1-1987

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When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Act)\(^1\) requires the cleanup of abandoned and inactive hazardous waste sites. The Act imposes liability for cleanup costs on three broadly defined classes of persons connected to waste disposal: site owners or operators,\(^2\) generators,\(^3\) and transporters.\(^4\) Because of the tremendous cost of hazardous waste cleanup,\(^5\) the judicial trend has been to extend liability to parties whose connection to waste disposal may be less than obvious.\(^6\)

Lending institutions are the most recent group to face CERCLA liability. A lender that forecloses on and takes title to property held as security for its loan may be liable for cleaning up hazardous wastes\(^7\) de-

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* This Note won first prize in the Natural Resources Section Student Writing Competition sponsored by the American Bar Association.

5. The United States Environmental Protection Agency (EPA) estimates that the average expenditure per CERCLA site is roughly $12 million. See Amendment to National Oil and Hazardous Substances Contingency Plan: The National Priorities List, 49 Fed. Reg. 40,320, 40,325 (1984). Total cost estimates for hazardous waste cleanup vary greatly due to the uncertainty of the number of sites. EPA projections show that the cost of remedying 1800 of the most threatening sites will require an expenditure of $23 billion. See EPA OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, EXTENT OF THE HAZARDOUS RELEASE PROBLEM AND FUTURE FUNDING NEEDS CERCLA § 301 (A)(1)(C) STUDY, FINAL REPORT (Dec. 1984). The Congressional Office of Technology Assessment estimates that cleaning up the 10,000 existing CERCLA sites could cost $100 billion and require 50 years to accomplish. See CONGRESSIONAL OFFICE OF TECHNOLOGY ASSESSMENT, SUPERFUND STRATEGY 3 (1985).
posited by the borrower. Because landowners are strictly liable under CERCLA, a lender that becomes an owner cannot avoid liability by disclaiming knowledge of or involvement in the borrower's disposal activities. Thus, a foreclosing lender may be exposed to liabilities beyond the value of its loan or its security. Secured lenders dispute this result, relying on a provision in CERCLA that expressly excludes a party "who, without participating in the management of a [waste disposal site], holds indicia of ownership primarily to protect his security interest." They maintain that this exculpatory language protects their actions in foreclosing, even when it leads to actual ownership.

Courts have disagreed over whether CERCLA's security interest exemption insulates a lender that succeeds in title to property to satisfy a secured debt. With 378,000 potential CERCLA sites in this country today and millions of tons of industrial wastes produced each year, exposing lenders to cleanup costs would have far-reaching implications for commercial lenders and those seeking their services. The immediate effect of such a rule likely would be to discourage lenders from foreclosing when the cleanup costs exceed the value of the security.

This straightforward cost-benefit analysis is complicated by con-
straints on a lender's ability to discover hazardous wastes on the property prior to foreclosure. A secured creditor enjoys protection from CERCLA liability only to the extent that it does not "participate in the management" of the security property. Therefore, a lender may be liable if it attempts to monitor the condition of the property prior to foreclosure. This construction forces a lender to walk a narrow path: it must know of potentially hazardous conditions, but must not become so involved that it forfeits the exemption and incurs liability.

This Note examines the dispute over lender liability under CERCLA. Section I provides an overview of CERCLA provisions that affect a lender's responsibility for its borrower's waste disposal obligations. Section II reviews general real estate financing principles and their potential for conflict under CERCLA. Section III surveys the court decisions that address the issue of lender liability and compares the alternative constructions of the security interest exemption adopted by the courts and the conflicting results they yield. Section IV evaluates lender liability in light of Congress' intentions for hazardous waste cleanup. This Note concludes, after reviewing CERCLA's history and structure, that a lender succeeding in title to its security property is a proper CERCLA defendant. It also proposes that the statute should be interpreted to allow lenders to police their security interests without incurring liability. This proposal preserves the remedy of foreclosure and encourages safer hazardous waste disposal practices.

I. CERCLA Overview

Congress enacted CERCLA in 1980 to close the gaps in federal hazardous waste laws. The Act, adopted during the final days of the ninety-sixth Congress, authorizes the federal government to respond to actual or threatened releases of hazardous substances. Because of the haste with which CERCLA was enacted, little legislative history exists to guide the courts in interpreting its provisions. Indeed, Congress delib-


16. In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA) to provide "cradle-to-grave" regulation of hazardous substances. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified at 42 U.S.C. §§ 6901-6987 (1982)). The RCRA regulatory scheme applies only to operating waste disposal facilities; CERCLA provides for clean up of abandoned or inactive facilities. The potential interaction between RCRA and foreclosure is beyond the scope of this Note.

17. CERCLA was approved by a lame-duck Congress just prior to the inauguration of a new administration. The legislation was adopted under a suspension of the rules that precluded amendments. No conference was held on the measure, and no report was issued on the statute as enacted. One exasperated court complained: "CERCLA is] a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions." United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984); see also
erately left politically sensitive issues relating to liability for the courts to resolve using common law principles. Thus, from the outset, the judiciary has played a central role in shaping federal hazardous waste laws. Congress affirmed this role when it reauthorized CERCLA in late 1986 without making major revisions in the law as developed by the courts.

CERCLA expressly provides for two mechanisms for hazardous waste cleanup. The President can order "potentially responsible parties" to undertake remedial measures at a hazardous waste site. Alternatively, the government can take immediate action, "response action," to remedy the problem and later sue for recovery of its expenses from the responsible parties.

To finance government response action, CERCLA created the federal "Superfund." A special tax on chemical and petroleum producers and general tax revenues provided the initial monies for Superfund. To


18. For example, CERCLA does not specify what standard of liability is to be applied. See infra notes 36-37 and accompanying text. The Act is also silent on whether liability is joint and several and whether a defendant has a right to contribution. See infra notes 52-57 and accompanying text. Congress intended that these issues be resolved by the courts. As Senator Randolph, sponsor of CERCLA, stated:

"It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms has been deleted, and the liability of joint tort-feasors will be determined under common or previous statutory law."


20. CERCLA § 106(a), 42 U.S.C.A. § 9606(a) (West Supp. 1987). Section 106(a) authorizes the President to order an abatement of a hazardous condition that poses an imminent and substantial endangerment to the public health or welfare or the environment. This authority has been delegated to the Administrator of the Environmental Protection Agency. See Exec. Order No. 12,316, 3 C.F.R. 169 (1982), reprinted in 42 U.S.C. § 9615 (Supp. I 1983).

21. CERCLA § 107(a), 42 U.S.C.A. § 9607(a) (West Supp. 1987). To recover its response costs, the government must prove that:

1. the site is a "facility";
2. a "release" or "threatened release" of any "hazardous substance" from the site has occurred;
3. the release or threatened release has caused the federal government to incur "response costs"; and
4. the defendant is one of the persons designated as a party liable for costs.


23. Of the initial $1.6 billion Superfund monies approved in 1980, 87.5% came from special taxes on petroleum and certain chemicals, see 26 U.S.C. §§ 4611-4612, 4661-4662 (1982), and 12.5% came from general revenue appropriations, see 42 U.S.C. § 9631(b)(2)
replenish the fund, the Act provides that the government may seek recovery from "responsible parties" under the meaning of the statute. Thus, absent an infusion of appropriated funds, the pace of federal cleanup efforts depends upon the government's success in recovering its costs from those responsible for creating hazardous waste problems.

Primary responsibility for conducting Superfund-financed cleanup actions rests in the Environmental Protection Agency (EPA). To carry out this responsibility, the EPA ranks potential cleanup sites on the National Priorities List according to the threat they pose to the public health and environment. Although the EPA has primary responsibility, state and local governments may also tap Superfund to finance their own cleanup efforts.

In addition to presidential orders and government response actions, CERCLA has indirectly created other hazardous waste cleanup mechanisms. The Act has encouraged private party cleanup participation. It has been interpreted as creating a new cause of action for private parties who voluntarily undertake hazardous waste cleanups, by allowing private cost recoveries against "potentially responsible parties" or Superfund.

A. Potentially Responsible Parties

CERCLA identifies four classes of potential defendants: (1) current owners and operators of hazardous waste disposal facilities; (2) owners and operators of such facilities at the time of the waste disposal; (3) hazardous waste generators that arranged for disposal of their wastes at the


29. All but ten states have enacted legislation that parallels CERCLA. See, e.g., CAL. HEALTH & SAFETY CODE §§ 25300-25395 (West 1984). States that have not enacted their own superfund programs are Alabama, Alaska, Delaware, Hawaii, Idaho, Iowa, Nebraska, North Dakota, South Dakota, and Wyoming.
facility; and (4) transporters of the hazardous substances for disposal at the facility selected by them.\(^{30}\) A waste disposal “facility” is given an extremely broad definition: it includes any fixture, equipment, or real property used to store hazardous wastes.\(^{31}\)

The first wave of CERCLA litigation focused on the liability of toxic waste generators.\(^{32}\) More recently, attention has shifted to landowners because federal authorities have urged an expansive reading of CERCLA liability.\(^{33}\) Four classes of landowners may be liable. Current owners of CERCLA sites, as well as those that owned such sites at the time of the waste disposal, are liable under section 107(a). The section 101(20)(A) definition of “owner” also includes any former owner whose interest in a property was conveyed to the government as a result of bankruptcy, foreclosure, tax delinquency, abandonment, or similar means.\(^{34}\) Finally, a landowner who transfers ownership of property without disclosing the existence of a hazardous waste condition is liable under section

\(^{30}\) Section 107(a) creates four classes of liable persons:

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

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

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

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

\(^{31}\) Section 101(9) defines the term “facility” to mean:

(A) 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

(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . .


\(^{34}\) Section 101(20)(A) defines “owner or operator” to include:

(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.


\(^{31}\) Section 101(9) has been interpreted broadly. See, e.g., New York v. General Elec. Co., 592 F. Supp. 291, 296 (N.D.N.Y. 1984) (drag strip on which contaminated oil had been applied held to be a “facility” for CERCLA purposes).


