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The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment

Steven B. Bass

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COMMENT

The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment

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I. INTRODUCTION

In enacting the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)¹ in 1980, Congress laid the foundation for a major federal program designed to take on one of America's most pervasive and dangerous environmental problems: the cleanup of inactive and abandoned hazardous waste sites.² In demonstrating its resolve to confront this environmental threat, Congress established a \$1.6 billion "Superfund" to subsidize the cleanup of the nation's most dangerous inactive and abandoned hazardous

1. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9657 (1982)) [hereinafter CERCLA]. CERCLA is commonly referred to as "Superfund" or the "Superfund Act."

2. See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 576 (D. Md. 1986).

waste sites.³ Although in 1980 the allocation of \$1.6 billion over a five year period seemed an impressive expression of Congress's resolve, the enormity of the hazardous waste problem⁴ quickly demonstrated that the Superfund evoked a confidence that was soon to wither.⁵

In 1984, the United States Environmental Protection Agency (EPA) estimated that up to \$16 billion in federal funds were needed to effectively deal with the national hazardous waste disposal problem.⁶ The Congressional Office of Technology Assessment, however, estimated the total cost at over \$100 billion.⁷ To bridge the financial gap between the amount of funds appropriated under CERCLA and the

3. Congress initially authorized \$220 million of general revenues and \$1.38 billion of excise taxes on petroleum products and certain inorganic chemicals to fund the program. 42 U.S.C. § 9631(b) (1982). These appropriations financed the original Hazardous Substance Response Trust Fund ("Superfund"), which Congress created to subsidize the cleanup costs of hazardous waste sites when responsible polluters are unknown, unable, or unwilling to compensate the government for expenses incurred to clean up such sites. If the party responsible for releasing hazardous waste can be identified, then the Environmental Protection Agency (EPA) may bring an action for damages to recover government funds expended for cleanup response costs. 42 U.S.C. §§ 9604(a), 9606 (1982). CERCLA also authorizes a private right of action against parties within the purview of section 107(a). *See, e.g.,* Walls v. Waste Resource Corp., 22 Env't Rep. Cas. (BNA) 1785 (6th Cir. 1985); Artesian Water Co. v. Government Castle County, 605 F. Supp. 1348 (D. Del. 1985); Pinole Properties v. Bethlehem Steel Corp., 596 F. Supp. 283 (N.D. Cal. 1984).

4. The EPA estimates that 77.1 billion pounds of hazardous waste are produced each year, 90% of which is disposed of in an environmentally unsound manner. H. REP. NO. 1096, 96th Cong., 2d Sess. 1, 22 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6124. As of June 1986, the EPA had inventoried over 24,000 uncontrolled hazardous waste sites, many of which require emergency action because they pose an immediate threat to the environment and the public health. OFFICE OF EMERGENCY AND REMEDIAL RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. HW-7.3, NATIONAL PRIORITIES LIST FACT BOOK 1 (1986). The cost of an average cleanup is approximately \$12 million. Address by Thomas M. McMahon, American Bar Association Annual Meeting (Aug. 11, 1986), *quoted in* 17 Env't Rep. (BNA) 563 (1986).

5. Moskowitz & Hoyt, *Enforcement of CERCLA Against Innocent Owners of Property*, 19 LOY. L.A.L. REV. 1171 (1986). Reporting on the Superfund Revenue Act of 1985, the Senate Committee on Finance commented:

It is now clear that the current Superfund program [CERCLA] will not be adequate to achieve the goals of the 1980 Act. The Environmental Protection Agency (EPA) estimates that only 15 of the 538 sites now on the National Priority List will be cleaned by September 30, 1985, and that the unobligated balance of the Superfund will be less than \$10 million on that date.

S. REP. NO. 73, 99th Cong., 1st Sess. 12 (1985).

6. *See \$8.4 Billion to \$16 Billion Needed to Clean Superfund Sites, EPA Paper Says*, [14 Current Developments] Env't Rep. (BNA) 1715, 1725 (1984). Congress's General Accounting Office challenged the reliability of the EPA's 1984 projection of cleanup costs because the agency's projection did not include groundwater cleanup costs, which can run as high as \$10.5 million per site, and because the EPA has little experience in cleaning up sites. *Superfund Projections May Not Be Reliable, Exclude Groundwater Cleanup Costs GAO Says*, [14 Current Developments] Env't Rep. (BNA) 1943 (1984).

7. CONGRESSIONAL OFFICE OF TECHNOLOGY ASSESSMENT, *SUPERFUND STRATEGY* (1985), *reprinted in* 9 CHEMICAL & RADIATION WASTE LITIGATION REP. 752 (1985).

amount actually needed to clean up hazardous waste sites, the EPA and the Department of Justice (DOJ) have advocated expansive theories of CERCLA liability.⁸

Perhaps sympathetic to the magnitude of the hazardous waste crisis, courts have adopted expansive theories of liability advanced by the EPA and the DOJ and have interpreted the vague liability provisions of CERCLA broadly. Courts have held the scope of liability imposed by CERCLA to include landowners not responsible for the production or release of any hazardous waste.⁹ One class of landowners placed in a particularly vulnerable position by CERCLA is the banking industry. A federal district court has interpreted CERCLA to hold a commercial lender, who becomes a landowner via foreclosure, strictly liable for cleanup costs incurred in the removal of hazardous substances from the land in its possession, even when the lender played no part in producing, dumping, or releasing any such substances on the land.¹⁰ Furthermore, the 1986 Superfund Amendments and Reauthorization Act (SARA), enacted on October 17, 1986,¹¹ narrows the scope of affirmative defenses available to shield innocent landowners from liability,¹² thereby increasing the likelihood that courts will hold commercial lenders liable for hazardous waste cleanup costs.

Because cleaning up hazardous waste sites can cost millions of

8. For example, although CERCLA does not contain any provisions that specifically impose strict liability for hazardous waste releases, the DOJ has successfully argued that landowners are strictly liable for the response costs the government incurs to remove hazardous waste from their land. For a discussion of cases interpreting CERCLA liability broadly, see *infra* notes 37, 39 & 57 and accompanying text. See, e.g., *J.V. Peters & Co. v. EPA*, 767 F.2d 263 (6th Cir. 1985); *United States v. South Carolina Recycling & Disposal, Inc.*, No. 80-1274-6 (C.D.S.C. Aug. 14, 1986) (WESTLAW, Allfeds database, Dist file); *United States v. Northeast Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 843-44 (W.D. Mo. 1984), *aff'd*, 55 U.S.L.W. 2376 (8th Cir. Dec. 31, 1986); *United States v. Price*, 577 F. Supp. 1103, 1113 (D.N.J. 1983). In addition, the Eighth Circuit, construing the scope of CERCLA liability broadly, recently held that CERCLA retroactively applies to acts of hazardous waste contamination occurring before its enactment and authorizes recovery of pre-enactment cleanup costs. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 55 U.S.L.W. 2376 (8th Cir. Dec. 31, 1986).

9. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (owner of land contaminated by hazardous waste released by prior owner strictly liable for government expended response costs); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986) (bank, which formerly held mortgage on land it later purchased at a foreclosure sale, required to reimburse United States for cost of cleaning up hazardous waste even though waste released by prior owner).

10. See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986).

11. Superfund Amendments & Reauthorization Act of 1986, Pub. L. No. 99-499, § 101(35), 100 Stat. 1613, 1616-17 (1986) (codified at 42 U.S.C.A. § 9601 (West Supp. 1987)).

12. See Hayes & Mackerron, *Superfund II: A New Mandate*, Env't Rep., Feb. 13, 1987, at 29 (BNA Special Rep.).

dollars,¹³ both state and federal agencies have an incentive to seek cleanup cost reimbursement from "deep-pocketed" parties. This strategy has made banks and other secured lenders targets of state and federal agencies seeking reimbursement for environmental cleanup costs. The purpose of this Comment is to survey the 1986 amendments affecting the liability of commercial lenders under CERCLA and to evaluate the availability and effectiveness of possible affirmative defenses to such liability. Such an evaluation is undertaken by synthesizing CERCLA, case law interpreting the scope of liability under CERCLA, and the 1986 amendments altering CERCLA. Additionally, this Comment will analyze, in light of CERCLA's underlying policy goals, the soundness of imposing liability for cleanup costs on commercial lenders who have taken no part in the production or release of any hazardous substances.

II. CERCLA: A STATUTORY OVERVIEW

Responding to a growing public concern over inactive and abandoned hazardous waste sites, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act in 1980.¹⁴ CERCLA provided a five-year, \$1.6 billion Superfund program to subsidize the cleanup of hazardous waste sites that pose an immediate danger to the public health or the environment.¹⁵ Essentially, the goals of CERCLA are: (1) to facilitate cleanups when hazardous substances are released¹⁶ into the environment¹⁷ or when a release is

13. The amount of the EPA's costs to clean up hazardous waste sites depends upon what actions the agency elects to take at a particular site. The cost of a "remedial" action, a short-term or emergency response, is usually limited to \$1 million. "Removal" actions usually are long-term operations involving permanent remedies. The agency places sites that require remedial action on the National Priority List. Generally, after a site has been recommended for inclusion on the National Priority List, the EPA conducts a search for responsible parties and a remedial investigation/feasibility study (RI/FS) to determine whether remedial actions should be undertaken. On average, such RI/FS studies cost \$875,000 per site. If, after conducting an RI/FS study, the EPA concludes that remedial action is warranted, it conducts another study to design a remedial action plan. Costs for "remedial design" studies average \$850,000 per site. The design is followed by remedial action averaging \$8,600,000 per site. Finally, upon completion of remedial action, "operation and maintenance" activities continue at an average cost of \$3,770,000 per site (the present value of operation and maintenance costs for 30 years). Proposed Amendments to the National Oil and Hazardous Substance Contingency Plan; the National Priorities List, 52 Fed. Reg. 2492 (proposed Jan. 22, 1987).

