3-1-1999

Bankers Beware: Liability of Lending Institutions Under Superfund

John M. Van Lieshout

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/hplj

Part of the Property Law and Real Estate Commons

Recommended Citation
Available at: https://scholarlycommons.law.hofstra.edu/hplj/vol2/iss2/4

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Property Law Journal by an authorized editor of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
BANKERS BEWARE: LIABILITY OF LENDING INSTITUTIONS UNDER SUPERFUND

John M. Van Lieshout*

INTRODUCTION

Lending institutions have long viewed themselves as outside the ever-widening scope of liability for the high cost of cleaning up hazardous waste disposal sites under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), popularly known as Superfund.¹ Such a belief seemed well-founded; although responsibility under CERCLA is imposed on the “owners or operators” of hazardous waste facilities,² a specific exception to

2. CERCLA imposes liability upon four categories of what have come to be called potentially responsible parties (“PRPs”): present owners and operators of a facility, 42 U.S.C.A. § 9607(a)(1) (West Supp. 1988); owners or operators of a facility at the time hazardous substances were disposed of at the facility, 42 U.S.C.A. § 9607(a)(2) (West Supp. 1988); persons who arranged for disposal of a hazardous substance at a facility, also known as “generators,” 42 U.S.C.A. 9607(a)(3)(West Supp. 1988); and parties who accepted hazardous substances for transportation to facilities selected by the party and at which there was a release or threatened release of a hazardous substance. 42 U.S.C.A. § 9607(a)(4) (West Supp. 1988). Parties in this last category are generally referred to as “transporters”.

“Facility” is defined by CERCLA at § 101(9), 42 U.S.C.A. § 9601(9) (West Supp. 1988). Like most definitions found in CERCLA §101, “facility” is defined very broadly, and generally refers to any place where hazardous substances have come to be located. 42 U.S.C.A. § 9601(9)(B) (West Supp. 1988). For example, while most would associate a facility with a dump or landfill, courts have also found facilities in places such as trailer parks, United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1148 (D. Ariz. 1984), and dragstrips, New York v. General Elec. Co., 592 F. Supp. 291, 295-96 (N.D.N.Y. 1984).

“Hazardous substances” are defined in CERCLA §101(14), 42 U.S.C.A. § 9601(14) (West Supp. 1988) by reference to lists of substances defined as hazardous in other environmental legislation such as the Clean Water Act and the Toxic Substances Control Act. 42 U.S.C.A. § 9601(14)(A), (D) (West Supp. 1988). This “list of lists” encompasses approxi-
CERCLA liability was carved out for 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." Lenders concluded that the "security interest" identified in the exception referred to the mortgages they held on properties affected by hazardous waste disposal. Consequently, lending institutions appeared to have little to fear from CERCLA.

However, two recent decisions cast doubt on the invulnerability of lending institutions to CERCLA. While the rulings seem at times contradictory, they deliver a common message: lending institutions can no longer assume that their status as secured creditors renders them immune to CERCLA liability. To fully understand the impact of the decisions on the lending community, it is necessary to review the regulatory and legislative origins of CERCLA, as well as the distinct fact situations under which the cases arose.

I. Federal Legislation of Waste Disposal

All federal solid waste legislation is of recent vintage. Prior to the early-1950's, regulation of waste disposal sites was primarily the province of local health and safety officials. By 1964, only two states had developed statewide programs for solid waste management. Thirty-one had no plan whatsoever.

With the passage of the Solid Waste Disposal Act of 1965, the federal government first entered the scene. National participation, however, was to be limited: allowances were made for federal technical and financial assistance, but disposal of solid waste remained a state and local responsibility. Nevertheless, due principally to the funding made available under the Solid Waste Disposal Act, by 1975 forty-eight states had adopted some form of waste management law and all fifty states had issued solid waste disposal regulations.
The Solid Waste Disposal Act was amended by the Resource Recovery Act of 1970 to expand the federal role in solid waste management. The Resource Recovery Act of 1970 mandated the enactment of guidelines for solid waste management and authorized federal grants for the construction of facilities that would recover usable materials from waste. The recycling efforts were financed by the Environmental Protection Agency ("EPA"), a federal agency created in 1970 to take over the functions of the Bureau of Solid Waste Management, a division of the Department of Health, Education and Welfare.

The federal government assumed direct control over solid waste disposal with the enactment of the Resource Conservation and Recovery Act of 1976 ("RCRA"). The congressional findings accompanying RCRA state that "while the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies, the problems of waste disposal . . . have become a matter national in scope and in concern and necessitate Federal action." Congress expressed particular concern in the preamble to RCRA of risks to human health and the environment due to inadequate controls on hazardous waste management. As a result, RCRA directs EPA to identify types, quantities, and concentrations of hazardous waste and to establish minimum standards applicable to all who generate, transport, treat, store, or dispose of such material.

Congress imposed a deadline of eighteen months from the passage of RCRA for the promulgation of EPA hazardous waste standards. Three years later, however, regulations had been proposed.
but not enacted. In the interim, the nation was faced with a disaster that brought to the fore the inadequacies of the existing legislation. During the summer of 1978, 236 families living near Love Canal in Niagara Falls, New York, were evacuated and permanently relocated because of exposure to toxic chemicals buried in a disposal site immediately adjacent to their homes. Before the relocation could occur, the residents had suffered disproportionately high incidences of miscarriages, birth defects, skin disorders, heart problems, and respiratory ailments. As a result, a massive cleanup effort was begun. By 1979, the costs had exceeded $27 million.

The Love Canal disaster made clear the shortcomings of RCRA. When the situation was discovered, the site was owned by the City of Niagara Falls Board of Education and local residents. Hooker Chemical Company seemed at least partially responsible for the problem, since it originally owned and operated the site. However, Hooker alleged that its disposal practices were sufficient under the standards in effect at the time and therefore contested its responsibility for the huge cleanup bill. Furthermore, neither the City Board of Education nor the residents of the area had the funds to finance the cleanup. As a result, the State of New York and federal government were forced to spend millions of dollars in tax revenues to reduce the dangers posed by the site.

Across the country, the problem was multiplying. In Shepherdsville, Kentucky, 20,000 to 30,000 barrels of discarded, leaking and unlabeled wastes were uncovered in a lowland dubbed the "Valley of
the Drums.” The owner, who had inherited the site from her deceased husband, was judgment proof from the enormous cost of remedying the situation. In New Jersey, more than 40,000 barrels of chemicals were found on the grounds of the Chemical Control Company. When Chemical Control went bankrupt, the State of New Jersey was stuck with a bill of $10 million for the cost of cleanup.

The root of the problem lay in the enabling language of RCRA. While it empowered EPA to abate discharges of hazardous wastes into the air or water, the wording of RCRA was prospective and focused solely on the control of present and future hazardous waste disposal. Consequently, RCRA was not well-suited to remedy the effects of past disposal practices. In drafting the Act, Congress simply did not anticipate the problem.

The abandoned site—an inactive hazardous waste disposal or storage facility that cannot be traced to a specific owner—created another dilemma. Although § 7003 of RCRA authorized EPA to bring suit to direct an owner or other responsible party to take remedial action to prevent or abate an imminent and substantial danger to human health or the environment, RCRA was only effective in those situations where the owner or responsible party was identifiable and financially able to afford the remedy. Therefore, if the perpetrator was unknown, could not be located, could not afford cleanup, or declared bankruptcy and walked away from the site, RCRA § 7003 was useless.

