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While some states' mini-Superfund laws mirror CERCLA, a number of states have enacted statutes that offer clarification of federal provisions and varying degrees of protection to lenders. In this article, Larry Schnapf provides lenders and counsel with a useful overview of state-enacted lender-liability provisions.

Environmental Lender-Liability Statutes: Review of the States

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IN 1992, the Environmental Protection Agency (EPA) issued its lender-liability regulations (the EPA Lender-Liability Rule)[1] to clarify the scope of the so-called secured creditor's exemption under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[2] Since that time, a number of states have enacted their own lender-liability regulations or statutory provisions that limit the liability of financial institutions and fiduciaries under state environmental laws.

These state lender-liability provisions have not received much attention from the lending community. However, now that a federal appellate court has vacated the EPA Lender-Liability Rule,[3] the state provisions have taken on greater importance. This article discusses the scope of the various state lender-liability rules and describes the state superlien laws that can subordinate the security interests that banks may have in contaminated collateral.

Lender Liability under CERCLA

Financial institutions are primarily concerned with CERCLA, which

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imposes strict and joint liability on past and present owners or operators of facilities as well as generators and transporters of hazardous substances. CERCLA exempts from the definition of owners or operators any person who "without participating in the management of a...facility, holds indicia of ownership primarily to protect...a security interest in property contaminated with hazardous substances."

This provision is known as the secured lender's exemption, and cases have held that lenders may lose their immunity to liability for the cleanup of hazardous substances if the lenders (1) acquire title to contaminated property or (2) become so entangled in the day-to-day affairs of the borrower's operation that the lender is deemed to be "participating in the management of the facility."

Lender-Liability Statutes

Many of the state mini-Superfund laws contain the same secured creditor exemption contained in CERCLA. During the past few years, some states have enacted legislation or promulgated regulations that either added provisions limiting the liability of financial institutions and fiduciaries under state environmental laws or that clarified the scope of the existing lender-liability provisions.

The protection afforded to banks by these state statutes varies. Some states grant banks complete immunity from environmental liability; others limit the immunity to third-party suits. Some states specifically extend the protection to lenders acting as trustees or fiduciaries. Others require financial institutions to perform environmental due diligence to qualify for the liability exemption. As a result, counsel must review the provisions of each statute where a financial institution conducts business, as well as the state case law interpreting these statutes.

This article discusses only states that have adopted statutes or regulations to clarify the meaning of the CERCLA secured creditor exemption, not those that simply incorporated the CERCLA secured creditor exemption within state statutes.

Arizona

The state Department of Environmental Quality has proposed regulations that partly track the CERCLA Lender-Liability Rule.[4] Under these regulations, persons who do not participate in the management of a facility, held indicia of ownership primarily to protect a security interest, *and* conducted a phase I environmental site assessment for security interests created after the effective date of the regulations are excluded from the definition of owner. Persons who do not participate in the management of a facility are also excluded from the definition of operator. The regulations also set out the requirements of the phase I site assessment.[5]

The regulations provide that the term "participation in the management of a facility" does not include the following:

- mere ability to influence decision making;
- unexercised right to control facility operations;
- policing activities before foreclosure that are intended to protect a security interest so long as the policing activity does not rise to the level of participation in the management of a facility;
- loan workout activities that are defined as reasonable activities to prevent, cure, or mitigate a default by a borrower or steps taken to preserve or prevent the diminution of value of the security, provided such acts do not constitute actual participation in the operational affairs of the facility.

To preserve its immunity from liability, a secured creditor foreclosing on property would have to comply with the following stipulations:

- *does not* contribute to or aggravate a release of hazardous substances;
- *does* take such action as may be reasonably necessary to prevent the release or a further release of a hazardous substance;
- *does* undertake to sell or otherwise divest the property in a reasonably expeditious manner using appropriate commercial means after taking the particular facts and circumstances into account provided the person does not otherwise participate in the management of the facility;
- *does* disclose the known or likely presence of a release of hazardous substances on the property.

California

The state Hazardous Substance Account Act does not contain a specific secured creditor's exemption but instead defines potentially responsible parties (PRPs) as those persons liable under Section 107(a) of CERCLA.[6] Since the CERCLA secured creditor's exemption excludes lenders who do not participate in the management of a facility from the definition of owner and operator, lenders should presumably have the same protection under the California statute.

The state legislature also gave lenders certain additional rights regarding "environmentally impaired" property.[7] Under this legislation, secured lenders are given the statutory right to inspect property to determine if there has been a present or past release of hazardous substances. A lender may also waive its lien on any contaminated property as long as written notice of default is provided to the borrower and the property is determined to be "environmentally impaired" by a court. If the borrower has other noncontaminated property securing its loan obligations, a secured lender must first foreclose on this additional collateral to the extent required by law.

