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LENDER LIABILITY UNDER CERCLA: SEARCH FOR A SAFE HARBOR

by

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UNTIL the 1985 decision of *United States v. Mirabile*,[1] few people understood the potential magnitude of lender liability for environmental cleanup, particularly for cleanup of hazardous substances[2] under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[3] Prior to 1985, lending institutions rarely considered environmental risks in evaluating and negotiating loan transactions.[4] After

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1. 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985) [hereinafter *Mirabile*]; *see infra* notes 43-47 and 60-65 and accompanying text.

2. A discussion of the dangers posed by hazardous waste, and the extent of hazardous waste contamination in the United States, has been well documented elsewhere and is beyond the scope of this Article. For a discussion of the hazardous waste crisis, see UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THE WASTE SYSTEM (1988); UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, SUPERFUND: LOOKING BACK, LOOKING AHEAD (1987); J. HIGHLAND, HAZARDOUS WASTE DISPOSAL—ASSESSING THE PROBLEM (1982); S. EPSTEIN, L. BROWN & C. POPE, HAZARDOUS WASTE IN AMERICA (1982).

3. Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9657 (1988)). The Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1613-1782 (codified at 42 U.S.C. §§ 9601-9657 (1988)), amended CERCLA in 1986. On the subject of lender liability under CERCLA, see these recent law review articles: Gieser, *Federal and State Environmental Law: A Trap for the Unwary Lender*, 1988 B.Y.U. L. REV. 643 (1988); James, *Financial Institutions and Hazardous Waste Litigation: Limiting the Exposure to Superfund Liability*, 28 NAT. RESOURCES J. 329 (1988); King, *Lenders' Liability for Cleanup Costs*, 18 ENVTL. L. 241 (1988); Klotz & Siakotos, *Lender Liability Under Federal and State Environmental Law: Of Deep Pockets, Debt Defeat and Deadbeats*, 92 COM. L.J. 275 (1988); Comment, *Lender Liability for Hazardous Waste: An Economic and Legal Analysis*, 59 U. COLO. L. REV. 659 (1988); Note, *Successor Liability of Financial Institutions Under CERCLA—A Takings and Policy Analysis*, 1 COLUM. BUS. L. REV. 243 (1988).

4. One commentator has reported that prior to *Mirabile* no suggestion arose in the legal literature that financial institutions might be held liable for environmental hazards caused by the activities of their borrowers. Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors and Other Deep Pockets*, 103 BANKING L.J. 509, 509 n.1 (1986). Banks and lawyers understandably underestimated the risk of lender liability posed by CERCLA. A number of other environmental statutes contain liability provisions similar to those in CERCLA, including the Federal Water Pollution Control Act. No court, however, has held a lender liable under any of these statutes. *See* Burkhart, *Lender/Owners and CERCLA: Title and Liability*, 25 HARV. J. ON LEGIS. 317, 321-23 (1988).

the decision in *Mirabile*, however, lenders quickly realized that CERCLA represented an unusual and extreme source of risk to lending.[5]

In simple terms, the customary risk taken by lenders in making a loan is a credit risk: the borrower may not have the economic resources to repay the loan. If the lender takes collateral such as a mortgage to secure the loan, then credit risk includes a component of collateral risk: the collateral may not have sufficient value to provide for the repayment of the loan upon a default by the borrower. CERCLA can increase a lender's credit risk by charging a borrower with substantial cleanup costs, consequently impairing the borrower's ability to repay the loan.[6] Of course, countless other statutes and regulations provide for civil liability and impose this type of credit risk. CERCLA can also increase a lender's collateral risk by effectively denying a lender the value of its real property collateral.[7] While this collateral risk is of great concern to lenders, this risk is also posed by various superlien statutes that grant first priority liens to federal or state agencies under certain circumstances.[8] Thus the credit risk and collateral risk provisions of CERCLA, while severe, are not unprecedented in the annals of legislation.

CERCLA represents a unique source of risk to lenders because under certain circumstances the lender may be held liable for the cleanup cost of a borrower's property.[9] This cost of cleanup may greatly exceed the amount of the loan,[10] with the consequence that CERCLA can extend a lender's risk well beyond the dollar amount of its credit risk and collateral risk.[11] This additional component of risk is profoundly disturbing to lenders who are accustomed to regarding the risk involved in making a loan as being limited to the amount of the loan.[12]

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5. *See* Berz & Sexton, *Superfund Collides with Lenders' Concerns*, Legal Times, Dec. 23, 1985, at 13.

6. 42 U.S.C. § 9607 (1988). CERCLA also provides for a lien against the property of any person liable for cleanup costs. This lien is, however, subordinate to security interests perfected under applicable state law prior to filing by EPA of a lien notice in the appropriate state office. *Id.* § 9607(1).

7. *See infra* notes 54 to 58 and accompanying text.

8. For example, at least six states (New Jersey, Arkansas, Connecticut, Massachusetts, New Hampshire, and Tennessee) have enacted statutes giving the state a lien on a cleanup site to secure the repayment of funds used by the state for the cleanup. These liens can take priority over previously recorded mortgages and other liens. *See* Gieser, *supra* note 3, at 690-92.

9. *See infra* notes 38 to 78 and accompanying text.

10. The estimated average cost of cleaning up a hazardous waste site is about $26 million. *See* Burkhart, *supra* note 4, at 318 n.3. The cleanup cost of certain sites greatly exceeds this figure. For example, based upon informal conversations with EPA, the cost of cleanup of the Stringfellow Acid Pit site in California is about $65 million, while the cost of cleanup of the dioxin sprayed at Times Beach and Minker Stout—Romaine Creek, Missouri, is about $120 million. To date the cleanup costs at Love Canal have exceeded $250 million. UNITED STATES LEAGUE OF SAVINGS INSTITUTIONS SPECIAL MANAGEMENT BULLETIN S-286, ENVIRONMENTAL RISK MITIGATION AND POLICIES OF SAVINGS INSTITUTIONS (July 3, 1989) [hereinafter U.S. LEAGUE BULLETIN].

11. *Id.*

12. A lender can certainly lose more than the amount of its loan if it engages in criminal or tortious conduct. During 1987 alone, juries in three separate cases awarded borrowers over $100 million in damages in cases involving "lender liability" claims. *See* 2 LENDER LIABILITY L. REP. No. 2 (Aug. 1988).

Since *Mirabile*, most lenders have dramatically changed their method of making loans so as to avoid liability under CERCLA. This is particularly true for lenders who provide financing for real property. Many lending institutions have adopted an environmental risk policy and hired in-house environmental analysts.[13] Lenders commonly require a qualified third party to perform an environmental audit on the borrower's facility prior to making a loan. In many instances the borrower must provide updated environmental audits during the term of the loan.[14] Many loan agreements now provide for the borrower to indemnify the lender against a panoply of environmental risks, and this obligation is typically set forth as a recourse obligation even when the obligation of the borrower to repay the loan is nonrecourse.[15] In addition, when the lender identifies a relatively minor environmental hazard at the borrower's premises, the lender often requires that a portion of the loan proceeds be set aside to remove the hazard, and that the borrower or a qualified third party certify that the hazard has been ameliorated. Such steps not only help lenders manage their risk under CERCLA, but also exert a positive influence in the battle to clean up hazardous substances.[16]

Unfortunately for borrowers, many lenders do not deem these steps sufficient to limit their liability under CERCLA. The standards for lender liability under CERCLA do not clearly establish the ways by which a lender can avoid CERCLA liability when making loans to environmentally sensitive borrowers. Consequently, many lenders are now reluctant to make loans to borrowers that face even a small possibility of environmental liability. Many proposed lending transactions have failed to close during the past few years due to lender concerns about possible CERCLA and other environmental liability, even when EPA or other authorities have not threatened action against the borrowers in question. According to recent testimony in Congress, CERCLA has caused lenders to become unwilling to lend to certain types of businesses such as chemical companies and those located near possible hazardous substance contamination, even without evidence that the borrower poses an environmental risk.[17] Lenders that might otherwise be

13. The Federal Home Loan Bank Board recommends these steps in guidelines set forth for thrift institutions such as savings banks and savings and loan associations. U.S. FEDERAL HOME LOAN BANK SYSTEM THRIFT BULLETIN 16, at 2-3 (Feb. 6, 1989) [hereinafter THRIFT BULLETIN 16]. An examiner may perceive failure to follow these guidelines as negligence. U.S. LEAGUE BULLETIN, *supra* note 10, at 1.

