4) appropriate roles and responsibilities for the Federal, State, and local governments and for interstate and nongovernmental entities in effectuating the plan;
>
> . . . .
>
> (8)(A) criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action. . . .
>
> (B) based upon the criteria set forth in subparagraph (A) of this paragraph, the President shall list as part of the plan national priorities among the known releases or threatened releases throughout the United States [the National Priorities List] . . . .

42 U.S.C. § 9605 (1988).

[32] CERCLA provides:

> any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances . . . are or have been stored, treated, or disposed of shall . . . notify the Administration of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, and any known, suspected, or likely releases of such substances from such facility.

Id. § 9603(c).

Moreover, "[a]ny person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release . . . of a hazardous substance from such vessel or facility . . ., immediately notify the National Response Center . . . of such release." Id. § 9603(a). Failure to notify the federal or appropriate State government agency of the release or threatened release of a hazardous substance pursuant to section 9603(a) subjects the person in charge of the site to criminal and civil penalties. Any person in charge of a site

to a hazardous waste problem as soon as the problem is reported. Ideally, responsible parties will initiate response actions, but if the EPA believes no private party will respond to the problem[33] (for example, the site has been abandoned, the responsible parties elude detection, or private resources are inadequate to pay for response costs), the EPA may initiate a cleanup.[34] Accordingly, CERCLA establishes a "Superfund"[35] to fund EPA response actions.[36] The EPA has the

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who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading shall, upon conviction, be fined in accordance with the applicable provisions of title 18 or imprisoned for not more than 3 years (or 5 years in the case of a second or subsequent conviction), or both.

Id. § 9603(b).

33 As CERCLA's architects envisioned:

[CERCLA] authorizes the Administrator to take emergency actions to protect public health or the environment whenever he receives evidence that the release of hazardous waste from an inactive site presents or may present an imminent and substantial danger to public health or the environment, or that there is a substantial threat of such a release. . . . *Because delay will often exacerbate an already serious situation, [CERCLA] authorizes the Administrator to take action when an imminent and substantial endangerment may exist.* The [House] Committee intends this standard to be a flexible one. However, the Administrator may not act where the party responsible for the release or threatened release, or the affected State, will take proper response action.

House Report, supra note 1, at 27-28 (emphasis added).

34 CERCLA gives the President the option to:

remove or arrange for the removal of, and provide for remedial action relating to [a released] hazardous substance . . . or take any other response measure consistent with the national contingency plan . . . to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of [the facility], or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title.

42 U.S.C. § 9604(a)(1) (1988).

35 26 U.S.C. § 9507 (Supp. VI 1988). The funds for Superfund initially came from taxes collected over a five-year period on petroleum products and certain inorganic chemicals. On the legislative background of the fee system devised under CERCLA, see House Report, supra note 1, at 2. See also New York v. Shore Realty Corp., 759 F.2d 1032, 1041 (2d Cir. 1985) (Superfund resources are used "to cover cleanup costs if the site has been abandoned, if the responsible parties elude detection, or if private resources are inadequate.").

Congress expected that Superfund would have sufficient funds to cover cleanup costs. Between industry-based fees and appropriations, Congress originally provided Superfund with approximately $1.6 billion over four years to remedy or prevent releases or threatened releases of hazardous substances into the environment. This funding expired on September 30, 1985, and the sections were repealed in 1986. Congress was unable to agree on the terms for a reauthorization bill. Instead, Congress enacted two appropriation bills in 1986 to extend the Superfund: the Hazardous Substance Response Trust Fund, Repayable Advance, Pub. L. No. 99-270, 100 Stat. 80 (1986); and the Superfund Extension, Pub. L. No. 99-411, 100 Stat. 931 (1986). In October 1986, Congress enacted the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1760 (1988) [hereinafter SARA]. SARA provided

authority to sue responsible parties for the costs of such procedures,[37] and responsible parties are required to reimburse the Superfund (or any third party who has paid for response actions) for any such costs.[38] Liability for response costs under CERCLA is strict,[39] joint and several,[40] and retroactive.[41] By imposing liability for response costs on responsible parties, CERCLA replenishes federal resources for future cleanups.[42]

B. *Responsible Parties Under CERCLA*

Section 9607(a) enumerates four parties potentially liable for response costs: (1) current owners, (2) past owners, (3) generators, and (4) transporters.[43] Most CERCLA case law, however, involves cur-

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an $8.5 billion replenishment of Superfund resources, in large part in response to the General Accounting Office's estimate that 425,380 potential hazardous waste sites required response measures. 18 Env't Rep. (BNA), at 2043 (Jan. 22, 1988). The General Accounting Office estimated that over 2,500 existing hazardous waste management sites would require cleanup costs in excess of $22 billion. Id.

[36] In the event that the EPA uses Superfund resources to pay for response actions, CERCLA subsequently imposes the costs of such actions on "responsible parties." The EPA will most often be the third party to initiate cleanup measures, but state agencies or private individuals may also do so.

[37] 42 U.S.C. § 9612(a) (1988).

[38] For a discussion of response costs and response actions under CERCLA, see supra notes 9-11 and accompanying text.

[39] "Under [section 9607(a)], any person who caused or contributed to a release or threatened release of hazardous waste into the environment . . . would be strictly, jointly and severally liable for such costs." House Report, supra note 1, at 33. Accordingly, courts have applied strict liability standards in CERCLA cases. See, e.g., J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263, 266 (6th Cir. 1985) (current and former owners of industrial waste storage facility held strictly liable under CERCLA); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) ("Congress intended that responsible parties be held strictly liable [under CERCLA] even though an explicit provision for strict liability was not included in the compromise."); United States v. Serafini, 706 F. Supp. 346, 350 (M.D. Pa. 1988) (in construing CERCLA liability "the courts have uniformly imposed strict liability").

[40] United States v. Conservation Chem. Co., 589 F. Supp. 59 (W.D. Mo. 1984); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983).

[41] See, e.g., United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984), aff'd in part, rev'd in part, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); United States v. A & F Materials Co., Inc., 578 F. Supp. 1249 (S.D. Ill. 1984); United States v. Price, 577 F. Supp. 1103 (D.N.J. 1983), aff'd, 688 F.2d 204 (3d Cir. 1982); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982).

[42] In theory then, the CERCLA framework was a self-sustaining process. Of course, the SARA amendments, which required a replenishment of Superfund resources, see supra note 35, demonstrate that the CERCLA framework, as originally devised, was not self-sustaining.

[43] CERCLA provides that:

rent owners.[44] The EPA can ascertain a current owner's identity more readily than it can ascertain the identity of a past owner, given a current owner's actual presence on the property and the availability of title searches.[45] Furthermore, section 9607(a)(1) does not distinguish between current owners responsible for hazardous waste dumping and those who merely own the land at the time the release or threatened release occurs.[46] In contrast, section 9607(a)(2) imposes liability on past owners *provided* such ownership or operation occurred "at the time of the disposal"[47] of the hazardous substance. Thus, past owners who owned the property at a time when no disposals occurred and sold the property before the release or threatened release of a hazardous substance would not be liable under CERCLA, unless the past owner knew of a potential problem and failed to disclose such knowl-

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

(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 for 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 . . . .

42 U.S.C. § 9607(a) (1988).

44 See, e.g., United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) (corporate officers and principal shareholders of corporation held liable for response costs in removal of toxic chemicals and asbestos); Dedham Water Co. v. Cumberland Farms Dairy, 805 F.2d 1074 (1st Cir. 1986) (corporate landowner may be held liable for response costs initiated by a third party for unlawful discharge of volatile organic compounds on its facility); J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263 (6th Cir. 1985) (current owner and operator of industrial waste storage facility held liable); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (corporation and corporate officers held liable for response costs as current landowners of property); United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985) (oil company held liable as owner and operator of off-shore facility); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984) (chemical company which manufactured, transported and disposed of hazardous waste held liable), aff'd in part, rev'd in part, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

As one court noted, "[i]t is quite clear that if the current owner of a site could avoid liability merely by having purchased the site after chemical dumping had ceased, waste sites certainly would be sold, following the cessation of dumping, to new owners who could avoid the liabilty otherwise required by CERCLA." *Shore Realty*, 759 F.2d at 1045.

45 "Congress had well in mind that persons who dump or store hazardous waste sometimes cannot be located or may be deceased or judgment-proof." *Shore Realty*, 759 F.2d at 1045.

46 42 U.S.C. § 9607(a)(1) (1988).

47 Id. § 9607(a)(2). For the text of sections 9607(a)(1)-(2), see supra note 43.

edge to the purchaser of the property.[48] Current owners, however, are strictly liable even if they are not responsible for the release or threatened release of a hazardous substance.[49]

C. *Affirmative Defenses Under CERCLA*

CERCLA provides potentially responsible parties with three affirmative defenses: (1) an act of God, (2) an act of war, and (3) an act or omission by a third party.[50] The third-party defense is the most commonly asserted. Originally, to establish the third-party defense, an owner had to prove three elements: (1) that the third party's actions were the sole cause of the hazardous waste problem, (2) that the owner exercised due care with respect to the existence of a hazardous substance on the property, and (3) that the third party was not the owner's employee or agent, and that there was not a contractual relationship existing with the owner.[51] The Superfund Amendments and

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[48] Under CERCLA, a party is required to disclose the release or threat of a release of a hazardous substance to a potential purchaser. 42 U.S.C. § 9601(35)(C) (1988).

[49] Originally, those who did not own or operate a hazardous site during dumping and sold before a cleanup were never liable under section 9607(a). Cadillac Fairview/California, Inc. v. Dow Chem. Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,376, 20,378 (C.D. Cal. 1984). The SARA amendments in 1986, however, provide that an interim owner will be liable for response costs if he had actual knowledge of a release or threatened release of a hazardous substance but did not disclose this to the person who acquired title to the property. 42 U.S.C. § 9601(35)(C) (1988).

[50] CERCLA provides:

> 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.

Id. § 9607(b).

[51] Id. The SARA amendments define the term "contractual relationship" to include "land contracts, deeds or other instruments transferring title or possession." Id. § 9601(35)(A). As a result, an owner cannot avoid liability by leasing or transferring possession of the property to a third party. See, e.g., Caldwell v. Gurley Refining Co., 755 F.2d 645 (8th Cir. 1985); Sand Springs Home v. Interplastic Corp., 25 Env't Rep. Cas. (BNA) 2127 (N.D. Okla. 1987); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 845 (W.D. Mo. 1984),

Reauthorization Act of 1986 ("SARA")[52] broadened the third-party defense by making it available to an innocent landowner who previously would have been held liable because of his contractual relationship with the prior owner. Nevertheless, under SARA, the third-party defense imposes significant burdens on the purchaser of property to show that he conducted "all appropriate inquiry"[53] in purchasing the property and "did not know and had no reason to know"[54] of the existence of the release or threatened release of a hazardous substance on the site.[55]

The innocent landowner defense is unlikely ever to be available to a lender. Lenders can discover the likelihood of a hazardous waste problem more easily than other potential purchasers given the regularity of title examination reports, investigation into the borrower's business operations, and inspection of the property.[56] A lender will have the opportunity to discover hazardous conditions if it is required to conduct environmental audits of the property, and will therefore be precluded from proving a third-party defense.[57]

II. INITIAL CASE LAW INVOLVING LENDER LIABILITY

The costs of an environmental cleanup can be staggering.[58]

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aff'd in part, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); United States v. Argent Corp., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,616 (D.N.M. 1984).

52 The Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1760-74. For background, see supra note 35.

53 Under the "all appropriate inquiry" test, the courts are directed to consider:

> any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

42 U.S.C. § 9601(35)(B) (1988).

54 Id. § 9601(35)(A)(i).

55 Id. § 9601(35)(A)(i), (B).

56 Burkhart, supra note 18, at 353. Because of this, a lender seeking the protection of the third-party defense would most likely experience the same hurdles faced by corporations, discussed infra at note 57.

57 Corporations have been deemed by the courts to fit into a category similar to lenders, whose usual business practices will preclude a third-party defense. See, e.g., Washington v. Time Oil Co., 687 F. Supp. 529, 532-33 (W.D. Wash. 1988) (corporation denied third-party defense for failure to "exercise due care or take precautions with respect to the property"); United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2128-29 (D.S.C. 1984) (chemical firm that held title to hazardous waste site for one hour not precluded from liability even if the firm served only as a conduit in the transfer of the property). Thus, those most likely to benefit from the third-party defense are individuals who own property at the time the problem is discovered. But see United States v. Price, 523 F. Supp. 1055, 1073-74 (D.N.J. 1981) (individuals held liable even though hazardous waste dumping had ceased three years prior to the purchase of the site), aff'd, 688 F.2d 204 (3d Cir. 1982).

58 The current average cleanup cost is approximately $26 million per site. See Corash and

Lenders are attractive defendants in CERCLA suits because they are easy to locate and can serve as "deep pockets" to pay for response action judgments. Since 1985, six cases have gained prominence for establishing the standards for lender liability under CERCLA: *In re T.P. Long Chemical, Inc.*,[59] *United States v. Mirabile*,[60] *Maryland Bank*,[61] *Guidice v. BFG Electroplating and Manufacturing Co.*,[62] *United States v. Fleet Factors Corp.*,[63] and *In re Bergsoe*.[64] In the first four decisions the courts focused on two factors: (1) the extent of the lender's involvement in the management, or ownership, of the property, and (2) in the absence of such a connection between the lender and the owner or operator of the site, whether the lender stood to benefit from the cleanup of the site by a third party.[65] The more recent cases, *Fleet Factors* and *Bergsoe*, while continuing to focus on the lender's participation in the management or ownership of the facility and the lender's ability to be unjustly enriched by a cleanup, have also focused on the extent to which a lender *could* control management decisions on a facility.[66] In other words, the original bounds of lender liability have expanded beyond actual management to potential management.

