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David C. Read

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THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT AFTER *UNITED STATES v. FLEET* FACTORS: NEW GUIDELINES CONCERNING LENDER LIABILITY

INTRODUCTION

The United States faces a hazardous¹ waste problem of staggering proportions.² In an attempt to immediately foreclose the spread of the problem,³ and to begin to ameliorate the toxic mess, the 96th Congress established the Comprehensive Environmental Response, Compensation and

1. Congress defines "hazardous substance" at 42 U.S.C. § 9601(14) as follows:

'[H]azardous substance' means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(14) (West 1983 & Supp. 1990).

2. Some estimates of the magnitude of the nation's hazardous waste problem run as high as 425,380 potential Superfund sites, with potential cleanup costs for only 2500 of these sites running \$22 billion. Roslyn Tom, Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925 n.6 (1989) [hereinafter YALE Note]. See also 18 ENVTL. L. REP. (BNA) 2043 (Jan.22, 1988); Note, *Superfund: Looking Back, Looking Ahead*, EPA J., Jan.-Feb. 1987, 13, 17 (estimating that the United States had roughly 9000 "problem" waste sites in 1980); Scott Wilsdon, Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261 n.5 (1987) [hereinafter HASTINGS Note] (cost to decontaminate 1800 of the most threatening sites may cost \$23 billion).

3. The U.S. produces in excess of 264 million metric tons of hazardous waste annually, enough to fill the New Orleans Superdome 1,500 times over. FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND U.S. POLICY 602 (2d ed. 1990).

Liability Act (CERCLA).⁴ By so doing, Congress brought the problem of inactive and abandoned hazardous waste sites to the forefront of a broad and comprehensive federal effort to address looming environmental problems such as air pollution, water pollution, and the general degradation of our nation's natural resources.⁵

CERCLA was designed to respond to and remedy⁶ the hazardous waste problem at inactive and abandoned waste generation or disposal facilities.⁷ The passage of CERCLA was the culmination of a twenty year effort to reverse environmental degradation through legislative directives⁸ that included the passage of the Clean Water Act,⁹ the Clean Air Act,¹⁰ the Resource

4. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) [hereinafter CERCLA] (codified in part as amended at 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1991)).

5. See H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120.

6. The legislative history of CERCLA reveals the two-pronged response mechanism of removal and remediation. "Removal" focuses on the short term and consists of an immediate cleanup effort. Removal is properly viewed as a stop gap measure designed to prevent the further spread of contamination, such as into the soil or groundwater. "Remedial action" consists of more far-reaching steps intended as a permanent restoration of the contaminated site. See Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 11 (1982).

7. HASTINGS Note, *supra* note 2, at 1262 n.23 (1987). The Congressional subcommittee investigating the hazardous waste problem prior to the final passage of CERCLA identified four characteristics common to dump sites:

(1) The sites contain large quantities of hazardous waste. For example, Hooker Chemical Company's three disposal sites in Niagara Falls, New York, contained an estimated 352 million pounds of waste including dioxin tainted TCP. The Valley of the Drums in Shepardsville, Kentucky contained over 17,000 drums of hazardous wastes.

(2) The widespread use of unsafe design and disposal methods. At the S-Area site at Niagara Falls, drums of toxic waste were rolled into trenches and tank wagons were discharged directly into the ground. At Hooker's Montague, Michigan site, workers hacked open drums with axes and left the wastes to seep into the groundwater.

(3) The sites involve a substantial danger to the environment. Improper disposal methods rendered the groundwater unusable at Montague, Michigan; Lathrop, California; and parts of Long Island, as well as at other locations.

(4) Many sites pose major health hazards. The State of New Jersey estimated that a fire or explosion at the Chemical Control site could release a toxic cloud into the New York metropolitan area threatening hundreds of thousands of people.

See H.R. REP. NO. 1016, 96th Cong., 2d Sess. 18-19 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6121-22.

8. H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120.

9. 33 U.S.C. §§ 1251-1387 (1988). The Clean Water Act regulates the amount of pollutants that may be discharged into the nation's surface waters.

10. 42 U.S.C. §§ 7401-7642 (1988). The voluminous Clean Air Act regulates the emissions of air pollutants.

Conservation and Recovery Act,¹¹ and the establishment of the National Environmental Policy Act.¹² Whereas the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act are primarily regulatory in nature, CERCLA authorizes broader agency action.¹³ CERCLA created a national inventory of inactive hazardous waste sites,¹⁴ and assigned authority to the Administrator of the Environmental Protection Agency (EPA) to take emergency assistance and containment actions with respect to those identified sites.¹⁵ Further, CERCLA created a federal cause of action in strict liability¹⁶ to enable the administrator of the EPA to pursue rapid recovery of the costs incurred from the liable parties¹⁷ and to maintain the viability of the Superfund.¹⁸ CERCLA names four broad classes of potentially responsible parties (PRPs),¹⁹ focusing on the present or past owners or operators of contaminated sites, and generators or transporters of toxic wastes.²⁰

11. 42 U.S.C. §§ 6901-87 (1988) [hereinafter RCRA]. A companion piece of legislation, RCRA provides for the "cradle to grave" tracking and regulation of the generation, transportation, and disposal of toxic wastes throughout the waste cycle. RCRA attempts to prevent hazardous waste mismanagement at every point in the waste cycle, or from the "cradle to grave." OFFICE OF SOLID WASTE, U.S. ENVTL. PROTECTION AGENCY, RCRA ORIENTATION MANUAL (Jan. 1986).

By comparison, CERCLA was enacted by Congress to address the growing problem of improperly disposed of wastes, and to remedy the problem of abandoned waste sites. See H. R. Rep. No. 1016, 96th Cong., 2d Sess. 1, 17-18 (1980), reprinted in (1980) U.S.C.C.A.N. 6119, 6119-20.

12. 42 U.S.C §§ 4321-4370 (1988). The National Environmental Policy Act proclaims the nation's desire to promote a harmonious coexistence between man and his environment.

13. H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17-18 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120.

14. *Id.*

15. *Id.* Superfund mandates the preparation of a National Contingency Plan (NCP). Included in the NCP is a National Priorities List (NPL) of sites eligible for Superfund-financed cleanups. Once a site has been placed on the NPL, a remedial investigation and feasibility study is performed. The proposed actions include an examination of options for treating, controlling or eliminating the release. The selected remedy is chosen, to the extent practical, within the parameters of the NCP. H.R. REP. NO. 253(V), 99th Cong., 2d Sess. 2-3 (1986), reprinted in 1986 U.S.C.C.A.N. 3124, 3125-26.

16. See, e.g., *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1073 (D. Colo. 1985) (The original legislation did not specify exactly what standard of liability should be applied.)

Apparently, Congress intended that the liability standard be resolved by the courts. CERCLA sponsor Senator Randolph stated that any unresolved liability issues should be "governed by traditional and evolving principles of common law." See Hastings Note, *supra* note 2, at 1264 n.18. When Congress reauthorized CERCLA in 1986, it tacitly approved the strict, joint and several, and retroactive liability scheme by not changing the liability standards. *Id.* at 1270 n.5.

