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# Lender Liability Under CERCLA and the Fleeting Protection of the Secured Creditor Exemption

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# LENDER LIABILITY UNDER CERCLA AND THE *FLEET*-ING PROTECTION OF THE SECURED CREDITOR EXEMPTION

by Timothy R. Zinnecker\*

CONGRESS enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)<sup>1</sup> in 1980 for the dual purposes of (i) providing the federal government with a mechanism by which it could promptly and effectively respond to the ever-increasing health and environmental problems posed by improper disposal of hazardous materials and (ii) imposing liability for remedying such problems on the parties responsible for the problems, rather than on the general taxpayer.<sup>2</sup>

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1. Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9675 (1988)). Congress amended CERCLA in 1986 with the passage of the Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)). For an excellent summary of caselaw interpreting various provisions of CERCLA, see Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 BUS. LAW. 923 (May 1990).

2. See *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989). See also *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1553 (11th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3477 (U.S. Jan. 15, 1991) (No. 90-504) (CERCLA enacted "in response to the environmental and public health hazards caused by the improper disposal of hazardous wastes." Its "essential policy" places responsibility for cleanup on those who were responsible for problems caused by such disposal.); *Lone Pine Steering Comm. v. United States Env'tl. Protection Agency*, 777 F.2d 882, 886 (3d Cir. 1985), *cert. denied*, 476 U.S. 115 (1986) (noting that goal of CERCLA is to promptly eliminate the sources of danger to health and environment presented by hazardous waste sites); *United States v. New Castle County*, 727 F. Supp. 854, 858 (D. Del. 1989) ("A major purpose behind CERCLA is to place the costs of cleanup of designated hazardous sites on those responsible for the contamination."); *Chemical Waste Management, Inc. v. Armstrong World Indus.*, 669 F. Supp. 1285, 1290 n.6 (E.D. Pa. 1987) ("[T]he statute's objectives are the following: to encourage maximum care and responsibility in the handling of hazardous waste; to provide for rapid response to environmental emergencies; to encourage voluntary clean-up of hazardous waste spills; to encourage early reporting of violations of the statute; and to ensure that parties responsible for release of hazardous substances bear the costs of response and costs of damage to natural resources."); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 576 (D. Md. 1986) ("Congress enacted CERCLA in 1980 in response to the environmental and public health hazards posed by improper disposal of hazardous wastes.").

While the purposes underlying CERCLA are noble, the statute itself is not the model of brilliant prose. See, e.g., *Fleet Factors*, 901 F.2d at 1554 n.3 ("careless statutory drafting"); *Aceto*, 872 F.2d at 1380 n.8 ("hurriedly put together"); *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988) ("not a paradigm of clarity or precision . . . inartful

CERCLA authorizes the Environmental Protection Agency (EPA) to clean up hazardous waste sites itself by using monies from a trust fund commonly known as the "Superfund"<sup>3</sup> and then to seek reimbursement for its expenditures from responsible parties, who may include commercial lenders.

To successfully recover clean-up costs from a commercial lender, the EPA must prove that the commercial lender falls within one of the statutorily prescribed classes of responsible parties,<sup>4</sup> including "the owner and operator of a vessel or a facility, [and] 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 . . . ."<sup>5</sup> The statute defines "owner and operator" in a somewhat circular fashion to include any person owning or

drafting and numerous ambiguities . . . . use of inadequately defined terms . . . . circuitous language"); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) ("not a model of clarity"); *Maryland Bank*, 632 F. Supp. at 578 ("hastily patched together . . . . hastily conceived").

3. The Superfund is financed through a combination of federal appropriations, industry taxes and judgments entered against responsible parties. See 26 U.S.C. § 9507(b) (1988). Congress appropriated \$8,500,000,000 into the Superfund for the five-year period beginning October 17, 1986, 42 U.S.C. § 9611 (Supp. 1990), and \$5,100,000,000 for the three-year period beginning October 1, 1991, 5 Toxics L. Rep. (BNA) 752 (Nov. 7, 1990). Its initial appropriation in 1980 was \$1,600,000,000. See Barr, *supra* note 1, at 953.

4. The EPA also must establish the "disposal" of a "hazardous substance" at a "facility" and must prove that its costs are statutorily recoverable. See 42 U.S.C. § 9607 (1988). The statute defines "disposal" as:

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3).

"Hazardous substance" is defined to include certain substances, elements, compounds, mixtures, solutions, wastes, and pollutants which (i) are described with more particularity in the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.* (1988)), the Solid Waste Disposal Act (42 U.S.C. § 6921 *et seq.* (1988)), or the Clean Air Act (42 U.S.C. § 7412 *et seq.* (1988)), (ii) "when released into the environment may present substantial danger to the public health or welfare or the environment," or (iii) are an "imminently hazardous chemical substance or mixture" as defined at 15 U.S.C. § 2606. See 42 U.S.C. § 9601(14) (1988). See also 40 C.F.R. § 401.15 (1989) (list of 65 "toxic pollutants" under the Federal Water Pollution Control Act); *id.* § 61.01(a) (list of eight "hazardous air pollutants" under the Clean Air Act); *id.* § 302.4, Table 302.4 (45-page list of "hazardous substances" promulgated by EPA under 42 U.S.C. § 9602(a) (1988)).

"Facility" is defined as:

(A) any building, structure, installation, 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.

42 U.S.C. § 9601(9) (1988).

5. 42 U.S.C. § 9607(a)(1)-(2) (1988). CERCLA also imposes liability against: any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and . . . any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person,

operating a facility, and, if title to or control of the facility has been conveyed to a state or local government as a result of bankruptcy, foreclosure, tax delinquency, abandonment, or similar means, then the person who owned, operated, or otherwise controlled activities at such facility immediately before such conveyance.<sup>6</sup> Commercial lenders find comfort in the definition's express exemption from liability of any person "who, without participating in the management of . . . a facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."<sup>7</sup>

Because neither the statute nor the legislative history offers guidance on the phrase "participating in the management," the task of articulating what a lender can and cannot do before losing the protection afforded by the secured creditor exemption has fallen to the courts, which, unfortunately for the banking community, have not rendered favorable decisions. Some courts have concluded that they need not interpret the phrase if the lender has foreclosed on the property because the statutory exclusion affords no protection to a lender after foreclosure.<sup>8</sup> In a recent decision even more alarming to the financial community, the first federal appellate court to address the parameters of lender liability under CERCLA held that a lender can be liable for environmental clean-up costs if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect the borrower's hazardous waste disposal decisions if it chose to do so.<sup>9</sup>

After summarizing the leading cases addressing lender liability under CERCLA, this article examines the reasons offered by those courts that have concluded that the safe harbor of the secured creditor exemption is unavailable to lenders who have foreclosed on their interests. This article contends that none of the reasons justify such a legal conclusion. In addition, this article criticizes the standard of liability articulated by the Eleventh Circuit in *United States v. Fleet Factors*<sup>10</sup> and concludes that, contrary to the court's opinion, the standard discourages lenders from monitoring the environmen-

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from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

*Id.* § 9607(a)(3)-(4) (1988). Although not inconceivable, most commercial lenders rarely, if ever, would engage in activities that would trigger liability under these latter two classes of responsible parties. *But see Tanglewood East Homeowners*, 849 F.2d at 1573-74.

6. 42 U.S.C. § 9601(20)(A) (1988). *See also* *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 19 (D.R.I. 1989), *aff'd in part*, 910 F.2d 24 (1st Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3406 (U.S. Dec. 4, 1990) (No. 90-816) ("CERCLA's definition of 'owner or operator' is not especially illuminating."); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651 (N.D. Ill. 1988), *aff'd*, 861 F.2d 155, 156 (7th Cir. 1988) ("The definition of 'owner or operator' for purposes of earthbound sites must come from a source other than the text. The circularity strongly implies, however, that the statutory terms have their ordinary meanings rather than unusual or technical meanings."). The legislative history offers little additional insight. *See infra* notes 70-71, 76.

7. 42 U.S.C. § 9601(20)(A) (1988).

8. *See Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556, 562-63 (W.D. Pa. 1989); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578-80 (D. Md. 1986) 632 F. Supp. at 578-80. *But see In re Bergsoe Metal Corp.*, 910 F.2d 668, 671-72 (9th Cir. 1990); *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992, 20,996 (E.D. Pa. Sept. 4, 1985).

9. *United States v. Fleet Factors*, 901 F.2d 1550, 1558 (11th Cir. 1990).

10. *Id.*

tal problems of their borrowers and thus increases the likelihood that the EPA will bear the initial, if not the ultimate, responsibility for remedying environmental problems.