14. S. REP. NO. 73, 99th Cong., 1st Sess. 12 (1985).

15. *Id.*

16. 42 U.S.C. § 9601(22) (1982) (" '[R]elease' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . .").

17. Section 9601(8) provides:

"[E]nvironment" means (A) the navigable waters, the waters of the contiguous

threatened; and (2) to hold responsible parties liable for the costs of these cleanups.¹⁸ The Act provides the federal government with two basic means of achieving these goals. Either the EPA can use Superfund funds to finance the cleanup of hazardous waste facilities¹⁹ and subsequently bring civil actions against responsible parties to recover the costs of such cleanups;²⁰ or, the EPA can require a responsible person²¹ to remove released hazardous substances from a facility.

Section 107(a)²² of CERCLA creates a broad net of liability that

zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

42 U.S.C. § 9601(8) (1982) (brackets in original).

18. H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 3, at 15 (1985), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038.

19. Section 9601(9) provides:

“[F]acility” means (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

42 U.S.C. § 9601(9) (1982).

20. 42 U.S.C. § 9607(a) (1982) [hereinafter section 107(a)].

21. 42 U.S.C. § 9601(21) (1982) (“ ‘[P]erson’ means 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.”).

22. Section 107(a) states:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—(1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and (C) damages for injury to, destruction of, or loss of natural resources, including

enables the government to recover hazardous substance response²³ costs from "responsible parties."²⁴ Under this section, parties can be held responsible for the release of hazardous substances irrespective of fault.²⁵ Section 107(a) extends liability to four categories of persons: (1) current owners or operators of hazardous substance facilities; (2) past owners or operators of hazardous substance facilities at the time of disposal; (3) persons who arrange for treatment or disposal of hazardous substances at the facility; and (4) persons who transport hazardous substances to a site from which there is a release or threatened release of a hazardous substance.

Congress intended the scope of liability under section 107(a) of CERCLA to be far-reaching.²⁶ In its zeal to respond to a national hazardous waste problem threatening both public health and the environment, Congress drafted section 107(a) as a "broad response and liability mechanism"²⁷ to facilitate the expeditious cleanup of toxic pollution and to impose liability on those parties responsible for producing such pollution. Section 107(a)'s expansive web of liability, however, catches not only parties responsible for releasing hazardous substances, but also innocent parties who acquire land subsequent to a hazardous substance release.²⁸

To ameliorate the expansive breadth of liability under section 107(a) and to protect these innocent parties, Congress provided three affirmative defenses in section 107(b) of the Act. Sections 107(b)(1) and (2) exempt from liability those otherwise liable under section 107(a) who can establish that the release or threat of release of a hazardous substance was caused solely by (1) an act of God or (2) an act of war. Because acts of God and acts of war are rarely the sole cause of an actual or threatened hazardous waste release, the most practica-

the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 107(a), 42 U.S.C. § 9607(a) (1982).

23. 42 U.S.C. § 9601(25) (1982) (" '[R]espond' or 'response' means remove, removal, remedy, and remedial action. ").

24. Responsible parties are those parties liable for response costs under section 107(a). See *supra* note 22 and accompanying text.

25. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

26. Liability for response costs under CERCLA is "strict joint and several." Liability may be imposed irrespective of fault, and any responsible party can be held liable for the entire cost of the cleanup "even if that party's contribution to the waste site was minimal." H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 3, at 15 (1985), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3038.

27. See EPA, PROJECT SUMMARY, COST OF REMEDIAL RESPONSE ACTION AT UNCONTROLLED HAZARDOUS WASTE SITES, H.R. DOC. NO. 93, 93d Cong., 1st Sess. 71 (1983).

28. See *supra* note 9 and accompanying text.

ble of the section 107(b) defenses is the "third party," or "innocent landowner," defense of section 107(b)(3). This defense allows defendants to escape liability if they can establish that the release or threatened release at issue was caused solely by a third party who neither is an agent or employee of the defendant, nor is engaged in a contractual relationship with the defendant.²⁹ Thus, section 107(b)(3) carves out an exception from section 107(a) liability when defendants can establish a complete lack of a causal nexus between their actions, or inactions, and the actual or threatened hazardous waste release at issue.³⁰

The juxtaposition of sections 107(a) and 107(b) manifests the conflicting policy concerns inherent in CERCLA: the need for effective and expeditious cleanup of hazardous waste sites to protect public health and the environment, and the need to protect the interests and legal rights of those innocent parties who may be held liable for such cleanups.³¹ At the heart of these competing policy concerns are complex legal issues which have spawned litigation concerning the magnitude of section 107(b)(3)'s narrowing effect on the scope of CERCLA

29. Section 107(b)(3) provides:

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—

(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, 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.

Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1982).

30. If lenders, however, become entangled with the operational affairs of a facility, in protecting their security interest, they may be found strictly liable under CERCLA as either an "owner or operator" of the facility. See § 107(a)(1).

31. See H. REP. NO. 253, 99th Cong., 1st Sess., pt. 3, at 15 (1985), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3038. The need to administer effective and expeditious cleanups of hazardous waste is so compelling that Congress, through its legislative function, and the judiciary, through its interpretive function, have concomitantly imposed strict liability on landowners whose property contains an actual or threatened hazardous waste release. Although this scheme of liability requires nonpolluters to clean up or reimburse the government for cleaning up the hazardous waste releases of others, the magnitude of the hazardous waste crisis is deemed severe enough to justify the imposition of strict liability on a potentially innocent class of nonpolluters. Such a result-oriented scheme is inconsistent with precepts of fundamental fairness and threatens to encroach upon the interests and legal rights of those innocent parties who may be found liable under CERCLA.

liability under section 107(a)(1).³² The availability of the section 107(b)(3) innocent landowner defense largely determines³³ whether such landowners can escape the broad reach of liability under section 107(a)(1).³⁴

III. JUDICIAL INTERPRETATIONS OF SECTION 107(a)

CERCLA is a particularly difficult statute for the judiciary to interpret because ambiguities and material omissions often obfuscate the intended meaning of its provisions,³⁵ and because few committee reports are available to clarify legislative intent.³⁶ In *United States v. Northeastern Pharmaceutical & Chemical Co.*,³⁷ the United States District Court for the Western District of Missouri identified the ramifications of CERCLA's lack of clarity:

CERCLA, although nicknamed "the Superfund," is not the ultimate tool in dealing with the problems associated with inactive or abandoned hazardous waste sites as initially intended by its sponsors. CERCLA is in fact a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions. . . . [N]umerous important features were deleted during the closing hours of the Congressional session. The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation.³⁸

Two key provisions in CERCLA marred by vague terminology are the liability provision in section 107(a)(1) and the innocent landowner

32. *Id.*

33. In addition to section 107(b)(3)'s affirmative defense, a landowner can seek to escape section 107(a)(1) liability by way of section 101(20)(A), which narrows the definition of "owner or operator" to exclude persons who, without participating in the management of a facility, hold indicia of ownership primarily to protect their security interest. Section 101(20)(A) provides:

"[O]wner 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 abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601(20)(A) (1982).

34. *See supra* note 22.

35. *See infra* notes 85-86 and accompanying text.

36. For a discussion of the legislative history of CERCLA, see generally H. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 1 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119.

37. 579 F. Supp. 823 (W.D. Mo. 1984).

38. *Id.* at 838, 839 n.15 (citations omitted).

affirmative defense in section 107(b)(3). In several principal cases decided prior to the 1986 amendments to CERCLA, the judiciary struggled to interpret these provisions.

A. *New York v. Shore Realty Corp.*

In *New York v. Shore Realty Corp.*,³⁹ the Court of Appeals for the Second Circuit found an owner of contaminated property, on which a prior owner had released hazardous waste, liable for government expended response costs.⁴⁰ In *Shore Realty*, the state of New York brought suit against Shore Realty Corp. (Shore) and Donald LeoGrande, a Shore officer and stockholder, seeking reimbursement for government costs incurred in cleaning up a hazardous substance disposal site in Glenwood Landing, New York. Shore acquired the land for development purposes even though one of its officers, LeoGrande, knew that hazardous waste was stored on the property. Although neither Shore nor LeoGrande were responsible for any of the nearly 700,000 gallons of hazardous waste located on the property, New York brought suit under CERCLA seeking injunctive relief and damages.⁴¹ The trial court granted New York's motion for partial summary judgment, found the defendants liable for New York's response costs, and required them to clean up the hazardous waste on the property.⁴² The Second Circuit affirmed the decision.⁴³

At trial, the defendants argued that they were not within the purview of section 107(a) because they neither owned the Glenwood Landing site at the time of disposal nor caused the release of the hazardous waste at the facility.⁴⁴ Shore argued that the court should limit the applicability of sections 107(a)(1) and (a)(2) to persons owning or operating a facility "at the time of disposal."⁴⁵ Shore further argued that both subsections require a showing of a causal connection between the actions of the defendant and the hazardous waste release at issue. The Second Circuit disagreed, finding that section 107(a)(1) "unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation."⁴⁶

39. 759 F.2d 1032 (2d Cir. 1985).