17. H.R. REP. NO. 1016, 96th Cong., 2d Sess. 1 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120.

18. See *infra* notes 35-41 and accompanying text.

19. CERCLA does not define "potentially responsible parties."

20. Section 9607(a) of CERCLA defines the four classes of responsible parties as follows:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or

Recently, at the urging of federal authorities,²¹ the judiciary has adopted a more expansive reading of CERCLA liability.²² For example, in the recent case of *United States v. Fleet Factors Corp.*,²³ the Eleventh Circuit Court of Appeals determined that despite the statutory exemption for secured creditors a lender may be liable for merely having the potential to influence a debtor's operations.²⁴ However, such an expansive reading of CERCLA liability means that parties such as financial institutions²⁵ or subsequent landowners²⁶ who have only a tenuous connection to the generation, transportation, and disposal of toxic wastes may be liable for the entire cost of cleanup operations.²⁷ This broadening standard of CERCLA liability undermines the express provision in the original legislation and subsequent amendments²⁸ exempting secured

operated any facility at which such hazardous substances were disposed of,

(3) Any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or site selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. . . .

42 U.S.C.A. § 9607(a) (West Supp. 1991).

Although the "owner and operator" language of CERCLA § 9607(a)(1) reads in the conjunctive, the legislative history of CERCLA reveals an intent for the statute to be read in the disjunctive. See *infra* note 59 and accompanying text. Section 9601(20)(A) of CERCLA further defines the terms "owners" and "operators." See *infra* note 70 and accompanying text.

21. See Phillip D. Reed, Comment, *CERCLA 1985: A Litigation Update*, 15 ENVTL. L. REP. (Envtl. L. Inst.) 10395 (1985).

22. Courts have held that current owners of sites, as well as those that owned such sites at the time of disposal are liable under § 9607(a) of CERCLA. See HASTINGS Note, *supra* note 2, at 1266.

23. 901 F.2d 1550 (11th Cir. 1990). See *infra* notes 114-29 and accompanying text.

24. 901 F.2d at 1557.

25. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986) (Financial institution held liable after the institution foreclosed and took title to debtor's facility). See *infra* notes 80-96 and accompanying text.

26. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (subsequent landowner held liable for costs to cleanup contamination caused by previous owner).

27. See *id.* at 1037 (present owner not involved with the prior owner's improper disposal practices was held liable for cleanup costs); *United States v. Maryland Bank & Trust Corp.*, 632 F. Supp. 573, 580 (D. Md. 1986) (bank holding a lien on the property found liable for the entire response costs after it foreclosed); *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554 (11th Cir. 1990) (lender liable for cleanup costs because it could have exercised financial control).

28. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in part at 42 U.S.C. §§ 9601-9675 (West Supp. 1990)).

lenders²⁹ and innocent purchasers³⁰ from CERCLA liability. Because the courts have failed to articulate guidelines, lenders are unsure what level of involvement in a debtor's operations will trigger CERCLA liability. Consequently, small businesses and other potential borrowers will have more difficulty obtaining and affording credit.³¹

Section I of this Note outlines the basic theories of CERCLA liability and the development of the secured creditor exemption.³² Section II tracks the broadening theories of liability concerning secured creditors and the decreasing availability of the statutory exemption for secured creditors as reflected in two recent cases that extended liability to creditors based on slightly different principles.³³ Section III examines the further narrowing of the CERCLA secured creditor exemption in *United States v. Fleet Factors*.³⁴ Section IV examines the effect of the expanding CERCLA secured creditor liability on the

29. 42 U.S.C.A. § 9601(20)(A) (West 1983). See *infra* notes 57-67 and accompanying text.

30. Section 9607(b)(3) provides for an exclusion from liability when the damages were caused by:

an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

42 U.S.C.A. § 9607(b)(3) (West 1983).

Section 9601(35)(A) of the 1986 Superfund Amendments and Reauthorization Act (SARA) expanded on the liability exclusion and provided what is known as the "innocent landowner" defense, which basically exempted from liability any party that acquired title to a site or facility but did not know or have reason to know at the time of acquisition that there was a release or threatened release of hazardous substances. See 42 U.S.C.A. § 9601(35)(A) (West Supp. 1990).

The innocent purchaser defense was created as a response to the seemingly unjust results reached in some of the pre-SARA cases. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986). See *infra* notes 80-96 and accompanying text.

31. 5 TOXICS L. REP. (BNA) 1, 25 (June 6, 1990) (the increased transaction costs due to more detailed investigations by lenders concerning the nature of the borrower's activities and the present condition of the site will be passed along to the borrower)

32. See *infra* notes 35-67 and accompanying text. Some courts have characterized CERCLA as "poorly drafted, hastily considered, and bereft of useful legislative history." See Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 BUS. LAW. 923 (1990).

33. See *infra* notes 68-96 and accompanying text. *Maryland Bank & Trust Corp.*, 632 F. Supp. 573 (D. Md. 1986); *United States v. Mirabile*, 15 ENVTL. L. REP. (Envtl. L. Inst.) 20994 (E.D. Pa. 1985). See *infra* notes 80, 97, 113 and accompanying text.

34. 901 F.2d 1550 (11th Cir. 1990). See *infra* notes 114-29 and accompanying text.

financial community. Finally, section V proposes a statutory modification to establish predictable guidelines for commercial lenders seeking to avoid CERCLA liability.

I. CERCLA LIABILITY, DEFENSES AND EXEMPTIONS

A. CERCLA Financing

Because CERCLA's goal is to spread the cost of environmental cleanup among those who profit from the generation of hazardous waste,³⁵ the financing scheme is inextricably related to the liability, defenses, and exemptions of CERCLA.³⁶ To finance the response and remediation actions taken pursuant to CERCLA, Congress set aside a \$1.6 billion fund, commonly known as the "Superfund."³⁷ In 1986, to confront the growing number of Superfund sites,³⁸ Congress provided an additional \$8.5 billion as part of the Superfund Amendments and Reauthorization Act (SARA).³⁹ The initial revenues for the Superfund were provided through a special tax on chemical and petroleum producers, and through general tax revenues.⁴⁰ Furthermore, Congress envisioned a self-perpetuating or "revolving fund" financed primarily by those

35. See H.R. REP. NO. 1016, 96th Cong., 2d Sess. 63-64 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6155.

36. See *id.*

37. 26 U.S.C.A. § 9507(a) (West Supp. 1990). The Superfund was to be financed by fees or excise taxes from the petrochemical, inorganic chemical and oil industries in proportion to their contribution to the annual hazardous waste stream. Grad, *supra* note 6, at 5-6.

38. See H.R. REP. NO. 253(V), 99th Cong., 2d Sess. 1-2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3125.

The Committee on Public Works and Transportation, in its report on H.R. 2817 prior to passage of the 1986 SARA revisions issued a scathing condemnation of the EPA's mismanagement of Superfund in the early 1980s. An Investigations and Oversight Subcommittee examination of the EPA's efforts led to the conclusion that the administrators were more concerned with conserving monies in the fund than they were with spending funds to clean up hazardous waste sites. The EPA administrator, Anne Gorsuch, was cited by Congress for contempt and eventually left the EPA in March of 1983, followed shortly thereafter by approximately twenty other senior agency officials. See *id.* at 3126.

39. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in part at 42 U.S.C. §§ 9601-75 (West Supp. 1990)).

