LENDER LIABILITY FOR ENVIRONMENTAL CONTAMINATION IN THE FORECLOSURE CONTEXT

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I knew the recession was truly affecting Florida's economy when lenders started asking the question more frequently, "Should we foreclose on property with potential environmental concerns or should we just walk away from our collateral?" Historically, lenders and property owners have asked for guidance about whether a lender may be liable for environmental contamination on a borrower's property. Lenders customarily require a Phase I Environmental Site Assessment prior to commencing a loan which utilizes real property as collateral. Lenders' typical concerns regarding the environmental condition of the property are direct liability for the cleanup and impairment of the collateral's value. I thought that lenders' concerns about direct liability for the cleanup were a thing of the past, largely assuaged by the 1996 CERCLA Amendments which enhanced lender liability protections.

More recently, however, lenders are facing a dilemma whether to foreclose on an environmentally impaired property or to walk away from the collateral. The dilemma is more acute with distressed properties which may need immediate action to abate an environmental problem, such as a leaking above ground storage tank. As a result, lenders are looking carefully at their exposure for post-foreclosure environmental liabilities. This paper discusses lender liability for environmental contamination in the real property foreclosure context under federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and Florida law.

I. CAN LENDERS BE LIABLE FOR ENVIRONMENTAL CONTAMINATION ON A BORROWER'S PROPERTY?

Generally, lenders cannot be liable for environmental contamination on a borrower's property unless they are deemed an owner or operator or actually participate in management of the facility. Federal CERCLA contains broad protection of lenders even after foreclosure while Florida's express statutory language provides narrower protection for lenders at petroleum and brownfield sites.

A. Federal Protection of Lenders.

CERCLA imposes sweeping liability on owners and operators of a facility at which hazardous substances were disposed of, transported to, or from which there is a release or threatened release, which causes the incurrence of response costs. 42 U.S.C. §9607(a) (Supp. III 2009); see also, Monarch Tile, Inc. v. City of Florence, 212 F.3d 1219, 1221 (11th Cir. 2000). Historically, a lender who held a security interest in the facility and did not participate in management was protected from CERCLA liability. 42 U.S.C. §9601(20)(A) (1994); DuFrayne v. FTB Mortgage Services, Inc., 194 B.R. 354 (E.D. Pa. 1996); Bancamerica Comm. Corp. v. Trinity Indus., 900 F. Supp. 1427 (D. Ks. 1995). This two-part test – not a participant in management and holding an interest to protect a security interest – seems simple enough. Even so, the application of this provision has occupied the courts for many years.

On one hand, a court would grant a motion to dismiss a CERCLA claim against a lender where there were no allegations of impermissible participation in management so long as the lender could demonstrate that it held a security interest such as a mortgage "primarily to protect its interest in the [p]roperty." See id. at 363-364 (noting the lack of legislative history of "impermissible participation in a facility's management"). On the other hand, a court would impose liability on a lender who was "participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes" even if not actually involved in the day-to-day operations of the facility. United States v. Fleet Factors Corp., 901 F.2d 1550 at 1557 (11th Cir. 1990) (emphasis added). The Eleventh Circuit in Fleet Factors reasoned that, "in order to achieve the 'overwhelmingly remedial' goal of the CERCLA statutory scheme," ambiguous language such as found in the secured creditor exemption should be construed to "favor liability for the costs incurred by the government." Id.

As evidenced by cases such as Z & Z Leasing, Inc., the extent of the lender protection after foreclosure was also less certain, prompting some lenders to forego foreclosure. Z & Z Leasing, Inc. v. Graying Reel, Inc., 873 F. Supp. 51 (E.D. Mich. 1995); see also, Matthew H. Ahrens, David S. Langer, Lender Liability Under CERCLA, 3 Bloomberg Corp. L.J. 482 (2008) (discussing environmental risks for lenders under Superfund during the economic downturn). In Z & Z Leasing, Inc., the court concluded that the bank's participation in financial management of a facility was not "participating in management" so as to abrogate CERCLA's lender protection. Id. at 56. The bank in that case had required debtors to comply with all applicable environmental laws, loaned up to $15,000 to remove any underground storage tanks, required the bank's written consent prior to amending operative documents, merging or selling assets, incurring indebtedness, etc. Id. The court also noted that the lender had never completed its foreclosure of the property, apparently due to the concerns over the environmental contamination. Id. at 53.