A. In re T.P. Long Chemical, Inc.

In *In re T.P. Long*, the EPA initiated cleanup procedures pursuant to CERCLA on land owned by a bankrupt debtor, the T.P. Long Chemical Corporation. The creditor, BancOhio, had a perfected se-

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Behrendt, Lender Liability Under CERCLA: Search for a Safe Harbor, 43 Sw. L.J. 863, 864 n.10 (1990). One expert noted that the difference between a high-risk site and a medium- or low-risk site for the purposes of estimating costs of an environmental cleanup is deceptive. Telephone interview with Rick Fichter, supra note 27. The initial costs for an environmental cleanup on any site will be the same because of uniform engineering and analytical remediation studies. For example, a common engineering procedure, which involves drilling to locate "hot spots," costs $10,000 per drilling. All cleanups require a minimum number of drillings, thus automatically fixing the costs of a cleanup. To illustrate how these costs effect the price of cleanup procedures, Mr. Fichter noted that a "low-risk" site he worked on took almost one year to complete and cost in excess of $2 million. Id.

59 45 Bankr. 278 (Bankr. N.D. Ohio 1985).

60 15 Envtl. L. Rep. 20992 (E.D. Pa. Sept. 4, 1985).

61 632 F. Supp. 573 (D. Md. 1986).

62 732 F. Supp. 556 (W.D. Pa. 1989).

63 901 F.2d 1550 (11th Cir. 1990).

64 Hill v. East Asiatic Co. (*In re* Bergsoe Metal Corp.), No. 89-35397, slip op. 8627 (9th Cir. Aug. 9, 1990).

65 For discusssions of the *Long*, *Mirabile*, *Maryland Bank*, and *Guidice* decisions, see infra notes 67-102 and accompanying text.

66 For discussions of the *Fleet Factors* and *Bergsoe* decisions, see infra notes 103-41 and accompanying text.

curity interest in the bankrupt's estate.[67] The EPA sued for reimbursement from the estate for the costs incurred in removing the hazardous waste from the property. BancOhio claimed the EPA could not recover from proceeds in which BancOhio had a perfected security interest. The Ohio bankruptcy court held that although the estate was liable for CERCLA cleanup costs as an administrative expense, the EPA had no claim against BancOhio's security interest.[68]

The Ohio court's rationale in the *T.P. Long* decision was twofold. First, the court maintained that it was undisputed that BancOhio did not participate in the management of the facility, and therefore was not an "owner and operator" under section 9607(a)(1).[69] Second, the court stated that BancOhio had not received a direct benefit from the EPA's cleanup of the property. The court noted that the collateral held by BancOhio did not increase in value after the EPA cleanup. The court therefore concluded that BancOhio would not unjustly benefit as a result of the cleanup by a third party.[70] The court went further, however, stating that "even if BancOhio had repossessed its collateral . . . it would not be an 'owner or operator' as defined under CERCLA."[71] The court stressed that BancOhio "sought *primarily* to protect its security interest," and accordingly was entitled to the exemption under section 9601(20)(A).[72]

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67 Under CERCLA, if BancOhio had an unperfected security interest in the property, it would not have had a superior lien to the EPA on the property. 42 U.S.C. § 9623 (1988).

68 *In re* T.P. Long Chem., Inc., 45 Bankr. 278, 280-81, 288-89 (Bankr. N.D. Ohio 1985).

69 Id. at 288-89. Because it was undisputed that BancOhio did not particpate in the management of the Long facility, the court did not actually consider whether BancOhio might be held liable as an owner or operator under CERCLA. The court agreed that the insolvent debtor was liable under CERCLA as a prior landowner at the time of disposal of the hazardous substance, and that the trustee could not abandon the property under CERCLA. Id. at 285. This reasoning, however, was used to show why the debtor's estate was still liable for the costs incurred by the EPA, and not to show that the EPA had a superior claim to that of BancOhio.

70 Id. at 288. BancOhio held a perfected security interest in the accounts receivable, equipment, fixtures, inventory, and other personal property of the debtor. Judge White wrote:

> Traditional costs associated with the preservation or disposition of property such as appraisers' fees, auctioneers' fees, advertising costs, moving expenses, storage charges, and repair and maintenance costs are usually found to benefit the holder of a secured claim. . . . Such expenses enable the creditor to either realize or preserve the value of its collateral.

Id. Judge White argued that unlike such costs, those costs incurred by the EPA in cleaning up the property did not benefit BancOhio because BancOhio sold its interest in the collateral before the EPA commenced its removal actions. Id.

71 Id. at 288.

72 Id. at 288-89 (emphasis added). The court rejected the EPA's argument that BancOhio could not transfer its ownership of the collateral and thereby avoid CERCLA liability. Rather, the court argued that pursuant to the exemption under section 9601(20)(A):

> The only possible indicia of ownership that can be attributed to BancOhio is that which is primarily to protect its security interest. It is undisputed that BancOhio

B. United States v. Mirabile

In *Mirabile*, the Federal District Court for the Eastern District of Pennsylvania was confronted with a more difficult question. The Mirabiles owned and operated a paint manufacturing business. American Bank and Trust Company ("ABT") and Mellon Bank ("Mellon") had each been involved in financing the operation of the business. ABT foreclosed on the property, purchased the property at the foreclosure sale, and sold the property four months later to the Mirabiles. Subsequently, the EPA initiated a cleanup of the site, and sued the Mirabiles as current owners and operators to recover costs incurred in the cleanup. The Mirabiles sought to join ABT and Mellon as responsible parties for the cleanup costs, claiming that ABT and Mellon were involved in the operation of the facility.[73]

The court held that a lender could only be liable under CERCLA if it exercised control over the "nuts-and-bolts operation" of the site.[74] In examining the definition of "owner or operator," the court concluded that the exemption under CERCLA "plainly suggests that provided a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be held liable for cleanup costs."[75] While conceding that ABT's

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has not participated in the management of the Long facility. Thus, BancOhio cannot be held liable as an owner or operator under CERCLA.

Id. at 289.

[73] United States v. Mirabile, 15 Envtl. L. Rep. 20992, 20994 (E.D. Pa. Sept. 4, 1985).

[74] Id. at 20996. The court noted: "That Congress intended to draw a distinction between parties involved in the actual operation of the facility and those who are involved in what may be properly characterized as the financial aspects of the business conducted at the facility finds some limited support in the legislative history. . . ." Id. at 20995-96. The extent of ABT's involvement in the Mirabile site, aside from its financial assistance, involved its foreclosure on, purchase of, and subsequent sale of the property.

[75] Id. at 20995. The court agreed that imposition of liability on lenders would enhance the government's chances of recovering cleanup costs. The court, however, argued that the question of expanding liability under CERCLA was a consideration which should be decided by Congress and not the courts because Congress had specifically singled out secured creditors for protection from liability in drafting CERCLA. Id. at 20996.

It should be noted that SARA's legislative history does not mention the issue of the liability of a lender landowner pursuant to CERCLA even though *Maryland Bank* and *Mirabile* had already been decided. Rather, the legislative history is replete with arguments that the polluter be held financially responsible for a hazardous waste release. See, e.g., 132 Cong. Rec. S14,934 (daily ed. Oct. 3, 1986) (statement of Sen. Durenberger) ("When it was adopted in 1980, Superfund was designed to assure that those who are responsible for the release of hazardous substances into the environment would also bear the responsibility of responding to the threats that those substances pose. That was the theory of Superfund."); 132 Cong. Rec. S14,932 (daily ed. Oct. 3, 1986) (statement of Sen. Wallop) ("The cost of cleaning environmental problems should be based on the principle that the polluter should pay."); 131 Cong. Rec. H11,118 (daily ed. Dec. 5, 1985) (statement of Rep. Traficant) ("Polluters should pay the entire costs of cleaning the mess they created and the grave hazards they caused.").

foreclosure on and subsequent purchase of the Mirabile property at the foreclosure sale "technically vested ABT with ownership"[76] under CERCLA, the court maintained that ABT's sale of the property only four months later demonstrated that ABT's purchase of the property was "plainly undertaken in an effort to protect its security interest in the property."[77] *Mirabile* thus afforded a shield to lenders, even where they took title to the property, provided they did not become "overly entangled" in the management and operation of the facility.[78] Prophetically, the Pennsylvania court stated that "[t]he difficulty arises, of course, in determining how far a secured creditor may go in protecting its financial interests before it can be said to have acted as an owner or operator within the meaning of the statute."[79]

C. United States v. Maryland Bank & Trust Company

The Federal District Court for the District of Maryland in *Maryland Bank* was faced with the question left open in *Mirabile:* whether a lender who forecloses on a mortgage, purchases the property at the foreclosure sale, and subsequently owns the property before *and* after cleanup actions are taken, is liable as an "owner or operator" under CERCLA. The McLeods owned and operated the California Maryland Drum site ("CMD") from July 1944 until December 1980. The McLeods permitted the dumping of hazardous wastes on the CMD site. The defendant, Maryland Bank & Trust Company ("MBT"), which knew that the McLeods operated a trash and garbage business on the site, held a mortgage on the property until 1981, when it foreclosed. MBT subsequently purchased the property at a foreclosure sale and took title in 1982. In June 1983, the EPA notified MBT that the CMD site posed a hazardous waste problem, but MBT refused to initiate any cleanup procedures. Four months later, the EPA cleaned

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[76] *Mirabile*, 15 Envtl. L. Rep. at 20996. The Mirabiles argued that ABT's ownership of the property brought ABT within the statutory definition of current owner under CERCLA. The court, however, rejected this argument because ABT "made no effort to continue operations on the property, and indeed foreclosed some eight months after all operations had ceased," illustrating to the court not a desire to own the property, but rather a desire to protect a security interest. Id.

[77] Id. *Mirabile* was decided in 1985, before SARA expanded the innocent landowner defense. As a result, ABT could not assert the third-party defense because it had a contractual relationship with the prior owner of the property.

[78] Compare this view with the treatment of corporate purchasers. See, e.g., Washington v. Time Oil Co., 687 F. Supp. 529, 532-33 (W.D. Wash. 1988) (corporation denied third-party defense for failure to "exercise due care or take precautions with respect to the property"); United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2128-29 (D.S.C. 1984) (chemical firm that held title to a site for only one hour not precluded from liability even if the firm served only as a conduit in the transfer of the property).

[79] *Mirabile*, 15 Envtl. L. Rep. at 20995.

up the CMD site and subsequently sought reimbursement for such costs from MBT as an owner and operator under section 9607(a)(1).[80]

Despite maintaining title to the property until the time *Maryland Bank* was decided in 1986, MBT refused to reimburse the EPA. At trial, MBT argued that, like ABT in *Mirabile*, MBT was entitled to the exemption pursuant to section 9601(20)(A) because MBT was merely protecting its financial interest as a mortgagee.[81] The court, however, held that MBT's purchase of the property at the foreclosure sale extinguished MBT's security interest:

> The exemption of subsection [9601(20)(A)] covers only those persons who, at the time of the clean-up, hold indicia of ownership to protect a then-held security interest in the land. . . . The security interest must exist at the time of the clean-up. The mortgage held by [MBT] (the security interest) terminated at the foreclosure sale . . . at which time it ripened into full title.[82]

D. Guidice v. BFG Electroplating and Manufacturing Co.

In *Guidice*, the question before the Federal District Court for the Western District of Pennsylvania was whether a lender could be held liable for its participation in the management of a facility before foreclosing on the property, or, alternatively, whether it could be held liable as an owner after it purchased the property at the foreclosure sale. During the 1970's Berlin Metal Polishers ("Berlin Metal") operated a metal polishing company at the Berlin Property. Berlin Metal was managed and owned by the Runco family. In May 1971, the National Bank of the Commonwealth approved a line of credit for Berlin Metal secured by assignment of Berlin Metal's accounts receivable. The Bank continued to finance Berlin Metal through September 1975.[83] On September 8, 1975, the Bank approved a loan to Berlin Metal to construct a treatment facility in accordance with the Penn-

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[80] United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 575-76 (D.Md. 1986). Thus, in contrast to ABT in *Mirabile*, MBT was aware of the existence of hazardous waste on the CMD site when it foreclosed on the McCleod's property. Such knowledge would not have made MBT liable under CERCLA per se. However, given that MBT maintained ownership of the property for four years after foreclosure and refused to initiate any cleanup procedures, MBT's motives with respect to its foreclosure actions appeared quite different from ABT's.

[81] Id. at 579. The court noted that Congress' intent to protect lenders from CERCLA liability did not apply to former mortgagees holding title after purchasing the property at a foreclosure sale "at least when, as here, the former mortgagee has held title for nearly four years, and a full year before the EPA clean-up." Id. The court distinguished these facts specifically from those in *Mirabile*: "[MBT] purchased the property at the foreclosure sale not to protect its security interest, but to protect its investment. Only during the life of the mortgage did [MBT] hold indicia of ownership primarily to protect its security interest in the land." Id.

[82] Id.

[83] Guidice v. BFG Electroplating and Manufacturing Co., 732 F. Supp. 556, 558 (W.D.

sylvania Department of Environmental Resources' requirements secured by a mortgage on the Berlin Property. The Bank continued to finance Berlin Metal until 1980, when Berlin Metal defaulted on its loan.[84] In January 1980, a Bank representative met with Berlin Metal's plant officials to discuss management.[85] Subsequently, Berlin Metal agreed to take out a loan guaranteed by the Small Business Administration ("SBA") to pay off the monies owed the Bank on the mortgage and lines of credit. In March 1980, the Bank submitted with recommendation of approval the loan application to the SBA on behalf of Berlin Metal. On April 9, 1980, the Bank confessed judgment against Berlin Metal.

