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**THE WIDENING GYRE: A SURVEY OF POST-KELLEY LENDER  
ENVIRONMENTAL LIABILITY ISSUES UNDER CERCLA,  
CHAPTERS 376 AND 403, FLORIDA STATUTES, AND CHAPTER  
24, DADE COUNTY CODE**

Michael R. Goldstein\*

*The Second Coming!*  
*Hardly are those words out*  
*When a vast image out of Spiritus Mundi*  
*Troubles my sight*<sup>1</sup>

In February of 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the United States Environmental Protection Agency's ("EPA") Final Rule on Lender Liability ("Final Rule").<sup>2</sup> In so doing, the court abandoned a comprehensive safe harbor afforded lenders<sup>3</sup> which had allowed them to hold environmentally distressed collateral while at the same time reducing their risk of exposure to the harsh joint and several liability scheme provided for under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA").<sup>4</sup> Absent this protection, lenders, at least those situated within the Eleventh Circuit, are once again subject to the notorious and over-reaching decision of *United States v. Fleet*

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<sup>1</sup> William Butler Yeats, *The Second Coming*, The Collected Poems of W.B. Yeats, A New Edition (1989).

<sup>2</sup> *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), *reh'g denied*, 25 F.3d 1088 (memorandum opinion). For additional commentary and analysis regarding vacation of the Final Rule, see Debra L. Baker, *The EPA Lender Liability Rule - Here Today, Gone Tomorrow*, 8 Prob. & Prop. 12 (May-June 1994); Alex C. Geisinger, *From the Ashes of Kelley v. EPA: Framing the Next Step of the CERCLA Lender Liability Debate*, 4 DUKE ENVTL. L. & POL'Y F. 41 (1994); Marianne Lavelle and Harvey Berkman, *Lender Liability Limits Struck in Superfund*, NAT'L L. J., Feb. 21, 1994, at 5; Edward B. Sears and Laurie P. Sears, Comment, *Lender Liability Under CERCLA: Uncertain Times for Lenders*, 24 ENVTL. L. REP. 10320 (June 1994); Sandra Ikuta, *Suggestions for Minimizing Lender Liability after "Kelley"*, LOS ANGELES DAILY J., April 25, 1994, at 7; Cliff Tuttle, *Regulations Designed to Protect Lenders from Clean-up Costs Struck Down*, 17 PENN. L. WEEK., May 9, 1994, at 28.

<sup>3</sup> The term "lenders" in this article refers not only to financial institutions, but any secured creditor be it a business entity or individual that holds indicia of title primarily to protect a security interest.

<sup>4</sup> 42 U.S.C. §§ 9601 *et seq.*

*Factors.*<sup>5</sup> While state law poses additional liability, lenders doing business in Dade County have even more reason to be concerned: lender environmental liability under Chapter 24 of the Dade County Code is arguably far more over-reaching than anything ever provided for by Florida or Congress.

## I. INTRODUCTION

The past three decades have seen a dizzying increase in legislative, regulatory and judicial activity in the environmental arena. There has been an explosion of complex statutory schemes<sup>6</sup> under which individuals and entities may find themselves liable.<sup>7</sup> In the world of environmental law, the rules are always changing, always evolving and, significantly, notions and theories of liability are constantly expanding.<sup>8</sup> These responsibilities, both civil and criminal,<sup>9</sup> are not only found on the federal and state level, but in detailed local

<sup>5</sup> 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 752 (1990).

<sup>6</sup> See Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions for the Most Complicated Environmental Statute*, 21 ENVTL. L. REP. 10254 (May 1991).

<sup>7</sup> In addition to CERCLA, a host of federal environmental statutes pose risk to owners and operators, and thus, potentially, to lenders. These include the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA") and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6901 *et seq.*; the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, 33 U.S.C. §§ 1251 *et seq.*; the Clean Air Act of 1966, as amended, 42 U.S.C. §§ 7401 *et seq.*; the Toxic Substances Control Act of 1976 ("TSCA"), 15 U.S.C. §§ 2601 *et seq.*; the Hazardous Materials Transportation Act, 49 U.S.C. App. 1801 *et seq.*; the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. §§ 651 *et seq.*; the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 *et seq.*; the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001 *et seq.*; and the Safe Drinking Water Act of 1974, as amended, 42 U.S.C. §§ 300(f) *et seq.*; see also Stephen L. Kass and Michael B. Gerrard, *Lender Liability for Water Pollution*, N.Y. L.J., Feb. 20, 1991, at 3.

In addition to statutory liability, a universe of common law and toxic tort theories of liability may apply including negligence, nuisance, trespass, and strict liability for ultrahazardous activity. See, e.g., *O'Neil v. Q.L.C.R.I., Inc.*, 750 F. Supp. 551 (D.R.I. 1990) (holding lender potentially liable for water pollution under common law aiding and abetting theory); *Birth of a New Lender Liability Theory? Aiding and Abetting a Borrower's Violation of Environmental Laws*, 6 TXLR 950 (January 8, 1992); Michael J. Maher, *Common Law Liability for Leaking Underground Storage Tanks*, 13 N. ILL. U. L. REV. 519 (1993); David Graiss, *Lender Liability for Injuries from Lead Paint*, N.Y. L.J., April 22, 1993, at 1.

<sup>8</sup> See Robert E. Lannan, *The Ever-Expanding Scope of Liability Under CERCLA 107(a)(3): An End in Sight?*, 20 N. KY. L. REV. 75 (1992); *EPA Criminal Enforcement Comes of Age, Officials Say; Cases to Double*, [DEN] Daily Env't Rep. (BNA) No. 48, Mar. 14, 1994, at AA-1; *U.S. Firms Predicted to Feel Effects of Environmental Management Standards*, [DEN] Daily Env't Rep. (BNA) No. 50, Mar. 16, 1994, at A-1; *More Systematic, Targeted Efforts Promised; EPA Emphasis on Compliance Assurance Praised*, 25 Env't Rep. (BNA) No. 1, at 14 (May 6, 1994).

<sup>9</sup> See Robert Damell, *Environmental Criminal Enforcement and Corporate Environmental Auditing, Time for a Compromise?* 31 AM. CRIM. L. REV. 123 (1993); Edward F. Novak and Charles W. Steese, *Survey of Federal and State Environmental Crime Legislation*, 34 ARIZ. L. REV. 571 (1992).

ordinances as well. Generally speaking, it follows that lenders have good reason to fear the liability that may arise under federal law the most. Banking executives, loan officers and general counsel follow the cases and regulations that arise under CERCLA and, as best as is possible, plan accordingly. An encyclopedia of literature devoted to analysis and diligence has developed on this issue alone.<sup>10</sup> However, given the very recent administrative and judicial events as well as legislative action that may or may not occur in the near future, the issue of lender environmental liability and the problems and partial solutions associated with it are all again ripe for review.

Following the *Kelley* decision,<sup>11</sup> lenders are arguably subject to the capricious *Fleet Factors*<sup>12</sup> regime which established, first in dicta but now accepted and feared as the law of the case, that secured creditors could be held liable as owners or operators where their involvement in the financial management of a borrower's property indicated a mere capacity to influence decisions related to hazardous waste management and disposal.<sup>13</sup> Furthermore, actual involvement in the borrower's day-to-day operations would not be necessary to incur liability; the *Fleet Factors* court held that a secured creditor would be liable if its involvement with the management of the facility was sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.<sup>14</sup>

This Article, then, is a comprehensive treatment of federal, state and local issues related to environmental liability. Part II briefly discusses the nature of environmental risks to lenders and attempts to identify both direct and indirect costs that may be incurred. Part III addresses lender environmental liability under federal law. It briefly analyzes the CERCLA statutory scheme, the secured creditor exemption, case law interpreting the exemption, the Final Rule and case law following its promulgation. Part IV discusses lender liability under Florida law and, in the main, focuses on the exclusion for petroleum contamination. Part V addresses the seldom discussed or analyzed lender liability provisions of Chapter 24 of the Dade County Code, under which no exemptions apply. Part VI of the Article sets forth lender strategies to define, manage and document the types of environmental risks arising under the

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<sup>10</sup> A review of the July 1994 *Infotrac Database* revealed that the category "Hazardous Substances" contained over 1000 law review and journal articles. See also *Cumulative Bibliography*, 23 ENVTL. L. REP. (Indexes) 4005 (Jan. 1993).

<sup>11</sup> *Kelley v. EPA*, 15 F.3d 1100 (D.C.Cir. 1994), *reh'g denied*, 25 F.3d 1088 (memorandum opinion).

<sup>12</sup> *Supra* note 6.

<sup>13</sup> 901 F.2d at 1557.

<sup>14</sup> *Id.* at 1557-58.

aforementioned liability schemes. This section includes review of the FDIC Guidelines for Environmental Risk Management issued in February of 1993.<sup>15</sup> Finally, the potential for meaningful reform will be addressed. Part VII analyzes federal legislation proposed in both the House of Representatives and the Senate which purports to limit the liability of secured creditors. In addition, a proposed lender liability rule for underground storage tanks is analyzed.

## II. NATURE OF ENVIRONMENTAL RISK TO SECURED CREDITORS

As a preliminary matter, and so that lenders may intuit how far reaching the liability for environmental occurrences suffered by their borrowers may be, it is essential to have a full understanding of the varied forms in which environmental risk may present itself. There are a host of direct and indirect risks presented not only by the various federal, state and local liability schemes but also by an ever-expanding array of environmental regulation and the exacting enforcement culture which all work in concert to threaten a borrower's solvency, the proffered collateral and, of course, the lender's assets above and beyond the value of the collateral.

### A. *Direct Liability for Clean-up Costs as Owner*

The first element of environmental risk that a lender should be concerned with, the direct cost of remediation, is necessarily the most obvious as it is potentially the most ruinous. When calculating the risk of incurring liability for its borrower's environmental incidents, a lender, due to the joint and several liability among potentially responsible parties,<sup>16</sup> is well advised to plan on assuming at the very least its borrower's full share. The worst case scenario, of course, is that in addition to an insolvent borrower, there are no other potentially responsible parties in a financial position to share the burden of remediation. In that case, a deep pocket lender, absent an ability to prove

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<sup>15</sup> Published in *Environmental Due Diligence Guide* (BNA), at 501:1201.

<sup>16</sup> See Section III.A., *infra*.

divisibility of harm,<sup>17</sup> will most probably incur liability for an incident in its entirety.

The direct cost of remediation at a given Superfund site is enormous and will most always outpace even the collateral tendered in any significant commercial transaction. The average cost of investigation and remediation at non-federal sites included on the National Priorities List, a federal list compiled by the EPA which identifies the sites necessitating immediate attention and eligible for federal funds, is \$26.5 million.<sup>18</sup> A recent Congressional Budget Office report estimates that the clean-up of non-federal hazardous waste sites could reach \$120 billion in current dollars.<sup>19</sup> Costs where state or local governments take a lead role, while considerably less, are still significant.

### *B. Collateral Devaluation and/or Restriction*

In addition to the above, there are serious indirect costs associated with environmental contamination arising not only under CERCLA, but other environmental statutes as well. First, the stigmatization of land or its perceived loss in value due to its "toxic taint" can and frequently does result in an outright loss in value.<sup>20</sup> It is entirely possible to hold hundreds of acres of land or thousands of square feet of commercial space that has no value as collateral, that no buyer would touch. The enforcement mechanism undergirding a loan in the first place is thereby emasculated, and the lender is essentially then rendered a lender at sufferance. The value of the collateral may also be

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<sup>17</sup> A potentially responsible party may successfully defend against the full application of joint and several liability if it presents evidence demonstrating that the quantum of hazardous substances contributed to a release is divisible and capable of being apportioned. *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *United States v. Marisol, Inc.*, 725 F. Supp. 833 (M.D. Pa. 1989); see also David M. Moore, *The Divisibility of Harm Defense to Joint and Several Liability Under CERCLA*, 23 ENVTL. L. REP. 10529 (Sept. 1993); B. Todd Wetzel, *Divisibility of Harm under CERCLA: Does an Indivisible Potential or Averted Harm Warrant the Imposition of Joint and Several Liability?*, 81 KY. L.J. 825 (1992-93).