40. The Superfund is financed from three sources. Eleven percent of the fund comes from the general fund of the United States Treasury, 73% is from taxes levied on petroleum and chemical related businesses, and about 16% of the fund comes from penalties, recoveries, and interest earned on the balance of the Superfund. U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-85-2) *ILLEGAL DISPOSAL OF HAZARDOUS WASTE: DIFFICULT TO DETECT OR DETER* 12 (Feb. 1985). See also HASTINGS Note, *supra* note 2, at 1264 n.23 (Of the initial Superfund monies approved in 1980, 87.5% came from special taxes on petroleum and certain chemicals, and 12.5% came from general revenue appropriations).

industries that profited from the generation of hazardous wastes.⁴¹

In addition to the funds raised by special taxes on waste generating products, CERCLA provided a cause of action to recover response costs from PRPs, with those recovered funds going back into the Superfund for future use.⁴² This cost recovery scheme was intended to prevent premature depletion of the Superfund and to foster the private allocation of responsibility for the enormous cleanup costs required.⁴³ CERCLA empowered the government to recover response costs by giving the EPA the authority to file suit against a PRP.⁴⁴

B. CERCLA Liability, Defenses, and Exemptions

To supplement and refurbish the Superfund, CERCLA names four broad classes of responsible parties including owners or operators of contaminated sites, as well as generators and transporters⁴⁵ of toxic wastes.⁴⁶ The class of

41. The "revolving fund" could be replenished as damages were recovered in cases where some of the "culprits" could be identified. Furthermore, a revolving fund financed primarily by the industries that profit from the generation of hazardous wastes would more equitably reflect the responsibility for the problem, and would tend to minimize contributions required by federal taxpayers. H.R. REP. NO. 1016, 96th Cong. 2d Sess. 63-64 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6140 (remarks of Senator Gore).

42. Under 42 U.S.C.A. § 9607(a), in order to recover its response costs, the government must prove that:

- (1) the site is a "facility";
- (2) a "release" or "threatened release" of any "hazardous substance" from the site has occurred;
- (3) the release or threatened release has caused the federal government to incur "response costs"; and
- (4) the defendant is one of the persons designated as a party liable for costs.

42 U.S.C.A. § 9607(a) (West Supp. 1990).

Response costs generally include costs of investigation and cleanup. However, the EPA is also empowered under § 9607(a)(4)(A)-(D) to recover for damage to natural resources and for the costs of health assessments. *See* 42 U.S.C.A. § 9607(a)(4)(A)-(D) (West 1983). *See also* Edmund B. Frost, *Strict Liability as an Incentive For Cleanup of Contaminated Property*, 25 HOUS. L. REV. 951, 952 (1988).

43. Barr, *supra* note 32, at 1001.

44. The provisions allocating administration and enforcement powers to the EPA were not uniformly favored. Congressman Stockman (R-Michigan) proposed a system of federal formula grants to fund state cleanup and remediation efforts. Stockman claimed the adopted provisions gave the EPA excessive discretion and feared the EPA would become the "czar over every hazardous waste site in the entire country." Stockman further asserted that the bill would turn "EPA people loose to go dig up everything in the country." *See* Grad, *supra* note 6, at 15-16.

45. The problems created by generators and/or transporters of hazardous wastes is now more appropriately addressed by RCRA and is therefore beyond the scope of this Note. *See supra* note 11 and accompanying text.

46. 42 U.S.C.A. § 9607(a) (West Supp. 1990). *See supra* notes 19-20 and accompanying text.

PRPs is subject to strict,⁴⁷ joint and several,⁴⁸ and retroactive liability.⁴⁹ In other words, causation is not a required element of the government's case.⁵⁰ Therefore PRPs may be found liable regardless of their lack of fault or negligence.⁵¹

Under the CERCLA strict liability scheme,⁵² defendants such as commercial lenders are liable unless they can invoke one of CERCLA's affirmative defenses.⁵³ The statutory defenses exclude potential defendants from liability if a release or threatened release is caused by an act of God, an act of war, or an act or omission of a third party who has no contractual relationship with the defendant.⁵⁴ Although the affirmative defenses are rarely

47. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (holding that CERCLA imposes strict liability on the property owner regardless of the present owner's lack of responsibility for the site contamination).

48. See, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 811 (S.D. Ohio 1983) (when two or more persons acting independently caused a single and indivisible harm each is liable for the entire harm).

49. See, e.g., *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1073 (D. Colo. 1985). When Congress reauthorized CERCLA in 1986, it tacitly approved the strict, joint and several, and retroactive liability schemes by not changing the liability standards. See also HASTINGS Note, *supra* note 2, at 1267.

50. The imposition of strict liability has a strong history of being used to implement long-term public policy goals by creating an incentive to affect private conduct. See generally Frost, *supra* note 32.

51. Under RCRA, an environmental statute analogous to CERCLA, the legislative history states that any party who has contributed or is contributing to the creation, existence, or maintenance of an environmental hazard is subject to liability without regard to fault or causation. See Cynthia Anne Oppliger, Note, *Putting Recovery Back Into RCRA: An Effective Addition to the Resource Conservation and Recovery Act*, 25 VAL. U. L. REV. 59, 71 n.59 (1990). Furthermore, the liability provisions of CERCLA and RCRA are to be interpreted in a similar manner. See Grad, *supra* note 6, at 9.

52. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985). The *Shore Realty* court concluded that proof of causation as a component of landowner liability would render "superfluous" one of CERCLA's affirmative defenses, and would open a huge loophole in CERCLA's liability scheme. *Id.* at 1044-45. The court explained as follows:

[I]f the current owner of a site could avoid liability merely by having purchased the site after chemical dumping had ceased, waste sites certainly would be sold, following the cessation of dumping, to new owners who could avoid the liability otherwise required by CERCLA. Congress had well in mind that persons who dump or store hazardous waste sometimes cannot be located or may be deceased or judgment-proof. We will not interpret Section 9607(a) in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intent otherwise.

Id. at 1045.

53. See generally HASTINGS Note, *supra* note 2, at 1267-75.

54. The affirmative defenses provided in § 9607(b) of CERCLA are defined as:

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship,

presented to the courts,⁵⁵ the courts have construed the section 9607(b) defenses narrowly.⁵⁶

Potential CERCLA defendants such as lenders⁵⁷ may also attempt to show that they fall outside of the class of identified PRPs. When Congress passed the Superfund legislation in 1980, it created a secured creditor exemption by expressly excluding from liability any parties who hold "indicia of ownership" primarily to protect a security interest and who do not "participate in the management" of the facility.⁵⁸ Under section 9601(20)(A) of CERCLA, these parties were expressly excluded from the definition of "owners or operators."⁵⁹

The courts have eroded the secured creditor exemption by holding lenders liable for cleanup costs under two theories. First, when a financial institution

existing directly or indirectly with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could reasonably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

42 U.S.C.A. § 9607(b) (West 1983).

55. See HASTINGS Note, *supra* note 2, at 1268.

56. See *id.* The narrow interpretation of the affirmative defenses is compelled by CERCLA's stringent conditions which require the defendant to show by a preponderance that the release or threatened release was caused *solely* by one or more of the enumerated forces. *Id.* (emphasis added).

57. Cases involving lender liability are not as common as those involving landowners, because the government has not pursued lenders as a class the way it has pursued other classes of parties named under CERCLA's liability provisions. See YALE Note, *supra* note 2, at 929 n.27. The government will bring an action against a bank when it finds that the owner or operator is insolvent and the defense and exemptions are unavailable. *Id.*

58. See *id.* at 926.

59. 42 U.S.C.A § 9601(20)(A) excludes secured creditors from liability as follows:

[S]uch term ("owners or operators") does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C.A § 9601(20)(A) (West Supp. 1990).

