

CHAPTER 8

ENVIRONMENTAL ISSUES

by Ernest G. Taylor and Quin H. Breland

[8.1] Environmental Issues and Foreclosure

A lender who has made a loan on property that is subject to potential environmental liability faces multiple risks. For example, if the property owner is forced to pay for cleanup costs, he may not have enough money left over to pay off the debt. Once environmental contamination is discovered on the property, its market value may fall below the original appraised value. Serious contamination may render the property totally unmarketable, making the lender's security interest worthless.

While the above risks are significant, lenders face an even more threatening risk when foreclosure is necessary – the risk of liability for remediation costs, which can amount to many times the actual value of the secured debt. Current environmental laws may require the lender to pay for environmental remediation of contaminated property even when they have no direct role in causing the contamination. This chapter outlines the evolution of environmental law, both federal and state, as it relates to the topic of lender liability. It also offers some pointers as to how to avoid environmental liability while protecting secured interests in environmentally damaged land.

[8.2] Evolution of Lender Liability Under Federal Environmental Laws

Since 1980, federal regulation of environmental hazards has imposed responsibility for remediation of environmental contamination on all “potentially responsible parties,” (PRPs) including lenders, who innocently foreclose on property without knowledge that it was contaminated, and, in some cases, have subsequently sold it, only to learn years later that it was contaminated and that the lender must share responsibility for cleanup. The laws seek to achieve remediation of polluted sites and to deter future contamination. Unfortunately for lenders, they

are often the only party available who are financially capable to pay for the remediation, and, therefore, they make attractive targets. Fortunately, both federal and state laws have been amended to afford protection for lenders who are prudent, but for those who fail to carefully monitor their loans for environmental hazards and properly manage them, substantial damages may result. Lenders can now protect themselves through good management, but they are not immune.

The primary law bearing on lender liability is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹ First enacted in 1980, CERCLA was intended to fill gaps in the solid waste legislation enacted in 1976 as the Resource Conservation and Recovery Act (RCRA), which provides for “cradle to grave” regulation and monitoring of hazardous substances.² Both CERCLA and RCRA apply to the land-based disposal of hazardous wastes. CERCLA liability, which is broader than that provided for under RCRA, attaches when:

- (1) There is a release or threatened release of a hazardous substance;
- (2) at a facility
- (3) causing the government or a private party to incur response costs; and
- (4) the defendant is a responsible party as defined in [CERCLA] § 107(a).³

A “responsible party” is defined under CERCLA as “any person who at the time of disposal of any hazardous substance owned or operated any [offending] facility.”⁴ An “owner” or “operator” is broadly defined by the statute.⁵ When a party is determined to be “responsible”

¹ 42 U.S.C.A. § 9601 to 9675 (West 1995 & Supp. 1997)

² See 42 U.S.C.A. §§ 6921 to 6925 (West 1995). Both CERCLA and RCRA are discussed in greater detail in Parts 8.19 through 8.28, *infra*.

³ *Kelley ex. Rel. Michigan Nat. Resources Comm’n v. Tiscornia*, 810 F.Supp. 901, 904 (W.D. Mich. 1993) (citations omitted).

⁴ 42 U.S.C.A. § 9607(a)(2).

⁵ 42 U.S.C.A. § 9601(2)(A).

as an owner or operator, under the environmental laws, the liability for damages and cleanup costs is strict. Fault or state of mind of the party is irrelevant.⁶

Congress, realizing that lenders need protection in regard to foreclosed properties, provided a secured party exception⁷ to liability to protect lenders who become owners through foreclosure. Since secured lenders, through a deed of trust or mortgage, become “owners” when they foreclose a loan after default, they can become “potentially responsible parties” who are liable for clean-up costs. Since CERCLA’s enactment, courts and lenders have struggled with the question of when a lender’s conduct crosses the line from “protecting a security interest” to “participating in management” of an offending site.⁸ Fortunately, CERCLA has been amended to provide guidance as to the protection afforded to a lender who forecloses on property and promptly offers it for sale. However, since the laws continue to evolve and the courts will interpret the amendments in light of the prior court’s decisions, an understanding of the prior judicial rulings is important.

[8.3] Fleet Factors and the Risks Faced by Lenders during Foreclosure

The first federal district courts to construe the secured creditor exception to CERCLA liability drew a distinction between permissible participation in the *financial* management of a facility and impermissible participation in the day-to-day or *operational* management of a facility.⁹ But the first Court of Appeals to decide the issue broke with this line of cases and considerably narrowed the protection afforded to lenders by the exception.¹⁰

⁶ *Tiscornia*, 810 F.Supp. at 905; *see also New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

⁷ *Id.*; *see United States v. Wallace*, 893 F.Supp. 627, 633 (N.D. Tex. 1995).

⁸ *E.g., Guidice v. BFG Electroplating & Mfg. Co.*, 732 F.Supp. 556, 561-62 (W.D. Pa. 1989).

⁹ *See, e.g., Guidice*, 732 F.Supp. at 561-62; *United States v. New Castle County*, 727 F. Supp. 854, 866 (D. Del. 1989); *Rockwell Int’l v. IU Int’l Corp.*, 702 F. Supp. 1384, 1390 (N.D.

In *United States v. Fleet Factors Corp.*, the Eleventh Circuit Court of Appeals affirmed the district court's denial of Fleet's motion for summary judgment but broke sharply with the legal analysis applied by the district court in reaching the decision.¹¹ Fleet had lent money secured by a cloth printing factory that turned out to have serious environmental problems. The printing company went bankrupt and the EPA sued Fleet Factors and the owners of the printing company for the \$400,000 it had spent on response costs, i.e., clean up costs. The district court granted summary judgment against the two owners but denied Fleet Factors' motion for summary judgment, finding that Fleet Factors' participation was such that it could be found liable as an operator under 42 U.S.C. § 9607(a)(2). While denying Fleet summary judgment, the district court relied on *Mirabile* to hold that the statutory exception allowed secured creditors to

provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation.¹²

The Court of Appeals determined that this interpretation was “too permissive towards secured creditors who are involved with toxic waste facilities.”¹³ The appellate court stated:

Although similar, the phrase “participating in the management” and the term “operator” are not congruent. Under the standard we adopt today, a secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable . . . Nor is it necessary for the

Ill. 1988); *United States v. Mirabile*, 1985 WL 97, No. 84-2280, slip op. at 3 (E.D. Pa. filed Sept. 6, 1985).

¹⁰ *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 155-58 (11th Cir. 1990; cf. *In re Bergsoe Metal Corp.*, 910 F.2d 668, 672 (9th Cir. 1990) (discussing “participation in management” and *Fleet Factors* but declining to adopt a rule for the Ninth Circuit).

