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United States v. Maryland Bank & Trust Co.: Lender Liability Under CERCLA*

Carolyn Rashby**

INTRODUCTION

In the seven years since the enactment of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), courts have read the vague provisions of the Act to impose widespread liability for the costs of cleaning up hazardous wastes. As


2. As one court commented: “CERCLA is . . . 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.” Northeastern Pharm. & Chem. Co., 579 F. Supp. at 837-38 n.15 (citations omitted); see also Grad, A Legislative History of the Comprehensive Environmental Response, Compensation & Liability (Superfund) Act of 1980, 8 COLUM. J. ENVTL. L. 1, 1-2 (1982); W.H. Frank & T.B. Atkeson, SUPERFUND: LITIGATION & CLEANUP (A BNA SPECIAL REPORT) 5-7 (1985).

3. See, e.g., United States v. Carolawn Co., 21 Env’t Rep. Cas. (BNA) 2124, 2128-29 (D.S.C. 1984) (chemical firm that held title to a hazardous waste site for only one hour could be held liable even though the firm claimed that it acted only as a conduit in the transfer and had no true ownership interest in the property); United States v. Price, 523 F. Supp. 1055,
one commentator noted: "Liability for hazardous substance cleanups, like the flu, eventually seems to get around to everyone with any contact with the infected site." 4

Until recently, financial institutions conducted their mortgage transactions with little concern for the fact that they too could catch the CERCLA liability influenza by acquiring title to hazardous waste sites through foreclosure proceedings. 5 Although one CERCLA section holds the current "owner and operator" of a hazardous waste site liable for cleanup costs, 6 the Act exempts one who "holds indicia of ownership primarily to protect his security interest" in the property. 7 Lenders ap-

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5. Id.


(a) Covered persons; scope

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 (otherwise subject to the jurisdiction of the United States) 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 other 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 the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.


'[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.
parently interpreted this exemption to mean that they would be immune from liability even after taking title to mortgaged property.

In *United States v. Maryland Bank & Trust Co.*, the United States District Court for the District of Maryland was presented with the question of whether a mortgagee that had foreclosed on a hazardous waste site could be liable as an owner under CERCLA for the Environmental Protection Agency’s (EPA) costs of cleaning up the site. In granting summary judgment for the United States, the court held that the mortgagee-turned-owner could be liable for response costs.

The mortgagee-turned-owner in this case, Maryland Bank & Trust, argued that under the definition of “owner or operator” it was not liable for response costs because it held title to the property only to protect its security interest. The United States argued successfully, however, that CERCLA’s security-interest exemption ceases to apply once a mortgagee acquires title to a hazardous waste site through foreclosure proceedings and, therefore, that the Bank could be held liable for the government’s costs of cleaning up the site. The court noted, however,

Clause (iii) has recently been amended:

(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.


Several services and reporters, such as West’s *United States Code Annotated*, have printed a faulty version of the amendment to CERCLA § 101(20)(A)(iii). These services and reporters relied on a final draft of SARA from the Office of Legislative Counsel of the House of Representatives, a draft that is now identified as inaccurate by that Office. In particular, that draft deleted the final sentence of CERCLA § 101(20)(A), thus deleting the security-interest exemption. The Environmental Law Institute printed the correct version of § 101(20)(A), including the security-interest exemption, in its *Environmental Law Reporter*. Envtl. L. Rep. Stat. (Envtl. L. Inst.) 44,001, 44,006. In response to reader inquiry regarding the accuracy of its version of the amendment, the Environmental Law Institute consulted with the Law Revision Commission and the Office of Legislative Counsel of the House of Representatives. Both Offices agreed that the law was accurately reflected in the *Environmental Law Reporter*. 17 Envtl. L. Rep. (Envtl. L. Inst.) Update No. 6 (Feb. 23, 1987). According to the Environmental Law Institute, West Publishing Company will soon publish a supplement to correct the error in the *United States Code Annotated’s* most recent pocket part. 17 Envtl. L. Rep. (Envtl. L. Inst.) Update No. 12 (April 20, 1987). Confusion about the amendment was due, no doubt, to its vague language. While the amendments stated that clause (iii) of CERCLA § 101(20)(A) should be amended, SARA § 101(b)(2), 100 Stat. 1613, 1615, nothing was said about the final sentence of § 101(20)(A), which directly follows clause (iii).

9. *Id.* at 577-80.
10. *Id.* at 582.
12. 632 F. Supp. at 577-78.
13. *Id.* at 579.
that the CERCLA defenses to liability\textsuperscript{14} may be available to a foreclosing mortgagee just as they are potentially available to any owner who has purchased a hazardous waste site.\textsuperscript{15}

This Note examines the issues that are bound to arise when financial institutions that have foreclosed on hazardous waste sites are added to the growing list of those responsible for cleanup costs. Part I summarizes the background of \textit{Maryland Bank & Trust}. Part II recounts the court's opinion. In Part III, this Note discusses the court's decision and reviews Maryland mortgage law, relevant case law, and CERCLA policies to support the court's holding that mortgagees-turned-owners, such as Maryland Bank & Trust, should be liable for CERCLA cleanup costs. Part III then discusses the statutory defenses to liability under CERCLA and considers whether the Bank could rely successfully on these defenses. Specifically, Part III reviews the expansion of the third-party defense under the Superfund Amendments and Reauthorization Act of 1986 (SARA),\textsuperscript{16} passed after the \textit{Maryland Bank & Trust} decision, and concludes that this defense may be available to careful mortgagees following foreclosure. Part III finally examines some of the problems that may result from the imposition of liability on foreclosing banks.

\section{I

\textbf{FACTS OF THE CASE}}

From July 7, 1944 until December 16, 1980, Herschel McLeod, Sr. owned a farm in St. Marys County, Maryland, near the town of Califor-

\\textsuperscript{14}. The defense provisions are contained in CERCLA § 107(b). In pertinent part, these provisions are as follows:

\begin{quote}
\textbf{(b) Defenses}

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.
\end{quote}

\textsuperscript{15}. 632 F. Supp. at 581-82.

nia. This property is now known as the California Maryland Drum site or the "CMD site." During the 1970's, Maryland Bank & Trust loaned money to McLeod, Sr. for the trash disposal businesses he operated at the site. During 1972 or 1973, McLeod, Sr. permitted hazardous wastes to be dumped at the CMD site. Maryland Bank & Trust knew that trash disposal businesses were conducted at the site, but the record failed to disclose whether the Bank was aware of any hazardous waste dumping.