<sup>18</sup> Lloyd S. Dixon, *Fixing Superfund: The Effect of the Proposed Superfund Reform Act of 1994 on Transaction Costs*, RAND MR-455-ICJ, at 66 (1994).

<sup>19</sup> *Non-Federal Cleanups Could Cost \$120 Billion for Work through 2075, CBO Says in New Report*, 24 ENV'T REP. (BNA) No. 43, at 1854 (February 25, 1994).

<sup>20</sup> See James P. Downey, *Environmental Cleanup Actions, The Valuation of Contamination Property and Just Compensation for Affected Property Owners*, 8 J. LAND USE & ENVTL. L. 325 (1993); Nancy A. Mangone, *The Effect of Superfund Site Designation on Property Values - Smuggler Mountain, Aspen, Colorado: A Case Study*, 70 DEN. U. L. REV. 537 (1993).

diminished or even extinguished outright due to restrictions imposed on future land uses.<sup>21</sup>

### C. Impairment of Borrower's Ability to Service Debt Obligation

It goes without saying that any obligation or occurrence affecting a borrower's solvency will constitute a direct threat to the integrity of the loan itself. The direct cost of remediation, as discussed above, is certainly this sort of direct threat to the borrower's ability to service its debt. Yet environmental regulation and the strict regulatory culture through which rules are implemented and enforced impose yet another threat, albeit an indirect one. Simply stated, the failure to comply with any applicable regulation may invite the close scrutiny of environmental regulators. These agencies frequently have the power,<sup>22</sup> and sometimes the predisposition, to shut down a borrower completely, thus once again calling into doubt a borrower's ability to service its debt.

A failure to comply also invites the imposition of penalties which tend to be severe.<sup>23</sup> Under RCRA, for example, the federal government can levy fines of up to \$25,000 per day.<sup>24</sup> In 1993, the EPA collected a record \$133 million in civil and criminal fines.<sup>25</sup> The median civil penalty collected under RCRA in 1993 was \$600,000.<sup>26</sup> While under no circumstance is the lender in danger of assuming a borrower's penalty obligation by mere foreclosure, at least not

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<sup>21</sup> See, e.g., *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2nd Cir. 1994); Harriett Jane Olsen and Pamela A. Humbert, *Deed Restrictions May Trouble Regulated Community*, N.J. L.J., Mar. 14, 1994, at S15.

<sup>22</sup> See, e.g., RCRA §§ 3008, 3013; 40 C.F.R. § 270.41; Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for Business, Government and Citizen Enforcers*, 21 ENVTL. L. REP. 10122 (Mar. 1994).

<sup>23</sup> See William D. Wick, *Cleanup Violators Face Huge Penalties, Including Punitives*, LOS ANGELES DAILY J., May 13, 1994, at 7.

<sup>24</sup> RCRA § 3008(g) (civil fines). Criminal penalties under RCRA can be as high as \$50,000 per day per violation. RCRA § 3008(d). See, e.g., *United States v. EKCO Housewares, Inc.*, 853 F. Supp. 975 (N.D. Ohio 1994) (court determined that based on 4606 violation days, civil penalty of \$115 million could be imposed but actually imposed lesser fine, calculated at \$1000 per day, of \$4.6 million).

<sup>25</sup> Of this amount, \$103.8 million was for civil infractions and \$29.5 million was criminal violations. A record number of 2110 cases were also brought by the EPA in 1993, broken down as follows: 140 criminal cases, 1614 administrative penalty actions, 338 civil judicial cases and 18 actions to enforce existing consent decrees. *Criminal Cases, Fine Collections Rise in 1993, EPA Says in Report on Enforcement*, 24 ENV'T REP. (BNA) No. 33, at 1516 (Dec. 17, 1993).

<sup>26</sup> Recent record penalties include fines against Bethlehem Steel Corp. of \$6 million for RCRA and RCRA-related Safe Drinking Water Act Violations, and against United Technologies for what was then the highest RCRA levy ever imposed, \$3.7 million. *Id.*

under state and federal law,<sup>27</sup> a major penalty can wipe out a borrower's ability to function in a business capacity.

#### *D. Environmental Liens*

One last significant element facing lenders in the environmental risk equation is the environmental lien mechanism. While CERCLA does provide for the imposition of liens against all real and personal assets affected,<sup>28</sup> it is the environmental "superlien" which is even more distressing. Briefly stated, superliens, creatures of state law, operate to take priority over pre-existing recorded liens.<sup>29</sup> Currently, Florida does not statutorily provide for environmental superliens.

### III. LENDER LIABILITY UNDER FEDERAL LAW

It is undeniably the case that there are many sources of environmental law which pose risk to a secured lender. Notwithstanding this fact, in extending credit and securing loan obligations, lenders must carefully focus on CERCLA, the centerpiece of the federal environmental arsenal. The broad mandate given by Congress to execute clean up of contaminated facilities, the consistently generous judicial interpretation of who may be liable, a strict and unforgiving liability scheme, and a chimerical exemption for secured creditors all conspire to make the avoidance of liability, literally, a moving target.

#### *A. Comprehensive Environmental Response, Compensation and Liability Act: Liability Scheme; Defenses*

CERCLA is, charitably put, by no means a model of legislative clarity.<sup>30</sup> As a compromise statute hastily enacted,<sup>31</sup> it is rife with ambiguity and

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<sup>27</sup> But see Section V, *infra*, for discussion of a lender's administrative-type liability under Chapter 24, Dade County Code.

<sup>28</sup> CERCLA § 107(1).

<sup>29</sup> See e.g., Conn. Gen. Stat. Ann. §§ 322-452A; Mass Gen. Laws Ann. § 21E; N.J. Rev. Stat. §§ 58-10:23.11-10-45.

<sup>30</sup> "[T]he legislative history of CERCLA gives more insight into the Alice-in-Wonderland-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature." *HRW Systems, Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318, 327 (D. Md. 1993).

<sup>31</sup> *United States v. A & N Cleaners and Launderers, Inc.*, 854 F. Supp. 229, 239 (S.D.N.Y. 1994); *United States v. Mottolo*, 605 F. Supp. 898, 9032 (D. N.H. 1985); *United States v. Waste Industries, Inc.*, 556 F. Supp. 1311 (E.D. N.C. 1982).



inconsistency.<sup>32</sup> However, one of the few aspects not enshrouded in uncertainty is the intent of Congress in enacting CERCLA. The legislative history makes clear that CERCLA is a remedial statute intended to facilitate the clean up of contaminated properties at private expense.<sup>33</sup> And courts have seized upon both the ambiguity and the mandate and construed the statute to extend liability to many parties not specifically identified. These twin engines driving the expansion of liability go a long way towards explaining CERCLA's onerous effect on lenders.

CERCLA identifies four categories of persons as potentially responsible parties ("PRP"): (i) current owners or operators of property; (ii) past owners if they owned or operated the property at the time of a release of hazardous substances; (iii) generators and possessors of hazardous substances who arranged for disposal, treatment or transport; and (iv) transporters of hazardous substances who selected a treatment facility from which a release subsequently occurred.<sup>34</sup> CERCLA has a roundly condemned but deserved reputation for its harsh and onerous operation and results. Liability is strict,<sup>35</sup> retroactive,<sup>36</sup> and joint and several<sup>37</sup> for costs incurred by federal and state agencies as well as private parties in responding to and remediating a release or threatened release. Specifically, a PRP is liable for all costs of removal or remediation incurred by the United States or a given state; any other necessary costs of response incurred by any other person; damages for destruction of natural resources; and costs of any health assessment or health effect study.<sup>38</sup> The statute provides only limited and very narrow defenses for releases related to acts of war; acts of God; and acts of third parties other than those caused by employees or agents

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<sup>32</sup> See *Smith Land & Improvement Corporation v. Celotex*, 851 F.2d 86, 91 (3d Cir. 1988).

<sup>33</sup> In enacting CERCLA, Congress expressed its major policy goals quite clearly. Thus the statute's objectives are the following: to encourage maximum care and responsibility in the handling of hazardous waste; . . . and to ensure the parties responsible for the release of hazardous substances bear the costs of response and cost of damage to natural resources. *Chemical Waste Management, Inc., v. Armstrong World Industries, Inc.*, 669 F. Supp. 1285, 1290 n. 6 (E.D. Pa. 1987); see also *U.S. v. A & N Cleaners and Launderers, Inc.*, 854 F.Supp. 229, 239 (S.D.N.Y. 1994); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986).

<sup>34</sup> CERCLA § 107(a).

<sup>35</sup> *United States v. Monsanto Co.*, 858 160, 167 n.11 (4th Cir. 1988), cert. denied, 109 S.Ct. 3156 (1989); *Jordan v. Southern Wood Piedmont Co.*, 805 F. Supp. 1575, 1578 (S.D. Ga. 1992); *U.S. v. Cannons Engineering Corp.*, 899 F.2d 79 (1st Cir. 1990).

<sup>36</sup> *Kelly v. Tiscornia*, 827 F. Supp. 1315 (W.D. Mich. 1993).

<sup>37</sup> *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805-10 (S.D. Ohio 1983); *United States v. Miami Drum Services, Inc.*, 25 ERC 1469, 1474-75 (S.D. Fla. 1986).

<sup>38</sup> CERCLA § 107(A)-(D).

of the defendant, or those occurring in connection with a contractual relationship existing directly or indirectly with the defendant.<sup>39</sup>

### B. SECURED CREDITOR EXEMPTION

One other basic defense exists, and it is the focal point of this Article.<sup>40</sup> In actuality, the defense is couched in the terms of an exemption and, like the innocent landowner defense, it can be found in the definitional section of CERCLA. The secured creditor defense is an expansion on the "owner/operator" terminology and provides that "the term owner or operator shall not include a person, who, without participating in the management of a facility, holds indicia of ownership primarily to protect a security interest."<sup>41</sup>

#### 1. Judicial Interpretation

In interpreting this exemption courts have been theoretically, doctrinally and analytically all over the place.<sup>42</sup> The lack of consistency is especially frustrating to anyone connected with the lending industry because, as discussed, the stakes are so high. In short, the fuss is that there is no consistent guidance regarding what a lender may or may not do to protect its interest in property collateralizing a loan without incurring the significant joint and several liability commonly associated with environmental occurrences. A logical dilemma follows: a lender must involve itself in certain aspects of a borrower's activities at various stages during the life of a loan. In order to maintain meaningful security, a lender will retain somewhat intrusive power to influence a borrower and its operations. A lender, to save or even to work out a loan, will not

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<sup>39</sup> CERCLA § 107(b). An additional defense is found in the definitional section of CERCLA and is known colloquially as the innocent landowner defense. See CERCLA § 101(35)(A), (B); L. Jager Smith, Jr., *CERCLA's Innocent Landowner Defense: Oasis or Mirage*, 18 COLUM. J. ENVTL. L. 155 (1993); G. Van Velsor Wolf, Jr., *Emerging Contours of the CERCLA Innocent Purchaser Defense*, 20 ENVTL. L. REP. 10483 (1990).

<sup>40</sup> While this Article focuses on the secured creditor exemption and protecting against owner and operator liability under CERCLA sections 107(a)(1) and (2), it is worth noting that nothing in the exemption protects a lender from incurring liability as an arranger for disposal or transporter of hazardous substances under CERCLA sections 107(a)(3) and (4). Thus, for example, where the lender possesses the right to conduct a clean-up, one poorly planned and executed can still result in liability. See, e.g., *U.S. v. Fleet Factors Corp.*, 821 F. Supp. 707 (S.D. Ga. 1993).

<sup>41</sup> CERCLA § 101(20)(A).