From June 1980 until July 1981, the Bank was apprised of potential purchasers of the Berlin Metal equipment and facility.[86] After a meeting in March 1981 to discuss the outstanding debt owed by Berlin Metal, it was recommended that the Bank foreclose. On June 3, 1981, the Bank filed a complaint and mortgage foreclosure against the Berlin facility and received judgment on June 22, 1981. On September 28, 1981, the Bank held a meeting with the Runcos and counsel for Berlin Metal in an effort to reach a settlement. Pursuant to a written agreement between the Bank and the Runcos dated January 21, 1982, the Bank agreed to provide financing to Colomba Runco were she the successful purchaser of the Berlin Property.[87] Pursuant to a trust created by Colomba and Anthony Runco, trustee Russell D'Aiello was directed to acquire the Berlin Property.[88]

Pa. 1989). During this time, the Bank authorized several extensions and renewals of Berlin Metal's line of credit.

[84] Id. The Bank had approved additional lines of credit and authorized two two-year installment loans during this period. During the course of these transactions, the Bank also received periodic financial statements from Berlin Metal.

[85] Id. At the meeting, Berlin Metal's plant officials informed the Bank representative of the number of work shifts, the status of Berlin Metal's accounts, the composition of the management, and the presence of raw materials on the site.

[86] Id. at 558-59. Efforts to sell the facility and equipment were not successful, in part because Berlin Metal could not obtain a permanent permit to use the Borough sewer. In July 1980, the Bank was informed by the Pennsylvania Department of Environmental Resources that samples taken at the Berlin Metal and BFG facilities showed cyanide and heavy metal discharge in excess of permissible limits. These excess discharges were attributed to a fish kill in Mahoning Creek. The Bank learned that any new owner of the Berlin Property would have to apply for approval to dump into the Mahoning Creek. Id.

In January 1981, Dominic Runco, Sr., a member of the Runco family, expressed an interest in repurchasing the business from his family, but expressed reservations concerning the outstanding debt against the business and the property. In the meantime, Berlin Metal was permitted to use the Borough sewer service. By February 1981, a Bank agent reported that the Berlin facility was inoperable, and reported that there were thirty-five drums of chemicals and large tanks, some containing acid, which appeared rusty. Id. at 559.

[87] Colomba Runco was the ex-wife of Dominic Runco, Sr.

[88] Id. The trust arrangement also directed that D'Aiello rent the premises, make mortgage

On April 16, 1982, the Bank purchased the Berlin Property at the foreclosure sale.[89] On April 22, 1982, the Pennsylvania Department of Environmental Resources inventoried the drums of leftover materials on the Berlin Property, and declared some of them to be hazardous wastes. The Bank was notifed of the results of the inventory by a letter dated April 23, 1982, and was asked to arrange for the removal of the hazardous waste. The Bank agreed to provide Berlin Metal with financing to arrange for the removal of the hazardous waste by a third party, Ecology Chemical and Refining Company. Removal actions were completed on September 16, 1982. On January 21, 1983, the Bank conveyed the property to D'Aiello as trustee.[90]

In October 1986, residents of the Borough of Punxsutawney, Pennsylvania sued BFG Electroplating and Manufacturing Company ("BFG") for personal injuries allegedly sustained because of BFG's contamination of the enviroment. Plaintiffs also sued BFG for response costs incurred for remedying such contamination. In December 1986, BFG filed a third-party complaint against current and past owners of the adjacent land, the Berlin Property, including the Bank. The Bank filed a motion to dismiss the third-party complaint.

The court in *Guidice* separated the Bank's relationship to the Berlin Property into two time frames: the time before the Bank foreclosed on and purchased the Berlin Property, and the time after the Bank had purchased the Berlin Property. Relying on *Mirabile*, the court noted that a lender who does not participate in the management and operation of a facility is entitled to the exemption. The court maintained that the Bank's activities with respect to the Berlin Property were "insufficient to void the security interest exemption of CERCLA."[91] Specifically, the court maintained that there was no evidence that the Bank "controlled operational, production, or waste disposal activities"[92] at the Berlin Property between October 1975 and

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payments to the Bank from the rent proceeds, and distribute any surplus proceeds to Colomba and Anthony Runco.

89 Id. The deed to the Berlin Property was delivered to the Bank on May 14, 1982.

90 Id. During the Bank's ownership, the Bank paid all insurance premiums and property taxes for the Berlin Property. At the same time the Bank was arranging for the purchase and sale of the Berlin Property to Colomba Runco, Berlin Metal arranged for a lease agreement with Season-All for a portion of the Berlin facility for housing raw materials used in Season-All's window manufacturing operation. A lease between Berlin Metal and Season-All was executed on August 27, 1981. On December 17, 1981, Season-All and Berlin Metal executed a second lease involving the entire Berlin Property. By April 1982, Season-All had taken possession of the entire Berlin Property. On February 3, 1982, the Bank and Season-All entered into an agreement whereby the Bank agreed to subordinate its lien on the Berlin Property to Season-All's leasehold interest. Id. at 559-60.

91 Id. at 562.

92 Id.

April 16, 1982, when the Bank foreclosed on the property. Rather, Judge McCune argued that the Bank's actions prior to its purchase of the Berlin Property were "prudent measures undertaken to protect its security interest in the property."[93] Accordingly, the court held that the Bank was not liable as a prior owner or operator.

The more difficult question facing the court in *Guidice* was whether the exemption was applicable after the Bank purchased the Berlin Property at the foreclosure sale. The court noted the divergent approaches taken by the courts in *Mirabile* and *Maryland Bank* concerning lender liability. The court argued that the focus in *Mirabile* was whether a lender was "*precluded from invoking the security interest exemption* rather than whether the exemption applies in the first place."[94] The court maintained that the *Mirabile* court held that ABT's actions after foreclosure were undertaken "merely to protect its security interest in the property and did not constitute an attempt to participate in the management of the site. . . . Foreclosure and repurchase were natural consequences in protection of a security interest."[95] ABT was therefore not *precluded* from invoking the exemption.

Relying on *Maryland Bank*, the court in *Guidice* argued that the failure of Congress in the 1986 amendments to CERCLA to provide an exemption for landowning lenders lent support to a narrow reading of the exemption such that a lender who purchased its security interest at a foreclosure sale would be liable to the same extent as any other potential purchaser.[96] The court argued that there was no dispute that the Bank was aware that drums containing hazardous material were on the Berlin Property during its ownership. Accordingly, the court held that the Bank could be held liable as a current owner and operator, and denied the Bank's motion for summary judgment.

E. *T.P. Long, Mirabile, Maryland Bank*, and *Guidice*: Squaring the Circle

In examining whether a lender was liable as an owner and opera-

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93 Id. Accordingly, the court rejected plaintiff's argument that the Bank's financial dealings with Berlin Metals—the additional loans and lines of credit secured by mortgages on the Berlin facility or Berlin Metal's accounts receivable, the periodic financial statements, the Bank's recommendation for the SBA loan application, and the Bank's subsequent financing agreement with Colomba Runco—and the Bank's involvement with management—specifically the Bank's meeting with Berlin Metal's plant officials and its referring a potential lessee, Season-All, to Berlin Metal—were sufficient to warrant liability.

94 Id. at 562 (emphasis added).

95 Id. at 563.

96 Id.

tor, the principal issue for the courts in *T.P. Long* and *Mirabile*, in the absence of day-to-day entanglement in the business affairs of the facility, was whether the lender stood to benefit unjustly from a cleanup. Foreclosure actions were not the linchpins of either court's decision. Rather, foreclosure actions were a threshold test: if the lender foreclosed, then the lender had to prove that it did not benefit from a subsequent cleanup of the property. In *T.P. Long* and *Mirabile* the lenders did not stand to benefit from a cleanup. Accordingly, neither lender was held liable, regardless of their purchase of the property.

The court in *Maryland Bank* stated that "[MBT's security interest] terminated at the foreclosure sale . . . at which time it ripened into full [ownership] title."[97] This view conflicted with the approaches taken earlier in *T.P. Long* and *Mirabile* because it regarded the foreclosure action as the determining factor in whether a lender was entitled to the exemption. The court in *Maryland Bank* could have held that MBT was not entitled to the exemption after four years of holding title, including one year after the EPA had initiated cleanup procedures, or that the exemption had expired once the EPA had initiated a cleanup, because MBT stood to be unjustly enriched at the expense of a third party.[98] Such a holding would conform with the rationale in *Mirabile*. Instead, the court in *Maryland Bank* narrowed the application of the exemption by eliminating the exemption if a lender foreclosed on and purchased the property.[99]

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[97] United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986).

[98] The court, in fact, spoke in such terms:

> Under the scenario put forward by [MBT], the federal government alone would shoulder the cost of cleaning up the site, while the former mortgagee-turned-owner, would benefit from the clean-up by the increased value of the now unpolluted land. . . .
>
> In essence, [MBT's] position would convert CERCLA into an insurance scheme for financial institutions, protecting them against possible losses due to the security of loans with polluted properties.

Id. at 580.

Indeed, the courts in *T.P. Long* and *Mirabile* both questioned whether the lender stood to unfairly gain from the EPA-initiated cleanup procedures. *In re* T.P. Long Chem., Inc., 45 Bankr. 278, 289 (Bankr. N.D. Ohio 1985); United States v. Mirabile, 15 Envtl. L. Rep. 20992, 20996 (E.D. Pa. Sept. 4, 1985). Having found that the lender did not stand to benefit as a result of the cleanups, the Ohio and Pennsylvania courts each held that the lender should not be held liable under CERCLA. Thus, the Maryland court's examination of the benefits MBT stood to receive was in keeping with the other courts' analyses.

[99] MBT purchased the CMD site on May 15, 1982. When *Maryland Bank* was decided on April 9, 1986, MBT still held title to the property. For a discussion approving of the court's decision in *Maryland Bank*, but noting the problems the decision has created in commercial real estate transactions, see Rashby, *United States v. Maryland Bank & Trust Co.*: Lender Liability Under CERCLA, 14 Ecology L.Q. 569, 578-85 (1987). See also Burcat, Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets, 103 Banking L.J. 509 (1986) (discussing the expansion of environmental liability to lenders and

At first blush, the court in *Guidice* seemed to adopt the approach in *Maryland Bank* that an exemption for landowning lenders would create a special class of otherwise liable owners, and that a lender should be liable "to the same extent as any other bidder" at a foreclosure sale.[100] Under this rationale, ABT should have been liable as an owner because it foreclosed on and purchased the Mirabile property. Judge McCune, however, accepted the view in *Mirabile* that a lender who forecloses on and purchases its security interest is not liable where "[f]oreclosure and repurchase [are] natural consequences in protection of a security interest."[101] Under *Guidice*, a foreclosure action may raise a question of fact concerning a lender's motives in foreclosing on the security interest. In such circumstances, a court would examine the lender's ability to benefit from a cleanup by virtue of the timing of the foreclosure action before imposing liability. *Guidice* therefore makes the exemption available to a lender who does not stand to benefit unjustly from a cleanup, even if it has foreclosed on and purchased its security interest.[102]

III. Recent Case Law on Lender Liability

A. United States v. Fleet Factors Corp.

With the number of suits against lenders mounting, federal courts stood poised, deciding between the broad construction of the exemption under *Mirabile* and the narrow construction of the exemption under *Maryland Bank*. On May 23, 1990, in *United States v. Fleet Factors Corp.*,[103] the Eleventh Circuit Court of Appeals held that a lender who foreclosed on its security interest in inventory and equipment, and *not* the property itself, could be held liable as an "owner or operator" under section 9607(a)(2) "if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so

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other secured creditors); McMahon, Lender's Perspectives on Hazardous Waste and Similar Liabilities, 18 Envt'l L. Rep. (Envtl. L. Inst.) 10,368 (Sept. 1988) (same).

100 *Guidice*, 732 F. Supp. at 563.

101 In effect, then, is *Guidice* a middle ground between the approaches in *Mirabile* and *Maryland Bank*? In *Guidice*, the Bank was not held liable as an owner or operator. Rather, the court denied the Bank's motion for summary judgment. Id. at 563. Accordingly, despite the fact that the court left open the question concerning the Bank's liability, it did not hold that the Bank would be liable by virtue of the fact that it owned the Berlin Property.

102 Thus, despite ABT's ownership of the property in *Mirabile*—which would make ABT liable as an owner under *Maryland Bank*—ABT could invoke the exemption, prove that it did not benefit from a cleanup, and thus avoid liability as an owner and operator.

103 901 F.2d 1550 (11th Cir. 1990).

chose."[104] *Fleet Factors* marked the extension of lender liability beyond even *Maryland Bank*, and seemed to close the safe harbor left open to lenders under *Mirabile*.[105]

In *Fleet Factors*, Swainsboro Print Works, Inc. ("SPW") operated a cloth printing plant on its premises in Swainsboro, Georgia from 1963 until Februrary 1981. In 1976, SPW and the defendant, Fleet Factors Corp. ("Fleet Factors"), entered into a factoring agreement whereby Fleet Factors agreed to loan money to SPW, in return for an assignment of SPW's accounts receivable and a security interest in SPW's equipment, inventory, and fixtures. In addition, Fleet Factors was given a security interest in SPW's plant. In August 1979, SPW filed for Chapter 11 bankruptcy. Fleet Factors continued to finance SPW as a debtor-in-possession pursuant to a court approved factoring agreement. On February 27, 1981, SPW ceased all operations at the facility. Fleet Factors continued to collect on the accounts receivable assigned to it pursuant to the court approved Chapter 11 factoring agreement. In December 1981, SPW was adjudicated a bankrupt under Chapter 7 and a trustee assumed title and control of the SPW facility. In May 1982, Fleet Factors foreclosed on its security interest in SPW's inventory and equipment, and contracted with a private contractor, Baldwin Industrial Liquidators, to auction off Fleet Factors' collateral interest in the equipment and inventory. Fleet Factors *did not*, however, foreclose on its security interest in the SPW's facility.[106] On August 31, 1982, Fleet Factors contracted with a private contractor, Nix Riggers, for the removal of the unsold equipment. On January 20, 1984, the EPA inspected SPW's facility and found 700 fifty-five gallon drums containing toxic chemicals and forty-four truckloads of material containing asbestos, and concluded that the SPW facility presented a serious threat to public health and the environment. On July 7, 1987, the facility was conveyed to Emanuel County, Georgia at a tax foreclosure sale after SPW failed to pay state and county taxes. Subsequently, the EPA

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104 Id. at 1558. The choice between a broad and a narrow construction could not have been made more clear.