In addition, a secured lender is specifically authorized to carry out the following actions:

- bring a breach of contract action for any breach of an environmental representation or warranty;
- recover as damages cleanup costs reasonably advanced by a lender in good faith pursuant to a cleanup order or, when a cleanup order has not been issued, recover costs relating to a reasonable and good faith cleanup;
- indemnify for all liabilities to third parties that a secured lender may incur unless the damages result from acts or omissions of the lender or from acts or omissions that occur after the borrower is no longer an owner/operator of the real property;
- recover attorney fees relating to the breach.

Principal amounts owed may not be included in the calculation for measuring damages, although funds advanced to help a borrower perform a cleanup that are added to the principal debt owed may be recovered. Furthermore, a secured lender may not recover as damages cleanup costs and attorney fees if all of the following circumstances are true:

- the original principal amount of the loan was below $200,000;
- the secured lender accepted an environmental site assessment in connection with the environmental representation and warranty;
- the borrower was not responsible for the release;
- the deed of trust or mortgage was not conveyed, discharged, or foreclosed upon.

Colorado

The state Superfund law[8] mirrors its federal counterparts by providing that persons who hold indicia of ownership primarily to protect a security interest or a lien will not be considered owners liable for releases if they do not participate in the management of the property.

The state Superfund law was amended to provide that a lender who forecloses on contaminated property will not be liable for any third-party liability resulting from the migration of the contaminants from the property during the lender's ownership of the property *if* the lender did not knowingly or recklessly cause or allow others to cause new contamination or pollution.[9] However, to gain this immunity from third-party liability, the lender must do the following:

- perform a phase I investigation to determine the presence of contamination at the property;

- take reasonable steps to resell the property.

The limited protection from third-party liability only applies to actions that were filed after July 1,1990.

Illinois

The state Superfund law was amended to provide that financial institutions that have acquired ownership of a vessel or facility shall not be liable as an owner or operator of the vessel or facility unless the financial institution exercises "actual, direct and continual or recurrent managerial control in the operation of the vessel or facility that causes a release...resulting in removal or remedial action."[10] However, it would appear that the term "financial institution" is limited to the Illinois Housing Development Authority and not to commercial lending institutions.

Louisiana

The lender-liability provision of the state's Liability for Hazardous Substance Remedial Action statute takes a different approach from CERCLA or other state Superfund laws. Instead of excluding secured creditors from the definition of owner or operator, the Louisiana law creates an affirmative defense for lenders. Under this provision, any person who acquires ownership or control of property through a foreclosure proceeding by virtue of a security interest or who manages property for the purpose of administering an estate or trust containing the property may assert a defense to liability providing the secured creditor has not caused the discharge or disposal of hazardous substances or did not know at the time the security interest was perfected that the property contained hazardous substances.[11]

Massachusetts

The Massachusetts Oil and Hazardous Material Release Prevention and Response Act has lender-liability provisions that are similar to the CERCLA Lender-Liability Rule. However, the state provisions differ in several significant ways.[12] The state statute applies to secured lenders, wholly owned subsidiaries of secured lenders, and persons who have rights of participation in a security interest. In addition, the lender-liability protections of the statute also extend to fiduciaries.

The term "indicia of ownership primarily to protect a security interest" applies to traditional instruments such as mortgages, deeds of trust, pledges, liens, assignments, and any other rights or encumbrances against personal or real property. It also includes security interests that have a contingent interest component to assure repayment of a financial obligation. However, the term does not apply to interests in property that are held for investment purposes, leases, or consignments that would not be considered a secured transaction under

state commercial law and any interest of a person acting as a trustee of a property or business.

A secured lender will be considered "participating in the management of a site or vessel" if it substantially divests from the borrower or any other person possession or control of the aspects of the operation involving management of oil or hazardous materials. The following actions specifically will not constitute participating in the management of a facility:

- requiring or conducting an assessment of the site or facility;
- periodically or regularly monitoring the business conducted at the site or facility;
- inserting covenants, warranties, or representations in the loan documents requiring compliance with environmental laws, proper handling of hazardous materials, or providing the lender with periodic information regarding oil or hazardous materials activities;
- providing general business or financial advice or guidance to the borrower so long as the advice or guidance does not pertain to the management of oil or hazardous materials;
- providing information or advice on how a borrower may comply with state or federal environmental laws and how a borrower may identify and select a hazardous-waste disposal facility;
- engaging in workouts, restructurings, or refinancings and undertaking other activities to protect and preserve the value of the security interest so long as the lender does not become involved in the aspects of the borrower's operations involving the management of oil or hazardous materials.[13]

A secured lender who acquires ownership or possession of a site or a vessel will not be considered an owner or operator of that vessel if the lender satisfies all of the following requirements:

- *immediately* notifies the state environmental authority of any release or threatened release;
- provides reasonable access to state employees or contractors performing response actions;
- takes all reasonable steps to contain the release and limit exposure of other persons to the release, such as by erecting fencing;
- complies with the state National Contingency Plan (NCP) if the secured lender undertakes a voluntary response action;

- tries diligently to sell or otherwise divest itself of ownership or possession of the site or vessel.