¹¹ 901 F.2d at 1557.

¹² *United States v. Fleet Factors Corp.*, 724 F. Supp. 955, 960 (S.D. Ga. 1988).

¹³ 901 F.2d at 1557

secured creditor to participate in management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of this facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions *if it so chose*.¹⁴

Whatever the court meant the contours of its new test to be, it was immediately apparent that the language increased lenders' liability for contaminated property that they "owned" as loan collateral, especially for lenders who made commercial loans to industry. The lending community reacted by "curtail[ing] loans ... secured by some types of properties in order to avoid the virtually unlimited liability risk. Some lenders... even chose to abandon collateral properties rather than foreclosing on them for fear of post-foreclosure liability."¹⁵

Despite the strong negative reaction in the lending industry, however, some courts cited *Fleet Factors* approvingly, while others were less enthusiastic.¹⁶ Although it did not resolve the issue, *Fleet Factors* became the focal point in the debate over the meaning of the secured party exception.

[8.4] After *Fleet Factors*: The Short-Lived EPA Safe Harbor

Fleet Factors' broad language caused great concern among the lending industry. Banks became much more cautious with their loans. Efforts in Congress to provide relief failed. However, in 1991, the Environmental Protection Agency (EPA), responding to considerable clamor from the banking industry, and in light of the federal government's increasing role as a

¹⁴ *Id.* at 1557-58 (footnotes omitted; emphasis added).

¹⁵ *Kelley v. E.P.A.*, 15 F.3d 1100, 1104 (D.C. Cir. 1994); see generally Note, *Lender Liability dilemma: Fleet Factors History and Aftermath*, 38 S.D.L. REV. 22 (1993); Note, *Cleaning up the Debris After Fleet Factors: lender Liability and CERCLA's Security Interest Exemption*, 104 HARV. L. REV. 1249 (1991).

¹⁶ *Compare Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1325 (7th Cir. 1992) citing *Fleet Factors*; *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 28 n. 6, 29 (1st Cir. 1990) (stating that "if limited owners participate in management, they may be held liable") (citing *Fleet Factors* with approval) with *Long Beach Unified Sch. Dist. V. Dorothy B. Godwin Cal. Living Trust*, 32 F.3d 1364, 1369 (9th Cir. 1994) (noting apparent disagreement between *Fleet Factors* and *Bergsoe Metal Corp.*, 910 F.2d at 668).

secured creditor itself after taking over numerous failed savings and loans, instituted a rulemaking proceeding to define the secured creditor exemption under CERCLA.¹⁷

In April 1992, EPA issued a final regulation, which employed a framework of specific tests and safe-harbored activities that better defined the scope of lender liability under the secured creditor exception.¹⁸ The EPA rule provided an overall standard of judging when a lender “participates in management,” thereby forfeiting its exemption.¹⁹ Under the EPA rule, a lender could safely (1) undertake investigatory actions before lending against the property, (2) inspect or monitor the facility, and (3) require that the borrower comply with all applicable environmental regulations, all without incurring any risk of liability. The rule also provided that a lender could take certain actions as a loan neared default, such as engaging in work-out negotiations or taking steps to ensure that the borrower or facility in question did not run afoul of environmental laws.²⁰

The regulation also protected a lender who took full title to the secured property through foreclosure. A lender would not be liable so long as it (1) did not participate in the management of the property before foreclosure and (2) made diligent efforts to divest itself of the property as soon as practicable after foreclosing.²¹ To remain within the “safe harbor,” for example, the

¹⁷ See 56 Fed. Reg. 28,798 (1991)

¹⁸ See 57 Fed. Reg. 18,344 (codified at 40 C.F.R. § 300.1100 (1992)); cf. 40 C.F.R. §280.210 (1997) (guidelines for lenders under RCRA UST regulations).

¹⁹ See 40 C.F.R. § 300.1100(c)(1)(1992).

²⁰ See 40 C.F.R. § 300.1100(c)(2); see generally Rose-Marie T. Carlisle and Laura C. Johnson, *The Impact of CERCLA on Real Estate Transactions*, 4 S.C. ENVTL. L.J. 129, 138-42 (1995) (discussing CERCLA’s and safe harbor rule’s influence on land transactions).

²¹ See 40 C.F.R. § 300.1100(d)(1992).

foreclosing lender had to take steps to sell the property expeditiously, like listing the property for sale within twelve months of foreclosure.²²

Although an admirable effort by the EPA to address the anxiety caused by *Fleet Factors*, the safe harbor rule did not enjoy a long life. In February 1994, a federal appeals court vacated it, holding that the EPA was not vested with the rulemaking authority to determine the scope of CERCLA liability. *Kelley v. E.P.A.*, 15 F.3d 1100, 1105-09 (D.C. Cir. 1994) (distinguishing, *inter alia*, *Wagner Seed Co., Inc. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992)).

The *Kelley* court concluded that, while the EPA was authorized to promulgate rules clarifying certain CERCLA provisions, “[l]iability issues are to be decided by the court.”²³ The court even refused to uphold the rule as “an interpretative regulation” or a “policy statement.”²⁴ The court gave the EPA little recourse for clarifying the rule, stating that there was “no alternative but that EPA try again” to seek congressional relief.²⁵ Two and a half years later, in October 1996 that relief came.

[8.5] Congress Weighs in with the 1996 CERCLA and RCRA Amendments

In September 1996, Congress attempted to end much of the uncertainty faced by lenders with secured interests. It passed, and President Clinton subsequently signed, comprehensive amendments to CERCLA and RCRA.²⁶ Titled, the “Asset Conservation, Lender Liability and

²² *Id.* § 300.1100(d)(1), (2); *see also Ashland Oil, Inc. v. Sonford Products Corp.*, 810 F. Supp. 1057 (D. Minn. 1993) (applying EPA rule to absolve lender of liability); *Note, Lender and Receiver Liability: New Era of CERCLA’s Security Interest Exemption*, 48 OKLA. L. REV. 131 (1995).

²³ 15 F.3d at 1107.

²⁴ *Id.* at 1108-09.

²⁵ *Id.*

²⁶ *See* Pub. L. No. 104-208, §§ 2501-2505 (1996). The amendments are set out, in relevant part, in Part 8.27, *infra*.