## I. SUMMARY OF THE CASELAW

### A. United States v. Mirabile<sup>11</sup>

In 1973, American Bank and Trust Company (ABT) made a loan to Arthur C. Mangels Industries (Mangels) that was partially secured by a paint-manufacturing plant. In 1976, Turco Coatings (Turco) acquired almost all of the stock of Mangels and continued to manufacture paint on the site. Girard Bank, a predecessor of Mellon Bank, made a working capital line of credit available to Turco in 1976 that was secured by inventory and other personal property. In 1979, Turco executed a \$150,000 promissory note payable to the Small Business Administration (SBA) secured by a second mortgage on the plant, second-lien security interests in other assets and pledged stock. After the bankruptcy court dismissed Turco's bankruptcy petition, ABT foreclosed on the site and was the highest bidder at the sheriff's sale in August 1981. In December 1981, ABT assigned its bid to Thomas A. Mirabile, who, together with his wife, Anna, accepted a sheriff's deed to the property.

In 1983, the EPA sued the Mirabiles to recover its clean-up costs of \$250,000 incurred in removing approximately 550 drums of hazardous waste discovered during an inspection in February 1983. The Mirabiles then sued ABT and Mellon as third-party defendants, alleging that exercise by these lenders of financial control over the facility made them liable. ABT and Mellon impleaded the SBA, urging that if their activities triggered liability, then the SBA also should be liable.

Relying on the protection afforded by the secured creditor exemption, all three lenders moved for summary judgment. The court in *Mirabile* observed that "the exemption plainly suggests that provided a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be held liable for cleanup costs."<sup>12</sup> In determining the type of activities in which a lender could safely engage, the court distinguished involvement in financial aspects of management from participation in day-to-day production aspects of the business, a distinction, in the court's opinion, supported by the statute itself.

I note that the exemption from liability is afforded to secured creditors who do not participate in the management of a "facility." . . . The reference to management of the "facility," as opposed to management of the affairs of the actual owner or operator of the facility, suggests once again that the participation which is critical is participation in operational, production, or waste disposal activities. Mere financial ability to control waste disposal practices of the sort possessed by the secured

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11. 15 Env'tl. L. Rep. 20,992.

12. *Id.* at 20,995.

creditors in this case appears insufficient for imposition of liability.<sup>13</sup>

In reviewing activities of each lender, the court noted that during the four-month period between the sheriff's sale and ABT's assignment of its bid to the Mirabiles, ABT secured the building against vandalism by boarding up windows and changing locks, made inquiries as to the approximate costs of disposal of various drums located on the property, and, through its loan officer, visited the property on various occasions for the purpose of showing it to prospective purchasers.<sup>14</sup> In the court's opinion, ABT was entitled to summary judgment because it had not "participate[d] in the day-to-day operational aspects of the site. In the instant case, ABT merely foreclosed on the property after all operations had ceased and thereafter took prudent and routine steps to secure the property against further depreciation."<sup>15</sup>

The court also granted the SBA's motion for summary judgment, despite the fact that the SBA's loan agreement allegedly contemplated some involvement which the Mirabiles construed as participation in day-to-day management.<sup>16</sup> The loan agreement also limited annual compensation of operating officers and prohibited the purchase of life insurance and the payment of dividends or advances to company officers absent the SBA's prior written consent. The court found no evidence that the SBA had actually participated in management and did "not believe participation in purely financial aspects of operation, of the sort which occurred here, [was] sufficient to bring a lender within the scope of CERCLA liability."<sup>17</sup>

The activity of Mellon Bank presented a "cloudier situation."<sup>18</sup> After Mellon Bank made its initial advance to Turco, Turco's president established an advisory board to oversee Turco's operations. One member of this board was Brett Sauers, the loan officer initially responsible for the Turco account. Because production was not discussed at advisory board meetings and Sauers' participation in the advisory board was limited to input into general financial matters, the court held that Sauers' activities did not trigger CERCLA liability.<sup>19</sup>

Nevertheless, the court denied Mellon Bank's motion for summary judgment because of the uncertainty surrounding the degree of loan officer McWilliams' post-bankruptcy oversight of Turco.<sup>20</sup> McWilliams had testified that he became involved with Turco because his superiors at Mellon wanted him to have "more of a day-to-day hands-on involvement." He described this involvement as including monitoring the cash collateral accounts, ensuring that receivables went to the proper account, and establishing a reporting system between the company and the bank."<sup>21</sup> The court did not believe

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13. *Id.*

14. *Id.* at 20,996.

15. *Id.*

16. *Id.* at 20,997.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

such activity would create CERCLA liability,<sup>22</sup> but evidence also indicated that McWilliams frequently visited the site and insisted on certain manufacturing changes and personnel reassignments. In addition, deposition testimony included such remarks as "Girard Bank had obvious, whatever, control," Mellon Bank "became more heavily involved in the day-to-day operations" of Turco, and "Turco would have to accept the day-to-day supervision of [a bank officer] if it wanted to continue operations with Girard funds."<sup>23</sup> The court concluded that such evidence presented a genuine issue of fact as to whether Mellon Bank, through its predecessor Girard Bank, engaged in the sort of managerial participation that would bring a secured creditor within the scope of CERCLA liability.<sup>24</sup>

*B. United States v. Maryland Bank & Trust Company*<sup>25</sup>

In 1980, Mark McLeod used proceeds of a \$335,000 loan from Maryland Bank & Trust Company (Maryland Bank) to purchase property on which his parents operated a trash and garbage business. The loan was secured by a mortgage on the property. After Mark defaulted on the loan, Maryland Bank foreclosed on the farm in 1981 and purchased the property at a foreclosure sale in May 1982.

In 1983, McLeod informed a local environmental official of the existence of dumped wastes on the farm. State officials then contacted the EPA, which removed 237 drums of chemical material and 1,180 tons of contaminated soil at a cost of approximately \$552,000, after Maryland Bank declined to take any corrective action. Litigation ensued when Maryland Bank refused to reimburse the EPA for its clean-up costs.

As in *Mirabile*, the success of Maryland Bank's motion for summary judgment hinged on whether Maryland Bank was an "owner or operator" of the farm under CERCLA or whether it fell outside the definition under the secured creditor exemption.<sup>26</sup> Relying on the verb tense of the exemption, the court held that the protective language was available only to those persons whose security interest existed at the time of clean-up.<sup>27</sup> Believing that Maryland Bank held indicia of ownership primarily to protect its security interest only as long as it was a mortgagee and not a title holder, the court imposed liability.<sup>28</sup> "The exclusion does not apply to former mortgagees

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22. *Id.*

23. *Id.*

24. *Id.*

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

26. The court first observed that it was undisputed that Maryland Bank had been the owner of the facility since May 1982. However, the parties disputed whether the bank had been the operator of the facility since that time. Notwithstanding the conjunctive nature of the statutory phrase, "the owner and operator," the court held that a party need not be both an owner and operator to incur liability. *Id.* at 577. "Proper usage dictates that the phrase 'the owner and operator' include only those persons who are both owners and operators. But by no means does Congress always follow the rules of grammar when enacting the laws of this nation." *Id.* at 578.

27. *Id.* at 579.

28. *Id.*

currently holding title after purchasing the property at a foreclosure sale, at least when, as here, the former mortgagee has held the title for nearly four years, and a full year before the EPA clean-up."<sup>29</sup> In the court's opinion, a contrary holding would result in windfalls to mortgagees who, able to purchase properties cheaply at foreclosure sales because other prospective purchasers would face potential liability, would wait for government clean-up and thereafter sell the marketable sites at a profit.<sup>30</sup>

C. Guidice v. BFG Electroplating & Manufacturing Co.<sup>31</sup>

Local residents sued BFG Electroplating & Manufacturing Company (BFG) in 1986 for unlawfully contaminating the environment and causing personal injuries. BFG filed a third-party complaint against current and past owners of the adjacent property on which Berlin Metal Polishers' (BMP) treatment facility was located, including National Bank of the Commonwealth (NBC). NBC had held a mortgage on the property to secure one of two loans to BMP. After BMP defaulted on its loans, NBC purchased the property at a sheriff's sale in April 1982 and held title until January 1983.

NBC did not dispute that drums containing hazardous materials were on the property during its ownership. Evidence also indicated that some drums were in a rusted condition, did not have lids, and were located in an area of the plant where water dripped from the ceiling and the floor was cracked. Nevertheless, as in *Mirabile* and *Maryland Bank*, NBC argued that it was entitled to summary judgment because it was neither an "owner or operator" of the property when hazardous wastes were allegedly released and disposed. The court examined the merits of NBC's motion by examining the periods before and after foreclosure.<sup>32</sup>

Prior to foreclosure during its five-year period as mortgagee, NBC had (a) made additional loans to BMP secured by the property or accounts receivable, (b) received periodic financial statements from BMP, (c) met with BMP officials to discuss the status of accounts, personnel changes, and presence of raw materials, (d) actively assisted BMP in obtaining financing from the Small Business Administration, (e) communicated with state and local environmental officials in an effort to assist BMP in complying with wastewater discharge laws, (f) visited and inspected the property through NBC's agent,

29. *Id.* The court rebutted Maryland Bank's reliance on *Mirabile* by noting that *Mirabile* "pertained to a situation in which the mortgagee-turned-owner promptly assigned the property. To the extent to which that opinion suggests a rule of broader application, this Court respectfully disagrees. The legislative history and policies behind the Act counsel against such a generous reading of § 101(20)(A)'s exclusion." *Id.* at 580 (footnote omitted).

