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Lender and Receiver Liability: A New Era of the Comprehensive Environmental Response, Compensation and Liability Act's Security Interest Exemption — Interpreted by the EPA's New Lender Liability Rule*

I. Introduction

Court appointed receivers¹ (receivers) and lenders are becoming more and more concerned about potential liability for hazardous waste cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).² There have been inconsistencies and unanswered questions throughout the courts when interpreting CERCLA, especially in the wake of *United States v. Fleet Factors Corp.*³ These inconsistencies and uncertainties are the cause of concern for the receivers and the lenders who have no set guidelines to follow when determining what law or rule governs their liability. Something had to be done to set a pattern for the receivers and the lenders to follow. As a result, the Environmental Protection Agency (EPA)⁴ designed a new rule on "Lender Liability"⁵ to help alleviate some of the inconsistencies and concerns. However, in *Kelley v. EPA*,⁶ the United States Court of Appeals for the District of Columbia vacated this

* Due to the inability of the law review staff to obtain certain materials cited in this student note, we have relied on the author's own research to verify those materials.

1. Receivers are persons "appointed by a court for the purpose of preserving property of a debtor pending an action against him, or applying the property in satisfaction of a creditor's claim, whenever there is danger that, in the absence of such an appointment, the property will be lost, removed, or injured." BLACK'S LAW DICTIONARY 1268 (6th ed. 1990). The receivers receive rents, issues, and profits, and apply or dispose of them at the direction of the court when it does not seem reasonable that either party should hold them. *Id.* A receiver is a fiduciary to the court. *Id.*

2. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

3. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991). In *Fleet Factors*, the court suggested that the mere ability to influence hazardous waste disposal decisions may be enough to constitute participating in management, and thus, may incur liability. *Id.* at 1557. This theory is inconsistent with other courts' holdings and the EPA's interpretation of participating in management in its new Lender Liability Rule, which requires actual participation in management instead of the mere ability to influence; *see* *United States v. Mirabile*, [1985] 15 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,994, 20,997 (E.D. Pa. Sept. 4, 1985) (holding that engaging in purely financial aspects of management is insufficient to bring liability); Lender Liability Under CERCLA, 40 C.F.R. §§ 300.1100, 300.1105 (1994).

4. The EPA was created in 1970 to permit coordinated and effective governmental action on behalf of the government.

5. Lender Liability Under CERCLA, 40 C.F.R. pt. 300 (1994).

6. 15 F.3d 1100 (D.C. Cir. 1994). On February 4, 1994, the United States Court of Appeals for the District of Columbia Circuit held that: (1) courts, not the EPA, are designated adjudicators of scope of CERCLA liability, and (2) the EPA's Lender Liability Rule had to be vacated. *Id.* at 1109. The analysis used by the *Kelley* court stated that where Congress does not give an agency authority to determine the

rule on a jurisdictional basis not a substantive basis. While the EPA's Lender Liability Rule is technically no longer in effect, it still offers a general guideline for lenders and receivers to follow in their day to day operations.

First, it is necessary to understand what CERCLA is and what its functions are. CERCLA, commonly referred to as the Superfund,⁷ is a complex federal regulatory scheme providing for the investigation, evaluation and remediation of actual and threatened releases of hazardous substances and broad liability allocations for costs of remedial action and damages to natural resources. The statute authorizes the federal government, states, and private parties to respond to any release or threatened release of hazardous substances into the environment by investigating, evaluating and remedying the release or threatened release. The statute also permits these parties to seek reimbursement for response costs from the parties upon whom CERCLA imposes liability.⁸ In addition, the federal government is authorized to order responsible parties to remedy a release or threatened release.⁹ CERCLA was enacted in 1980 in response to the growing problems caused by improper disposal of hazardous wastes. While the statute is unquestionably complex, "stripped to its bare essentials" it permits the United States to recover from various responsible parties its costs incurred in cleaning up hazardous waste sites.¹⁰

Congress identifies four categories of persons under section 107(a) of CERCLA,¹¹ generally referred to as "potentially responsible parties" (PRPs), who may be held strictly liable for the cleanup of property that has been contaminated by hazardous substances. The categories of PRPs, relevant to this comment, are as follows: (1) the owner and operator of a vessel or a facility, and (2) any person who at the time of disposal of any hazardous substance owned or operated any

interpretation of a statute in the first instance and instead gives the agency authority only to bring the question to a federal court as the "prosecutor," deference to the agency's interpretation is inappropriate. *Id.* at 1105; *see* *United States v. Western Elec. Co.*, 900 F.2d 283, 297 (D.C. Cir. 1990). Moreover, the *Kelley* court stated that if Congress meant the judiciary, not the EPA, to determine liability issues — and the *Kelley* court believed it did — the EPA's view of statutory liability may not be given deference. *Kelley*, 15 F.3d at 1108. Thus, the *Kelley* court vacated the Lender Liability Rule. *Id.* at 1109.

However, Chief Judge Mikva of the United States Court of Appeals for the District of Columbia Circuit filed a dissenting opinion in response to the *Kelley* court's holding. *Id.* at 1109. Chief Judge Mikva stated that the majority in *Kelley* misread that statute and misinterpreted congressional intent. *Id.* at 1110. In Mikva's opinion, the EPA did not exceed the scope of its delegated authority in promulgating regulations that construe the meaning of "owner or operator" within the meaning of CERCLA. *Id.* at 1112. Because CERCLA's secured lender exemption lacks a plain meaning and the EPA's Final Rule does not construe that exemption unreasonably, Mikva stated that he would uphold the EPA's Lender Liability Rule. *Id.*

7. Superfund is the popular name of CERCLA. The Act holds responsible parties liable for the cost of cleaning up hazardous waste sites. The name derives from a trust fund initially created by the Act for meeting clean up costs pending reimbursement from responsible parties. Many states have passed similar laws.

8. 42 U.S.C. § 9613(f)(1) (1988).

9. *Id.* § 9607(j).

10. *United States v. Mirabile*, 23 Env't Rep. Cas. (BNA) 1511, 1512 (E.D. Pa. June 6, 1985); *see* 42 U.S.C. § 9607(a) (1988).

11. 42 U.S.C. § 9607(a) (1988).

facility at which such substances were disposed.¹²

The term "owner or operator" is defined in CERCLA as "any person owning or operating" the facility from which a release of hazardous substance occurred.¹³ Also, the term "owner or operator" is used for a person who owned, operated, or otherwise controlled activities at any facility where title or control was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to the State or local government.¹⁴ This term does not include a person, who, without participating in management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.¹⁵

Receivers and lenders often fall within the category of owners and operators. Unfortunately, despite a statutory exemption for their benefit,¹⁶ receivers and lenders with a security interest in contaminated property have all too often been found liable for hazardous waste cleanup of the contaminated property. Such liability primarily arises in one of two ways: (1) when the lender or receiver becomes too involved in the debtor's operation (i.e., participating in the management of the facility), or (2) when the lender or receiver forecloses on contaminated property.¹⁷ Courts in different jurisdictions have come up with inconsistent interpretations pursuant to the statutory security interest exemption for secured lenders. As a result, the EPA published the new CERCLA Lender Liability Rule to provide guidance of how the security interest exemption should be interpreted.¹⁸

This comment will discuss the evolution of lender and receiver liability under CERCLA. First, case law prior to the new Lender Liability Rule will be discussed to show some inconsistencies and unanswered questions that developed due to the ambiguity with regards to CERCLA's security interest exemption. The factual scenarios of several cases will be discussed to give some idea of what constitutes

12. *Id.* The remaining categories of PRPs are as follows:

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person . . . , and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . from which there is a release . . . , which causes the incurrence of response costs, of a hazardous substance . . . [These PRPs] shall be liable for— (A) all costs of removal or remedial action incurred by the United States . . . ; (B) any other necessary costs of response . . . ; (C) damages for injury . . . ; and (D) the costs of any health assessment or health effects study carried out under § 9604(i) of this title.

Id. § 9607(a).

13. *Id.* § 9601(20)(A).

14. *Id.* § 9601(20)(A)(iii).

15. *Id.*

16. The statutory exemption within CERCLA for secured lenders is found in § 101(20)(A) of CERCLA. The exemption states that "owners or operators" do "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 of the facility." *Id.* § 9601(20)(A).

17. Robert J. Joyce, *Lender Liability Under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") — EPA's Final Rule Interpreting the Security Interest Exemption*, 63 OKLA. B.J. 2707 (1992); see *Lender Liability Under CERCLA*, 40 C.F.R. §§ 300.1100-300.1105 (1994).

18. *Lender Liability Under CERCLA*, 40 C.F.R. §§ 300.1100, 300.1105 (1994).

either liability or protection under the security interest exemption. The evolution will continue through a detailed discussion of the EPA's Lender Liability Rule. This discussion will clarify the inconsistencies and unanswered questions as interpreted by the EPA. As noted before, the Lender Liability Rule was vacated on jurisdictional grounds. While the rule is no longer in effect, a discussion and analysis of the Lender Liability Rule is beneficial in that it provides guidelines for receivers and lenders to follow to help them avoid liability. This comment will analyze the EPA's version of what they consider appropriate behavior for receivers and lenders, and the author suggests that courts use these guidelines when determining receiver and lender liability. Finally, case law decided after the EPA's new Lender Liability Rule was released will be discussed to show how the courts have interpreted the EPA's definition and applicability of CERCLA's security interest exemption.

II. Historical Interpretations and Case Law Under CERCLA

In *United States v. Mirabile*,¹⁹ the Eastern District Court of Pennsylvania set a ground rule in determining lender liability under CERCLA. In *Mirabile*, the United States filed an action against the Mirabiles, who were the present owners of the site. The Mirabiles, in turn, joined others as third party defendants. One defendant was a creditor who merely foreclosed on the property after all the operations had ceased and then took prudent and routine steps to secure the property. A second creditor had the authority to participate in the management of Turco, a paint manufacturing facility on the site, yet he did not participate in the management. A third creditor sent advisors to Turco, one of which may have participated in day-to-day nonfinancial management decisions.

The *Mirabile* court concluded that the security interest exemption plainly suggests that if a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be liable for cleanup costs.²⁰ The holding in *Mirabile* closely reflects the holdings in the cases subsequent to the EPA's new Lender Liability Rule. In deciding this case of first impression, the *Mirabile* court relied on an inference that a stockholder who actively participates in management may be held liable.²¹ However, the *Mirabile* court then distinguished between the nuts-and-bolts involvement in decisionmaking in the stockholders, cases and the strictly financial involvement in the case before it.²² The participation must be in the management of the facility, i.e., the operational, production, or waste disposal activities.²³ Thus, the secured creditors would be liable only if they had exercised control over the operations of the corporation.²⁴

With regards to the creditor who merely foreclosed on the property, the *Mirabile* court held that the nature of the title received in its actions with respect to the

19. [1985] 15 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985) (creditor's defenses).

20. *Id.* at 20,995.

21. *Id.* at 20,994.

22. *Id.*

23. *Id.*

24. *Id.*

foreclosure was plainly undertaken in an effort to protect its security interest in the property.²⁵ The creditor made no effort to continue any operations on the property; in fact, the creditor was involved in only very limited activities on the property. Thus, the *Mirabile* court concluded that for a secured creditor such as this to be held liable, it must, at a minimum, participate in the day-to-day operational aspects of the site.²⁶ In the instant case, the creditor did not participate in the operations. Merely foreclosing on property after all the operations had ceased and taking prudent and routine steps to secure the property against further depreciation does not constitute participating in management which would subject the creditor to liability.²⁷

The creditor which had the authority to participate in management, yet did not participate, was also found to be free of liability.²⁸ This creditor never took legal or equitable title to the site. The loan agreement it had with the Mirabiles contemplated some degree of involvement which could be characterized as participation in day-to-day management; however, this involvement never occurred. The loan agreement also contained certain restrictions on Turco's finances. The court noted that participation in the purely financial aspects of operation, as here, is not sufficient to bring a lender within the scope of CERCLA liability.²⁹

The creditor who sent advisors to Turco presented a cloudier situation. Resolution of this creditor's liability required a finely tuned determination of the sort of participation in management which would lead to the imposition of CERCLA liability.³⁰ In *Mirabile*, the court denied the creditor's motion for summary judgment in lieu of more information as to the extent that the creditor participated in management.³¹ However, the court rejected the Mirabiles' argument that this creditor was liable because it refused to provide the operator with enough money to meet environmental obligations.³²

In the cases following *Mirabile*, the courts began to stray from the *Mirabile* holding. Instead, they implemented their own interpretations of CERCLA liability for lenders. In *United States v. Maryland Bank & Trust Company (MB & T)*,³³ the court held that by merely taking title to contaminated property through foreclosure, secured parties could become strictly liable for the cleanup of any hazardous substances at the facility.³⁴ MB & T engaged in a relationship with the owners of the land at issue. MB & T loaned money to the owners for their two businesses. MB & T knew that the businesses were trash and garbage businesses on the site. For several years, the owners permitted hazardous waste dumping on their site.

25. *Id.* at 20,996.

26. *Id.*

27. *Id.*

28. *Id.* at 20,997.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. 632 F. Supp. 573 (D. Md. 1986).

34. *Id.* at 579.

Subsequently, MB & T loaned money to a new purchaser of the land, who soon failed to make loan payments. Consequently, MB & T instituted a foreclosure action against the site and purchased the property at the foreclosure sale. MB & T then took title to the property. MB & T retained ownership of the property up through the date of the litigation. The EPA informed MB & T that they either could clean up the hazardous wastes or the EPA would use its funds to clean up the site itself. MB & T failed to clean up the property. Subsequently, the EPA proceeded with the cleanup and sought reimbursement from MB & T in this action.

The *MB & T* court applied section 107(a) of CERCLA to impose liability. This section stated that the government must establish: (1) the site is a "facility;" (2) a "release" or "threatened release" of any "hazardous substance" from the site has occurred; (3) the release or threatened release has caused the United States to incur "response costs"; and (4) the defendant is one of the person designated as a party liable for costs.³⁵ MB & T conceded the first three elements were met. The fourth element was determinative of whether MB & T was an "owner and operator" within the meaning of sections 107(a)(1) and 101(20)(A).³⁶ It was undisputed that MB & T was the owner of the facility. It was not determined whether MB & T was the operator of the facility. However, the *MB & T* court held that current ownership of a facility alone brings a party within the ambit of section 107 (a)(1) of CERCLA.³⁷ Unless MB & T fell within the security interest exclusion³⁸ (which MB & T had the burden of proving), they would be held liable as an owner under CERCLA.³⁹

The *MB & T* court stated that the exemption in subsection (20)(A) of CERCLA covers only those persons who, at the time of the clean-up, hold "indicia of ownership" to protect a then-held security interest in the land.⁴⁰ In other words, the security interest must exist at the time of the clean-up.⁴¹ The *MB & T* court found that MB & T's security interest terminated at the foreclosure sale, at which time it ripened into full title.⁴² Thus, MB & T was found liable for the cleanup costs as

35. *Id.* at 576.