The legislative history describes the secured creditor exemption as follows:

[The term "owner"] does not include certain persons possessing indicia of ownership (such as a financial institution) who, without participating in the management or operation of a vessel or facility, hold title either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rules, or regulations. [A] . . . financial institution which held title primarily to secure a loan but also received tax benefits as the result of holding title would not be an "owner" as long as it did not participate in the management or operation of the vessel or facility.

H.R. REP NO. 172, 96th Cong., 2d Sess. 36 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6160, 6181.

forecloses on a parcel of land, it may then be found liable as an owner.⁶⁰ Second, when a lender attempts to exert financial control over a debtor's business operations in an attempt to prevent failure, that lender has effectively "participated in the management" of the debtor's business and therefore loses the secured creditor exemption provided by section 9601(20)(A).⁶¹

Lenders who face liability after foreclosing on their security interest, may attempt to invoke the "innocent purchaser" defense.⁶² Although not included in the original legislation, Congress in the 1986 SARA amendments acted to create this defense to protect subsequent purchasers of contaminated property, who did not contribute to the contamination of the parcel in question.⁶³ As with the other types of defenses and exclusions under CERCLA, the innocent purchaser defense is difficult to establish and extremely limited in scope.⁶⁴ To qualify for the innocent purchaser defense, potential purchasers have an affirmative duty to conduct a "reasonable inquiry" using "due diligence" into the nature of the prior owner's activities.⁶⁵ The courts have found that if a party has failed to discover subsequently revealed contamination, that party simply did not use due diligence.⁶⁶ As construed by the courts, this defense is largely beyond the reach of subsequent landowners.⁶⁷

The courts have applied varying interpretations in defining the scope and extent of the defenses and exemptions contained in CERCLA. This has left lenders unsure as to what constitutes an "indicia of ownership," and what constitutes "participation in the management" sufficient to void the secured creditor exemption. To illustrate this point, it is necessary to examine the

60. See *infra* notes 80-96 and accompanying text.

61. See *infra* notes 97-113 and accompanying text.

62. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986) (a lender may be liable for the full amount of the hazardous waste cleanup operation if it forecloses on property that turns out to be contaminated, regardless of the lender's lack of contribution to the contamination).

Although the exclusion for innocent landowners is often characterized as an affirmative defense, it is more properly characterized as an exemption from the class of liable parties. Hence its inclusion in the § 9601 list of definitions.

63. 42 U.S.C.A. § 9601(35)(A) (West Supp. 1990). The "innocent landowner defense" was created to eliminate the "onerous" liability concerning subsequent purchasers. See H.R. REP. NO. 253(V), 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 3124, 3125. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Serafini*, 711 F. Supp. 197 (M.D. Pa. 1988).

64. See HASTINGS Note, *supra* note 2, at 1267.

65. See generally JAMES P. O'BRIEN, ENVIRONMENTAL DUE DILIGENCE: THE COMPLETE RESOURCE GUIDE FOR REAL ESTATE LENDERS, BUYERS, SELLERS, AND ATTORNEYS (BNA 1989).

66. *BCW Assoc. v. Occidental Chem. Corp.*, 3 TOXICS L. REP. (BNA) 943 (E.D. Pa. 1988) (Parties who perform an environmental assessment of the site are still liable if that assessment is later shown to have been inaccurate.)

67. See HASTINGS Note, *supra* note 2, at 1268 n.44.

varying results in several cases involving the question of secured creditor liability.

II. EXPANDING LENDER LIABILITY UNDER CERCLA

A. *Lenders as Landowners*

CERCLA exempts lenders "who, without participating in the management" of a facility hold an "indicia of ownership primarily to protect [a] security interest in the . . . facility."⁶⁸ Such lenders are exempt from liability because they are excluded from CERCLA's definition of "owner or operator."⁶⁹ Section 9601(20)(A) of CERCLA quite clearly defines an "owner or operator" of a facility as anyone who formerly or presently owns, operates, or charters a vessel or facility.⁷⁰ However, the precise meaning of the exemption for secured creditors who hold an "indicia of ownership" is unclear because Congress simply did not provide much guidance to assist with interpretation.⁷¹ CERCLA was hastily drafted and adopted and has only a sparse legislative history.⁷² Therefore, it is difficult to determine precisely what Congress intended to qualify as an "indicia of ownership" or "participat[ion] in the management" of a facility.⁷³ In the past several years CERCLA litigation has

68. 42 U.S.C.A. § 9601(20)(A) (West 1983).

69. *Id.*

70. Section 9601(20)(A) of CERCLA defines "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 an abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment. Such term does not include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C.A. § 9601(20)(A) (West 1983).

71. *See Grad, supra* note 6, at 1. CERCLA's sparse legislative history is due to the fact that CERCLA was passed in the closing days of a lame duck Congress, as a substitute for all pending bills, and under a suspension of the rules with virtually no room for amendments. *Id.* at 1-2.

72. *See YALE Note, supra* note 2, at 925.

73. The legislative history describes the secured creditor exemption as follows:

[the term ("owners or operators")] does not include certain persons possessing indicia of ownership (such as a financial institution) who, without participating in the management of a vessel or facility, hold title either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rules, or regulations. [A] . . . financial institution which held title primarily to secure a loan but also received tax benefits as the result of holding title would not be an "owner" as long as it did not participate in the management or operation of the vessel or facility.

H.R. REP. NO. 172, Part 2, 96th Cong., 2d Sess. 36 (1980), *reprinted in* 1980 U.S.C.C.A.N 6160,

centered on landowners.⁷⁴ Four categories of landowners may be liable.⁷⁵ Section 9607(a) of CERCLA names two groups, including current owners of a contaminated site and those that owned the site at the time of the waste disposal.⁷⁶ Section 9601(20)(A) defines the third category of landowner as any former owner whose interest in the property was conveyed to the government as a result of bankruptcy, foreclosure, tax delinquency, abandonment or similar means.⁷⁷ Finally, section 9601(35)(C) defines the fourth category as any landowner who transfers ownership of property without disclosing the existence of a hazardous waste problem.⁷⁸ Again, each of the four classes of landowners is subject to strict, joint and several, and retroactive liability, without regard to causation.⁷⁹

Reflecting the trend towards a more expansive theory of liability,⁸⁰ the court in *United States v. Maryland Bank & Trust Corp.*⁸¹ held that a lender who forecloses and takes title to a piece of property containing hazardous waste is not protected by the secured creditor exemption.⁸² In *Maryland Bank*, the

6181.

74. In the early stages of CERCLA the thrust of the litigation focused on generators. *See generally* Reed, *supra* note 21. However, the present focus of CERCLA litigation has shifted to landowners; Phillip D. Reed, Comment, *CERCLA Litigation Update: The Emerging Law of Generator Liability*, 14 ENVTL. L. REP. (Envtl L. Inst.) 10,224 (1984).

75. *See* HASTINGS Note, *supra* note 2, at 1265-66.

76. The portions of § 9607(a) of CERCLA pertaining to landowners reads as follows:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-

(1) The owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

42 U.S.C.A. § 9607(a) (West Supp. 1990).

77. The section 9601(20)(A)(iii) definition of a CERCLA "owner or operator" consists of the following:

(iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment.

