CERCLAing the Field of Lender Liability: Clarifying the Security Interest Exemption

Brian J. McGaughan

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"CERCLAING" THE FIELD OF LENDER LIABILITY: CLARIFYING THE SECURITY INTEREST EXEMPTION

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I. INTRODUCTION

Since the late 1970's, the American public has experienced an unprecedented awakening concerning the dangers posed to the environment by certain practices of American industry.1 One aspect of this new awareness has been the recognition of the formidable costs required to repair damage already inflicted upon the environment.2

A Congressional response to these environmental concerns was the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).3 CERCLA was enacted in

2. Id. at 140 n.3.
order to establish a mechanism to respond to problems and costs associated with abandoned and inactive waste disposal sites. Generally, CERCLA authorizes the Environmental Protection Agency (EPA) to identify hazardous waste sites and provides EPA with the funding required to clean up those sites. CERCLA also allows EPA to compel those parties who are determined to be responsible for the release of the hazardous waste materials to reimburse the government for the costs involved in the cleanup.

One provision in CERCLA has been the source of much discussion and controversy concerning the scope of the statute's reach in attempting to spread the costs of environmental cleanups. This provision, popularly labeled the security interest exemption, exempts from liability lenders who hold a security interest in property identified as a hazardous waste site, and who meet the requirements of the provision. In recent years, inconsistent court decisions interpreting the security interest exemption have created uncertainty among lenders. Accordingly, lenders are concerned that they may be held liable for the activities of their debtors. Facing this troubling possibility, lenders perceive the need for some clarification of the activities that might lead to liability under CERCLA, in order to restore their confidence in the protection that the exemption offers.

EPA responded to the lenders' demand for guidance in April

5. See Quentel, supra note 1, at 142.
6. CERCLA defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance . . . )." CERCLA § 101(22), 42 U.S.C. § 9601(22).
7. The term "hazardous waste" is defined by CERCLA according to designations in various other environmental statutes and includes several exclusions. CERCLA § 101(14), 42 U.S.C. § 9601(14). For purposes of this Comment, the term "hazardous waste" will be used interchangeably with the terms "hazardous substances" and "hazardous waste materials."
14. Id.
1992 by issuing final regulations designed to ease the concerns of lenders and other interested parties by specifying the scope of a lender's responsibility under CERLCA. In addition, legislation has been proposed in recent sessions of Congress that would address the liability of lenders for CERCLA cleanup costs. This governmental activity has fueled the debate regarding the wisdom of the security interest exemption. Lenders assert that they are merely innocent parties who require regulatory and/or statutory protection from CERCLA liability. Environmental groups, on the other hand, claim that expansion of the security interest exemption is unnecessary and in contravention of the intent behind CERCLA's liability scheme.

This Comment will explore the controversy surrounding the security interest exemption under CERCLA. The analysis will begin with a description of CERCLA in general and the security interest exemption in particular. Next, an examination of the leading cases that have dealt with the security interest exemption will provide the background for the claims that this area is in need of clarification. This Comment will then consider the possible responses to lender liability by explaining the final EPA regulations, the legislative proposals, and actions that lenders may take on their own to protect themselves. Finally, the Comment will examine the contrasting positions of lenders and environmental groups concerning the proper interpretation of the security interest exemption.

II. A HISTORY OF LENDER LIABILITY UNDER CERCLA

A. The History of CERCLA

CERCLA was enacted as a response to the discovery of several hazardous waste sites in the late 1970's. In the rush to pass

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16. For a description of the proposed legislation, see infra notes 240-54 and accompanying text.
18. Id. For a further discussion of the arguments lenders have made in support of a broad interpretation of the security interest exemption, see infra notes 226-39 and accompanying text.
19. Commenters, supra note 17. For further discussion of the arguments supporting a narrow construction of the security interest exemption, see infra notes 217-25 and accompanying text.
legislation to address this serious problem, Congress drafted in CERCLA a statute that was full of compromises and that has been described as being "marred by vague terminology and deleted provisions." In addition, the lack of a clear legislative history has made interpretation of CERCLA’s broadly drafted provisions a difficult task for courts.

CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). Generally, SARA established more stringent hazardous waste cleanup standards, and broadened EPA’s powers with respect to the investigation of and access to hazardous waste sites.

B. How CERCLA Works

CERCLA provides the federal government with the power to identify hazardous waste sites for which cleanup measures are necessary. Once EPA determines that a facility has released or threatens release of a hazardous substance, the agency is authorized by CERCLA to undertake an appropriate response. EPA may target the parties that it deems responsible for the release and may give these parties the opportunity to clean up the facility themselves.

Alternatively, EPA may decide to take action on its own, par-

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26. The term “facility” as defined by CERCLA is so broad that it can include practically anything. Watercraft and consumer products in consumer use are specifically excepted. CERCLA § 101(9), 42 U.S.C. § 9601(9).
27. CERCLA § 101(23), 42 U.S.C. § 9601(23). CERCLA empowers EPA to take any actions that will “prevent, minimize, or mitigate damage to the public health or welfare or to the environment . . . .” Id. EPA may physically remove hazardous substances and may evaluate the nature and extent of the release. Id.
28. See infra notes 37-39 and related text for a discussion of responsible parties under CERCLA.
particularly if it decides that the situation presents the potential to endanger health.\textsuperscript{31} The action of EPA may take the form of an order to one or more of the targeted responsible parties, requiring a cleanup of the site.\textsuperscript{32} EPA may also have the contaminated site cleaned up through the use of government funds.\textsuperscript{33} CERCLA established the Hazard Response Trust Fund, more commonly referred to as “Superfund,” to pay for such cleanups.\textsuperscript{34} If Superfund dollars are used, EPA can take legal action against those parties identified to be responsible\textsuperscript{35} under CERCLA for reimbursement of the actual expenses required to clean up the site.\textsuperscript{36}

C. The Liability Scheme of CERCLA

CERCLA identifies four groups of “potentially responsible parties” (PRP’s) from whom EPA may seek cleanup costs.\textsuperscript{37} These groups of PRP’s include: (1) current owners or operators of facilities containing hazardous waste sites; (2) any person\textsuperscript{38} who owned or operated a facility at the time hazardous waste was disposed of; (3) any person who by contract or other agreement arranged for the disposal or transport of hazardous waste from a facility owned by another party; and (4) any person who accepts any hazardous substances for transport to disposal facilities selected by that person, from which there is a release of hazardous substances.\textsuperscript{39}

Each of the four categories of PRP’s have been held to be

\begin{itemize}
\item \textsuperscript{31} CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1).
\item \textsuperscript{32} CERCLA § 106(a)-(b), 42 U.S.C. § 9606(a)-(b). In addition to requiring the cleanup of the site, these provisions authorize EPA to impose fines of up to $25,000 per day for lack of compliance. \textit{Id.}
\item \textsuperscript{33} CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1).
\item \textsuperscript{34} \textit{Id.} Congress had initially authorized $2.2 billion to provide for the funding of CERCLA cleanups. CERCLA § 131(b)(2), 42 U.S.C. § 9631(b)(2) (1980) (repealed 1986). In 1986, Congress increased the amount of the funding to $8.5 billion. CERCLA § 111(a), 42 U.S.C. § 9611(a) (1988).
\item \textsuperscript{35} CERCLA § 104(b)(1), 42 U.S.C. § 9604(b)(1).
\item \textsuperscript{36} CERCLA § 107(a), 42 U.S.C. § 9607(a). In addition, offenders who did not comply with an original EPA order to clean up the site are subject to being charged triple the amount EPA incurred in the actual cleanup of the facility. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3).
\item \textsuperscript{37} CERCLA § 107(a), 42 U.S.C. § 9607(a).
\item \textsuperscript{38} A “person” is defined by CERCLA to mean “an 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).
\item \textsuperscript{39} CERCLA § 107(a), 42 U.S.C. § 9607(a).
\end{itemize}
strictly liable under CERCLA. In addition, all parties determined to be responsible under CERCLA are subject to joint and several liability. This means that lenders may be liable for all or a part of the cost of a cleanup of a hazardous waste site, even though some other party was directly responsible for the release of the hazardous waste. Lenders may be particularly vulnerable under the joint and several liability standard, since they are considered to have "deep pockets."

D. Liability of Lenders Under CERCLA

The basis of a lender’s liability under CERCLA has been whether the lender can be determined by its actions to be or to have been an owner or operator of a hazardous waste facility. CERCLA, in defining the term "owner or operator," provides lenders with potential relief from liability. An owner or opera-

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41. See, e.g., Monsanto Co., 858 F.2d at 171. While CERCLA does not require joint and several liability, it allows such liability in the event of indivisible harm. Id.

42. See Quentel, supra note 1, at 155.

43. See Lettow, supra note 13. Lenders may also be the only PRP with the ability to pay the cleanup costs, since their direct involvement in the facility in the first place is often due to borrowers who are experiencing financial difficulties. See Quentel, supra note 1, at 179.

44. CERCLA § 107(a), 42 U.S.C. § 9607(a). See Dominick & Harmon, supra note 9, at 857.

45. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A). It should be noted that, in addition to the security interest exemption, CERCLA does provide for certain narrow affirmative defenses that are available to all PRP's. CERCLA § 107(b)(1)-(3), 42 U.S.C. § 9607(b)(1)-(3). CERCLA states that there will be no liability for a person who would otherwise be liable if that person can show by a preponderance of the evidence that the release of a hazardous substance was due to: (1) an act of God; (2) an act of war; or (3) an act of an unrelated third party. Id.

Although the "third party" defense would appear to hold the most hope for a lender seeking exclusion from liability, this defense has generally been interpreted narrowly by the courts and does not provide dependable protection for lenders. Quentel, supra note 1, at 156-58. In order to be able to successfully assert the third party defense, a PRP must demonstrate that: (1) the release of a hazardous substance was caused solely by the act or omission of a third party; (2) the release did not occur in connection with a contractual relationship with the PRP; and (3) the PRP exercised due care with respect to the hazardous substance. CERCLA § 107(b), 42 U.S.C. § 9607(b).

