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4S

**Lender Liability Under
Environmental Laws for
Real Estate and Corporate
Transactions**

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II. AVOIDING LIABILITY AS A LENDER UNDER THE ENVIRONMENTAL LAWS — SECURED CREDITOR EXEMPTIONS

A. Lender Liability Exemption Under CERCLA

4. [4S.5] Lender Liability Act of 1996 — More Security for the Secured Lender

Add at the end of the section:

A 2007 case and a settlement have found lenders liable for response costs when the lenders ignored cleanup laws or failed to notify environmental agencies about threats posed by chemicals on sites acquired through foreclosure. *See, e.g., Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758 (Miss. 2007) (finding Chase had duty to disclose EPA investigation of illegal dumping on site it purchased in foreclosure and was selling to Hess); *New York v. HSBC USA N.A.*, No. 07-3160 (S.D.N.Y. May 30, 2007) (HSBC agreed to pay \$850,000 in settlement with New York State after HSBC violated state law by failing to notify New York Department of Environmental Conservation of fire and explosives threat posed by chemicals left behind by debtor chemical company after bank seized the company's operating capital).

C. Limited Secured Creditor Protection Under RCRA

2. [4S.9] Lenders' Liability for RCRA Citizen Suits

Add at the end of the section:

Village of Riverdale v. 138th Street Joint Venture, 527 F.Supp.2d 760, 767 (N.D.Ill. 2007), addressed the same issue and held that pleadings are sufficient to survive a motion to dismiss if they allege a “causal connection between the Location, the solid waste alleged to be currently stored on the Location and the injury-in-fact recognized under the RCRA-imminent and substantial endangerment to health or the environment [standard].”

D. [4S.10] Limits to Lenders' RCRA Liability Under Illinois Law

The website for the Illinois State Fire Marshal rules in the last paragraph is revised:

www.sfm.illinois.gov/about/statutes.aspx

III. PROTECTING LENDERS' COLLATERAL

A. Due Diligence Before the Investment Decision — All Appropriate Inquiries

3. [4S.15] Congress Protects Prospective Purchasers

Add at the end of the section:

The USEPA has determined that ASTM Standard E2247-08 is also fully compliant with its AAI rule. 40 C.F.R. §312.11.

C. [4S.21] Precautions in the Event of Workout, Default, and Foreclosure

Add at the end of the section:

A lender cannot obtain remediation costs from the borrower's insurer in a garnishment proceeding following a foreclosure unless the lender first proves that the insurer was indebted to the policyholder (the borrower) and that the contamination was covered by the policy. *City Bank v. S & Hy Corp.*, 139 Wash.App. 1062 (2007).

E. Cost Recovery — Potential Opportunity or Risk

1. [4S.24] Cost Recovery Under CERCLA §113(f)

Add at the end of the section:

While *Cooper* affirmed that a potentially responsible party (PRP) can only bring a CERCLA §113(f)(1) contribution action “during or following any civil action under [CERCLA §106 or §107],” CERCLA also provides for a contribution action under §113(f)(3). Under CERCLA §113(f)(3), PRPs who have settled with a state or the United States can seek contribution from non-settling parties. Whether and when a settling party, who has the right to bring a contribution claim under §113(f)(1) or §113(f)(3), also has the right to bring a cost recovery claim under §107(a) is an issue still debated in the lower courts after the Supreme Court's decision in *United States v. Atlantic Research Corp.*, 551 U.S. 128, 168 L.E.2d 28, 127 S.Ct. 2331 (2007), discussed in §4S.25.

2. [4S.25] Cost Recovery Under CERCLA §107(a)

Add at the end of the section:

Since *United States v. Atlantic Research Corp.*, 551 U.S. 128, 168 L.E.2d 28, 127 S.Ct. 2331 (2007), the predicted litigation regarding the potential overlap in rights of recovery under CERCLA §§107(a) and §113(f) has occurred. A principal point of debate has been whether a PRP that settles pursuant to an administrative order or consent decree has the right to bring a §107(a) action, rather than solely a §113(f) action. To date, the Seventh Circuit Court of Appeals has not

directly addressed the issue. For examples of the courts' discussion of the issue, *see, e.g., Morrison Enterprises LLC v. Dravo Corp.*, 638 F.3d 594 (8th Cir. 2011) (§113(f) is only remedy for PRP who incurs response costs pursuant judicial or administrative CERCLA settlement); *Bernstein v. Bankert*, No. 1:08-cv-0427-RLY-DML, 2010 WL 3893121 (S.D.Ind. Sept. 29, 2010) (plaintiffs who had entered into federal consent decrees could not bring §107(a) claim, concluding that their claims could only be brought for contribution); *Solutia, Inc. v. McWane, Inc.*, 726 F.Supp.2d 1316 (N.D.Ala. 2010) (§113(f) is exclusive remedy for party to recoup monies it expends performing cleanup pursuant to consent decree). *But see, e.g., United States v. Pharmacia Corp.*, 713 F.Supp.2d 785, 789 – 792 (S.D.Ill. 2010) (parties to consent decree may bring §107(a) action if they show costs voluntarily incurred outside consent decree or compelled costs different from those which the government sought to recover); *City of Waukegan v. National Gypsum Co.*, No. 07 C 5008, 2009 WL 4043295 (N.D.Ill. Nov. 20, 2009) (PRP alleging costs incurred voluntarily beyond obligations of federal consent decrees can bring claim under §107(a)).

The U.S. Supreme Court has also addressed another source of potential CERCLA liability — liability as an entity that “arrange[s] for disposal . . . of hazardous substances.” 42 U.S.C. §9607(a)(3). In *Burlington Northern & Santa Fe Ry. v. United States*, ___ U.S. ___, 173 L.Ed.2d 812, 129 S.Ct. 1870, 1879 (2009), the Court held that a party can only be liable as an “arranger” if “it takes intentional steps to dispose of a hazardous substance.” Moreover, “knowledge alone [that a release may occur] is insufficient to prove that an entity ‘planned for’ the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.” 129 S.Ct. at 1880. Thus, arranger liability must be assessed on a case-by-case basis to determine the intent to dispose of a hazardous substance.