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Rochstein: Rethinking the Joint and Several Liability of Lenders Under CERCL

RETHINKING THE JOINT AND SEVERAL LIABILITY OF LENDERS UNDER CERCLA

I. INTRODUCTION

Industry pollutes.¹ One consequence of an expanding economy is the industrial production of hazardous wastes.² Out of sight and out of mind; industry polluted without any regard for the dangers to human health and the environment.³ In 1978, however, the hazardous waste problem began to attract massive public attention with the Love Canal disaster.⁴

1. BERNARD J. NEBEL, ENVIRONMENTAL SCIENCE 314 (1981). From a broad point of view, industry encompasses all human endeavors to provide a better material life. Every level of industry - obtaining raw materials, manufacturing, using products, and ultimately disposing of products - produces wastes that are discharged into the environment. The whole of the industrial society that desires, produces, and uses products is to blame for the creation of industrial pollution. *Id.*

2. Wastes do not accumulate to unmanageable levels if the production of pollutants is balanced by dilution and assimilation. The problem, however, is not that natural processes do not work, but rather, that the critical balance is exceeded. This comes about in three basic ways: (1) overproduction of wastes; (2) introduction of unique chemicals; and (3) reduction of assimilative capacity. NEBEL, *supra* note 1, at 315.

3. The casual attitude toward pollution is underlaid by one or more of the following assumptions:

(1) *Threshold level*: It is assumed that below a certain level of concentration, pollutants will have no ill effect.

(2) *Dilution*: It is assumed that pollutants will mix freely in air and/or water and will thus be diluted below threshold levels.

(3) *Assimilation*: It is assumed that wastes will re-enter the natural biological or geochemical cycles of the earth.

(4) *Immobility of solid wastes*: It is assumed that solid wastes will stay where they are put.

(5) *Accidents will not happen*: In all our activities we tend to assume that accidents (oil spills, chemical leaks) will not occur.

NEBEL, *supra* note 1, at 314.

4. Peter N. Lavalette, *The Security Interest Exemption Under CERCLA: Timely Relief from the EPA*, 24 U. TOL. L. REV. 473, 476 (1993). The Superfund was high on the Carter Administration agenda after the Love Canal disaster in New York State. Brent Nicholson & Todd Zuiderhoek, *The Lender Liability Dilemma: Fleet Factors History and Aftermath*, 38 S.D. L. REV. 705 (1990). Massive leaks of toxic wastes one-quarter mile outside Niagara Falls were discovered in 1978, forcing 236 families to abandon their homes. In the Mid-1890s, Love Canal was started as a navigational canal linking Lake Ontario with the Niagara River, but the work was never finished. *Id.* In the 1930s, it was used as an industrial dump site. Owner Hooker Chemical sold the parcel to the county in 1953, and, shortly thereafter, homes and a school were built over the site. *Id.* Twenty years later, odors were noticed in basements, remnants of chemical were found, and air monitoring tests revealed heavy organic vapor concentrations. The EPA had no authority to act at the time and could only offer technical advice. *Id.* See also Roger J. Marzulla & Brett G. Kappel,

Hazardous waste is the result of the use and production of toxic chemicals by industry.⁵ Chemicals produced by industry are often lethal and must be stored and disposed of with the utmost care.⁶ Unfortunately, negligent storage and disposal practices within the industrial community led to severe contamination through "leaching," the process in which rainfall combines with leaking hazardous waste and migrates into groundwater supplies, lakes, and rivers.⁷

To facilitate the cleanup of hazardous waste sites in the United States, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act⁸ (CERCLA) in 1980. CERCLA empowered the Environmental Protection Agency (EPA) to clean up inactive hazardous waste sites and to recover the costs from responsible parties.⁹ A site is usually abandoned,¹⁰ however, because the business that owns the property normally

Lender Liability Under the Comprehensive Environmental Response, Compensation and Liability Act, 41 S.C. L. REV. 705 (1990); Nicolas M. Kublicki, Comment, *Shockwave: Lender Liability Under CERCLA After United States v. Fleet Factors Corporation*, 18 PEPP. L. REV. 513, 518 (1991).

5. Hazardous waste is any discarded material that may pose a substantial threat or potential hazard to human health or the environment. G. TYLER MILLER, JR., ENVIRONMENTAL SCIENCE 378 (2d ed. 1988).

6. About 96% of hazardous waste is generated and either stored or treated on site by large companies - chemical producers, petroleum refineries, and manufacturers. *Id.* at 380.

7. Historically, industrial by products such as ethylene, sulfur-dioxide, and carbon monoxide were present in nature and could be assimilated into the environment. However, many of today's industrial by products do not occur naturally and cannot be similarly assimilated. See NEBEL, *supra* note 1, at 316. These by products pose a threat to human health by leaching into groundwater supplies. Because rainwater eventually ends up in groundwater supplies, the process of leaching often pollutes water supplies near hazardous waste sites where chemical waste drums have leaked. See *id.* at 165, 238.

Chemicals dumped in the environment are often diluted and consequently pose a lesser risk to humans and other living organisms. *Id.* Sometimes, however, chemicals appear in organisms at higher levels of concentration. *Id.* This process is called "bioaccumulation" or "biomagnification." One example of biomagnification occurred when the pesticide Dichlorodiphenyltrichloroethane (DDT) that was used commonly in the 1960s, was ingested by insects that were consumed by certain animals. *Id.* Scientists believed that DDT would be diluted in the environment. *Id.* Instead, the biomagnification in certain animals caused severe reproductive failures and deaths, especially in birds that consumed contaminated insects. *Id.* The biomagnification of DDT was responsible for the near extinction of the American bald eagle. See *id.* at 342-43.

8. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 95 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9675 (1983 & Supp. 1993)), amended by Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1988).

9. "Responsible parties" is a broad term that includes many different individuals and companies. See *infra* note 44 and accompanying text.

10. CERCLA was enacted in order to establish a mechanism to respond to problems and costs associated with abandoned and inactive hazardous waste disposal sites. H.R. REP. NO. 1016 (part I & II), 96th Cong., 2d Sess. 22 (1980), reprinted in 1980 U.S.C.A.N. 6119, 6125.

goes bankrupt,¹¹ and in most instances lacks the funds necessary to reimburse the EPA for its costs.¹² When the business cannot reimburse the EPA, the government may attempt to collect its cleanup costs from other deep pocket sources, such as banks.¹³ Banks have been caught in the liability net of CERCLA because they loan money to polluting businesses that are secured by an interest in the business facility.¹⁴

When CERCLA was promulgated, Congress included an exemption, commonly called the security interest exemption,¹⁵ that excluded from liability those persons "who, without participating in the management of a facility, hold indicia of ownership¹⁶ primarily to protect a security interest."¹⁷ The security interest exemption is at the center of the environmental lender liability controversy between the government and lending institutions.¹⁸

11. *In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990) (Bergsoe went into involuntary bankruptcy); *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) (the borrower filed for chapter 11 bankruptcy); *Guidice v. BFG Electroplating & Mfg.*, 732 F. Supp. 556 (W.D. Pa. 1989) (the borrower defaulted on the loan so the bank foreclosed); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986) (the borrower failed to make payments on the loan so the bank instituted a foreclosure action); *United States v. Mirabile*, 15 Env'tl. L. Rep. 20,994 (E.D. Pa. 1985) (the borrower filed a petition for bankruptcy); *In re T.P. Long Chemical Inc.*, 45 B.R. 278, 280 (Bankr. N.D. Ohio 1985) (the borrower filed for reorganization under chapter 11 of the bankruptcy code).

12. The cost of cleaning up a hazardous waste site often exceeds the amount that the lender invested against the security of the property. Ann M. Burkhart, *Lender/Owners and CERCLA: Title and Liability*, 25 HARV. J. ON LEGIS. 317, 323 (1988). Consequently, lenders often face the possibility of a much greater economic burden than was originally anticipated when they made their loans. *Id.*

13. Kublicki, *supra* note 4, at 513. Banks have been hard hit by cleanup liability under CERCLA because the government sees their large assets and capital reserves as easy targets for recovering cleanup costs. *Id.* at 513 n.5.

14. *Id.* at 513.

15. See National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (1992) (codified at 40 C.F.R. pts. 300.1100, 300.1105 (1992)) (referring to the statutory elements that protect secured creditors as the "security interest exemption"); Brian J. McGaughan, "CERCLAing" the Field of Lender Liability: Clarifying the Security Interest Exemption, 4 VILL. ENVTL. L.J. 89 (1993) (questioning when a lender should lose the "security interest exemption" and when the lender should be considered an owner under CERCLA).

16. "Indicia" is defined as "[s]igns; indications." "Circumstances which point to the existence of a given fact as probable, but not certain." BLACK'S LAW DICTIONARY 772 (6th ed. 1990). "Indicia of ownership" refers to lenders who have loaned funds to a business and then take technical title to the property in order to secure the loan. See 40 C.F.R. pt. 300.1100(a) (1992).

17. See *infra* notes 63-69 and accompanying text. This phrase is contained within CERCLA's definition of "owner or operator." 42 U.S.C.A. § 9601(20)(A) (West 1993) [hereinafter the "security interest exemption"]

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

CERCLA has been interpreted by the courts as imposing joint and several liability.¹⁹ If a court finds a lender liable for costs the EPA incurred when it cleaned up a contaminated hazardous waste facility, the lender could potentially bear the responsibility for the entire cost of the cleanup.²⁰ This interpretation, as establishing joint and several liability, means that any single party may be sued for the entire cost of cleanup whether or not other parties are joined in the suit.²¹ When the polluter has defaulted on its loan, the lender may be the only defendant left with the financial ability to pay for the cleanup.²² Moreover, an expansive interpretation of the scope of liable parties under CERCLA could implicate innocent lenders whose seemingly innocent activities lead to a finding of liability for harm they never caused.

This Note will examine the lender liability dilemma in relation to CERCLA's imposition of joint and several liability. The lender liability controversy evolved through an inconsistent body of case law²³ and became a full blown crisis when the Eleventh Circuit handed down a decision that potentially narrowed the protection that CERCLA affords to lenders.²⁴ The EPA responded to the problem and issued an interpretive rule defining CERCLA's security interest exemption.²⁵ The rule provided a basic framework for banks to follow to avoid liability but failed to address the root of the problem: the potential for courts to impose joint and several liability. Although no case concerning lender liability has ever addressed the issue in light of CERCLA's imposition of joint and several liability, this Note will show why courts should consider the two issues together. Lenders are in a unique position because they typically become involved in facilities containing hazardous wastes after the owner goes bankrupt. Joint and several liability may impose on lenders

Md. 1986); *United States v. Mirabile*, 15 *Env'tl. L. Rep.* 20,994 (E.D. Pa. 1985); *In re T.P. Long Chem. Inc.*, 45 B.R. 278, 280 (Bankr. N.D. Ohio 1985).

19. *Bell Petroleum Servs. Inc. v. Sequa Corp.*, 3 F.3d 889, 895 (5th Cir. 1993); *Hastings Bldg. Prod. v. National Aluminum Corp.*, 1991 WL 350042, at *9 (W.D. Mich. May 13, 1991); *Kelly v. Thomas Solvent Co.*, 790 F. Supp. 710, 717 (W.D. Mich. 1990); *O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732 n.3 (8th Cir. 1986); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983).

20. *Nicholson & Zuiderhoek*, *supra* note 4, at 40.

21. *Id.*

22. *Id.*; *See also, e.g.*, *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986) (the court held the lender liable for over \$400,000 in cleanup costs while the loan to the polluting borrower was only \$335,000). *See also* Michael I. Greenberg & David M. Shaw, *To Lend or Not to Lend - That Should Not Be the Question: The Uncertainties of Lender Liability under CERCLA*, 41 *DUKE L.J.* 1211, 1211 n.3 (1992).

23. *See infra* notes 144-249 and accompanying text.

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

25. 57 *Fed. Reg.* 18,344 (1992) (codified at 40 C.F.R. pts. 300.1100, 300.1105 (1992)).

a disproportionate burden for the reimbursement of costs incurred by the EPA because the bankrupt owner no longer has the resources for such reimbursement. This Note will argue that courts should not apply joint and several liability to lenders in certain situations.²⁶

Section II of this Note will provide an overview of the relevant statutory provisions contained in CERCLA.²⁷ The legislative history will be discussed to show how Congress failed to clearly direct the courts as to the meaning of the security interest exemption.²⁸ Section III will address how the federal courts and Congress have dealt with joint and several liability under CERCLA and will show why lenders are exposed to unique problems as a result.²⁹ Section IV will proceed with a discussion of the inconsistent federal case law regarding lender liability and will show why the EPA addressed the issue with its own interpretation of the security interest exemption.³⁰ Section V will provide an analysis of the EPA's lender liability rule and will show why the EPA or Congress should address the issue of joint and several liability.³¹ Finally, Section VI will propose an alternative method of liability allocation for courts to apply to lenders that fail to qualify for the security interest exemption.³²

II. OVERVIEW OF CERCLA

A. Relevant Statutory Provisions

CERCLA is better known as the Superfund Law.³³ Congress originally allocated \$1.6 billion in 1980³⁴ to finance the cleanup of hazardous waste sites.

26. *But see* Burkhardt, *supra* note 12, at 382-83. The joint and several liability standard provides important advantages to the EPA. *Id.* First, joint and several liability significantly simplifies the EPA's pretrial investigations and its burden of establishing liability during the trial. *Id.* Rather than finding each potential defendant, the EPA can choose one or more defendants based on accessibility and ability to satisfy a judgment. *Id.*

Second, joint and several liability simplifies the EPA's burden of proving causation. In the absence of joint and several liability, the EPA could recover damages from a defendant only to the extent that the EPA could prove the actual amount of damage that a particular defendant caused. *Id.* This burden of proof would be impossible to satisfy. *Id.*

Finally, joint and several liability enhances the EPA's ability to recover all of its response costs. *Id.* In the absence of joint and several liability, the EPA could recover the full amount of its response costs only if all responsible parties could be located and were sufficiently solvent to pay their portion of the response costs. *Id.*

27. *See infra* notes 33-69 and accompanying text.

28. *See infra* notes 70-83 and accompanying text.

29. *See infra* notes 84-134 and accompanying text.

30. *See infra* notes 135-249 and accompanying text.

31. *See infra* notes 250-315 and accompanying text.

32. *See infra* notes 316-52 and accompanying text.

33. Lavalette, *supra* note 4, at 474.

34. Nicholson & Zuiderhoek, *supra* note 4, at 26.

In 1986, CERCLA was amended and an additional \$8.5 billion was authorized for Superfund use.³⁵ Finally, in late 1990, an additional \$5.1 billion was granted to the fund for the period from October 1, 1991, to September 30, 1994.³⁶ These funds were earmarked for the removal and remediation (cleanup) of hazardous waste from sites designated by the EPA.³⁷ The EPA has prioritized hazardous waste sites on a National Priorities List that contains the sites that present the most serious threats to health and the environment.³⁸

When passing CERCLA, Congress had two goals. First, Congress wanted to allow the federal government to address hazardous waste problems promptly.³⁹ To do so, the Superfund was created to identify and remediate sites containing hazardous waste.⁴⁰ Second, Congress wanted, to the extent possible, to impose the cost of remediation on the responsible parties.⁴¹ In furtherance of the second goal, CERCLA authorizes the EPA to: 1) order a responsible party to clean up the site and impose fines of up to \$25,000 per day for non-compliance;⁴² 2) seek an injunction to compel a responsible party to clean up the site;⁴³ and 3) clean up the site itself using Superfund money and

35. *Id.* The 1986 increase was implemented through the Superfund Amendments and Reauthorization Act (SARA) to allow for a more aggressive effort to combat the waste cleanup problem. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1988).

36. *Id.*

37. *Id.*

38. *Id.* The sites have been ranked from most to least serious and from this list, the EPA determines the order in which the sites will be remediated.

