Prudent due diligence before a loan is booked is, of course, the best way to avoid incurring environmental liability for your borrower's mistakes. However, in a less-than-perfect world, lenders must try to contain environmental problems during the term of the loan.

What to Do when Your Borrower Faces Environmental Problems

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DURING THE PAST FEW YEARS, financial institutions have become the targets of government regulators and private parties seeking partners in the $100 million battle over who will pay for the cleanup of the nation's hazardous waste sites.

In response to potential environmental liability, lenders have changed their business practices profoundly. Some banks have decided to forgo lending to companies that generate, transport, treat, or store hazardous substances. Others refuse to write any mortgages on buildings containing asbestos or on properties that could be contaminated because of their former use.

However, many financial institutions recognize that most commercial properties have detectable levels of contaminants yet remain good credit risks. These lenders continue to extend credit to borrowers with potential environmental liability—but only after performing detailed environmental audits. Bankers use environmental examinations not only to evaluate whether or not a heavily leveraged borrower could become insolvent if forced to fund a cleanup out of working capital but also to screen or to exclude properties that pose high environmental liability from the credit. If the purpose of the loan is to acquire

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the stock of another company, the lender should investigate the potential liabilities of the target, since parent or successor corporations and shareholders with the controlling interest in a company may be liable for cleanup obligations.

Environmental due diligence, though, does not end once a loan has been booked. Lenders must continue to monitor the environmental liability of their borrower's operations throughout the administration of the loan. This article describes the actions that financial institutions may take to minimize the possibility that environmental cleanups impair their collateral or affect the financial viability of their borrowers and to avoid incurring liability for the environmental obligations of their borrowers.

Direct Liability of Lenders

The environmental law of chief concern to lenders is the federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA), which provides that owners and operators of facilities or vessels (that is, equipment, containers) may be strictly and jointly liable for the cleanup costs associated with releases or threatened releases of hazardous substances. This liability extends to current owners of the site as well as to past owners or operators who were responsible for release of the hazardous substances. CERCLA generally exempts holders of security interests in contaminated property from liability by excluding them from the definition of owners or operators. However, lenders may lose their immunity and become liable for their borrower's environmental liability if the lenders participate in the management of the borrower's operation or acquire actual title to the contaminated property.

To minimize the severe impact that CERCLA can have on property owners who acquire title after the land has been contaminated, Congress added an innocent purchaser's defense to CERCLA when the law was amended in 1986. This defense provides that a landowner who acquires contaminated property will not be liable for the cleanup costs if it can establish that it "did not know or had no reason to know" that the property was contaminated when it was acquired. To use this defense, however, the landowner must conduct an "appropriate" inquiry into the previous ownership and use of the property that is consistent with "good commercial or customary practice." Thus, if an undeveloped parcel is sold for a price well below the market value of comparable parcels, a lender taking a security interest in the land should inquire about the environmental condition of the property. Likewise, metal drums or distressed vegetation might be deemed to be signs of the "likely presence of contamination," and failure to conduct a walking tour of the site might preclude a lender from asserting the innocent purchaser's defense.

The Federal National Mortgage Association (Fannie Mae) also has established environmental due diligence requirements for the sec-

ondary mortgage market, and the Federal Home Loan Bank Board (FHLBB) has issued guidelines for developing environmental risk policies for thrifts.[1] In addition, the Federal Home Loan Mortgage Corporation (Freddie Mac) has proposed rules for lenders whose mortgages they purchase. While these requirements only pertain to residential properties, many lenders have adopted such environmental auditing requirements for commercial loans that they do not intend to sell.

Many states have adopted their own mini-Superfund laws that are modeled after the federal counterpart but may differ in significant ways. For example, many mini-Superfund laws do not have an express innocent purchaser's defense nor a secured lender's exemption.

Indirect Liability of Lenders

In addition to direct liability for cleanup costs, lenders must worry about the effect of environmental liability on the borrower's ability to repay its loan obligations, since the enormous cleanup liabilities under CERCLA could make a borrower insolvent. 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 securing a loan. If a borrower is forced to file a bankruptcy petition, a creditor's rights may be affected by pending cleanup obligations.

Lenders must worry about the effect of environmental liability on the borrower's ability to repay its loan obligations.