27. Id. at 11, 24; 1979 Envt'l Hearings, supra note 19, at 33. One estimate put the number of barrels at the site at “up to 100,000.” See Resource Conservation and Recovery Act Authorization Hearings Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 249-54 (1979) [hereinafter cited as 1979 RCRA Authorization Hearing].
29. See id. at 5.
30. Id. at 5, 24.
31. Id. at 47.
32. 1979 RCRA Authorization Hearings, supra note 27, at 54 (statement of Thomas C. Jorling, Assistant Administrator for Water and Waste Management, United States Environmental Protection Agency).
33. 1979 Oversight Report, supra note 17, at 47.
35. 1979 Envt'l Hearings, supra note 19, at 43. But see United States v. Waste Indus., Inc., in which the court ruled that RCRA § 7003 [42 U.S.C.A. § 6973 (West Supp. 1988)] could apply to owners and operators of an inactive landfill site. Any other decision, the court concluded, would interpret CERCLA as repealing RCRA, a result that Congress did not intend. 734 F.2d 159, 168 (4th Cir. 1984).
36. See 1979 Envt'l Hearings, supra note 19, at 43.
With these concerns in mind, Congress set out to develop a new legislative scheme for environmental liability. At the outset, it was clear that the scope of responsibility had to be widened. In this way, the enforcers of the law could avoid the dilemma faced by the State of New Jersey in its attempt to recover from six present and former owners of an abandoned site: in each instance the defendants had stated "I didn't do it; it was the guy before me." As an answer, strict liability was proposed for both past and present owners of disposal sites.

Liability without regard to fault was based on the premise that the handling of hazardous substances is an inherently ultrahazardous activity that involves the risk of serious harm to the public which cannot be eliminated completely even through application of the most stringent precautions. Without such broad-based liability, proof problems with regard to liability—as in the Chemical Control case—were thought to be inevitable. Furthermore, the imposition of strict liability was intended to serve as a deterrent for owners and operators of hazardous waste facilities.

The responsibility of past owners was also considered in response to the problem of abandoned sites. Love Canal proved that seeking relief against the present owner was not always appropriate since the present owner may be completely unrelated to the prior dumping. The only way to ensure effective enforcement was to legislate liability for past and present site owners.

At the same time, however, critics of the proposed legislation stated that its guiding philosophy was reflected in the statement that "government is perfectly prepared to punish the innocent for the sins of the guilty." The broad-based nature of strict liability was char-

37. 1979 Oversight Report, supra note 17, at 25.
39. Id. at 307.
40. Id. The Wildlife Federation concurred in this opinion, asserting that without strict liability, the possibility of recovery under the present legal system for other than initial cleanup costs would be "very remote." 1979 Envt'l Hearings, supra note 19, at 754-755.
41. 2 CERCLA Leg. Hist., supra note 38, at 307. Sprinkled throughout the debate on strict liability are numerous references to Rylands v. Fletcher, 159 Eng. Rep. 737 (1865), rev'd L.R. 1 Ex. 265, aff'd L.R. 3 H.L. 330 (1868), the historic case out of which the concept of ultrahazardous activity arose. Id. at 347-350.
42. 2 CERCLA Leg. Hist., supra note 38, at 307.
43. Id.
44. Id. at 98.
acterized as flying in the "face of fundamental fairness and equity" and viewed as giving EPA access to the deep pockets of whatever company had the money to pay, regardless of its degree of culpability. Concern was also voiced that the liability scheme blew the problem "out of proportion" and extended the punishment instead of the cleanup. One Congressman dramatically concluded that "legislation like the Superfund will mandate that the injured be compensated by the innocent." It was against this conflicting background that CERCLA was passed into law on December 4, 1980.

CERCLA retains most of the proposals by which RCRA was sought to be remedied. To rectify the problem of responsibility for abandoned sites, CERCLA § 101(2)(A) provides that any person who owned, operated, or otherwise controlled activities at an abandoned facility immediately prior to such abandonment is deemed to be the owner or operator of the site. This characterization is important insofar as CERCLA imposes liability upon past and present owners and operators of hazardous waste facilities.

Present site owners are subject to a type of "absolute liability": they are responsible even if they never disposed of any hazardous waste at the site and acquired ownership years after hazardous waste was disposed of at the site. The liability of former owners of hazardous waste sites is more limited. Former owners are

45. See id. at 99.
46. Id. at 98.
47. See id.
48. Id. at 247 (Statement of Rep. Ronald E. Paul, R.-Texas).
50. 42 U.S.C.A. § 9601(20)(A) (West Supp. 1988). The Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986), also imposes duties on former owners. SARA § 101 (35)(C), 42 U.S.C.A. § 9601(35)(C) (West Supp. 1988) states that "if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclos- ing such knowledge, such defendant shall be treated as liable under section 107(a)(4) and no defense under section 107(b)(1) and no defense under section 107(b)(3) shall be available to such defendant." Id.
51. 42 U.S.C.A. § 9607(a)(1) and (2) (West Supp. 1988).
not held accountable under CERCLA unless they owned the site at the time hazardous waste was disposed of at the site.\textsuperscript{54}

The liability provisions of CERCLA reflect the intent of its drafters to adopt a strict liability scheme. Although the terms “strict liability” are not used in CERCLA,\textsuperscript{55} liability under CERCLA is defined to be the standard of liability which obtains under § 1321 of the Clean Water Act.\textsuperscript{56} It is well settled that strict liability is the standard of liability which governs the application of § 1321 of the Clean Water Act.\textsuperscript{57}

Furthermore, CERCLA’s liability section states that it is subject to only three defenses,\textsuperscript{58} none of which incorporate any reference to fault or negligence that could negate an inference of strict liabil-


\textsuperscript{55} Both the early House and Senate versions of the proposed CERCLA legislation contained language providing for strict liability. See § 1480, 96th Cong., 2d Sess. § 4(a), 126 Cong. Rec. 30,908, reprinted in 1 CERCLA Legislative History, supra note 38, at 438-39. As part of the compromise necessary to effect adoption of the measure, the sponsors removed specific reference to strict liability. See Note, Generator Liability Under Superfund for Clean-up of Abandoned Hazardous Waste Dumpsites, 130 U. Pa. L. Rev. 1229, 1252-58 (1983).

\textsuperscript{56} See 42 U.S.C. § 9601(32).


\textsuperscript{58} 42 U.S.C.A. § 9607(b)(1),(2) and (3) (West 1986 and Supp. 1988):

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were 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 (except where 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 (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; or
(4) any combination of the foregoing paragraphs.
ity. A responsible party is liable under CERCLA unless it can be proven by a preponderance of the evidence that the release or threat of release of a hazardous substance, and the damage resulting therefrom, were caused solely by: (1) an act of war; (2) an act of God; and/or (3) an act of a third party with whom the defendant had no contractual relationship. In an effort to limit the range of objections to liability, CERCLA provides that its liability scheme is subject "only" to the above-enumerated defenses.

CERCLA does, however, set forth at least one exception to its strict liability scheme. CERCLA § 101(20)(A) exempts from the

59. See id. (No case to date has applied the "act of war" defense).
61. The "act of God" defense was unsuccessfully asserted in United States v. Stringfellow, 26 Envtl Rep. (BNA) 1624 (C.D. Cal. June 4, 1987). In that case, the defendants contended that heavy rainfall could serve as the type of national disaster which constituted an act of God. However, the court found that rain was not the kind of "exceptional natural phenomena" to which the "narrow act of God defense" applied. Stringfellow, 26 Envtl Rep. (BNA) at 1630. The court declared that the rains were foreseeable based on normal climatic conditions and any harm caused by the rain could have been prevented through design of proper drainage channels.
62. 42 U.S.C.A. § 9706(b)(3) (West Supp. 1988). The third party defense has been the most frequently employed CERCLA defense. See, e.g., United States v. Conservation Chemical Co., 619 F. Supp 162, 236-37 (W.D. Mo. 1985); United States v. Ward, 23 Envtl Rep. (BNA) 1391, 1400 (E.D.N.C. Sept. 9, 1985); and United States v. Tyson, 25 E.R.C. (BNA) 1897, 1906 (E.D. Pa. Aug. 22, 1986). Greater use has not, however, coincided with greater success on the merits. In most cases, the defense fails due to the defendant's contractual relationship with the allegedly responsible third party. In Ward, for example, a verbal agreement relating to disposition of PCB fluid was sufficient to create a contractual relationship to void use of the defense even when the agreement was "never reduced to writing or incorporated in a company resolution." Ward, 23 Envtl Rep. at 1394.

