Impact of CERCLA on Real Estate Transactions: What Every Owner, Operator, Buyer, Lender, . . . Should Know

Jeffrey M. Moss

Follow this and additional works at: https://digitalcommons.law.byu.edu/jpl
Part of the Environmental Law Commons, and the Property Law and Real Estate Commons

Recommended Citation
Available at: https://digitalcommons.law.byu.edu/jpl/vol6/iss2/9

This Comment is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.
Impact of CERCLA on Real Estate Transactions: What Every Owner, Operator, Buyer, Lender, . . . Should Know

I. INTRODUCTION

Environmental liability issues affect every real estate transaction, whether it be the financing and purchase of a multimillion dollar industrial facility, a piece of farm land, or even residential property.¹ These issues are deeply serious, for they involve at their heart our relation to the powerful technologies upon which our society increasingly has come to rely. Yet the effects of these developing legal rules are also severe: they threaten to disrupt and even reorder established investments, longstanding methods of doing business, and preexisting expectations about legal rights and responsibilities.²

Indeed, 

"[n]o field of liability involves more far reaching statutory civil liabilities than those imposed by the Federal Superfund and similar state regimes."³ Many of the players in real estate transactions, including buyers, sellers, lenders, and successor and parent corporations, regardless of their degree of care, risk exposure to millions of dollars in potential liability for hazardous wastes which may be hidden on, or which may later be disposed of on a parcel of property. Although few disagree that the environmental threat which these hazardous waste sites impose justifies drastic measures, many argue that liability under CERCLA is misplaced⁴ and that its dramatic

³. Id. at 942.
⁴. Gerhardt, supra note 1, at 17 (arguing that the court in United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986), “ignored commercial realities and left some disturbing questions” in holding a secured lender which had

365
impact on real estate transactions and the economy is unjustified,\(^5\) and even counterproductive.\(^6\)

This paper discusses CERCLA's impact on real estate transactions and what, at a minimum, every player in any real estate transaction should know in order to prevent or limit CERCLA liability. It is not the purpose of this paper to analyze every issue raised in great detail; its scope is far too broad for such in depth coverage. Rather, it is intended to provide an overview of the potential CERCLA liability of the major players in a real estate transaction, focusing on the most controversial current issues.\(^7\) Part II of this paper briefly surveys CERCLA's statutory scheme. Part III focuses on the various players in any real estate transaction who risk exposure to millions of dollars in Superfund liability, regardless of their degree of care and foreclosed on property contaminated by hazardous wastes liable for $500,000 in cleanup costs incurred by the EPA); Elizabeth Ann Glass, *Superfund and SARA: Are there any Defenses Left?*, 12 HARV. ENVTL. L. REV. 385, 432 (1988). Glass argues that

\[^{[t]}\]he scope of CERCLA liability needs to be narrowed so that it is more predictable. Investors and businessmen need to know the true potential of their liability under the Act. Current trends are resulting in the alienation of lands and businesses which might have contained hazardous waste sites at one time rather than deterring the abandonment of such sites. As this indicates, the Emphasis of CERCLA is severely misplaced.

*Id.*

5. Glass, *supra* note 4, at 431-32 ("businessmen are becoming increasingly reluctant to invest in businesses which might generate, transport, or store hazardous waste, and are finding that the possible CERCLA liability often outweighs the investment opportunity in a potentially profitable company") (citation omitted). Glass points out that "enforcement of CERCLA has deleteriously affected real estate and commercial transactions," *id.* at 386, and that "the current state of the law is grossly unfair . . . ." *Id.* at 394. See also Abraham, *supra* note 2, at 944 (new environmental liability and lack of insurance for it "is bound to discourage productive enterprise"); Steven B. Bass, Comment, *The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment*, 41 U. MIAMI L. REV. 879, 899-901 (1987) (pointing out that imposition of Superfund liability on banking industry forces interest rates to rise, thus stunting economic growth).

6. Glass, *supra* note 4, at 386 ("The Act has created as many problems as it has resolved"). See also *id.* at 432. CERCLA can be referred to as an "environmental black hole" since it generally promotes the abandonment, rather than the cleanup of waste sites. For example, CERCLA encourages lenders, rather than to foreclose and purchase the property through a sheriff's sale and expose themselves to potential liability far exceeding the value of the underlying security interest, to simply write the loans off and not touch the property; furthermore, property taxes will most likely not be paid on property marked with CERCLA liability—no one wants the property so eventually it will merely escheat back to the state.

7. For example, lender liability and the security interest exemption of CERCLA section 101(20)(A).
often regardless of their degree of comparative fault. Part III also analyzes the limited defenses available to these respective players as well as other ways in which liability may be limited. Part IV concludes that until Congress acts to more fairly and justifiably allocate responsibility for hazardous waste disposal liability, or until courts limit their extremely expansive and liberal interpretation of CERCLA, every player in any real estate transaction must be acutely aware of its potential liability and of how this liability may be limited.

II. STATUTORY OVERVIEW

A. History and Policy of CERCLA

CERCLA is a hastily drafted "eleventh hour compromise" which, as one judge has said, is "marred by vague terminology and deleted provisions." Other judges concur that "CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history." Despite its vague provisions and indefinite legislative history, however, the courts' liberal interpretation of CERCLA has led to one fairly uniform rule: the EPA usually gets its way.

CERCLA is designed for the dual purpose of "allow[ing] the federal government to respond effectively to 'problems of na-

8. New York v. Shore Realty, 759 F.2d 1032, 1040 (2d Cir. 1985). See also Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988) (noting that "[i]t is not surprising that, as a hastily conceived and briefly debated piece of legislation, CERCLA failed to address many important issues, including corporate successor liability"); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988) (CERCLA was "enacted in the waning hours of the 96th Congress, and as the product of apparent legislative compromise is not the model of clarity"); Glass, supra note 4, at 389 ("[t]he senators were determined to pass legislation in response to the tragedy at Love Canal before the session ended. Therefore, . . . the actual Bill which became law has virtually no recorded legislative history. Cuts, changes, and adaptations were made without reference or explanation").


tional magnitude resulting from hazardous waste disposal' and to assure that those who profit from hazardous activities 'bear the cost and responsibility for remedying the harmful conditions they created.' Through its statutory scheme "the government generally undertakes pollution abatement and polluters pay for such abatement through tax and reimbursement liability." However, as is discussed below, it is often more than the actual "polluters" who pay.

B. Statutory Structure

1. Who May Be Liable?

CERCLA's liability section establishes four classes of potentially responsible parties:

1. current owners or operators of hazardous waste sites;
2. those persons who owned or operated the site at the time of disposal;
3. hazardous waste generators who arranged for disposal or treatment of their waste at the site;
4. transporters of the hazardous waste to a site from which there is a release or threatened release.

The term "owner or operator" "does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." This is commonly referred

12. Sharon Steel, 681 F. Supp. at 1495 (quoting United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982). See also Cumberland Farms, 805 F.2d at 1081; United States v. Wade, 577 F. Supp. 1326, 1331 (D. Pa. 1983) ("the Act is intended to facilitate the prompt clean-up of hazardous waste dump sites and when possible to place the ultimate financial burden upon those responsible for the danger created by such sites").