During the past few years, several states have enacted so-called superlien provisions in their mini-Superfund laws. These laws vary considerably from state to state but generally grant a first-priority lien to the state for the cleanup expenditures incurred by the state. The state's lien may be superior to previously perfected mortgages or security interests. Some of the statutes impose a priority lien on only 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 within the state. Some superlien statutes permit a secret superlien, which attaches to the property before public notice of the lien is filed. These provisions are particularly onerous because a prudent lender who searches the public records diligently nevertheless may find its interest subordinated by the hidden superlien.

The 1986 amendments to CERCLA also authorized the EPA to impose a lien against real and personal property that is subject to a federal response action. However, this lien is not a superlien because it

[1] "Environmental Hazards Management Procedures" (August 1, 1988); "Environmental Risk and Liability" (February 6, 1989) [Thrift Bulletin 16].

is subject to security interests that were recorded before the date the federal cleanup is perfected. This federal cleanup lien does not have to be recorded but is automatically perfected when the owner of the property receives actual notice of the lien or when the federal response action is commenced, whichever is later.

Risk Management Procedures and Strategies

To minimize potential environmental liability, lenders should institute written environmental risk management programs for their existing loan portfolios and for all new lending opportunities.

The environmental risk management program should require environmental due diligence examinations for industrial sites and for commercial properties with gasoline stations, dry cleaners, jewelers, electroplaters, paint operations, print shops, textile firms, high-tech companies, and businesses that use underground storage tanks (such as strip malls, restaurants, and apartment complexes). Hazardous substances such as petroleum, paint thinners, solvents, hydraulic fluids, metals, and PCBs may be present. Farmland, ranches, and undeveloped parcels also should be investigated, since they may contain contamination from a prior use on the property or from an adjacent parcel.

The investigation should scrutinize not only the site subject to the loan but also neighboring properties, landfills, or salvage yards. Contamination plumes from past or present activities can migrate onto the property or contaminate the groundwater underneath the property. In addition, if the property is located next to a hazardous waste site, it may be subject to essentially an inverse condemnation, since the EPA is authorized to use any property necessary to conduct a remedial investigation. This use could decrease the property's value.

Because some superlien laws attach to all property of the discharger, the lender should require information about other properties held by the borrower in different states—even if the property that will be collateral for the loan is clean. Finally, the due diligence investigation should be conducted for non-real-estate loans and for all loans booked before the environmental risk management program was implemented.

The bank should appoint a trained environmental risk analyst to consult with loan officers on environmental issues. The environmental risk analyst should develop a standard due diligence questionnaire for each loan officer to use, outline a format for environmental assessment reports prepared by the lender's environmental consultant, and select environmental consultants to conduct environmental assessments. Finally, the bank should set procedures for reviewing collateral before beginning foreclosure proceedings, exercising management clauses, or accepting a deed in lieu of foreclosure.

Environmental risk management programs also should be insti-

tuted for alternative financing arrangements such as sale-leasebacks, equipment finance leases, joint ventures, or equity participation. A lender could be deemed an owner or operator of the business under these arrangements and thus incur liability for cleanups.

Finally, all loan documents must include provisions that give the lender the right to require periodic environmental audits during the life of the loan, to conduct any testing it deems necessary, and to compel the borrower to perform necessary cleanups. The loan documents should provide that failing to conduct the cleanup can be deemed an event of default and should give the lender discretion to undertake the cleanup at the borrower's expense. The borrower also should be required to forward to the lender all notices of violations and potential claims for environmental liability and notices of release or spill of any hazardous materials. If practicable, the borrower should agree contractually to refrain from handling hazardous substances or wastes on the property or to comply with all applicable environmental laws. The lender also should obtain indemnities, escrowed funds, or letters of credit to cover possible environmental liabilities, although at the closing it may be difficult to estimate accurately the dollar limitation on potential environmental liability.

Administration of existing loans

During the life of each loan, the financial institution should monitor the use and condition of the property to make sure that the borrower or its tenants are not contaminating it. As part of its monitoring, the lender should conduct periodic site inspections to observe the condition of the property and equipment. The lender should require the borrower to document environmental compliance and to provide all notices of violations or threatened claims for environmental liability. The lender may even require annual environmental audits, including groundwater monitoring.

In addition, loan officers should examine annual rent rolls to determine if any new tenants are engaged in businesses that involve hazardous substances.