Even when an act occurs which is outside of the scope of a contractual relationship, courts have denied application of the defense. In Violet v. Picillo, 648 F. Supp. 1283 (D.R.I. 1986), a targeted defendant claimed that its waste was contracted for disposition at a certain Rhode Island landfill. The transporter deposited the waste at a different landfill, and the latter site became the subject of a CERCLA cleanup. Despite the contention that this "trans-shipment" was clearly outside the parameters of the disposal contract, the court refused to invoke the third-party defense since its specific statutory requirements had not been met. Violet, 648 F. Supp at 1283.
63. 42 U.S.C.A. § 9706 (a) (West Supp. 1988). Despite this fact, many defendants interpose non-statutory defenses. Some courts, relying on the "only" in § 107(a), have stricken these defenses with little discussion. Stringfellow, 26 Envtl Rep. (BNA) at 1631.

Other courts, however, have rejected this approach. Relying on the statement in CERCLA § 106(a), 42 U.S.C.A. § 9606(a) (West 1986) that a court may "grant such relief as the public interest and the equities of the case may require," courts have allowed the use of equitable defenses such as laches, estoppel and waiver. Conservation Chemical Co., 619 F. Supp. at 204-05. Other defenses going to the constitutionally of CERCLA and procedural defenses such as failure to join indispensable parties have also been raised, albeit with little success. See generally, Glass, Superfund and SARA: Are There any Defenses Left?, 12 HARV. ENVTL. L. REV. 385 (1988).
definition of a liable owner or operator a person who, without participating in the management of a facility, holds indicia of ownership primarily to protect his security interest in the facility. On its surface, this provision appears to be an attempt to mollify the critics of strict liability insofar as it provides protection for a certain category of seemingly "innocent" parties.

II. Case Law

As stated above, lending institutions viewed CERCLA with little apprehension as a result of the exception in § 101(20)(A) for persons holding indicia of ownership to protect a security interest. Prior to 1985, no authority to the contrary existed, insofar as the section had not been judicially interpreted.

However, lenders should have been tipped off by CERCLA's

The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such a term does not include a person, who, without participation in the management or operation of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

CERCLA's legislative history makes specific reference to the exception:

"Owner" is defined to include not only those persons who hold title to a vessel or facility but those who, in the absence of holding a title, possess some equivalent evidence of ownership. It does not include certain persons possessing indicia of ownership (such as a financial institution) who, without participating in the management or operation of a vessel or facility, hold title either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rule or regulations . . . . For example, a financial institution which held title primarily to secure a loan but also received tax benefits as the result of holding title would not be an "owner" as long as it did not participate in the management or operation of the vessel or facility.

2 CERCLA Leg. Hist., supra note 38, at 546.

65. The issue was briefly mentioned by the United States Bankruptcy Court for the Northern District of Ohio in T.P. Long Chemical, Inc., 22 Env't Rep (BNA) 1547 (N.D. Ohio Jan. 3, 1985). The court, in dicta, stated that a secured creditor that had repossessed its collateral pursuant to a security agreement would not be an "owner or operator" as defined by CERCLA:

The E.P.A. suggest, but does not specifically state, that BancOhio is liable under CERCLA as an owner or operator . . . . The court must reject this argument. The court finds that even if BancOhio had repossessed its collateral pursuant to its security agreement, it would not be an "owner or operator" as defined under CERCLA . . . . The only possible indicia of ownership that can be attributed to BancOhio is that which is primarily to protect its security interest. It is undisputed that BancOhio has not participated in the management of the Long facility. Thus, BancOhio cannot be held liable as an owner or operator under CERCLA.

22 Env't Rep. (BNA) at 1556.
legislative history. The intent of the drafters was clear: few, if any, parties with connections to a hazardous waste site would escape liability. Moreover, if the present owner was without funds to finance the cleanup, a thorough examination of the chain of title would be made until a solvent target could be found. As a result, deep pockets like lending institutions had the most to fear from CERCLA. Two decisions rendered within six months of each other combined to make this fear a reality for the lending community.66

A. United States v. Mirabile

In United States v. Mirabile, the United States District Court for the Eastern District of Pennsylvania decided an issue of first impression: "how far a secured creditor may go in protecting its financial interests before it can be said to have acted as an owner or operator within the meaning of [CERCLA]."67 The Mirabile decision discusses this question in the context of three separate loan transactions.

American Bank & Trust Company of Pennsylvania ("ABT"), lent a sum of money to Arthur C. Mangels Industries, Inc. ("Mangels") in February of 1973.68 The loan was secured, in part, by a mortgage on the site of Mangels' paint manufacturing facility.69 In 1976, Turco Coatings, Inc. ("Turco") acquire 98% of the outstanding shares of Mangels and shortly thereafter began to manufacture paint at the site.70

Girard Bank ("Girard"), the predecessor-in-interest of Mellon Bank ("Mellon"), entered into a financing agreement with Turco in 1976 whereby Girard would advance working capital to Turco.71 These advances were to be secured by the inventory and assets of Turco.72 At an unspecified date thereafter, Turco established an advisory board to oversee its operations.73 One member of the advisory board was Brett Sauers, the Girard loan officer initially responsible

67. 15 Envtl. L. Rep. at 20,995.
68. Id. at 20,996.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id. The board was established by the president of Turco, Robert Horstmann, who was also brought into the case as a third-party defendant. Id.
for the Turco account.\textsuperscript{74}

In July of 1979, the Small Business Administration ("the SBA") lent $150,000 to Turco.\textsuperscript{75} The loan was secured as follows: a second lien security interest in Turco machinery and equipment, a second lien on inventory and accounts receivable, and a second mortgage on the real estate.\textsuperscript{76} However, Turco filed for bankruptcy under Chapter 11 of the Bankruptcy Code in January of 1980.\textsuperscript{77} All operations at the site in December of 1980 were ceased by Turco.\textsuperscript{78} Sauer's was replaced by Peter McWilliams as the loan officer in charge of the Turco account and Girard increased its monitoring of Turco's financial condition.\textsuperscript{79}