In 1980, Mark McLeod, Herschel's son, applied to Maryland Bank & Trust for a $335,000 loan to purchase the CMD site from his parents. Maryland Bank & Trust sent the Farmers Home Administration (FmHA) a Request for Loan Note Guarantee relating to the McLeod loan. On January 2, 1981, FmHA issued Loan Note Guarantees for ninety percent of the loan to Mark McLeod on the condition that Maryland Bank & Trust remove all the trash and junk from the farm.

Mark McLeod purchased the CMD site on December 16, 1980, but soon after failed to make payments on his loan. Maryland Bank & Trust consequently instituted a foreclosure action against the CMD site in 1981. The Bank purchased the site at the foreclosure sale on May 15, 1982. Maryland Bank & Trust thereafter became the record owner of the CMD site and from that time until the present has continued to be the record owner, with FmHA continuing to be a ninety percent guarantor of the loan. Consistent with its ownership of the site, the Bank conveyed a portion of the site to a third party, discussed granting a right-of-way across the site with another party, and retained an insurance policy on the property.

On June 20, 1983, Mark McLeod informed the St. Marys County

17. 632 F. Supp. at 575.
18. Id.
19. Id.
20. The wastes included organics such as toluene, ethylbenzene, and total xylenes and heavy metals such as lead, chromium, mercury, and zinc. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. Plaintiff United States' Cross-Motion for Partial Summary Judgment on Liability at 12, Maryland Bank & Trust, (No. 84-4026) [hereinafter Cross-Motion]. Maryland Bank & Trust certified that these requirements had been met (a fact that evidently was not true). Id.
27. Id.
28. Id.
29. Id.
31. Id.
32. Id.
Department of Health of the presence of wastes on the CMD site.\textsuperscript{33} The Department inspected the site and subsequently contacted the Environmental Protection Agency.\textsuperscript{34} EPA tested the substances dumped there and, on the basis of the test results, requested and received funding to institute a cleanup action under CERCLA.\textsuperscript{35} EPA notified Maryland Bank & Trust's president that the Bank would be given until October 24, 1983 to clean up the site or EPA would use its funds to conduct the cleanup.\textsuperscript{36} The Bank declined EPA's offer, and EPA cleaned up the site, incurring approximately $551,700 in response costs.\textsuperscript{37} EPA requested that Maryland Bank & Trust reimburse the Agency for these costs, but the Bank failed to pay.\textsuperscript{38} Thereafter, the United States instituted an action to recover EPA's cleanup costs under CERCLA.\textsuperscript{39}

II

THE COURT'S OPINION

Based on the parties' arguments, the district court employed a three-step analysis to determine whether Maryland Bank & Trust could be liable for the government's costs of cleaning up the site. First, the court decided that CERCLA imposes liability on those who are either owners or operators rather than on only those who are both owners and operators of hazardous waste sites.\textsuperscript{40} Second, the court determined that CERCLA's security-interest exemption did not apply to Maryland Bank & Trust and thus that the Bank was an owner within the meaning of section 101(20)(A).\textsuperscript{41} Finally, the court concluded that the Bank might be able to invoke CERCLA's third-party defense.\textsuperscript{42}

The Bank's first argument was a semantic one: Focusing on the language of section 107(a)(1) rather than on that of section 101(20)(A),\textsuperscript{43} Maryland Bank & Trust argued that to incur liability under CERCLA a person has to be both an owner and an operator of a hazardous waste site.\textsuperscript{44} Thus, even though the Bank owned the site, it could not be held

\begin{itemize}
\item \textsuperscript{33} 632 F. Supp. at 575.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id. at 575-76. EPA removed 237 drums of chemicals and 1180 tons of contaminated soil. Id.
\item \textsuperscript{38} Id. at 576.
\item \textsuperscript{39} The United States filed its complaint on October 31, 1984. Cross-Motion, supra note 25, at 2.
\item \textsuperscript{40} 632 F. Supp. at 577-78.
\item \textsuperscript{41} Id. at 578-80.
\item \textsuperscript{42} Id. at 581-82.
\item \textsuperscript{43} CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), imposes liability on "the owner and operator of a facility" (emphasis added), while CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A), defines liability in terms of the "owner or operator" of a site (emphasis added). See supra notes 6 & 7 for the full text of both sections.
\item \textsuperscript{44} See 632 F. Supp. at 576-77.
\end{itemize}
liable under the statute because it did not operate the site.\textsuperscript{45} The court conceded that the language of section 107(a) could be interpreted to hold liable only persons who are both owners and operators, but it rejected this interpretation, stating that the ambiguity was due to a congressional error in drafting.\textsuperscript{46} "[B]y no means does Congress always follow the rules of grammar when enacting the laws of this nation. In fact, to slavishly follow the laws of grammar while interpreting acts of Congress would violate sound canons of statutory interpretation."\textsuperscript{47} The court relied on language in a House report accompanying one of the four bills out of which CERCLA emerged to conclude that one need not be both an owner and an operator to be held liable.\textsuperscript{48} In reaching its conclusion, the court also relied on \textit{New York v. Shore Realty Corp.},\textsuperscript{49} a recent case in which the United States Court of Appeals for the Second Circuit held an owner of a hazardous waste site liable for government cleanup costs even though the owner never participated in the operation of the site and had not owned the site at the time of the dumping. The \textit{Maryland Bank & Trust} court agreed with the Second Circuit that section 107(a)(1) unequivocally imposes strict liability on the current owner of a facility\textsuperscript{50} from which there is a release or the threat of a release, without regard to causation.\textsuperscript{51} The Bank also argued that it was free from liability under CERCLA's "security-interest exemption,"\textsuperscript{52} which exempts from liability owners who do not participate in the management of a facility and who hold indicia of ownership merely to protect their security interest in the facility.\textsuperscript{53} After all, the Bank contended, it acquired ownership of the site only by foreclosing on its security interest in the property and purchasing the land at the foreclosure sale.\textsuperscript{54} The court rejected this argument as