SARA slightly broadened this defense by defining "contractual relationship" to exclude situations in which the real property involved was acquired
tor under CERCLA "does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." 46

Although this exemption seems straightforward, the interpretation of its terms has posed problems for courts trying to determine whether a lender should be considered an operator or owner. 48 The holdings of these courts have left unclear the circumstances under which a lender will be considered to have lost the benefit of the exemption as a result of participation in the management of a debtor's business. 49 For instance, questions may arise as to whether a lender which provides assistance on financial matters, or negotiates a loan workout with a struggling borrower, is participating in management or simply protecting its security interest. 50

A second question relevant to the interpretation of the security interest exemption available to lenders, a more extensive description of the affirmative defenses under CERCLA is beyond its scope. For a more detailed discussion, see Daniel M. Steinway, The Innocent Landowner Defense: An Emerging Doctrine, 4 Toxics L. Rep. (BNA) 486 (Sept. 27, 1989).

46. A security interest generally arises when a lender, wishing to protect itself and to minimize the risk that the loan will not be repaid, requires the borrower to secure the loan with some form of collateral. If the borrower should default on the loan, the lender has the option of foreclosing on the collateral. Quentel, supra note 1, at 160.

47. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A). This provision describes the term "owner or operator" as follows:
(i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in 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.

Id.

48. Quentel, supra note 1, at 160-61.

49. Cases that have considered this issue include In re Bergsoe Metal Corp., 910 F.2d 668 (9th Cir. 1990); United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991). For a further discussion of Bergsoe, see infra notes 121-29 and accompanying text. For a further discussion of Fleet Factors, see infra notes 90-120 and accompanying text.

50. See cases cited supra note 49.
ity interest exemption involves the point at which a lender should be considered an owner under CERCLA. For example, it is not clear whether a lender which forecloses on the property of a defaulting borrower is, as a result, no longer eligible for the protection provided by the security interest.

E. Treatment of the Security Interest Exemption by the Courts

1. "Participating in the Management" of a Facility
   a. Initial interpretations by lower federal courts

The issue as to whether a lender's security interest may result in the lender being considered an operator under CERCLA was first addressed by a bankruptcy court in Ohio, in In re T.P. Long Chemical, Inc. In this case, BancOhio National Bank (BancOhio) held a security interest in the property of T.P. Long Chemical, Inc., which ran a rubber recycling plant on the property in question. In 1981, after the T.P. Long company filed for bankruptcy, EPA discovered drums containing hazardous waste buried at the facility. EPA performed the cleanup of the facility and then sued BancOhio and the bankrupt debtor's estate for reimbursement of the costs incurred in the cleanup.

Although deciding the case on other grounds, the court

52. See cases cited supra note 51.
54. Id. at 280. BancOhio held a security interest in the accounts receivable, equipment, fixtures, inventory, and other personal property of T.P. Long Chemical, as well as the proceeds thereof. Id.
55. Id. at 281. The trustee of the company's estate conducted an auction at which all of the company's personal property was sold. Id. The company that bought the personal property caused a release of a hazardous substance at the Long facility. Id. When the trustee of the company's estate refused EPA's request to clean up the site, EPA cleaned up the facility itself and subsequently found the drums. Id. Apparently the owner of the bankrupt company was the only person aware of the buried drums prior to their discovery by EPA. Id.
56. Id. at 280. The court found the estate liable to EPA for cleanup costs, since it determined that the drums containing the hazardous materials fell within CERCLA's definition of "facility" and that the estate had an ownership interest in the drums. Id. at 284.
57. The court found that BancOhio had received no direct benefit from the cleanup by EPA, since the property in which BancOhio had a security interest
rejected the argument suggested by EPA that BancOhio was liable under CERCLA as an owner or operator. The court held that the only possible indicia of ownership that could be attributed to BancOhio involved its activities concerning the protection of its security interest. Since there was no indication that BancOhio had "participated in the management" of T.P. Long's facility, BancOhio clearly met the security interest exemption contained in the definition of owner or operator in CERCLA. Thus the court's literal interpretation of the security interest exemption meant that BancOhio had only acted to protect its security interest and therefore was not subject to liability.

The next important case concerning the security interest exemption under CERCLA was decided in the United States District Court for the Eastern District of Pennsylvania, United States v. Mirabile. In Mirabile, EPA sued the owners (the Mirabiles) of a property containing hazardous waste for the costs incurred by EPA in the course of a cleanup of the property. Three lenders were joined in the proceedings pursuant to the third party claims of the property owners. The lenders were the American Bank & Trust Company (ABT), the Small Business Administration (SBA), and Mellon Bank National Association (Mellon). was sold prior to the cleanup. Id. at 288. Therefore, the court found no reason to charge BancOhio as a secured creditor for the cleanup costs. Id. at 287-88.

58. T.P. Long Chem., 45 B.R. at 288. EPA had argued that the obligation of the bankruptcy trustee to remove the hazardous waste would have extended to BancOhio if it had sought to sell the property in which it had a security interest. Id. EPA asserted that this liability could not be avoided by BancOhio's transfer of the collateral at auction. Id.

59. Id. at 288-89.

60. Id. at 289.

61. See Quentel, supra note 1, at 164.


63. Id. at 20,995.

64. Id.

65. Id. The first lender, ABT, made a loan in 1973 to an owner of the property not involved in the subsequent litigation. Id. at 20,996. The facility involved was a paint manufacturing facility. Id. The loan by ABT was secured, in part, by a mortgage on the site of the facility. Id.

Three years later, Girard Bank, the predecessor-in-interest of Mellon Bank, entered into an agreement with a subsequent owner of the facility, Turco, to provide working capital. Id. The Mellon loan was secured by the inventory and assets of the company. Id.

In 1979, SBA provided further financing to the company. Id. SBA secured its loan with a second lien security interest in the company's machinery and equipment, a second lien on inventory and accounts receivable, a second mortgage on the real estate, and a pledge of the company's stock. Id.
In 1980, Turco, then owner of the property, filed a petition for bankruptcy, which was dismissed by the Bankruptcy Court in 1981. The dismissal enabled ABT to proceed with foreclosure of the real property, for which it was the highest bidder at the sheriff's sale. Between the time of the sheriff's sale and the eventual assignment of the property to the Mirabiles, ABT took certain actions to protect the property.

The court ruled in favor of ABT's motion for summary judgment, holding that ABT brought itself within the security interest exemption. Importantly, the court stated that before a secured creditor such as ABT would be subject to CERCLA liability, it "must, at a minimum, participate in the day-to-day operational aspects of the site." The sort of financial "control" possessed by ABT was not sufficient in the court's view to subject ABT to liability.

The court also granted the motion for summary judgment filed by SBA. Again, the court emphasized that SBA had merely participated in the financial aspects of the operation. Although SBA's loan agreement with Turco, as required by SBA regulations at the time, indicated that SBA must provide management assistance to its borrowers, there was no evidence that such assistance was ever provided.

Mellon Bank's motion for summary judgment against the Mirabiles was denied. The court felt that there was a genuine issue of material fact concerning whether Mellon's involvement with the operational aspects of the business caused it to become.

67. Id. ABT, without ever having perfected its title, assigned its bid for the property to the Mirabiles approximately four months after the sheriff's sale. Id.
68. Id. ABT secured the building against vandalism, inquired as to the cost of disposal of drums containing hazardous substances, and visited the property to show it to prospective purchasers. Id.
69. Id.
70. Id. The critical factor in determining whether a secured creditor had become so involved in the affairs of a borrower that they would lose the protection of the exemption, according to the court, was participation in "operational, production, or waste disposal activities." Id. at 20,995.
71. Mirabile, 15 Envtl. L. Rep. at 20,996. The court noted that ABT made no effort to continue operations of the facility, and in fact did not foreclose until eight months after all operations had ceased. Id.
72. Id. at 20,997.
73. Id.
74. Id. at 20,996. The extent of SBA's involvement appeared to be three visits to the site during 1981 to monitor liquidation of the assets. Id.
75. Id. at 20,997.
ineligible for the security interest exemption. There was testimony that the bank had become heavily involved in the day-to-day operations of Turco, and may have asserted some control over manufacturing, personnel, and supply decisions.

The Mirabile decision was welcome news to lenders in that the court specifically stated that lender involvement in a debtor's financial decisions was permissible under the security interest exemption. However, the decision served to warn lenders who became heavily involved in the day-to-day operations of a borrower that they might be subject to liability under CERCLA. The court did not, however, define specific guidelines concerning the degree of a lender's involvement in a borrower's business which would be sufficient to subject it to CERCLA liability.

A district court in Pennsylvania addressed lenders' liability in both the operator and owner context in Guidice v. BFG Electroplating & Manufacturing Co. Guidice involved a dispute among PRP's in which the National Bank of the Commonwealth (the Bank) was joined as a third party defendant. The Bank held a security interest in its debtor's treatment plant.

The debtor eventually defaulted on its obligations to the Bank, after which representatives of the Bank met with officials of the debtor to tour the facility and to discuss management issues.

76. Mirabile, 15 Envtl. L. Rep. at 20,997. The record indicated that one of the loan officers in charge of this account for Girard Bank had been a member of an Advisory Board, established by the president of Turco, which was to oversee the company's operations. Id. at 20,996.

77. Id. at 20,997. The court noted that certain financial activities conducted by Girard Bank, such as monitoring the company's cash collateral accounts, ensuring that receivables went to the proper account, and establishing a reporting system between the company and the bank, would not by themselves give rise to CERCLA liability. Id.

78. Id. at 20,995.

79. Quentel, supra note 1, at 170.

80. Id.


82. Id. at 557. The original claim was filed by residents of the Borough of Punxsutawney, Pennsylvania, asserting that BFG Electroplating and Manufacturing Company (BFG) caused environmental contamination on BFG's property resulting in personal injuries and response costs under CERCLA. Id. BFG filed a third party complaint against current and previous owners of adjacent property, which included the Bank. Id.

83. Id. at 558.

84. Id. The meeting included discussions of the number of work shifts, the status of the debtor's accounts, the presence of raw materials, and the composition of the management itself. Id. The management also accepted the Bank's
The Bank thereafter foreclosed on the mortgage it held on the site and purchased the facility at the subsequent sheriff's sale. Soon after the Bank’s purchase, the state environmental agency discovered hazardous wastes in drums of leftover materials from the debtor’s operations.