Liability was imposed on lenders after foreclosure who otherwise appeared to meet the secured creditor exemption. See, eg., United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986) (the bank held title for nearly four years, including one full year before the property's cleanup). Maryland Bank & Trust was deemed an owner under 9607(a)(1) and required to reimburse the United States for the cost to clean up hazardous wastes even though they were dumped prior to the bank's acquisition of the property through foreclosure. Id. at 579. The court reasoned that the language of section 9601(20)(A) in place at the time required that the "security interest must exist at the time of the clean-up." Id.

As a result of lender uncertainty, Congress amended CERCLA in 1996 with the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 ("the 1996 Amendments"). Pub. L. No. 104-208, 110 Stat. 3009-462 (1996). The 1996 amendments improved the federal secured creditor exemption. Specifically, section 9601(20)(F) expounded on the definition of "participate in management" and section 9601(20)(E) clarified that the protection continues after foreclosure so long as certain criteria are met. 42 U.S.C. § 9601(20)(E) and (F) (Supp. III 2009). The post-foreclosure criteria include taking steps to sell, re-lease or otherwise divest the property "at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements." 42 U.S.C. § 9601(20)(E) (Supp. III 2009).

In the 1996 Amendments, the term "participation in management" is defined as one who actually participates in the management or operational affairs of a facility while the borrower is still in possession if the lender 1) exercises decision making control over the environmental compliance such that the lender has undertaken responsibility for the hazardous substance handling or disposal practices related to the facility or 2) exercises control like a manager who assumed responsibility for day-to-day decision making with respect to environmental compliance or assumed responsibility for all operational functions other than environmental compliance. 42 U.S.C. §9601(20)(F) (Supp. III 2009).

Perhaps most importantly, "participate in management" does not include conducting a cleanup under CERCLA section 107(d) or under the direction of an on-scene coordinator appointed under the National Contingency Plan ("NCP"). 42 U.S.C. §9601 (20)(F)(iv)(IX) (Supp. III 2009). Section 107(d) also makes clear that a person or lender who takes actions to render "care, assistance, or advice in accordance with the [NCP]" or at the direction of an on-scene coordinator appointed by the United States Environmental Protection Agency ("EPA") under the NCP "with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof" is shielded from CERCLA liability. 42 U.S.C. § 9607(d)(1) (Supp. III 2009). Therefore, so long as a lender conducts any cleanup in accordance with the NCP or an EPA on-scene coordinator, the lender is not participating in management of the facility which would subject it to strict liability under CERCLA for the cleanup.

Further, CERCLA's express definition of participation in management excludes numerous activities designed to protect the security interest such as requiring in the security agreement that the borrower comply with environmental laws, enforcing terms of the security agreement, inspecting the borrower's facility, requiring a response action by the borrower to address a release or threatened release of a hazardous substance prior to, during or on the expiration of the term of the extension of credit, and so on. 42 U.S.C. §9601(20)(F)(iv) (Supp. III 2009).

The 1996 CERCLA Amendments were seen largely as a direct response "to the perceived overbreadth of the Fleet Factors rule." Monarch Tile, 212 F.3d at 1222, n. 2. Congress rejected the Fleet Factors rule and the definition of participate in management now specifically excludes a lender who has only "the capacity to influence facility operations." Id. (quoting 42.U.S.C. § 9601(F)(i)(II)). Even so, the 1996 Amendments are not a panacea. If the lender is alleged to have engaged in "active management," more than a mere foreclosure, a CERCLA claim against the lender may withstand dismissal. F.P. Woll & Co. v. Fifth and Mitchell St. Corp., et al., 1997 WL 535936 (E.D. Pa. 1997). The burden of proving the secured creditor exemption to CERCLA liability is on the lender. United States v. Pesses, 1998 WL 937235, *17 (W.D. Pa. 1998).