<sup>42</sup> Carroll E. Dubue and William D. Evans, Jr., *Recent Developments in Lender Liability Under CERCLA: Coping with "Animal House" Disorder*, 28 TORT & INS. L.J. 40 (1992).

infrequently have to roll up its sleeves and dirty its hands in the business of a borrower. Unfortunately, to one federal appellate circuit, this normal course of affairs looked too much like "participation in the management of a facility" and it established a pinprick threshold of liability on this score.<sup>43</sup>

A second interpretive problem upon which the courts have stumbled relates to the definition of "maintaining indicia of ownership primarily to protect a security interest." Again, in the real world, foreclosure will become, at times, necessary, and lenders will acquire, at least in the short term, full title to collateral. Other times, under certain common arrangements, lenders will acquire full title involuntary; that is, their indicia of ownership may mature into outright title without any positive steps taken by the lender. Certain courts have taken a crabbed approach to this phenomena, the temporary vesting of title in the lender, and held that upon such an occurrence, the exemption fails.<sup>44</sup>

In the "cannon" of lender environmental liability law, four principal decisions stand out and underscore the conflicting messages sent by the courts interpreting the secured creditor exemption.

a. *United States v. Mirabile*<sup>45</sup>

This earliest of cases presents a reasonable but unfortunately fleeting interpretation of the secured creditor exemption. In this case, a lender foreclosed on contaminated property and took actual title to it, but conveyed it less than four months later. During the time that the bank held title, it secured a building against vandalism by boarding up windows and changing locks, made inquiries about the cost of disposal of drums located on the property and showed it to prospective purchasers. The first issue before the court was whether the lender's actions constituted impermissible participation in management. The court carefully scrutinized the types of borrower actions the lender became involved in and drew a bright line distinction between financial aspects and operational aspects. The court approved of the lender's involvement in the financial management of its borrower, holding that only involvement in the day-to-day *operational* affairs of a borrower will predicate a finding of impermissible participation in management. The second issue the court addressed was foreclosure and whether by this action alone the lender could no longer avail itself of the secured creditor exemption. Again, sensibly,

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<sup>43</sup> Fleet Factors, 901 F.2d at 1557.

<sup>44</sup> See Section III.E.(III). *infra*.

<sup>45</sup> 15 Env't. L. Rep. 20992 (E.D. Pa. 1985).

the court found for the lender, holding that its actions with respect to foreclosure were plainly undertaken to protect its security interest.

b. *United States v. Maryland Bank & Trust*<sup>46</sup>

The *Maryland Bank & Trust* decision is diametrically opposed to the *Mirabile* case and is a direct precursor to *Fleet Factors*.<sup>47</sup> This case involved an attempt by the United States to recover half a million dollars in response costs incurred to clean up the defendant bank's borrower's property, a 117-acre farm. The central issue was whether the bank's foreclosure vitiated the secured creditor exemption. The court construed the rule very narrowly, finding the exemption to be a fragile defense at best. The court wrote that "the security interest must exist at the time of the clean up. The mortgage held by Maryland Bank terminated at the foreclosure sale at which time it ripened into full title."<sup>48</sup>

In a stinging rebuttal to secured lenders in general, the court rejected the defendant bank's arguments concluding that

[u]nder 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.

In essence, the defendant's position would convert CERCLA into an insurance scheme for financial institutions, protecting them against possible losses due to the security of loans with polluted properties. Mortgagees, however, already have the means to protect themselves, by making prudent loans. Financial institutions are in a position to investigate and discover potential problems in their secured properties. For many lending institutions, such research is routine. CERCLA will not absolve them from responsibility for their mistakes of judgment.<sup>49</sup>

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<sup>46</sup> 632 F. Supp 573 (D. Md. 1986).

<sup>47</sup> See Section III.B.1.c., *infra*.

<sup>48</sup> 632 F. Supp. at 579.

<sup>49</sup> *Id.* at 580.

c. *United States v. Fleet Factors*<sup>50</sup>

While *Maryland Bank* was cause for a certain amount of concern in the industry, *Fleet Factors*, the dark knight of the lender liability "cannon," roused it to action. Here, a factoring company extended credit to a manufacturer and secured the loans with accounts receivable, equipment, inventory and property. After the manufacturer defaulted, the lender foreclosed on some of the equipment and inventory and contracted to have the site cleaned up. Critically, it never foreclosed on the property. Nevertheless, the court took the opportunity to expound upon the standards related to the secured creditor exemption. In so doing, it rejected outright the lender friendly, bright line rule enunciated in *Mirabile*, stating the following:

Under the standard we adopt today, a secured creditor may incur liability . . . by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day to day operations of the facility in order to be liable . . . . Nor is it necessary for the secured creditor to participate in the management decisions related to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.<sup>51</sup>

With this, the Eleventh Circuit established a pinprick theory of liability for lenders, a standard totally oblivious to the realities of the dynamics between lender and borrower.<sup>52</sup>

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<sup>50</sup> 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 752 (1990).

<sup>51</sup> 901 F.2d at 1557-58.

<sup>52</sup> For further analysis regarding the impact of *Fleet Factors*, see G. Alan Perkins, *Lender Liability Under CERCLA Deserves More Than A Fleeting Glance*, 13 U. ARK. LITTLE ROCK L.J. 209 (1991); Nill V. Toulme and Douglas E. Cloud, *The Fleet Factors Case: A Wrong Turn for Lender Liability Under Superfund*, 26 WAKE FOREST L. REV. 127 (1991); Weintraub and Resnick, *Secured Creditor's Liability for Hazardous Cleanup Costs: The Warnings of Fleet Factors*, 23 U.C.C. L.J. 420 (1991); Timothy R. Zinnerver, *Lender Liability under CERCLA and the Fleeting Protection of the Secured Creditor Exemption*, 44 SW. L.J. 1449 (1991).

d. *In Re Bergsoe Metal Corp.*<sup>53</sup>

In a decision reached shortly after *Fleet Factors*, and yet of little value to lenders within the Eleventh Circuit, the Ninth Circuit attempted to provide a zone of comfort to lenders. In *Bergsoe Metal*, due to a complicated and interlocking series of transactions involving municipal revenue bonds, a sale lease back agreement and a warranty deed, a municipal corporation was sued by a private party for costs incurred to clean up contamination. On summary judgment, the Ninth Circuit addressed the principal lender liability issues: what constitutes impermissible participation in management and when a party holds indicia of ownership primarily to protect a security interest.

The municipal corporation, a port authority, held title to the contaminated property by warranty deed that it acquired in a sale and lease back transaction. As a defendant in a separate action for declaratory judgment that Bergsoe be liable for all cleanup costs, Bergsoe in turn filed a third party suit for contribution against, *inter alia*, the port authority arguing that the port authority was also an owner under CERCLA. The court acknowledged that the port authority did indeed hold paper title to the subject property, but that was not enough. The critical inquiry for the court was the *reason* for the port's holding title.<sup>54</sup> The court determined in short order that the port did so simply to ensure that Bergsoe would meet its lease and other obligations.

The more meaningful impact of the *Bergsoe* decision, however, is found in its discussion of "participation in management." While sidestepping a direct address of the rigorous standard established by *Fleet Factors*,<sup>55</sup> it did roll back at least one onerous and unworkable aspect: "It is clear from the statute that, whatever the precise parameters of 'participation,' there must be *some* actual management of the facility before a secured creditor will fall outside the exception."<sup>56</sup> Despite this favorable result, as a Ninth Circuit case, lenders in the Eleventh Circuit are cautioned not to rely upon it.

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<sup>53</sup> 910 F.2d 668 (9th Cir. 1990).

<sup>54</sup> 910 F.2d at 671.

<sup>55</sup> "We leave for another day the establishment of a Ninth Circuit rule on this difficult issue." *Id.* at 672.

<sup>56</sup> *Id.* The court examined the actions of the port authority and found no actual management of the facility. It approved a lender's involvement at the planning stages of any large-scale project and its reservation of rights to inspect the premises and to re-enter and take possession upon foreclosure.

e. Annotated Lender Liability "Cannon"

There are a handful of other cases on lender liability, at both the district court and appellate level, which, while under particular circumstances may provide guidance, taken as a whole, reveal how clouded and unsettled this area of law really is. (Where the facts of the following cases provide specific guidance other than citation in favor of a particular proposition, brief annotations are given.)

(i) Cases Holding Lender Within Exemption Because of Failure to Participate in Management

(a) *In Re T.P. Long Chemical, Inc.*<sup>57</sup>

(b) *Guidance v. BFG Electroplating & Manufacturing Co.*<sup>58</sup> In this case, a borrower defaulted and the lender, a bank, took the following steps: it met with company officials of the borrower, visited the property and held meetings to restructure the loans. *But cf.* Section (iii) below.

(c) *Grantors to the Silresim Site Trust v. State Street Bank & Trust Co.*<sup>59</sup> In this case, the lender, a bank, took the following steps: it influenced removal of the borrower's chief executive officer, directly attempted to collect accounts receivable owed to the borrower and made demands regarding the collateral and security.

(d) *McGuire v. Sigma Coatings*<sup>60</sup> Here, the lender, a bank, was found not to have been consulted as to how borrower's lessee, which contaminated property, should conduct its business and that it had no capacity to exert control over the lessee's handling of hazardous substances.

(ii) Cases Holding Lender Outside Exemption for Participating in Management

*United States v. Nicolet, Inc.*<sup>61</sup> In this case, the lender, a shareholder secured a loan to a corporation with a hazardous waste site. Allegations of

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<sup>57</sup> 45 B.R. 278 (N.D. Ohio 1985).

<sup>58</sup> 732 F. Supp. 556 (W.D. Pa. 1989).

<sup>59</sup> 23 ENVTL. L. REP. 20428 (D. Mass. 1992).

<sup>60</sup> 1993 U.S. Dist. LEXIS 11934 (E.D. La. 1993).

<sup>61</sup> 712 F. Supp. 1193 (E.D. Pa. 1989).

participation in management and operational aspects of facility held sufficient to withstand summary judgment.

(iii) Cases Holding Exemption Fails Upon Foreclosure

*Guidance v. BFG Electroplating & Manufacturing Co.*<sup>62</sup> Here, the lender, a bank, held record title for only eight months, but the court held that exemption failed upon foreclosure.

(iv) Cases Holding Exemption Will Not Fail If Title Held Primarily to Protect Security Interest

(a) *Snediker Developers Limited Partnership v. Evans*.<sup>63</sup> Sellers of property, land contract vendors, retained record title and purchaser took possession. The court found the arrangement to be similar to sale and lease back arrangement approved in *Bergsoe*.

(b) *Waterville Industries v. Finance Authority of Maine*.<sup>64</sup> Once a sale and lease back transaction collapsed, the lender, a finance authority, moved within a reasonably prompt time period (six months) to divest itself of ownership.<sup>1</sup>

(c) *United States v. McLamb*.<sup>65</sup> The lender, a bank, exercised its rights as a beneficiary under a deed of trust and foreclosed on borrower's property. The court held that the lender moved within a reasonably prompt time period (seven months) to divest itself of ownership.

(d) *Northeast Doran, Inc. v. Key Bank of Maine*.<sup>66</sup> The lender, a bank, foreclosed on its borrower's property and sold it to a third party. The third party, in turn, sued the bank for declaratory judgment on the basis, *inter alia*, that it was liable as an owner. The court disagreed and held that bank moved within a reasonably prompt time period (approximately five months) to divest itself of ownership.

(e) *Kemp Industries v. Safety Light Corp.*<sup>67</sup> Here, the lender, an insurance company, held title to property through a sale-leaseback agreement to property that eventually became a Superfund site. Because the defendant's intent was generation of a lease income stream and not that type of profit opportunity

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<sup>62</sup> 732 F. Supp. 556 (W.D. Pa. 1989).

<sup>63</sup> 773 F. Supp. 984 (E.D. Mich. 1991).

<sup>64</sup> 984 F.2d 549 (1st Cir. 1993).

<sup>65</sup> 5 F.3d 69 (4th Cir. 1993).

<sup>66</sup> 15 F.3d 1 (1st Cir. 1994).

<sup>67</sup> D.N.J., No. 92-95 (June 28, 1994).



typically presented by prolonged ownership; that the arrangement placed nearly all rights and responsibilities with regard to the property with borrower, including taxes, insurance, assessments, maintenance, and repairs; and because the borrower gained the primary ownership benefits from the property, the court held that title was mere indicia of ownership held primarily to protect a security interest.

