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Comments

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INTRODUCTION

Recently enacted legislation, namely Pennsylvania's Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act¹ ("PA Act") and the secured creditor exemption under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),² as amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act,³ ("Federal Act") provides lenders with broader protection from inadvertent environmental cleanup liability. Part I of this comment explores the evolution of lender liability under CERCLA by examining the capacity to influence standard and the EPA Lender Liability Rule's actual participation standard. Part II provides an analysis of Pennsylvania's response to lender environmental liability as set forth in the PA Act. Part III examines the Federal Act that amended CERCLA. Part IV compares Pennsylvania legislation and federal legislation concerning lender liability protection. Finally, Part V addresses two cases decided since the enactment of the above mentioned legislation that illustrate the results of such enactments.

In 1980, with the advent of CERCLA⁴ and its strict liability provi-

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¹. 35 PA. CONS. STAT. § 6027 (1995).
². 35 PA. CONS. STAT. § 6027 (1995).
⁴. 42 U.S.C. § 9601-9675 (1980) (amended 1986). CERCLA's goal is to clean up hazardous waste sites with a systematic approach, and allow the Environmental Protection
sions, lenders\textsuperscript{5} first faced potential liability for environmental cleanup costs. Under 42 U.S.C. § 9607, the liability provisions of CERCLA, four groups may be held liable: the current owner; the prior owner or operator; the generator; and the transporter.\textsuperscript{5} If a

Agency to assess strict liability to the parties that are responsible for the contaminated sites and make them pay for the cleanup of those sites. 2 GERARD L. BLANCHARD, LENDER LIABILITY: LAW, PRACTICE, & PREVENTION, § 16:01, at 5 (1997).

5. Under 42 U.S.C. §9601(20)(G)(iv), "lender" is defined as the following:
   (I) an insured depository institution;
   (II) an insured credit union;
   (III) a bank or association chartered under the Farm Credit Act of 1971;
   (IV) a leasing or trust company that is an affiliate of an insured depository institution;
   (V) any person (including a successor or assignee of any such person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;
   (VI) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Agricultural Mortgage Corporation, or any other entity that in a bona fide manner buys or sells loans or interests in loans;
   (VII) a person that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person; and
   (VIII) a person that provides title insurance and that acquires a vessel or facility as a result of assignment or conveyance in the course of underwriting claims and claims settlement.

Id.

6. 42 U.S.C. §9607(a) provides as follows:
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 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 or incineration vessel 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, incineration vessels 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 or an Indian tribe 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;
   (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; and
   (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D).
lender falls into one of these categories, it could be liable. The prospect of liability concerned lenders because CERCLA's strict liability provisions assess liability on entities that did not contaminate the property but subsequently acquired the property either by purchase or foreclosure. Despite its strict liability provisions, CERCLA, does include a secured creditor exemption, excepting such secured creditors from the definition section of "owner or operator" and, thereby, providing lenders with some protection. In the years following the enactment of CERCLA, various courts have interpreted CERCLA's secured creditor exemption.

I. EVOLUTION OF LENDER LIABILITY UNDER CERCLA

A. The Capacity to Influence Standard

In the 1990 case of United States v. Fleet Factors Corporation, the court held that a secured creditor may incur liability under CERCLA "by participating in the financial management of a facility to a degree indicating a 'capacity to influence' the corporation's treatment of hazardous wastes." In this case, Fleet Factors Corporation had a security interest in the Swainsboro Print Works textile facility, including a security interest in personal property in a...
Due to financial difficulties, Swainsboro Print Works filed for bankruptcy under Chapter 7 of the Bankruptcy Code. Subsequently, Fleet Factors Corporation foreclosed on its security interest and eventually sold the textile facility and inventory at an auction. The Environmental Protection Agency ("EPA") discovered a hazardous waste problem after the foreclosure, resulting in the cleanup of "700 fifty-five gallon drums containing toxic chemicals" and "forty-four truckloads of material containing asbestos." Pursuant to 42 U.S.C. § 9607(a), the government assessed liability against Swainsboro Print Works and Fleet Factors Corporation and brought suit to recover the cleanup costs. The Court denied Fleet Factors Corporation's motion for summary judgment, and Fleet Factors Corporation appealed. Was Fleet Factors Corporation protected from liability as a secured creditor that did not participate in the management of the facility? The court left this question unanswered because material questions of fact existed as to whether Fleet Factors Corporation's participation in the management of the facility was within the secured creditor exemption. The case was remanded for further determination. On remand, the district court rejected the

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12. Fleet Factors Corp., 724 F. Supp. 955-57 (S.D. Ga. 1988). A deed of trust is "an instrument in use in some states, taking the place and serving the uses of a mortgage, by which the legal title to real property is placed in one or more trustees, to secure the repayment of a sum of money or the performance of other conditions." BLACK'S LAW DICTIONARY 414 (6th ed. 1990).