13. New York v. Shore Realty, 759 F.2d 1032, 1041 (2d Cir. 1985) (citation omitted). See also United States v. Fleet Factors, 901 F.2d 1550, 1553 (11th Cir. 1990) (noting that "[t]he essential policy underlying CERCLA is to place the ultimate responsibility for cleaning up hazardous waste on 'those responsible for problems caused by the disposal of chemical poison'") (citing Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1316; United States v. Aceto Ag. Chem. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989)).


to as the security interest exemption.\textsuperscript{17}

2. Extent of Liability and Who May Sue

The parties enumerated in CERCLA section 107(a) are "potentially liable for the costs incurred as a result of 'a release, or a threatened release . . . of a hazardous substance' from the facility."\textsuperscript{18} The federal (or state) government may either use Superfund funds\textsuperscript{19} to finance the cleanup of a hazardous waste facility and then bring an action against these parties to recover the cost,\textsuperscript{20} or the EPA may require these parties to remove hazardous substances which present an imminent and substantial danger to public health or welfare or the environment from the facility.\textsuperscript{21} CERCLA not only allows the government to bring suit, but "section 107(a)(1-4)(B) makes responsible parties liable to private persons for response costs" consistent with the national contingency plan.\textsuperscript{22} A

\textsuperscript{17} See infra text accompanying notes 75-150.

\textsuperscript{18} 42 U.S.C. § 9607(a) (1988). These costs include costs of removal or remedial action incurred by the federal or state government, other necessary response costs incurred by a party other than the government "consistent with the national contingency plan," natural resource damages, and the costs of a health assessment. 42 U.S.C. § 9607(a)(4)(A-D) (1988). Note that although it is an unspoken EPA policy to use CERCLA only against owners or operators of abandoned sites and RCRA against owners or operators of nonabandoned sites, CERCLA liability may be imposed on owners or operators of nonabandoned sites. Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986).

\textsuperscript{19} When it was created in 1980, Superfund was funded primarily from excise taxes levied on the petroleum and chemical industries. Congress levied those taxes, essentially pollution excise taxes, specifically on those two industries because it believed there was a reasonable nexus between their activities and the production of hazardous substances. Predominantly following the "polluter pays" principle, Congress fashioned the Superfund so that parties responsible for producing hazardous substances bore the brunt of the removal and cleanup costs.

In 1986, however, Congress decided that to finance the substantial increase in the Superfund, it would broaden the Superfund tax base beyond merely the chemical and petroleum industries. Such a change in policy reflected the Senate Finance Committee's view that "the clean-up of abandoned hazardous waste sites is a broad societal problems extending beyond the chemical and petroleum industries." Consequently, SARA drew on other sources to replenish the Superfund with $8.5 billion over five years. The Superfund is currently subsidized as follows: 30% from a tax on petroleum, 30% from a tax on raw chemicals, 15% from general revenues, 3.5% from interest, and 3.5% from government recoveries of cleanup costs from responsible parties.

\textsuperscript{20} 42 U.S.C. § 9607(a) (1988).


\textsuperscript{22} Wickland Oil Terminals v. Asarco, 792 F.2d 887, 890 (9th Cir. 1986) (citing Bass, supra note 5, at 903-04.)
governmentally authorized cleanup is *not* a precondition to a private cause of action under CERCLA\(^{23}\) so long as the private party is acting consistent with the national contingency plan.\(^{24}\)

3. *Retroactive Strict Liability*

Not only are responsible parties strictly liable\(^{25}\) for the costs incurred as a result of a release or threatened release, but this liability is retroactive, meaning that liability is imposed "for the consequences of actions that were not subject to strict liability at the time they were taken."\(^{26}\) Thus, "[t]his liability attaches regardless of the time when the material was deposited and regardless of the absence of fault by the party held liable."\(^{27}\)

4. *Joint and Several Liability and Apportionment*

Although "CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm."\(^{28}\) The policy for imposing joint and several liability in light of CERCLA's primary goal of expeditiously cleaning up hazardous waste sites is persuasive.

It enables a plaintiff to select one primarily responsible party as the defendant, determine liability as to that defendant,

\(^{23}\) See also United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032, 1041-42 (2d Cir. 1985) (citing 42 U.S.C. § 9607(a)(4)(B) (1988), which holds a potentially responsible person liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan"). However, Superfund funds must be focused only on those sites on the National Priorities List. *Id.* at 1047.

\(^{24}\) See, e.g., United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); United States v. Carolina Transformer Co., Inc., 739 F. Supp. 1030, 1036 (E.D.N.C. 1989); United States v. Marisol, Inc., 725 F. Supp. 833, 839 (M.D. Pa. 1989); Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1572 (E.D. Pa. 1988); The *Monsanto* Court noted: "In addition to the unanimous judicial viewpoint that Congress intended CERCLA liability to be strict, we observe that CERCLA section 101(32) provides that the standard of liability applicable to CERCLA actions shall be that which governs actions under section 311 of the Clean Water Act," which courts have held to be strict. *Monsanto*, 858 F.2d at 167 n.11. *See also Shore Realty*, 759 F.2d at 1042.

\(^{25}\) Abraham, *supra* note 2, at 957.

\(^{26}\) *Id.* (citations omitted). *See also Glass, supra* note 4, at 393 & n.76.

\(^{27}\) *Monsanto*, 858 F.2d at 171 (citing *Shore Realty*, 759 F.2d at 1042 n.13; United States v. ChemDyne, 572 F. Supp. 802, 810-11 (S.D. Ohio 1983)).
and collect the total amount of the damages from that one defendant. If a plaintiff were required to sue all potentially responsible parties... in order to ensure a comprehensive cleanup, delays inherent in such massive lawsuits would surely delay cleanup of the site.29

Thus, joint and several liability will be imposed unless the defendant establishes a “reasonable basis for apportioning liability among responsible parties.”30 Litigation on the apportionment issue indicates that most defendants will have a very difficult time establishing a reasonable basis upon which to apportion liability.31 In most cases, the defendant must establish more than just the volume of hazardous substance which she deposited at the site.32 Courts may require that the defendant show how much of that deposited volume was released into the environment, how the amount released interacted with other released substances, and how these commingled substances contributed to the harm.33 Other factors

31. Monsanto, 858 F.2d at 172-73 & n.27 (where defendants argued that “liability should have been apportioned according to the volume they deposited as compared to the total volume disposed of there by all parties” the court held that mere volumetric measures of amounts of hazardous wastes deposited “provide a reasonable basis for apportioning liability only if it can be reasonably assumed, or it has been demonstrated, that independent factors had no substantial effect on the harm to the environment”). The Monsanto court could find no reasonable basis for apportioning liability since the defendants “presented no evidence... showing a relationship between waste volume, the release of hazardous substances, and the harm at the site. Further, in light of the commingling of hazardous substances, the district court could not have reasonably apportioned liability without some evidence disclosing the individual and interactive qualities of the substances deposited there.” Id. Thus, where numerous types of wastes have been disposed of at the site, in order for a court to apportion the liability, the defendant must not only establish the volume of hazardous waste which she contributed, but also must show the relationship between that volume, the actual release of hazardous substances, and the harm, taking into consideraton the interactive and individual characteristics of the wastes deposited.
32. Id.; see also Kramer, 757 F. Supp at 422; Marisol, 725 F. Supp. at 842.
33. Monsanto, 858 F.2d at 172. As the Monsanto court noted, “Common sense
which may be relevant to a defendant’s apportion argument include “relative toxicity, migratory potential, and synergistic capacity of the hazardous substances at the site,” and the relationship of the response action taken to the defendant’s particular waste. It is important to note, however, that although joint and several liability will most often be imposed on defendants since courts are reluctant to find that a reasonable basis exists to apportion liability, “defendants still have a right to sue responsible parties for contribution, and in that action they may assert both legal and equitable theories of cost allocation.” This right, however, is only valuable to the extent that other potentially responsible parties still exist and are viable.