In 1981, Turco's Chapter 11 petition was dismissed by the bankruptcy court.\textsuperscript{80} ABT proceeded with a foreclosure of its mortgage on the site and Girard, with the approval of the bankruptcy court, took possession of Turco's inventory.\textsuperscript{81} A percentage of the inventory was disposed of through private sales, and the remainder was sold at a public auction in May 1981.\textsuperscript{82} On August 21, 1981, the sheriff's sale in the ABT foreclosure action was held.\textsuperscript{83} ABT was the highest bidder but, less than four months later, assigned its bid to Thomas and Anna Mirabile ("the Mirabiles"), who then accepted a sheriff's deed to the property.\textsuperscript{84}

\begin{itemize}
  \item \textsuperscript{74} \textit{id.}
  \item \textsuperscript{75} \textit{id.} The loan was to be applied to "specified debts." \textit{id.}
  \item \textsuperscript{76} \textit{id.} The SBA also required a pledge of stock to secure its loan. \textit{id.}
  \item \textsuperscript{77} \textit{id.}
  \item \textsuperscript{78} \textit{id.}
  \item \textsuperscript{79} \textit{id.}
  \item \textsuperscript{80} \textit{id.} The record does not disclose the ground for dismissal. See, however, \textit{In re Matticke Indus., Inc.}, 28 Env't Rep. (BNA) 1212 (Bkrtcy. E.D.N.Y. July 31, 1987) in which a bankruptcy petition was dismissed for the following reasons: [T]he court will not allow the debtor to continue operation under the protection of the bankruptcy court while continuing to dump toxic chemicals polluting the environment. It is implicit that the legislative intention of Congress was not to permit the operation of a business for profit that constitutes a threat to the health and welfare of the public, nor that the bankruptcy court serve as a refuge for Chapter 11 polluters. 28 E.R.C. at 1215. For general information on the interplay between CERCLA and the Bankruptcy Code see Klein, \textit{Hazardous Waste Liability and the Bankruptcy Code}, 10 \textit{Harv. Env't L. Rev.} 533 (1986); See also Jackson, \textit{Kovics and Toxic Wastes in Bankruptcy}, 36 \textit{Stan. L. Rev.} 119 (1984).
  \item \textsuperscript{81} 15 Env't L. Rep. at 20,996. Turco also consented to Girard's possession of the inventory. \textit{id.}
  \item \textsuperscript{82} \textit{id.}
  \item \textsuperscript{83} \textit{id.}
  \item \textsuperscript{84} \textit{id.} The court noted that "[b]oth before and after the sale ABT negotiated with other parties for purchase of the property." \textit{id.}\
\end{itemize}
In the winter of 1981-82, the Pennsylvania Department of Environmental Resources informed the Mirabiles that drums on the site contained hazardous waste and asked the Mirabiles to remove the drums. The Mirabiles made efforts to consolidate the drums—which had been scattered about the site—into a warehouse. Although they obtained quotations from firms as to the cost of removing the drums, no drums were actually removed.

In February of 1983, the EPA visited the Turco site. Approximately 550 drums of waste from the paint manufacturing process were found stored in a warehouse. Many of the drums were in a deteriorated state and there were signs, including the residue of fires, that trespassers had entered the warehouse. The EPA concluded, based upon the inspection of the warehouse and air samples taken at the time, that immediate removal actions were necessary.

The EPA, on February 9, 1983, authorized the use of CERCLA money for the initiation of immediate action at the site. The Mirabiles were provided with a final opportunity to rectify the problem and, upon their failure to do so, the EPA commenced cleanup on February 11, 1983. Thereafter, the United States brought suit against the Mirabiles to recover cleanup costs in the amount of $249,792.52.

85. The substances in question included benzene, ethylbenzene, naphthalene, toluene and mercury. See United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20, 992, 20,993 (E.D. Pa. Sept. 4, 1985) (This was a companion decision on the motion of the United States for partial summary judgment on its complaint against Anna and Thomas Mirabile. The motion was denied based on the Mirabiles' assertion of a CERCLA 107(b)(3) third-party defense and the factual issues raised with respect to that defense.)
86. 15 Envtl. L. Rep. at 20,993.
87. Id.
88. Id.
89. Id.
90. Id.
91. Id. An immediate removal action is authorized by CERCLA's National Oil and Hazardous Substances Pollution Contingency Plan, codified at 40 C.F.R. § 300 (1987). Removal actions are in the nature of short-term responses to problems requiring immediate attention, 40 C.F.R. § 300.6 (1987), and are limited by SARA to twelve months in duration and two million dollars in expenditures. 42 U.S.C.A. § 9604(c)(1) (West Supp. 1988).
92. 15 Envtl. L. Rep. at 20,993.
93. Id.
94. Id.
as third-party defendants.\(^95\) ABT and Mellon brought a claim against the United States, based upon the SBA’s alleged involvement in creating the existing conditions at the Turco site, relying on the alleged involvement of the SBA in creating the conditions existing at the site.\(^96\)

ABT, the SBA and Mellon Bank each filed motions for summary judgment relying on the exception to CERCLA liability in §101 (20)(A).\(^97\) In its ruling on the motions, the court noted that ABT’s involvement at the site presented “the most compelling case” for the granting of summary judgment.\(^98\) ABT had asserted that “its activities at the site were undertaken merely to protect its security interest in the property and that it never participated in the management of the site.”\(^99\) In resolving ABT’s motion, the court took into consideration the actions taken by ABT with respect to the property. In the period between the sheriff’s sale and the assignment of its bid to the Mirabiles, ABT had: (1) secured the building against vandalism by boarding up windows and changing locks; (2) made inquiries as to the approximate cost of disposal of various drums located on the property; and (3) visited the property on various occasions for the purpose of showing it to prospective purchasers.\(^100\)

The court indicated that “ABT made no effort to continue Turco’s operations on the property and had foreclosed some eight months after all operations had ceased.”\(^101\) In light of these facts, the court decided that ABT simply could not be deemed to have

---

\(^95\) United States v. Mirabile, 15 Env’t Rep. (BNA) 20,994, 20,995 (E.D.Pa. Sept. 4, 1985). ABT and Mellon argued, in essence, that if they were liable, so was the SBA. Id. The Mirabiles never made a direct claim against the SBA, but raised a defense that the SBA should have been joined in the action as an indispensable party. Id.

\(^96\) Id.

\(^97\) Id. at 20,994-95.

\(^98\) Id. at 20,996.

\(^99\) Id.

\(^100\) Id. The court noted that all of these activities occurred “several months after Turco ceased its operations at the site,” thereby implying that ABT was not imposing its will on Turco. Id. If these acts had taken place while Turco was still doing business, it is submitted that ABT’s control over Turco would have been significant and would lend credence to a claim that it was a de facto operator of the Turco plant.

\(^101\) Id. ABT also contended that it was not an “owner” for purposes of CERCLA §107(a)(1) (codified at 42 U.S.C.A. § 9607(1)(a) (West Supp. 1988), because under Pennsylvania law it acquired only equitable title to the property by virtue of its successful bid at the sheriff’s foreclosure sale. 15 Envtl. L. Rep. at 20,996 (for an overview of the parties upon whom CERCLA imposes liability, see infra note 2). ABT asserted that it had assigned its successful bid to the Mirabiles before it was vested with legal title—presumably before its bid was confirmed by the court in its foreclosure action. Id. The Mirabile court resolved ABT’s liability on other grounds and never ruled on this issue.
participated in the management of the site. Given the “security interest” exception in § 101(20)(A) of CERCLA, the court stated that congress had manifested its intent to impose liability [primarily] upon those who were responsible for and profited from improper disposal practices. Therefore, before a secured creditor such as ABT could be declared liable, the court ruled that “it must, at a minimum, participate in the day-to-day operational aspects of the site.” In the instant case, the court remarked, “ABT merely foreclosed on the property after all operations had ceased and thereafter took prudent and routine steps to secure the property against further depreciation.” Summary judgment was granted for ABT.

The court next considered the responsibility of the SBA with respect to the property. While the SBA had loaned money to Turco, it had never become an owner of the property in the same sense as ABT. However, the SBA regulations in effect at the time of its loan to Turco required that the SBA provide management assistance to its borrowers. Although no evidence was introduced to prove that such assistance was ever provided, representatives of the SBA did visit the Turco site three times during 1981 to monitor liquidation of Turco’s assets. In addition, the SBA loan agreement placed certain restrictions on Turco’s financial dealings, and limited the annual compensation of Turco’s operating officers.