13. Fleet Factors Corp., 724 F. Supp. at 958. A Chapter 7 bankruptcy is "[a] proceeding designed to liquidate the debtor's property, pay off his or her creditors, and discharge the debtor from his or her other debts." BLACK'S LAW DICTIONARY 148 (6th ed. 1990).


15. Id. at 959.

16. Fleet Factors Corp., 901 F.2d at 1553. The government asserted that the Fleet Factors Corporation was liable as the present owner under 42 U.S.C. § 9607(a)(1) or as the owner at the time of disposal under 42 U.S.C. § 9607(a)(2). Id. at 1554.

17. The standard for the motion for summary judgment is "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

18. Fleet Factors Corp., 901 F.2d at 1553. Although the district court did not find Fleet Factors Corporation to be liable as a present owner under 42 U.S.C. § 9607(a)(1), its motion for summary judgment was denied because there was a factual issue as to whether Fleet Factors Corporation was liable as an owner/operator at the time of disposal under 42 U.S.C. §9607(a)(2). Id. at 1554.

19. Id. at 1556.

20. Id. at 1660.

21. Id.
government's interpretation of the secured creditor exemption as assessing liability for "any manner" of participation in management. Ultimately, the Court of Appeals held that if the lender has a "capacity to influence" the management of hazardous wastes, it will not be protected by the secured creditor exemption and will be liable for cleanup costs.

*Fleet Factors Corp.* makes it easier for the government to hold lenders liable for CERCLA cleanup costs; if lenders have the "capacity to influence," they are participating in management. Under this interpretation of the secured creditor exemption, lenders must not only be conscientious about avoiding participation in the day-to-day operations of a facility, including decision making about environmental compliance, but must also consider whether they have the capacity to influence such decisions.

**B. EPA Lender Liability Rule and Actual Participation Standard**

In 1992, in response to such cases as *Fleet Factors Corporation*, the EPA published its Lender Liability Rule. The new rule sought to overcome the narrow interpretation of the secured creditor exemption under 42 U.S.C. § 9601(20)(A) by providing a broader interpretation. The EPA rule stated that a lender was liable only if it actually exercised control over the management decisions relating to environmental compliance, and incurred no liability if it only had the capacity to influence. The rule applied not only to the original lender but also to any subsequent lenders, as well as to guarantors. To be protected by the exemption, the primary purpose of the lender's ownership interest must be to protect its security interest; the lender's interest may not be for investment purposes. The rule's significance lay in its definition of participation in management.

22. *Id.* at 1556.
23. *Fleet Factors Corp.*, 901 F.2d at 1557. The court also noted that participation in day to day operations, or management decisions relating to the contamination is not required to find a lender liable. *Id.*
24. *Fleet Factors Corp.*, 901 F.2d at 1550.
26. BLANCHARD, supra note 4, § 16:38, at 77.
28. 40 C.F.R. § 300.1100(b).
29. Participation in management is defined as follows:
The obvious difference between the Fleet Factors Court's interpretation of the secured creditor exemption and the EPA's is that the latter provided more protection to lenders. The EPA rule also defined what practices are not considered participation in management: actions taken before the lender obtains a security interest (such as environmental assessments and environmental compliance actions); actions by the lender to protect the security interest; actions by the lender prior to foreclosure to "prevent, cure, or mitigate a default by the borrower or obligor; or [actions] to preserve, or prevent the diminution of, the value of the security interest;"

and any response action under CERCLA. In addition, the rule provided that "as long as the borrower's management retains the power to decline or accept the advice or counsel provided by the lender, the lender has not reached the level of control necessary to have participated in the management of the property."

The lender could also foreclose on a property with impunity provided it marketed the "property in a reasonably expeditious manner, using whatever commercially reasonable means [were] relevant to the particular facts and circumstances." Although the

A holder is participating in management, while the borrower is still in possession of the vessel or facility encumbered by the security interest, only if the holder either: (i) Exercises decisionmaking control over the borrower's environmental compliance, such that the holder has undertaken responsibility for the borrower's hazardous substance handling or disposal practices; or (ii) Exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with the respect to: (A) Environmental compliance; or (B) All, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise other than environmental compliance. Operational aspects of the enterprise include functions such as that of facility or plant manager, operations manager, chief operating officer, or chief executive officer.

Id. § 300.1100(c)(1).

30. Id. § 300.1100(c)(2)(B). These work out activities may include the following activities:

restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice; suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, representations or promises from the borrower.

Id.

31. Id. § 300.1100(c)(2).
32. BLANCHARD, supra note 4, § 16:38, at 77.
33. Id. § 16:38, at 78.
Lender Liability Rule seemed beneficial to lenders because it offered them more protection, such protection was limited. The Lender Liability Rule applied only to liability under CERCLA and was not applicable to other laws; it did not address the liability of fiduciaries and trustees, and it did not apply to actions taken prior to its effective date. The method by which the EPA created the rule was also problematic.