To determine whether a secured lender has acted diligently to divest itself of the property, the following factors must be examined:

- how the site or vessel was used during the period that the lender owned or operated the property;
- market conditions at the time of the sale;
- the extent of contamination and the impact this contamination had on marketability;
- the extent to which the secured lender complied with applicable environmental laws;
- any legal constraints that may have affected the sale or divestment of the property.

The statute contains certain presumptions for determining if a lender has diligently acted to sell or divest itself of the site or vessel. These presumptions are based on the length of time that the secured lender owned or operated the site or vessel. For the first 18 months, there is a rebuttable presumption that the lender is acting diligently to divest itself of the property or vessel. A party seeking to impose liability on a lender during this initial period has the burden of proof to establish by a preponderance of the evidence that the lender was not acting diligently to divest itself of the property. If the secured lender has not divested itself of the site or vessel after 18 months, then the lender has the burden of proof during the next 42 months to demonstrate by a preponderance of the evidence that it has acted diligently to divest itself of the property.

If the secured lender has still failed to divest itself of the property after five years but can demonstrate by a preponderance of the evidence that it has satisfied all of the six requirements for being excluded from the definition of owner or operator, then the lender will only be liable to the state for response costs incurred by the state up to the value of the property. While it is unclear from the statute, it would appear that such a qualifying secured lender will not be liable for response costs incurred by third parties.

Even if the secured lender qualifies for the exemption from liability, this immunity only applies to releases that took place before the date that the lender acquires ownership or possession of the site or vessel. A lender who meets the test for the secured lender exemption will still be considered an owner or operator and will be liable for a release that began after the date that the owner or operator acquired ownership or possession, even if the hazardous materials were placed on the property before that date.

Furthermore, a secured lender who otherwise qualifies for the secured lender exemption will forfeit immunity if the lender abandons a

site where there is a release or threatened release of oil or hazardous materials.

Fiduciaries who acquire title to or exercise control over a site or vessel may also be exempt from the definition of owner or operator provided the fiduciary satisfies certain conditions. In such a case, the grantor or settlor of the estate shall be liable for response costs to the extent that the assets of the estate are inadequate to pay for the response costs.

The following categories of persons fall within the definition of *fiduciary:*

- a person acting as an executor, administrator, guardian, or conservator;
- a trustee under a will or inter vivos instrument creating a trust under which the trustee takes title to or otherwise controls or manages property for the purpose of conserving it;
- a court-appointed receiver;
- a trustee appointed under the federal bankruptcy laws;
- an assignee or a trustee acting under an assignment made for the benefit of creditors;
- a trustee acting under an indenture agreement or similar financing agreement, debt securities, certificates of interest or participation in any such debt certificates, and any successor of such trustee;
- any person who holds legal title to, controls, or manages directly or indirectly any site or vessel as a fiduciary for the purpose of administering an estate or trust that contains the site or vessel.

The rules for fiduciaries who assume ownership or control over a site or vessel are similar to those that apply to secured lenders. However, the fiduciary rules contain two additional notification requirements. A fiduciary who is acting pursuant to an assignment made for the benefit of creditors must notify the state upon the acceptance of that assignment. In addition, a fiduciary is required to notify the state when the fiduciary learns or has a reasonable basis to believe that the assets of the estate or trust will not be sufficient to respond to an imminent hazard to public health or the environment.

As far as a fiduciary's obligations to perform a response action, the fiduciary is only required to take reasonable steps to contain a release or prevent exposure to other persons when there are sufficient assets in the estate. If the fiduciary has made the required notifications to the state and there are insufficient funds in the estate or trust to respond to a release, a fiduciary will not be required to use its own or any other funds to respond to a release. To determine whether sufficient funds exist in an estate or trust to respond to a release or threatened release, a fiduciary must include the following assets:

- any assets in the estate or trust in which the site or vessel are included;
- any assets that are or are placed in any other estate or trust by action of or on behalf of settlor or grantor of the estate or trust after the fiduciary learns of the release, provided that the settlor or grantor is or was an owner or operator of the site or vessel and such estate or trust is managed or controlled by the fiduciary;
- any assets that are transferred out of the estate by the fiduciary at the time or after the fiduciary learns of the release or threatened release for less than full and fair consideration as determined by the fiduciary in good faith.