The Mirabiles grounded their case against the SBA on the provisions of the loan agreement. Notwithstanding the duties called

102. 15 Envth. L. Rep. at 20,996.
103. Id.
104. Id.
105. Id.
106. Id.
107. Id. at 20,997. The court noted that the SBA never took “legal or equitable title to the site.” Id.
108. 15 Envth. L. Rep. at 20,996.
109. Id.
110. Id. In addition, the purchase of life insurance and payment of dividends or advances to Turco officers required prior written SBA consent. Id. A dispute also arose in the case out of the hiring of Charles Curtis, who replaced Horstmann as President and Chief Operating Officer of Turco. ABT, Mellon and the Mirabiles contended that the SBA retained Curtis to assist in the administration of Turco’s SBA loan. In response, the United States submitted an affidavit stating that Curtis was never employed by the SBA as a management consultant. Id. No party introduced evidence to the contrary by any affidavit and the court concluded that Turco, and not the SBA, hired Curtis. Id.
111. Although the Mirabiles never filed suit against the SBA, their claims against ABT and Mellon involved the same issue as the third-party action ABT and Mellon had been commenced against the SBA. As a result, the court noted that “the major opposition to all three motions comes from the Mirabiles despite the fact that the Mirabiles have asserted no direct
for by the agreement, the court concluded that no evidence was introduced that the day-to-day managerial involvement required by SBA loan ever took place. Consistent with its decision granting summary judgement for ABT, the court declared that "participation in purely financial aspects of a borrower's operation [was insufficient] to bring a lender within the scope of CERCLA liability." Therefore, the motion of SBA for summary judgement was granted.

The court declared, however, that the motion of Mellon "presents a cloudier situation." The court's concern arose out of the participation of Mellon and its predecessor, Girard, on the Turco advisory board. For example, McWilliams testified that "he became involved with Turco because his superiors at Mellow wanted him to have 'more of a day-to-day hands-on involvement.'" He described this involvement as taking the form of "monitoring the cash collateral accounts, insuring that receivables went to the proper account, and establishing a reporting system between [Turco] and the bank."

In addition, evidence was offered that Girard had demanded that "additional sales efforts" be made by Turco and that McWilliams insisted, on several occasions, that Turco make certain "manufacturing changes and reassignment of personnel." A member of Turco's advisory board testified that "it seemed for a period of time as if McWilliams was always present at the site" and stated that "McWilliams would, for example, determine the order in which or-
Although it noted that there were weaknesses in the case which the Mirabiles had presented against Mellon, the above-testimony convinced the court that a full factual record at trial was necessary in order to reach a determination as to whether Mellon, through its predecessor Girard, engaged in the sort of participation and management that would bring it within the scope of CERCLA liability. In particular, the court requested a clearer picture of McWilliams’ participation in the manufacturing processes. As a result, Mellon’s motion for summary judgement was denied.

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

In United States v. Maryland Bank & Trust Co. the United States District Court for the District of Maryland also considered the liability of lending institutions under CERCLA. Unlike the court in Mirabile, the Maryland Bank court focused on the liability of a lending institution as an “owner,” as opposed to an “operator,” of a facility under CERCLA.

In 1980, Mark Wayne McCleod (“McCleod”) applied for a $335,000 loan from Maryland Bank & Bank Trust Co. (“MB&T”) to acquire a 117 acre farm from his parents. MB&T issued the loan and McCleod purchased the site on December 16, 1989. Soon thereafter, he failed to make payments on the loan, and MB&T instituted a foreclosure action, purchased the property at the fore-
closure sale on May 15, 1982, and took title to the site.\textsuperscript{130}

On June 20, 1983, McCleod informed the County Department of Health of the existence of waste deposited at the site.\textsuperscript{131} The State of Maryland inspected the property the next day and then contacted the EPA.\textsuperscript{132} After conducting tests to identify the substances dumped at the site, the EPA requested and received funding to conduct a removal action under the Superfund.\textsuperscript{133} The agency MB&T that it had to initiate corrective action at the site before October 24 1983 or the EPA would use its own funds to remove the waste.\textsuperscript{134} After the bank declined the EPA’s offer, the agency instituted its own cleanup, removing 237 drums of chemical material and 1,180 tons of contaminated soil at an estimated cost of $551,713.50.\textsuperscript{135} After MB&T failed to tender payment for the cleanup costs, the United States instituted a civil action for their recovery.\textsuperscript{136}

The court’s decision arose out of a motion for summary judgment filed by MB&T. First, MB&T contended that it could not be liable as an owner of the site unless it was also an operator of the

\begin{itemize}
\item \textsuperscript{130} \textit{Id.} MB&T bid $381,5000.00 for the site, well in excess of the original amount of its loan. \textit{Id.}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.} For more information on removal actions, see \textit{supra} note 91.
\item \textsuperscript{134} CERCLA provides in § 104(a)(1) (42 U.S.C.A. § 9604(a)(1) (West 1986)) that the President is authorized to act . . . to remove or arrange for the removal of, and provide for remedial action relating to [any] hazardous substance, pollutant or contaminant at any time . . . unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible parties.
\item Several CERCLA defendants have seized upon this language and argued that where the owner or operator was not allowed the first chance at cleanup, CERCLA had been violated and the government’s cleanup costs are unreasonable \textit{per se}. However, this argument has been rejected insofar as CERCLA was recognized as contemplating emergency removal actions in which prior notification of and consultation with the owner or operator is not feasible. United States v. Dickerson, 24 Env’t Rep. (BNA) 1875, 1880 (D. Md. May 28, 1986). Consequently, courts have ruled that CERCLA merely encourages, rather than compels, notification of and cleanup by the responsible party. United States v. Medley, 24 Env’t Rep. (BNA) 1858, 1860 (D.S.C. July 8, 1986). SARA solved the dilemma once and for all by amending the provision to make it clear the act was discretionary:
\item When the President determines that such action will be done properly and promptly by the owner and operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study . . . .
\item \textsuperscript{135} 632 F. Supp. at 575-76.
\item \textsuperscript{136} \textit{Id.} at 576.
\end{itemize}
site. Additionally, MB&T asserted that since McLeod had done all the dumping, MB&T was insulated from liability by CERCLA’s third-party defense. Finally, MB&T relied on Mirabile to argue that it held indicia of ownership only to protect its security interest in the property and did not participate in the management of the site—the same grounds that excused ABT and the SBA from liability in Mirabile.

The court made quick work of MB&T’s first contention. Although CERCLA § 107(a)(1) by its terms applies only to “owners and operators,” the court declared that MB&T could still be held liable under the section as an owner even if it did not also operate the site. To rule otherwise, stated the court, would require it to “slavishly follow the laws of grammar while interpreting acts of Congress” and “would violate sound canons of statutory interpretation.” The legislative history of CERCLA, according to the court, provided strong evidence that Congress intended liability for owners and operators to be distinct and separate.