42 U.S.C.A. § 9601(20)(A) (West 1983).

78. 42 U.S.C.A. § 9601(35)(C) (West Supp. 1990).

79. *See supra* notes 47-51 and accompanying text.

80. *See supra* notes 21-31 and accompanying text.

81. 632 F. Supp. 573 (D. Md. 1986).

82. In the 1970s Maryland Bank & Trust Co. (Maryland Bank) loaned money for business operations to Herschel McLeod, who ran a trash and garbage business on his family farm. *Id.* at 575-76. In 1980 Maryland Bank loaned \$335,000 to McLeod's son to purchase the farm. *Id.* Approximately a year later, the junior McLeod stopped making payments and the bank began foreclosure actions. In 1982, Maryland Bank purchased the property at the foreclosure sale for \$381,500. *Id.* The record does not disclose why the bank bid in excess of the outstanding debt.

The EPA inspected the site in 1983 and discovered 237 drums of chemicals and 1180 tons of contaminated soil. The EPA investigation also disclosed that the two disposal areas contained buried drums, some of which were leaking. Tests identified the presence of chromium, cadmium, lead,

Maryland Bank & Trust Corporation foreclosed on property used to secure a loan, and subsequently purchased the property at the foreclosure sale.⁸³ Maryland Bank then claimed protection under the secured creditor exemption.⁸⁴ The central issue in *Maryland Bank* was the scope and extent of the secured creditor exemption provided by section 9601(20)(A) of CERCLA. Maryland Bank's primary assertion was that it qualified for the secured creditor exemption because its ownership came about pursuant to actions taken to protect the bank's security interest.⁸⁵ However, the court declined to adopt the bank's liberal interpretation of the exemption and opted for a more narrow construction of the secured creditor exemption.⁸⁶

In adopting a narrow interpretation of CERCLA's secured creditor exemption, the court reasoned that the exemption only applies if at the time of the cleanup, the lender's interest in the subject property is limited to an "indicia of ownership."⁸⁷ Maryland Bank's previously held security interest had been converted from an "indicia of ownership" to full ownership by virtue of the bank's purchase at the foreclosure sale.⁸⁸ Therefore, under CERCLA's strict liability provisions the bank was liable as a current "owner or operator" under section 9601(20)(A) even though it did not own the site at the time of disposal or contribute to the contamination in any way.⁸⁹

mercury, toluene, cyanide compounds, ethylbenzene, and xylenes. [Pending Litigation 1971-1990] ENVTL. L. REP. (Envtl. L. Inst.) 65,847 (1985).

The EPA subsequently instituted a cleanup operation at the cost of \$551,713.50 after Maryland Bank refused to initiate corrective action on its own. The EPA then sued Maryland Bank after the bank refused to reimburse the EPA, and both sides moved for summary judgment. *Maryland Bank*, 632 F. Supp. at 575-76.

83. *Maryland Bank*, 632 F. Supp. at 575-76.

84. *Id.* at 577.

85. The bank raised two other arguments in support of its motion. First, that current owners of hazardous waste sites could only be held liable under § 9607(a)(1) if they also operated such sites. Second, the bank raised a third party defense under § 9607(b)(3). *Id.* at 576.

The court dismissed the first argument and reasoned that to adopt the bank's interpretation of CERCLA's liability provisions would render § 9607(a)(1) useless because the class of "owners and operators" would contain no members. By definition, an owner simply cannot be the person as an operator. *Id.* at 578.

The court dismissed the bank's second argument on the grounds that genuine issues of fact exist concerning the reasonableness of the bank's conduct in light of bank's knowledge of the prior owner's uses of the land. Further, the full nature of the contractual arrangements between the parties was not clear, thus precluding the assertion of a third party defense under § 9607(b)(3). *Id.* at 581.

86. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578 (D. Md. 1986).

87. The court reasoned that the verb tense used in the exemption was critical. Section 9601(20)(A) states that the exemption applies when a creditor "holds indicia of ownership primarily to protect a security interest . . . [emphasis added]." *Id.* at 578-79.

88. The court also pointed out that the bank had been full owner for an "extended period of time." *Id.* at 579 n.5.

89. *See United States v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

Even though the *Maryland Bank* result fits snugly within the parameters of CERCLA's long term goals of fostering diligence within the private sector,⁹⁰ a more liberal interpretation of the secured creditor exemption would essentially convert CERCLA into an insurance policy for lenders⁹¹ by protecting them against possible losses due to loans secured with polluted properties.⁹² However, because foreclosure may turn a lien into full ownership, lenders are faced with the alternative of avoiding CERCLA liability or foregoing foreclosure and facing the prospect of losing the value of their collateral.⁹³ Such a dilemma creates a disincentive for banks to extend credit because they are unsure if their investment is fully secured.⁹⁴

Under *Maryland Bank*, the protection offered by the secured creditor exemption evaporates once a lender's security interest ripens into full ownership.⁹⁵ Therefore, if a lender does not foreclose on a parcel, the protection offered by the secured creditor exemption theoretically remains in force.⁹⁶ This assumes, however, that the lender does not "participate in the management of a . . . facility," the precise meaning of which had yet to be clarified by the courts.

B. Lenders Participating in Management

The second way the courts have eroded the secured creditor exemption is by the courts' adoption of an expansive interpretation of lender management participation.⁹⁷ In theory, a secured creditor who does not "participate in the

90. The court expanded by pointing out that financial institutions are in a position to investigate and discover potential problems with secured properties. Under the long term goals of CERCLA, such investigations should be routine. Therefore, CERCLA should not absolve financial institutions from mistakes in judgment when they have the ability to protect themselves by making prudent loans. *Maryland Bank*, 632 F. Supp. at 580.

See also YALE Note, *supra* note 2, at 935 n.58 (statement of Sen. Domenici) ("we must provide incentives for the government and private parties to join together rather than litigate"); *id.* at 926 n.15 (CERCLA provisions are meant to foster increased diligence in the financial community).

But compare id. at 937 n.62 (A low threshold of liability decreases a bank's incentive to monitor a borrower's practices).

91. See YALE Note, *supra* note 2, at 936.

92. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 580 (D. Md. 1986).

93. See YALE Note, *supra* note 2, at 926 n.16 (A bank may avoid liability by deciding not to foreclose, but in so doing faces the prospect of losing its collateral).

94. See 5 TOXICS L. REP. (BNA) at 75. See also *infra* notes 130-37 and accompanying text.

95. See *supra* notes 80-96 and accompanying text.

96. *But see United States v. Mirabile*, 15 ENVTL. L. REP. (Envtl. L. Inst.) 20994 (E.D. Pa. 1985).