The court reviewed the issue of whether the Bank was liable as an owner or operator under CERCLA by considering separately the Bank’s liability before and after its purchase of the debtor’s property at the sheriff’s sale. For the period prior to foreclosure, the court followed the reasoning of the Mirabile decision, holding that there would be no liability under CERCLA since the Bank was merely assisting in the debtor’s financial matters.

b. Conflicting circuit court decisions

A decision by the United States Court of Appeals for the Eleventh Circuit, in United States v. Fleet Factors Corp., seemed to cast a new light on the types of lender activities that could void the security interest exemption. Lenders were for the first time confronted with the real possibility of being liable under CERCLA due to involvement with a debtor’s management.

In Fleet Factors, the secured creditor exemption reached the federal court of appeals level for the first time. In this case, the lender, Fleet Factors Corp. (Fleet), entered into an agreement with a cloth printing facility in which Fleet agreed to advance funds against an assignment of the borrower’s accounts receivable.

After the borrower filed for bankruptcy under Chapter 11 of

suggestion that the debtor take out a loan guaranteed by the SBA to pay off amounts owed to the Bank. Id.

85. Id. at 559. The Bank decided to foreclose when the debtor’s account became six months delinquent and after determining that plant operations had seemingly ceased. Id.

86. Guidice, 732 F. Supp. at 559. The Bank conveyed the property to a trustee of the previous owners in January, 1983, with the rents from the facility being paid directly to the Bank. Id.

87. Id. at 560.

88. Id. at 561-63.

89. Id. at 561-62. The Guidice court noted that the Bank did not control “operational, production, or waste disposal activities” at the facility. Id. at 562.

90. 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991).

91. See Glick & Nulton, supra note 12.

92. Fleet Factors, 901 F.2d at 1556.

93. Id. at 1552. Fleet also obtained a security interest in the borrower’s textile facility, as well as all of its equipment, inventory and fixtures. Id.
the Bankruptcy Code in August, 1979, Fleet continued to advance funds to the borrower until early 1981. The bankruptcy court subsequently permitted Fleet to foreclose on and sell at auction certain inventory and equipment.

In 1984, an inspection by EPA resulted in the discovery of hazardous substances that were traceable to the operation of Fleet's borrowers. EPA sued Fleet, among others, for the cost of the cleanup of the facility, claiming that Fleet was liable under section 107(a)(2) of CERCLA as an owner or operator of the facility at the time of the release. The district court denied Fleet's motion for summary judgment. The court of appeals then affirmed the district court's decision. In its holding, however, the court of appeals appeared to greatly broaden the test for determining whether a lender had sufficiently participated in management to have lost the protection of the security interest exemption.

The court noted that in order to achieve the remedial goals of CERCLA, ambiguous statutory terms such as "owner" or "operator" should be construed in favor of finding liability, to reim-

94. Id. Shortly thereafter, the borrower ceased operations, and began to liquidate its inventory. Id. Meanwhile, Fleet continued to collect on the accounts receivable that had been assigned to it with the approval of the bankruptcy court. Id.
95. Id. at 1552-53. Since Fleet never foreclosed on its security interest in the facility itself, the district court determined that it could not be held liable as an owner of the facility. Id. at 1555. The court of appeals affirmed, holding that under the facts of the case Fleet could not be considered to be the present owner of the facility. Id. at 1554-55.
96. Fleet Factors, 901 F.2d at 1553.
98. Fleet Factors, 901 F.2d at 1555-56.
99. Id. at 1553. The district court's decision to deny Fleet's motion for summary judgment was based on its holding that a material issue of fact remained concerning whether Fleet had actually contributed to the release of hazardous waste in its attempts to liquidate assets. Id. at 1557. The district court also found, however, that Fleet's involvement in its debtor's affairs was less than day-to-day management and therefore did not amount to sufficient participation in the debtor's activities to void the security interest exemption. Id.
100. Id.
101. Id. at 1556-58. The court of appeals actually chose a middle ground between the government's and Fleet's view of the level of participation in management that was permissible. Id. at 1556. The government argued that a secured creditor that participates in management in any manner should be excluded from the exemption. Id. The court felt that this interpretation would "largely eviscerate" the exemption. Id. Fleet argued that the decision by the Mirabile court, that a lender would only be participating in a borrower's management if it was involved in the borrower's day-to-day operations, should control. Id. Significantly, the court of appeals felt that this standard was too permissive. Id. at 1556-58.
burse the government's expenditures. The part of the court's decision which especially alarmed the lending community was its indication that a secured creditor may be liable "by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes." The court also stated that although a secured creditor's day-to-day involvement in the facility would "certainly lead to the loss of the protection of the statutory exemption," the exemption could be lost with less than complete involvement.

Although the Eleventh Circuit's comments concerning the narrow scope of permissible lender involvement could be viewed as mere "dicta," the decision nonetheless created a great deal of uncertainty and apprehension in the lending community. Based on the court's rationale, lenders who merely had the ability to control a borrower's decisions, even if only through participation in the financial management of the borrower, were potentially subject to liability. Lenders felt that almost any secured creditor could theoretically be held liable under this construction of the exclusion. This appeared to be a radical expansion of

102. Id. at 1557. The court felt that a primary goal of CERCLA was to force those parties responsible for environmental damage to pay for cleanup costs incurred by the government. Id.

103. See Mitchell, supra note 10.

104. Fleet Factors, 901 F.2d at 1557 (emphasis added).

105. Id. at 1557-58. The Eleventh Circuit also said that the exemption could be lost even if the lender did not participate in management decisions concerning hazardous waste. The court reiterated that liability could be imposed if the lender's involvement supported the inference that the lender could affect hazardous waste disposal decisions if it chose. Id. at 1558.

It is noteworthy that the particular involvement of Fleet in the borrower's operations was relatively substantial after the borrower began to wind down its affairs. Fleet required the borrower to seek Fleet's approval before shipping goods to customers, established pricing for excess inventory, dictated policy on shipping and personnel matters, supervised the office administrator's activities at the site, controlled access to the facility, and arranged for disposal of the borrower's fixtures and equipment. Id. at 1559. While these activities seemed adequate to impose liability on Fleet as an operator of the facility, it was the court's broad standard of liability and narrow interpretation of the security interest exemption that concerned lenders. Sean P. Madden, Will The CERCLA Be Unbroken? Repairing The Damage After Fleet Factors, 1 FORDHAM L. REV. 135, 148-51 (1990).

106. See Garrou, supra note 22, at 122. The Eleventh Circuit's statements that a lender could be held liable if it had the capacity to influence a debtor's hazardous waste treatment were made in a context in which the court found evidence of actual involvement by Fleet. Fleet Factors, 901 F.2d at 1559-60; see supra note 105 for a description of Fleet's activities with the debtor.

107. See Glick & Nulton, supra note 12.

108. Id.

109. M. Joan Cobb, Where Will It End? Increased Risks to Lenders Under CER-
the previous Mirabile interpretation of the "participating in management" phrase of CERCLA section 101(20)(A). 110

Not all commenters agree that the Fleet Factors decision was an extreme departure from earlier interpretations of the participating in management standard.111 According to this view, the full context of the court's holding is that a lender must actually participate in the financial management of a facility before a court will scrutinize the lender's capacity to influence the facility's hazardous waste practices.112 The Eleventh Circuit did say that a secured creditor should be allowed to monitor any aspect of a debtor's business.113 The court would even permit creditors to become involved in "occasional and discrete financial decisions relating to the protection of its security interest," without incurring liability.114 Regardless of the true scope of the holding, however, the Fleet Factors decision is important because of the effect that it had on lenders who were more reluctant to extend credit due to the perceived expansion of the risk of CERCLA liability.115

The Eleventh Circuit felt that its decision would encourage lenders to engage in complete pre-loan investigations of prospective borrowers, to make certain that any potential environmental risk is discovered.116 Creditors would also be encouraged, according to the court, to continue to monitor the environmental policies and practices of their debtors to ensure compliance with required governmental standards.117


112. Id. This means the security holder must first become involved in the management of the facility and that the extent of the involvement must be at such a level that an inference could be drawn that the holder had the ability to influence the environmental operations of the facility. Id.

113. Fleet Factors, 901 F.2d at 1558.

114. Id.

115. Glick & Nulton, supra note 12.

116. Fleet Factors, 901 F.2d at 1558-59.

117. Id. The court of appeals seemed to ignore other public policy ramifications of its decision, however, such as the possible denial of credit in the future to companies in environmentally sensitive industries, particularly small businesses. Madden, supra note 105, at 155-59.
Critics of the Fleet Factors decision have asserted that such a strict reading of the security interest exemption will not result in the benefits contemplated by the court. The lack of specific judicial guidelines may actually make lenders fearful that any direct involvement in the borrower's activities, especially concerning hazardous waste policies, will result in a loss of their security interest exemption. Therefore, it has been suggested that, as a result of the Fleet Factors decision, lenders may become less likely to investigate or monitor a borrower's environmental practices.

Lenders did receive some relief in a decision by the Ninth Circuit approximately three months after the Fleet Factors decision. In In re Bergsoe Metal Corp., a port authority issued an industrial revenue bond financing of a lead recycling plant, with the port authority acquiring title to the property through a sale and leaseback arrangement with Bergsoe Metal Corporation (Bergsoe Metal).

As a result of financial difficulties at the plant, Bergsoe Metal was placed into involuntary bankruptcy. Subsequently, Bergsoe Metal was also sued as a result of the release of hazardous waste materials at the site, and filed a third party complaint against the port authority seeking indemnification under CERCLA. The Ninth Circuit affirmed the decision of the district court to grant the port authority's motion for summary judgment.