To retain its secured creditor exemption after foreclosure, the lender must undertake commercially reasonable efforts to divest itself of the property. Such efforts may include listing the property with multiple real estate agents, entertaining inquiries from many interested parties, leasing part of the facility, and searching for a new tenant to take over the industrial development loan already in place. Pesses, 1998 WL 937235, at *18-19. Divestiture efforts may also need to continue during an agency's site investigation efforts. Id.

B. Florida Protection of Lenders.

Florida law contains a secured creditor exemption which is narrower than CERCLA. Florida law only expressly protects lenders from liability at petroleum and brownfield sites using nearly identical language. Fla. Stat. Ann. §§ 376.308(3), 376.82(4) (LexisNexis 2011)[1].

Section 376.308(3), Florida Statutes, contains three enumerated defenses for lenders that find themselves with a security interest contaminated with petroleum or petroleum products. First, a lender is protected from liability if it is "serving as a trustee, personal representative, or other type of fiduciary," and the lender demonstrates that it did not "cause or contribute to the discharge." Fla. Stat. §§ 376.308(3)(a), 376.82(4)(a).

Second, a lender is not liable for site contamination if it demonstrates that its primary purpose for "holding indicia of ownership in the site" is to protect its security interest in the site. Fla. Stat. § 376.308(3)(b); see also, Fla. Stat. § 376.82(4)(b). If the lender raises this defense, it must also show that it "has not divested the borrower of, or otherwise engaged in, decision-making control over site operations, particularly with respect to the storage, use, or disposal of petroleum or petroleum products, or which otherwise caused or contributed to the discharge." However, the lender "may direct or compel the borrower to maintain compliance with environmental statutes and rules and may act to prevent or abate a discharge." Fla. Stat. § 376.308(3)(b).

Third, a lender is also protected from liability if the lender, who holds a security interest in the now contaminated site, forecloses on that site or acts in some other similar manner demonstrating that the lender's primary purpose for acquiring title is to protect its security interest in that site. Once the lender forecloses or acts in such a required manner, it must then 1) seek "to sell, transfer, or otherwise divest the assets for subsequent sale at the earliest possible time, taking all relevant facts and circumstances into account," and 2) not undertake management activities beyond those necessary to protect its financial interest, to effectuate compliance with environmental statutes and rules, or to prevent or abate a discharge." Fla. Stat. § 376.308(3)(c); see also, Fla. Stat. § 376.82(4)(b).

Although Florida's statutory protections only inure expressly to lenders regarding petroleum and brownfield sites, as a practical matter, it is unlikely for a lender to be pursued for cleanup or cost recovery unless it has engaged in conduct which actually contributed to a discharge.

II. SHOULD LENDERS PERFORM ENVIRONMENTAL DUE DILIGENCE SUCH AS PHASE I OR PHASE II PRIOR TO LENDING OR PRIOR TO FORECLOSURE?

[1] All Florida statutes cited herein are current through Act 2011-32 of the 2011 Regular Session of the Florida Legislature and have been referenced via LexisNexis. Hereafter, they will be cited as "Fla. Stat. § x.x."

The legal reason for performing a Phase I is to meet the All Appropriate Inquiry due diligence standard which is a pre-requisite to establishing CERCLA's third party defenses such as the BFPP defense or the Innocent Purchaser defense. See 42 U.S.C. § 9601(35)(B); 40 CFR Part 312. Further, the All Appropriate Inquiry due diligence standard is now the industry standard as established by ASTM 1527-05[2] which has also been approved by EPA.[3]

The business reason for performing a Phase I is to understand the condition of the collateral and the likelihood that the property suffers from an adverse environmental condition which might affect its value or the ability of the borrower to meet its obligations under the loan.

