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William R. Mitchell

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Cover Page Footnote

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CERCLA: THE PROBLEM OF LENDER LIABILITY*

WILLIAM R. MITCHELL**

I. INTRODUCTION

Government actions to regulate industrial processes, business activities, and land uses that threaten environmental integrity have marked the last two decades. Because traditional common law concepts and zoning and land use legislation are unable to address growing environmental concerns appropriately, these approaches to environmental protection have given way to an increasingly complex system of environmental regulatory programs.[1] Although relatively new, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) has gained widespread notoriety as one of the most formidable weapons in the government's regulatory arsenal due to its complexity and expansive applicability.[2]

Ten years of CERCLA and the positions taken by the Environmental Protection Agency (EPA) based on the statute should be sufficent to convince most lawyers and businessmen that the potential for liability lurks in the shadows of even the most mundane business transac-

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* Since Mr. Mitchell wrote this article, the EPA has proposed new rules involving lender liability. At the time of publication of this article, these rules have not been approved.

** University of West Florida, B.A. 1988, Florida State University College of Law, J.D. 1991. Mr. Mitchell is a former Editor-in-Chief of the JOURNAL OF LAND USE AND ENVIRONMENTAL LAW and is now an Associate at Moore, Hill and Westmoreland in Pensacola, Florida.

1. *See, e.g.*, Levitas & Hughes, *Hazardous Waste Issues in Real Estate Transactions*, 38 MERCER L. REV. 581, 583 (1987). A sampling of federal regulatory programs enacted to address perceived environmental harms includes the following: Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1988); Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. §§ 1251-1387 (1988); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992 (1988); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988). *See also* Lieshout, *Bankers Beware: Liability of Lending Institutions Under Superfund*, 2 HOFSTRA PROP. L.J. 291, 292-300 (1989) (synopsis of the development of federal solid waste legislation).

2. Pub. L. No. 96-510, 94 Stat. 2767 (1988)(codified as amended at 42 U.S.C. §§ 9601-9675 (1988)). The enactment of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986), has engendered confusion among some practitioners and authors as to the moniker to be ascribed to the current codification. CERCLA is the proper name for the current codification of the Act appearing in the United States Code. *See* Stoll, *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)*, in ENVIRONMENTAL LAW HANDBOOK, 75-76 (10th ed. 1989). When reference is made to CERCLA in this work it shall be a reference to the basic statute enacted in 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). References to SARA will also be made for the purpose of indicating important changes to the framework of CERCLA.

tions. Markets that never would have been considered at risk under CERCLA in 1980 have moved to the top of the EPA's list of those potentially responsible for remedial action or cost recovery. Even lending institutions are realizing that the EPA expects their market to shoulder the burden imposed by CERCLA. Recent judicial opinions have served to bolster the EPA's position that lenders should be responsible under the terms of CERCLA.

Because a general understanding of CERCLA's statutory framework is necessary to appreciate its impact on the lending industry and the milieu in which judicial opinions have been rendered, this article begins with a broad overview of CERCLA's most significant provisions. Next, the judiciary's reaction to the practices of commercial lenders in light of the statutory mandate is reviewed. Finally, the reaction of the lending industry, Congress, and the EPA to the expanding role of lending institutions as responsible persons under CERCLA is addressed.

II. LIABILITY UNDER CERCLA

Although a landmark piece of environmental legislation, CERCLA suffers from drawbacks that might be expected with any complex and far-reaching regulatory scheme. The bill that was to become CERCLA was drafted by an ad hoc group of senators to replace the original version reported out of the Senate Committee on Environment and Public Works.[3] The House considered the Senate compromise bill under a suspension of the rules; thus no opportunity for amendment of the Senate bill existed and only limited debate occurred.[4] Consequently, no committee report exists for the bill which ultimately became CERCLA. Legislative history, such as it is, consists almost entirely of the House and Senate floor debates on the substitute bill.[5]

It is generally conceded that the bill which ultimately became CERCLA was "a severely diminished piece of compromise legislation from

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3. *See generally* State of Colo. v. Asarco, Inc., 608 F. Supp. 1484, 1489 (D. Colo. 1985) (chronicling the legislative history of CERCLA). For an excellent treatment of the process that produced CERCLA see Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

4. Grad, *supra* note 3, at 29-30.

5. *Asarco*, 608 F. Supp. at 1489. *See also* State of N.Y. v. Shore Realty Corp., 759 F.2d 1032, 1042 n.12 (2d Cir. 1985) (Senate report concerning pre-compromise version of CERLCA is a useful guide to congressional intent, as to matters which received little or no change under the compromise); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1111 (D. Minn. 1982) (admonishing readers of committee reports to use caution in light of CERCLA's legislative history).

which a number of significant features were deleted."[6] Many also have recognized that the bill that passed was destined to be riddled with ambiguity because of the great difficulty of passing such a controversial piece of legislation.[7] Although the statute is not a model of legislative clarity, one might consider the statute in light of what the courts have determined to be its key objective—the facilitation of prompt cleanup of sites containing hazardous waste by creating a financing scheme for governmental and private responses that places the ultimate financial burden on those responsible for the problem.[8] With this precept and the statute's history in mind, a review of the statute's liability scheme is appropriate.

A. Persons Subject to Liability

CERCLA incorporates a liability scheme which creates several categories of persons who may be liable for costs associated with the release or threatened release of a hazardous substance.[9] These are the owner or operator of a facility; persons who owned or operated a facility at the time hazardous substances were disposed of at the facility; persons who arranged for the disposal or treatment of hazardous substances, or arranged for transportation of hazardous substances for disposal or treatment; and transporters of hazardous substances.[10] Absent undue involvement with a debtor whose business is the disposal of hazardous waste, the two categories of greatest concern to lenders are those which premise liability upon ownership of a facility.[11] Once a determination of liability is made, the results can be dev-

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6. City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1142 (E.D. Pa. 1982). *See also* Grad, *supra* note 3, at 1-2.

7. *See, e.g.*, Grad, *supra* note 3, at 1-2.

8. *Stepan Chem.*, 544 F. Supp. at 1142-43.

9. 42 U.S.C. § 9607(a)(1)-(4) (1988). The statutory definition of a number of salient terms evident in CERCLA's liability provision is important to get a complete picture of the scope of the liability imposed. CERCLA does not seek to limit who may be deemed a "person" for purposes of the liability imposed under section 9607. Individuals, corporations, associations, partnerships, consortiums, joint ventures, and other commercial entities are all deemed to be "persons" who may be subject to CERCLA liability. *Id.* § 9601(21). A "release" which will subject a person to liability is defined in terms broad enough to cover any manner, whether intentional or unintentional, by which a hazardous substance is introduced into the "environment," *id.* § 9601(22), which is itself defined to encompass any surroundings. *Id.* § 9601(8) (environment encompasses the air; ground, including surface and subsurface; and water, including surface, ground and drinking water, and navigable and coastal waters). *See also id.* § 9601(14) (defining "hazardous substance").

10. 42 U.S.C. § 9607(a)(1)-(4) (1988).

11. *See* 42 U.S.C. § 9607(a)(1)-(2) (1988). It is extremely important to realize that the term "facility" is by no means confined to any concept of discrete structures committed to the proc-

astating. Responsible parties are liable for all costs of removal and remedial action incurred by the United States or a state, other necessary response costs incurred by any other person, natural resource damage, and the costs of health assessments.[12]

B. The Liability Scheme

Section 9607 of CERCLA makes no explicit reference to the standard of liability to be imposed on persons who face potential liability under the categories created therein. Rather, CERCLA defines liability by reference to the Clean Water Act.[13] Courts have routinely imposed strict liability under CERCLA based on the standard of liability that has developed in actions brought under the Clean Water Act.[14]

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essing or disposal of hazardous substances. Rather, a facility is

> any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . .

Id. § 9601(9). *See also* United States v. Bliss, 667 F. Supp. 1298, 1305 (E.D. Mo. 1987) ("facility" is not limited to traditional dumpsites but includes both the container from which a hazardous substance has been released and the site where the substance has been placed). To demonstrate that an area is a facility, a plaintiff need only show that a hazardous substance was placed or has come to be located there. *Id.* Thus, a lender taking a security interest in personal property is at risk of incurring CERCLA liability where the property is involved in the storage or disposal of hazardous waste or otherwise comes to be contaminated with such waste.

The "owner or operator" of a facility is, quite simply, any person who owns or operates the facility. 42 U.S.C. § 9601(20)(A)(ii) (1988). It should be noted, however, that an exception to "owner or operator" status does exist for secured creditors. *See infra* notes 22-24 and accompanying text. An interesting argument has been made regarding "owner or operator" status which could have alleviated many of the liability problems faced by lending institutions under CERCLA. In United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577-78 (D. Md. 1986), the potentially liable party argued that section 9607(a)(1) imposed liability only on those who are both owners and operators of a facility at which a release has occurred. *See* 42 U.S.C. § 9607(a)(1) (1988). The district court, while conceding that the contested section was ambiguous as to the scope of coverage, rejected the proposed interpretation. *Maryland Bank*, 632 F. Supp. at 577-78. Recognizing that CERCLA emerged from Congress as a hastily drafted piece of compromise legislation, the court declined to "slavishly follow the laws of grammar" in construing the statute. *Id.* at 578. Rather, the court preferred to rest its holding that ownership of a facility was alone sufficient to confer liability under section 9607(a)(1) on the statute's legislative history and prior decisional law. *Id. See also* State of N.Y. v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) ("Section 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation").

12. 42 U.S.C. § 9607(a)(4)(A)-(D) (1988 & Supp. 1990). Responsible parties are also liable for interest on the amounts recoverable under section 9607 and, under appropriate circumstances, may be subject to an action by the United States for punitive damages of up to three times the government's actual response costs. *Id.* § 9607(c)(3) (1988).

13. *See* 42 U.S.C. § 9601(32) (1988).

14. Prior to CERCLA's enactment, courts had imposed strict liability under the Clean Water Act. *See, e.g.*, Stuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979);

The determination that CERCLA contemplates strict liability has simplified the burden of establishing a *prima facie* case against a potentially responsible party.[15]

Because the standard is strict liability, the scope of an individual defendant's liability is of paramount importance.[16] The courts have had few qualms about making joint and several liability the rule under CERCLA.[17] Although important in the multi-defendant context, the

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United States v. Tex-Tow, Inc., 589 F.2d 1310, 1316 (7th Cir. 1978); Burgess v. M/V Tamano, 564 F.2d 964, 981-82 (1st Cir. 1977), *cert. denied*, 435 U.S. 941 (1978). The courts have had little trouble finding that CERCLA also imposes strict liability. United States v. Conservation Chem. Co., 589 F. Supp. 59, 62 (W.D. Mo. 1984) (strict liability is consistent with legislative aims of CERCLA such as cost-spreading and placing cleanup costs on responsible parties); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 843-44 (W.D. Mo. 1984), *aff'd in relevant part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (although specific strict liability provision contained in original Senate bill was deleted, CERCLA, as enacted, was intended to incorporate the standard of liability contemplated by section 1321 of the Clean Water Act); United States v. Price, 577 F. Supp. 1103, 1113-14 (D.N.J. 1983) (conclusion that strict liability is the appropriate standard of liability under CERCLA is reinforced by "due care" defense of section 9607(b)(3), "which would be rendered meaningless in the absence of strict liability").

15. In order for a plaintiff to establish a *prima facie* case of liability he or she must prove that: the site which is the subject of the dispute is a "facility," a "release or threatened release" of a "hazardous substance" from the site has occurred which caused the plaintiff to incur "response costs," and that each defendant falls within one of the statutorily defined classes of persons liable for response costs. *E.g.*, United States v. Northernaire Plating Co., 670 F. Supp. 742, 746 (W.D. Mich. 1987), *aff'd sub nom.* United States v. R. W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1527 (1990). *See also infra* notes 21-23 and accompanying text. Once the required showing has been made, it becomes incumbent upon the defendant to establish a defense to liability. *See Northernaire Plating Co.*, 670 F. Supp. at 747. *See also* United States v. Monsanto Co., 858 F.2d 160, 168 (4th Cir. 1988) (person who owned facility at time hazardous waste was deposited there can be held liable for all response costs incurred due to a release, irrespective of the degree of participation in disposal), *cert. denied*, 490 U.S. 1106 (1989); T & E Indus. v. Safety Light Corp., 680 F. Supp. 696, 708 (D.N.J. 1988) (if undisputed facts establish each element of a *prima facie* case, plaintiff is entitled to summary judgment on the issue of liability). Obviously, defenses that are based upon the defendant's lack of negligence or exercise of due care will not bar the imposition of liability, although such issues may become relevant when liability is apportioned among defendants. United States v. Conservation Chem. Co., 619 F. Supp. 162, 204 (W.D. Mo. 1985).