Minnesota

The state Environmental Response and Liability Act (MERLA)[14] was amended by the Land Recycling Act to provide that lenders who finance purchases of contaminated property that will be voluntarily cleaned up will not be liable for remediating the contamination at the site that is not covered by the voluntary cleanup.[15]

Missouri

The state Superfund provides that a person who holds indicia of ownership without participating in the management of real or personal property shall not be considered an owner or operator of real or personal property or a person having control over the real or personal property.[16] Lenders who become owners of real or personal property are also not liable for response costs or third-party liability arising from contamination or pollution that took place before the date that the lender assumed ownership of the property.[17] The lender-owner will also not be liable for any new contamination or pollution that occurs during its ownership of the property so long as the lender-owner does not knowingly or recklessly cause or allow others to cause new contamination and the lender-owner takes reasonable steps to resell the property.[18] The state Superfund also provides that a fiduciary shall not be personally liable to any beneficiary for any diminution of property value because of noncompliance with environmental laws.[19]

The statute indicates that "participating in the management" of property does not include monitoring a debtor's business or acquiring title in lieu of foreclosure to satisfy a debt.[20] However, the law does not indicate what constitutes taking reasonable steps to resell the property.

The law contains a list of the kinds of financial institutions that are covered by the lender-liability provision. These include a bank or bank holding company, a savings and loan association, a credit union, an insurance company, a consumer finance company, or a mortgage company that holds a bona fide security interest that was not obtained primar-

ily for the purpose of avoiding environmental liability. The law then lists a number of actions that financial institutions may take that fall within the protection of the state lender-liability provisions. These actions include:

- foreclosing on a debt;
- receiving an assignment of a debt;
- receiving a deed in lieu of foreclosure or other conveyance in partial or full satisfaction of a debt;
- obtaining a receiver in anticipation of foreclosure regardless of whether the lender actually becomes the owner of the property;
- obtaining title pursuant to an execution of judgment when the financial institution is a regulated creditor principally in the business of extending credit.[21]

The state version of the Resource Conservation and Recovery Act (RCRA) also contains a secured creditor exemption for persons who hold indicia of ownership in an underground storage tank primarily for the purpose of protecting a security interest in or a lien on the tank or the property where the tank is located so long as the person does not participate in the management of the underground storage tank or is not primarily engaged in petroleum production, refining, and marketing.[22] This law also provides that "participating in management" does not include monitoring a debtor's business or acquiring title in lieu of foreclosure to satisfy a debt.[23]

New Hampshire

The New Hampshire Hazardous Waste Cleanup Fund (HWCF) has a secured creditor exemption that is modeled on the CERCLA provision. Under the HWCF there are essentially two categories of "holders" who will not be liable to the state or any third persons for response costs associated with releases of hazardous waste or materials.[24] These holders include:

- a person holding indicia of ownership primarily to protect a security interest in real or personal property;[25]
- a person who does not participate in the management of a facility (a "qualified holder").

The HWCF tracks the federal definition for what constitutes holding indicia of ownership primarily for the purpose of protecting a security interest with two exceptions. A lender may establish that it is holding the security interest primarily for the purpose of protecting its security interest if it lists the property for sale within five months of foreclosure. In addition, within the first three years after foreclosure, a holder is entitled to a presumption that it holds ownership primarily for the purpose of protecting its security interest.[26]

The HWCF definition of "participation in the management of a facility" mirrors the federal definition. In addition, the statute contains the following list of activities that do not constitute participating in the management of a facility:

- taking title by foreclosure or similar means;
- conducting or requiring a borrower to perform an environmental site assessment;
- withholding funds under an existing loan obligation or restructuring or renegotiating the terms of a borrower's obligations including but not limited to the payment of interest, extension of payment periods, or the issuance of additional funds;
- providing financial advice to the borrower;
- requiring or advising the borrower to comply with state or federal environmental laws;
- collecting rents, maintaining utility services, and securing the facility from unauthorized entry;
- undertaking any cleanup action approved by the state.[27]

The scope of liability of the two categories of holders is not congruent. A qualifying holder cannot be liable to the state or any other persons for response costs associated with the cleanup of releases of hazardous substances since by definition it is not participating in the management of a facility and does not have indicia of ownership.[28] However, a qualifying holder will lose its immunity from liability if it negligently or intentionally causes a release.[29] If a release occurs during the time that a qualifying holder has indicia of ownership, the holder will have limited liability for releases that it may demonstrate were not caused by its acts or omissions. In such cases, the holder will be liable for the lesser of the value of the secured property or the amount of indebtedness secured by the facility.[30]