C. EPA Lender Liability Rule Vacated

In 1994, the court in *Kelley v. Environmental Protection Agency* vacated the EPA Lender Liability Rule, holding "that EPA lack[ed] statutory authority to restrict by regulation private rights of action arising under the statute." The state of Michigan and the Chemical Manufacturers Association in *Kelley* asserted that the EPA lacked statutory authority to issue a regulation interpreting the lender liability provisions of CERCLA because such interpretation could only come from the federal courts. They also argued that the regulation was in conflict with the plain meaning of the statute. The EPA argued that 42 U.S.C. § 105, dealing with the responsibility of the EPA to create the national contingency plan that delineates the procedures to be taken for cleanup of hazardous waste, included the authority of the EPA to define liability under CERCLA. The court disagreed with this assertion, finding that the EPA did not have the authority to define the liability provisions. Instead, the court agreed with the state of Michigan and the Chemical Manufacturers Association and held that, because Congress included private rights of action in CERCLA, the courts, and not the EPA, were to make the decision as to CERCLA liability. As a result, the court gave no deference to the EPA's interpretation of

34. Id. § 16:38, at 78.
35. Id. § 16:38, at 78-9.
37. Id. at 1109.
38. Id. at 1104-05.
39. Id. at 1105.
40. Id. The specific provisions of 42 U.S.C. § 9605 the EPA argued gave them authority to interpret the liability section are: Section 9605(a)(3) stating that the national contingency plan is to include: "methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by this chapter", and section 9605(a)(4) stating the EPA has the authority to "appropriate roles and responsibilities for the Federal, State, and local governments and for interstate and nongovernmental entities in effectuating the plan." 42 U.S.C. § 9605.
41. *Kelley*, 15 F.3d 1105-06.
42. Id. at 1107.
lender liability under CERCLA. Instead, courts continued to apply the capacity to influence standard developed in Fleet Factors to assess the liability of lenders. This resulted in lenders being left without the protection that the EPA intended when it promulgated the Lender Liability Rule.

II. PENNSYLVANIA'S RESPONSE TO LENDER ENVIRONMENTAL LIABILITY


Prior to the enactment of federal legislation in response to the court's decision in Kelley, Pennsylvania enacted the PA Act to provide lenders with more protection from environmental liability.\(^4\) The PA Act provides lenders, along with fiduciaries and economic development agencies ("EDAs"), protection from liability if they do not cause the release of hazardous wastes or the contamination of the property.\(^44\) The legislative intent is to allow economic development agencies, fiduciaries, and lenders to assist in the redevelopment of property in Pennsylvania without the fear that they will be found liable for an environmental hazard on the property.\(^45\)

The statute begins by stating the policy reasons behind the PA Act.\(^46\) The PA Act addresses EDAs\(^47\) that exist to facilitate development and redevelopment of property in Pennsylvania for the benefit of all.\(^48\) If environmental liability were assessed against these agencies when they acquire title from a defaulting tenant or borrower or when they acquire title for financing purposes, these agencies would be hesitant to enter into such arrangements to redevelop property in Pennsylvania.\(^49\) Thus, the PA Act aims to bene-

\(^44\) Id.
\(^45\) Id. § 6027.2.
\(^46\) Id.
\(^47\) Id. § 6027.3. The statute defines an EDA as any agency or organization under the Urban Redevelopment Law, the Pennsylvania Industrial Development Authority Acts, the Economic Development Financing Law, or the Capital Loan Fund Act, as well as any municipal authority, tourist promotion agency, or local community-based nonprofit sponsor for an industrial heritage program. Id.
\(^48\) Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act, § 6027.2(1).
\(^49\) Id. § 6027.2(2)-(4). The statute provides as follows: Economic development agencies acquire title to industrial property for financ-
fit Pennsylvania by facilitating the growth of business and the re-
development of abandoned and reusable property.\textsuperscript{50}

The statute next addresses lenders and fiduciaries. Lenders\textsuperscript{51} and
fiduciaries\textsuperscript{52} may be liable for environmental hazards even when
they are not responsible for the release and contamination.\textsuperscript{53} This
potential liability makes lenders hesitant to assist in the redevelop-
ment of property in Pennsylvania,\textsuperscript{54} and makes fiduciaries hesi-
tant to assist persons who may have caused an environmental haz-
ard on property.\textsuperscript{55} Because of the potential deleterious effect of
environmental liability for EDAs, lenders, and fiduciaries, this PA
Act attempts to alleviate concern by protecting these entities from