40. *Id.* at 1043-44.

41. *Id.* at 1037.

42. *Id.*

43. *Id.*

44. *Id.* at 1043.

45. *Id.* at 1044. This argument calls for the court to adopt the notion that culpability for releasing hazardous waste should not attach to the title of the property and transfer every time ownership changes hands.

46. *Id.*

Shore also tried to escape section 107(a)(1) liability by asserting the section 107(b)(3) innocent landowner defense, claiming that it was not involved in transporting any hazardous substances to the site and that it exercised due care after taking control of the site.⁴⁷ The court again disagreed, finding that the defendants could not avail themselves of the section 107(b)(3) affirmative defense because: (1) at the time of Shore's acquisition of the property, LeoGrande knew that hazardous waste was stored on the site;⁴⁸ (2) Shore knew of the previous owner's activities on the land and could have readily ascertained that the previous owners would continue to dump waste at the site;⁴⁹ and (3) Shore appeared to have a contractual relationship with the previous owners of the site that effectually precluded it from raising the innocent landowner defense.⁵⁰

The notion of strict liability implicit in section 107(a)(1) makes an owner or operator of a facility liable for hazardous waste response costs even in the absence of a showing of causation. Section 107(b)(3), however, carves out an exception to the strict liability imposed in section 107(a)(1), which is, ironically, based on causation. Because strict liability requires no showing of fault or causation, the innocent landowner exception to the liability imposed under section 107(a)(1) perhaps evinces Congress's intention to exempt from liability consummately innocent landowners who neither have contractual ties to responsible parties,⁵¹ nor have any actual or constructive knowledge of the presence of hazardous waste on a facility at the time of its acquisition.⁵²

The *Shore* court's imposition of strict liability on owners or operators of land containing an actual or threatened hazardous waste release creates, in effect, a presumption of liability on parties within the purview of section 107(a)(1). To rebut this presumption and escape liability, innocent landowners must either prove that they fall

47. *Id.* at 1048.

48. *Id.* at 1037.

49. The court reasoned that because Shore could have readily foreseen that the tenants on the property would continue to dump hazardous waste at the site, the releases at the site were not caused solely by the activities of the tenants. *Id.* at 1049.

50. *Id.*

51. Before defendants can escape liability via section 107(b)(3), they must show by a preponderance of the evidence that the release at issue was caused solely by a third party. Consequently, before one defendant can be exonerated from liability via section 107(b)(3), another party must first be implicated. Thus, under the statutory construction of the innocent landowner defense, some party will remain liable for the cost of cleaning up the hazardous waste release at issue.

52. If a landowner has actual or constructive notice of the presence of hazardous waste on a facility when he acquires the facility, the landowner is precluded from raising the section 107(b)(3) innocent landowner defense. *See infra* notes 90, 93 and accompanying text.

outside the parameters of section 107(a)(1),⁵³ or prove that they are shielded from section 107(a)(1) liability by section 107(b)(3)'s innocent landowner affirmative defense.⁵⁴

B. *United States v. Mirabile*

Section 101(20)(A)⁵⁵ of CERCLA restricts the purview of section 107(a)(1)⁵⁶ by defining the term "owner or operator of a facility" narrowly. Under section 101(20)(A), a holder of a mere security interest in property may be exempt from liability for hazardous waste releases. In *United States v. Mirabile*,⁵⁷ a federal district court construed section 101(20)(A) as exempting certain secured lenders from liability for hazardous waste response costs when such lenders hold merely a security interest in the property where a release has occurred or threatens to occur. The court interpreted the exemption language in section 101(20)(A) as suggesting that as long as a secured creditor does not become "overly entangled" in the affairs of the owner of the facility, the creditor cannot be held liable for cleanup costs.⁵⁸ Thus, when the government brings an action against a secured creditor to recover funds expended to clean up a hazardous waste release, the issue becomes how far a secured lender can go to protect its financial interest before courts will find that it acted within the meaning of "owner or operator of a facility" under section 101(20)(A).

In *Mirabile*, the United States brought a civil action to recover costs incurred in removing alleged hazardous substances from land owned by defendants Anna and Thomas Mirabile.⁵⁹ The Mirabile's land had been contaminated by a previous owner, Turco Coatings, Inc. (Turco), who was operating a paint manufacturing business on the site. The Mirabiles joined American Bank and Trust Co. (ABT) as a third party defendant, claiming ABT had become liable for the creation of the hazardous condition at the Turco site by virtue of its financial dealings with Turco. Turco had taken out a loan with ABT to purchase the land on which it erected its paint manufacturing facil-

53. See *supra* note 33 and accompanying text.

54. Although the existence of the section 107(b)(3) innocent landowner affirmative defense makes the presumption of liability under section 107(a)(1) a rebuttable one, the burden of meeting the conditions of section 107(b)(3) is so severe that the loophole created by the defense to protect innocent landowners is indeed a narrow one.

55. See *supra* note 33.

56. See *supra* note 22.

57. *United States v. Mirabile*, 15 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,992, 20,994 (E.D. Pa. 1985).

58. *Id.* at 20,995.

59. *Id.* at 20,994.

ity. When Turco defaulted on its loan, ABT purchased the site at a foreclosure sale and, shortly thereafter, sold the site to the Mirabiles.

After being joined as a third party defendant, ABT filed a motion for summary judgment asserting two grounds. First, ABT contended that when it purchased the site at the foreclosure sale it received only equitable, not legal, title to the property because it expeditiously assigned its bid for the property to the Mirabiles, who then actually purchased the land.⁶⁰ Consequently, ABT asserted that since it never acquired legal ownership of the Turco site, it was not a liable “owner” within the purview of section 107(a)(1). Second, ABT argued that any activity it undertook at the site while holding equitable title was merely to protect its security interest, and that it never participated in the management of the property. Accordingly, ABT asserted it was also not liable as an “operator” within the scope of section 107(a)(1).⁶¹

The court found it unnecessary to address ABT’s first argument concerning equitable versus legal title, because it granted ABT’s motion for summary judgment based solely on the second argument.⁶² The court found that regardless of the nature of title ABT received, its actions after foreclosure were undertaken merely to protect its security interest in the property and did not constitute an attempt to participate in the management of the site.⁶³ Construing the scope of section 107(a)(1) narrowly, the court stated:

[I]n enacting CERCLA Congress manifested its intent to impose liability upon those who were responsible for and profited from improper disposal practices. Thus, it would appear that before a secured creditor such as ABT may be held liable, it must, at a minimum, participate in the day-to-day operational aspects of the site. In the instant case, ABT merely foreclosed on the property after all

60. *Id.* at 20,996.

61. *Id.*

62. *Id.*

63. *Id.* Although the court never directly addressed the question of whether ABT was an actual owner under section 107(a)(1), it can be inferred that the court did not view ABT as an owner despite the fact that ABT foreclosed on the Turco site, because the court restricted its analysis to the question of whether ABT was an “operator” under section 101(20)(A). By disregarding ABT’s first argument concerning equitable versus legal title and essentially ignoring the term “owner” in section 107(a)(1), the *Mirabile* court focused exclusively on whether ABT was an “operator” within the parameters of section 101(20)(A), which would make ABT strictly liable under section 107(a)(1). The court determined that ABT had not acted as an “operator” of the Turco site and was therefore not liable under section 107(a)(1). *Id.* It is important to note that if the *Mirabile* court found that ABT was an “owner” of the Turco site, the court’s “operator” analysis would have been unnecessary as ABT would have been liable under section 107(a)(1) as an “owner” of a facility where hazardous waste had been released. Unfortunately, the court in *Mirabile* gave no hint of its rationale for ignoring ABT’s legal versus equitable title argument.

operations had ceased and thereafter took prudent and routine steps to secure the property against further depreciation.⁶⁴

In essence, the *Mirabile* court found that section 101(20)(A)'s definition of "owner or operator" narrows the scope of section 107(a)(1) so as to exclude from liability 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."⁶⁵

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

In *Shore Realty*, the court broadly interpreted section 107(a)(1) as imposing strict liability on current owners and operators of facilities from which hazardous substances have been or threaten to be released.⁶⁶ But in *Mirabile*,⁶⁷ the court interpreted section 101(20)(A),⁶⁸ which defines "owner or operator" narrowly, so as to limit the liability under section 107(a)(1). In 1986, however, in *United States v. Maryland Bank & Trust Co.*,⁶⁹ a federal district court interpreted section 101(20)(A) as limiting the scope of liability under section 107(a) only when a defendant, at the time of a cleanup, holds merely a security interest in the facility. If the defendant is an *actual* owner or operator of the facility at the time of a hazardous waste cleanup, section 101(20)(A) has no narrowing effect on section 107(a)(1).⁷⁰

In *Maryland Bank & Trust*, the United States brought a civil action against the Maryland Bank and Trust Co. (MBT) to recover funds expended by the EPA for the removal of hazardous substances from a 117 acre farm owned by MBT since 1982.⁷¹ The previous owners of the farm, Herschel and Nellie McLeod, had operated a trash and garbage business on the land and, in 1973, permitted the dumping of hazardous waste thereon.⁷² In 1980, the McLeods' son, Mark, applied for and received a loan from MBT to purchase the farm from his parents. After Mark failed to make payments on the loan, MBT instituted a foreclosure action and subsequently purchased the land at a foreclosure sale in 1982.⁷³

64. *Id.*

65. *Id.*

66. See *supra* note 46 and accompanying text.

67. *United States v. Mirabile*, 15 *Env'tl. L. Rep.* (*Env'tl. L. Inst.*) 20,992 (E.D. Pa. 1985).