97. See generally YALE Note, *supra* note 2, at 929.

management of a . . . facility” is entitled to the secured creditor exemption.⁹⁸ However, lenders are unsure what level of involvement is sufficient to remove them from the protection of the secured creditor exemption, thus triggering CERCLA liability.⁹⁹

The recent case of *United States v. Mirabile* reflects the difficulty lenders face interpreting the meaning of management participation.¹⁰⁰ In *Mirabile*, the EPA brought an action to recover response costs incurred by the removal of hazardous waste from property owned by defendants Anna and Thomas Mirabile.¹⁰¹ The Mirabiles joined American Bank and Trust Company (“American Bank”) and Mellon Bank (East) National Association (“Mellon”) as third party defendants.¹⁰² The government, the Mirabiles, and both banks moved for summary judgment.¹⁰³

Both banks asserted the CERCLA secured creditor exemption as a defense.¹⁰⁴ The court recognized that individuals or corporations not involved in the management of a facility are exempted from CERCLA liability,¹⁰⁵ and acknowledged that the difficulty arises in determining how far a creditor may go to protect its financial interests.¹⁰⁶

The banks argued “that a secured creditor’s exercise of *financial* control over a debtor should not bring the creditor within the scope of CERCLA liability.”¹⁰⁷ But the court declined to adopt American Bank’s and Mellon’s

98. This is the argument raised by the defendant in *United States v. Mirabile*, 15 ENVTL. L. REP. (Envtl. L. Inst.) 20,994.

99. See generally HASTINGS Note, *supra* note 2, at 1267.

100. 15 ENVTL. L. REP. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985).

101. The Mirabiles’ took title to a former paint manufacturing facility at a sheriff’s sale after American Bank and Trust foreclosed on the property. *Id.* at 20,995.

102. The Mirabiles asserted as a defense that the Small Business Administration (SBA) was an indispensable party under F.R.C.P. 19. See 15 ENVTL. L. REP. at 20,995. American Bank and Mellon also counterclaimed against the SBA alleging the SBA was involved in creating the conditions at the site. *Id.* The claims involving the SBA do not affect the court’s interpretation of the secured creditor exemption. *Id.*

103. *Mirabile*, 15 ENVTL. L. REP. at 20,995.

104. *Id.*

105. See *United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 579 F. Supp. 823, 849 (W.D. Md. 1984) (the exemption from liability for lenders who are not involved in management activities gives rise to the inference that lenders who are actively involved in management should lose the protection of the secured creditor exemption).

106. The court further explained the problem as “defining the point at which participation is too attenuated to permit the imposition of liability.” *Id.*

107. American Bank foreclosed after the previous owner defaulted, prior to the Mirabiles’ purchase. After foreclosure, American Bank merely took actions to secure the property. It boarded up windows and locked the buildings to prevent vandalism, and made inquiries into the cost of disposing of drums found on the site. *United States v. Mirabile*, 15 ENVTL. L. REP. (Envtl. L. Inst.)

interpretation of management participation.¹⁰⁸ Instead the court reasoned that the exemption suggested that secured creditors may avoid liability if they are not "excessively entangled" in the financial affairs of the actual owners.¹⁰⁹

The *Mirabile* court's interpretation of the secured creditor exemption is not conducive to ready interpretation, nor does it provide workable guidelines for lenders seeking to avoid CERCLA liability.¹¹⁰ Although the facts of the case seem to justify the court's conclusion,¹¹¹ lenders cannot rely on the *Mirabile* standard as a guide.¹¹² Clearly, lenders who participate in the "day-to-day" operational management of a facility lose the protection of the secured creditor exemption, because such actions qualify lenders as operators. However, based on the *Mirabile* interpretation, a lender must toe the line between permissible and impermissible management participation with only the "excessive entanglement" standard to guide its actions. Such a standard is vague and ambiguous at best, and easily subject to a myriad of judicial interpretations. As a result, banks are discouraged from monitoring their debtor's disposal practices and are effectively precluded from encouraging the exercise of safe disposal practices out of the fear of incurring liability.¹¹³

III. LENDER LIABILITY IN *UNITED STATES V. FLEET FACTORS*

The issue of lender liability was most recently addressed in *United States v. Fleet Factors Corp.*¹¹⁴ In *Fleet Factors*, the court extended the principle enunciated in the *Mirabile* case.¹¹⁵ In 1976, Fleet Factors Corporation (Fleet) entered into an agreement with the Swainsboro Print Works (SPW) in which Fleet agreed to advance funds against the assignment of SPW's accounts receivable.¹¹⁶ In 1979, SPW filed for bankruptcy, but the agreement between

at 20,994, 20,996 (E.D. Pa. 1985) (emphasis added). The court eventually dismissed liability as to American Bank under § 9601(20)(A) because its actions were "plainly" taken to protect the bank's security interest in the property. *Id.*

108. *Id.* at 20,995-96.

109. *Id.* The court explained "were it not for the [Section 9601(20)(A) security exemption], the definition [of owner] would be a hopeless tautology." *Id.*

110. See *United States v. Fleet Factors*, 901 F. 2d 1550 (11th Cir. 1990); see *infra* notes 114-29 and accompanying text.

111. One of Mellon's officers was always present at the site. The officer determined the order in which orders were filled, he monitored the cash accounts and established a reporting system between the company and the bank.

112. See Barr, *supra* note 32, at 979.

113. See YALE Note, *supra* note 2, at 929 n.27

114. 901 F.2d 1550 (11th Cir. 1990).

115. *United States v. Mirabile*, 15 ENVTL. L. REP. (Envtl. L. Inst.) 20,994. See *supra* notes 100-13 and accompanying text.

116. As collateral for the cash advances, Fleet obtained a lien on SPW's textile facility and all of its equipment, fixtures, and inventory. *Fleet Factors*, 901 F.2d at 1552.

Fleet and SPW continued to operate with the court's approval.¹¹⁷ Shortly thereafter, SPW ceased operations and began to liquidate its inventory, while Fleet continued to collect on the value of the outstanding accounts.¹¹⁸ In May of 1982, Fleet foreclosed on the remainder of SPW's inventory and equipment.¹¹⁹ In 1984, the EPA surveyed the site, found contamination, and subsequently instituted an action against Fleet for the recovery of response costs after the site was decontaminated.¹²⁰ Fleet claimed protection under the secured creditor exemption.¹²¹

In *Fleet Factors*, the Eleventh Circuit Court of Appeals stated that the critical issue was whether the lender (Fleet) participated in the management of the facility to such an extent as to trigger CERCLA liability.¹²² Fleet asked the court to delineate the distinction between permissible and impermissible management participation as the court in *Mirabile* attempted to do.¹²³

The court stated that the *Mirabile* construction of the secured creditor exemption was too permissive toward lenders.¹²⁴ The court reasoned that in order to achieve the "overwhelmingly remedial" goals of CERCLA, ambiguous statutory terms should be construed to favor liability.¹²⁵ Therefore, the court determined that a lender needs only to be "affiliated" with the debtor's

117. In 1981, Fleet ceased advancing funds to SPW when the amount of SPW's debts exceeded the value of their accounts receivable. *Id.*

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

119. In December of 1981, a court adjudicated SPW a bankrupt, and a trustee assumed title to the facility. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1553 (11th Cir. 1990). Fleet subsequently foreclosed and contracted with Baldwin Industrial Liquidators to auction off the remaining inventory and equipment. *Id.* In August of 1982 Fleet contracted with Nix Riggers, who apparently had a free hand and were to remove the unsold equipment and material and leave the premises "broom clean." *Id.*

120. On January 20, 1984, the "EPA" surveyed the site and found 700 fifty-five gallon drums containing toxic chemicals and forty-four truckloads of asbestos containing material. 901 F.2d at 1552. The EPA incurred roughly \$400,000 in response costs to remediate the SPW facility. *Id.* In 1987, the title to the facility was conveyed to Emanuel County, Georgia, due to SPW's failure to pay state and county taxes. *Id.*

121. The district court refused to dismiss the case on Fleet's motion for summary judgment. *United States v. Fleet Factors Corp.*, 724 F. Supp. 955, 958 (S.D. Ga. 1988). The lower court found that genuine issues of fact existed as to whether Fleet could be found liable as a third party because Fleet's agents may have been responsible for releasing asbestos during the liquidation and removal of SPW's assets. *Id.*

122. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1556 (11th Cir. 1990). The secured creditor exemption is contained in 42 U.S.C.A. § 9601(20)(A) (West 1983).