During the servicing of a loan, a borrower may be forced to comply with a cleanup directive or injunction that requires large sums of money for a long-term remedial action. Since a long-term cleanup obligation could force the company to close down or to file for bankruptcy in order to preserve its liquidity, the borrower may attempt to coerce a lender into making overadvances to finance compliance with environmental requirements.

Under such circumstances, the lender must weigh the potential liabilities against the loan balance and explore all available options, particularly alternatives to foreclosure, such as use of antideficiency statutes, reconveyance of the security, or appointment of a trustee to manage the property. If the lender elects to advance the funds, it should seek additional clean collateral, preferably from a state that

does not have a superlien statute, and personal indemnities or other collateral from the principals of the borrower.

If the loan documents authorize the lender to compel the borrower to perform a cleanup or to conduct the cleanup itself at the borrower's expense, the lender must assess the circumstances carefully before exercising such provisions. The lender could run the risk of being deemed the person "in charge" of the facility and lose its exemption from liability. In addition, the environmental risk analyst must ensure that any cleanup complies with the requirements of CERCLA. If the cleanup does not conform to CERCLA, the bank or the borrower may be prohibited from pursuing a private cost-recovery action against the party responsible for the discharge.

Disposition of loan

A lender also must exercise care when selling a loan in whole or in part to another investor. The lender should disclose all environmental audits and records. If it fails to provide such information to the loan purchaser, the lender not only will be precluded from asserting the innocent purchaser's defense but also may subject itself to a fraudulent nondisclosure action.

If the loan purchaser requests environmental representations or warranties, these provisions should be limited to the lender's knowledge and the actual investigations performed by the lender's environmental consultants.

Workouts

When a borrower's business begins encountering problems, lenders often negotiate workout agreements that give them broad management powers. Several federal courts have ruled that lenders can be liable for the costs of environmental cleanups if they become too entangled in the affairs of the borrower; thus, the workout can expose the lender to liability. As a result, lenders must use extreme caution when exerting financial control over the borrower's business. They should resist exercising any management clauses, negative covenants, and other contractual provisions to avoid becoming the "operator" of the facility. No actions should be taken before consulting counsel.

Several federal courts have ruled that lenders can be liable for the costs of environmental cleanups if they become too entangled in the affairs of the borrower.

For example, in *United States v. Mirabile*,[2] a federal district court in Pennsylvania refused to dismiss one of three creditors from the ac-

[2] 15 Envtl. L. Rep. (Envtl. L. Inst.) 20994 (E.D. Pa. 1985).

tion because there was a factual question of whether the lender had exercised so much financial control over the borrower that it had become the de facto operator/owner of the site.

Initially, one loan officer of the bank served on an advisory board overseeing the postbankruptcy operation. A second loan officer was appointed to monitor cash collateral accounts, ensure that receivables went to the proper account, and establish a reporting system between the bank and the company. The court found that this involvement in the financial decisions of the borrower was not sufficient to impose CERCLA liability. However, as the operator's financial woes deepened, the bank's employees made weekly visits to the site and insisted on changes in manufacturing, sales practices, and personnel. These latter actions, the court said, raised the issue of whether the bank had crossed the line from protecting its security interest to participating in management, thus bringing it within the purview of CERCLA liability.

In *U.S. v. Fleet Factors*,[3] a lender entered a factoring agreement with a Georgia cloth printer. The agreement was secured by machinery and equipment, fixtures, and inventory including raw materials, work in progress, and packing and shipping materials. As additional collateral, Fleet took back a mortgage.

After the borrower filed a Chapter 11 bankruptcy petition, Fleet continued to advance funds for three years. Then, Fleet foreclosed on the inventory and equipment but did not foreclose on the real estate, which eventually was abandoned to the municipality for unpaid taxes. Fleet appointed a liquidator to auction the assets and hired a rigger to remove all unsold equipment. After the auction, the EPA discovered that the site had approximately 700 rusting or leaking drums, several holding tanks and vats containing hazardous substances, and torn insulation that was releasing asbestos fibers.

The EPA filed a $400,000 cost-recovery action against Fleet, arguing that by exercising veto power over credit decisions, controlling shipments to customers, directing the activities of the employees on payroll after the plant was closed, deciding which employees to dismiss, and prohibiting hazardous wastes from being removed, Fleet overstepped the bounds of a normal lender and had become the operator of the facility.