16. CERCLA does not address the scope of liability under section 9607. The importance of the scope of liability, especially in the early years of CERCLA litigation, is underscored by a district court's notation that the liability issue most litigated under section 9607 was whether CERCLA provides for joint and several liability. State of Colo. v. Asarco, Inc., 608 F. Supp. 1484, 1486 (D. Colo. 1985).

17. The issue of joint and several liability has been addressed *ad nauseam* by the courts. United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983), is representative of the opinions holding joint and several liability to be an appropriate standard under section 9607. The *Chem-Dyne* court recognized that all references to joint and several liability were deleted from the House and Senate bills; however, determined that the deletions were not dispositive of the scope of liability issue. *Id.* at 806-807. Rather, the legislative history disclosed an intent to avoid inequitable results in particular cases which might result from a statutory standard applicable in all situations. *Id.* at 808. Thus, references to joint and several liability were deleted so

issue of joint and several liability is diluted when liability hinges upon ownership of the facility from which a release has occurred. An action maintained solely against an owner of a facility essentially imposes a de facto scheme of joint and several liability since an owner of a facility who is found liable under section 9607 is solely responsible for all costs recoverable under CERCLA.[18] The plaintiff's election to omit certain potentially responsible parties from an action for costs does not foreclose shifting the responsibility for cleanup costs to them, however. The owner named as defendant in the main action may bring an action for contribution against such potentially responsible parties in an effort to recover some of the costs from them.[19]

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that the scope of liability could be determined under common law principles on a case by case basis. *Id.* In shaping a uniform federal rule of decision, the *Chem-Dyne* court turned to the RESTATEMENT (SECOND) OF TORTS for guidance. *Id.* at 810. Because the RESTATEMENT takes the position that each person is subject to liability for the entire harm created where one's actions combine with others to form a single and indivisible harm, the court determined that "where the conduct of two or more persons liable under § 9607 has combined to violate the statute, and one or more of the defendants seeks to limit his liability on the ground that the entire harm is capable of apportionment, the burden of proof as to apportionment is upon each defendant." *Id.* *Accord* United States v. Mottolo, 695 F. Supp. 615, 629 (D. N.H. 1988); State of Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986); United States v. Conservation Chem. Co., 589 F. Supp. 59, 63 (W.D. Mo. 1984). *But cf.* Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1116-17 (N.D. Ill. 1988); United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905, 1909-10 (C.D. Cal. 1984); United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984) (rejecting rigid application of Restatement approach in order to avoid harsh result of imposing entire liability on a defendant who contributed only a small amount of waste to a site).

18. Being the current owner of a piece of property rounds out the elements necessary for a *prima facie* case where the plaintiff has incurred response costs due to a release or threatened release of a hazardous substance from the owner's property. *See supra* note 15. *See also* State of N.Y. v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (CERCLA unequivocally imposes strict liability on current owners, without regard to causation); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992, 20,993-94 (E.D. Pa. 1985) (liability attaches once an unrebutted *prima facie* case is made, whether apportionment of the liability among defendants is appropriate does not bar the entry of judgment on liability); United States v. Carolawn Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,699, 20,700 (S.C. 1984) (owners of a site are responsible for response costs unless they can establish one of CERCLA's affirmative defenses).

19. SARA established a statutory right of contribution against parties liable or potentially liable under section 9607 of CERCLA. *See* 42 U.S.C. § 9613(f)(1) (Supp. 1991). *See also* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89-90 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). CERCLA "enables a plaintiff to select one primarily responsible party as [a] defendant [in a cost recovery action], determine liability as to that defendant, and collect the total amount of damages from that defendant." State of Colo. v. Asarco, Inc., 608 F. Supp. 1484, 1491 (D. Colo. 1985); *see also Shore Realty*, 759 F.2d at 1041 (EPA can sue for cleanup cost reimbursement from any responsible party it can locate). The burden of allocating costs among other responsible parties rests with the defendant. *Asarco* 608 F. Supp. at 1491, 1488 n.3 (one tortfeasor cannot compel the joinder of another tortfeasor in a CERCLA action; the appropriate procedure is to implead a joint tortfeasor as a third party defendant).

C. *Defenses or Exceptions to Liability*

Section 9607 also establishes certain statutory defenses to CERCLA liability. Additionally, CERCLA provides what may be considered an exception to liability in its definition of who is an "owner or operator."[20] The defenses to liability might be seen as a brass ring because they totally absolve a defendant of liability.[21] All the defendant needs to do is satisfy a court that its actions fit within the terms of a defense.[22] For their part, the courts have tended toward a narrow construction of the defenses to keep in line with CERCLA's mandate of broad liability.[23]

1. *Owner or Operator Defined*

CERCLA, in a typically simplistic fashion, defines the term "owner or operator" to include any person who owns or operates a facility.[24] The definition provided is not surprising in light of CERCLA's goals.[25] It creates a potential liability net that is sufficiently wide to catch almost anyone having substantial contacts with a piece of property. The portion of the definition relevant to lenders, however, is the express exception to the term "owner or operator." Specifically excluded from the definition is any person, "who, without participating in the management of a . . . facility, holds indicia of ownership *primarily* to protect his security interest in the . . . facility."[26] Unfortunately, this exception has not provided the haven from liability many lenders thought it would.[27]

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20. 42 U.S.C. § 9601(20)(A) (1988).

21. *Id.*

22. *Id.* § 9607(b).

23. *See, e.g.*, United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992 (E.D. Pa. 1985).

24. *Id.* § 9601(20)(A).

25. The goals of CERCLA include cleanup of sites containing hazardous waste by creating a financing scheme for governmental and private responses that places ultimate financial burden on those responsible for the problem. City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982).

26. *Id.* (emphasis added).

27. The courts are in disarray over what level of activity in a borrower's affairs is sufficient to support the conclusion that a lender has participated in the management of a facility. For lenders, such uncertainty is extremely disconcerting because it increases the risk of incurring CERCLA liability where traditionally acceptable levels of supervison of a borrower's affairs are undertaken. For an argument that traditional lender liability doctrines should be employed to give meaning to the term "participating in the management," see Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 934-43 (1989).

2. *Statutory Defenses*

The statutory scheme of liability embodied in CERCLA contemplates relief for those persons who, although technically liable under the statute, are not truly at fault for the release of a hazardous substance.[28] The defenses are cast as affirmative defenses with the burden of establishing, by a preponderance of the evidence, their applicability to a defendant.[29] To avoid liability, a defendant must show that a release or threatened release and the resulting damages were caused solely by an act of God, an act of war, or an act or omission of a third party.[30]

a. An Act of God or War

An act of God is specifically defined by CERCLA.[31] This definition appears to be in line with the goals of the Act.[32] An occurrence qualifies as an act of God if it is considered "an unanticipated grave natural disaster."[33] Not every unusual climatic occurrence, however, will classify as an act of God. For example, in *United States v. Stringfellow* the court determined that heavy rains were not so exceptional as to rise to the level of an act of God.[34]

What constitutes an act of war is not addressed by CERCLA or case law interpreting CERCLA. Neither the act of God nor act of war defense should be perceived as a haven for those otherwise liable under CERCLA. Even if a party demonstrates that it should come under either of these defenses, the burden of proving that the release or threatened release was caused solely by such act will be insurmountable in virtually every case.[35]

b. Acts or Omissions of Third Parties

CERCLA also provides a defense to liability where the act or omission of a third party has caused the release or threat of release and the

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28. 42 U.S.C. § 9607(b) (1988).

29. *Id.*

30. *Id.* § 9607(b)(1)-(3).

31. *Id.* § 9601(1).

32. *See supra* note 25.

33. *Id.* Other natural phenomena which might be characterized as exceptional, inevitable, and irresistible, and whose effects could not have been prevented or avoided through the exercise of due care or foresight, may also qualify as acts of God. *Id.*

34. 661 F. Supp. 1053, 1061 (C.D. Cal. 1987). The court held that the act of God defense was a narrow one. Further, the court determined that the rains in question were foreseeable and that any harm caused by them could have been prevented. Finally, the defendants were precluded from asserting the act of God defense because the heavy rains were not the sole cause of the release at issue. *Id.*

35. *See id.*

resulting damages.[36] Although the statute contains several qualifiers, defendants rely on this defense much more frequently than the act of God or war defenses; however, in most instances it provides no more practical protection. To qualify for the third party defense, a defendant must show that the third party was the *sole* cause of a release or threatened release and the resulting damages, and that the third party was not an employee or agent of the defendant nor in any way involved in a contractual relationship with the defendant.[37] Furthermore, the defendant must establish, by a preponderance of the evidence, that

> 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 [] 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.[38]

In an effort to clarify what was meant by contractual relationships under section 9607 of CERCLA, a definition of the term "contractual relationship" was added by the Superfund Amendments and Reauthorization Act of 1986 (SARA).[39] The avowed purpose of the amendment was to confirm that a truly innocent purchaser of land should be allowed to assert the third party defense of section 9607.[40] To establish innocent landowner status and avoid the contractual relationship bar to asserting the third party defense, a defendant must show that he or

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36. 42 U.S.C. § 9607(b)(3) (1988).

37. *Id.* Determining what constitutes a "contractual relationship" for purposes of section 9607(b)(3) has been a substantial impediment to the successful assertion of the third party defense. *See, e.g.*, United States v. Northernaire Plating Co., 670 F. Supp. 742, 748 (W.D. Mich. 1987) (lessee and lessor were both precluded from raising the third party defense in an action under CERCLA due to the contractual relation created by the lease existing between the two), *aff'd sub nom.*, United States v. R. W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1527 (1990).

38. 42 U.S.C. § 9607(b)(3)(a)-(b) (1988).

39. Pub. L. No. 99-499, 100 Stat. 1613. *See* 42 U.S.C. § 9601(35). Strictly speaking, section 9601(35) does not provide a defense to CERCLA liability; it merely explicates the third party defense of section 9607. The practicing bar, however, commonly refers to the provisions of section 9601(35) as the "innocent landowner" or "innocent purchaser" defense. O'Brien, *EPA's Landowner Liability Guidance*, 4 TOXICS L. REP. (BNA) 184, 184 n.5 (1989).

40. *See* 132 CONG. REC. H9084-85 (daily ed. Oct. 3, 1986). Essentially, land contracts, deeds, and other instruments transferring title or possession are exempted from inclusion in the term "contractual relationship" if the defendant can satisfy the requirements imposed by section 9601(35). 42 U.S.C. § 9601(35)(A) (Supp. 1991). In this manner, a defendant will be allowed to assert a defense under section 9607(b)(3) otherwise barred due to the existence of a contractual relationship. *See id.* § 9607(b)(3) (1988).

she neither knew nor had reason to know that any hazardous substance, which is the subject of the release or threatened release, was disposed of on, in, or at the facility, and that the property on which the facility is located was acquired after disposal or placement of hazardous waste at the facility.[41] Additionally, the defendant must satisfy the section 9607 requirements of the exercise of due care and precaution against foreseeable third party acts to prove entitlement to the innocent landowner defense.[42]

The viability of asserting the innocent landowner defense was complicated by the legislative prerequisite imposed on a purchaser of land who might later want to use the defense.[43] To demonstrate that there was no reason to know of contamination, a purchaser who becomes a defendant in a section 9607 action must be able to demonstrate that "all appropriate inquiry into the previous ownership and uses of the property" was made at the time of acquisition.[44] Furthermore, the inquiry made must be consistent with good commercial or customary practice.[45] Unfortunately, at the time of SARA's enactment, no

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41. 42 U.S.C. § 9601(35)(A)(i) (Supp. 1991).

42. *Id.* § 9601(35)(A). *See id.* § 9607(b)(3)(a)-(b) (1988).

43. 42 U.S.C. § 9601(35)(B) (Supp. 1991).

44. *Id.* Commentators have noted that the innocent landowner amendment essentially imposes a negligence standard on a purchaser who wishes to avoid strict, joint, and several liability. Levitas & Hughes, *supra* note 1, at 599. Where a landowner is not negligent in inquiring into the previous use and ownership and contamination potential of a parcel of property, section 9607 liability can be avoided. *Id.* Other commentators view the inquiry requirement of the innocent landowner amendment as merely clarifying what was already implicitly required by the provisions of section 9607(b)(3). It is highly probable, in their opinion, that the "due care" mandate of the third party defense required an inspection of land for the presence of hazardous substances. Anderson, *Will the Meek Even Want the Earth?*, 38 MERCER L. REV. 535, 539 (1987); *Environmental Liabilities Imposed on Landowners, Tenants, and Lenders—How Far Can and Should They Extend?*, 18 ENVTL. L. REP. 10,361, 10,362 (1988).