39. 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, 925 (1990) (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)).

40. See *supra* notes 33-38 and accompanying text.

41. Barr, *supra* note 39, at 925 (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989)). "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created." *Id.* (quoting *Reilly Tar*, 546 F. Supp. at 1112). See also *infra* note 44 and accompanying text.

42. 42 U.S.C. § 9606(b) (1988). 42 U.S.C. § 9606(b)(1) provides in part:

Any person who wilfully violates, or fails or refuses to comply with, any order of the President . . . may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than \$5,000 for each day in which such violation occurs or such failure to comply continues.

Id.

43. 42 U.S.C. § 9606(a) (1988). 42 U.S.C. § 9606(a) provides in part:

[W]hen the president determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat

Id.

to seek recovery from responsible parties.⁴⁴

Although the statute does not directly refer to the type of liability imposed on responsible parties, the courts have interpreted CERCLA as providing for both strict liability and joint and several liability.⁴⁵ In other words, after the EPA has incurred cleanup costs at a hazardous waste site, those parties deemed liable under CERCLA must pay for the entire cost of the cleanup.⁴⁶ Liability is imposed regardless of culpability, fault, or intent, and it is retroactive in nature.⁴⁷

Under § 9607 of CERCLA, a party is deemed potentially responsible if the party is: a past or present owner or operator⁴⁸ of a facility where hazardous wastes have contaminated the surrounding environment; a generator of hazardous wastes that were deposited at the site;⁴⁹ or a transporter of hazardous

44. 42 U.S.C.A. § 9607(a) (West Supp. 1994). 42 U.S.C. § 9607(a) provides in part: 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 . . . 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,
- (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 sites 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, shall be liable for-

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

45. *United States v. Alcan Aluminum Corp.*, 755 F. Supp. 531, 535 (N.D.N.Y. 1991); *United States v. Western Processing Co., Inc.*, 734 F. Supp. 930, 942 (W.D. Wash. 1990); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983).

46. *See supra* notes 19-22 and accompanying text.

47. *See United States v. Monsanto Co.*, 858 F.2d 160, 173 (4th Cir. 1988) (holding that CERCLA's retroactivity does not violate due process), *cert. denied*, 490 U.S. 1106 (1989).

48. 42 U.S.C. § 9607(a)(1) & (2) (1988).

49. *Id.* § 9607(a)(3) (1988).

wastes to the site designated for remediation.⁵⁰ If a party is found liable under one of the preceding categories, the party will be liable for: cleanup costs incurred by the government;⁵¹ costs incurred by non-government private citizens for the cleanup of hazardous wastes;⁵² damages to natural resources;⁵³ and costs of any necessary health assessments.⁵⁴

CERCLA enumerates three defenses that potentially responsible parties (PRPs) can use to avoid liability.⁵⁵ The PRP must establish by a preponderance of the evidence that the release of hazardous substances was caused solely by an act of God,⁵⁶ an act of war,⁵⁷ or was the sole act or omission of a third party who had no contractual relationship with the party.⁵⁸ Additionally, the third party defense is available only if the PRP exercised due care with respect to the hazardous substance concerned, and the PRP took precautions against the foreseeable acts or omissions of the third party.⁵⁹

In 1986, Congress created a new defense to account for innocent landowners by redefining the term "contractual relationship."⁶⁰ The innocent landowner defense is available to purchasers of property who neither knew nor had any reason to know that hazardous substances were disposed on the

50. *Id.* § 9607(a)(4) (1988).

51. 42 U.S.C.A. § 9607(a)(4)(A) (West Supp. 1994). The EPA's cleanup costs include the cost of removal and remedial action.

"Removal" is generally a short-term remedy undertaken when the contamination is first discovered. It includes, but is not limited to, costs involved in physically removing the hazardous substances; disposing of the removed material; monitoring, assessing, and evaluating the risk of further contamination; and providing security fencing, alternative water supplies, and temporary housing for threatened individuals. "Remedial action" is a longer-term, more permanent remedy and includes storage, confinement, cover, cleanup, recycling, reuse, dredging, excavation, and the like.

Id. See Margaret Murphy, *The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities*, 41 BUS. LAW. 1133, 1137-38 (1986). See also 42 U.S.C. § 9601(23)-(24) (1988).

52. 42 U.S.C.A. § 9607(a)(4)(B) (West Supp. 1994).

53. *Id.* § 9607(a),(f) (West Supp. 1994).

54. *Id.* § 9607(a)(4)(D) (West Supp. 1994).

55. *Id.* § 9607(b) (West Supp. 1994).

56. *Id.* § 9607(b)(1) (West Supp. 1994).

57. 42 U.S.C.A. § 9607(b)(2) (West Supp. 1994).

58. *Id.* § 9607(b)(3) (West Supp. 1994). See Marzulla & Kappel, *supra* note 4, at 709.

59. 42 U.S.C.A. § 9607(b)(3) (West Supp. 1994).

60. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1988). In 1986, SARA modified the third party defense by defining the term "contractual relationship" to include instruments transferring title or possession to real property unless the purchaser did not know or have reason to know that hazardous substances had been disposed on the property. 42 U.S.C.A. § 9601(35)(A) (West Supp. 1994).

property.⁶¹ To invoke the innocent landowner defense, purchasers of real property must show that prior to the purchase, they made "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability."⁶²

Congress defined the term "owner or operator" in CERCLA as "any person owning or operating" a facility.⁶³ This definition provides little guidance to

61. 42 U.S.C.A. § 9601(35)(A)(i) (West Supp. 1994). Today, in order to establish the third party defense, a defendant must establish, by a preponderance of the evidence, that it: (1) exercised due care with regard to the hazardous substance; (2) took precautions against the foreseeable acts or omissions of the third party; and (3) purchased the property without knowing or having reason to know that the property was contaminated by hazardous substances. *Id.*

62. 42 U.S.C.A. § 9601(35)(B) (West Supp. 1994). In deciding whether a defendant has made an appropriate inquiry, courts are directed to consider any expertise possessed by the defendant, the purchase price of the property compared to its value if uncontaminated, reasonably ascertainable information about the property, the obviousness of the contamination at the site and the ability to detect such contamination by an appropriate inspection. *Id.*

63. See 42 U.S.C.A. § 9601(20)(A) (West Supp. 1994). 42 U.S.C. § 9601(20)(A)-(D) provides in part:

The term "owner or operator" means (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 state or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. 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.

Id. Furthermore, regardless of ownership, a person is liable, if responsible for polluting or disposing of hazardous materials, where a contractual relationship exists or where the person agrees to transport the materials. Following the definition of "owner or operator," CERCLA provides:

(B) In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control.

(C) In the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control.

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which caused or contributed to the

courts as to what actually constitutes ownership and operation.⁶⁴ The confusion regarding the definition of "owner or operator" is furthered by Congress' definition of the security interest exemption.⁶⁵ With respect to lenders, CERCLA provides, the term "[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."⁶⁶ The statute provides no guidance, however, on the meanings of two key phrases: "indicia of ownership, primarily to protect [a] security interest," and "participating in management."⁶⁷ Moreover, the scant legislative history available on the security interest exemption and the varying interpretations provided by the federal courts have caused considerable concern in the lending community.⁶⁸ Lenders are prime targets because they are easy to locate, are joined in cleanup cost recovery actions, and often have deep pockets to pay the massive judgments rendered in CERCLA liability suits.⁶⁹

B. Legislative History of the Security Interest Exemption

Because the language used on the face of the security interest exemption is vague, courts have often looked to the legislative history⁷⁰ of CERCLA for guidance.⁷¹ Unfortunately, the legislative history⁷² concerning the security

release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

42 U.S.C.A. § 9601(20) (West Supp. 1994). See *supra* notes 44, 48-54 for the pertinent parts of § 9607(a)(1)-(4).

64. 42 U.S.C. § 9607(a)(1) (1988).

65. 42 U.S.C.A. § 9601(20)(A) (West Supp. 1994).

66. *Id.*

67. Lavalette, *supra* note 4, at 478.

68. *Id.*

69. The "deep pocket theory" advocates placing the loss on those most able to bear the loss. GUIDO CALABRESI, *THE COST OF ACCIDENTS* 40 (1970). Calabresi's deep pocket theory states that losses can be reduced most by placing them on the categories of people least likely to suffer substantial economic or social dislocation as a result of bearing the costs, usually thought to be the wealthy. *Id.*

70. For a complete discussion of the legislative history of CERCLA, 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 (1982).

71. The legislative history of CERCLA is uninformative, however. The report of the House Committee on Merchant Marine and Fisheries on an earlier version of the legislation that eventually became CERCLA stated only that the provision was intended to exclude from liability "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." H.R. REP. No. 172, 96th Cong., 2d. Sess. 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6160, 6181.

interest exemption also gives little insight into the extent of liability that Congress intended to apply to lenders.⁷³ An examination of the legislative history does provide evidence, however, that Congress created the security interest exemption to accommodate the two different approaches states take in regard to the assignment of title after a mortgage is executed.⁷⁴

The majority of states follow the lien theory of title assignment, where a mortgage does not convey title to the property to the lender.⁷⁵ Instead, the mortgage creates only the right to sell the property in the case of default.⁷⁶ The approach taken by most other states,⁷⁷ the title theory, characterizes a mortgage as actually conveying the title of the mortgaged property to the lender.⁷⁸ Therefore, in title theory states, ownership vests in the lender, while in lien theory states, no title is conveyed.⁷⁹

Without the security interest exemption, all lenders in title theory states

72. CERCLA was actually the product of three bills of the 96th Congress: H.R. 7020, H.R. 85, and S. 1480. Grad, *supra* note 70, at 2.

73. See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578, 579 (D. Md. 1986). One commentator said that it is somewhat inaccurate to refer to CERCLA's legislative history. Burkhart, *supra* note 12, at 324 n.15.

Although Congress had worked on "Superfund" toxic and hazardous waste cleanup bills and on parallel oil spill bills for over three years, the actual bill which became law had virtually no legislative history at all. The bill which became law was hurriedly put together by a bipartisan leadership group of senators (with some assistance from their House counterparts), introduced, and passed by the Senate in lieu of all other pending measures on the subject. . . . It was considered on December 3, 1980, in the closing days of the lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments. Faced with a complicated bill on a take-it-or-leave-it basis, the House took it, groaning all the way.

Id. (quoting Grad, *supra* note 70, at 1) (footnote omitted).

74. See Burkhart, *supra* note 12, at 338. Although the distinction between title and indicia of ownership is technical, an examination of 42 U.S.C. § 9601(20)(A) reveals that Congress intended to draw this distinction. *Id.* The first sentence of the "owner or operator" distinction applies to persons "owning" or who "owned" the affected property, when the property has been abandoned, whereas the security interest exemption applies to persons who hold "indicia of ownership." *Id.* A reference to holding indicia of ownership indicates that such ownership is not ownership in the usual sense but is given to serve another purpose, to secure a loan. *Id.* The logical conclusion is that the security interest exemption applies only to holders of security interests and not to persons who own property. *Id.* at 339.

75. Burkhart, *supra* note 12, at 338 (citing Ann M. Burkhart, *Freeing Mortgages of Merger*, 40 VAND. L. REV. 283, 327 (1987)).

76. Burkhart, *supra* note 12, at 338 (footnote omitted).

77. Alabama, Georgia, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, and Pennsylvania describe a mortgage as conveying title to the mortgage. See Burkhart, *supra* note 12, at 322-24.

78. See Burkhart, *supra* note 12, at 339.

79. See Lavalette, *supra* note 4, at 479.

would be owners based on their possession of title.⁸⁰ The result would be that lenders, as title holders, would be potentially liable for CERCLA response costs when they did not participate in the operations of the contaminated facility.⁸¹ Congressional concern about the title and lien theory distinction reveals that it included the security interest exemption in CERCLA to accommodate that distinction.⁸² Congress intended for the security interest exemption to exclude title theory lenders from the definition of "owner" because title vested in such lenders only by operation of law.⁸³

III. JOINT AND SEVERAL LIABILITY UNDER CERCLA

A. *The Legislative History*

An examination of the legislative history of CERCLA provides some insight into the scope of liability⁸⁴ intended by Congress. Both the House and the Senate proposed bills⁸⁵ that were integrated and eventually became CERCLA. First, the House bill⁸⁶ contained the most lenient version of the imposition of joint and several liability.⁸⁷ Representative Gore introduced an amendment that addressed the concern that relatively small contributors would not be able to prove their lack of contribution and would face joint and several liability as a result.⁸⁸ Under the Gore Amendment, the court had the power to impose joint and several liability whenever defendants could not prove their contribution.⁸⁹

80. *Id.*

81. *Id.* If CERCLA equated title with ownership, similarly situated mortgage holders would be held liable in some states and not others. The security interest exemption eliminated this potential for unequal treatment, provided the mortgage holder has no greater interest in the encumbered land. Burkhardt, *supra* note 12, at 339.

82. See Burkhardt, *supra* note 12, at 339. Representative Harsha explained that the purpose of the exemption was to shield titleholders who have not participated in management from liability. See Lavalette, *supra* note 4, at 479; Greenberg & Shaw, *supra* note 22, at 1213. Representative LaFalce stated that the security interest exemption was inserted to recognize the difference between title and lien theory states. 135 CONG. REC. E1325 (daily ed. Apr. 25, 1989) (statement of Rep. LaFalce).

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

84. Scope of liability in the context of this note refers to whether the lenders held liable under CERCLA will be jointly and severally liable.

85. The relevant bills to this discussion are H.R. 7020, 96th Cong., 2d Sess. (1980) and S. 1480, 96th Cong., 1st Sess. (1979).

86. H.R. 7020, 96th Cong., 2d Sess. (1980). Congressman Florio introduced the bill entitled the "Hazardous Waste Contaminant Act," on April 2, 1980. 126 CONG. REC. 7490 (daily ed. Apr. 2, 1980). The bill proposed to regulate inactive sites bearing hazardous wastes on land and in non-navigable waters, by a regime of reporting, cleanup and monitoring.

87. Ellen J. Sokol, *Joint and Several Liability Under CERCLA*-*United States v. United Chem-Dyne Corp.*, 57 TEMP. L.Q. 885, 896 (1984).

88. Sokol, *supra* note 87, at 896.

89. H.R. 7020 § 3071(a), 126 CONG. REC. 26,779 (1980).

In addition, the amendment authorized the courts to apportion damages according to a number of equitable factors.⁹⁰ Some relevant parts included: the ability of the parties to demonstrate their relative contributions; the amount of hazardous waste involved; and the degree of involvement and care of the parties regarding the disposal of the hazardous waste.⁹¹ The Gore Amendment was adopted by the House and became part of the House bill.⁹²

In the Senate, the Committee on Environment and Public Works presented a bill that contained liability provisions that were more stringent than those of the House bill.⁹³ The Senate's version⁹⁴ would have imposed joint and several liability unless two conditions were met: first, that the defendant could prove its own contribution to the contamination;⁹⁵ and second, that the defendant's contribution to the harm was not a significant factor in causing the discharge.⁹⁶

The issue of joint and several liability was highly controversial, though, and

90. H.R. 7020 § 3071(a)(2)(B), (as amended), 126 CONG. REC. 26,781 (1980).

91. The Gore Amendment to H.R. 7020 provided:

(B) To the extent apportionment is not established under subparagraph (A), the court may apportion the liability among the parties where deemed appropriate based upon evidence presented by the parties as to their contribution. In apportioning liability under this subparagraph, the court may consider among other factors, the following:

- (i) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;
- (ii) the amount of hazardous waste involved;
- (iii) the degree of toxicity of the hazardous waste involved;
- (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- (vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

H.R. 7020 § 3071(a)(2)(B) (as amended), 126 CONG. REC. 26,781 (1980).