Deposit Insurance Protection Act of 1996,” these changes limit the liability of fiduciaries and lenders for costs associated with environmental contamination. The law revives the EPA rule regarding lender liability that was invalidated by *Kelley* and the law specifically provides that the rule shall be deemed to have been validly issued and to have been effective according to its final terms.²⁷

The amendments include explicit safe harbors for lenders facing “ownership” of a contaminated site through the foreclosure process.²⁸ In addition to the guidance provided to lenders facing foreclosure, the law also allows lenders to take a number of actions before making a loan while remaining within the provisions of the safe harbor. Lenders can, for example, conduct environmental inspections, alter the collateral package, or require compliance with applicable environmental regulations. Once a loan is made, lenders can also do certain things without running afoul of CERCLA. They can, for instance, (1) prevent; cure, or mitigate defaults; (2) prevent the diminution of value of the property as collateral; (3) impose financial work-out requirements; (4) require cleanup and compliance with environmental laws; and (5) provide financial or administrative guidance or counseling to the buyer. The law clarifies the definition “owner or operator” to exclude lenders that do not participate in management; the amendments provide comprehensive guidance as to what actually constitutes lender “participation” in management for the purposes of CERCLA liability.²⁹ The protections spelled

²⁷ *Id.* § 2504; *see Kelley v. Tiscornia*, 1996 WL 732323, *2 (6th Cir. 1996) (unpublished disposition discussing amendments), *affirming* 810 F.Supp. 901 (W.D. Mich. 1993) (applying safe harbor rule).

²⁸ *See* 42 U.S.C.A. §9601(20)(F)(iv), *added by* Pub. L. No. 104-208, § 2502(b)(1996).

²⁹ Unlike the EPA safe harbor developed to clarify lender liability under CERCLA, the RCRA UST safe harbor rule has never been judicially invalidated. *See* Steven E. Friedman, *Note, UST Lender Liability*, 2 ENVTL. LAW. 505, 509-10 (1996).

out under the CERCLA amendments are also applied to RCRA's underground storage tank regulations.³⁰

Under the amendments, once a secured creditor comes into possession of a site, it can nonetheless avoid liability for environmental cleanup so long as it carefully restricts its activities to those spelled out in the safe harbor. Under that safe harbor, a lender may, after foreclosure, (1) maintain the borrower's business activities to the extent necessary to preserve the value of the business's inventory and equipment; (2) wind up the borrower's operations; (3) undertake environmental response actions, if necessary to protect the lender's security interest; and (4) take other measures to preserve and protect the collateral property.

However, a lender's protection can be lost if it does not act affirmatively to make commercially reasonable efforts to sell or otherwise divest itself of the property after foreclosure. Such efforts include listing the property for sale with a broker or agent within twelve months of foreclosure and acceptance of any firm offer of fair consideration received any time after six months from the date of foreclosure. The safe harbor provides that if a lender seeks any amount above what is owed on the debt, or if a lender outbids others at a foreclosure sale, the lender could lose protection from liability. Otherwise, a lender's activities in selling the property are protected by the rule.³¹

The amendments are an attempt by Congress to address the skittishness of the lending community that arose in the wake of *Fleet Factors* and *Kelley*. The law also goes a long way toward reconciling a confused jurisprudence, regarding the meaning of "participating in

³⁰ See Pub. L. No. 104-208, § 2503; see generally Steven E. Friedman, *Note, UST Lender Liability*, 2 ENVTL. LAW 505 (1996) (discussing RCRA underground storage tank regulatory program, lend liability, and safe harbor rule promulgated by EPA similar to one vacated by *Kelley* under CERCLA).

³¹ See *Waterville Industries v. Finance Auth. of Maine*, 984 F.2d 549, 553 (1st Cir. 1993) (pre-amendment case applying EPA rule to absolve lender that took reasonable steps to divest itself of contaminated property).

management,” “owner and operator” liability, and other obtuse concepts incorporated in the environmental laws. Most importantly, the amendments provide needed guidance from Congress for lenders to avoid inadvertent liability under the federal environmental laws when faced with a decision to foreclose on contaminated property. Congress has clearly stated its will to expand lender protections under CERCLA and construe the protections as broadly as the language suggests.³²

[8.6] Evolution of Mississippi Law: Tracking the Federal Experience

Mississippi’s principal environmental statutes are the Mississippi Air and Water Pollution Control Law, MISS. CODE ANN. §§ 49-17-1 to 49-17-435 (Supp. 1996) and the Mississippi Solid Waste Disposal Law, MISS. CODE ANN. § 17-17-1 to 17-17-63 (Supp. 1996). These statutes generally track and complement the federal statutory regime relating to contamination of air, water and land. However, unlike the secured party provisions of CERCLA, the Mississippi statutes did not include any exemption or protection for a lender until MISS. CODE ANN. § 49-17-42 was adopted in 1995. This lender liability exemption statute was adopted at least in part due to a Rankin County Chancery Court suit which exposed the vulnerability of Mississippi lenders under the Mississippi statutes.

[8.7] *Citizens Bank and Trust v. MidSouth Rail Corp. and Donald v. Amoco Production Co.*

In the 1990s, the Mississippi Supreme Court addressed lender liability on two separate occasions. First, on March 17, 1994, the Rankin County Chancery Court, applying Mississippi’s environmental laws, ruled that Citizens Bank and Trust Company, a lender to a sulphur processing business, was liable for a portion of remedial costs for the clean-up of an abandoned sulphur processing site. While the chancery court rejected the argument that the bank was liable

³² See Pub. L. No. 104-208, § 2504(b)(d) (preventing further judicial review of EPA rule until EPA amends it).

as an owner or operator under MISS. CODE ANN. § 49-17-43(d), it held that it was liable under the Mississippi Solid Waste Law, § 17-17-29(4) which states:

Any person creating, or responsible for creating, through misadventure, happenstance, or otherwise, an immediate necessity for remedial or clean-up action involving solid waste disposal shall be liable for the cost of such remedial or clean-up action. . . .

Applying this language, the chancery court concluded that

[b]y the use of “any person,” it is clear that the legislature extended the statute to include lenders, absent some contrary provision or exception such as that found in the CERCLA. The phrase “responsible for creating,” and the ordinary usage of those words, when combined with the all-inclusive terminology which follows, “through misadventure, happenstance, or otherwise” clearly would reach any lender who, as in this case, consciously and purposefully enabled an enterprise to go forward in order to protect the best interest of the lender in recovering previous indebtedness and earning future interest, by making an enabling loan.

Citizens Bank & Trust Co. v. MidSouth Rail Corp., No. 30,001, slip op. at 10 (Rankin Cty. Ch. Ct. decided March 17, 1994).