## 2. Regulatory Response: EPA's Final Rule on Lender Liability

As one can imagine, a hue and cry arose over all this uncertainty.<sup>68</sup> Pressure was put on the Environmental Protection Agency by the financial community as well as certain federal agencies,<sup>69</sup> and on April 29, 1992, the Final Rule was promulgated.<sup>70</sup> This comprehensive rule not only concisely addressed and resolved the ambiguities previously identified by the many decisions discussed *supra*, but even anticipated future vagaries as well.<sup>71</sup>

The first three sections of the rule defined the elements of the secured creditor exemption: "indicia of ownership,"<sup>72</sup> "primarily to protect a security

<sup>68</sup> See, e.g., Patricia A. Schackelford, *Easing the Credit Crunch: A "Functional" Approach to Lender Control Liability Under CERCLA*, 19 B.C. ENVTL. AFF. L. REV. 805 (1992).

<sup>69</sup> While mobilization from the financial community was to be expected, the more interesting story relates to the about-face by the federal government. For many years, the Justice Department advocated strongly for an expansive construction of the term "owner and operator" under CERCLA that would marginalize the secured creditor exemption and ensnare lending institutions. This effort culminated in the *Fleet Factors* decision. At some point soon thereafter, immense pressure was brought by sister federal agencies, and the Justice Department found itself litigating to save the Final Rule from the attack mounted by the Chemical Manufacturers Association and the Attorney General of Michigan. In fact, some of the very same Justice Department attorneys briefed and argued both the *Fleet Factors* and the *Kelley* decisions. For a thorough history of these developments, see William D. Evans, Jr., *Exorcising the Polluted Mortgage*, 2 DICK. J. ENVTL. L. & POL'Y 127, 147-49 (1993); Michael G. Greenberg and David M. Shaw, *To Lend or Not to Lend - That Should Not Be the Question: The Uncertainties of Lender Liability Under CERCLA*, 41 DUKE L.J. 1211, 1239 (1992).

<sup>70</sup> 57 Fed. Reg. 18,344.

<sup>71</sup> For additional commentary and analysis regarding the Final Rule, see Robin A. Goble, *EPA's CERCLA Lender Liability Proposal: Secured Creditors "Hit the Jackpot"*, 32 NAT. RESOURCES J. 653 (1992); Ronald L. Weaver and Jo Clair Spear, *Lender Environmental Liability: the EPA's Interpretation of CERCLA's Security Interest Exemption*, 66 FLA. B.J. 24 (July-August 1992).

<sup>72</sup> The Final Rule defined "indicia of ownership" to mean evidence of a security interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title to real or personal property acquired incident to foreclosure and its equivalents. See 40 C.F.R. § 300.1100(a).

This section also set forth a list of approved interests, including those which technically vested title in a lender. They included, but were not limited to, mortgages, deeds of trust, liens, surety bonds and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not

interest”<sup>73</sup> and “participation in management.”<sup>74</sup> The last section then exhaus-

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initially select the leased property, legal or equitable title obtained pursuant to foreclosure, and their equivalents. Evidence of indicia also included assignments, pledges, or other rights to or other forms of encumbrance against property that are held primarily to protect a security interest.

The Final Rule also clarified aspects relating to the holder of indicia, declaring that a “holder” includes the initial holder, such as the loan originator; any subsequent holder, such as a successor in interest or subsequent purchaser of the security on the secondary market; a guarantor of an obligation, surety, or any other person who holds ownership indicia primarily to protect a security interest; or a receiver or other person who acts on behalf or for the benefit of a holder. *See* 40 C.F.R. § 300.1100(a)(1).

<sup>73</sup> In construing the security interest exemption, the Final Rule attempted to clarify what exactly is meant by “primarily to protect a security interest” by declaring that it applies where a holder’s indicia of ownership is held primarily for the purpose of securing payment or performance of an obligation. *See* 40 C.F.R. § 300.1100(b). To provide additional guidance, the Final Rule set forth in laundry list fashion a host of acceptable security interests, even those technically vesting title in a lender. They included, but were not limited to, mortgages, deeds of trusts, liens and title pursuant to lease financing transactions. They may also arise from transactions such as sale and leasebacks, conditional sales, installments sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements and consignments. *See* 40 C.F.R. § 300.1100(b)(1).

While the Final Rule did reassert that the exemption does not apply where indicia of ownership is held primarily for investment purposes, nor where ownership indicia is held primarily for purposes other than as protection for a security interest, a holder may have other secondary reasons for maintaining indicia of ownership. *See* 40 CFR § 300.1100(b)(2).

<sup>74</sup> Perhaps the most welcome aspect of the Final Rule was its clarification of what constitutes permissible participation in management. In so doing, the Final Rule created two categories of activities: those that simply are participation in management (and impermissible), 40 C.F.R. § 300.1100(c)(1), and those that are not (and sanctioned), 40 C.F.R. § 300.1100(c)(2).

The first salient aspect of the former category is that actual participation in management or operational affairs was required in order for a lender to fall outside of the exemption. *See* 40 C.F.R. § 300.1100(c)(1). Under this section, the “mere capacity to influence,” “ability to influence,” or the “unexercised right to control facility operations” standards of *Fleet Factors* and its progeny were all specifically rejected. *Id.*

Further guidance to determine whether a holder is participating in management was provided in the form of a two-prong test. The test was satisfied if the holder either exercises decisionmaking control over the borrower’s environmental compliance, such that the holder has undertaken responsibility for the borrower’s hazardous substance handling or disposal practices, 40 C.F.R. § 300.1100(c)(1)(i); or exercised control at a level comparable to that of a manager of the borrower’s enterprise, such that the holder had assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with respect to environmental compliance or operational aspects. *See* 40 C.F.R. § 300.1100(c)(1)(ii). A detailed definition of “operational aspects” was also provided. *See* 40 C.F.R. § 300.1100(c)(1)(ii)(B).

Detailed guidance was provided as to the second category, actions that are not participation in management. These permissible actions were also subcategorized based upon the status of the loan transaction. Where the loan transaction is at its inception, that is, prior to the time that indicia of ownership are held primarily to protect a security interest, almost any act or omission was allowed. A prospective holder may undertake or require an environmental inspection of property in which indicia of ownership are to be held, or require a prospective borrower to clean up property or to comply or come into compliance with any applicable law or regulation. *See* 40 C.F.R. § 300.1100(c)(2)(i).

tively documented what activities would and would not be sanctioned during foreclosure<sup>75</sup> and following foreclosure.<sup>76</sup> While the Final Rule went to great

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The second phase of permissible activities typically arose during policing and workout and were considered under the Final Rule to be consistent with holding ownership indicia primarily to protect a security interest. During the policing stage, for example, a lender was allowed to require the borrower to clean up property during the term of the security interest; require the borrower to comply or come into compliance with applicable federal, state and local environmental and other laws, rules and regulations during the term of the security interest; secure or exercise authority to monitor or inspect property or the borrower's business or financial condition; or take other appropriate action to adequately police the loan or security interest such as requiring the borrower to comply with any warranties, covenants, conditions, representations or promises. *See* 40 C.F.R. § 300.1100(c)(2)(ii)(A).

During workout, a holder was allowed to take action which sought to prevent, cure or mitigate a default by the borrower or to preserve or prevent the diminution in value of the security. Permissible workout activities would have included, but were not limited to, restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations or promises from the borrower. *See* 40 C.F.R. § 300.1100(c)(2)(ii)(B).

<sup>75</sup> This section of the Final Rule repudiated that line of cases holding that the exemption failed upon the lender taking title. In addition to the traditional method of foreclosure, a wide array of mechanisms through which a lender may acquire title primarily to protect its security interest was approved. The Final Rule referred to this array as "foreclosure and its equivalents" and included not only purchase at a foreclosure sale, but acquisition or assignment of title in lieu of foreclosure, termination of a lease or other repossession, acquisition of a right to title or possession, an agreement in satisfaction of obligations, or any other formal or informal manner by which the holder acquires title to or possession of the secured property. *See* 40 C.F.R. § 300.1100(d)(1).

Immediately following foreclosure, the Final Rule allowed indicia of ownership to continue to be maintained primarily as protection for a security interest provided that the holder undertakes to sell, re-lease property held pursuant to a lease financing transaction, or otherwise divest itself of the property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the property, taking all facts and circumstances into consideration. However, a holder that outbids, rejects or fails to act upon a written bona fide, firm offer of fair consideration for the property was not considered to hold indicia of ownership primarily to protect a security interest. In such an instance, the exemption would fail. *Id.*

Specific guidance was provided relating to a lender's actions to divest itself of title. A lender that, within twelve months following foreclosure, lists the property with a broker, dealer or agent who deals with the type of property in question, or that advertises the property as being for sale or disposition on at least a monthly basis in either a real estate publication or a trade or other publication suitable for the property in question, or a newspaper of general circulation stayed within the exemption. *See* 40 C.F.R. § 300.1100(d)(2)(i). A lender could not outbid, reject or fail to act upon an offer of fair consideration for the property, unless the lender is required, in order to avoid liability under federal or state law, to make a higher bid, to obtain a higher offer, or to seek or obtain an offer in a different manner. *See* 40 C.F.R. § 300.1100(d)(2)(ii). Fair consideration was defined as follows:

An amount equal to or in excess of the sum of the outstanding principal owed to the lender immediately preceding acquisition of full title pursuant to foreclosure, plus any unpaid interest,

lengths to clarify the secured creditor exemption, it also made clear that nothing therein would preclude liability incurred in connection with a lender's activities related to arranging for disposal or treatment of a hazardous substance<sup>77</sup> or accepting hazardous substances for transportation and disposal.<sup>78</sup> See 40 C.F.R. § 300.1100(d)(3).

During the relatively brief period of its existence, the Final Rule, in the majority of cases, was applied by several courts in a fashion favorable to lenders.<sup>79</sup> However, on the last day possible, the state of Michigan and the

rent or penalties, plus all reasonable and necessary costs, fees or other charges incurred by the holder incident to work out, foreclosure and its equivalents, retention, maintaining the business activities of the enterprise, preserving, protecting and preparing the vessel or facility prior to sale, re-lease of property held pursuant to a lease financing transaction, plus response costs incurred under section 107(d)(1) of CERCLA or at the direction of an on-scene coordinator; less any amounts received by the lender in connection with any partial disposition of the property, net revenues received as a result of maintaining the business activities of the enterprise, and any amounts paid by the borrower subsequent to the acquisition of full title. 40 C.F.R. § 300.1100(d)(2)(ii)(A).

A lender was considered to have rejected fair consideration where it outbids, rejects or fails to act upon within 90 days of receipt of a written, bona fide, firm offer of fair consideration received at any time after six months following foreclosure and its equivalents. A "written, bona fide, firm offer" was defined as a legally enforceable, commercially reasonable, cash offer solely for the foreclosed facility or vessel, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform. See 40 C.F.R. § 300.1100(d)(2)(ii)(B).

<sup>76</sup> The Final Rule provides detailed guidance to lenders who find themselves holding foreclosed property for disposition and liquidation. Specifically, a holder may sell, re-lease property held pursuant to a lease financing transaction, liquidate, maintain business activities, wind up operations, undertake any response action under CERCLA section 107(d)(1) or under the direction of an on-scene coordinator, and take measures to preserve, protect or prepare the secured asset prior to sale or other disposition without voiding the exemption. See 40 CFR § 300.1100(d)(2).

<sup>77</sup> See CERCLA § 107(a)(3); see also *United States v. Fleet Factors Corp.*, 821 F. Supp. 707 (S.D. Ga. 1993).

<sup>78</sup> See CERCLA § 107(a)(4).