5. Requisites for CERCLA Cause of Action

A prima facie case under CERCLA section 107(a) is established if the plaintiff shows 1) that the site is a “facility,” 2) that a “release” or threatened release of a “hazardous substance” from the facility has occurred, 3) that the plaintiff counsels that a million gallons of certain substances could be mixed together without significant consequences, whereas a few pints of others improperly mixed could result in disastrous consequences.” Id.

34. Id. at 172 n.26.

35. United States v. Marisol, Inc., 725 F. Supp. 833, 842 (M.D. Pa. 1989) (defendants in CERCLA action seeking to avoid joint and several liability sufficiently alleged divisibility of harm, considering “percentage of total volume of materials disposed of at the site, the nature and relative toxicity of the materials, ... the relative contributions of the other defendants” and the fact that “the response actions taken by the government were unrelated to the defendant’s particular waste ...”). Id.


(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

The term facility has, not surprisingly, been given a very broad meaning by courts. In New York v. General Electric Co., 592 F. Supp. 291 (N.D.N.Y. 1984), the court held that a race strip on which used oil had been disposed of in order to keep the dust down was a facility under section 101(9) According to the court, 101(9); was not “designed to cover only traditional dump sites. That section expressly covers ... any area where hazardous substances come to be located.” Id. at 296 (emphasis in original).

38. “Release” is defined in 42 U.S.C. § 9601(22) (1988) as any spilling, leaking,
has incurred "response costs" as a result of the release or threatened release, and that the defendant is an "owner or operator" of a facility. As to causation, the plaintiff must merely show, "by a preponderance of the evidence that the defendant's hazardous waste was deposited at the site and that the substances contained in the defendants' waste were also found at the site."

6. Defenses

CERCLA section 107(a) establishes that CERCLA liability is "subject only to those defenses set forth in subsection (b) of this section." Subsection (b) provides that an otherwise liable person may not be liable if he can "establish by a preponderance of the evidence" that the release or threatened release was caused solely by (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant..., if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances,

pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant). . . .


40. Circularly defined in 42 U.S.C. § 9601(20) (1988) to mean "any person owning or operating" a vessel or facility. However, "such term does not include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest." Id.


42. United States v. Marisel, 725 F. Supp. 833, 840 (M.D. Pa. 1989) (citing United States v. Picillo, 648 F. Supp. 1283, 1292 (D.R.I. 1986); United States v. Wade, 577 F. Supp. 1326, 1333 (E.D. Pa. 1983)). See also United States v. Monsanto, 858 F.2d 1326, 1328 (4th Cir. 1988) (finding that causal nexus was established "by proof that hazardous substances 'like' those contained in the generator defendants' waste were found at the site... . Absent proof that a generator defendant's specific waste remained at a facility at the time of release, a showing of chemical similarity between hazardous substances is sufficient").

43. 42 U.S.C. § 9607(a) (1988). A few defenses, however, such as the security interest exemption, exist outside of CERCLA § 107(b).
and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .

In 1986, Congress enacted the SARA amendments which added another defense known as the “innocent landowner defense.” This defense is a subset of the third party defense of section 107(b); it limits the term “contractual relationship” in that section to exclude defendants who can establish by a preponderance of the evidence that “[a]t the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.”

To establish that the defendant had no reason to know, . . . the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability” considering factors such as “any specialized knowledge or experience” of the defendant, “the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.”

A more detailed discussion of these defenses is presented below.

Finally, the security interest exemption provides that a secured creditor “who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility” is not an “owner and operator” and is thus not subject to CERCLA liability. The availability of this exemption to secured credi-

44. 42 U.S.C. § 9607(b) (1988) (emphasis added). Both the “act of God” and “act of war” defenses are rarely successful. The only time successful “act of God” defenses have been raised are to the releases which occurred in the aftermath of the recent San Francisco earthquake. The third party defense is rarely available since it requires that the defendant have no contractual relationship with the third party.


47. See infra text accompanying notes 168-179.

tors has been significantly eroded by the courts. This exemption is discussed in depth below.\textsuperscript{49}

Upon an examination of the cases, one must question the applicability of any of these defenses. Rarely do defendants successfully raise them. "[T]he courts' virtual adoption of the EPA's enforcement policies has caused many parties to wonder if a potentially responsible party . . . may successfully raise any defenses against a CERCLA claim."\textsuperscript{50}

\section*{III. REAL ESTATE PLAYERS WHO MAY HAVE CERCLA LIABILITY}

The courts' expansive and liberal definition of "owner or operator" has resulted in the imposition of CERCLA liability on a wide variety of parties involved in real estate transactions including buyers (current owners), sellers (past owners), lenders, corporate officers, employees, and majority shareholders, lessors, successor corporations, parent corporations, and trustees.

\subsection*{A. Current Owners or Operators}

CERCLA section 107(a)(1) makes the "owner or operator of a vessel or facility" at the time of cleanup\textsuperscript{51} liable for costs associated with the cleanup of a release or threatened release of a hazardous substance. CERCLA does not provide a helpful definition for the term "owner or operator"\textsuperscript{52} so courts have been left to define this critical term for themselves; consequent-

\textsuperscript{49} See infra text accompanying notes 75-150.

\textsuperscript{50} Glass, supra note 4, at 386. See also Pinole Point Properties v. Bethlehem Steel Corp., 596 F. Supp. 283, 286 (N.D. Cal. 1984) (scope of liability under CERCLA is "extremely broad" and available defenses are "extremely limited").


\textsuperscript{52} CERCLA § 101(20)(A) defines "owner or operator" as "any person" "owning or operating" a facility. 42 U.S.C. § 9601(20)(A) (1988). "Person" is defined in subsection 21 as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (1988). The term "person" has also been given a liberal interpretation by the courts. In United States v. Sharon Steel Corp., 681 F. Supp. 2492 (D. Utah 1987), the court held that even a dissolved corporation whose assets had not yet been fully distributed was a "person" liable under CERCLA section 107(a)(2); thus, CERCLA preempted state corporation law regarding the capacity of a dissolved corporation to be sued.
ly, its meaning is still evolving.

A current owner is strictly, jointly, and severally liable regardless of whether he owned the facility at the time of disposal. In *New York v. Shore Realty Corp.*, the Second Circuit rejected Shore’s argument that it, as a current owner of the facility who did not own it at the time the waste was disposed of, should not be held liable. Shore argued that only current operators who owned the property at the time of disposal should be held liable. In rejecting this argument, the court pointed out that “if the current owner of a site could avoid liability merely by having purchased the site after chemical dumping had ceased, waste sites certainly would be sold, following the cessation of the dumping, to new owners who could avoid the liability otherwise required by CERCLA.” Thus, current owners, regardless of the fact that they did not own the property at the time of disposal, are liable under CERCLA.

Whether a person is an “operator” of a facility depends largely on the degree of control which the person had over the facility. In *Edward Hines Lumber Co. v. Vulcan Materials Co.*, the court, using common law principles, found that despite the fact that the defendant had “designed and built the plant, furnished toxic chemical, trained [plaintiff’s] employees, and reserved a right to inspect ongoing operations” the defendant was not an operator largely because it “had no control of the work at the [plaintiff’s] plant, no right to choose employees, direct their activities, or set prices; it had at most a limited veto power” enabling it to stop sales if the product was not “up to snuff.”