The court found that Fleet's actions before foreclosure did not amount to sufficient involvement and control over the debtor to warrant CERCLA liability. The court said the lender exclusion permits "secured creditors to provide financial assistance and general, even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation."

In the first federal Court of Appeals decision interpreting the se-

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[3]No. CV687-070 (S.D. Ga. Dec. 22, 1988).

cured lender's exemption, the 11th Circuit expanded the district court's decision in Fleet Factors and dramatically broadened the liability of lenders under CERCLA.[4] The circuit court ruled that it was not necessary for a lender to be involved in the day-to-day operations of its borrower in order to be liable under CERCLA. Instead, the court held that a lender could be liable if it had the ability to influence or control the operations of its borrower. In essence, the court seemed to create a new category of liable parties just for lenders in which lenders can be liable even if they do not qualify as statutory operators of the facility. As a result, the court found that Fleet's post-foreclosure actions were sufficient to expose it to liability under CERCLA. The court also placed lenders in an untenable catch-22 situation. On the one hand, the court said that lenders should monitor the hazardous waste treatment practices of their borrowers and insist that their borrowers comply with applicable requirements as a conditon to continued financing; on the other, such involvement would render the lender liable under the court's interpretation of the secured creditor's exemption.

In addition to the government suits, financial institutions must be concerned that their actions will not expose them to cost-recovery actions filed by private parties. In such cases, the plaintiffs have contended that they incurred cleanup costs at facilities where the lenders' conduct constituted management.

In *Guidice v. BFG Electroplating & Manufacturing Company, Inc.*, the defendant filed a third-party action against owners and operators of adjacent property, including the National Bank of the Commonwealth (National), which had extended a line of credit secured by accounts receivable and a mortgage to an industrial concern that had operated on adjacent property.

When its borrower defaulted on the loan, National took actions to assist its troubled debtor including discussing management issues with the borrower, assisting it with a loan application to the Small Business Administration, and communicating with local environmental officials to help the borrower obtain a wastewater discharge permit. The defendant charged that these actions transformed National into the operator of the facility and that it should be liable for the cleanup of leaking drums on the site. However, the court characterized National's actions before foreclosure as prudent measures designed to protect its security interest and said that these isolated instances of management advice were not sufficient to defeat the secured lender's exemption.

In a case that has not been decided, plaintiffs filed a $50 million cost-recovery action against a bank that had hired an environmental consultant to operate a landfill that had been run by the now-insolvent borrower.[5] The plaintiffs allege that hazardous wastes accumulated

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[4]No. 89-8094 (May 23, 1990).

[5]Grantors to the Silresim Site Trust v. State Street Bank & Trust Co. No. 88-1324-K (D.C. Mass. September 21, 1988).

and were improperly disposed after the bank's consultant assumed control and that the bank had become the operator of the facility by hiring the consultant.

Finally, in another private cost-recovery action, an institutional investor was sued by a successor landowner of a former paint manufacturing plant (*Insilco Corp. v. Maxxam Properties*, Inc.[6]). In 1968, John Hancock helped finance the acquisition of the assets of the paint division of the Mary Carter Paint Company. The $3 million loan was secured by the accounts receivable and fixtures of the borrower. Hancock did not take back a mortgage. The plaintiff alleges that between 1968 and 1973, Hancock participated in the management of the site because it assisted in the recruitment of a management consultant, interviewed candidates for CEO, hired a search consultant to help select officers, attended meetings of the board, participated in a committee of lenders that made suggestions to management and reviewed plant operations and cost containment programs, and reviewed financial and sales analysis.

While these cases do not precisely mark the boundary where prudent financial oversight of a borrower's operation is transformed into participation in the management of the site that will impose CERCLA liability, they do suggest that if lenders confine their activities to steps traditionally used to protect collateral, they will not lose their immunity to CERCLA liability.

It is still unclear whether or not a lender will be liable if it refuses to release money to clean up wastes or fails to take actions to control the facility to prevent further contamination.

Thus, it appears that common practices such as monitoring cash collateral accounts, establishing financial reporting requirements, providing financial advice, or recommending management consultants should not result in CERCLA liability. More intrusive actions used by secured lenders during workouts present greater exposure. These include requesting reductions in sales personnel; suggesting that operations be consolidated; and requiring consent for major purchases, improvements, dividend payments, or bonuses. Since these actions have not been construed as rising to management of a borrower under common-law debtor-creditor principles, such actions probably will not lead to CERCLA liability either.