The HWCF also applies to fiduciaries. Under the statute, a fiduciary includes the following persons acting in a representative capacity:

- a person acting as an executor, administrator, guardian, or conservator;
- a trustee under a will under which the trustee takes title to or otherwise controls or manages property for the purpose of conserving the property;
- a court-appointed receiver;
- a trustee appointed under the federal bankruptcy laws;
- an assignee or a trustee acting under an assignment made for the benefit of creditors;
- a trustee acting under an indenture agreement or similar financing agreement, debt securities, certificates of interest of participation in any such debt certificates, and any

successor of such trustee;
- any person who holds legal title to, controls, or manages directly or indirectly any facility as a fiduciary for the purpose of administering an estate or trust that contains the facility.[31]

If a person qualifies as a fiduciary, that person shall not be individually liable to the state or third persons for releases that take place during the time the person is acting as a fiduciary unless the releases are due to negligent acts, omissions, or intentional misconduct. However, the HWCF does not preclude asserting claims relating to releases of hazardous waste and materials against a fiduciary in its representative capacity or against the assets of the estate or trust administered by the fiduciary.[32]

New Jersey

The Spill Compensation and Control Act (the Spill Act) provides that a person who holds indicia of ownership of a vessel or facility primarily to protect a security interest and who does not participate in the management of the vessel or facility shall not be deemed to be an owner or operator of the vessel or facility, a discharger, or a responsible party and shall not be liable for cleanup costs or damages resulting from discharges from the vessel or facility.[33]

The lender-liability provisions of the Spill Act are virtually identical to the federal rule. The Spill Act contains the same definitions for "indicia of ownership," "primarily to protect a security interest," "security interest," "participation in the management of a facility," "holder," and "fair consideration."[34] Thus, a holder who does not actually participate in the management or operational affairs of its borrower or who merely has the ability to influence or has unexercised rights to control vessel or facility operations will not be considered to be participating in the management of a facility.[35] Likewise, a holder may engage in policing or workout activities before foreclosure[36] and may foreclose on the vessel or facility if it tries to sell or divest the property within 12 months using commercially reasonable means without losing the immunity from liability.[37] A holder will not be deemed to be participating in the management of a facility if it undertakes a response action. Like the federal rule, the immunity from liability does not apply to lenders acting as generators or transporters of hazardous substances.[38]

The Spill Act does contain some interesting features that are not contained in the federal rule. For example, the exemption does not apply to new discharges after the date of foreclosure that occur because of negligent acts or omissions. However, if a property has both preexisting and new discharges, a lender may perform an environmental audit and submit it to the state to determine the discharges for which the lender must assume responsibility. The state is required to furnish its determination within 30 days of receipt of the audit.[39]

If a holder who forecloses on a vessel or property has actual knowledge of a preforeclosure discharge, the holder must notify the state within 30 days of foreclosure or face civil penalties of up to $25,000. Similarly, a holder who becomes aware of a new discharge after foreclosure must notify the state immediately or be subject to a civil penalty of up to $10,000.[40]

If a discharge has taken place at a facility or vessel that comprises or is part of a trust, receivership estate, guardianship estate, or the estate of a deceased person, Spill Act liability will only attach to the assets of the trust or estate and not to the individual assets of the fiduciary.[41]

Oregon

The state Removal or Remedial Action to Abate Health Hazards Act [42] contains a security-interest holder exemption similar to the federal provision.[43] The state legislature recently instructed the state Environmental Quality Commission (EQC) to promulgate rules clarifying the scope of this exemption. In particular, the regulations must identify the activities that are consistent with holding and protecting a security interest, as well as the activities that a security-interest holder may take to supervise the activities of a borrower during the life of a loan to protect its security interest or during foreclosure that will not expose the lender to liability. In adopting these regulations, the EQC must provide that the mere capacity or unexercised right to influence the management of a facility's hazardous substance activities will not void the exemption.[44] The EQC was also instructed to promulgate regulations identifying the circumstances under which fiduciaries will be exempt for contamination at sites the fiduciary holds in a fiduciary capacity.[45]

Pennsylvania

The secured creditor exemption of the state Hazardous Sites Cleanup Act (HSCA) operates in the same manner as its CERCLA counterpart. The definition of owner or operator excludes any person who holds indicia of ownership in a site without participating in the management of the site.[46]

However, the HSCA contains additional clarifying language not contained in CERCLA. The exclusion specifically applies to financial institutions and their affiliates or parents that satisfy the following three conditions:

- the site was acquired by foreclosure or by deed in lieu of foreclosure as a result of enforcing a mortgage or security interest held by the financial institution, its parent, or affiliate;
- the site was acquired before the financial institution, affiliate, or parent had knowledge that the site was on the National Priorities List (NPL) or the state counterpart to the NPL;

- the financial institution, affiliate, or parent did not manage or control activities at the site that contributed to the release or threatened release of hazardous substances.