45. 42 U.S.C. § 9601(35)(B) (Supp. 1991). When determining whether a defendant has made "all appropriate inquiry" a court is required to take into account

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

Id. The considerations imposed on the courts by Congress reflect the intended application of the innocent landowner defense as evidenced in SARA's legislative history. Although the duty of inquiry imposed is to be judged at the time of acquisition, it was contemplated that defendants would be held to a higher standard as the public's awareness of the inherent problems with hazardous waste grew. 132 CONG. REC. H9085 (daily ed. Oct. 3, 1986). A literal reading of this intent would suggest that current acquisitions will be held to a relatively high degree of inquiry when compared to acquisitions made twenty or thirty years ago. *Id. Cf.* United States v. Serafini, 711 F. Supp. 197, 198 (M.D. Pa. 1988) (EPA maintained that it was inconceivable that a commercial real estate purchaser acquiring a large tract of land in 1969 would have failed to inspect the property prior to purchase). A second dichotomy in the standard of inquiry has even

"practice" existed in this field and some would contend that one has yet to develop.[46] The lack of a true standard of inquiry has left many lawyers and businessmen in a quandary over what should be done and how much inquiry is sufficient to satisfy the standard imposed.

Innocent landowner status is severely circumscribed by these requirements. Congress limited its applicability to purchasers who take without knowledge.[47] The status is denied to defendants who took property without knowledge, later obtained actual knowledge of a release or threatened release, and subsequently transferred ownership to another while failing to disclose the knowledge of contamination.[48] Finally, innocent landowner status is unavailable to defendants who actually cause or contribute to a release or threatened release.[49]

III. Application of CERCLA Liability Provisions by the Judiciary

Only recently have courts begun to address the potential CERCLA liability of commercial lending institutions. Consequently, the vast majority of jurisdictions have yet to address the question of lender liability. Unfortunately, the courts that have addressed this issue have had great difficulty in finding a common ground on which to premise liability. No "bright-line" rules exist. Other than a few basic guide-

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greater impact on the lending community. It was recognized that good commercial or customary practice would, at a minimum, require an inquiry to be conducted in light of best business and land transfer principles. 132 Cong. Rec. H9085 (daily ed. Oct. 3, 1986). What would be considered best land transfer and business principles, however, was to vary depending on the defendant involved. Specifically, a higher standard was to be imposed on persons engaged in commercial transactions than on those engaged in private residential transactions. *Id.*

The rigorous standards imposed have been criticized because it is felt they will result in lenders always having reason to know of the existence of hazardous substances. Vollmann, *Double Jeopardy: Lender Liability Under Superfund*, 16 Real Est. L.J. 3, 13 (1987). The inherent problem is that the dealings between lender and borrower could be used as a basis to impute knowledge about the property to the lender. *Id.* Thus, regardless of the fact that the duty of inquiry arises at acquisition, a lender only would be able to avail itself of the innocent landowner defense if it could demonstrate that it had made appropriate inquiry at the time the loan was made, and, perhaps, only if continued monitoring of the property during the term of the loan was pursued. *Id.*

46. *See infra* notes 142-147 and 157-160 and accompanying text. If no standard of inquiry exists for current acquisitions of property, the difficulty of proving that "all appropriate inquiry" was made in the purchase of parcels acquired decades ago should be apparent. *See* United States v. Serafini, 711 F. Supp. 197 (M.D. Pa. 1988); United States v. Serafini, 706 F. Supp. 346 (M.D. Pa. 1988).

47. 42 U.S.C. § 9601(35)(A)-(B) (Supp 1991). The innocent landowner defense cannot be utilized by previous owners or operators otherwise liable under CERCLA. *Id.* § 9601(35)(C); *see id.* § 9607(a)(2) (1988) (liability imposed on those who owned facility at time hazardous waste disposed there).

48. *Id.* § 9601(35)(C).

49. *Id.* § 9601(35)(D).

lines, today's lender is offered little practical guidance by the courts. The increase in interstate activity by lenders has complicated matters further. Even lenders who have made honest efforts to comply with existing case law are not assured that their efforts will be acceptable to other jurisdictions. The following cases interpreting CERCLA liability provisions as they relate to the activities of institutional lenders demonstrate the practical difficulties lenders face with existent transactions and when formulating "across-the-board" policies to apply to future transactions.

The first reported case to analyze the viability of the secured creditor exemption was *United States v. Mirabile*.[50] In *Mirabile*, the United States instituted a civil action under CERCLA against defendants Anna and Thomas Mirabile to recover costs of responding to hazardous waste on property owned by the Mirabiles.[51] The Mirabiles joined American Bank and Trust Company (ABT) and Mellon Bank National Association (Mellon) as third party defendants.[52] The Mirabiles premised Mellon's and ABT's liability on actions taken by those institutions during their financial dealings with the previous owner which allegedly caused the creation of hazardous conditions on the property.[53]

In 1973, ABT loaned money to Arthur C. Mangels Industries (Mangels), then owner of the property.[54] The loan was partially secured by a mortgage on the site.[55] Turco Coatings, Inc. (Turco) subsequently acquired Mangels through a stock purchase.[56] Turco filed a bankruptcy petition and ceased all operations at the site in 1980.[57] After Turco's bankruptcy petition was dismissed, ABT foreclosed on its security interest and was the highest bidder at the sheriff's sale of the property.[58] ABT subsequently assigned its bid to the Mirabiles, who accepted a sheriff's deed to the property.[59] In the four months between the sheriff's sale and ABT's assignment, ABT took a number of actions with respect to the property, including securing the building against vandalism, making inquiries into the cost associated with the

50. 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985).
51. *Id.* at 20,994-95.
52. *Id.* at 20,995.
53. *Id.* at 20,994-95. The Mirabiles alleged that ABT and Mellon's activities elevated them to owner or operator status under CERCLA. *Id.* at 20,995.
54. *Id.* at 20,996.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

disposal of drums located on the property, and sending a loan officer to the property to show it to prospective purchasers.[60]

The court, in considering ABT's motion for summary judgment, determined that whether ABT had a vested property interest in the site after its successful bid at the sheriff's sale was irrelevant to an inquiry into ABT's liability under CERCLA.[61] The court was convinced that ABT's actions with respect to the foreclosure were undertaken to protect its security interest in the property, irrespective of the title it had received.[62] Because ABT foreclosed after all operations had ceased, no effort was made by it to continue operations, and the steps it took were deemed prudent and routine efforts to secure the property against further depreciation, its actions were not considered participation in management.[63] Accordingly, ABT was allowed the secured creditor exemption.[64]

The court noted that wholesale imposition of liability on secured creditors or lending institutions, while enhancing the government's chances of cost recovery and promoting responsible management of sites, was a policy matter for Congress to address.[65] Because ABT was neither responsible for, nor had profited from, waste disposal at the site, and CERCLA had singled out secured creditors for protection, the court simply could not justify the imposition of liability on ABT.[66] Thus, absent participation in the "day-to-day operational aspects of

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60. *Id.* All of ABT's activities took place several months after Turco had ceased manufacturing at the site. *Id.*

61. *Id.* ABT argued that under state law it had received only equitable and not full legal title to the property after its successful bid at the sherriff's sale. *Id.* Since ABT was not an owner of the property at the time the action for costs was instituted it could not have been liable as a current owner under section 9607(a)(1). *Id.* Although section 9607(a)(2) allows the imposition of liability on persons who owned property at the time waste was disposed, there was no evidence that any waste was disposed at the site during any period which ABT could have arguably been an owner. Thus, the court had no reason to inquire into ABT's status as an owner of the property in determining its potential CERCLA liability. *See* Lieshout, *supra* note 1, at 311-13. Had ABT undertaken activities with regard to the hazardous wastes on the property during the span between foreclosure and assignment to the Mirabiles, its potential for liability under section 9607(a)(2) could have been greatly increased. *See infra* note 103.

62. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,996.

63. *Id.* It appears that the court would be amenable to allowing full legal title to property to qualify as an indicia of ownership held to protect a lender's security interest where the lender's activity with respect to the site does not rise to the level of "participation in management." *See id. See also* 42 U.S.C. § 9601(20)(A); Mays, *Secured Creditors and Superfund: Avoiding the Liability Net*, 20 ENV'T REP. (BNA) 609, 611 (1989). *Cf.* Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556, 562-63 (W.D. Pa. 1989) (section 9601(20)(A) does not recognize foreclosure and repurchase of property in which a security interest is held to be natural consequences in the protection of that interest).

64. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,996.

65. *Id.*

66. *See id.*

the site," a secured creditor such as ABT could not be held liable as an owner or operator.[67]

In 1976, Girard Bank, Mellon's predecessor-in-interest, entered into a financing agreement with Turco for the advancement of working capital.[68] The advances were secured by Turco's inventory and assets.[69] Sometime after the agreement, Turco established an advisory board to oversee operations.[70] A Girard loan officer was one of the board members.[71] After Turco filed for bankruptcy, Girard increased its monitoring of Turco's financial condition.[72] When Turco ceased operations, Girard took possession of Turco's inventory and disposed of it through public and private sales.[73]

The court noted that summary judgment would have been appropriate had Mellon's activity been limited to the participation of the first loan officer to sit on Turco's advisory board.[74] Mellon, however, had replaced the original loan officer with one who took a much more "hands-on" approach in supervising Turco.[75] Specifically, the second loan officer's actions included making frequent site visits; determining the order in which orders would be filled; demanding additional sales efforts, manufacturing changes, and reassigning personnel; monitoring cash collateral accounts; ensuring receivables went to the proper accounts; and establishing a reporting system between the company and the bank.[76] Admittedly, much of the second loan officer's action could be classified as participation in purely financial aspects of oper-

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67. *Id.* Participation which is limited to the "purely financial aspects of operation" will not, in most instances, be sufficient to bring a lender within the scope of CERCLA liability. *Id.* at 20,997. Furthermore, having the ability and authority to exercise control which could be characterized as participation in day-to-day management is not sufficient to subject a lender to CERCLA liability where the control is not exercised in fact. *See id.* at 20,996-97. *Accord In re* Bergsoe Metal Corp., 910 F.2d 668, 672-73 (9th Cir. 1990). *See also* United States v. Nicolet, Inc., 712 F. Supp. 1193, 1205 (E.D. Pa. 1989) (a mortgagee is liable under CERCLA only if it participated in management and operational aspects of facility in question). The critical issue in determining owner or operator status under the *Mirabile* approach appears to hinge on whether a lender participated in the operational aspects of a debtor's business, not whether it participated in the management of financial affairs. The *Mirabile* court did, however, recognize that a different rule may be appropriate for a financier of an entity whose business is hazardous waste disposal. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,996 n.5.

68. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,996.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 20,997. The court was convinced that the first loan officer to sit on the advisory board gave only general financial advice and not advice on production or waste disposal. *Id.*

75. *Id.*

76. *Id.* at 20,997.

ation.[77] The court was unsettled by the testimony of deeper involvement, however, and determined that factual issues regarding Mellon's degree of participation remained to be resolved at trial.[78] Although *Mirabile* by no means established clear and concise boundaries between permissible and impermissible activities of lenders, it did intimate that some level of lender involvement with a troubled debtor would be tolerated before the protection of the secured creditor exemption would be lost. In 1986, the confusion over acceptable activities by lenders was exacerbated by *United States v. Maryland Bank & Trust Co.*[79]

During the 1970s, Maryland Bank and Trust (MB&T) loaned money to landowners using their parcel to operate a trash and garbage business.[80] MB&T was aware of the property's use and, in fact, advanced the money for use in the site owner's business.[81] In the early 1970s, the site owners allowed hazardous wastes to be deposited at the site.[82] In 1980, the owner's son received a loan from MB&T to purchase the site from his parents.[83] Shortly after the purchase, the son defaulted and MB&T instituted foreclosure proceedings.[84] MB&T purchased the property at the foreclosure sale in 1982, subsequently took title, and was the record owner from that point forward.[85] The United States

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77. *Id.* The court states that "mere financial ability to control waste disposal practice of the sort possessed by the secured creditors in this case is not, in my view, sufficient for the imposition of liability." *Id.*

78. *Id.* Unfortunately for Mellon, the testimony indicated that its involvement had gone beyond participation in the "purely financial aspects" of Turco's operation. *See id.* Other courts have been willing to allow lenders to get involved with troubled debtors prior to foreclosure in order to protect their security interest as long as their participation does not rise to the level of controlling operational, production, or waste disposal activities. *See* Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556 (W.D. Pa. 1989). In *Guidice* it was determined that a bank was justified in protecting its security interest in property of a defaulting mortgagor by pursuing activities which included meeting with the mortgagor's corporate officials to keep the bank apprised of the status of corporate accounts, personnel changes, and the presence of raw materials; active assistance in applying for a Small Business Administration loan to pay off the bank; contacting state and local officials to assist the corporation with wastewater discharge compliance; referring potential lessee after corporate operations had ceased; and working on a financing agreement for a subsequent purchaser. *Id.* at 562. According to the *Guidice* court, allowing creditors such a high liability threshold prior to foreclosure would enable them to protect their investment and further CERCLA's goals of safe handling and disposal of waste by allowing creditors to monitor a debtor's use of security property. *Id.*

79. 632 F. Supp. 573 (D. Md. 1986).