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

124. *Id.* at 1557.

125. *Id.* See *Maryland Bank & Trust Corp.*, 632 F. Supp. 573, 579 (D. Md. 1986). See also HASTINGS Note, *supra* note 2, at 1285-86.

management.¹²⁶ The court then declared that “a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it *could* affect hazardous waste disposal decisions if it so chose.”¹²⁷ The *Fleet Factors* holding has established a lower threshold of lender liability because virtually all lenders “could” affect hazardous waste disposal practices if they so chose.¹²⁸ Consequently, lenders find it virtually impossible to claim protection under CERCLA’s secured creditor exemption.¹²⁹

IV. CURRENT LENDER LIABILITY UNDER CERCLA

A. *The Chilling Effect on Lenders*

The expanding theories of lender liability which began with *Maryland Bank*, continued in *Mirabile*, and culminated in *Fleet Factors*, has led to the establishment of three categories of lenders subject to liability despite the statutory exemption for secured creditors.¹³⁰ First, under *Maryland Bank*, a lender that forecloses on contaminated property is liable as an owner.¹³¹ Second, under *Mirabile*, a lender “affiliated” with a debtor’s management is liable as an operator.¹³² Finally, under *Fleet Factors* a lender loses the protection of the secured creditor exemption if that lender “could have exercised control” over a facility if it so chose.¹³³

The expansion of lender liability in the wake of *Fleet Factors* has “sent

126. *Fleet Factors*, 901 F.2d at 1558 n.11. The court justified its “affiliation” approach to lender management participation by citing a passage from CERCLA’s legislative history. *Id.* Referring to the addition of the secured creditor exemption to the bill that was finally passed, one sponsor stated the following:

[T]his change is necessary because the original definition inadvertently subjected those who hold title to a . . . facility, but do not participate in the management or operation and are not otherwise affiliated with the person leasing or operating the . . . facility, to the liability provisions of the bill.

Id. (remarks of Rep. Harsha).

127. *Id.* at 1557 (emphasis added).

128. See 5 TOXICS L. REP. (BNA) 1, 23-24 (1990).

129. *Id.*

130. *Id.* at 25.

131. *United States v. Maryland Bank & Trust Corp.*, 632 F. Supp. 573 (D. Md. 1986). See *supra* notes 80-96 and accompanying text.

132. *United States v. Mirabile*, 15 ENVTL. L. REP. (Envl. L. Inst.) 20,994 (E.D. Pa. 1985). See *supra* notes 97-113 and accompanying text.

133. *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990). See *supra* notes 114-29 and accompanying text. See also 21 ENV’T REP. (BNA) 305, 308 (June 8, 1990) (*The Fleet Factors* decision effectively creates a new category of responsible parties.)

tremors through the financial community."¹³⁴ Many lenders feel that the *Fleet Factors* decision has eroded the secured creditor exemption to the point of creating a chilling effect on commercial lending transactions.¹³⁵ As a result, lenders will simply avoid extending credit to businesses that use hazardous materials or that are located in areas of possible contamination.¹³⁶ This chilling effect makes it more difficult for small businesses to obtain and afford credit, and has spurred a drive in Congress to expand the availability of the secured creditor exemption.¹³⁷

B. The Need for Workable Guidelines

The low threshold of lender liability forces lenders into an impossible situation. On one hand, lenders may be liable for the cost of cleanup operations if they foreclose on a borrower's contaminated property,¹³⁸ or lenders may be liable for cleanup costs if they actually influence or merely have the potential to influence a debtor's day-to-day activities.¹³⁹ On the other hand, in an attempt to avoid CERCLA liability, lenders must refrain from protecting their investment through foreclosure or must abstain from giving financial or operational advice while they watch their investment disappear in the face of a

134. 5 TOXICS L. REP. (BNA) 1, 75 (1990). The mere threat of litigation, regardless of the actual outcome, deters lenders from entering loan agreements. *Id.* The threat of litigation also deters creditors from taking normal actions to protect their investment, such as instituting foreclosure or providing financial advice. *Id.* However, the EPA has proposed new regulations ostensibly to limit the effect of *Fleet Factors*. See Lender Liability Under CERCLA, 56 Fed. Reg. 28798 (1991) (to be codified at 40 C.F.R. pt. 300) (proposed June 24, 1991).

But see Amy T. Phillips, *EPA's Lender Liability Rule: A Sweetheart Deal for Lenders?*, 22 ENV'T REP. (BNA) 1158 (1991) (One category of special interest after another has sought to justify its special need to escape Superfund liability).

135. 5 TOXICS L. REP. (BNA) at 74.

136. *Id.* The types of small businesses potentially affected by CERCLA liability, and thus potentially affected by tightened credit, include auto paint or repair shops, dry cleaners, farms, or "any business that has some sort of tank in the ground." *Id.*

137. "The *Fleet Factors* decision is a troublesome indicator of why there has to be a legislative solution." 21 ENV'T REP. (BNA) 308 (1990) (Statement of Thomas J. Greco, Associate General Counsel of the American Banking Association). The drive towards reform seems to be gaining momentum in Congress. As of June of 1990, one proposed reform bill already had 118 co-sponsors in the House of Representatives. See 5 TOXICS L. REP. at 75. Furthermore, sponsors anticipate the support of at least 100 more co-sponsors in the near future. *Id.* However, the pending CERCLA revisions merely expand the category of parties eligible for the secured creditor exemption without clarifying the allowable level of participation. See *id.*

138. "In other words, a simple \$50,000 loan may saddle a lender with \$5,000,000 in cleanup costs for a problem that it did nothing to create". 5 TOXICS L. REP. (BNA) 1, 75 (1990) (Remarks of Rep. LaFalce).

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

debtor's looming bankruptcy.¹⁴⁰

However, any solution designed to safeguard lenders must be fashioned so as not to undercut the long term goals of CERCLA. In other words, any revisions to the secured creditor exemption should not simply create an "insurance policy" for lenders.¹⁴¹ If the availability of the secured creditor exemption is overly liberalized, creditors will lose any incentive to be part of the solution and instead will aggravate the problem by choosing the safe haven of ignorance. Lenders should not be allowed to manage a debtor's activities, and profit therefrom, under the protection of an overly broad exemption.

The long term goals of CERCLA are best achieved when prudent lenders independently act to identify problems at an early stage.¹⁴² By being involved with their creditors, lenders can encourage environmental diligence within the private sector. For example, lenders could write environmental compliance and remediation clauses into commercial loan agreements prior to closing.¹⁴³ Further, lenders can exercise greater scrutiny concerning the nature of the borrower's business operations.¹⁴⁴ Finally, lenders can and should require environmental audits of both the nature of a prospective borrower's business activities and the past and present operations carried out on the property used as security for the loan.¹⁴⁵ However, under the current interpretation of the second creditor exemption, the threat of litigation and the fear of lender liability deters lenders from freely engaging in such environmentally conscious business activities.¹⁴⁶

Lenders must be allowed to exercise financial prudence to protect the quality of their investments without the threat of liability, or lenders will cease to lend to clients who face some degree of environmental risk.¹⁴⁷ Furthermore, when the lack of predictable liability standards renders creditors

140. See Steven B. Bass, Comment, *The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment*, 41 U. MIAMI L. REV. 879, 892 (1987).