\begin{itemize}
  \item Id. § 6027.2(2). EDAs also "acquire possession of these industrial sites from time to
time when the industrial occupant defaults under its obligations to the agencies under its
lease or installment sales agreement." Id. § 6027.2(3). Furthermore, these agencies may
"acquire industrial property either for the purpose of financing or redevelopment but
without a motive for profit or to occupy the property for their own industrial
operations." Id. § 6027.2(4).
  \item Id. § 6027.2(7)-(8).
  \item Id. § 6027.3. A lender is defined as:
  \begin{quote}
  \textquote{Any person regulated or supervised by any Federal or State regulatory
agency and any of its affiliates or subsidiaries, successor or assigns,
including its officers, directors, employees, representatives or agents and
any Federal or State banking or lending agency or its successors. . . . It
also includes the initial lender and any subsequent holder of a security
interest or note, guarantor, lease financier or any successor or a receiver
or other person who acts on behalf or for the benefit of a holder of a
security interest. The terms includes an economic development agency.}
\end{quote}
  \item Id. § 6027.3. A fiduciary under the Act is defined as:
  \begin{quote}
  \textquote{A}ny person who is considered a fiduciary under section 3(21) of the Em-
ployee Retirement Income Security Act of 1974 . . . or who acts as trustee,
executor, administrator, custodian, guardian of estates, conservator, com-
mittee of estate of persons who are disabled, personal representative, re-
ceiver, agent, nominee, registrar of stocks and bonds, assignee or in any other
capacity for the benefit of another person.}
\end{quote}
  \item Id. § 6027.2(9)-(10). Environmental liability for fiduciaries affects
family businesses [that] are unable to convey their business interests to the
next generation, and other businesses [that] are unable to receive retirement,
investment and other trust services from fiduciaries, when fiduciaries in their
personal or individual capacities may be held liable for environmental
contamination caused by other persons merely by virtue of owning property in
their trustee capacities and providing fiduciary services.
\end{itemize}
liability for releases or contamination they have not caused, and by assisting in the business growth and redevelopment of property in Pennsylvania.\textsuperscript{56}

B. Protection from Environmental Liability for EDAs

EDAs will be protected from environmental liability if they "hold an indicia of ownership in property as a security interest for the purpose of developing or redeveloping the property or to finance an economic development or redevelopment activity."\textsuperscript{57} This protection, however, is based on certain conditions. The EDAs will not be liable unless they "directly cause[] an immediate release or directly exacerbate[] a release of a regulated substance on or from the property."\textsuperscript{58} There is no liability if the agency forecloses on property or if it conducts a remedial action.\textsuperscript{59}

C. Protection of Lenders from Environmental Liability

Under section 6027.5, a lender is protected from environmental liability if it mainly provides standard commercial lending services, such as financial services, retention of security interests, and foreclosures.\textsuperscript{60} A lender is protected unless "its employees or agents directly cause an immediate release or directly exacerbate a release of a regulated substances on or from the property."\textsuperscript{61} A lender will be liable if it "knowingly compelled the borrower" to either release a substance or violate any environmental law.\textsuperscript{62} If the lender's activity caused a release or if the lender compelled a bor-
rower to cause a release, then the lender's liability will be limited
to the cost of the response action. Lenders are not liable when
they foreclose on property and subsequently own or control it. Lenders will not be responsible for response action costs for
leases that occur before and continue after foreclosure, but they
will be responsible if they act to directly exacerbate releases for
estate claims.

D. Protection of Fiduciaries from Environmental Liability

Under section 6027.6, fiduciaries are not personally liable for
environmentally contaminated property, unless a release occurs
while they have an "express power and authority to control the
property," and the release is a result of "gross negligence or willful
misconduct." Any liability of a fiduciary is limited to the cost of a
response action that is necessitated by the fiduciary's activities. If
the fiduciary is a lessor of property, it is the lessee who has control
of the property pursuant to section 6027.6(a)(2). The fiduciary
will not be responsible for the cost of response actions if the re-
lease occurs prior to and continues after any fiduciary activities.

63. Economic Development Agency, Fiduciary and Lender Environmental Liability
Protection Act, § 6027.5(b). The lender will be liable only if its activities were the
"proximate and efficient cause of the release or violation." Id. A response action is
defined in § 6027.3 as follows:
An action, including, but not limited to, a response or interim response,
remedial response or remedy or corrective action, closure or any other ac-
tion under the environmental acts in response to a release, such as test-
ing, inspections, sampling, installations, corrective action, removals, closure,
response costs, assessments or any types of claims, damages, ac-
tions, fines and penalties.

64. Id. § 6027.3. Foreclosure is defined as follows:
The date upon which title vests in property through realizing upon a security
interest, including but not limited to, any ownership of property recognized
under applicable law as vesting the holder of the security interest with some
indicia of title, legal or equitable title obtained at or in lieu of foreclosure,
shefiff sales, bankruptcy distributions and their equivalents.