105 It should be noted that until the Ninth Circuit's decision in *Bergsoe*, discussed infra at text accompanying notes 120-39, *Fleet Factors* was the only opinion on lender liability by a federal circuit court. With the decisions in *Fleet Factors* (Eleventh Circuit) and *Maryland Bank*, and the opposing views set forth in *Bergsoe* (Ninth Circuit), *T.P. Long* and *Mirabile*, a split in circuit law has developed. The parameters of lender liability are so nebulous that the time is ripe for either the Supreme Court or Congress to issue a final word on how CERCLA should, in fact, be interpreted with respect to lender liability.

106 Thus, unlike ABT in *Mirabile* and MBT in *Maryland Bank*, Fleet Factors did not own the property on which the SPW facility was located. Rather, Fleet Factors only owned SPW's equipment and inventory.

sued Fleet Factors, along with SPW's two principal officers and stockholders, as an "owner and operator" under section 9607(a)(1) and as an "owner or operator" under section 9607(a)(2) for the response costs incurred in cleaning up the SPW facility.[107]

The Federal District Court for the Southern District of Georgia held that since Fleet Factors did not "own, operate or otherwise control activities at the facility immediately before the tax foreclosure," Fleet Factors was not liable as a current owner and operator within the meaning of section 9607(a)(1).[108] Judge Bowen argued that:

> Nix [Riggers] left the facility in or around December, 1983. Fleet [Factors] never foreclosed on its security interest in the facility. Neither Fleet [Factors] nor any of its putative agents had any access, or other control, or engaged in any activities at the facility after Nix [Riggers] left the facility in or around December, 1983.[109]

Relying on *Mirabile*, the court also held that Fleet Factors was not liable as an owner of the facility at the time of the disposal of a hazardous waste under section 9607(a)(2) because Fleet Factors' activities at the facility "did not rise to the level of participation in management sufficient to impose CERCLA liability."[110] Nevertheless, the court held that a material issue of fact remained concerning whether Fleet Factors had caused an environmental hazard in removing the equipment and inventory in August 1982, and was therefore an "operator" under section 9607(a)(2). Accordingly, the court denied Fleet Factors' motion for summary judgment.[111]

On interlocutory appeal, the Court of Appeals for the Eleventh Circuit affirmed the denial of Fleet Factors' motion for summary

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107 *Fleet Factors*, 901 F.2d at 1552-53. The actual owner of the SPW facility was Emanuel County, Georgia, who involuntarily acquired the facility at the tax foreclosure sale on July 7, 1987. Under CERCLA, however, a local government that involuntarily acquires title to a facility is not held liable as an owner or operator of the facility. 42 U.S.C. § 9601(20)(D) (1988). Instead, CERCLA provides that where title to a facility is acquired due to a tax delinquency, the owner or operator is "any person who owned, operated, or otherwise controlled activities at such facility *immediately beforehand*." Id. § 9601(20)(A)(iii) (emphasis added). Accordingly, the dispute between the parties concerned the interpretation of "immediately beforehand," and whether Fleet Factors was the last party to control the SPW facility before the tax foreclosure.

The court maintained that "the plain meaning of the phrase 'immediately beforehand' means without intervening ownership, operation, and control. Fleet [Factors], therefore, cannot be held liable under section 9607(a)(1) because it neither owned, operated, or controlled SPW immediately prior to Emanuel County's acquisition of the facility." *Fleet Factors*, 901 F.2d at 1555.

108 United States v. Fleet Factors Corp., 724 F. Supp. 955, 960 (S.D. Ga. 1988).

109 Id.

110 Id.

111 Id. at 961.

judgment.[112] Specifically, Judge Kravitch, writing for the unanimous court, agreed with the district court's holding that Fleet Factors was not liable as a current owner and operator under section 9607(a)(1).[113] The court also affirmed the district court's judgment that Fleet Factors was not liable as an "owner or operator" under section 9607(a)(2) by virtue of its participation in the financial management of the SPW facility or its influence in the subsequent treatment of the hazardous waste on the facility.[114] The court also agreed with the district court that a material issue of fact remained concerning Fleet Factors' involvement in the removal of equipment and inventory. More importantly, however, Judge Kravitch expanded the scope of activities which could constitute sufficient participation in the day-to-day management of a facility to warrant imposing CERLCA liability on a lender.

In interpreting the class of persons potentially liable as past owners or operators, Judge Bowen had written:

> For the purpose of [section 9607(a)(2)], CERCLA excludes from the definition of "owner or operator" 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." Id. § 9607(20)(A). I interpret the phrases "participating in the management of a . . . facility" and "*primarily* to protect his security interest," to permit secured creditors to provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation.[115]

Consequently, Judge Bowen's opinion regenerated the protection prior lenders had enjoyed under *Mirabile*, but seemingly lost in *Maryland Bank*. Judge Kravitch's opinion, however, took the opposite approach:

> The district court's broad interpretation of the exemption would essentially require a secured creditor to be involved in the operations of a facility in order to incur liability. This construction ignores the plain language of the exemption and essentially renders it meaningless. . . . Had Congress intended to absolve secured creditors from ownership liability, it would have done so. Instead, the statutory language chosen by Congress explicitly holds secured

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112 *Fleet Factors*, 901 F.2d at 1550.

113 Id. at 1555. See supra note 107.

114 Id. at 1556-59.

115 *Fleet Factors*, 724 F. Supp. at 960 (citing *Mirabile*) (emphasis in original).

creditors liable if they participate in the management of a facility.[116]

Although similar, the phrase "participating in the management" and the term "operator" are not congruent. 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—although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, *a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.*[117]

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116 It is interesting that Judge Kravitch refers to "the statutory language chosen by Congress *explicitly*." Earlier in her opinion, Judge Kravitch states:

> [a]lthough the "owner and operator" language of § 9607(a)(1) is in the conjunctive, we construe this language in the disjunctive in accordance with the legislative history of CERCLA and the persuasive interpretations of other federal courts. Additionally, we note that § 9607(a)(2) is phrased in the disjunctive. *We can perceive no rational explanation, other than careless statutory drafting*, for imposing liability upon "owners *or* operators" under one section but only holding "owner *and* operators" liable under another section.

Fleet Factors, 901 F.2d at 1554 n.3 (citations omitted) (emphasis added). Judge Kravitch's earlier reliance on careless statutory drafting to explain the ambiguities of section 9607(a)(1) undercuts her reliance on Congress' express language to support her interpretation of the exemption. While the incongruities between the express language of section 9607(a)(1) and section 9607(a)(2) have little to do with the exemption language under section 9601(20)(A), courts' reliance on statements such as "had Congress intended X, it would have done X" when dealing with CERCLA liability issues leads to ad hoc interpretations that offer little guidance or persuasive value, and necessitates that Congress itself clear up any ambiguities in language by amending CERCLA. For the text of the amendment proposed in this Note and its rationale, as well as the LaFalce amendment proposed in the House to limit a lender's liability, see infra Part V.

117 *Fleet Factors*, 901 F.2d at 1557-58 (emphases added). Judge Kravitch subsequently argues that her holding "should give lenders some latitude in their dealings with debtors without exposing themselves to potential liability." Id. at 1558. However, Judge Kravitch placed on Fleet Factors "the burden of establishing its entitlement to [the] exemption." Id. at 1555-56. If the Eleventh Circuit Court's test for liability under section 9607(a)(2) is whether the lender's involvement with the management of the facility "is sufficiently broad to support the *inference* that it could affect hazardous waste disposal decisions *if it so chose*," Judge Kravitch's statement that this test does not "preclude a secured creditor from monitoring any aspect of a debtor's business . . . [or] discrete financial decisions relating to the protection of its security interest," id. at 1558, is an economic dare that lenders would not be willing to take given the potential costs of an environmental cleanup and the near impossible burden of proof a lender would have in order to show that *no* inference could be made that it could affect hazardous waste disposal decisions "*if it so chose*." For a discussion of average cleanup costs, see infra note 157.

In effect, the Eleventh Circuit Court held that a lender could be liable as an owner or operator if it could affect management decisions, rather than if it *did* affect such decisions. Accordingly, the court narrowed the exemption left open by the court in *Mirabile*[118] and further expanded lender liability.[119]

B. In re Bergsoe Metal Corp.

The *Fleet Factors* decision seemed to remove any doubt that remained concerning the expansion of lender liability in conformity with, and beyond, the decision in *Maryland Bank*. After *Fleet Factors*, the exemption seemed more out of the reach of lenders than ever. On August 9, 1990, however, in *In re Bergsoe Metal Corp.*,[120] the Ninth Circuit Court of Appeals held that a lender who foreclosed on property was *not* liable as an "owner and operator" under section 9607(a)(1) nor as an "owner or operator" under section 9607(a)(2) if the lender foreclosed "primarily" to protect its security interest in the property.

In *Bergsoe*, Bergsoe Metal Corporation ("Bergsoe") owned and operated a lead recycling operation since 1978. The East Asiatic Company, Ltd., the East Asiatic Company, Inc., and Heidelberg Eastern, Inc. (collectively, "EAC") owned all of Bergsoe's stock. The defendant, Port of St. Helens ("Port"), was a municipal corporation empowered to issue revenue bonds to promote industrial development in the St. Helens, Oregon area. Under an agreement between Bergsoe and the Port dated December 13, 1978, the Port agreed to issue revenue bonds to provide funds to Bergsoe to purchase land and construct a lead recycling plant. On December 28, 1979, Bergsoe purchased fifty acres of land from the Port on which to construct the plant in exchange for a promissory note for $400,000 and a mortgage on the property.[121] Under a sale-and-lease-back arrangement between Berg-

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118 The court stated: "We, therefore, specifically reject the formulation of the secured creditor exemption suggested by the district court in *Mirabile*." *Fleet Factors*, 901 F.2d at 1558.

119 As Judge Kravitch wrote:

> Although we agree with the district court's resolution of the summary judgment motion, we find its construction of the statutory exemption too permissive towards secured creditors who are involved with toxic waste facilities. In order to achieve the "overwhelmingly remedial" goal of the CERCLA statutory scheme, ambiguous statutory terms should be construed to favor liability for the costs incurred by the government in responding to the hazards at such facilities.

Id. at 1557.

120 Hill v. East Asiatic Co. (*In re* Bergsoe Metal Corp.), No. 89-35397, slip op. 8627 (9th Cir. Aug. 9, 1990).

121 Id. at 8631. The key to the Bergsoe deal involved a financing agreement with the United States National Bank of Oregon. Under this agreement, the Port issued revenue bonds which

soe and the Port dated June 5, 1981, Bergsoe conveyed the warranty deed to the fifty acres and the recycling plant to the Port, and entered into two leases to cover the property and the plant.[122] Under a second agreement between Bergsoe and the Port also dated June 5, 1981, the Port issued revenue bonds, mortgaged the property and recycling plant to the United States National Bank of Oregon, and agreed to assign its rights under the leases to the Bank. The Bank, in turn, purchased the revenue bonds.[123]

The Bergsoe recycling plant began operation in early 1982, but experienced financial difficulties soon thereafter. In September 1983, the Bank declared Bergsoe in default on the leases. On June 30, 1984, the Bank, Bergsoe, and the Port executed various workout agreements whereby a private corporation, Front Street Management Corporation ("Front Street"), agreed to manage the recycling plant.[124] The recycling plant continued to fail despite the new management and operations on the plant shut down in 1986. On October 21, 1986, the Bank put Bergsoe into involuntary bankruptcy under Chapter 11. By that time, the Oregon Department of Environmental Quality had determined that the plant site was contaminated with various hazardous substances that posed a danger to public health and the environment. In September 1987, the Bank sued EAC to collect on Bergsoe's debt. The Bank subsequently amended its complaint to request for a declaratory judgment that EAC was liable for the cleanup costs under CERCLA. EAC filed a counterclaim, including a third party complaint against the Port, alleging that the Bank and the Port were liable for the cleanup costs. The Port maintained that it did not own the recyclying plant for CERCLA purposes,[125] and moved for summary judg-

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the Bank, in turn, held in trust for the bondholders. The revenue from the bond sales went to Bergsoe, which was obligated to pay the money owed on the bonds to the Bank. Id.

122 Id. at 8631-32. Under the sale-and-lease-back agreement, Bergsoe agreed to pay rent on the leases directly to the Bank in an amount equal to the principal and interest to come due on the bonds. In addition, the leases gave Bergsoe the option of purchasing the entire facility for $100 once the bonds had been paid in full. Id.

123 Id. at 8632. In partial consideration for this purchase, the Port signed an agreement which subordinated all the Port's rights under the prior $400,000 obligation to the Bank's rights under the leases. The Port also placed the warranty deeds, bills of sales and UCC release statements in escrow with the Bank, with instructions to deliver the documents to Bergsoe when the company exercised its option to purchase the facility. Id.

124 Id. Under the terms of the workout agreement, Front Street Management Corporation agreed to manage the recycling plant in exchange for the Port's agreement not to foreclose on Bergsoe under the lease or bond indentures.