Similarly, in *United States v. New Castle County*, the court agreed with the state of Delaware that its regulation of a hazardous waste site did not make it an “operator” of the site for CERCLA purposes despite the fact that it granted permits to dump hazardous waste and required implementation of a groundwater monitoring program as part of its permit approval

54. *Id.*
55. *Id.* at 1043.
56. *Id.* at 1045.
57. 861 F.2d 155 (7th Cir. 1988).
58. *Id.* at 158.
The court noted several nonexclusive factors which may, based upon the unique factual situation presented, be relevant in determining whether a person had "operator" status under CERCLA:

The court should inquire . . . into whether the person sought to be strapped with operator status controlled the finances of the facility; managed employees of the facility; managed the daily business operations of the facility; was responsible for the maintenance of environmental control at the facility; and conferred or received any commercial or economic benefit from the facility, other than the payment or receipt of taxes.

B. Past Owners or Sellers

CERCLA section 107(a)(2) imposes liability for the costs associated with a hazardous waste cleanup upon "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." When applied to typical past owners, the interpretation of this section is essentially clear and unambiguous: Typical owners or operators of facilities at the time of disposal are liable. But, as is discussed in the following sections, when applied to not so typical "owners or operators" such as successor corporations, lenders, officers, and majority shareholders, this section as well as section 107(a)(1) becomes much more controversial.

A past owner or operator may not use the doctrine of caveat emptor as a defense to CERCLA liability, nor may he use it as a defense to a current owner's contribution action against him. Similarly, clauses in real estate contracts reciting that the intended buyer has inspected the property and agrees to purchase the property "as is" and "in its present condition subject to reasonable use" are ineffective as a defense to the buyer's contribution action against a past owner. However,
although past owners may not indemnify themselves against a governmental CERCLA liability claim, a clear and unambiguous agreement between a past owner and buyer indemnifying the past owner for any CERCLA liability will be effective as to the parties. Thus, although a past owner cannot avoid joint, several, and strict CERCLA liability, he may recover from the buyer in a 113(f) contribution action, if the purchase agreement clearly indemnified him. Of course, recovery to such a past owner against a buyer is contingent upon the financial viability of the buyer at the time of the contribution action.

Courts have construed section 107(a)(2) broadly. In United States v. Sharon Steel Corp., the court found that even a dissolved corporation which was a past owner of a hazardous waste site at the time of disposal could, despite state law providing that dissolved corporations had no capacity to be sued, be held liable for response costs incurred to cleanup the site where the corporation’s assets had not yet been fully distributed to shareholders. The court pointed out that to hold otherwise would allow a corporation to dissolve in order to take away its capacity to be sued; thus, “any corporation could escape CERCLA liability simply by dissolving before the government brought suit, perhaps to incorporate again after someone else had paid to clean up its hazardous waste.”

Even where a past owner did nothing to dispose of hazardous materials while he owned the property, courts may find a way to impose CERCLA liability. In Westwood Pharmaceuticals Inc. v. National Fuel Gas Distribution Corp., the court noted that an innocent intervening owner may be exposed to CERCLA liability where it, as intervening owner, obtains actual knowledge of a release or threatened release of hazardous substances and then transfers ownership of the property to another person without disclosing that knowledge.

Courts may even, given the proper facts, find room to expand the meaning of “disposed of” in CERCLA section 107(a)(2) to allow it to find a seemingly innocent seller liable.


68. Id. at 1497-98 (refusing to follow Levin Metals Corp. v. Parr-Richmond Terminal Co., 817 F.2d 1448 (9th Cir. 1987)).
70. Id. at 462-63.
71. 42 U.S.C. § 6903(3) (1988) defines “disposal” as
Tanglewood East Homeowners v. Charles-Thomas, Inc., the court held that a real estate developer who had merely "filled in and graded creosote pools" left by its predecessor owner had disposed of toxins and thus could be held liable as a past owner under CERCLA section 107(a)(2). Broadly construing the definition of "disposal" in CERCLA section 103(3), the court found that the "definition of disposal does not limit disposal to a one-time occurrence—there may be other disposals when hazardous materials are moved, dispersed, or released during landfill excavations and fillings." Of course the ramifications of this holding can be preposterous. Could one be held liable as a past owner for merely having dug a post-hole in his back yard? Although it seems inconceivable that a court could ever hold so, under a literal reading of Tanglewood such a past owner could be liable.

Given the exposure that a past owner has to potential CERCLA liability, and given such ludicrous holdings as Tanglewood's, a potential seller, even if it did nothing to place hazardous wastes on the property, should be cautious when considering the sale of even remotely possibly contaminated property. On first blush, one might think that CERCLA could only enhance a landowner's desire to sell possibly contaminated property and thereby at least realize some return, while also possibly roping in another PRP to share in any liability for cleanup that subsequently might be imposed. However, even if possible, selling may not necessarily be to the property owner's advantage.

If a potentially hazardous substance exists on the property and the possibility of a release, the owner might well decide to hold onto the property and carefully manage it to avoid a release, rather than risk a new owner's untaking activity that might cause a release and attract enforcement attention.

Also, a responsible property owner might well decide that it would be cheaper in the long run to hold contaminated property and voluntarily clean it up at a manageable cost, rather than risk an EPA enforcement action at twice the price after
the property is beyond its control.\textsuperscript{75}

C. Lenders and the Security Interest Exemption

The so-called "security interest exemption" spelled out in CERCLA section 101(20)(A) purports to exempt from liability one "who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility;" however, many secured lenders seemingly fitting this exemption have been held to be "owners or operators" of a facility on which hazardous wastes have been released, and thus have become exposed to millions in CERCLA liability. These cases can be divided into two groups: those finding that the secured lender became an "operator" of the facility (without foreclosing on the property) due the extent of its control; and those finding that the secured lender became an "owner" of the facility upon foreclosure and purchase through a sheriff's sale. These decisions have prompted heated opposition from the lending industry, academia,\textsuperscript{76} and consequently from members of Congress.\textsuperscript{77}

1. "Owner" Lenders

"There is a divergence in case law as to whether the security interest exemption is applicable when a secured creditor purchases its security interest at a foreclosure sale."\textsuperscript{78} However, the recent trend among courts, of course, is to limit the security interest exemption as much as possible to assure access to as many deep pockets as possible.

a. United States v. Mirabile.\textsuperscript{79} In United States v Mirabile...
bile, this issue was first raised and was summarily dealt with by the court in the secured lender's favor. In that case American Bank & Trust (ABT), one of the secured lenders, foreclosed on and bought property where a hazardous waste site was located and sold the property to the Mirabiles four months later. The court dismissed the Mirabiles' argument that when the secured party acquired the property through foreclosure it no longer was merely a secured party holding indicia of ownership but rather became an "owner" subject to liability under CERCLA section 107(a). The court held that the actions of ABT in foreclosing on the property "were plainly undertaken in an effort to protect its security interest in the property" where the only actions taken by the secured party following foreclosure were to secure the property against vandalism, inquire into the cost of properly disposing of various drums on the property, and visit the property several times to show it to prospective purchasers. Since the secured party, after foreclosing, "made no effort to continue . . . operations," it was merely holding indicia of ownership primarily to protect its security interest in the property. This makes good sense since a secured lender's purchase through a foreclosure sale is the natural consequence of the protection of a security interest. If a secured lender cannot foreclose and purchase the property at the sheriff's sale without exposing itself to CERCLA liability, its security interest would have little or no value since the practical value of any security interest in real property is based on the right to foreclose.