14. One commentator has argued that Congress intended to encourage banks to require such environmental audits both before the loan is made and while the loan is outstanding. *See* Tom, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 926 (1989).

15. In certain real estate loans, leveraged leases, and other forms of financing, the borrower may have a "nonrecourse" obligation to repay the loan. In such a case, if the borrower fails to repay the loan, the lender may not proceed directly against the borrower to recover the amount unpaid. The lender's sole remedy is to foreclose upon the collateral securing the loan.

16. Lenders occupy a unique position in monitoring the environmental condition of the property of their borrowers, and consequently lenders are in a position to play a significant role in the cleanup of hazardous substances. *See* Tom, *supra* note 14, at 931-33.

17. *See* Statement of Sally B. Narey, General Counsel U.S. Small Business Administration, Before the Committee on Small Business, U.S. House of Representatives (Aug. 3, 1989) (statement made in hearings on how lender liability under CERCLA affects small business and

willing to make these loans are being encouraged not to do so by their regulators. For example, the Federal Home Loan Bank Board has discouraged thrift institutions from lending to borrowers located in areas with documented evidence of hazardous substance releases.[18] Thus CERCLA may function primarily to prevent loans from being made to borrowers facing environmental risks.

The loss of bank financing for environmentally sensitive companies and industries could cripple not only the economic health of these companies and industries, but also the ability of these companies and industries to finance needed environmental cleanups. Such a result is particularly unfortunate, given that EPA is increasingly committed to assuring that CERCLA cleanups be accomplished through private funding.[19] Facilitating the sale and financing of contaminated properties would substantially assist EPA's goal of privately funding remedial actions. With the possible, and as yet unproven, exception of pre-purchase agreements,[20] however, EPA policy does not yet recognize this fact and EPA has achieved little toward this end.

Financial institutions will continue to have a strong disincentive to lend to environmentally troubled businesses and industries unless Congress or the EPA can find a safe harbor for lenders under CERCLA. A bill to amend CERCLA to include such a provision has been introduced in the House of Representatives,[21] but the prospects for passage of any such amendment seem remote.[22] Some commentators have sought to interpret the limited exceptions to strict liability provided under section 107(a) of CERCLA as providing such a safe harbor,[23] but these exceptions are not likely to give lenders much comfort without definitive and favorable court interpretation.[24] EPA recently suggested that the availability of purchaser and pre-purchase agreements under CERCLA may help provide a more favorable scheme for lenders.[25] The availability and impact of these agreements are

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H.R. 2085, 101st Congress, 1st Session); Statement of the American Banker's Association on the Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and H.R. 2085, Before the U.S. House of Representatives Small Business Committee by Charles M. Mitchow (Aug. 3, 1989); *see also* H.R. 2085, 101st Cong., 1st Sess., 135 CONG. REC. H1364 (daily ed. Apr. 25, 1989) (statement of Rep. LaFalce).

18. THRIFT BULLETIN 16, *supra* note 13, at 3-4. As interpreted by the authors of this Article, the criteria set forth in THRIFT BULLETIN 16 recommend against lending to businesses located in substantial portions of the industrialized cities and counties of California.

19. U.S. ENVIRONMENTAL PROTECTION AGENCY, MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM 2-1 to -31 (1989).

20. *See infra* notes 111-153 and accompanying text.

21. Legislation has been proposed in the House of Representatives that would amend CERCLA to provide that a financial institution could not become liable under CERCLA solely by foreclosing on real property. H.R. 2085, 101st Cong., 1st Sess., 135 CONG. REC. H1364 (daily ed. Apr. 25, 1989).

22. *See* [20 Current Developments] Env't Rep. (BNA) 654-55 (Aug. 11, 1989).

23. *See, e.g.*, Tom, *supra* note 14, at 934-43.

24. *See infra* notes 102-110 and accompanying text.

25. Statement of Glenn L. Unterberger, Associate Enforcement Counsel for Waste, Office of Enforcement and Compliance Monitoring, U.S. Environmental Protection Agency, Before the Committee on Small Business, U.S. House of Representatives (Aug. 3, 1989)(statement made in hearings on how lender liability under CERCLA affects small business and H.R. 2085, 101st Congress, 1st Session).

analyzed later in this Article.[26]

This Article briefly examines the liability of lenders and others for environmental cleanup under section 107(a) of CERCLA, as well as the statutory exceptions to such liability and the lender liability cases decided to date under CERCLA. The Article then focuses on EPA's program of purchaser and pre-purchase agreements to evaluate the program's effectiveness in affording lenders the safe harbor lacking in CERCLA.

I. LIABILITY OF LENDERS UNDER CERCLA

Congress intended that CERCLA provide a comprehensive program to address the release or threatened release of hazardous substances. Under CERCLA, if EPA determines that an actual or threatened release of a hazardous substance poses an imminent and substantial danger to the environment, EPA can order the responsible persons to clean up the release or abate the threat of release.[27] Alternatively, EPA itself can undertake the effort to clean the site.[28] The Hazardous Substance Response Trust Fund, commonly referred to as the Superfund,[29] may fund EPA's cleanup efforts, and EPA may seek to recover its cost of cleaning up the site from any one or more of the following persons under section 107(a) of CERCLA:

(1) the owner and operator of the site;[30]
(2) any person who was the owner or operator of the site at the time of the disposal of the hazardous substances in question;
(3) any person who arranged for disposal or treatment of the hazardous substances at the site, or who arranged for transport of the hazardous substances to the site; and
(4) any person who selected the site for disposal or treatment of the hazardous substances, and accepted the hazardous substances for transport to the site.[31]

With limited exceptions,[32] any person listed in clauses (1) through (4) above can be held *strictly* liable under section 107(a) of CERCLA. Thus, EPA may charge any person with cleanup costs no matter how cautious or prudent the person may have been in disposing of or handling the hazardous substances in question,[33] irrespective of any causal connection between such person's conduct and the release of the hazardous substances,[34] and (in the case of a person listed in clauses (1) and (2) above) without regard to whether such person actually participated in the dispostion or handling of

26. *See infra* notes 111-153 and accompanying text.
27. 42 U.S.C. § 9606(a) (1988).
28. *Id.* § 9604.
29. 26 U.S.C. § 9507 (1988).
30. According to EPA, this provision imposes liability only on the person who owns the site at the time of the cleanup. *See* Burkhart, *supra* note 4, at 327 n.26.
31. 42 U.S.C. § 9607(a) (1988). Private parties who have incurred cleanup costs under CERCLA may, under appropriate circumstances, also bring suit against the persons listed in § 9607(a) to recover all or a portion of such cleanup costs. *Id.* § 9607(a)(4)(B).
32. *See infra* notes 79-110 and accompanying text.
33. *See* United States v. Dickerson, 640 F. Supp. 448, 451 (D. Md. 1986).
34. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).

the hazardous substances.[35] In addition, liability under section 107(a) of CERCLA may be joint and several,[36] meaning that any one person listed in clauses (1) through (4) above may be held liable for the entire cost of cleanup even if others might also have been held responsible under CERCLA.[37] Thus CERCLA section 107(a) does not so much find and apportion fault as it assures that the cost of cleanup is privately funded by relying upon private party liability until the deepest pocket is depleted.