<sup>79</sup> Only a few decisions were reached while the Final Rule was in effect that actually applied its provisions either independently of or in conjunction with the secured creditor exemption under the statute. See *Ashland Oil, Inc. v. Sonford Products Corp.*, 810 F. Supp. 1057 (D. Minn. 1992) (lender engaging in routine lending and bankruptcy workout activities, including selling assets and holding title to former tenant's assets for three to four weeks, not liable); *Kelley v. Tiscornia*, 810 F. Supp. 901 (W.D. Mich. 1993) (holding that lender's demand that borrower obtain new management, regular consultations with borrower, monitoring of borrower's financial conditions, installing two representatives on borrower's board of directors, issuing letter of credit to secure payment of bonus for borrower's chief executive officer based on reduction of company's indebtedness to bank, issuing statements concerning power of borrower's chief executive officer and owner to fire employees and asserting influence over workout specialist were all sanctioned by Final Rule); *United States v. Fleet Factors Corp.*, 821 F. Supp. 707 (S.D. Ga. 1993) (lender's agents' handling of hazardous substances on site and failure to vacate the property in reasonably expeditious manner were all outside Final Rule, triggering liability); see also Richard A. Spehr, *Lenders Find Safe Harbor as Courts Uphold Environmental Protection Agency Rule Limiting CERCLA Liability*, 22 REAL EST. L. J. 66 (1993);

Chemical Manufacturers Association sued to overturn the rule. In February of 1994, the Appellate Court for the D.C. Circuit handed down the *Kelley* decision vacating the Final Rule and suggesting that the EPA and the Clinton Administration seek relief from Congress.<sup>80</sup> The court held the Final Rule could not stand as either a substantive or legislative rule because, *inter alia*, Congress gave the courts and not the EPA authority to interpret questions of liability.<sup>81</sup>

### C. Impact of Vacation and Current Status of Liability

The immediate effect of the *Kelley* case, and this is especially so for lenders in the Eleventh Circuit, is that the *Fleet Factors*<sup>82</sup> doctrine once again controls. While some cases have been decided in favor of lenders during the existence of the Final Rule though independent of it and in reliance solely on the statutory secured creditor exemption,<sup>83</sup> these cases offer negligible solace. Until the Eleventh Circuit directly speaks once more to the issue of the secured creditor exemption and clarifies the standards previously enunciated, under no circumstances should a lender assume the more permissive doctrines apply.

## IV. SECURED CREDITOR LIABILITY UNDER FLORIDA LAW

While scattered about in haphazard fashion, there are ample provisions under Florida law for private and public parties to recover environmental response costs. These provisions can be found in Chapters 403 and 376, respectively, of the Florida Statutes.

### A. Hazardous Substances in General: Chapter 403, Florida Statutes

Fla. Stat. § 403.727(4) provides the Florida Department of Environmental Protection with a CERCLA-type liability scheme for the recovery of costs

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William D. Evans, *Ashland Oil v. Sonford Products Corp.*, *Kelley v. Tiscornia*, and *United States v. Fleet Factors Corp.*: Upholding EPA's Lender Liability Rule, 29 TORT & INS. L. J. 141 (1993).

<sup>80</sup> *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), *reh'g denied*, 25 F.3d 1088 (memorandum opinion).

<sup>81</sup> *Id.* at 1108.

<sup>82</sup> *Supra* Section III.B.1.c.

<sup>83</sup> *Northeast Doran, Inc. v. Key Bank of Maine*, 15 F.3d 1 (1st Cir. 1994); *Waterville Indus., Inc. v. Finance Authority of Maine*, 984 F.2d 549 (1st Cir. 1993); *United States v. McLamb*, 5 F.3d 69 (4th Cir. 1993); *McGuire v. Sigma Coatings*, 1993 U.S. Dist. LEXIS 11934 (E.D. La. 1993); *Grantors to the Silresin Site Trust v. State Street Bank & Trust Co.*, 23 ENVTL. L. REP. 20428 (D. Mass. 1992).

associated with releases and threatened releases of hazardous substances. Similar and narrow CERCLA-type defenses are available as well.<sup>84</sup> While the state and federal schemes in broad respects mirror one another, the former departs from the latter in at least one material aspect - the lack of any secured creditor exemption.<sup>85</sup>

*B. Protection of Ground and Surface Waters: Chapter 376, Florida Statutes*

The Department of Environmental Protection may also recover environmental response costs under Chapter 376, Florida Statutes, which,

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<sup>84</sup> See Fla. Stat. § 403.727(5), which provides as follows:

The following defenses are available to a person alleged to be in violation of this act, who shall plead and prove that the alleged violation was solely the result of any of the following or combination of the following:

- (a) An act of war.
- (b) An act of government, either state, federal, or local, unless the person claiming the defense is a governmental body, in which case this defense is available only by acts of other governmental bodies.
- (c) An act of God, which means only an unforeseeable act exclusively occasioned by the violence of nature without the interference of any human agency.
- (d) An act or omission of a third party other than an employee or agent of the defendant or other than one whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the defendant, except when the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail, if the defendant establishes by a preponderance of the evidence that:
  - 1. The defendant exercised due care with respect to the biomedical or hazardous waste concerned, taking into consideration the characteristics of such biomedical or hazardous waste, in light of all relevant facts and circumstances; and
  - 2. The defendant took precautions against foreseeable acts or omission of any such third party and against the consequences that could foreseeably result from such act or omissions.

<sup>85</sup> Another material difference, but one outside the scope of this article, is the lack of provisions for either private or governmental parties regarding consistency with the National Contingency Plan ("NCP"). The NCP, developed by the EPA, pursuant to CERCLA § 105 and codified at 40 C.F.R. Pt. 300, is a comprehensive regulatory document addressing all phases of a Superfund response action, including the means for site identification, investigation, ranking, selection of cleanup alternative and preferred remedies and implementation of any final selected remedy. Both private and governmental parties must comply with the NCP pursuant to applicable standards. Failure to do so in any substantial respect can result in the denial of recovery of response costs. Compare *Pierson Sand & Gravel v. Pierson Tp.*, 851 F. Supp. 850, 855-58 (N.D. Ohio 1994) (non-compliance) with *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 24 F.3d 1565 (9th Cir. 1994) (compliance); see also James R. Geason, *Clear as Mud: The Function of the National Contingency Plan Consistency Requirement in a CERCLA Private Cost Recovery Action*, 28 GA.L. REV. 555 (1994); Charles C. Steincamp, *Toeing the Line: Compliance with the National Contingency Plan for Private Party Cost Recovery Under CERCLA*, 32 WASH. L.J. 190 (1993).

generally speaking, regulates discharges to surface and ground waters of the state. Section 376.308 is another detailed liability scheme identifying categories of liable parties<sup>86</sup> and very narrow defenses.<sup>87</sup> Liability under this section differs from liability under Chapter 403, Florida Statutes, in that § 376.308 allows for an explicit, albeit limited, exemption for secured lenders. The exemption is limited in two separate ways. First, it applies only to petroleum releases. Second, it does not apply to *any* entity or individual holding indicia of ownership primarily to protect a security interest; it applies only to financial institutions.<sup>88</sup>

Arguably, a cause of action exists for the recovery of costs private parties incur to respond to hazardous substance contamination under sections 376.313(3) and 376.302(1)(a), Florida Statutes.<sup>89</sup> Section 376.313(3) provides in part that "nothing contained in ss. 376.30-376.319 prohibits any person from bringing a cause of action in a court of competent jurisdiction for all damages resulting from a *discharge or other condition of pollution covered by ss. 376.30-376.319* (emphasis added)." Thus, a private party may recover the costs it is forced to incur to ameliorate damages caused by another as a result of any regulated event prohibited by sections 376.30-376.319, Florida Statutes. Section 376.302(1)(a), Florida Statutes, in particular prohibits the discharge of hazardous substances into or upon surface or ground water. While private parties may therefore sue for cost recovery under state law, lenders in this instance still will have recourse to the limited secured creditor defense set forth in section 376.308(3), Florida Statutes.

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<sup>86</sup> Fla. Stat. §§ 376.308(1)(a)-(c) (1993).

<sup>87</sup> Fla. Stat. §§ 376.308(1)(c), (2)(a)-(d), (3) (1993).

<sup>88</sup> Fla. Stat. § 376.308(3) provides that financial institutions are exempt in three circumstances: (i) where they serve as trustee, personal representative, or other type of fiduciary; (ii) where they hold indicia of ownership primarily to protect a security interest and have not divested the borrower of, or otherwise engaged in, decisionmaking control over site operations, particularly with respect to the storage, use, or disposal of petroleum or petroleum products, and (iii) where they have foreclosed and seek to sell or otherwise divest themselves of the security at the earliest possible time. The exemption also allows a financial institution to compel the borrower to maintain compliance with environmental statutes and rules and to act to prevent or abate a discharge.

<sup>89</sup> While the scope of recovery afforded a private party under section 376.313(3) is open to interpretation and has been subject to debate, at least one court has ruled that recovery is limited to the costs associated with responding to hazardous substance contamination, i.e., remediation costs and not any real or imagined diminution in value to property. See *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372 (Fla. 2nd DCA 1993).

## V. SECURED CREDITOR LIABILITY UNDER CHAPTER 24, DADE COUNTY CODE

In analyzing the risk posed to lenders by collateral which may become environmentally distressed, there is more to be considered than the potential liability posed by CERCLA and any of its state counterparts. A practitioner is well advised to consult applicable ordinances or laws promulgated by a local government or municipality. It would not be out of the ordinary to discover there is another significant source of exposure, at least to a governmental entity.

Chapter 24 of the Dade County Code (the "Code"), otherwise known as the Metropolitan Dade County Environmental Protection Ordinance,<sup>90</sup> controls and regulates activities which are causing or may cause pollution or contamination of air, water, soil and property within Dade County. Sections 24-54 through 24-57 set forth the enforcement, penalty and liability scheme for any violation of Chapter 24, which is itself divided into four distinct and separate articles.<sup>91</sup> Lenders and their counsel should focus on section 24-57(g), a little discussed and less understood component which nonetheless has serious ramifications and provides as follows:

Whenever a violation of this chapter occurs or exists, or has occurred or existed, any person, individually or otherwise, who has a legal, beneficial, or equitable interest in the facility or instrumentality causing or contributing to the violation or who has a legal beneficial or equitable interest in the real property upon which such violation occurs or exists, or has occurred or existed, shall be jointly and severally liable for said violation regardless of fault and regardless of knowledge of the violation. This provision shall be construed to impose joint and severable liability, regardless of fault and regardless of knowledge of the violation, upon all persons, individually or otherwise, who,

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<sup>90</sup> § 24-1, Dade County Code.

<sup>91</sup> Article I, sections 24-1 through 24-57, is a general catchall category, containing, in addition to enforcement, penalty and liability provisions, *inter alia*, definitions, water quality standards, provisions for the protection of water supply and wellfields and regulations relating to underground storage facilities, the handling of petroleum and petroleum products and the spraying of substances containing asbestos. Article II, sections 24-58 through 24-59.2 addresses construction and other activities in canals, tidal water, submerged bay-bottom lands, coastal wetlands and freshwater wetlands. Article III, sections 24-60 through 24-60.9, regulates tree removal and provides for preservation and protection. Article IV, section 24-61, is the Metropolitan Dade County Stormwater Ordinance.



although said persons may no longer have any such legal, beneficial or equitable interest in said facility or instrumentality or real property, did have such an interest at any time during which such violation existed or occurred or continued to exist or occur. This provision shall be liberally construed and shall be retroactively applied to protect the public health, safety, and welfare and to accomplish the purposes of this chapter.

Lost in the verbiage are at least four different elements which are more readily apparent when broken up as follows:

- (1) Whenever a VIOLATION of this chapter occurs or exists, or has occurred or existed,
- (2) any person, individually or otherwise, who has a LEGAL, BENEFICIAL, OR EQUITABLE INTEREST
- (3) in the facility or instrumentality causing or contributing to the violation or who has a legal, beneficial or equitable interest in the real property upon which such violation occurs or exists, or has occurred or existed,
- (4) shall be JOINTLY AND SEVERALLY LIABLE FOR
- (5) SAID VIOLATION
- (6) REGARDLESS OF FAULT AND REGARDLESS OF KNOWLEDGE of the violation.
- (7) This provision shall be construed to impose joint and severable liability, regardless of fault and regardless of knowledge of the violation, UPON ALL PERSONS, individually or otherwise, WHO, ALTHOUGH SAID PERSONS MAY NO LONGER HAVE ANY SUCH LEGAL, BENEFICIAL OR EQUITABLE INTEREST in said facility or instrumentality or real property, DID HAVE SUCH AN INTEREST AT ANY TIME DURING WHICH SUCH VIOLATION EXISTED OR OCCURRED OR CONTINUED TO EXIST OR OCCUR.
- (8) This provision shall be LIBERALLY CONSTRUED and shall be RETROACTIVELY APPLIED to protect the public health, safety, and welfare and to accomplish the purposes of this chapter.