80. *Id.* at 575.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

brought a cost recovery action against MB&T after an EPA cleanup of the site.[86]

MB&T disavowed liability as an owner or operator of the site based upon its interpretation of the statutory exemption for secured creditors.[87] In support of its contention, MB&T asserted that its method of acquisition—foreclosure on its security interest and its subsequent purchase—allowed it to assert the exemption.[88] The court, however, determined that the verb tense of the secured creditor exemption defeated MB&T's interpretation.[89] Since section 9601(20)(A) covers persons who, at the time of cleanup, hold indicia of ownership to protect a *then-held* security interest in land, MB&T was precluded from asserting the exemption because at the time of the foreclosure sale its security interest was replaced by full title to the property.[90] Thus, at the time of cleanup, MB&T was the record owner of the property and was subject to CERCLA liability based on that status.[91]

According to the court, Congress passed the secured creditor exemption to avoid the imposition of liability on mortgagees in states that follow the common law of mortgages and place title to property in the hands of the mortgagee while a mortgage is in force.[92] The exemption was not intended to apply when a lender ceases to be a mortgagee.[93] Consequently, a purchase at a foreclosure sale is to be viewed as protecting a lender's investment, not its security interest.[94] Finally,

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86. *Id.* at 575-76.

87. *Id.* at 578.

88. *Id.* at 579.

89. *Id.*

90. *Id.*

91. *Id.* at 579. It has been noted that the decisions in *Mirabile* and *Maryland Bank* can be harmonized based on the approach taken to the liability question by those courts. *See* Lieshout, *supra* note 1, at 311-13; *see also supra* note 61. Indeed, if the factual scenario of *Maryland Bank* was presented to the *Mirabile* court it might well reach a similar result. *See supra* note 67.

92. *Maryland Bank*, 632 F. Supp. at 579-80. In so ruling the court relied upon the legislative history of a 1979 predecessor bill to CERCLA. *Id.*; Mays, *supra* note 60, at 611.

93. *Maryland Bank*, 632 F. Supp. at 580.

94. *Id.* at 579. *Accord* Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556, 562-63 (W.D. Pa. 1989) (when lender is successful purchaser at a foreclosure sale it should be liable to the same extent as any other bidder). The *Maryland Bank* court expressly declined to consider the application of its holding to a purchase by a secured creditor followed by prompt resale. *Maryland Bank*, 632 F. Supp. at 579 n.5. Apparently, the court would acquiesce in such activity because it expressly disagreed with *Mirabile* only to the extent that it suggested a rule of broad application. *Id.* at 580. Although the length of time MB&T held the property may have been persuasive, it should have been irrelevant based on the courts analysis of the secured creditor exemption. Mays, *supra* note 59, at 611-12. *Cf.* United States v. Carolawn Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,698, 20,698-699 (D.S.C. 1984) (corporation which held title to contaminated property for one hour was potentially liable for cleanup costs where corporation transferred property to corporate officials because corporation may have retained a legal or equitable interest in the property after transfer). *But see In re* T.P. Long Chem., Inc., 45 B.R. 278, 288-89

the court noted that financial institutions have the means to protect themselves from incurring liability by making prudent loans because they are "in a position to investigate and discover potential problems in their secured properties."[95] Thus, CERCLA would not be available to absolve them from responsibility for judgmental errors.[96]

(Bankr. N.D. Ohio 1985) (in *dicta* the court stated that had the bank involved repossessed collateral pursuant to a security agreement it would have qualified for the section 9601(20)(A) exemption because it had not participated in management of the facility and its only indicia of ownership was held primarily to protect a security interest).

95. *Maryland Bank*, 632 F. Supp. at 580. According to the court such investigation is routine for many lenders. *Id.* Commentators have taken exception to this position. Lenders typically possess none of the special skills necessary to investigate and quantify environmental risks; thus, they must expend time and money to acquire the competence themselves or make use of one who already possesses the requisite degree of competence in environmental monitoring. Comment, *Lender Liability for Hazardous Waste: An Economic and Legal Analysis*, 59 U. COLO. L. REV. 659, 677 (1988). Expecting lenders to exercise exacting scrutiny over every parcel of land in which they hold a security interest is both practically and economically unfeasible. Comment, *The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment*, 41 U. MIAMI L. REV. 879, 902 (1987). *Cf.* Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 931-33 (1989) (high and predictable threshold of liability should be created for banks since they are excellent monitors of the economic and environmental health of their debtors; banks, however, are not skilled at monitoring technical decisions concerning pollution; instead they monitor economic and environmental health through loan covenants). Furthermore, the expansion of lender liability law in general could result in banks being subjected to liability for failing to take steps to force changes in their borrower's business decisions—actions which in themselves could subject a borrower to CERCLA liability if affirmatively taken. Comment, *Lender Liability for Hazardous Waste: An Economic and Legal Analysis*, 59 U. COLO. L. REV. 659, 678. Thus, banks may be liable for either their action or inaction with regard to a borrower's affairs. *Id.*

96. *Maryland Bank*, 632 F. Supp. at 580. Lenders who choose not to make prudent loans would be able to protect themselves by not foreclosing or not bidding at the foreclosure sale. *Id.* at 580 n.6. Furthermore, the court evidenced concern over the cleanup burden being shifted to taxpayers. Under MB&T's interpretation of section 9601(20)(A) the federal government would be saddled with the cleanup costs and MB&T would benefit due to an increase in the value of the "unpolluted land." *Id.* at 580. Since other prospective purchasers would be faced with potential CERCLA liability MB&T would be virtually assured of obtaining the property at a low price. *Id.*

Although the court's legal interpretation is plausible, to the extent that interpretation was influenced by its public policy views it is erroneous. Mays, *supra* note 61, at 612. Since the United States' lien on property for cleanup costs cannot supersede a prior recorded mortgage, a secured creditor who delays foreclosure until after government cleanup is complete will benefit from the cleanup efforts. *Id. See* 42 U.S.C. § 9607(l)(3) (1988). Furthermore, the court failed to take into account the reduced market value of property subject to cleanup under CERCLA. Property cleanup is not designed to restore property to its condition prior to contamination; consequently, the market value of a parcel after cleanup may be substantially lower than the value of the property at the time it was offered as security for a loan of funds. *See* McMahon, *Lender's Perspectives on Hazardous Waste and Similar Liabilities*, 18 ENVTL. L. REP. (Envtl. L. Inst.) 10,368, 10,369 (1988). Thus, a lender who is forced to rely on contaminated property to satisfy a debt owed may receive far less at sale than is left owing from the debtor, even after cleanup. Admittedly, cleanup may increase significantly the market value of property, thereby conferring some economic benefit to a mortgagee, but if mortgagees also are precluded from purchasing property at foreclosure due to potential CERCLA liability, then there will be no

Not all commercial lenders have sought the shelter of the secured creditor exemption when faced with CERCLA liability. For example, in *Tanglewood East Homeowners v. Charles-Thomas, Inc.*[97] the savings and loan faced with liability argued for a liberal interpretation of CERCLA's liability scheme. First Federal Savings & Loan Association of Conroe (FFS&L) participated with residential developers, construction companies, and real estate agencies in the development of the Tanglewood East subdivision.[98] The subdivision was built on a site where a wood treatment facility had operated for almost thirty years.[99] During the plant's lifetime a substantial amount of toxic waste was allowed to accumulate on the property.[100] In 1973, the property was acquired by certain of the defendants, the pools of waste were filled and graded, and residential development was begun.[101] Purchasers of subdivision lots subsequently brought suit under CERCLA for damages, response costs, and injunctive relief.[102] FFS&L filed a motion to dismiss the action for failure to state a federal cause of action.[103] The district court denied the motion.[104]

On appeal, FFS&L asserted that neither it nor any of the other defendants were persons covered by CERCLA.[105] FFS&L contended that CERCLA was meant to apply only to those persons responsible for introducing toxins to a parcel of property.[106] In rejecting so narrow a reading of the statute, the circuit court determined that the defendants were potentially liable under all of the section 9607 liability provisions.[107] Although it declined the invitation to delineate specific businesses and activities which fell outside CERCLA's liability net, the

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incentive for anyone to purchase and the government will be unable to recover costs. Apparently, the court assumed that government cleanup would remove all traces of contamination and MB&T would be left with a pristine commercial tract at the taxpayer's expense. *See infra* note 226 and accompanying text.

97. 849 F.2d 1568 (5th Cir. 1988).

98. *Id.* at 1571.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1571-72.

104. *Id.*

105. *Id.* at 1572.

106. *Id.* at 1572.

107. *Id.* at 1572-73. Initially, the court noted that prior case law had imposed liability on the current owner of a facility from which a release occurred. *Id.* (citing *Shore* and *Maryland Bank*). Further, it determined that section 9607(a)(2) contemplates that disposal of the same wastes can occur more than once. Thus, the defendants also could face liability for the movement, dispersal, or release of previously deposited waste which occurred during excavation and filling. *Id.* at 1573. Finally, through an analogous interpretation of what constitutes "treatment" of wastes, the court determined that the potential for liability existed under section 9607(a)(3) and (4). *Id.*

court apparently took a dim view of FFS&L's contention that CERCLA was not meant to chill business opportunity in the banking, real estate, construction, and development fields.[108]

Unfortunately, the procedural posture of the appeal forced the *Tanglewood East* court to make broad assertions about the nature of CERCLA liability. Relying solely on the parties pleadings on the motion to dismiss and invited by FFS&L to create a broad exception to CERCLA liability, the court had to rule as it did. Because FFS&L attempted to exonerate all the defendants on the grounds that they were not covered parties, the court was never able to address the secured creditor exemption.[109] Faced with a rationale so clearly at odds with what was fast becoming clear judicial precedent under CERCLA, the court's ruling is not surprising.

At this juncture in the development of lender liability principles, no case had gone before an appellate tribunal. That would change with *United States v. Fleet Factors Corp.*[110] In 1976, Swainsboro Print Works (SPW) entered into a factoring agreement with Fleet Factors Corporation (Fleet) which called for Fleet to advance funds against the assignment of SPW's accounts receivable.[111] Fleet obtained a security interest in all of SPW's equipment, inventory, and fixtures, as well as its facility as collateral for the advances.[112] By 1979, SPW had filed for bankruptcy, but the factoring agreement continued with court approval.[113] Subsequently, Fleet ceased advancing funds to SPW because the debt owed to Fleet exceeded its estimate of the value of SPW's accounts receivable.[114] In February of 1981 SPW ceased opera-

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108. *See id.* at 1573-74. It has been noted that the *Tanglewood East* court failed to indicate the extent of FFS&L's activity in the development of the subdivision aside from its loan. Mays, *supra* note 60, at 612. The *Tanglewood East* opinion should not be read to impose liability on financial institutions under section 9607(a)(3) and (4) where the only action taken by the lender is the loan of money to develop contaminated property. *Id.* Unfortunately, it does suggest that the argument can be made where the lender is otherwise involved in the project or has knowledge of the contamination when the loan is made. *Id.* Financiers whose activity goes beyond the provision of venture capital for a project to include equity participation or direct managerial responsibilities are at risk of being characterized as involved in a joint venture and thus subject to CERCLA liability. *See supra* note 10. *See infra* notes 215-18 and accompanying text.

109. The value of *Tanglewood East* to the growing body of judicial interpretation of CERCLA would have been increased had the secured creditor exemption been asserted. Further inquiry into the extent of FFS&L's involvement in the subdivision development could have enlightened banks on the extent of participation in a joint venture which might be deemed acceptable before a court would be willing to impose CERCLA liability.