\(^{34}\) Section 101(20)(A)(iii) (West Supp. 1987).
Liability lies even when the transferor did not create the hazard, but was aware of its existence.

B. Standard of Liability

Defendants are strictly liable under CERCLA. Courts have reached this conclusion even though Congress deleted language prescribing strict liability as it hurried to adopt the legislation. Courts have noted that CERCLA language and history strongly suggest that liability is imposed without fault. Thus, a party is liable if it falls within one of the classes of culpable parties identified in section 107(a), unless it can invoke one of the affirmative defenses set forth in section 107(b). Congress tacitly approved this scheme in 1986 when it reauthorized CERCLA without changing the standard of liability.

At least one court has imposed CERCLA liability without requiring proof of causation between the defendant's actions and the hazardous waste dumping. In New York v. Shore Realty Corp., the Second Circuit rejected the defendant's claim that causation was an element of CERCLA liability, at least in the context of landowner liability. The court concluded that requiring causation would make "superfluous" one of the affirmative defenses provided under the Act, and would "open a huge loophole" in CERCLA's scheme of liability. The court's explanation is illustrative of the judiciary's broad reading of CERCLA liability:

It is quite clear that if the current owner of a site could avoid liability merely by having purchased the site after chemical dumping had ceased, waste sites certainly would be sold, following the cessation of dumping, to new owners who could avoid the liability otherwise required by CERCLA. Congress had well in mind that persons who dump or store hazardous waste sometimes cannot be located or may be deceased or judgment-proof. We will not interpret section 9607(a) [section 107(a)] in any way that apparently frustrates the statute's


36. Representative Florio, the sponsor of CERCLA, explained: "Liability [is] 'subject only to the defenses' provided in the bill.... Thus, the absence of negligence is not a defense to liability." 126 CONG. REC. 31,965 (1980).


37. See infra notes 41-47 and accompanying text.

38. 759 F.2d 1032 (2d Cir. 1985).

39. Id. at 1044-45.
goals, in the absence of a specific congressional intention otherwise.\textsuperscript{40}

Under \textit{Shore Realty}, the current owner of real property containing hazardous materials is liable for removal and remedial costs even if it neither owned the site at the time of disposal nor caused the waste to be placed there. The defendant, however, can raise the affirmative defense that the disposal was caused solely by a third party. This defense is one of three expressly provided by CERCLA, discussed in the following section.

C. Affirmative Defenses

Section 107(b) enumerates three defenses available to persons falling within CERCLA's broad liability provisions. The section exculpates an otherwise liable party who can show that the release or threat of hazardous substances and the resulting damages were due solely to acts of God, war, or an unrelated third party.\textsuperscript{41} The few courts that have been presented with section 107(b) defenses have construed the statute very narrowly. Support for a narrow construction is found in the statute's stringent conditions, which include requiring the defendant to show "by a preponderance of the evidence" that the hazardous condition was "caused solely" by one or more of the three enumerated forces.\textsuperscript{42}

The third-party defense is the most important of the three affirmative defenses. It is limited, however, by definitional requirements. The defense requires that the third party be someone "other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant."\textsuperscript{43} In addition, the defendant must show by a preponderance of the evidence that it exercised due care with respect to the hazardous substances and took precautions against the foreseeable acts or omissions of others.\textsuperscript{44}

In the context of successor landowner liability, the Second Circuit ruled in \textit{Shore Realty} that the third-party defense is available only when the hazardous substances were dumped during the defendant's owner-

\textsuperscript{40} Id. at 1045 (citations omitted).
\textsuperscript{41} CERCLA § 107(b), 42 U.S.C.A. § 9607(b) (West Supp. 1987).
\textsuperscript{42} An "act of war" is not defined in the statute; however, an "act of God" is narrowly defined to mean "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." CERCLA § 101(1), 42 U.S.C.A. § 9601(1) (West Supp. 1987).
\textsuperscript{44} CERCLA § 107(b)(3), 42 U.S.C.A. § 9607(b)(3) (West Supp. 1987).
ship or operation of the property.\textsuperscript{45} The decision had the effect of placing the third-party defense largely beyond the reach of successor landowners. In response, Congress introduced a definition of "contractual relationship" that relieves persons who unknowingly acquire property that contains hazardous wastes. This "innocent landowner" defense is extremely limited in scope: the defendant must show that it had neither actual nor constructive knowledge of the hazardous condition at the time it acquired the property.\textsuperscript{46} Furthermore, the defendant is under an affirmative duty to inquire into the previous ownership and uses of the property. In judging the reasonableness of the defendant's investigation, CERCLA expressly requires the courts to consider any specialized knowledge or experience possessed by the defendant. Finally, a person who discovers a toxic condition after acquiring the property may be liable in the event the property is transferred without disclosing the defect.\textsuperscript{47}

D. Scope of Liability

Liability under CERCLA can be enormous. Responsible parties are liable for all removal or remedial costs, plus interest.\textsuperscript{48} Responsible parties are also liable for up to fifty million dollars for damages to natural resources.\textsuperscript{49} No ceiling on liability exists when the release or threatened


The third party defense is also available to persons who acquire hazardous waste property by inheritance or bequest. \textit{Id.} § 101(35)(A)(iii), 42 U.S.C.A. § 9601(35)(A)(iii) (West Supp. 1987). To claim the defense, the defendant must show that it exercised reasonable care with regard to the hazardous substances, and took precautions against the acts or omissions of third parties. \textit{Id.} § 107(b)(3), 42 U.S.C.A. § 9607(b)(3).

\textsuperscript{47} Section 101(35)(C) states:

\[ [1] \text{If the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(0) [107(a)(0)] and no defense under section 9607(b)(3) [107(b)(3)] shall be available to such defendant.}\]


\textsuperscript{48} CERCLA § 107(a), 42 U.S.C.A. § 9607(a) (West Supp. 1987) (recovery of interest on expenses incurred added by amendment in 1986).

\textsuperscript{49} \textit{Id.} § 107(a)(4)(C), 42 U.S.C.A. § 9607(a)(4)(C); \textit{see also} \textit{id.} § 107(c)(1)(D), 42 U.S.C.A. § 9607(c)(1)(D).
release of hazardous substances results from willful misconduct, or failure on the part of the disposer to cooperate in the cleanup. Once a court has ordered an abatement action,\textsuperscript{50} failure to comply may result in a penalty of up to $25,000 per violation and fines of up to $25,000 per day of noncompliance.\textsuperscript{51}

CERCLA is silent about whether liability may be joint and several. Early versions of the legislation provided that joint tortfeasors be jointly and severally liable for the harm caused. Language to this effect was deleted, however, prior to CERCLA's enactment. Nonetheless, courts have interpreted the Act to grant them the discretionary power to impose joint and several liability.\textsuperscript{52} This interpretation allows the government to collect its total cleanup expenses from one responsible party, thereby relieving it of the burden of suing all potentially responsible parties. Moreover, the threat of full liability provides a powerful incentive for small contributors to a waste site to negotiate a settlement with the government.\textsuperscript{53} Congress affirmed this approach when it reauthorized CERCLA in 1986.\textsuperscript{54}

When Congress deleted reference to joint and several liability from the compromise CERCLA legislation prior to its enactment, it also struck specific provisions extending a right of contribution to defendants. The courts, again examining the legislative history and language of the statute as enacted, concluded that federal common law provided a right to contribution.\textsuperscript{55} Therefore, a defendant held jointly and severally liable

\textsuperscript{50} See supra note 20 and accompanying text.

\textsuperscript{51} Id. § 109(a)-(b), 42 U.S.C.A. § 9609(a)-(b) (Congress increased the maximum penalty in 1986 from $10,000 to $25,000 per day).


\textsuperscript{55} See, e.g., Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo. 1985) (contribution allowed among joint tortfeasors); Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1489-92 (D. Colo. 1985) ("Congress intended issues of liability, including . . . contribution, to be determined under traditional and evolving principles of federal common law"). For a general discussion of the right to contribution under CERCLA, see Comment, Apportionment and Contribution Under the "Superfund" Act, 53 UMKC L. Rev. 594 (1985); Note, A
is entitled to seek contribution from other potentially responsible parties. A defendant may not seek contribution, however, when it has knowingly and willfully participated in an illegal dumping of hazardous waste.\textsuperscript{56} The right of contribution was recently codified in the Superfund Amendments and Reauthorization Act of 1986.\textsuperscript{57}

### II. Lender Liability Under CERCLA

Liability for hazardous waste cleanup under CERCLA is closely linked to landownership.\textsuperscript{58} Lenders may become landowners when they acquire real property held as security for a debt under current lending practices. To understand fully lender liability under CERCLA, it is necessary to review briefly some of the basic features of commercial lending law.

To finance the purchase of real property, a buyer typically borrows some portion of the purchase price from a commercial lender\textsuperscript{59} that, in turn, secures the debt by taking a security interest in the real estate. This process involves the transfer of a real property interest\textsuperscript{60} by the borrower\textsuperscript{61} to the lender,\textsuperscript{62} to be held as security for the payment of the debt. Similarly, a landowner can obtain credit for other purposes by borrowing against the value of its existing real property holdings.

Various types of financing instruments are utilized by lenders and

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58. \textit{See supra} notes 33-35 and accompanying text.

59. Commercial banks, savings and loans associations, and mutual savings banks are common commercial lenders. Other real estate creditors include life insurance companies, pension funds, real estate investment trusts and, of course, real property sellers.

60. Three conceptual theories have been advanced to explain the nature of the interest taken by the mortgagee. At common law, a mortgagee held legal "title" to the mortgaged property until the obligation has been satisfied. This "title" was somewhat illusory: the mortgagor was treated as the owner of the property. The legal significance of the mortgagee's "title" arose only in disputes between the parties to the mortgage and their successors. \textit{See G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW} § 4.1, at 142-45 (2d ed. 1985); \textit{W. WALSH, A TREATISE ON MORTGAGES} § 5, at 26 (1934). A minority of states, primarily in the East, adhere to this position.