\textsuperscript{45} See id.
\textsuperscript{46} Id. at 577-78.
\textsuperscript{47} Id. at 578.
\textsuperscript{48} Id. The court relied on H.R. REP. No. 172, 96th Cong., 1st Sess., pt. 1 (1979), reprinted in 2 CERCLA LEGISLATIVE HISTORY, supra note 1, at 525. The bills out of which CERCLA emerged are cited infra note 58.
\textsuperscript{49} 759 F.2d 1032 (2d Cir. 1985).
\textsuperscript{50} A facility is defined in CERCLA § 101(9), 42 U.S.C. § 9601(9):
\begin{enumerate}
\item (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
\item (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.
\end{enumerate}
\textsuperscript{51} 632 F. Supp. at 578 (citing \textit{Shore Realty}, 759 F.2d at 1044).
\textsuperscript{52} CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1982) (amended 1986) ("[The term 'owner or operator'] does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.").
\textsuperscript{53} See 632 F. Supp. at 579.
\textsuperscript{54} Id.
well, reasoning that after Maryland Bank & Trust foreclosed on and purchased the property, it became the full-fledged owner of the site and as such was no longer entitled to the security-interest exemption.\textsuperscript{55} According to the court, Congress meant the security-interest exemption to protect only mortgagees who held title by force of state mortgage laws.\textsuperscript{56}

In support of its holding, the court reviewed CERCLA's legislative history, the policies underlying CERCLA, and pertinent case law.\textsuperscript{57} The legislative history revealed that the first draft of the Comprehensive Oil Pollution Liability and Compensation Act\textsuperscript{58} contained an exemption to the definition of owner similar to the security-interest exemption in CERCLA.\textsuperscript{59} After analyzing a report accompanying that draft, the court found that, by including this exemption in CERCLA's definition of owner, "Congress intended to protect banks that hold mortgages in jurisdictions governed by the common law of mortgages, and not all mortgagees who later acquire title."\textsuperscript{60}

\textsuperscript{55} Id.
\textsuperscript{56} Id. ("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."). Maryland Bank & Trust also argued that it was an involuntary owner of the CMD site because it was compelled by FmHA to foreclose on and bid on the site, and therefore it was entitled to the ownership exemption of § 101(20)(A). Id. at 580 n.8. The court rejected this notion as well: "The Court declines to carve a judicially-created loophole in the statutory structure. The role of the FmHA was [not] pertinent . . . to the question of whether the bank is an owner within the meaning of the statute." Id.

\textsuperscript{57} 632 F. Supp. at 579-80.
\textsuperscript{58} H.R. 85, 96th Cong., 2d Sess. (1980). H.R. 85 was one of four bills from which CERCLA ultimately emerged. The other bills were H.R. 7020, 96th Cong., 2d Sess. (1980); S. 1480, 96th Cong., 1st Sess. (1979); S. 1341, 96th Cong., 1st Sess. (1979).

\textsuperscript{59} 632 F. Supp. at 579-80. The court quoted from H.R. 85:

\textsuperscript{60} 632 F. Supp. at 580. The court quoted from the report:

"Owner" is defined to include not only those persons who hold title to a vessel or facility but those who, in the absence of holding a title, possess some equivalent evidence of ownership. It does not include certain persons possessing indicia of ownership (such as a financial institution) who, without participating in the management or operation of a vessel or facility, hold indicia of ownership primarily to protect his security interest in the vessel or facility.

632 F. Supp. at 579 (quoting H.R. 85, 96th Cong., 1st Sess. § 101(4) (1979)).

Other relevant language from this same report was deleted by the court. The report continued:

Owners form one of the three major classes (the others being operators and guarantors) subject to liability under the Act. For example, a financial institution which held title primarily to secure a loan but also received tax benefits as the result of holding title would not be an "owner" as long as it did not participate in the management or operation of the vessel or facility.

The court also believed that acceptance of the Bank's security-interest exclusion argument would be inconsistent with CERCLA's policy of favoring private rather than government-financed cleanup of hazardous waste sites. Furthermore, the court reasoned that if the Bank's argument were accepted, the Bank could purchase the land at a bargain (because no one else would be in the market for a hazardous waste site) and then sell the waste-free site for an unfair profit after the federal government shouldered the costs of cleanup. Maryland Bank & Trust's position, the court noted, "would convert CERCLA into an insurance scheme for financial institutions, protecting them against possible losses due to the security of loans with polluted properties." The court reasoned that lenders could protect themselves by making prudent loans, a process that would entail conducting thorough investigations of sites before lending.

The court quickly dismissed the relevance of two cases cited by the Bank in support of its exclusion argument. In the first case, In Re T.P. Long Chemical, Inc., a bankruptcy court stated that had a bank possessed its collateral in a toxic waste dump pursuant to its security agreement, it would have qualified for the security-interest exemption and thus escaped liability. The Maryland Bank & Trust court considered the bankruptcy court's statement to be merely dictum. In the other case, United States v. Mirabile, a district court held that a former mortgagee who had purchased a site at a foreclosure sale and assigned it four months later was exempt from liability under the security-interest exemption. The Maryland Bank & Trust court declined to give the holding in Mirabile a broad reading to support the exemption claim of Maryland Bank & Trust, which had owned the CMD site for over four years.

In the final section of the Maryland Bank & Trust opinion, the court considered whether the Bank could avail itself of CERCLA's third-party defense. The defense exempts from liability an owner who can show

61. See 632 F. Supp. at 580. Congress was aware when it enacted CERCLA that the national aggregate cost of cleaning up toxic dumpsites would greatly exceed the fund. See S. REP. No. 848, supra note 1, at 18, reprinted in 1 CERCLA LEGISLATIVE HISTORY, supra note 1, at 325. Moreover, Congress wanted to ensure "that those responsible for any damage, environmental harm or injury from chemical poisons bear the costs of their actions." Id. at 13, reprinted in 1 CERCLA LEGISLATIVE HISTORY, supra note 1, at 320.
63. Id.
64. Id.
65. 45 Bankr. 278 (N.D. Ohio 1985).
67. 632 F. Supp. at 580.
70. Id. at 579-80.
71. Id. at 581.
that the hazardous waste release was caused solely by the act or omission of an unrelated third party.\textsuperscript{72} The United States argued that the defense was unavailable both because the Bank had a sufficiently close contractual relationship with the mortgagors and, alternatively, because the Bank had exercised no reasonable care with respect to the site.\textsuperscript{73} The court held, however, that there existed genuine issues of material fact on these issues and thus denied this part of the United States' motion for summary judgment.\textsuperscript{74}

III

DISCUSSION

A. The Bank as an Owner Under Section 107(a)

The district court's conclusion that Maryland Bank & Trust could be found liable for the government's response costs is consistent with the language of CERCLA, Maryland mortgage law, CERCLA case law, and public policy.