110. 724 F. Supp. 955 (S.D. Ga. 1988), *aff'd*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 752 (1991).

111. *Id.* at 957.

112. *Id.*

113. *Id.*

114. *Id.* at 957-58.

tions and began liquidating its inventory.[115] Fleet continued to collect on the accounts receivable.[116] A trustee assumed title and control of SPW's facility after SPW was declared bankrupt in December 1981.[117]

By mid-1982, Fleet had foreclosed on some of SPW's inventory and equipment and arranged for Baldwin Industrial Liquidators (Baldwin) to auction that property.[118] Fleet subsequently contracted with Nix Riggers (Nix) to remove equipment which remained unsold.[119] Nix completed the job by the end of 1983.[120] The EPA inspected the SPW facility in January of 1984 and conducted an immediate cleanup of hazardous wastes.[121] Title to the SPW facility passed to Emmanuel County, Georgia, through conveyance at a foreclosure sale held in 1987 resulting after SPW failed to pay state and county taxes; Fleet had never foreclosed on the real property.[122]

The major issue addressed by the district court in the government's action for response costs was whether Fleet fell under the liability categories established in sections 9607(a)(1) and (2) of CERCLA.[123] Because Fleet never foreclosed on its security interest in the facility and since neither Fleet nor any of its putative agents had access or control, or had otherwise engaged in any activities at the facility after Nix departed, the court had little difficulty concluding that Fleet neither owned nor operated the SPW facility at the time the EPA filed its complaint.[124] Thus, Fleet was absolved of liability under section 9607(a)(1).[125] The more difficult question, however, was whether Fleet might be liable under section 9607(a)(2).

In considering whether Fleet had owned or operated the SPW facility at the time hazardous waste was disposed there, the court turned to the definition of owner or operator.[126] The court determined that the exclusionary language of section 9601(20)(A) permitted secured creditors, such as Fleet, "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

115. *Id.*
116. *Id.*
117. *Id.* at 958.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 959.
122. *Id.* at 957.
123. *Id.* at 959-60.
124. *Id.*
125. *Id.*
126. *Id.* at 960.

before or after the business ceases operation."[127] In general, it was undisputed that neither Fleet nor its putative agents operated the facility prior to Baldwin's auction.[128] Thus, the court simply was not convinced that Fleet's actions up until the auction constituted participation in management sufficient to impose CERCLA liability.[129] Fleet's activity at the SPW facility between Baldwin's entrance and Nix's departure presented a different problem, however.

The EPA alleged that Baldwin moved drums of hazardous waste around before conducting the public auction and that movement of equipment by Nix or purchasers at the auction dislodged friable asbestos from pipes connected to the equipment.[130] Fleet countered that no evidence had been produced to show that any materials containing asbestos had been discharged and that any improper disposal of hazardous substances had occurred prior to its use of the facility to foreclose on inventory and equipment.[131] Presented with these disputed issues of fact, the court was obliged to deny both Fleet and the EPA's motions for summary judgment.[132] Recognizing the importance of its construction of CERCLA liability provisions, the court certified the case as appropriate for interlocutory appeal.[133] Fleet subsequently sought interlocutory appeal of the district court's order in the Eleventh Circuit.[134]

The appellate court, in considering Fleet's potential liability under section 9607(a)(2), affirmed the trial court's order of summary judgment based on Fleet's alleged activity after Baldwin entered the SPW facility.[135] Unfortunately, the circuit court was determined to forge

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127. *Id.* at 960. Although the rule espoused by the court did not precisely mirror the rule set forth by the court in *Mirabile*, it appears that the Georgia district court's formulation would prohibit essentially the same activity by a lender seeking to avoid CERCLA liability. *See supra* notes 59-65 and accompanying text.

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

129. *Id.*

130. *Id.*

131. *Id.* at 958. Fleet was attempting to avoid liability by asserting that disposal of hazardous substances had occurred prior to any activity on its part which could have been construed as participation in management or operation of the facility. *See* 42 U.S.C. § 9607(a)(2) (requiring ownership or operational activity to coincide with disposing of hazardous substances for liability to attach).

132. *Fleet Factors*, 724 F. Supp. at 961. The trial court's denial of Fleet's motion to dismiss left Fleet subject to liability for actions taken during the foreclosure proceeding which might have resulted in disposal of hazardous wastes. *Cf.* Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988) (there can be more than one disposal of hazardous substances).

133. *Fleet Factors*, 724 F. Supp. at 962.

134. United States v. Fleet Factors Corp., 901 F.2d 1550, 1552 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 752 (1991).

135. *Id.* at 1557. The circuit court agreed that Fleet was absolved from liability under section

ahead in an analysis of the secured creditor exemption. Finding the district court's construction of the statutory exemption to be "too permissive towards secured creditors who are involved with toxic waste facilities," the circuit court noted that the district court's interpretation of the secured creditor exemption ignored the plain language of the exemption and rendered it meaningless.[136] The circuit court determined that a secured creditor could 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.[137]

9607(a)(1). Fleet was not in control of the SPW facility from December 1983 through July 1987; the bankruptcy trustee was the entity responsible for control of the facility during that period. Thus, Fleet could not have owned or controlled the facility immediately before title passed to Emmanuel County, Georgia in 1987. *Id.* at 1554-555. *See also* 42 U.S.C. § 9601(20)(A)(iii) (1988) (where title or control of a facility is taken by a unit of state government due to tax delinquency the "owner or operator" for purposes of section 9607 is "any person who owned, operated or otherwise controlled activities at such facility immediately beforehand").

136. *Fleet Factors*, 901 F.2d at 1557. By determining that the terms "participating in the management" and "operator" were not congruent, the Eleventh Circuit attempted to cast doubt on the district court's interpretation of the secured creditor exemption. *Id. See* 42 U.S.C. §§ 9601(20)(A), 9607 (a)(1)-(2) (1988). According to the circuit court, the district's interpretation would require a secured creditor to be involved in the operations of a facility before liability could attach. Congress, however, had chosen to impose liability on those who were involved in the operations of a facility by denominating them "operators" under section 9607(a)(2). Thus, Congress did not mean to absolve creditors from ownership liability in the secured creditor exemption; rather, it intended to impose liability on those who participate in management. *Fleet Factors*, 901 F.2d at 1557.

137. *Fleet Factors*, 901 F.2d at 1557-58 (emphasis added). *But see In re* Bergsoe Metal Corp., 910 F.2d 668, 672 (9th Cir. 1990); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,996 (E.D. Pa. 1985) (before a secured creditor will fall outside the section 9601(20)(A) secured creditor exception there must be some actual management of the facility at issue). In adopting this approach, the court specifically repudiated the doctrine developed in *Mirabile*. *Fleet Factors*, 901 F.2d at 1558. *See supra* notes 52-74 and accompanying text. The test announced by the Eleventh Circuit, however, is squarely at odds with CERCLA. Section 9607(a)(2) provides for the liability of owners or operators. Fleet was not an owner of the SPW facility; arguably, it may have been an operator. The circuit's test makes inquiry into whether Fleet was an operator irrelevant for the purposes of determining liability. *Fleet Factors*, 901 F.2d at 1556 n.6. In effect, the court has rewritten CERCLA to turn what had been an exemption from liabil-

Further, the court noted that its opinion should not be read to "preclude a secured creditor from monitoring any aspect of a debtor's business."[138] In fact, it went so far as to encourage potential creditors to investigate thoroughly both the waste treatment systems and policies of its potential debtor.[139] In this manner, according to the court, banks would incur only the bargained for risk.[140]

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ity for institutional lenders, which they had to prove to use, into a liability section that can have enormous impact. The Eleventh Circuit's insistence on breaking new ground is particularly troublesome since the court had determined that Fleet's activities with regard to SPW were of such a nature and degree that CERCLA liability could be imposed as a matter of law without resorting to any inference regarding "capacity to influence." *Fleet Factors*, 901 F.2d at 1559 n.13.

Irrespective of whether a bank is an owner or operator, liability can attach under the *Fleet Factors* formulation where a lender's involvement in the financial management of its debtor would support the inference that the lender could have affected waste disposal decisions had it chosen to do so. Apparently, a lender need not have been able actually to control a debtor's waste practices for liability to attach. *But see In re* Bergsoe Metal Corp., 910 F.2d 668, 672-73 (9th Cir. 1990); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,996-997 (E.D. Pa. 1985) (rights creditor has to participate in management cannot be sufficient to impose CERCLA liability if not actually exercised). The court's formulation will force courts to theorize about what actions taken by a bank would give it the power to affect a debtor's business decisions. *Fleet Factors*, 901 F.2d at 1559 n.13. Arguably, a creditor could force its views with regard to waste disposal decisions on any debtor if it so choose. Further, it could even be theorized that the ability to do so would bear a direct correlation to a debtor's need for funds. What the approach fails to recognize, however, is that management of a debtor's financial affairs does not necessarily bear a direct correlation to the management of a debtor's operational affairs. In fact, expertise in financial management in no way suggests a concomittant expertise in the proper techniques to be employed in the disposal of hazardous wastes.

In support of its construction the court relied on a statement by a single Congressman, *id.* at 1558 n.11, while ignoring other pertinent legislative history. H.R. Rep. No. 1016, 96th Cong., 2d Sess., pt. 2 at 36, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 6151, 6181 (the term "owner" "does not include certain persons possessing indicia of ownership (such as a financial institution) who, without participating in the management or operation of a . . . facility, hold title either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rules, or regulations"). The court reasoned that because Congress had enacted the definition, ostensibly to avoid imposing liability on those who hold title to a facility but did not participate in management or operation *and were not otherwise affiliated* with the person leasing or operating the facility, it must have meant to suggest that the threshold at which a secured creditor is to be held liable under CERCLA is somewhat less than that necessary to be held liable as an operator. *Fleet Factors*, 901 F.2d at 1558 n.11. According to the court, the use of the term "affiliated" by Congress was meant to indicate a threshold of liability for secured creditors which hinged on "a more peripheral degree of involvement than that necessary to be held liable as an operator." *Id.* In light of the view taken by most other courts as to reliance on legislative history and the myriad possible interpretations of the reason given for the enaction of the secured creditor exemption, the court's rationale was not justified. *See supra* note 5.

138. *Fleet Factors*, 901 F.2d at 1558. "[O]ccasional and discrete financial decisions relating to the protection of its security interest" were deemed to be appropriate activities which would not subject a lender to CERCLA liability. *Id.* The commercial lending industry is left with absolutely no guidance on the point at which occasional and discrete acts of financial management will begin to support an inference that an institution has participated in the financial management of a facility to such a degree that it could influence the treatment of hazardous wastes.

139. *Id.*

140. *Id.* Secured creditors are expected "to monitor the hazardous waste treatment systems and policies of their debtors and *insist* upon compliance with acceptable treatment standards as a

Judicial interpretations of various CERCLA provisions—particularly the secured creditor exemption—have left lenders in a quandary over what activities they must avoid or pursue in order to avoid liability for the cleanup of contaminated property. Decisions before *Fleet Factors* are confusing and difficult to apply to factual scenarios which diverge from those addressed. *Fleet Factors* imposes an impossible burden on the lending community. Under the test espoused in *Fleet Factors*, a precarious balance between action and inaction is required. It is ludicrous to expect a commercial lender to walk such a thin line in the hundreds of transactions that will transpire between them and their clientele. Admittedly, CERCLA is a complex statute which provides no easy answers to the questions lenders face. Lenders should not be burdened, however, with the responsibility of gauging risks involved with hazardous waste disposal or for developing and overseeing policies for their debtors. Commercial lenders provide the fuel that drives the American economy; if they cannot provide funding without being faced with unlimited risk, then serious economic repercussions are sure to result. Lenders deserve to be provided with a more detailed and broadly applicable set of "rules" to follow in conducting their affairs than the judiciary is capable of producing. Accordingly, the impetus for change rests with either the executive or legislative branch.

IV. RESPONSE TO CONFUSION ENGENDERED BY THE JUDICIARY

The commercial lending industry, Congress, and the EPA have been slow to respond to the lender liability issue. Only recently have these groups escalated efforts to establish a more coherent framework for lender liability. Unfortunately, no viable solution to the judicial confusion over lender liability has emerged from their efforts.

