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Lender Liability under CERCLA - A New Hazardous Waste Hazard for the Secured Creditor - United States v. Fleet Factors Corp.

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CASENOTES

LENDER LIABILITY UNDER CERCLA—A New Hazardous Waste Hazard for the Secured Creditor. *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990).

Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980 to deal with the growing problem of cleaning up inactive and abandoned hazardous waste sites in the United States.[1] Under CERCLA, the government may assess cleanup costs against "persons"[2] responsible for the release or threatened release of hazardous wastes.[3] Congress' goal in enacting the law, popularly known as "Superfund," was to make the polluter pay for the cost of cleaning up its environmental spills.[4] Specifically excluded from liability, however, was any creditor who maintained a security interest in the hazardous waste site or facility, but who did not participate in managing the property or operations.[5] The initial judicial interpretations of this "secured creditor exemption" provided some shelter to lenders from CERCLA liability.[6] But more recently, courts have begun to unravel this lenders' security blanket, narrowly interpreting the creditor exemption in order to hold lenders liable.[7] In

1. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. § 9601-9675 (1988)) [hereinafter CERCLA].

2. CERCLA section 101(21) defines the term "person" to include: "[a]n individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." CERCLA § 101(21), 42 U.S.C. § 9601(21) (1988).

3. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988).

4. According to the legislative history of CERCLA, the purpose of the statute is to: "establish liability for costs expended by the government to clean up past disposal practices that today are threatening public health and the environment . . . . The supposition of the Administration's proposal is that society should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer or dumpsite owner or operator who has profited or otherwise benefited from commerce involving these substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created." Brief for Appellant, Fleet Factors at 17, United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir.) (No. 89-8094) (citing *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980*), *reh'g denied*, 911 F.2d 742 (11th Cir. July 17, 1990), *cert. denied*, 111 S. Ct. 752 (1991).

5. The "owner or operator" of a facility at the time the hazardous wastes were disposed is one of the four categories of potentially liable parties under CERCLA. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988). *See also infra* note 23. Section 101(20)(A) defines the term "owner or operator," but specifically excludes from this definition any "person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988).

6. *See, e.g.*, *In re* T.P. Long Chem., Inc., 45 Bankr. 278 (Bankr. N.D. Ohio 1985); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985).

7. *See, e.g.*, Guidice v. BFG Electroplating and Mfg. Co., 732 F. Supp. 556 (W.D.

United States v. Fleet Factors Corp., the United States Court of Appeals for the Eleventh Circuit continued that trend, leaving the blanket torn and tattered and the creditors searching for cover.

Fleet Factors Corporation (Fleet) entered into an agreement in 1976 with Swainsboro Print Works (SPW), a cloth-printing company.[8] Fleet agreed to advance funds to SPW, and obtained as collateral a security interest in SPW's accounts receivable, inventory, fixtures and equipment.[9] Fleet also obtained a trust deed[10] to secure debt on SPW's facility and real property located in Emanuel County, Georgia.[11]

In 1979, SPW filed for Chapter 11 bankruptcy. Fleet continued to make secured loans to SPW with bankruptcy court approval.[12] In early 1981, SPW ceased operations. Later that year, SPW was adjudicated a bankrupt under Chapter 7 and a trustee assumed title and control of the facility.[13]

In May 1982, Fleet obtained bankruptcy court approval to foreclose on the security interests covering SPW's inventory and equipment.[14] Fleet hired an auction firm to sell this collateral.[15] Fleet itself did not bid at this auction.[16] Fleet never foreclosed on its deed to secure debt on SPW's real property and never took legal title to SPW's facility.[17] Fleet then hired another contractor to remove the unsold equipment and leave the premises "broom clean."[18]

Pa. 1989); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986).

8. United States v. Fleet Factors Corp., 901 F.2d 1550, 1552 (11th Cir.), *reh'g denied*, 911 F.2d 742 (11th Cir. July 17, 1990), *cert. denied*, 111 S. Ct. 752 (1991).

9. *Id.*

10. Black's Law Dictionary defines a "Trust Deed" as: "[A]n instrument . . . 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 repayment of a sum of money or the performance of other conditions. Though differing in form from a mortgage, it is essentially a security." BLACK'S LAW DICTIONARY 414 (6th ed. 1990).

11. *Fleet Factors*, 901 F.2d at 1552.

12. *Id.*

13. *Id.* Following the adjudication by the bankruptcy court, the facility became part of the bankruptcy estate, and the trustee was empowered to liquidate all assets, including those in which Fleet held a security interest, in order to pay SPW's debts. Brief for Appellant at 6, *Fleet Factors*, 901 F.2d 1550.

14. Brief for Appellant at 6, *Fleet Factors*, 901 F.2d 1550.

15. *Fleet Factors*, 901 F.2d at 1552. The auction contractor sold the machinery and equipment "as is" and "in place." *Id.*

16. Appellant Fleet Factors' Petition for United States Supreme Court *Certiorari* at 3, United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir.), *reh'g denied*, 911 F.2d 742 (11th Cir. July 17, 1990), *cert. denied*, 111 S. Ct. 752 (1991).

17. *Id. See* United States v. Maryland Bank & Trust, Co., 632 F. Supp. 573 (D. Md. 1986), where the district court, in assessing liability against a secured lender which *had* foreclosed on its security in and assumed title to the property, stated that mortgagees had the option of not foreclosing and not bidding at the foreclosure sale, and that both of these steps would "apparently insulate the mortgagee from liability." *Maryland Bank & Trust*, 632 F. Supp. at 580.

18. *Fleet Factors*, 901 F.2d at 1553.

Eighteen months after the auction sale, the Environmental Protection Agency (EPA) inspected the facility and found 700 fifty-five gallon drums containing toxic chemicals[19] and forty-four truckloads of materials containing hazardous asbestos.[20] EPA paid $400,000 to remove the hazardous wastes, and sued Fleet to recover the costs.[21] The government claimed Fleet was liable under CERCLA as either a present "owner and operator"[22] of the facility or as the "owner or operator" at the time the wastes were disposed.[23]

Fleet denied all liability, claiming it was protected by CERCLA's secured creditor exemption.[24] This exemption excludes from the definition of "owner or operator" any "person, who, without participating in the management of a . . . facility,[25] holds indicia of ownership pri-

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19. The substances found at the SPW site included vats containing 715 gallons of sodium cyanide, storage tanks of caustic soda, approximately 700 fifty-five gallon drums of dyes and chemicals, and an underground tank containing varsol. Brief for Appellee, United States at 9-10, United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir.) (No. 89-8094), *reh'g denied*, 911 F.2d 742 (11th Cir. July 17, 1990), *cert. denied*, 111 S. Ct. 752 (1991).