The court also rejected MB&T’s argument that it was entitled

137. Id. The United States disputed the claim that MB&T was not an “operator” of the facility. Id. at 577.
138. 632 F. Supp. at 576. For a discussion of the CERCLA third party defense, see supra note 62.
139. See id. at 578.
140. See supra note 2.
141. 632 F. Supp. at 577.
142. Id. at 578. The court was particularly swayed by the fact that CERCLA is widely acknowledged to be model of ambiguity, due in part to the fact that it was a “hastily patched together compromise Act.” Id. United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) (“CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.” See also Bulk Distribution Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437, 1441, (S.D. Fla. 1984) (“CERCLA’s legislative history is riddled with uncertainty because lawmakers hastily drafted the bill, and because last minute compromises forced changes that went largely unexplained.”); City of Philadelphia v Stepam Chemical Co., 544 F. Supp. 1135, 1142 (E.D. Pa. 1982) (“What was enacted and signed into law is a severely diminished piece of compromise legislation from which a number of significant features were deleted.”).
143. 632 F. Supp. at 578. The court examined the House Report accompanying H.R. 85, one of the four bills to coalesce into CERCLA. The report contained a definition of “operator”: “In the case of a facility, an ‘operator’ is defined to be a person who is carrying out operational functions for the owner of the facility pursuant to an appropriate agreement.” 632 F. Supp. at 578, citing H.R. Rep. No. 96-172, Part 1, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 6119, 6182. The reference to an operator working for the owner convinced the court that “an operator cannot be the same person as an owner.” Id.

The court also cited to State of New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) in which an owner of a site who had bought the site for development and had never operated it was still held liable under CERCLA.
to the "security interest" exception of CERCLA § 101(20)(A). To arrive at this conclusion, the court reviewed the law of Maryland and twelve other states, under which a lending institution that possesses a mortgage as security for an obligation actually holds title to the property while the mortgage is in force. The court stated that the language of § 101(20)(A) was limited to these situations since ownership in the property was in the hands of the lender by operation of law.

In support of this interpretation, the court cited the legislative history of the Comprehensive Oil Pollution Liability and Compensation Act, one of the four proposed bills out of which CERCLA emerged. Contained in a house report accompanying the proposed bill was a definition of "owner." The term excluded "certain persons possessing indicia of ownership (such as a financial institution), who, without participating in the management or operation of a vessel or facility, hold title either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rules or regulations." The purpose of CERCLA was to protect only those lenders in the thirteen states who hold title as secured parties as a matter of law, and not mortgagees who acquire title in other ways—such as at a sheriff's foreclosure sale.

As a consequence, the court ruled that MB&T's security interest existed only so long as its mortgage was in effect. During this period it could avail itself of the defense contained in § 101(20)(A). However, when it foreclosed on the mortgage its security interest was terminated, along with the mortgage. When cleanup occurred, MB&T did not "hold" a mere security interest, but "held" title to the property as the owner of an investment. Based on its finding that the verb tense of the exclusionary language was critical, the court denied application of the "security interest exception" to

144. 632 F. Supp. at 579 (citing, inter alia 58 C.J.S. Mortgages § 1, at 23-28 (19 ).
145. Id.
146. Id.
147. Id. (citing H.R. Rep. 96-172, Part 1, 2 CERCLA Leg. Hist., supra note 38, at 546).
148. 632 F. Supp. at 579-80. See supra note 64.
149. Id. at 580. The court suggested that MB&T could have been entitled to this exception had it not foreclosed on the site or had it withheld from bidding at the foreclosure sale. Id. at 580, n.6.
150. Id. at 579.
151. Id.
152. Id.
MB&T. 153

Confronted with MB&T's reliance on Mirabile, the court found that case to be distinguishable. 164 The court stated that in Mirabile, ABT's foreclosure was "plainly undertaken in an effort to protect its security interest in the property," once again suggesting that MB&T had acted as the owner of an investment. 155 As further evidence, the court noted that ABT "promptly" assigned the property to a third party, 166 while MB&T had owned the McLeod site for almost four years at the time the court rendered its decision. 157 The Maryland Bank disagreed that Mirabile had a broader application and limited the case to its facts. 158

Having quashed MB&T's attempt to avoid liability in the same manner as ABT and the SBA had accomplished in Mirabile, the court concluded the opinion by offering MB&T a glimmer of hope. A full trial on the facts of the third-party defense was ordered. 159 The court could not rule, based on the affidavits submitted in support of and opposition to the motion, on "the full nature of the contractual and business relations" between McLeod and MB&T and requested the development of a factual record at trial. 160

III. Analysis

A. Harmonizing Mirabile and Maryland Bank

In Mirabile, ABT and the SBA walked away without any liability and Mellon very nearly so; in Maryland Bank, MB&T lost on the same arguments that exonerated its counterparts in Mirabile. It is therefore difficult to accept the fact that the courts in both cases were construing and applying the same section of CERCLA. However, in reality, the decisions are simply different pieces of the same puzzle and quite capable of being harmonized.

Section 107(a)(1) of CERCLA imposes liability on owners and

153. Id.
154. Id. at 580.
155. Id. This statement is incorrect. The Mirabile court did not concern itself with the reasons for ABT's purchase of the property at the foreclosure site. Instead, it dealt solely with ABT's actions prior to and after the foreclosure which might have rendered ABT liable as an operator under CERCLA § 107(a)(1). See supra notes 162-64 and accompanying text.
156. 632 F. Supp. at 580.
157. Id. at 579.
158. Id. at 580.
159. Id. at 581.
160. Id.
operators of sites affected by hazardous waste.\textsuperscript{161} \textit{Mirabile} concerned itself solely with the "operator" portion of the § 107 (a)(1) equation. As a result, the court limited its inquiry to the issue of whether the participation of ABT, the SBA and Mellon in the affairs of Turco reached such a level that any of the three could be labeled operators of the Turco facility. The court's conclusion was not complicated: involvement in purely financial aspects of a business does not render a lender liable as an "operator" under CERCLA.\textsuperscript{162} Indeed, it was only Mellon's "day-to-day involvement"\textsuperscript{163} in Turco's business, arguably one of the most basic characteristics of an operator in any sense of the term, that gave the court pause.

\textit{Mirabile} was not a case that turned on whether ABT, the SBA and Mellon were "owners" of the Turco facility, nor should it have been. Only one of the parties, ABT, ever held anything in the way of an ownership interest. And while ABT's ownership interest was short—four months—it is not the length of time that one holds title but what takes place during the time one holds title that is crucial to CERCLA liability. ABT's status under CERCLA was that of a former owner that held title during a period when no hazardous waste was disposed of at the Turco site. This is the limited exception to liability that CERCLA allows under § 107(a)(2): former owners are liable only if hazardous waste was disposed of at the facility during their term of ownership.\textsuperscript{164} ABT could therefore never be held liable as an owner under CERCLA, and the court was correct to limit its review to ABT's status as a § 107(a)(1) operator.\textsuperscript{165}

Once it brushed aside the contention that one had to be both an owner and operator to be subject to CERCLA liability, the court in \textit{Maryland Bank} never concerned itself with whether MB&T was a § 107(a)(1) operator, and with good reason. MB&T clearly owned the property in question and had assumed many of the duties and obligations of ownership.\textsuperscript{166} Unlike ABT, its ownership liability was unfettered; it was the current, as opposed to the former, owner of the facility. CERCLA does not impose any limitation on the liability of

\textsuperscript{161} See \textit{supra} note 2 and accompanying discussion.

\textsuperscript{162} 15 Envtl. L. Rep. at 20,996.

\textsuperscript{163} \textit{Id.} at 20,997.

\textsuperscript{164} See \textit{supra} note 54 and accompanying text.

\textsuperscript{165} \textit{Id.}

\textsuperscript{166} MB&T "conveyed a portion of the site to a third party, discussed granting a right-of-way across the site with another party, and retained an insurance policy on the property." Rashby, \textit{United States v. Maryland Bank & Trust Co.: Lender Liability Under CERCLA}, 14 Ecology L. Q. 569, 573 (1987).
current owners: current owners, under § 107(a)(1), unlike former owners under § 107(a)(2), are liable whether or not waste was disposed at the site during their term of ownership. As a result, the court never had to reach the issue of whether MB&T was an operator in order to resolve the liability question.