The court's rejection of the Bank's argument that only owners who are also operators may be held liable under CERCLA is persuasive and relatively complete.\textsuperscript{75} The only additional point that warrants mention is that the language of CERCLA itself does not support the Bank's position. Section 101(20)(A) plainly states that "'owner or operator' means . . . any person owning or operating such facility."\textsuperscript{76} Whether or not one agrees with this approach, CERCLA clearly "holds future owners of property responsible for the sins of prior owners."\textsuperscript{77}

The court also properly rejected the Bank's argument that it was entitled to CERCLA's security-interest exemption.\textsuperscript{78} The Bank, having purchased the CMD site, no longer held merely a security interest in the site. Rather, it had become a full-fledged owner of the property and thus subject to CERCLA liability. The remainder of this Note will examine in greater depth the laws and policies that support the court's refusal to

\textsuperscript{72} The third-party defense is contained in CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3), the text of which is set forth supra note 14. The elements of the defense are described infra text accompanying note 120.

\textsuperscript{73} 632 F. Supp. at 581.

\textsuperscript{74} Id. at 581-82. The United States and Maryland Bank & Trust have since settled this case. A Stipulation of Settlement and Approval was signed by Judge Northrup of the United States District Court for the District of Maryland on May 18, 1987. See also Andresky, Cover Your Assets, FORBES, Mar. 24, 1986, at 117.

\textsuperscript{75} See supra text accompanying notes 44-51.

\textsuperscript{76} 42 U.S.C. § 9601(20)(A).


\textsuperscript{78} See supra note 52 for the text of the security-interest exemption. See also Burcat, Environmental Liability of Creditors: Open Season on Banks, Creditors, and other Deep Pockets, 103 BANKING L.J. 509, 524-30 (1986) (discussing the meaning and purpose of a security interest).
apply the security-interest exemption to the Bank in *Maryland Bank & Trust*.

I. Maryland Mortgage Law

Maryland’s statutory and case law on mortgages and foreclosure counsel against accepting the Bank’s interpretation of section 101(20)(A) when a mortgagee has foreclosed on property and purchased it at the foreclosure sale.79 There exist three theories of mortgage law in the United States today: title theory, lien theory, and the intermediate theory.80 Under title theory, to which Maryland subscribes,81 legal title is always in the mortgagee until the mortgage has been satisfied or foreclosed.82 The mortgagee, however, has no right to possession and thus is considered to possess merely a security interest in the mortgaged property.83 Although the mortgagee holds legal title under Maryland law, it is not subject to liability under CERCLA.84 If the security-interest exemption means anything, it excludes from liability mortgagees who formally hold title pursuant only to title theory.85

Foreclosure and purchase of the mortgaged property at the foreclosure sale, however, drastically changes the title status of the purchasing mortgagee. Under Maryland law, a mortgagee may purchase property at a foreclosure sale even though it previously held the mortgage.86 Thus,

79. State mortgage law applies to the analysis of whether Maryland Bank & Trust falls within the liability provisions of CERCLA because Congress appended the security-interest exemption to the definition of “owner or operator” to accommodate state mortgage law. Specifically, Congress intended to exempt from the liability provisions parties who do not hold actual title but who hold title only by force of a state’s mortgage theory. See 632 F. Supp. at 579-80.


82. G. Osborne, G. Nelson & D. Whitman, supra note 80, § 4.1.

83. *Id*. Lien theory provides that the mortgagee holds no title and only has a security interest in the property. *Id*. § 4.2. The mortgagor has title and the right to possession until a valid foreclosure sale. *Id*. The intermediate theory gives the mortgagor the right to possession at least until default on the mortgage and gives the right to possession to the mortgagee upon default. *Id*. § 4.3. Some courts have stated that this means the mortgagor holds legal title until default, and the mortgagee holds title thereafter. *Id*. (and cases cited therein).

84. See 632 F. Supp. at 580.

85. *Id*.

86. See Weismiller v. Bush, 56 Md. App. 593, 595, 468 A.2d 646, 648-49 (Md. Ct. Spec. App. 1983) (“As far back as Murdock’s Case, 2 Bland 461, 468 (1828), Chancellor Bland concluded that a mortgagee was competent to buy the property at a foreclosure sale . . . .”); Heighe v. Evans, 164 Md. 259, 269-71, 164 A. 671, 676 (Md. App. 1933) (mortgagee entitled to bid on property at a foreclosure sale, not only to the extent of protecting his interests, but as freely as any other person); 55 Am. Jur. 2d Mortgages § 658 (1971) (mortgagee may purchase the mortgaged property at a foreclosure sale and, when the sale is completed and confirmed, the real estate becomes the property of the bank purchaser just as it would become the property of anyone else who could have purchased it at the foreclosure sale); see also Md. Rules
in effect, there are two different types of title: one type exists when the mortgagee holds only legal title under state law by virtue of its mortgage; the second materializes to the exclusion of the first when the mortgagee purchases the mortgaged property. The security-interest exemption in CERCLA logically must have been intended to protect only the holders of the first type of title because holders of the second type are full-fledged owners of the property.

Generally, a completed foreclosure sale passes all the right, title, and interest the mortgagor has in the property to the purchaser, and through the process of foreclosure, the mortgage ripens into a perfect title. In Maryland, title passes as the result of a valid foreclosure sale, but only after the sale is ratified by the courts. Only until the court ratification can the mortgagor challenge a foreclosure sale; that is, the right of redemption of a mortgagor ends with a court's ratification and the subsequent passing of the title to the purchaser. Thus, because the process of foreclosure and sale was complete and consistent with Maryland law, Maryland Bank & Trust obviously no longer held only an indicia of ownership to protect a security interest. Maryland Bank & Trust was not entitled to take cover under the security-interest exemption because after the Bank validly purchased the property, it no longer held title merely by the operation of the common law.

2. United States v. Mirabile

Maryland Bank & Trust inappropriately relied on United States v.