92. The amendment was passed by the House on September 23, 1980. 126 CONG. REC. 26,798-99 (1980).

93. S. 1480, 96th Cong., 2d Sess. 126 CONG. REC. 30,908-09 (1980).

94. S. 1480, 96th Cong., 2d Sess., 126 CONG. REC. 30,909 (1980).

95. S. 1480, § 4(f)(1)(A).

96. *Id.* The Senate's version provided in part:

(f)(1) In any case where a person held liable under this section can demonstrate by a preponderance of the evidence that (A) the contribution of such person to a discharge, release, or disposal of a hazardous substance can be distinguished or apportioned and (B) such contribution was not a significant factor in causing or contributing to the discharge, release, or disposal or the damages resulting therefrom, the liability of such person shall be limited to that portion of the release or damages to which such person contributed.

S. 1480, § 4(f)(1), 126 CONG. REC. 30,908-09 (1980).

was deleted by both houses to ensure passage of the bill.⁹⁷ The final bill contained no explicit reference to joint and several liability but instead adopted the liability standard set forth in the Federal Water Pollution Control Act (FWPCA).⁹⁸ The FWPCA is also silent with respect to joint and several liability but has been interpreted to impose joint and several liability on responsible parties.⁹⁹

In addition to the adoption of the FWPCA standard, Congress intended that courts should look to common law principles to determine if joint and several liability applies in CERCLA suits.¹⁰⁰ Senator Randolph explained during the final debates on the Senate bill that "traditional and evolving principles of common law" would govern issues of liability not resolved by the act.¹⁰¹ Therefore, the legislative history of CERCLA indicates that the imposition of joint and several liability was contemplated but not mandated in the statute.¹⁰² Instead, courts were instructed to look to both the FWPCA and the common law when determining whether to impose joint and several liability.¹⁰³

B. *The Common Law of Joint and Several Liability Under CERCLA*

The landmark case discussing joint and several liability in the CERCLA context was *United States v. Chem-Dyne Corp.*¹⁰⁴ In *Chem-Dyne*, the government sued twenty-four of 289 alleged generators and transporters of

97. On November 24, 1980, the Senate made its final amendment to the bill and eliminated the terms strict liability and joint and several liability from its provisions. 126 CONG. REC. 30,932 (1980). Senator Randolph explained "we have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable." *Id.* Subsequently, on December 3, 1980, the House struck the language in its bill and substituted the language of the Senate bill. 126 CONG. REC. 31,981 (1980).

98. S. 1480, 96th Cong., 2d Sess., 126 CONG. REC. 30,972-82 (1980). Under CERCLA, "liability" is construed as the standard of liability that obtains under § 1321 of the FWPCA. 42 U.S.C. 9601(32) (1983). Section 1321 of the FWPCA governs liability for discharges of oil and hazardous substances into the navigable waters of the United States. 33 U.S.C. § 1321(f) (1982).

99. See *United States v. M/V Big Sam*, 681 F.2d 432 (5th Cir. 1982) (holding that § 1321(g) of the FWPCA imposes joint and several liability on the owners and operators of vessels from which oil has been discharged), *reh'g denied*, 693 F.2d 451 (5th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

100. 126 CONG. REC. 30,932 (1980) (statement of Senator Randolph).

101. *Id.* Senator Randolph went on to say that the liability of joint tortfeasors will be determined under common or previous statutory law. *Id.*

102. See *supra* notes 84-101 and accompanying text.

103. See *supra* notes 98-102 and accompanying text.

104. 572 F. Supp. 802 (S.D. Ohio 1983). The court in *Chem-Dyne* was the first to decide whether multiple defendants could be held jointly and severally liable under CERCLA. See Sokol, *supra* note 87, at 886.

hazardous waste for reimbursement of the EPA's cleanup costs.¹⁰⁵ The government alleged that the express statutory language made clear that the defendants were jointly and severally liable for the cleanup costs.¹⁰⁶

The court found that the statutory language was ambiguous regarding the scope of liability contemplated by Congress in CERCLA.¹⁰⁷ To determine whether CERCLA required the imposition of joint and several liability, the court reviewed the legislative history.¹⁰⁸ From an examination of the legislative history, the court held that common law principles¹⁰⁹ should determine whether parties are jointly and severally liable.¹¹⁰ The court stated that liability could be apportioned when two or more persons acting independently cause a single harm that has a reasonable basis for division.¹¹¹ The court further stated that where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.¹¹²

After *Chem-Dyne*, the federal courts arrived at inconsistent decisions interpreting CERCLA's scope of liability.¹¹³ In *U.S. v. A & F Materials Co.*,

105. *Chem-Dyne*, 572 F. Supp. at 804. The defendants filed a motion for summary judgment, claiming they were not subject to joint and several liability. The court stated that the matter of scope of liability under CERCLA was one of first impression to the court. *Id.*

106. *Id.* at 805. The court disagreed and held that the language contained in the statute was ambiguous with regard to the scope of liability that courts should apply to responsible parties. *Id.*

107. *Chem-Dyne*, 572 F. Supp. 802, 805. In order to expedite discovery and trial preparation, the defendants moved for an early determination that they were not jointly and severally liable for the *Chem-Dyne* cleanup costs. *Id.* at 804.

108. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983) (citing *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119 (1982)).

109. The court based its analysis on the Second Restatement of Tort's definition of joint and several liability. Section 433A of the restatement provides that:

- (1) Damages for harm are to apportioned among two or more causes where
 - (a) there are distinct harms, or
 - (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

- (2) Damages for any other harm cannot be apportioned among two or more causes.

RESTATEMENT (SECOND) OF TORTS, § 433A (1976).

110. *Chem-Dyne*, 572 F. Supp. at 805 (quoting 126 CONG. REC. S14,969 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph)).

111. *Id.* at 810. (citing RESTATEMENT (SECOND) OF TORTS, §§ 443A, 881 (1976)).

112. *Id.* (citing RESTATEMENT (SECOND) OF TORTS, § 875 (1976)). In addition, the burden of proof as to apportionment is on each defendant. *Chem-Dyne*, 572 F. Supp. at 810 (citing RESTATEMENT (SECOND) OF TORTS, § 433B (1976)). The court denied the defendants' motion for summary judgment because disputed material facts existed as to the divisibility of the harm. *Chem-Dyne*, 572 F. Supp. at 811.

113. See *Kelly v. Thomas Solvent Co.*, 790 F. Supp. 710, 717 (W.D. Mich. 1990) (recognizing that the burden for proving that the harm is divisible lies on the owners); *but see Hastings Bldg. Prod. Inc. v. National Aluminum Corp.*, No. 1:88-CV-619, 1991 U.S. Dist. LEXIS 6443, at *20 (May 13, 1991) (noting that courts have the power to refuse to impose joint and several liability);

the court rejected *Chem-Dyne's* rigid Restatement approach to joint and several liability and adopted a more moderate approach.¹¹⁴ The court concluded that even if the defendant could not prove that the harm was divisible, equitable factors¹¹⁵ could be applied in apportioning liability.¹¹⁶ The court endorsed the principles set forth in the Gore Amendment¹¹⁷ because, as the court stated, a moderate approach promotes fairness and avoids the indiscriminate application of joint and several liability.¹¹⁸

Unfortunately, division of harm is difficult, if not impossible, in some cases. No defendant has ever successfully invoked a divisibility of harm defense in any reported decision.¹¹⁹ Many cases that impose joint and several liability involve hazardous wastes sites where numerous substances have been commingled.¹²⁰ Determining the contribution of each defendant often requires a very complex assessment of the relative toxicity, the potential for leaching,¹²¹ and the ability of the environment to safely absorb the wastes.¹²²

The First Circuit recognized the inherent difficulty in apportioning liability for hazardous waste cleanup costs in *O'Neil v. Picillo*.¹²³ The *O'Neil* court adopted the approach taken in *Chem-Dyne* and followed the Restatement method of apportioning damages based on the divisibility of the harm.¹²⁴ The court noted, however, that the practical effect of placing the burden of proving divisibility on the defendant has been that responsible parties rarely escape joint

United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732 n.3 (8th Cir. 1986) (noting that most cases have imposed joint and several liability under CERCLA).

114. 578 F. Supp. 1249 (S.D. Ill. 1984).

115. The court was referring to the Gore Amendment. The court reasoned that the moderate approach to joint and several liability set out in the Gore Amendment was both persuasive and consistent with Congress' intent. *Id.* at 1256.

116. *Id.*

117. *Id.* See *supra* note 91 and accompanying text for a description of the Gore Amendment.

118. *Chem-Dyne*, 578 F. Supp at 1257.

119. David Montgomery Moore, *The Divisibility of Harm Defense to Joint and Several Liability Under CERCLA*, 23 ENVTL. L. REP. 10,529 (1993). Moore argues that the divisibility of harm defense is difficult to raise except in the clearest of cases. *Id.*

120. See, e.g., United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 994 (D.S.C. 1986).

121. See *supra* note 7 and accompanying text.

122. United States v. Monsanto Co., 858 F.2d 160 n.26 (4th Cir. 1988) (agreeing with the district court that evidence disclosing the relative toxicity, migratory potential, and synergistic capacity of the substances at the site would be relevant to establishing divisibility of harm).

123. 883 F.2d 176 (1st Cir. 1989).

124. *Id.* at 178.

and several liability.¹²⁵ Further, the court stated that holding defendants jointly and severally liable in such situations often results in defendants paying far more than their fair share of the harm.¹²⁶

The *O'Neil* court proceeded to address the right to bring a suit for contribution when joint and several liability imposes a disproportionate burden on some defendants.¹²⁷ The Superfund Amendments and Reauthorization Act of 1986 (SARA) contained a statutory cause of action for contribution,¹²⁸ codifying what most courts had concluded was implicit in the 1980 Act.¹²⁹ The contribution section of SARA authorized courts to allocate the costs of hazardous waste cleanups using such equitable factors that the courts deem appropriate.¹³⁰ Unfortunately, the *O'Neil* court recognized that the right to contribution does not help a defendant where other responsible parties are either difficult to locate or insolvent.¹³¹ Moreover, the court stated, there are significant transaction costs involved in bringing other responsible parties to court.¹³² If it were possible to locate all responsible parties at a small cost, the issue of joint and several liability would only be of marginal significance.¹³³

The recognition of the *O'Neil* court that joint and several liability can be especially inequitable when the other responsible parties are insolvent lies at the center of the special problems lenders face. When the EPA sues a lender for

125. *Id.* at 178-79. Courts regularly find that where wastes of varying (and unknown) degrees of toxicity and migratory potential commingle, it is impossible to determine the amount of environmental harm caused by each. *Id.* at 179 (citing *Chem-Dyne*, 572 F. Supp. at 811; *Monsanto*, 858 F.2d at 172-73).

126. *Id.* (citing *Monsanto*, 858 F.2d at 173) (the court shared the appellants' concern that the appellants not be held ultimately responsible for reimbursing more than their just proportion of the government's response cost).

127. *Id.* at 179.

128. 42 U.S.C. § 9613(f)(1) (1988). 42 U.S.C. § 9613(f)(1) provides in part: "Any person may seek contribution from any other person who is liable . . . under section 9607(a) of this title . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *Id.*

129. *O'Neil*, 883 F.2d at 179.

130. 42 U.S.C. § 9613(f)(1) (1988).

131. *O'Neil*, 883 F.2d at 179. See B. Todd Wetzel, Note, *Divisibility of Harm Under CERCLA: Does an Indivisible Potential or Averted Harm Warrant the Imposition of Joint and Several Liability?*, 81 Ky. L.J. 825 (1993). In *O'Neil*, the EPA argued that it is irrelevant whether the costs of removal could be apportioned. *O'Neil*, 883 F.2d at 180. The court explained that the reason the EPA took this position was not because the environmental harm that actually occurred was indivisible, but because the additional environmental harm that the government averted would have been indivisible had it occurred. *Id.* at 829. Wetzel argues that the *O'Neil* court's criticism of the EPA's argument was warranted and was in fact incorrect. *Id.* at 831.

132. *Id.*

133. *Id.*

CERCLA cleanup costs, the parties primarily responsible for the pollution often do not have the funds to reimburse the EPA.¹³⁴ The imposition of joint and several liability can lead to inequitable results, even when the lender's role in the contamination was minor and easy to identify. The following section will discuss the common law evolution of lender liability in the United States. It will then conclude that the main cause of the lender liability problem is CERCLA's imposition of joint and several liability on lenders.

IV. REVIEW OF LENDER LIABILITY IN THE UNITED STATES

A. Lender Liability Defined

When transacting a loan, it is common practice for lending institutions to take security for the loan.¹³⁵ The most typical arrangements are the general security agreement and the real estate mortgage.¹³⁶ A general security agreement provides for a security interest in the personal property of the borrower to secure the performance of the loan obligations.¹³⁷ A mortgage, in title theory states,¹³⁸ forms a specific charge on the title of the borrower's real estate, with the title vesting in the lender until the loan obligations are met.¹³⁹ Both agreements are often perceived by the government to bring

134. See David R. Berz & Peter M. Gillon, *Lender Liability Under CERCLA: In Search of a New Deep Pocket*, 108 BANKING L.J. 4, 8 (1991) (noting that in the typical CERCLA case, involving millions of dollars in cleanup costs, the parties actually responsible for the environmental contamination are often unknown or are financially insolvent).

135. Scott G. Requadt, *Lender on a Hot Tin Roof: The Developing Doctrine of Lender Liability for Environmental Cleanup in Canada*, 50 U. TORONTO FAC. L. REV. 194, 197 (1992).

136. *Id.*

137. *Id.*

138. See *supra* notes 75-83 and accompanying text.

139. Requadt, *supra* note 135, at 197. The crux of the problem is rooted in the metaphysics of a real estate secured transaction. Whether the lender takes title, title remains legally in the borrower, or title is transferred to a third party trustee, all secured parties have a right to foreclose the mortgagor's interest in the security to pay off a defaulted loan. Marzulla & Kappel, *supra* note 4, at 711. Whether the property is located in a "lien theory" or "title theory" state, the result of the foreclosure is the same. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986). This holds true unless a third party overbids the amount of the loan (plus allowable fees and costs), otherwise the lender takes title to the property. Marzulla & Kappel, *supra* note 4, at 711.

The nature of a security interest in property during the term of the mortgage is treated differently by different states. Under the "title theory," the lender holds title to the property until the entire mortgage debt has been paid off, at which point the title passes to the borrower. Marzulla & Kappel, *supra* note 4, at 711.

The majority of states, however, follow the "lien theory," which holds that during the term of the mortgage, the lender merely has a first priority lien on the secured property. *Id.* Under the "lien theory," the borrower holds title to the property at all times. See GEORGE E. OSBORNE, ET AL., REAL ESTATE FINANCE LAW §§ 1.5, 4.1, 4.2 (1979).

lenders within the definition of an owner or operator under CERCLA.¹⁴⁰

Lenders often take an active role in the management of facilities to which they have loaned money.¹⁴¹ Such involvement, coupled with technical owner or operator status, could potentially lead to liability for claims filed against the property. Courts have shown a willingness to impose liability where the lender's activities are managerial in nature.¹⁴² The result is that lenders are often held liable for the entire cleanup cost born by the EPA since liability is strict and joint and several.¹⁴³ The following case discussions will show how the government has brought lenders into the liability scheme of CERCLA. The cases will exemplify how the deep pocket lenders were attractive targets to the government when the polluting borrowers were insolvent.