_Mirabile_ and _Maryland Bank_ arrive at different conclusions because they approach liability under CERCLA from different perspectives. While both cases involve lenders in a mortgage foreclosure setting, the factual similarity ends there: _Mirabile_ is a case about lender as operator, and _Maryland Bank_ is a case about lender as owner. Comparing operators and owners under CERCLA is like comparing apples and oranges, and lenders are missing that point if they criticize the courts for not coming to the same conclusion. Moreover, given the different policy considerations which governed each court in its review of CERCLA liability, it is doubtful that the cases would have reached the same conclusion even had the courts been dealing with the same facts.

**B. The Philosophy of Lender Liability Under CERCLA**

The fundamental difference between _Mirabile_ and _Maryland Bank_ concerns the manner in which each court viewed the philosophy of CERCLA liability when applied to lenders who had never disposed of the hazardous waste which gave rise to the cases. In reviewing the policy considerations at issue, each court raised echoes of the debate that occurred in the drafting stages of CERCLA over the imposition of strict liability and its effect on seemingly innocent parties.

In _Mirabile_, the court recognized that imposition of liability on secured creditors or lending institutions would enhance EPA’s chances of recovering its cleanup costs, given the fact that such institutions are usually more financially solvent than other responsible parties. The court further acknowledged that imposing liability in such circumstances may help to ensure more responsible management of hazardous waste sites. Nonetheless, noting that Congress had failed to address these policy questions and had, in fact, singled out secured creditors for protection under CERCLA § 101(20)(A), the court declined to expand the scope of liability under

---

167. See supra notes 52 and 53.
168. 15 Envtl. L. Rep. at 20,996.
169. Id.
CERCLA.  

In *Maryland Bank*, however, the court envisioned a scenario under which EPA would shoulder the cost of cleanup alone, allowing the former mortgagee-turned-owner to benefit from the cleanup by the increased value of the land. Furthermore, since prospective purchasers would shy away from a sheriff's sale bid due to potential CERCLA liability, a lending institution could purchase the property with a low bid and re-sell it at a handsome profit once the cleanup had been undertaken at taxpayer's expense.

The *Maryland Bank* court stated that it would not allow CERCLA to become an insurance "scheme" for lending institutions to protect them against losses on loans secured by polluted properties. Intimating that MB&T had simply made a mistake in judgment, the court declared that "lending institutions are in an able position to investigate and discover potential problems in their secured properties" and that "such research is routine for many lenders."

To a certain extent, the decisions reflect the conflicting viewpoints expressed during the drafting of CERCLA. *Mirabile* can be seen as an extension of the concern that CERCLA would result in a fishing expedition for the deepest available pocket regardless of the degree of culpability. The *Mirabile* court held that the primary intent of the drafters of CERCLA was to punish whose who profited from the illegal disposal of hazardous wastes and that certain innocent parties had been afforded protection from liability. Included in this protection were lending institutions that held indicia of ownership primarily to protect a security interest and that did not participate in the management of the facility. While recognizing the advantages that would be made available to EPA if Superfund liability were extended to the deep pockets of lending institutions, the court in *Mirabile* was not willing to judicially extend the scope of liability to such an "innocent party" absent an express directive from Congress in the way of an amendment to CERCLA.

*Maryland Bank* is an outgrowth of the opinion that strict liability of past and present owners under CERCLA must adhere in order

170. *Id.*
171. 632 F. Supp. at 580.
172. *Id.*
173. *Id.*
174. *Id.*
175. 15 Envtl. L. Rep. at 20,996.
for an effective cleanup scheme to be enforced. Proponents of strict liability during CERCLA’s drafting asserted that it was necessary in order to avoid burdensome proof problems that would inevitably result in the cost of cleanup being borne by taxpayers. The court in Maryland Bank rejected the arguments of MB&T that it was not responsible for the presence of hazardous waste at the site and based liability under CERCLA solely on its status as the present owner of the property. Had the result been otherwise, it is clear that McCleod, who was unable to make the payments on his loan, would not have been able to meet the cost of cleanup. Therefore, EPA would have been faced with a result under CERCLA no better than was available to remedy the Love Canal disaster under RCRA. This is the scenario that the strict liability advocates sought to avoid by enacting CERCLA.

C. Legislative Fallout: The Innocent Landowner Defense

The reauthorization of CERCLA was well underway when the Maryland Bank decision was handed down. During the course of the reauthorization, the controversy surrounding “innocent party vs. strict liability” that highlighted the drafting of CERCLA was rekindled. The publicity arising from the Maryland Bank decision added impetus to the call for protection of innocent parties from the ever-increasing scope of CERCLA’s strict liability scheme. The culmination of these efforts took the form of the so-called “innocent landowner” defense embodied in the Superfund Amendments and Reauthorization Act of 1986 (“SARA”).

In reality, the innocent landowner defense is not a separate defense at all. It is instead an adjunct to CERCLA’s § 107(b)(3) third-party defense. Section 107(b)(3) of CERCLA provides a defense if a potentially responsible party can prove that the release or threat of a release of a hazardous substance and the damages resulting therefrom were caused solely by a third party with whom the

176. See note 38 supra.
178. CERCLA’s reauthorization was necessary due to the expiration of the taxing system established to finance the cleanup fund. Superfund II: A New Mandate, (BNA) 13 (Feb. 13, 1987) [hereinafter Superfund II].
179. Superfund II, supra note 176, at 28.
180. Id.
183. See supra note 62.
defendant had no contractual relationship. SARA amended the definition of the terms "contractual relationship" to provide that a contractual relationship will not result in liability if a defendant acquired the facility after the disposal of hazardous substances and, at the time the facility was acquired, the defendant did not know and had no reason to know that any hazardous substance was disposed of in, on or at the facility.

However, in defining when a defendant "had no reason to know" that any hazardous substance was in, on or at the facility, SARA adopted a standard of research remarkably similar to that espoused by the court in *Maryland Bank.* The innocent landowner defense is applicable only to those defendants who 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." In reviewing the level of inquiry that is "appropriate," SARA requires courts to take into account several factors:

[(1)] any specialized knowledge or experience on the part of the defendant; [(2)] the relationship of the purchase price to the value of the property if uncontaminated; [(3)] commonly known or reasonably ascertainable information about the property; [(4)] the obviousness of the presence or likely presence of contamination at the property; and [(5)] the ability to detect such contamination by

---

184. *Id.*

The term "contractual relationship", for the purpose of section 9607(b)(3) of this title includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless 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 one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At 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.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) or this title.

186. 632 F. Supp. at 580.
appropriate inspection.\textsuperscript{188}

To date, the innocent landowner provision has spawned little in the way of judicial interpretation.\textsuperscript{189} There is no reported decision that discusses application of the defense in the context of a lender liability under CERCLA.

D. The Implications of Mirable, Maryland Bank, and the Innocent Landowner Defense for Lenders

The lessons of Mirabile and Maryland Bank for lending institutions may be painful, but there are at least simple to understand and should be easy to follow. However, lenders ought not feel secure that the innocent landowner defense provides a safe harbor from CERCLA liability. In many way, lenders should view the defense with a "once bitten, twice shy" attitude: any potential liability under CERCLA must be viewed carefully, regardless of the existence of a possible defense.

Mirable counsels lenders to avoid environmental liability as operators of hazardous waste facilities by steering clear of day-to-day involvement in the management of their borrowers' concerns. However, the emergence of huge money judgments for lender liability in non-environmental matters arising out of interference by lenders in the affairs of borrowers has ensured that this type of conduct will become increasingly rare, if non-existent, on the part of lenders.\textsuperscript{180} As a result, Mirabile should not really change the way lenders do business; rather, it should impress upon lenders the dangers of straying too far from the normal lender-borrower relationship.