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Code Ann. § W74g2 (1986) (rule governing sale when vendor and purchaser are the same). The only limitation on a bank's ability to purchase the mortgaged property at the foreclosure sale is that the transaction will be subjected to close scrutiny because of possible abuses by the purchasing financial institution. See Southern Md. Oil, Inc. v. Kaminetz, 260 Md. 443, 272 A.2d 641, 645 (Md. App. 1971) ("When the purchaser at a foreclosure sale is the mortgagor or his assignee, the Courts will examine the sale closely to determine whether or not it was bona fide and proper."); Heighe v. Evans, 164 Md. 259, 270, 164 A.2d 671, 676 (Md. App. 1933) (mortgagee's power to bid at a foreclosure sale on the mortgaged property is subject to the condition that a sale to him will be scrutinized with the utmost care, and will be voided upon slight evidence of partiality").

88. Id. § 785. See Burcat, supra note 78, at 535-36.
90. See Butler v. Daum, 245 Md. 447, 453, 453, 226 A.2d 261, 264 (Md. App. 1967) ("Although the jurisdiction of equity does not become complete until the filing of the report of sale, nevertheless the sale in effect foreclosed the mortgage and divested the mortgagors of all right of redemption."); G. Osborne, G. Nelson & D. Whitman, supra note 80, § 7.1 (mortgagor has the right to redeem the mortgage at any time before a valid foreclosure sale).
Mirabile in its argument that it was not liable as an owner pursuant to CERCLA's security-interest exemption. Although the Maryland Bank & Trust court correctly rejected the Bank's reading of Mirabile, it inadequately distinguished Mirabile from Maryland Bank & Trust in its own analysis of the Bank's liability.

In Mirabile, the United States sued the Mirabiles, the owners of a hazardous waste site, to recover cleanup costs the government had incurred under CERCLA. A previous owner, Turco Coatings, had deposited wastes on the property until 1980, when it ceased its operations at the site. Less than one year later, the mortgagee, American Bank & Trust Company (ABT), foreclosed on the property. ABT successfully bid on the site at the foreclosure sale, later assigning the bid to the Mirabiles. The Mirabiles purchased and continued to own the property until the time of the government cleanup efforts.

The Mirabiles joined as defendants ABT, Mellon Bank (East) National Association (Mellon), and the United States on behalf of the Small Business Administration (SBA), all three of which were involved at some point in the financing of Turco's operations. The court's decision to grant the ABT and SBA motions for summary judgment—holding that they could not be found liable—but to deny Mellon's motion for summary judgment on the issue of liability was based upon the institutions' respective participation in the management of the Turco facility.

After purchasing the property at the foreclosure sale, ABT assigned its bid to the Mirabiles four months later. Between the time that ABT purchased the property and then assigned the bid, its only actions were to secure the property against vandalism, to inquire about the cost of removing some drums, and to show the property to prospective purchasers. The court held that the actions taken by ABT with respect to the foreclosure obviously were undertaken by ABT to protect its security interest in the Turco site. The court noted that Congress, in enacting CERCLA, had manifested its intent to impose liability on those parties

92. Id. at 20,994.
93. Id. at 20,995-96.
94. Id. at 20,996.
95. Id.
96. Id. at 20,995.
97. Id.
98. See id. at 20,996-97. The § 101(20)(A) security-interest exemption will exempt a holder of a security interest only if he did not participate in the management of the facility. See supra note 52 for the text of the exemption.
99. 15 Envtl. L. Rep. at 20,996. There is some question whether ABT ever really had full title in this case because ABT assigned its "bid" rather than its title to the Mirabiles and the Mirabiles accepted a sheriff's deed to the property after the bid assignment. Id.
100. Id.
101. Id.
responsible for improper hazardous waste disposal and those who profited from such noxious practices.\(^\text{102}\) With respect to ABT, the court concluded that before a secured creditor such as ABT may be held liable for cleanup costs, it must, at a minimum, participate in the day-to-day operation of the site.\(^\text{103}\)

The Maryland Bank & Trust court distinguished Mirabile on the ground that there the mortgagee-turned-owner (ABT) promptly assigned its bid on the property, while Maryland Bank & Trust, on the other hand, held title to the property for over four years.\(^\text{104}\) However, length of ownership alone cannot reconcile the two cases for the simple reason that, in Mirabile, ABT could not have been found liable even if it had held title for more than several months. ABT purchased the property at the foreclosure sale after the hazardous wastes had been dumped on the property by the previous owner and assigned its bid before the government began the cleanup efforts resulting in the litigation.\(^\text{105}\) Section 107(a) holds liable only a present owner or operator of a hazardous waste site or any person who owned or operated the site at the time the hazardous substances were deposited there.\(^\text{106}\) Therefore, a party who simply owns a site after the disposal of the wastes but before government cleanup—no matter how long that period lasts—cannot be held liable for the costs of cleanup. In this regard, a distinction between Mirabile and Maryland Bank & Trust based on the length of time title was held after foreclosure makes no sense.

A more useful distinction might be drawn between Mirabile and Maryland Bank & Trust based upon management. The Mirabile court granted ABT’s motion for summary judgment, holding it not liable, because ABT never participated in the management of the facility either before or after it bid on the property; ABT only got involved to the extent necessary to protect its security interest.\(^\text{107}\) In Maryland Bank & Trust, the court did not discuss the Bank’s management of the site, but having held title for four years, the Bank must have had some involve-

\(^{102}\) Id.

\(^{103}\) Id. at 20,997. The court also concluded that SBA was not liable. Id. SBA never took legal or equitable title to the property, unlike ABT, and the only evidence of SBA’s participation in the management of the Turco site was their involvement with some purely financial aspects of the operation. Id. Such participation, the court believed, was insufficient to bring a lender within the scope of CERCLA liability. Id. The court denied Mellon’s motion for summary judgment because there was a genuine issue of fact regarding Mellon’s participation in the management of the site. Id. An officer of Mellon had visited the site frequently and may have had more of a day-to-day involvement in the management of the Turco facility. Id.

\(^{104}\) 632 F. Supp. at 579-80; see supra text accompanying note 70.

\(^{105}\) See supra notes 93-96 and accompanying text.

\(^{106}\) CERCLA § 107(a)(1), (2), 42 U.S.C. § 9607(1), (2); see supra note 6 for the full text of these sections.