In contrast, certain actions—especially in concert by more than one lender—may prove particularly dangerous. These include determining which creditors to pay or which checks to honor, collecting monies due the borrower, vetoing specific transactions, removing or selecting management, and appointing voting pledged stock.

[6]No. 88-282 Civ. T-15A (M.D.C. Fla. June 26, 1989).

It is still unclear, though, whether or not a lender will be liable if it refuses to release money to clean up wastes or fails to take actions to control the facility to prevent further contamination. As a result, during the negotiation of the workout agreement, any clauses that require prior consent of the lender should exempt expenditures on environmental or waste disposal practices. Similarly, the lender's right of access should be limited to inspection of records and seizure of fixtures but should not grant it the right to complete access to the site to abate a dangerous condition.

Bankruptcy

If the borrower files for Chapter 11 reorganization, the lender should attempt to obtain a court order granting superiority to its debtor-in-possession liens and also appoint a trustee. It might be advisable to negotiate the cleanup obligations as part of the asset distribution plan in jurisdictions that give such claims priority. In addition, since state governments hesitate to impose obligations that could force a local employer out of business, the confirming plan could provide for payment of cleanup costs that represent only a fraction of the original cost in exchange for a release from liability.

Lenders should conduct detailed environmental audits before extending additional credit or advancing loans to financially troubled debtors. The environmental due diligence investigation should be completed before the refinancing proposal goes to the loan committee. In conducting its investigation, the lender should act as if it is directly purchasing the property. To minimize its potential liability, a financial institution should consider excluding as collateral assets that might be a source of contamination or writing separate loans for collateral that presents environmental risk.

Foreclosure

The greatest danger to lenders exists when they acquire title to contaminated property through a judicial foreclosure, exercise of a statutory power of sale, or acceptance of a deed in lieu of foreclosure. Since the innocent purchaser's defense considers the diligence at the time of acquisition—not at the time the loan application was made or the loan was approved—no foreclosure proceedings should be considered until environmental audits have been completed on the borrower's operation and lender's counsel has reviewed the results.

The federal courts have been divided on whether foreclosure alone renders a lender liable under CERCLA. In *United States v. Mirabile*,[7] a Pennsylvania federal district court ruled that foreclosure without participation in the management of the borrower's operation is simply an act to protect a security interest in the land and will not cause a lender to lose its exemption from liability. In that case, after a paint

[7] 15 Envtl. L. Rep.(Envtl. L. Inst.) 20994 (E.D. Pa. 1985).

manufacturer ceased operations, American Bank & Trust Company (ABT) purchased the property at the sheriff's sale. The bank held title for four months before assigning title to the defendant. During that period, the bank secured the buildings against vandals, showed the site to prospective purchasers, and even inquired about the cost of removing 550 drums of hazardous wastes from the property. When the EPA filed a cost-recovery action against the defendant to recoup $249,792 in response costs, the defendant sought to bring the three lenders into the case, claiming that they were responsible for creating the hazardous conditions at the site because they had financed the operations.

The court found that ABT was simply attempting to protect its security interest when it foreclosed and that its actions were "prudent and routine steps to secure the property against further depreciation," which would not vitiate its immunity under the secured creditor exemption.

While the *Mirabile* court viewed foreclosure as merely an incident to protecting a security interest that could not subject a lender to CERCLA liability and ignored transfer of title, the passage of title was the crucial factor in *United States v. Maryland Bank & Trust Company* (Maryland).[8]

In that case, MB&T foreclosed on farm property that also contained a trash dump. Three years later, the EPA inspected the site and discovered 237 drums leaking hazardous wastes. After MB&T declined the EPA's request to clean up the site, the agency removed the drums and filed a $551,713 cost-recovery action against MB&T as owner of the property.

The bank filed a motion for summary judgment, contending that the security interest exemption insulated it from CERCLA liability. However, a Maryland district court adopted a narrow construction of the exemption and refused to dismiss the action. The court said the security interest exemption applied only in the 13 so-called title states where mortgagees actually hold title to the property subject to the mortgage and, thus, would be liable under CERCLA as owners of contaminated property. The court also said that the security interest exemption did not apply to MB&T because the security interest terminated at the foreclosure sale and ripened into full title before the cleanup was performed. The court seemed influenced by the fact that MB&T had held title for three years; in *Mirabile*, ABT had promptly assigned the property within four months.