65. Id. § 6027.3. Environmental due diligence is defined as "[i]nvestigaive techniques, including but not
limited to, visual property inspections, electronic environmental data base searches,
review of ownership and use history of the property, environmental questionnaires,
transaction screens, environmental assessments or audits." Id. § 6027.3.

66. Id. § 6027.6(a).
67. Id. § 6027.6(b).
68. Economic Development Agency, Fiduciary and Lender Environmental Liability
Protection Act, § 6027.6(b).
69. Id. A fiduciary will be liable for a response action that is a result of the fiduciary's
Although fiduciaries are protected in their personal capacities, they are not protected in their representative capacity.\textsuperscript{70}

\section*{E. Other Provisions}

Although the PA Act provides increased protection for EDAs, lenders, and fiduciaries, they can still be held liable. Under section 6027.7, any one of these entities can avoid liability if a release is caused by events that are beyond the entity's control.\textsuperscript{71} A party can also avoid liability if it can prove any defense applicable to other environmental laws\textsuperscript{72} or the common law.\textsuperscript{73}

Section 6027.8 is a savings provision that provides that no private right of action is created by the PA Act.\textsuperscript{74} It also provides that this PA Act does not affect the rights and defenses available to EDAs, lenders, and fiduciaries under other applicable law.\textsuperscript{75}

If found liable, EDAs, lenders, and fiduciaries will be liable only for that part of the liability that resulted from their particular activities.\textsuperscript{76} Section 6027.10 also provides that “this act preempts and exacerbation of a release. \textit{Id.}

\textsuperscript{70} \textit{Id.} § 6027.6. Representative capacity means "the office or other position an agent holds in relation to his or her principal which, along with the principal's name, should be indicated on any instrument the agent signs for the principal so that the agent herself avoids personal liability." \textsc{Black's Law Dictionary} 1302 (6th ed. 1990).

\textsuperscript{71} Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act, § 6027.7. Entities can avoid liability under § 6027.7 if one of the following occurs:

\begin{enumerate}
  \item An act of God.
  \item An intervening act of a public agency.
  \item Migration from property owned by a third party.
  \item Actions taken or omitted in the course of rendering care, assistance or advice in accordance with the environmental acts or at the direction of the department.
  \item An act of a third party who was not an agent or employee of the lender, fiduciary or economic development agency.
  \item If the alleged liability . . . arises after foreclosure and the lender or economic development agency exercised due care . . . and took reasonable precautions.
\end{enumerate}

\textit{Id.}

\textsuperscript{72} \textit{Id.} § 6027.3. Environmental acts include the Clean Streams Law, the Air Pollution Control Act, the Solid Waste Management Act, the Worker and Community Right to Know Act, the Infectious and Chemotherapeutic Waste Law, the Hazardous Sites Cleanup Act, the Storage Tank and Spill Prevention Act, the Hazardous Material Emergency Planning and Response Act, the Oil Spill Responder Liability Act, and any other federal, state, or local environmental law. \textit{Id.}

\textsuperscript{73} \textit{Id.} § 6027.7.

\textsuperscript{74} \textit{Id.} § 6027.8.

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act, § 6027.9.
eliminates all present liability standards" including the secured creditor exemption.\textsuperscript{77} The PA Act also preempts and repeals any environmental law that is inconsistent relative to liability.\textsuperscript{78} Furthermore, section 6027.13 provides that the PA Act also applies retroactively.\textsuperscript{79} Thus, the PA Act provides EDAs, lenders, and fiduciaries with increased protection from environmental liability.

III. FEDERAL LENDER LIABILITY PROTECTION LEGISLATION

A. Secured Creditor Exemption and Validation of EPA Lender Liability Rule

In response to Kelley, Congress enacted federal lender liability legislation in the form of the Federal Act.\textsuperscript{80} This legislation included an amendment to CERCLA's lender and fiduciary liability limitations.\textsuperscript{81} The legislation amends the definition of owner or operator by limiting what constitutes participation in management.\textsuperscript{82} As long as the lender does not participate in the management of the facility or control the activities at the facility, the lender will not be liable.\textsuperscript{83}

CERCLA defines owner or operator so as to specifically exclude a lender that holds an ownership interest in a facility solely to protect its security interest as long as it does not participate in management.\textsuperscript{84} Furthermore, under CERCLA, foreclosure on a facility will not make the lender liable provided it did not participate in the management of the facility prior to the foreclosure action.\textsuperscript{85} The term participation in management "does not include merely having the capacity to influence, or the unexercised right to control vessel