\(^{107}\) See supra text accompanying notes 100-01.
ment in managing the site after acquiring title, probably more in an effort to protect its investment interest rather than to protect its already-perfected security interest. The record in *Maryland Bank & Trust* indicates that the Bank held insurance on the property, conveyed a portion of the parcel to a third party, and negotiated for a right-of-way across the property with another party.\textsuperscript{108}

*Maryland Bank & Trust* is therefore readily distinguishable from *Mirabile*. ABT was not subject to liability under CERCLA because it did not own the property at the time the wastes were dumped or at the time of cleanup. Also, even if Maryland Bank & Trust were correct in its assumption that it held a security interest in the CMD site, it would not be entitled to CERCLA's security interest exemption for the reason that the exemption is only available when the party holding the indicia of ownership does not participate in the management of the facility.\textsuperscript{109}

3. **CERCLA Policy**

The structure and history of both CERCLA and SARA, along with sound public policy, support categorizing a mortgagee-turned-owner, such as Maryland Bank & Trust, as an owner not entitled to the shield of the security-interest exemption. Congressional intent to keep the security-interest exemption narrow is evidenced by several factors. First, liability under CERCLA is extremely widespread. Courts have applied the liability provisions of the statute to a myriad of situations involving past and present owners and operators of sites on which hazardous wastes have been dumped.\textsuperscript{110} In the face of these court decisions, Congress, when it amended CERCLA in 1986, did not narrow significantly the liability provisions or alter their interpretation by the courts. Moreover, there are only three statutory defenses to CERCLA-imposed liability, two of which—the act of God and the act of war defenses—are unlikely ever to be invoked.\textsuperscript{111} The last defense, the third-party defense, is also quite limited because the third party must be solely responsible for dumping the wastes, there must be no contractual relationship between the third party and the defendant, and the defendant must act with due care and take reasonable precautions to prevent a hazardous release.\textsuperscript{112}

\textsuperscript{108.} *See supra* text accompanying notes 30-32.

\textsuperscript{109.} *See CERCLA § 101(20(A), 42 U.S.C. § 9601(20(A). This section provides: "‘owner or operator’ ... does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility" (emphasis added).

\textsuperscript{110.} *See supra* note 3.

\textsuperscript{111.} *See, e.g., United States v. Argent, 21 Env’t Rep. Cas. (BNA) 1354, 1356 (D.N.M. 1984) ("extremely limited affirmative defenses [are available] under § 107(b)"). The act of God and act of war defenses are contained in § 107(b), the text of which is set out *supra* note 14.

\textsuperscript{112.} *See CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). *See supra* note 14 for the text of this section; *see also infra* notes 119-34 and accompanying text. Congressman Florio, CER-
Having imposed widespread liability and afforded only limited defenses, it seems reasonable to conclude that when Congress provided an express exemption from liability, it expected the exemption to be narrowly applied.

The legislative history behind the SARA exemption from liability for state and local governments further indicates that liability should be extended to lenders that have acquired title to contaminated property through foreclosure proceedings. When Congress amended CERCLA in 1986, it did not broaden the security-interest exemption, but it did add minor new exemptions to the definition of owner or operator and to section 107(a) liability. In particular, SARA exempts state and local governments from liability in certain limited situations. During the Senate's consideration of one of the bills out of which SARA eventually emerged, Senator Stafford explained why the Senate deliberately kept the exceptions to CERCLA liability quite narrow despite lobbying efforts to broaden the exemption:

[The state and local government exemption] is very narrow and justifiable because of the special duties and obligations which fall on the government. Governments acquire title or possession of property involuntarily; banks and other businesses do not. . . . For these reasons and others, the reported bill alters the law's liability standards for units of State and local government. But for all others, the standard remains, as it should, unchanged.

Senator Stafford's statement is evidence that a construction of the secur-
ity-interest exemption that holds lenders such as Maryland Bank & Trust liable when they voluntarily acquire title through foreclosure is consistent with congressional intent.

An important policy reason to hold foreclosing mortgagees liable for response costs is that if they were exempted from liability they could unfairly profit from the government's payment of cleanup costs. Foreclosing mortgagees could purchase CERCLA sites cheaply at foreclosure sales (as no one else would be interested because of potential liability) and then wait for the government to clean up the sites with government funds. The former mortgagees then could proceed to sell the decontaminated sites at large profits. In effect, mortgagees-turned-owners, and no other landowners, would receive the equivalent of government subsidies to clean up their land. There is no evidence that Congress intended to provide a special CERCLA subsidy for mortgagees that become owners.

There are additional policy reasons that favor holding mortgagees-turned-owners liable for response costs. A policy that exempts such owners from liability would provide mortgagors with an incentive to shirk their responsibilities and abandon their property to the mortgagees (who would have no liability), thereby leaving the government to shoulder the cleanup costs if the mortgagor could not be found.118 As long as foreclosing lenders face liability, they, like other landowners, will be motivated to avoid releases and to keep their property and the surrounding areas free from hazardous substances. Finally, the threat of liability will prompt lending institutions to investigate properties for hazardous substances before financing mortgages.

B. Applicability of the Third-Party Defense

Even if a mortgagee-turned-owner is categorized as an owner under CERCLA and thus held liable for response costs, it may be able to avail itself of CERCLA's third-party defense, which is set forth in section 107(b)(3).119 This Note now will analyze the third-party defense and its expansion under SARA.

1. The Third-Party Defense Prior to Amendment

To establish the third-party defense, the defendant must prove four

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[supra note 14]
elements: (1) a third party’s act or omission was the sole cause of the release; (2) the third party is neither an employee nor an agent of the defendant; (3) the act or omission of the third party did not occur in connection with a direct or indirect contractual relationship with the defendant; and (4) the defendant exercised due care with respect to the hazardous substances and took precautions against foreseeable acts and omissions of the third party.  

Lenders easily should be able to establish the first element; most likely, lenders rarely contribute to or cause hazardous releases. Most lenders also should be able to satisfy the second and fourth elements. The only requirement for the second element is that the third party not be an agent or employee of the lender; because landowners and lenders are in a mortgagor-mortgagee relationship, one is unlikely to be the agent or employee of the other. The fourth element, the due care requirement, will depend on the care the lender took after discovering the presence of hazardous wastes on the site. With reasonable effort, this element can be satisfied because courts will take into account such factors as whether the lender put up fences and warning signs to prevent harm to individuals who might enter the site.