The Ninth Circuit concluded that the port authority did not participate in the management of the facility, since it did not engage in any actual managerial activities. While not expressly

118. Madden, supra note 105, at 155-59.
119. Id.
120. Id.
121. 910 F.2d 668 (9th Cir. 1990).
122. Id. at 669-70. The port authority received a promissory note and a mortgage on the plant. Id. at 670. The transaction was determined to constitute a security interest, and not a true lease, since the rental payments owed by Bergsoe Metal to the port authority were exactly the amount due to retire the debt service on the bonds, and there was a provision for Bergsoe Metal to purchase the facility for a nominal sum when the debt was paid. Id. at 670, 673.
123. Id.
124. Id.
125. Id. at 673.
126. Bergsoe, 910 F.2d at 672. The court of appeals also held that although the port technically held title through the leaseback arrangement in the financing, the port was not liable under CERCLA as an owner of the facility. Id. at 671. This decision would seem to run counter to the idea expressed by the court in Maryland Bank & Trust that a creditor who holds title to a facility cannot
disagreeing with the holding in *Fleet Factors*, the court did state that a lender must actually engage in management activities, not just have the unexercised right to do so, to risk the loss of the security interest exemption.\(^{127}\)

The *Bergsoe* holding seemed to repudiate the statement in *Fleet Factors* that the unexercised capacity to engage in management of the borrower’s operations could subject lenders to the loss of the exemption.\(^{128}\) However, even though *Bergsoe* was a more favorable holding for lenders, the case still failed to establish specific guidelines regarding permissible activities.\(^{129}\) Therefore, in the absence of some clarification from EPA or Congress, uncertainty continues to exist as to the types of activities that would cause a lender to be considered an “operator” of its debtor’s facility or to have “participated in the management” of the facility.\(^{130}\)

2. *Lender Liability Through Ownership of the Facility*

There has also been disagreement in the courts concerning whether a lender will lose the protection of the security interest exemption if the lender legally obtains title to the facility. The first court to address this issue was the United States District Court for the Eastern District of Pennsylvania in *United States v. Mirabile*.\(^{131}\)

In *Mirabile*, American Bank & Trust (ABT) had foreclosed on real property in which it had a security interest after its debtor had filed for bankruptcy.\(^{132}\) ABT was the highest bidder for the property at the foreclosure sale, but assigned its bid four months later without having perfected title.\(^{133}\)
The district court ruled that ABT's actions with respect to foreclosure on the property were solely for the purpose of protecting its security interest, and did not necessarily result in liability under CERCLA. The Mirabile holding provided lenders with reassurance that simply foreclosing on and subsequently purchasing a property were legitimate actions in protecting a security interest.

If lenders were generally pleased with the Mirabile decision, new doubts were suddenly raised several months later in United States v. Maryland Bank & Trust Co., a case decided by a federal district court in Maryland. Maryland Bank & Trust (MB&T) had a security interest in property on which the borrower allowed hazardous waste materials to be dumped. In 1980, the borrower defaulted on the loan, leading MB&T to foreclose on and purchase the property in 1981. EPA eventually proceeded to clean up the facility, using CERCLA funds. EPA subsequently sued MB&T to recover the costs incurred in the cleanup.

The dispute in this case centered on whether MB&T could be held liable under CERCLA as an owner of the facility in question. MB&T argued that its foreclosure on and purchase of the property was simply to protect its security interest, bringing it under the exemption of CERCLA section 101(20)(A). This position was rejected by the court, which held that the exemption only applied to parties who held indicia of ownership to protect a security interest at the time of cleanup. Since the mortgage

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134. Id. The court felt that it was unnecessary to resolve whether, under Pennsylvania law, the successful bid at the sheriff's sale technically vested ABT with ownership under CERCLA, since the foreclosure was valid under the security interest exemption. Id.
135. Quentel, supra note 1, at 170.
137. Id. at 575. The borrower conducted a trash and garbage business on the site involved. Id.
138. Id.
139. Id. at 575-76. Several months after foreclosure, the borrower who had defaulted notified state authorities about the hazardous waste that had been dumped. Id. at 575. EPA investigated the claim and confirmed that a removal action was necessary. Id.
140. Id. at 576. MB&T had previously refused EPA's request to clean up the site. Id. at 575.
142. Id. at 579.
143. Id. Prior to reaching this conclusion, the court had ruled that a proper reading of CERCLA § 107(a)(1) holding the "owner and operator" of a facility liable really meant that a party did not have to be both an owner and operator to be deemed liable. Id. at 577-78. A party could be subject to CERCLA liability if it was either the owner or operator of the facility. Id.
(the security interest) held by MB&T had terminated at the foreclosure sale, the court ruled that MB&T had full title at the time of the cleanup, and therefore could not use the security interest exemption. 144

The court in Maryland Bank & Trust thus defined an "owner" under CERCLA much differently than the Mirabile court. 145 The effect of the Maryland Bank & Trust court's narrow construction of a security interest was to limit the applicability of the exemption allowed by CERCLA. 146 The Maryland Bank & Trust court concluded that a lender which forecloses on a property is no longer protected by the security interest exemption and therefore is potentially liable for cleanup costs as an owner of a hazardous waste site. 147

The decision by the court in Maryland Bank & Trust seems to have been based largely on policy grounds. 148 The court stated that MB&T purchased the property at foreclosure "not to protect its security interest, but to protect its investment." 149 The court was troubled by the prospect of lenders being able to foreclose on and purchase contaminated properties cheaply, wait for the government to clean up the site, and then profit from a sale of the newly-cleaned property. 150

The court in Maryland Bank & Trust attempted to distinguish the Mirabile decision on the basis that the lender in Mirabile only held the property for four months and promptly assigned its interest. 151 In contrast, MB&T had held title to the property for

144. Id. at 579. The court held that Congress only intended this exemption to protect lenders in the 13 states which use the title theory of ownership. Id. Lenders holding a security interest in these states are considered to hold title while the mortgage is in force, so the court concluded that the exemption was meant solely to exclude these common-law owners from liability. Id.
145. See Quentel, supra note 1, at 170.
146. Id.
147. Id.
149. Id. at 579. But see Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,996, where the court expressly declined to impose liability simply to enhance the public policies of increasing the government's chances of recovering its costs or ensuring more responsible management of hazardous facilities. Id. The court in Mirabile felt that the consideration of such policy matters was up to Congress, which had determined that secured creditors should receive an exemption. Id.
150. Maryland Bank & Trust, 632 F. Supp. at 580. The court felt that the lenders should protect themselves by making prudent loans, and by investigating and discovering potential problems in their secured properties. Id. The court did not want CERCLA to turn into an insurance policy for lenders who had made unwise lending decisions. Id.
151. Id.
nearly four years, including an entire year before the cleanup conducted by EPA.\textsuperscript{152}

The analysis in \textit{Maryland Bank \& Trust} regarding the liability of a lender who forecloses on its security interest was followed by a Pennsylvania district court in \textit{Guidice v. BFG Electroplating \& Manufacturing Co.}\textsuperscript{153} In \textit{Guidice}, the National Bank of the Commonwealth (the Bank) foreclosed on a mortgage it held on the facility of a debtor who had defaulted.\textsuperscript{154} Soon after the Bank purchased the property at the sheriff’s sale, the hazardous wastes were discovered on the site, and cleanup costs were sought from the Bank.\textsuperscript{155}

After deciding that the Bank was not liable under CERCLA for its activities prior to foreclosure, the court in \textit{Guidice} specifically disagreed with the \textit{Mirabile} rationale for the period after the Bank foreclosed.\textsuperscript{156} The court instead adopted the reasoning of the court in \textit{Maryland Bank \& Trust}, holding that when a lender forecloses on and subsequently repurchases a property, the lender is no longer protected by the security interest exemption.\textsuperscript{157} Such a lender, the court held, should have the same level of liability as any other purchaser of the property.\textsuperscript{158}

The \textit{Maryland Bank \& Trust} and \textit{Guidice} decisions caused alarm in the lending community since they apparently forced lenders to choose between exercising their right to foreclose and the risk of possible liability for potentially large cleanup costs.\textsuperscript{159} These decisions created uncertainty as to when a lender would be deter-

\textsuperscript{152. Id. at 579. However, the court in \textit{Maryland Bank \& Trust} did not feel compelled to follow the \textit{Mirabile} court’s interpretation of the security interest exemption, stating that “[t]o the extent to which \textit{Mirabile} suggests a rule of broader application, this Court respectfully disagrees.” \textit{Id.} at 580.}

\textsuperscript{153. 732 F. Supp. 556 (W.D. Pa. 1989). For a discussion of the court’s reasoning in \textit{Guidice} concerning a lender’s liability as an operator of a facility, see \textit{supra} notes 81-89 and accompanying text.}

\textsuperscript{154. \textit{Id.} at 559.}

\textsuperscript{155. \textit{Id.}}

\textsuperscript{156. \textit{Id.} at 563. The court felt that the \textit{Mirabile} decision would provide lenders who purchase properties after foreclosure with special treatment and would frustrate the goal of CERCLA to distribute the costs of cleaning up facilities. \textit{Id.}}

\textsuperscript{157. \textit{Id.}}

\textsuperscript{158. \textit{Guidice}, 732 F. Supp. at 563. The \textit{Guidice} court found persuasive the rationale of the court in \textit{Maryland Bank \& Trust}, that secured lenders who repurchase foreclosed property would receive a windfall from government cleanup of the land. \textit{Id.} The court found that there was no reason for these lenders to receive special treatment once they no longer held a security interest in the property. \textit{Id.}}

\textsuperscript{159. Quentel, \textit{supra} note 1, at 179.}
mined to be the "owner" of a facility.\textsuperscript{160} Lenders have argued that these holdings render security interests in such property ineffective protection for their investments and desire clarification of when ownership under CERCLA will attach.\textsuperscript{161}

III. POTENTIAL RESPONSES TO THE RISK OF LENDER LIABILITY

The lack of consistency and guidance provided by the decisions summarized above has created demands from the lending community for governmental intervention.\textsuperscript{162} Despite the inconsistency in the interpretation of the security interest exemption, the United States Supreme Court has not yet reviewed this issue. In fact, the Court denied certiorari in the \textit{United States v. Fleet Factors} case.\textsuperscript{163}

In response to the demands for clarification, legislation has been proposed in Congress to ease lenders' concerns.\textsuperscript{164} Additionally, EPA has issued final regulations in an attempt to clarify the scope of the security interest exemption.\textsuperscript{165}

A. Clarification Offered by EPA

EPA recognized that the decisions by the courts interpreting the security interest exemption have caused uncertainty among lenders.\textsuperscript{166} These decisions have especially led to confusion among lenders as to the range of activities that a secured creditor