30. *Id.* The court also denied that part of the bank's motion for summary judgment concerning applicability of the so-called third party defense codified at 42 U.S.C. § 9607(b)(3) (1988). 632 F. Supp. at 581-82. For a discussion of this defense, which is beyond the scope of this article, see Corash & Behrendt, *Lender Liability under CERCLA: Search for a Safe Harbor*, 43 S.W. L.J. 863, 875-78 (1990); Klotz & Siakotos, *Lender Liability Under Federal and State Environmental Law: Of Deep Pockets, Debt Defeat and Deadbeats*, 92 COM. L.J. 275, 280-81 (1987); Comment, "Buying into Trouble — Lender Liability Under CERCLA and SARA," 14 S. ILL. U.L.J. 319, 328-34 (1990).

31. *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556 (W.D. Pa. 1989).

32. *Id.* at 561-64.

and (g) discussed loan restructures with BMP officials. Finding no evidence suggesting that NBC controlled operational, production, or waste disposal activities at the plant, the court concluded that NBC's actions "were prudent measures undertaken to protect its security interest in the property" and were "insufficient to void the security interest exemption of CERCLA."<sup>33</sup>

The court held that the security interest exemption was unavailable to NBC after foreclosure, however, and offered two reasons for its ruling.<sup>34</sup> First, as noted in *Maryland Bank*, holding otherwise would permit a mortgagee-turned-owner to reap the windfall of the increased value of the improved property.<sup>35</sup> Second, 1986 amendments to CERCLA exempted state and local governments who involuntarily acquired title through bankruptcy, tax delinquency, abandonment, or similar means from liability as owners or operators.<sup>36</sup> "That Congress did not simultaneously amend the statute to exclude from liability lenders who acquire property through foreclosure might indicate that Congress intended to hold them liable as owners."<sup>37</sup>

#### D. United States v. Fleet Factors Corp.<sup>38</sup>

In 1976, Fleet Factors Corporation agreed to advance funds to Swainsboro Print Works (SPW) against the assignment of SPW's accounts receivable and a security interest in SPW's cloth printing plant, equipment, inventory, and fixtures. A court declared SPW bankrupt in December 1981 and appointed a trustee to supervise the liquidation of assets. Fleet Factors foreclosed on its security interest in certain inventory and equipment, some of which was sold at a public auction in June 1982 by Fleet Factors' contractual agent, Baldwin Industrial Liquidators. In August 1982, Fleet Factors contracted with Nix Riggers to remove any equipment remaining after the public sale. Fleet Factors never foreclosed on the facility, which was conveyed to Emanuel County, Georgia, at a tax lien foreclosure sale in July 1987.

Following an inspection of the plant in 1984, the EPA disposed of 700 fifty-five gallon drums of toxic chemicals and removed forty-four truckloads of materials containing asbestos. The EPA alleged that most of the drums were at the facility at the time of Fleet Factors' public auction in June 1982

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33. *Id.* at 562 (citation omitted). The court offered the following policy reasons for its holding:

A goal of CERCLA is safe handling and disposal of hazardous waste. To encourage banks to monitor a debtor's use of security property, a high liability threshold will enhance the dual purposes of protection of the banks' investments and promoting CERCLA's policy goals. Conversely, a low liability standard would encourage a lender to terminate its association with a financially troubled debtor and expedite loan payments in an effort to recover the debts.

*Id.* (footnote omitted).

34. *Id.* at 563.

35. *Id.*

36. *Id.*

37. *Id.*

38. 724 F. Supp. 955 (S.D. Ga. 1988), *aff'd and remanded*, 901 F.2d 1550 (11th Cir.), *reh'g denied*, 911 F.2d 742 (11th Cir. 1990) (en banc), *cert. denied*, 59 U.S.L.W. 3477 (U.S. Jan. 15, 1991) (No. 90-504).

and that removal of equipment or machinery by the purchasers or Riggers disturbed asbestos allegedly in pipes connected to the equipment or machinery. The EPA sought to collect its costs of approximately \$400,000 from Fleet Factors and certain other parties.

The EPA conceded that Fleet Factors never had been an "owner" of the facility within the meaning of CERCLA. It argued, however, that Fleet Factors was liable as an "operator" of the facility because its activities both before and after the public auction constituted participation in management sufficient to preclude protection afforded by the secured creditor exemption. Specifically, the EPA asserted that after SPW ceased its operations and began to wind down its affairs, Fleet Factors (a) required SPW to seek its approval prior to shipping goods to customers, (b) established prices for SPW's excess inventory, (c) dictated when and to whom SPW shipped its finished goods, (d) involved itself in personnel matters, (e) controlled access to SPW's facility, and (f) contracted with a third party to dispose of machinery and equipment.

The district court interpreted the phrases "participating in the management of a . . . facility" and "primarily to protect his security interest" as permitting a secured lender "to provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability, if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation."<sup>39</sup> The court then concluded as a matter of law that Fleet Factors' activities prior to the public auction were insufficient to result in liability.<sup>40</sup> Nevertheless, precluding summary judgment, the court held that Fleet Factors' dispute with the EPA's allegations concerning movement of toxic-filled drums and the effect of removal of equipment and machinery on asbestos-filled pipes might trigger liability.<sup>41</sup>

The appellate panel noted that it was undisputed that Fleet Factors held a mortgage primarily to protect its security interest in the facility.<sup>42</sup> "The critical issue is whether Fleet participated in management sufficiently to incur liability under the statute."<sup>43</sup> After noting that no other federal appellate

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39. 724 F. Supp. at 960.

40. *Id.*

41. *Id.*

42. 901 F.2d at 1556.

43. *Id.* Initially, the appellate panel had determined whether Fleet Factors was liable under 42 U.S.C. § 9607(a)(1) as the "present" owner or operator of the property. The court held that the quoted term should be construed at the time when the plaintiff filed its complaint, and under such a construction, Emanuel County was the "present" owner or operator of the facility. *Id.* Except in certain circumstances inapplicable here, however, the owner or operator of a facility whose title has been conveyed to a governmental entity due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means is the person who owned, operated, or otherwise controlled activities at the facility "immediately beforehand." 42 U.S.C. § 9601(20)(A)(iii) (1988). Although Fleet Factors never had foreclosed on the mortgaged property and had not been on the premises since December 1983, the government argued that Fleet Factors was liable because it was the last entity to exercise "control" over the facility. The court held that acceptance of such an interpretation of "immediately beforehand" would "torture the plain statutory meaning" of the statute. Instead, the court interpreted the phrase to mean "without intervening ownership, operation, and control." 901 F.2d at 1555. The

court had interpreted the secured creditor exemption, the court summarized and rejected positions asserted by the government and Fleet Factors.<sup>44</sup> The government argued that the exemption afforded no protection to a secured creditor who participated in any manner in managing the facility. In the panel's opinion, the government's construction "would largely eviscerate the exemption Congress intended to afford to secured creditors" and "could expose all such [secured] lenders to CERCLA liability for engaging in their normal course of business."<sup>45</sup> Fleet Factors, on the other hand, favored the distinction delineated by *Mirabile* between permissible participation in financial management of the facility and impermissible participation in day-to-day or operational management of the facility. The court rejected such an interpretation as being "too permissive towards secured creditors"<sup>46</sup> and "ignor[ing] the plain language of the exemption and essentially render[ing] it meaningless. Individuals and entities involved in the operations of a facility are already liable as operators under the express language of section 9607(a)(2)."<sup>47</sup> The court then penned its own standard of liability:

Under the standard we adopt today, a secured creditor may incur section 9607(a)(2) liability, without being an operator,<sup>48</sup> by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable — although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, 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. We, therefore, specifi-

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court held that Fleet Factors could not be the present owner or operator under such an interpretation. *Id.*

44. *Id.* at 1556-57.

45. *Id.* at 1556.

46. *Id.* at 1557.

47. *Id.*

48. "For an example of activity that could subject a secured creditor to liability as an operator, see [United States of America v.] Kayser-Roth Corp., 724 F. Supp. [15.] 22-23 [(D.R.I. 1989)]." *Id.* at 1557 n.10. *Kayser-Roth* did not involve a secured creditor; it involved a parent corporation's potential responsibility for its subsidiary's liability under CERCLA. The court had little trouble finding that Kayser-Roth Corporation controlled the management and operations of its subsidiary, Stamina Mills, to such a degree that Kayser-Roth could be deemed an "operator." 724 F. Supp. at 22.