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prerequisite to continued and future financial support" in order to avoid CERCLA liability. *Id.* (emphasis added). This act, in and of itself, would be sufficient to impose liability under both CERCLA and the court's rule. *See supra* note 92. The reliance placed on *Maryland Bank* is unpersuasive. *See Fleet Factors* 901 F.2d at 1559. While the MB&T court noted that lenders could protect themselves adequately by investigating property which will be the subject of a security interest to discover potential problems with the property, that opinion was issued in the context of a foreclosure on contaminated property and was meant to suggest a method for avoiding liability on foreclosure. *See United States v. Maryland Bank & Trust Co.* 632 F. Supp. 573, 580 n.6 (D. Md. 1986). Here, the court is imposing a duty of monitoring and administering the actual processes by which a generator of hazardous wastes conducts its disposal activities. CERCLA makes no mention of imposing such a responsibility on a lender and, arguably, provides a specific exemption for lenders who do not monitor and supervise the activities of their borrowers. *See* 42 U.S.C. § 9601 (20)(a) (1988). Imposing such a burden seems manifestly inappropriate in the absence of a congressional directive.

A. *Attempts to Formulate an "All Appropriate Inquiry" Standard*

Faced with ever expanding CERCLA liability based on their relations with debtors or property, creditors have been searching for methods to manage the risk inherent in many of today's real estate transactions.[141] Lenders have attempted to address environmental liability much as they would any other risk—"by exercising due diligence and comparing the probability of exposure to potential return on investment."[142] The innocent landowner defense passed by Congress was seen by many in the industry as a congressional license for such due diligence investigations.[143] Unfortunately, the innocent landowner defense has not been the panacea many desired.

SARA established the requirement that "all appropriate inquiry" be made into the prior uses and ownership of property.[144] What SARA failed to provide, however, was guidance as to what level of inquiry would satisfy the standard.[145] SARA defined "all appropriate inquiry" by referencing the industry standard of inquiry that would be appropriate for an acquisition of property.[146] Unfortunately, at the time of SARA's enactment no industry standard existed in either "the real estate industry or among consulting engineers for investigating the overall environmental condition of a tract of land involved in a typical commercial transaction."[147] An additional problem raised by SARA is that the skills necessary to investigate "previous ownership and uses" of property are multi-disciplinary.[148] Thus, the required inquiry often goes beyond the practice and experience of the engineering disciplines, thereby inhibiting the formation of a consistent practice by engineering consultants.[149]

1. *Action Outside the Legislative Branch*

One of the earliest attempts to establish a standard form of due diligence inquiry was set out in an opinion authored by two EPA offi-

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141. Whether CERCLA liability is imposed on a commercial lender is only one of the concerns faced by lending institutions. Contamination of property and the liability which results from contamination can devalue collateral seriously and impair a borrower's ability to repay. Mauch, *Site Assessment Standards Sorely Needed*, HAZMAT WORLD, Mar. 1990, 36. These variables also must be factored into the lender's risk equation when a loan is contemplated.

142. *Id.*

143. *Id.*

144. *See supra* notes 44-46 and accompanying text.

145. Mauch, *supra* note 141, at 37.

146. 42 U.S.C. § 9601(35)(B) (1988).

147. Mauch, *supra* note 141, at 37.

148. *Id.*

149. *Id. See also* Colten, *Thorough Site Histories Call for Expert Researchers*, HAZMAT WORLD, Nov. 1990, at 16 (a thorough site assessment should include research of "historical hazards" undertaken by a practiced researcher).

cials.[150] According to the opinion, prospective purchasers should review a site's history and federal, state, and local government records concerning the site to minimize their potential liability.[151] An environmental investigation of the property could then be conducted based on the results of the inquiries.[152] The systematic approach enunciated by those authors has served as the basis for later attempts at defining a standard.[153]

The secondary mortgage market has taken the lead in recognizing that environmental risks pose a substantial impediment to real estate transactions by developing its own due diligence techniques to meet the risks.[154] The Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal Home Loan Bank Board (FHLBB) have published guidelines which outline what those institutions believe is necesary to conduct an adequate investigation of a piece of property.[155] The approach taken by these entities follows the approach suggested by the EPA commentators.[156] Unfortunately, the guidelines have yet to gain widespread acceptance among commercial institutions due in part to the competitive pressures of the commercial marketplace.[157] A serious drawback to the various approaches taken to develop a due diligence formula is that they are not binding on a trial court. A bank willing to comply with any of these guidance documents still may be held liable by a court that determines the guidelines followed do not comport with "all appropriate inquiry."[158]

2. *Congressional Reaction*

Congress also attempted to respond to the lack of a standard of inquiry with House Bill 2787.[159] The bill's sponsor, Representative

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150. Mauch, *supra* note 141, at 37.

151. *Id.*

152. *Id.* The actual site investigation is the only step which falls within the engineers' area of expertise. *Id.*

153. *Id.*

154. Bennett & Miller, *Environmental Risk in Real Estate Transactions: Due Diligence in the Secondary Market*, 51 BANKING REP. (BNA) 795 (1988). Mauch, *supra* note 141, at 37-38.

155. Mauch, *supra* note 95, at 38. *See* FEDERAL NATIONAL MORTGAGE ASSOCIATION, CONVENTIONAL SELLING PROCEDURES HANDBOOK, Ch. 5; THRIFT BULL. 16 (Feb. 6, 1989). Fannie Mae avoided any specific reference to due diligence in its policy guidelines, possibly to allow for repurchase enforcement or indemnification of loans should environmental problems arise. Bennett & Miller, *supra* note 152, at 796.

156. Mauch, *supra* note 141, at 38. *See, e.g.*, THRIFT BULL. 16 (Feb. 6, 1989).

157. Mauch, *supra* note 141, at 38. These guidelines also have been rightly criticized for exalting efficiency of application over detailed investigatory techniques. *See* Colten, *supra* note 105, at 16.

158. Mauch, *supra* note 141, at 38.

159. H.R. 2787, 101st Cong., 1st Sess. (1989).

Curt Weldon, acknowledged that the lack of a standard of inquiry was a serious deficiency since no standard existed at the time of enactment and none had since developed.[160] The net result, even in light of guidelines published by entities such as FHLBB, is that investigations lack consistency and often are not made at all.[161] Weldon acknowledged what many within the industry already recognized: industry was not entirely to blame for failing to create a standard. The interdisciplinary approach necessary to create a broadly based investigatory standard simply did not lend itself to the expeditious development of an industry standard.[162] As a baseline for the approach to be utilized, the bill recognized the precepts espoused by the pioneering EPA authors.[163]

House Bill 2787 would have amended the innocent landowner defense of CERCLA to provide a means by which a purchaser could establish a rebuttable presumption that "all appropriate inquiry" was made by conducting what has come to be known as a phase I environmental audit.[164] An owner establishes that a phase I audit has been conducted by showing that environmental professionals have investigated the subject property to determine the obviousness of the presence or likely presence of either a release or threatened release of hazardous substances on the real property.[165] Additionally, the owner must show that the environmental professional's review of information concerning the previous uses and ownership of the property consisted of recorded chain of title documents for a period of fifty years;[166] aerial photographs which might reflect prior use of the prop-

160. 135 CONG. REC. E2367 (daily ed. June 28, 1989).

161. *Id.* Representative Weldon also noted that the EPA guidance document on landowner liability provided no assistance with policy development and in fact, demonstrated "a reluctance on the part of the EPA to provide guidance through regulation on this issue." *Id. See infra* notes 197-207 and accompanying text.

162. 135 CONG. REC. E2367 (daily ed. June 28, 1989). Representative Weldon acknowledged that the industry that was evolving to provide the necessary services was a hybrid of many disciplines. *Id.*

163. *Id.* at E2367-68. *See supra* notes 148-50 and accompanying text.

164. *See* H.R. 2787, 101st Cong., 1st Sess., sec. 2, § (C)(i) (1989).

165. *Id.* at sec. 2, § (C)(ii). An environmental professional was contemplated to be a person, who through training or experience could conduct an audit *objectively*. *Id.* The provision was not meant definitively to identify characteristics or skills that a person would be required to possess to qualify as an environmental professional; rather, it directed that the audit should be conducted by professionals qualified according to industry standard. 135 CONG. REC. E2368 (daily ed. June 28, 1989).

166. H.R. 2787, 101st Cong., 1st Sess., sec. 2, § (C)(ii)(I) (1989). For purposes of the bill, recorded chain of title documents included deeds, easements, leases, restrictions, and covenants. *Id.*

erty;[167] determination of the existence of recorded environmental cleanup liens against the property;[168] reasonably obtainable federal, state, and local government reports which would indicate potential problems with the site;[169] and visual site inspection of the property, including all facilities and improvements, as well as immediately adjacent properties.[170] To maintain the presumption, however, an owner would be required to keep the documents compiled during the course of the audit.[171] The bill contemplated that further action would be necessary to maintain the presumption that "all appropriate inquiry" was made where the audit disclosed the presence or likely presence of a release or threatened release.[172]

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167. *Id.* at sec. 2, § (C)(ii)(II). Apparently, no effort would have been required beyond obtaining photos reasonably available through state or local government agencies. *Id. See infra* note 169.

168. H.R. 2787, 101st Cong., 1st Sess., sec. 2, § (C)(ii)(III) (1989). The bill would have required liens arising pursuant to federal state and local law to have been researched. *Id.*

169. *Id.* at sec. 2, § (C)(ii)(IV). Reports of incidents or activities which would be likely to cause or contribute to a release would have to have been investigated. *Id.* What is "reasonably obtainable" could have proven troublesome in that a copy need only have been obtainable from a government agency by request. *See id.*

Difficulties with gathering the information necessary to perform a due diligence audit probably cause many entities to fail to perform them. One such

> problem is the tremendous cost involved with gathering several, dispersed sources of information from a multitude of government agencies. For a particular transaction, information may be found at the local, county, state, and federal levels. At each of these levels there could be many different agencies that might have information bearing on the environmental integrity of the property. Not only is the time element unbearable but the information, once obtained, is often not susceptible to analysis without further detailed investigation to determine the precise effect on the property.

Bennett, *Technology-Based Standards for Environmental Due Diligence*, 4 TOXICS L. REP. (BNA) 351, 352 (1989). Only recently have markets begun to develop for the purpose of consolidating and centralizing government information which has been difficult to obtain in the past. Thus, the developments in these markets may have some bearing on determining what is appropriate inquiry into government records. *Id.*

170. H.R. 2787, 101st Cong., 1st Sess., sec. 2, § (C)(ii)(V)(1989).

171. *Id.* at sec. 2, § (C)(iii) (1989). *See also* 135 CONG. REC. E2368 (daily ed. June 28, 1989).

172. H.R. 2787, 101st Cong., 1st Sess., sec. 2, § (C)(iv) (1989). "The foregoing scope of investigation is referred to as a phase 1 investigation because it assumes that the purchaser is not aware of any specific environmental hazard affecting the property prior to the investigation." 135 Cong. Rec. E2368 (daily ed. June 28, 1989). A phase I audit is a nonintrusive investigatory technique directed toward reviewing and interpreting data which may indicate the existence of contamination on property. *See* Funderburk, *Site Assessments Call for Variety of Approaches*, HAZMAT WORLD, Mar. 1990, at 40, 40-47; 135 CONG. REC. E2368 (daily ed. June 28, 1989). Certainly in some investigations the presence of contaminants will be readily evident to even the casual observer. To determine whether a potential problem identified in a phase I audit is an actual problem and identify and quantify the extent of the problem, however, it will be necessary to proceed with a testing phase. The phase II audit contemplates the verification of potential problems identified by a phase I audit and the generation of possible remedial solutions. Funderburk, *supra* at 63-64. *See* 135 CONG. REC. E2368 (daily ed. June 28, 1989). The phase approach to environmental auditing is becoming the standard in the lending industry. This approach serves

The bill was not intended to be the exclusive means of establishing that "all appropriate inquiry" was made.[173] Rather, it was meant to provide one method of satisfying the high standard of inquiry to which commercial real estate transactions are to be held.[174] Although the bill did not pass, its concepts need not be lost to the industry. These concepts are based on the three generally accepted investigatory principles espoused in the various guidelines for conducting a due diligence inquiry; thus, it can provide a useful base for lenders who wish to implement a due diligence policy in their day-to-day operations.[175] Presently, no single environmental audit policy can guarantee the successful use of the innocent landowner defense; however, the failure to conduct an investigation which complies with the three prong inquiry suggested almost assuredly will preclude use of the innocent landowner defense.[176]

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to keep the level of investigation commensurate with the risk involved in the transaction. Bennett, *Environmental Due Diligence: An Evolving National Standard*, 3 TOXICS L. REP. (BNA) 1262, 1264 (1989).