68. See *supra* note 33.

69. 632 F. Supp. 573 (D. Md. 1986).

70. *Id.* at 579.

71. *Id.* at 575-76.

72. *Id.* at 575.

73. *Id.*

In 1983, the EPA undertook a hazardous waste removal action under CERCLA to facilitate the cleanup of the site.⁷⁴ The EPA notified the president of MBT that the agency would use EPA funds to conduct its own cleanup if MBT did not take corrective action on the site before October 24, 1983. After MBT declined to institute its own cleanup, the EPA removed 237 drums of chemical material and 1,180 tons of contaminated soil from the land at a cost of over \$500,000. The EPA then requested compensation from MBT for these cleanup costs. Upon MBT's failure to comply, the United States initiated a civil action against MBT.⁷⁵ Both parties moved for summary judgment.

MBT raised two principal defenses to the government's action. First, MBT asserted it was not an owner or operator within the scope of sections 107(a)(1) and 101(20)(A)⁷⁶ because, as the former mortgagee of the property, it purchased the property at a foreclosure sale solely to protect its security interest in the land. This argument is similar to the one ABT raised successfully in *Mirabile*.⁷⁷ Contrary to the court's ruling in *Mirabile*, however, the court in *Maryland Bank & Trust* found MBT, as a current legal owner of the facility at the time EPA brought suit, liable under section 107(a)(1) for government incurred response costs.⁷⁸

The difference between the two cases is that in *Mirabile*, ABT owned the land at issue for only four months, whereas MBT held title to the property, after purchasing it at the foreclosure sale, for nearly four years.⁷⁹ The court in *Maryland Bank & Trust* therefore held that "current ownership of a facility alone brings a party within the ambit of subsection (1) [of section 107(a)]."⁸⁰ MBT, as the owner of the facility since 1982, fell within the purview of section 107(a)(1) and

74. *Id.*

75. *Id.* at 573.

76. *Id.* at 576-80.

77. See *supra* notes 55-65 and accompanying text.

78. See *Maryland Bank & Trust*, 632 F. Supp. at 579 n.5. It is unclear in *Mirabile* whether ABT ever actually held legal title to the Turco site. If it did not, then *Mirabile* is easily distinguished from *Maryland Bank & Trust* because the former is a section 107(a)(1) "operator" case, while the latter is a section 107(a)(1) "owner" case. If in *Mirabile*, however, ABT did actually hold legal title to the Turco site, even if for only four months, then distinguishing the two cases becomes much more dubious. The only distinction then may be the amount of time the defendant lender in each case actually owned the facility at issue.

79. See *id.* at 582.

80. Finding that MBT did not fall within the purview of the exemption language of section 101(20)(A), the court stated:

The exemption of subsection [101] (20)(A) covers only those persons who, at the time of the clean-up, hold indicia of ownership to protect a then-held security interest in the land. The security interest must exist at the time of the clean-up.

was therefore strictly liable for the response costs the government incurred to clean up the facility. For this reason, the court granted the government's motion for summary judgment regarding liability under section 107(a)(1).⁸¹

MBT raised the innocent landowner affirmative defense of section 107(b)(3) as a second attack against the government's claim. The government responded with a two-pronged attack on the merits of that defense. First, it argued that MBT's contractual relationship with Herschel McLeod precluded it from availing itself of the innocent landowner defense.⁸² Second, the government argued that even assuming arguendo that MBT passed the contractual relationship hurdle, it could not prove that it exercised reasonable care concerning the hazardous waste on the site; nor could MBT prove it took precautions against the foreseeable acts or omissions of third parties. The court, concluding that genuine issues of material fact existed regarding the section 107(b)(3) issue, denied the government's motion challenging the adequacy of the innocent landowner defense.⁸³

Maryland Bank & Trust is important for two reasons. First, it establishes that a secured lender who forecloses on property subject to an actual or threatened release of hazardous waste may be strictly liable for response costs expended by the EPA. Second, the decision serves as a warning to secured lenders that if they do not carefully investigate and monitor their landed security interests, they may find themselves repeatedly paying for the pollution sins of others.⁸⁴

The courts in *Mirabile*, *Shore Realty*, and *Maryland Bank &*

The mortgage held by MB & T (the security interest) terminated at the foreclosure sale of May 15, 1982, at which time it ripened into full title.

MB & T purchased the property at the foreclosure sale not to protect its security interest, but to protect its investment. Only during the life of the mortgage did MB & T hold indicia of ownership primarily to protect its security interest in the land. Under the law of Maryland (and twelve other states), the mortgagee-financial institution actually holds title to the property while the mortgage is in force. Congress intended by this exception [section 101(20)(A)] to exclude these common law title mortgagees from the definition of "owner" since title was in their hands only by operation of the common law. The 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.

Id. at 579 (citations omitted).

81. *Id.*

82. *Id.* at 581.

83. *Id.* at 582.

84. See Brandt, *Contaminated Collateral: A New Subspecialty*, Am. Law., Oct. 1986, at 10, col. 1.

Trust have been in the "undesirable and onerous position"⁸⁵ of interpreting CERCLA's morass of vague statutory language. The *Mirabile* court interpreted the definition of "owner or operator" in section 101(20)(A) narrowly, limiting the scope of section 107(a)(1) liability to exclude defendants merely holding a security interest in a facility at the time hazardous substances are disposed. The court in *Shore Realty*, however, construed the definition of "owner or operator" broadly and held the current owner of a contaminated facility liable under section 107(a)(1), irrespective of whether the defendant actually owned the facility at the time of disposal. In *Maryland Bank & Trust*, the court held that a bank owning a facility containing an actual or threatened hazardous waste release is liable under section 107(a)(1), regardless of whether it contributed to such release.

Mirabile, *Shore Realty*, and *Maryland Bank & Trust* all represent judicial attempts to define the breadth of CERCLA liability. Yet, despite these judicial attempts to clarify some of CERCLA's statutory language, the availability and effectiveness of the section 107(b)(3) innocent landowner defense, as well as the definition of "owner or operator" under section 101(20)(A), remain unclear. How should "contractual relationship" be defined under section 107(b)(3)? Does a deed or land contract with another party constitute a "contractual relationship"? How should "due diligence" or "having reason to know" be defined? Congress attempted to address these questions, among others, when it drafted the Superfund Amendments and Reauthorization Act of 1986.⁸⁶

IV. THE 1986 SUPERFUND REAUTHORIZATION ACT: AN ATTEMPT AT LEGISLATIVE CLARITY

Authorization for the Superfund expired on September 30, 1985. Although the primary motive for passing the Superfund Amendments and Reauthorization Act of 1986 (SARA) was to replenish the coffers of the Superfund, Congress also revised, expanded, and clarified many of CERCLA's provisions,⁸⁷ including the innocent landowner affirmative defense in section 107(b)(3). Although the liability provisions in section 107(a) were essentially unchanged by the 1986 amendments,⁸⁸

85. See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 838, 839 n.15 (W.D. Mo. 1984), *aff'd*, 55 U.S.L.W. 2366 (8th Cir. Dec. 31, 1986).

86. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 101(35), 100 Stat. 1613, 1616-17 (1986) (codified at 42 U.S.C.A. § 9601 (West Supp. 1987)).

87. For a legislative summary of SARA and its impact on CERCLA, see generally Hayes & Mackerron, *supra* note 12.

88. One material change the 1986 amendments made to section 107 is the addition of the federal lien provision in new section 107(l). This provision provides that all costs and damages

Congress added newly defined terms to section 101 of CERCLA to clarify the vague statutory language in 107(a)(1).⁸⁹ Consequently, the 1986 amendments affect both the scope of liability under CERCLA and the availability of the innocent landowner affirmative defense.