A. Due Diligence Prior to Loan

Regardless of whether required by the lender, a borrower should complete All Appropriate Inquiry to protect itself from environmental liability associated with an environmental condition on the property. Absent All Appropriate Inquiry, the borrower is unlikely to be able to establish a third party defense to liability under state or federal law which could impair its ability to fulfill its obligations to the lender.

B. Due Diligence Prior to Foreclosure

As described in greater detail above, CERCLA specifically protects a lender from environmental liability so long as it holds a security interest in the property and does not participate in management while the borrower is in possession. This protection continues after foreclosure so long as the lender takes steps to sell, re-lease or otherwise divest the property "at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements." 42 U.S.C. § 9601(20)(E) (Supp. III 2009).

Under Florida law, however, there is no express protection of a lender except at petroleum and brownfield sites. Like CERCLA, where available, Florida's lender protection continues after foreclosure so long as the lender acted as follows:

> "to acquire title primarily to protect its interest, and seeks to sell, transfer, or otherwise divest the assets for subsequent sale at the earliest possible time, taking all relevant facts and circumstances into account, and has not undertaken management activities beyond those necessary to protect its financial interest, to effectuate compliance with environmental statutes and rules, or to prevent or abate a discharge."

Fla. Stat. § 375.308(3)(c).

Therefore, prior to making the foreclosure decision, the lender needs to know whether the site is likely contaminated and the potential risks to proceeding with foreclosure and potentially taking title to the property. A foreclosing lender at a Florida site other than petroleum or brownfield is at risk of being deemed an owner or operator and could be relegated to raising the

[2] ASTM International, formerly known as the American Society for Testing and Materials.
[3] http://www.epa.gov/brownfields/aai/AAI_Reporting_FactSheet.pdf.

third-party defense to liability as set forth in section 376.308(2)(d), Florida Statues, or to seeking contribution from other responsible parties under sections 376.313 or 403.727, Florida Statutes.

Completing All Appropriate Inquiry prior to foreclosure would educate the lender on the likelihood and nature of the contamination, if any. The lender could then make an informed decision as to whether the risks of taking title after foreclosure outweigh the benefit and potential proceeds from the sale of the collateral.

III. SHOULD LENDERS FORECLOSE ON A PROPERTY WITH ENVIRONMENTAL CONTAMINATION?

In light of the statutory and regulatory framework at the state and federal level, the answer to this question rests on a business decision rather than a legal one. Absent direct liability under CERCLA for environmental cleanup, lenders should consider whether the environmental condition of the property will impair the value of the lender's collateral. This is a fact-specific analysis which depends on the circumstances of the particular property, borrower and lender. Where property values have declined due to the market, the environmental condition is more likely to impair the value.

Factors which may affect the valuation and the decision to foreclose include the availability of state funds to pay for the cleanup and the scope of liability protection under state or federal law for subsequent purchasers. Subsequent purchasers will be motivated to complete their own due diligence prior to acquisition to maximize their protection under CERCLA's third party defenses such as the Bona Fide Prospective Purchaser ("BFPP") defense. The BFPP defense generally protects a subsequent purchaser from CERCLA liability even if contamination is known prior to acquisition so long as the statutory criteria found at CERCLA sections 101(40) and 107(r) are met. 42 U.S.C. §§ 9601(4) (Supp. III 2009), 9607(r) (Supp. III 2009) (setting forth conditions of the BFPP defense and lien rights of EPA for any unreimbursed response costs at the facility if there is an increase in fair market value of the property as a result of the response action).

Florida created the Inland Protection Trust Fund ("the Fund") to help mitigate the threats that petroleum and petroleum product contamination poses to the environment or the public health, safety, and general welfare of Florida resident; the Fund assists with financing the remedial purposes of sections 376.30-376.317, Florida Statutes (except for sections 376.3078 and 376.3079, which apply to drycleaning facilities and wholesale supply facilities), that the Department of Environmental Protection ("DEP") or the Department of Health oversee. Therefore, this fund is used to pay for expenses incurred by the departments, not private entities who voluntarily cleanup a site.