173. 135 CONG. REC. E2368 (daily ed. June 28, 1989). Thus, the inquiry suggested by H.R. 2787 would not have foreclosed those who had conducted investigations in the past from asserting innocent landowner status. *Id.*

174. *Id.*

175. A number of excellent sources exist for those who are interested in an overview of due diligence information and due diligence techniques. *See, e.g.*, J. MOSKOWITZ, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS: LAW AND PRACTICE, ch. 16 (1989); Miller & Bennett, *Due Diligence Techniques for the Innocent Purchaser/Lender*, 3 TOXICS L. REP. (BNA) 434, 437-39 (1988).

176. Miller & Bennett, *supra* note 175, at 437. Lenders continue to rely on contractual provisions in loan documentation, such as indemnity and acceleration, to avoid environmental risk. *Id.* at 439. Contractual provisions do not offer the maximum protection to the lender, however. Once cleanup proceedings on a debtor's property have commenced or the debtor has become bankrupt, it is highly probable that they will not have the resources to indemnify the lender or pay off their loan. *Id.* The prudent lender will adopt an environmental due diligence policy and monitor property which is subject to rapid change on a continuing basis. *Id.* at 438.

Ultimately, the position taken by enforcement authorities on what constitutes "all appropriate inquiry" may have had the greatest chilling effect on the development and implementation of an industry standard. It has been intimated that if contamination exists on a piece of property it would have been discovered were "all appropriate inquiry" made; once contamination is discovered, however, the innocent landowner defense is no longer applicable. O'Brien, *supra* note 39, at 186 n.16; Ruhl, *Environmental Quality*, NAT. RESOURCES & ENV'T, Summer 1989, at 30, 31. *See supra* notes 47-48 and accompanying text. It should be painfully obvious to enforcement officials that few banks are willing to expend substantial sums on testing which may prove to be of limited value to them in establishing a defense to CERCLA liability. Because a phase I audit is *not* designed to establish conclusively the nonexistence of contamination on a particular piece of property, enforcement officials should recognize that "all appropriate inquiry" may be made without disovering the existence of property contamination. *See* Ruhl, *supra* at 37. Neither CERCLA nor its admittedly imprecise history gives any indication that Congress intended "all appropriate inquiry" to mean that an inquiry into property contamination must discover the existence of contamination for the appropriate level of inquiry under the innocent landowner defense to be met.

B. *Congressional Attempts at Exempting Lenders from Liability*

In the past two years, Congress has attempted to establish a statutory exemption from liability for lenders on a number of occasions.[177] Although laudable, its efforts have failed to produce any substantive gains for lending institutions. In light of Congress' last minute reauthorization of CERCLA funding and recent EPA activity in the area, it now appears that statutory relief for lenders may not be forthcoming.[178]

House Bill 2085[179] was introduced in April 1989, by Representative John LaFalce, to clarify the limitations upon the liability of financial institututions under CERCLA.[180] The bill recognized the practical difficulties faced by lending institutions in preliminary testing and continued monitoring of facilities subject to security interests and the problems created by the secured creditor exemption of section 9601(20)(A).[181] Therefore, the express purpose of the bill was to permit commercial lending institutions to foreclose on their security interests "without subjecting themselves as *innocent parties* to . . . liability under CERCLA."[182] The bill was viewed by its sponsor as merely perfecting the policy decision previously made "in exempting a mortgagee from liability by virtue of its loan."[183] Essentially, the bill would have amended the term "owner or operator" so that a commercial lending institution acquiring ownership or control of a facility to real-

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177. For a discussion of the EPA's latest activity, see *infra* notes 208-230 and accompanying text.

178. Congress chose to extend CERCLA's funding without substantive change to the law in the Omnibus Budget Reconciliation Act of 1990. Pub. L. No. 101-508, § 6301, 104 Stat. 1388.

179. H.R. 2085, 101st Cong., 1st Sess., 135 CONG. REC. E1325-26 (daily ed. April 25, 1989).

180. 135 CONG. REC. E1325 (daily ed. April 25, 1989). The bill also proposed an exemption from liability for financial institutions administering trusts or estates. *Id.*

181. The lack of guidance regarding the requirements of the innocent landowner defense also was viewed as an impetus for the bill. *Id.*

182. *Id.* (emphasis added). Although H.R. 2085 apparently would have provided a clear exemption from CERCLA liability for a foreclosing commercial lending institution, one must wonder how the innocent party language of the bill's legislative history would have been interpreted by enforcement officials and the courts. It seems entirely probable that the language would have been pressed by enforcement officials to suggest that it was still incumbent upon lenders to conduct some level of inquiry into the potential for contamination of property which was the subject of foreclosure. In this manner, H.R. 2085 could have created an entirely new set of problems for lenders who might have viewed its language as a congressional imprimatur to conduct their business without regard to potential contamination of property. Conversely, it is also possible to interpret the innocent party language to accomplish what lenders would prefer—absolute exemption from liability under CERCLA upon foreclosure irrespective of the inquiry made into the potential for contamination.

183. *Id. See* 42 U.S.C. § 9601(20)(A)(1988). Representative LaFalce suggested that the secured creditor exemption was of limited value unless a lender was also able to realize on its security interest in mortgaged property. *Id.*

ize on a security interest held by it would not be deemed an owner or operator of that facility for purposes of determining CERCLA liability.[184]

In 1990, LaFalce renewed his effort, this time with House Bill 4494, to exempt lending institutions from liability after foreclosure on contaminated collateral.[185] Concern was voiced over the "disturbing trend in hazardous waste liability law," which effectively forced lending institutions to cease extending credit to many small businesses.[186] Once again, the deficiencies of the innocent landowner's defense were noted by the bill's sponsor.[187]

Senate Bill 2319[188] also was introduced to address the problems faced by depository institutions and mortgage lenders when foreclosing on contaminated property.[189] The bill was odd, however, in that it did not seek to amend CERCLA. Rather, it was proposed as an amendment to the Federal Deposit Insurance Act.[190] The bill sought to relieve the covered entities from CERCLA liability incurred on "property acquired through foreclosure."[191] An attempt was made to clarify

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184. H.R. 2085, 101st Cong., 1st Sess., sec. 1, § (a)(1)(A)(i) (1989). The exemption proposed by H.R. 2085 would have by no means extended to every person who took a mortgage on property as security for a loan of funds. *See id.* at sec. 1, § (a)(3) ("commercial lending institutions" limited to commercial or savings banks, industrial savings banks, savings and loan associations, or trust companies).

185. H.R. 4494, 101st Cong., 2d Sess., 136 CONG. REC. E1024 (daily ed. April 4, 1990). H.R. 4494 was a slightly modified version of what had been introduced the previous year by Representative LaFalce as H.R. 2085. *See* H.R. 4494, 101st Cong., 2d Sess., 136 CONG. REC. E1024 (daily ed. April 4, 1990). The major difference in the two bills was the extent of coverage offered. H.R. 4494 was intended to sweep more than just commercial lending institutions into the owner or operator exemption. *See* 136 CONG. REC. E1024 (daily ed. April 4, 1990). It was designed to move beyond the corporate context and protect many types of lending institutions which faced similar CERCLA liability concerns, such as the Small Business Administration, mortgage lenders, and charitable institutions. *Id. See* H.R. 4494 101st Cong., 2d Sess. sec. 1, § (a)(3) (1990).

186. 136 CONG. REC. E1023 (daily ed. April 4, 1990)(statement of Rep. LaFalce). Representative LaFalce cited United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986), and Guidice v. BFG Electroplating & Manufacturing Co., 732 F. Supp. 556 (W.D. Pa. 1989), with obvious disdain.

187. 136 CONG. REC. E1023-24 (daily ed. April 4, 1990). The cost of an environmental assessment was viewed as particularly devastating because it simply exacerbated the credit situation for small businesses, the ones least able to afford the initial assessment and any subsequent assessment or remediation that must be performed. *Id.* Facially, the concern evidenced is not only for the lending institution faced with staggering environmental liability but for a significant sector of the American economy—the small business. *See id.*

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

189. *See* S. 2319, 101st Cong., 2d sess. (1990). The bill also addressed the liability of credit unions. *Id.*

190. *Id.* at sec. 1.

191. *Id.* at sec. 1, § (b). The term "property acquired through foreclosure" was apparently meant to be broad enough to encompass acquisitions at traditional foreclosure sales as well as more modern means of receiving title to property subject to a security interest such as the deed-in-lieu of foreclosure. *See id.* at sec. 1, § (a)(1).

what activity would cause a loss of the proposed exemption, a point sorely lacking in similar House bills.[192] Specifically, the exemption provided would not have been available to institutions that caused a release or threatened release from the property acquired or to those who benefitted from removal, remedial action, or other response action.[193]

C. *EPA "Action"*

Until very recently, the EPA's response to the liability concerns of commercial lending institutions has been, to say the least, minimal. EPA personnel have freely admitted that Congress has pressured them to collect as much money from potentially responsible parties as possible.[194] Consequently, the EPA has sought to expand CERCLA's broad and often ambiguous provisions to their outermost limits in order to impose liability on those who have the funds to finance cleanup operations.[195] In light of the EPA's position, it is not surprising that the EPA has not issued specific guidelines that might help entities avoid liability. The EPA guidance documents are typically little better than no guidance at all.[196]

1. De Minimis Settlements

SARA added a significant settlement framework to CERCLA.[197] One of the settlement provisions was directed toward allowing waste contributors and landowners whose settlement would involve a relatively minor portion of the response costs incurred at a facility to attempt to resolve their liability prior to or in the early stages of

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192. *See supra* note 181 and accompanying text.

193. S. 2319, 101st Cong., 2d Sess., sec. 1, § (c) (1990). The loss of the exemption by those benefitting from response actions extended only to actual benefits conferred by such action. *Id.* This proviso would address the concerns of the *Maryland Bank* court that lenders would benefit from cleanup activities if they were allowed to foreclose on contaminated property without incurring liability. *See supra* note 96. *See supra* note 182 and accompanying text.

194. Lucero, *Environmental Liabilities Imposed on Landowners, Tenants, and Lenders—How Far Can and Should They Extend? C. EPA's Role in and Perspectives on Property Transfer and Financing Liabilities*, 18 ENVTL. L. REP. (Envtl. L. Inst.) 10,366 (1988).

195. *Id.*

196. For example, EPA issued an Environmental Auditing Policy Statement in 1985. Other than encouraging environmental auditing by industry, the statement gave no real guidance or incentive to industry to conduct environmental audits of their operations. *See* Environmental Auditing Policy Statement, 50 Fed. Reg. 46,504 (1985).

197. *See* 42 U.S.C. § 9622 (1988).

litigation.[198] This provision has been the subject of an EPA guidance document.[199] Not surprisingly, the EPA's *de minimis* landowner settlement guidance document offers little hope to the commercial lender seeking to avoid CERCLA liability.[200]

The primary stumbling block of the EPA guidance document is the linking of the innocent landowner defense with the *de minimis* settlement requirements.[201] According to the EPA, whether a party has "actual or constructive knowledge" of a property's use prior to its acquisition is to be determined in light of the "all appropriate inquiry" requirement of the innocent landowner defense.[202] Thus, in order to enter a *de minimis* settlement a party essentially must prove to the EPA that it could establish the elements of the innocent landowner defense at trial.[203] Unfortunately, what will be deemed to con-

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198. *Id.* § 9622(g). This section is known as the *de minimis* settlements provision. *Id. See also* Guidance on Landowner Liability Under Section 107(a)(1) of CERCLA, *De Minimis* Settlement Under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property, 54 Fed. Reg. 34,235, 34,236 (1989) [hereinafter EPA Settlement]. A lender seeking to establish *de minimis* status normally would expect to proceed under section 9622(g)(1)(B). *Cf.* 42 U.S.C. § 9622(g)(1)(A) (1988) (addressing persons who actually have contributed hazardous substances to a facility).

In order to qualify as a landowner who may obtain a *de minimis* settlement under section 9622(g)(1)(b) it must be shown that the potentially responsible party

> (i) is the owner of the real property on or in which the facility is located;
> (ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; *and*
> (iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

Id. § 9622(g)(1)(B)(i)-(iii) (emphasis added). A landowner may not make use of the *de minimis* settlements provision if he "purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance." *Id.* § 9622(g)(1)(B).

199. EPA Settlement, *supra* note 198, at 34,235.

200. *See generally* O'Brien, *EPA's Landowner Liability Guidance*, Toxics L. Rep. (BNA) 321 (1989).