Kayser-Roth exercised pervasive control over Stamina Mills through, among other things: 1) its total monetary control including collection of accounts payable; 2) its restrictions on Stamina Mills' financial budget; 3) its directive that subsidiary-governmental contact, including environmental matters, be funneled directly through Kayser-Roth; 4) its requirement that Stamina Mills' leasing, buying or selling of real estate first be approved by Kayser-Roth; 5) its policy that Kayser-Roth approve any capital transfer or expenditures greater than \$5,000; and finally, 6) its placement of Kayser-Roth personnel in almost all Stamina Mills' director and officer positions, as a means of totally ensuring that Kayser-Roth corporate policy was exactly implemented and precisely carried out.

*Id.*

cally reject the formulation of the secured creditor exception suggested by the district court in *Mirabile* . . . .<sup>49</sup>

Under this new standard, the court held that Fleet Factors' involvement in the financial management of the plant as alleged by the EPA was pervasive, if not complete.<sup>50</sup> Such involvement permitted the court to remove the protection afforded by the secured creditor exemption and impose liability as a matter of law.<sup>51</sup>

*E. In Re Bergsoe Metal Corporation*<sup>52</sup>

In December 1979, the Port of St. Helens sold fifty acres of land to Bergsoe Metal Corporation (BMC) on which to construct a lead recycling plant and related pollution control equipment. In exchange, BMC executed a \$400,000 promissory note secured by a mortgage on the property. Through a series of transactions through June 1981, BMC, the Port, and United States National Bank of Oregon (Bank) completed the bond financing. BMC conveyed the warranty deed to the property and the plant to the Port, which executed leases in favor of BMC. To secure its obligations under the bonds, the Port mortgaged the property and the plant to the Bank and also assigned all of its right, title, and interest in the two leases to the Bank. Pursuant to the leases, BMC paid its lease payments to the Bank to retire the indebtedness evidenced by the bonds.

The plant began experiencing difficulties shortly after operations commenced in 1982 and closed in 1986. The Bank then put BMC into involuntary bankruptcy, but not before Oregon officials determined that various hazardous substances had contaminated the plant site. The Bank and the bankruptcy trustee sought a declaratory judgment that BMC's parent companies (collectively, EAC)<sup>53</sup> were liable for the environmental clean-up costs. In turn, EAC filed a third-party complaint alleging that the Bank and the Port were liable for clean-up under CERCLA. The bankruptcy court granted the Port's motion for summary judgment, and the district court affirmed.<sup>54</sup>

EAC's success on appeal depended on its ability to create a material issue of whether the Port was an owner under CERCLA. The appellate court noted that although the Port held legal title to the property and plant, this fact alone was not dispositive.<sup>55</sup> "[U]nder the security interest exception the court must determine *why* the Port holds such indicia of ownership. Here, there is no doubt that the Port has the deed in the plant primarily to ensure that [BMC] would meet its obligations under the leases and therefore under

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49. *Fleet Factors*, 901 F.2d at 1557-58 (footnote omitted).

50. *Id.*

51. *Id.* at 1559.

52. 910 F.2d 668 (9th Cir. 1990).

53. Bergsoe's stock was held by The East Asiatic Company, Ltd., The East Asiatic Company, Inc., and Heidelberg Eastern, Inc. *Id.* at 669.

54. *Id.* at 670.

55. The court did not discuss the contrary holdings of *Maryland Bank* and *Guidice*. See *supra* notes 26-30, 33-37 and accompanying text.

the bonds.”<sup>56</sup>

Nor could EAC persuade the court that the secured creditor exemption failed to apply because the Port participated in managing the BMC plant. EAC pointed to three facts that allegedly demonstrated managerial participation. First, the Port had negotiated and encouraged plant construction. Second, the leases gave the Port the right to inspect the premises and to re-enter and take possession upon foreclosure. Third, the Port participated in management through its actions in giving a successor manager control of the plant.

The court gave short shrift to each argument. First, the court stated that to hold that encouragement and negotiation constitute managerial participation would render the exclusionary language meaningless, for all contracting parties engage in such conduct.<sup>57</sup> Second, the court held that there was no evidence that the Port exercised any of its rights under the leases.<sup>58</sup> “What is critical is not what rights the Port had, but what it did. The CERCLA security interest exception uses the active ‘participating in management standard.’ Regardless of what rights the Port may have had, it cannot have participated in management if it never exercised them.”<sup>59</sup> And third, the court held that the Port never entered into any contract with the successor manager, nor did EAC offer evidence of any negotiations between the two entities.<sup>60</sup> Finding no managerial participation, the appellate court held that the Port was not an “owner” under CERCLA and affirmed the bankruptcy court’s summary judgment in favor of the Port.

## II. TITLE HOLDERS AND THE SECURED CREDITOR EXEMPTION

In both *Mirabile* and *Bergsoe Metal*, lenders successfully claimed the protections afforded by the secured creditor exemption despite holding title to the tainted property.<sup>61</sup> In *Maryland Bank* and *Guidice*, however, such pro-

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56. *Bergsoe*, 910 F.2d at 671 (emphasis in original). Unlike lenders in *Mirabile*, *Maryland Bank*, *Guidice*, and *Fleet Factors*, the Port held title not to secure repayment of its own credit, but “to ensure that Bergsoe would meet its obligations under the leases and therefore under the bonds” and as a “guarantee that Bergsoe would cover the Port’s own indebtedness [to the Bank] under the bonds.” *Id.* at 671. In Judge Kozinski’s words, “[t]his does not change the analysis.” *Id.* at 671. Originally, the Port held title to secure BMC’s rental payments under the leases. Once the Port assigned the leases to the Bank, however, BMC and the Port no longer enjoyed a debtor-creditor relationship. In the absence of such a relationship, query how the Ninth Circuit could so easily conclude that the Port held not only a security interest, but also indicia of ownership primarily to protect its security interest. *Id.* at 673. The answer may rest in the loan documents not discussed in the opinion.

57. *Id.* at 672.

58. *Id.* at 672-73.

59. *Id.* at 672-73 & n.3. Query whether the Port could have exercised any power under the leases since it had assigned them to the Bank.

Unlike the Eleventh Circuit, the *Bergsoe* court declined to rule on the degree of managerial participation necessary to trigger CERCLA liability. *Id.* at 672. The court found it clear that, whatever the statutory parameters of participation, some actual management is necessary before a secured creditor will fall outside the exception. Finding none in the instant case, the court refused to engage in line drawing. *Id.* at 672.

60. *Id.* at 673.

61. See *supra* notes 15, 55-60 and accompanying text.

tection magically disappeared when the financial institutions acquired title.<sup>62</sup> This section of the article examines the reasons offered in the latter two cases; the examination reveals that such reasons do not support the legal conclusion that a title holder cannot successfully invoke the secured creditor exemption.<sup>63</sup>

### A. *The Verb Tense*

The court in *Maryland Bank* held that the secured creditor exemption "covers only those persons who, at the time of the clean-up, hold indicia of ownership to protect a then-held security interest in the land. The verb tense of the exclusionary language is critical. The security interest must exist at the time of the clean-up."<sup>64</sup> Any legal conclusion resting on the verb tense of the exclusion is somewhat tenuous, however, especially when the entire statute is far from a model of clarity. As the court admitted earlier in its opinion, "[b]y no means does Congress always follow the rules of grammar when enacting the laws of this nation."<sup>65</sup>

### B. *The Common-Law Mortgagee*

To its credit, the *Maryland Bank* court looked beyond the rules of grammar and examined legislative history. In the court's opinion, the latter revealed that the secured creditor exemption was incorporated into the statute to prevent imposition of liability upon a mortgagee who would be deemed the "title holder" of the property under the common law of a handful of states.<sup>66</sup> By no means could Congress have intended to protect all mortgagees who later acquired title.<sup>67</sup>

Although plausible,<sup>68</sup> this reasoning nevertheless fails to support a *per se* legal conclusion that a title holder cannot avail itself of the secured creditor exemption. As defined, "owner or operator" includes "any person owning

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62. See *supra* notes 26-30, 33-37 and accompanying text.

63. For a contrary viewpoint, however, see Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261, 1285-96 (1987).

64. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986).

65. *Id.* at 578. See also *id.* at 578 n.2 (syntactical irregularities render statutory interpretation difficult).

66. *Id.* at 579.

67. *Id.* at 579-80.

68. But see Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets*, 103 BANKING L. J. 509, 532 (1986):

A literal reading of *Maryland Bank & Trust Co.* shows that the court ruled the security interest exception protects only those creditors who hold a security interest in property in Maryland and twelve other states in which common-law title mortgages are in effect. In those jurisdictions, the protection lasts only until foreclosure. Under this interpretation, the security interest exception is a virtual *tabula rasa*. The so-called exception really provides no protection for creditors under this interpretation.