20. *Id.* at 10.

21. *Id.*

22. CERCLA defines a present "owner and operator" as the individual presently "owning and operating such facilit[ies]." CERCLA § 101(20)(A)(ii), 42 U.S.C. § 9601(20)(A)(ii) (1988). The Eleventh Circuit construed this phrase to mean at the time the plaintiff initiated the lawsuit by filing a complaint. On that date, however, Emanuel County, Georgia, was the owner of the facility. Under CERCLA, a state or local government that involuntarily has acquired title to a facility is not liable as an "owner or operator." CERCLA § 101(20)(D), 42 U.S.C. § 9601 (20)(D) (1988). In that case, CERCLA holds liable the person who owned or operated the facility "immediately beforehand." CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988). Therefore, the Eleventh Circuit held that Fleet could not be liable under § 107(a)(1) since it was "undisputed" that the bankruptcy estate and trustee, and not Fleet, owned the SPW site immediately before Emanuel County. *Fleet Factors*, 901 F.2d at 1555.

23. *Fleet Factors*, 901 F.2d at 1554. The four categories of potentially liable parties for CERCLA cleanup costs are listed in section 107(a). The Eleventh Circuit addressed Fleet's potential liability under the second of the four categories. They include:

(1) the owner and operator of a vessel or 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 substance, 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 release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988).

24. Appellant Fleet Factors' Petition for United States Supreme Court *Certiorari* at 4, *Fleet Factors*, 901 F.2d 1550. Fleet had the burden of proving it was entitled to this statutory exemption to a congressionally imposed rule of general liability. *See* United States v. Maryland Bank & Trust, 632 F. Supp. 573, 578 (D. Md. 1986); United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 366 (1967).

25. CERCLA defines the term "facility" to mean: (a) any building, structure, in-

marily to protect its security interest in the . . . facility."[26] The central issue in many of the cases interpreting the secured creditor exemption, and indeed in *Fleet Factors*,[27] is just what type of activity by a lender amounts to "participating in the management."[28] In addressing Fleet's liability as the "owner or operator" of the facility at the time of disposal of the hazardous wastes,[29] the district court construed the phrase "participating in the management" to allow creditors to provide their debtors with financial assistance and isolated management advice, so long as the creditor does not participate in the day-to-day management of the business.[30] The Eleventh Circuit, however, disagreed with the district court construction of the secured creditor exemption, calling it "too permissive towards secured creditors who are involved with toxic waste facilities."[31]

The Eleventh Circuit ruled that a secured creditor may incur CERCLA liability simply by participating in the facility's financial management to a degree that indicates a "capacity to influence" the hazardous waste disposal activities of the debtor.[32] This decision breaks new ground. Before *Fleet Factors*, courts had interpreted the exemption to mean that a lender may incur CERCLA liability as an "owner or operator" where it has engaged in actual and active involvement in the debtor's day-to-day operational, production or waste-disposal activities,[33] or where it has assumed title to the facility following purchase at a foreclosure sale.[34] But the court went much further here, ruling that the secured creditor may face liability without operating or assuming title to the facility if it merely participated in the financial management such that a court could infer an *ability* to affect the hazardous waste disposal decisions of the debtor.[35]

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stallation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (b) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel. CERCLA § 101(9), 42 U.S.C. § 9601(9) (1988).

26. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988).

27. *Fleet Factors*, 901 F.2d at 1556.

28. *See, e.g.*, Bergsoe Metal Corp. v. East Asiatic Co., Ltd., 910 F.2d 668 (9th Cir. 1990) (lender participating in management when it exercises actual control over the operational activities of the borrower); United States v. Maryland Bank & Trust, 632 F. Supp. 573 (D. Md. 1986) (lender participating in management when it forecloses security interest in facility and assumes title); United States v Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985) (lender only participating in management when it is involved in the day-to-day operation).

29. *See* CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1988). *See also supra* note 23.

30. United States v. Fleet Factors Corp., 724 F. Supp. 955 (S.D. Ga. 1988).

31. *Fleet Factors*, 901 F.2d at 1557.

32. *Id.*

33. *See, e.g.*, *In re* T.P. Long Chem., Inc., 45 Bankr. 278 (Bankr. N.D. Ohio 1985); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985).

34. *See, e.g.*, Guidice v. BFG Electroplating & Mfg., Co., 732 F. Supp. 556 (W.D. Pa. 1989); United States v. Maryland Bank & Trust, 632 F. Supp. 573 (D. Md. 1986).

35. *Fleet Factors*, 901 F.2d at 1558.

This casenote examines the Eleventh Circuit's interpretation of the secured creditor exemption and criticizes as uncertain and unnecessary the new "capacity to influence" standard of liability asserted by the court. The casenote also reviews proposed measures which purport to provide some concrete guidance to lenders in the wake of the *Fleet Factors* decision.

BACKGROUND

CERCLA authorizes both federal and state governments to respond to releases and threatened releases of hazardous substances in order to protect public health or welfare and the environment.[36] The muscle which powers the CERCLA scheme is the funding mechanism created by Congress which allows EPA to pay for the cleanup of a hazardous site when the responsible party cannot be found or cannot be required to handle the chore.[37] Congress first authorized $2.2 billion to fund CERCLA's Hazardous Substances Response Trust Fund from 1981 through 1985.[38] That figure was boosted to $8.5 billion in 1986 with the adoption of the Superfund Amendments and Reauthorization Act (SARA).[39] CERCLA empowers EPA to tap this "Superfund" to pay for the cleanup of various hazardous sites which require attention[40] and then to sue the potentially responsible parties for the response costs to replenish the fund.[41] State agencies may also exercise this same authority by entering into a cooperative agreement with the federal government.[42] Enforcing agencies may respond to a hazardous site by investigation, removal of wastes or by any other remedial measure consistent with CERCLA's National Contingency Plan.[43] Private parties who incur cleanup costs may also sue other potentially responsible parties to recover their expenses.[44]

CERCLA establishes four categories of potentially responsible parties who may be strictly liable,[45] and who may incur joint and several liability for all environmental response expenses.[46] They include:

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36. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1988).
37. For example, a state or local government that involuntarily has acquired title to a facility is not liable as an "owner or operator" for CERCLA response costs. CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D) (1988).
38. CERCLA § 131(b)(2), 42 U.S.C. § 9631(b)(2) (1980) (repealed 1986).
39. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986); *see* 42 U.S.C. § 9611(a) (1988).
40. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1988).
41. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1988).
42. CERCLA § 104(c)(3), 42 U.S.C. § 9604(c)(3) (1988).
43. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1988).
44. CERCLA § 107(a)(4)(b), 42 U.S.C. § 9607(a)(4)(b) (1988).
45. CERCLA defines the standard of liability as the same standard which applies under section 311 of the Federal Water Pollution Control Act, 33 U.S.C. § 1321 (1988). CERCLA § 101(32), 42 U.S.C. § 9601(32) (1988). Courts have interpreted this language to mean that Congress intended a standard of strict liability. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); *Maryland Bank & Trust*, 632 F. Supp. at 576.
46. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 171-72 (4th Cir. 1988),