201. *See* EPA Settlement, *supra* note 198, at 34,236-37. "[T]he guidance picks and chooses from the settlement and innocent landowner provisions in order to craft a settlement policy that requires environmental due diligence." O'Brien, *supra* note 154, at 322.

202. EPA Settlement, *supra* note 198, at 34,238. *See also id.* at 34,238 n.9 (constructive knowledge requirements of innocent landowner defense and *de minimis* settlement provision to be construed as similar by EPA).

203. *Id.* at 34,237. The strength of the showing made by a potentially responsible person also determines the terms of the settlement entered with the EPA. *Id.* at 34,239-240. Where a "thoroughly convincing demonstration that each of the elements" of the innocent landowner defense has been made, a landowner may only have to provide EPA access and due care assurance for his when part of the settlement. *Id.* at 34,240. As the probability of success on the merits of the third party defense decreases, it becomes necessary for a landowner to supplement the *de minimis* settlement with cash. *Id.* A landowner who cannot persuade the EPA "that it is likely that he would prevail in establishing" the innocent landowner defense at trial is not eligible for a *de minimis* settlement, although he may qualify for a general section 9622 settlement. *Id.*

stitute "all appropriate inquiry" is not clarified by the EPA in the guidance document.[204]

Further criticisms have been directed at the EPA guidance document. Upon settlement, the EPA will require that a notice be filed in the local land records stating that "hazardous substances were disposed of on the site and that EPA makes *no representation* as to the appropriate use of the property."[205] Such a statement could be a substantial impediment to a later transfer of the property, thus making settlement less attractive.[206] Furthermore, questions have arisen as to the protection provided by a settlement from contribution actions directed toward a settling party by other potentially responsible parties.[207]

2. *Recent EPA Activity*

The EPA may have begun to realize the serious side effects its positions on lender liability have had on commercial lenders. The EPA has announced that it intends to interpret the secured creditor exemption of CERCLA in a manner which would allow foreclosure on collateral and workout of defaulted loans in order to protect a security

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204. The only guidance given regarding "all appropriate inquiry" is that it will be determined on a case-by-case basis. *Id.* at 34,238. This determination makes it difficult to rely on the processes undertaken in establishing "all appropriate inquiry" by parties who are successful in obtaining a *de minimis* settlement since subtle factual nuances may dictate a different result in the EPA's mind. Noting the conference committee report addressing the degree of inquiry contemplated by the innocent landowner defense, EPA did recognize that a higher level of inquiry would be expected of commercial transactions and that the level of inquiry would increase over time. *Id.* at 34,238 n.11.

In light of the lack of a due diligence standard, the EPA approach has been criticized as an abrogation of its statutory responsibility to interpret the law which has produced uncertainty in the operation of financial markets. O'Brien, *supra* note 200, at 322-24. This lack of certainty has resulted in continued efforts by financial institutions to document potential environmental problems rather than attempting to discover the extent of risk involved in a particular transaction. *Id.* at 324.

205. EPA Settlement, *supra* note 198, at 34,240 (emphasis added).

206. O'Brien, *supra* note 200, at 322.

207. Parties to a *de minimis* settlement are supposed to be protected from contribution actions, at least as to the matters addressed in the settlement. 42 U.S.C. § 9622(g)(5) (1988). *See also* EPA Settlement, *supra* note 199, at 34,239. The EPA's loose interpretation of the settlement requirements may jeopardize that protection. O'Brien, *supra* note 201, at 326. The language of the *de minimis* settlement provision is markedly different from that of the innocent landowner defense. *Id.* at 325. By straining to interpret the terms of the two provisions congruently, the EPA not only has further obscured what constitutes "all appropriate inquiry" but may have failed to comply with the statutory mandate of section 9622(1)(B). *Id.* at 324-26. If the EPA has exceeded its statutory mandate to enter into settlements it will thereby jeopardize a settling party's protection from the contribution actions of other potentially responsible parties. *Id.* at 326.

interest.[208] According to an EPA official, the agency believes that CERCLA liability should be certain and predictable so as not to inhibit financial transactions unnecessarily.[209] This modification of the EPA's position regarding lender liability is a significant step in the clarification of CERCLA liability. Although its final terms are not yet set, the overarching goals of the rule are important and are discussed in the EPA's summary of effects.[210]

Perhaps the most important effect of the rule will be its move away from the innocent landowner defense as a means for lenders to seek protection from liability. Under the rule, the innocent landowner defense will be considered a limited and secondary means for protecting holders of security interests.[211] Lenders and their successors in interest will have to rely on the secured creditor exemption as the principal means of avoiding liability.[212] Accordingly, the interpretive rule is designed to ameliorate the uncertainty surrounding both the text of the secured creditor exemption and the cases, such as *United States v. Fleet Factors Corp.*, which have interpreted the exemption.[213]

By defining "indicia of ownership," "primarily to protect a security interest," and "participating in the management of a . . . facility," the EPA hopes to allow lenders to undertake certain activities regarding a facility in the course of protecting a security interest they hold in the facility without voiding the secured creditor exemption.[214] The EPA does note, however, that the competing interests of the EPA and lenders are to be accomodated by "protecting the secured creditor that acts in an environmentally responsible manner (which includes *requiring* environmental audits of the collateral upon making loans) from incurring CERCLA liability."[215] This requirement alone should be sufficient to strike fear in the hearts of lenders.[216]

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208. Draft Lender Liability Rule, Environmental Protection Agency (Sept. 14, 1990) [hereinafter Draft Rule].

209. *EPA Official Tells House Panel of Shift in Policy Towards Lenders, CERCLA Liability*, 21 Env't Rep. (BNA) 756, 756 (1990).

210. Draft Rule, *supra* note 208, at 1-21.

211. *Id.* at 17. The EPA recognizes that circumstances may exist where a secured lender is not in the position to claim the secured creditor exemption. In these limited circumstances the lender may seek to defend as an innocent landowner in the same manner as any other party. *Id.* at 18-19.

212. *Id.* at 7.

213. *Id.* at 3. The EPA maintains that the Eleventh Circuit's "capacity to influence" rationale in *Fleet Factors* was merely *dicta*. *Id.* at 3-4. *See supra* note 136 and accompanying text.

214. Draft Rule, *supra* note 208, at 1, 5-6.

215. *Id.* at 7 (emphasis added).

216. *See* Reilly, *EPA, Congress Moving Towards Lender Liability Rule Under CERCLA*, HAZMAT WORLD, Dec. 1990, at 14, 15.

To qualify for the secured creditor exemption, only "those interests in real or personal property held as security or collateral for a loan" will be considered "indicia of ownership."[217] Although the nature of the ownership may be represented by forms such as a mortgage, deed of trust, or legal title obtained pursuant to foreclosure, the encumbrance is required solely for purposes of loan security.[218] Interests "in the nature of an investment in the contaminated property, or any interest, other than as a security" do not qualify.[219] Obviously, this requirement will stymie many modern forms of financing by lenders who have the greatest need of protection—financiers of commercial ventures.[220]

According to the EPA, a lender *must* undertake certain "affirmative obligations" to act "primarily to protect its security interest." The secured creditor exemption requires the inspection or audit of collateral in an effort to minimize environmental liability "as an action taken to protect the security interest through assessing and ensuring the value of the collateral" in which the interest is held.[221] Although a lender is expected to act consistently with CERCLA, it "is not expected to be an insurer or guarantor of environmental safety at a facility in which it has a security interest."[222] Conversely, the secured creditor exemption will not be viewed as a loan guarantee. It will not protect lenders from "ordinary risk" or cover poor loan decisions.[223]

The EPA's proposed rule also addresses activities surrounding loan workout and loan foreclosure.[224] The overarching principles in these areas are that the borrower must remain "the ultimate decisionmaker

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217. Draft Rule, *supra* note 207, at 8.

218. *Id.*

219. *Id.* If a lender holds an indicia of ownership for reasons other than loan security or acts as trustee or manager of the property or business then the "primarily to protect a security interest" qualifier of the secured creditor exemption will be violated. *Id.* at 9. *See supra* note 24 and accompanying text.

220. Whether arrangements such as a sale-and-leaseback, conditional sale, or installment sales contract are within the exemption is to be determined on a case-by-case basis. Draft Rule, *supra* note 208, at 9 n.2.

221. *Id.* at 11. It appears the EPA may now be "picking and choosing" from the secured creditor exemption and innocent landowner provision in an effort to require environmental due diligence. *See supra* note 201. *See also* 42 U.S.C. § 9601(20)(A) (1988) (secured creditor exemption makes no reference to inspection or audit of collateral held by secured creditor). The obvious lack of any standards for conducting an "acceptable" environmental audit has been addressed in various sections of this article.

222. Draft Rule, *supra* note 208, at 12. A lender's activities must consider and account for hazardous substances known to be present at a facility and cannot cause or contribute by act or omission to the environmental harm. *Id.* at 13.

223. *Id.* at 6.

224. *Id.* at 12-16.

for operation of the facility"[225] during a workout and that disposal of property after foreclosure must be "expeditious."[226] In either instance, a lender's actions must be undertaken for the purpose of protecting or preserving the security interest in order to maintain the exemption from liability.[227]

Finally, the EPA has addressed some of the concerns evidenced by courts presented with difficult policy questions under CERCLA. The EPA proposes to seek equitable reimbursement for the amount of enrichment or benefit conferred by an EPA cleanup that enhances the value of collateral during the time that the lender holds its indicia of ownership.[228] Furthermore, the EPA acknowledges that the controversial "participation in the management of a . . . facility" qualifier of the secured creditor exemption encompasses only "actual operational participation by the lender, and does not include the mere capacity or ability to influence facility operations."[229]

Although the proposed change in the EPA's position toward lender liability is encouraging, the EPA's new approach will not answer all the liability woes of lenders. Unfortunately, the proposed rule suffers the same drawbacks as other attempts to articulate a policy in this area; it is completely lacking in specific standards. Too many details are left to be worked out on a case-by-case basis for the rule to be of immediate practical significance to lenders. It is also unclear whether the rule can or will apply to suits by private parties seeking contribution from a lender.[230] Parties maintaining contribution actions still may be able to capitalize on the largely unsettled state of the law under CERCLA. Thus, lending institutions still could be subject to devastating liability based on judicial construction of CERCLA liability provisions.

V. CONCLUSION

At present, commercial lending institutions cannot rely on any single course of action to insulate themselves from liability once they be-

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225. *Id.* at 13.

226. *Id.* at 14-15. Where the property is held for six months or less, the lender generally will be presumed to be holding it to protect the security interest. *Id.* at 15. The lender may, however, act in a manner inconsistent with this presumption and lose the secured creditor exemption. *Id.* at 14.

227. *Id.* at 12, 14.

228. *Id.* at 16. Such action would allow the EPA to recapture any increase in value realized by the lender at foreclosure sale due to the difference in value of the property in its "clean" rather than contaminated state. *Id. See supra* note 95.

229. Draft Rule, *supra* note 208, at 16-17 (emphasis added). This is an express repudiation of the Eleventh Circuit's rationale in *Fleet Factors*. *See supra* note 137 and accompanying text.

230. *See* Reilly, *supra* note 216, at 14. The potential lack of protection from third-party actions has been seen as a drawback to much of the EPA's activity in this area. *See supra* note 161.

come involved with contaminated property. CERCLA itself is vague, and judicial interpretation is still evolving. Congress has provided no remedies, and the EPA has only recently begun to alter its policy toward lenders. Therefore, lenders must protect themselves. Environmental audits, not for the purpose of establishing the innocent landowner defense, but to apprise lenders of the condition of property to be taken as security for a loan, should become standard practice prior to a loan.[231] In this manner a lender can enter a loan transaction with some knowledge of the potential risks involved. Lenders who want to avoid CERCLA liability must rely on their own ingenuity to avoid contaminated property.

For its part, Congress should address specifically the issue of lender liability. Senate Bill 2319 was an encouraging step and would have provided a potentially workable framework for exempting lenders from liability. Its plan should be revisited.[232] The imposition of liability on lenders has had far-reaching effects which, if allowed to continue, seriously may affect an already unstable economy. It is imperative that Congress take affirmative action to clarify the circumstances in which lenders may face liability under CERCLA. Although the proposed shift in EPA policy is encouraging, it does not go far enough in resolving the inherent tension exhibited by CERCLA's all or nothing approach to liability.

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231. Indeed, an environmental audit will become a fact of life for any lender should the EPA's rule be adopted. *See supra* note 168 and accompanying text.

232. *See supra* notes 188-93 and accompanying text.