36. 42 U.S.C. §§ 9607(a), 9601(20)(A) (1988).

37. *MB & T*, 632 F. Supp. 573, 577 (D. Md. 1986) (citing 42 U.S.C. § 9607(a)(1) (1988)). Although Superfund § 107(a)(1) refers to the term "owner and operator," the courts have consistently interpreted this phrase to mean "owner or operator" for purposes of imposing Superfund liability. *Id.* at 578. Thus, it is only necessary to establish that a person is either an owner or an operator, rather than being required to prove that the person is both an owner and an operator. *Id.*

38. 42 U.S.C. § 9601(20)(A)(iii) (1988).

39. *MB & T*, 632 F. Supp. at 578.

40. *Id.* at 579.

41. *Id.*

42. *Id.* (citing 55 AM JUR. 2D *Mortgages* § 785 (1971)). However, the court referred to an Ohio holding which stated that had a bank repossessed its collateral in a toxic waste dump pursuant to its security agreement, it would have qualified for the § 101(20)(A) exception, and hence escaped liability. *Id.* at 580 (citing *In re T.P. Long Chem., Inc.*, [1985] 15 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,635 (Bankr. N.D. Ohio Jan. 3, 1985)). Also, the *MB & T* court referred to the *Mirabile* holding that a mortgagee's purchase of land was an effort to protect its security interest because the mortgagee promptly assigned the property. *Id.* at 580; see *United States v. Mirabile*, [1985] 15 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,994, 20,996 (E.D. Pa. Sept. 4, 1985). The *MB & T* court disagreed with the *Mirabile* court to the extent to which it suggested a rule of broader application. *MB & T*, 632 F. Supp. at 580. The *MB & T* court stated

an owner of the property.⁴³

In *United States v. Fleet Factors Corp.*,⁴⁴ the court suggested that a secured creditor could be liable under CERCLA for participating in the financial management of a borrower's facility if evidence indicated that the creditor had the capacity to influence the borrower's treatment of hazardous waste disposal.⁴⁵ Yet, the *Fleet Factors* court confirmed that some level of actual involvement is required to abrogate the exemption.⁴⁶ This suggestion that a secured creditor could be liable for participating in the financial management of a facility is inconsistent with other jurisdictions, and thus, caused uncertainties among lenders.⁴⁷

In *Fleet Factors*, the Swainsboro Print Works (SPW), a cloth printing facility, entered into a factoring agreement with Fleet in which Fleet agreed to advance funds against the assignment of SPW's accounts receivable. As collateral for these advances, Fleet also obtained a security interest in SPW's textile facility and all of its equipment, inventory, and fixtures. Three years later, SPW filed for bankruptcy under Chapter 11. The factoring agreement between SPW and Fleet continued with court approval. Eventually Fleet ceased advancing funds to SPW. Subsequently, Fleet foreclosed on its security interest in some of SPW's inventory and equipment, and contracted with Baldwin Industrial Liquidators, Inc. (Baldwin) to conduct an auction. Baldwin sold the material as is and in place. Then Fleet contracted with Nix Riggers to remove the remaining unsold equipment. The EPA inspected the facility and found 700 fifty-five gallon drums containing toxic chemicals and forty-four truckloads of material containing asbestos and incurred nearly \$400,000 in responding to the environmental threat at SPW. The facility was conveyed to Georgia at a foreclosure sale. The government sued the two principal officers of SPW and Fleet to recover its costs.

There was no dispute that Fleet held an "indicia of ownership" in the facility through its deed of trust to SPW, and that this interest was primarily to protect its security interest in the facility. However, the critical issue in determining whether Fleet met the security interest exemption was whether Fleet participated in

that the "legislative history and policies behind the Act counsel against such a generous reading of § 101(20)(A)'s exclusion." *Id.*

43. *MB & T*, 632 F. Supp. at 579. The court noted that because MB & T held the property for such an extended period of time, it was not necessary to consider the issue of whether a secured party which purchased the property at a foreclosure sale and then promptly resold it would be precluded from asserting the § 101(20)(A) exemption. *Id.* at 579 n.5. *But see* *United States v. Mirabile*, [1985] 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992 (E.D. Pa. Sept. 4, 1985) (site-buyer's defenses).

44. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

45. *Id.* at 1558.

46. *Id.* at 1557. The *Fleet Factors* court stated that the ability to influence could be considered participation in management, while other courts have held that actual participation in management is required. *Id.*; *see Mirabile*, [1985] 15 Env'tl. L. Rep. at 20,996.

47. *Cf. Waterville Indus., Inc. v. Finance Auth. of Me.*, 984 F.2d 549 (1st Cir. 1993); *Kelley ex rel. Michigan Natural Resources Comm'n v. Tiscornia*, 810 F. Supp. 901 (W.D. Mich. 1993); *Ashland Oil v. Sonford Prods. Corp.*, 810 F. Supp. 1057 (D. Minn. 1993); *United States v. Mirabile*, [1985] 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985); *Lender Liability Under CERCLA*, 40 C.F.R. §§ 300.1100, 300.1105 (1994).

management sufficiently to incur liability under the statute. The *Fleet Factors* court acknowledged that the interpretation of the lender defense was an issue of first impression in the federal appellate courts and held that a secured creditor can incur Superfund liability if it participates in the financial management of a facility to such a degree as to indicate a capacity to influence the borrower's waste management practices even if it is not involved in day-to-day operational decisions.⁴⁸

The *Fleet Factors* court stated that the trial court's broad interpretation of the security interest exemption would essentially require a secured creditor to be involved in the operations of a facility in order to incur liability and this construction ignored the plain language of the exemption and essentially rendered it meaningless.⁴⁹ The court further stated that individuals and entities involved in the operations of a facility are already liable as operators under the express language of 42 U.S.C. § 9607(a)(2) (1988), and if Congress intended to absolve secured creditors from ownership liability, it would have done so.⁵⁰ Instead, the statutory language chosen by Congress explicitly holds secured creditors liable if they participate in management of a facility.⁵¹

The *Fleet Factors* court adopted the standard that a secured creditor may incur CERCLA liability without being an operator by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes.⁵² The *Fleet Factors* court held it is not necessary for the secured creditor to actually be involved in the day-to-day operations of the facility or to participate in the management decisions relating to hazardous waste to be liable, although such conduct will certainly lead to the loss of the statutory exemption's protection.⁵³ Rather, the *Fleet Factors* court held a secured creditor will be liable if its involvement in the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.⁵⁴ The *Fleet Factors* court specifically rejected the formulation of the secured creditor exemption suggested by the district court in *Mirabile*.⁵⁵

The *Fleet Factors* court stated that its interpretation of the exemption could be challenged as creating a disincentive for lenders to extend financial assistance to businesses with potential hazardous waste problems, and thus, would encourage secured creditors to distance themselves from the management actions, particularly those related to hazardous wastes.⁵⁶ However, the *Fleet Factors* court concluded

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

49. *Id.* at 1557.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1557-58.

54. *Id.* at 1558.

55. *Id.*; see *United States v. Mirabile*, [1985] 15 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,994, 20,997 (E.D. Pa. Sept. 4, 1985) (stating that the security interest exemption plainly suggests that if secured creditor does not become overly entangled in affairs of operation of facility, creditor may not be liable for cleanup costs).

56. *Fleet Factors*, 901 F.2d at 1558; see *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp.

that these concerns were unfounded.⁵⁷ The *Fleet Factors* court determined that its holding would instead encourage creditors to monitor the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support.⁵⁸ The *Fleet Factors* court reasoned that once a secured creditor's involvement with a facility became sufficiently broad that it could anticipate losing its exemption from CERCLA liability, it would have a strong incentive to address hazardous waste problems at the facility rather than studiously avoiding the investigation and amelioration of the hazard.⁵⁹

The decision in *Fleet Factors* created some uncertainties that needed to be resolved. For example, the *Fleet Factors* court's suggestion that a secured creditor could be liable under CERCLA for participating in the financial management if the creditor merely had the capacity to influence the borrower's treatment of waste disposal caused uncertainties among lenders because its holding was inconsistent with other jurisdictions. This created questions as to what was considered participation in management and which actions were permissible to avoid CERCLA liability. Also, lenders were unclear as to the applicability of the security interest exemption under CERCLA. As a result of these uncertainties, the EPA issued a proposed rule under the National Oil and Hazardous Substances Contingency Plan to clarify its interpretation of lender liability.⁶⁰ This rule, titled the Security Interest Exemption, specifies the range of permissible actions that may be taken within the bounds of section 101(20)(A) of CERCLA.⁶¹

III. The Lender Liability Rule (Security Interest Exemption)

The EPA's Lender Liability Rule defines the security interest exemption and provides that if a lender does not participate in the management of a contaminated facility (i.e., exercise actual control over environmental compliance activities or day-to-day operations at the facility) it cannot be held liable under CERCLA as an "owner or operator" of the facility.⁶² The rule frees lending institutions from fear of undue and unfair cleanup liability without impairing the EPA's ability to protect the public from mismanaged hazardous waste sites.⁶³ The security interest exemption focuses on three key elements: (1) indicia of ownership, (2) primarily to protect a security interest, and (3) participating in the management of a vessel or facility.⁶⁴

556 (W.D. Pa. 1989); Roslyn Tom, Note, *Interpreting the Meaning of Lender Management Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 928, 944 (1989).

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

58. *Id.*

59. *Id.* at 1559.

60. 56 Fed. Reg. 28,798 (codified at 40 C.F.R. pt. 300) (proposed June 24, 1991).

61. *Id.*

62. See 40 C.F.R. § 300.1100(c) (1994) (security interest exemption).

63. Ruth G. Fields, *EPA Clarifies Lender Liability, Secured Creditor Exemption Upheld Under Superfund Law*, *SERVICING MGMT.*, June 1992, at 16.

64. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988); see also 40 C.F.R. § 300.1100(a)-(c)

A. To Whom the Security Interest Exemption Applies

The security interest exemption applies to a person who maintains indicia of ownership primarily to protect a security interest without participation in management.⁶⁵ Such persons are referred to as "holders" under the EPA's new regulations. The definition of a holder is set forth in the regulations as follows:

A holder is a person who maintains *indicia of ownership* (as defined in 40 CFR 300.1100(a)) primarily to protect a *security interest* (as defined in 40 CFR 300.1100(b)(1)). A holder includes the initial holder (such as the loan originator), any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market), a guarantor of an obligation, surety, or any other person who holds ownership indicia primarily to protect a security interest, or a receiver or other person who acts on behalf or for the benefit of a holder.⁶⁶

While the security interest exemption applies to holders, the question arises as to whether a person other than a holder could exercise the same rights and undertake the same activities as a holder under the EPA's new rule. Examples of such persons

(1994).

65. 42 U.S.C. § 9601(20)(A) (1988). However, the extent to which a holder may become involved in a facility without also being considered to be participating in management is not defined by the statute nor is it addressed in the legislative history. Judicial interpretations of this provision have articulated its meaning using different terms, without clearly defining a precise standard. EPA Lender Liability Rule, 57 Fed. Reg. 18,344, 18,345 (1992) (codified at 40 C.F.R. pt. 300); *see, e.g., United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir.), *cert. denied*, 498 U.S. 1046 (1991); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986); *United States v. Mirabile*, [1985] 15 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,994 (E.D. Pa. Sept. 4, 1985).

However, the few cases construing this exemption have established a general rule that a holder's involvement in financially related matters — such as periodic monitoring or inspections of secured property, loan refinancing and restructuring, financial advice and similar activities — will not void the exemption. EPA Lender Liability Rule, 57 Fed. Reg. at 18,345; *see also Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556 (W.D. Pa. 1989); *United States v. Nicolet*, 712 F. Supp. 1193 (E.D. Pa. 1989). Beyond the examples provided by these few judicial holdings, however, this area of the law is unsettled and it is not clear what other activities would or would not be considered "participating in the management" of a facility by a holder. EPA Lender Liability Rule, 57 Fed. Reg. at 18,345.

This uncertainty was heightened by dicta in *Fleet Factors* where the court held that a secured creditor may be liable if it actually participates in management of a facility "to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes." *Fleet Factors*, 901 F.2d at 1557. The *Fleet Factors* court stated that some level of actual participation is required to abrogate the exemption. *Id.* A subsequent decision by the Ninth Circuit consistent with *Fleet Factors* also held that there must be some "actual management of the facility before a secured creditor will fall outside the exception," and that the mere capacity to control a facility is insufficient to void the exemption. *In re Bergsoe Metal Corp.*, 910 F.2d 668, 672 (9th Cir. 1990). The court in *Bergsoe Metal Corp.* also said that "[w]hat is critical is not what rights the [creditor] had, but what it did," and that a creditor cannot participate in management if it does not exercise its rights. *Id.*; *see also In re T.P. Long Chem., Inc.*, [1985] 15 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,635 (N.D. Ohio Jan. 3, 1985).

66. 40 C.F.R. § 300.1100(a)(1) (1994).

would be court appointed receivers or "keepers" of a holder's property.⁶⁷ The statute, and therefore the rule, applies to any person who maintains ownership indicia as protection for a security interest of the holder.⁶⁸ Therefore, while the rule has no application to a person who is not a holder, under well-established rules governing principals and agents, the actions of employees, representatives, or others acting for the benefit or on behalf of a principal are generally considered to be the actions of the principal.⁶⁹ This rule has been endorsed judicially in this context, and accordingly a holder's agents, employees, and others acting on its behalf may undertake the full range of protected activities specified in the rule.⁷⁰ Similarly, where a holder seeks a court-appointed receiver for the purposes of this rule the receiver is also considered to be acting for the benefit of the holder.⁷¹ Hence, the receiver may exercise the same rights and undertake the same actions as the holder, without being considered an owner or operator of the secured property.⁷² The regulatory text provides that a "receiver or other person who acts on behalf of or for the benefit of a holder is covered by the protective provisions of this final rule."⁷³

Of course, there is always the possibility that a holder or a holder's agent may overstep the bounds of the exemption and cause liability. It is important to steer clear from participating in the management of the facility, unless permitted by the Lender Liability Rule, to avoid liability.