B. Judicial Treatment of the Security Interest Exemption

While congressional intent when passing CERCLA makes plain that secured creditors are exempt from some degree of CERCLA liability, the scope of the exemption is not clear.¹⁴⁴ Courts have looked to the legislative history but have been unable to find guidance.¹⁴⁵ As a result, courts have made inconsistent determinations about the scope of the exemption and their tendency to apply narrow interpretations has caused alarm in the lending community.¹⁴⁶

This Note will discuss six federal court cases that have dealt with the security interest exemption since 1985.¹⁴⁷ In the earlier cases, the courts focused on two requisite factors to apply the security interest exemption. First,

140. Requadt, *supra* note 135, at 198.

141. Lenders must deal with foreclosures, secured creditor contracts with the borrower, lender-borrower work-outs, pre-loan evaluations, and claims by private parties and state governments. Charles F. Lettow, *Five Questions May Hold Key to Ultimate Superfund Liability*, BANKING POL'Y REP., May 20, 1991, at 1.

142. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir. 1990); *In re Bergsøe Metal Corp.*, 910 F.2d 668, 672 (9th Cir. 1990).

143. Jimmy Y. Levy, *Landlord and Lender Liability for Hazardous Waste Clean-up: A Review of the Evolving Canadian and American Case Law*, 20 CAN. BUS. L.J. 269, 293 (1992).

144. See *supra* notes 70-83 and accompanying text.

145. See *supra* notes 70-83 and accompanying text.

146. Kublicki, *supra* note 4, at 515. Most affected by the decision are banks. *Id.* Kublicki argues that *Fleet Factors* transforms banks into involuntary sureties for polluting businesses. *Id.* Under *Fleet Factors*, banks, as liable lenders, must foot the bill for businesses that have dumped waste on their own premises. *Id.* Certain banks are so small that a single environmental cleanup would wipe them out. *Id.*

147. *In re Bergsøe Metal Corp.* 910 F.2d 668 (9th Cir. 1990); *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990); *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556 (W.D. Pa. 1989); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986); *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. 1985); *In re T.P. Long Chem.*, 45 B.R. 278 (Bankr. N.D. Ohio 1985).

the extent of the lender's involvement in the management of the facility was determined.¹⁴⁸ Second, the courts determined whether the lender stood to be unjustly enriched because of the cleanup of the facility by the EPA.¹⁴⁹ However, in the more recent cases, the courts have focused on a third issue: the extent to which a lender could exercise managerial control over the borrower's day-to-day operations.¹⁵⁰ Both actual involvement and the lender's potential to become involved were determinative.¹⁵¹ The following discussion will address the early interpretations of the security interest exemption followed by an examination of the more recent cases that prompted the EPA to issue its own interpretation.

C. Early Interpretations of the Security Interest Exemption

Whether a lender could be held liable under CERCLA as an operator of a facility was addressed by a bankruptcy court in Ohio, in *In re T.P. Long Chemical, Inc.*¹⁵² The lender, BancOhio National Bank held a security interest in the property of T.P. Long Chemical, Inc., a company that ran a rubber recycling plant where the EPA conducted a Superfund cleanup.¹⁵³ The EPA alleged that BancOhio was liable for the EPA's cleanup costs because the obligations of the borrower extended to the lender as an owner or operator.¹⁵⁴ However, the court rejected the EPA's argument.¹⁵⁵ The court held that the only possible indicia of ownership attributable to BancOhio was its activities concerning the protection of its security interest.¹⁵⁶ BancOhio was found not to have participated in the management of the facility and, as a result, was entitled to the security interest exemption contained in CERCLA's definition of owner or operator.¹⁵⁷

The issue of lender liability next surfaced in *United States v. Mirabile*.¹⁵⁸

148. See Levy, *supra* note 143, at 293.

149. See *id.*

150. *Fleet Factors*, 901 F.2d at 1557; *Bergsoe*, 910 F.2d at 672.

151. *Id.*

152. 45 B.R. 278 (Bankr. N.D. Ohio 1985).

153. *Id.* at 280. T.P. Long filed for bankruptcy reorganization and a trustee was appointed to administer the estate. *Id.* BancOhio held a security interest in the accounts receivable, equipment, fixtures, and inventory. *Id.*

154. *Id.* at 288.

155. *Id.* The court reasoned that a creditor assumes a financial risk when it takes a security interest in collateral. *Id.* The creditor always bears the inherent risk that the value of the collateral will be insufficient to protect it in the case of default by the borrower. *Id.* The court went on to say that it would not add to this risk by making the creditor the insurer of all risks caused by its collateral. *Id.*

156. *Id.* at 289.

157. *In re T.P. Long Chemical, Inc.*, 45 B.R. 278, 289 (Bankr. W.D. Ohio 1985).

158. 15 Env't. L. Rep. 20,994 (Env't. L. Inst.) (E.D. Pa. 1985).

In *Mirabile*, the EPA sued the Mirabiles as the owners of property containing hazardous waste caused by a previous owner, Turco Coatings, Inc., for the costs incurred in the cleanup of the property.¹⁵⁹ Three former creditors of Turco were joined as third party defendants: American Bank and Trust Company (ABT), Mellon Bank National Association (Mellon), and the Small Business Administration (SBA).¹⁶⁰

In 1980, Turco filed a petition for bankruptcy that the bankruptcy court dismissed in 1981.¹⁶¹ The dismissal enabled ABT to proceed to foreclose on the property because it was the highest bidder at the sheriff's sale.¹⁶² Despite this involvement, the court found that ABT had never become so "overly entangled" in Turco's activities that it lost the benefit of the security interest exemption.¹⁶³ According to the court, ABT's involvement had been limited to the general financial aspects of management.¹⁶⁴ The court stated that before it could hold a secured creditor liable under CERCLA, the secured creditor "must, at a minimum, participate in the day-to-day operational aspects of the site."¹⁶⁵ For these reasons, the court granted summary judgment to ABT.¹⁶⁶

The court also found that SBA's conduct was insufficient to bring it within the scope of CERCLA liability.¹⁶⁷ The court found that SBA had merely participated in the financial aspects of the operation¹⁶⁸ even though there was a clause in the loan agreement, as required by SBA regulations, indicating that SBA must provide management assistance to its borrowers. No evidence existed

159. *Id.* at 20,995.

160. *Id.* The Mirabiles joined ABT and Mellon, who counterclaimed against the United States, relying on the alleged involvement of the SBA in creating the conditions at the site. *Id.*

161. *Id.* at 20,996.

162. *United States v. Mirabile*, 15 *Env'tl. L. Rep.* 20,994, 20,995 (*Env'tl. L. Inst.*)(E.D. Pa. 1985).

163. *Id.*

164. *Id.*

165. *Id.* The court reasoned that the imposition of liability on secured creditors or lending institutions would enhance the government's chances of recovering its cleanup costs given the fact that owners and operators of hazardous waste dump sites are often elusive, defunct, or otherwise judgment proof. *Id.* It may well be that the imposition of such liability would help to ensure more responsible management of hazardous waste sites. *Id.* The consideration of such policy matters, and the decision as to imposition of liability, however, lies with Congress. *Id.* In enacting CERCLA, Congress singled out secured creditors for protection from liability under certain circumstances. *Id.*

166. *Id.*

167. *United States v. Mirabile*, 15 *Env'tl. L. Rep.* 20,994, 20,997 (*Env'tl. L. Inst.*)(E.D. Pa. 1985).

168. *Id.* In fact, the court stated that SBA's case for summary judgment was stronger than ABT's. *Id.*

that such assistance was ever provided.¹⁶⁹ Therefore, the court granted summary judgment to SBA.¹⁷⁰

However, the court denied Mellon's motion for summary judgment.¹⁷¹ The court was not satisfied that Mellon's involvement brought it within the security interest exemption.¹⁷² Witnesses testified 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.¹⁷³ The court believed that such activities created a genuine issue of material fact and precluded summary judgment.¹⁷⁴

The security interest exemption was read more narrowly in *United States v. Maryland Bank & Trust Co.*¹⁷⁵ The court in *Maryland Bank* sought to determine whether it could hold a bank liable for CERCLA reimbursement costs.¹⁷⁶ Maryland Bank held a mortgage on the California Maryland Drum Site¹⁷⁷ which was used to conduct a trash and garbage business.¹⁷⁸ After the owner defaulted on the loans, Maryland Bank foreclosed and purchased the property at the foreclosure sale.¹⁷⁹ Four years after Maryland Bank's purchase of the property, the EPA found toxic waste at the site, removed it, and then sued the bank for the cleanup costs.¹⁸⁰ The bank argued that it was entitled

169. *Id.* In addition, the court dismissed the argument that placing restrictions in a loan agreement, without more, constitutes participation in management sufficient to lose the protection of the security interest exemption. *Id.*

170. *Id.*

171. *Id.* at 20,097.

172. *United States v. Mirabile*, 15 *Envl. L. Rep.* 20,994, 20,097 (*Envl. L. Inst.*)(E.D. Pa. 1985). However, the court stated that the liability Mirabile sought to impose on Mellon was based on a weak foundation. *Id.* Nonetheless, given that all doubts were to be resolved in favor of the party opposing the motion for summary judgment, the court held that genuine issues of material fact existed. *Id.*

173. *Id.* The court acknowledged that while such involvement would not normally lead to CERCLA liability, it would be helpful to have a clearer picture of Mellon's involvement before a decision was made. *Id.*

174. *Id.*

175. 632 F. Supp. 573 (D. Md. 1986).

176. *Id.* at 574.

177. The piece of property subject to litigation was a 117 acre farm located near the town of California, Maryland, in St. Mary's County. *Id.* at 575. The parties dubbed the property the California Maryland Drum site. *Id.*

178. *Id.*

179. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 575 (D. Md. 1986).

180. *Id.* at 575-76. The EPA actually notified the president of Maryland Bank that it would give Maryland Bank an opportunity to initiate corrective action at the site. *Id.* at 575. The bank declined the EPA's offer so the agency proceeded to clean up the site itself, removing 237 drums of chemical material and 1180 tons of contaminated soil at a cost of approximately \$551,713. *Id.* at 575-76.

to the security interest exemption.¹⁸¹ The court held, however, that because the bank held the property after the purchase at the foreclosure sale for investment purposes, it was no longer entitled to the security interest exemption.¹⁸² The court stated that the exclusion did not apply to former mortgagees currently holding title after purchasing the property at the foreclosure sale when the former mortgagee held title for nearly four years, and it was nearly one year before the EPA cleanup.¹⁸³

The next important case concerning lender liability was *Guidice v. BFG Electroplating & Manufacturing Co.*¹⁸⁴ The residents of a Pennsylvania borough sued BFG, alleging that BFG was liable for personal injuries caused by unlawful contamination of the environment as well as the cleanup costs under CERCLA.¹⁸⁵ In response, BFG filed a third party complaint against the National Bank of the Commonwealth (National Bank) for indemnification and contribution.¹⁸⁶ National Bank filed a motion for summary judgment claiming that it was not a past owner or operator and therefore, not liable under CERCLA.¹⁸⁷

In 1975, National Bank made a loan to Berlin Metal Polishers (Berlin) that was secured by a mortgage on the property.¹⁸⁸ In 1980, Berlin defaulted on its obligation to the bank.¹⁸⁹ A year later, in February of 1981, the facility was shut down and National Bank foreclosed on the Berlin loan.¹⁹⁰ Subsequent to the foreclosure, Berlin leased the property in August 1981, to Season-All, a window manufacturer.¹⁹¹ Initially Season-All paid rent to Berlin, but National Bank soon intervened in this arrangement and instructed Season-All to submit all payments to the bank.¹⁹² In April of 1982, National

181. *Id.* at 579. The bank contended that it was entitled to the benefit of this exclusion because it acquired ownership of the dump site through the foreclosure on its security interest and the purchase of the land at the foreclosure sale. *Id.*

182. *Id.*

183. *Id.* at 579. The court stated that the verb tense of the exemption is critical. *Id.* The security interest must exist at the time of the cleanup. *Id.* The security interest in the form of a mortgage terminated at the foreclosure sale at which time it ripened into full ownership. *Id.*

184. 732 F. Supp. 556 (W.D. Pa. 1989).

185. *Id.* at 557.

186. *Id.* National Bank was an eight-month record title owner of the property in question. *Id.*

187. *Id.* at 561.

188. *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556, 558 (W.D. Pa. 1989).

189. *Id.* In January of that year, National Bank representatives toured the facility, met with Berlin management, and tried to arrange for a new loan guaranteed by the Small Business Administration. *Id.*

190. *Id.* at 559.

191. *Id.* Season-All used the property to store raw materials for its window manufacturing operation. *Id.*

192. *Id.* at 560.

Bank purchased the property at a sheriff's foreclosure sale and took delivery of the property on May 14, 1982.¹⁹³ In April of 1982, Season-All, at the request of National Bank, arranged for the removal of drums containing toxic waste from the site.¹⁹⁴

The court considered two time frames to determine whether National Bank was an "owner or operator" of the property.¹⁹⁵ The time frames were the pre- and post-foreclosure periods.¹⁹⁶ The court held that the pre-foreclosure steps National Bank took to protect its loan were entitled to the security interest exemption.¹⁹⁷ As to National Bank's post-foreclosure purchase of the property, the court held that the security interest exemption did not apply.¹⁹⁸ The court reasoned that when a lender is the successful purchaser at a foreclosure sale, the lender should be liable to the same extent as any other bidder at the sale would have been.¹⁹⁹ Therefore, the court denied National Bank's motion for summary judgment.²⁰⁰

In sum, *Guidice* strengthened the view advanced in *Mirabile* that lenders can involve themselves in their borrowers' financial decisions without risking CERCLA liability.²⁰¹ Such an interpretation seems consistent with the language contained in the security interest exemption.²⁰² Nonetheless, *Maryland Bank* cast considerable doubt on whether banks can foreclose on a

193. *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556, 559 (W.D. Pa. 1989).

194. *Id.* at 560.

195. *Id.* at 561.

196. *Id.*

197. *Id.* at 562. After Berlin defaulted on its loan obligations, the bank took steps to protect its security interest in the Berlin Property. *Id.* These steps included a meeting with Berlin officials where the bank was informed of such things as the status of the Berlin accounts, personnel changes, and the presence of raw materials. *Id.* The court regarded these actions as prudent measures undertaken to protect the bank's security interest in the property. *Id.*

198. *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556, 563 (W.D. Pa. 1989). The court focused on the decisions in *Maryland Bank* and *Mirabile*. *Id.* The court noted the divergence in outcomes of the two cases and was ultimately persuaded by the reasoning in *Maryland Bank* that an exemption for landowning lenders would create a special class of otherwise liable landowners. *Id.* In other words, the security interest exemption should only apply to lenders when they hold title to the property as secured creditors. *Id.* Otherwise, if the lender becomes the beneficial owner of the property, then the security interest exemption should not apply. *Id.* Once a lender purchases the property at the foreclosure sale, then the lender no longer holds the property as security for their loan. *Id.* But see the foreclosure provisions in the EPA's interpretation of the security interest exemption, *infra* notes 275-97 and accompanying text.

199. *Guidice*, 732 F. Supp. at 563.

200. *Id.* at 561. The court concluded that National Bank was aware that drums containing hazardous materials were on the Berlin Property during its ownership. *Id.* at 564.

201. Sean P. Madden, Note, *Will the CERCLA Be Unbroken? Repairing the Damage After Fleet Factors*, 59 *FORDHAM L. REV.* 135, 144 (1990).

202. *Id.* at 144.

facility without exposing themselves to potential CERCLA liability.²⁰³ Further, *Guidice* precludes banks from purchasing property at a foreclosure sale without incurring CERCLA liability.²⁰⁴ The theme that came from the early interpretations of the security interest exemption, however, was that actual participation in management can lead to CERCLA liability for lenders.