*Id.* at 532; see also *id.* at 534 ("The *Maryland Bank & Trust Co.* court's restriction of the security interest exception makes it a virtual nullity. Under the court's interpretation, only mortgagees in thirteen states have some limited protection. Presumably, mortgagees in other states and secured creditors holding security other than a mortgage have no protection under CERCLA.") (emphasis in original).

or operating [an onshore or offshore] facility," but excludes "a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."<sup>69</sup> The legislative history indicates that indicia of ownership includes actual title.<sup>70</sup> When read together, therefore, the exclusionary language in the statute and the legislative history make clear that a lender can hold such indicia of ownership and not be liable as an owner or operator if (a) the lender is holding title primarily to protect his security interest and (b) while holding title, the lender is not participating in the management of the facility.<sup>71</sup>

69. 42 U.S.C. § 9601(20)(A) (1988).

70. See H.R. REP. NO. 172, 96th Cong., 2d Sess., pt. 1, at 36, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6181 (" 'Owner' is defined to include not only those persons who hold title to a vessel or facility but those who, in the absence of holding a title, possess some equivalent evidence of ownership."); H.R. REP. NO. 172, 96th Cong., 2d Sess., pt. 2, at 2, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6212, 6213 [hereinafter H.R. REP. 172] ("Section 101(x) of H.R. Rep. 85 defines the term 'owner' as any person holding title to, or in the absence of title, any other indicia of ownership of, a vessel or facility[.]"); H.R. REP. NO. 253(IV), 99th Cong., 2d Sess. 63 *reprinted in* 1986 U.S. CODE CONG. AND ADMIN. NEWS 3068, 3093 [hereinafter H.R. REP. 253 (IV)] (" 'Owner' is defined to include not only those persons who hold title to a vessel or pipeline but those who, in the absence of holding a title, possess some equivalent evidence of ownership.").

71. See 42 U.S.C. § 9601(20)(A) (1988); H.R. REP. 172, *supra* note 70 at 6213 (definition of owner "does not include a person who, without participating in the management or operation of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility"); H.R. REP. NO. 99-253(IV), *supra* note 70 at 3093 (definition of owner "does not include certain persons possessing indicia of ownership (such as a financial institution) who, without participating in the management or operation of a vessel or pipeline, hold title in order to secure a loan"). See also Berz & Sexton, *Superfund Collides with Lenders' Concerns*, 13 LEGAL TIMES 15 (Dec. 23-30, 1985), in which the authors argue that a mortgagee who acquires title through foreclosure should remain immune from Superfund liability, provided it acts at all times to protect its collateral. "It is not legal title which necessarily subjects the holder to 'owner' or 'operator' liability under Superfund, but the purpose for which title is held." *Id.* (emphasis in original; footnote omitted.) In an accompanying footnote, the authors make the following observation:

[T]he scant legislative history of the "owner/operator" definition makes clear that the exemption was intended to protect all secured creditors, even those actually holding title, and to thereby encourage continued lending, particularly institutional lending: "[The term owner] does not include certain persons possessing indicia of ownership (such as financial institutions) who, without participating in the management or operation of a vessel or facility, hold title either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rules and regulations."

*Id.* at 18 n.18 (quoting H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 35, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6181 (emphasis in original)). See also *In re T.P. Long Chemical, Inc.*, 45 Bankr. 278 (Bankr. N.D. Ohio 1985) (stating in dicta that creditors do not assume responsibility for public risks posed by collateral merely by taking a security interest therein). "[E]ven if [the secured lender] had repossessed its collateral pursuant to its security agreement it would not be an 'owner or operator' as defined under CERCLA" because it held indicia of ownership primarily to protect its security interest and did not participate in management of the tainted facility. *Id.* at 288-89.

Unlike the lenders in the cases discussed herein, the lender in *T.P. Long* held a security interest in personal property rather than a mortgage on real property. *Id.* at 280. Because a party must own or operate the facility before incurring liability, an unsecured lender or one holding security in personal property could be liable under CERCLA only as an operator, absent application of an ownership standard of liability akin to that articulated by the Eleventh Circuit in *Fleet Factors*. See *infra* notes 93-94 and accompanying text. Thus, the *Maryland Bank* and *Guidice* holdings are of no concern to such lenders.

Neither the statute nor its legislative history supports the theory that protection under the secured creditor exemption magically disappears at the moment the lender-mortgagee becomes the lender-owner. The title holder's reasons for holding indicia of ownership and the extent to which it is involved in managing the facility cannot be ignored by the courts. To hold otherwise is to misconstrue the express language of the statute and its legislative history.<sup>72</sup>

### C. 1986 Amendments

As the *Guidice* court noted, Congress amended the definition of "owner or operator" in 1986 to exclude state and local governments that acquire ownership or control "involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign."<sup>73</sup> This amendment prompted the following response from the court: "That Congress did not simultaneously amend the statute to exclude from liability lenders who acquire property through foreclosure might indicate that Congress intended to hold them liable as owners."<sup>74</sup>

The court could have strengthened its argument further by noting that the amendment also imposes liability on a governmental entity "that has caused or contributed to the release or threatened release of a hazardous substance from the facility."<sup>75</sup> The new language suggests that the definition of "owner or operator" was altered to prevent innocent governmental entities — and, indirectly, innocent taxpayers — from incurring CERCLA liability as a result of merely acquiring legal title to tainted property. Why not include innocent title holders, such as commercial banks, as well? Additionally, Congress believed that bankruptcy, tax delinquency, abandonment, *and* foreclosure are similar to each other.<sup>76</sup> This negates the theory that liability

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72. As Judge Kozinski wrote, "the undisputed facts must demonstrate *both* that the [lender-title holder] holds [such] indicia of ownership primarily to protect its security interest in the . . . plant and that it did not participate in the management of the plant" before a court will grant a lender's motion for summary judgment premised on the secured creditor exemption. *In re Bergsoe Metal Corp.*, 910 F.2d 668, 671 (9th Cir. 1990) (emphasis added).

The apparently inconsistent results in *Mirabile* and *Maryland Bank* can be reconciled under this two-pronged analysis. In *Mirabile*, the fact that ABT's actions were taken during a relatively short four-month period suggests that ABT held title for purposes of protecting its security interest, and in examining the second prong, the court held that ABT's post-foreclosure actions did not constitute participation in the management of the site. *Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996. In *Maryland Bank*, MB&T held title for at least four years, and one year prior to cleanup. The extended length of time strongly suggests that MB&T was holding indicia of ownership as an investment rather than primarily to protect its security interest, thus rendering an examination of the second prong moot. *Maryland Bank*, 632 F. Supp. at 579-80. Whether the lender in *Guidice* would be liable under this analysis is indeterminable from the opinion, which fails to discuss NBC's post-foreclosure activities during the nine months it held legal title to the tainted property. The opinion does indicate, however, that NBC's pre-foreclosure activities were taken in an attempt to protect its security interest. *Guidice*, 732 F. Supp. at 561-62.

73. 42 U.S.C. § 9601(20)(D) (1988).

74. 732 F. Supp. at 563.

75. 42 U.S.C. § 9601(20)(D) (1988).

76. See 42 U.S.C. § 9601(20)(A) (1988) ("The term 'owner or operator' means . . . (iii) in

fluctuates with the manner in which title is involuntarily acquired. Again, why not include foreclosing lenders in the amendment?

Concededly, failure to amend the definition of "owner or operator" to exclude from liability lenders who acquire property through foreclosure *might* indicate that Congress intended to hold them liable as owners. However, failure to so amend the statute could just as easily indicate that Congress considered such an amendment superfluous. As noted earlier, the legislative history indicates that indicia of ownership includes outright title.<sup>77</sup> This history also indicates that such a lender is already immune from liability if it holds title primarily to protect a security interest and has not participated in managing the borrower's facility.<sup>78</sup> With such protection already existing, Congress may have asked itself why lenders needed any additional protection. What Congress might have intended and actually intended may be entirely different. Absent legislative history clearly indicating the latter, courts should hesitate to use conjecture as a foundation for buttressing already shaky legal conclusions.

#### D. Windfall Profits

The courts in both *Maryland Bank* and *Guidice* feared that permitting a mortgagee-turned-owner to claim the secured creditor exemption would contradict the policies underlying CERCLA.<sup>79</sup>

Under the scenario put forward by the bank, the federal government alone would shoulder the cost of cleaning up the site, while the former mortgagee-turned-owner, [sic] would benefit from the clean-up by the increased value of the now unpolluted land. At the foreclosure sale, the mortgagee could acquire the property cheaply. All other prospective purchasers would be faced with potential CERCLA liability, and would shy away from the sale. Yet once the property has been cleared at the taxpayers' expense and becomes marketable, the mortgagee-turned-owner would be in a position to sell the site at a profit.<sup>80</sup>

Although such reasoning cannot be faulted,<sup>81</sup> it does not support an auto-

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the case of any facility, title or control of which was conveyed due to *bankruptcy, foreclosure, tax delinquency, abandonment, or similar means* to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand.") (emphasis added).