67. EPA Lender Liability Rule, 57 Fed. Reg. at 18,352. Agents, affiliates, subsidiaries of the holder and "participating lenders" are other examples in determining whether they can exercise the same activities and rights as a holder. *Id.*

68. *Id.*

69. *Id.*

70. EPA Lender Liability Rule, 57 Fed. Reg. at 18,352-53; see *Fleet Factors*, 901 F.2d at 1555 (discussing actions of holder's agents as they relate to the liability of the principal).

71. EPA Lender Liability Rule, 57 Fed. Reg. at 18,352-53.

72. *Id.*

73. *Id.*; see 40 C.F.R. § 300.110(a)(1) (1994). However, there are individuals involved in financial transactions to whom the exemption does not apply. For example, unsecured creditors or creditors who do not hold any ownership indicia in any property of the debtor do not apply under the security interest exemption. EPA Lender Liability Rule, 57 Fed. Reg. at 18,352. Of course, a secured creditor who also holds unsecured debt in a facility is not foreclosed from asserting the exemption because of the unsecured debt. *Id.*

Likewise, the exemption does not apply to trustees and fiduciaries unless they otherwise qualify as holders. *Id.* at 18,349. The EPA expressed its general position concerning the CERCLA liability of trustees and fiduciaries in that "innocent" trustees and fiduciaries are not liable under CERCLA. *Id.* A trustee is not personally liable for CERCLA cleanup costs solely because a trust asset is contaminated by hazardous substances and in most instances, the trust's assets are available for the cleanup of a trust property. *Id.*

Thus, while trustees and fiduciaries are not within the security interest exemption, the EPA has given its position that "innocent" trustees and fiduciaries are not liable under CERCLA. *Id.* An "innocent" trustee is presumably one is no way involved in the activities that resulted in contamination of the trust property. *Joyce*, *supra* note 17, at 2710; see *United States v. N.L. Indus.*, 36 Env't Rep. Cas. 1372, 1373 (S.D. Ill. Apr. 23, 1992) (holding that a trustee of Illinois land trust cannot be considered an owner of a facility under CERCLA). *But see* *City of Phoenix v. Garbage Servs. Co.*, 827 F. Supp. 600 (D. Ariz. 1993) (finding a trustee to be owner under meaning of § 107(a) of CERCLA and personally liable because he had power to control use of property and used it for disposal of hazardous substances).

B. *Indicia of Ownership*

A holder must maintain some "indicia of ownership" in real or personal property in order to come within the boundaries of the security interest exemption.⁷⁴ "Indicia of ownership" as used in the security interest exemption in section 101(20)(A) of CERCLA is defined 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."⁷⁵ The nature of the ownership interest may vary according to the type of secured transaction and the nature of the holder's relationship (such as guarantor or surety).⁷⁶ Holding title or a security interest in order to maintain indicia of ownership is not required.⁷⁷

C. *Primarily to Protect a Security Interest*

The EPA has adopted a functional approach for determining what constitutes a security interest and applies the exemption to all transactions in which ownership indicia are held primarily to protect a security interest.⁷⁸ Security interest is defined as an interest in a vessel or facility created or established for the purpose of securing a loan or other obligation.⁷⁹ In general, a transaction that gives rise to a security interest is one that provides the holder with recourse against real or personal property of the person pledging the security.⁸⁰ The purpose of the interest is to secure the repayment of money, the performance of a duty, or of some other obligation.⁸¹

Indicia of ownership held primarily to protect a security interest does not include evidence of interests in the nature of an investment in the facility, or an ownership interest held primarily for purposes other than as protection for a security interest.⁸²

74. 42 U.S.C. § 9601(20)(A) (1988); see 40 C.F.R. § 300.1100(a) (1994).

75. 40 C.F.R. § 300.1100(a) (1994). It also includes "assignments, pledges, or other rights to or other forms of encumbrances against the property that are held primarily to protect a security interest." *Id.*

76. EPA Lender Liability Rule, 57 Fed. Reg. at 18,374.

77. 40 C.F.R. § 300.1100(a) (1994).

78. EPA Lender Liability Rule, 57 Fed. Reg. at 18,351.

79. 40 C.F.R. § 300.1100(b)(1) (1994). Example of security interests as provided by § 101(20)(A) of CERCLA include mortgages, deeds of trusts, liens, and title pursuant to lease financing transactions. *Id.*

Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable, financing arrangements, and consignments, if the transaction creates or establishes an interest in a vessel or facility for the purpose of securing a loan or other obligation.

Id.

80. EPA Lender Liability Rule, 57 Fed. Reg. at 18,375.

81. *Id.* See generally JAMES WHITE & ROBERT SUMMERS, HANDBOOK ON THE UNIFORM COMMERCIAL CODE § 22 (2d ed. 1980); RESTATEMENT OF SECURITY (1941).

82. 40 C.F.R. § 300.1100(b)(2) (1994); see, e.g., *United States v. Maryland Bank & Trust*, 632 F. Supp. 573, 579 (D. Md. 1986) (finding actions taken by lending institution after foreclosure indicate property held as an investment rather than as security for a loan). The EPA recognizes that lending institutions have revenue interests in the loan transactions that create security interests; such transactions

A holder may have secondary reasons for maintaining indicia of ownership, but the primary reason must be as protection for a security interest.⁸³

D. Participating in the Management of a Facility

A holder will lose the security interest exemption if, prior to foreclosure, it engages in activities which are considered to constitute participation in the management of the borrower's facility.⁸⁴ As a result of the suggestion in *Fleet Factors*⁸⁵ regarding the ability to influence, the question as to the definition of "participating in management" has been unclear. The EPA's new Lender Liability Rule addresses this issue in detail. In fact, the EPA's new rule expressly rejects the "mere capacity to influence" standard in *Fleet Factors*.⁸⁶ The EPA emphasizes that the intent of the Agency's general test of management participation is to protect "lenders from being exposed to CERCLA liability for engaging in their normal course of business," at the same time while imposing liability upon a holder who moves from oversight and advice to instances of actual facility management.⁸⁷

The regulations state that the term "participating in the management" of a facility means "actual participation in the management or operational affairs of the vessel or facility by the holder, and does not include the mere capacity to influence, or ability to influence, or the unexercised right to control facility operations."⁸⁸ Hence, under

are not considered to be investment interests, but are considered secured transactions falling within the exemption. EPA Lender Liability Rule, 57 Fed. Reg. at 18,375; see *In re Bergsoe Metal Corp.*, 910 F.2d 668, 672 n.2 (9th Cir. 1990). When a person holds indicia of ownership in a facility primarily for investment purposes, as opposed to assuring repayment of a loan or as security for some other obligation, the exemption will not apply. EPA Lender Liability Rule, 57 Fed. Reg. at 18,375. The person may have secondary reasons for maintaining the indicia in addition to protecting a security interest, however, these additional reasons must be secondary to protecting a security interest in the secured facility. *Id.*

83. 40 C.F.R. § 300.1100(b)(2) (1994). See *supra* note 82 and accompanying text.

84. Joyce, *supra* note 17, at 2712; see, e.g., *United States v. Fleet Factors*, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986); *United States v. Mirabile*, [1985] 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985).

85. A holder's "mere capacity to influence" the borrower's handling of hazardous waste could constitute participation in the management of the borrower's facility. *Fleet Factors*, 901 F.2d at 1557.

86. 40 C.F.R. § 300.1100(c)(1) (1994).

87. EPA Lender Liability Rule, 57 Fed. Reg. at 18,359 (citing *Fleet Factors*, 901 F.2d at 1556).

88. 40 C.F.R. § 300.1100(c)(1) (1994). It is important to distinguish between actual control and the ability to influence. The EPA stated that the general test should also reflect the distinction between the control exercised by a person who is exercising decisionmaking authority over the operational aspects of the facility, and the influence that may be exerted over the borrower by a person who is not part of the facility's decisionmaking hierarchy. EPA Lender Liability Rule, 57 Fed. Reg. at 18,359. In the first instance, a person who is functioning as a facility manager is "participating in management" under this final rule. *Id.* In the latter case, a person who exerts influence over such a facility manager but who has no power to direct or implement operational decisions is not "participating in management," even if the level of influence exerted over the borrower is substantial. *Id.* The distinction between control and influence is critical because the borrower's behavior may be strongly influenced by a broad array of parties such as customers, suppliers, insurers, unions, competitors, and even the government, none of whom participate in the day-to-day management of the borrower's facility. *Id.* However, the borrower is always free to decline to accept the advice and counsel of such persons, even if doing so may entail

the EPA's new rule, the holder must exercise some actual control over either the facility's day-to-day operations or the facility's environmental waste disposal practices. The EPA's general test of management states that a holder participates in management, while the borrower is still in possession of the facility encumbered by the security interest, if the holder meets one of two conditions.⁸⁹ The first condition determining participation in management is whether the holder has decisionmaking control over the borrower's environmental compliance, in a way that the holder has undertaken responsibility for the borrower's hazardous substance handling or disposal practices.⁹⁰ The second condition determining participation in management is whether the holder "[e]xercises 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 with respect to" environmental compliance and of the operational (as opposed to financial or administrative) aspects of the enterprise.⁹¹

There are several examples of actions which do not normally constitute participation in management. Pre-loan activities, policing activities, and work out activities are examples of actions not participating in management.⁹²

1. Pre-Loan Activities⁹³

The EPA explained that pre-loan activities are the actions at the inception of the loan or other transaction. The EPA stated that actions undertaken by a holder prior to or at the inception of a transaction in which indicia of ownership are held primarily to protect a security interest are irrelevant with respect to the general test

adverse consequences. *Id.* Accordingly, it is only where the holder actually exercises decisionmaking control over the facility's operations from within the facility's hierarchy that the holder participates in management. *Id.*

89. 40 C.F.R. § 300.1100(c)(1) (1994).

90. *Id.* § 300.1100(c)(1)(i).

91. *Id.* § 300.1100(c)(1)(ii). "Operational aspects of the enterprise include functions such as that of the facility or plant manager, operations manager, chief operating officer, or chief executive officer." *Id.* "Financial or administrative aspects include functions such as that of credit manager, accounts payable/receivable manager, personnel manager, controller, chief financial officer, or similar functions." *Id.*

92. *Id.* § 300.1100(c)(2).

93. Pre-loan activities are actions occurring prior to the inception of the loan. The regulations state that

[n]o act or omission prior to the time that indicia of ownership are held primarily to protect a security interest constitutes evidence of participation in management within the meaning of § 101(20)(A). 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 (whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest) 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 requires 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.

40 C.F.R. § 300.1100(c)(2)(i) (1994).

of participation in management.⁹⁴ Thus, they are not considered evidence of participation in the management of the facility and, absent any indicia of ownership, the section 101(20)(A) exemption has no application.⁹⁵

However, the EPA is not saying that a creditor cannot incur CERCLA liability prior to taking a security interest. The EPA is merely saying that the exemption applies only after the creditor becomes a holder (i.e., after he acquires indicia of ownership).⁹⁶ Nevertheless, if a creditor participates in the management of a facility or directly participates in the cleanup of the property prior to becoming a holder it may incur CERCLA liability as an "operator" of the facility.⁹⁷

A holder may decide to undertake or require an environmental inspection of a facility prior to securing the loan or other obligation.⁹⁸ Such undertaking may be done by the holder, or the holder may require one to be conducted by another party as a condition of the loan.⁹⁹ Additionally, a holder may require the borrower to clean up the facility as a condition of the loan or other obligation.¹⁰⁰ Such activities do not constitute participation in management, and a holder that knowingly takes a security interest in a contaminated facility is not subject to CERCLA liability solely on that basis.¹⁰¹

2. Policing Activities¹⁰²

Policing actions are consistent with holding ownership indicia primarily to protect a security interest that does not constitute participation in management for purposes of section 101(20)(A) of CERCLA.¹⁰³ The EPA encourages holders to include loan covenants and other requirements in agreements to require a facility to be operated in an environmentally sound manner, and further notes that liability cannot be premised on the existence (or the absence) of such covenants or other require-

94. EPA Lender Liability Rule, 57 Fed. Reg. at 18,376.

95. *Id.*

96. Joyce, *supra*, note 17, at 2713.

97. *Id.* In addition, if a holder directly participates in a cleanup prior to taking its security interest, it may incur liability as (1) a person who arranged for disposal under § 107(a)(3) of CERCLA; or (2) a person who accepted hazardous waste for transport under § 107(a)(4) of CERCLA. *Id.*

98. EPA Lender Liability Rule, 57 Fed. Reg. at 18,376.

99. *Id.*; see 40 C.F.R. § 300.1100(c)(2)(i) (1994). See *supra* note 93 and accompanying text.

100. EPA Lender Liability Rule, 57 Fed. Reg. at 18,377.

101. *Id.*

102. Policing activities are as follows:

Such actions include, but are not limited to, requiring the borrower to clean up the vessel or facility during the term of the security interest; requiring the borrower to comply or to come into compliance with applicable federal, state, and local environmental and other laws, rules and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the vessel or facility (including on-site inspections) in which indicia of ownership are maintained, or the borrower's business or financial condition during the term of the security interest; or taking other actions to adequately police the loan or security interest (such as requiring a borrower to comply with any warranties, covenants, representations, or promises from the borrower).