DEP has specific criteria for determining which contaminated sites it will clean up and use the Fund. DEP uses a scoring system to determine the priority of various petroleum contaminated sites, and this scoring system is based on factors such as:

1. The potential effects of contamination exposure on human health, safety, and welfare;
2. The size of the population or area affected by the contamination;

3. "The present and future uses of the affected aquifer or surface waters, with particular consideration as to the probability that the contamination is substantially affecting, or will migrate to and substantially affect, a known or private source of potable water"; and
4. The effect the contamination will have or does have on the environment.

Fla. Stat. § 376.3071(5)(a). DEP may use its discretion to determine how much remediation is necessary at a given site, taking into consideration the above factors and any additional factors DEP deems relevant. A lender will not be indebted to DEP for DEP's use of the Fund to remediate the site, unless provided otherwise by law, so long as the lender is not causing or has not caused the discharge. Fla. Stat. § 376.3071(7)(a).

Generally, a lender may escape liability like all subsequent purchasers by demonstrating the third party defense[4] which requires proof as follows:

> that the occurrence was solely the result of any of . . .[a]n act or omission of a third party, other than an employee or agent of the defendant or other than one whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the defendant, except when the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier or by rail, and the defendant establishes by a preponderance of the evidence that:
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> 1. The defendant exercised due care with respect to the pollutant concerned, taking into consideration the characteristics of such pollutant, in light of all relevant facts and circumstances.
> 2. The defendant took precautions against any foreseeable acts or omissions of any such third party and against the consequences that could foreseeably result from such acts or omissions.

Fla. Stat. § 376.308(2)(d); see, e.g., Sunshine Jr. Stores v. State, 556 So. 2d 1177, 1180 (Fla. 1st DCA 1990), review denied by 564 So. 2d 1085, 1990 Fla. LEXIS 894 (Fla. 1990). In Sunshine Jr. Stores, the subsequent purchaser was not liable where gasoline was not released during a the prior ownership and the gasoline already in the ground had continued to seep through the soil and into the water table but the subsequent owner:

> (1) had no knowledge of the underground tanks' conditions or that any such tanks had leaked at any time during the past;

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[4] No Florida court has considered whether a security interest is a contractual relationship which would defeat the third party defense. Keep in mind that CERCLA's third party defense at 9607(b)(3) is nearly identical to the state's, 376.308(2)(c). As such, the state court is likely to rely on interpretations of CERCLA in its interpretation of state law. See, e.g., Kalamazoo River Study Group v. Rockwell International, 3 F. Supp. 2d 799, 803 (W.D. Mich. 1998).

(2) had no knowledge of any discharge from the underground tanks until a third party began removing the tanks;

(3) had the tanks checked and that checkup revealed a small amount (e.g., three inches) of gasoline in each tank;

(4) had a third party pump out all of the remaining gasoline except for one inch prior to beginning the removal process;

(5) had verification from the third party removing the tanks declaring that the tanks were pressure tested and that only one tank had a hole 30 inches from the bottom of the tank; and

(6) during its time of ownership, never added any gasoline to the underground tanks.

Id.

After the creation of the Fund, DEP saw a dramatic increase site rehabilitations and, as a result, excessive costs to the Fund. Therefore, a site must be preapproved for site rehabilitation before the Fund can be used for the site. Fla. Stat. § 376.30711(1)(a). The sites that are preapproved first are those which "pose the greatest threat to human health and the environment." Therefore, sites with low priority rankings are less likely to be preapproved for site rehabilitation with use of the Fund, and a site may sit idle and contaminated for much longer than a lender desires if the lender does not voluntarily clean up the site.