D. Recent Conflicting Interpretations of the Security Interest Exemption

The most controversial case regarding the security interest exemption is the 1990 decision of *United States v. Fleet Factors Corp.*²⁰⁵ The Eleventh Circuit applied a surprisingly narrow interpretation of the security interest exemption. Prior to *Fleet Factors*, no federal court had clearly defined the degree of participation required for a lender to incur CERCLA liability.²⁰⁶

In *Fleet Factors*, Swainsboro Print Works (SWP) operated a cloth-printing facility from 1963 until it ceased operations in 1981.²⁰⁷ SWP and Fleet Factors entered into an agreement in 1976, whereby Fleet lent money to SWP and SWP assigned its accounts receivables to Fleet as collateral for the loans.²⁰⁸ Fleet also took a security interest in SWP's property, plant, equipment, fixtures, and inventory.²⁰⁹ In December 1981, SWP filed for bankruptcy²¹⁰ and in May of 1982, Fleet foreclosed on its security interest in inventory and equipment but did not foreclose on its security interest in the plant or real property.²¹¹ In June of 1982, Fleet contracted to have the equipment auctioned off and finally in 1983, Fleet arranged for the removal of all unsold equipment.²¹² Fleet had no involvement in the facility after December of

203. *Id.* at 142.

204. See *supra* notes 198-99 and accompanying text.

205. 901 F.2d 1550 (11th Cir. 1990). See generally Note, *Cleaning Up the Debris After Fleet Factors: Lender Liability and CERCLA's Security Interest Exemption*, 104 HARV. L. REV. 1249 (1991); Michael B. Kupin, *New Alterations of the Lender Liability Landscape: CERCLA After the Fleet Factors Decision*, 19 REAL EST. L.J. 191 (1991); Madden, *supra* note 201, at 158-59.

206. Nicholson & Zuiderhoek, *supra* note 4, at 32.

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

208. *United States v. Fleet Factors Corp.*, 724 F. Supp. 955, 957 (S.D. Ga. 1988). SWP and Fleet entered into a factoring agreement. *Id.* Factoring is a "type of service whereby a firm sells or transfers title to its accounts receivable to a factoring company, which then acts as principal, not as agent. The receivables are sold without recourse, meaning the factor cannot turn to the seller in the event accounts prove uncollectible." JOHN DOWNES & JORDAN E. GOODMAN, *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 122 (1985).

209. *Fleet Factors*, 724 F. Supp. at 957.

210. *Id.* at 958. SWP originally filed under chapter 11 of the Bankruptcy Code but subsequently converted the case to a chapter 7 liquidation. *Id.*

211. *Id.* at 957.

212. *Id.* at 958.

1983.²¹³ The EPA inspected the site in January of 1984 and discovered 700 drums of hazardous substances.²¹⁴ The EPA removed the drums and then sought recovery from the responsible parties.²¹⁵ Fleet was included in the action as a potentially responsible party.²¹⁶ Both the government and Fleet moved for summary judgment.²¹⁷

The Court of Appeals held that a secured creditor could incur liability under § 9607(a)(2) of CERCLA without being an operator,

by participating in the financial management of a facility to a degree indicating a *capacity to influence* the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor to actually involve itself in the day-to-day operations of the facility in order to be liable. . . . Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.²¹⁸

The court rationalized that in order to achieve the remedial goals of CERCLA, ambiguous statutory terms such as "owner" or "operator" should be construed

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

214. *United States v. Fleet Factors Corp.*, 724 F. Supp. 955, 959 (S.D. Ga. 1988).

215. *Id.* Title was eventually passed to the county, but the EPA could not bring an action against the county because SARA amended CERCLA to exempt from liability states and their political subdivisions that acquire title to contaminated property pursuant to foreclosure for non-payment of taxes. *Id.* at 959-60; 42 U.S.C. § 9601(20)(A)(ii) (1988).

216. *Fleet Factors*, 724 F. Supp. at 957.

217. *Id.* The district court interpreted the phrases "participating in the management of a facility" and "primarily to protect the security interest" to permit secured creditors to provide financial assistance and general instances of specific management advice to debtors. *Id.* at 960 (citing *United States v. Mirabile*, 15 ENVTL. L. REP. 20,994, 20,995 (Envtl. L. Inst.) (E.D. Pa. 1985)). According to the district court, the debtor would not risk CERCLA liability if it did not participate in the day-to-day management of the business or facility. *Fleet Factors*, 724 F. Supp. at 960. The district court applied this standard to the time that SWP initially became involved with the facility in 1976 until Fleet's representative auctioned off the foreclosed equipment in 1982. *Id.* The district court concluded that Fleet's activities at the facility did not rise to the level of participation in management sufficient to impose CERCLA liability. *Id.* The district court went on to find, however, that disputed material facts existed with respect to the time period from the auction until Fleet ceased contact with the SWP facility and thereby denied part of Fleet's motion for summary judgment. *Id.* at 961. The trial judge authorized an interlocutory appeal to the Eleventh Circuit Court of Appeals because of uncertainties about the definition of "owner and operator" and the security interest exemption. *Id.* at 962.

218. *United States v. Fleet Factors*, 901 F.2d 1555, 1557-58 (S.D. Ga. 1988) (emphasis added). The court stated that the terms "operator" and "participation in management" encompassed different levels of activity, a construction it said was necessary to give meaning to the "participating in management" language. *Id.*

in favor of finding liability in order to reimburse the government's expenditures.²¹⁹ In the opinion of the Eleventh Circuit, its decision would encourage lenders to engage in complete pre-loan investigations of prospective borrowers to make sure that any environmental risk is discovered.²²⁰ Further, the decision would also encourage creditors to monitor the environmental policies and practices of borrowers to ensure responsible disposal of hazardous wastes.²²¹

The term "capacity to influence," however, was a very broad characterization of the degree of participation in management necessary to incur liability.²²² Lenders believed that almost any secured creditor could theoretically be held liable under this construction of the exemption.²²³ Critics of the decision argued that such a broad reading of "participation in management" would not result in the benefits²²⁴ contemplated by the court.²²⁵ Others argued that such a broad interpretation would actually make

219. *Id.* at 1557. In order to achieve the remedial goal of the CERCLA statutory scheme, ambiguous statutory terms should be construed to favor liability for the costs incurred by the government in responding to the hazards at such facilities. *Id.* (citing *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990)).

220. *Id.* at 1558-59.

221. *Id.* at 1558.

222. Neal B. Glick & Kevin L. Nulton, *Lender Liability Under the Superfund Statute*, MASS. LAW. WKLY., July 22, 1991, at 37.

The decision immediately reverberated through at the lending community. The implication of the decision was that any significant involvement in day-to-day operations would result in liability, even if it was merely to protect the lender's security interest. Further, any involvement with management could trigger liability if the lender had the power to influence hazardous waste disposal decisions. This could mean that liability might be triggered by the language in loan documents allowing lenders to make decisions concerning hazardous waste disposal activities.

Id.

223. *See, e.g.*, Lettow, *supra* note 141, at 1.

224. *See supra* notes 220-21 and accompanying text.

225. *See generally* Madden, *supra* note 201, at 148-51. Critics have argued that the narrow interpretation of the security interest exemption by the court in *Fleet Factors* impinges on other policy considerations, particularly those involving small business and banking. *Id.* at 158. The risks of lending to environmentally sensitive small businesses are open-ended, and under the *Fleet Factors* analysis, virtually unquantifiable. *Id.* If banks cannot measure the risk of lending to borrowers in environmentally sensitive businesses, they will not extend credit to these borrowers. *Id.* at 158-59.

There are essentially two components to a bank's analysis of a borrower's appropriate loan rate premium. *See* Mark J. Flannery, *A Portfolio View of Loan Selection and Pricing*, in *HANDBOOK FOR BANKING STRATEGY* 457, 459-60 (R. Aspinwall & R. Eisenbeis eds. 1985). First, the default premium accounts for the lender's expected loss on the loan, that is generally computed with reference to the type of borrower's default rate. *Id.* For example, if the assessed probability of default is two percent, the lender would charge approximately two percent above the pure time value of money. *Id.* at 460. Second, the bank computes a risk premium that "compensates the lender for uncertainty about how much of the loan will be repaid." *Id.* (emphasis in original). Both components are affected by the open-ended nature of environmental liability. *Id.*

lenders fearful that any direct involvement in the borrower's activities, especially hazardous waste policies, could result in the loss of the security interest exemption.²²⁶ Consequently, some commentators have suggested that the *Fleet Factors* decision would make lenders less likely to investigate or monitor a borrower's environmental practices.²²⁷

Lenders did receive some relief, though, from a Ninth Circuit decision three months after the Eleventh circuit's decision in *Fleet Factors*. In *Hill v. East Asiatic Co. (In re Bergsoe Metal Corp.)*,²²⁸ Bergsoe Metals Corporation (Bergsoe) operated a lead recycling business in St. Helens, Oregon.²²⁹ In December of 1978, the Port of St. Helens (Port) agreed to issue industrial development revenue bonds and pollution control bonds for Bergsoe.²³⁰ Bergsoe and the Port entered into a sale-lease back of the property with Bergsoe and agreed to build the plant and pay its lease payments to the United States National Bank of Oregon (Bank) as trustee of the Port-issued industrial revenue bonds.²³¹ In the words of the Ninth Circuit, the Port, on the one hand, held the "paper title" to the property on which the plant was constructed.²³² Bergsoe, on the other hand, had all other traditional indicia of ownership "such as responsibility for the payment of taxes and for the purchase of insurance."²³³

Bergsoe began to operate the newly constructed plant in 1982.²³⁴ Shortly thereafter, Bergsoe began experiencing financial difficulty, and by 1983, was in

226. See generally Madden, *supra* note 201, at 155-59.

227. See McGaughan, *supra* note 15, at 103-04.

228. 910 F.2d 668 (9th Cir. 1990).

229. *Id.* at 669.

230. *Id.* An industrial development revenue bond (IDB) is defined as follows:

A bond issued by a state or local government to finance plants and facilities that are then leased to private business. The purpose of IDBs is to attract industry as part of local economic development efforts. The appeal to investors is that they are tax-exempt . . .

. . . Properties financed by IDBs are nominally owned by the issuing government, but the bonds are the credit responsibility of the firms that lease the facilities.

J. DOWNES & J. GOODMAN, *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 180 (1985).

231. *In re Bergsoe*, 910 F.2d at 670.

232. *In re Bergsoe Metal Corp. v. East Asiatic Comp., Ltd.*, 910 F.2d 668, 671 (9th Cir. 1990). The *Bergsoe* court made plain that the Port was the owner of the facility in name only: Bergsoe's "rent" was equal to the principal and interest due under the bonds. The money was to be paid directly to the Bank as trustee for the bondholders. The leases expired not on a specific date, but when the money owed under the bonds was paid off. Further, when the bonds were paid off, Bergsoe could purchase full title to the property for the nominal sum of \$100.

Id.

233. *Id.*

234. *Id.* at 670.

default on its leases.²³⁵ The Port, Bergsoe, and the bondholders' trustee subsequently agreed to an arrangement whereby a third party would manage the facility.²³⁶ Nonetheless, the facility continued to perform poorly and in October of 1986, Bergsoe was placed in involuntary bankruptcy proceedings.²³⁷

Subsequently, Bergsoe was sued because of the release of hazardous waste materials at the site.²³⁸ Bergsoe's shareholders filed a counterclaim, including a third party complaint against the Port seeking indemnification, alleging that the Port and the Bank were liable for the CERCLA cleanup costs.²³⁹ The Ninth Circuit followed the lower court's decision and held that the Port was entitled to the security interest exemption and not liable for CERCLA cleanup costs.²⁴⁰ The appellate court concluded that the Port held title to the property primarily to ensure repayment of the bonds and had insufficient participation in the management of the plant to lose the exemption.²⁴¹ Most compelling in the decision was the court's statement in a footnote that "a creditor must . . . exercise actual management authority before it can be held liable for action or inaction which results in the discharge of hazardous wastes. Merely having the power to get involved in management, but failing to exercise it, is not enough."²⁴² Such language undermined the broad inclusion of liable parties announced in the *Fleet Factors* decision.²⁴³

235. *In re Bergsoe*, 910 F.2d at 670.

236. *Id.*

237. *In re Bergsoe Metal Corp. v. East Asiatic Comp., Ltd.*, 910 F.2d 668, 670 (9th Cir. 1990). A company's creditors may force it into bankruptcy proceedings. See 11 U.S.C. § 303(b) (1988) (discussing involuntary bankruptcy).

238. *Bergsoe*, 910 F.2d at 670.

239. *Id.* The Port moved for summary judgment on the ground that it was not an owner for the purposes of establishing liability under CERCLA. *Id.* There was no district court opinion. The bankruptcy court made certain findings of fact and conclusions of law regarding the motions that were accepted by the district court that granted the summary judgment motion. See *Hill v. East Asiatic Co. (In re Bergsoe Metal)*, 1989 U.S. Dist. LEXIS 12188 (granting defendant's motion for summary judgment).

240. *Bergsoe*, 910 F.2d at 673. The court analyzed both the Port's ownership and the extent of its participation in the management of the facility. *Id.* The court concluded that no material issues of fact existed as to either. *Id.*

241. *In re Bergsoe*, 910 F.2d at 670-71.

242. *In re Bergsoe Metal Corp. v. East Asiatic Comp., Ltd.*, 910 F.2d 668, 673 n.3 (9th Cir. 1990). The court stated that the critical point was not what rights the Port had, but what it did. *Id.* at 672. A secured creditor will always have some input at the planning stages of large-scale projects. *Id.* If this were management, no secured creditor would ever be protected. *Id.*

243. Several commentators have construed the two cases; some have tried to reconcile the two decisions, and others have argued that *Bergsoe* and *Fleet Factors* are completely at odds. See, e.g., Berz & Gillon, *supra* note 134, at 8 ("Although the decision purported to agree with *Fleet Factors*, the Ninth Circuit expressly rejected the 'capacity to control' test."); Freeman, *Recent Case Law*

The CERCLA cases discussed above did not consider the implication of joint and several liability on those lenders found liable for the reimbursement of the EPA's cleanup costs. This Note posits that the lenders were joined in these cases because the polluting defendants were insolvent,²⁴⁴ and the lenders were viewed as potential deep pockets. In *Mirabile*, for example, the court denied summary judgment to one lender because evidence was introduced that the lender had asserted some control over manufacturing, personnel, and supply decisions.²⁴⁵ In *Guidice*, the court found that because National Bank held title for a mere eight months after foreclosure, the bank was liable under CERCLA.²⁴⁶ In *Maryland Bank*, however, the bank purchased the property at the foreclosure sale and was properly considered an owner of the property to which it held title for nearly four years.²⁴⁷ *Mirabile* and *Guidice* illustrate how minimal involvement in the borrower's facility could lead to inequitable results when joint and several liability is applied. Such a threat is unnecessary, and Congress or the EPA should address the threat of inequitable results by adopting a new liability scheme applicable to lenders who fail to qualify for the security interest exemption.

In addition, the varying interpretations of the scope of the security interest exemption provide evidence of the uncertainty in the judicial community with regard to CERCLA liability.²⁴⁸ The key terms lack definition, and neither federal case law nor legislative history provide insight into CERCLA's intended scope of liability for lenders. In response, the EPA issued a rule providing its own interpretation of CERCLA's security interest exemption.²⁴⁹

May Expand Lenders' Risks Under Superfund, NAT'L L.J., Sept. 17, 1990, at 18 (stating that *Bergsoe* rejected the *Fleet Factors* standard, at least in its most extreme form); Stephen Kleege, *Banks Welcome Court Ruling on Liability for Environmental Cleanups*, AM. BANKER, Aug. 22, 1990, at 30 (stating that the *Bergsoe Metal* decision "implicitly rejects" *Fleet Factors*). *But see* Clyde Mitchell, *Liability Under CERCLA for Indenture Trustees*, N.Y.L.J., Aug. 23, 1990, at 3 ("*Bergsoe Metals* [sic] appears to reinforce and perhaps clarify the Eleventh Circuit's decision in *Fleet Factors*.").