In order for a lender to be held liable for the cost of a site cleanup under section 107(a) of CERCLA, the lender must be a present or former "owner" or "operator" of the site.[38] The following discussion examines each of these potential causes for liability.[39]

A. "Owner" Liability Under CERCLA

Most case law and scholarly work dealing with CERCLA lender liability have focused on owner liability under section 107(a) of CERCLA. CERCLA provides that a lender is not an owner of a facility merely by holding "indicia of ownership primarily to protect [its] security interest" in the facility, so long as the lender does not participate in the management of the facility.[40] This provision attempts to treat equally all mortgagees and beneficiaries under deeds of trust, regardless of whether applicable state law may deem such persons to hold title to the encumbered property.[41] Consequently, as long as a lender remains simply a passive holder of an encumbrance on a facility, the lender will not be an owner of the facility under

35. *See* United States v. Monsanto Co., 858 F.2d 160, 168 (4th Cir. 1988).

36. *See* Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1571 (E.D. Pa. 1988).

37. *Id.* Defendants may avoid joint and several liability if they can establish a reasonable basis for apportioning damages between them. *See* United States v. Wade, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983).

38. Courts may hold a lender liable under CERCLA as a person who "arranges for the treatment or disposal" of a hazardous substance under clause (3) of § 107(a) of CERCLA. 42 U.S.C. § 9607 (a)(3) (1988). In Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573-74 (5th Cir. 1988), the court refused to rule that this type of liability is inapplicable to lenders. The court in this case, however, failed to explain how the lender may be determined to have arranged for such treatment. Clause (3) of CERCLA § 107(a) may prove significant in deciding liability in *United States v. Fleet Factors Corp. See infra* notes 66-68 and accompanying text. In the absence of a more definitive ruling on lender liability under clause (3) of § 107(a) of CERCLA, we have focused in this Article on liability as an "owner or operator" under clauses (1) and (2) of § 107(a) of CERCLA. 42 U.S.C. § 9607 (a)(1)-(2) (1988).

39. CERCLA provides a singular definition of the "owner or operator" of a facility as any person owning, operating, or controlling the facility. 42 U.S.C. § 9601(2)(A) (1988). This definition is hopelessly circular. Consequently, this Article separately analyzes the meaning of "owner" and "operator." Such an analysis is consistent with the ruling in United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578-82 (D. Md. 1986), that a person can be an owner under CERCLA without being an operator. *See infra* notes 48-53 and accompanying text.

40. 42 U.S.C. § 9601(20)(A) (1988).

41. *See* Burkhart, *supra* note 4, at 338-39. This exception should also afford protection for persons who hold title to real property in connection with a lease financing arrangement. *See id.* at 342.

CERCLA.[42]

Difficulties arise for a lender when a loan goes into default and the lender seeks to foreclose on its mortgage or deed of trust encumbering the facility. At some stage in the foreclosure process, the lender may have taken title to the facility for reasons falling outside the "indicia of ownership" exception. *Mirabile* and *United States v. Maryland Bank & Trust Co.*[43] illustrate this danger. In *Mirabile*, EPA sued American Bank and Trust Company (ABT) and Mellon Bank to recover the cost of removing hazardous waste from a paint manufacturing facility that had been financed in part by the two banks. ABT held a mortgage on the site, eventually foreclosed on the mortgage, and then made the highest bid at the foreclosure sale. Within four months of its successful bid, however, ABT assigned its bid to the Mirabiles, the owners of the site at the time of the lawsuit.

ABT moved for summary judgment on the ground that its successful bid at the foreclosure sale did not vest legal title in ABT.[44] The court found it unnecessary to decide this technical issue, stating that ABT's actions between the time of its bid and the assignment to the Mirabiles were "plainly undertaken in an effort to protect its security interest in the property."[45] ABT had restricted its actions during this time to securing the site against vandalism, making inquiries concerning the disposal of drums on the site, and showing the site to prospective purchasers. Given the limited nature of these activities, the court held that ABT fell within the exception in CERCLA for lenders holding "indicia of ownership."[46] The court stated that ABT's "participation in the day-to-day operational aspects of the site" would have placed ABT outside of this exception.[47]

In contrast, the court in *Maryland Bank* found a foreclosing bank liable as an owner under facts very similar to those in *Mirabile*. In *Maryland Bank* the lender instituted a foreclosure action, purchased the contaminated site at foreclosure sale with a bid of $381,500, and held title to the site for approximately four years. During this four-year period, EPA initiated and completed the cleanup of the site at a cost of approximately $551,713.50. The lender attempted to escape liability for the cleanup costs on the ground that it held title to the site "primarily to protect its security interest" within the meaning of the secured lender's exception.[48] The district court disagreed, finding that the exception was intended to protect current mortgagees, not former mortgagees currently holding title purchased at a foreclosure sale.[49] The court distinguished *Mirabile*, noting that the court there had found that

42. *See* discussion of *United States v. Maryland Bank & Trust Co., infra* notes 48-53 and accompanying text.

43. 632 F. Supp. 573 (D. Md. 1986). For an excellent and detailed analysis of *Mirabile* and *Maryland Bank*, see Seneker & Townsend, *New Liabilities for Lenders: Hazardous Waste and Toxic Building Materials*, LEGAL BULL., July 1987, at 363, 368-74 [hereinafter Seneker].

44. 15 Envtl. L. Rep. at 20,996.

45. *Id.*

46. *Id.*

47. *Id.*

48. 632 F. Supp. 573, 578-79 (D. Md. 1986).

49. *Id.* at 579.

the lender's purchase of the site in question "was plainly undertaken in an effort to protect its security interest in the property."[50] The court in *Maryland Bank* expressly declined to give *Mirabile* a broader interpretation.[51] In particular, the court found that a lender could be an owner under CERCLA without also being an operator.[52] This finding casts doubt on the *Mirabile* holding that a lender must participate in the day-to-day operation of a site before being found to be an owner under CERCLA.[53]

One cannot easily reconcile the rules set forth in *Mirabile* and *Maryland Bank*. While the lender in *Mirabile* held title for a much shorter period than did the lender in *Maryland Bank*, this distinction is meaningless, given the rule in cases like *United States v. Carolawn Co.*[54] that a person can be a CERCLA owner by holding title for as little as one hour.[55] In the absence of a definitive reconciliation between the decisions in *Mirabile* and *Maryland Bank*, most banks have adopted the conservative position that they can remain immune from owner liability only if they refuse to take title to real property that may be contaminated by hazardous substances.[56] Thus *Maryland Bank* has provided one of the few bright line rules for lenders under CERCLA: think twice before foreclosing on real property that may become the site of a CERCLA cleanup.[57] The application of this rule requires that unless an exception to CERCLA liability is available, lenders must be prepared to abandon their collateral under certain circumstances.

Lender efforts to avoid owner liability should extend beyond the fear-of-foreclosure test. Banks today commonly take warrants, preferred stock, and other forms of equity from a borrower as partial compensation for providing financing. These so-called equity kickers may convert a holder of a mortgage into an owner under CERCLA,[58] especially if a court concludes that the mortgage holder is receiving income from the property as a result of its equity interest. In order to fend off this possibility, lenders should perform an environmental due diligence check prior to accepting any such equity interest.

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50. *Id.* at 580.

51. *Id.*

52. *Id.* at 577.

53. The fact that the lender in *Maryland Bank* held title to the contaminated site during the EPA cleanup, and thus benefitted from the cleanup, distinguishes *Mirabile* from *Maryland Bank*. The court in *Maryland Bank* noted that the exception from liability sought by the lender "would convert CERCLA into an insurance scheme for financial institutions, protecting them against possible losses due to the security of loans with polluted properties." *Id.* at 580. In contrast, ABT had no interest in the site at issue in *Mirabile* at the time of its cleanup.

54. 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,698 (D.S.C. 1984).

55. *Id.* at 20,698-99.

56. *See* Comment, *Fear of Foreclosure: United States v. Maryland Bank & Trust Co.*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,165 (1986) (characterizing this position as "fear of foreclosure").

57. For a more elegant and detailed explanation of this rule, see *id.* at 10,169 and Seneker, *supra* note 43, at 372-74.

58. *See* Seneker, *supra* note 43, at 373.