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

103. *Id.* § 300.1100(c)(2)(ii).

ments.¹⁰⁴ Nevertheless, a holder needs to be aware that with regards to policing activities a holder that enforces these loan covenants at a facility cannot overstep the bounds and participate in management.¹⁰⁵ The enforcement or exercise of rights in covenants that allow a holder to undertake or direct the activities at a facility — *i.e.*, to participate in management — would be inconsistent with the express provisions of this lender liability rule and with case law construing section 101(20)(A).¹⁰⁶ Therefore, the enforcement of these loan covenants may be construed as participating in management, and thus, would be sufficient to void the exemption, as provided in this final rule.¹⁰⁷

3. Work Out Activities¹⁰⁸

A holder may determine that action needs to be taken with respect to the facility to secure or safeguard the security interest from loss. These actions may be necessary when, for example, a loan is in default or threat of default, and are commonly referred to as loan "work-out" activities.¹⁰⁹ Work out activities are recognized by the EPA as a common lender undertaking, and as such, these actions will not take

104. Joyce, *supra* note 17, at 2714 (citing *United States v. Fleet Factors, Inc.*, 901 F.2d 1550, 1558 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991) (stating secured creditors may closely monitor waste treatment practices and policies of debtors, insist upon compliance with acceptable treatment standards, and adjust loan terms to reflect debtor's hazardous waste practices)). The intent behind including this provision was to protect these types of common policing activities by holders as consistent with the environmental objectives of CERCLA. EPA Lender Liability Rule, 57 Fed. Reg. at 18,356. The inclusion of such covenants merit protection under the rule because requirements of this sort have the effect of ensuring that the value of the collateral or property securing the holder's obligation is not impaired by hazardous substance contamination. *Id.* However, the holder that enforces or takes action at the facility under these covenants cannot overstep the bounds of the test of management participation or must ensure that it is acting pursuant to § 107(d)(1) of CERCLA. *Id.*

105. *Id.* at 18,356.

106. *Id.* at 18,357; see *In re Bergsøe Metal Corp.*, 910 F.2d 668, 672 (9th Cir. 1990) (holding that management participation may exist where a holder exercises rights under security agreement).

107. EPA Lender Liability Rule, 57 Fed. Reg. at 18,357.

108. These are as follows:

A holder who engages in work out activities prior to foreclosure and its equivalents will remain within the exemption provided that the holder does not by such action participate in the management of the vessel or facility as provided in 40 CFR § 300.1100(c)(1). For purposes of this rule, "work out" refers to those actions by which a holder, at any time prior to foreclosure and its equivalents, seeks to prevent, cure, or mitigate a default by the borrower or obligor; or to preserve, or prevent the diminution of, the value or the security. Work out activities include, but are not limited to, restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations or promises from the borrower.

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

109. See *supra* note 108.

a holder outside of the security interest exemption provided that such actions are consistent with the general test of management participation.¹¹⁰

Finally, the EPA agrees that when addressing a facility's environmental problems in a work-out situation, a holder will generally not incur CERCLA liability (provided it does not otherwise participate in management).¹¹¹ The EPA specifically provides as follows:

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 . . . as a result of any releases of a hazardous substance or the threat thereof.¹¹²

Persons addressing hazardous site conditions in accordance with this section are not subject to strict liability, but are liable only for costs and damages as the result of negligence on the part of such person.¹¹³ Therefore, and for public policy reasons, both the EPA's proposed rule and final rule specify that the actions of a holder engaged in mitigating or otherwise responding to a release at a facility in which a security interest is held are not considered to be evidence of management participation.¹¹⁴

E. Foreclosure

One of the major concerns of lenders and receivers is their potential liability under CERCLA subsequent to foreclosure on a contaminated facility. This concern is a direct result of prior case law holding that a lender who purchased property at a foreclosure sale did so not to protect its security interest, but to protect its investment.¹¹⁵ It has been held that only during the life of the mortgage did the lender hold indicia of ownership primarily to protect its security interest in the land.¹¹⁶ Some commentators argue that a foreclosing holder should be considered the "owner or operator" of the foreclosed-on property because the borrower has been dispossessed of the facility, and the holder is now exercising complete control over the

110. EPA Lender Liability Rule, 57 Fed. Reg. at 18,355; see 40 C.F.R. § 300.1100(c)(1) (1994).

111. EPA Lender Liability Rule, 57 Fed. Reg. at 18,357. The EPA recognizes that no regulation could specifically cover every activity that a holder might conceivably undertake. *Id.* The EPA does not agree that a holder, prior to foreclosure, may divest the borrower of control over facility operations without voiding the exemption. *Id.* In such a situation, the holder is not seeking to cure, mitigate, or prevent the default of the borrower (a workout situation), but is itself acting as the operator of the facility. *Id.*

112. 42 U.S.C. § 9607(d)(1) (1988).

113. EPA Lender Liability Rule, 57 Fed. Reg. at 18,357; see 42 U.S.C. § 9607(d)(1) (1988).

114. EPA Lender Liability Rule, 57 Fed. Reg. at 18,357; see *Kelley ex rel. Michigan Natural Resources Comm'n v. ARCO Indus. Corp.*, 739 F. Supp. 354 (W.D. Mich. 1990) (stating that active, direct knowing efforts to prevent or abate contamination may work for, not against, a person).

115. See *Guidice v. BFG Electroplating & Mfg., Co.*, 732 F. Supp. 556 (W.D. Pa. 1989); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986).

116. *MB & T*, 632 F. Supp. at 579.

facility and its ultimate disposition.¹¹⁷ The EPA's new Lender Liability Rule rejects this reasoning,¹¹⁸ agreeing with case law holding that a holder does not necessarily lose the exemption upon foreclosure.¹¹⁹ In fact, the new regulations remove much of the uncertainty associated with foreclosure and permit holders to foreclose on contaminated property without incurring CERCLA liability.¹²⁰

The regulations on foreclosure and post-foreclosure activities state "[i]ndicia of ownership that are held primarily to protect a security interest include legal or equitable title acquired through or incident to foreclosure and its equivalents."¹²¹

117. EPA Lender Liability Rule, 57 Fed. Reg. at 18,361.

118. The EPA disagrees that the cases cited by the commenters in the proposed regulations establish a "no foreclosure" rule under § 101(20)(A). *Id.* at 18,361. In *United States v. Maryland Bank & Trust, Co.*, 632 F. Supp. 573 (D. Md. 1986) the court held that the exemption does not apply "to former mortgagees currently holding title after purchasing the property at a foreclosure sale, at least when, as here, the former mortgagee has held title for nearly four years." *Id.* at 579. While commenters commonly cite this passage to mean that a foreclosing holder necessarily loses the exemption, EPA disagrees that this passage establishes a per se rule against foreclosure. EPA Lender Liability Rule, 57 Fed. Reg. at 18,361. A close reading of this passage indicates that a holder may — but does not necessarily — lose the exemption upon foreclosure. *Id.* In fact, the court specifically left open the issue of whether a foreclosing holder automatically becomes the "owner" of a facility under CERCLA, and specifically declined to consider "the issue of whether a secured party which purchased the property at a foreclosure sale and then promptly resold it would be precluded from asserting the section 101(20)(A) exemption." *Id.* (quoting *MB & T*, 632 F. Supp. at 579 n.5).

119. EPA Lender Liability Rule, 57 Fed. Reg. at 18,361; *see In re T.P. Long Chem., Inc.*, 45 B.R. 278 (Bankr. N.D. Ohio 1985); *United States v. Mirabile*, [1985] 15 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,994 (E.D. Pa. Sept. 4, 1985). The EPA specifically referred to the holding in *Guidice v. BFG Electroplating & Mfg., Co.*, 732 F. Supp. 556 (W.D. Pa. 1989), to distinguish the regulations from it. The *Guidice* court held that "when the 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." *Id.* at 563. "While the EPA agrees that the holding appears to be more restrictive than in other cases construing § 101(20)(A), the EPA disagrees that it establishes a firm rule that a holder becomes the owner of property immediately upon foreclosure." EPA Lender Liability Rule, 57 Fed. Reg. at 18,361. The case's holding indicates that foreclosure is in fact permitted. *Id.* In *Guidice*, the lender became the owner of the property only after it had purchased the property at the foreclosure sale. However, this holding is not necessarily inconsistent with the final rule. *Id.* The regulation provides that a foreclosing holder will lose the exemption if it refuses or outbids an offer of fair consideration. *Id.* at 18,362. In *Guidice*, the holder became a liable owner because it was the successful bidder at the foreclosure sale, which indicated to the court that the ownership indicia in the property were no longer held to protect its security interest. *Id.* Under the rule, "the result would be the same if the holder outbid (or rejected) the offer of a person at the foreclosure sale (or thereafter) of fair consideration for the foreclosed-on property." *Id.* "To the extent that *Guidice* indicates a contrary result, the Agency believes it is inconsistent with the purposes of § 101(20)(A) exemption." *Id.*

120. Joyce, *supra* note 17, at 2715.

121. For purposes of this section, the EPA has defined the term "foreclosure and its equivalents" to include

purchase at 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; an agreement in satisfaction of the obligation; or any other formal or informal manner (whether pursuant to law or under warranties, covenants, conditions, representations or promises from the borrower) by which the holder acquires title to or possession of the secured property.

40 C.F.R. § 300.1100(c)(1) (1994).

This "indicia of ownership" status held after foreclosure continues to protect as a security interest provided that the holder attempts to sell, re-lease property held pursuant to a lease financing transaction. . . , or rid itself of the property in a reasonably expeditious manner and provided that the holder did not participate in management prior to foreclosure.¹²² Based on these regulations, a holder who acts promptly to sell or otherwise divest itself of the foreclosed-on property will avoid liability as an "owner" after foreclosure as long as the holder did not participate in management.

The regulations referred to above require that the property be divested in a "reasonably expeditious manner."¹²³ In general, a foreclosing holder must seek to sell or otherwise divest itself of foreclosed-on property using whatever commercially reasonable means are available or appropriate, taking all facts and circumstances into account.¹²⁴ A holder that outbids, rejects or fails to act upon a written *bona fide*, firm offer of fair consideration¹²⁵ for the property does not hold indicia of ownership primarily to protect a security interest.¹²⁶ A holder that outbids or refuses offers from parties offering fair consideration for the property establishes that the property is no longer being held primarily to protect a security interest,¹²⁷ and thus loses the security interest exemption under CERCLA.¹²⁸

122. *Id.* The test to determine participation in management is defined in § 300.1100(c).

123. *Id.* § 300.1100(d)(1).

124. EPA Lender Liability Rule, 57 Fed. Reg. at 18,378.

125. *See* 40 C.F.R. § 300.1100(d)(2)(ii) (1994). The section provides that a holder that outbids, rejects, or fails to act upon an offer of fair consideration loses its "indicia of ownership primarily to protect a security interest" status unless the holder is required, in order to avoid liability under federal or state law, to make a higher bid, to obtain a higher offer, or to seek or obtain an offer in a different manner. *Id.* Fair consideration is defined in § 300.1100(d)(2)(ii)(A). For a senior creditor, the term "fair consideration" means a cash amount that represents a value equal to or greater than the outstanding obligation owed to the holder (including the fees, penalties, and other charges incurred by the holder in connection with the property). EPA Lender Liability Rule, 57 Fed. Reg. at 18,378. "Fair consideration" is further defined to reflect the amount that will recover the holder's value in the "security interest" in the property and may vary depending on the seniority of the loan or other obligation that is being foreclosed on. *Id.* Specifically, a junior creditor may be required to outbid senior creditors in order to recover the value of its loan or other obligation. *Id.* Moreover, to avoid liability under the law the foreclosing holder may be required to see an amount at the foreclosure sale that is greater than the outstanding obligation owed to the foreclosing holder, or to sell the property in a different manner; therefore, the final rule does not require a holder to accept an offer of "fair consideration" if to do so would subject the holder to liability under federal or state law. *Id.*

"Outbids, rejects, or fails to act means that the holder outbids, rejects or fails to act within 90 days of receipt of a written, *bona fide*, firm offer of fair consideration for the property received at any time after six months following foreclosure and its equivalents." 40 C.F.R. § 300.1100(d)(2)(ii)(B) (1994). "A 'written, *bona fide*, firm offer' means a legally enforceable, commercially reasonable, cash offer solely for the foreclosed vessel or facility, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform." *Id.*

126. 40 C.F.R. § 300.1100(d)(1) (1994).

127. *Id.* § 300.1100(d)(2)(ii). "To the extent that the foreclosing lender is acting 'primarily to protect its security interest' and is within the secured creditor exemption, [the] EPA considers that the ownership of the property remains with the borrower for purposes of the CERCLA lien provision." EPA Lender Liability Rule, 57 Fed. Reg. at 18,378 n.13; *see* 42 U.S.C. § 9607(1) (1988).

128. The EPA stated as follows:

I. Divesting of Property

While a holder may use whatever means are reasonable and appropriate for marketing foreclosed-on property to establish that it is seeking to divest itself of property in an expeditious manner, the final rule also provides a mechanism by which a holder can establish that it continues to hold indicia of ownership primarily to protect a security interest and is not an "owner or operator" of the facility.¹²⁹ The EPA calls this mechanism the "bright line test" and its purpose is to provide clear and unambiguous evidence that a holder is not the facility's "owner or operator" following foreclosure.¹³⁰ The requirement of this "bright line" test is that a holder must, within twelve months following foreclosure, list the property with a broker, dealer, or agent who deals with the type of property at issue, or advertise the property as being for sale or disposition at least a monthly.¹³¹ The twelve-month period begins to run from the time that the holder acquires marketable title, provided that the holder acts diligently to acquire marketable title.¹³² If the holder does not act diligently to acquire marketable title, the twelve-month period begins to run on the date of foreclosure.¹³³

The EPA recognizes that market conditions, the condition of the property, and other factors may prevent the property from being quickly sold despite reasonable efforts to expeditiously sell or divest foreclosed-on property.¹³⁴ Therefore, the EPA does not impose a time requirement for the ultimate disposition of foreclosed-on

[t]he terms of the bid are relevant for this purpose, and a holder is not required to accept offers that would require it to breach duties owed to other holders, the borrower, or other persons with interests in the property that are owed a legal duty. In addition, the term "fair consideration" refers to an all cash offer, which is intended to ensure that this final rule will not require a lender to accept a bid that contains unacceptable conditions, such as requirements for indemnification agreements, non-cash offers, "bundled" offers, etc. This provision should not be read to require that a holder may accept only cash offers, however; a holder is always free to accept any offer satisfactory to the holder. The exact requirement imposed by this regulation, consistent with the established caselaw, is that a holder may not reject a cash offer of fair consideration for the foreclosed-on property. If it does, or if it outbids others offering fair consideration, then the holder is liable in the same manner as any other purchaser of property.

EPA Lender Liability Rule, 57 Fed. Reg. at 18,378; *see* *Guidice v. BFG Electroplating & Mfg., Co.*, 732 F. Supp. 556 (W.D. Pa. 1989).

129. EPA Lender Liability Rule, 57 Fed. Reg. at 18,378.

130. *Id.*

131. 40 C.F.R. § 300.1100(d)(2)(i) (1994). This advertisement must appear in either a real estate publication or a trade or other publication suitable for the vessel or facility in question, or a newspaper of general circulation (defined as one with circulation over 10,000, or one suitable under any applicable federal, state, or local rules of court for publication required by court order or rules of civil procedure) covering the area where the property is located.