Typical of environmental cases, *Citizens Bank* had an involved history and a complex set of facts, all of which may have weighed on the judge in reaching his ultimate opinion. But the principal facts are relatively simple. MidSouth Rail owned a small parcel of land adjacent to its railroad tracks in Rankin County. It leased this acreage to a sulphur processing company for the purpose of processing “dirty” sulphur into a marketable product. MidSouth was paid a small rental fee pursuant to a lease agreement which, among other things, held the sulphur operator (the lessee) responsible for all environmental damage at the site.

Citizens Bank provided the operating capital for the sulphur operations and took as collateral both the processing equipment and the unprocessed sulphur. Though Citizens disputed after the fact that the sulphur was part of its collateral, the court found that it was. Citizens Bank, slip op. at 4. Citizens also obtained an assignment of the lease from the railroad to the sulphur processor. The nature of the assignment was contested in the court proceeding; the railroad

asserted that the assignment was a general assignment, while Citizens argued that it was merely a collateral assignment.

The sulphur processing company ran short on capital. It brought in a new investor who was able to obtain credit from the bank. The bank made a loan on April 22, 1988, for over \$200,000, secured by an assignment of the lease, and perfected a security interest in the sulphur as well as the equipment and other property at the site.

Before it made the new loan, Citizens had previously covered overdrawn checks for the business and had visited the site on a number of occasions. Citizens was generally aware of the hazardous nature of the 5,000 tons of sulphur onsite, *i.e.*, its potential to create acid run-off and catch fire easily. At the time of the April 1988 loan, the bank also knew that the Mississippi Department of Environmental Quality (DEQ) was involved with the operator of the site concerning continuing problems with polluted water run-off and recurring small fires.

Approximately one year after the \$200,000 loan was made and after the processing business had taken bankruptcy, the sulphur stockpile caught fire, creating a major environmental hazard which threatened the evacuation of the state hospital at Whitfield as well as the Rankin County Correctional Facility. The railroad cleaned up the site at a cost of \$161,000. The bank, in the face of a demand by the railroad to pay a portion of the cost, filed suit in Rankin County Chancery Court asking the court to declare that it had no liability. The railroad filed a counterclaim asserting that the bank was liable under MISS. CODE ANN. § 17-17-29(4) and § 49-17-43(d); it also asserted that the bank was liable to it for repayment of a portion of the costs pursuant to the Mississippi Contribution and Indemnity Law, MISS. CODE ANN. § 85-5-7. Because of Citizens Bank's involvement and knowledge concerning the site, and in light of the broad statutory language, the court found that the bank was liable under § 17-17-29(4) for a portion of the clean-up costs. But the court limited Citizens Bank's contribution to ten percent.

The railroad appealed, arguing that the bank's contribution should have been at least fifty percent. It also contended that the assignment of the lease was a general assignment, making the bank responsible for the lessor's environmental obligations, *i.e.*, for all of the \$161,000 in remediation costs. The bank cross-appealed, asserting that it had no liability under § 17-17-29(4), or the contribution statute, § 85-5-7.

The Mississippi Supreme Court held that MISS. CODE ANN. § 17-17-29(4) did not impose liability on lenders as "any person creating, or responsible for creating,...immediate necessity for remedial or clean-up action." *MidSouth Rail Corp. v. Citizens Bank & Trust Co.*, 697 So. 2d 451, 459-60 (Miss. 1997). Citing public policy reasons, the Court declined to extend liability to Citizens Bank, stating:

[E]xtending the scope of the statute would negatively impact lenders and their customers across the state. By placing liability on lenders for "enabling" business operations, banks would be subject to liability for environmental contamination to which they did not cause or contribute.... This liability would serve to discourage business development and to apply the consequences of one party's act to a more financially sound party with no fault. An innocent lender could become subject to liability in virtually any type of loan. [T]he ... only reasonable conclusions are an increase in the cost of loan transactions, a decrease in business capital due to stricter loan guidelines, and a corresponding decrease in business development.

Midsouth Rail, 697 So. 2d at 459. Accordingly, the judgment against Citizens Bank was reversed and rendered.

Two years later, in *Donald v. Amoco Production Co.*, 735 So. 2d 161 (Miss. 1999), the Mississippi Supreme Court extended the holding of *Midsouth Rail* to prevent lender liability where the innocent lender has foreclosed on a parcel of real estate with a latent environmental defect and then sold that parcel to a third party at a foreclosure sale. In *Donald*, the plaintiff purchased a parcel from the Bank of Waynesboro which had seized the property at foreclosure. 735 So. 2d at 164. The plaintiff discovered oil field waste on the property approximately four years later and sued the Bank for misrepresentation of fact and for failing to reasonably inspect

the premises, as he claimed he would not have purchased the property had he known it was contaminated with hazardous waste. *Id.* at 180. The court examined its decision in *Midsouth Rail* and held that “[u]nder the same rationale and with public policy in mind, this Court extends the holding of *Midsouth Rail* to prevent lender liability where the innocent lender has foreclosed on a parcel of real estate with a latent environmental defect and then sold by quitclaim deed that parcel to a third party at a foreclosure sale.” *Id.* Therefore, the Court affirmed the lower court's dismissal of the plaintiff's claim against the bank.

After *Midsouth Rail* and *Donald*, the issue of lender liability under Mississippi state law appears to be settled. The Mississippi Supreme Court rejected the view that a lender could be liable, even without statutory protections, in *Midsouth Rail*, and explicitly extended those protections to foreclosure situations in *Donald*.

[8.8] Mississippi's Lender Protection Act, § 49-17-42

In 1995, the Mississippi Legislature, in apparent response to the *Citizens Bank* case, adopted MISS. CODE ANN. § 49-17-42 to protect lenders against environmental cleanup liability. The statute shields lenders that do not participate in the management of the borrower's business; in this respect, the law aligns Mississippi with the federal law providing an equivalent exemption from liability. The statute provides:

Any lender or holder who maintains indicia of ownership primarily to protect an interest in a property, facility, or other person, and who does not participate in the management of the property, facility, or other person, shall not be considered an owner or operator . . . , nor liable under any pollution control or other environmental protection law, or any rule or regulation or written order of the commission . . . for the prevention, clean-up, removal, remediation or abatement of any pollution

MISS. CODE ANN. § 49-17-42(1) (Supp. 1995). The statute is incorporated by reference in the Solid Waste Disposal Act (MISS. CODE ANN. § 17-17-29(8), the Mississippi Underground Storage Tank Act of 1988 (MISS. CODE ANN. §§ 49-17-405, 49-17-409), the Mississippi Surface

Mining and Reclamation Law (MISS. CODE ANN. §§ 53-7-59, 53-7-63), and the Mississippi Surface Coal Mining and Reclamation Law (MISS. CODE ANN. §§ 53-9-55, 53-9-67).