The HSCA secured creditor's exemption also contains a definition of "management." Under the definition, a financial institution will not be considered participating in the management of a site if it participates in or supervises the "finances or fiscal operations of a responsible person or an owner or operator in connection with a loan to, services provided for, or fiscal obligation of that responsible person or an owner or operator or actions taken to protect or preserve the value of the site or operations conducted on the site."[47]

Vermont

The Vermont Solid Waste Management Law [48] was amended by "An Act Limiting the Liability of Secured Creditors and Fiduciaries for the Release of Hazardous Materials."[49] The amendment not only defined the scope of lender liability but also provided a mechanism for lenders to obtain contribution protection from the state when the lender could otherwise be liable for response costs.

The definition of secured lender differs somewhat from the federal definition of holder. Vermont defines a secured lender as any person who holds indicia of ownership that was "furnished by the owner or person in lawful possession" of the property. Furthermore, the indicia of ownership is not primarily to protect a security interest but "primarily to assure the repayment of a financial obligation."[50] Indicia of ownership includes participation rights that are held by a financial institution "solely for legitimate commercial purposes, in making or servicing loans." The term secured creditor specifically extends to a person who acquires ownership of a facility by assignment from another person who qualifies as a secured lender.

The statute provides that a secured lender or fiduciary will not be liable as an owner or operator in the event that any of the following situations occur:

- A secured lender holds indicia of ownership primarily to assure repayment of a financial obligation.
- A fiduciary acquires ownership status through appointment under law or by conducting activity that is a part of a fiduciary's duties or falls within the fiduciary's scope of authority.
- A secured lender or fiduciary requires or conducts financial or environmental assessments of a facility.
- A secured lender or fiduciary monitors the operations of a facility.
- A secured lender or fiduciary requires compliance with environmental laws through covenants in loan documents.

- A secured lender or fiduciary provides advice or guidance regarding general business and financial aspects of a borrower's operation.
- A secured lender or fiduciary engages in workouts, restructurings, or refinancings.
- A secured lender or fiduciary extends or denies credit to a person owning or lawfully possessing a facility.
- A secured lender or fiduciary requires or undertakes actions in an emergency that are designed to prevent individuals from being exposed to hazardous materials to contain a release.
- A secured lender or fiduciary requires or conducts abatement, investigation, remediation, or removal activities in response to a release, provided the secured lender or fiduciary does the following:

  (a) provides 30 days' advance notice to the state unless the 30-day period is waived by the state;
  (b) prepares a work plan by a qualified consultant before the commencement of the activities (however, if the state notifies the secured lender or fiduciary that it intends to review the work plan, the activity cannot be started until the work plan is approved);
  (c) performs an appropriate investigation before taking any abatement, remedial, or removal activities;
  (d) submits regular progress reports and a final report to the state;
  (e) preserves all nonprivileged materials for 10 years following the completion of the work;
  (f) ensures individuals living near the facility are not exposed to unacceptable health risks;
  (g) ensures the activity complies with all requirements and orders of the state environmental authorities.[51]

A secured lender or a fiduciary will forfeit its immunity from liability if its actions cause, contribute to, or worsen a release or threatened release of a hazardous material.[52]

The statute does allow a secured lender or a fiduciary who wishes to take possession or title of a facility where there has been a release or who wishes to undertake response actions to enter into an agreement with the state that will limit the liability of the secured lender or fiduciary. If the state finds that the secured lender or fiduciary has complied with the agreement and does not cause, contribute to, or worsen the release, the maximum liability that the secured lender or fiduciary could face will be either the liability set forth in the agreement or, in the absence of such a provision, the fair market value of the property in its remediated state less any response costs incurred by the lender or the

fiduciary.[53] The secured lender and fiduciary would also receive contribution and indemnity protection from any claims that may be filed by other PRPs.[54]

The state is not required to enter into this agreement with a secured lender or fiduciary. Instead, the secretary of natural resources first must determine that a release or threatened release exists, that there will be a substantial benefit to the public, and that the proposed activity will not contribute to or worsen conditions or expose individuals living near the facility to unacceptable health risks. After finding that an agreement is appropriate, the state is required to publish a notice in a newspaper serving the area where the facility is located announcing the state's intention to enter into the agreement and describing the actions to be taken.[55]

Finally, any secured lender or fiduciary who becomes aware of a release or suspected release is required to notify the state environmental agency immediately.[56] While a secured lender or fiduciary will not forfeit its immunity to liability automatically by failing to report the release or suspected release, it could be subject to fines and could become liable for response costs if the failure to report worsens or contributes to the environmental contamination at the site.