Id.

132. *Id.*

133. *Id.*

134. EPA Lender Liability Rule, 57 Fed. Reg. at 18,378.

property.¹³⁵ If the holder actively offers the property for sale and no offers of fair consideration are ignored, outbid, or rejected, the foreclosed-on property may continue to be held by the holder without the holder being considered as the "owner or operator" of the property.¹³⁶ In sum, as long as reasonable efforts are made to divest of the property, and no offers of fair consideration are ignored, the holder may hold the property indefinitely.

2. Postforeclosure Activities

A holder who did not participate in management prior to foreclosure may conduct a number of activities without voiding the exemption.¹³⁷ The holder may "sell, re-lease property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), liquidate, maintain business activities, wind up operations, undertake any response action, . . . [138] and take measures to preserve, protect or prepare the secured asset prior to sale or other disposition."¹³⁹

The provision about continuing business activities and winding up operations¹⁴⁰ is and will continue to be one of the most controversial issues of the new Lender Liability Rule.¹⁴¹ This controversy stems around the allowance of business activities and wind up operations without incurring CERCLA liability.¹⁴² It should be appropriate for a holder to continue a facility's business activities following foreclosure without being an "operator" of the facility.¹⁴³ Congress did intend to impose liability on a holder acting consistently with accepted commercial lending practices in the post-foreclosure context according to the EPA.¹⁴⁴ The EPA states that continuing or maintaining the business activities of a foreclosed-on facility is a common undertaking and a normal business practice.¹⁴⁵ In those situations, the EPA believes that the holder (provided that it is seeking to sell, liquidate, or otherwise divest the facility) still holds indicia of ownership primarily to protect a security interest.¹⁴⁶ Thus, according to the rule, the exemption still applies in this context.¹⁴⁷ The effect of the exemption in these circumstances is that the foreclosing holder is not the "owner or operator" simply because it is "acting as a holder is expected to act."¹⁴⁸

135. *Id.*

136. *Id.*; see 40 C.F.R. § 300.1100(d) (1994).

137. 40 C.F.R. § 300.1100(d)(2) (1994). This is subject to the requirements of § 300.1100(d)(1)-(d)(2).

138. "[U]nder § 107(d)(1) of CERCLA or under the direction of an on-scene coordinator." *Id.* § 300.1100(d)(2); see 42 U.S.C. § 9607(d)(1) (1988).

139. 40 C.F.R. § 300.1100(d)(2) (1994).

140. *Id.*

141. Joyce, *supra* note 17, at 2717.

142. See 40 C.F.R. § 300.1100(d)(2) (1994).

143. EPA Lender Liability Rule, 57 Fed. Reg. at 18,367.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

Hence, to maintain the security interest exemption (i.e., to avoid liability as an "owner or operator")¹⁴⁹ the holder need only comply with the requirements of 40 C.F.R. § 300.1100(d)(1)-(d)(2). The problem or controversy is that 40 C.F.R. § 300.1100(d)(1)-(d)(2) contains no standard for operations and no prohibitions on releases.¹⁵⁰ Although the holder foreclosing on the property is allowed to continue business activities (i.e., operational activities), the holder is purportedly still exempt from liability as an "owner or operator."¹⁵¹

The EPA fails to comment on a situation where the holder who is "maintaining business activities" at a foreclosed-on facility subsequently causes or contributes to a release of hazardous waste.¹⁵² Despite opposition, the lenders support the idea of being allowed to continue business activities.¹⁵³ In fact, most lenders desired to be able to foreclose on a facility without necessarily incurring liability for the pre-existing contamination at the facility for which the holder was not responsible.¹⁵⁴ They argued that a lender's liability should be limited to responsibility for the hazardous substance releases for which the holder was responsible, or that occurs between foreclosure and subsequent sale.¹⁵⁵ These lenders believed that post-foreclosure maintenance of a facility's business activities was a proper policy objective because it preserves the facility's value for subsequent sale and it could conceivably generate funds for possible cleanup if the facility were in fact contaminated.¹⁵⁶

Numerous lenders agree that when they were responsible for contamination at a facility they should be obligated to contribute to the cleanup of the release; thus, in recognition of the CERCLA tenet a holder's activities at a foreclosed-on facility may form an independent basis of liability.¹⁵⁷ Nevertheless, the EPA provides that a holder who maintains business activities at a foreclosed-on facility cannot be liable as an owner or operator.¹⁵⁸ "[T]his final rule, . . . provides that a holder may be held liable as having arranged for disposal or treatment of hazardous substances at the facility, under section 107(a)(3) or by having transported hazardous substances for disposal, under section (a)(4)."¹⁵⁹ The final rule protects a holder from incurring

149. See CERCLA § 107(a)(1)-(a)(2), 42 U.S.C. § 9607(a)(1)-(a)(2) (1988).

150. Joyce, *supra* note 17, at 2717.

151. *Id.*

152. *Id.*

153. Commenters have argued that it was impossible as a practical matter for any person who continues to function the enterprise to avoid also "participating in the management" of the facility. EPA Lender Liability Rule, 57 Fed. Reg. at 18,366. They have argued that a holder who is "functioning the enterprise" is also acting as the "exclusive manager" of a facility, which is equivalent to being an "operator" of a facility. *Id.* Acting as the manager of a facility is sufficient to void the exemption under the proposed rule. *Id.* Thus, arguably this provision obliterated all meaning from the term "without participating in management." *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 18,367.

158. 40 C.F.R. § 300.1100(d)(2) (1994).

159. EPA Lender Liability Rule, 57 Fed. Reg. at 18,367; see CERCLA § 107(a)(3)-(4), 42 U.S.C.

liability as an "owner or operator" at a facility where it is acting in a manner consistent with ordinary lending practices and it also fulfills Congress' intent that the person liable under CERCLA should contribute to the cleanup of the facility where liability was incurred.¹⁶⁰

This conclusion by the EPA should make holders (i.e., lenders and receivers) wary of participating in too many postforeclosure business activities. Despite the EPA's attempt at making a distinction of when liability should or should not be imposed on the holders, there is much room for varying interpretations by the courts. As a warning, a holder should refrain from engaging in business activities at a foreclosed-on facility if there is at least the potential for causing a release of hazardous substances.

"Winding up operations"¹⁶¹ should be less risky than "maintaining business activities."¹⁶² Generally, "winding up operations" means taking the necessary measures to preserve, protect or prepare the secured asset for sale:

"Winding up" . . . includ[es] those actions necessary to properly and responsibly close down a facility's operations, secure the site, and otherwise protect the value of the foreclosed assets for subsequent liquidation. In winding up a facility a security holder may take measures that protect and preserve a facility's assets. . . . [and] steps taken to prevent or minimize the risk of a release or threat of release of hazardous substances are not considered evidence of management participation.¹⁶³

There may be circumstances in which a security holder may need to act to preserve the value of the foreclosed-on assets or to prevent a future release (such as removing drummed waste), or to prepare property for safe public access.¹⁶⁴ Because a holder in charge of a facility may need to take "affirmative action with respect to the hazardous substances. . . , such mitigative actions are not considered to be evidence as participation in management."¹⁶⁵ However, there is always a risk that a holder "winding up" operations will be considered as participating in management. Thus, holders should beware of their actions.

§ 9607(a)(3)-(4) (1988).

160. EPA Lender Liability Rule, 57 Fed. Reg. at 18,367. The applicable regulation provides as follows:

[If the] holder did not participate in management prior to foreclosure and its equivalents and the holder complies with the requirements of 40 CFR 300.1100(d)(1)-(d)(2), during the period following foreclosure a holder in possession of the property can incur liability CERCLA in connection with its activities at such foreclosure vessel or facility only by arranging for disposal or treatment of a hazardous substance . . . or by accepting for transportation and disposing of hazardous substances at a facility selected by the holder.

40 C.F.R. § 300.1100(d)(3)(i) (1994).

161. 40 C.F.R. § 300.1100(d)(2) (1994).

162. Joyce, *supra* note 17, at 2718.

163. Proposed EPA Lender Liability Rule, 56 Fed. Reg. 28,798, 28,804 (1991) (citation omitted) (proposed rule and request for comment) (final rule codified at 40 C.F.R. pt. 300).

164. *Id.*

165. *Id.*

The EPA has stated that mitigative or preventative measures that are environmentally responsible are considered to be actions that preserve and protect the value of the facility and, hence, protect the security interest.¹⁶⁶ These actions do not constitute participation in management.¹⁶⁷ In addition, security holders that undertake environmentally mitigative actions should know that

no person is liable for CERCLA costs or damages "as a result of rendering care, assistance, or advice" with respect to hazardous substances — even if such actions result in the release or threat of release of a hazardous substance — so long as the actions taken are consistent with the NCP,^{168]} or at the direction of an on-Scene Coordinator.¹⁶⁹

Hence, a holder who is winding up operations or preparing a facility for sale and who is attempting to mitigate existing environmental problems will probably escape liability under CERCLA for releases caused by the holder's activities if it adheres to the statute.¹⁷⁰

IV. Current Case Law (Subsequent to the Lender Liability Rule)

After the EPA published its Lender Liability Rule, courts began applying the EPA's interpretation of the security interest exemption. These courts held that lenders and/or receivers qualified as persons who maintain indicia of ownership primarily to protect a security interest in a vessel or facility, and who do not participate in the management of the vessel or facility.¹⁷¹ Consequently, these lenders and receivers were exempt from CERCLA liability for hazardous waste cleanup.

A. Lenders

The Western District of Michigan held that a bank's monitoring of the financial condition of its borrower and insistence that certain steps be taken and that certain management be hired did not provide basis for the imposition of liability under CERCLA in *Kelley ex rel. Michigan Natural Resources Commission v. Tiscornia*.¹⁷² The *Tiscornia* court's holding gives a good analysis on the issue of whether lenders are "participating in management."

166. Joyce, *supra* note 17, at 2718.

167. Proposed EPA Lender Liability Rule, 56 Fed. Reg. at 28,804 (1991); see Joyce, *supra* note 17, at 2718-19.

168. Promulgated under CERCLA § 105, 42 U.S.C. § 9605 (1988). The National Contingency Plan (NCP) specifies the appropriate response actions for addressing the release or threat of release of hazardous substances at a facility.

169. Proposed EPA Lender Liability Rule, 56 Fed. Reg. at 28,804 (quoting 42 U.S.C. § 9607(d)(1) (1988)).

170. Joyce, *supra* note 17, at 2719; see 42 U.S.C. § 9607(d)(1) (1988).

171. See *United States v. McLamb*, 5 F.3d 69 (4th Cir. 1993); *Waterville Indus., Inc. v. Finance Auth. of Me.*, 984 F.2d 549 (1st Cir. 1993); *Kelley ex rel. Michigan Natural Resources Comm'n v. Tiscornia*, 810 F. Supp. 901 (W.D. Mich. 1993); *Ashland Oil, Inc. v. Sonford Prods. Corp.*, 810 F. Supp. 1057 (D. Minn. 1993); *In re Sundance Corp., Inc.*, 149 B.R. 641 (Bankr. E.D. Wash. 1993).

172. 810 F. Supp. 901, 907 (W.D. Mich. 1993).

In *Tiscornia*, a commercial relationship between the Manufacturers National Bank of Detroit (Bank) and the Auto Specialties Manufacturing Company (AUSCO) developed. The Bank's president was a member of AUSCO's board. After the president died, the Senior Vice President of the Bank took a seat on the board. The board met once or twice a year and dealt primarily with pension and capital spending issues. AUSCO had an executive committee that was comprised of inside directors and the plant operation staff which met more frequently and decided daily operational matters.

The Bank provided an agreement that required daily reporting, prohibited outside financing, banned dividends, and created a blanket lien on all machinery and equipment. The Bank was authorized to monitor the cash proceeds from receivables against the outstanding loan on a daily basis. The Bank officers met with AUSCO officers on a more frequent basis to monitor AUSCO's adherence to the plan. Day, a Bank employee, met with AUSCO monthly, and expressed concerns on the ability of AUSCO's management to make the manpower reductions and cost reductions, which were monitored by the Bank.

At a meeting with *Tiscornia*, the Bank stated that if it were to remain involved in financing, certain changes had to be made. These changes were: (1) *Tiscornia* would be dropped from the payroll, and; (2) a turnaround specialist was needed to replace *Tiscornia* (the Bank recommended Sachs). AUSCO hired Sachs. A Bank representative informed *Tiscornia* that if outside representation were not retained by AUSCO, the Bank would not continue to lend them money. As President and Chief Executive Officer of AUSCO, Sachs had responsibility for the day-to-day operations at AUSCO. Sachs provided information to the Bank on a regular basis.

The *Tiscornia* court noted that CERCLA liability attaches if each of the four elements are established: (1) there is a release or threatened release of a hazardous substance; (2) at a facility, (3) causing the plaintiff to incur response costs; and (4) the defendant is a responsible party.¹⁷³ Moreover, the court stated that liability is strict; fault or state of mind is irrelevant.¹⁷⁴

The *Tiscornia* court viewed, the issue as whether the Bank was a responsible party under CERCLA.¹⁷⁵ A responsible party is defined as 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.¹⁷⁶ Further, an owner or operator includes any person owning or operating a facility¹⁷⁷ and any person is defined as "an individual, firm, corporation, association, partnership, consortium, joint venture,

173. *Tiscornia*, 810 F. Supp. at 904; see 42 U.S.C. § 9607(a) (1988); *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989). A responsible party is defined in § 107(a) of CERCLA as any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed.

174. *Tiscornia*, 810 F. Supp. at 905 (citing *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988)).

175. *Id.* Also at issue was whether the Bank was liable under the Michigan Environmental Response Act, but this point was not relevant to the discussion in this comment.

176. 42 U.S.C. § 9607(a)(2) (1988).