125 Id. at 8633. The Port admitted that it "owned" the plant by reason of the lease agreements with Bergsoe. The Port maintained, however, that it held title to the plant "indicia of ownership primarily to protect [its] security interest in [the plant]" pursuant to the exemption under section 9601(20)(A). Id.

ment.[126] The Oregon bankruptcy court granted the Port's motion for summary judgment, and the Oregon federal district court affirmed.[127]

On appeal, the Court of Appeals for the Ninth Circuit affirmed the district court's judgment.[128] Initially, Judge Kozinski maintained that:

> *[t]he CERCLA definition of "owner" is not . . . coextensive with all possible uses of that term*; it specifically excludes "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." CERCLA thus protects secured creditors who do not participate in [the] management of the facility.[129]

Nonetheless, the court held that the Port had to meet its burden of proof in demonstrating both that the Port held indicia of ownership *primarily* to protect its security interest in the Bergsoe plant and that it did not participate in the management of the plant.

1. Ownership of the Bergsoe Plant

With respect to ownership of the Bergsoe plant, the court agreed that "in at least one sense, the Port owns the Bergsoe recylcing plant: the deed to the property is in the name of the Port."[130] Nevertheless, the court contended that the fact that the Port "holds paper title to the Bergsoe plant does not, alone, make it an owner of the facility for purposes of CERCLA."[131] Rather, the court maintained that the exemption required that the court determine why the Port held such indicia of ownership. In distinguishing the Port from ordinary lenders who hold indicia of ownership "to ensure that it will be paid what it is owed,"[132] the court contended that the Port held title to the property to guarantee that Bergsoe cover the Port's own indebtedness under the revenue bonds.[133] Furthermore, the court argued that the Port's ownership of the Bergsoe plant, by virtue of the leases granting the deeds to the property to the Port, was part of its financing agreement with the Bank.[134]

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126 Again, the Port did not contend that it was not the owner of the property, but rather that it was protecting its security interest in the property pursuant to the exemption. Id.

127 Hill v. East Asiatic Co. (*In re* Bergsoe Metal Corp.), No. 87-0492 (D. Or. Oct. 3, 1989) (LEXIS, Genfed library, Courts file).

128 *Bergsoe*, No. 89-35397, slip op. at 8627.

129 Id. at 8633.

130 Id. at 8634. Thus, as was the case in *Mirabile*, title to the property technically vested in the Port.

131 Id.

132 Id.

133 Id.

134 The court gave three reasons for this conclusion. First, the court noted that the terms of

> Essentially, the Bank financed the Bergsoe plant; the Port's only involvement was to give its approval to the project and to issue the bonds that served as the vehicle for the financing. The Port received the warranty deeds as part of a transaction whose *sole purpose* was to provide financing for the plant.[135]

2. Participation in the Management of the Bergsoe Plant

With respect to the Port's participation in the management of the Bergsoe plant, Judge Kozinski stated:

> EAC generally errs in equating *the power to manage with actual management*. As did the Eleventh Circuit in *Fleet Factors*, we hold that a creditor must, as a threshold matter, exercise actual management authority before it can be held liable for action or inaction which results in the discharge of hazardous wastes. *Merely having the power to get involved in management, but failing to exercise it, is not enough*.[136]

Accordingly, the court held that actual management of the facility was required before a lender could be held liable under CERCLA.[137] The court rejected EAC's argument that the Port's rights under the

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the leases provided for rent equal to the principal and interest due under the bonds, and thus the Port did not receive an additional benefit for its financial assistance. Second, the court looked to the $100 amount that Bergsoe could pay in order to purchase the property once Bergsoe had paid off the revenue bonds, and thus concluded that since Bergsoe had to pay only a nominal fee, the Port's ownership was in name only. Finally, the court noted that the deeds and other relevant documents related to the property were in escrow with the Bank. Id. at 8635. In this sense, the court viewed the rental terms, the nominal purchase price, and the escrow account as evidence of the fact that the leases were a means of facilitating the financing agreement, rather than to ensure payment. Accordingly, the court held that the Port did not have a true ownership interest in the property, other than as security for its financial interest.

135 Id. at 8634-35 (emphasis added). The court did not address the question whether the financing of the Bergsoe plant *had* to be the "*sole purpose*" for the Port's ownership of the property in order for the Port to be entitled to the exemption. One might argue that the burden of proof was on the Port to prove that such was the case. Nevertheless, the Port won the case on a summary judgment motion. Accordingly, one must recognize that the standard of proof required was much higher; in effect, the Port had to show that there was no material issue of fact *whatsoever* that its purpose of ownership was for the purpose of satisfying the financial agreement with Bergsoe and the bank. Other courts that choose to follow the Ninth Circuit Court's decision may not require such a 100%, "sole purpose" standard of proof.

136 Id. at 8637-38 n.3 (emphasis added).

137 Id. at 8637-38. The court rejected EAC's argument that the Port's negotiating and encouraging the building of the Bergsoe plant constituted sufficient participation in the management of the plant to warrant CERCLA liability. "Were this sufficient to remove a creditor from the security interest exception, the exception would cease to have any meaning." Id. at 8637. Accordingly, the court argued that since the Port had not been involved in the actual management of the facility, there was no need to determine the exact parameters of "participation." Nevertheless, Judge Kozinski's opinion stated that a narrow interpretation of "management" was necessary to protect lenders because a lender will normally extend credit only after ascertaining all the facts related to a proposed project, and thus will often have some input at the planning stages of any large scale project be it of a financial or other nature. Id.

leases,[138] or the control given to Front Street under the 1984 workout agreement constituted management of the Bergsoe plant.[139] Rather, the court maintained that the Port's participation in the Bergsoe plant was limited to an agreement between itself, the Bank, and Bergsoe, and thus the Port had not participated in the management of the Bergsoe plant to the extent required to deny the Port the right to the exemption. Accordingly, the court affirmed the Oregon district court's judgment and held the Port not liable for response costs.

C. *The Current Status of Lender Liability*

The Ninth Circuit Court's decision in *Bergsoe* marks a clear division from the Eleventh Circuit Court's decision in *Fleet Factors*. Whereas Judge Kravitch's test for lender liability centers on "the inferences" one can draw concerning a lender's ability to affect hazardous waste disposal decisions, Judge Kozinski's test looks more closely to "the purposes" for which a lender has become involved in either the ownership, or participation in the management, of a facility. To be sure, Judge Kozinski states that the Ninth Circuit was not asked to establish a rule specifically on the extent to which a lender's involvement in the management of a facility would be sufficiently broad to warrant CERCLA liability.[140] Nevertheless, *Bergsoe* clearly conflicts with the *Fleet Factors* rule that a secured creditor will be liable if its involvement with the management of the facility is "sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." Rather, the Ninth Circuit Court's test requires that a lender make actual management decisions before it can be held liable as an owner or operator.[141]

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138 The Port had the right under the leases to inspect the premises and to reenter and take possession upon foreclosure. Id.

139 EAC also maintained that the Bank was acting as the Port's agent by enforcing the Port's rights under the leases. The court, however, maintained that the Bank was acting as trustee for the bondholders and thus had a duty to keep the plant running so that Bergsoe could pay the principal and interest due under the bonds. Id. at 8638.

140 "We leave for another day the establishment of a Ninth Circuit rule on this difficult issue. It is clear from the statute that, whatever the precise parameters of 'participation,' there must be some actual management *of the facility* before a secured creditor will fall outside the exception." Id. at 8636 (emphasis added).

141 The different approaches taken in *Fleet Factors* and *Bergsoe* in defining "participation in the management" of a facility are analagous to the different views espoused in *Maryland Bank* and *Mirabile* in determining what constitutes ownership. Underlying these decisions is the question of what the term "indicia of ownership" means; that is, is record title subsequent to foreclosure "indicia of ownership," or does the term require more. A clear understanding of "indicia of ownership" might offer a uniform case law approach to lender liability. If "indicia of ownership" meant record title, a lender would know that it would incur liability if it foreclosed on and purchased its security interest. A definitive explanation of the term does not

IV. LENDERS' RESPONSES TO CASE LAW

A. *Current Lenders' Alternatives*

Today, lenders are reluctant to extend loans secured by a site connected with hazardous waste activities.[142] In particular, current lenders are reluctant to extend credit, given the difficulty in obtaining insurance coverage for sites engaged in hazardous waste activities[143]

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exist, however. Congress has yet to explain what "indicia of ownership" means. Moreover, case law involving lender landowner liability has not resolved the issue.

Mirabile and *Bergsoe* view "indicia of ownership" as permitting temporary ownership, provided it is taken in the course of protecting the lender's security interest. Under such an analysis, a lender's ability to benefit unjustly from a cleanup weighs heavily in determining whether the lender's ownership is "actual ownership" sufficient to impose liability, or merely "technical ownership" in order to retrieve the value of the security interest and nothing more. In contrast, *Maryland Bank* and *Fleet Factors* view "indicia of ownership" as the point until foreclosure. Any ownership position taken by a lender places it outside the term "indicia of ownership" and thus subjects it to liability. Accordingly, whether a lender stood to benefit from a subsequent cleanup is irrelevant. Given the practicalities of commercial lending and the negative impact of expanding lender liability, the approaches taken in *Mirabile* and *Bergsoe* offer more realistic responses to CERCLA's goals than do the approaches employed in *Maryland Bank* and *Fleet Factors*.

The court's decision in *Guidice* may offer a middle road of analysis by holding that a lender does not necessarily forfeit the exemption upon foreclosure. Whether this is an accurate interpretation of *Guidice* or not, courts should employ a two-part test to determine whether a lender held "indicia of ownership." Initially, the court should determine if the lender has foreclosed on the property. If the lender has not foreclosed, then it would be protected by the exemption because it does not own the property. If the lender has foreclosed, it would not be liable per se. Rather, the court should examine the lender's ability to benefit unjustly from a subsequent cleanup. If the lender has not benefitted unjustly, as in *Mirabile*, then it could still invoke the exemption. If, however, the lender stood to benefit unjustly, as was the case in *Maryland Bank*, then it would not be able to invoke the exemption and would be liable to the same extent as any other bidder at a foreclosure sale unless it could prove, as in *Bergsoe*, that its ownership was "primarily to protect the security interest."

142 See, e.g., Tom, Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA, 98 Yale L.J. 925, 927 (1989) (noting a bank's reluctance to finance operations that engage in hazardous waste activities); Burcat, Foreclosure and *United States v. Maryland Bank & Trust Co.*: Paying the Piper or Learning How to Dance to a New Tune?, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,098, 10,099 (1987) (same); Garbarine, Jersey's Revisions on Cleanup Still Face a Challenge; New Regulations Intensify Debate on Impact of Law, N.Y. Times, Sept. 24, 1989, § 10, at 23, col. 1 (fear of losing collateral leading prudent banks to conduct environmental audits). As one commentator noted:

> the present system tends to make pollution control more of a risk than an opportunity. As Superfund is structured now, almost any party associated with a waste site—*even those only remotely linked to it, like a bank that forecloses on the property*, or a company that leased equipment for use at the site—can be held liable for the cleanup of toxics found there.

Morgenson and Eisenstodt, Profits Are For Rape and Pillage, Forbes, Mar. 5, 1990, at 100 (emphasis added).

143 Insurance companies, realizing the magnitude of environmental cleanup costs, have implemented a "Pollution Exclusion Clause" within the "General Commercial Liability" policy. Such a provision affects hazardous waste owners as much as lenders, and until an insurance scheme is devised to pay for cleanups, lenders remain likely targets for CERCLA suits. See

and the unsettled case law concerning lender liability.[144] First, current lenders can require mortgagors to indemnify them for any costs incurred in response actions under CERCLA. Indemnification is not a defense to CERCLA liability, however.[145] As a result, if a mortgagor is insolvent or eludes detection as is likely, an indemnification clause is useless to the lender. A second alternative for current lenders is to require mortgagors to make sufficient guarantees that the property is not contaminated or that the owner is not involved in hazardous waste activities on the property. This may help a lender from making some bad loans, but it too is no protection against liability should it make a loan and then a problem arise. Given the "all appropriate inquiry"[146] test and the requirement that the defendant "did not know and had no reason to know"[147] of the release or threatened release of a hazardous substance, a lender who relied on an uninvestigated guarantee would not be entitled to the third-party defense.[148]

A third alternative available to current lenders is to secure the loan with other collateral owned by the mortgagor.[149] Of course, a mortgagor may not have additional collateral, or the value of the col-

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Adler & Broiles, The Pollution Exclusion: Implementing the Social Policy of Preventing Pollution Through the Insurance Policy, 19 Loy. L.A.L. Rev. 1251 (1986) (discussing the development of the insurance policy pollution exclusion clause designed to discourage environmentally harmful business practices); Note, The Pollution Exclusion in the Comprehensive General Liability Insurance Policy, 1986 U. Ill. L. Rev. 897 (discussing the diminishing number of environmental insurance policies covering claims arising from the gradual release of pollution).

144 For a discussion of the prominent decisions involving lender liability, see supra Parts II & III.

145 CERCLA provides that:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

42 U.S.C. § 9607(e)(1) (1988). Thus, while a lender can require an indemnification clause from the mortgagor, use of such a device is limited if the lender is deemed liable in an action and the mortgagor is insolvent.

146 See supra note 53 and accompanying text.

147 See supra note 54 and accompanying text.

148 Since prior lenders might not have seen a need to protect themselves from CERCLA liability, they might not have required either indemnification or guarantee clauses and the limited protection offered by such clauses. Consequently, even the limited benefits of such clauses might not be afforded to prior lenders unless they are able to rework the terms of their loan agreements. For a discussion of the third-party defense, see supra notes 53-58 and accompanying text.