1) current owners and operators of a facility, 2) persons who owned or operated the facility when the hazardous wastes were disposed of, 3) persons who arranged for disposal or treatment of the wastes, and 4) transporters of the hazardous wastes who selected the disposal sites.[47] The categories of potential liability involving past and present "owners and operators" are of primary relevance to banks and other lending institutions.[48] Lenders routinely foreclose on security interests when their debtors default on loans; and short of foreclosure, they often wish to influence (or at least monitor) management decisions on the mortgaged property to protect the value of their security.[49] The problem that banks face is that foreclosure potentially makes them CERCLA "owners" and influencing decisions brings them dangerously close to "operator" status.

CERCLA purportedly offers a safeguard to lenders in the form of the secured creditor exemption.[50] A creditor avoids liability under the statute as long as the creditor "holds indicia of ownership[51] primarily to protect [its] security interest" and does not "participat[e] in the management" of the site.[52]

Fleet Factors was the first federal appellate court decision to address directly the construction of CERCLA's secured creditor exemption.[53] Lower courts, faced with the question of whether a foreclosing lender who takes title to its mortgaged property becomes an "owner or operator" for purposes of CERCLA liability, have offered differing interpretations of the exemption.[54] A brief review of four lower court decisions demonstrates how the interpretation has developed.

The United States Bankruptcy Court for the Northern District of Ohio was the first court posed with the CERCLA lender liability question.[55] In *In re T.P. Long Chemical, Inc.*, the lender, BancOhio, did not foreclose on the property in which it held a security interest.[56] But the court stated in dicta that "even if [the bank] had repossessed its collateral pursuant to its security agreement, it would not be an 'owner or operator' as defined under CERCLA."[57] According to the bankruptcy court, BancOhio was protected by the secured creditor ex-

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cert. denied, 109 S. Ct. 3156 (1989).

47. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988).

48. Mitchell, *Liability Under CERCLA for Indenture Trustees*, N.Y.L.J., Aug. 23, 1990, at 3, col. 1.

49. *Id.*

50. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988).

51. The trust deed held by Fleet Factors was an example of "indicia of ownership." *See supra* note 10.

52. *See supra* note 50.

53. United States v. Fleet Factors Corp., 901 F.2d 1550, 1556 (11th Cir. 1990).

54. *See* Guidice v. BFG Electroplating & Mfg., Co., 732 F. Supp. 556 (W.D. Pa. 1989); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985).

55. *In re* T.P. Long Chem., Inc., 45 Bankr. 278 (Bankr. N.D. Ohio 1985).

56. *Id.* at 288.

57. *Id.*

emption because "[t]he only possible indicia of ownership that can be attributed to BancOhio is that which is held primarily to protect its security interest. It is undisputed that BancOhio has not participated in the management of the . . . facility."[58]

The first federal district court to interpret the secured creditor exemption followed the trend set by the Ohio bankruptcy court, and did not find that the lender had participated in managing its borrower's affairs.[59] *United States v. Mirabile* was the first case to answer the question of whether a lender who forecloses on and takes title to its mortgaged property is a CERCLA "owner or operator."[60] The *Mirabile* court focused on whether a lender is precluded from invoking the creditor exemption, based on its level of participation in the management.[61] Under *Mirabile*, a lender succeeding in title to the mortgaged property may be liable as an "owner or operator" for hazardous waste cleanup costs only if the lender becomes too embroiled in the "nuts-and-bolts, day-to-day production aspects of the business."[62]

According to the *Mirabile* court, in order to claim safe harbor under the exemption, the secured creditor's actions in foreclosure must be limited simply to protecting the security interest. The creditor risks liability under CERCLA if it continues the operations that produced the hazard or becomes overly entangled in the borrower's hazardous waste activities.[63] In *Mirabile*, the lender had not crossed that line.[64] The lender merely foreclosed on the property after all operations had ceased and thereafter took prudent and routine steps to secure the property against further depreciation.[65]

The *Mirabile* court distinguished between management of the actual operation of the facility, which *would* subject the lender to liability, and participation in the borrower's financial management, which would not.[66] Financial management, under *Mirabile*, is not sufficient

58. *Id.* at 289.
59. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985).
60. *Id.*
61. *Id.* at 20,995.
62. *Id.*
63. *Id.*
64. *Id.* at 20,996.
65. *Id.* Both before and after the foreclosure sale, the lender had negotiated with other parties about purchasing the property. After the sale, the lender made no attempt to continue the operations of the former owner which had resulted in the contamination of the property. The lender did periodically visit the property to show it to prospective buyers. The lender also took steps to prevent the property from being vandalized. *Id.*
66. *Id.* at 20,995-96. The court noted that the exemption from liability is afforded to secured creditors who do not participate in the management of a "facility," rather than those who do not participate in the management of the "affairs" of the actual owner or operator of the facility. The court interpreted this construction to mean that Congress intended the critical focus to be on the participation in operational, production, or hazardous waste disposal activities rather than the financial aspects of the

to remove the creditor from the protection of the secured creditor exemption.[67]

The next court to consider the issue of lender liability under CERCLA took a different approach from the *Mirabile* court, holding that foreclosure may be enough to expose a bank to CERCLA liability as an "owner or operator."[68] In *United States v. Maryland Bank & Trust Company*, the federal district court narrowly interpreted the secured creditor exemption, adopting a literal reading of the statute.[69] The court, focusing on the present tense language of the secured creditor exemption, reasoned that Congress intended to exempt only those creditors actually holding security interests at the time of the CERCLA cleanup.[70] The exemption excludes from the definition of "owner or operator" one who, "without participating in the management of a . . . facility, *holds* indicia of ownership primarily to protect his security interest in the . . . facility."[71] If one *holds* the indicia of ownership to protect a security interest, then that security interest must *exist* at the time the exemption is invoked.[72]

The court was swayed, however, by the fact that Maryland Bank had purchased the debtor's property in a foreclosure sale and was still the property owner four years after the purchase, at the time the trial took place.[73] The *Maryland Bank & Trust* court concluded, therefore, that the security interest "terminated at the foreclosure sale . . . at which time it ripened into full title."[74] The court offered a policy reason for its decision, suggesting that if Maryland Bank were exempted from liability, the federal government alone would shoulder the cleanup burden while the bank would enjoy a windfall from the increased value of the improved land.[75] Therefore, exempting lenders who hold full legal title would frustrate CERCLA's policy goal of distributing cleanup costs.[76]

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business. *Id.* By contrast, the Eleventh Circuit in *Fleet Factors* held that participation in the financial management of the borrower may be sufficient to find liability. *Fleet Factors*, 901 F.2d at 1557.