The key, according to the court in Mirabile, is to focus on whether the actions contemplated by the lender "constitute partici-

\textsuperscript{188} Id.

\textsuperscript{189} Reliance on the defense was rejected in the only reported case to date. In Washington v. Time Oil Co., 27 Env't Rep. (BNA) 2076 (W.D. Wash. Feb. 19, 1988), the court deferred its holding on whether defendant "Time Oil knew, or had reason to know, if the property was contaminated at the time of purchase." Id. Instead, the court found that Time Oil had failed to satisfy the other elements of CERCLA § 107(b)(3); namely, that the release of the hazardous substance in question was caused solely by a third party with whom Time Oil had no contractual relationship. Id. The court ruled that a sublessee of Time Oil, with whom it had at least an "indirect contractual relationship" had caused a release of hazardous substances at the site. Id.

pation in the management of the site."\(^{191}\) Under this test, ABT was absolved because it never tried to revive Turco as a going concern; it merely boarded up the windows, changed the locks and secured the property until it could be transferred to a willing buyer.\(^{192}\) And, although the SBA regulations required it to provide "management assistance to its borrowers," the Mirabiles could turn up nothing more on this issue than the fact that SBA representatives visited the Turco site three times.\(^{193}\)

Even Mellon would have been entitled to summary judgment had the only testimony on the issue been that of McWilliams. McWilliams stated at his deposition that he monitored the cash collateral accounts, ensured that receivables went into the proper accounts and established a reporting system between the bank and the company.\(^{194}\) Consistent with its earlier rulings, the court stated that this purely financial activity would not give rise to CERCLA liability.\(^{195}\) It was only when Curtis, Turco's Chief Executive Officer, brought up two obvious examples of management-related activity completely outside the scope of the lender's authority—McWilliams "insisted on certain manufacturing changes and reassignment of personnel"—that the court concluded that Mellon had stepped over the line.\(^{196}\) This line should be bright enough to provide lenders with a clear view of what will and will not suffice under CERCLA.

Unlike Mirabile, Maryland Bank should change the way lenders do business. Foreclosures will no longer be a routine method of recouping a loss on a bad loan. Indeed, given the average CERCLA cleanup cost of $14 million,\(^{197}\) most, if not all, lenders will simply walk away from the loan rather than acquire CERCLA liability at the same time they acquire the mortgaged premises at the sheriff's foreclosure sale.

This should not necessarily result in a greater number of uncollectable loans. Heeding the advice of the Maryland Bank court to "investigate and discover potential problems,"\(^{198}\) lenders should institute a system of environmental research that impacts on every phase of the loan process. Lenders must require potential borrowers to an-

\(^{191}\) 15 Envtl. L. Rep. at 20,996.
\(^{192}\) Id.
\(^{193}\) Id.
\(^{194}\) Id. at 20,997.
\(^{195}\) Id.
\(^{196}\) Id.
\(^{197}\) See supra note 91.
\(^{198}\) Maryland Bank, 632 F. Supp. at 580.
answer an in-depth questionnaire at the time application for the loan is made. This should be followed by an environmental audit of the site in which all possibilities for environmental liability for the lender are reviewed. If the investigation is satisfactory, the loan can be made and the loan documents can contain representations and warranties allowing the lender to void the deal if misrepresentations as to the environmental condition of the site have occurred. If the investigation is unsatisfactory, the application is denied.

The latter result achieves indirectly what CERCLA sought to provide for directly. Borrowers unable to obtain finances to continue or expand their business as a result of environmental difficulties will be left with no choice but to remedy the ills at their own expense. The CERCLA ideal of having "those who profit from pollution pay for it" is thus realized—albeit in a roundabout way.

If the loan relationship ends prematurely, the process must be repeated: before commencing a foreclosure action or accepting a deed to any property in lieu of foreclosure, the lender should undertake environmental reconnaissance once again and obtain assurances that is not buying into CERCLA liability by becoming an owner of the site. If the environmental review is satisfactory, the lender can proceed with the transaction, taking some comfort in the fact that its review might enable it to utilize the innocent landowner defense in the event of some unforeseen environmental difficulty. If the review is unsatisfactory, the lender should simply walk away from the loan. Given the cost of a CERCLA cleanup, few loans will be worth the risk of liability.

The danger in all this lies somewhere in the middle, a potent mixture of Mirabile and Maryland Bank. Given Maryland Bank's emphasis on research, many lenders may find it necessary to review the environmental practices of their borrowers prior to extending further credit. In such a situation, it is conceivable that a lender could, in the interest of avoiding future CERCLA liability, condition the extension of credit on compliance by the borrower with certain accepted methods of hazardous waste management and disposal.

201. Cohen, supra note 200, at 124.
202. Miller & Bennett, supra note 199, at 438.
203. Id.
rub occurs when the lender dictates the terms of the borrower's environmental compliance to the point that it begins to participate in what is essentially a function of management. In so doing, is the lender out of the Maryland Bank frying pan only to fall into the Mirabile fire as an operator under CERCLA § 107(a)(1)? To date, no court has considered this question, but it illustrates the difficult choices faced by lenders in the area of environmental liability.

Finally, lenders should be wary of the apparent benefits of the innocent landowner defense. In the wake of Mirabile and Maryland Bank, and given the level of inquiry required by CERCLA § 101(35)(B), it is difficult to conceive of a situation in which lenders could be viewed as "innocent." It is submitted that the provision is little more than a legislative placebo; it looks good in print, but promises to have little effect. If a mistake is made in the process of environmental review and a lender becomes the owner of contaminated property, the lender will probably still be held liable under CERCLA. Although the lender will have a claim against the party that committed the error in the review, it will be of little consolation given the enormity of the cost of CERCLA liability. As a result, lenders must be aware that not just any review will suffice; CERCLA calls for an "appropriate inquiry" and it is suggested that a lender focus squarely on the qualifications and experience of any party undertaking environmental reconnaissance on its behalf.

CONCLUSION

The ultimate impact of Mirabile, Maryland Bank and the innocent landowner provision will be felt most keenly by the average citizen who pays taxes. If absolute liability is to accrue to a lender under the Maryland Bank decision and no innocent landowner defense is available, the most likely course for a lender is to simply


205. In BCW Associates Ltd. v. Occidental Chemical Corp., 3 Toxic L. Rep. (BNA) 943 (E.D.Pa. Sept. 30, 1988), the CERCLA § 107(b)(3) third-party defense was ruled unavailable to two parties that had commissioned environmental investigations which reached faulty conclusions. The purchaser, BCW, hired two engineering firms, and a subsequent lessee, Knoll International, Inc., retained a technical service to perform environmental reconnaissance on a warehouse. Id. at 944. All three environmental reviews failed to detect the presence of lead in dust that had accumulated at the warehouse. Id. Both BCW and Knoll asserted a third-party defense against the liability for cost of the lead cleanup, but the court ruled that neither had exercised "due care" as required by § 107(b)(3). Id.

abandon its interest in the property and forego acquiring ownership through foreclosure. In such a situation, the cost of cleanup will obviously not be borne by a borrower that was unable to meet even the monthly mortgage payment to the lending institution. As a result, EPA or state government will be forced to foot the bill for cleanup and the ultimate responsibility will fall on the taxpayer. It will be, in essence, “Love Canal revisited” and no greater result will attach under CERCLA than was achieved under RCRA. In conclusion, therefore, expanding CERCLA liability to lenders is not the deep-pocket windfall it seemed to be at first blush: while it has no doubt expanded the scope of parties liable under CERCLA, it may have guaranteed that the country will face many more situations that CERCLA was specifically drafted to avoid.