The Mirabile court felt that Congress' intent was clear. Obviously, imposition of liability on secured creditors or lending institutions would enhance the government's chances of recovering its cleanup costs, given the fact that owners and operators of hazardous waste dumpsites are often elusive, defunct, or otherwise judgment proof. It may well be that the imposition of such liability would help to ensure more responsible management of such sites. The consideration of such policy matters, and the decision as the imposition of such liability, however, lies with Congress. In enacting CERCLA Congress singled out secured creditors for protection from liability under certain circumstances. Because I believe ABT has

80. 15 ENVTL. L. REP. (Envtl. L. Inst.) at 20994.
81. Id.
82. Id.
brought itself within that protection, ABT is entitled to the entry of summary judgment in its favor.83

Unfortunately, subsequent courts facing this issue did not feel that Congress’ intent was so clear.

b. United States v. Maryland Bank & Trust Co.84 In United States v. Maryland Bank & Trust Co.,85 the court held that when a secured party forecloses on property, purchases it through a foreclosure sale, and holds the property for an extended period, it becomes an “owner” of that property under CERCLA section 107(a) and loses the security interest exemption.86 In that case, Maryland Bank & Trust foreclosed on the property, purchased it at the sheriff’s sale, and then held title for four years when the EPA sued for recovery costs.87 According to the court, Congress intended the section 101(20)(A) exemption to exclude mortgagees in common law states where it actually holds title to the property during the life of the mortgage.88 However, “[t]he exclusion does not apply to former mortgagees currently holding title after purchasing the property at a foreclosure sale, at least when, as here, the former mortgagee has held title for nearly four years and a full year before the EPA clean-up.”89 However, the court explicitly refused to consider whether “a secured party which purchased the property at a foreclosure sale and then promptly resold it would be precluded from asserting the section 101(20)(A) exemption.”90

The court argued that if mortgagees like Maryland Bank & Trust were not liable,

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

83. Id.
85. Id.
86. Id. at 579.
87. Id. at 575. The court distinguished its holding from the Mirabile holding by pointing out that in that case ABT had promptly assigned the property but “to the extent that the opinion suggests a rule of broader application . . . respectfully disagrees” with the Mirabile court. Id. at 580.
88. Id. at 579.
89. Id.
90. Id. at 579 n.5.
purchasers would be faced with potential CERCLA liability, and would shy away from the sale. Yet, once the property has been cleared at the taxpayers' expense and becomes marketable, the mortgagee-turned-owner would be in a position to sell the site at a profit.

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 [and by not foreclosing or bidding at a foreclosure sale]. 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.  

Commentators argue that the Maryland decision ignores commercial realities and reflects an "obvious lack of concern for secured lenders' financial risk . . . . [since under Maryland Bank & Trust] secured creditors must in fact abandon their collateral or face enormous risk". Other commentators point out that the court failed to consider the broad societal costs which this decision may impose. Under Maryland Bank & Trust, lenders are forced to take additional precautions when entering into new loans; and as to already existing loans, they are forced to swallow large losses on contaminated property on which it holds a security interest by either abandoning the property or by foreclosing and facing potential CERCLA liability as an "owner" of the property. All this will cause the cost of capital to rise; at least some portion of this increase will be passed on to all borrowers in the form of higher interest rates, thus causing the demand for capital to decline, resulting in stunted economic growth.


91. Id. at 580.
92. See Gerhardt, supra note 1, at 17.
93. Bass, supra note 5, at 899-903.
94. Id. at 899-900.
96. Id.
deciding what the Maryland court refused to decide.97 In Guidice a foreclosing bank held title to a waste site for eight months before reselling it.98 Although the court found that the bank’s actions “prior to its purchase of the . . . [p]roperty at the foreclosure sale were prudent measures undertaken to protect its security interest in the property,”99 the court found that once the bank foreclosed, the security interest exemption was no longer available to it for the period that it was the record owner.100 “When a lender is the successful purchaser at a foreclosure sale, the lender should be liable to the same extent as any other bidder at the sale would have been.”101 “[A]n exemption for landowning lenders would create a special class of otherwise liable landowners” which is contrary to Congress’ intent.102 This decision “alarmed already skittish lenders even further.”103 It seems clear that this decision and its predecessors are likely to “have a chilling effect on credit,”104 thus causing a detrimental ripple effect on society.

d. In re Bergsoe Metal Corp.105 In the most recent decision dealing with the security interest exemption, the Ninth Circuit seemed to indicate that a secured creditor, by foreclosing and becoming a record title holder, does not necessarily become an “owner” for CERCLA purposes if it holds title primarily to protect its security interest. In In re Bergsoe Metal Corp.,106 the court, interpreting the plain language of CERCLA section 101(20)(A), held that the Port of St. Helens was not a CERCLA owner merely because it held title to the contaminated property.107

That the Port holds paper title to the [site] does not, alone, make it an owner of the facility for purposes of CERCLA; under the security interest exception, the court must determine why the Port holds such indicia of ownership. Here,

97. See supra text accompanying note 90.
99. Id. at 562.
100. Id. at 563.
101. Id.
102. Id.
104. Id.
105. 910 F.2d 668 (9th Cir. 1990).
106. Id.
107. Id. at 671.
there is no doubt that the Port has the deed in the [site] primarily to ensure that [the debtor] would meet its obligations.108

Although the Port had never foreclosed to obtain paper title, essentially the same argument can be used for a secured creditor who does become a title holder after foreclosing on contaminated property. The fact that a secured party holds title due to foreclosure should not, alone, make it a CERCLA "owner". The issue should be whether the secured creditor is holding indicia of ownership to merely assure that its loan will be paid, or whether it is holding indicia of ownership for some additional purpose, such as to be involved in the management of the property, or for investment purposes. If the secured party holds the property for longer than is necessary to resell it and receive the equivalent of payment on its loan, or does more than is absolutely necessary to protect the property from damage, then it is probably doing more than holding indicia of ownership primarily to protect its security interest. If, however, immediately after foreclosure the secured party/title holder diligently attempts to resell the property, and only takes steps necessary to sell the property and protect it against damage, such as insuring it and protecting it against vandalism, it is merely holding indicia of ownership to protect its security interest and thus should not be liable as an "owner" under CERCLA section 107(a).109 Indeed, Mirabile and even Maryland Bank & Trust make sense under this analysis. In Maryland Bank & Trust since the secured party held title for four years, the court reasonably concluded that it was doing more than primarily protecting its security interest in property.

e. Which argument makes more sense? It is difficult to dispute the Maryland Bank & Trust and Guidice courts' conclusions that to allow a secured creditor to foreclose on property without becoming exposed to CERCLA liability as "owners" would essentially allow the mortgagee-turned-owner to reap a windfall from a governmental cleanup of land on which it had foreclosed. It could acquire the property cheaply at the foreclosure sale since all other potential buyers would, by buying, expose themselves to CERCLA liability as a present owner,

108. Id.

hold the property while the government cleans it up, and then sell the now clean property at a substantially higher price.\footnote{110} It seems to this author, however, that the secured creditor in such a case is not so much reaping a windfall as it is avoiding a loss. Upon a post-cleanup sale, a secured creditor would recover only its loan principal. Any remainder in the sale price would most likely go to the government to compensate for its cleanup costs under a Superfund lien. If a secured lender cannot foreclose on contaminated property and resell it without exposing itself to CERCLA liability, it is essentially faced with the unpleasant choice of swallowing the loss either by abandoning the property altogether or foreclosing and subjecting itself to CERCLA liability potentially far greater than the value of the property. If liability is not imposed on a secured lender due to its foreclosure of contaminated property, it is not reaping a windfall at all, but it is merely avoiding a loss. The ultimate issue, then, is whether secured lenders or the government should bear the cost of hazardous waste cleanup. Whether the government or lenders pay, the cost will be passed on to society, either by lenders in the form of higher interest rates, or by the government in the form of higher taxes.