\textsuperscript{160} See Lettow, supra note 13.
\textsuperscript{161} Id.
\textsuperscript{163} 111 S. Ct. 752 (1991).
\textsuperscript{164} For a discussion of the pending legislation, see infra notes 240-54 and accompanying text.
\textsuperscript{165} Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (1992) (to be codified at 40 C.F.R. pt. 300). EPA indicated that it received over 300 written comments on the proposed rules which were published in the Federal Register on June 24, 1991. Mitchell, supra note 10. In addressing the comments made to the proposed rules, EPA indicated that the key issue was to balance the practical difficulties encountered by lenders in dealing with defaulted loans with the need to protect the environment. 57 Fed. Reg. 18,366.
\textsuperscript{166} 57 Fed. Reg. 18,344-45. The area identified by EPA as causing the most uncertainty was the extent to which a secured creditor could become involved in the affairs of its debtor without incurring liability under CERCLA. Id. at 18,344. EPA indicated that the new rules would pertain to persons who maintain indicia of ownership primarily to protect their security interest. Id. EPA identified these "persons" as including "privately-owned and governmental financial institutions, governmental receivers, conservators, loan guarantors, and lending or other governmental entities ..." Id.
can take in protecting its security, without being subject to CERCLA liability for "participating in the management" of the facility.\textsuperscript{167} The courts that have interpreted "participation in management," according to EPA, have failed to articulate a clear standard that security holders can safely follow.\textsuperscript{168}

EPA organized its attempt to clarify the scope of the security interest exemption by explaining the meaning of three key terms in CERCLA section 101(20)(A) that are not defined in the statute.\textsuperscript{169} The agency has attempted to identify: (1) which "indicia of ownership" are covered by the exemption; (2) the meaning of the requirement that the security interest be held "primarily to protect [a] security interest"; and (3) the activities that will and will not cause a lender to be deemed to be "participating in the management" of a facility.\textsuperscript{170}

"Indicia of ownership" is defined by EPA as "evidence of interests in real or personal property."\textsuperscript{171} EPA made a policy decision that the exemption should protect a broad range of secured transactions, with the only qualification being that the ownership interest be held primarily to protect the security interest.\textsuperscript{172} A broad definition allows the exemption to be applied on a consistent basis nationally, regardless of the manner in which a particular state's law characterizes a specific transaction.\textsuperscript{173}
SECURITY INTEREST EXEMPTION

The final regulations include indicia of ownership obtained as a result of a foreclosure in the type of security interests that are eligible for the exemption. This is extremely significant in light of the decisions by the courts in United States v. Maryland Bank & Trust and Guidice v. BFG Electroplating and Manufacturing Co., which held that the exemption could be lost when a security holder forecloses on the security interest. EPA recognized that often the only realistic course of action for a lender is to foreclose on and sell the property in order to recover on the debt.

The lender can only avail itself of this protection if it abides by certain guidelines described in the rules pertaining to disposal of the property. The steps that a lender must take in offering the property for sale are flexible, but provide criteria for determining whether an offer must be accepted. EPA also provided legal or equitable title to real or personal property acquired incident to foreclosure and its equivalents. The rule provides a non-exhaustive list of such security interests, including: mortgages, deeds of trust, liens, surety bonds and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased property, legal or equitable title obtained pursuant to foreclosure, and their equivalents. Evidence of such interests also include assignments, pledges, or other rights to or other forms of encumbrance against property. EPA specifically noted that certain actions are "necessary incidents" to protection of a security interest. These actions include foreclosure, purchase at foreclosure sale, acquisition or assignment of title in lieu of foreclosure, repossession in the case of a lease financing transaction, acquisition of a right to possession of title, or any other formal or informal manner by which the lender acquires possession of the borrower's property for subsequent disposition in partial or full satisfaction of the underlying obligation. EPA disagreed with comments indicating that these cases established a per se rule that a foreclosing lender surrenders its security interest for full legal title as owner of the property. EPA asserted that the court in Maryland Bank & Trust specifically declined to decide this issue and found the lender liable because the property was retained for four years, with no evidence of any attempt to resell the property. Although the court claimed that the lender should be held liable for CERCLA costs to the same extent as any other successful bidder, EPA stated that this holding was restricted to the facts in that case, where the lender apparently outbid other bidders who offered a fair price for the property.

Generally, the regulations are intended to assure that the property is only being held to protect the lender's security interest and not for any other purpose.

EPA agreed with comments to the proposed rules stating that there were numerous methods by which property can be divested, and that lend-
lenders with a "bright-line" method to follow, which describes specific steps that a lender may take that will serve as conclusive evidence that the lender is attempting to dispose of the property "in a reasonably expeditious manner." 181

Recognizing that economic conditions, the state of the property itself, or other factors may make a property unmarketable despite acceptable efforts by the lender, EPA has not imposed a time requirement for the lender to dispose of the property. 182 However, a lender which has foreclosed on property cannot ignore, reject, or outbid offers of fair consideration for the property. 183 EPA feels that a rejection of or failure to act upon a valid offer is evidence that the lender is maintaining its interest in the property for investment purposes, and not as security for the loan obligation. 184 EPA also indicated its intention to seek recovery of any

181. Id. In order to establish that it is seeking to divest itself of the property, a lender must, within 12 months after acquiring marketable title, list the property with a broker, dealer or agent who deals in that type of property, or advertise the property as being for sale in a suitable publication. Id. at 18,378.

182. Id. A lender wishing to use the "bright-line" method must list or advertise the property within 12 months. Id. Because a variety of factors may affect the time when a lender is permitted to offer the foreclosed-on property for sale, EPA stated that the 12 month period will begin to run from the date that the holder may legally offer the property for sale. Id. at 18,364. However, if the lender did not diligently attempt to acquire marketable title, the 12 month period will begin to run from the date of foreclosure. Id. at 18,384.

183. 57 Fed. Reg. 18,378. Specifically, a lender will lose the benefit of the security interest exemption if, at any time after six months following the acquisition of marketable title, the lender rejects or fails to act upon a written, bona fide offer of fair consideration within 90 days of receipt. Id. The two important components of this analysis are: (i) what constitutes a written, bona fide offer, and (ii) what should be deemed to be fair consideration. EPA defines a written, bona fide offer as "a legally enforceable, commercially reasonable, cash offer solely for the foreclosed vessel or facility, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform." Id. at 18,384. An offer is considered to be for "fair consideration" if it is for an amount equal to or greater than the sum of the outstanding principal plus any unpaid interest, rents, or penalties, and other reasonable costs incurred by the lender in relation to the property. Id. EPA agreed with several comments to the proposed rules which stated that there are situations in which a lender has a duty, imposed by federal or state law, to protect other parties by requiring a bid in excess of the amount owed to the security holder itself. Id. at 18,364-65. Therefore, a foreclosing lender under such a duty may still be deemed to be primarily protecting its security interest even though it rejects an offer that otherwise meets the definition of fair consideration. Id. at 18,384.

184. Id. at 18,378.
"windfall" received by a lender in excess of the balance due that lender, which results from a publicly-financed cleanup of the facility that enhances the value of the property.\(^{185}\)

Following foreclosure, the final regulations provide lenders with broad discretion in the actions they may take without losing the exemption. EPA decided that lenders should not be penalized for actions that are designed to protect or preserve the value of the asset, including measures taken to prevent future releases or to ensure safe public access.\(^{186}\) In addition, under the new regulations lenders may either "wind up" or maintain the operations of a foreclosed-on facility without losing the security interest exemption.\(^{187}\) Although permitting a lender to assert such control over the facility would seem to violate the requirement that the lender not "participate in the management" of the facility, EPA held that this type of activity was consistent with the usual manner in which foreclosing security holders operate.\(^{188}\) Therefore, in order to give real meaning to the exemption, EPA felt it was important to allow lenders the ability to determine on an individual basis whether the facility's operations should be maintained.\(^{189}\) However, the lender would face liability for any contamination for which the lender is responsible subsequent to

185. 57 Fed. Reg. 18,365. Pursuant to CERCLA § 107(l), a lien in favor of the United States is imposed on a property when EPA conducts a response action to clean up the facility. Id. at 18,368. EPA agreed that this is not a "Super-lien" that takes precedence over pre-existing valid and superior liens, but stated that the lien is also not junior to any and all liens. Id. The lending community claimed that principles of equity and unjust enrichment would give EPA the right to recover any windfall, and that it was unlikely that such a windfall would ever occur. James P. O'Brien & Jeremy A. Gibson, Final EPA Rule Allows Traditional Lender Activities Without Superfund Liabilities, 23 Env't Rep. (BNA) No. 3, at 326, 329 (May 15, 1992).

186. 57 Fed. Reg. at 18,378. EPA recognized that some steps taken by the lender, although evidencing control over the facility, are "necessary components of holding ownership indicia primarily to protect a security interest." Id. at 18,379.

187. Id. "Winding up" the operations includes actions "that are necessary to close down a facility's operations, secure the site, and otherwise protect the value of the foreclosed assets for subsequent sale or liquidation." Id. A lender choosing to continue the operations of the facility is still subject to the regulations requiring that the lender seek to sell or dispose of the facility. Id.

188. Id. at 18,366. A central premise for EPA in promulgating these regulations was that Congress did not intend to prevent security holders from conducting their business according to their normal lending practices. Id. A lender found to have "participated in management" prior to foreclosure has violated the terms of CERCLA § 101(20)(A), and is not eligible for the exemption. Id. at 18,384.

189. Id. at 18,366. EPA also agreed with comments to the proposed rules stating that maintenance of the facility's operations could enhance the value for subsequent sale, generate funds to assist with possible cleanup costs, and pro-
The phrase “primarily to protect the security interest” is used by EPA to determine whether the security holder’s indicia of ownership brings it within the definition of “owner or operator.” The primary purpose of the holder’s security interest must be to secure payment or performance of a loan or other obligation. Interests held primarily for purposes other than securing a loan or other obligation would not qualify for the exemption.

Since the decision by the Eleventh Circuit in United States v. Fleet Factors, perhaps the most discussion and uncertainty in the area of lender liability has involved the meaning of the term “participation in management.” EPA recognized that it would be an impossible task to try to identify every action or situation that a security holder may take and indicate whether such action constituted participation in management. Therefore, EPA adopted a general test that would take a “functional approach” in determining whether the lender’s involvement in the operational aspects of a facility should subject the lender to liability. EPA vide economic advantages such as employment and the production of goods and services. Id.