[8.9] Mississippi DEQ Guidance: Aligning the State Law with the 1996 CERCLA and RCRA Amendments

When § 49-17-42 was passed in 1995, the EPA's safe harbor rule had just been struck down by *Kelley v. E.P.A.*, and Congress had not yet amended CERCLA to codify the rule. *Fleet Factors*, therefore, had not lost its viability and remained the prevailing interpretation of the secured party exception to CERCLA liability. However, in light of the case law interpreting the federal statutes, Mississippi's secured creditor exemption appears to be in line with federal law.

[8.10] Environmental Hazards Faced by Foreclosing Lenders

A lender should be concerned both about actual hazardous materials that might be found on collateral property, as well as permits and regulatory compliance required by the DEQ and other agencies. Even if foreclosed property is not contaminated, a lender turned "owner" may be held responsible (possibly criminally) for operating a facility without proper permits.

[8.11] Chemicals of Concern

What are the most common chemicals of concern in Mississippi? There are long technical lists of chemicals which are identified as hazardous substances. *See, e.g.*, 40 C.F.R. § 61.01 (1997) (listing hazardous substances under Clean Air Act); 40 C.F.R. § 116.4 (1997) (designating hazardous substances under Clean Water Act); 40 C.F.R. § 302.4 (1997) (designating hazardous substances under CERCLA § 102(a), 42 U.S.C.A. § 9602(a)). Unfortunately for most people, these technical lists are overwhelmingly complicated. The following checklist identifies some common products and materials which could cause problems:

- **asbestos** - asbestos was a common construction material prior to the 1980's. It was used to insulate structural steel, heating ducts, space heating and cooling units and in materials such as roofing papers, vinyl tile adhesive and acoustical ceilings.

- **PCBs** - found in solvents, as well as in electrical transformers and other equipment generating high levels of heat.
- **chlorinated hydrocarbons** - included in dry cleaning materials, general solvents, paint thinners, paint strippers, degreasers and various other products often used in industrial and automobile shops.
- **petroleum products** - gasoline, diesel fuel from leaking underground storage tanks, solvents, kerosene and paint thinners.
- **pesticides** - household pesticides, DDT, myrex, toxaphene and methyl parathion.
- **herbicides** - dioxins and other chemicals of concern are found in certain herbicides.
- **heavy metals** - concentrations result from plating shops, automobile battery operations and as a residual material at dump sites where chemicals have been burned.
- **lead** - paint and plumbing in old buildings.

Of course, the regulations specify the quantities of these and other hazardous substances that give rise to clean-up liability. If small quantities of these hazardous substances are found at a site, often no clean-up is required. In fact, some of these chemicals, certain heavy metals for example, occur naturally in the soil in unpolluted areas. Such chemicals as arsenic, chromium, nickel, and lead are commonly found in the soils of Mississippi at trace levels and pose no threat to anyone. A cleanup is required, however, when the chemicals are present in high enough concentrations that they pose a threat to public health or the environment.

[8.12] Permits and Environmental Compliance

As a general rule, a facility that handles, discharges, or disposes of hazardous materials can do so only after obtaining any required permits. If a permit is not in place and up to date, then the continued operation of the business is threatened. If there are permit violations, then the business may be subject to substantial fines or criminal liability. Therefore, the lender should be very careful to assess whether or not all the proper permits are in place and whether the borrower involved is in full compliance--both before making a loan as well as during the foreclosure

process. If compliance problems do arise, the value of the property could be greatly diminished and the obligation to pay fines could greatly reduce funds available for loan repayment. The following is a checklist (by no means complete) of basic permits.

- **air permits** - The 1990 amendments to the Clean Air Act greatly expanded its permitting and compliance requirements. Permits which may be required include (1) permits to construct air emission equipment, (2) permits to operate air emission equipment and (3) Title V operating permits.
- **water permits** - Any business or industry that is discharging water will need a national pollutant discharge elimination system (NPDES) permit under the Clean Water Act. Other permits which may be required include (1) state operating permits, (2) pretreatment permits, (3) storm water permits, and (4) state water quality certification permits.
- **solid waste management** - Permits are required for the construction or operation of any facility for the processing or disposal of any solid waste or sludge.
- **underground storage tanks** - There is no specific permit required, but the installation, operation and closure of underground storage tanks are regulated to prevent, detect and remediate leaks of substances from both the tanks and associated piping. Regulations include both RCRA provisions and state rules: (1) Mississippi Underground Protection Trust Fund Regulations; (2) Mississippi Underground Storage Tank Regulations; and (3) regulations for the certification of tank installers, removers and repairers. Moreover, notices are required for an intent to close permanently an underground storage tank. An application for certification is also required to install, repair or close an underground storage tank permanently.
- **hazardous waste management permit** - Anyone who generates, transports, handles or stores hazardous waste must obtain a hazardous waste management permit under RCRA. The permit will require results of chemical and physical analysis of the waste to be handled, a description of security procedures and equipment and a copy of a required contingency plan for emergencies. If there are leaks, spills or accidents, then immediate reports are required and a plan must be in place and implemented to deal promptly with any such “upsets.” Substantial fines are issued for violations of the permits and non-compliance could lead to criminal charges.

For a more comprehensive discussion of environmental permitting regulations applicable in Mississippi, see the Mississippi Department of Environmental Quality’s website at <http://www.deq.state.ms.us>.

[8.13] Practice Pointers

A common theme in the 1996 CERCLA and RCRA amendments is that, from the outset, a secured creditor must exercise due diligence to remain safely within the protections afforded by the secured party exemption. Taking the proper precautions throughout the loan period will allow lenders to avoid trouble should the need for foreclosure arise.

[8.14] Adequately Investigate the Property

Before making a loan, the lender should inspect the property and, if it is a business or industry which has environmental permits, check on the status of the environmental permits with the Mississippi DEQ. A general site inspection should include observations concerning water running off of the property. Is it discolored? Does it have an oily sheen on it? Does it have an unusual odor? The lender should also observe the general condition of the property. Does it have drum storage areas or empty and unused drums scattered around? Are there old tires stacked or partially buried on the site? Is the soil discolored? Are there any unusual odors? In all cases, a lender should ascertain past uses of the property that signal possible environmental hazards. A secured lender should also find out if there have been any unusual occurrences such as fires or unusual odors.