\textsuperscript{77} Id. § 6027.10.
\textsuperscript{78} Id. § 6027.12.
\textsuperscript{79} Id. § 6027.13.
\textsuperscript{81} Id. § 2502.
\textsuperscript{82} Id. § 2502(b)(E).
\textsuperscript{83} Id.
\textsuperscript{84} 42 U.S.C. § 9601(20)(E).
\textsuperscript{85} 42 U.S.C. § 9601(20)(F)(ii). A lender may foreclose on a facility without liability even if, as a result of the foreclosure, the lender "sells, releases (in the case of a lease finance transaction), or liquidates the vessel or facility, maintains business activities, winds up operations, undertakes a response action . . . or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition. . . ." Id. § 9601(20)(E)(ii).
or facility operations. A lender that takes an ownership interest merely to protect its security interest will nonetheless be deemed to participate in management if it makes decisions regarding environmental compliance and assumes responsibility for disposal procedures or if it manages and influences routine decision-making related to environmental compliance or operational matters. If a lender does not participate in the management as described above but merely holds the vessel or facility as security, then the lender will not be liable under CERCLA.

In addition, the 1996 amendment to CERCLA addresses the 1992 EPA Lender Liability Rule that was invalidated by Kelley in 1994. The 1992 EPA Lender Liability Rule was validated as within the authority of the EPA to promulgate with the enactment of the Federal Act. The amendment also stated that this final rule shall not be reviewed by any court. As a result of the amendment, participation in management requires the actual exercise of control and not the mere capacity to influence, as interpreted in the Fleet Factors Corporation and Kelley cases.

86. Id. § 9601(20)(F).
87. Id. Participation in management does not include:
   (I) holding a security interest or abandoning or releasing a security interest;
   (II) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;
   (III) monitoring or enforcing the terms and conditions of the extension of credit or security interest;
   (IV) monitoring or undertaking 1 or more inspections of the vessel or facility;
   (V) requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;
   (VI) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;
   (VII) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;
   (VIII) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or
   (IX) conducting a response action under section 9007(d) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan, if the actions do not rise to the level of participating in management.

Id. § 9601(20)(F)(iv).
90. Id. § 2504(b).
92. Kelley, 15 F.3d at 1100.
B. Fiduciary Liability Protection

The final important amendment to CERCLA made by the Federal Act is the specific reference to fiduciary liability. The reference is significant because CERCLA had not previously distinguished between fiduciaries as owners of property and other property owners. Both could be held liable under the unamended version of CERCLA as owners. Section 9607(n) provides that the liability of fiduciaries "shall not exceed the assets held in the fiduciary capacity." This limitation on liability, however, is inapplicable to an individual person's liability for actions taken independent of the fiduciary capacity or if a release occurs because of the negligence of the fiduciary.

The safe harbor for fiduciaries is that they are not personally liable for the response actions, nor for (1) terminating the fiduciary relationship, (2) adding environmental compliance in the fiduciary agreement, (3) monitoring and inspections, (4) giving financial advice, (5) altering the fiduciary relationship, (6) managing a contaminated vessel or facility prior to the origination of the fiduciary relationship, or (7) declining to take any of the above listed ac-

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93. 42 U.S.C. § 9607(n)(5)(A) (1996). The term fiduciary is defined as follows:
   (i) [A] person acting for the benefit of another party as a bona fide—
   (I) trustee;
   (II) executor;
   (III) administrator;
   (IV) custodian;
   (V) guardian of estate or guardian ad litem;
   (VI) receiver;
   (VII) conservator;
   (VIII) committee of estates of incapacitated persons;
   (IX) personal representative;
   (X) trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or
   (XI) representative in any other capacity that the Administrator, after providing public notice, determines to be similar to the capacities described in subclauses (I) through (X); and
   (ii) does not include—
   (I) a person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, 1 or more estate plans or because of the incapacity of a natural person; or
   (II) a person that acquires ownership or control of a vessel or facility with the objective purpose of avoiding liability of the person or of any other person.

94. Id. § 9607(n)(1).
95. Id. § 9607(n)(2)-(3).
The amendment neither affects rights under or defenses to other applicable laws nor creates a private right of action against a fiduciary. Only fiduciaries in their fiduciary capacity may be protected from environmental liability. If the fiduciary acts as a beneficiary of a trust or if the fiduciary is a beneficiary as to the same estate and in its fiduciary capacity receives benefits beyond what is normally received, then it may be subject to liability.

IV. COMPARISON OF FEDERAL ACT AND PA ACT

The Federal Act provides greater protection against environmental liability for lenders and fiduciaries, provided that such entities do not actually participate in the management of the property, than does CERCLA. The PA Act also offers broader protection from environmental liability for lenders, fiduciaries and EDAs in order to promote the redevelopment of property and provide for business growth in Pennsylvania.

Both acts are similar in that they offer protection to lenders and fiduciaries. The PA Act offers protection by excluding liability for a lender that does not cause a release or exacerbate a release of regulated substances. The Federal Act precludes liability provided the lender does not actually participate in the management of the property.