Id. at 18,367. For example, the lender would be responsible for any damage caused as the result of having arranged for the disposal of hazardous substances, under CERCLA section 107(a)(3), or for having accepted hazardous substances for transport and disposal at a facility, under CERCLA section 107(a)(4). Id.

57 Fed. Reg. 18,374.

Id. at 18,375. EPA stated that a transaction giving rise to a security interest “is one that provides the holder with recourse against real or personal property of the person pledging the security.” Id.

Id. EPA identified certain transactions that qualify as security interests, assuming that the interest is held to secure an obligation. Id. These transactions include mortgages, deeds of trust, liens, and titles held pursuant to lease financing transactions. Id. Transactions from which a security interest may arise include sale-and-leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements, or accounts receivable financing agreements. Id.

Id. For example, holding property for investment purposes, apparently in the hope of appreciation, rather than as security, would not be a valid purpose. Id. EPA recognized, however, that a lender could legitimately have additional reasons for maintaining the indicia, as long as those reasons are secondary to the security interest. Id.

901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991). For a discussion of the holding in Fleet Factors, see supra notes 90-120 and accompanying text.


Id. The test adopted by EPA is not concerned with a lender’s unexercised right to influence the operations of a facility. Id. This should ease concerns of lenders who had focused on the language used by the court in Fleet Factors.
also specified certain activities that are deemed to be consistent with protecting a security interest and therefore would not be considered evidence of participation in management.\(^{198}\)

The goal of EPA in promulgating its general test of management participation was to "assess the effect of a holder's involvement in a facility on the hazardous substances present there."\(^{199}\) In assessing the lender's involvement, EPA believed that a distinction should be made between the "control" that a lender in a decisionmaking position would have versus the "influence" that a lender not in the decisionmaking hierarchy could exert.\(^{200}\) The general test that EPA has promulgated is a two-prong test that will impose liability in instances where a lender: (i) has assumed decisionmaking control over the borrower's environmental compliance practices, or (ii) has exercised responsibility at the level of day-to-day management of the borrower's enterprise.\(^{201}\)

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\(^{198}\) 57 Fed. Reg. 18,375. For a discussion of the specific activities EPA has indicated are not evidence of participation in management, see infra notes 205-16 and accompanying text.

\(^{199}\) Id. at 18,359. According to EPA, a lender which simply engages in its normal course of business should not be subject to liability under CERCLA. Id. On the other hand, EPA indicated that liability should be imposed on a lender which actually performs activities which constitute management of a facility. Id. It is interesting to note that although the rules require direct, actual involvement in the facility, EPA did not consider this to have overruled the decision in Fleet Factors. Id. at 18,369. EPA stated that the Fleet Factors court required actual involvement in a borrower's facility, as did the court in In re Bergssoe Metal Corp., 910 F.2d 668, 672-73 (9th Cir. 1990). 57 Fed. Reg. 18,369. Instead, EPA saw the regulations as resolving a question left unanswered by Fleet Factors, concerning the extent of involvement required to support the inference that a lender could be affecting a borrower's environmental practices. Id. In fact, in subsequent litigation continuing the Fleet Factors case, EPA has argued that Fleet maintained pervasive control of the facility, and therefore should face CERCLA liability under both prongs of the "participating in management" rule promulgated in the final regulations. U.S. Says Fleet Factors Liable Under Rule Because It Controlled Activities at Georgia Site, 23 Env't Rep. (BNA) No. 16, at 1196, 1197 (Aug. 14, 1992).

\(^{200}\) 57 Fed. Reg. 18,369. EPA felt that this distinction was a critical one because the borrower could be "influenced" by a great many parties with whom it transacts business. Id. According to EPA, liability should not attach to any of these parties, no matter how substantial their influence, as long as the ultimate decision was still made by the borrower. Id. It would seem that there would be a gray area, however, where a party with tremendous "influence" over the borrower would in effect be operating the facility if the borrower did not feel truly free to decline to accept the "suggestions" offered by that party.

\(^{201}\) Id. at 18,359. The first prong of the test states that a lender partici-
A lender does not have to actually cause a release at the facility in order to be found to be exercising control over the borrower's environmental practices under the second prong. The second prong was structured to prevent a lender from maintaining complete control of the facility except for the environmental compliance practices. EPA did not want lenders to be able to fully operate a facility, but artificially "carve out" environmental matters in order to avoid liability.

In addition to the general test to determine when a lender is participating in management, EPA also specified certain activities that would not by themselves cause liability to be imposed on the lender. As a threshold, EPA has decided that activities taken prior to or at the inception of the loan obligation are not relevant in determining whether a lender has participated in management where the lender exercises decisionmaking control over the borrower's "hazardous substance handling or disposal practices." The second prong of the test imposes liability when a lender has assumed managerial control of the borrower's business. This control can be manifested by management of: (i) the borrower's environmental compliance practices or (ii) all or substantially all the borrower's operations other than environmental compliance. EPA only considers the operational aspects of the borrower's business in determining whether the lender has taken over day-to-day management decisionmaking. Operational aspects of the business include such functions as facility or plant manager, operations manager, chief operating officer, or chief executive officer. Financial or administrative aspects of the business, such as credit manager, accounts payable/receivable manager, personnel manager, controller, or chief financial officer, are considered to be within the usual functions that a security holder may perform and therefore are not viewed as evidence of participation in management.

202. Id. at 18,383. The key to determining liability is the actual control that the lender has over the disposal or handling of hazardous waste at the facility, and is not dependent on any specific environmental outcome. Id.

203. Id. The second prong of the test seems to be similar to the standard employed by the court in United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985). In Mirabile, the court held that assumption of the day-to-day decisionmaking of a borrower, not simply participation in the borrower's financial matters, was required before liability would be imposed on a lender. Mirabile, 15 Envtl. L. Rep. at 20,995-96. The new rules seem to contemplate that same level of involvement in order to void the security interest exemption due to "participation in management."

204. 57 Fed. Reg. 18,360. EPA felt that a lender's ability to "carve out" the environmental responsibilities from its purview was itself evidence that the lender had assumed sufficient responsibility to be considered to be participating in management. Id.

205. Id. at 18,375. The specific activities approved by EPA were not intended to be the only activities that lenders could undertake without voiding the exemption. Id. at 18,376. Other activities are not automatically considered evidence of participation in management, and must be addressed on a case-by-case basis using the general rule provided by the regulations. Id.
ment. Since no indicia of ownership exists prior to the time the security interest is created by the loan obligation, EPA felt the security interest exemption and the “participation in management” test should not be applied to these activities. The lender may also require an environmental inspection of the facility serving as security prior to finalizing the loan obligation. If an inspection is conducted and contamination is revealed, the lender may take actions it deems appropriate from a broad variety of permissible responses. A lender may also require a borrower to clean up the facility or to comply with any applicable law or regulation as a condition of making the loan.

A lender is permitted under the rules to “police” the loan or security interest prior to foreclosure. The lender can require and enforce financial, environmental and other warranties, conditions, covenants, representations, or promises made by the borrower, in contractual or other documents. Requiring such warranties and covenants, however, does not mean that the lender is expected to serve as an insurer of the environmental safety of the facility.

206. Id. at 18,376. Some of the activities that EPA indicated would not be relevant include negotiations concerning the structure and terms of the loan, and other advice, suggestions, or counseling provided to the borrower. Id.

207. Id. EPA noted that a lender which gets too involved in a prospective borrower’s business prior to the loan obligation could face CERCLA liability as an operator of the facility, as an “arranger” for disposal under CERCLA section 107(a)(3) or as a “transporter” under CERCLA section 107(a)(4). Id. at 18,356.

208. 57 Fed. Reg. 18,376. The lender can have the inspection performed to assist it with risk assessment or for any other business purpose. Id. In addition, the lender’s ability to take advantage of the security interest exemption will be unaffected by whether the lender required an inspection or failed to require an inspection. Id. EPA found no theory in CERCLA or case law that would impose liability on this basis. Id. at 18,353.

209. Id. For example, the lender may decline to make the loan, may require other non-contaminated property as security, or may decide to make the loan if it determines that the risk of default or the extent of contamination is sufficiently small. Id. at 18,376-77.

210. Id. at 18,377. The lender can require that the borrower’s compliance be either prior or subsequent to the time that the lender holds indicia of ownership to protect its security interest. Id. at 18,383.

211. Id. at 18,383. In addition to requiring cleanups and compliance with applicable laws, policing can include, among other actions, the authority to monitor or inspect the facility, and the ability to monitor the business or financial condition of the borrower. Id.

212. Id. at 18,383. However, a lender must be cautious in exercising a right to take control of or direct a facility’s activities prior to foreclosure. Such activity could result in the lender facing liability for having participated in management. Id. at 18,357.

213. 57 Fed. Reg. 18,377. EPA viewed these warranties and covenants as deserving the protection of the exemption, since they are intended to ensure
Once a borrower is experiencing difficulties, lenders may, consistent with the exemption, engage in "work out" activities with the borrower prior to foreclosure. These activities may be necessary to protect the security interest from loss. The lender's activities must still be consistent with the general test for participation in management promulgated in the rules.

B. Reactions to the Final EPA Rules

The reactions to the final regulations promulgated by EPA have been varied. Environmental and industry groups believe that the new rules are unnecessary and may represent the beginning of an undercutting of CERCLA's liability scheme. These critics assert that there is no lender liability crisis, because so few lenders have been identified as responsible parties by EPA. Moreover, these groups feel that the threat of liability is necessary in order to force lenders to provide assistance in reducing the risk of contaminations. The environmental groups are concerned that the incentive to carefully assess loan applicants for environmental risks and to monitor the activities of borrowers will no longer exist if lenders are not faced with a real risk of CERCLA liability.

that the value of the property is not impaired by a release or contamination. Id. at 18,356.

214. Id. at 18,383. "Work out" refers to a lender's attempts to "prevent, cure, or mitigate" a default by the borrower. Id. Work out activities permitted by EPA include, among others, restructuring the terms of the security interest, requiring payment of additional rent or interest, exercising forbearance, providing financial or other advice or guidance, and exercising any contractual or legal right possessed by the lender. Id.