If any of these general observations indicate a problem, then a lender should retain an expert to perform a professional audit. There are generally two types of audits: a phase one audit and a phase two audit. A phase one audit is generally (1) a review of historical records from federal, state and local jurisdictions; (2) a review of aerial photographs and of the chain of title to identify prior uses of the property; and (3) a review of present business practices and uses of the property. A phase one audit usually also includes a site visit and analysis of any potential areas of concern by a professional auditor trained to make the necessary observations.

A phase two audit is the next level of review and is typically performed by an environmental engineer or other environmental scientist who is capable of taking appropriate samples and making other technical assessments of the site. If necessary, a phase two audit will include a remediation plan. A caveat is that the lender should carefully select the environmental auditing firm that it uses. There are many capable professional firms in Mississippi, but not all who hold themselves out as environmental auditors or environmental scientists are, in fact, fully qualified to do the work. Also, any recommendation that an audit be elevated to a phase two audit should always be carefully weighed, because a phase two audit usually involves taking soil, water, or air samples and having laboratory analysis done. The process can be quite expensive and may be unnecessary.

[8.15] Choose a Proper Environmental Consultant and Retain an Attorney, If Necessary

Choosing a qualified environmental consultant is key to properly assessing and making wise decisions in regard to the potential contamination and value of secured property. Any lender who expects to make significant number of loans on real property should establish a professional relationship with an environmental consultant and also with an attorney knowledgeable about environmental law. Ideally, the attorney and the environmental consultant should form a team to provide advice in their respective areas of expertise and coordinate with each other. If loans are to be made only on raw land and no industrial or intensive agricultural activities are present, then a smaller environmental firm familiar with that type of property may be adequate. However, if loans will be made to industrial operations, or in situations where significant contamination may occur, a more sophisticated firm with experts proficient in various technical areas of expertise will be necessary. These experts may include geologists, hydrogeologists, soil scientists, toxicologists, industrial hygienists, chemists and others. Obviously, most firms will not have all of these experts, but the selected firm should know when

each type of expertise is required and bring the appropriate expert on the job when needed. Most importantly, the environmental consultant should be familiar with the permitting processes and the state and federal regulations so that the consultant can determine what regulatory deficiencies may exist.

A good start in considering a firm for a particular job is to identify the job and ask the environmental firm whether the consultant has experience in dealing with that particular type of environmental problem. If the answer is yes, ask for references and determine whether the consultant has a history of doing a good job for a reasonable price (and within a reasonable time). Other topics to evaluate include:

- Type of disciplines on staff, including registrations and certifications
- Laboratory capability, including any field screening laboratory
- Available project team
- Insurance
- Indemnification requirements
- Approach to conducting the work
- Range of costs
- Type of report produced (*i.e.*, comprehensiveness and future usefulness)
- Directly applicable experience

See generally Joel S. Moskowitz, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS, 247-256 (1989). As is the case with hiring other consultants, the proven ability to do the job right and timely, should be the primary criteria, not per hour cost. Often a well-qualified and experienced expert can perform a more efficient and cost-effective audit than others who charge less per hour.

[8.16] Incorporate Lender Protections in the Loan Documents and Terms

Loan document provisions that provide environmental protection are advisable because they can be used to assign clearly the responsibility for environmental mishaps should they occur. Moreover, documents can also be worded to provide written, tangible evidence that a lender has taken steps to comply with CERCLA's (or RCRA's) safe harbor provisions.

Some terms that can be incorporated into loan documents include:

- Provisions relating to past and current uses. A borrower should affirmatively represent that past and current uses of the property comply with all federal, state and local environmental laws and regulations and that there have been no releases or threatened releases of hazardous materials, waste, pollutants or other contaminants on the property to the borrower's knowledge.
- A provision stating that, to the borrower's knowledge, no formal notices of violation have been received. The borrower should assure the lender that it has not received any formal or informal notice of violation of any environmental laws or regulations from *any* government agency, state or federal.
- A covenant that the borrower will provide the lender with immediate notice of any newly discovered on-site contamination.
- An indemnity agreement that includes a covenant to defend and hold harmless.
- An obligation on the borrower's part to remediate.
- An agreement to pay for a due diligence audit and to cooperate with auditors.
- A provision preserving the right of the lender to enter the premises and inspect the property for environmental compliance.

Id. at 263.

[8.17] Employ Proper Foreclosure Strategies

Under the 1996 CERCLA and RCRA amendments, lenders have greater flexibility in making foreclosure decisions. It is possible now to ensure environmental compliance while maximizing the chances that a troubled borrower will be able to pay off a loan. Some examples of activities safely within the secured creditor safe harbor include:

- *Workouts.* Under the CERCLA provisions, a lender has more freedom to work with a borrower on resolving problems. But lenders still must be careful to avoid stepping over the line from protecting its interest in the collateral to assuming an actual position in operating the borrower's business.
- *Partial Foreclosure.* If only a part of the property is contaminated, the lender might consider foreclosing on the rest of the property and abandoning the portion that is contaminated.
- *Post Foreclosure.* Once the property has been foreclosed and title is held by a lender, the lender must diligently market the property. The statute provides that lenders must divest themselves at the "earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements." 42 U.S.C.A. § 9601(E)(ii). Therefore, the property should be put on the market and diligently marketed. Once a good offer is received, the property should be sold.

[8.18] Review Insurance Policies for Coverage

When contamination is discovered on property, the property owner should put his insurance carrier(s) on notice. Lenders can ensure this is done by requiring borrowers to take all reasonable remedial measures after environmental problems arise. Insurance coverage, often included in long-expired policies, can be a significant source of money to pay for clean-ups.

The process of filing an insurance claim can become complicated, however. If the claim relates to practices going back twenty or thirty years, this may require some research to determine which policies are applicable. Consultants are available who can help in this search. Once identified, though, the insurance companies may deny coverage for environmental claims arguing that they neither anticipated the CERCLA cleanup risk when they wrote the policy nor intended to cover that risk.³³ Still, searching back for insurance coverage is nonetheless often a good investment of time. Liability policies are the most likely to provide coverage, but fire, casualty, and even title policies are potential sources of environmental coverage as well.

³³Courts seem to be more sympathetic to the policy holder who says that he bought *comprehensive* liability insurance coverage to protect him against unknown and unexpected risks. Some courts have even ruled that the "pollution exclusion" language found in policies issued after 1970 is not applicable to prevent collection on many environmental claims.