77. See *supra* note 70.

78. 42 U.S.C. 9601(20)(A) (1988). See *supra* note 71 and accompanying text.

79. *Maryland Bank*, 632 F. Supp. at 580; *Guidice*, 732 F. Supp. at 563.

80. 632 F. Supp. at 580. See also *Guidice*, 732 F. Supp. at 563 (relying partly on *Maryland Bank* in holding that "[w]hen a lender is the successful purchaser at a foreclosure sale, the lender should be liable to the same extent as any other bidder at the sale would have been.").

81. The legislative history of the CERCLA lien provisions, codified at 42 U.S.C. § 9607(l) (1988) and enacted as part of the 1986 amendments, indicates that Congress shares the windfall profits concern. See H.R. REP. NO. 99-253(III), 99th Cong., 2d Sess., reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3040 (federal lien provisions enacted "to ensure that the owners of the property where a clean-up has occurred will not receive a windfall profit as a result of the clean-up."). Unlike certain state environmental liens, the CERCLA lien attaches only to the tainted property and is subject to the rights afforded by applicable state law to purchasers and secured creditors. 42 U.S.C. § 9607(l)(1)(B) (1988). Cf. Civins, *Lender Concerns Under Environmental Laws*, 20 ST. B. TEX. ENVTL. L. J. 93, 95 & notes 12-13

matic emasculation of the protections afforded by the secured creditor exemption immediately upon foreclosure. The windfall profits argument makes sense in situations where the lender forecloses and thereafter holds title for a significant period of time during which the EPA cleans the site — a scenario akin to *Maryland Bank*.<sup>82</sup> In a situation where the lender forecloses and shortly thereafter transfers title without knowledge of any environmental problems or waiting for EPA cleanup,<sup>83</sup> such as in *Mirabile*,<sup>84</sup> the policy underlying the windfall profits argument is not advanced. In such instances, a title-holding lender should be permitted to present evidence that it can avail itself of the secured creditor exclusion. This view does not negate the logic of the windfall profits argument but merely recognizes that such logic does not universally apply to all foreclosure scenarios.

### III. FLEET FACTORS AND FLEETING PROTECTION

A lender may incur liability for environmental clean-up costs if it is the present owner or operator of the facility or the former owner or operator of the facility when hazardous substances were disposed.<sup>85</sup> In either case, the lender must be an owner or operator to incur liability. As previously discussed, the statutory definition of owner or operator and the underlying legislative history offer little practical guidance on the meaning of the two terms.<sup>86</sup> Both sources clearly indicate, however, that a person who holds

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(1990) (Statutes enacted in Arkansas, Connecticut, and Tennessee, among other states, impose super-priority liens over all other liens, except real estate tax liens. Statutes enacted in Maine, Massachusetts, New Hampshire, and New Jersey impose super-priority liens which, if recorded first, attach to all the owner's real and personal property).

82. The length of time title is held after foreclosure may be the most important evidence in determining why such indicia of ownership is held. As the duration increases, the chances of successfully arguing that title is held primarily to protect a security interest diminish. Consequently, a court will be more likely to conclude that the motive for holding title is profit-oriented. *But see* *United States v. Carolawn Co.*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 20,698, 20,698-99 (D.S.C. 1984) (defendant could be liable for acting as "conduit" and holding title to hazardous waste site for less than one hour).

83. A lender with knowledge of the presence of hazardous substances on the property must disclose such presence to a prospective purchaser. 42 U.S.C. § 9601(35)(C) (1988). Because such a purchaser would be precluded from asserting the third-party defense (*see* 42 U.S.C. § 9601(35)(A)(i) (1988) and *supra* note 30) the lender may be forced to hold title to the property until after the environmental problems have been remedied, at which time the windfall profits argument becomes attractive.

A lender with knowledge of the presence of hazardous substances may decline to disclose such knowledge to a purchaser. Such a decision precludes a lender from raising the third party defense. *See* 42 U.S.C. § 9601(35)(C) (1988). The lender may still argue, however, that it is immune from liability under the secured creditor exemption. Nevertheless, such a lender could incur liability under a host of other legal or equitable theories, not the least of which would be fraud.

84. 15 ENVTL. L. REP. (Envtl. L. Inst.) at 20,996.

85. 42 U.S.C. § 9607(a)(1), (2) (1988).

86. *See* 42 U.S.C. § 9601(20)(A) (1988); *supra* notes 6, 70; H.R. REP. 172, *supra* note 70, at 6181-82 ("In the case of a facility, an 'operator' is defined to be a person who is carrying out operational functions for the owner of the facility pursuant to an appropriate agreement."); H.R. REP. 253(IV), *supra* note 70, at 3093 (" 'Operator' is one of the classes of responsible persons subject to liability under the Act. Operators of vessels do not include those individuals who are not totally responsible for the operation of a vessel. To fall within the definition, the individual must have assumed the full range of operational responsibility.").

indicia of ownership primarily to protect its security interest is neither an owner nor an operator absent participation in the management of the tainted property.<sup>87</sup> The following analysis of the initial appellate examination of the secured creditor exemption suggests that the court misconstrued the phrase, "participating in the management," when articulating its liability standard and that such misconstruction will prompt lenders to act in a manner at odds with the court's intent.

*A. Participating in the Management v. Operation*

Premised on its conclusion that the terms "participating in the management" and "operation" were incongruent,<sup>88</sup> the court held that a lender could be liable for *either* operating the troubled site *or* holding indicia of ownership and managing the facility to the extent necessary to preclude application of the secured creditor exemption.<sup>89</sup> While the court's ability to engage in semantic warfare is commendable, the necessity for doing so is unclear. Far worse, the court's standard conflicts with unambiguous statutory language and could result in holding an innocent party liable.

A lender who holds indicia of ownership and becomes overly entangled in managing the facility cannot avail itself of the protection afforded by the exclusionary language. Nevertheless, and contrary to the court's interpretation, such a lender is not automatically liable merely because it cannot successfully claim the exemption unless its actions also prompt the conclusion that the lender is an owner or operator. Furthermore, a lender who "operates" the facility is not liable if the secured creditor exemption is applicable, for in such a situation the lender is expressly excluded from the definition of "owner or operator." Such liability, however, could result under the appellate panel's standard.

Whether or not the meanings of "participating in the management" and "operation" are congruent, the statute requires a court to examine the two provisions in harmony.<sup>90</sup> The Eleventh Circuit's construction is anything but harmonious and, ironically, bears the imprint of "ignor[ing] the plain language" it so quickly placed on the reasoning of lower courts.<sup>91</sup> When such an imprint could result in liability being placed on an otherwise innocent lender, the reasoning leading to such a result should be reconsidered.

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87. See 42 U.S.C. § 9601(20)(A) (1988); *supra* note 71.

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

89. *Id.* at 1556 n.6, 1557. Why the court did not compare and contrast participation in management with "owner or" operator or "owning or" operating is unclear. Perhaps the court was attempting to limit its reasoning to the facts, which suggested that Fleet Factors was not an owner because it had not foreclosed on its mortgage. Yet, in articulating its novel standard, the court imposed liability on Fleet Factors not as an operator, but as an owner. *Id.* at 1557 ("Under the standard we adopt today, a secured creditor may incur section 9607(a)(2) liability, *without being an operator . . .*") (emphasis added).

90. 42 U.S.C. § 9601(20)(A) (1988).

91. 901 F.2d at 1557.

*B. Inferences and Financial Management*

The Eleventh Circuit's distinction between "participating in the management" and "operation"<sup>92</sup> was merely a prelude to an edict even more troubling to lenders. Under the circuit court's liability standard, a secured creditor can be liable as an owner prior to foreclosure if its involvement in facility management would support the inference that it could, if it so chose, influence its borrower's hazardous waste disposal decisions.<sup>93</sup> In the court's opinion, a "lender's capacity to influence a debtor facility's treatment of hazardous waste will be inferred from the extent of its involvement in the facility's financial management."<sup>94</sup>

Much to the dismay of the financial community, liability under the appellate standard is premised on what a lender's activities suggest it could do, rather than on what a lender has done or is doing.<sup>95</sup> The standard correctly requires a lender to be involved in managing the facility before it is prevented from claiming that it is not an owner or operator under the secured creditor exemption. The flaw in the standard, however, is that it permits the mere inference of what a lender *could do* to support the legal conclusion regarding what the lender *has done*: involved itself in managing the facility.<sup>96</sup> The statutory language itself counsels against imposing liability on mere ability to exercise control,<sup>97</sup> and the overwhelming majority of courts that have addressed the issue have rejected such a notion.<sup>98</sup> Further, one of

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92. *Id.*

93. *Id.* at 1557-58.

94. *Id.* at 1559 n.13.

95. *Id.* at 1557-58.