The prevailing view today is to treat the mortgage as conferring to the mortgagee a lien on the mortgaged property, not legal title. The lien theory has the advantage of describing more accurately the limited nature of the mortgagee's security interest. \textit{See G. NELSON & D. WHITMAN, supra}, § 4.2, at 145-49. A few states have adopted a compromise position between the title and lien theories. This intermediate theory holds that the mortgage creates a security interest by which the mortgagee's right to possession accrues on default of the mortgage debt. \textit{See id.}, § 1.5, at 10-11, § 4.3, at 149-51.

61. This Note will use interchangeably the terms "borrower," "debtor," and "mortgagor."

62. This Note will use interchangeably the terms "lender," "creditor," and "mortgagee."
landowners. The mortgage is the most common form of real estate financing in this country. If the borrower defaults on the mortgage loan, the lender may proceed against the borrower personally. More commonly, the lender will choose to foreclose the mortgage. Some states even require the lender to exhaust the security by foreclosure before the lender can take other legal steps to collect the debt. While the proceedings for foreclosure vary greatly by jurisdiction, central to all is the sale of the security to satisfy the unpaid debt.

Many states also offer a tripartite lending device, known as a deed of trust, by which a landowner-borrower conveys the realty to a third party in trust to hold as security for the underlying obligation to the lender. Deeds of trust generally authorize the third party trustee to sell the property through a private trustee's sale in the event of a default. The advantage of the deed of trust is that the trustee's sale avoids both the time and expense of a judicial proceeding.

At the sale of security property, the lender is entitled to receive as much of the sale proceeds as is necessary to satisfy the unpaid debt. It is therefore common practice for the lender to bid up to that amount. If a third party makes a higher bid, that party receives the title to the property and the lender is made whole by the sale proceeds. Alternatively, if the lender makes the highest bid, it takes title to the property. When practical, the lender can attempt to recoup its loss on the bad debt by holding the property until it can be sold for at least the value of the debt. For example, if the property is worth less than the outstanding debt that it secured, the lender can wait for the property to appreciate before selling it. In this way, lending institutions often acquire substantial real

63. Foreclosure developed in the English equity courts as a way to extinguish a mortgagor's right to redeem a debt in default. Typical foreclosure statutes will establish a fixed period, after which the mortgagor's right to redeem is forever barred. G. Nelson & D. Whitman, supra note 60, § 1.3, at 8-9, § 7.5, at 485-88; W. Walsh, supra note 60, § 3, at 9-11.


65. See G. Nelson & D. Whitman, supra note 60, § 1.6, at 11-13; G. Glenn, Mortgages, Deeds of Trust, and Other Security Devices as to Land § 20, at 122-29 (1943). In this scenario, the lender is technically the "beneficiary" under the deed of trust.

66. The trustee's sale or private power of sale has other advantages. For instance, in California it circumvents the statutory redemption period of a judicial proceeding, during which time the debtor can retain possession of the property. When available, the private sale is used much more often than judicial foreclosure. R. Bernhardt, California Mortgage and Deed of Trust Practice, § 6.3, at 258-59 (CEB 1979 & Supp. 1986).

67. See 1 G. Glenn, supra note 65, § 94.1, at 582-84. The mortgagee is free to bid at a foreclosure by judicial sale, unless the foreclosure takes place in a state that permits foreclosure by out-of-court sale. In such jurisdictions, the mortgagee may be precluded from bidding at its own sale. See G. Nelson & D. Whitman, supra note 60, § 7.21, at 548-49; W. Walsh, supra note 60, § 83, at 349-51. Under the deed of trust, the lender is permitted to participate in the trustee's sale. See 1 G. Glenn, supra note 65, § 108.1, at 650-53.
property holdings.\textsuperscript{68}

As an alternative to foreclosure, a lender may choose to accept the deed to the mortgaged property in satisfaction of the mortgage debt.\textsuperscript{69} Accepting the deed in lieu of foreclosure avoids property sale costs. It is also advantageous to the lender that seeks immediate title to the mortgaged property or believes that the value of the property exceeds the amount of the outstanding debt.

Whenever a lender acts to satisfy a debt in default, it may become vulnerable to CERCLA liability if the property contains an unmonitored hazardous waste problem. Predictably, lenders adamantly disagree with this result. They contend that the imposition of hazardous waste liability on the basis of land ownership undermines the overall aim of commercial lending law to protect creditors.\textsuperscript{70} It is not clear whether Congress intended that a lender that takes title to property in this manner should become liable for its borrower's hazardous waste problems. Congress did create two exceptions, however, to landowner liability in CERCLA.

First, CERCLA recognizes a narrow class of affirmative defenses.\textsuperscript{71} Second, the Act excludes from its definition of a liable "owner or operator" persons holding "indicia of ownership" for the purpose of protecting a security interest. Real estate lenders claim that this latter exemption protects their actions in foreclosure. If the exemption of security interest holders is to have any meaning, lenders contend, Congress must also have intended to exclude those who act to satisfy a debt in default by taking title to the property securing that debt.\textsuperscript{72}

CERCLA's definition of a liable "owner or operator" provides little insight into Congress' intentions. Section 101(20)(A) provides:

"[O]wner or operator" means... (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility... Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility...\textsuperscript{73}

Congress clearly intended to give lending institutions some relief from the broad reach of CERCLA liability, at least to the extent that they do not participate in managing the security property. As with many CERCLA provisions, CERCLA's legislative history is silent on whether

\begin{itemize}
  \item \textsuperscript{68} The two largest holders of foreclosed farmlands, for example, have combined holdings in excess of 3.6 million acres, valued at $1.8 billion. See N.Y. Times, May 1, 1987, at 9, cols. 3, 5.
  \item \textsuperscript{69} See G. Nelson & D. Whitman, supra note 60, § 6.18, at 474.
  \item \textsuperscript{70} See, e.g., Burcat, Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets, 103 Banking L.J. 509, 524-36 (1986).
  \item \textsuperscript{71} See supra notes 41-47 and accompanying text.
  \item \textsuperscript{72} See supra note 70; see also Moskowitz & Hoyt, supra note 45, at 1179.
  \item \textsuperscript{73} CERCLA § 101(20)(A), 42 U.S.C.A. § 9601(20)(A) (West Supp. 1987) (emphasis added).
\end{itemize}
the exemption protects a lender that takes title to the mortgaged property. In most instances, the mortgagee's decision to succeed in ownership may be a sensible approach to protecting its financial stake in a bad debt. By taking such action, however, the mortgagee replaces its limited security interest in the property with actual ownership. The courts have disagreed as to the effect of this result when applying the security interest exemption to CERCLA liability.

III. Judicial Discord: CERCLA Claims Against Secured Lenders

Two federal district court decisions frame the current dispute about whether a foreclosing lender that takes title to its mortgaged property becomes an "owner or operator" for purposes of CERCLA liability. Because higher court review was not pursued in either case, the law remains unsettled. The issue of lender liability first was raised in a bankruptcy proceeding. That decision lays the groundwork for the divergence in the district courts.

_in re T.P. Long Chemical, Inc._ was an action by the EPA to recover $37,859.35 in CERCLA response costs from the estate of a bankrupt debtor and its secured creditor, BancOhio National Bank (BancOhio). BancOhio held a perfected security interest in the debtor's personal property, including its accounts receivable, equipment, fixtures, and inventory. Mr. Long and his wife owned, in fee simple, the real property upon which the bankrupt corporation operated a rubber recycling plant.

After initially filing for reorganization, T.P. Long Chemical Company petitioned for dissolution under Chapter Seven of the Bankruptcy Code. Pursuant to the petition, the bankruptcy trustee auctioned all personal property in the debtor's estate except approximately ninety drums that, unknown to anyone but Mr. Long, were buried at the rear of the property. The EPA discovered that the drums contained several hazardous substances. Because the unencumbered assets of the estate were insufficient to pay the response costs at the site, the EPA sought payment from the proceeds of the trustee's auction.

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76. _Id._


78. The bankruptcy judge rejected the government's claim to proceeds from the sale of the debtor's property in which BancOhio held a perfected security interest. The EPA claimed that it stood "in the shoes" of a bankruptcy trustee when it removed the hazardous waste and therefore, was entitled to its expenses under the Bankruptcy Code. _T.P. Long Chemical_, 45
BancOhio did not foreclose on its security interest. More importantly, foreclosure would not have led to liability under CERCLA because BancOhio's loan was secured by the debtor's personal property, not the real property on which the wastes were buried.79 Ignoring this fact, the court stated in dictum that "even if BancOhio had repossessed its collateral [the drums] pursuant to its security agreement[,] it would not be an 'owner or operator' as defined under CERCLA."80 Foreclosure, in the court's view, is merely a logical action taken by the lender to protect its financial stake when the borrower defaults; it does not expose the lender to liability.

The bankruptcy court found that the security interest exemption in section 101(20)(A) was applicable because "[t]he only possible indicia of ownership that can be attributed to BancOhio is that which is primarily to protect its security interest."81 Instead of addressing whether foreclosure affected BancOhio's status as an exempt security interest holder, the court considered only whether the bank had "participated in the management" of the Long facility.82 Finding no involvement that would preclude the exemption, the bank was deemed protected. Eight months later, in United States v. Mirabile, a federal court for the Eastern District of Pennsylvania applied an analysis similar to the dictum in T.P. Long Chemical.83

A. United States v. Mirabile

United States v. Mirabile84 was the first case to decide whether a lender who forecloses on and takes title to its mortgaged property is an "owner or operator" for purposes of CERCLA liability. The court also examined when a lender may be liable as a result of its involvement in the borrower's hazardous waste activities. This second issue dominates the

79. Section 107(a)(1) imposes liability on "the owner and operator of . . . a facility." The drums that the defendant allegedly owned did not constitute a "facility" within the meaning of § 101(9). See supra note 31. Indeed, a "release" of hazardous substances that triggers CERCLA's provisions is defined to include "the abandonment or discarding of barrels, containers, and other closed receptacles . . . ." CERCLA § 101(22), 42 U.S.C.A. § 9601(22) (West Supp. 1987) (emphasis added). Because the loan was secured by personal property that was outside the definition of a "facility," repossession of the drums would not have brought BancOhio within CERCLA liability. See supra note 31.