Section 101(35)(A)⁹⁰ of the 1986 Act defines the meaning of the term "contractual relationship" for the purpose of the section 107(b)(3) defense. Under section 101(35)(A),⁹¹ a contractual relationship includes, *inter alia*, land contracts, deeds, or other instruments transferring title or possession. Section 107(b)(3)⁹² states that a defendant in a "contractual relationship" with a third party responsi-

for which a person is liable to the United States under section 107(a) shall constitute a lien in favor of the United States upon all real property and rights to such property that belong to such person and "are subject to or affected by a removal or remedial action." H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 19 (1986). The purpose of this provision is to ensure that landowners whose land was cleaned up with Superfund dollars are not able to reap windfall profits from selling their decontaminated property. See H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 3, at 17 (1985), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3040. In addition, an increasing number of states have adopted, as part of their state hazardous waste regulatory schemes, provisions granting state officials the authority to conduct cleanups of contaminated land and then levy a "superlien" against the responsible party. Such a lien is levied on real or personal property and takes priority over all other liens or interests in the property. See Note, *Federal & State Remedies To Clean Up Hazardous Waste Sites*, 20 U. RICH. L. REV. 400 (1986). Thus, by preempting secured lenders' security interests in mortgaged property, state "superlien" provisions portend another impending escalation in lender liability due to expanding hazardous waste regulatory schemes. For a discussion of the interaction of Florida and federal statutes regulating the cleanup of hazardous waste, see Note, *Hazardous Waste and the Innocent Purchaser*, 38 U. FLA. L. REV. 253, 258-60 (1986).

89. See *infra* note 90.

90. Section 101(35)(A) of the 1986 Act provides:

The term 'contractual relationship' for the purpose of section 107(b)(3), includes, but is not limited to, land contracts, deeds or other instruments transferring title of 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 107(b)(3) (a) and (b).

Pub. L. No. 99-499, § 101(35)(A), 100 Stat. 1613, 1616 (1986) (codified at 42 U.S.C.A. § 9601 (West Supp. 1987)).

91. *Id.*

92. See *supra* note 29.

ble for an actual or threatened release of hazardous substances is precluded from raising the innocent landowner defense. Section 101(35)(A) of the 1986 Act, however, provides a statutory exception to the definition of "contractual relationship" if the defendant acquired the facility at issue *after* the disposal of hazardous substances occurred and if, at the time he acquired the facility, the defendant did not know and had no reason to know⁹³ of the disposal of any hazardous substances at the facility. In addition, in order to avail oneself to the innocent landowner affirmative defense, a defendant must satisfy the requirements of section 107(b)(3)(a) and (b) by establishing that, in light of all relevant facts and circumstances, he exercised due care with respect to the hazardous substance, and took precautions against foreseeable acts or omissions by third parties.⁹⁴

The practical effect of section 101(35)(A)'s definition of "contractual relationship" is to create a trapdoor through which truly innocent landowners can escape section 107(a)(1) liability by asserting a section 107(b)(3) defense. Where third parties acquire land after hazardous substances have been released, section 101(35)(A) limits the availability of the innocent landowner defense by establishing that all deeds and land sale contracts transferring either title or possession are, in effect, presumed "contractual relationships" unless the defend-

93. For the purpose of section 107(b)(3), section 101(35)(B) describes the duty of inquiry of potential land purchasers as follows:

(B) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of property consistent with good commercial or customary practice in an effort to minimize liability. For the purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on 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.

H.R. CONF. REP. NO. 262, 99th Cong., 2d Sess. 5 (1986). The Superfund Amendments and Reauthorization Act of 1986 Conference Report states that the purpose of section 101(35) is to eliminate liability under section 107(a)(1) for landowners who acquire real property after hazardous substances have been deposited thereon, and who, despite their exercise of due care regarding the discovery of such materials, remain ignorant of the presence of hazardous substances on the land. The Conference Report also makes it clear that "those engaged in commercial transactions should . . . be held to a higher standard [of inquiry] than those who are engaged in private residential transactions." H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 187 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3275, 3280.

94. *See generally* §§ 107(b)(3), 101(35)(A). Under section 107(b)(3), the only way a lender can avail himself of the innocent landowner affirmative defense is to have acquired land after it has been contaminated without any actual or constructive knowledge of hazardous substances present, and after fulfilling the stringent duty of inquiry established under sections 101(35)(A) & (B).

ant can establish by a preponderance of the evidence the necessary conditions to rebut the presumption.⁹⁵ Failure to rebut this presumption will preclude a defendant from asserting a section 107(b)(3) affirmative defense.⁹⁶ Furthermore, section 101(35)(C)⁹⁷ of the 1986 Act establishes that a defendant who, after acquiring ownership of a facility, obtains actual or constructive notice of a real or threatened release of hazardous substances on the facility, and subsequently transfers ownership to another person without disclosing such knowledge, shall be liable under section 107(a)(1)⁹⁸ and shall forfeit any right to raise a section 107(b)(3) defense.⁹⁹

The synergistic effect of sections 101(35)(A), (B), and (C) is to drastically restrict the availability of the innocent landowner defense in section 107(b)(3).¹⁰⁰ Whether such landowners contributed in any way to an actual or threatened release becomes irrelevant if they acquired their facility with either actual or constructive notice of such a release.¹⁰¹ In light of the stringent duty of inquiry¹⁰² imposed by section 101(35)(A) and (B) on those who acquire land, it will be near futile for an innocent landowner liable under section 107(a)(1) to attempt to escape liability via section 107(b)(3)'s innocent landowner defense.¹⁰³

95. Because all land transfer transactions presume contractual relationships, purchasers of land containing an actual or threatening hazardous waste release are precluded from using the section 107(b)(3) innocent landowner defense unless their acquisition of the property in issue was within the narrow exceptions to the contractual relationship presumptions enumerated in section 101(35)(A). Alternatively, landowners may try to escape liability under section 107(a)(1) by asserting that they held merely an indicia of ownership primarily to protect their security interest in the facility at issue. *See supra* notes 33, 90 and accompanying text.

96. *See supra* notes 29, 90 & 93.

97. Superfund Amendments and Reauthorization Act of 1980, Pub. L. No. 99-499, § 101(35)(C), 100 Stat. 1613, 1617 (1986) (codified at 42 U.S.C.A. § 9601 (West Supp. 1987)).

98. *Id.*

99. *Id.*

100. *See Hayes & MacKerron, supra* note 12.

101. *See supra* note 90.

102. *See supra* note 93.

103. To protect their security interests to the extent necessary to effectively avoid CERCLA liability under section 107(a), lenders will have to show by a preponderance of the evidence that after meeting a strict duty of inquiry requirement, they do not know, nor have any reason to know, of any actual or threatened hazardous substance release on land they either own or operate. To provide an expeditious, nonlitigious remedy to innocent landowners charged with liability under section 107(a), however, Congress included in the Superfund Amendments and Reauthorization Act of 1986 a new "de minimis settlements" provision in section 122(g). This provision provides that whenever practicable and in the public interest, the President shall as promptly as possible reach a settlement with a potentially liable party if such settlement involves only a minor portion of the response costs at the facility concerned. This settlement procedure is not available as a matter of right, but is only available at the discretion of the President who retains the authority to allocate total response costs among potentially responsible parties as he deems appropriate. The mutual incentive of parties to settle, rather

V. BANKER LIABILITY UNDER CERCLA EXACERBATED BY THE
SUPERFUND AMENDMENTS AND REAUTHORIZATION
ACT OF 1986

The amended Superfund Act places commercial lenders in a vulnerable position because when commercial lenders make loans to land purchasers, they usually retain a security interest in the land as collateral. This security interest allows the lender, in the event the borrower defaults, to recoup its loss by foreclosing on the mortgaged property and reselling it. Because foreclosures are a regular part of the commercial lending industry, lenders frequently find themselves, even if only temporarily, as landowners strictly liable for hazardous waste response costs under section 107(a)(1) of CERCLA.

In the sphere of banker liability imposed by section 107(a)(1), the definition of "contractual relationship" in section 101(35) of the 1986 Act changes both the analysis and the threshold test in the determination of the availability of section 107(b)(3) as an affirmative defense. Under section 101(35), the focus of the judicial inquiry shifts from an assessment of causation¹⁰⁴ to an assessment of actual and constructive notice.¹⁰⁵ Because section 101(35)(B) places a strict duty upon secured lenders to make all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial practice,¹⁰⁶ it becomes extremely difficult for secured lenders to overcome the constructive notice hurdle and take advantage of the innocent landowner defense.

In terms of sections 107(a) and 107(b)(3), commercial lenders are caught in a quandary. If they foreclose on property on which hazardous substances have been disposed and they acquire the property with knowledge of such disposal, they are liable for response costs under section 107(a)(1). If they have no knowledge of hazardous sub-

than litigate, environmental response cost disputes is twofold. First, parties avoid the high costs of litigation; and second, parties can resolve their disputes in a more expeditious manner. H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 77 (1986). Several commentators have emphasized, however, that political disincentives exist that deter the resolution of hazardous waste liability disputes through negotiation. One commentator has noted, "pressure for body counts (number of cases filed) and a showing of toughness, or an unwillingness to negotiate with polluters for fear that such negotiation will result in a trip before a Congressional committee, has paralyzed the [EPA negotiation] system." Friedman, *Corporate Environmental Programs and Litigation: The Role of Lawyer-Managers in Environmental Litigation*, 45 PUB. ADMIN. L. REV. 768 (1985). For further discussion of how EPA officials under intense political pressure have little incentive to negotiate, see Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261.