B. Operator Liability

Case law on operator liability under CERCLA is considerably more vague than the case law discussed above on owner liability.[59] The *Mirabile* case provides some instruction on this issue. In *Mirabile* the court discussed whether lender Mellon Bank was ineligible for the exception available to lenders who hold mere "indicia of ownership" to a facility and have not participated in the management of the facility.[60] The court found an issue of fact concerning possible participation by Girard Bank, Mellon Bank's predecessor in interest, in the management of the borrower.[61] While the court did not focus on whether Girard Bank was an owner or operator within the meaning of CERCLA section 107(a), the facts clearly established that Girard Bank could not have been an owner of the facility in question. Girard Bank never held title to the facility or a mortgage or any other lien on the real property comprising the facility. Thus, the court must have implicitly found a factual basis for holding Girard Bank to be an operator under CERCLA.

The decision in *Mirabile* concerning the liability of Mellon Bank was based upon the court's distinction between participation in financial aspects of management, which the court deemed too attenuated to permit the imposition of liability,[62] and participation in the "nuts-and-bolts, day-to-day production aspects of the business."[63] There had been testimony at trial that a Girard Bank officer was present on the site on a regular basis and had become involved in the day-to-day operations of the site, taking actions such as determining the sequence in which orders were filled and insisting on personnel and manufacturing changes. While the court in *Mirabile* found this testimony to be a "slender reed"[64] on which to base liability, it nonetheless found that the bank's liability under CERCLA presented an issue of fact precluding summary judgment.[65] *Mirabile* thus provides some authority for the conclusion that a lender can avoid operator liability by limiting its participation in the affairs of its borrowers to financial matters.

In the recent decision of *United States v. Fleet Factors Corp.*[66] the court utilized the *Mirabile* analysis. The court in *Fleet Factors* held that a lender's financial assistance, or even isolated instances of specific, management advice given by a lender to a borrower, are not sufficient bases for lender liability under CERCLA.[67] The court refused to grant the lender's motion for summary judgment, however, noting that industrial liquidators hired by the lender may have moved, released, or disturbed hazardous substances on the

59. *See infra* notes 71-77 and accompanying text.
60. 42 U.S.C. § 9601(20)(A) (1988); *see supra* note 40 and accompanying text.
61. 15 Envtl. L. Rep. at 20,997.
62. *Id.* at 20,995-97.
63. *Id.* at 20,995.
64. *Id.* at 20,997.
65. *Id.* at 20,997. Mellon Bank eventually agreed to a settlement of *Mirabile* that required the bank to pay $26,000 of the cleanup costs. 17 Env't Rep. (BNA) 1263 (1986).
66. 19 Envtl. L. Rep. (Envtl. L. Inst.) 20,529 (S.D. Ga. 1988), *appeal docketed*, No. 89-8094 (11th Cir. Feb. 8, 1989).
67. *Id.* at 20,531.

site, or may have permitted ongoing releases to continue in the course of preparing equipment for sale.[68] While *Fleet Factors* has received a great deal of attention,[69] the decision poses no greater risk of lender liability than did *Mirabile*. Any person, whether or not a lender, whose agent releases hazardous substances on a site clearly is liable for such release under CERCLA.

Based on the decisions in *Mirabile* and *Fleet Factors*, a lender apparently can avoid operator liability under CERCLA by divorcing itself from the day-to-day operations of its borrowers, or by limiting its involvement to the financial affairs of its borrowers. However, there are a number of reasons to question whether lenders can rely upon the limited involvement test set forth in *Mirabile*:

1. Failure to Define "Operator"

Neither *Mirabile* nor *Fleet Factors* expressly addresses the meaning of "operator" under CERCLA. For this reason, a court seeking to define this term may not restrict itself to the test set forth in *Mirabile*.

2. EPA Opposition

EPA argued in *Fleet Factors* that *Mirabile* was decided incorrectly, and that in order to avoid operator liability under CERCLA, a secured creditor may participate in a borrower's financial affairs only to the extent that such affairs are unrelated to the facility at issue.[70] EPA's opposition to the test set forth in *Mirabile* may persuade a court to adopt a more restrictive test in this area.

3. Difficulty of Application

In many cases it will be difficult to determine whether a lender has limited its involvement in the affairs of a borrower to financial matters. If a lender merely audits the financial statements of its borrower and requires the borrower to satisfy certain financial covenants,[71] CERCLA likely would not deem the lender to be an operator. But if the lender goes further and actively monitors or supervises the ongoing financial operations of the borrower, the lender will have influenced the operation of the borrower's business as a whole. The courts would not likely exempt a lender from CERCLA liability if the lender had prohibited its borrower from spending

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68. *Id.* The court in *Fleet Factors* did not make clear whether it found a potential basis in fact for "operator" liability under clause (2) of § 107(a) of CERCLA, or for liability as a generator of hazardous substances under clause (3) of § 107(a) of CERCLA. *Id.*

69. *See* Mott & Slaughter, *Minimizing Environmental Liability for Lenders: The Most Common Mistakes*, 51 Banking Rep. (BNA) 949 (Dec. 5, 1988); 2 LENDER LIABILITY L. REP. No. 9 (March 1989); Forde, *Secured Lender Wins Decision in Liability Case; Fleet Unit Not Responsible for Pollution by Customer*, American Banker, Jan. 24, 1989; 2 LENDER LIABILITY L. REP. No. 6 (Dec. 1988).

70. *Permissible Scope of Activity at Issue for Lenders in Eleventh Circuit Appeal*, 4 Toxics L. Rep. (BNA) 411 (Sept. 13, 1989)[hereinafter *Appeal*].

71. In a typical commercial loan agreement, the lender may require the borrower to meet ongoing financial tests covering its net worth, working capital, cash flow, net earnings, debt to worth ratio, and other similar measures of financial health.

any funds on environmental safety. The courts might reach a similar result when a lender's tight control over the cash flow of a borrower had effectively prevented the borrower from making expenditures to prevent toxic substance releases. Many forms of asset-based lending give rise to such control over a borrower's cash flow. For instance, a lender may take a security interest in a borrower's inventory and accounts receivable, and control the cash flow of the borrower by setting up a lock box account or similar device.[72] Such control might also be found in construction loans, where lenders typically advance construction costs in stages and only after receiving satisfactory evidence that construction is proceeding as planned. Finally, such control may exist in workout financing, where lenders typically attempt to exercise greater control over borrowers in order to limit the greater risk inherent in this sort of financing.[73]

4. Inconsistent with Due Diligence

The rule of limited involvement suggested by *Mirabile* conflicts with the due diligence required to avoid owner liability under *Maryland Trust* in the event of foreclosure.[74] By limiting its involvement in its borrower's affairs to financial matters, a lender may preclude itself from engaging in the due diligence and supervision necessary to monitor and prevent hazardous substance releases that may result in owner liability. As noted above, lenders secured by real property often require environmental audits of the property both before the loan is made and during the term of the loan. Such audits should not, by themselves, constitute the type of involvement that could lead to liability under *Mirabile*. If such an audit discloses a problem, however, then the lender faces a no-win situation. If the lender requires the borrower to clean up the problem, and especially if the lender monitors or supervises the cleanup, it may be deemed to have crossed the *Mirabile* line by participating in the borrower's management. If the lender takes no action, however, the problem may never be corrected, and the lender may face owner liability upon foreclosure of the site.

72. For example, in Clark Pipe & Supply Co. v. Associated Commercial Corp., 870 F.2d 1022 (5th Cir. 1989), the lender and the borrower entered into an asset-based financing arrangement that required the borrower to deposit all of its collections into a lock box under the lender's control. The lender advanced the cash to the borrower based on a formula of eligible inventory and accounts receivable. These cash advances, which were discretionary on the part of the lender, represented the borrower's sole source of cash. When the business of the borrower began to fail, the lender reduced the advance rate, permitting the borrower sufficient funds to continue its operations and to sell inventory, the proceeds of which were paid to the lender under the lock box arrangement. The court held that the lender had exercised its power in such a way as to prevent the borrower from making payments to its unsecured creditors, and consequently ordered the lender's claim against the debtor to be equitably subordinated. *Id.* at 1029-30. For further analysis of this case, see 3 LENDER LIABILITY L. REP. No. 2 (Aug. 1989).