80. T.P. Long Chemical, 45 Bankr. at 288.
81. Id. at 289.
82. Id.
84. Id. In a companion case by the same name, the court held that the current owners of the property may assert a third-party defense. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992 (E.D. Pa. Sept. 4, 1985). This Note refers to the former decision, 15 Envtl. L. Rep. 20,994, except as indicated.
court's analysis; indeed, the court offered only a cursory evaluation of how foreclosure affects the application of the security interest exemption in section 101(20)(A). As a result, the court concerned itself with the question of when a lender is precluded from invoking section 101(20)(A), rather than addressing whether the exemption applies in the first place.

*Mirabile* was an EPA action for the recovery of $249,792.52 spent in removing approximately 550 drums of hazardous wastes from the site of a defunct paint manufacturing business. The EPA filed its claim against, among others, the current owners of the site, Anna and Thomas Mirabile. The Mirabiles, in turn, joined American Bank and Trust Company (American Bank) and Mellon Bank (East) National Association (Mellon Bank). Both banks had loaned money to the site's former owners.

During the 1970s, Arthur C. Mangels Industries, Inc. (Mangels) owned and operated a paint manufacturing facility in Phoenixville, Pennsylvania. In 1973, American Bank loaned money to Mangels, secured in part by a mortgage on the site. In 1976, Turco Coatings, Inc. (Turco) acquired Mangels. That same year, Turco borrowed advance working capital from Girard Bank, the predecessor-in-interest of Mellon Bank. The second loan was secured by Turco's inventory and assets. Turco continued to manufacture paint at the site until 1980, when it filed for protection under Chapter Eleven of the Bankruptcy Code. In the course of manufacturing paint, both Mangels and Turco generated hazardous wastes which were stored in drums on the site. The EPA brought suit against both manufacturers for cleanup costs.

In 1981, Turco's Chapter Eleven petition was dismissed and American Bank initiated a foreclosure action. American Bank, the highest bidder at the sheriff's sale held on August 21, 1981, informed the sheriff and the tax department that it intended to take title to the property. On December 15, 1981, American Bank assigned its bid to Thomas Mirabile who, along with his wife, accepted a sheriff's deed to the property. Shortly thereafter, state officials informed the Mirabiles that the drums on the property contained hazardous substances and would have to be

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86. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, at 20,995. The Mirabiles also joined several individuals who were connected to the property, including Robert Horstmann, the former president and chairman of the board of the paint manufacturing company. See United States v. Mirabile, No. 84-2280, slip op. (E.D. Pa. June 6, 1985) (motion to dismiss denied).


90. *Id.* at 20,996.
removed.91

During the four months between the sheriff’s sale and the assignment of its bid to the Mirabiles, American Bank officials visited the property on several occasions for the purpose of showing it to prospective purchasers. The bank also took steps to secure the site against vandalism. Finally, the bank made inquiries about the cost of removing the drums.92 These actions occurred several months after Turco ceased its operations.

The Mirabiles joined both American Bank and Mellon Bank, alleging that they were “potentially responsible parties” under CERCLA. American Bank denied that it was responsible for cleaning up the hazardous waste and moved for summary judgment.93 The bank made two arguments to support its motion. First, American Bank contended that it was not an owner under CERCLA because it never held legal title to the property.94 Second, American Bank argued that its actions relating to the Turco property, including the purchase, were taken merely to protect its security interest.95 On this basis, the bank claimed protection as a security interest holder.

The court granted American Bank’s motion for summary judgment, holding that the passage of title, whether legal or equitable, was irrelevant to the applicability of the security interest exemption. The court stated that “[r]egardless of the nature of the title received by [American Bank], actions with respect to the foreclosure were plainly undertaken in an effort to protect [the bank’s] security interest in the property.”96 The court assumed that a secured lender is exempt from CERCLA liability in its actions relating to the security property as long as its purpose is to protect its security interest. The court summarily concluded that foreclosure did not affect American Bank’s status as an exempt security interest holder. Moreover, the court held that the bank’s purchase of the Turco property did not bring it within CERCLA’s definition of an owner or operator because the purchase was incident to holding the security interest.97

Having concluded that American Bank’s status under section 101(20)(A) was unaffected by its purchase of the Turco site, the court limited its analysis to the question of whether the lender had become so

93. Id.
94. Id.
95. Id.
96. Id.
97. Id.
“overly entangled” in its borrower’s activities as to preclude the applicability of the exemption. The court concluded it had not:

[B]efore a secured creditor such as [American Bank] may be held liable, it must, at a minimum, participate in the day-to-day operational aspects of the site. In the instant case, [American Bank] merely foreclosed on the property after all operations had ceased and thereafter took prudent and routine steps to secure the property against further depreciation.98

Under Mirabile, a lender succeeding in title to its security property is not an owner or operator within the meaning of CERCLA. This holding, however, operates under two caveats. First, the creditor’s actions in foreclosure must be limited to protecting its security interest.99 How foreclosure can be undertaken for purposes other than to protect the security interest is unclear from the decision, because the right to foreclose accrues only after the borrower has defaulted. The court hinted that a foreclosing lender may be liable under CERCLA if it continues the operations that created the hazardous condition.100 This interpretation would limit the advantage of foreclosing on income-producing property.

The second caveat is that any secured lender, whether its loan is secured by real or personal property, must avoid becoming “overly entangled” in its borrower’s hazardous waste activities.101 A lender “participating in the management” of the security property, therefore, is precluded from asserting the section 101(20)(A) exemption.102 The significance of this qualification was demonstrated in the court’s treatment of the second lender, Mellon Bank.

The Mirabile court found itself faced with a “cloudier situation” when it considered Mellon Bank’s motion for summary judgment.103 The Mirables joined Mellon Bank, alleging that the bank’s involvement with Turco Coatings brought it within the scope of CERCLA liability. They contended that the bank was an owner or operator within the meaning of section 101(20)(A) because of the level of its involvement in the paint manufacturing. Mellon Bank denied that it was a responsible party and moved for summary judgment. Holding that further fact-finding was required, the court denied the bank’s motion.104

Mellon Bank, through its predecessor-in-interest, held a security in-
interest in Turco’s inventory and assets. With the onset of financial difficulties, the bank became involved in Turco’s operations. One loan officer served on an advisory board established to oversee Turco’s operations; a second loan officer was involved in monitoring Turco’s financial condition. The bank’s involvement deepened over time, and eventually included making weekly visits and giving instructions concerning manufacturing, personnel, and sales matters. When Turco ceased all operations in 1980, the bank took possession of its inventory.105

In attempting to define how far a creditor could go in protecting its financial interest before being subject to CERCLA liability, the court noted that section 101(20)(A) exculpates security interest holders who refrain from “participating in the management of a . . . facility.”106 Because the Act defines “facility” as the structure or site where hazardous substances are stored,107 the court interpreted the statute to impose liability on a secured party only if it participated in managing the actual operation of the “facility.”108 Such involvement, the court noted, is to be distinguished from a creditor’s participation in its borrower’s financial decisions. Financial involvement, according to Mirabile, is not sufficient to justify imposing CERCLA liability.109

Although the court noted that “[t]he reed upon which the Mirabiles seek to impose liability on Mellon [Bank] is slender indeed,”110 it nevertheless concluded that a broader factual inquiry was necessary to determine whether the bank’s involvement warranted the imposition of liability. On this basis, the court denied Mellon Bank’s motion for summary judgment. Mellon Bank settled with the EPA before the issue proceeded to trial.111

Mirabile was a bittersweet victory for the lending community. On one hand, the court virtually dismissed the significance of the lender’s purchase of its security property in determining CERCLA liability. On the other hand, the court cautioned that any lender, whether its loans are secured by real or personal property, may be liable if it becomes too involved in its borrower’s operations. The decision yields a result rich in irony. Both Mellon Bank, which never owned the site, and the

105. Because Mellon Bank’s loan was secured by collateral other than property described in the definition of a “facility” in section 101(9), the issue of CERCLA liability based on ownership of a disposal facility was not present. But see In re T.P. Long Chem., Inc., 45 Bankr. 278, 288-89 (Bankr. N.D. Ohio 1985); see supra note 79 and accompanying text.

106. See supra text accompanying note 73.


109. The court stated that before a secured creditor may be held liable, “it must, at a minimum, participate in the day-to-day operational aspects of the site.” Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,996.

110. Id. at 20,997.

111. A consent decree was filed on October 24, 1986. Confirmed by telephone interview with Steven V. Englemyer, United States Attorney’s Office (Mar. 13, 1987).
Mirabiles, who were never involved in the waste dumping, were forced to continue to trial. In contrast, American Bank was dismissed from the case although it had once owned the site and had been financially involved with the waste dumpers. In effect, the holding in *Mirabile* allows a lender to own a contaminated property without incurring CERCLA liability as long as it is circumspect in its pre-foreclosure activities at the site. The next court to consider the issue of lender liability rejected this result.

B. *United States v. Maryland Bank & Trust Co.*

Since *Mirabile*, another court has been presented with the question of whether a lender which forecloses on and takes title to property containing hazardous wastes is subject to CERCLA liability. Unlike *Mirabile*, the court in *United States v. Maryland Bank & Trust Co.* held that the security interest exemption does not protect a mortgagee that becomes an owner, an issue that the *Mirabile* court gave only a cursory evaluation. Because it found liability, the court did not reach the issue that occupied the *Mirabile* court: when is a lender precluded from claiming the section 101(20)(A) exemption.