104. See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986).

105. See *supra* note 93 and accompanying text.

106. *Id.*

stances on the land, they will probably still be liable because the duty of inquiry,¹⁰⁷ imposed on those acquiring property, suggests that they should have known.¹⁰⁸ Finally, if the secured lender exercises due care in protecting and inspecting its security interest and discovers the mortgagor has been dumping hazardous waste on the land, the secured lender loses his right to raise a section 107(b)(3) defense because the lender has acquired actual notice of the presence of hazardous waste. Moreover, courts will likely find lenders who acquire ownership of contaminated land through foreclosure strictly liable for the response costs incurred in cleaning up the land,¹⁰⁹ and these lenders will have little chance of escaping liability under the section 107(b)(3) innocent landowner defense.¹¹⁰

VI. LENDERS' LIABILITY UNDER THE AMENDED SUPERFUND ACT: A CRITICAL ASSESSMENT

A. *Economic Ramifications*

The broad scope of liability the amended Superfund Act imposes on the banking industry compels the need for lenders to take special precautions when making loans to land purchasers.¹¹¹ These precautions include environmental audits of land, soil samples, monitoring of land usage, and pre-acquisition investigation of the ownership and usage history of the property.¹¹² A lender may also find it prudent to include in loan agreements restrictions on the mortgagor's handling of hazardous substances on the land.¹¹³ These precautions are primarily preventive in nature and would be taken by a lender to protect himself from liability for response costs under CERCLA.¹¹⁴

107. *Id.*

108. Although section 101(35)(B) contains a "reason to know" test, the stringent duty of inquiry imposed by section 101(35)(B) will transform this test, through application, into a "should have known" test. The practical result of this transformation is a stricter threshold test, which presupposes that persons who purchase land either know or should know whether hazardous substances are present. Such a presumption approaches the view that when it comes to an actual or threatened hazardous waste release, there is no such thing as an "innocent landowner."

109. See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986).

110. See *supra* note 108 and accompanying text.

111. See Cohen, *Hazardous Waste: A Threat to the Lender's Environment*, 19 U.C.C. L.J. 127 (1986).

112. *Id.* at 124-25; see also Brandt, *supra* note 84, at 10, col. 4.

113. See Brandt, *supra* note 84, at 10, col. 4. A bank may undertake all of the precautionary measures listed above and still be held liable under CERCLA for response costs. Thus, even increasing expenditures on precautionary measures to prevent the disposal of hazardous waste on lenders' security interests will not insure lenders against CERCLA liability.

114. Precautionary measures taken by a bank to prevent the disposal of hazardous

Although banks would implement these precautions to save money by protecting themselves from liability, these preventive measures become part of a lender's cost of lending capital. These increased costs can either be absorbed by lenders or passed on to borrowers in the form of higher interest rates or increased transaction costs. Inevitably, at least some portion of these costs will be passed on to borrowers.¹¹⁵ Such an increase in the cost of capital can cause the demand for capital to decline.¹¹⁶

When an increase in the cost of capital results in a decline in the demand for capital, economic growth may be stymied by the subsequent decline in investment.¹¹⁷ Depressed levels of investment generally contribute to decreases in housing and other construction, a reduction in the number of new businesses, potential increases in unemployment, and a general decline in the aggregate level of spending.¹¹⁸ Although a slight increase in the cost of investment capital may not singularly cause a recession, its depressing economic effects are felt at all levels of society.¹¹⁹ Thus, when assessing the economic implications of lender liability under CERCLA, it is important to remain cognizant of all the economic ripples in the pond caused by a rise in the cost of capital.

substances on its landed security interest merely demonstrate the exercise of due diligence. After acting diligently and in accordance with good commercial practice, a bank, to avail itself of the innocent landowner defense, must establish by a preponderance of the evidence that it neither knew nor had reason to know of an actual or threatened hazardous substance release. Because of the strict duty of inquiry imposed on commercial land purchasers, however, commercial lenders are faced with an almost insurmountable burden of showing they had "no reason to know."

115. In all likelihood, commercial lenders will respond to the increased risks of CERCLA liability by increasing the cost of capital. Lenders may apportion this increase broadly among all borrowers, or specifically among borrowers who have the highest propensity to become entangled with CERCLA liability. Query, however, whether it is possible for a lender to be able to consistently identify or predict which of its borrowers are most likely to be charged with CERCLA liability? This identification problem is magnified by the fact that innocent borrowers, once they become landowners, may be charged with CERCLA liability for the pollution sins of prior landowners. This type of liability is almost impossible to foresee unless a lender conducts a comprehensive examination of the owner and usage history of the facility to be purchased by the borrower.

116. This decline occurs because the cost of capital and interest rates are directly related, while interest rates and the demand for capital are inversely related. The magnitude of the decline in the demand for capital depends on the elasticity level of the capital market. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 365-67 (1977). Under either a Keynesian or monetarist economic framework, interest rate volatility affects the level of investment on a macroeconomic level. When interest rates rise, reflecting the increasing cost of capital, investment spending declines. See W. BAUMOL & A. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 242-43 (1979).

117. See *supra* note 116.

118. See W. BAUMOL & A. BLINDER, *supra* note 116, at 242-43.

119. *Id.*

In addition to the macroeconomic spillover effects that may be created if lenders are liable under section 107(a)(1), microeconomic implications exist as well. Because mortgagors found liable under CERCLA for the high cleanup costs of hazardous waste releases will often become insolvent and default on their loans, commercial lenders will increasingly face a difficult dilemma: foreclose and face CERCLA liability, or elect not to foreclose to escape CERCLA liability and lose the value of their security interest. Because, in most cases, CERCLA liability is preferable to losing a security interest altogether, the normal foreclosure rate will likely increase as a result of the CERCLA liability imposed on mortgagors. Mortgagees therefore will increasingly bear the costs of cleaning up hazardous waste sites that they had no part in creating—costs that potentially can exceed the amount of the lender's original loan.¹²⁰

The increased risks lenders will incur in property loan transactions will likely be manifested in the form of increased interest rates or the amount of points a lender charges a borrower up front in a property loan transaction. Additionally, section 107(a)(1)'s imposition of strict liability on owners and operators of land may impede the free transferability of loans in the secondary mortgage market; another unintended economic spillover effect resulting from lenders getting caught in CERCLA's expansive web of strict liability. Finally, and perhaps most dangerous, the section 107(b)(3) innocent landowner affirmative defense may create an incentive for lenders about to foreclose on their security interest to look for, but not find, hazardous waste on the property; because finding a release prior to acquisition of the property is tantamount to forfeiting any chance of using the innocent landowner affirmative defense to escape section 107(a)(1) liability.

B. *The Deputization of Banks as Involuntary EPA Monitors*

CERCLA, by imposing liability on lenders, effectually deputizes banks as quasi-EPA monitors.¹²¹ The purpose of conscripting the commercial lending industry as an involuntary appendage of the EPA's enforcement arm is to force banks to investigate the ownership and usage history of property before obtaining a security interest in

120. One of the most significant aspects of banker liability under CERCLA is the fact that lenders can be held liable for amounts exceeding the amount of the original loan. Normally, when a lender enters into a commercial loan transaction, its risk is limited to the amount of the loan.

121. Telephone interview with Robert Norris, Legislative Assistant to Congressman Barney Frank (Nov. 14, 1986).

the property.¹²² By disallowing the section 107(b)(3) defense to owners or operators of land who have constructive notice of actual or threatened hazardous substance releases, CERCLA induces lenders to act as watchdogs over their security interests to prevent hazardous substance releases before they occur. Thus, the potential liability forces lenders to police land transfer transactions to ensure that property is not transferred with hidden hazardous waste problems.¹²³

This "banker beware" policy presupposes that lenders are in a position to effectively monitor thousands of parcels of property held as security interests. It envisions lenders being able to exercise strict scrutiny of every parcel held as security for a loan. Such a vision is both unfounded and unrealistic. Practical limitations abound that preclude lenders from effectively implementing a comprehensive, national monitoring program to protect their security interests from hazardous substance contamination.

The impediments to an effective national monitoring program range from economic impracticability to legally instituted disincentives. First, for banks to conduct environmental inspections on every parcel of land held as a security interest is a costly economic undertaking in and of itself; but to effectively protect itself from CERCLA liability, the commercial lending industry must do even more. It must maintain a national program to monitor all landed security interests for the entire repayment period of all outstanding loans. Moreover, commercial lenders are simply not in a position, practically or economically, to bear the type of monitoring implicitly required by CERCLA's imposition of strict liability on landowners.

Even if a comprehensive national monitoring program was an economically feasible undertaking for commercial lenders, CERCLA strongly discourages them from ardently serving as environmental monitors. By eliminating the availability of the innocent landowner affirmative defense to parties with actual or constructive knowledge of potential hazardous waste releases, CERCLA has created a strong disincentive for lenders to seek out and find hazardous waste problems. This is because once lenders discover hazardous waste on their landed security interest, they lose the innocent landowner defense of section 107(b)(3).¹²⁴ Consequently, sections 101(35)(A),¹²⁵

122. *Id.*

123. *Id.*

124. Merely monitoring land held as a security interest is inadequate to protect lenders from liability because a lender who discovers that hazardous waste is being disposed of on its landed security is effectually precluded from raising the innocent landowner affirmative defense. *See supra* note 93.