73. A loan workout is a renegotiation of the terms of an existing loan, where the existing loan is in default or in danger of default.

74. The "limited involvement" test is also inconsistent with the "appropriate inquiry" required to claim the innocent purchaser defense to CERCLA liability. *See infra* notes 91-101 and accompanying text.

5. Wrongful Failure to Act

EPA apparently has determined to deny the benefit of the *Mirabile* rule to any lender that possesses the power to control its borrower, even when this power was never exercised. For example, in the *Fleet Factors* appeal, the United States has claimed that Fleet knew of the presence of hazardous substances at the facility, "yet rather than remedy the situation, it left the barrels to rust and leak . . . ."[75] The United States also accused Fleet of wrongful conduct,[76] and this accusation will likely predominate at trial. However, the accusation that Fleet wrongfully failed to act is potentially more troubling to lenders, as a doctrine of wrongful failure to act may deny lenders the ability to avoid CERCLA liability by limiting their involvement with borrowers.[77]

In conclusion, lenders have good reason to worry that making loans to environmentally sensitive borrowers may lead to operator liability under CERCLA. The EPA is attacking the suggestion in *Mirabile* that lenders may avoid CERCLA liability by limiting their involvement in the day-to-day affairs of borrowers;[78] and even if this attack should fail, *Mirabile* does not set forth clearly the extent to which a lender may become involved in the affairs of a borrower without risking operator liability. As is the case with owner liability, a lender can best avoid operator liability under CERCLA by refusing to make loans to companies that may conceivably be faced with environmental liability.

C. Exceptions to Owner and Operator Liability

CERCLA sets forth two primary exceptions to owner and operator liability that are applicable to lenders.[79] The first exception is for lenders that hold "indicia of ownership primarily to protect [their] security interest" in a facility and that have not participated in the management of the facility.[80] As discussed above, this exception applies only to lenders that have not taken title to the facility after foreclosure and have not intervened in the day-to-day affairs of the borrower operating the facility. The severe limitations posed by this exception, and the uncertainty of its application, greatly restrict its usefulness.

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75. *See Appeal supra* note 70, at 411.

76. *Id.* at 412.

77. The United States has pursued its theory of wrongful failure to act in cases such as *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1203-04 (E.D. Pa. 1989), in which the government has accused a parent corporation of wrongfully failing to control the activities of its subsidiary.

78. *See Appeal supra* note 70, at 411-12.

79. A lender qualifies for a third exception to liability if the lender can prove that the release of hazardous substances in question was caused solely by an act of God or war. 42 U.S.C. § 9607(b)(1)-(2) (1988). Lenders usually cannot determine the cause of a hazardous substance release. Lenders usually stumble across hazardous substance contamination as a fait accompli that may have occurred at any time or at multiple times over a period of years. Thus lenders face impossible odds in most instances in attempting to prove that the contamination is due solely to an act of God. For this reason, we have focused our attention on the "good faith" exception set forth in *Id.* § 9607(b)(3), which is potentially useful to lenders.

80. *Id.* § 9601(20)(A).

The second primary exception to lender liability under CERCLA is the third-party defense found in section 107(b)(3).[81] In order to establish the third-party defense under section 107(b)(3), the lender must show:

(1) that the release of hazardous substances was caused solely by the act or omission of a third party other than (a) an employee or agent of the lender or (b) a person whose act or omission occurs "in connection with a contractual relationship . . . existing directly or indirectly" with the lender;

(2) that the lender exercised due care with respect to the hazardous substance concerned; and

(3) that the lender took precautions against foreseeable acts or omissions of third parties and the foreseeable consequences of such acts.[82]

The first component of the third-party defense is the most difficult to satisfy, and thus it has received the most attention.[83] One could argue that in order to prove that a hazardous substance release was caused solely by the act or omission of an unrelated third party, it would be necessary to identify the responsible party. Most lenders would find this piece of detective work difficult or impossible to accomplish. Fortunately, EPA has interpreted this provision to require that the lender prove only that it did not itself participate in or contribute to the release of the hazardous substances in question.[84] Based on the language in section 107(b)(3), the lender must also prove that no agent or employee of the lender contributed to such hazardous release.

The sole remaining burden under this component of section 107(b)(3) is to prove that the lender had no direct or indirect contractual relationship with any person whose act or omission caused the hazardous substance release. This component of the third-party defense has generated considerable controversy. In *United States v. Hooker Chemicals & Plastics Corp.*[85] the court held that a real property deed could create a contractual relationship under section 107(b)(3). Consequently, the third-party defense would be unavailable to a purchaser of a contaminated facility from a seller who had caused the contamination, and to a seller of a contaminated facility where the buyer subsequently contributes to the contamination.[86] EPA has interpreted section 107(b)(3) even more broadly than the court in *Hooker Chemicals*. According to EPA, any landowner in the chain of title that had caused or

81. *Id.* § 9607(b)(3).

82. *Id.*

83. *See infra* notes 85-101 and accompanying text.

84. EPA has stated that the requirements of CERCLA § 107(b)(3) are substantially the same as the requirements that must be satisfied under CERCLA § 122(g)(1)(B) in order for EPA to consider a de minimis settlement. EPA Memorandum, Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property at 7 (1989) [hereinafter EPA Guidance]. Under CERCLA § 122(g)(1)(B), EPA may settle with a potentially responsible party that did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, and did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission. 42 U.S.C. § 9622(g)(1)(B)(ii)-(iii) (1988).

85. 680 F. Supp. 546 (W.D.N.Y. 1988).

86. *Id.* at 558.

contributed to the release would be ineligible for the third-party defense.[87] This interpretation would have rendered the third-party defense virtually useless to lenders.

Fortunately for lenders, the SARA amendments to CERCLA have added a definition of "contractual relationship" that has partially resurrected the third party-defense.[88] The definition confirms the *Hooker Chemicals* holding that a contractual relationship can be created by means of a land contract, deed, or other contract transferring title or possession.[89] However, the definition provides that a contractual relationship does not exist if the buyer can establish that it acquired the site without knowledge or reason to know of the existence of the hazardous substance at the site.[90] This provision has come to be known as the innocent purchaser defense. To establish eligibility for this defense, the buyer must show that "at the time of purchase" it made "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability."[91] The extent of the inquiry required for this exception depends in part on the relationship of the purchase price to several variables, including the value of the property if uncontaminated,[92] commonly known or reasonably ascertainable information about the property, the obviousness of the contamination, the ability to detect the contamination by appropriate inspection, and "any specialized knowledge or experience" of the buyer.[93]

The dictate to consider the buyer's "knowledge or experience" may create special difficulties for lenders, because lenders are likely to be regarded as particularly well-suited to spot potential environmental contamination. EPA has expressly recognized this fact, and has indicated that it will hold commercial lenders to a higher standard of knowledge than many other types of property owners.[94] At a minimum, the lender will be expected to visually inspect the property.[95] EPA may also require the lender to hire an environmental inspector to survey the property for contamination,[96] and to examine the chain of title to determine whether the property may have been owned at one time by a generator of hazardous substances.[97] A lender may

87. EPA Guidance, *supra* note 84, at 5. Despite the sweeping nature of the EPA pronouncement, any person who sold a site prior to its contamination should not be liable under CERCLA, since such a person would not have been an owner or operator at the time of the contamination. *See* 42 U.S.C. § 9607(a)(2) (1988). However, it may be difficult or expensive for a prior owner to prove that contamination of the site began after the prior owner's sale of the site.

88. 42 U.S.C. § 9601(35) (1988).

89. *Id.* § 9601(35)(A).

90. *Id.* § 9601(35)(A)(i).

91. *Id.* § 9601(35)(B).