It is not the purpose of this paper to address whether the costs of hazardous waste cleanup are better imposed on society through higher interest rates or through higher taxes, nor should that be the purpose of courts addressing this issue. A court should interpret statutes according to their plain meaning if possible. It is this author's opinion that the security interest exemption's meaning is plain. If a secured party holds indicia of ownership (whether through foreclosure or not) primarily to protect its security interest (i.e., insures and pays taxes on the property, protects it from vandalism, and diligently tries to resell it), then it is not an "owner or operator" under CERCLA section 107(a), and is thus not liable for the costs associated with a hazardous waste facility cleanup.

2. "Operator" Lenders

Until recently, "case law suggest[ed] that, prior to foreclosure, a mortgagee is exempt from CERCLA liability under [the

secured party exemption] so long as the mortgagee did not participate in the managerial and operational aspects of the facility.”¹¹¹ However, the *dicta* in one opinion could substantially narrow the availability of this exemption to secured parties; the court in *United States v. Fleet Factors Corp.*,¹¹² said that a secured creditor can expose itself to CERCLA liability as an “operator” of a facility merely “by participating in the financial management of a facility to a degree indicating a capacity to influence the [debtor’s] treatment of hazardous waste . . . . [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.”¹¹³

*a. United States v. Mirabile.*¹¹⁴ In *Mirabile* the court held that the security interest exemption protected the Small Business Administration (SBA) from CERCLA liability.¹¹⁵ The Mirabiles argued that, although the SBA was never involved in the operation of the facility, since the “loan agreement . . . apparently contemplated some degree of involvement which could be characterized as participation in day-to-day management” the SBA did not qualify for the security interest exemption.¹¹⁶ The court did not agree that “participation in purely financial aspects of operation, of the sort which occurred here, is sufficient to bring a lender within the scope of CERCLA liability.”¹¹⁷

However, the court refused to grant summary judgment to another secured creditor, Mellon Bank, due to its “participation [and] oversight of the company.”¹¹⁸ The court held that Mellon’s degree of involvement in the company’s day-to-day operations, such as “monitoring the cash collateral accounts, ensuring that receivables went to the proper account, . . . establishing a reporting system between the company and the

¹¹² 901 F.2d 1550 (11th Cir. 1990).
¹¹⁵ *Id.* at 20997.
¹¹⁶ *Id.*
¹¹⁷ *Id.*
¹¹⁸ *Id.*
bank,” visiting the site often, demanding additional sales efforts, and requiring manufacturing changes and reassignment of personnel was enough to preclude summary judgment in Mellon Bank’s favor. Thus, it was clear after Mirabile that so long as a creditor who had not foreclosed refrained from participating in the day-to-day operations of the facility, the security interest exemption protected it from CERCLA liability.

b. Guidice v. BFG Electroplating & Mfg. Co. In Guidice, the court held that a secured creditor’s pre-foreclosure activities were “insufficient to void the security interest exemption of CERCLA.” The secured creditor’s pre-foreclosure activities included the following: meeting with company officials to be informed of such things as the status of accounts, personnel changes, the presence of raw materials; assisting in loan applications; communicating with local officials to assist the debtor in wastewater discharge compliance; visiting the property; meeting to consider the restructuring of the debtor’s loans; and referring a potential lessee to the debtor. The court found all of these pre-foreclosure actions to be “prudent measures undertaken to protect its security interest in the property.” The court also noted the policy reason for the exemption of secured creditors in the bank’s position prior to foreclosure:

A goal of CERCLA is safe handling and disposal of hazardous waste. To encourage banks to monitor a debtor’s use of security property, a high liability threshold will enhance the dual purposes of protection of the banks’ investments and promoting CERCLA’s policy goals. Conversely, a low liability standard would encourage a lender to terminate its association with a financially troubled debtor and expedite loan payments in an effort to recover the debts.

119. Id.
121. Id. at 562.
122. Id.
123. Id.
c. United States v. Fleet Factors Corp. In Fleet Factors the 11th Circuit sent a shockwave through the lending industry when it said in dicta that the secured interest exemption will be waived where a secured creditor participates 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 . . . . [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.

The court argued that its decision would “encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential debtors” and weigh any perceived risks into the loan agreement. The decision, however, ignores the millions of creditors who loaned money to businesses previous to this ruling. They certainly, because of this decision, “incur[red] a much greater risk than they bargained for.”

d. In re Bergsoe Metal Corp. The Ninth Circuit apparently refused to restrict the availability of the security interest exemption to the extent that the Fleet Factors court did. The court, interpreting the words of the statute, held that “[i]t is clear from the statute that, whatever the precise

125. 901 F.2d 1550 (11th Cir. 1990).
126. See id. at 1559 n.13 (noting that a lender’s capacity to influence a debtor’s facility treatment will normally be “inferred from the extent of its involvement in the facility’s financial management” but that here this analysis was unnecessary since the creditor actually had asserted control over the waste site).
127. Id. at 1557-58 (emphasis added) (refusing to follow Mirabile, 15 ENVTL L. REP. (Envtl. L. Inst) 20994 (E.D. Pa. 1985)). The court found the lower court’s reasoning, which essentially found the secured party to be an “operator” because it actually had participated in the day-to-day operations of the facility, to be “too permissive towards secured creditors who are involved with toxic waste facilities. In order to achieve the ‘overwhelmingly remedial’ goal of the CERCLA statutory scheme, ambiguous statutory terms should be construed to favor liability for the costs incurred by the government in responding to the hazards at such facilities.” Id. at 1557.
128. Id. at 1558.
129. Id.
130. 910 F.2d 668 (9th Cir. 1990).
131. Id. at 672 (“[w]e leave for another day the establishment of a Ninth Circuit rule on this difficult issue”).
parameters of 'participation,' there must be some actual management of the facility before a secured creditor will fall outside the exception." 132 Thus, although not disagreeing with Fleet Factors, the court refused to go quite as far. Since there was no management of the facility in Bergsoe, the court did not need to determine whether or to what degree mere participation in the financial management of a facility will indicate a capacity to influence the debtor's handling of hazardous waste. 133 The court did, however, note: "That a secured creditor reserves certain rights to protect its investment does not put it in a position of management. What is critical is not what the [creditor] had, but what it did." 134 Thus, it is clear from this decision that mere capacity, reserved in the loan agreements, to influence the debtor's handling of hazardous waste will not in and of itself void the security interest exemption. However, once the creditor does participate in the financial management, it is unclear, at least in the Ninth Circuit, to what extent it may go before it will become exposed to CERCLA liability.