149 By securing a loan in another piece of property, a lender may protect his financial interest without incurring CERCLA liability. See, e.g., *In re* T.P. Long Chem., Inc., 45 Bankr. 278, 288-89 (Bankr. N.D. Ohio 1985). But see United States v. Fleet Factors Corp., 901 F.2d 1550, 1552-53, 1559 (11th Cir. 1990) (fact that lender owned equipment and inventory, and

lateral may be small in comparison to the lender's overall investment. Thus, in such situations, a current lender will be able to protect part of its financial interest, but it will not be able to protect its entire financial interest. A fourth alternative for current lenders is to require environmental audits as a precondition of a loan.[150] This policy has become commonplace in commercial real estate lending and can protect current lenders from involvement in potentially dangerous hazardous waste sites.[151] Nevertheless, the costs of full investigation can usually be absorbed only by large corporations.[152] As a result, a cur-

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not actual property on which facility located, does not preclude liability as an "operator" under section 9607(a)(2)).

150 See Tom, supra note 142, at 926 n.15. Lenders should have an initial environmental audit conducted to determine the likelihood of a release of a hazardous substance or the existence of "hot spots." The costs for such procedures can be worked into the terms of the loan. In addition, the lender can require periodic monitoring throughout the life of the loan, but under a *Maryland Bank* analysis this might amount to excessive entanglement in the operation of the site. But see *Fleet Factors*, 901 F.2d at 1558 ("creditors' awareness that they are potentially liable under CERCLA will encourage them to monitor the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support.").

151 Unfortunately, environmental audits were not readily available to prior lenders or the need for such procedures to guard against potential CERCLA liability was not viewed as essential because no lender had ever been held liable under a federal environmental statute. For a discussion of the traditional limits on lender liability in environmental statutes, see supra notes 12-20 and accompanying text.

152 As one commentator noted:

> Unfortunately, the impact of more restrictive lending policies and increased transaction costs may fall unevenly on small borrowers and industries that tend to generate hazardous by-products. In the future, parties such as the dump owner in *Maryland Bank & Trust* may find it difficult to obtain funding for their ventures—ventures that, aside from potential waste problems, may benefit society substantially.

Rashby, supra note 99, at 590-91. The negative economic effect of expanding liability to lenders was noted by Representative Brown (R-Colo.):

> Financial institutions are extremely wary of lending capital for operations when the borrower may or may not be subject to huge liabilities created by the legal disposal of hazardous waste. The impact of this ripples through the economy as small business finds itself unable to borrow needed capital for expansion and investment due to the contingent liabilities generated under the CERCLA liability system.

131 Cong. Rec. H11091 (daily ed. Dec. 5, 1985).

In *Fleet Factors*, Judge Kravitch admitted that the Eleventh Circuit Court's test with respect to lender liability would

> be challenged as creating disincentives for lenders to extend financial assistance to businesses with potential hazardous waste problems and encouraging secured creditors to distance themselves from the management actions, partciularly those related to hazardous wastes, of their debtors. (citations omitted) As a result the improper treatment of hazardous wastes could be perpetuated rather than resolved.

Fleet Factors, 901 F.2d at 1558. Judge Kravitch asserted that "[t]hese concerns are unfounded." Id. Judge Kravitch, however, did not cite any authority for this blanket assertion.

rent lender may simply choose not to loan money where the potential for a hazardous waste problem exists.[153] Obviously, the effects of conservative lending practices is likely to affect smaller businesses because only large corporations will be able to afford the increased costs in the loan process.[154]

B. *Prior Lenders' Alternatives*

While current lenders can guard against potential CERCLA liability, the import of the *Maryland Bank* and *Fleet Factors* decisions fall on prior lenders.[155] These lenders have two choices. First, they can foreclose on the property, purchase the property at the foreclosure sale, initiate cleanup procedures, and sell the property to realize its increased value.[156] Such action might protect a prior lender's financial interest in the property, but would subject him to potential CERCLA liability. The continued increase in cleanup costs[157] makes

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153 "[I]f lenders are unable to predict the scope of potential liability they may incur . . . they may simply choose not to lend." Tom, supra note 142, at 927-28.

154 See supra note 152 and accompanying text.

155 Despite the Ninth Circuit Court's opinion in *Bergsoe*, lenders are not guaranteed the protection of the exemption nor can they rely upon other courts to choose the Ninth Circuit Court's test for "participation" in management over the Eleventh Circuit Court's test. A court might well argue that the Ninth Circuit never ruled on what actions are sufficient to constitute "participation" in management and cite Judge Kozinski's statement that "[w]e leave for another day the establishment of a Ninth Circuit rule on this difficult issue" to support such an argument.

Thus, because CERCLA liability is retroactive, see supra note 41 and accompanying text, those who made loans prior to *Maryland Bank*—who did not foresee a need for, or may not have had available to them, such protective devices—must still determine how they will deal with loans involving hazardous waste activities, and what actions will be considered to encroach upon the parameters of liability under section 9607(a)(2) as set forth by the Eleventh Circuit in *Fleet Factors*. The situation is even more complex when one considers that a lender may be obligated to bid on the property at a foreclosure sale. This was the case in *Maryland Bank*, where MBT was compelled by its agreement with the Farmers Home Administration to bid on the site upon foreclosure. United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 580 n.8 (D. Md. 1986).

156 This action was taken by ABT in *Mirabile*. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20995 (E.D. Pa. Sept. 4, 1985). See also Rashby, supra note 99, at 590 (limited courses of action for lenders when a mortgagor abandons a hazardous waste site); Burkhart, supra note 18, at 323 (lenders face a greater economic burden than anticipated when making loans since damage amounts often exceed the fair market value of the land after a cleanup).

157 Average cleanup costs on high-risk sites on the National Priorities List have been estimated at $26 million, supra note 58, but some commentators note that that average cost may rise to as much $36 million per site. McMahon, supra note 99, at 10,368. Although these estimates reflect average cleanup costs on high-risk sites, even the cost of an environmental cleanup on a low-risk site can run as high as $2 million per site. Interview with Rick Fichter, supra note 58.

In New Jersey alone, state figures show that $20 million was spent to clean up 734 low concern sites, and $60 million was spent to clean up 111 medium and high concern sites. The

such a decision economically prudent *only* when the estimated cost of a cleanup is less than the value of the property after remedial actions, and this is very rare. A prior lender, therefore, will be deterred from foreclosing on property,[158] and perhaps actively avoid foreclosure.[159]

State estimates that $110 million will be spent on 218 medium and high concern sites in 1990; $631 million in bonds has already been posted for cleaning up 809 other sites. See Garbarine, supra note 142, at 23, col. 1.

158 With the Eleventh Circuit Court's decision in *Fleet Factors*, "property" may now include inventory, equipment, and fixtures, and not merely the facility itself. Although *Mirabile* afforded an exemption from liability where the lender foreclosed and quickly sold the property, CERCLA requires that owners of property on which hazardous waste has been released must disclose this to a purchaser. 42 U.S.C. § 9601(35)(C) (1988). Furthermore, CERCLA provides that where a government cleanup occurs, the government has a lien on the property for reimbursement costs. Id. at § 9607(*l*). Given these economic restrictions, it would be difficult for a lender to find a purchaser of the property. The lender is legally "boxed-in" if it is compelled by an agreement to bid at a foreclosure sale, as was the case in *Maryland Bank*. *Maryland Bank*, 632 F. Supp. at 580 n.8. Moreover, *Fleet Factors* suggests that a lender need not foreclose on property to be an operator under section 9607(a)(2). Rather, all that need be found is that the lender's involvement with the management of the facility "is sufficiently broad to support the *inference* that [the lender] could affect hazardous waste disposal decisions *if it so chose*." United States v. Fleet Factors Corp., 901 F.2d 1550, 1558 (11th Cir. 1990) (footnote omitted) (emphases added).

159 See Reed, supra note 23, at 10,165 (noting that lenders may choose not to foreclose on property to avert the risk of lender liability as an owner of the property). A prior lender may also seek to rework the terms of an existing loan, by substituting a security interest in other collateral for its security interest in the site, or by adding an indemnification or guarantee provision clause into the agreement. Nevertheless, as discussed earlier, supra text accompanying notes 155-57, such attempts will often prove futile.

One attorney noted that another common practice among lenders is to set up a subsidiary corporation whose only asset is the security interest. In doing so, the parent/lender corporation hopes to shield itself from potential liability. Interview with Joan Lieberman, Associate with Thacher, Proffitt, and Wood (Jan. 26, 1990). There are no reported cases in which the courts have dealt with such a parent/lender-subsidiary relationship. The trend towards aggressiveness in expanding corporate liability, however, is illustrated by a dramatic rise in suits against corporate officers. For example, in fiscal 1988, defendant corporate officers were sentenced to a total of thirty-nine years imprisonment and fined $7 million. Through the first half of fiscal 1989, defendant corporate officers had already been sentenced to thirty-one years imprisonment and fined more than $9 million. Seymour, Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws, 20 Env't Rep. (BNA) No. 6, at 337 (June 9, 1989).

In light of the expansive reading of lender liability in *Fleet Factors* and the expansion of corporate successor liability, it would not be surprising if the courts chose to pierce the corporate veil and hold the parent corporation liable for the subsidiary corporation's liability, particularly given the parent corporation's ability to affect hazardous waste disposal decisions "if it so chose." See Dearing, Successor and Parent Corporations: Liability for CERCLA Response Costs, 20 Env't Rep. (BNA) No. 41, 1764, 1765-66 (Feb. 9, 1990) (setting forth criteria for when a court can disregard the corporate form and subject a parent corporation to the debts and liabilities of a subsidiary); Spracker, Corporate and Liability Consequences of Acquiring Environmentally Sensitive Properties, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,364 (Sept. 1988) (successor corporate liability under CERCLA beyond common law approach governing liability of successor corporations).

C. *Notification Under CERCLA*

Although the EPA can initiate response actions,[160] it obviously first has to learn of the problem.[161] The EPA must rely on notification from a party who either knows of a problem or who has an interest in the property.[162] The EPA will not learn of a site's existence, however, if the property owner does not notify the EPA of the need for response actions and the lender is unwilling to foreclose on the property despite its security interest in it.

The behavior of an owner who knows of the existence of a hazardous waste problem on his property and faces CERCLA liability will fall into three scenarios. First, an owner that is itself responsible for some or all of the hazardous waste at the site may feel compelled *not* to notify the EPA of a problem. Although CERCLA imposes civil and criminal penalties for failure to notify the EPA of the release or threatened release of a hazardous substance,[163] the increasing costs of response actions may discourage notification. In effect, an owner may find that abandoning the property or simply sitting on the land is a more cost effective means of dealing with the problem than reporting the problem to the EPA. Moreover, although the EPA offers *de minimis* settlements for owners who report hazardous waste problems,[164] such a settlement is not guaranteed to an owner who is

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160 See supra notes 33-36 and accompanying text.

161 See supra note 31 and accompanying text.

162 See supra note 32 and accompanying text. The General Accounting Office estimated that there were over 425,000 hazardous waste sites potentially requiring response actions. 18 Env't Rep. (BNA), at 2043 (Jan. 22, 1988). At least one expert, however, estimates that there are over two million sites engaged in hazardous waste activities. Telephone interview with Rick Fichter, supra note 27. Since the EPA cannot effectively monitor all of these sites (as well as the hundreds of thousands of other sites that have the potential to pose a hazardous waste problem in the future), it must rely upon individual compliance with section 9603(b) to notify the EPA of the release or threatened release of a hazardous substance.

163 42 U.S.C. § 9603(b) (1988).

164 The SARA amendments encourage *de minimis* settlements. Id. § 9622(g). An EPA memorandum offered *de minimis* settlements to encourage owners to notify the EPA of any hazardous waste problem. EPA Memorandum, Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, *De Minimis* Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property at 7 (1989) [hereinafter EPA Settlements].

Some commentators have suggested that lenders who foreclose on property might limit their liability for cleanup costs through pre-purchase agreements. Corash and Behrendt, supra note 58, at 880-85. Corash and Behrendt correctly argue that the EPA would receive a substantial monetary benefit through such agreements. Id. at 882. The problem, however, is that an enforcement action *must be* contemplated on the site before the EPA will initiate such a settlement. EPA Settlements, supra, at 28. As discussed in Part IV(C), however, owners are unlikely to report a problem to the EPA because of the widespread imposition of liability on secured creditors.

Fleet Factors exacerbates the problem by expanding lender liability even further. As a

guilty of dumping. The second scenario involves an owner who is not responsible for dumping, but cannot rely on the third-party defense to avoid liability. In this case, the owner—most often a corporation—is in a similar position with the guilty dumper and will have little incentive to notify the EPA of a problem. In the final scenario, the owner is not responsible for dumping and may be able to rely on the third-party defense. Only in this situation will the owner have an incentive to notify the EPA of a hazardous waste problem. Nevertheless, given the expansion of CERCLA liability, even this owner is not guaranteed of escaping economically unscathed unless it can successfully invoke the third-party defense.[165] Thus, the EPA is never guaranteed that owners—or even a particular class of owners—will report hazardous waste problems.

In contrast to owners, prior lenders have a continual interest in site cleanups by virtue of their financial interest in the property. After all, if there is a hazardous waste problem and the owner has abandoned the property or ceased operations on the property, the prior lender is assured of at least one thing: the lender will, in all likelihood, lose its financial investment. If an owner does not report a problem, a prior lender's refusal to foreclose on a hazardous waste site and report a problem eliminates the only likely party who can alert the EPA of an existing problem. This lessens the EPA's ability to discover dangerous hazardous waste sites, impedes a cleanup, and destroys the ability to transfer the property. Consequently, a policy of non-foreclosure may not only defeat CERCLA's paramount goal to clean up environmentally hazardous sites, but may also effectively destroy the marketability of the property.[166]

D. *The Problem of Prior Lender Liability: Dead Property*[167]

Traditional property laws have continually sought to keep land

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result, lenders are even less likely to foreclose on property than before, and it is unlikely that the EPA will even know of the existence of a hazardous waste problem on the site. Thus Corash's and Behrendt's proposal for pre-purchase agreements would effect few sites. Instead, lenders must be given an economic incentive to notify the EPA of a problem *before* the question of pre-purchase agreements can be considered. See infra notes 177-79 and accompanying text.