141. See Amy T. Phillips, *EPA's Lender Liability Rule: A Sweetheart Deal for Lenders?* 22 ENV'T REP. (BNA) 1158 (1991) (The bankers now ask us to let them forget about the potential environmental problems they have helped bankroll, at least until they can pass them off to another owner or until the tax-funded superfund picks up the tab.)

142. See 5 TOXICS L. REP. (BNA) 1, 25 (1990).

143. *Id.* See also YALE Note, *supra* note 2, at 929.

144. YALE Note, *supra* note 2, at 930.

145. (This is the same logic as applies to the "innocent purchaser" defense contained in section 9601(35)(A)). See 42 U.S.C.A. § 9601(35)(A). See also *supra* notes 30 and 80-96 and accompanying text.

146. YALE note, *supra* note 2, at 930.

147. See generally JAMES P. O'BRIEN, ENVIRONMENTAL DUE DILIGENCE: THE COMPLETE RESOURCE GUIDE FOR REAL ESTATE LENDERS, BUYERS, SELLERS, AND ATTORNEYS (BNA 1989).

unsure as to whether their advice to management encouraging environmental diligence will be perceived as management participation, that lender will prefer to remain ignorant as to the nature of a debtor's activities.¹⁴⁸ In sum, the actual or perceived hazard of incurring CERCLA liability effectively precludes lenders from acting independently to realize CERCLA's long term goals by reducing the capacity of lenders to prudently monitor their investments and by decreasing their incentive to encourage environmental diligence.¹⁴⁹

V. THE SECURED CREDITOR EXEMPTION: A REFINED DEFINITION

The chilling effect on the commercial lending industry can be minimized by the development of workable guidelines governing the allowable level of lender management participation. This can easily be accomplished in the context of CERCLA's present liability scheme. The amendment proposed in this Note sets forth a clear guideline for lenders and the courts concerning the CERCLA secured creditor exemption.

Clear guidelines can easily be established by refining the present definition of the secured creditor exemption contained in section 9601(20)(A), which defines "owner or operator". The last sentence of section 9601(20)(A) containing the exclusionary language of the existing secured creditor exemption currently reads as follows:

Such term [referring to "owner or operator"] does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.¹⁵⁰

The proposed amendment to section 9601(20)(A) contains two prongs. The first prong of the amendment contains language designed to clarify the secured creditor exemption by clarifying the allowable level of lender participation. The second prong consists of adding an affirmative duty designed to foster environmentally diligent lending practices by lending institutions. Both prongs can be accomplished by adding the following language to section 9601(20)(A):

Any person who holds an indicia of ownership in a vessel or facility primarily to protect a security interest therein, will be deemed not to have participated in the management of a vessel or facility if the extent

148. In the face of financial difficulties, environmental compliance usually takes a back seat to more pressing short term economic considerations. See Frost, *supra* note 42, at 957.

149. *Id.* (In the course of an attempt to help the borrower out of financial difficulty nothing under CERCLA assures that loan proceeds are directed towards environmental compliance.)

150. 42 U.S.C. § 9601(20)(A).

of that person's involvement, exclusive of the initial negotiation of the security interest, consists of no more than the appointment of a management team, not to be comprised of that person's employees or agents. Furthermore, such a person must complete an environmental audit prior to the execution of the security agreement.

Under the expanded and clarified definition of lender participation, secured creditors are no longer forced to stand idly by as financially troubled and environmentally questionable borrowers slide into insolvency. Instead, a secured creditor may act to protect its investment through the appointment of a management team.¹⁵¹ Through the operation of the management team as defined above, the lender is separated from the actual management of the borrower's operations by a "chinese wall."¹⁵² This effectively precludes actual or potential management participation by the lender, while still allowing the management team, analogous to a bankruptcy trustee, to safeguard the lender's financial interests by offering financial guidance.¹⁵³

The goals of CERCLA are further served by requiring lenders to inquire into the nature of the borrower's business activities and the past and present uses of the property used as collateral. The "environmental audit" requirement thus works to ensure that lenders take an affirmative role to reveal past problems and to prevent the financing of future environmental nightmares.¹⁵⁴ Even though

151. The powers of the management team could be analogous to the powers of a trustee in bankruptcy, although not quite as extensive. The exact parameters of such an "environmental trustee" would have to be worked out by Congress.

152. See, e.g., Model Rules of Professional Conduct Rule 1.11 (a)(1), reprinted in MURRAY L. SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION* (2d ed. 1985).

153. The powers of the management team, although analogous to the powers of a trustee in bankruptcy, would not be quite so extensive. The Federal Bankruptcy laws empower a trustee in bankruptcy to buy, sell or lease property and/or equipment, and also give the trustee the power to determine whether to continue a bankrupt's business operations pending the outcome of a liquidation or reorganization. See 11 U.S.C. §§ 363, 1104-08 (West 1990).

The powers of the management team in the revised CERCLA context should, like the parameters of the security agreement itself, be negotiated ahead of time.

154. The precise parameters of the environmental due diligence standard is beyond the scope of this Note. However, there is presently underway an effort by the American Society of Testing and Materials (ASTM) to establish these standards. The ASTM presently has a subcommittee on Environmental Assessments in Commercial Real Estate Transactions. See Bruce P. Howard & Melissa K. Gerard, *Lender Liability Under CERCLA: Sorting Out the Mixed Signals*, 64 S. CAL. L. REV. 1187, 1226 (1991). Presumably, the standards will encompass a wide variety of inquiries based on the experiential backlog of commercial real estate representatives, members of the lending industry, environmentalists and public interest groups, and engineers. *Id.*

The standards for environmental audits should also be applied to establish the minimum inquiry required in order to entitle a party to the protection of the innocent purchaser defense contained in § 9601(35)(A). See *supra* note 30 and accompanying text.

The ASTM is a private organization that establishes voluntary standards for an unbelievably

this affirmative role will entail increased transaction costs, given the amount of potential CERCLA liability at stake, this *quid pro quo* should be seen as reasonable by lenders and should clearly represent the desirable and prudent course of action.

VI. CONCLUSION

Despite CERCLA's secured creditor exemption, banks, financial institutions, and other secured creditors have been subjected to gradually increasing CERCLA liability. Unfortunately, the courts' expansion of lender liability under CERCLA has not been accompanied by a clear articulation of predictable standards by which lenders can guide their future actions. The resulting fear of litigation, whether real or perceived, has created a chilling effect on the commercial lending industry. This chilling effect can be minimized by the development of workable guidelines governing the allowable level of lender activity under CERCLA's present liability scheme. However, Congress must adopt an approach that does not allow indifferent and unenlightened lenders to completely avoid CERCLA liability. The proposed amendment contained in this Note provides workable guidelines for lenders that allow them to monitor their investments, if and only if those lenders are willing to act affirmatively to foster private efforts to achieve CERCLA's long term goals.

DAVID C. READ

diverse array of engineering testing procedures, as well as standards for business and industry.