Herschel McLeod, Sr. and his wife owned a 117-acre farm in California, Maryland. The McLeods operated two trash and garbage businesses at the site. During the 1970s, Maryland Bank & Trust Co. (Maryland Bank) loaned money to Herschel McLeod for his business operations. In 1980, the McLeods’ son, Mark, borrowed $335,000 from the bank to buy the family farm. The purchase was completed in December 1980. At some point in 1981, Mark McLeod stopped making payments on the loan. In response, Maryland Bank instituted a foreclosure action. On May 15, 1982, a foreclosure sale was held at which Maryland Bank purchased the property with a high bid of $381,500. The bank still owned the property at the time of trial, nearly four years later.

In June 1983, a little more than one year after the foreclosure sale, the EPA inspected the site and discovered improperly disposed hazardous wastes. Herschel McLeod had accepted the wastes at the site in

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112. In addition to refusing to dismiss Mellon Bank, the court rejected the Mirables' motion for summary judgment. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992, at 20,994. The court ruled, however, that the Mirables would be allowed to raise a third-party defense. See supra notes 41-47 and accompanying text. The Mirables settled before this issue was litigated. See supra note 111.

113. See infra notes 114-137 and accompanying text.


115. The record does not disclose why Maryland Bank bid in excess of the $335,000 mortgage debt.

116. The EPA inspection revealed two disposal areas containing deteriorated or leaking drums, some of which were buried. Subsequent testing identified several hazardous substances,
1972 or 1973. In response, the EPA ordered Maryland Bank to clean up the site. When the bank refused, the EPA began removing the wastes. Ultimately, the EPA removed 237 drums containing hazardous materials and 1180 tons of contaminated soil.

The United States filed suit when Maryland Bank refused to reimburse the EPA for $551,713.50 spent in responding to the problem. The government alleged that because Maryland Bank was the current owner of the McLeod farm, it was liable for cleaning up the hazardous wastes disposed there. Maryland Bank denied that it was a liable owner or operator within the meaning of section 101(20)(A). Both parties moved for summary judgment.

The bank made three arguments supporting its motion. First, it contended that current owners of hazardous waste sites are liable only in the event that they also operate them. Second, the bank argued that the security interest exemption insulated it from liability. Finally, it raised a third-party defense, arguing that it had no connection with the dumping. The court rejected the first two arguments and reserved judgment on the third until after trial. Accordingly, the court denied Maryland Bank’s motion for summary judgment and granted the government partial summary judgment on the issue of liability.\(^\text{117}\)

In the first of its arguments, Maryland Bank contended that the definition of liable persons under section 107(a)(1) applied only to current owners of hazardous waste properties who also operate them. This section states that the owner and operator of a waste disposal facility is liable for Superfund cleanup costs.\(^\text{118}\) Thus, the bank argued, it was not liable because it never operated the garbage dump.

The court was not persuaded. Proper usage, it conceded, limits the phrase the “owner and operator” to persons who are both owners and operators. However, the court concluded that “to slavishly follow the laws of grammar while interpreting acts of Congress would violate sound canons of statutory interpretation.”\(^\text{119}\) Such caution, in the court’s opinion, was particularly appropriate in light of the haste with which Congress enacted CERCLA.

The court also reviewed CERCLA’s legislative history. It found that an early version of the legislation defined an “operator” to mean one who carries out functions for the “owner.” Under such a definition, an operator cannot be the same person as an owner. Therefore, the court reasoned, the construction of section 107(a)(1) urged by the defendant including: chromium, lead, cadmium, mercury, cyanide compounds, ethylbenzene, toluene, and xylenes. Envil. L. Rep. (Envtl. L. Inst.) PENAL. LIT. 65,847 (1985).

\(^{117}\) Maryland Bank & Trust, 632 F. Supp. at 582.


\(^{119}\) Maryland Bank & Trust, 632 F. Supp. at 578.
would render the provision useless.120

Finally, the court relied on New York v. Shore Realty Corp.121 for the proposition that section 107(a)(1) imposes strict liability on the current owner of a CERCLA site, without regard to causation. Under the bank's interpretation of section 107(a)(1), a landowner would only be liable if it had participated in the actual operation of the waste site. This reading of the statute, the court held, conflicted with the Second Circuit's ruling in Shore Realty.

The central issue raised in the case was whether the security interest exemption insulates from CERCLA liability a lender succeeding in ownership of its security property. Maryland Bank argued that it was within the exculpatory language in section 101(20)(A) because it acquired the McLeod farm for the sole purpose of protecting its security interest. The court rejected this claim. Instead, it held that the security interest exemption does not protect a lender that holds title to the mortgaged property at the time of the Superfund cleanup.122

In contrast to its liberal interpretation of section 107(a)(1), the court approved a literal reading of the security interest exemption. Section 101(20)(A) excludes from the definition of "owner or operator" one who, "without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."123 In the court's opinion, the verb tense of the exclusionary provision is critical. It reasoned that by using the present tense, Congress intended to exclude only those actually holding security interests at the time of the Superfund cleanup. If one holds the indicia of ownership to protect a security interest, then that security interest must exist at the time the exemption is invoked.

The purpose of the exemption, the court reasoned, was to protect secured lenders in Maryland and other states that follow the common law rule of mortgages. In such jurisdictions, a mortgagee holds legal "title" to the mortgaged realty until the loan obligation is satisfied.124 The "title" so held describes only the relationship between the parties to the

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120. Id.
121. 759 F.2d 1032 (2d Cir. 1985). The Second Circuit stated: "Section 9607(a)(l) [107(a)(l)] unequivocally imposes strict liability on the current owner of a facility . . . without regard to causation." Id. at 1044. Maryland Bank & Trust, 632 F. Supp. at 578.
122. Maryland Bank & Trust, 632 F. Supp. at 578-80. The defendant also argued that it was an "involuntary owner" of the McLeod property. Maryland Bank alleged that it was compelled by Farmers Home Administration, which had guaranteed the loan up to 90% of its value, to foreclose and bid on the site. The court rejected this claim, stating that it would not "carve a judicially-created loophole" in CERCLA. Id. at 580 n.8. The court indicated that it would allow the issue to be raised in the bank's counterclaim against Farmers Home Administration; however, the counterclaim was dismissed at the parties' request. Id.
124. See supra note 60; see also infra text accompanying notes 142-43.
mortgage; the mortgagor is recognized as the owner of the mortgaged property in all other contexts.\textsuperscript{125} The court concluded that Congress intended under section 101(20)(A) to exempt only mortgagees that hold the indicia of ownership in the form of common law legal title at the time of the cleanup. The court based its conclusion on a committee report accompanying an early version of the legislation that referred to the exclusion of those that "hold title . . . in order to secure a loan."\textsuperscript{126} The court viewed this reference as evidence that Congress intended the exculpatory language in section 101(20)(A) to protect mortgagees in jurisdictions governed by the common law of mortgages. To extend the exemption to mortgagees that have acquired the mortgaged property, the court concluded, is not consistent with that purpose.\textsuperscript{127}

In applying this interpretation to the case, the court found that the security interest exemption did not apply to Maryland Bank. Although the bank held a mortgage on the McLeod farm at the time of the cleanup, the security interest, the court concluded, "terminated at the foreclosure sale . . . at which time it ripened into full title."\textsuperscript{128} Under this construction, Maryland Bank was not entitled to the exemption because it had replaced its security interest with full legal title.

As a final reason to hold Maryland Trust responsible, the court emphasized the policy implications of exempting lenders that otherwise fall within CERCLA liability. Specifically, the court objected to the possibility that lenders would enjoy an unfair advantage in real estate markets under a broader interpretation. The court stated:

Under the scenario put forward by the bank, the federal government alone would shoulder the cost of cleaning up the site, while the former mortgagee-turned-owner, would benefit from the clean-up by the increased value of the now unpolluted land. At the foreclosure sale, the mortgagee could acquire the property cheaply. All other prospective purchasers would be faced with potential CERCLA liability, and would shy away from the sale. Yet once the property has been cleared at the taxpayers' expense and becomes marketable, the mortgagee-turned-owner would be in a position to sell the site at a profit.\textsuperscript{129}

Exempting lenders that hold full title to waste sites, the court reasoned, would frustrate the distribution of cleanup costs achieved by CERCLA.\textsuperscript{130} It would also reallocate the risks assumed in owning real property. The court took particular exception to this result, pointing out that lenders already have the means to protect themselves by making

\textsuperscript{125} \textit{Id.}
\textsuperscript{127} \textit{Maryland Bank & Trust}, 632 F. Supp. at 579.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.} at 580
\textsuperscript{130} \textit{Id.}
prudent loans. It noted that lenders are in a position to investigate and discover potential problems, and can refrain from foreclosing or bidding at the foreclosure sale. For these reasons, the court concluded, lenders do not need the protection of a broad reading of section 101(20)(A).

After finding liability, the court offered Maryland Bank a glimmer of hope by reserving judgment on the bank's third-party defense. Section 107(b)(3) excuses an otherwise liable party that can establish by a preponderance of the evidence that the hazardous waste problem was caused solely by an unrelated third party. To claim the defense, the defendant must also show that it exercised due care with respect to the hazardous substances and took precautions against the foreseeable acts of others.

The court rejected the government's claim that Maryland Bank could not invoke the defense because of its lengthy business relations with the McLeods. It concluded that more evidence was required to establish the status of the relationship between the parties at the time the dumping occurred. In particular, the court suggested that a mortgagee-turned-owner may be precluded from raising a third-party defense where it was contractually linked to the toxic dumper by virtue of an outstanding loan at the time of the waste disposal. Maryland Bank settled with the EPA before this issue proceeded to trial.