Problems may arise, however, in connection with a lender’s attempt to establish the third element of the third-party defense. Courts must decide whether the term “contractual relationship” includes either the loan agreement between the third party and the lender or the deed acquired by the lender at the foreclosure sale.

2. The Third-Party Defense After Amendment: Protection for the Innocent Purchaser

In the 1986 amendments to CERCLA, Congress broadened the third-party defense to provide protection for innocent purchasers by defining the term “contractual relationship” for the purposes of CERCLA section 107(b)(3). Although the Senate bill contained no provisions

120. CERCLA § 107(b), 42 U.S.C. § 9607(b); see also United States v. B.R. MacKay & Sons, Inc., No. 85 C 6925, slip op. at 5 (N.D. Ill. Nov. 28, 1986) (LEXIS, Fenv-CS library) (discussing the elements of the third-party defense).

121. In Maryland Bank & Trust, the United States alleged that the Bank made no attempt to secure the CMD site to prevent harm to people who might wander onto the property. Cross-Motion, supra note 25, at 53-54.

122. See SARA § 101(f), 42 U.S.C.S. § 9601(1)-(36). This section of SARA provides, in pertinent part:

(f) Additional Definitions.—Section 101 of CERCLA is amended by . . . adding the following new paragraphs at the end thereof:

“(35)(A) 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 or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances
to amend the third-party defense, the House bill\textsuperscript{124} included an amendment\textsuperscript{125} introduced by Representative Frank that released from liability any person who (1) was an owner of the real property on which the hazardous waste was located; (2) did not conduct any activities relating to the disposal of the substances at the site; (3) did not contribute to the release of the hazardous substance; and (4) purchased the property without either constructive or actual knowledge that the hazardous wastes were dumped there.\textsuperscript{126}

From the debates on the Frank amendment, it is evident that the general feeling in the House was that the unamended third-party defense 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).

"(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 the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceeding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

"(C) Nothing in this paragraph or in section 107(b)(3) shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this Act. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 107(a)(1) and no defense under section 107(b)(3) shall be available to such defendant.

"(D) Nothing in this paragraph shall affect the liability under this Act of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.".


\textsuperscript{126} 131 CONG. REC. H11,625 (daily ed. Dec. 10, 1985) (amendment as passed). The amendment, as finally incorporated into H.R. 2817, provided in part:
was wholly inadequate;\textsuperscript{127} the third-party defense established by CERCLA potentially caught too many innocent individuals within its web of liability.\textsuperscript{128}

The final version of SARA incorporated the spirit of the Frank amendment, but changed the form. Rather than directly amending section 107(b)(3), it defined the term "contractual relationship" in a general definitional section added to the statute.\textsuperscript{129} According to SARA, "contractual relationship" includes land contracts, deeds and other instruments transferring title or possession.\textsuperscript{130} Consequently, the defense is not available to most owners who have such a contractual relationship with a third party. The amendment makes an important limited exemption, however, for landowners who acquired property after the disposal of hazardous substances and who did not know, and had no reason to know, of the presence of hazardous substances.\textsuperscript{131} Thus, as with the Frank amendment, if a mortgagee purchases property after hazardous substances have been disposed on it, the mortgagee may be able to avoid liability if it can show no actual or constructive knowledge of waste dumping at the site.

The difficult issue for a former mortgagee asserting the innocent purchaser defense will be showing that it had no reason to know. Under the amendment, the phrase "no reason to know" means that "the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize

\begin{itemize}
\item \textsuperscript{(m)} Landowner Liability.—There shall be no liability under subsection (a)(1) of this section [107] for a person otherwise liable who can establish by a preponderance of the evidence that he—
\begin{itemize}
\item \textsuperscript{(1)} is the owner of the real property on or in which the facility is located;
\item \textsuperscript{(2)} did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, the release or threatened release of which causes significant environmental hazards;
\item \textsuperscript{(3)} did not contribute to the release or threat of release of a hazardous substance at the facility through any act or omission; and
\item \textsuperscript{(4)} did not acquire the property with actual or constructive knowledge that the property was used prior to the acquisition for the generation, transportation, storage, treatment, or disposal of any hazardous substance."
\end{itemize}
\end{itemize}

\textsuperscript{128.} \textsuperscript{Id.}
\textsuperscript{129.} Speaking in support of the Frank amendment, one House member noted:

\begin{quote}
I think somebody who buys a piece of ground in good faith, without actual or constructive knowledge, that is, any reasonable cause to believe whatsoever that any of these criteria [sic] were on the land, that it was ever used for toxic waste-dumping purposes, ought to have this as a defense. Besides, you have to prove each one of these things by a preponderance of the evidence, anyway. So the burden is against you. You have the burden to prove these kinds of things.
\end{quote}

\textsuperscript{Id.} at H11,160 (remarks of Rep. Glickman).

\textsuperscript{129.} \textsuperscript{See SARA § 101(f), 42 U.S.C.S. § 9601(1)-(36).}
\textsuperscript{130.} \textsuperscript{Id.; see supra note 122 for the SARA definition of "contractual relationship."}
\textsuperscript{131.} SARA § 101(f), 42 U.S.C.S. § 9601(1)-(36).
LENDER LIABILITY

The Conference Committee report defines "good commercial or customary practice" to mean "that a reasonable inquiry must have been made in all circumstances, in light of best business and land transfer principles."\(^\text{133}\)

The Conference Committee report reveals that Congress intended to hold commercial parties, presumably including financial institutions, to a high standard of care in their transactions.\(^\text{134}\) This is a realistic standard to impose on financial institutions. Financial institutions generally have the resources to inquire thoroughly whether hazardous wastes have been dumped on property. Financial institutions typically also have the legal and real estate expertise to protect themselves from liability, even with such a high standard of care. Given the availability of resources and expertise, this standard will force financial institutions to be much more careful in their lending policies or at least in deciding whether to purchase real estate at foreclosure sales. Extreme prudence and caution in real estate transactions not only will help ensure that financial institutions may invoke the third-party defense, but they also will further the goals of CERCLA by promoting careful hazardous waste practices among those seeking the help of financial institutions.

C. Problems with Lender Liability Under CERCLA

While there are many compelling reasons to characterize foreclosing financial institutions as owners under section 107(a), there are also some troubling consequences. The imposition of liability on foreclosing financial institutions may create problems that do not arise when other landowners are held liable.