125. *See supra* note 90.

(B),¹²⁶ and 107(b)(3)¹²⁷ create an incentive for lenders to look for, but not find hazardous waste.

C. *The "Polluter Pays" Principle v. Distributed Societal Costs*

When the Superfund was created in 1980, Congress funded it primarily from excise taxes levied on the petroleum and chemical industries.¹²⁸ Congress levied those taxes, essentially pollution excise taxes,¹²⁹ specifically on those two industries because it believed there was a reasonable nexus between their activities and the production of hazardous substances.¹³⁰ 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.¹³¹

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.¹³² 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 problem extending beyond the chemical and petroleum industries."¹³³ Consequently, SARA drew on other sources to replenish the Superfund with \$8.5 billion over five years.¹³⁴ The Superfund is currently subsidized as follows: 30% from a tax on petroleum, 30% from a tax on raw chemicals, 15% from general revenues,¹³⁵ 3.5%

126. See *supra* notes 93, 108 and accompanying text.

127. See *supra* note 29 and accompanying text.

128. S. REP. NO. 73, 99th Cong., 1st Sess. 12 (1985).

129. Excise taxes tax the consumption of certain goods. Their primary function is usually not to raise revenue per se, but to either deter the consumption of certain goods or to internalize the cost of externalities. Lecture by Professor William Kelso, University of Florida (Sept. 27, 1984). In a market economy, competition among the conflicting forces of supply and demand normally causes prices of goods to reflect their true market values. Sometimes, however, the production or consumption of a good causes an economic spillover effect, which is not reflected in the cost of that good. Pollution is an example of a negative spillover effect associated with the manufacturing process of many goods. It is harmful to both health and the environment, and its cleanup poses a cost to society. Because the cost of pollution produced in the manufacturing of a particular good usually is not reflected in the market price of that good, overconsumption results. To counter this result, government may internalize the true cost of the good through the imposition of an excise tax. *Id.* In the case of the Superfund, which is largely subsidized by excise taxes imposed on the chemical and petroleum industries, Congress has opted to internalize the costs of hazardous waste by taxing the principal producers.

130. The petroleum and chemical industries produce over 65% of the hazardous waste in this country every year. See C. REVELLE & P. REVELLE, *THE ENVIRONMENT* 617 (1984)

131. S. REP. NO. 73, 99th Cong., 1st Sess. 13 (1985); see *supra* note 3.

132. *Id.*

133. *Id.*

134. CONG. Q., Oct. 11, 1986, at 2540, col. 1.

135. *Id.* The fact that Congress decided to subsidize the Superfund, at least in part, with

from interest, and 3.5% from government recoveries of cleanup costs from responsible parties.¹³⁶ Thus, under the 1986 Amendments to Superfund, CERCLA's philosophy of recovery has changed from one of strict adherence to the "polluter pays" principle¹³⁷ to a slightly more liberal version, incorporating some generalized apportioning of societal costs among a broader range of parties.¹³⁸

Nevertheless, the liability of commercial lenders under CERCLA is difficult to justify under either philosophy of recovery. Under the "polluter pays" principle, it is impossible to justify the imposition of hazardous waste liability on a particular group of persons that may not be in any way responsible for the production of hazardous waste. Because commercial lenders are not producers of hazardous waste, it is logically inconsistent with the "polluter pays" principle to charge them with the financial responsibility of cleaning up such waste. The commercial lending industry simply is not similar to, and should not be treated the same as, the petroleum and chemical industries, which together produce the vast majority of the hazardous waste in this country.

CERCLA's imposition of strict liability on "owners or operators of a facility" potentially results in the commercial lending industry incurring specific economic costs for a broad-based societal problem. Congress, perhaps believing that banks are in a position to effectively police land transactions, has ultimately placed much of the onus of hazardous waste liability on commercial lenders who become owners via foreclosure.¹³⁹ Although the imposition of liability on potentially innocent landowners may be rationalized on utilitarian grounds,¹⁴⁰

general revenues, suggests that Congress has embraced the notion that hazardous waste is a national problem whose costs should be borne or shared by a broad segment of society. Conversely, the fact that Congress chose to apportion 60% of the cost of replenishing Superfund to the chemical and petroleum industries, which together produce over 65% of this nation's hazardous waste, strongly suggests that Congress remains loyal to the "polluter pays" principle.

136. *Id.*

137. *See supra* note 3.

138. *See* H.R. CONF. REP. 962, 99th Cong., 2d Sess. 333-35 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3426-28.

139. Although bank lobbies attempted to persuade members of Congress to include in section 101(35) of the 1986 Superfund amendments a provision exempting mortgagees from liability when they acquire possession of land by foreclosure, members of the Senate were so hostile to the idea that it was never even formally considered in committee. Telephone interview with Robert Norris, Legislative Assistant to Congressman Barney Frank (Nov. 14, 1986).

140. A utilitarian justification for banker liability presupposes that imposing liability on innocent lenders will actually reduce the hazardous waste problem enough to offset the economic costs that accompany banker liability. Because imposing liability on banks raises the cost of capital, Congress, though well-intentioned, has created an economic externality while

the accomplishment of the greater good in promoting greater environmental protection, trying to justify such an imposition via the "polluter pays" principle, is logically fallacious.

The current liability scheme imposed in section 107(a)(1) of CERCLA stems from the philosophy that the production of hazardous waste is a broad societal problem¹⁴¹ and the costs of dealing with it should be generally apportioned among a wide range of parties.¹⁴² Imposing strict liability on owners of land containing an actual or threatened hazardous waste release appears justifiable under the notion of broadly apportioned societal costs. Such a broad scheme of liability, however, is dysfunctional in that it creates a number of damaging economic externalities and harmful disincentives that may outweigh the utility of the expansive scheme of strict liability currently imposed by section 107(a)(1).

Additionally, strict liability of owners and operators of land places a disproportionate share of the hazardous waste cleanup costs on a class of potentially innocent parties. Such a disproportionate assignment of hazardous waste liability contravenes the spirit of the broadly distributed societal costs philosophy; a philosophy increasingly embraced by Congress.¹⁴³ If Congress truly desires to implement a policy of spreading hazardous waste cleanup costs broadly among the American polity, it should increase the share of the Superfund derived from general revenues. Further, Congress should either provide an effective innocent landowner defense or do away with section 107(a)(1)'s imposition of strict liability on owners and operators of land. The present scheme of imposing strict liability on owners and operators of land is consistent neither with the "polluter pays" principle nor the notion of broadly distributed societal costs.

D. *Mortgage Liability: A Standard Practice*

Although imposing liability on commercial lenders not involved in the production of hazardous waste is difficult to justify in terms of either economic or administrative efficiency, it is arguably consistent with the traditional motgagor-mortgagee relationship. Section 107(a)(1) of CERCLA makes commercial lenders holding landed security interests, who acquire ownership through foreclosure, financially responsible for any damage done to the land prior to foreclo-

trying to contain an environmental one. Such an externality negatively affects the economy by increasing the cost of capital investment, which may impede economic growth, and by retarding the free transferability of loans in the secondary mortgage market.

141. See *supra* notes 132-33 and accompanying text.

142. *Id.*

143. See S. REP. NO. 73, 99th Cong., 1st Sess. 13 (1985); see also *supra* note 135.

sure. If a mortgagor dumps hazardous waste on land held as a security interest by a mortgagee, and then defaults on the mortgage, the mortgagee, upon foreclosing, exposes itself to section 107(a)(1) liability. This scenario is analogous to situations where a mortgagee forecloses on property that the mortgagor has negligently damaged in some way. In both cases, the mortgagee can sue the mortgagor for damages.¹⁴⁴ If the mortgagor is insolvent, however, the mortgagee will ultimately bear the financial burden of the repair.

The fact that mortgagees may ultimately be responsible for damage done to their landed security interests by mortgagors is self-evident.¹⁴⁵ The only difference between mortgagee liability under CERCLA and more traditional norms of mortgagee liability¹⁴⁶ is that CERCLA deals with an environmental problem deemed so severe and dangerous that the federal government has used its police power¹⁴⁷ to mandate that owners of property clean up hazardous substances on their land or reimburse the government for such clean-ups. Generally, when a mortgagee forecloses on a security interest and finds that its property has been damaged by the mortgagor, who for some reason is judgment or execution-proof, the mortgagee has the option of restoring the property to its previous value or electing to do nothing and accepting the land in its depreciated state. CERCLA takes away the latter option by statutorily *compelling* land owners to clean up hazardous waste releases or to reimburse the EPA when the agency conducts its own cleanup.¹⁴⁸ Such a stat-

144. See, e.g., *Jaffe-Spindler v. Genesco, Inc.*, 747 F.2d 253 (4th Cir. 1984) (person possessing lien against real estate has right to restrain waste); *In re Tremblay*, 43 Bankr. 221 (D. Vt. 1984) (Under Vermont law, mortgagee may enjoin mortgagor from emitting waste that will endanger mortgagee's security and may seek recompense for diminution of value of security below amount of mortgage debt.).