On its face, Maryland Bank & Trust offers a hard and fast rule for lender liability: a secured creditor is exempt from CERCLA liability unless it purchases the mortgaged property. The court, however, expressly limited its decision to the facts of the case. It emphasized the length of the bank's ownership, noting that the defendant had held the property for four years, including one full year prior to the Superfund cleanup. The court used this fact to distinguish Mirabile, in which the foreclosing bank promptly assigned its interest to another party.

131. Id.; see also infra note 181 and accompanying text.
132. See supra notes 43-47 and accompanying text.
133. In October 1986, six months after the decision in Maryland Bank & Trust, Congress enacted the Superfund Amendments and Reauthorization Act. See supra note 19. Included in the 1986 legislation are two additional requirements for landowners seeking to avoid liability for hazardous conditions created by a previous owner. Under the new law, the defendant must show that it had neither actual nor constructive knowledge of the hazardous waste condition at the time it acquired the property. In addition, the defendant landowner must show that it made a reasonable inquiry about hazardous wastes. CERCLA § 101(35), 42 U.S.C.A. § 9601(35) (West Supp. 1987); see supra notes 46-47 and accompanying text.
134. Maryland Bank & Trust, 632 F. Supp. at 581. The United States also alleged that Maryland Bank could not prove that it had exercised reasonable care. The court, again citing the need for further inquiry, declined to grant the government's motion for summary judgment. Id. at 581-82.
135. An administrative order dismissing the case pending settlement was filed on February 6, 1987. Confirmed by telephone interview with Ellen M. Mahan, Land & Natural Resources Division, United States Department of Justice (Mar. 13, 1987).
136. "Because [Maryland Bank] has held the property for such an extended period of
The addition of a duration requirement, however, conflicts with the logic of the decision. If a court denies a lender the security interest exemption because the lender has converted its interest into ownership, then the logical point for liability to arise is when the security interest ceases to exist. The decision itself contains language supporting this conclusion. Moreover, other courts have rejected the notion that the length of ownership is relevant in establishing CERCLA liability.

Moreover, other courts have rejected the notion that the length of ownership is relevant in establishing CERCLA liability.

IV. Comparing Judicial Applications to CERCLA's Structure and Objectives: A Case for Lender Liability

*Mirabile* and *Maryland Bank & Trust* approach the issue of lender liability from opposite directions. The *Mirabile* court was primarily concerned with giving full effect to the security interest exemption in section 101(20)(A). It gave virtually no weight to the passage of title to the foreclosing bank. Indeed, the *Mirabile* court treated the bank's purchase at the foreclosure sale as merely incident to the holding of a security interest to which the exemption logically extends. Thus, the court limited its analysis to determining whether the lender was precluded from asserting the exemption because of its involvement in the operation of the borrower's facilities.

Manifesting an entirely different concern, the *Maryland Bank & Trust* court sought to avoid establishing a rule that would allow secured lenders to profit from government cleanup actions. It approved a narrow reading of the security interest exemption under which the passage of title at foreclosure is dispositive. A secured lender, under this analysis, is exempt from CERCLA liability only while the security instrument is in force. By purchasing the mortgaged property at the foreclosure sale, the lender converts its security interest into full ownership and becomes subject to the same liabilities as other landowners. As a result, a mortgagee-
turned-owner can escape liability only to the extent it can establish one of the affirmative defenses in section 107(b).

The narrow construction of the security interest exemption adopted by the Maryland Bank & Trust court best reflects CERCLA's express and implied objectives. The opposite holding in Mirabile illustrates why a narrow construction is preferable. The rule in Mirabile, which extends the exemption to lenders who succeed in ownership of CERCLA sites, conflicts with the language and purpose of section 101(20)(A). It creates an exempt class from otherwise liable landowners based on an artificial distinction drawn from the circumstances by which the realty was acquired. More importantly, allowing lenders to retain their exempt status after foreclosure frustrates CERCLA's objectives in the allocation of hazardous waste cleanup costs. The decision in Maryland Bank & Trust answers these concerns. Moreover, its narrow construction of the security interest exemption furthers CERCLA's implicit objective of encouraging safer waste disposal practices by involving lenders in waste management.

A. The Language and Purpose of Section 101(20)(A)

Congress had a purpose in mind when it exempted security interest holders from CERCLA liability. Absent a legislative record, it is reasonable to conclude that Congress intended to exclude security interest holders from cleanup liability because they have only an attenuated connection to hazardous waste property. This conclusion draws support from Congress' denial of the exemption when the secured party has a more substantial connection because it participates in managing the security property.

The statutory language of the security interest exemption, as pointed out in Maryland Bank & Trust, also supports a limited application. The reference to a creditor that "holds" a security interest clearly implies that Congress intended to exempt only those actually holding security interests at the time the exemption is invoked. Moreover, the use of the term "indicia of ownership" which, in other contexts, has been held to mean the appearance of ownership, strongly suggests that persons holding actual title ownership are outside section 101(20)(A) protection. That CERCLA was enacted in great haste, however, cautions against placing too much weight on a literal reading of the statute.

139. See supra note 17 and accompanying text.
140. Maryland Bank & Trust, 632 F. Supp. at 579; see supra notes 123-28 and accompanying text.
141. See, e.g., 3 Am. Jur. 2d Agency § 105, at 614 (1986); 77 C.J.S. Sales § 295-96, at 1107-08, 1111 (1952); see also Weisinger v. Flatbush Auto Discount Corp., 34 N.Y.S.2d 1008, 1009 (N.Y. City Ct. 1942) (construing "indicia of ownership" to mean evidence of actual title ownership).
By extending the exempt status of creditors to actions they take after foreclosure, the *Mirabile* court adopted a rule that exceeds the purpose of the exculpatory provision. Since seventeenth century England, the mortgagor has been recognized as enjoying full ownership of the mortgaged property, subject only to the mortgagee's security rights.\textsuperscript{142} Although at common law the execution of a mortgage vested legal title in the mortgagor, the interest taken was for security purposes only and liabilities founded upon land ownership did not attach to it. The modern trend in this country has been to view the mortgage as creating a lien for the benefit of the mortgagee.\textsuperscript{143} This American invention has the advantage of explicitly recognizing the mortgagor's ownership of the property.

Congress codified the principle of mortgage ownership in section 101(20)(A). Thus, the statute exempts a person who merely holds a security interest in the hazardous waste property even though that interest may give the appearance of actual ownership. When a mortgagee succeeds in ownership of the mortgaged property, however, it takes an interest in the realty equal to any other landowner. Thus, the rationale for exempting security interest holders—that their connection to the security property is insufficient to warrant CERCLA liability—is no longer relevant when a secured party has replaced its security interest with actual ownership.

The expansive reading of section 101(20)(A) approved in *Mirabile* also conflicts with the statute's limited legislative record. In view of Congress' broad definition of CERCLA liability,\textsuperscript{144} it is unlikely that Congress would exclude an entire class of otherwise liable landowners without any explanation or record of debate. A more plausible explanation is that by adopting the exculpatory language in section 101(20)(A), Congress intended merely to codify the recognition of the mortgagor as the owner of the mortgaged property.\textsuperscript{145} Thus, when the mortgagee succeeds in title, it becomes the owner for all purposes, including CERCLA liability.

The *Maryland Bank & Trust* court recognized the limited purpose of section 101(20)(A) intended by Congress. Accordingly, the court ruled that the provision protects a secured party that is connected to a hazardous waste property only by virtue of its security interest. Since the security interest terminates with the sale of the property at foreclosure, the court reasoned that a secured party electing to participate in the foreclosure bidding is exposed to the same potential liability as the other bidders. The same result will occur when the lender purchases the prop-

\textsuperscript{142} See W. WALSH, * supra* note 60, § 3, at 9. For example, the mortgagor's ownership was recognized in determining the right to shoot game and the right to vote as owner of a freehold estate. *Id.* § 5, at 20-21.

\textsuperscript{143} See * supra* note 60.

\textsuperscript{144} See * supra* note 30.

\textsuperscript{145} See * supra* note 60 and text accompanying notes 142-143.
erty from the third-party trustee in a deed of trust, or accepts the deed to the property in lieu of foreclosure.\textsuperscript{147}

Lenders reject the narrow construction of the security interest exemption adopted in \textit{Maryland Bank & Trust}.\textsuperscript{148} They argue that for the exemption to have any meaning, Congress must have intended to exclude lenders that act to satisfy a debt in default. This argument mistates the result reached in \textit{Maryland Bank & Trust}: a lender can \textit{foreclose} to protect its financial stake in a bad debt; however, a lender may incur CERCLA liability if it chooses to \textit{acquire} the mortgaged property. Foreclosure may still yield an unsatisfactory result for the mortgagee under this interpretation because knowledge of a hazardous condition will depress the bidding at the foreclosure sale. This risk, however, is but an extension of the risk lenders normally bear—the risk that the property taken as a security may prove less valuable than originally envisioned.

B. Landowner Liability Under CERCLA

The \textit{Mirabile} court treated the bank’s purchase of the mortgaged property as a natural consequence of protecting its financial interest in the mortgage debt. Because the bank was only protecting its interest, the court concluded, the bank was not a liable “owner or operator” under CERCLA. This analysis, however, does not provide a basis for the resulting disparate treatment of landowners: those that own land containing hazardous wastes are generally liable for cleanup, except for those that held a mortgage on the property prior to owning it. Although the court did not articulate this distinction, it did reach this result. On the same day that the court dismissed American Bank because its purchase of the property did not make it an owner or operator within the meaning of CERCLA,\textsuperscript{149} the court denied the summary judgment motion of Anna

\begin{itemize}
  \item \textsuperscript{146} See supra text accompanying notes 65–66.
  \item \textsuperscript{147} See supra text accompanying note 69.
  \item \textsuperscript{149} \textit{Mirabile}, 15 Env’t L. Rep. (Env’t L. Inst.) 20,994, at 20,996; see supra notes 96-97 and accompanying text. Ironically, American Bank might not have been a “potentially responsible party.” Unlike the defendant bank in \textit{Maryland Bank & Trust}, the foreclosing bank in \textit{Mirabile} did not fit any of the then-recognized categories of liable landowners. American Bank was neither the current owner of the site, see CERCLA § 107(a)(1), supra note 30, nor the owner at the time of disposal, see id. at § 107(a)(2); see also Cadillac Fairview/California, Inc. v. Dow Chemical Co., 14 Env’t L. Rep. (Env’t L. Inst.) 20,376, 20,378 (C.D. Cal. Mar. 5, 1984) (holding prior owner not liable when it neither deposited nor allowed others to deposit hazardous wastes during its ownership of the realty). However, the 1986 Superfund Amendments and Reauthorization Act, see supra note 19, includes a provision making liable any prior landowner that transfers title to real property without disclosing the existence of a hazardous condition known to it. See also, supra note 47 and accompanying text.
\end{itemize}
and Thomas Mirabile, who purchased the property from the bank.\textsuperscript{150} How a statute that imposes liability on the basis of landownership can be interpreted to reach such conflicting results defies logic and common sense.