State Superlien Statutes

Lenders enter into financing transactions expecting to be repaid according to the terms of the loan. Thus, in addition to direct liability for cleanup costs, lenders are concerned with the impact that environmental liability may have on the borrower's ability to repay its loan obligations.

The enormous cleanup liabilities under CERCLA, as well as the operating and corrective action requirements of RCRA, may not only render a borrower insolvent but also significantly impair the value of contaminated collateral. Environmental laws that restrict development of former hazardous-waste sites or prohibit construction activity in ecologically sensitive areas such as wetlands can severely erode the value of real estate used to secure a borrower's loan obligations. If a borrower is forced to file a bankruptcy petition, a creditor's rights may be affected by pending cleanup obligations. Finally, many states have enacted superlien laws that subordinate previously perfected security interests.

Approximately 17 states have nonpriority environmental lien laws that operate in the same manner as general commercial liens.[57] The cleanup costs incurred by environmental agencies in those states take precedence over all other claims *except* previously perfected security interests. However, during the past few years, six states—Connecticut, Maine, Massachusetts, Michigan, New Hampshire, and New Jersey—have enacted so-called superlien provisions within their mini-Superfund laws. These laws, which were initially adopted to ensure that states could recover the costs of publicly financed cleanups of hazardous-waste sites, grant a first-priority lien on various assets of PRPs equal to the

amount of cleanup expenditures incurred by the state that is superior to previously perfected mortgages or security interests.

The superliens not only subordinate the rights of lenders with previously perfected security interests but also the rights of a bona fide purchaser who bought property without notice of the contamination or who acquired title through abandonment, foreclosure, a deed in lieu of foreclosure, or a bankruptcy order. These laws also can jeopardize the solvency of de minimis PRPs whose limited assets may be attached despite their tenuous connection to a hazardous-waste site.

Interestingly, only a limited number of liens have actually been filed. Instead, states are prospectively wielding these laws like a sword of Damocles hanging over the assets of the PRPs to extract concessions for privately financed settlements. Nevertheless, it is extremely important that corporate managers, lenders, and their counsel be aware of the requirements of these laws and the risks they represent.

The superlien laws vary considerably from state to state. Some of the superlien statutes merely impose a priority lien on the property that is subject to the cleanup; others attach to all of the assets of the responsible party, including personal property and business revenues located or derived from within the state.

While some superliens only become effective after the lien has been recorded, several statutes permit a "secret" superlien that attaches to the property before public notice of the lien is filed. These are particularly onerous provisions because a prudent lender who diligently searches the public records may nevertheless find its interest subordinated by the "hidden" superlien.

Finally, some states permit the superlien to apply retroactively and prevail over security interests that were perfected before the superlien law was enacted.

Surprisingly, the superlien legislation has spawned only a handful of lawsuits but, thus far, these statutes have withstood those challenges. For example, in *Kessler v. Tarrats,*[58] the plaintiff charged that the New Jersey superlien amounted to an unconstitutional taking of private property and impermissibly interfered with private contracts. However, the appellate division of the superior court of New Jersey ruled that the strong public interest in cleaning up hazardous-waste sites warranted the impairment of private contract rights. Furthermore, the court noted that since the plaintiff had placed the hazardous materials on the property, there could be no "taking" because it was the plaintiff's acts that had caused the diminution in market value of the property.

Similarly, in *Chicago Title Insurance Company v. Kumar,*[59] the issue was whether the Massachusetts superlien law rendered title to land unmarketable. In that case, the defendant claimed that the possibility that the state might attach a lien on its property because of contamination undisclosed at the time the property was acquired was a title defect. The plaintiff denied coverage to the defendant insured on a claim under its title insurance policy that alleged that the existence of the Massachu-

setts superlien rendered the defendant's title to contaminated property unmarketable. The plaintiff denied the claim and filed suit for a declaratory judgment. In upholding the plaintiff's denial of the claim, the appeals court of Massachusetts observed that one could have a perfected title in valueless land. The court also said that while a superlien could render the property uneconomic, it would not affect title to the land. Therefore, the court upheld the plaintiff's denial of coverage.