The first important element of this section is located in paragraph (2). As the ordinance covers "any person with a legal, beneficial or equitable interest," secured creditors are specifically included. There is no exemption by which a

secured creditor may shield itself from the liability incurred by its borrower.<sup>92</sup> This is a major deviation from the federal scheme and, therefore, should put lenders holding collateral in Dade County on notice that great care needs to be taken to define, limit and manage environmental risk.

The second important element of this section addresses the scope of liability which may be incurred and is, itself, divided, into several sub-elements. First, review of paragraphs (4), (6) and (7) reveals a familiar CERCLA type structure: liability is strict, joint and several and retroactive. However, a major deviation and another significant source of concern for lenders is revealed in paragraphs (1) and (5), for it is here indicated that liability is triggered for *any* violation of Chapter 24. A lender could thus incur liability not only for CERCLA-type contamination situations but for any other infraction its borrower commits as set forth in Chapter 24 of the Code. A lender may also be responsible for administrative penalties assessed against its borrower. As DERM may assess fines at up to \$25,000 per violation per day,<sup>93</sup> this avenue poses a very real additional source of liability which must be considered.

The third significant element of this section is found in paragraph (7) and, again, extends liability beyond traditional boundaries established under CERCLA case law. In a CERCLA context, under certain circumstances, a potentially responsible party ("PRP") may maneuver out of the chain of liability. This is arguably so if (i) the PRP acquires property after a release has occurred and after a release has ceased to occur; (ii) the PRP does not exacerbate or contribute to the past release and (iii) if the PRP is no longer a current owner when contamination is discovered.<sup>94</sup> Similarly, in certain jurisdictions, a PRP may also escape liability where there are "passive"

<sup>92</sup> This is only absolutely the case for regulations set forth in Articles I, II and IV. The one exception to this rule is found in Article III, at section 24-60(5), which provides a limited mortgagee exemption for a borrower's violation of the regulations relating to tree protection. This exception however, is extremely narrow and fails upon (i) foreclosure; (ii) a secured party's participation in the management and control of the collateral; or (iii) where the secured party itself has effected or caused the tree ordinance violations.

The existence of this exemption should provide little, if any, consolation, to lenders. That is, while it will infrequently, if ever, be the case that a lender will incur liability under Article III, the mere existence of the exemption will go a long way on the County's behalf in serving to uphold an interpretation of section 24-57(g) which denies the existence of a secured creditor exemption. In other words, a persuasive argument can and will be made that the drafters of the Code knew how to craft a secured creditor exemption, they did so in this limited instance pertaining to Article III, and their failure to enact a similar provision in Article I indicated that this was a conscious effort on their part.

<sup>93</sup> § 25-57(a), Dade County Code.

<sup>94</sup> Richard H. Mays, 1 CERCLA LITIGATION, ENFORCEMENT AND COMPLIANCE MANUAL §7.04, at 7-7.

releases.<sup>95</sup> However, the drafters of the Code have seemingly closed even these narrow loopholes.

The Code assesses liability against "all persons . . . who, although said persons may no longer have any such legal, beneficial or equitable interest in said facility . . . did have such an interest at any time during which such violation existed or occurred or continued to exist or occur."<sup>96</sup> The operative language here is "did have such an interest at any time during which such violation existed." Thus, for example, consider a situation where a lender holds as collateral property upon which a spill of hazardous solvents occurred. This spill occurred suddenly, prior to the establishment of the lender's security interest, and was not discovered at any time until after the loan was repaid and the interest terminated. However, the groundwater standards beneath the property were violated by the spill and continued to be violated, unbeknownst to anybody, during the term of the security interest's existence. Under CERCLA, without more, no liability arguably should attach. Under a plain reading of the Code, however, a lender would be rendered liable.

The final significant element of this section is found in paragraph (8). Here, the drafters directed that the section should be liberally construed to protect public health, safety, and welfare and purposes of this chapter. This language ensures that its many far reaching provisions will be upheld. And, indeed, it is, *inter alia*, this exact language that the Florida Third District Court of Appeals relied upon in *Seaboard System R.R., Inc. v. Clemente*,<sup>97</sup> upholding several critical aspects of the ordinance.<sup>98</sup> While the Third District Court of Appeals did not pass on a secured lender's liability in this case, it is likely that this issue would withstand judicial scrutiny as well.

<sup>95</sup> See *Snediker Developers Ltd. Partnership v. Evans*, 773 F. Supp. 984, 988-99 (E.D. Mich. 1991); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454 (N.D. Cal. 1989); but see *State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032 (2nd Cir. 1985) (holding that leaking, continued leaching and seepage from earlier spills constitutes "release"); see also Henry L. Stephens, Jr., *When Is "Leaching" Not "Leaking": CERCLA Liability of Owners and Operators at the Time of Disposal*, 24 ENVTL. L. REP. 10177 (April 1994).

<sup>96</sup> § 25-57(g), Dade County Code.

<sup>97</sup> 467 So. 2d 348 (Fla. 3d DCA 1985).

<sup>98</sup> The *Seaboard* Case upheld the joint and several and strict liability provisions of section 24-57(g). It specifically upheld retroactive application based on the environmental protection benefits accorded the public:

The newly enacted ordinance, section 24-57(g), merely defines and delineates the scope and breadth of the strict liability imposed under the previously existing environmental protection provisions of Chapter 24 . . . . Furthermore, we do not find retroactive application of this ordinance unduly harsh in a due process sense since the environmental protection benefits accorded the public by this provision far exceed any burden imposed upon appellants.

*Id.* at 358.

## VI. DEFINING, MANAGING, AND DOCUMENTING ENVIRONMENTAL RISK

Regardless of the many risks and uncertainties facing lenders on the federal, state and local level, some financial opportunities will be so otherwise attractive that a business decision is made to go forward. And indeed, while environmental risk can never be eliminated in its entirety, it can certainly be defined, managed and documented against such that the decision to go forward is both reasonable and prudent. This next section identifies strategies, programs and methods to this end which operate to ameliorate judicial, regulatory and legislative failures.

### A. Pick Appropriate Loan Vehicle

The EPA's Final Rule embraced the full panoply of loan financing arrangements, including traditional mortgage arrangements as well as those vesting title in the lender, such as sale and lease back arrangements.<sup>99</sup> With its vacation, lenders in the Eleventh Circuit have no specific guidance on this score, the Eleventh Circuit Court of Appeals has not spoken on this issue. Other courts have gone both ways.<sup>100</sup> While the majority of courts, both on the trial and appellate level, look to a lender's intent in structuring the transaction,<sup>101</sup> there have been decisions which take the more crabbed and formalistic approach.<sup>102</sup> To afford itself an additional protection where an "alternative"-type vehicle is chosen, such as a financing lease, joint venture or deed absolute, a lender is advised to restrict the borrower's ability to unilaterally abandon its interest in the property.<sup>103</sup> A further right a lender will want to obtain in negotiating the loan is that which would allow the lender to unilaterally deed title to the borrower without affecting the borrower's payment obligations.

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<sup>99</sup> See *supra* note 68.

<sup>100</sup> Compare *Guidance v. BFG Electroplating & Manufacturing Co.*, 732 F. Supp. 556 (W.D. Pa. 1989) with *Snediker Developers Limited Partnership v. Evans*, 773 F. Supp. 984 (E.D. Mich. 1991).

<sup>101</sup> See Section III.B.1.e.(iv), *supra*.

<sup>102</sup> Notwithstanding the theoretical nature of this dichotomy, lenders in Dade County have no such dilemma to ponder. As any legal, equitable or beneficial interest whatsoever in property is sufficient to implicate a lender, the qualitative title analysis is rendered irrelevant and immaterial.

<sup>103</sup> See Paula Thornton Perkins, *Abandonment in the Face of Possible Toxic Contamination: What's a Lender to Do?*, 44 Sw. L. J. 1563 (1991).

### B. Investigate Collateral and Borrower

Perhaps the most important precaution a lender can take is the performance of a thorough pre-loan investigation of the collateral offered as security and of the borrower him or herself.<sup>104</sup> In some cases a less formal transaction screen will be appropriate. In others, an American Society of Testing Materials ("ASTM") "phase I audit"-type investigation will be required.<sup>105</sup> In heavily industrialized areas, inquiry into surrounding properties is appropriate. Where the borrower maintains ongoing operations, an investigation into any past enforcement action taken against him would be prudent as well. While the importance of environmental investigation when entering into a loan transaction cannot be underestimated,<sup>106</sup> the very real possibility that contamination may

<sup>104</sup> See Malcolm D. Griggs, *Lender Audits May Yield Dividends*, 5 ENVTL. PROTECTION 48 (1994).

<sup>105</sup> A "phase I audit" or site assessment is the most common and thorough way in which to establish an environmental baseline. While the nature and scope of a phase I audit may vary depending on the circumstances, it usually involves a physical inspection of the property, and review of prior uses, aerial photographs and environmental agency records. Sometimes more intrusive, or "phase II"-type inquiry, is necessary. The ASTM has recently promulgated a protocol which is the emerging industry standard. See James W. Conrad, Jr., *Sliding Scale or Slippery Slope? The New ASTM's Standard Practices for Environmental Site Assessments*, 23 ENVTL. L. REP. 10181 (Month Year). There is at least one other institutional protocol, promulgated by the Resolution Trust Company. See *RTC Guidance for Phase I Environmental Site Assessments*, published in ENVIRONMENTAL DUE DILIGENCE GUIDE (BNA), at 501:1241 (January 22, 1993). Fannie Mae also has developed extensive and comprehensive "phased" guidance which a lender must follow to assess and monitor the environmental condition of property pledged as security for a mortgage. See *Fannie Mae DUS Guide, Part X - Environmental Hazards Management Procedures*, published in ENVIRONMENTAL DUE DILIGENCE GUIDE (BNA), at 131:801 (April 25, 1994). The Office of Thrift Supervision has issued guidance as well. However, this document is not as formalized or comprehensive as any of the foregoing. See *Office of Thrift Supervision Guidelines on Environmental Risk and Liability (Thrift Bulletin 16)*, published in ENVIRONMENTAL DUE DILIGENCE GUIDE (BNA), at 501:1221 (Feb. 6, 1989).

<sup>106</sup> In April of 1993, Environmental Data Resources, Inc. surveyed thirty-five U.S. commercial banks. The table below, compiled as a result of that survey, reflects those operating areas subject to a formalized policy of environmental review.

#### OPERATIONAL AREAS SUBJECT TO FORMALIZED POLICY OF ENVIRONMENTAL REVIEW

I. Commercial Real Estate		
A.	Loan Origination	88%
B.	Loan Renewal	81%
C.	Real Estate Owned ("REO")/Foreclosure	92%
II. Single Family Residential Real Estate		
A.	Loan Origination	38%
B.	Loan Renewal	35%
C.	REO/Foreclosure	42%

have occurred during the life of the loan as well suggests the need to conduct further investigation prior to foreclosure.<sup>107</sup>

### C. Impose Appropriate Transactional and Documentary Protections

Various transactional and documentary measures have been specifically developed to identify, manage and marginalize the environmental risk posed by a borrower and its collateral.<sup>108</sup> Where a problem is known and contamination has been discovered, a lender may require that a borrower escrow a certain portion of the financing to fund remediation.<sup>109</sup> A lender may also simply

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III. Non-Real Estate Secured Transaction	
A. Equipment	27%
B. Receivables	23%

The survey principally reveals that almost all the institutions surveyed subject commercial loan transactions collateralized by real property to a formalized policy of environmental review. The survey also reflects, understandably, that the percentages drop dramatically when residential real estate is involved. However, where loans are secured by personalty or receivables, the lowest percentages are indicated. This result is curious given that banks incur the same sort of onerous liability where receivables and assets become contaminated or are the source of contamination. *See, e.g., Polger v. Republic Nat'l Bank*, 709 F. Supp. 204 (D. Colo. 1989).