177. *Id.* § 9601(20)(A).

commercial entity, United States government, state municipality, commission, political subdivision of the state, or any interstate body.¹⁷⁸ The *Tiscornia* court referred to CERCLA which "excludes from liability persons who 'without participating in the management of a vessel or facility, hold indicia of ownership primarily to protect securing interests in the vessel or facility.'¹⁷⁹ Accordingly, the *Tiscornia* court held that it was not enough that the Bank held first mortgages to impose liability on the Bank under CERCLA and it was necessary to analyze the actual role played by the Bank in the management of the company.¹⁸⁰

In analyzing the Bank's participation, the *Tiscornia* court considered the EPA's Lender Liability Rule.¹⁸¹ The *Tiscornia* court found that if the borrower was in possession of the property during the period in question, then the lender was in actual control if it takes one of three actions.¹⁸² First, the lender will be deemed to be participating in management if it exercises decisionmaking control over the borrower's environmental compliance.¹⁸³ No such allegation was made in this case, and thus, this section of the rule did not apply. Second, the lender will be deemed participating in management if it assumes or manifests responsibility for the overall management of the enterprise encompassing day-to-day decisionmaking of the enterprise with respect to environmental compliance.¹⁸⁴ Again, this was not claimed. Third, the lender will be deemed to be participating in management if it assumes or manifests responsibility for the overall management of the enterprise with respect to all, or substantially all, of the operational aspects of the enterprise other than environmental compliance, as opposed to financial or administrative aspects of the business.¹⁸⁵ The third test was applied to the facts in *Tiscornia*.

The *Tiscornia* court held that although the Bank had members on AUSCO's board, their status as directors did not alone impose liability.¹⁸⁶ The Bank members' only involvement with AUJSCO was in the meetings, occurring only once or twice a year, and they dealt strictly with pension and capital issues. The executive committee dealt with operational issues and environmental compliance, and neither member sat on this committee. Hence, the *Tiscornia* court found that there were no attenuating facts to support liability on the basis of this limited participation.¹⁸⁷ Also, no evidence

178. *Id.* § 9601(21).

179. *Tiscornia*, 810 F. Supp. at 905 (citing 42 U.S.C. § 9607(a)(2) (1988)).

180. *Tiscornia*, 810 F. Supp. at 905.

181. *Id.* at 905-06; see 40 C.F.R. § 300.1100(c)(1) (1994).

182. *Tiscornia*, 810 F. Supp. at 906.

183. *Id.*; see 40 C.F.R. § 300.1100(c)(1)(i) (1994).

184. *Tiscornia*, 810 F. Supp. at 906; see 40 C.F.R. § 300.1100(c)(1)(ii)(A) (1994).

185. *Tiscornia*, 810 F. Supp. at 906; see 40 C.F.R. § 300.1100(c)(1)(ii)(B) (1994).

186. *Tiscornia*, 810 F. Supp. at 906; see *Kelley ex rel. Michigan Natural Resources Comm'n v. Arco Indus., Corp.*, 723 F. Supp. 1214, 1220 (W.D. Mich. 1989).

187. *Tiscornia*, 810 F. Supp. at 906. The cases cited by plaintiff as supporting Bank liability were all decided prior to the enactment of the EPA rule and were factually inapposite. *Id.* For example, the Bank involvement here was not as overreaching as that upon which the court relied to impose liability in *Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384, 1390-91 (N.D. Ill. 1988). In *Rockwell*, the defendant, IU was found to have participated in management because it hired or approved the hiring of certain corporate officers, some of whom were IU officers. These officers who remained in charge

presented by the State showed that the Bank was intimately involved with AUSCO's day-to-day operations.¹⁸⁸

Moreover, the Bank's close monitoring of AUSCO and the Bank's encouragement of AUSCO to follow the consolidation plan did not remove the Bank from the lender liability exemption.¹⁸⁹ As the EPA makes explicit, influence alone does not incur liability; actual control is necessary.¹⁹⁰ The conditions imposed by the Bank for continued financing did not exclude the Bank from the exemption, because the financial health of the company was such that the Bank needed to protect its security interest.¹⁹¹ There was no evidence of actual decisionmaking by the Bank as needed to find liability, thus there was no liability.

As to the Bank's insistence upon outside management under the threat of calling the loan, the *Tiscornia* court found that this did not constitute impermissible control.¹⁹² AUSCO did not have to agree to the Bank's insistence. The company was free to disregard any of the Bank's advice, despite the Bank's threat. These actions indicated the Bank merely influenced, but did not control, the decisionmaking at AUSCO.¹⁹³ It was irrelevant how strong the Bank's influence was, as long as AUSCO was free to make its own decisions, which it did when it fired Sachs. In fact, the EPA rule provides that a person who exerts influence over a "facility manager but who has no power to direct or implement operational decisions is not 'participating in management,' even if the level of influence exerted over the borrower is substantial."¹⁹⁴

Daily monitoring of the debtor's financial situation or suggestions to the debtor did not justify an exclusion from the lender liability exemption contained in the EPA rule.¹⁹⁵ Such monitoring reflected valid financial concerns, not operational concerns. Moreover, the Bank's actions did not exceed the scope of monitoring authorized in the loan agreement.¹⁹⁶

throughout various changes in ownership, determined the responsibilities of those officers it appointed, established the procedure for an approved operational plan, suggested changes in procedures that directly affected the disposal of hazardous substances, and stated in public announcements that it operated the facility. Although it is likely the court would reach the same result today, the recent EPA rules temper the value of the decision and the others entered prior to its enactment. *Tiscornia*, 810 F. Supp. at 906-907. See, e.g., *United States v. County of New Castle*, 727 F. Supp. 854, 866 (D. Del. 1989); *United States v. Nicolet Inc.*, 712 F. Supp. 1193, 1204-05 (E.D. Pa. 1989).

188. This was all financially related, and thus fell within the scope of activities permitted by the EPA rule. *Tiscornia*, 810 F. Supp. at 907.

189. *Id.*

190. *Id.*; see 40 C.F.R. § 300.1100(c)(1) (1994).

191. *Tiscornia*, 810 F. Supp. at 907.

192. *Id.*; see, e.g., *In re Badger Freightways, Inc.*, 106 B.R. 971, 975-77 (Bankr. N.D. Ill. 1989).

193. *Tiscornia*, 810 F. Supp. at 907.

194. EPA Lender Liability Rule, 57 Fed. Reg. at 18,359.

195. *Tiscornia*, 810 F. Supp. at 908. A bankruptcy court reached a similar result with respect to the doctrine of equitable subordination. See *In re Teltronics Servs., Inc.*, 29 B.R. 139, 172 (Bankr. E.D.N.Y. 1989) (citations omitted).

196. *Tiscornia*, 810 F. Supp. at 908. The *Tiscornia* court noted that there were executive committee meeting minutes that reported Sachs had cleared an expenditure of \$120,000 to relocate the general offices of AUSCO with the Bank. *Id.* Furthermore, Sachs stated at a special meeting of the board of

The *Tiscornia* court included a critical public policy argument. The *Tiscornia* court stated that Congress enacted CERCLA "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."¹⁹⁷ The *Tiscornia* court stated that imposing liability upon the lender in this case may well result in increasing the number of abandoned and inactive hazardous waste disposal sites.¹⁹⁸ The *Tiscornia* court reasoned that if banks are held liable under CERCLA for actions such as those in *Tiscornia* (*i.e.*, suggesting or demanding new management, monitoring the borrower's financial health, and consulting regularly with its customer), it is reasonable to assume that banks will refuse to extend additional credit or otherwise continue to work with troubled borrowers.¹⁹⁹ In addition, banks will insulate themselves from liability by calling loans rather than nursing troubled borrowers back to financial health.²⁰⁰ The *Tiscornia* court concluded that this anticipated response virtually guarantees an increase in the country's inventory of abandoned and inactive hazardous waste disposal sites.²⁰¹ Although imposing liability on the Bank in this case might not yield such a result in and of itself, the *Tiscornia* court declined to extend the definition of responsible parties to include the Bank.²⁰²

The *Tiscornia* holding should give much relief to lenders and holders in general. The Bank in *Tiscornia* had extensive interaction with AUSCO, yet it was found to be covered by the security exemption under the EPA's new Lender Liability Rule. In addition, the public policy argument given by the *Tiscornia* court is weighty. If holders were found liable in situations similar to that in *Tiscornia*, holders would lose their motivation to become involved in potentially risky businesses who need their help. This would lead to a tremendous amount of failed businesses and a huge increase in abandoned waste sites. Overall, our economy and society would suffer huge detriment without the security the EPA provides to lenders, receivers, and all holders when conducting their businesses as a whole. Thus, to the greatest extent

directors that he had discussed at great length with the Bank the recording of an inventory writedown at AUSCO for the purpose of establishing an artificial income stream. The *Tiscornia* court stated that these topics related to financial transactions and business. *Id.* There was no evidence that the Bank decided where the offices should be relocated, when the move should take place, and who should move. Consultation with the Bank about an expenditure did not constitute control. *Id.* Similarly, questions as to whether to create an artificial income stream fell within the area of the financial functions of a company, and came within the ambits of the lender liability exclusion. *Id.*

In addition, if the bank had the authority to fire management, it could still potentially be entitled to the exclusion. *Id.* This is based on the language in 40 C.F.R. § 300.1100(c)(1)(ii)(B) (1994), labeling administrative functions as those performed by a personnel manager, not a CEO. *Id.*

197. *Tiscornia*, 810 F. Supp. at 909; see *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1500 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

198. *Tiscornia*, 810 F. Supp. at 909.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* But see *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1558 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991). However, the decision in *Fleet Factors* was held prior to the EPA's new Lender Liability Rule.

possible, it is important to remember the EPA's intent to protect "lenders from being exposed to CERCLA liability for engaging in their normal course of business," and to define with greater precision the point at which a holder's actions pass from oversight and advice to actual facility management.²⁰³

In *Ashland Oil, Inc. v. Sonford Products Corp.*,²⁰⁴ the court held that a lender holding title to assets of an alleged polluter was within CERCLA's "safe harbor" provision, and thus, was not liable as an owner or operator for cleanup of hazardous substances.²⁰⁵ In addition, the *Ashland* court held that a lender did not lose its CERCLA "safe harbor" immunity from liability as an owner or operator for cleanup costs on the basis of participating in the financial management of property.²⁰⁶

In *Ashland*, the plaintiff Ashland Oil (Ashland) leased land to tenants who manufactured wood preservatives on the site. Industry Financial Corporation's (IFC) loaned money to Sonford Products Corporation (Sonford), one of the tenants. As collateral, IFC took a security interest in Sonford's assets, including inventory and equipment. When Sonford filed for bankruptcy, IFC, as a secured creditor, participated in the proceedings. Attempting to recover the value of its loans, IFC agreed to a transaction which would transfer Sonford's assets to Park Penta Corporation. Subsequently, the assets were abandoned. IFC foreclosed on its security interest in the abandoned assets and held title to the assets for no longer than a month. IFC sold the assets to Park Penta, which were financed by a loan from IFC. IFC took a security interest in the assets as collateral. Park Penta filed for bankruptcy. After attempts to find prospective buyers for the assets proved fruitless, IFC abandoned its security interest. Ashland alleged that during the time that Sonford conducted its operations on the leased property, the property became contaminated with hazardous substances.

In its analysis, the *Ashland* court noted that there was confusion about the scope and applicability of the safe harbor in the financial community and differing interpretations by the circuit courts.²⁰⁷ The *Ashland* court referred to the EPA's promulgated rules that intended to clarify the scope of the lender safe harbor provision.²⁰⁸ In short, the rule exempts lenders from liability as owners or operators

203. EPA Lender Liability Rule, 57 Fed. Reg. at 18,376 (citing *Fleet Factors*, 901 at F.2d at 1556).

204. 810 F. Supp. 1057 (D. Minn. 1993).

205. *Id.* at 1060; see *United States v. Mirabile*, [1985] 15 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985) (creditor's defenses).

206. *Ashland*, 810 F. Supp. at 1060; see 40 C.F.R. § 300.1100(c) (1994).

207. *Ashland*, 810 F. Supp. at 1059.

208. *Id.*; see 40 C.F.R. § 300.1100 (1994). Ashland contended that the EPA rules were inapplicable because the rule's effective date was April 29, 1992, after the relevant events occurred and after Ashland filed this action. However, the explanation of the rules in the Federal Register states "EPA expects that the provisions of this regulation will provide appropriate guidance for evaluating the actions of a holder or government entity prior to the effective date of this final rule." EPA Lender Liability Rule, 57 Fed. Reg. at 18,374 (citing *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991)). This comports with the general rule of administrative law that agency rules apply to cases pending on the effective date of the rule, regardless of the date of the underlying events. *Ashland*, 810 F. Supp. at 1059-60 n.4. Therefore, the court concludes that the EPA's rule, clarifying an existing statutory exemption, applies to the instant case. *Id.*

if they "maintain [] indicia of ownership primarily to protect a security interest."²⁰⁹ The EPA's definition of "indicia of ownership" includes "any legal or equitable title to real or personal property acquired incident to foreclosure or its equivalents."²¹⁰ The "safe harbor" provision requires that a foreclosing lender actively attempt to sell the property expeditiously, including listing the property for sale within twelve months.²¹¹ IFC held title to the assets for three to four weeks, including barrels and equipment which allegedly leaked pollutants. After briefly holding title, IFC transferred the assets to Park Penta and took a security interest in the assets. The *Ashland* court held that IFC's brief holding of title fell within the "indicia of ownership to protect a security interest" safe harbor provided by the statute and clarified by EPA's rule.²¹²

The *Ashland* court looked to the statute to resolve Ashland's contention that IFC was liable because it participated in the management of the facilities. A security interest holder is not exempt from CERCLA liability if it participates in the management of the offending facility.²¹³ However, EPA defines participation in management of a facility as "actual participation in the management or operational affairs of the . . . facility by the holder, [it] does not include the mere capacity to influence, or the ability to influence, or the unexercised right to control facility operations."²¹⁴ Applying the EPA's definition, the *Ashland* court held that IFC did not participate in the management of either facility or exercise any decisionmaking control over environmental compliance decisions.²¹⁵ The periodic reviews of the debtors' finances were insufficient to constitute participation in management, and thus, IFC remained within the lender "safe harbor."²¹⁶ Therefore, IFC was not liable as an owner or operator under EPA's authoritative interpretation of the application of CERCLA's security interest exemption.²¹⁷

209. *Ashland*, 810 F. Supp. at 1060; see 42 U.S.C. § 9601(20)(A) (1988); 40 C.F.R. § 300.1100 (1994).

210. *Ashland*, 810 F. Supp. at 1060 (quoting 40 C.F.R. § 300.1100(a) (1994)).

211. *Id.*; see 40 C.F.R. § 300.1100(d)(1)-(d)(2) (1994).