67. *Mirabile*, 15 Envtl. L. Rep. at 20,996.

68. United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986).

69. *Id.* at 579. According to the court, the verb tense of the exclusionary language is critical. Under the law of Maryland (and twelve other states), the mortgagee-financial institution actually holds title to the property while the mortgage is in force. Congress, the court stated, intended this exception to exclude these common law title mortgages from the definition of "owner" since title was in their hands only by operation of the common law. *Id.*

70. *Id. See supra* note 68.

71. *Maryland Bank & Trust*, 632 F. Supp. at 579 (emphasis added).

72. *Id.*

73. *Id.* at 575.

74. *Id.* at 579 (emphasis added).

75. *Id.* at 580. If the exemption were to protect the mortgagee, the court stated, then the mortgagee could purchase the property cheaply at the foreclosure sale, since all other prospective purchasers would shy away, faced with potential CERCLA liability. Yet once the property was cleaned up at taxpayer expense and again became marketable, the mortgagee-turned-owner could sell the site at a profit. *Id.*

76. *Id.*

Guidice v. BFG Electroplating & Manufacturing Co., Inc., a 1989 federal district court decision, followed the trend started by *Maryland Bank and Trust*.[77] In *Guidice*, the lender foreclosed on its security interest, but held the property for only eight months.[78] The court held that where the lender is the successful purchaser at a foreclosure sale, the lender should be liable to the same extent as any other bidder would have been.[79] The *Guidice* court reviewed Congress' 1986 amendments to CERCLA,[80] and interpreted the amendments to support a narrow reading of the creditor exemption.[81] The amendments excluded from liability state or local government entities which involuntarily acquire polluted property.[82] Congress did not, however, exclude lenders who acquire similarly situated property through foreclosure.[83] Therefore, the court concluded, the secured creditor exemption did not apply for the period the bank was the record owner of the property.[84]

Although the Eleventh Circuit was the first federal appellate court to interpret the secured creditor exemption, the Ninth Circuit, in a decision after *Fleet Factors*, also considered the issue. However, the Ninth Circuit refused to go as far as the Eleventh Circuit in holding secured lenders responsible for CERCLA cleanup costs.[85] In *Bergsoe Metal Corp. v. East Asiatic Co.*, the Ninth Circuit distanced itself from the "capacity to influence" approach of the Eleventh Circuit, and instead adopted an actual control test for determining when a lender participates in management.[86] The court concluded that a municipal corporation, empowered to issue revenue bonds as part of the financing of a sale and lease-back transaction, was not liable as a CERCLA "owner or operator" even though the municipal corporation held the deed to the underlying property.[87] The *Bergsoe* court emphasized the necessity for actual management before incurring liability, stating that "[m]erely having the power to get involved in management, but failing to exercise it, is not enough."[88] This requirement of the actual exercise of control contrasts with the Eleventh Circuit's

77. Guidice v. BFG Electroplating & Mfg., Co., 732 F. Supp. 556, 563 (W.D. Pa. 1989).
78. *Id.* at 559.
79. *Id.* at 563.
80. *See supra* note 39.
81. *Guidice*, 732 F. Supp. at 563.
82. CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D) (1988). *See supra* note 22.
83. *Guidice*, 732 F. Supp. at 563.
84. *Id. See* Tom, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 926 (1986).
85. Bergsoe Metal Corp. v. East Asiatic Co., Ltd., 910 F. 2d 668 (9th Cir. 1990).
86. *Id.* at 672. The Ninth Circuit chose not to establish the complete parameters of a rule that it would follow in future cases. The court of appeals stated, "It is clear from the statute that, whatever the precise parameters of 'participation,' there must be *some* actual management of the facility before a secured creditor will fall outside the exception. Here there was none, and we therefore need not engage in linedrawing." *Id.* (emphasis added).
87. *Id.* at 670, 673.
88. *Id.* at 673 n.3.

Fleet Factors rule that the inference by a court that a lender had the ability to influence decisions regarding hazardous waste is enough to hold the lender liable.[89]

PRINCIPAL CASE

Fleet Factors represents the initial consideration of the CERCLA secured creditor exemption by a federal appellate court.[90] The issue was before the Eleventh Circuit on appeal by Fleet Factors from the denial of Fleet's summary judgment motion.[91] The Eleventh Circuit agreed with the government that Fleet could be liable based on either of two distinct, but related theories under section 107(a)(2).[92] First, Fleet could be liable if it was the actual "operator" of the facility when the hazardous wastes were disposed.[93] And second, under the analysis of the secured creditor exemption, Fleet could be liable if it held indicia of ownership in SPW[94] and participated in the management of the facility to the extent necessary to remove it from the exemption protection.[95] The Eleventh Circuit stated that if the facts alleged by the government were true, Fleet would be liable under either analysis. But since it believed the case fit "more snugly" in the secured creditor analysis, it chose not to discuss Fleet's liability as an "operator."[96]

The critical issue then, according to the court, was whether Fleet participated in SPW's management to a sufficient extent to remove it

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89. In light of the discrepancy created by the Ninth Circuit ruling in *Bergsoe*, Fleet Factors filed a petition for *certiorari* to the United States Supreme Court, asking the Court to review the Eleventh Circuit decision and to adopt a rule which all jurisdictions could follow. Appellant Fleet Factors' Petition for United States Supreme Court *Certiorari* at 14, *Fleet Factors*, 901 F.2d 1550. However, on January 14, 1991, the Supreme Court denied the petition. United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir.), *reh'g denied*, 911 F.2d 742 (11th Cir. July 17, 1990), *cert. denied*, 111 S. Ct. 752 (1991).

90. *Fleet Factors*, 901 F.2d at 1556.

91. The district court denied Fleet's motion for summary judgment, but determined that the case was appropriate for interlocutory appeal since the interpretation of the secured creditor exemption was a controlling question of law that had not been addressed by a federal appellate court. Therefore, the district court judge certified the question for appeal to the Eleventh Circuit under 28 U.S.C. § 1292(b). United States v. Fleet Factors, Corp., 724 F. Supp. 955, 962 (S.D. Ga. 1988).

92. *Fleet Factors*, 901 F.2d at 1556 n.6.

93. *See* CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988).

94. The Eleventh Circuit noted that no dispute existed as to the fact that Fleet held "indicia of ownership" in the facility through its trust deed to SPW, and that this interest was indeed held primarily to protect its security interest. *Fleet Factors*, 901 F.2d at 1556 n.6.