96. Rather than permitting inferences to support a finding of actual involvement in management, the Eleventh Circuit's holding arguably is comprised of two independent requirements: (1) the lender must be involved in managing the facility and (2) the lender's degree of managerial involvement must, at a minimum, support the inference that the lender could influence hazardous waste disposal decisions if it so chose. *Id.* at 1558. This argument is tenuous for the following reason. A lender is liable for environmental cleanup as an owner or operator unless it can successfully invoke the secured creditor exemption. This exemption is unavailable to a lender who participates in managing the borrower's facility, however, regardless of inferences drawn from such managerial participation. Therefore, requiring the presence of such inferences *in addition to* actual managerial involvement is irrelevant.

97. See 42 U.S.C. § 9601 (20)(A) (1988) ("owned, operated or otherwise controlled" and "participating in the management"); see also H.R. REP. 172, *supra* note 70, at 6182 (defining an operator as "a person who is carrying out operational functions"); H.R. REP. 253(IV), *supra* note 70, at 3093 ("To fall within the definition [of operator], the individual must have assumed the full range of operational responsibility.").

98. See, e.g., *Bergsoe Metal Corp.*, 910 F.2d at 672 ("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."); *id.* at 672-73 ("What is critical is not what rights the Port may have had, but what it did. The CERCLA security interest exemption uses the active 'participating in management.' Regardless of what rights the Port may have had, it cannot have participated in management if it never exercised them."); *United States v. New Castle Co.*, 727 F. Supp. 854, 866 (D.Del. 1989) (court rejected argument that *ability* to, rather than *actual*, control established CERCLA liability); *Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384, 1390 (N.D. Ill. 1988) ("Mere ability to exercise control as a result of the financial relationship of the parties is insufficient for liability to attach. The entity must actually exercise control."); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 656-57 (N.D. Ill. 1987) *aff'd*, 861 F.2d 155 (7th Cir. 1988) "Again, the clear language of § 9607(a)(2) imposes liability only upon those who actually oper-

the policies underlying CERCLA—to impose liability on parties who are responsible for environmental problems—suggests that a lender must act before a court will impose such liability.

Of additional concern to lenders is that the court, in using a lender's financial involvement as a benchmark against which its participation in facility management is determined, articulates a standard that effectively emasculates the secured creditor exemption. All lenders are involved in the financial aspects of their borrowers; such involvement is inherent in the debtor-creditor relationship.<sup>99</sup> Additionally, any financial involvement by a lender, no matter how attenuated to environmental concerns, can support the inference that the lender is able to influence a borrower's hazardous waste disposal decisions. For example, regardless of the size of the loan, the type of collateral, or the nature of the borrower's business, most lenders require their borrowers to comply with certain financial ratios, maintain adequate insurance and fund any pension obligations. To the extent such covenants direct the flow of funds so as to preclude the simultaneous remedy of hazardous waste problems, their inclusion in the loan papers suggests the inference that the lender is influencing a borrower's environmental decisions, thus triggering liability under the appellate court's standard.<sup>100</sup>

If CERCLA liability is imposed under a standard that permits little, if

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ate a 'facility' within the meaning of CERCLA . . . . Only those who actually operate or exercise control over the facility that creates an environmental risk can be held liable under CERCLA for the costs of reducing that risk.''). *But see* *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 849 (W.D. Mo. 1984) (emphasis on management capacity and ability to control), *modified*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987).

99. The degree of such involvement most often is influenced by the perceived financial strength of the borrower and the current market value of any collateral. The ever-changing nature of these factors, often tempered by events outside either party's control, necessitates the inclusion of financial and other representations, warranties, and covenants in loan documents.

100. Unlike covenants, which are promises to perform in a certain manner, a borrower's representations and warranties constitute a statement of fact as of a particular time. Thus, they do not support any inference that the lender is influencing or could influence managerial decisions concerning environmental matters. Therefore, a lender concerned about environmental liability should not hesitate to demand that the borrower provide detailed environmental representations and warranties. Some suggested examples, together with definitions of terms used therein, follow:

(i) Borrower is not, nor will the execution, delivery, performance, or observance of the loan papers cause Borrower to be, in violation of any Environmental Laws.

(ii) No notice, notification, demand, request for information, citation, summons, or order has been issued, no complaint has been filed, no penalty has been assessed, and no investigation or review is pending or threatened by any Tribunal or other person or entity with respect to any alleged violation of any Environmental Law (including, without limitation, any generation, treatment, storage, recycling, transportation, disposal, or release of any Hazardous Substance generated by the operations or business, or located on, under, or at any property, of Borrower).

(iii) Except in compliance with Environmental Laws and permits issued thereunder, neither Borrower nor any other person or entity has generated, treated, stored, recycled, transported, disposed, or released any Hazardous Substance on, under, or at any property now or previously owned or leased by Borrower, and no property of Borrower has been used (whether by Borrower or by any other person or entity) as a dump or storage site, whether permanent or temporary, for any Hazardous Substance.

(iv) No property now or previously owned or leased by Borrower is listed or, to Borrower's knowledge, proposed for listing on any contaminated site list promulgated pursuant to any

any, financial involvement,<sup>101</sup> a lender likely will conclude that it cannot adequately protect its investment and refuse to make the loan. In turn, borrowers will be unable to obtain the funds necessary to remedy their environmental problems, thus leaving federal and state agencies to pick up the ever-increasing tab for clean-up costs. Because any evaporation of the available credit pool would impair the furtherance of CERCLA's policy of avoiding remediation of privately-caused problems with public funds, other courts should hesitate to adopt the analysis of the Eleventh Circuit as their own. Instead, the courts should strive to fashion a liability standard that seeks to reconcile a lender's need to manage its loan portfolio with the EPA's obligation to clean up hazardous waste sites with money gleaned from the pockets of the responsible party.

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Environmental Law, and Borrower knows of no circumstance that could result in such listing or proposed listing.

(v) There are no environmental Liens on any of the property owned or leased by Borrower, and no actions by any Tribunal have been taken or are in process which could subject any of such property to such Liens.

(vi) Prior to the date hereof, Borrower has provided to Lender all environmental investigations, studies, audits, tests, reviews, or other analyses (collectively, the "*Environmental Site Analyses*") conducted by, or which are in the possession of, Borrower relating to any property now or previously owned or leased by Borrower. The Environmental Site Analyses furnished to Lender by Borrower are accurate and complete.

(vii) Except as previously disclosed to Lender in writing, there have been no communications or agreements with any Tribunal or any private entity, including, but not limited to, any prior owners of the property, relating in any way to any liability arising from or the violation of any Environmental Law.

(viii) Borrower knows of no condition or circumstance, such as the presence of any Hazardous Substances, that could materially and adversely affect the fair market value of Borrower's property.

*Environmental Law* means any Law that relates to the environment or generation, treatment, storage, recycling, transportation, disposal, or release of Hazardous Substances; *Hazardous Substance* means any hazardous or toxic waste, pollutant, contaminant, or substance that is the subject of any Law; *Law* means all applicable statutes, laws, treaties, ordinances, rules, regulations, orders, writs, injunctions, decrees, judgments, or opinions of any Tribunal; and *Tribunal* means any local, state, or federal judicial, executive, or legislative instrumentality.

In many situations, a corporate borrower is the sole or majority shareholder of other entities. A lender should require such subsidiaries to make similar representations and warranties because courts have held a parent company liable for the environmental sins of its subsidiary. See, e.g., *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 20-23 (D.R.I. 1989), *aff'd in part*, 910 F.2d 24 (1st Cir. 1990), *petition for cert. filed*, 59 U.S.W. 3406 (U.S. Dec. 4, 1990) (No. 90-816) (court found parent was both owner and operator of subsidiary under CERCLA); *United States v. McGraw-Edison Co.*, 718 F. Supp. 154, 158 (W.D.N.Y. 1989) (court denied summary judgment motion of 49% shareholder); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1202-03 (E.D.Pa. 1989) (parent with significant financial or ownership interest in subsidiary liable for subsidiary's CERCLA costs); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 671-72 (D. Idaho 1986) (parent with capacity to control, and authority to prevent damage caused by, disposals and releases of hazardous waste at subsidiary's facility was owner or operator). But see *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3058 (U.S. July 24, 1990) (No. 89-1973) (parent not liable for subsidiary's cleanup costs when subsidiary maintained statutory corporate formalities). See generally Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986) (discussing parent liability for subsidiary's clean-up costs).

101. The Eleventh Circuit would permit a lender to become involved in "occasional and discrete financial decisions relating to the protection of its security interest without incurring liability." *Fleet Factors*, 901 F.2d at 1558. Unable to locate the oasis of safety in the desert of liability, most lenders will draw little comfort from this statement until future caselaw provides guidance on the meaning of the inherently speculative phrase, "occasional and discrete."