244. *Bergsoe*, 910 F.2d at 670 (*Bergsoe* went into involuntary bankruptcy); *United States v. Fleet Factors*, 901 F.2d 1550, 1552 (11th Cir. 1990) (the borrower filed for chapter 11 bankruptcy); *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556, 559 (W.D. Pa. 1989) (the borrower defaulted on the loan so the bank foreclosed); *United States v. Maryland Bank*, 632 F. Supp. 573, 575 (D. Md. 1986) (the borrower failed to make payments on the loan so the bank instituted a foreclosure action); *United States v. Mirabile*, 15 Env'tl. L. Rep. 20,994, 20,996 (Env'tl. L. Inst.) (E.D. Pa. 1985) (the borrower filed a petition for bankruptcy); *In re T.P. Long Chem., Inc.*, 45 B.R. 278, 280 (Bankr. N.D. Ohio 1985) (the borrower filed for reorganization under chapter 11 of the Bankruptcy Code).

245. *Mirabile*, 15 Env'tl. L. Rep. at 20,997.

246. *Guidice*, 732 F. Supp. at 663.

247. *Maryland Bank*, 632 F. Supp. at 579.

248. *See supra* notes 144-247 and accompanying text.

249. 40 C.F.R. § 300.1100 (1994).

V. THE EPA'S LENDER LIABILITY RULE

A. *The Rule*

On April 29, 1992, the EPA issued a final rule on lender liability under CERCLA.²⁵⁰ The purpose of the rule was to clarify the range of activities for secured lenders that will not result in liability under CERCLA for response costs incurred by the EPA at borrowers' facilities.²⁵¹ Under the security interest exemption of CERCLA, if the lender holds "indicia of ownership" in a contaminated facility primarily to protect its security interest and does not "participate in the management" of the facility, the lender is not subject to

250. After the *Fleet Factors* decision, severe criticism from the lending community and the ambiguity created by the decision prompted the EPA to prepare a set of draft rules to clarify the set of actions a lender could take without exceeding the security interest exemption. See Nicholson & Zuiderhoek, *supra* note 4, at 38. A first draft of the proposal to clarify the security interest exemption was submitted to the Office of Management and Budget in September 1990. *EPA Draft Proposal Defining Lender Liability Issues Under the Secured Creditor Exemption of CERCLA*, 21 ENV'T RPTR. (BNA) No. 24, at 1162 (Oct. 12, 1990). Under this first draft, lenders were required to conduct a pre-loan environmental inspection or audit to qualify for the exemption. *Id.* at 1164. The lender could also take certain actions such as restructuring or extending the loan, requiring additional interest, or giving financial or operational advice to secure or protect its collateral from loss. *Id.* Acquisition at a foreclosure sale was considered to be an action within the scope of the exemption, an act necessary to protect the security interest. *Id.* However, if the lender did not divest itself of the property within six months, it would have the burden of proving that it was holding the property primarily to protect its security interest. *Id.* at 1165.

A second proposed draft was issued on January 24, 1991. *Proposed Draft Rule on Lender Liability Under CERCLA With Accompanying Letter From EPA to OMB*, 21 ENV'T RPTR. (BNA) No. 43, at 1908 (Feb. 22, 1991). The most significant change in this draft removed the requirement that lenders must have a pre-loan environmental assessment conducted to qualify for the exemption. *Id.* at 1911-12, 1915. The second draft stated that an inspection was not necessary in every case but that such an inspection would be considered probative of conduct consistent with the exemption. *Id.* at 1912, 1915.

A third draft, issued June 24, 1991, modified the previous drafts by stating that the security holder must take steps to sell the contaminated property within 12 months, instead of six months, after foreclosure. 40 C.F.R. § 300.1100 (d)(2)(i) (1994). So long as the lender did not refuse a "bona fide" purchase offer more than six months after foreclosure, there was no time limit on how long the lender could hold the property. *Id.* § 300.1100 (d)(2)(ii)(B). Lenders would need to attempt to sell the property by listing and advertising it before the twelfth month after foreclosure. *Id.* § 300.1100 (d)(2)(i).

In addition, the third draft stated that any party implicating a secured creditor in cleanup cost liability had the burden of proving that the secured creditor exemption was not applicable. *Id.* § 300.1100. This provision was designed to reduce third party accusations of CERCLA liability to those where there was clear proof of lender liability. See Nicholson & Zuiderhoek, *supra* note 4, at 45.

251. National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 40 C.F.R. § 300.1100, 300.1105 (1994). The rule also interpreted CERCLA's statutory requirements that address involuntary acquisition of contaminated facilities by certain government entities and addressed comments received on the proposed versions. *Id.* § 300.1105.

CERCLA liability.²⁵² Confusion over the scope of the security interest exemption led the EPA to promulgate its own interpretation of the amount of protection that the exemption should afford lenders.²⁵³

The rule attempted to clarify CERCLA's security interest exemption by defining each of the important terms in the exemption. The rule would have the effect of overriding the *Fleet Factors* decision²⁵⁴ despite the insistence of the EPA that the rule was consistent with *Fleet Factors*.²⁵⁵ In addition, the rule explicitly stated that several of the activities that lenders commonly undertake are within the security interest exemption. The rule defined the meanings of "indicia of ownership,"²⁵⁶ "primarily to protect a security interest,"²⁵⁷ and "participation in the management"²⁵⁸ of a facility.²⁵⁹ Finally, the rule described what lenders could do to protect their exempt status after they have foreclosed on contaminated property.²⁶⁰

252. See 42 U.S.C. § 9601(20)(A) (Supp. V. 1993).

253. See 40 C.F.R. § 300.1100 (1994).

254. But see 57 Fed. Reg. 18,344, 18,369 (1992). The EPA, in its final rule, did not specifically override the *Fleet Factors* decision. The language of the preamble, however, suggests that the standard followed by the *Bergsoe* court more accurately reflected the intent behind the security interest exemption. *Id.* The EPA went on to say that because the holder in *Bergsoe* was not in any way involved in the facility's operations, the Ninth Circuit did not address the question left unanswered in *Fleet*: the extent to which a holder may act to oversee and manage its security interest without being considered to be participating in the facility's management. *Id.*

255. See *id.* at 18,369. The EPA stated that the view that the new lender liability rule overrules or repudiates *Fleet Factors* is based on the mistaken assumption that the Eleventh Circuit held that a lender is liable merely because it has the power or right to influence facility operations, even if those rights are never exercised. *Id.* The EPA said that this characterization is inaccurate because the *Fleet Factors* decision held that some actual involvement by a holder is a necessary precedent to voiding the exemption. *Id.* The majority of commentators, however, disagree with this proposition. See *supra* note 243.

256. The first definition provided by the rule was a broad and inclusive one for the term "indicia of ownership." The EPA defined indicia of ownership as "evidence of a security interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title to real or personal property acquired incident to foreclosure and its equivalents." 40 C.F.R. § 300.1100(a) (1994). The definition includes title to property acquired through foreclosure. *Id.* The inclusion of foreclosure as an act consistent with a holder's effort to protect a security interest was a departure from the *Maryland Bank* and *Guidice* decision that stated that post-foreclosure ownership would be participation in management. See Lavellette, *supra* note 4, at 489.

257. 40 C.F.R. § 300.1100(b) (1994). Under this definition, "the holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation." *Id.* Excluded from the definition was any indicia of ownership "held primarily for investment purposes." *Id.* § 300.1100(b)(2).

258. See *infra* notes 261-66 and accompanying text.

259. See 57 Fed. Reg. 18,344, 18,346 (1992). The definitions did not, however, attempt to define all possible activities that a lender could undertake consistent with the exemption. *Id.*

260. See generally 40 C.F.R. § 300.1100(d) (1994).

The most important section of the EPA rule was the explanation of what constitutes "participation in management."²⁶¹ The rule stated that courts should not consider the several actions lenders commonly take before making loans when determining if lenders participated in the management of a borrower's facility. These actions include: consultation and negotiations concerning the structure and terms of the loan;²⁶² negotiations concerning the interest rate;²⁶³ negotiations concerning the payment period;²⁶⁴ and specific or general financial or other advice, suggestions, counseling or guidance.²⁶⁵ In addition, the rule stated that it was acceptable, although in no way required, for a lender to undertake or require an environmental inspection of a borrower's facility, or to require that the borrower clean up its facility before the lender makes the loan or as a condition to making the loan.²⁶⁶

Once a loan has been made, the rule allowed a lender to engage in several types of activities without losing its security interest exemption. Permissible activities included: policing the loan;²⁶⁷ undertaking a financial workout with the borrower if the loan was in default or in threat of default;²⁶⁸ and monitoring the borrower's business.²⁶⁹ In addition, the lender could require or conduct on-site inspections and audits of the environmental and financial condition of the borrower's facility.²⁷⁰

261. *See id.* § 300.1100(c).

262. *Id.* § 300.1100(c)(2)(i).

263. *Id.*

264. *Id.*

265. 40 C.F.R. § 300.1100(c)(2)(ii)(B) (1994).

266. *Id.* § 300.1100(c)(2)(i). This section provided in part:

A prospective holder who undertakes or requires an environmental inspection of the vessel or facility in which indicia of ownership are to be held, or requires a prospective borrower to clean up a vessel or facility or to comply or come into compliance . . . with any applicable law or regulation, is not by such action considered to be participating in the vessel or facility's management. Neither the statute nor this regulation requires a holder to conduct or require an inspection to qualify for the exemption, and the liability of a holder cannot be based on or affected by the holder not conducting or not requiring an inspection.

Id.

267. *Id.* The EPA included a section to protect lenders that police their loans because the EPA believed that liability could not be premised on the existence of loan covenants that seek to ensure that the facility is operated in an environmentally sound manner. 57 Fed. Reg. 18,356 (1992).

268. 40 C.F.R. § 300.1100(c)(2)(ii)(B)(1994). A lender could undertake financial work-out activities regardless of whether the borrower was in default. *Id.* The lender's actual conduct, rather than the lender's motivation, was critical. 57 Fed. Reg. 18,256 (1992) (citing *In re Bergsøe Metal Corp. v. East Asiatic Comp., Ltd.*, 910 F.2d 668, 672 n.2).

269. 40 C.F.R. § 300.4400(c)(2)(ii)(A)(1994).

270. *Id.*

Under the rule's general test for participation in management,²⁷¹ a lender would lose its security interest exemption before foreclosure if it exercised decisionmaking control over the borrower's environmental compliance in such a way that the lender undertook responsibility for the borrower's hazardous substance handling or disposal practices.²⁷² In addition, the lender would lose the exemption if it exercised control at a level comparable to that of a manager of the borrower's facility such that the lender assumed a level of control encompassing the day-to-day decisionmaking of the enterprise²⁷³ even if such decisions were not limited to environmental matters.²⁷⁴

The rule made it clear that a lender's security interest exemption became void by merely foreclosing on, and taking title to, a contaminated property where it holds a security interest.²⁷⁵ If a lender's acquisition during foreclosure was temporary and the lender sought to sell or otherwise divest the foreclosed property in a reasonably expeditious manner, the lender could do several things without losing its exemption. The lender could purchase the property at a foreclosure sale,²⁷⁶ acquire or assign title to the property in lieu of foreclosure,²⁷⁷ or, in the case of a lease financing transaction, repossess the

271. The rule's general test for participation in management provided that the borrower would only lose the exemption if it

(i) exercises decisionmaking control over the borrower's environmental compliance, [in] such [a way] that the [lender undertakes] responsibility for the borrower's hazardous substance handling or disposal practices; or

(ii) exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with respect to:

(A) Environmental compliance or

(B) All . . . of the operational . . . aspects of the enterprise other than environmental compliance. Operational aspects of the enterprise include functions such [as] that of facility or plant manager, [personnel] manager, [controller, chief financial officer, or similar functions].

Id. § 300.1100(c)(1).

272. *Id.* § 300.1100(c)(1)(i). The EPA intended the general test to serve as a framework for analyzing the propriety of a lender's actions within the limitations of the exemption. 57 Fed. Reg. 18,344, 18,358 (1992).

273. 40 C.F.R. § 300.1100(c)(1)(ii)(1994).

274. *Id.* § 300.1100(c)(1)(ii)(A),(B). The rule covered two situations: where the lender controlled or directed the facility's environmental compliance activities; and where the lender's actions indicated that it had assumed responsibility for other aspects of the facility's operations at the level of a facility manager.

275. 40 C.F.R. § 300.1100(d)(1) (1994). Consistent with the holding in *Maryland Bank*, the EPA rule allowed foreclosure when the lender did not hold the property for an extended period of time without making an attempt to sell it. 57 Fed. Reg. 18,344, 18,361 (1992).

276. 40 C.F.R. § 300.1100(d)(1) (1994).

277. *Id.*

property.²⁷⁸

A lender would not meet its obligation of attempting to divest itself of property in a reasonably expeditious manner if it rejected, refused, or outbid an offer for foreclosed property that represented "fair consideration" for the property.²⁷⁹ Fair consideration²⁸⁰ was defined as an all-cash offer that does not include any unacceptable conditions, such as indemnification requirements, and does not require the lender to breach any duties that it owes to other parties like the borrower or other lenders.²⁸¹ The rule further defined fair consideration in such a way that lenders were not required to take any less than they were owed on the property.²⁸²

No time requirements were imposed by the rule for the sale or disposition of the property, provided the lender actively and continuously tried to sell the property. A bright-line test was created where a lender could establish that it was attempting to divest itself of the property in a reasonably expeditious

278. *Id.* The lender could also acquire a right to possession or title to the property; or use any other formal or informal method to acquire the borrower's collateral for later disposition in partial or full satisfaction of the underlying obligation. *Id.*

279. *Id.* § 300.1100(d)(2)(ii). The purpose of the "fair consideration" aspect of the rule was to determine when a lender inappropriately rejected offers for foreclosed property. 57 Fed. Reg. 18,344, 18,365 (1992).

280. 40 C.F.R. § 300.1100(d)(2)(ii) (1994). "Fair consideration" reflected the amount that was necessary to recover the security interest in the property. *Id.* The United States could seek to recover any windfall or excess amount that unjustly enriched a lender. 57 Fed. Reg. 18,344, 18,365 (1992).

281. 40 C.F.R. § 300.1100(d)(2)(ii)(A) (1994) provides in part:

The value of the security interest is calculated as an amount equal to or in excess of the sum of the outstanding principal . . . owed to the holder immediately preceding the acquisition of full title . . . pursuant to foreclosure and its equivalents, plus any interest, rent or penalties . . . plus all reasonable and necessary costs, fees, or other charges incurred by the holder incident to work out, foreclosure and its equivalents, retention, maintaining the business activities of the enterprise, preserving, protecting and preparing the vessel or facility prior to sale, re-lease of property held pursuant to a lease financing transaction . . . or other disposition, plus response costs incurred under section 107(d)(1) of CERCLA or at the direction of an on-scene coordinator; less any amounts received by the holder in connection with any partial disposition of the property, net revenues received as a result of maintaining the business activities of the enterprise, and any amounts paid to the borrower subsequent to the acquisition of full title . . . pursuant to foreclosure and its equivalents. In the case of a holder maintaining indicia of ownership primarily to protect a junior security interest, fair consideration is the value of all outstanding higher priority security interests plus the value of the security interest held by the junior holder, each calculated as set forth in the preceding sentence.

Id.