While a New Jersey court in *Simon v. Oldmans Township*[60] did allow a purchaser of property at a tax sale to rescind the sale when state environmental authorities subsequently asserted a superlien, it was a narrow ruling that is probably limited to tax sales where the purchaser does not initially acquire full legal title to the land. In that case, the notice of the superlien had not been filed when the tax sale took place, and the plaintiff claimed that the defendant withheld information that the property was contaminated. The court said it was essential to maintain the integrity of title recordation and that a purchaser of tax certificates should be entitled to relief when the public records did not reveal any superlien and the purchaser had no reason to suspect land was contaminated.

Much to the relief of lenders, the superlien laws have not proven to be the lethal enforcement weapon that was once feared. Perhaps because of a credit crunch that has reduced the resources available to perform cleanups, states are now rarely using their superlien authority. Indeed, during the past few years, Arkansas, Tennessee, and Texas repealed their superlien provisions.

Notes

[1]40 C.F.R. 300.1100.
[2]42 U.S.C. 9601 et seq.
[3]Kelley v. EPA, 15 F. 3d 1100 (D.C. Cir. 1994).
[4]R18-7-102.1.
[5]R18-1-102.2.
[6]Health and Safety Code 25323.5.
[7]Stats. 1992, c.167 (A.B. 2750).
[8]C.R.S. 13-20-701.
[9]C.R.S. 13-20-703.
[10]Public Act 87-676 (H.B. 687) sect. 22.2(h)(1)(E).
[11]R.S.A. 30:2277(4)
[12]Mass. Gen. L. ch. 21E et seq.
[13]Cpt. 21E, section 273(c)(2).
[14]Minn. Stat. 115B.01 et seq.
[15]Ch. 512, H.F. 1985.
[16]Mo. Rev. St. 427.031.1.
[17]Mo. Rev. St. 427.031.2.
[18]Mo. Rev. St. 427.031.03.
[19]Id.
[20]Mo. Rev. St. 427.021(3).

[21]Mo. Rev. St. 427.021(2)(a)-(e).
[22]Mo. Rev. St. 319.100(4).
[23]Mo. Rev. St. 319.100(5).
[24]RSA 147-B:10, IV.
[25]RSA 147-B:2, VIII-e.
[26]RSA 147-B:2, VII-h.
[27]RSA 147-B:2, VIII-g.
[28]RSA 147-B:10, IV-a.
[29]RSA 147-B:10, IV(d).
[30]RSA 147-B:10, IV(b).
[31]RSA 147-B:2, III-a(a).
[32]RSA 147-B:10, V.
[33]N.J.S.A. 58:10-23.11g.
[34]N.J.S.A. 58-10.23.11g4-5.
[35]N.J.S.A. 58:10-23.11g4.
[36]Id.
[37]N.J.S.A. 58.10-23.11g6.
[38]Id.
[39]Id.
[40]N.J.S.A. 58:10-23.11g8.
[41]N.J.S.A. 58:10-23.11g9.
[42]Or. Rev. St. 465.200 et seq.
[43]Or. Rev. St. 465.255.
[44]1991 Oregon Laws ch. 680 (H.B. 3349), section 4.
[45]1991 Oregon Laws ch. 680 (H.B. 3349), section 5.
[46]35 P.S. 6020.103.
[47]Id.
[48]10 V.S.A. 6601 et seq.
[49]P.L. 29 (S.130).
[50]10 V.S.A. 6602(23).
[51]10 V.S.A. 6615(g)(1).
[52]10 V.S.A. 6615(g)(2).
[53]10 V.S.A. 6615(h)(5).
[54]10 V.S.A. 6615(i).
[55]10 V.S.A. 6615(h)(2).
[56]10 V.S.A. 6617.
[57]Ala. Stat. 46.08.075; Ark. Stat. Ann. 8-7-417; Calif. Water Code 13305; Ill. Rev. Stat. ch 111 1/2 sect.1021.3; Iowa Code. Ann. 455B.396; Ky. Rev. Stat. Ann. 224.877(7); La. Rev. Stat. Ann. 30.1149.7(f); Md. Health and Environment Code. Ann. 7-266(b)(5); Minn. Stat. Ann. 514.671; Ohio Rev. Code Ann. 3734.20(B), 3734.22 and 3734.26; Okla. Stat. Ann. Tit. 63, 1-1011; Oreg. Rev. Stat. 466.205, 465.335, and 466.835; Pa. Stat. Ann. Tit. 35, 6020.509; Tenn. Code Ann. 68-46-209; Tex. Code Ann., Health & Safety 361.196 and 361.197; Va. Code Ann. 10.1-1406.
[58]194 N.J. Super 136 (App. Div. 1984).
[59]506 N.E.2d 154 (Mass. App. Ct. 1987).
[60]203 N.J. Super 365 (Ch. Div. 1985).