### C. Incentive or Disincentive?

Perhaps the greatest shortcoming in the court's reasoning is its belief that a broad construction of the phrase "participating in the management" furthers the remediation of environmental problems by the lending community. Because the parameters of CERCLA liability remain nebulous, the court correctly surmised that its ruling not only should, but will, "encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential debtors."<sup>102</sup> To suggest further, however, that a lender can adequately protect itself by weighing and incorporating the risks associated with the negative results of such due diligence into the terms of its loan documents<sup>103</sup> is, as one critic noted, naive.<sup>104</sup> Rarely can such risks be quantified with any degree of certainty or comfort, especially when the contours of environmental liability are subject to the vagaries of judicial interpreters. Furthermore, lenders that extend credit to borrowers laden with environmental difficulties will do anything but "monitor the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support."<sup>105</sup> To do so is to participate in the very type of management upon which the Eleventh Circuit premised liability. Thus, rather than providing financial institutions with a "strong incentive to address hazardous waste problems" at the facilities of their borrowers, the court's attempt at honing the law ironically provides the lending community with an excellent reason for "studiously avoiding the investigation and amelioration" of such hazardous waste problems—a result the court expressly sought to avoid.<sup>106</sup>

The test also will preclude the closing of many loan transactions. A lender confronted with the discovery of an environmental problem during the term of the loan will find itself between the proverbial rock and a hard place. Whether or not the lender withholds or extends the credit necessary to remedy the situation, its conduct infers an ability to influence its borrower's hazardous waste disposal decisions. Rather than find itself in such a quandary, a lender simply may decide not to enter into a credit relationship with the borrower. As previously noted, the absence of such a relationship only increases the likelihood that federal or state agencies will bear the initial, and perhaps ultimate, financial burden of remediation.

### IV. CONCLUSION

The confusion created by the various judicial interpretations of the secured creditor exemption may provide an impetus for reconsideration of legislation previously introduced in Congress. Such legislation would have expressly excluded from the definition of "owner or operator" lenders who

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102. *Id.*

103. *Id.*

104. Connelly, *Superfund Whacks the Banks*, WALL ST. J., Aug. 28, 1990, at A10, col. 3.

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

106. *Id.* at 1559.

foreclosed on their security interests and in no way caused, contributed to, or exacerbated the environmental problems.<sup>107</sup> Such legislation, if enacted, would mitigate the harsh and automatic results of the holdings in *Maryland Bank* and *Guidice* but would leave intact the mischief created by the Eleventh Circuit.

The EPA, believing that clarification would best be accomplished through agency regulation, has promulgated a rule that clarifies what actions a lender may take and still remain within the bounds of the secured creditor exemption.<sup>108</sup> The rule responds to the holdings of *Maryland Bank* and *Guidice* by permitting a lender to foreclose on its mortgage without automatically losing the protection of the exemption. Perhaps of most interest to financial institutions, however, is the rule's definition of "participation in management," which expressly refutes any suggestion that the phrase includes mere capacity or ability to influence facility operations. In this manner the rule, if adopted, would greatly alleviate the concerns prompted by the holding in *Fleet Factors*.

The EPA may replace those concerns with others, however. The interpretive ruling precludes a lender from falling within the ambit of the exemption if it fails to undertake an environmental audit or examination of the collateral securing loans made after the rule becomes effective. Furthermore, a lender may lose the statutory protection if its *failure to act* while winding up operations caused or contributed to environmental contamination. In addition, a lender will negate the exemption if it fails to foreclose or otherwise acquire or protect its collateral or delays foreclosure for an unreasonable period of time once the loan is nonperforming. On the other hand, a lender that acquires property by default, foreclosure, or similar means must sell or otherwise divest itself of the property within six months; otherwise, the

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107. See H.R. REP. 4494, 101st Cong., 2d Sess., 136 CONG. REC. E1024 (April 4, 1990). The proposed amendment would have excluded from the definition of owner or operator any "designated lending institution which acquires ownership or control of the facility pursuant to the terms of a security interest held by the person in that facility." *Id.* The amendment defined "designated lending institution" to include all depository institutions (as defined at 12 U.S.C. § 461(b)(1)(A) (1988)) and other "bona fide lending institutions" that make aggregate real estate loans in excess of \$1,000,000 to at least 25 borrowers during the one-year period beginning six months before, and ending six months after, the date on which the lender perfected its security interest in the facility. *Id.* Similar legislation was introduced in the Senate. See S. 2827, 101st Cong., 2d Sess., 136 CONG. REC. S172 (June 28, 1990) (introduction of S. 2827); *id.* at 110, 115-16 (July 19, 1990) (comments by co-sponsor). The 101st Congress adjourned without taking action on either reform bill.

For an analysis of these and other legislative options, see Unterberger, *Lender liability Under Superfund: What the Congress Meant to Say Was . . .*, 5 Toxics L. Rep. (BNA) 541 (Part I) (Sept. 19, 1990), 569 (Part II) (Sept. 26, 1990).

108. A copy of the interpretive ruling can be found at 55 BNA's Banking Report 636-42 (Oct. 15, 1990). The ruling will become effective upon publication in the Federal Register. Thereafter, the EPA will accept public comment for 60 days and then will formally codify the rule in volume 40 of the Code of Federal Regulations. *Id.* at 637.

Citing United States Supreme Court caselaw, one commentator argues that courts will not be bound by the EPA's administrative interpretation of the secured creditor exemption. See O'Brien, *Environmental Lender Liability: Will an Administrative Fix Work?*, 5 Toxics L. Rep. (BNA) 512 (Sept. 12, 1990).

lender bears the burden of proving that it continued to hold the property after such period primarily to protect its security interest.

Because environmentalists and the lending community will have differing views on how, and whether, CERCLA should be amended,<sup>109</sup> any binding legislative or regulatory guidance may not be forthcoming for some time and may fall far short of clearly defining what actions a lender may take without becoming an owner or operator.<sup>110</sup> Until such time, lenders must implement credit policies that will mitigate the scope of potential liability under standards promulgated by the courts. Of paramount importance to a lender should be its due diligence before the loan is funded, which, at a minimum, should include an environmental audit conducted by an experienced consultant.<sup>111</sup> If, after conducting its due diligence, the lender decides to extend credit, then the lender should include detailed environmental representations and warranties in the loan papers.<sup>112</sup> In addition, the lender should obtain environmental indemnification from the borrower and other related parties, such as major shareholders, officers, and directors.<sup>113</sup>

Historically, a lender also would include financial and environmental covenants in the loan papers, together with provisions permitting it to take certain actions if the borrower breached such covenants. Whether a lender should continue to include such covenants and remedy provisions in light of *Fleet Factors* is a question that cannot be summarily answered. Absent an affirmative response, many lenders will refuse to extend credit. Ironically, judicial decisions that prompt a reduction in the amount of available capital necessary to remedy today's many environmental problems effectively place the financial burden of remediation on the shoulders of those CERCLA was enacted to protect — the general public. Hopefully, such irony will not be lost on Congress, the EPA, and the courts.

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109. *E.g., Banks, Environmentalists Each See the Other Winning in EPA Superfund Rule*, 11 INSIDE E.P.A. 5 (Oct. 12, 1990).

110. *See House Panel Drafts Narrowing Amendments to Superfund Lender Exemption*, 11 INSIDE E.P.A. 12 (Sept. 7, 1990).

111. For a discussion of environmental audits, see Cogen, Ford & McCreary, *What You Need To Know About Environmental Audits*, 35 PRAC. LAW. 17 (1989); Hogan & Bromberg, *The Hidden Hazards of the Environmental Audit*, 36 PRAC. LAW. 15 (1990); Kane, *Screening Real Estate for Environmental Problems*, 72 J. COM. BANK LENDING 4 (1990); Payne, *A Practical Approach to Environmental Audits*, 5 PRAC. REAL EST. LAW. 83 (1989); Note, *Viable Protection Mechanisms for Lenders Against Hazardous Waste Liability*, 18 HOFSTRA L. REV. 89, 106-14 (1989).

112. *See supra* note 101 (suggested examples).

113. Such agreements are enforceable between the parties but not against the government. *See* 42 U.S.C. § 9607(e) (1988). *See also* Marmon Group, Inc. v. Rexnord, Inc., 822 F.2d 31, 33-34 (7th Cir. 1987) (party seeking indemnification under contractual indemnity clause for violation of environmental regulation not in existence at inception of contract had possible cause of action under the indemnity provision); Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1000 (D.N.J. 1988) (private parties can contract to indemnify or be indemnified for CERCLA costs); Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1569 (E.D. Pa. 1988) (party seeking enforcement of indemnification provisions must perform its contractual obligations); Chemical Waste Management, Inc. v. Armstrong World Indus., Inc., 669 F. Supp. 1285, 1295 (E.D. Pa. 1987) (express, but not implied, contractual indemnity provisions are enforceable); Gershonowitz, *What Should Be in Environmental Indemnity Clauses*, 5 PRAC. REAL EST. LAW. 55 (1989) (outlining problems peculiar to drafting effective environmental indemnity clauses).