282. *Id.*

months of acquiring marketable title, with a broker, dealer, or agent who deals with the same type of property.²⁸⁴ Alternatively, a lender could advertise the property for its sale or disposition at least once a month in either a real estate publication or a trade or other suitable publication, or a newspaper of general circulation covering the area where the property was located.²⁸⁵ The rule then said, if the lender "outbids, rejects, or fails to consider an offer of fair consideration" for the facility, such action is not considered taken primarily to protect a security interest and the exemption is lost.²⁸⁶ The bright-line test took effect six months after the lender either acquired marketable title or foreclosed on the property. If the lender failed to diligently acquire marketable title, the lender had ninety days to consider "bona fide"²⁸⁷ offers to sell the property.²⁸⁸

Lenders could also undertake certain activities without losing the security interest exemption.²⁸⁹ First, a lender could take action to prevent future releases of hazardous substances.²⁹⁰ Second, the lender could remove drums from the site without incurring liability.²⁹¹ Third, a lender that foreclosed on a property could wind-up operations at the facility including actions that were necessary to close down a facility's operations, secure the site, and otherwise protect the value of the foreclosed asset for sale or liquidation.²⁹² Under the rule, a lender could continue operating the business activities of a facility that had been foreclosed if the lender determined that it was appropriate to do so, provided the lender sought to sell or liquidate the property as otherwise required.²⁹³

A lender could have also incurred liability independent of its status as an owner or operator.²⁹⁴ Even if the lender complied with the pre-foreclosure requirements of the rule, the lender could still incur liability if it arranged for

284. *Id.*

285. *Id.*

286. 40 C.F.R. § 300.1100(d)(2)(ii) (1992). The exemption is lost in such situations, except where the lender's action was required by law. *Id.*

287. A written, bona fide, firm offer meant "a legally enforceable, commercially reasonable, cash offer . . . from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform." *Id.* § 300.1100(d)(2)(ii)(B).

288. *Id.*

289. *See generally* 57 Fed. Reg. 18,344, 18,378-379 (1992).

290. *Id.* at 18,379.

291. *Id.*

292. *Id.* Winding up was considered a protected activity because without such protection, foreclosure was not possible where practical or commercial necessity dictated that the foreclosing holder undertake such action. *Id.*

293. *Id.*

294. 40 C.F.R. § 300.1100(d)(3) (1992).

disposal, or transportation of hazardous waste.²⁹⁵ Following foreclosure, a lender that arranged for the cleanup of hazardous wastes was shielded from liability if it acted in accordance with Section 107(d)(1) of CERCLA.²⁹⁶ In other words, the lender had to conduct the cleanup in accordance with the National Contingency Plan (NCP) or at the direction of an NCP coordinator.²⁹⁷

B. EPA Rulemaking Authority and the Invalidation of the Lender Liability Rule

On February 4, 1994, the D.C. Circuit Court vacated the EPA's lender liability rule in *Kelley v. EPA*.²⁹⁸ The State of Michigan and the Chemical Manufacturer's Association (CMA)²⁹⁹ challenged the validity of the EPA's rule.³⁰⁰ In a two-to-one decision, the majority held that the EPA lacked statutory authority under CERCLA to define the scope of a lender's liability.³⁰¹ The court refused to uphold the rule either as a legislative rule or as an interpretive rule.

The majority refused to uphold the rule as a legislative rule because Congress had not specifically authorized the EPA to make regulations defining the terms in CERCLA.³⁰² The court rejected the argument that as the administering agency for CERCLA, Congress implicitly authorized the EPA to

295. 40 C.F.R. § 300.1100(d)(3)(i) (1992). 40 C.F.R. § 300.1100(d)(3)(i) provided:

(i) Provided that the holder did not participate in management prior to foreclosure and its equivalents and the holder complies with the requirements of 40 C.F.R. 300.1100(d)(1)-(d)(2), during the period following foreclosure and its equivalents, a holder in possession of a vessel or facility can incur liability [under] CERCLA in connection with its activities at such foreclosed vessel or facility only by arranging for disposal or treatment of a hazardous substance, as provided by CERCLA section [9607(a)(3)], or by accepting for transportation and disposing of hazardous substances at a facility selected by a holder, as provided by CERCLA section [9607(a)(4)].

(ii) Following foreclosure and its equivalents, a foreclosing holder that directs or undertakes activities under CERCLA section [9607(d)(1)] or at the direction of an on-scene coordinator at the foreclosed vessel or facility does not incur liability for such activities.

Id.

296. 40 C.F.R. § 300.1100 (d)(3)(ii) (1992).

297. 42 U.S.C. § 107(d)(1) (Supp. V. 1993).

298. 15 F.3d 1100 (D.C. Cir. 1994).

299. As potential litigants seeking cost recovery and contribution under CERCLA, the petitioners "did not want to be foreclosed from recovering cleanup costs from those secured lenders that the Final Rule exempted from CERCLA liability." *Id.* at 1109 (Mikva, C.J., dissenting).

300. The EPA argued that the court should uphold the rule as a legislative rule that permitted the Agency to define the limits of lender liability under CERCLA. *Id.* at 1104 (citing 57 Fed. Reg. at 18,368 (1992)). In the alternative, the EPA argued that the court should uphold the rule as an interpretive rule entitled to judicial deference. *Id.* at 1108 (citing 57 Fed. Reg. 18,368 (1992)).

301. *Id.* at 1108.

302. *Id.*

promulgate regulations interpreting liability provisions under CERCLA.³⁰³ The court held that the rule was not entitled to judicial deference as an interpretive rule because Congress intended that the courts, and not the EPA, interpret CERCLA's liability provisions.³⁰⁴ The court explained that an interpretive rule simply explains an agency's construction of a statute³⁰⁵ but is not binding.³⁰⁶

The dissent in *Kelley* raised several arguments that may reappear in subsequent cases.³⁰⁷ The majority opinion is significant not only because it invalidated the EPA's security interest exemption rule, but also because it restricted the EPA from interpreting the liability provisions in CERCLA. In response, the dissent argued that the rule should have been upheld because CERCLA's language, structure, and legislative history suggest that Congress delegated authority to the Agency to interpret the scope of CERCLA's regulatory regime. In addition, the dissent disagreed with the majority's view that the preponderance of the evidence standard in section 106(b)(2) reserves all determinations of CERCLA liability to the courts.³⁰⁸ Rather, the dissent argued that final determinations of causation rest with the courts while the scope of CERCLA's statutory coverage is subject to EPA interpretation.³⁰⁹

303. The EPA based its argument on *Wagner Seed v. Bush*, 946 F.2d 918 (D.C. Cir. 1991), where the court held that the EPA "had authority to interpret certain language in section 106 of CERCLA that applied to EPA's administrative responsibilities." *Kelley v. EPA*, 15 F.3d 1100, 1105 (D.C. Cir. 1994).

The D.C. Circuit also rejected what it considered the EPA's strongest argument, that the EPA's role in implementing the reimbursement provisions under section 106(b)(2) implies authority to define liability. *Kelley*, 15 F.3d at 1106. Section 106 authorizes nonliable parties that clean up a site under an imminent and substantial endangerment order to petition the EPA for reimbursement of reasonable costs from the Superfund. 42 U.S.C. § 9606(b)(2). The EPA argued that to determine whether to reimburse requires a determination of liability. *Kelley*, 15 F.3d at 1106. However, the court held that Congress authorized courts to use a preponderance of the evidence standard to determine whether a party whose petition for costs was denied by the EPA may nonetheless recover. *Id.* at 1107.

304. *Id.* at 1106.

305. *Id.* at 1108 (citing *United Technologies Corp. v. EPA*, 821 F.2d 714, 719 (D.C. Cir. 1987)); *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

306. *Id.* (citing *Chevron*, 467 U.S. at 842-43 (noting that although the EPA's construction of CERCLA is not binding on courts, it is entitled to substantial deference)).

307. On April 11, 1994, the EPA filed a petition for rehearing. Respondents' Petition for Rehearing and Suggestions for Rehearing en banc, *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994). If the petition is denied, the government may wish to appeal to the United States Supreme Court.

308. *Kelley v. EPA*, 15 F.3d 1100, 1111 (D.C. Cir. 1994).

309. *Id.* The dissent disagreed with the majority's determination that the private right of action that CERCLA confers on third parties is incongruent with EPA's authority to define liability. The presence of a private right of action does not, as the dissent pointed out, necessarily indicate congressional intent to designate to the judiciary, rather than the EPA, the sole authority to determine the scope of statutory liability. *Id.*

In the view of the dissenting judge, the EPA should have been entitled to *Chevron* deference.³¹⁰ Based on the opinion of the dissenting judge, the respondents filed a petition for rehearing that was decided on June 14, 1994.³¹¹ In its decision, the court reaffirmed its prior decision to vacate the EPA's Lender Liability Rule.³¹² The court again argued that the EPA lacked the authority to interpret the liability provisions contained in CERCLA no matter how ambiguous.³¹³ Subsequently, the respondents filed a writ of certiorari to have the case heard by the Supreme Court which was denied on January 17, 1995.³¹⁴

Despite the reasonableness of the EPA's interpretation, the rule was nonetheless struck down. Lenders still face an uncertain fate with respect to liability issues and Congress must address these issues. The fact that lenders face the liability of their insolvent borrowers should entitle them to special consideration. The following is a suggestion for a congressional proposal to address the issues involving lender liability and resolve them in an equitable manner.³¹⁵

VI. A PROPOSAL TO REDEFINE THE LIABILITY OF LENDERS WHO FAIL TO QUALIFY FOR THE SECURITY INTEREST EXEMPTION

This Note proposes to amend the security interest exemption by redefining the parameters of liability as applied to lenders. To apply joint and several liability to lenders who fail to qualify for the security interest exemption creates inequitable results. Lenders typically become involved in the management of their borrower's hazardous waste facility when the borrower is either

310. *Id.*; See also *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984) (stating that an administrative agency's interpretation of a federal statute is entitled to deference).

311. *Kelley v. EPA*, 25 F.3d 1088 (D.C. Cir. 1994).

312. *Id.* at 1092.

313. *Id.* at 1089. The court disagreed with the dissent in its original decision to invalidate the rule that the EPA had implicit authority to interpret liability provisions contained in CERCLA. *Id.* The court acknowledged that the EPA is authorized to prescribe the manner and form by which owners and operators are to notify the agency of hazardous waste storage, treatment, or disposal at their facilities. However, the court noted that such authority is isolated and does not extend to authorizing the EPA to determine the specific circumstances under which a specific lender would be an owner or operator and therefore liable for hazardous waste clean up. *Id.*

314. *American Bankers Ass'n v. Kelley*, 115 S. Ct. 900 (1995).

315. The following proposal is an alternative approach that Congress may use to address the issue of the scope of liability to be applied to lenders. Its purpose is to strike a balance between the interests of the EPA and the lending community. First, the proposal would spare lenders the inequity resulting from joint and several liability. Second, while the EPA may not be able to collect all of the funds expended in a hazardous waste cleanup, lenders would still be forced to bear their fair share when held liable.

experiencing financial difficulty or after the borrower has gone bankrupt. The EPA sues lenders because the borrower, the owner of the facility, is insolvent. When the borrower is insolvent and the lender is held liable for the borrower's environmental contamination, the lender may face a judgment far in excess of its actual culpability. For the foregoing reasons, CERCLA should afford lenders special consideration in assessing their liability.³¹⁶

PROPOSED CONGRESSIONAL OR ADMINISTRATIVE AMENDMENT
TO THE SECURITY INTEREST EXEMPTION: DEFINING THE
SCOPE OF LIABILITY OF LENDERS WHO FAIL TO QUALIFY FOR
THE SECURITY INTEREST EXEMPTION

Scope of Liability

(a) *Pre-Foreclosure Activities*

(1) *Persons covered.* Persons³¹⁷ who maintain indicia of ownership primarily to protect a security interest in a vessel or facility.

(2) *Liability & Fault Allocation.* Upon the finding that a person has participated in the management of a facility sufficient to void the security interest exemption, such person shall,

(i) be jointly and severally liable, as defined by the common law, to the extent that the participation in management is greater than fifty percent of:

(A) the decisionmaking control over the

316. Ultimately, business and industry would benefit if lenders were afforded special consideration regarding their liability. Environmentally sensitive small businesses are particularly vulnerable when lenders face the possibility of CERCLA liability. Madden, *supra* note 201, at 158. House member John LaFalce stated that small business, as the backbone of the economy, faces particular problems because of environmental risks to lenders. 135 CONG. REC. E1325 (daily ed. Apr. 25, 1989) (statement of Rep. LaFalce). He listed five problems that small businesses face because of the environmental concerns of lenders:

- (1) the inability to obtain financing for construction of new or expanding facilities;
- (2) the inability to refinance existing mortgages with balloon payments coming due;
- (3) the inability to refinance existing mortgages to reduce debt service or generate working capital;
- (4) the inability to use real estate as security for working capital loans; and
- (5) the inability to sell properties not needed for current operations or vacated because of relocation. *Id.*

Representative LaFalce went on to say that many lenders may be unwilling to provide financing to businesses located in the general area where hazardous waste contamination exists, even if there is no showing that the particular property or adjacent properties are contaminated. *Id.* At the very least, the expansive scope of potentially responsible parties under CERCLA has made lenders particularly cautious in their lending practices.

317. CERCLA's definition of the term "person" is provided in § 9601(21), which states: "The term 'person' means 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." 42 U.S.C. § 9601 (21) (1983).

- borrower's environmental compliance; or
- (B) the managerial day-to-day decisions made at the vessel or facility after the security interest is obtained; or
- (ii) be liable for no greater than twice that person's percentage of fault if such person's participation in management constitutes equal to or less than fifty percent of:
 - (A) the decisionmaking control over the borrower's environmental compliance; or
 - (B) the managerial control encompassing the day-to-day decisions made at the vessel or facility after the security interest is obtained.

(b) *Post-Foreclosure Activities*

(1) *Liability and Fault Allocation.* Upon the finding that a person has foreclosed (or its equivalents)³¹⁸ on a facility but has engaged in conduct inconsistent with whose actions are the security interest exemption, liability shall be determined as follows:

- (i) if the actions of such person constitute participation in management sufficient to void the security interest exemption, a reviewing court shall apply joint and several liability as defined by the common law.
- (ii) if the actions of such person do not constitute participation in management but fail to comply with 42 U.S.C. § 9607(d)(1),³¹⁹ such person shall
 - (A) be jointly and severally liable as defined by the common law if such actions constitute greater than fifty percent of the environmental damage caused by the vessel or facility; or
 - (B) be liable for no greater than twice that

318. The reference to foreclosure "or its equivalents" includes purchase at a foreclosure sale, acquisition or assignment of title in lieu of foreclosure, termination of a lease or other repossession; acquisition of a right to title or possession, agreement in satisfaction of the obligation, or any other formal or informal matter that the lender acquires title to or possession of the secured property. 40 C.F.R. § 300.1100(d)(1) (1994).

319. 42 U.S.C. § 9607(d)(1) (1994) provides in part that no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as a result of negligence on the part of such person.

Id.

person's percentage of fault if that person's actions constitute equal to or less than fifty percent of the environmental damage caused by the vessel or facility.

ANALYSIS OF THE PROPOSED AMENDMENT

The proposal is tailored in part after South Dakota's method for allocating liability when a person is less than fifty percent at fault.³²⁰ Under South Dakota law, any person found less than fifty percent liable on the basis of joint and several liability³²¹ may not be held liable for more than twice the percentage of fault allocated to that person.³²² The South Dakota law was passed in reaction to the inequity to solvent joint tortfeasors caused by the imposition of joint and several liability.³²³ The statute attempts to limit the inequitable result that occurs when "less than half at fault" joint tortfeasors pay more than their fair share.³²⁴ Moreover, the statute still protects the plaintiff's recovery, but to a lesser extent.³²⁵

This proposal applies only to lenders found liable under CERCLA who fail to qualify for the security interest exemption. Moreover, it applies before a court apportions liability. Finally, the proposal determines liability based on specific guidelines³²⁶ and then directs the reviewing court to use equitable factors that no more than double the lender's allocation of fault.³²⁷

Similar to the EPA's interpretive rule, the proposal addresses the actions of lenders in the pre- and post-foreclosure periods. In the pre-foreclosure

320. S.D. CODIFIED LAWS ANN. § 15-8-15.1 (1984 & Supp. 1993) states:

If the court enters judgment against any party liable on the basis of joint and several liability, any party who is allocated less than [50%] of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.