3. Limiting Potential Lender Liability In light of these cases, lenders must exercise extreme caution in entering into and handling loans with borrowers who have potential CERCLA liability (industrial, commercial, or farm property). Commentators urge a number of precautions which lending institutions should take. 135

   a. Before entering into a loan agreement consider the need to do an environmental audit. "A creditor should not enter into a loan or commence a foreclosure action where the principal security is industrial, commercial or farm property without evaluating the need for obtaining an environmental audit of the property." 136 Although these are not guaranteed to detect all environmental problems, the likelihood that the "innocent landowner" defense will be available to a secured creditor is greatly enhanced by a pre-loan environmental audit. 137

132. Id. (emphasis in original).
133. Id.
134. Id.
135. The following guidelines are recommended in Ufford, supra note 1, at 19. For additional detailed guidance in this minefield of potential liability, see Guidelines to Avoid or Limit CERCLA Liability, 21 ENVTL. REP. (BNA) 614-15 (July 28, 1989).
136. Ufford, supra note 1, at 18.
137. Considering few successful "innocent landowner" defenses, perhaps the likeli-
b. **Train loan officers to do environmental “due diligence” reviews.** Loan officers should know how to identify potential hazardous waste, know of the harm that various hazardous wastes can cause, and know of the methods and costs involved in lawfully handling them. 138 They should be on the lookout for any potential warning signs of hazardous wastes. 139

c. **Determine whether the debtor’s potential uses of and whether any past uses of the property will or have in any way involve(d) hazardous wastes.** A creditor should determine whether the debtor will use hazardous materials or generate, store, or dispose of hazardous wastes on the property and whether any of the property has in the past been used by one who used hazardous materials or generated stored, or disposed of hazardous wastes on the property. 140 If any of the above signals hint of any hazardous waste problems, the lender should probably have its own environmental engineering consultant conduct an environmental audit before proceeding with the transaction, should assure that the documents contain “appropriate contractual provisions shifting the risk to the borrower,” and thoroughly consider the risks in proceeding with the transaction. 141

d. **Before foreclosing reevaluate the above considerations to determine whether an environmental audit may be warrant­ed.** As is discussed above, a secured creditor places itself at a substantial risk to potential CERCLA liability for amounts far greater than the value of the underlying property if it forecloses on a site that is later discovered to be hazardous. Consequently, it should carefully consider this risk before foreclosing.

e. **Draft adequate loan documentation.** Loan documents should represent and warrant that 1) the seller is and has been in compliance with all federal, state, and local environmental laws and permit requirements; 2) there are no pending or potential environmental actions against the seller to the seller’s best knowledge; 3) there are no past or current releases of hazardous substances at the facility, as defined under

---

138. *Id.*

139. *Id.* Such as “soil or water discoloration, oozing liquids, discolored or unnatu­ral vegetation, unexplained bare spots, chemical odors,” etc. *Id.*

140. *Id.*

141. *Id.*
CERCLA and any other environmental law; 4) the seller is not aware of any condition at or concerning the facility that would give rise to an action or liability under any ordinance.\(^\text{142}\)

\(f\). Conduct an insurance analysis. Lenders should analyze the borrower's, as well as its own insurance to determine whether CERCLA liability is covered,\(^\text{143}\) and, if possible require the borrower to obtain it. It should be noted, however, that "for most businesses in the United States insurance against environmental liability is completely unavailable."\(^\text{144}\)

\(g\). Avoid becoming a lender in control. As is discussed above, the security interest exemption is unavailable where the secured party participates in the management of the facility. The following creditor activities are unlikely to remove the creditor from the protection of the security interest exemption:

1. entering into a security agreement or mortgage;
2. filing mortgages or financing statements (UCC-1 forms), even for hazardous materials;
3. requiring a debtor to submit to the creditor detailed financial statements and annual cash flow projections;
4. auditing the books of a debtor;
5. monitoring cash collateral accounts;
or
6. establishing a financial reporting system between the debtor and the creditor.\(^\text{145}\)

The following activities by a secured creditor will likely expose it to CERCLA liability as one who participates in the management of the debtor to a degree indicating a capacity to influence its decisions concerning hazardous waste disposal:

1. taking over the management of the debtor;
2. obtaining the right to have a third party manage the affairs of the debtor;
3. installing an agent to take over the management of the debtor's business;
4. promising payments to other creditors on behalf of the debtor; or
5. foreclosing on and obtaining sheriff's deed to contaminated property that is held as security for a loan.\(^\text{146}\)

\(^{142}\) Id. at 19.

\(^{143}\) Id.

\(^{144}\) Abraham, supra note 2, at 944. (remarking that "the demise of the environmental liability market is a symptom of the high levels of legal uncertainty that are being created by the new environmental liability"). See also Percy L. Angelo & Lynn L. Bergeson, The Expanding Scope of Liability for Environmental Damage and its Impact on Business Transactions, 8 CORP. L. REV. 101, 115 (1985).

\(^{145}\) Ufford, supra note 1, at 19. (quoting Burcat, Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets, 103 BANKING L.J. 509, 537 (1986)).

\(^{146}\) Id. (quoting Burcat, Environmental Liability of Creditors: Open Season on
4. Proposed Regulations

Maryland Bank & Trust, Guidice, and Fleet Factors have caused outrage throughout the commercial lending industry, prompting members of Congress to propose guidelines clarifying and broadening current availability of the security interest exemption.\textsuperscript{147} It is likely that some version of these proposals will soon be enacted. If so, the availability of the security interest exemption would be significantly broadened by allowing creditors to purchase property through a foreclosure sale without risking CERCLA liability so long as the security holder “temporarily acquires” the property for subsequent disposition and such an act is a “necessary incident[] to protection of the security interest.”\textsuperscript{148} This regulation also would more clearly define what actions constitute participation in management sufficient to invalidate availability of the security interest exemption.\textsuperscript{149} Needless to say, such legislation would greatly enhance a lender’s willingness to enter into loan agreements at reasonable rates with borrowers whose activities may risk hazardous waste dangers. It seems clear to me that these new proposals are in line with the original purpose of the security interest exemption. The courts, in their fervor to interpret CERCLA as broadly as possible and to reach as many deep pockets as possible, stretched the plain meaning of the security interest exemption to a point where it provided very little protection, if any, to secured creditors. The proposed legislation would bring courts back to reality.

D. Corporate Officer and Majority Shareholders

“By now, a substantial line of decisions has established that corporate officers and directors will themselves be ‘owners’ and ‘operators’ under section 107(a)(1) and (2) if they are actively involved in the day-to-day management of a liable corporation.”\textsuperscript{150} For example, in \textit{United States v. Carolina Transform-}


\textsuperscript{148} 56 Fed. Reg. at 28808.

\textsuperscript{149} \textit{Id}. at 28809.

\textsuperscript{150} Battle, \textit{supra} note 75, at 253 (citing United States \textit{v. Conservation Chem.
the court found that a corporation's 100 percent shareholder and former president who personally supervised day-to-day operations at the site, was "jointly and severally liable under CERCLA as an owner and operator." The court enumerated several factors which have been established to determine whether an officer should be liable under CERCLA:

[S]izable stock ownership in the corporation, active participation in the management of the corporation, presence at and supervision of the operation of the facility, founded the company, capacity and general responsibility to control the disposal of hazardous waste at the facility, power to direct negotiations concerning the disposal of hazardous wastes . . . . The dominant consideration appears to be significant participation in the running of the company, especially as it relates to waste disposal.

A number of cases hold similarly.