Mortgage law makes no distinction in the character of ownership acquired by a mortgagee when it purchases the mortgage property. The mortgagee-in-possession rule illustrates this point. At common law, a mortgagee had a legal right to possession prior to default or foreclosure to protect its security.\textsuperscript{151} Most jurisdictions today require express or implied consent of the mortgagor before the mortgagee may take possession.\textsuperscript{152} Moreover, the right of possession terminates with satisfaction of the debt by foreclosure or redemption. Once in possession, the mortgagee is personally liable for tort injuries resulting from its use of the property or its failure to perform duties imposed by law upon landowners.\textsuperscript{153} It is anomalous to conclude that the duty to the public of a lender that purchases its security property in fee simple is less than that of a mortgagee-in-possession. Instead, logic compels the conclusion that a mortgagee that becomes an owner should be subject to the same liabilities as any other landowner.

Similarly, the common law tort of nuisance does not distinguish between the liability of landowners according to how they acquired their holdings. At common law, an action for nuisance lies against the party in possession of the property that contains the hazardous condition. \textit{The Restatement (Second) of Torts} takes the position that current owners are liable for damages resulting from artificial conditions created by prior owners.\textsuperscript{154} In its explanatory comments, the Second Restatement makes explicit that “a vendee . . . of land upon which a harmful physical condition exists may be liable . . . for failing to abate it after he takes posses-

\textsuperscript{150} The Mirabiles settled with the EPA before proceeding to trial on their third-party defense. \textit{See supra} note 112 and accompanying text.

\textsuperscript{151} \textit{See} G. NELSON \& D. WHITMAN, \textit{supra} note 60, § 1.2, at 6-7; W. WALSH, \textit{supra} note 60, § 18, at 91.

\textsuperscript{152} \textit{See} G. NELSON \& D. WHITMAN, \textit{supra} note 60, § 4.24, at 200-05; W. WALSH, \textit{supra} note 60, § 18, at 91-92, § 19, at 97-100. In addition to consent, a lender may become a mortgagee-in-possession as a result of a defective foreclosure sale. \textit{See} G. NELSON \& D. WHITMAN, \textit{supra} note 60, § 4.24 at 202-03.

\textsuperscript{153} \textit{See, e.g.}, City of Newark v. Sue Corp., 124 N.J. Super. 5, 8, 304 A.2d 567, 569 (1973) ("A mortgagee in possession may be liable to third persons for negligence in connection with the property . . . ."); 2 G. GLENN, \textit{supra} note 65, § 204.1, at 1030-31, § 217.1, at 1063-64; G. NELSON \& D. WHITMAN, \textit{supra} note 60, § 4.26, at 206-08.

\textsuperscript{154} \textit{RESTATEMENT (SECOND) OF TORTS} § 839 (1977). The section states:
sion, even though...he had no part in its creation."\(^{155}\)

The *Mirabile* court exempted American Bank from CERCLA liability because the bank's purpose in acquiring the property was "plainly" to protect its financial stake in the mortgaged debt. In this fashion, the court recognized an exception to the general rule of successor CERCLA liability based on the lender's association with the property prior to acquisition. The distinction the *Mirabile* court attempts to draw is neither recognized at common law nor grounded in logic.

By contrast, the rule adopted in *Maryland Bank & Trust* is consistent in its treatment of potential CERCLA defendants. The holding does not necessarily require the mortgagee-turned-owner to assume legal responsibility for hazardous waste problems created by the mortgagor. Rather, the decision puts a creditor acquiring the mortgaged property on the same footing as any other landowning CERCLA defendant. This result also comports with Congress' express intent that issues of CERCLA liability be resolved by application of common law principles.\(^{156}\) Thus, the mortgagee-turned-owner can avoid liability to the extent it can raise one of the defenses in section 107(b),\(^{157}\) or can seek contribution from other potential CERCLA defendants, including the defaulting borrower.\(^{158}\)

### C. CERCLA's Allocation of Cleanup Costs

CERCLA represents a deliberate attempt by Congress to internalize the costs of cleaning up hazardous wastes within the hazardous waste industry.\(^{159}\) This internalization is accomplished in two ways. First, funding of Superfund is derived initially from a special per-barrel tax

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\(^{155}\) See also Bleicher & Stonelake, *supra* note 45, at 10,018.

\(^{156}\) See *supra* note 18 and accompanying text.

\(^{157}\) See *supra* notes 41-47 and accompanying text. But see *Maryland Bank & Trust*, 632 F. Supp. at 581-82 (suggesting that existence of an outstanding loan at the time of waste dumping may preclude lender's third-party defense).

\(^{158}\) See *supra* notes 55-57 and accompanying text. Seeking contribution, at least from the defaulting mortgagor, may have limited effectiveness.

\(^{159}\) In an economically efficient market, costs such as harm or damage caused by pollution are borne by the producer that, in turn, passes them on to the consumer in the form of higher prices. A market failure occurs when a disproportionate share of the costs falls on individuals or is left to the government. Typically, federal environmental legislation attempts
imposed on current petroleum and chemical producers. In this manner, current producers are taxed for the cleanup of health and environmental problems created in prior years. Second, CERCLA's broad liability scheme imposes hazardous waste cleanup costs on those responsible for creating the problem. Thus, persons who generate or transport waste, or allow such materials to be disposed on their property are potentially liable for the government's cleanup costs.

Making the current owners of CERCLA sites liable, subject only to the narrow defenses in section 107(b), underscores Congress' awareness of the difficulties in finding and obtaining full recovery from those actually generating and dumping toxic waste. It is also a legislative judgment that the costs of hazardous waste cleanup are to be borne primarily by private parties rather than the federal treasury. Including current landowners in CERCLA's liability scheme greatly enhances the government's chances for recovering at least a portion of its cleanup costs. There is some economic justification for this result. The current owner stands to benefit from the removal of the toxic materials since the value of the property will presumably increase after cleanup. Moreover, current owners have a common law obligation to abate harmful physical conditions on their land. To the extent that the government intercedes to remedy the problem, it is therefore reasonable to impose those costs on the otherwise liable owner. These justifications apply with equal force to banks with real property holdings as to other landowners.

In approving a narrow construction of the security interest exemption, the Maryland Bank & Trust court was clearly guided by a sense of fairness in the social allocation of hazardous waste cleanup costs. To exempt landowning creditors would create a special class among otherwise liable landowners. Its members would reap a windfall benefit from Superfund-financed response actions. At the foreclosure sale, for example, the foreclosing lender could acquire the contaminated property cheaply because all other prospective purchasers would face potential CERCLA liability. Once the government had cleared the property of the toxic wastes, the former mortgagee could sell the property at a price reflecting its increased value due to the cleanup. The government, in such a scenario, would be limited in its ability to recover response costs. It would face the difficult task of identifying and collecting from the generators or transporters of the hazardous wastes, or collecting an unlikely recovery from the defaulting mortgagor.

to approximate the results of an efficient market by taxing or regulating polluters. See Note, Developments in the Law—Toxic Waste Litigation, 99 Harv. L. Rev. 1458, 1477-80 (1986).

160. See supra note 23.

161. This "benefit" may be obscured in many cases because the cleanup will only return the property to the value that the current owner paid, a price that did not reflect the existence or magnitude of the environmental burden.

162. See supra notes 154-55 and accompanying text.
The *Mirabile* court was not moved by these concerns. In anticipation of its critics, the court acknowledged the difficulties the government faces in recovering its costs in cleaning CERCLA sites. The court conceded that bringing lenders under CERCLA liability would enhance the government's chances of full recovery, and might lead to more responsible management of waste disposal sites. The court concluded, however, that the decision to impose liability based on these considerations belongs to Congress.\(^{163}\)

The court's restraint in *Mirabile* overlooks the haste with which CERCLA was enacted. From the outset, the judiciary has played a central role in the evolution of hazardous waste liability.\(^{164}\) By framing its decision without reference to public policy concerns, the *Mirabile* decision departs from clear judicial precedent. The trend in CERCLA cases, exemplified by the Second Circuit's decision in *New York v. Shore Realty Corp.*,\(^{165}\) has been to interpret broadly who may be liable under CERCLA. This trend is consistent with the general principle that courts should liberally construe statutes enacted for the protection and preservation of public health.\(^{166}\) A recent United States Supreme Court decision highlighted the importance of environmental laws by holding that a bankruptcy trustee may not abandon a polluted property in violation of state health and safety laws.\(^{167}\)

In addition, the result in the *Mirabile* decision is inconsistent with recent changes in CERCLA approved by Congress. In the fall of 1986, Congress approved a five-year reauthorization of CERCLA.\(^{168}\) The most controversial feature of the measure was a five-fold increase in funding for Superfund.\(^{169}\) The legislation also included sweeping changes in fed-

\(^{163}\) The court stated:

> Obviously, imposition of liability on secured creditors or lending institutions would enhance the government's chances of recovering its cleanup costs, given the fact that owners and operators of hazardous waste dumpsites are often elusive, defunct, or otherwise judgment proof. It may well be that the imposition of such liability would help ensure more responsible management of such sites. The consideration of such policy matters and the decision as to the imposition of such liability, however, lies with Congress.