92. *Id.* One commentator has noted that foreclosing lenders may have difficulty satisfying this provision, given the fact that foreclosure sales are often made at a price below fair market value. Burkhart, *supra* note 4, at 354. However, nothing in this statute precludes a court from factoring into this equation the discount to fair market value inherent in foreclosure sales.

93. 42 U.S.C. § 9601(35)(B) (1988).

94. *See* Burkhart, *supra* note 4, at 355 (discussing the court's holding in *Maryland Bank*).

95. This is the position of EPA. EPA Guidance, *supra* note 84, at 12 n.11.

96. *Id.* at 12.

97. Burkhart, *supra* note 4, at 352-54.

also wish to consult the National Priorities List (NPL)[98] and similar lists of contaminated property maintained by state environmental agencies, records pertaining to the Resource Conservation and Recovery Act of 1976,[99] community right-to-know lists maintained in accordance with the Emergency Planning and Community Right to Know Act of 1986,[100] and discharge permits.[101]

The innocent purchaser defense provides the only meaningful defense available under CERCLA to a lender that has potential liability as an "owner" or "operator" of a hazardous substance site under CERCLA. However, a number of severe limitations restrict this defense as applied to lenders. These limitations are as follows:

1. High Burden of Proof

The burden of proving eligibility for the defense falls to the person claiming eligibility.[102] Lenders may experience difficulty proving the many elements of the innocent purchaser defense. In particular, the "appropriate inquiry" required by the SARA amendment[103] may be difficult to demonstrate.

2. Limited Availability

Lenders with knowledge of the presence of hazardous substances on the site may not utilize the innocent purchaser defense.[104] In addition, given the definition of "contractual relationship" provided by the SARA amendments, lenders that have grounds to *suspect* the presence of hazardous substances at the site may forfeit eligibility for this defense.[105] Thus, only lenders that have inadvertently become the owners or operators of a hazardous substance site in spite of their exercise of appropriate inquiry may use the defense.

3. Inapplicability to Due Diligence at Closing

A lender's exercise of appropriate inquiry at the time a loan is closed and a mortgage is taken will not bear on the availability of the innocent purchaser

98. The National Priorities List (NPL) is required to be developed by EPA pursuant to § 105(a)(8) of CERCLA. It provides the basis for ordering the priority of CERCLA expenditures. No CERCLA funds may be expended on sites not listed on the NPL. 1 D. STEVOR, LAW OF CHEMICAL REGULATION AND HAZARDOUS WASTE § 6.06[2][b]-[c] (1989).

99. 42 U.S.C. §§ 6901-6987 (1988) (commonly known as RCRA). RCRA subtitle C provides for the regulation of ongoing hazardous waste management activities by generators, transporters, and owners and operators of treatment, storage, and disposal facilities. While RCRA establishes liability for certain activities, it does not pose the same threat of lender liability as CERCLA. Consequently, a complete discussion of the RCRA liability scheme is beyond the scope of this Article.

100. Pub. L. No. 99-499, 100 Stat. 1614 (1986) (codified at 42 U.S.C. §§ 11001-11005, 11021-11023, and 11041-11050 (1988)).

101. Gieser, *supra* note 3, at 682-83 n.194.

102. State v. Time Oil Co., 687 F. Supp. 529, 531 (W.D. Wash. 1988) (addressing the issue at the summary judgment stage).

103. *See supra* note 91.

104. *See supra* note 90.

105. *Id.*

defense, for the SARA amendments require that appropriate inquiry be made at the time the lender acquires the site in question.[106] This condition apparently requires that the lender make its inquiry prior to purchasing the site at a foreclosure sale.[107]

4. *Limitations on Transferability of Defense*

A lender eligible for the innocent purchaser defense may not tranfer its protected status.[108] Each owner or operator of a site must independently establish its eligibility for the defense.[109] Moreover, if an eligible lender learns of the presence of hazardous substances on a site after taking title, it must disclose such presence to any prospective buyer of the site,[110] and such disclosure would disqualify the prospective buyer from claiming the innocent purchaser defense. Thus, even when the defense is available, the lender may have no option but to hold the contaminated site until it is cleaned up by private or EPA action.

In short, the innocent purchaser defense only helps lenders already in trouble. If the lender has inadvertently taken title to contaminated property, the innocent purchaser defense may offer the only escape from liability. Even in such instances, lenders will find the innocent purchaser defense procedurally difficult, given the high burden of proof, and of limited utility, since the availability of the defense does not allow a lender to sell contaminated property unless the lender has no knowledge of the contamination at the time of the sale. Moreover, a lender that has knowledge prior to foreclosure that the mortgaged property is contaminated may not avail itself of the defense.

II. PURCHASER AND PRE-PURCHASE AGREEMENTS

The EPA guidelines for purchaser and pre-purchase agreements as set forth in the EPA Guidance[111] provide the most promising source of a safe harbor for lender liability under CERCLA. These agreements grew out of the authority granted to EPA by section 122(g)(1)(B) of CERCLA,[112] which authorizes EPA to reach settlements involving "only a minor portion of the response costs" at a facility whenever such a settlement would be "practicable and in the public interest" and would involve "only a minor portion of the response costs at the facility concerned."[113] Pursuant to this authority, EPA may enter into two types of settlement: purchaser agreements with

106. 42 U.S.C. § 9601(35)(A)(i) (1988).

107. For an argument that "appropriate inquiry" at closing may be sufficient for purposes of the innocent purchaser defense, see Seneker, *supra* note 43, at 378-79 n.76.

108. This conclusion follows from the language of § 107(b)(3) of CERCLA, which requires each person claiming eligibility for the innocent purchaser defense to prove each of the elements set forth in note 82 *supra* and accompanying text.

109. *Id.*

110. 42 U.S.C. § 9601(35)(C) (1988).

111. *See supra* note 84.

112. 42 U.S.C. § 9622(g)(1)(B) (1988).

113. *Id.*

certain existing landowners and pre-purchase agreements with certain prospective landowners.[114]

A. Purchaser Agreements

Purchaser agreements are available only to persons or entities potentially liable as owners under section 107(a) of CERCLA.[115] Under the EPA Guidance, in order for an owner of a contaminated site to be eligible to enter into a purchaser agreement, the owner must not have (1) conducted or permitted the generation, transportation, storage, treatment, or disposal of any hazardous substance at the site, (2) contributed to the release or threatened release of any hazardous substance at the site through any act or omission, and (3) known or had reason to know that the site was used for the generation, transportation, storage, treatment, or disposal of any hazardous substances.[116] EPA has admitted that these requirements are substantially the same as those necessary for the innocent purchaser defense under CERCLA.[117]

The EPA Guidance sets forth a model purchaser agreement with EPA.[118] Based upon this model and the provisions of the EPA Guidance, owners entering into such agreements should be prepared to agree to grant EPA access to the affected site, cooperate in EPA cleanup activities, take due care with respect to the hazardous substances at the site, and waive any claims against the United States arising as a result of response activities at the site.[119] Perhaps most importantly, EPA will require that the owner make cash payments to EPA in order to fund all or a portion of the cleanup costs, unless the owner makes a "thoroughly convincing demonstration" that it is eligible for the innocent purchaser defense.[120] In exchange for the foregoing covenants and payments, EPA will provide the owner with statutory protection under CERCLA.[121] Significantly, EPA grants this protection only to the owner.[122] Protection does not extend to a purchaser of the site from the owner.[123]

Entering into a purchaser agreement is a relatively complicated procedure. The owner of the site must come forward with information to establish eligibility.[124] This information includes all evidence relevant to the actual and constructive knowledge of the owner at the time of acquisition, including evidence that the owner made the appropriate inquiry required

114. EPA Guidance, *supra* note 84.
115. The EPA Guidance provisions on purchaser agreements consistently speak of "landowner" eligibility for settlement under such agreements. *See* EPA Guidance, *supra* note 84, at 9-16.
116. *Id.* at 6-7.
117. *Id.*
118. *Id.* attachment I.
119. *Id.* at 20-21.
120. *Id.* at 19-20.
121. *Id.* at 21.
122. *Id.*
123. *See* Sample Administrative Order On Consent attached to *id.* at 7, para. 13.
124. *Id.* at 17.