Both acts impose liability when a lender oversteps the bounds of what are considered routine practices of commercial lending, but the PA Act offers broader protection by assessing liability only when a lender causes or exacerbates a release and does not require an analysis of whether the lender participated in management. Both acts also shield a lender from liability when it forecloses on property to protect its security interest. In this situation, the lender is an owner only as a result of a borrower's default and should not be responsible for hazardous materials or environmental contaminants on the property.

In addition, the PA Act focuses on EDAs because its aim is to

96. Id. § 9607(n)(4).
97. Id. § 9607(n)(6).
101. Id.
foster economic development through the redevelopment and re-use of property. The PA Act is also more inclusive than is the Federal Act, because it targets EDAs as well as lenders and fiduciaries who are concerned with inadvertent environmental liability.\(^\text{103}\)

Similarly, both acts address fiduciary liability and protect the fiduciaries in their personal capacities but not in their representative capacities. The PA Act focuses on liability when a fiduciary (1) has control over the property, which assumes that the fiduciary should be able to prevent any releases, or (2) is negligent. If found liable, the fiduciary will only be responsible for its share of the additional cost of the response action.

The Federal Act assesses liability to a fiduciary for negligent actions, as well as actions taken that are distinct from its fiduciary capacity. If a court finds a fiduciary liable under the Federal Act, liability is limited to the assets held in the fiduciary capacity. Consequently, the Federal Act protects fiduciaries from environmental liability provided they act within their fiduciary capacity.\(^\text{104}\)

The PA Act illustrates the important connection between lenders and property development and transfer. The PA Act and the Federal Act have been passed in large part because of the significance of this connection. Their purpose is to protect lenders, fiduciaries, as well as EDAs for the PA Act, from liability for environmentally contaminated property when such contamination results from the actions of others.

In Pennsylvania, as a result of the PA Act, lenders are provided with broader protection than they were before the enactment of the PA Act. Since the PA Act was passed in 1995 to address lender environmental liability protection, few cases have dealt with the statute.

V. OUTCOME OF LENDER ENVIRONMENTAL LIABILITY PROTECTION

A recent Pennsylvania case, Raab v. Westinghouse Electric and Mellon Bank,\(^\text{105}\) illustrates the determination of liability under the PA Act. In Raab, the court held that retroactive application of the PA Act protected a trustee-fiduciary from environmental liability


\(^{104}\) 42 U.S.C. § 9607(n)(5)(B).

under the Pennsylvania Storage Tank and Spill Prevention Act.  

On April 19, 1979, Max L. Raab purchased the property in question from Mellon Bank and Trust Company ("Mellon"), which was acting as a trustee for Westinghouse Pension Plan Trust ("Westinghouse"). Prior to Raab's ownership, Mellon held the property and leased it to Westinghouse. In 1965, Mellon acquired an adjacent piece of property from Daromann, Inc. Subsequently, Mellon leased that adjacent property back to Daromann, Inc. to use as a heating fuel yard until June 1, 1970. From 1968 until 1978, Morgan Guaranty Trust Company of New York owned the property as the new trustee for Westinghouse. From early 1978 through April 19, 1978, Mellon held title to the property solely as trustee for Westinghouse and never exercised control over the property, except for executing the lease to Westinghouse.

Prior to closing, Raab conducted approximately six inspections of the property, and became aware of the fuel intake pipes, fuel pump, and gasoline pump on the property. Raab signed an Agreement of Sale in which he accepted the property in an "as-is" condition without warranty. He was not aware of any underground storage tank problems at the time. During the time the property was for sale, Mellon neither played a role in its marketing nor dealt directly with Raab. Raab dealt strictly with a broker and never spoke with anyone at Mellon.

In 1992, some thirteen years after Raab's acquisition of the property in 1979, an environmental study undertaken to determine whether there were any hazardous wastes on the property revealed the existence of the underground storage tanks. The five underground storage tanks that were located on property were removed in 1994. Raab was listed as the owner of the property on an Underground Storage Tank Closure Report Form to the

106. Raab, No. 1378 at II(19).
107. Id. at I(1),(25).
108. Id. at I(2).
109. Id. at I(3),(5), (10).
110. Id. at I(3),(5), (10).
111. Raab, No. 1378 at I(13), (18).
112. Id. at I(20), (24).
113. Id. at I (26),(41).
114. Id. at I(36).
115. Id. at I(51).
116. Raab, No.1378 at I(31), (33).
117. Id. at I(32)-(33).
118. Id. at I(53)-(54).
119. Id. at I(68)-(69).
The corroded tanks contained a combination of "diesel fuel, water and sludge." The type of diesel fuel found in the tanks was a "regulated substance under the Storage Tanks and Spill Prevention Act." Because of the corrosion, the excavation of the tanks caused fuel contamination of the soil. There was also contamination from the underground storage tanks themselves. The removal of the corroded tanks resulted in six thousand tons of soil being removed and treated and the concrete pad that covered the location of the tanks being removed over a three- to four-month period at a cost to Raab of $572,624.77.