An operational area not addressed by the survey but of significant concern is the bank trust department. A recent decision indicates that trust departments, trustees and fiduciaries are subject to the same kind of risks as lenders. In *Phoenix v. Garbage Services*, 1993 U.S. Dist. LEXIS 5970 (D.Az. April 5, 1993), a federal district court in Arizona held a trustee personally liable for the hazardous contamination of a landfill site. Remediation costs there were estimated to run as high as \$60 million. *See also* Michele B. Corash and Robert J. Reinhard, *Liability of Institutional Trustees Under CERCLA*, 3 DUKE ENVTL. L. & POL'Y F. 1 (1993); F. James Handley, *Trustee Liability Under CERCLA*, 24 ENVTL. L. REP. 10479 (August 1994); Edward N. Polisher and Clifford S. Meyer, *Clothing the Emperor - An Update Responding to City of Phoenix v. Garbage Services Company*, 132 TR. & EST. 41 (1993).

<sup>107</sup> There is additional incentive to do so. The "innocent landowner" defense set forth at CERCLA § 101(35) requires that those relying on it conducted all appropriate inquiry into previous ownership and uses at the time of acquisition. Performing a phase I audit immediately prior to foreclosure will allow a lender to invoke the defense. *See Banks as Innocent Owners in Forfeiture Cases*, Carl H. Lowenson Jr. and Kathleen Fallon, N.Y. L.J., March 17, 1993, at 1.

<sup>108</sup> *See, e.g.,* Charles E. Davidson, *Environmental Considerations in Loan Documentation*, 106 BANKING L. J. 308 (1989); Aimmee L. Manocchio Nason, *How to Environmentally Assess Your Loan Documentation after Fleet Factors*, 2 DICK. J. ENVTL. L. & POL'Y 157 (1993).

<sup>109</sup> This, however, will not suffice to adequately protect a lender from incurring liability or other environmental loss. The facts and result memorialized in *U.S. v. Pitney Bowes, Inc.*, 25 F.3d 66 (2nd Cir. 1994), present a cautionary tale and underscore the important role that appropriate documentary protections play in an overall environmental risk management program. Here, a foreign bank lent \$7 million to a company to develop property located within a known Superfund site. The bank was aware of this designation and thus required the borrower to hold back \$1 million of the loan proceeds to fund the remediation. Apparently confident that it had successfully limited its exposure, the bank failed to closely monitor the borrower, nor did it provide a vehicle to do so. It had failed to require the borrower to provide regular notification regarding

require the borrower to supplement the offered collateral. In this instance, the lender should reserve the right to foreclose on any part of the security individually. In the main, however, contamination will not have occurred or will be either undiscovered or unrevealed. Therefore, a lender must provide for and against the unknown. While documenting around, through or against the possibility of contamination is certainly not a panacea, it does complement the other methods discussed in this article and will provide some recognizable benefits. Sample provisions include those that would require the borrower to:

- Comply with all federal, state and local environmental laws;
- Refrain from or limit the use, generation, treatment, storage or disposal of any hazardous substance on site, or prohibit the sublease to or affiliation with any entity that does;
- Notify the lender whenever any material amount of hazardous substance is spilled, deposited or discovered on site;
- Notify the lender of any orders, requests, notifications or other written or verbal communication from any government agency or private party relating to the presence, suspected presence or potential presence of any hazardous substance on site, from any source;
- Indemnify the lender against any liability arising out of the presence or release of any hazardous substance;
- Obtain environmental impairment insurance in favor of the lender;<sup>110</sup>
- Permit the lender to enter the property for purposes of environmental testing or the determination of compliance; and
- Where permitted under state law, reconvey any security subsequently discovered to be contaminated, and treat the loan as unsecured, if necessary.

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remediation activities. Nor did the bank receive any notification regarding pending developments from the EPA. At the time, the Final Rule was still in effect, and as the EPA, per the Final Rule, did not consider the bank a PRP, it simply declined to provide the bank with information.

Eventually, the various PRPs entered into a settlement decree whereby future land uses would be severely curtailed and deed restrictions required. In short, the decree severely crippled, if not altogether extinguished, the marketability of the property. The issue before the Second Circuit Court of Appeals was whether the bank was entitled to intervene at such a late date, following entry of the consent decree. In holding that the bank was not, the court admonished that a "sophisticated" lender must either keep in touch with its borrower or in some other way closely monitor the situation. *Id.* at 71 ("Such parties are responsible for monitoring their collateral themselves, and it may reasonably be assumed that a lender of nearly seven million dollars will keep in contact with its debtor to protect its interest in the loan.")

<sup>110</sup> See John L. Riedl & Armin R. Callo, *Financial Institution Environmental Liability Insurance: New Panacea for Lenders' Pollution Ills*, 4 ENVTL. CLAIMS J. 359 (1994); see also David J. Barberie, *Dimmitt Chevrolet v. Southeastern Fidelity Insurance Corp.: Reaching in the Wrong Pocket?*, 9 J. LAND USE & ENVTL. L. 161 (1993); Walter E. Engle III, *Dimmitt Chevrolet v. Southeastern Fidelity Insurance Corp.: Florida Interprets the "Sudden and Accidental" Clause*, 44 MERCER L. REV. 1387 (1993).

*D. Develop Consistent Loan Servicing Practices*

In order to protect not only assets but future rights and options regarding collateral, consistent attention to loans presenting known environmental risks are extremely important. Where collateral is involved in ongoing remediation activities, counsel should be engaged to monitor the proceedings and be provided with all agency documentation received by the lender, especially all notices of hearing and/or settlement. Similarly, where the borrower has been required to supply documentation of compliance, scrutinize such proof closely.<sup>111</sup>

*E. FDIC Guidelines*

While the preceding section sets forth comprehensive procedures and transactional considerations to protect a lender from being exposed to environmental risk and liability, FDIC institutional lenders have been provided and are subject to additional protocols. On February 23, 1993, the FDIC issued its Guidelines for an Environmental Risk Program ("FDIC Guidelines"). The preamble states only that a lending institution *should* have in place appropriate safeguards and controls to limit exposure to environmental liability. A close reading of the document, however, makes clear that these are much more than suggested procedures.

Examiners will review an institution's environmental risk program as part of the examination of its lending and investment activities. When analyzing individual credits, examiners will review the institution's compliance with its own environmental risk program. Failure to establish or comply with an appropriate environmental program will be criticized and corrective action required.<sup>112</sup>

The FDIC Guidelines require that a lender's environmental risk management program be formalized, not ad hoc, and integrated into an institution's overall decisionmaking process. The more salient aspects of the

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<sup>111</sup> See also Peter G. Glubiak, *Loan Policies for Environmental Matters*, 6 PROB. & PROP. 30 (May-June 1992).

<sup>112</sup> *Id.* at 1.



environmental risk management program set forth in the FDIC Guidelines are as follows:

- The Board of Directors should review and approve the environmental risk management program.
- A senior officer knowledgeable in environmental matters should be designated responsible for implementation of the environmental risk management program.
- As not all institutional lending requires the same level of environmental scrutiny, the environmental risk management program can be tailored to individual needs.
- The program should provide for staff training,<sup>113</sup> set environmental policy guidelines and procedures,<sup>114</sup> require environmental review or analysis during the application process,<sup>115</sup> include loan documentation standards<sup>116</sup> and establish appropriate environmental risk assessment safeguards<sup>117</sup> in loan workout situations and foreclosures.

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<sup>113</sup> Training should be sufficient to ensure that the environmental risk management program is implemented and followed within the institution and that the appropriate personnel have knowledge and experience to determine and evaluate potential environmental concerns that might affect the institution. However, when the complexity of the environmental issue is beyond the expertise of staff, outside professional counsel should be consulted.

<sup>114</sup> Loan policies that affect collateral posing an environmental risk should be reduced to writing and incorporated into formalized lending manuals. Furthermore, these lending manuals are suggested to identify types of environmental risk associated with industries and real estate in the lender's trade area, provide guidelines for conducting analysis of environmental liability and describe procedures for resolution of potential environmental concerns. The FDIC Guidelines suggest that the same procedures apply to credit monitoring, loan workout situations and foreclosures.

<sup>115</sup> The environmental risk analysis should be conducted prior to making loan, i.e., during the application process. Most relevant information can be gathered by account officers when interviewing a loan applicant concerning his or her business activities. The application itself should contain relevant inquiries related to present and past uses of the property, and the occurrence of any contacts by federal, state or local government agencies about environmental matters. It is also suggested, but not required, that the loan officer or other representative visit the site to note obvious visual evidence of environmental concerns.

Where the initial review indicates a possible environmental concern, the FDIC deems appropriate a more detailed, structured investigation by qualified personnel. On this score, an ASTM phase I audit type review is recommended, encompassing a survey of past ownership and uses of the property, inspection of site and contiguous parcels of property, review of company records for past use or disposal of hazardous materials, review of regulatory records, and review of historical aerial photographs.

<sup>116</sup> The FDIC Guidelines specifically identify language which would require the borrower to comply with all environmental laws, disclose information about the environmental status of collateral, and grant the institution the right to acquire additional information by inspecting the collateral.

<sup>117</sup> In order for a lender to maximize the protection afforded by an environmental risk management program, the FDIC Guidelines suggest that an environmental risk assessment is an ongoing process which should continue during the life of a loan by monitoring the borrower and collateral for potential environmental concerns. Specific attention should be directed to any changes in business activities, operations or processes of the borrower that might result in significant increased environmental risk.

As the foregoing demonstrates, the FDIC recommends a fairly aggressive posture regarding the evaluation and management of environmental risk posed by a borrower, its operations and collateral. At the same time it recognizes a danger in doing so, one informed by the lesson of *Fleet Factors*.<sup>118</sup> To that end, the FDIC Guidelines note that even while closely scrutinizing and monitoring a borrower, a lender should at the same time evaluate whether its actions in doing so rise to the level of "participation in management" which would vitiate the secured creditor exemption.<sup>119</sup>

#### F. State Rehabilitation Programs

The remediation costs related to contamination of property by hazardous and other substances are, at this point in time, a well recognized fact of commercial life. The Florida Legislature has specifically recognized two of the most frequent sources of contaminated property, that caused by petroleum storage tanks and dry cleaning facilities, and has provided public funding mechanisms to assist in their remediation. These programs may serve to provide a lender with either additional financial assurances prior to executing a loan arrangement or funds for reimbursement should it lose the secured creditor exemption and be held liable for clean-up costs.

Of the two state rehabilitation programs, the older is the Abandoned Tank Restoration Program ("ATRP") which provides funding for the cleanup of contamination of abandoned petroleum tanks.<sup>120</sup> The Florida Legislature recently renewed this program for another two years. Note that there are some strict qualification requirements that must be met.<sup>121</sup> A borrower's facility may not qualify based upon past regulatory exceedances or failures.<sup>122</sup> Counsel

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<sup>118</sup> See Section III.B.1.c, *supra*.

<sup>119</sup> Indeed, the FDIC Guidelines have been subject to criticism on this very point. See Charles E. Bethel II, *Are FDIC Environmental Risk Guidelines Adequate or Is the FDIC Leading Banks Out of Their Safe Harbor?*, 17 HAMLINE L. REV. 177 (1993); see also Constantine Sidamon-Eristoff and Robert LoBue, *The Federal Deposit Insurance Corporation's New Environmental Guidelines*, 22 REAL EST. L. J. 319 (1994). It is for this very reason that environmental counsel should be retained not only to assist in designing an appropriate environmental risk management program, but to monitor the status of lender liability law and how legislative and judicial developments affect the risk calculus.

<sup>120</sup> Fla. Stat. § 376.3071.

<sup>121</sup> Fla. Admin. code r. 17-769.800.

<sup>122</sup> See, e.g., *Flav-O-Rich, Inc. v. State of Florida Department of Environmental Regulation*, 13 FALR 921 (1991) (denial of eligibility for participation in restoration coverage of Florida Petroleum Liability Insurance and Restoration Program for failure to properly abandon underground storage tanks, failure to maintain inventory records, failure to timely install a monitoring system and overfill protection and failure to properly monitor leak detection systems); *Weeks Oil Company, Inc. v. State of Florida Department of*

should be engaged to review a borrower's representations about its facility, its past compliance history and likelihood of receiving reimbursement funds.

These caveats also apply to the most recent state rehabilitation program which provides for the cleanup of facilities contaminated by dry cleaning solvents.<sup>123</sup> Moreover, as this program only became effective July 1, 1994, a lender's reliance on representations related to future funding from this source would be ill-advised for another reason. Regulations related to qualifying, priority and fund disbursement will take some time to promulgate and finalize. Any legal challenge to these regulations will further delay implementation. In short, the final parameters will not be established for some time.