under the innocent purchaser defense, as well as evidence of the due care taken by the owner once hazardous substances were discovered.[125] The agreement takes the form either of a judicial consent decree or an administrative order on consent.[126] All agreements reached with an owner by a regional office of EPA require the approval of the U.S. Department of Justice, in consultation with the EPA Assistant Administrator for Enforcement and Compliance Monitoring and the EPA Assistant Administrator for Solid Waste and Emergency Response.[127] The Federal Register publishes all such agreements for a thirty-day comment period.[128] The EPA may withdraw an agreement on the basis of any comments received.[129]

Purchaser agreements provide lenders with little more protection than does the innocent purchaser defense. Indeed, a cynic might conclude that purchaser agreements are simply a tool used by EPA to cause persons innocent of CERCLA liability to contribute to the cost of CERCLA cleanups. However, these agreements may have some utility for lenders who inadvertently become owners of contaminated facilities. For at least some of these lenders, the cost of entering into a purchaser agreement may be less than the cost of establishing an innocent purchaser defense at trial. In addition, by having CERCLA liability fixed at an early stage, a lender may find it possible to reduce the size of the loss reserve associated with a loan secured by a contaminated facility.[130] Finally, lenders may find it advantageous to pay EPA a certain amount in order to remove the risk that it may be held liable for a larger amount under CERCLA. Nevertheless, purchaser agreements suffer from all of the infirmities associated with the innocent purchaser defense: they are procedurally difficult to obtain, are applicable only to lenders already facing CERCLA liability, and require the lender to wait until EPA cleans up the site before the lender has a realistic chance to sell the property.[131]

B. Pre-Purchase Agreements

Both the innocent purchaser defense and purchaser agreements provide limited relief to lenders who innocently and accidentally become, by CERCLA definition, owners of contaminated facilities. In order to establish eligibility for this protection, the lender must have made a comprehensive environmental investigation prior to foreclosure. Further, the investigation must have failed to reveal the presence of hazardous substances at the facil-

125. *Id.* at 18.
126. *Id.* at 23.
127. *Id.* at 24. In addition, the EPA Assistant Administrator for Enforcement and Compliance Monitoring and the EPA Assistant Administrator for Solid Waste and Emergency Response must approve the first purchaser agreement negotiated by each EPA region prior to referral to the U.S. Department of Justice. *Id.*
128. *Id.* at 25.
129. *Id.*
130. *See* U.S. Office of the Comptroller of the Currency, *Clarification of Bad Debt Reserve Policies*, Banking Bulletin No. 76-1 (Nov. 16, 1976), *reprinted in* 5 Fed. Banking L. Rep. (CCH) ¶ 59,425.
131. *See supra* note 108 and accompanying text.

ity in question. If the investigation reveals the presence of hazardous substances at the site, then neither protection is available and the lender must consider whether the risk of CERCLA liability outweighs the benefits of selling the site at a foreclosure sale. The requirement of such analysis raises a new issue: how to *quantify* the cost of remedying the conditions identified by the site assessment, as well as the cost of identifying and satisfying all government claims for cleanup costs.

Quantifying the liability assumed by a foreclosing lender presents a particularly difficult problem when the source of contamination on the property is unknown or potentially attributable to many parties. A new type of NPL site that EPA has begun addressing in the past few years illustrates the problem. These are multi-party and multi-property sites where an entire geographic area is contaminated—a bay, lake, or large underground aquifer, for example. At these sites, the source of the contamination frequently remains unknown or the contamination may be attributable to numerous property owners whose precise degree of responsibility cannot be accurately allocated. As a result, owners and operators of property adjoining or overlying bodies of contaminated surface or groundwater are being held responsible, jointly and severally, for the costs of remedying the contamination.[132] The cleanup of these sites may involve dozens of parties, tens of millions of dollars in total costs, and remedial action and liability extending over decades.[133] A lender deciding whether to loan or foreclose on such a property cannot easily determine whether it is assuming a liability amounting to pocket change or millions of dollars.

Until recently, a lender who discovered contamination in a pre-foreclosure site assessment essentially had only two options: conclude that the cost of remediation was small enough to justify foreclosure or write off the loan and walk away from the property. Prior to issuing the EPA Guidance, EPA declined numerous requests to enter into pre-purchase agreements that would provide prospective purchasers with a covenant not to sue in exchange for some benefit provided by the purchaser.[134] The EPA Guidance

132. For example, at the Motorola site in Arizona, owners of twelve properties are being asked to remediate contaminated groundwater in the area. California EPA has announced its intention to order a dozen property owners in Menlo Park, California, to clean up groundwater in the area and to order some 27 companies in the Burbank, California, area to clean up contamination of the San Fernando Valley Basin—an aquifer of 112,000 acres, which provides drinking water to parts of Los Angeles. At Commencement Bay near Tacoma, Washington, over 50 owners of 10 to 12 square miles of shallow water, shoreline, tide flats, and upland areas have been informed that EPA expects them to finance the cleanup of sediments contaminated by decades of runoff and disposal. At each of these sites, the total cost of investigation and remediation is expected to approach or exceed $100 million. EPA, Commencement Bay—Near Source—Tie Flats Superfund Sites, General Information Packet for Property Owners and Businesses (April 1989).

133. *Id.*

134. In one instance, EPA Headquarters Office of Enforcement and Compliance Monitoring (OCEM) successfully objected to a proposed agreement vigorously supported by EPA Region VIII. The proposed agreement involved two parcels in Denver with an estimated cleanup cost of only $25,000. The lender for the bankrupt owners of one of the parcels wished to foreclose during the period that the contamination would be cleaned up if a release from liability could be negotiated with the bank willing to pay the entire cost of cleanup. OCEM's objec-

now opens the door a crack to such agreements. The words with which EPA announces its EPA Guidance suggest, however, just how small a crack this may be: "It is [EPA's] policy not to become involved in private real estate transactions."[135] Nevertheless, lenders should consider such pre-purchase agreements when foreclosure on contaminated property is at issue.

1. Criteria for Pre-Purchase Agreements

According to the EPA Guidance, EPA may appropriately consider an agreement providing prospective purchasers of property with a covenant not to sue where at least all of certain enumerated criteria are satisfied.[136]

(a) *EPA Must Receive a Substantial Benefit Not Otherwise Available.*[137] EPA must receive either a substantial monetary benefit[138] or the performance of response actions[139] where "performance of or payment for cleanup would not otherwise be available."[140] This feature seems to make the pre-purchase agreement ideally suited to the foreclosure situation, where the current owner is unable to repay the loan and thus probably lacks the resources to finance cleanup. To assure that this benefit is actually realized, EPA requires a showing that the prospective purchaser is financially capable of performance under the agreement.[141]

(b) *An Enforcement Action Must Be "Contemplated" by EPA.*[142] At a minimum, the site must be listed on the NPL[143] or the EPA must have expended Superfund monies thereon in order for the site to be the subject of a pre-purchase agreement.[144] This requirement limits the current availability of such pre-purchase covenants to a few thousand properties at most.[145]

(c) *The Operation or Development of the Property Must Not Aggravate the Environmental Problem, Interfere with Cleanup, or Pose a Health Risk to*

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tions included the positions that no public policy exists for facilitating real estate transactions, that EPA is biased against encouraging land speculation based on ground rules that would ease the minds of purchasers with no public benefit (the amount involved was too small), and extension of liability protection to future purchasers would foreclose access to "deep pockets" in the future, if necessary. This policy debate overlooked the fact that if purchasers are discouraged from buying property from bankrupt parties because of the liability, the cost of cleanup must be paid from the Superfund.

135. EPA Guidance, *supra* note 84, at 25.

136. *Id.* at 28-31.

137. *Id.* at 28.