\(^{164}\) See *supra* notes 17-19, 52-57 and accompanying text.

\(^{165}\) 759 F.2d 1032 (2d Cir. 1985); see *supra* text accompanying notes 38-40.

\(^{166}\) See 3A N.J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 71.02, at 517 (4th ed. 1986). "For some time the courts have been committed to give statutes which are enacted for the protection and preservation of public health an extremely liberal construction in order to accomplish and maximize their beneficent objectives." Id. (emphasis added).


\(^{169}\) The new law increases funding of Superfund from the $1.6 billion approved in 1980 to $8.5 billion. The replenishment will be derived from a per-barrel tax on petroleum and
eral toxic cleanup efforts. Among these changes, Congress expanded the definition of who may be liable, when liability arises, and the amount of liability. It also authorized an automatic federal lien on real property that has been the object of a Superfund-financed cleanup in the amount of the government’s costs. Finally, Congress increased the civil and criminal penalties imposed under the Act. Two factors underlie these changes: Congress’ growing appreciation of the magnitude of the toxic waste problem, and its continued unwillingness to open the public fisc to pay for the cleanup. The rule adopted in Mirabile cannot be reconciled with these legislative developments.

D. CERCLA’s Incentives for Safer Disposal Practices

In addition to internalizing toxic cleanup costs, CERCLA’s liability scheme also creates incentives for safer handling and disposal of wastes. For example, the Act identifies waste generators as potential defendants. Because generators know in advance that they may be liable for improperly disposed wastes, they are more likely to accept the higher costs of disposing waste at a licensed facility than to assume the risk of disposing by the most expedient or inexpensive means available. The effect of this


170. A landowner may be liable for selling property without disclosing a known hazardous waste condition. CERCLA § 101(35)(C), 42 U.S.C.A. § 9601(35)(C) (West Supp. 1987); see supra note 35 and accompanying text.

171. Congress amended the definition of “release” or threatened “release” of hazardous substances that triggers CERCLA to include “the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant . . . .” CERCLA § 101(22), 42 U.S.C.A. § 9601(22) (West Supp. 1987).

172. The definition of “remedy” or “remedial action” for which the government can claim its expenses was amended to include “offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.” Id. § 101(24), 42 U.S.C.A. § 9601(24).

173. Id. § 107(l)-(m), 42 U.S.C.A. § 9607(l)-(m). The government’s rights are explicitly subordinate to the rights of others, including secured creditors, whose interests were perfected before notice of the lien was filed or actual notice received. Id. § 107(l)(3), 42 U.S.C.A. § 9607(l)(3).

174. Id. § 103(b), 42 U.S.C.A. § 9603(b) (increasing maximum criminal sentence from one to three years for first offenses); id. § 109(a)-(b), 42 U.S.C.A. § 9609(a)-(b) (increasing maximum civil penalty from $10,000 to $25,000 per day for first offenses); see supra note 51 and accompanying text.

175. See supra notes 159-60 and accompanying text.

176. It should be noted that the substantive mark-up of the reauthorization legislation was completed prior to the decisions in Mirabile and Maryland Bank & Trust. The Senate approved its CERCLA reauthorization proposal September 26, 1985; see 131 Cong. Rec. S12,184 (daily ed. Sept. 26, 1985); the House approved its proposal December 10, 1985; see 131 Cong. Rec. H11,595 (daily ed. December 10, 1985). Mirabile was decided September 4, 1985; see 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. September 4, 1985); Maryland Bank & Trust was decided April 9, 1986; see 632 F. Supp. 573 (D. Md. 1986).
scheme is two-fold. First, it depresses the market for those engaged in illegal waste disposal. Second, the increased costs to manufacturers becomes part of the cost of doing business. In this way, the costs of safer waste disposal are internalized within the industry.177

CERCLA also encourages safer procedures by assigning liability to parties that can influence waste disposal practices. The third-party defense in section 107(b)(3) illustrates well this second internalization feature. The section exculpates CERCLA site owners that can show that the hazardous waste problem was created solely by a third party with whom they had no connection.178 Two additional requirements must be satisfied. First, the site owner must show that it exercised due care with regard to the hazardous substances and took precautions against the foreseeable acts of others.179 Second, the site owner must show that it had neither actual nor constructive knowledge of the pollution at the time it acquired the property.180 With respect to the second requirement, the Act requires that the defendant inquire about prior uses of the property in order to identify potential contamination.

The narrowly drawn defense clearly evinces Congress' desire to enlist, albeit with the threat of liability, the help of parties not actually responsible for creating the toxic problems. CERCLA requires prospective land buyers, in effect, to become a hazardous waste police force by requiring purchasers to investigate for hazardous wastes. Subjecting buyers to this affirmative duty may deter sellers from dumping hazardous waste on property they intend to put on the market, and may encourage such sellers to undertake cleanup actions themselves.

The result reached in Maryland Bank & Trust conforms with CERCLA's implicit function of encouraging safer hazardous waste procedures. The possibility that CERCLA liability will depress the value of the security property provides economic incentive for lenders to guard against its misuse. Lending institutions are especially well-equipped for this function. They can require the borrower to submit to periodic environmental audits, either as a condition to receiving a loan or by an amendment to an existing agreement.181 Lenders can also require warranties from their borrowers guaranteeing that they are in full compliance with hazardous waste laws and regulations.182 Other forms of collateral, such as personal property, may be used as security when contamination is possible. Ultimately, lenders can refuse to lend money to

177. See Note, supra note 159, at 1513, 1519-20.
178. See supra notes 43-47 and accompanying text.
179. See supra note 44 and accompanying text.
180. See supra notes 46-47 and accompanying text.
181. See Earl, Environmental Auditing: What Your Client Doesn't Know Hurts the Most, 60 FLA. B. J., Jan. 1986, at 47; see also Burcat, supra note 70, at 537.
182. See Glenn & Steinberg, The Environmental Liability Crisis, 170 BANKER MAG., May–June 1987, at 40-41; see also Burcat, supra note 70, at 537.
persons believed to be operating illegal or improper hazardous waste activities. While there is a clear risk that innocent borrowers will find it difficult to obtain credit because of the nature of their business, this result is consistent with CERCLA's general effect of spreading hazardous waste costs industry-wide.

To require lenders to police their security properties calls attention to the language of section 101(20)(A), providing that a security interest holder is exempt from CERCLA liability as long as it refrains from "participating in the management" of the security property. A literal reading of the restriction will impede lenders that wish to monitor their borrower's use of the security property. Such a result conflicts with the Act's purpose of assigning liability to private parties that can influence waste disposal practices. Accordingly, the stricture should be construed to allow lenders sufficient authority to guard against illegal or improper dumping.

The court's refusal in Mirabile to dismiss the second lender, Mellon Bank, is the only example to date of lender liability resulting from a lender's involvement in its borrower's operations. The court distinguished between participation in financial decisions and in decisions affecting the operations of the security property. Only involvement in the latter, according to the Mirabile court, gives rise to liability.

A further refinement is in order. To effectuate the goal of safe waste disposal, security interest holders must be allowed to oversee and monitor certain operational aspects of the property. For example, a lender might require a borrower, known to generate hazardous substances, to provide copies of receipts showing that it is disposing the wastes at a licensed facility. It is also consistent with CERCLA's objectives to allow a lender to work with a borrower in removing hazardous substances from the site. Indeed, a lender may be willing to advance additional funds for such purposes, knowing that the value of its security property will increase. A borrower, in turn, likely would welcome the opportunity to relieve itself of the potential liability. The Mirabile decision would appear to have the unfortunate effect of proscribing such "operational" involvement.

If a lender knowingly loans money to a business engaged in improper waste disposal, it should be liable under the "make the polluter pay" principle. This same rationale should apply when a secured party participates in making decisions about the operation of the waste

183. See supra text accompanying note 73.
184. See supra notes 103-11 and accompanying text.
185. See supra notes 107-09 and accompanying text.
186. See, e.g., United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.")
site. A lender's actions that conflict with CERCLA's twin aims of clean-
ing up hazardous waste sites and encouraging safer disposal practices are
not deserving of protection. In view of Congress' broad delegation of
authority to the judiciary in interpreting CERCLA liability,187 it is an
appropriate function of the courts to delineate when a lender's involve-
ment will give rise to liability. In so doing, the rule offered by Mirabile
should be rejected as inadequate.

V. Conclusion

CERCLA exempts security interest holders from hazardous waste
cleanup. Acquisition of the security property is a common and, indeed,
sometimes logical way for a secured party to satisfy a debt in default. It
is tempting to complete this syllogism by concluding that a secured party
ought to be exempt from liability when it acquires the security property.
Federal environmental laws, however, do not lend themselves to such
simple interpretation.

A careful analysis of CERCLA's express and implied objectives
reveals that Congress intended to exempt security interest holders only
while the security instrument is in force. Thus, a lender that acquires its
security property is a proper CERCLA defendant. This interpretation
finds support in the language and purpose of the exemption. Moreover,
such a construction treats potential CERCLA defendants equally and
upholds the statute's allocation of cleanup costs. A narrow construc-
tion of the exemption provision also encourages lenders to police their secur-
ity properties. This result is consistent with other CERCLA provisions
that encourage private parties to involve themselves in safer waste prac-
tices. This function, however, may conflict with restrictions on a secured
party's involvement with its security. Therefore, the statute must be con-
strued to allow lenders to monitor and oversee the operation of security
properties to ensure compliance with state and federal environmental
laws. In this way, lenders can improve the security of their loans and
encourage safer disposal practices.

Scott Wilsdon*

187. See supra notes 17-19, 36-40, 52-57 and accompanying text.
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