95. *Id.*

96. *Id.* The court stated that although it could conceive of some instances where the facts showing participation in management are different from those indicating operation, this was not such a case. *Id.* This casenote focuses on the Eleventh Circuit's secured creditor analysis and not the "operator" analysis. However, the casenote criticizes the decision since the Eleventh Circuit could have found "operator" liability without unnecessarily creating the "capacity to influence" standard for determining participation in management.

from the protection of the secured creditor exemption.[97]

The government urged the court to adopt a narrow and strictly literal interpretation of the exemption which would exclude from its protection a secured creditor who participates in any manner in the management of a facility.[98] According to the government, "Congress's intent is clear—the exemption is available only to those who do not participate in management of the facility, not those who participate in management for limited purposes, such as in order to protect their security interest."[99] The Eleventh Circuit declined this invitation, stating that such an interpretation would eviscerate the protection Congress intended to afford secured creditors.[100] Secured lenders frequently have some involvement in the financial affairs of their debtors, according to the court, in order to assure that their interests are adequately protected.[101] To adopt the government's construction could expose all such lenders to CERCLA liability for engaging in what the court called "their normal course of business."[102]

Fleet, by contrast, suggested that the court adopt the approach followed in *United States v. Mirabile*, distinguishing between permissible participation in the financial management of the facility and impermissible participation in the day-to-day or "operational" management of a hazardous waste site.[103] The district court below, relying on *Mirabile*, interpreted the exemption to allow creditors to provide their debtors with financial assistance and isolated instances of specific management advice, as long as the creditor does not participate in the day-to-day running of the business.[104]

Applying that standard, the district court reviewed Fleet's relationship with SPW since its inception in 1976. The district court held that Fleet's activities *before* foreclosure of the inventory and equipment did not constitute "participating in the management."[105] But the district court denied Fleet's motion for summary judgment since the facts alleged by the government presented a genuine issue as to Fleet's participation *after* foreclosure.[106]

97. *Id.* at 1556.
98. Brief for Appellee at 40, *Fleet Factors*, 901 F.2d 1550.
99. *Id.* According to the government, a test requiring participation in day-to-day management comes near to holding secured creditors liable only when their involvement would suffice to hold them liable as operators. Isolated instances of making or sharing management decisions, the government argued, especially when those decisions directly affect the release of hazardous substances, should suffice to attach liability. *Id.* at 41.
100. *Fleet Factors*, 901 F.2d at 1556.
101. *Id.*
102. *Id.*
103. *Id. See also* Brief for Appellant at 22-27, *Fleet Factors*, 901 F.2d 1550.
104. United States v. Fleet Factors Corp., 724 F. Supp. 955, 960 (S.D. Ga. 1988).
105. *Id.*
106. *Id.* at 961. The government alleged that the auction company hired by Fleet moved the barrels containing the hazardous wastes before it conducted the public auction. Additionally, the government alleged that friable asbestos was knocked loose

The Eleventh Circuit agreed with the denial of Fleet's summary judgment motion, but held the district court's construction of the secured creditor exemption "too permissive" in favor of secured lenders.[107] The Eleventh Circuit disagreed with the district court's assessment of Fleet's activity during the period between February 1981, when SPW ceased its printing operations, and June 1982, when Fleet foreclosed.[108] During this sixteen-month time frame, according to the government, Fleet's involvement with SPW's operations increased substantially.[109] Fleet required SPW to seek its approval before shipping goods to customers, established the price for excess inventory, dictated when and to whom the finished goods should be shipped, determined when employees should be laid off, supervised the activity of the office of administrator at the site, received and processed SPW's employment and tax forms, controlled access to the facility, and contracted with the auction company to sell the fixtures and equipment.[110] In addition and of particular importance, Fleet asserted its control over the disposal of hazardous wastes at the site by prohibiting SPW from selling several barrels of toxic chemicals.[111] As a result, the barrels remained at the facility unattended.[112]

The Eleventh Circuit stated that Fleet's involvement in the financial management of SPW was "pervasive, if not complete," and if proved, the facts alleged by the government were sufficient to remove Fleet from the protection of the secured creditor exemption.[113] Judge Kravitch, writing the opinion of the case which was decided by a two-judge quorum,[114] stated that the district court's broad interpretation of the exemption would not succeed in achieving the "overwhelmingly remedial" goal of CERCLA, and that the ambiguous statutory terms should be construed to favor liability of the secured creditor who

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from the pipes connected to the machinery and equipment either by the purchasers of the equipment or by the contractor which Fleet hired to remove the unsold equipment. Together, the condition of the barrels of chemicals and the asbestos constituted an immediate risk to public health and the environment. *Id.* at 960-61. "Friable" asbestos material refers to any material containing more than one percent asbestos by weight that hand pressure can crumble, pulverize, or reduce to powder when dry. Brief for Appellee at 17 n.13, *Fleet Factors*, 901 F.2d 1550.

107. *Fleet Factors*, 901 F.2d 1550, 1557 (11th Cir. 1990).

108. *Id.* at 1559.

109. *Id.*

110. *Id.*

111. Brief for Appellant at 31, *Fleet Factors*, 901 F.2d 1550. According to the government, SPW's former Vice President was concerned about the presence of chemicals and hazardous substance in trenches, drums, storage tanks and vats throughout the plant. He attempted to sell or dispose of these materials after the plant was closed, but Fleet did not permit him to do so. *Id.*

112. *Id.*

113. *Fleet Factors*, 901 F.2d at 1559.

114. *Id.* at 1552. The case was orally argued before Eleventh Circuit Judges Vance and Kravitch, and United States District Judge Lynne, who sat by designation. *Id.* However, Judge Vance was assassinated on December 16, 1989, and he did not participate in the opinion. *Id.*

loans to companies which operate toxic waste sites.[115]

The district court interpretation, according to the Eleventh Circuit, essentially would require a secured creditor to be operating the facility before it could incur liability.[116] But that construction ignores the plain language of the exemption and renders it meaningless, Kravitch opined.[117] Individuals and entities *already* may be liable as "operators" under the express language of section 107(a)(2). Therefore, according to the court, Congress explicitly intended to hold secured creditors liable as "owners," if they participated in the management of the facility.[118]

The Eleventh Circuit thus took the position that the phrase "participating in the management," as used in CERCLA section 101 (20)(A), is not the same as being an "operator" under section 107(a).[119] Applying this interpretation, the court stated that a secured creditor may incur section 107(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a "capacity to influence" the corporation's treatment of hazardous wastes.[120] It is not necessary for the secured creditor actually to involve itself in the facility's day-to-day operations to be liable, although such conduct will indeed remove the creditor from the exemption.[121] Under the *Fleet Factors* standard, a secured creditor will be liable if its involvement with the management of the facility is "sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose."[122]