Raab filed suit against Mellon in order to recoup some of the cleanup costs. The court found that Mellon and Westinghouse were not liable for the contamination under the Storage Tank and Spill Prevention Act, which had been enacted in 1989, because they were neither owners nor operators of the underground storage tanks as defined by this act. Mellon had acted as a fiduciary for Westinghouse in all its actions pertaining to the property and, therefore, was not liable in its personal or individual capacity for the environmental contamination of the property. Pursuant to the PA Act, if a fiduciary leases property, it is the lessee, and not the fiduciary, that is deemed to control the property. Thus, the court found that Raab failed to prove the following: (1) that Mellon's activities caused the contamination to the property; (2) that Mellon caused a release of a substance regulated under the Storage Tank and Spill Prevention Act; (3) that Mellon controlled the property at the time of the release; and (4) that Mellon had been grossly negligent when the release occurred.

Although the Storage Tank and Spill Prevention Act was enacted in 1989 and the PA Act was not enacted until 1995, the court held that the latter applied retroactively to protect Mellon, as a fiduciary, in its individual or personal capacity from environmental li-
ability under the former. With the fiduciary protected from environmental liability, the court found Raab, as the owner, to be liable for all cleanup costs.

In Raab, the PA Act protected the fiduciary from liability because it neither caused the contamination of the property nor was negligent in its fiduciary capacity. The Raab case is the first case that has interpreted the PA Act. It leads to the assumption that lenders, as well as fiduciaries and EDAs, are protected from environmental liability if they do not cause a release or facilitate an environmental hazard. Because the fiduciary was not liable for cleanup costs, the Raab Court found that it is the current owner who will bear all the cleanup costs. In other cases, it may be the prior owner, the generator, or transporter who will bear the costs. For the present time, lenders, fiduciaries, and EDAs, have the comfort of knowing that they are protected by the PA Act.

Similar results have been reached under the Federal Act. In Kelley v. Tiscornia, the Court of Appeals for the Sixth Circuit affirmed the lower court's decision holding that Manufacturers National Bank of Detroit ("Bank") was not an owner/operator of the facility that it foreclosed upon and, therefore, was not responsible for cleanup costs. Here, the State of Michigan filed suit under CERCLA and sought to recover cleanup costs for two factory sites no longer operated by Automobile Specialties Manufacturing Company. The Bank was also named as a defendant. However, the district court granted summary judgment to the Bank because the Bank was held to be within the secured creditor exemption of CERCLA.

The district court interpreted the secured creditor exemption based on the EPA lender liability rule that defined participation in management. Although the EPA lender liability rule was later vacated, the Federal Act amended CERCLA and codified the EPA lender liability rule after the district court's ruling and before the appeals court heard the case. Because the "amendments are ex-

131. Raab, No. 1378 at II(19).
132. Id. at II(21).
135. Id.
136. Id.
137. Id.
138. Id.
pressly made applicable to any claim 'that has not been finally ad-
judicated as of the date of enactment,'” the rule applied in this case. 140

The pertinent issue in the case was whether the Bank partici-
pated in the management of the factory sites. 141 The district court
found that no facts supported such a finding and that the State did
not allege that the Bank participated in ultimate decision-making
or daily management responsibility about environmental concerns
at the factories. 142 Nor did the evidence show that the Bank partici-
pated in daily management of all operations of the factories “other
than environmental compliance as opposed to financial or admin-
istrative aspects of the company's business.” 143

The court held that the Bank did not participate in management
as defined in CERCLA amendment. 144 Rather, the Bank participated
solely in a financial or administrative capacity. 145 Thus the lender
was not held liable for cleanup costs

CONCLUSION

The PA Act and the secured creditor exemption under CERCLA
as amended by the Federal Act provide lenders with broader pro-
tection from inadvertent environmental cleanup liability. The PA
Act fosters property redevelopment in Pennsylvania and new
business growth. The benefits of the PA Act and the Federal Act lie
not only in protecting lenders, but also in placing the responsibility
and liability for the cleanup of environmental contamination upon
the responsible parties who caused or facilitated the releases of
environmentally hazardous substances. These new laws discour-
age lenders from directly causing or exacerbating a release and
from participating in the management of the properties in which
they hold security interests, while shielding them from cleanup
liability for environmental contamination for which they are not
responsible. The choice is with the lenders. The lenders can either
enjoy the extra protection of these new laws by neither directly
causing or exacerbating a release nor participating in the man-
agement of the properties in which they hold security interests, or

140. Id.
141. Id.
142. Id.
143. Id.
145 Id.
they can choose to directly cause or exacerbate a release or to participate in the management of such properties and open themselves up to environmental cleanup liability.

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