165 See, e.g., United States v. Price, 523 F. Supp. 1055, 1073-75 (D.N.J. 1981) (owners held liable even though dumping of hazardous materials had ceased three years before their purchase of the site), aff'd, 688 F.2d 204 (3d Cir. 1982).

166 For a discussion of the requirements imposed on an owner under CERCLA when selling property on which a hazardous substance has been released, see supra note 158.

167 "Dead property" exists whenever land remains outside the stream of commerce. Restraints on alienation are one device that may lead to "dead property." Other such devices include provisions that violate the Rule Against Perpetuities or provisions which act as pre-

freely alienable and within the stream of commerce.[168] Restrictions on property destroy an owner's ability to sell or make use of the property in a beneficial manner. Accordingly, the law views encumbrances, covenants, and other restrictions, which make property less alienable and less marketable as antithetical to the goals of a free-market economy. A lender will be less willing to extend credit for improvements on property if there are restrictions that jeopardize his ability to dispose of the property.[169]

A potential hazardous waste problem is a constructive restraint on alienation. Like other restraints on alienation, the existence of hazardous waste on property destroys the owner's ability to sell the property or make use of the property in a beneficial manner.[170] And like other restraints on alienation, lenders are less willing to involve themselves in the property because the lender's ability to dispose of the property is also jeopardized. Non-foreclosure per se is *not* a proscribed restraint on alienation. Nevertheless, the foreclosure process is often a lender's first step toward securing his interest in the property if the mortgagor is insolvent or abandons the property. If fore-

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emptive restraints on the transfer of property. For a discussion on the negative affects of restraints on alienation, see infra notes 168-69 and accompanying text.

A contract provision or other transfer stipulation is not the only way in which "dead property" might exist. Only the negative effects of restraints on alienation are necessary for "dead property" to exist: the owner's inability to sell or make use of the property in a beneficial manner; and creditors' unwillingness to extend credit for improvements on the property because the restrictions may jeopardize the creditor's ability to dispose of the property.

168 Restraints on Alienation are defined as: "[a] provision in an instrument of conveyance which prohibits the grantee from selling or transferring the property which is the subject of the conveyance." Black's Law Dictionary 1181-82 (5th ed. 1979). The law favors ready alienation of property because any restriction on the property destroys the owner's ability to sell or make use of the property in a beneficial manner. See, e.g., Berry v. Kimbrough, 265 Ala. 459, 92 So. 2d 20 (1957); Crecelius v. Smith, 255 Iowa 1249, 125 N.W.2d 786 (1964); In Re Estate of Dees, 180 Kan. 772, 308 P.2d 90 (1957); Mann v. Schuman, 1 A.D.2d 678, 146 N.Y.S.2d 716 (1955); Holien v. Trydahl, 134 N.W.2d 851 (N.D. 1965); Page v. Page, 15 Utah 2d 432, 394 P.2d 612 (1964). Accordingly, a creditor will be less willing to extend credit for improvements on the property because the restrictions may jeopardize the creditor's ability to dispose of the property. Boyer & Spiegel, Land Use Control: Pre-emptions, Perpetuities, and Similar Restraints, 20 U. Miami L. Rev. 148, 150 (1965).

169 Restrictions on the transfer of land tend to restrain the extension of credit and operate to prevent creditors from satisfying their claims. Such restrictions take property out of commerce by destroying its marketability and tend to prevent its improvement by impairing the land owner's ability to secure credit by mortgaging his interest or ability to sell to another who can finance the needed improvement. This inability in the long run is detrimental to society as a whole.

Boyer & Spiegel, supra note 168, at 150 n.14; see Note, supra note 28, at 477.

170 One need only look at the Love Canal incident to illustrate the long-term effects of hazardous waste site problems on property values. Only now, ten years after the tragedy of the Love Canal was first discovered, have people begun to purchase property located on the Love Canal site. Verhovek, At Love Canal, Land Rush on a Burial Ground, N.Y. Times, July 26, 1990, at A1, col. 2.

closing might cause a lender to suffer costs equal to, or greater than, the fair market value of the property, he is less likely to foreclose on the property. Accordingly, a lender's incentive to foreclose on property is inherently tied to benefitting from the foreclosure process. Since property polluted with hazardous waste may have no resale value before a cleanup,[171] and the costs of a cleanup will often be greater than the fair market value of the property after a cleanup,[172] there is no incentive for a prior lender to foreclose on the property. Consequently, non-foreclosure in the context of dangerous hazardous waste sites has the same detrimental effects on society as do restraints on alienation and thus acts as a constructive restraint on alienation: lenders are prevented from satisfying their claims, property is taken out of commerce because it is no longer marketable, and the owner is prevented from selling the property to another who will finance the needed improvement. By delaying the cleanup process, a policy of non-foreclosure effectively defeats CERCLA's paramount goal to clean up environmentally hazardous sites without providing an offsetting benefit to society. In effect, the search for prior lenders as "deep pockets" fails to justify the adverse effects on traditional property laws.

V. A PROPOSED SOLUTION TO THE PROBLEM: AN AMENDMENT TO CERCLA

A. *The Proposed Amendment*

The following proposed amendment would clarify the exemption under section 9601(20)(A) to reflect Congress's intent to protect a lender from excessive liability where that lender is seeking "primarily" to protect its security interest. Simultaneously, the proposed amendment attempts to prevent a lender from being unjustly enriched by cleanup actions initiated by a third party, or from being discouraged from monitoring individual compliance on sites involved in hazardous waste activities.[173] Section 9601(20)(A) should be amended to

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171 See supra notes 156-57 and accompanying text.

172 See supra notes 1, 3, 58 & 157 and accompanying text (discussing estimated cleanup costs).

173 The 1980 version of CERCLA illustrated this intent by stating that "[s]uch 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." 42 U.S.C. § 9601(20)(A) (1988) (emphasis added). The 1986 SARA amendments did not change this language, thus demonstrating Congress' continued desire to protect lenders from liability where only a financial interest existed, without an operational interest. The proposed amendment seeks to protect that class of lenders who could not, or did not see a reason, to protect themselves at the time the loans were made.

An amendment to limit lender liability has been proposed in the House by Representative

add the following provision:

> Provided the requirements set forth in subsections one (1) through four (4) below are met, a lender's, mortgagee's, or otherwise secured creditor's contribution to the Superfund, as described in section 9607 of this act, shall not exceed fifty percent, nor be less than ten percent, of the fair market value of the security interest, after response actions have been taken pursuant to section 9605 of this act, less the principal already received by the lender, mortgagee, or otherwise secured creditor pursuant to its financial agreement with the mortgagor. The exact percentage of the fair market value of the security interest shall be based on any relevant economic factors related to the security interest, including, without limitation, the fair market value of the security interest after response actions have been completed pursuant to section 9605 of this act, and the extent to which the lender, mortgagee, or otherwise secured creditor has been reimbursed on the principal of its financial agreement with the mortgagor. A lender, mortgagee, or otherwise secured creditor, whose financial involvement in a vessel or facility began before October 9, 1986,[174] is not a responsible party to the extent provided in subsections one (1) and two (2) of section 9607(a) of this act, provided:
>
> (1) the lender, mortgagee, or otherwise secured creditor was not involved in the day-to-day operation of the vessel or facility prior to the date of a foreclosure decree by a court of competent jurisdiction, order of bankruptcy under title 11 of this code, or other similar insolvency proceedings; and
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> (2) the lender, mortgagee, or otherwise secured creditor notifies the Administrator, or other appropriate Federal, State, or local government agency, of the release or threatened release of a hazardous substance from the vessel or facility; and
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> (3) the owner or operator of the vessel or facility has failed to notify the Administrator, or other appropriate Federal, State, or local government agency, of the release or threatened release of a hazardous substance on the site pursuant to section 9605 of this act; and
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> (4) the lender, mortgagee, or otherwise secured creditor notifies the Administrator of its intention to foreclose on the site to secure its security interest, but waives all claims to the full value of

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John LaFalce (D-N.Y.). H.R. 2085, 101st Cong., 1st Sess., 135 Cong. Rec. H1364 (daily ed. Apr. 25, 1989). The amendment is being co-sponsored by 263 members of the House. Labaton, Pollution Raises Cost of Bailout, N.Y. Times, July 20, 1990, at D1, col. 4. For a comparison of the proposed amendment in this Note and the LaFalce amendment, see infra note 177.

174 The decision in *Maryland Bank* was decided on April 9, 1986. The amendment offers a grace period of six months for those loans that were already agreed upon, but not as yet completed when *Maryland Bank* was decided.

its security interest once response actions have been taken pursuant to section 9603 of this act.

B. *The Rationale of the Amendment*

The proposed amendment has two purposes. First, the amendment overrides the constraints on prior lenders imposed by the *Maryland Bank* and *Fleet Factors* decisions, and moves the status of lender liability more in line with the decisions in *Mirabile* and *Bergsoe*. Under *Maryland Bank*, a lender forfeits the exemption upon foreclosure. *Fleet Factors* goes even further, imposing liability whenever the lender has the ability to influence hazardous waste disposal on a site "if it so chose."[175] Thus, *Fleet Factors* makes the ability to *affect* management decisions sufficient to impose CERCLA liability.[176] The amendment requires more than mere foreclosure for a prior lender to lose the exemption. It requires a prior lender to take such actions which constitute participation in the management of the facility, or serve as a direct benefit to the prior lender as an owner rather than as a mortgagee. Thus, a prior lender must be involved in the actual, rather than have the *potential* to affect, day-to-day management decisions whether before or after foreclosure. The second purpose of the amendment is to counteract prior lenders' responses to the *Maryland Bank* and *Fleet Factors* decisions and, instead, seeks to encourage prior lenders to foreclose on the property and promptly report the problem so the EPA can initiate response actions.[177] In order to

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[175] United States v. Fleet Factors Corp., 901 F.2d 1550, 1558 (11th Cir. 1990).

[176] In contrast, the Ninth Circuit Court's test in *Bergsoe* not only requires actual, rather than potential, management actions, but also requires that a court examine a lender's motivation for the actions it takes. As Judge Kozinski argued: "Regardless of what rights [lender] may have had, it cannot have participated in management if it never exercised them." Hill v. East Asiatic Co. (*In re* Bergsoe Metal Corp.), No. 89-35397, slip op. 8627, 8637 (9th Cir. Aug. 9, 1990). For a discussion of the decision in *Bergsoe*, see supra notes 120-41 and accompanying text.

[177] Like the proposed amendment, the bill proposed by Representative LaFalce, supra note 173, provides that a commercial lending institution would not be an "owner or operator" under CERCLA if it foreclosed on the property to protect its security interest. According to one source, the bill defines a "commercial lending institution" as a "commercial or savings bank, industrial savings bank, savings and loan association, or trust company." Legislation in House Would Limit Liability of CERCLA Lenders, Trustees, 20 Env't Rep. (BNA) No. 1, at 17 (May 5, 1989). The problem inherent in the LaFalce bill is that the bill does not distinguish between prior and current lenders. While the *T.P. Long*, *Mirabile*, *Maryland Bank*, *Guidice*, *Fleet Factors*, and *Bergsoe* decisions each examined the lender's business involvement in the sites, the decisions also looked to the lender's potential to be unjustly enriched by an EPA-paid cleanup. Foreclosure actions, however, are *always* inherently related to protecting a security interest. In effect, the LaFalce bill provides blanket coverage to lenders, regardless of *when* they made loans. This problem is enhanced by the bill's definition of "owner or operator." The bill would provide that the exemption under section 9601(20)(A) be amended to expressly exclude a commercial lending institution which acquires ownership or control of a property to

achieve these goals, the amendment addresses five points in response to the problems caused by the *Maryland Bank* and *Fleet Factors* decisions.

1. The Cap on Prior Lender Contributions

Capping prior lenders' contributions to a cleanup to a percentage of the amount left on the debtor's mortgage will encourage foreclosures. The cap furthers CERCLA's goals better than expanding liability. By expanding CERCLA liability to lenders, the courts in *Maryland Bank* and *Fleet Factors* sought to replenish Superfund resources by expanding the pool of potentially responsible parties. That has not been the result. Current lenders will shield themselves from future liability (even if it means choosing *not* to grant loans), and prior lenders will simply "lay low," thus diminishing the number of viable suits against lenders.[178] At the same time, CERCLA's primary

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protect its security interest. Id. Such blanket coverage, however, would enable lenders to benefit even where their actions could prevent, or severly reduce, the harms caused by borrowers engaged in hazardous waste activities.

The time limitation in the amendment proposed in this Note does not go as far as the LaFalce bill because the amendment only applies to pre-*Maryland Bank* loans, and therefore requires current lenders to continue to encourage environmentally sound loans. In this sense, this Note agrees with Judge Kravitch's statement in *Fleet Factors* that decisions regarding lender liability

> should encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential debtors. If the treatment systems seem inadequate, the risk of CERCLA liability will be weighed into the terms of the loan agreement. Creditors, therefore, will incur no greater risk than they bargained for and debtors, aware that inadequate hazardous waste treatment will have a significant adverse impact on their loan terms, will have powerful incentives to improve their handling of hazardous wastes.

Fleet Factors, 901 F.2d at 1558.