One potential problem is that mortgagors may abandon their property when they know it will be the subject of a government cleanup action. If the mortgagor cannot be found and joined as a defendant in a government action to recover costs, the mortgagee (now the owner if it purchased the site at the foreclosure sale) may be held solely liable for the response costs. The only shield available to the mortgagee-turned-owner at this point would be the third-party defense, which requires the mortgagee to establish that it had no reason to know that the property was contaminated at the time of acquisition.\(^\text{135}\) Perhaps the mortgagee could always refuse to purchase the property at the foreclosure sale.\(^\text{136}\) No one else, however, would want to purchase the liability at the foreclosure sale.

\(^{132}\) Id.


\(^{134}\) Id. ("Those engaged in commercial transactions should, however, be held to a higher standard than those who are engaged in private residential transactions.").

\(^{135}\) SARA § 101(f), 42 U.S.C.S. § 9601(1)-(36).

\(^{136}\) See supra note 56 for a discussion of Maryland Bank & Trust's argument that it was compelled by FmHA to bid on the CMD site at the foreclosure sale. See also Burcat, Foreclo-
sure sale either. As a result, the lender would lose its investment, and the
government would be forced to pay the costs of cleanup. If a trend does
develop in which mortgagors abandon hazardous waste sites to mortga-
gees, lenders will have to make one of two choices: either they can refuse
to purchase the property, and take the amount still owed on the mort-
gage as a loss, or they can purchase the property at the foreclosure sale,
pay the hazardous waste cleanup costs, and hope that the value of the
property after cleanup exceeds the expenses incurred. Often, however,
the costs of cleaning up even a modest hazardous waste site rise far above
the value of the real estate, even after the waste has been removed.\textsuperscript{137}
Given that neither of these choices is attractive or profitable, mortgagor
abandonment appears to place mortgagees in a difficult position not gen-
erally faced by other owners or potential owners under CERCLA.

Lenders can take several steps to protect themselves from losses due
to abandonment of hazardous waste sites by mortgagors. First, lenders
can attempt to procure insurance. In the wake of widespread liability
under CERCLA, however, potentially liable parties often find that ob-
taining adequate, or even any, insurance coverage is difficult.\textsuperscript{138} Second,
lenders can include an indemnity agreement in their mortgage contracts
requiring mortgagors to indemnify the lender for any costs incurred
under CERCLA. This method of protection will be of limited useful-
ness, however, if a mortgagor is insolvent or cannot not be found when
the cleanup costs are incurred. Third, lenders can seek guarantees from
mortgagors that the land to be mortgaged contains no hazardous wastes;
in the event of mortgagor abandonment, the lender would have an easier
task of proving that it had “no reason to know.” Fourth, lenders might
require that mortgagors refrain from conducting activities that could
lead to toxic waste problems. Alternatively, lenders could require
greater security for their loans by obtaining a security interest in addi-
tional property owned by the borrower.\textsuperscript{139}

There can be no doubt that the double threat of incurring extensive
liability under CERCLA and losing a real estate investment will compel
lenders to be more prudent in their lending policies. This increased pru-
dence in turn will make mortgage financing more difficult; lenders may

\textsuperscript{137}Bleicher & Stonelake, \textit{Caveat Emptor: The Impact of Superfund and Related Laws on

\textsuperscript{138}Regarding the current difficulty in obtaining insurance coverage for hazardous waste
sites, see Kunzman, \textit{The Insurer as Surrogate Regulator of the Hazardous Waste Industry:
Solution or Perversion?}, 20 \textit{FORUM} 469 (1985); Rodburg & Chesler, \textit{Beyond the Pollution Ex-
clusion: Emerging Parameters of Insurance Coverage Beyond Superfund Liability}, 10 Chem. &

\textsuperscript{139}Bleicher & Stonelake, \textit{supra} note 137, at 10,023. See also Burcat, \textit{supra} note 78, at
539-41 for additional recommendations to help limit the environmental liability of lenders.
refuse to finance a mortgage on property when there is even a remote likelihood that hazardous waste problems may exist then or arise in the future. In addition, the time that lenders will require to examine the property at issue thoroughly will delay real estate transactions. Moreover, the transaction costs of real estate deals will rise to reflect the increased costs associated with extensive land examinations.

Unfortunately, the impact of more restrictive lending policies and increased transaction costs may fall unevenly on small borrowers\textsuperscript{140} and industries that tend to generate hazardous by-products. In the future, parties such as the dump owner in *Maryland Bank & Trust* may find it difficult to obtain funding for their ventures—ventures that, aside from potential waste problems, may benefit society substantially.

CONCLUSION

The district court's decision in *Maryland Bank & Trust* opens up a new area of liability under CERCLA—mortgagees that foreclose on and purchase contaminated sites probably will be held liable as owners under CERCLA for the costs of cleaning the sites. Lenders in this position will not be able to invoke CERCLA's security-interest exemption because, when a lender purchases a site, its security interest in the property ripens into full title. It seems relatively clear that the security-interest exemption was not intended to protect lenders who voluntarily acquire full title.

The *Maryland Bank & Trust* court noted, however, that mortgagees-turned-owners may be able to avoid expensive cleanup costs by asserting one of CERCLA's defenses to liability. Specifically, the third-party defense, as amended last year by the Superfund Amendments and Reauthorization Act of 1986, might be available to exonerate lenders from liability. If the hazardous wastes were dumped solely by a party unrelated to the lender, and the lender did not know and had no reason to know of the existence of hazardous wastes on the property, the lender may be considered an "innocent purchaser" under CERCLA and thus entitled to the protection of the third-party defense.

Although the extension of liability to lenders is consistent with CERCLA law and policy, it is not without problems. To protect themselves from liability, lenders will have to institute more restrictive lending policies. As a result, commercial real estate transactions will become more expensive. Although real estate sales probably will not grind to a

\textsuperscript{140} A small borrower might not be able to afford to borrow if costs associated with obtaining a mortgage go up. Furthermore, in the event of a hazardous waste problem, small borrowers, such as private individuals or entrepreneurs, would not have the capital to clean up the sites themselves or to reimburse the government for its cleanup costs. A prudent lender might consider this when making loan decisions; that is, a lender would be wary of having to pay the cost of cleanup if the small borrower abandoned the property because of inability to pay for cleanup.
halt in the wake of the *Maryland Bank & Trust* decision, adverse impacts on real estate transactions are sure to materialize.