The Eleventh Circuit labeled "unfounded" concerns that its interpretation of the exemption would discourage lenders from loaning to businesses with potential hazardous waste problems, and would encourage lenders to distance themselves from management actions of their debtors.[123] Rather, the court predicted that its ruling would encourage creditors to: 1) investigate thoroughly the waste treatment systems and policies of potential borrowers; 2) weigh the risks of CERCLA liability into the terms of the loan agreement; 3) monitor the hazardous waste treatment systems and policies of their borrowers; and 4) insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support.[124] The Eleventh Circuit added that once a creditor's involvement becomes great enough to risk losing its exemption from CERCLA liabil-

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115. *Id.* at 1557.
116. *Id.*
117. *Id.*
118. *Id.* (emphasis added). *See* CERCLA § 101(20)(A), 42 U.S.C. 9601(20)(A) (1988).
119. *Fleet Factors*, 901 F.2d at 1557.
120. *Id.*
121. *Id.* at 1557-58.
122. *Id.* at 1558.
123. *Id.*
124. *Id.*

ity, the creditor will have a strong incentive to address hazardous waste problems.[125]

ANALYSIS

The critical question in the wake of *Fleet Factors* is whether the "capacity to influence" standard asserted by the Eleventh Circuit is a sufficient test for determining "participat[ion] in the management." Because this subjective test may be difficult to apply and provides little concrete guidance to creditors in terms of a permissible level of involvement with their debtors' activities, the answer must be that it is not.

The Eleventh Circuit's goal of promoting improved environmental compliance and safety is indeed laudable. Encouraging lenders and borrowers to engage in thorough investigation of waste treatment systems and policies, and to weigh into their loan agreements the risks of CERCLA liability, is a positive step toward that objective.[126] The problem is in the means the court chose to try to achieve that goal. A degree of certainty in the standards which govern liability is vital so that lenders clearly may know the boundary lines of their permitted participation. Without this concrete guidance, one expert suggests lenders will grow increasingly reluctant to loan to companies which purchase or use property that presents environmental risks, and major segments of the business community, particularly small businesses,

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125. *Id.* at 1559.

126. This type of environmental oversight has become a prudent practice of lenders who loan to borrowers with potential environmental problems. The Office of Regulatory Activities of the Federal Home Loan Bank System has issued a bulletin that contains guidelines for establishing an environmental risk policy. *See* FEDERAL HOME LOAN BANK SYSTEM, OFFICE OF REGULATORY ACTIVITIES, THRIFT BULLETIN TB 16 (February 6, 1989). The bulletin recommends that lenders incorporate the following components into their environmental risk policies:

> (1) A stated assessment of potential environmental problems and liabilities . . . and a declaration that a policy of due diligence is adopted to protect the institution from such risks.
>
> (2) A requirement that loan applicants provide information on environmental matters pertaining to their business and facilities. Institutions should develop a form covering specific questions to which applicants respond. The questions should request information concerning past, present or proposed uses of collateral, potential hazards, insurance availability for the property as it pertains to environmental matters, and contracts by any federal, state, or local government agencies concerning environmental matters that must be resolved in order to obtain business and environmental permits.
>
> (3) A requirement that an acquiring institution, in a purchase or participation loan, ensure that adequate due diligence regarding environmental risk matters has been met by the lead lender and a requirement that all loans sold to Freddie Mac or Fannie Mae meet with the environmental due diligence standards imposed by those agencies.
>
> (4) A requirement that all loan requests, in which the proposed real property collateral has a higher environmental risk potential than other types of real property, have a Phase I Environmental Risk Report . . . prepared for the institution prior to approval of the loan.

Id.

may be unable to receive the financing they need.[127] The Eleventh Circuit's "capacity to influence" standard does not provide this guidance; it only confuses an already uncertain situation.

Before *Fleet Factors*, lower courts had interpreted the secured creditor exemption to protect creditors from liability unless they actually "operated"[128] or actually "owned"[129] the contaminated facility. Under the *Mirabile* approach, the secured creditor exemption provided shelter to any lender foreclosing on and succeeding in title to its mortgaged property as long as the lender did not participate in the day-to-day operational management of the facility.[130] One commentator suggests that this "day-to-day" test was easy to apply, and gave lenders a clear sense of what they could and could not do.[131]

The ruling in *Maryland Bank & Trust* that the purchase of a facility at a foreclosure sale was sufficient to find the lender liable as an "owner," regardless of participation in management, significantly narrowed the secured creditor exemption.[132] Still, in the aftermath of *Mirabile* and *Maryland Bank & Trust*, the boundary lines for lenders were somewhat clear: do not get intimately involved in the daily operations of the facility and do not become the legal titleholder of the property through purchase at a foreclosure sale.

The Eleventh Circuit's decision in *Fleet Factors* muddies the picture, making more urgent than ever the necessity for a uniform standard applicable in all jurisdictions. After the Eleventh Circuit ruling, a secured lender who has *not* foreclosed on its security interest in a facility and who has *not* participated in the operations of the site may still be liable for CERCLA costs, if the lender participates in the facility's "financial" management such that a court may infer that the lender has the capacity to influence hazardous waste disposal decisions.[133] What is truly ironic about the decision is the fact that it was unnecessary for the court to go so far in order to deny Fleet's summary judgment motion. The Eleventh Circuit itself noted that Fleet's alleged pre-foreclosure activities at SPW, if proven, were sufficient to hold Fleet liable as an operator.[134] And the same activities—approving and scheduling shipments, establishing prices, supervising employees,

127. Matusik, *Environmental Cleanup Liability Makes Banks Leery of Lending*, Investor's Daily, July 27, 1989.

128. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985).

129. United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986).

130. *Mirabile*, 15 Envtl. L. Rep. at 20,995.

131. Brodsky, *Lender Liability for Environmental Cleanup*, N.Y.L.J., July 11, 1990, at 3, col. 1.

132. *Maryland Bank & Trust*, 632 F. Supp. at 579.

133. United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990) (emphasis added).

134. *Fleet Factors*, 901 F.2d at 1559.

and making personnel decisions[135]—most likely would satisfy the *Mirabile* day-to-day operations test for "participating in the management," as well.