[8.19] Overview of Selected Federal Environmental Laws³⁴

[8.20] Resource Conservation and Recovery Act (RCRA)

Passed in 1976 as an amendment to the existing Solid Waste Disposal Act, RCRA was designed to provide “cradle to grave” regulation and monitoring of hazardous substances. The law was subsequently amended by the Hazardous and Solid Waste Amendments of 1984, and was amended again in 1996 to clarify, among other things, the scope of liability applicable to lenders who hold secured interests in covered sites. RCRA regulates the use, transportation, and disposal of defined “hazardous wastes,” but it does not apply to wastes already disposed of and not currently being “released.” In other words, the statute was designed to regulate ongoing and future improper hazardous waste disposal, as opposed to preexisting sites and improper behavior in the past.

[8.21] “Cradle to grave” regulation of hazardous wastes

RCRA’s provisions are designed to monitor specific hazardous materials from the time they are manufactured, through their useful life, and until they are disposed of. As a result, RCRA applies to facilities and transporters that handle covered materials at each step along the way.

³⁴This chapter concentrates on CERCLA and RCRA liability and so therefore discusses only those statutes. Of course, there are other federal environmental laws that bear upon secured property, such as the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C.A. §§ 1251 to 1387, the Clean Air Act, 42 U.S.C.A. §§ 7401 to 7671q, and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §§ 136 to 136y. Detailed treatment of these statutes is beyond the scope of this chapter. For a general overview of the federal environmental laws and how they relate to Mississippi environmental laws, see John E. Milner and Charles A. Waggoner, *Overview of Major Federal Environmental Acts and Regulations for the General Practitioner*, 60 MISS. L.J. 1 (1990). In addition, as discussed above in Part III, *supra*, Mississippi’s environmental laws track the federal statutes and are therefore not expounded upon here. The main provision bearing on the foreclosure context, § 49-17-42, is discussed above in Part III, § B, *supra*.

[8.22] Permitting and manifest program for monitoring hazardous wastes

What exactly is a “hazardous waste” under RCRA is determined in a couple of ways. First, the law lists generic characteristics that, if exhibited by a given waste material, can render a waste stream “hazardous.” *See* 42 U.S.C.A. § 6921 (West 1995); *see also* 40 C.F.R. pt. 261 (1996) (regulations regarding identification and listing of hazardous wastes). Basically, if a substance is ignitable, corrosive, reactive, or toxic, then it can be classified as “hazardous” by the EPA. The EPA can also choose to list specific wastes on “hazardous” waste lists, based on complicated criteria provided in 40 C.F.R. pt. 261, subpts. B & C (1996). If a substance is listed by name, then it is considered to be hazardous regardless of whether it exhibits the generic characteristics discussed above.

Once a waste is determined to be hazardous, RCRA establishes a tracking system that applies to generators of waste, 42 U.S.C.A. § 6922, and transporters, *id.* § 6923. Both generators and transporters must obtain EPA identification numbers before treating, storing, transporting, or disposing of hazardous wastes. The law uses a manifest system of tracking: All but the smallest producers of waste must complete a manifest for each substance generated, which is a document containing information about the waste material that travels with the waste until it is finally disposed. Generators are required to maintain copies of these manifests, even after the wastes are disposed, for a certain number of years (*e.g.*, three years for small generators). Generators must also file biennial reports on their waste-generating activities with the EPA.

RCRA also regulates treatment and storage of hazardous wastes. Any facility that treats, stores, or disposes RCRA wastes (a “treatment, storage, or disposal facility” or TSDF), must obtain a permit from the EPA or an authorized state agency, unless it is eligible for an exemption. *See* 42 U.S.C.A. §§ 6924, 6925. Permits are issued for a fixed term and include requirements for identification numbers, personnel training, facility security and emergency

procedures, record-keeping (including manifests) and reporting requirements, and coverage for third party property damage and bodily injury. The Hazardous and Solid Waste Amendments added a presumption against land storage and disposal of wastes, but wastes can be placed in landfills if rigorous design standards (like double liners and technologically advanced monitoring systems) are met by the TSDF.

[8.23] Liability for environmental harm; civil and criminal penalties

RCRA provides both civil and criminal penalties to ensure compliance with its provisions. *See* 42 U.S.C.A. § 6928. The law allows the EPA or any other authorized administrator to issue compliance orders if it determines that a person is in violation of any provision of RCRA. The EPA can also file civil suits and seek the imposition of civil penalties of up to \$25,000 per day of non-compliance.

In addition, the Hazardous and Solid Waste Amendments added broad authority for the courts to grant any equitable relief necessary to abate conditions that threaten human health and the environment. *See* 42 U.S.C.A. § 6973(a) (providing that EPA can restrain any person contributing to pollution where there is “imminent and substantial endangerment to health or the environment”). Finally, if the EPA is slow to act, a private person can bring suit under the statute. Courts have generally interpreted RCRA’s provisions broadly to effectuate the statute’s remedial goals, which means the law casts a wide net over potentially liable parties. Those parties, in turn, can be held responsible for remediation of even preexisting sites not otherwise covered by RCRA’s prospective application, if waste begins to escape from the site.

[8.24] Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

The passage of CERCLA, 42 U.S.C.A. §§ 9601 to 9675 (West 1995), resulted from gaps in the solid waste legislation enacted under RCRA. While RCRA provided comprehensive “cradle to grave” regulation of hazardous substances generated after the Act’s passage, inactive

dump sites and their previous owners escaped the law's reach. CERCLA goes after the same parties that RCRA targets to pay remediation costs, but CERCLA defines hazardous wastes more broadly and applies even to inactive sites and former owners and operators of sites.

[8.25] General overview – the “Superfund”

CERCLA's most famous innovation is the “Superfund,” which has been used to pay for expedited remediation of the nation's most dangerous environmental sites. See 42 U.S.C.A. § 9611. Basically, the Superfund operates by providing immediate funding for remediation of the worst sites; after the cleanup is accomplished, the government seeks reimbursement from all potentially responsible parties (PRPs), usually through lawsuits.

CERCLA defines hazardous substances in two ways: by listing them specifically and by referencing the definitions of hazardous wastes used in other federal environmental laws. Based on the hazardous substances encompassed under CERCLA, all sites reported to the EPA as posing environmental dangers are preliminarily assessed to determine the extent of any possible environmental threat. Most properties are actually cleared by the EPA at this stage. The ones that are not cleared undergo a site inspection and are ranked according to the degree of danger presented. All sites above a certain ranking threshold are placed on the National Priorities List (NPL), a compilation that now includes over 1200 sites across the nation. Once on the NPL, sites become eligible for Superfund funding.