This rationale makes sense. In the first place, current lenders want to secure their loans to escape a situation in which day-to-day involvement in the management of the facility could subject them to liability. Moreover, current lenders want to know the uses to which their funds will be applied in order to assess the debtors' ability to repay the loans and avoid the risk of default which might subject lenders to potential CERCLA liability. Secondly, the EPA would want to encourage lenders to act as private watchdogs to make sure that the debtor's management of hazardous waste is adequate, thus stopping a problem before it even starts. The amendment proposed in this Note would *only* protect prior lenders, thus preventing a current lender from escaping liability where his actions could have altered the existing problem. Moreover, the protection afforded to prior lenders would require that lenders notify the EPA of a problem. Accordingly, the amendment proposed in this Note would offer protection only for prior lenders, who were not able to have the risk of CERCLA liability "weighed into the terms of the loan agreement" as the Eleventh Circuit Court's test in *Fleet Factors* presupposes, *id.*, but continue the benefits of increased lender scrutiny in commercial lending.

178 This is evidenced by the fact that since *Maryland Bank*, *Guidice*, *Fleet Factors*, and *Bergsoe* are the only reported cases involving lender liability. Despite the broad interpretation offered by the Ninth Circuit Court in *Bergsoe*, the Eleventh Circuit Court's decision in *Fleet Factors* deters lenders from taking any steps that could potentially lead to CERCLA liability.

goal of responding to dangerous hazardous waste sites is thwarted. Thus, expanding liability has promoted neither of CERCLA's goals.

The cap does not preclude the EPA from seeking reimbursement from the responsible party. In effect, the prior lender will merely act as a party technically vested with ownership, but only for the purposes of response actions. Where a responsible party is found who can pay for the costs of such actions, CERCLA's goals will be met: the property will be cleaned up and the private party responsible for the damage will pay. In cases where no responsible party is found, capping a prior lender's contribution achieves a major task: it promotes the reporting of a problem and encourages a prior lender to foreclose on the property knowing that it may, at the very least, come out better than if it lost the entire value of its security interest. Currently, a prior lender stands to lose the remaining value of its security interest: fear of liability will deter foreclosing on, or reporting a problem with, the property. As a result, it would be in a prior lender's economic interests to foreclose on property and report a problem to the EPA in order to recover a substantial portion of its security interest. Thus, while CERCLA's goal that private funds pay for response actions might not be fully achieved, a cap will promote CERCLA's goal to respond to dangerous hazardous waste sites.[179]

In fact, the Eleventh Circuit Court's test in *Fleet Factors* suggests that the lender's financial involvement could, itself, be a sufficient nexus for the EPA to seek contributions for an environmental cleanup given the "inference" that could be drawn that the lender could have affected management decisions "if it so chose."

If the Eleventh Circuit Court's test in *Fleet Factors* is followed by the other courts, rather than the Ninth Circuit Court's test in *Bergsoe*, it is likely that more suits in the future will be waged against lenders. Moreover, as the need increases for "deep pockets," it is likely that the link required to impose CERCLA liability on lenders may go beyond even the "inference" test employed by Judge Kravitch.

[179] How would such a cap work? Suppose that The SmithBank loaned $1,000,000 to Jones prior to the decision in *Maryland Bank*. After Jones pays off $500,000 of the principal over a span of time, he discovers a hazardous waste problem, but also becomes insolvent. Jones does not find it in his best interest to report the hazardous waste problem to the EPA because he may be guilty of dumping or may not be able to rely on the third-party defense. Under *Maryland Bank* and *Fleet Factors*, SmithBank would be deterred from foreclosing on, or taking title to, the property because of fear of CERCLA liability. Given the likelihood that neither SmithBank nor anyone else would want to purchase the property at a foreclosure sale, SmithBank would probably choose not to foreclose on the property; the proceeds from securing the collateral held by SmithBank would be outweighed by potential CERCLA liability. As a result, Smith would not foreclose, the property would remain "dead" for however long, and the goals of CERCLA would be defeated.

By capping a lender's liability, SmithBank would be encouraged to foreclose on Jones' property because the sooner a cleanup was initiated, the sooner SmithBank would be able to sell the property and realize the proceeds of a resale. If no one bought the property at the foreclosure sale, the EPA would cleanup the property. SmithBank would then pay the market price of the land after the cleanup less a percentage of the $500,000 not collected from Jones—under the amendment proposed in this Note, between fifty and ninety percent depending on

2. The Time Limitation

Current lenders, who were aware of the increased risks after *Maryland Bank*, can protect themselves against potential liability by requiring environmental audits and other precautions. Prior lenders, however, might not have taken such precautionary steps because of either inadequate technology at the time or their expectation that they would be immune from liability based on past federal environmental legislation. Thus, the amendment would only apply to lenders whose financial interest in the site began before October 9, 1986.

3. Day-to-Day Involvement in the Site

The third area targeted by the amendment is the prior lender's involvement in a site. Prior lenders can help police the activities of hazardous waste site owners and operators and thus increase the reporting of hazardous waste problems to the EPA.[180] This, in turn, would encourage owners to report a problem to the EPA to avoid the potential civil and criminal penalties for failure to notify the EPA of the release or threatened release of a hazardous substance.[181] Widespread imposition of liability on lenders, however, deters such involvement.[182] In contrast, the amendment achieves a proper balance of interests: it provides prior lenders with the economic incentive to report a problem, but only on the conditions that the prior lender not be involved in the daily management of the site, and that it notify the EPA of a problem before the owner of the site does so. Thus, provided a prior lender does not become involved in the actual management of the site, it should be allowed to take on advisory or limited ownership positions without incurring CERCLA liability.[183] Subsection (1) of the amendment therefore requires that a prior lender be

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any relevant economic factors, including the amount outstanding on the debt, the costs of a cleanup, and the value of the property after a cleanup. Thus, under the cap, SmithBank would be guaranteed of receiving *at least* fifty percent, or $250,000 (and perhaps as much as ninety percent, or $450,000) of the amount it did not expect to collect from Jones without incurring extraordinary costs for the cleanup under CERCLA. At the same time, the courts would be able to adjust the percentage available to a prior lender depending on the lender's actions, and thus prevent a lender from benefitting unjustly from the subsequent sale of the property.

180 "[Society] can further benefit from the monitoring role that banks normally play during the loan term." Tom, supra note 142, at 927. See also Morgenson and Eisenstodt, supra note 142, at 97 ("If given the right incentives, the private sector—entrepreneurs, private investors and nonprofit organizations—can be the environment's best friend.").

181 42 U.S.C. § 9603 (1988). For the relevant portions of section 9603, see supra note 32.

182 "[I]f lenders are unable to predict the scope of potential liability they may incur as constructive operators of the site, they will refrain from aiding borrowers. . . ." Tom, supra note 142, at 927-28.

183 Under *T.P. Long*, *Mirabile*, and *Bergsoe*, lenders are shielded from CERCLA liability even if they technically "own" the property, provided their actions demonstrate that they are

uninvolved in the "day-to-day operation" of the site to be entitled to the benefits of the amendment.[184]

4. Notification Requirements

A fourth problem created by the *Maryland Bank* and *Fleet Factors* decisions is that the EPA may not be notified of a dangerous hazardous waste problem if the property owner and the lender have no incentive to report a problem. The amendment seeks a balance between offering a prior lender an incentive to foreclose on property and report a hazardous waste problem, while simultaneously not affording a prior lender a benefit where the owner has already reported a problem. Thus, subsection (2) of the amendment provides that a prior lender will be afforded the exemption if it reports a problem, but subsection (3) precludes a prior lender's entitlement to the exemption if the owner has already reported a problem.

5. Against Unjust Enrichment

Finally, the fifth problem addressed by the amendment is the potential abuse of the exemption. In accord with the decisions in *T.P. Long*, *Mirabile*, *Maryland Bank*, *Guidice*, *Fleet Factors*, and *Bergsoe*, a prior lender should not unjustly benefit from the sale of the property after a cleanup. Therefore, subsection (4) of the amendment stipulates that a prior lender who wants to retain the exemption, presumably in the hope of receiving a substantial portion of its interest, must first waive his ownership interest in the property. Thus, a prior lender will not receive the value of the exemption as a prior lender *and* the fair market value of the property as an owner once the property is sold following a cleanup.

CONCLUSION

By expanding the scope of responsible parties, the *Maryland Bank* and *Fleet Factors* decisions may increase the pool of private par-

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primarily protecting their security interest in the site. For a discussion of the decisions in *T.P. Long*, *Mirabile*, and *Bergsoe*, see supra notes 67-79, 120-41 and accompanying text.

184 This language is taken specifically from the Pennsylvania federal court's opinion in *Mirabile*. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20996 (E.D. Pa. Sept. 4, 1985). Standards have been suggested to determine when a lender is overly entangled in the day-to-day operations in the management of a hazardous waste site. See, e.g., Tom, supra note 142, at 934-43 (arguing that lender liability under section 9601(20)(A) require actual management of the facility similar to the court's reasoning in *Mirabile*); Burkhart, supra note 18, at 370-81 (arguing that imposing CERCLA liability on lenders conforms with common law principles); Note, Lender Liability for Hazardous Waste: An Economic and Legal Analysis, 59 U. Colo. L. Rev. 659, 660 (1988) (arguing for a "joint venture" standard for the purposes of imposing CERCLA liability on lenders).

ties able to reimburse Superfund for cleanup costs. In reponse to potential liablity, lenders will be careful in examining properties for environmental hazards. This is a positive result and should be encouraged among future lenders. The decisions in *Maryland Bank* and *Fleet Factors*, however, have created a problem for prior lenders who are unable to ward off the potential liability that those decisions impose.[185] Prior lenders, fearing liability and unable to rely on the more favorable decision in *Bergsoe*, have simply chosen, and may continue to choose, other means to avoid having the ever-increasing costs of cleanups heaped upon them.[186] Thus, while the decisions in *Mary-*

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185 The expansion of liability imposed on prior lenders may have the greatest impact on the federal government. According to Steven A. Seelig, director of the Federal Deposit Insurance Corporation's division of liquidations, the Federal government has seized more than 400 properties as a result of the nationally publicized savings and loan crisis and found that they contain hazardous waste or asbestos for which the federal government may be held legally responsible. Labaton, Pollution Raises Cost of Bailout, N.Y. Times, July 20, 1990, at D1, col. 6. Ironically, those who may eventually pay for related cleanup costs would be taxpayers, with money allocated to resolve the savings and loan crisis, rather than the polluters as Congress originally hoped. For the comments of Senators Durenberger and Wallop, and Representative Traficant on the original intent of Congress in enacting CERCLA to make the polluter pay for response costs, see supra note 75.

Due, in part, to the widespread concern over failing savings and loan institutions, the EPA has reversed its policy concerning lender liability under CERCLA, and has sought to preserve the exemption under section 9601(20)(A). EPA Official Tells House Panel of Shift in Policy Toward Lenders, CERCLA Liability, 21 Env't Rep. (BNA) No. 15, at 756 (Aug. 10, 1990). According to James Strock, EPA Assistant Administrator for Enforcement, lenders who act in "a custodial capacity in adminstering and winding down the affairs of a borrower" upon learning of a hazardous waste problem would not be subject to CERCLA liability. Id. If the lender "affirmatively undertakes activities that do not simply protect its security interest but cause environmental harm," however, the lender would not be entitled to the exemption. Id.

While the EPA favors administrative rule-making, rather than a legislative attempt to clarify lenders' status, the EPA has indicated that it will not oppose legislation should Congress propose appropriate legislation that is narrowly tailored to lender liability, and provided such legislation "fosters responsible behavior by lenders when they initially lend funds and when they discover contamination upon foreclosure." Id. The EPA has recommended that any such legislation specifically provide that lenders act prudently in making loans, including requiring site assessments and cleanups when appropriate, act reasonably upon the discovery of a hazardous waste problem so as not to exacerbate any contamination, and entitle the Superfund to recoup the cost of any EPA initiated cleanup. The amendment proposed by this Note meets these EPA recommendations head on. For the text and rationale of the proposed amendment, see supra Part V. According to Alan P. Vollmann, a partner in the Washington, D.C. law firm of Morrison and Foerster, Congress has recognized the need for a legislative solution to the environmental problems faced by lenders. Legislative Changes Necessary After Fleet Factors Case, Lawyer Says, 21 Env't Rep. (BNA) No. 20, at 907 (Sept. 14, 1990).

186 The court in *Guidice* noted the policy reasons for limiting lender liability where the lender had not foreclosed on the property:

> There are policy reasons for exemption of secured creditors in the Bank's position from CERCLA liability prior to the secured creditor's purchase of the property at foreclosure. A goal of CERCLA is safe handling and disposal of hazardous waste. To encourage banks to monitor a debtor's use of security property, a high liability

land Bank and *Fleet Factors* seek to further CERCLA's goals, they do the opposite. The prior lender's disavowal of ownership of hazardous waste sites defeats the aim to shift reponse costs to private parties. Moreover, dangerous sites are unreported to the EPA and thus untreated. This defeats CERCLA's goal to respond to dangerous sites. These results magnify the impracticality of the view expressed in *Maryland Bank* and *Fleet Factors*. Such a view provides few benefits. The proposed amendment to CERCLA, including the cap on prior lenders' contributions, encourages prior lenders to foreclose on property and see that any problems are remedied. Thus, CERCLA's ultimate goal of responding to dangerous hazardous waste sites will be met.

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threshold will enhance the dual purposes of protection of the banks' investments and promoting CERCLA's policy goals. Conversely, a low liability standard would encourage a lender to terminate its association with a financially troubled debtor and expedite loan payments in an effort to recover the debts.

Guidice v. BFG Electroplating and Manufacturing Co., 732 F. Supp. 556, 562 (W.D. Pa. 1988). This rationale holds equally true for lenders who fear foreclosure and do not foreclose on the property. The higher the liability threshold after foreclosure, the more likely a lender will report a problem.