Id.

321. The South Dakota statute applies to all tortious conduct, not just environmental contamination. *Id.*

322. *Id.* Compare IOWA CODE ANN. § 668.4 (West 1987) (joint and several liability does not apply to defendants who are found to bear less than 50% of the fault assigned to all the parties).

323. Steven D. Kelley, *South Dakota's Uniform Contribution Among Tortfeasors Act: Unsettling Issues Regarding Settlement and Release of Joint Tortfeasors*, 36 S.D. L. REV. 600, 605 (1991).

324. *Id.*

325. *Id.*

326. The reviewing court would look to either the lender's degree of participation in management, or the amount of hazardous waste the lender contributed.

327. This would apply so long as the lender is found no more than 50% at fault. Otherwise, common law joint and several liability would apply.

period, lenders are held to a "participation in management" standard. The proposal attempts to accommodate lenders that do not substantially control the borrower's facility, but control it sufficiently to void the security interest exemption.³²⁸

First, the proposal addresses the situation where the lender exercises managerial decisionmaking control over the borrower's facility.³²⁹ An equitable allocation of fault is imposed based on the degree of control that the lender exercises at the facility. The proposal protects lenders from joint and several liability if their involvement in managerial decisionmaking is equal to or less than fifty percent of the total managerial decisionmaking.³³⁰ As an alternative, a court has the discretion to hold the lender liable, but a lender cannot be held liable for more than double its allocation of fault.³³¹ In CERCLA cleanup cost recovery actions, both the EPA and the lender(s) would share the burden when the borrower is insolvent.³³²

At levels of managerial control above fifty percent, common law joint and several liability would apply (double liability at levels of fault greater than fifty percent would result in allocations greater than one hundred percent). Fifty

328. The practical problem is that despite all of the precautions, testing, and evaluation that lenders take when transacting a loan, there is no assurance for the lender that contamination at a property has not been overlooked or deliberately concealed. 135 CONG. REC. E1325 (daily ed. Apr. 25, 1989) (Statement of Rep. LaFalce).

329. This part of the proposal seeks to protect lenders who do not contribute to the disposal of hazardous waste. Lenders whose actions are found to be beyond the protection of the exemption may not have contributed to the environmental contamination at the site, yet must still pay for its cleanup. Lender's whose control does not constitute a majority will not be subject to joint and several liability.

330. Fifty percent was chosen because levels of control greater than 50% would indicate that the decisions of the lender have controlling weight. If it is apparent to the reviewing court that the lender has a majority of the control over the decisions made at the facility, then the lender would be subject to joint and several liability. However, the inherent difficulty in the proposed liability scheme is apportioning damages based on managerial control. A judge or jury would have to determine the relative degrees of fault of each liable defendant.

331. Doubling the lender's allocation of fault accomplishes two goals. First, because the lender would be no more than 50% at fault, the lender would never be held responsible for greater than 100% of the total fault. The proposal would not put the lender in a worse position than if joint and several liability were applied. Second, by doubling the lender's allocation of fault, the proposal recognizes the need to balance the competing interest in environmental cleanup cost allocation. While the EPA would not be left to bear the entire burden of unrecoverable sums from insolvent polluters, lenders would be relieved from the harsh results of joint and several liability.

332. Despite the enormity of the task of rehabilitating hazardous waste sites, joint and several liability puts seemingly innocent lenders in a predicament. The threat of joint and several liability, some have argued, encourages minimally responsible parties such as lenders to settle. See Burkhardt, *supra* note 12, at 390. However, the EPA could put forth completely unreasonable settlement offers because the lender risks a far worse result if the case goes to trial. Empowering the EPA with a joint and several liability only furthers the problems facing lenders with minimal liability.

percent is a natural division because this proposal does not intend to make lenders worse off than if joint and several liability were applied. In addition, if a lender takes control of a facility, then it should face the same liability as the borrower.³³³

The inherent difficulty in this proposal is in apportioning damages based on the levels of managerial control that lenders exert. To apportion liability, this proposal directs the reviewing court to follow the method of apportionment commonly followed in comparative negligence suits.³³⁴ In comparative negligence suits, the jury is instructed to calculate the full amount of damages sustained by the plaintiff and then to compare the fault of each party.³³⁵ Next, the jury is instructed to reduce the full amount of the plaintiff's damages by an amount equal to the plaintiff's contributory negligence.³³⁶ Analogizing that

333. McGaughan, *supra* note 15, at 126. If the 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. *Id.*

334. See Damon Ball, *A Reexamination of Joint and Several Liability Under a Comparative Negligence System*, 18 ST. MARY'S L.J. 891, 894 (1987).

335. See 3 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 80.27, at 188-90 (4th ed. 1987).

336. *Id.* One example of comparative negligence jury instruction provides:

The issues to be determined by the jury in this case are these:

First: Was the defendant negligent in one or more of the particulars alleged? *Id.*

If your unanimous answer to that question is "No," you will return a verdict for the defendant; but if your unanimous answer is "Yes," you then have a second issue to determine, namely:

Second: Did the negligence of (one or more) defendant cause or contribute to any injury and damage to the plaintiff? *Id.*

If your unanimous answer to that question is "No", [sic] you will return a verdict for the defendant(s); but if your unanimous answer is "Yes", [sic] you must then find the answer to a third question, namely:

Third: Was the plaintiff guilty of some contributory negligence?

If you should find that he was not, then, having found in [the] plaintiff's favor in answer to the first two questions, you will proceed to determine the amount of [the] plaintiff's damages, and return a verdict in the plaintiff's favor for that amount. *Id.*

On the other hand, if you should find, from a preponderance of the evidence in the case, that the plaintiff himself was guilty of some contributory negligence, and that [the] plaintiff's fault caused or contributed to any injuries which [the] plaintiff may have sustained, then you must compare the negligence of the parties, and return a verdict in favor of the plaintiff for a reduced amount, based upon the comparison. *Id.*

The proper procedure to be followed by the jury in comparing the negligence of the parties, and returning a verdict in favor of the plaintiff for a reduced amount based upon that comparison, is: First, determine the full amount of all damages sustained by the plaintiff, as a proximate result of the accident; next, compare the negligence or fault of the parties, by determining in what proportion, figured in percentage, [the] plaintiff's own fault contributed as a proximate cause of all damages suffered by the plaintiff, as a proximate result of the accident; then, reduce the full amount of [the] plaintiff's damages, by subtracting a sum equal to the percentage of the total you find, from a

scheme to lenders in the environmental context, either the judge or jury would calculate the full amount of the EPA's expenditures at the site. Then, the trier of fact would determine the relative degrees of fault of the borrower and lender, taking into account: the amount of contamination caused by the borrower; the degree of control the lender had over the borrower's disposal activities; the degree of control the lender had with respect to the overall management of the facility; and the length of time that the lender had pervasive control over the facility.³³⁷ The court need not reduce the damages because contributory negligence of the plaintiff is not a factor when the EPA sues to recover cleanup costs. Finally, if the lender is found to control fifty percent or less of the managerial decisions made at the facility, the court would increase the lender's fault by no more than double the lender's allocation.³³⁸

If the lender engages in impermissible post-foreclosure activities, the proposal directs the reviewing court to follow common law principles of joint and several liability. A lender that fails to qualify under the post-foreclosure requirements enumerated in the EPA's rule is assumed to have become the owner of the facility. This proposal recognizes that the lender is no longer acting under the guise of the security interest exemption and should be treated the same as other owners and past owners.

preponderance of the evidence, in the case, was caused by [the] plaintiff's contributory negligence; and return a verdict in favor of the plaintiff for the amount remaining (against all defendants that you find caused or contributed to cause plaintiff's damages).
Id.

Id.

337. Analogizing to the method of apportionment in the products liability suit of *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984), the judge or jury would follow a preponderance of the evidence standard and determine the relative fault of each defendant. *Id.* at 427 n.8. In *Duncan*, the judge issued the following instruction to the jury:

If, in answer to Questions ____, ____, and ____, you have found that more than one party's act(s) or product(s) contributed to cause the plaintiff's injuries, and only in that event, then answer the following question. *Id.*

Find from a preponderance of the evidence the percentage of [the] plaintiff's injuries caused by:

Product X	_____
Defendant	_____
Plaintiff Z	_____
Total	100%

Id.

338. A judge or jury would determine from a preponderance of the evidence the percentage of each defendant's fault as follows:

Borrower	_____
Lender	_____
Other Responsible Parties	_____
Total	100%

The court could then increase the lender's allocation to no more than double, if the lender's liability is found equal to or less than 50% of the total liability.

the same as other owners and past owners.

If, however, the lender does not participate in the management of the facility but fails to comply with the requirements of 42 U.S.C. § 9607(d)(1), liability should be apportioned equitably. Section 9607(d)(1) requires parties that clean up hazardous waste sites to do so in accordance with the National Contingency Plan (NCP) or at the direction of an NCP on-scene coordinator.³³⁹ Failure to do so can result in liability.³⁴⁰ This proposal directs courts to apply the common law principles of joint and several liability when the lender's contribution to the environmental contamination is greater than fifty percent of the total contamination.

If the lender's contribution is equal to or less than fifty percent of the contamination, the court can hold the lender liable for no more than double its allocated liability.³⁴¹ A court can follow a volumetric apportionment³⁴² approach to dividing the harm if the lender is found to have violated section 9607(d)(1) of CERCLA. When a volumetric apportionment is used to apportion the defendant's environmental harm, the defendant must show that a relationship exists among the waste volume, the release of hazardous substances, and the harm at the site.³⁴³

339. 42 U.S.C. § 9607(d)(1) (1994).

340. See *United States v. Fleet Factors*, 821 F. Supp. 707, 718 (S.D. Ga. 1993) (holding that removal of leaking and corroded drums was not protected by the foreclosure provisions of the EPA's lender liability rule because the removal was neither consistent with the NCP, nor done under the supervision of an NCP on-scene coordinator).

341. The proposed amendment only affects lenders found to be equal to or less than 50% at fault for the environmental contamination at hazardous waste sites. Two examples will illustrate why 50% is used as a benchmark. First, a lender who is responsible for slightly less than 50% of the environmental contamination is protected by the amendment. For example, assume the insolvent borrower contributed 51% percent to the environmental contamination and the lender contributed 49% percent. Clearly, if joint and several liability is applied, the proposal would require the lender to cover 100% of the government's cleanup expenses. But for a very small difference in liability, however, joint and several liability would not apply under this amendment. The proposal accommodates for this apparent inequity and would double the lender's allocation of liability. Therefore, the lender would have to reimburse 98% percent of the EPA's costs, leaving only two percent uncollected.

Second, at the other extreme, assume the insolvent borrower contributed 95% of the contamination and the lender contributed only five percent. To hold the lender 100% responsible for the government's cleanup costs would be inequitable. This proposal would double the lender's allocation to 10%, leaving 90% uncollected. Although the result seems unfair from the government's perspective, to hold the lender entirely responsible would be far more unfair. The government can internalize environmental cleanup costs far easier than lenders.

342. See *Moore*, *supra* note 119, at 10,535.

343. *United States v. Monsanto*, 858 F.2d 160, 172 & n.25 (4th Cir. 1988). Harm may be apportioned volumetrically if it can be shown or assumed that no separate, independent factor affected the environment. *Moore*, *supra* note 119, at 10,535. After the court hears testimony on the apportionment of each defendant's harm, the court would instruct the lender to submit an

To apply this proposal, the trial court's final opinion in *Fleet Factors*³⁴⁴ is helpful.³⁴⁵ The district court found that Fleet was entitled to the security interest exemption for the pre-foreclosure period.³⁴⁶ However, Fleet engaged in impermissible post-foreclosure activities when its agents prepared the site for the auction of the foreclosed equipment.³⁴⁷ The court held that the activities of Fleet's agents were not done in accordance with 42 U.S.C. § 9607(d)(1).³⁴⁸ As the court stated, the contractors cleaned up the site haphazardly, "with all the finesse of a Viking raiding party."³⁴⁹ Therefore, Fleet was found liable under CERCLA as an owner operator.³⁵⁰

The opinion does not specify the extent of Fleet's liability. However, this Note's proposal would protect Fleet to the extent that Fleet's post-foreclosure activities consisted of equal to or less than fifty percent of the environmental contamination. In the trial court's final opinion in *Fleet Factors*, the court found Fleet's agent "seriously aggravated a conspicuous environmental hazard."³⁵¹ The fact that Fleet's agent aggravated an existing hazard indicates that Fleet's relative degree of fault was less than fifty percent. Under this Note's proposal, the court would determine an accurate measure of Fleet's contribution to the environmental hazard.³⁵² The court would then, at its discretion, increase Fleet's allocation of fault to a level not more than double the original allocation. In sum, Fleet would bear its fair share of the responsibility for the EPA's cleanup costs but would not suffer the potentially inequitable consequences of joint and several liability.

court would ultimately decide the matter based on the evidence given at trial.

344. *United States v. Fleet Factors Corp.*, 821 F. Supp. 707 (S.D. Ga. 1993).

345. For a complete discussion of *Fleet Factors*, see *supra* notes 205-27 and accompanying text.

346. The court said that Fleet's arranging for the shipment of the remaining SWP inventory did not rise to the level of managerial control sufficient to void § 300.1100(c)(1)(ii) of the security interest exemption. *Fleet Factors*, 821 F. Supp. at 716-17.

347. *Id.* at 718-19.

348. *Id.* at 718. The removal of drums from the site was not done in accordance with the NCP or under the supervision of an NCP on-scene coordinator. *Id.* The court also held that Fleet engaged in impermissible post-foreclosure participation in management because Fleet's handling of the SWP chemical drums posed a serious environmental threat. *Id.* at 719.

The actions of the salvage contractor also voided Fleet's protection under the exemption because: (1) the contractor handled "hazardous substances in an impermissible manner; (2) it seriously aggravated a conspicuous environmental hazard; and (3) it failed to complete its salvage operations in a reasonably expeditious manner." *Id.* at 720.

349. *United States v. Fleet Factors corp.*, 821 F.Supp. 707, 720 (S.D. Ga. 1993).

350. *Id.* at 726.

351. *Id.* at 720.

352. For a description of an appropriate method for apportioning the harm, see *supra* notes 334-43 and accompanying text.

VII. CONCLUSION

An examination of the lender liability cases decided under CERCLA reveals that the issue of joint and several liability was never analyzed. This Note suggests that the failure to recognize the causal link between the lender liability crisis and CERCLA's imposition of joint and several liability is the root cause of the problem. Lenders should not fear being forced to bear more than their fair share of responsibility for the cleanup of a hazardous waste site. Such fear, spawned by the threat of courts imposing joint and several liability, has created panic in the lending community.

The EPA attempted to address the lender liability crisis with its own interpretation of the security interest exemption. Unfortunately for lenders, the rule was struck and the only relief for lenders can come from Congress. This Note proposes to limit liability on a more equitable basis. Lenders should not be the last resort, deep pocket defendants that the government can sue for reimbursement of the funds expended to clean up a hazardous waste site. Of course, if the lender has contributed a substantial amount to the environmental contamination, then it should be forced to take responsibility for its actions. But where a lender's involvement is minimal, and the lender is sued simply because it has the funds to reimburse the government, there should be limitations on liability.

This Note and its proposal are directed only at lenders and CERCLA's imposition of joint and several liability. The premise of this Note is that joint and several liability puts lenders in a compromising position because they are often the only defendants left with the available funds to reimburse the EPA for its cleanup costs. While the proposal deals only with lenders, the problems with CERCLA's liability scheme extend further, to other potentially liable deep pocket defendants. This proposal attempts only to deal with lenders, but on a practical level. Congress will have to deal with liability under CERCLA in a more comprehensive manner. Nonetheless, the components of this Note should serve as useful guidelines for the EPA and Congress when they reevaluate liability under CERCLA.

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