According to section 376.308(3)(c), Florida Statutes, if a site is not eligible for cleanup pursuant to the Inland Protection Trust Fund or the Florida Petroleum Liability and Restoration Insurance Program, a lender may still find that DEP has taken part in cleanup of the petroleum or petroleum product contamination. If DEP has used financial resources for such cleanup, then a lender should be forewarned that DEP will have a lien on the subject property "against any subsequent sale after the amount of the former security interest (including the cost of collection, management, and sale) is satisfied." Fla. Stat. § 376.308(3)(c) .

IV. MUST A LENDER CLEAN UP CONTAMINATED PROPERTY AND CAN LENDERS SEEK REIMBURSEMENT IF THEY CLEAN UP THE PROPERTY?

A. CERCLA Allows, But Not Requires, Cleanup by the Lender.

After foreclosure, a lender may take measures "to preserve, protect or prepare the" facility such as sell, re-lease, liquidate, "maintain[] business activities, wind[] up operations, undertake[] a response action under section 9607(d)(1) of [CERCLA] or [at] the direction of an [EPA] on-scene coordinator" so long as the lender divests itself of the facility at the earliest practicable time. 42 U.S.C. §§ 9601(20)(E)(ii), 9607(d)(1). A lender in possession of a foreclosed property may, but is not required to, undertake a response action under CERCLA section 9607(d)(1) or at the direction of an EPA on-scene coordinator. 42 § U.S.C. 9607(d)(1).

CERCLA's secured creditor exemption does not protect a lender from damages due to its negligence in undertaking such response action. See id. ("This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.").

Further, EPA has authority to issue an order — typically referred to as a Unilateral Administrative Order or UAO — to address an actual or threatened release of a hazardous substance from a facility. 42 U.S.C. § 9606(a); see also Gen. Electr. Co. v. Jackson, 595 F. Supp. 2d 8, 11 (D. D.C. 2009), *aff'd*, 610 F.3d 110 (D.C. Cir. 2010). Although this authority under CERCLA section 9606 is to address an imminent and substantial endangerment to the public health or welfare or to the environment, EPA is often slow in issuing such orders, having attempted to negotiate a settlement agreement with the owner or operator of the facility. See Gen. Electr. Co., 595 F. Supp. 2d at 32 (citing an expert report which demonstrated "an average eight year lag-time between identification of a hazardous waste site and issuance of a UAO and a four year lag-time between remedy selection and UAO issuance"). When deciding whether to issue a UAO, EPA looks first at the strength of the case or evidence of liability against a PRP, then that PRP's ability to contribute financially as well as technically to the selected response actions. Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions, OSWER Directive No. 9833.0-1a, at 13-15 (March 7, 1990). If a PRP has a solid defense to liability, that PRP should not be named in a UAO. Id. at 15-16. Therefore, it follows that these UAO's would rarely, if ever, be issued to lenders of foreclosed property (as they would qualify for the secured lender exemption).

If a lender were the recipient of a UAO, it may decline to comply with the UAO so long as it has sufficient cause to do so. Gen. Electr. Co., 595 F. Supp. 2d at 11-12 (citing Kelley v. EPA, 15 F.3d 1100, 1108 (D.C.Cir.1994)); see also Raytheon Aircraft Co. v. United States, 501 F. Supp. 2d 1323, 1325 (D. Kan., 2007). Although sufficient cause is not defined under CERCLA, federal courts have interpreted the term to mean an objective, reasonable belief that the UAO is invalid or inapplicable under CERCLA and subsequent EPA regulations, i.e., that the party has a valid defense to liability. United States v. Capital Tax Corp., 545 F.3d 525, 537 (7th Cir. 2008); Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 391-92 (8th Cir. 1987). A lender who satisfies the secured creditor exemption would have an objective reason to believe that a UAO was inapplicable to it and therefore would have sufficient cause to decline to follow a UAO. See Capital Tax Corp., 545 F.3d (explaining that a company did not qualify for secured lender exemption but may not be an owner of the property under the doctrine of equitable conversion and therefore still have sufficient cause for noncompliance with UAO).