212. *Ashland*, 810 F. Supp. at 1060; see 42 U.S.C. § 9601(20)(A) (1988); 40 C.F.R. § 300.1100(a) (1994).

213. *Ashland*, 810 F. Supp. at 1060; see 42 U.S.C. § 9601(20)(A) (1988).

214. *Ashland*, 810 F. Supp. at 1060 (quoting 40 C.F.R. § 300.1100(c)(1) (1994)).

215. *Id.*

216. *Id.*; see 40 C.F.R. § 300.1100(c)(2)(ii) (1994) (policing security interest or loan and various "work-out" activities, including foreclosure, forbearance and renegotiating security interest terms, do not constitute participation in management for purposes of CERCLA liability).

217. *Ashland*, 810 F. Supp. at 1060. Ashland also contended that IFC was an "arranger" of disposal of hazardous substances, and thus should be found liable. The *Ashland* court found this to be a strained construction and application of the statutory language, with little support in case law. *Id.* at 1061. The language of the statute and most cases interpreting the statute require some affirmative action of the part of the defendant in order for "arranger" liability to attach. *Id.*; see, e.g., *United States v. Northeastern Pharm. & Chem., Co.*, 810 F.2d 726, 743-44 (8th Cir. 1986), *cert. denied*, 484 U.S. 845 (1987) (imposing liability on officer who personally approved disposal of hazardous substances, and stating that authority to control handling and disposal of hazardous substances is key to liability determination); *United States v. Consolidated Rail Corp.*, 729 F. Supp. 1461, 1469-70 (D. Del. 1990) (holding that CERCLA arranger liability turns on "who made the crucial decision to dispose of hazardous substances");

The court in *Waterville Industries, Inc. v. Finance Authority of Maine*²¹⁸ held that the maturation of a lender-lessor's titular ownership under a sale-and-lease-back transaction to full ownership does not divest the lender-lessor of protection under CERCLA's security interest exemption if the lender-lessor proceeds within a reasonable time to divest itself of ownership.²¹⁹ The *Waterville* court reasoned that the purpose of the security interest exemption of CERCLA is to shield from liability those "owners" who are in essence lenders holding title to the property as security for debt.²²⁰ Congress did not intend to protect only the classic case of bank mortgages but also equivalent devices serving the same function, such as lease financing arrangements.²²¹

In *Waterville*, First Hartford (Hartford) sold a defunct textile mill to Waterville Textile Development Corporation (WTDC) and then leased it back. Loans in connection to this project were made to Hartford by an out of state lender and secured by mortgages on the property which the lender held. The loans were guaranteed by the Finance Authority of Maine (FAME). Hartford defaulted on the loans. Hence, FAME made substantial payments to the lender, assumed Hartford's future obligations to the lender, and received an assignment of the mortgages from the lender. FAME accepted a deed in lieu of foreclosure from WTDC and became the holder of title to the property. FAME then leased the property back to Hartford to allow it to continue to operate the mill. During this period, Hartford released hazardous substances on the property.

Hartford filed for bankruptcy and subsequently ceased operations at the mill. The bankruptcy court found that title to the property vested solely in FAME, but the court gave Hartford three months to find a buyer for the property. Hartford did not find a buyer within three months, and thus, eight months later FAME contracted with an auctioneer to sell the property. The auction was held five months later and MKY Realty was the highest bidder. One month later, FAME and MKY realty entered into a contract, and one month after that FAME conveyed the property to Gano Industries, the nominee of MKY realty. Gano Industries changed its name to Waterville Industries, the appellee. Waterville Industries consented with the EPA for a cleanup of the property, and sought an action pursuant to CERCLA contending that FAME was liable for contribution as a former owner.

Jersey City Redev. Auth. v. PPG Indus., 655 F. Supp. 1257, 1260 (D. N.J. 1987) (holding that sale did not constitute "arranging" the disposal of hazardous substances because defendant did not make "crucial decision" regarding treatment or disposal). The *Ashland* court found no evidence of such affirmative acts or decisions by IFC regarding the disposal of hazardous waste. *Ashland*, 810 F. Supp. at 1061. IFC did not make any crucial decisions regarding the disposal, therefore the *Ashland* court held that IFC was not liable as an arranger under CERCLA. *Id.*

218. 984 F.2d 549 (1st Cir. 1993).

219. *Id.* at 553.

220. *Id.* at 552; see *United States v. McLamb*, 5 F.3d 69, 72 (4th Cir. 1993) (holding bank that owned property primarily to protect security interest to be exempt from liability under CERCLA pursuant to security interest exemption).

221. *Waterville*, 984 F.2d at 552; see *In re Bergsoe Metal Corp.*, 910 F.2d 668, 671 (9th Cir. 1991) (finding that lease financing is a security interest under CERCLA).

The *Waterville* court stated that FAME received from WTDC a nominal title typical of the lender in a lease financing transaction.²²² The subsequent transactions did not alter the lease financing character of the original transaction.²²³ The *Waterville* court noted that the EPA had recently adopted regulations declaring that the security interest exception applies to "title held pursuant to the lease financing transactions."²²⁴ Since these regulations were not in effect at the time of the events in this case, the *Waterville* court did not elaborate further. However, the *Waterville* court stated that legislative history and case law confirmed that Congress intended to include lease financing arrangements into CERCLA's security interest exemption.²²⁵

The difficult issue in *Waterville* was whether FAME's titular ownership became real, and hence, no longer merely a security interest. The *Waterville* court held that such a maturation of ownership did not divest the owner of protection under CERCLA's security interest exemption so long as the owner proceeded within a reasonable time to divest itself of ownership.²²⁶ The *Waterville* court stated that at the time of the events in this case, CERCLA did not provide any period for divestiture after the collapse of a financing arrangement, but such a "safety zone" was implicit in the statute.²²⁷ As long as the lender-lessor makes a reasonable effort of divestiture, the *Waterville* court held that continued coverage under the exception serves its basic policy to protect bona fide lenders and to avoid imposing liability on "owners" who are not in fact seeking to profit from the investment opportunity normally presented by prolonged ownership.²²⁸

The *Waterville* court held that the earliest time to start a divestiture would ordinarily be when the security holder obtained full title free of serious encumbrances.²²⁹ FAME did not obtain title free of serious encumbrances until after the date Hartford was given to seek a buyer. Within six months of the date FAME contracted with an auctioneer to sell the property. In fact, FAME sold the property to the successful bidder and conveyed title not long afterwards. Thus, the *Waterville* court held that FAME made diligent efforts to dispose of the property in a timely fashion

222. *Waterville*, 984 F.2d at 552.

223. *Id.*

224. *Id.* at 553 (quoting 40 C.F.R. § 300.1100(b)(1) (1994)).

225. *Waterville*, 984 F.2d at 552.

226. *Id.* at 553.

227. *Id.* Were it otherwise, every sale and lease-back arrangement would subject the lender-lessor to the risk of sudden CERCLA liability whenever the lessee, by default or otherwise, lost its contractual rights to regain full ownership. *Id.* However, the EPA's new regulations provide a safe harbor of 12 months within which the security interest holder may take title and offer property for sale, noting that one who delays longer "may still be able to show that it has acted consistently with the exemptions." EPA Lender Liability Rule, 57 Fed. Reg. at 18,363-64.

228. *Waterville*, 984 F.2d at 553; see *United States v. Mirabile*, [1985] 15 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,994, 20,996 (E.D. Pa. Sept 4, 1985); *In re T.P. Long Chem., Inc.*, 45 B.R. 278, 288-89 (Bankr. N.D. Ohio 1985). *But see* *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556 (W.D. Pa. 1989); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986). The latter case is distinguishable because foreclosing mortgagee did not promptly resell the property after foreclosure.

229. *Waterville*, 984 F.2d at 554.

and held only a security interest in the property.²³⁰ FAME was fully protected by the security interest exemption, and thus, was not liable under CERCLA for hazardous waste cleanup.²³¹

Referring back to *United States v. Fleet Factors (Fleet Factors)*,²³² any further action on this case was stayed pending the release of the EPA's new Lender Liability Rule.²³³ In the more recent case of *United States v. Fleet Factors Corp. (Fleet Factors II)*²³⁴ the United States District Court took the new Lender Liability Rule into consideration in its decision and stated that the new rule warrants deference to the extent it conflicts with the Eleventh Circuit Court's holding in *Fleet Factors*.²³⁵ However, the *Fleet Factors II* court noted that there was no direct conflict with the new rule and that the rule simply elaborated on several unanswered questions in *Fleet Factors*.²³⁶

The *Fleet Factors II* court agreed with the *Fleet Factors* court's holding that a secured creditor may incur liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes.²³⁷ However, the *Fleet Factors II* court clarified a distinction from the Preamble of the new Lender Liability Rule concerning the capacity to influence.²³⁸ The distinction is between a secured creditor who, acting as an outsider, has considerable influence over a borrower from one who "actually exercises decisionmaking control over the facility's operations from within the facility's hierarchy."²³⁹ The *Fleet Factors II* court stated that only the latter, the one who actually exercised decisionmaking control, warrants liability under this rule.²⁴⁰ The new Lender Liability Rule had to be applied, however, to decide whether Fleet was covered by the security interest exemption to avoid CERCLA liability.²⁴¹ Fleet's pre-foreclosure actions were found to be covered by the security interest exemption in *Fleet Factors*.²⁴² In addition, Fleet was covered by the foreclosure provisions of CERCLA despite the fact that Fleet never foreclosed on the

230. *Id.*

231. *Id.*

232. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 U.S. 752 (1991).

233. Lender Liability Under CERCLA, 40 C.F.R. §§ 300.1100, 300.1105 (1994).

234. *Fleet Factors II*, 819 F. Supp. 1079 (S.D. Ga. 1993) (*Fleet Factors II*).

235. *Id.* at 1085.

236. *Id.*

237. *Id.*

238. *Id.* at 1087.

239. *Id.*

240. *Id.* at 1087-88.

241. *Id.* at 1088; *see* 42 U.S.C. § 9601(20)(A) (1988); *id.* § 9607(a)(2). The security interest exemption is intended to protect secured creditors engaged in the normal course of business, and consideration of this issue should include whether a reasonable factor facing Fleet's circumstances and acting primarily to protect its security interest would have engaged in the actions undertaken by Fleet. *Fleet Factors II*, 819 F. Supp. at 1089.

242. *Fleet Factors II*, 819 F. Supp. at 1089. However, it was a factual question whether Fleet's actions constituted participation in management under the new rule, which was not decided in *Fleet Factors II*. All that was decided on this issue was that Fleet was not entitled to summary judgment. *Id.* at 1090.

real property because it foreclosed on the SPW inventory, equipment, and machinery.²⁴³ Thus, regarding this issue Fleet was not precluded from the application of the security interest exemption to CERCLA liability.²⁴⁴

In yet another opinion, *United States v. Fleet Factors Corporation (Fleet Factors III)*,²⁴⁵ the court examined the issue of Fleet's "arranging for disposal" of the hazardous waste drums.²⁴⁶ The *Fleet Factors III* court held that the creditor was liable as an owner or operator at the time of disposal.²⁴⁷

The *Fleet Factors III* court held that a secured creditor forfeits the security interest exemption's protection by either holding ownership indicia other than primarily to protect a security interest or by participating in management.²⁴⁸ The *Fleet Factors III* court stated that Fleet held ownership primarily to protect a security interest, thus Fleet's level of management participation was the issue to be explored.²⁴⁹ The *Fleet Factors III* court held that Fleet's activities fell within those permissible under the new Lender Liability Rule and under CERCLA's definition of participating in management up until its handling of the drums.²⁵⁰

Baldwin's and Nix's²⁵¹ handling of the drums was not a protected activity under CERCLA.²⁵² In the Preamble to its rule, the EPA noted that after foreclosure a secured creditor may act to prevent a future release, or to otherwise prepare for safe public access incident to sale or liquidation of assets.²⁵³ The EPA added that such activities are consistent with holding indicia of ownership primarily to protect a security interest only if done in accordance with the National Contingency Plan (NCP) or under the supervision of an NCP on-scene coordinator.²⁵⁴ The *Fleet Factors III* court held that Baldwin's move of the leaking drums was not protected by the foreclosure provisions because it was not consistent with the NCP or done with an NCP on-scene coordinator.²⁵⁵ The *Fleet Factors III* court explained that failing to comply with the NCP may indicate a participation in management because

243. *Id.* at 1091.

244. *Id.*

245. *Fleet Factors III*, 821 F. Supp. 707 (S.D. Ga. 1993) (*Fleet Factors III*).

246. *See* 42 U.S.C. § 9607(a)(3) (1988). Section 9607(a)(3) brings within CERCLA's scope "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances . . ." *Id.*

247. *Fleet Factors III*, 821 F. Supp. at 717, 719.

248. *Id.* at 714.

249. *Id.*

250. *Id.* at 714-18; *see* 40 C.F.R. §§ 300.1100(c),(d) (1994).

251. Baldwin was the contractor Fleet hired to conduct the auction to sell SPW's materials. Nix was contracted for the removal of the drums.

252. *Id.* at 718; *see* 42 U.S.C. § 9607(d)(1) (1988). *See supra* note 112 and accompanying text.

253. *Fleet Factors III*, 821 F. Supp. at 718; *see* EPA Lender Liability Rule, 57 Fed. Reg. at 18,379.

254. *Fleet Factors III*, 821 F. Supp. at 718; *see* 42 U.S.C. § 9607(d)(1) (1988); EPA Lender Liability Rule, 57 Fed. Reg. at 18,379.