The court in *U.S. v. Fleet Factors* endorsed the *Mirabile* view that foreclosure was simply a necessary step toward preserving a lender's security interest. However, the court was troubled by the activities that occurred after the foreclosure and refused to dismiss Fleet from the case because of its postforeclosure actions. The court found that

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[8]632 F.Supp. 573 (D. Md. 1986).

there were genuine questions of fact as to whether the liquidator retained by Fleet had contributed to the release of hazardous substances by moving the leaking drums from the sales area and whether the rigger had disturbed the asbestos during the removal of the equipment. The appellate decision in Fleet Factors affirmed that a lender could be liable as an operator of a facility not only if its agents are responsible for the release of hazardous substances but also if it simply has the ability to control or influence actions over the facility during foreclosure.

Some commentators have attempted to reconcile the *Fleet*, *MB&T*, and *Mirabile* cases on the grounds that the lender in *Mirabile* had held title for only four months before reconveying the property, while in *MB&T* the lender had held title for four years.

However, the *Guidice* case has made this idea less tenable. In that case, the mortgagee reconveyed the land within eight months. Despite the same state and a similar set of facts, the *Guidice* court expressly rejected the holding of its sister district court in *Mirabile* and ruled that a lender who took title for any amount of time could be liable under CERCLA as the owner of the property.

Foreclosure proceedings should not be started until it is clear that there are no environmental problems that could result in lender liability. The bank should review the law in the state where the property is located to determine if those jurisdictions follow the *MB&T* or *Mirabile* decisions. Indeed, under the 11th Circuit decision in *Fleet Factors*, lenders will be required to monitor their borrower's environmental practices and insist that they comply with all applicable requirements. If the due diligence reveals problems, the lender could pursue alternatives to foreclosure, such as use of antideficiency statutes, reconveyance of the security, appointment of a trustee to manage the property, and remedies under promissory notes or any guaranties that have been delivered.

Foreclosure proceedings should not be started until it is clear that there are no environmental problems that could result in lender liability.

If foreclosure is still the best option, the lender might begin foreclosure proceedings but arrange to sell the property to a third party before the foreclosure is completed. As part of such a sale, the lender would have to disclose all information on the environmental condition of the property to avoid liability for fraudulent nondisclosure or concealment[9] as well as to be able to raise the innocent purchaser's defense for itself.

[9]La Placita Partners v. Northwestern Mutual Life Ins. Co., et al, No. C88-2824 (N.D. Ohio Aug. 1, 1988); Bank Western Federal Savings Bank v. Western Office Partners Ltd., No. 86CV13417 slip. op. (D. Denver Feb. 1989); 195 Broadway Co. v. 145 Broadway Corp., No. 27945/86 (Sup. Ct. N.Y. Co. Dec. 1, 1987).

Furthermore, if the security interest includes equipment and inventory, the lender should consider limiting the foreclosure to those items and not foreclosing on the real estate. Because of the *Fleet Factors* decision, lenders that intend to auction off collateral now will have to supervise liquidators or riggers closely. Lenders must ensure that subcontractors handle equipment carefully and keep complete records during the cataloging, packing, and disposition of property.

Lenders must exercise additional care for borrowers located in New Jersey. If the lender repossesses personal property, such as assigned accounts receivable, inventory, or equipment, that represents more than 50% of the assets of the borrower, that action will trigger the Environmental Cleanup Responsibility Act (ECRA) and obligate the borrower to clean up the facility.

If the borrower defaults on this obligation, the state may treat the lender as the owner of the industrial establishment and require the lender to perform the cleanup. Before foreclosure, the lender should request a letter of nonapplicability from the state indicating that such action will not trigger ECRA.

The lender that does foreclose and take title to contaminated property should hold the land only as long as necessary to find a buyer. During that period, it should take only precautionary actions designed to preserve or to protect the property, such as erecting fences to secure the property against trespass or vandals, boarding up broken windows, mothballing equipment, and showing property to prospective purchasers.

If the foreclosure is at the insistence of a participant, the lender should consider assigning the contaminated property to the participant and obtain indemnities from the participant for all damages resulting from the enforcement of the loan.