Alternatively, a party who has sufficient cause to demonstrate that it is not a liable party under CERCLA may proceed to comply with the UAO and seek reimbursement of its costs from EPA. 42 U.S.C. § 9606(b)(2)(A); Gen. Electr. Co., 595 F. Supp. 2d at 36. If EPA declines to reimburse those costs to a non-liable party, the party may seek reimbursement by filing a lawsuit in federal court against EPA. 42 U.S.C. §§ 9606(b)(2)(B)-(D); see also City of Rialto v. W.

Coast Loading Corp., 581 F. 3d 865, 871 (9th Cir. 2009) ("Once the PRP has incurred its own costs, it can seek cost recovery from other PRPs under § 9607(a)(4)(B).").

If a party chooses not to comply with a UAO, EPA may bring suit against that party to enforce compliance or complete the UAO itself and file for recovery costs; in either case, sufficient cause is a defense to the litigation. 42 §§ U.S.C. 9606(b), 9607(c)(3); Gen. Electr. Co., 595 F. Supp. 2d at 11-12, 31. Once EPA brings suit, the party may also seek contribution from the party or parties responsible for the release or threatened release of hazardous substances. 42 U.S.C. § 9613(f).

B. Florida Law Allows, But Not Requires, the Lender to Conduct a Cleanup at Brownfield and Petroleum Sites.

As a party who did not cause the release of a hazardous substance, or own or operate the facility at the time of release, the lender cannot be required to conduct site assessment or site rehabilitation. For petroleum sites eligible for restoration funding from the Inland Protection Trust Fund, section 376.308, Florida Statutes, specifically prohibits any administrative or judicial action brought by government or any other person to "compel rehabilitation in advance of commitment of restoration funding in accordance with a site's priority ranking . . . or to pay for the costs of rehabilitation of environmental contamination." Fla. Stat. § 376.308(5).

After foreclosure at a brownfield or petroleum site, the lender may conduct a cleanup so long as it does not undertake "management activities beyond those necessary to protect its financial interest, to effectuate compliance with environmental statutes and rules, or to prevent or abate a discharge." Fla. Stat. § 375.308(3)(c).

A lender who voluntarily cleans up petroleum or petroleum product contamination due to the actions of the mortgagor of the site or another third party need not worry that such voluntary cleanup will serve as an admission of liability of the financial institution for such discharge. "No action taken by any person to contain or remove a discharge, whether such action is taken voluntarily or at the request of the [Florida] [D]epartment [of Environmental Protection] or its designee, shall be construed as an admission of liability for the discharge." Fla. Stat. § 376.305(3).

Furthermore, a lender will not be liable to third parties who are harmed solely by voluntary cleanup or cleanup requested by the Florida Department of Environmental Protection, so long as the lender did not act with gross negligence or willful misconduct. Fla. Stat. § 376.305(4). Florida law provides:

> "No person who, voluntarily or at the request of the department or its designee, renders assistance in containing or removing any pollutant shall be liable for any civil damages to third parties, resulting solely from the acts or omissions of such person in rendering such assistance, except for acts or omissions amounting to gross negligence or willful misconduct."

Fla. Stat. § 376.305(4).

The lender will still have the ability to seek damages from any third party responsible for the site contamination. Fla. Stat. §§ 376.305 (5); 376.313.

A different fund, the Florida Coastal Protection Fund, is available to reimburse cleanup costs for the discharge of pollutants into or upon any coastal waters, estuaries, tidal flats, beaches, and lands adjoining the seacoast of the state in the manner defined by sections 376.011-376.21, Florida Statutes:

> "Any person, other than the responsible party, who renders assistance in containing or removing any pollutant may assert a claim against the fund, under s. 376.12, for reimbursement of the reasonable costs expended for containment, abatement, or removal, **provided prior approval for such reimbursement is granted by the department.** The department may, upon petition and for good cause shown, waive the prior-approval prerequisite."
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> Fla. Stat. § 376.09(7)(a).

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