215. Id. at 18,377. Since work out activities are seen as a normal reaction by a security holder, EPA felt that they were evidence of the lender's interest in protecting its security. Id.

216. Id.


218. Commenters, supra note 17. EPA has stated that in the history of the Superfund program, it has identified only eight lenders as responsible parties, out of many thousands of identified parties. Id. Environmental groups claim that lenders are simply seeking a special exemption to which they are no more entitled than other potentially responsible parties. Id.

219. Lavelle, supra note 217, at 19. The environmental groups believe that the possibility of large cleanup costs was the primary reason for the increase in environmental studies and monitoring that lenders have conducted in recent years. Id.

220. Id. Environmental groups note that such activities became much more commonplace after the decision in United States v. Fleet Factors, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991), made the risk of liability seem more imminent to lenders. Lavelle, supra note 217, at 24.
expressed by the court in *Maryland Bank & Trust*, that lenders will be encouraged by the rules to hold property until the government or another PRP cleans it up, will become reality.\textsuperscript{221} The environmental groups would at minimum like to see lenders have to earn the security interest exemption by conducting pre-loan environmental audits and continuing to monitor the facility during the life of the loan.\textsuperscript{222}

Large corporations and industrial groups such as the Chemical Manufacturers Association also oppose the new rules limiting lender liability.\textsuperscript{223} These groups assert that they currently bear the largest burden of CERCLA liability and do not want to be left with even more of the responsibility as other sectors of the economy, such as lenders, are given special protection.\textsuperscript{224} The goal of the corporate groups is not to eliminate the exemption for secured lenders, but instead to defeat the liability scheme of CERCLA completely.\textsuperscript{225}

Lender groups and their supporters, on the other hand, generally see the new rules as a positive step in their attempt to gain protection from liability for contamination caused by other parties.\textsuperscript{226} The lenders believe that a broad interpretation of the exemption is necessary to change the perception that facilities with potential for environmental liability present a much greater than normal commercial risk.\textsuperscript{227} A relatively expansive view of the exemption is required, lenders assert, because under the present

\begin{itemize}
  \item \textsuperscript{221} Commenters, supra note 17. For a discussion of the decision in *Maryland Bank & Trust*, see supra notes 136-52 and accompanying text. Since the rules only require that the lender make certain efforts to sell the property after foreclosure and not reject valid offers, environmental groups feel that these provisions grant "near absolute immunity" to lenders' post-foreclosure activities. \textit{Id.}
  \item \textsuperscript{222} Commenters, supra note 17. These requirements were included in EPA's initial draft proposal that was "leaked" to the public in September, 1990. Mitchell, supra note 10. A second draft of the proposed rules did not include these audits as requirements, but indicated that such inspections would be considered highly probative of the lender's intention to act in concert with the exemption. \textit{Id.}
  \item \textsuperscript{223} Lavelle, supra note 217, at 24.
  \item \textsuperscript{224} \textit{Id.} Although the corporate groups admit that the new regulations protecting lenders seem fair, they claim that the liability scheme of CERCLA was not intended to be fair and that liability should not be avoided because of political pressure. \textit{Id.}
  \item \textsuperscript{225} \textit{Id.} The corporate groups would like to have the "reasonableness" that they see in the security interest exemption applied to all parties when CERCLA is considered for reauthorization in 1995. \textit{Id.}
  \item \textsuperscript{226} \textit{Id.}
  \item \textsuperscript{227} Commenters, supra note 17. Thus lenders feel that the argument of the environmental groups, that actual past liability of lenders has been negligible, is not relevant to lenders' concerns. \textit{Id.}
\end{itemize}
uncertain conditions lenders will be extremely reluctant to make loans to borrowers with such facilities. As a result, many areas of the business community, particularly small businesses, would be adversely affected by an inability to obtain financing.

In response to the claims that the regulations will result in a reduction of environmental studies and monitoring, lenders assert that regular market forces will provide motivation to continue such assessments. Lenders also claim that the new rules' reliance on market forces will provide benefits to other groups while still encouraging the protection of the environment. Lenders who feel less threatened by CERCLA liability will be more likely to provide capital to small businesses, particularly those in industries posing a high risk of environmental problems. Lenders also claim that the new regulations will encourage lending to businesses which plan to use the funds to clean up property which has already been contaminated.

Although generally encouraged by EPA’s regulations, lenders continued to express concerns that the new rules are not adequate. For example, lenders have expressed concern that the regulations do not provide any protection for trustees administering estates containing contaminated property. In addition, while the rules provide guidance to lenders as to how EPA will

228. Id.
229. Id.
230. Id. According to lenders, they would still not make loans to environmentally unsound businesses, or allow borrowers to contaminate the property serving as security, since the result would be a decrease in the value of the collateral, to the possible detriment of the lender. Id.
231. O’Brien & Gibson, supra note 185, at 328.
232. Id. Businesses which have been foreclosed on would also be more likely to be allowed to keep operating, since the new rules do not consider such actions to be participation in management. See 57 Fed. Reg. 18,366.
233. Todd Woody, EPA Lender Liability Rules Comfort Banks, a Little, The Recorder, June 10, 1992, at 3. Some commenters, however, feel that while the new rules may encourage foreclosure to be used more readily as a remedy, lenders will remain very cautious in providing money to businesses which present large risks of hazardous releases. Steve Cocheo, New EPA Rule Helps, But Bankers Hope for New Law, ABA Banking J., July 1992, at 13.
234. Woody, supra note 233, at 3.
235. Id. EPA stated that the final rule was not extended to cover trustees because the agency did not see any basis for construing the security interest exemption as applying to trustees, since indicia of ownership would not be held primarily to protect a security interest. 57 Fed. Reg. 18,349. EPA also indicated that the need for such an exemption was not apparent since it claimed that a trustee would not be personally liable "solely because a trust asset is contaminated by hazardous substances." Id. The assets of the trust, however, would generally be available to help pay for cleanup costs of a trust property. Id.
view their actions under CERCLA, lenders may still face potential liability under analogous state environmental laws and other federal laws such as the Resource Conservation and Recovery Act (RCRA).\footnote{236}

Lenders are especially concerned that the protection offered by EPA in the new regulations will not help them in suits brought by private third parties.\footnote{237} EPA attempted to extend its interpretation of the exemption to cover third parties by making the regulation a part of the National Contingency Plan (NCP), a group of EPA regulations which govern CERCLA cleanups.\footnote{238} The regulations have already been challenged in court, however, and there is concern in the lending community that they will not be upheld.\footnote{239}

\footnote{236. 42 U.S.C. §§ 6901-6991 (1988 & Supp. II 1990). RCRA covers hazardous waste practices at active facilities, while CERCLA generally applies to releases at abandoned sites. Lavelle, supra note 217, at 24. In the preamble to the regulations, EPA stated that since there was no evidence that Congress intended CERCLA to preempt any other law, there was no principle under which the regulations could be used to make them apply to a lender's potential liability under other state or federal laws. 57 Fed. Reg. 18,349-50. EPA did indicate that RCRA section 9003(h)(9), which includes a security holder exemption similar to CERCLA section 101(20)(A), should be interpreted similarly to the CERCLA exemption. Id. at 18,349. In order to formalize this interpretation, EPA stated that it has begun to work on a proposed rule that would define the RCRA exemption similar to the new CERCLA rules. Id.}

\footnote{237. Lavelle, supra note 217, at 24. “Third parties” are generally entities and individuals who have begun paying for the cleanup of a facility and bring suit against other potentially responsible parties under the broad joint and several liability scheme of CERCLA. Id.}

\footnote{238. O'Brien & Gibson, supra note 185, at 329. As part of the NCP, the regulations are legislative rules and theoretically are binding in suits brought against lenders by third parties. Id. EPA asserted in the preamble to the regulations that its definition of the scope of the security interest exemption was a substantive rule which had undergone notice-and-comment pursuant to the Administrative Procedure Act and therefore applied to all relevant actions, whether initiated by EPA or any other person. 57 Fed. Reg. 18,368. Even if the rule was only viewed as an interpretation of the exemption, EPA claimed that its guidance would be given substantial deference by courts in third party actions. Id.}

\footnote{239. EPA stated in the preamble that based on administrative law, the regulations would be binding on third parties unless challenged within 90 days of promulgation. 57 Fed. Reg. 18,369. On July 28, 1992, the Chemical Manufacturers Association (CMA) and the Michigan Attorney General filed separate suits in the U.S. Court of Appeals for the District of Columbia Circuit. Michigan, CMA Challenge EPA Regulation Shielding Lenders from CERCLA Liability, 23 Env't Rep. (BNA) No. 15, at 1142 (Aug. 7, 1992). The Michigan suit asserted that EPA had exceeded its authority in promulgating the rules, and that the rules would encourage lenders to operate contaminated facilities. Id. A particular area of concern noted by a Michigan assistant attorney general was the ability of lenders under the final regulations to foreclose on property and to take an active role in the operation of the facility after foreclosure. Id. CMA asserted that EPA does not have general rule-making authority under CERCLA because it is a liability scheme, not a regulatory statute. Id. EPA was able to promulgate the rules by making them a part of the NCP, but CMA claims that this was invalid because the...}
C. Legislative Responses

The concerns voiced by lenders that the final regulations may not provide adequate protection from CERCLA liability have caused them to continue to seek a legislative solution. Several bills have been proposed in recent years that would address the lender liability issue in various ways, but for a variety of reasons these measures have yet to be passed by Congress. A House bill authored by Rep. John LaFalce (D-N.Y.) and a Senate bill introduced by Sen. Jake Garn (R-Utah) offer examples of proposals intended to deal with the concerns of lenders regarding liability under CERCLA.

The LaFalce bill included within the definition of "indicia of ownership" any interests obtained in the course of protecting the creditor's security interest, including those acquired through foreclosure. The secured creditor would have to diligently attempt to dispose of the property on commercially reasonable terms in order to preserve the exemption. The security holder would be liable if it caused or worsened a release, to the extent rules deal with liability, not with the NCP specifically. Id. The American Bankers Association indicated that it would intervene in the suit in support of the rules, and argued that the regulations simply recognize that lenders should not be penalized for taking actions that are economically efficient. Id.