To trigger liability under CERCLA, all that must be shown is a “release” or a “threatened release” of a hazardous substance, in violation of any applicable state or federal standard. “Release” is broadly defined by the statute. 42 U.S.C.A. § 9601(22). Once there has been a release or a threatened release, cleanup can occur in one of two ways under CERCLA. Where “imminent and substantial danger” exists, the EPA can commence cleanup measures and then bill the PRPs afterwards. When there *may* be imminent danger, the EPA can order PRPs--either

the current or past owners, for example--to take remedial measures or face fines of up to \$25,000 per day for noncompliance. Private parties can in some circumstances also remediate, in the government's stead, and then sue PRPs for reimbursement, though the cleanup measures taken must be consistent with CERCLA's National Contingency Plan.

[8.26] Potentially responsible parties

Cost recovery for cleanup is facilitated by CERCLA's very broad regime of strict, joint and several liability among PRPs. *Regardless of which PRP caused the pollution*, CERCLA imposes liability for cleanup costs on current owners and operators of sites, past owners and operators, hazardous waste generators, and transporters of hazardous wastes. Thus, any of these entities can be held liable for *all* the costs of cleanup, even if they caused none of the pollution.³⁵ "Owners and operators" can be successor or parent corporations; officers, directors, and shareholders, when they have participated in the management of the offending corporation; fiduciaries, such as trustees or executors; and property owners, even though a lessee actually caused the contamination.

There are limited defenses to CERCLA liability, such as the secured party exemption discussed in detail above. Moreover, there is also an innocent purchaser defense, which has some bearing in the residential property market but little relevance in other real estate markets. Innocent purchasers must, according to their market sophistication, demonstrate that they made reasonable investigation into the possibility that their newly-acquired property could be contaminated. For a private homeowner, this duty is light; for a lender engaging in a sophisticated commercial or industrial market, the duty to investigate is much greater.

³⁵But see *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 129 S.Ct. 1870 (U.S. May 4, 2009) (Joint and several liability standard not applicable in certain situations where the PRPs fault is divisible and subject to being apportioned.)

The other defenses, *e.g.*, war or act of God, have limited applicability, especially in the foreclosure context. In general, the liability for cleanup costs can be quite far-reaching. In particular, prior to the 1996 CERCLA amendments, lenders or other entities with security interests in contaminated sites have been held liable in some instances, despite their exclusion from the definition of “owner or operator” under the statute. *See, e.g., Fleet Factors*, 901 F.2d at 1557; *but see Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 899-900 (5th Cir. 1993) (discussing alternatives to across-the-board application of joint and several liability to defendants only marginally involved in contamination).

[8.27] 1996 Amendments

The 1996 CERCLA amendments, discussed above, add several important provisions to CERCLA’s liability regime. Set out below are the chief provisions impacting the foreclosure context, beginning with the sections defining the terms “owner or operator” and “participate in management.” 42 U.S.C.A. § 9601 (20)(E) through (G) (West 1997). Under the amendments, an “owner or operator” does not include:

- a lender that did not participate in management of a facility prior to foreclosure, if the lender eventually forecloses on the property, 42 U.S.C.A. § 9601(20)(E)(ii)(I);
- a lender that, after foreclosure, sells, releases, or liquidates the property, maintains business activities in order to preserve the value of the collateral property, winds up operations, undertakes a response action under CERCLA § 9607(d)(1) or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the property, or takes any other measure to preserve, protect, or prepare the property prior to sale or disposition, *id.* § 9601(20)(E)(ii)(II). To continue within the amendments’ protection, the lender must seek to sell, re-lease, or otherwise divest itself of the property at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements. *Id.* § 9601(20)(E)(ii).

The amendments clarify “participation in management” to mean “actually participating in the management or operational affairs of a vessel or facility.” 42 U.S.C.A. § 9601(F)(i). It does

not include “merely having the capacity to influence, or the unexercised right to control,...facility operations.” *Id.* Section 9601(20)(F) continues by further defining the contours of liability:

(ii) a person that is a lender and that holds indicia of ownership primarily to protect a security interest in [property] shall be considered to participate in management only if, while the borrower is still in possession of the [property] encumbered by the security interest, the person--

(I) exercises decision-making control over the environmental compliance related to the [property], such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the [property]; or

(II) exercises control at a level comparable to that of a manager of the [property], such that the person has assumed or manifested responsibility--

(aa) for the overall management of the [property] encompassing day-to-day decision-making with respect to environmental compliance; or

(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the [property] other than the function of environmental compliance;

(iii) the term “participate in management” does not include performing an act or failing to act prior to the time at which a security interest is created in [secured property]; and

(iv) the term “participate in management” does not include
—

(I) holding a security interest or abandoning or releasing a security interest;

(II) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(III) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(IV) monitoring or undertaking 1 or more inspections of [collateral property];

(V) requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the [property] prior to, during, or on the expiration of the term of the extension of credit;

(VI) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of [secured property];

(VII) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(VIII) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(IX) conducting a response action under CERCLA § 9607(d) or under the direction of an on-scene coordinator appointed under the National Contingency Plan, if the actions do not rise to the level of participating in management (within the meaning of clauses (i) and (ii)).

42 U.S.C.A. § 9601(20)(F). The amendments also expand upon the meaning of “foreclosure” for purposes of CERCLA liability, *id.* § 9601(20)(G)(iii), and they explicitly set out who is considered to be a “lender” under the statute, *id.* § 9601(20)(G)(iv). Finally, the 1996 Act defines “security interest” as

a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.

Id. § 9601(20)(G)(vi).

[8.29] Conclusion and Endnotes

Congress’s passage of amendments to CERCLA and RCRA creating a secured party safe harbor brought welcome relief to lending institutions by eliminating much of the uncertainty surrounding liability for environmental remediation connected with loans secured by industrial or commercial property. Mississippi’s adoption of MISS. CODE ANN. § 49-17-42 in 1995 aligns Mississippi law with federal law. Therefore, if lenders will take care to follow the guidelines now codified in CERCLA, they can expect to be safe from unanticipated liability due to foreclosure of collateral property carrying environmental risks. Still, given the inherent

complexity and scientific and legal uncertainties associated with contaminated property, lenders must, in addition to following the statute's provisions, also remain abreast of changes in state law, judicial rulings, and regulatory changes that will always loom on the horizon.

Complacency may be the greatest present risk for lenders. Now that we have been through such a tumultuous period and have ultimately ended up with rules and procedures that provide protection for the vigilant, it will be easy for lenders to relax their management of environmental issues and get into serious trouble. Since many businesses are looking for ways to cut their costs to get through this difficult economic cycle, it is likely that some are cutting corners on their environmental duties. Likewise, lenders are cutting their expenditures wherever they can and auditing environmental issues may appear to be one of those non-essential functions that can be eliminated or limited. These factors open the door for the development of environmental surprises in the future.