E. Lessors

Under the same standard that a current or past owner or operator may be held liable under CERCLA section 107(a)(1) and (2), a lessor of the property may be liable. For example, in United States v. Monsanto Co., the court held that a landowner who entered into a lease with a company which stored hazardous waste on the land were liable as "owners" under section 107(a) and that the third party exemption of section 107(b)(3) did not protect them since they, through the lease, were in a contractual relationship with the party responsible for the hazardous wastes and they "presented no evidence that they took any precautionary action against the foreseeable conduct of" that party. In our view, the statute does not sanction such willful or negligent blindness on the part of ab-

152. Id. at 1036-37.
153. Id.
155. 858 F.2d 160 (4th Cir. 1988).
156. Id. at 168-69.
sentee owners." 157

F. Parent Corporations

If a parent corporation is found to be participating in the management of a subsidiary to a substantial degree, a court is likely to hold it liable under CERCLA as an "owner or operator." For example, in Idaho v. Bunker Hill Co., 158 the court held that a parent corporation's activities with respect to the subsidiary were sufficient to make it an "owner or operator" under CERCLA section 107(a) where the parent was intimately familiar with hazardous waste disposal and releases of the subsidiary facility, had capacity to control such disposal and releases, and had capacity, if not totally reserved authority, to make decisions and implement actions and mechanisms to prevent and abate damage caused by disposal and releases of hazardous wastes. 159 However, "'normal' activities of a parent with respect to its subsidiary do not automatically warrant finding the parent an owner or operator." 160

G. Successor Corporations

"[T]he successor corporation in a merger or consolidation assumes the potential environmental liabilities of its predecessors." 161 However, an asset purchase does not normally result in liability for the successor corporation. 162 In Smith Land & Improvement Corp. v. Celotex Corp., 163 the court found that successor CERCLA liability could be imposed on a corporation which had either merged or consolidated with a company which had "created a large waste pile in the course of manufacturing asbestos products." 164 The court pointed out that, where the choice is between placing the burden for hazardous waste

157. Id. at 169.
159. Id. at 672. See also United States v. Nicolet, Inc., 712 F. Supp. 1193 (E.D. Pa. 1989) (parent corporation can be liable under CERCLA if it has substantial financial ownership of the subsidiary, control over management, is active in management, familiar with hazardous waste disposal at the subsidiary's facility, had capacity to control disposal, and benefitted from subsidiary's waste disposal practices).
160. Id.
162. Id.
163. 851 F.2d 86, 91-92 (3d Cir. 1988).
164. Id. at 88.
cleanup on taxpayers or on successor corporations, "the successor should bear the cost."\textsuperscript{165}

\textbf{H. Trustees and Executors}

Although one who inherits a facility plagued with potential hazardous waste liability is expressly excluded from CERCLA liability,\textsuperscript{166} "if an executor or trustee undertakes to operate a site containing hazardous materials, the executor may be exposed to CERCLA liability as an 'operator,' 'generator,' or 'transporter' of hazardous substances."\textsuperscript{167} Where a "trustee holds legal title to the trust assets . . . . the trustee may be exposed to direct responsibility for hazardous waste contamination liability as the 'owner' of the facility."\textsuperscript{168}

\textbf{I. Third Party and Innocent Landowner Defenses}

\textit{1. Third Party Defense}

CERCLA section 107(b) provides for a defense to CERCLA liability if the defendant can show by a preponderance of the evidence that the release or threatened release was caused solely by "an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . ., if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .\textsuperscript{169} This is commonly referred to as the third party defense. Of course its applicability is extremely limited since it requires that there be no contractual relationship between the polluting third party and the defendant. In these situations,

\textsuperscript{165} Id. at 92.


\textsuperscript{167} Ufford, supra note 1, at 20.

\textsuperscript{168} Id. (recommending risk management strategies which should be considered by fiduciaries). See also United States v. Burns, No C-88-94-L (D.N.H. Sept. 12, 1988) (imposing personal CERCLA liability on trustee and sole beneficiary of trust for property which had been contaminated before being placed in the trust).

there almost always is a contractual relationship.

A survey of the cases wherein this defense is raised reveals how rarely it will be allowed. For example, in *United States v. South Carolina Recycling & Disposal, Inc.*, the court denied the third-party defense to the owner of the property since a contractual relationship existed with the responsible third party through a lease agreement between the defendant and the third party. However, it has been held that where the contractual relationship between the third-party polluter and the defendant is dissolved prior to the polluter's omissions, use of the third-party defense is not precluded. One court recently held that a predecessor's sale of contaminated property to its present owner did not establish a "contractual relationship" between the parties that would defeat the predecessor's use of the third-party defense provided that the acts causing the release did not occur "in connection with" the deed between the parties.

2. Innocent Landowner Defense

The innocent landowner defense is a subset of the third party defense. In 1986 the SARA amendments added a section which defined the previously undefined term "contractual relationship" to provide that no contractual relationship exists where "the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility," and the defendant shows by a preponderance of the evidence that "[a]t the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened

171. *Id.* at 993. *See also* New York v. Shore Realty Corp., 759 F.2d 1032, 1048-49 (2d Cir. 1985) (real estate developer not entitled to third-party defense because at the time of acquisition the developer knew of hazardous waste storage at the site and did not take the requisite precautions against the third party's foreseeable acts or omissions); United States v. Argent Corp., 14 *Envtl L. Rep.* (Envtl L. Inst) 20616 (D.N.M. 1984) (third-party defense not available due to lease between defendant and third-party polluter via lease agreement).
release was disposed of on, in, or at the facility." A defendant can be shown to have no reason to know of the hazardous substances if he undertook, "at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability" considering such factors as any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

Successfully establishing this defense is also extremely difficult since it is difficult to show that "all appropriate inquiry" was made.

Cases where this defense is successful are extremely rare. The cases and commentary, do, however, clearly indicate that the most critical aspect of this defense is establishing that, prior to purchase, the defendant made "all appropriate inquiry" into the possibility that hazardous wastes may exist on the property. Thus, prospective purchasers of any real

176. Ufford, supra note 1, at 16.
177. My research reveals only two successful cases: International Clinical Laboratories Inc. v. Stevens, et. al., 20 ENVTL. L. REP. (Envtl. L. Inst.) 20,560 (E.D.N.Y. 1990) (Current owner had conducted inspection of property, incurred great expense in performing environmental test work and analysis, and purchase price did not reflect contamination) and United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp 1341 (D. Idaho 1989) (current owners who received ownership of the contaminated property through gift from their father, the founder of the corporation, successfully asserted innocent landowner defense where the defendants had no knowledge or reason to know of hazardous waste, had no specialized knowledge or experience concerning hazardous wastes, were not involved in operations of facility, and due to the fact that private transactions are given more leniency than commercial transactions; this transaction was more like an inheritance, for which there is no CERCLA liability. Although the defendants had conducted no inquiry prior to purchase, the court found that "no inquiry" under these circumstances reasonable. Thus, no inquiry under these circumstances was "all appropriate inquiry"). See also United States v. Serafini, 706 F. Supp. 346 (M.D. Pa. 1988) (issues of fact existed precluding summary judgment against defendant on issue of availability of innocent landowner defense; issue existed as to whether current owners' failure to inspect site or inquire into past uses was inconsistent with good commercial practices). 178. For guidance on what constitutes "all appropriate inquiry," see MORTGAGE BANKERS ASSOCIATION OF AMERICA, ENVIRONMENTAL HAZARDS: A REAL ESTATE
estate, if there is any reason from which the existence of hazardous wastes may be inferred, must have an environmental engineering consultant conduct an environmental assessment of the property.

IV. CONCLUSION

CERCLA liability issues affect almost every player in every real estate transactions. These players and their counsel must be well aware of this potential liability and ways in which it may be avoided or limited. Badly needed legislation may soon be enacted which will greatly clarify some aspects of this minefield of liability. However, until such legislation is enacted and it is clear how it will be applied, buyers, sellers, lenders, lessors and lessees, corporate successors, corporate officers and majority shareholders, and trustees must exercise extreme caution when entering into nearly any real estate transactions.

Jeffrey M. Moss


179. Prospective buyers should conduct a title search to discover any past uses of the property which may have involved the production, storage, or disposal of hazardous materials.