138. *Id.* EPA does not define the term "substantial." However, experience at one site where the authors have been negotiating a pre-purchase agreement for a foreclosing lender may shed some light on this issue. There, eight properties, including the one on which foreclosure is contemplated, share joint liability for the contamination. EPA has asked the lender to pay well over half the estimated cleanup costs even though the owners of the other properties are financially viable.

139. EPA Guidance, *supra* note 84, at 28.

140. *Id.* at 25.

141. *Id.* at 31.

142. *Id.* at 28.

143. *Id.*

144. *Id.*

145. There are currently 1175 sites on the proposed NPL. Action, *Understanding Superfund, A Progress Report*, viii (Rand Corporation 1989).

Those on the Site.[146] This condition will probably require that EPA and others conducting the work be provided with a right of access across the property, and possibly with a continuing right to inspect the property.

On its face, the EPA Guidance appears to provide a promising vehicle for removing the obstacles now blocking so many loans, purchases, or foreclosures. Time will reveal whether that promise is realized in implementation. Much reason for skepticism exists.

Every page of the EPA Guidance evidences EPA's lack of enthusiasm for these pre-purchase agreements.[147] EPA makes no commitment of any kind actually to enter such pre-purchase agreements when the applicable criteria are met,[148] promising only to consider doing so.[149] The criteria are tough, expensive, and inflexible. The EPA Guidance specifies that any agreements negotiated thereunder must be approved, not only by several EPA divisions in the Region and at EPA headquarters in Washington, but also by the Attorney General.[150] Thus, even if an agreement can be negotiated and approved, the time required for the process may make it impractical for most transactions. Thus it is not surprising that four months after the issuance of the EPA Guidance, only one pre-purchase agreement has been entered into.[151] That single agreement addresses a situation so unique that it provides little insight as to how and whether EPA will respond to more typical situations.

2. *Use of Pre-Purchase Agreements by Foreclosing Lenders*

From EPA's point of view, pre-purchase agreements appear made to order for the foreclosure situation.[152] Presumably, the borrower can no more easily pay its clean-up costs than repay its loan. The amount paid by the lender to EPA in a pre-purchase agreement thus would appear to satisfy the requirement that EPA receive a substantial benefit not otherwise available. Moreover, since a foreclosure may proceed at a slower pace than a typical purchase and sale transaction, it may better suit the potentially lengthy agency review process.

However, two aspects of the EPA pre-purchase agreement program se-

146. EPA Guidance, *supra* note 84, at 29.

147. The statement that EPA policy is "not to become involved in private real estate transactions" is repeated twice in the first four pages. *Id.* at 25 and 28.

148. *See id.* at 25.

149. *Id.*

150. *Id.* at 31.

151. Agreement and Covenant Not to Sue Re: Kellogg Gondola Project Located Within the Bunker Hill Superfund Site, U.S. E.P.A. Region 10 No. 1089-07-01-122. There, the City of Kellogg had received a $6.4 million appropriation from the United States Government to fund the construction of a gondola transport system expected to expand the economy of the area. The site of the proposed project was within the boundaries of the Bunker Hill Superfund Site—an area covering several square miles and involving several responsible parties. In exchange for agreements to pave the parking lots for the gondola and grade and encapsulate areas of contaminated soil at a cost of "at least $10,000," EPA provided a covenant not to sue to the owners and operators of the gondola. *Id.*

152. While the EPA Guidance does not define "purchase," nothing suggests that the term excludes foreclosure.

verely limit the appeal of this program to lenders. First, as noted above, EPA will agree to pre-purchase agreements only with respect to facilities where EPA action is contemplated. This limits the availability of the program to a relatively small number of facilities. Second, and more importantly, EPA apparently will not permit the assignment of the covenant not to sue contained in the pre-purchase agreement. In a section entitled "Reservation of Rights," the EPA Guidance specifies that "[T]he agreement should also expressly reserve the Agency's rights to assert all claims and causes of actions against all persons other than the purchaser."[153] Some EPA staff members have suggested that if EPA enters into a pre-purchase agreement with a foreclosing lender, it will insist on the right to sue subsequent purchasers, the lender's successors-in-interest, over pre-foreclosure environmental conditions.

If EPA limits the benefits of pre-purchase agreement covenants not to sue to only the party entering into the agreement with EPA, such agreements will hold little or no appeal to lenders seeking to foreclose upon environmentally contaminated property. Such an agreement would permit a lender to take title to a facility without risk of CERCLA liability, but would not permit a lender to sell the facility free of such liability. Since a lender's only interest in foreclosing upon property is to sell the property in order to recoup all or a portion of its loan, a lender will rarely desire to enter into such an agreement unless the property can be sold for a material amount, notwithstanding the risk to the purchaser of CERCLA liability. The possibility of such a sale will be remote in most cases.

EPA's reluctance to allow for the transferability of its pre-purchase agreement covenants not to sue makes little sense on either legal or policy grounds, at least when the agreement is entered into with a lender. EPA bases its position on this point on the hope that it can cause the purchaser at the foreclosure sale, as well as the lender, to contribute to the cost of cleanup. As noted above, however, such an interpretation provides a foreclosing lender no incentive to enter into a pre-purchase agreement. Without foreclosure EPA will not even have recourse to the substantial benefit contributed by the lender towards the cost of cleanup. In addition, courts have not imposed liability for *past* contamination on a current owner after the past owner has fully discharged liability for its contribution to such contamination. The EPA Guidance requirement for a reservation of rights against other persons should thus not be read to include successors-in-interest that do not themselves cause contamination.

The pre-purchase agreement may prove to be a useful tool for foreclosing lenders, especially in the absence of legislation or a definitive court decision providing lenders with some way to foreclose on environmentally contaminated property. However, unless EPA is willing to broaden the number of facilities eligible for pre-purchase consideration and to extend the covenant not to sue to cover purchasers at foreclosure sale, the utility of pre-purchase

153. EPA Guidance, *supra* note 84, at 34. Indeed, the single pre-purchase agreement entered into to date contains precisely such a reservation. *See supra* note 151.

agreements will be severely limited.[154]

III. CONCLUSION

The spectre of lender liability under CERCLA threatens to stop lenders from making loans with any component of environmental risk. The severe risk of CERCLA liability, combined with the uncertain nature of the law in this area, has led many lenders to conclude that there is no safe way to make loans to environmentally sensitive borrowers. The unfortunate consequences of this conclusion extend not only to many borrowers, but also to EPA and the taxpayer. Without available bank financing, most CERCLA cleanups will have to be paid from the Superfund.

In order to reduce the risk of lender liability under CERCLA to an acceptable level, a safe harbor must be found for lenders to lend to borrowers with potential or actual CERCLA liability. Unfortunately, neither cases such as *Mirabile* and *Maryland Trust* nor the innocent purchaser defense under CERCLA offer such a safe harbor. The only promising source of such a safe harbor is the availability of protection under pre-purchase agreements with EPA. In order for the availability of such agreements to be meaningful to lenders, however, EPA must broaden the number of facilities eligible for coverage and extend the protection afforded to purchasers from lenders at foreclosure.

154. After this article went to press, the court decided *Guidice v. BFG Electroplating & Manufacturing Co.*, 30 Env't Rep. (BNA) 1665 (W.D. Pa. 1989). The case is important on two points. First, it follows *Maryland Bank*, *supra* note 43, in holding the CERCLA's security interest exemption does not apply after a lender has foreclosed and taken title. 30 Env't Rep. (BNA) at 1671. Second, *Guidice* illustrates the vitality of the rule in *Fleet Factors*, *supra* note 66, that "general and even isolated instances of specific management advice" to a debtor will not automatically void the security interest exemption. In *Guidice*, National Bank of the Commonwealth escaped pre-foreclosure liability even though it had communicated with government agencies respecting its debtor's environmental obligations and provided additional financing for a partial site cleanup. The court reasoned that a different rule would discourage monitoring of the environmental compliance status of debtors by lenders and thus run counter to CERCLA's goal that hazardous substances be handled and disposed of safely. 30 Env't Rep. (BNA) at 1669, 1670.