240. Cocheo, supra note 233, at 13. In addition to the potential problems that could be presented by third party suits and application of state and other federal laws, legislation would make it less likely that lenders would be held liable due to judicial interpretation or changes in philosophy by a new administration. Id.


243. Lettow, supra note 13. A third bill, H.R. 1643, sponsored in the House by Representative Wayne Owens (D-Utah), was also introduced, but not reported out of committee. Mitchell, supra note 10. The Owens bill would retain the CERCLA definitions of "owner" and "operator" but would conditionally permit mortgage lenders, insured depository institutions, or federal lending institutions to foreclose. Id. In order to be able to foreclose, the secured creditor must have conducted an environmental inspection according to guidelines to be developed by EPA. Id.

244. Lettow, supra note 13. This legislation stalled in the House Banking Committee pending the publication of the final EPA regulations. Michael Hsu, Lender Liability Clarification May Come from Hill or EPA; Bankers, Environmentalists Clash, Mortgage Commentary, Nov. 8, 1991, at 1.

245. Lettow, supra note 13.
that the lender’s actions led to the release.\textsuperscript{246}

The Garn bill approached the problem in a different way in that it would amend the Federal Deposit Insurance Act,\textsuperscript{247} rather than CERCLA directly.\textsuperscript{248} In 1991, the Garn bill had been attached as Title X to a proposed banking and deposit insurance reform bill that was approved by the Senate Banking, Housing and Urban Affairs Committee in August.\textsuperscript{249} The proposal was most recently offered, prior to publication of this Comment, as an amendment to a housing bill.\textsuperscript{250} The provisions of the amendment were based on the Title X provisions sponsored by Sen. Garn, with minor changes to conform more closely with the new EPA regulations.\textsuperscript{251}

The Garn proposal would limit the liability of an insured depository institution or a mortgage lender for CERCLA cleanup costs.\textsuperscript{252} A protected lender’s liability would be limited to the actual benefit received by the lender from a cleanup conducted by some other party, although there would be no exclusion for a lender who caused or contributed to a release.\textsuperscript{253} Regarding a lender’s participation in management, the Garn proposal provides certain “safe harbors” that would allow lenders to conduct a variety of management activities without incurring CERCLA liability.\textsuperscript{254}

\textsuperscript{246} \textit{Id.} Note that the LaFalce bill is similar to the final EPA rules in that it requires actual participation in management, and permits loan work-out activities. \textit{Id.}


\textsuperscript{248} Lettow, supra note 13.

\textsuperscript{249} \textit{Liability Limits, supra note 241.} The Garn proposal was passed by the Senate, but was not included in the final bill because it was deemed too controversial. \textit{Senate-Passed Lender Liability Title Would Amend CERCLA to Protect Bankers,} Banking Rep. (BNA), at 883 (Dec. 2, 1991).

\textsuperscript{250} \textit{Senate Votes 77-19 to Pass GSE Bill,} Banking Daily (BNA) (July 2, 1992). The amendment was attached to S. 2733, which originally dealt with housing-related government-sponsored enterprises. \textit{Id.}

\textsuperscript{251} \textit{Id.}

\textsuperscript{252} \textit{Liability Limits, supra note 241.} Thus this bill is somewhat more narrow than the LaFalce bill and the final EPA rules as far as the parties that are protected. \textit{Id.} However, the bill would cover lenders under any federal law that imposes strict liability for hazardous waste releases, as long as the lender did not cause the contamination, whereas the EPA rules would only protect lenders from CERCLA liability. \textit{Id.}

\textsuperscript{253} \textit{Id.}

\textsuperscript{254} \textit{Id.} The Garn bill would also require the promulgation of federal regulations to ensure that lenders would perform pre-loan environmental audits. \textit{Id.}
D. The Lender's Role in Protecting Itself

The extent to which a lender may protect its security interest without risking liability under CERCLA is still not completely certain. One way for a lender to avoid liability as an owner under CERCLA would be to decline to foreclose on a property owned by a borrower that has defaulted.255 Alternatively, the lender could foreclose on the property, but not purchase the property at the foreclosure sale, and hope that there will be a willing buyer who will pay a reasonable price.256 Neither of these options is financially attractive to lenders who desire at least an approximation of their expected return.257

However, there are certain steps that a lender can take to protect itself and which should also serve the public's interest in preserving the environment.258 A lender should engage in a careful evaluation of loan applicants, including conducting pre-approval audits of borrowers and their facilities, before agreeing to take a security interest in the facility.259 Lenders should also continue to conduct random or periodic environmental audits to remain aware of any current risk a facility may pose.260 The loan documentation itself can include warranties and representations in which the borrower agrees to comply with certain conditions established by the lender.261 EPA has indicated that enforcement of such conditions does not generally constitute evidence of man-

255. See Quentel, supra note 1, at 177.
256. Id.
257. See id. at 179.
258. Id. at 184-85.
259. Id. at 183. A comprehensive pre-loan evaluation may have the benefit of informing borrowers for the first time that they have actual or potential environmental problems. John C. Buckley, Reducing the Environmental Impact of CERCLA, 41 S.C. L. Rev. 765, 799 (1990). The borrower would then have the knowledge and motivation to try to resolve these difficulties. Id. In addition, the audit may indicate to the lender that the loan simply should not be made. Id.
260. Buckley, supra note 259, at 799. These continuing audits can prove helpful in allowing lenders to assess their current risk, while providing a further incentive for the borrower to comply with environmental requirements. Id.
261. Philip R. Sellinger & Avery S. Chapman, EPA's Proposed Rule on Lender Liability Under CERCLA: No Panacea for the Financial Services Industry, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,618 (Oct. 1991). For example, a lender may reserve the right to enter and inspect the facility to assess the extent of any environmental damage, have the borrower warrant that it will comply with all environmental regulations and statutes, and notify the lender immediately in the event of any environmental problems. Id. In order to avoid the appearance that these "requirements" are evidence that the lender is managing the facility, it may be advisable to use negative covenants which forbid the borrower from taking certain actions, rather than affirmative covenants that give the lender the right to directly affect operations of the facility. Id.
agreement participation.262

A borrower presenting a high risk of environmental liability may be required to purchase insurance against this risk, although the high cost of such insurance may in effect make this requirement a denial of the loan.263 Of the companies that offer limited environmental insurance, most policies are limited in coverage and subject to an initial independent risk assessment.264

IV. Conclusion

The debate over the extent of the security interest exemption under CERCLA continues. CERCLA itself does not contain a clear legislative history to provide answers for those charged with interpreting the exemption.265 Court decisions have been inconsistent in dealing with several key issues concerning the exemption.266 For example, there are conflicting opinions regarding the types of indicia of ownership that qualify for the exemption. In addition, there is much uncertainty as to the kinds of activities that are deemed to be simply protecting a security interest versus those that constitute participation in management. Environmental groups argue that the public welfare requires that lenders be held accountable to the same extent as any other group.267 Lenders, on the other hand, assert that future loans to entities representing even a slight risk of environmental liability will evaporate without a broad exemption.268

In light of the confusion and conflicting views, it is imperative that more definite guidance be provided regarding the security interest exemption. Whether the policy decision is made to interpret the exemption narrowly or broadly, lenders and other

262. 57 Fed. Reg. 18,357. However, the exercise of a warrant or condition must not cause a lender to become so directly involved with the operations of a borrower that the lender would be considered to be participating in management as construed by the regulations and caselaw. Id.

263. Buckley, supra note 259, at 801. One reason environmental insurance is difficult to obtain is because of the view held by insurance companies that it is inevitable that waste sites will leak. Id. at 802.

264. Id. Environmental insurance policies often exclude long-term gradual contamination, only providing coverage for "sudden and accidental" events. Id.

265. For a discussion of the legislative history of CERCLA, see supra notes 20-22 and accompanying text.

266. For a discussion of cases dealing with the security interest exemption, see supra notes 58-161 and accompanying text.

267. For a discussion of the views of environmental groups on the proposed EPA regulations, see supra notes 217-25 and accompanying text.

268. For a discussion of lenders' views on the need for a strong security interest exemption, see supra notes 226-39 and accompanying text.
involved parties must be able to know the circumstances under which liability will attach. Only with such knowledge can participants in the lending process recognize which actions are permissible under CERCLA and plan accordingly. Lenders will be unlikely to execute any agreements involving potentially hazardous property if they are unable to predict the extent of their liability.

The final rules promulgated by EPA, which call for a relatively expansive view of the exemption, are likely to best serve the overall interests of all parties involved. A broad interpretation seems more consistent with the logical intention of this provision to limit liability of secured creditors. Lenders will be more comfortable in monitoring troubled enterprises closely without fear of liability. This scenario is preferable to one in which lenders ignore real or potential problems because of a fear of liability. Moreover, prospective borrowers will have increased access to loan funds, and will have another interested party (the lender) encouraging compliance with environmental requirements.

Lenders should not, of course, be completely absolved from responsibility for cleanup costs. If a lender effectively takes control of a facility and its actions cause or greatly contribute to a release of hazardous waste, the lender should face liability. Lenders not acting in good faith with respect to the environmental problems of their debtors, by either ignoring the problems or exacerbating them, should similarly expect to pay for the damage caused.

Requiring pre-loan environmental audits and continuing monitoring of facilities representing security interests seem to be reasonable prerequisites to the security interest exemption. These requirements do not appear overly burdensome, since it is common for lenders to thoroughly investigate a prospective borrower before committing to a loan. If the inspection or monitoring is not done, the lender should bear the burden of proof to show that such monitoring was not reasonably necessary or feasible. Holding lenders liable under any standard, however, only seems reasonable when they are aware of the rules under which

269. See Bruce P. Howard & Melissa K. Gerard, Lender Liability Under CERCLA: Sorting Out the Mixed Signals, 64 S. CAL. L. REV. 1187, 1220 (1991). The use of a strict test in determining whether a lender has participated in management, such as that espoused by the court in Fleet Factors, in effect creates another way to find lenders liable, in addition to the owner or operator test. Id. at 1220-21. This could lead to the anomalous result that the exemption would actually increase lender liability rather than restrict it. Id.
they must operate. The final EPA regulations are a major step in establishing such guidelines. A well-drafted legislative solution would provide even more certainty, and therefore should be pursued.

Brian J. McGaughan