In the wake of the *Fleet Factors* decision, the critical question is what degree of involvement by a creditor constitutes a "capacity to influence" the borrower's treatment of hazardous substances, such that the creditor is participating in the management of the borrower's facility.[136] Disturbingly, the Eleventh Circuit offers no guidance as to how courts will establish this inference that the lender had the ability to influence the debtor's hazardous waste disposal decisions. The court stated that a creditor would not be liable for "monitoring" aspects of the debtor's business or becoming involved in "occasional and discreet" financial decisions related to protecting its security interest.[137] But arguably, every secured creditor has the "capacity to influence" its debtor's hazardous waste disposal decisions, or any other decisions by the debtor, simply because it holds the security interest.[138]

A hypothetical situation suggested by one commentator helps to illustrate the point. A loan agreement imposes a penalty interest rate on a debtor when an environmental audit[139] conducted by the creditor, pursuant to the agreement, indicates a potential hazard has developed.[140] The loan covenant authorizes the creditor to divert cash from the debtor's accounts receivable to respond to a spill or to improve environmental control equipment.[141] Such an agreement would appear to give the creditor the "capacity to influence" the debtor's hazardous waste disposal decisions, regardless of whether the authority was exercised, thus removing the creditor from the CERCLA liability exemption.[142]

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135. *Id.*

136. Koegel, *Bank Power Draws Superfund Liability*, N.Y.L.J., July 9, 1990, at 1, col. 1.

137. *Fleet Factors*, 901 F.2d at 1558.

138. Freeman, *Recent Case Law May Expand Lenders' Risks Under Superfund; Environmental Risks May Grow for Lenders*, N.Y.L.J., Sept. 17, 1990, at 18, col. 1.

139. A Phase I Environmental Risk Report involves an examination of the particular site and a review of certain public records in order to determine whether any hazardous substances are present. A Phase II Environmental Risk Report is a more detailed study, and involves actual soil and water sampling. Bolstein & Reznick, *Lender Liability After Fleet Factors*, ENVTL. L., Fall 1990, at 1, 4.

140. Koegel, *Bank Power Draws Superfund Liability*, N.Y.L.J., July 9, 1990, at 1, col. 1.

141. The Eleventh Circuit suggested that its decision would encourage lenders to insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support. *Fleet Factors*, 901 F.2d at 1558. However, it would seem that refusing to loan funds for environmental cleanup might trigger liability under the "capacity to influence" analysis. Indeed, in light of the *Fleet Factors* ruling, a more prudent loan contract might call for termination of the agreement altogether upon a showing of non-compliance by the debtor with acceptable environmental standards.

142. Koegel, *Bank Power Draws Superfund Liability*, N.Y.L.J., July 9, 1990, at 1, col. 1. One counter-argument to this theory is that the Eleventh Circuit is only targeting those lenders who become "pervasively" involved in their debtor's activities. How-

The answer to this and other problems for the careful lender is to include more detailed contractual protections in credit instruments.[143] For example, lenders may require as a condition to advancing funds a guarantee from the parent company of the borrower to indemnify the creditor for any CERCLA response expenses the creditor must pay. Such guarantees could allow the lender to receive its loan payments without becoming involved in a loan work-out that might trigger liability under the *Fleet Factors* analysis.[144]

To be sure, the pre-loan environmental investigations encouraged by the Eleventh Circuit and the loan agreements reflecting any identified risks are positive steps that lenders already are working to incorporate into the loan process.[145] However, after a loan has been made, the *Fleet Factors* standard likely will *not* encourage creditors to address their debtors' hazardous waste problems, contrary to the Eleventh Circuit's prediction, and will encourage lenders to distance themselves from their borrowers' activities.[146] For example, while prudent practice may dictate that a bank help to facilitate the cleanup of a debtor's contaminated site or to foreclose on collateral which secures a defaulted loan, the threat of CERCLA liability may dictate otherwise. Prudent practice in this situation will require the lender to perform a new environmental audit of the contaminated property, weighing the amount of the outstanding loan against the cost of cleaning up the site.[147] In some cases, given the potential difficulties of quickly and accurately assessing the extent of contamination and predicting the final cleanup cost, a lender may decide that it is better to avoid the risk of CERCLA liability by walking away from its loan and the contaminated collateral property.[148]

The threat of environmental liability in general, exacerbated by the *Fleet Factors* holding in particular, has become a "major problem" not only for lenders, but for borrowers, small businesses, farmers

ever, the Eleventh Circuit could have clarified its position on this issue, as did the Ninth Circuit in Bergsoe Metal Corp. v. East Asiatic Co., Ltd., 910 F.2d 668 (9th Cir. 1990). The *Bergsoe* court stated that a lender may continue to include such covenants in its loan agreements without incurring liability, provided the lender does not exercise those powers and remains uninvolved during the work-out phase of the loan. *Id.*

143. Bolstein & Reznick, *supra* note 139, at 1, 4.

144. *Id.* Examples of "loan work-outs" include restructuring or renegotiating the terms of a loan, requiring payment of additional interest, extending a payment period or providing financial or operational advice necessary to protect a security interest.

145. It is now a common practice for banks to require potential borrowers to fill out extensive questionnaires describing their potential liabilities. Indeed, a 1988 survey indicated that in each of 300 loan transactions studied, an environmental audit was required by the lender as a condition to advancing funds. *Lender Liability Act of 1990: Hearings on S. 2827 Before the House Committee on Banking, Housing and Urban Affairs,* 101st Cong., 2d Sess. (July 19, 1990) (Statement of William J. Roberts, Legislative Director, Environmental Defense Fund).

146. Bolstein & Reznick, *supra* note 139, at 1, 4 (emphasis added).

147. *Id.*

148. *Id.*

and even homeowners.[149] Lenders have become increasingly reluctant to loan to companies with property containing or generating hazardous substances.[150] The result is that many small businesses are unable to get started or continue operating without the needed funding.[151] Surprisingly, many of the small businesses that are affected do not fit the traditional description of rusting barrels oozing with toxic substances. Instead, many of the operations are the type with which people interact on an everyday basis.[152] These businesses are finding that as a condition for receiving a loan, they must pay for environmental audits costing from $500 to $2,500.[153] When the audit indicates environmentally contaminated property, some lenders may require a full and complete cleanup before any funds are advanced.[154] Other lenders, however, may decline to make the loan altogether.[155] Certainly, either option represents a prudent business practice for lenders, and promotes CERCLA's policy goal of ensuring that the polluter, and not the taxpayer, pays for the cleanup costs.[156] But the severe and difficult reality for borrowers is that many creditors, reacting to the uncertainty created by *Fleet Factors*, have stopped making loans altogether to certain categories of small businesses most frequently associated

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149. *Lender Liability Act of 1990: Hearings on S. 2827 Before the House Committee on Banking, Housing and Urban Affairs*, 101st Cong., 2d Sess. (July 19, 1990) (Statement of Charles M. Mitschow, American Bankers Association).

150. *Id.*

151. "[T]he real loser here is the small business community . . . well-run, creditworthy businesses that cannot obtain the financing they need to survive because their lenders are afraid of Superfund liability." *See The Impact of Superfund Lender Liability on Small Businesses and Their Lenders, Hearings on H.R. 4494 Before the House Committee on Small Business*, 101st Cong., 2d Sess. (June 7, 1990) (Statement of Congressman John LaFalce, Chairman, House Committee on Small Business).