While in some circumstances, state reimbursement funds may provide adequate additional assurances sufficient to extend a loan, these situations must be subjected to the closest of scrutiny.

### *G. Proposed Storage Tank Rule*

Given all that has transpired with the promulgation and subsequent vacation of the Final Rule, the EPA is acutely aware of the credit crunch facing owners and operators of facilities likely to use, store or become contaminated with hazardous waste.<sup>124</sup> This factor in conjunction with a recent federal mandate to upgrade and replace Underground Storage Tank ("UST") systems, has prompted the EPA to propose a lender liability rule specifically for UST systems (the "UST Rule").<sup>125</sup> The UST Rule is simply a clarification of an existing statutory exemption for secured creditors under Subtitle I of RCRA.<sup>126</sup>

Under the proposed UST Rule, a lender is eligible for an exemption, both prior to and after foreclosure, if the lender (i) holds an ownership interest in an UST or in a property on which the UST is located in order to protect its security interest; (ii) does not engage in petroleum production, refining and marketing;

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*Environmental Regulation*, 12 FALR 2827 (1990) (denial for participation in Early Detection Incentive Program under §376.3071(9)(b)3 due to gross negligence in the maintenance of a petroleum storage system); *Flash Foods, Inc. v. State of Florida Department of Environmental Regulation*, 89 ER FALR 0080 (1989) (denial for participation in Early Detection Incentive Program under §376.3071(9)(b)3 due to gross negligence in failure to meet monitoring and retrofit requirements).

<sup>123</sup> H.R. 2817/Ch. 94-355.

<sup>124</sup> 59 Fed. Reg. 30,448 (June 13, 1994) (to be codified at 40 C.F.R. 280.200 *et seq.*).

<sup>125</sup> *Id.*

<sup>126</sup> The exemption provides that the term "owner" in the statute "does not include any person, who, without participating in the management of an underground storage tank and otherwise not engaged in petroleum production, refining and marketing, holds indicia of ownership primarily to protect the owner's security interest in the tank." RCRA § 9003(h)(9).

(iii) does not participate in the management or operation of the UST; and (iv) does not store petroleum in the UST after foreclosure.<sup>127</sup>

Without going into detail, the rule discusses and defines the terms "participating in management," "indicia of ownership" and "primarily to protect a security interest" and lists types of activities that can be undertaken without losing the exemption. Significantly, the proposed UST Rule also rejects the "mere capacity" test.<sup>128</sup> In short, it generally mirrors the now vacated Final Rule on lender liability.<sup>129</sup> Should it survive the inevitable legal challenge, it should provide sufficient assurances to lenders financing the purchase, renovation or general upgrading of gas stations and other similar petroleum facilities.

## VII. SUPERFUND REFORM

No doubt any permanent and certainly the most meaningful relief will come from Congress. The high level of uncertainty and the universally unacceptable compliance and program costs<sup>130</sup> associated with Superfund has famously aroused resentment and opposition from all quarters - lenders, manufacturers, municipalities, business and professional associations and insurers.<sup>131</sup> While for many years, these groups concentrated their energies on scuttling CERCLA altogether,<sup>132</sup> and past Congressional efforts to deal with this issue have

<sup>127</sup> See 59 Fed Reg. 30,465-30,466.

<sup>128</sup> See 59 Fed Reg. 30,463-30,465.

<sup>129</sup> In a footnote contained in the preamble to the UST Rule, the EPA acknowledges the *Kelley* case, but maintains that the decision does not affect the current proposed regulations. According to the EPA, its rulemaking authority under RCRA is broader than that under CERCLA and is sufficiently explicit. 59 Fed. Reg. 30,451 n.3.

<sup>130</sup> It is estimated that annual environmental compliance will exceed \$200 billion by the end of this decade. Robert G. Harvey and Michael H. Levin, *What You Can Do If You Don't Have Cash - Financing Environmental Compliance*, 24 ENV'T REP. (BNA) No. 46, at 1984 (March 18, 1994); see also Claudia MacLachlan, Marianne Lavelle and Marcia Coyle, *EPA Chief Decries Legal Bills of Superfund* (Carol Browner), NAT'L L.J., May 24, 1993, at 5.

<sup>131</sup> See *Business Leaders Call For Program Overhaul, Concede That Reforms Likely to Increase Costs*, 24 ENV'T REP. (BNA) No. 23, at 1072 (Oct. 8, 1993); *House Chair Shelves Efforts to Overhaul Law After Remedy Selection Negotiations Collapse*, 24 ENV'T REP. (BNA) No. 50, at 2091 (May 6, 1994). For a discussion of the problems facing selected interest groups and suggested legislative solutions, see Earl K. Madsen, Dennis L. Arfmann, and John Galbavy, *Superfund Reauthorization: An Opportunity to Rectify Major Problems*, 24 ENV'T REP. (BNA) No. 22, at 1020 (Oct. 1, 1993).

<sup>132</sup> See *U.S. v. A & N Cleaners and Launderers, Inc.*, 854 F.Supp. 229, 239 (S.D.N.Y.) (" . . . CERCLA is now viewed nearly universally as a failure"); Robert W. McGee, *Superfund: It's Time for Repeal After a Decade of Failure*, 12 UCLA J. OF ENVTL L. & POL'Y 165 (1993); Estelle Fishbein, *Superflop; the Failure of Superfund, and the Flawed Plan to Fix It*, WASH. POST, April 22, 1994 at A25; Ralph W. Siskind,

stalled,<sup>133</sup> more recently a consensus has emerged and meaningful reform appears imminent.<sup>134</sup>

The Superfund Reform Act of 1994,<sup>135</sup> has emerged as the primary vehicle for amending CERCLA. While the House version contains detailed provisions related to lenders, real relief for the industry will come not only through a congressional clarification of the secured creditor exemption - it will involve substantive reform to CERCLA itself. This too looks achievable as the reform package proposed by Congress contains various components which will appeal to most potential PRPs, from deep pocket defendants such as lenders, municipalities and insurers to individuals and small businesses that comprise the majority of small quantity generators.

#### A. Direct Relief for Lenders

The House version exhumes the lender liability rule from its judicial grave.<sup>136</sup> In amending CERCLA § 115, it directly references the Federal Register citation to the Final Rule, deeming it to have been validly issued under CERCLA and precluding judicial review of same. A comparable version proposed in the Senate<sup>137</sup> takes a somewhat different approach. It does limit the

*The Not So Superfund: Replacing the Law's Liability Scheme in the Law Might Make It Work Better*, 16 PENN. L.J., May 10, 1993, at 5.

<sup>133</sup> For an excellent and comprehensive survey of past legislative Superfund reform proposals as well as a review of the current House and Senate proposals, see *Uncertain Times for Lenders* at 103270-30; see also James E. Satterfield, *A Tale of Sound and Fury: The Environmental Record of the 102d Congress*, 23 ENVTL. L. REP. 10015 (Jan. 1993). For additional thorough analysis of the Superfund Reform Act, see Richard E. Bartelt and David E. Polter, *Summary of the Proposed Superfund Reform Act of 1994*, 25 ENV'T REP. (BNA) No. 13, at 608 (July 29, 1994); Steven M. Javetz, *The Superfund Reform Act of 1991: Success or Failure is Within EPA's Sole Discretion*, 24 ENVTL. L. REP. 10161 (April 1994).

<sup>134</sup> See *Reauthorization Process Back on Track after EPA's Proposed Changes Win Support*, 25 ENV'T REP. (BNA) No. 1, at 4 (May 6, 1994); *House Subcommittee Approves Reform Bill; State Role, Voluntary Cleanup Titles Added*, 25 ENV'T REP. (BNA) No. 2, at 43 (May 13, 1994); *Groups Suggests Dozens of Superfund Amendments to House Panel*, 15 INSIDE EPA, No. 29, July 22, 1994, at 3; *Reform Bill Continues Advance in House; Move against Retroactive Liability Thwarted*, 25 ENV'T REP. (BNA) No. 13, at 579 (July 29, 1994); but see *In the Congress*, 24 ENVTL. L. REP. (News and Analysis) 10488 (August 1994) ("The race to reauthorization is close, and the pressure on legislators is enormous. Powerful interests with vastly different concerns contend that Congress must reauthorize these statutes their way. Compromises are difficult to forge and difficult to preserve. Participants threaten to 'kill' proposals or 'hold them hostage.' For the cynics, it is business as usual in our nation's capital.").

<sup>135</sup> Superfund Reform Act of 1994, H.R. 3800, 103d Cong., 2d Sess. (1994); Superfund Reform Act of 1994, S. 1834, 103d Cong., 2d Sess. (1994).

<sup>136</sup> H.R. 3800, § 407.

<sup>137</sup> S. 1834, §§ 44, 131.

liability of those lenders who either reacquire a facility through foreclosure or who would otherwise be liable as owners and operators. Liability would be limited to the actual benefit (net gain in property) conferred on the lender by a remediation unless the lender caused or contributed to a release. However, rather than incorporating the EPA's rule, the Senate bill articulates those specific actions that a lender could take and still avoid liability. Federal banking and lending activities are also shielded from certain CERCLA liabilities.

*B. Additional Reforms - Indirect Relief for Lenders*

**1. Rollback of Joint and Several Liability/Adoption of Equitable Allocation Scheme**

There are other likely reforms which will serve to reduce a lender's total exposure should it be held liable. A detailed allocation system is proposed to ameliorate some of the perceived unfairness that results from the joint and several liability scheme. Under this proposed scheme, the PRPs for a Superfund site would select an EPA-approved allocator. The allocator would be empowered to gather information, conduct investigations and compel compliance with information gathering efforts. He or she would then make a non-binding apportionment recommendation based upon a list of factors including: the amount of hazardous substances contributed by each allocation party; the degree of toxicity of hazardous substances contributed by each allocation party; the degree of involvement of each allocation party in the generation, transportation, treatment, storage, or disposal of hazardous substances; degree of care exercised by each allocation party with respect to the hazardous substance; and the cooperation of each allocation party in contributing to the response action and in providing complete and timely information during the allocation process.

**2. Legislative "Due Diligence" Definition and Establishment of Consultant Standards**

Another major reform that is a long time in coming, but welcome nonetheless, is related to the due diligence required of those parties that acquire title to real property upon which contamination is later discovered. While there has been considerable speculation regarding what is the sufficient "all appropriate inquiry" that must take place prior to purchase to establish the

"innocent landowner" defense under sections 107(b)(3) and 101(35) of CERCLA and whether any given phase I assessment will qualify, EPA has heretofore never defined acceptable criteria and content. In an effort to resolve this uncertainty, the House version would authorize the EPA to establish standards or adopt standards developed by others. The House bill also directs the EPA to establish a model state program for organizations that train and certify individuals to perform phase I assessments.

### VIII. CONCLUSION

Lenders and others attempting to keep track of environmental regulations and the cases interpreting them have every right to feel dizzy. There is a non-stop swirl of activity — legislative, administrative and judicial — and liabilities expand and contract gyre-like. While it seems that a legislative fix now slouches towards Congress to be born, this apparition may ultimately prove illusory. Taken as whole, the climate for lenders doing business in the Eleventh Circuit is extremely precarious. Moreover, as the Eleventh Circuit has not readdressed the issue of secured creditor liability since *Fleet Factors*, it would be ill-advised at best for any lender to bank on escaping liability based on the developing and somewhat more expansive caselaw in other jurisdictions. For lenders holding collateral in Dade County, the risks are even more acute, and any relief from the Eleventh Circuit is not likely to alter this fact. The liability provisions of Chapter 24 of the Dade County Code were drafted with precision and care, and it will be extremely difficult for any secured creditor to successfully defend against a cost recovery suit filed by Dade County.

What can remain constant in this storm of uncertainty and change is the precaution a lender takes in entering into a loan relationship and the diligence it maintains thereafter. Adequate investigation of the borrower and proffered collateral prior to extending funds, close continued scrutiny thereafter, knowledge regarding the status of the law and the leeway it currently affords lenders in monitoring and directing a borrower's operations, and a legally and factually informed and carefully crafted foreclosure contingency plan will provide adequate although not absolute protection against environmental risk.