145. Although mortgagees attempt to protect themselves in commercial loan transactions by retaining security interests equal to or exceeding the value of the loans made to mortgagors, they assume the risk that the value of their collateral may fall below the amount of the outstanding loan to the mortgagor. If the mortgagor damages the mortgagee's landed security interest, causing the market value of the property to fall, the mortgagee, by virtue of its interest in the property, may bring an action against the mortgagor for damages. See *supra* note 144. If the mortgagor is judgment or execution-proof, however, the mortgagee, if he ever acquires ownership of the security interest via foreclosure, becomes responsible for the cost of restoring the property to its original value.

146. See *supra* note 144.

147. The question of whether a federal police power actually exists is certainly beyond the scope of this Comment. Suffice it to say for the purpose of this point that the commerce power serves as a surrogate for the federal police power.

148. Congress legislated away a landowner's right to do nothing while a potential hazardous substance release threatens his land. This usurpation of liberty was motivated by the environmental and public health hazards resulting from the improper disposal of hazardous waste. See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986).

utory scheme has its policy underpinnings rooted in the fact that hazardous waste, like all pollution, is an externality that lies beyond the realm of market regulation thereby necessitating government intervention.¹⁴⁹ A problem arises, however, when the government chooses to intervene by imposing liability for hazardous waste pollution on a potentially innocent group of nonpolluters; especially when such liability, imposed to curb one externality, is responsible for the unintended creation of others.

E. *Alternative Schemes of Liability*

Faced with a scheme of liability capable of holding innocent parties responsible for the cleanup costs of hazardous waste releases, Congress may need to amend CERCLA again to provide a statutory framework capable of effectively and fairly dealing with the problem of inactive and abandoned hazardous waste sites. Alternative schemes of hazardous waste liability could be fashioned to avoid much of the unintended economic turbulence¹⁵⁰ caused by the present scheme of strict liability imposed by CERCLA and SARA.

In 1986, the Freddie Mac banking lobby proposed an alternative scheme of hazardous waste liability,¹⁵¹ which would leave the main-

149. Pollution is conventionally viewed as a failure of the self-regulatory mechanisms of a free market economy and, therefore, is an appropriate occasion for government regulation. See R. POSNER, *supra* note 116, at 271.

150. See *supra* notes 111-119 and accompanying text.

151. Under this scheme, commercial lenders who become owners or operators of land would be absolved from section 107(a)(1) liability if they could establish by a preponderance of the evidence that the release or threat of release of the hazardous substance at issue, and the damages resulting therefrom, were caused solely by:

[A]n act or omission of a third party, regardless of when it occurs, 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 substances 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 and omissions; provided that a land contract, deed, mortgage or deed of trust does not establish a contractual relationship as referred to above if the real property on which the facility is located was acquired by the defendant after the placement of the hazardous substance on, in, or at the facility, and any of the following circumstances are 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 threat of release was disposed of on, in or at the facility, or (ii) if the defendant has acquired the facility by virtue of (a) taking possession of the site as a mortgagee or other secured party, (b) foreclosing or accepting an instrument in lieu of foreclosure, or (c) otherwise exercising its rights or remedies

stay of the current statutory structure essentially intact while eliminating many of the negative economic spillover effects plaguing the imposition of strict liability under section 107(a)(1).¹⁵² Under Freddie Mac's proposed scheme, CERCLA would be amended to absolve from liability banks and other commercial lenders who become owners or operators of property as a direct result of their mortgagee relationship.¹⁵³ Lenders who enter into secured loan agreements without having actual or constructive notice of an actual or threatened hazardous waste release on the property to be held as security would be exempt from section 107(a)(1) liability. The only material difference between this scheme and the CERCLA scheme currently in effect is that under CERCLA a lender who enters into a secured commercial loan without actual or constructive knowledge of hazardous waste on the landed security interest *may* still be strictly liable under section 107(a)(1) if he discovers or should have discovered an actual or threatened release on the land prior to foreclosure. Under Freddie Mac's proposed scheme, such an innocent lender would be shielded from section 107(a)(1) liability.¹⁵⁴ The Freddie Mac liability scheme, although not substantially divergent from the status quo, would likely alleviate many of the harsh, yet unintended, economic externalities and spillover effects created by the broad imposition of strict liability under section 107(a)(1).¹⁵⁵

under the mortgage or other instrument, and at the time the defendant originated or purchased the mortgage or other instrument, the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threat of release was disposed of on, in or at the facility, or (iii) the defendant acquired the facility by inheritance, bequest, or escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

Proposed substitute for House amendment § 107(m) of SARA, formulated by Federal Home Loan Corporation (Freddie Mac) (Summer 1986); Telephone interview with Jeanne Broyhill, Legislative Director Federal Home Loan Mortgage Corp. (Nov. 20, 1986).

152. See Proposed substitute for House amendment § 107(m) of SARA, *supra* note 151.

153. *Id.*

154. *Id.*

155. One argument frequently used to oppose liability schemes creating broad innocent landowner affirmative defenses is that they will result in nonpolluting purchasers who acquire contaminated land at fire sale prices reaping windfall profits when the EPA cleans up the land, thereby restoring its value. This argument rests on the notion that people should not be rewarded when they buy contaminated land and then do nothing while the government expends money and resources cleaning the land. This argument, however, is flawed for two reasons. First, it presupposes that purchasers will be able to purchase contaminated land at fire sale prices. If a site is known to be on an EPA cleanup list, this information will be reflected in the market value of the property. Therefore, contaminated land, if it is targeted for cleanup, will not likely be available at a fire sale price. Second, this argument is ineffective against the liability scheme that Freddie Mac proposed because the proposed scheme does not absolve from liability land purchasers who acquire ownership with knowledge of a hazardous waste release on the property to be purchased, nor does it absolve from liability lenders who

VII. CONCLUSION

The imposition of CERCLA liability on parties who are in no way responsible for the production or release of hazardous substances seems both inherently unfair and a gross misapportionment of legal responsibility. Although probing the underlying policy justifications for such an imposition reveals a bold attempt by Congress to minimize the societal costs of a rampant hazardous waste problem, the manner in which the amended Superfund Act will effectually conscript the commercial lending industry into the enforcement arm of the EPA is economically and administratively impracticable. Through the imposition of strict liability, CERCLA encourages the commercial lending industry to take greater responsibility for their landed security interests in an attempt to make environmental monitoring a standard practice in the industry. The systemic shortcomings inherent in such a scheme, however, may cause banks to engage in a dangerous game of "look, but don't find"; for finding hazardous waste is rewarded with liability.¹⁵⁶

The practical result of this policy is charging innocent landowners with liability for hazardous waste cleanup costs. Congress, to ease the latent unfairness of this policy, has created an avenue by which innocent landowners can attempt to escape or minimize liability—the section 107(b)(3) innocent landowner affirmative defense.¹⁵⁷ The stringent requirements necessary to invoke this defense, however, undermine its ability to effectively protect innocent landowners from section 107(a)(1)'s far-reaching imposition of strict liability.

The result of section 107(b)(3)'s failure to effectively restrict the

become owners via foreclosure, if at the time they purchased or originated the mortgage, they knew or had reason to know of any actual or threatened release on the property.

156. An unintended result of this policy may actually be to create an economic inducement for commercial lenders who discover hazardous waste on their landed security interests to try to hide it to avoid relinquishing their innocent landowner defense. Reporting the discovery is tantamount to admitting actual notice. *See supra* note 124 and accompanying text.

157. A second, perhaps more attractive avenue to minimize liability under CERCLA is the nonlitigation route of the *de minimis* settlement procedures under section 122(g). The expeditious settlement of section 107 claims under section 122 of the 1986 Act may be mutually beneficial to both the government and potentially liable parties because it minimizes litigation costs. Further, the government may be willing to settle with potentially responsible parties for a reasonable amount for the sake of expediting cleanup actions and the desire to avoid lengthy litigation. Section 122's settlement procedures, however, are not a matter of right, but are only discretionary. The EPA may, but is not compelled to, enter into settlement proceedings with potentially liable parties. Section 122 has the potential to instill a sense of fairness into an otherwise "shoot first, ask questions later" scheme of strict liability. Through section 122, the EPA can fashion a response cost recovery scheme that facilitates expeditious settlements to recover response costs, while providing a forum receptive to weighing the mitigating circumstances of innocent third parties; a forum that the section 107(b)(3) innocent landowner affirmative defense does not adequately provide.

expansive reach of section 107(a)(1) is a well-intentioned statute calling on government to supplant the forces of market regulation in order to regulate one externality; but in so doing, creates a scheme of liability so broad as to cause an economic riptide responsible for the creation of other externalities. At some point, increasing the scope of hazardous waste liability under section 107(a)(1) ceases to result in the greater good to society. Accordingly, SARA's narrowing effect on the section 107(b)(3) innocent landowner defense has expanded the breadth of section 107(a)(1)'s imposition of strict liability beyond the point of diminishing returns.

STEVEN B. BASS*

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