152. *Id.* A partial list of businesses with potential problems includes:

* residential areas and developments which may contain asbestos fill or may be located over former landfills
* gas stations and other businesses with underground storage tanks, such as automotive dealerships
* automotive repair shops
* dry cleaners
* tool and die shops
* wood preserving facilities
* scrap yards
* railroad facilities
* utilities
* bottling and canning facilities
* metal fabricating facilities
* semiconductor plants
* chemical manufacturers and distributors
* fertilizer or pesticide producers and distributors
* feedlot operations
* grain elevators
* meat packing and rendering facilities, and
* cattle ranches and hog production facilities.

Id.

153. *Id.*

154. Bolstein & Reznick, *supra* note 139, at 1, 4.

155. *Id.*

156. *Fleet Factors*, 901 F.2d at 1558-59, n.12.

with environmental pollution.[157]

In direct response to the Eleventh Circuit's *Fleet Factors* decision and Congress' failure to clarify the intended protections of the secured creditor exemption, EPA has drafted a proposed rule on lender liability.[158] The proposed rule is an effort by EPA to define the secured creditor exemption terms that have proved so difficult for the courts to interpret.[159] The rule as proposed would provide concrete and certain standards for courts, lenders and borrowers to follow in all jurisdictions.

The EPA proposal rejects the *Fleet Factors* rule that a lender is "participating in management" when it has the ability to influence hazardous waste decisions at the facility.[160] Instead, under the proposed rule, "participating in management" is defined to mean actual operational participation by the lender, and does not include the mere "capacity to influence" the facility's operations.[161] Under EPA's proposed standard, a lender is considered to be participating in management if, while the borrower is still in possession, the lender "materially divests the borrower of decision-making control over the facility operations, particularly with respect to the hazardous substances present at the facility."[162]

The proposal also lists specific actions that a secured creditor may take to protect its security interest while remaining within the exemption protection. These include policing the loan, undertaking a financial work-out when the security interest is threatened, foreclosing and expeditiously liquidating the assets securing the loan, monitoring the borrower's business, requiring on-site inspections of the facility

157. A recent poll of the American Banker's Association's Community Bankers Council indicates that 43 percent of the surveyed banks have already stopped loaning to certain types of small businesses which deal with hazardous substances, and another 11 percent plan to do so. *Lender Liability Act of 1990: Hearings on S. 2827 Before the House Committee on Banking, Housing and Urban Affairs*, 101st Cong., 2d Sess. (July 19, 1990) (Statement of Charles M. Mitschow, American Bankers Association).

158. EPA released its draft proposed rule to various federal agencies in February 1991, requesting comments on the rule. A copy of the draft proposal may be found in the offices of the *Land and Water Law Review*. The official proposal is now published at 56 Fed. Reg. 28,798 (1991) (to be codified at 40 C.F.R. Part 300) (proposed June 24, 1991).

159. Proposed EPA rule at 9.

160. *Id.* at 22-23.

161. *Id.* The draft proposal states that whether a lender has engaged in management participation sufficient to remove it from the creditor exemption is a fact-sensitive issue which can depend upon such things as:

(1) the nature of the borrower's business
(2) the areas in which the lender is involved
(3) whether the facility is in possession of the borrower or lender after foreclosure
(4) the extent of actual control exercised by the lender, and
(5) whether the lender has caused or contributed to environmental harm at the facility.

Id. at 22.

162. *Id.* at 26.

and requiring certification of financial information or compliance with environmental laws.[163] As long as the borrower remains substantially in possession and control of the facility, this type of oversight will be considered part of the creditor's role in protecting its security interest, and not as participation in the management of the facility.[164] In addition, the EPA proposal would allow a secured creditor to foreclose on a facility and then sell the property within six months without losing its secured creditor exemption.[165]

EPA's proposed rule makes eminent good sense. It allows lenders to act responsibly and to promote environmental compliance on the part of their borrowers, while preserving the secured creditor exemption and the goals of CERCLA. The proposal provides a clear-cut and certain standard to which lenders may look when determining a permissible and prudent level of involvement in their debtor's activities.[166] Yet at the same time, it does not completely exempt lenders from CERCLA liability, as some legislative proposals in Congress would do,[167] leaving only the taxpayers and the parties who polluted the property to pay for the cleanup.

CONCLUSION

The issue and scope of secured lender liability under CERCLA are of extraordinary importance to commercial lending law. Finding lenders liable for Superfund cleanup costs has had a tremendous impact on banking and lending practices, not to mention the impact on borrowers. The Eleventh Circuit's ruling in *United States v. Fleet Factors Corp.* has elevated to a new height the concern over secured lender liability in both the lending and business communities. The Eleventh Circuit's "capacity to influence" standard for determining "participation in management" is unworkable because it does not provide concrete guidelines for lenders to follow in determining the extent of their involvement in their debtors' activities. Instead it creates confusion and uncertainty, and renders lenders reluctant to make future loans to companies with identified or potential hazardous waste problems. The net effect of this reluctance is that adequate funding

163. *Id.* at 11-12.
164. *Id.* at 24.
165. *Id.* at 39.
166. Congressman John LaFalce on March 14, 1991, introduced a bill in the United States House of Representatives which a member of his staff said essentially would attempt to codify the EPA proposal. H.R. 1450, 102nd Cong., 1st Sess. (1991).
167. Two measures which were introduced in the 101st Congress essentially would have exempted banks, savings and loans and other lenders from CERCLA liability. H.R. 4494, 101st Cong., 2d Sess. (1990); S. 2827, 101st Cong., 2d Sess. (1990). Neither bill passed into law. Both measures were strongly opposed by a wide variety of environmental groups which suggested that exempting the lenders from CERCLA liability would result in cleanup costs being shouldered by taxpayers. Form letter to Dear Senator entitled "Environmentalists Strongly Oppose S. 2827: Another Bailout for Banks" (July 1990); Form letter to Dear Representative entitled "Environmentalists Strongly Oppose H.R. 4494: Another Bailout for Banks" (not dated).

simply may be unavailable to some types of businesses, particularly small businesses.

EPA recognizes this problem. Its proposed rule would allow lenders to act responsibly, by working alongside their borrowers to achieve environmental compliance, without risking pollution cleanup liability. In enacting a secured creditor exemption, Congress did indeed intend to afford lenders some degree of protection from CERCLA liability, as long as they do not assume actual control of their borrowers' businesses. The Eleventh Circuit's overzealous and unnecessary interpretation of CERCLA decimates the shelter provided by the secured creditor exemption. EPA's rule would undo the damage.

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