255. *Fleet Factors III*, 821 F. Supp. at 718. The *Fleet Factors III* court elaborated further by stating that when hazardous substances are readily identifiable as such, and are present in significant quantities, and are in such a condition that the environmental threat they pose is apparent, the handling of those substances indicates impermissible participation in management unless it is done in accordance with 42 U.S.C. § 9607(d)(1) (1988). *Fleet Factors III*, 821 F. Supp. at 719; *see* 40 C.F.R. § 300.1100(d) (1994).

it indicates holding ownership other than primarily to protect a security interest.²⁵⁶ However, this explanation is not controlling.²⁵⁷ Instead, the EPA's intent merely indicates that post-foreclosure handling of hazardous substances may void the exemption.²⁵⁸

The *Fleet Factors III* court also explained that post-foreclosure participation in management is protected under the security interest exemption.²⁵⁹ However, such involvement is only protected if it is incident to those actions authorized under CERCLA and consistent with CERCLA's underlying principles.²⁶⁰ To the extent a secured creditor exceeds those bounds, it engages in impermissible post-foreclosure participation in management.²⁶¹ Hence, the *Fleet Factors III* court held that Baldwin's and Nix's handling of the drums was an impermissible post-foreclosure participation in management because the environmental threat posed by the drums was apparent and serious.²⁶² Thus, Baldwin's and Nix's actions voided Fleet's security interest exemption protection, causing Fleet to be an "owner or operator" of the facility under CERCLA.²⁶³

The *Fleet Factors III* holding is consistent with the new Lender Liability Rule. If Fleet had handled the toxic drums in accordance with CERCLA, then Fleet would have maintained the security interest exemption. A lender will avoid liability if, without participating in management, it holds indicia of ownership primarily to protect its security interest in the vessel or facility.²⁶⁴ This indicia of ownership primarily to protect a security interest allows lenders to participate in management in certain circumstances outlined in the New Lender Liability Rule.²⁶⁵ Yet, strict compliance to the rules should be followed to avoid liability.²⁶⁶

256. *Fleet Factors III*, 821 F. Supp. at 719.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*; see 40 C.F.R. § 300.1100(d)(2) (1994).

261. *Fleet Factors III*, 821 F. Supp. at 719.

262. *Id.* at 719-20. The *Fleet Factors III* court noted that had only a small quantity of hazardous substance been present, Baldwin's handling of the drums would not have voided the security interest exemption. *Id.* at 720. The critical factor was the environmental threat, which is what CERCLA is designed to alleviate. *Id.* Baldwin's and Nix's handling falls short of the incidental handling that must be tolerated to ensure that the foreclosure provisions serve their intended function. *Id.*

263. *Id.* at 719-21. The *Fleet Factors III* court went further in its decision to determine whether there was actually a disposal of any hazardous substance while Fleet owned or operated the SPW plant. This discussion extends beyond the scope of this comment and will not be discussed.

264. 42 U.S.C. § 9601(20)(A) (1988).

265. See 40 C.F.R. §§ 300.1100(c),(d) (1994); Lender Liability Under CERCLA, 40 C.F.R. §§ 300.1100, 300.1105 (1994).

266. These rules are not all inclusive of what is considered participating in management because it would be impossible for the EPA to include a conclusive list. EPA Lender Liability Rule, 57 Fed. Reg. at 18,357. However, where the statutes and interpretations are specific, strict compliance should be exercised to avoid liability.

B. Receivers

Although the majority of case law involves lenders instead of receivers with regards to CERCLA liability, receivers are nevertheless potentially liable under CERCLA for hazardous waste cleanup. The EPA includes a receiver in the definition of a holder who maintains indicia of ownership primarily to protect a security interest.²⁶⁷ While the EPA's final rule has no application to a person that is not a holder, under well-established rules governing principals and agents the actions of employees, representatives, or others acting for the benefit or on behalf of a principal are generally considered to be actions of the principal.²⁶⁸ Thus, the EPA states that a holder's agents, employees and others acting on its behalf or for its benefit may undertake the full range of protected activities specified in the Lender Liability Rule.²⁶⁹ Where a holder seeks a court-appointed receiver for purposes of the EPA's rule the receiver is considered to be acting for the benefit of the holder.²⁷⁰ Thus, based on the EPA's stated intent, receivers should be subject to the same treatment as holders or lenders.

A matter of first impression was brought before a bankruptcy court in Washington involving the issue of receiver liability under CERCLA. *In re Sundance Corporation, Inc.*²⁷¹ involved a receiver who was actively involved in the operational management functions of the facility at the time of the release and was responsible for the release. The *Sundance* court held that a receiver was not personally liable to the bankruptcy estate and the receiver was entitled to judicial immunity under CERCLA in both of its roles as state court receiver and bankruptcy custodian.²⁷² The *Sundance* court used two different approaches in reaching its decision. The first analysis used by the *Sundance* court was the common law approach in that the court appointed the receiver was an officer of the court, and thus, judicial immunity was discussed.²⁷³ The second analysis used was determining the receiver's personal liability as an owner or operator of the facility under CERCLA and whether the security interest exemption applied.²⁷⁴

In *Sundance*, the Community First Federal Savings and Loan (Community) filed a complaint to foreclose a mortgage on an orchard owned by the Sundance Corporation (Debtor), Holeman, and Holeman Limited Partnership (collectively, Holeman). Concurrently, Community sought appointment of a state court receiver and authority to expend funds necessary for the protection and preservation of the

267. See 40 C.F.R. § 300.1100(a)(1) (1994).

268. EPA Lender Liability Rule, 57 Fed. Reg. at 18,352.

269. *Id.* at 18,352-53; see *Fleet Factors*, 901 F.2d 1550, 1555 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

270. EPA Lender Liability Rule, 57 Fed. Reg. at 18,353.

271. 149 B.R. 641 (Bankr. E.D. Wash. 1993). The receiver's liability under the Washington's Model Toxic Control Act or Washington's Hazardous Waste Management Act was also at issue, but is not relevant to the matter in this comment.

272. *Id.* at 654, 664.

273. *Id.* at 653.

274. *Id.* at 655; see 42 U.S.C. § 9601(20) (1988); *id.* § 9607.

orchard. Scott Property Management, Inc. (SPM) was stipulated by court order as receiver. The order also authorized Community to disburse funds to SPM for the "operation and maintenance" of the orchard and authorized SPM to take the necessary action to prune and spread the orchard. SPM received an order allowing SPM to maintain and preserve the orchard pursuant to horticultural practices and standards in the county.

SPM needed to stake the orchard. SPM treated one end of each stake with a mixture called the Dip to prevent deterioration. Additionally, SPM used various pesticides at the orchard. At all times, SPM's use and application of the stake treatment and pesticides was in good faith and in accordance with prevailing horticultural practices and standards in the county. Community approved SPM's use of the pesticides. The state court approved SPM's report on operations and extended the receivership another year. Later, the debtor filed for bankruptcy, and Community moved for an order to excuse SPM from having to turn over the orchard to the debtor. The bankruptcy court granted this order finding that SPM had ably performed its duties as receiver.

Tests of soil samples in the stake treatment area found traces of the Dip and also found pesticides that visibly stained certain areas. Holeman asserted that SPM was liable under CERCLA and common law for the cleanup costs in connection with the release of hazardous substances at the orchard on the grounds that SPM's activities were abnormally dangerous. SPM asserted that because it conducted the activities pursuant to court orders, the doctrine of derivative judicial immunity immunized it from liability.

First, the *Sundance* court discussed personal liability of a receiver or trustee for torts under common law.²⁷⁵ Generally, there were two classes of claimants to whom receivers or trustees might incur personal tort liability. The first class included those whose cause of action was independent of any interest in the receivership itself.²⁷⁶ The other class included those who had an interest in the receivership itself.²⁷⁷ Holeman asserted that SPM breached its fiduciary duties by mismanaging the receivership's affairs and was thus personally liable to the estate.

Regarding the liability to parties disinterested in the receivership, the *Sundance* court looked to a Ninth Circuit decision which held that a bankruptcy judge was immune from liability for acts that "were judicial in nature and . . . not done in clear absence-of all jurisdiction," and that a bankruptcy trustee "or an official acting under the authority of the bankruptcy judge, is entitled to derived judicial immunity because he is performing an integral part of the judicial process."²⁷⁸ The Ninth Circuit decision followed a well-settled rule, known as the *McNulta* rule, that actions against the receiver are in law against the receivership, and the receiver's contracts,

275. *Sundance*, 149 B.R. at 650.

276. *Id.* at 651. These claims were independent of any interest they might have had in the receivership and could be asserted by one with no interest in the receivership at all. *Id.*

277. *Id.* Their claim arose when a receiver breached its fiduciary duties by mismanaging the receivership. *Id.*

278. *Id.* (quoting *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096, 1097 (9th Cir. 1986)).

misfeasances, negligence, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands.²⁷⁹ However, a receiver or trustee is not completely immune from personal liability under the *McNulta* rule.²⁸⁰ The *McNulta* rule restricts the situations in which personal liability will result instead of guaranteeing immunity from personal liability.²⁸¹ Therefore, strict official liability is prescribed when a third person is injured by a receiver "acting within the scope of his authority" but the receiver is personally liable for torts "personally committed by him."²⁸²

Applying this rule to the *Sundance* facts, both the state court and bankruptcy court were advised of and approved the funding for the treatment of the stakes and use of the pesticides at the orchard. Thus, these activities were within the scope of SPM's authority.²⁸³

The *Sundance* court next determined whether the receiver personally committed the tort. The *Sundance* court held that a receiver would be personally liable if it willfully and deliberately breached a duty.²⁸⁴ SPM and its employees did not intentionally, willfully, or deliberately spill the Dip or pesticides, nor did they appear to have been negligent.²⁸⁵ The issue was whether SPM was strictly liable for committing abnormally dangerous activities.

The *Sundance* court concluded that while a receivership estate would be strictly liable for damages resulting from abnormally dangerous activities, the issue of whether receivers or trustees personally would be strictly liable for acts done in the course of their official duties was a question of first impression.²⁸⁶ The *Sundance* court found that a policy analysis against *per se* liability for trustees was equally applicable to common law arguments seeking to impose strict liability.²⁸⁷ The *Sundance* court reasoned that holding trustees personally liable in these situations may cause trustees to decline to operate bankrupt businesses with environmental problems and this would cause a "potential devastating impact" on the pool of persons willing to serve as trustees.²⁸⁸ The *Sundance* court found such public policy considerations compelling because matters involving the complex legal area of environmental law depend on the involvement of skilled trustees.²⁸⁹ The *Sundance*

279. *Sundance*, 149 B.R. at 651 (citing *McNulta v. Lockridge*, 141 U.S. 327 (1891)).

280. *Id.* at 651.

281. *Id.* (citing E. Allen Tiller, *Personal Liability of Trustees and Receivers in Bankruptcy*, 53 AM. BANKR. L.J. 75, 81 (1979)).

282. *Id.* (citing Tiller, *supra* note 282, at 81 n.28).

283. *Id.*

284. *Id.*; see *Mosser v. Darrow*, 341 U.S. 267 (1951); *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1357 (9th Cir. 1983) (holding that a trustee is also personally liable for its negligence). *But see In re Chicago Pac. Corp.*, 773 F.2d 909, 915 (7th Cir. 1985) (holding that a trustee may be held personally liable only for a willful and deliberate violation of his fiduciary duties).

285. *Sundance*, 149 B.R. at 651.

286. *Id.* at 652; see *Reading Co. v. Brown*, 391 U.S. 471 (1968); *Great N. Ry. Co. v. Oakley*, 237 P. 990 (1925).

287. *Sundance*, 149 B.R. at 652.

288. *Id.*

289. *Id.*

court reasoned that if a receiver could be personally liable for any damage resulting from an abnormally dangerous activity, despite the lack of any showing of a negligent or wrongful act, the courts would be unable to obtain receivers for any site where abnormally dangerous acts frequently occur.²⁹⁰ To reward a receiver's willingness to act for the public benefit with personal liability in the absence of any wrongdoing would be counter-productive, thus the court found SPM not personally liable for engaging in abnormally dangerous activities within the scope of its authority.²⁹¹

Once it was determined that SPM was not strictly liable per se for performing in abnormally dangerous activities, the *Sundance* court next considered whether SPM was liable for the damages resulting from treating the stakes and use of the pesticides.²⁹² The facts in this case were insufficient to determine whether SPM's acts were beyond reasonable business judgment, yet SPM's acts were not negligent nor willful deliberate wrongs.²⁹³ The *Sundance* court held that court officers may be surcharged for the benefit of the estate for wrongful acts that were willful and deliberate, negligent, or beyond the spectrum of reasonable business judgment.²⁹⁴ However, the court stated that if SPM's specific actions were authorized by order of a fully informed court²⁹⁵ and SPM acted within the scope of its authority without negligence, then SPM's personal liability would be barred by the doctrine of derivative judicial immunity.²⁹⁶

290. *Id.*

291. *Id.* at 653.

292. *Id.* at 655.

293. *Id.*

294. *Id.* at 664.

295. An order immunizing power varies with the extent that a court is fully informed as to the nature of the options available for its consideration, and that notice an opportunity is given to interested parties to participate in the decision-making process. *Id.* at 654 (citing *Bennett v. Williams*, 892 F.2d 822, 823 (9th Cir. 1989)). An order which is the result of such a process will provide much more protection than one which is the product of a receiver's mere suggestion. *Id.* If the court and the interested parties are fully advised as of the risks and options available to a receiver, given an opportunity to state their views on the proposed action, and the court's order then adopts the receiver's proposal, it would be difficult indeed to fault a receiver for following that order. *Id.* To this extent, a receiver may justifiably assert judicial immunity based upon the order. *Id.* But if a receiver does not analyze the risks inherent in the various known options and bring the risks to the attention of the court and the parties for their consideration in the decision making process, then the court will not provide immunity and a receiver will have to defend itself on the merits of whether it acted with reasonable business judgment. *Id.* at 655.

296. *Id.* at 664 (finding that court officers are not personally liable for violations of CERCLA when acting within the scope of their authority pursuant to court order); *see, e.g.*, *Bennett v. Williams*, 892 F.2d 822, 823 (9th Cir. 1989). This process required an examination of what information was provided to the appointing court when it issued its order. *Sundance*, 149 B.R. at 653. The record before the court was incomplete on this issue, thus this court could not rule as a matter of law that SPM was protected from personal liability as a result of derivative judicial immunity. *Id.* The evidence on SPM's business judgment, here, was inconclusive. Without further [factual] evidence, the court could not rule as a matter of law, that SPM is absolutely immune because it was simply following the state court's order. *Id.* at 655.

The second analysis used by the *Sundance* court was concerned with whether the receiver was an owner or operator of the facility and if the security interest exemption applied.²⁹⁷ The *Sundance* court found that SPM was an operator of the facility²⁹⁸ because the orchard constituted an onshore facility and SPM's conduct of farming operations.²⁹⁹

CERCLA, however, contains exceptions to the definition of "owner and operator."³⁰⁰ CERCLA defines an "owner or operator" when dealing with a government by referring "to a unit of State or local government."³⁰¹ The *Sundance* court noted that it is unclear whether a state's judicial branch and its agents are included in the definition of a "person" as an "owner or operator" under CERCLA.³⁰² Yet, the *Sundance* court stated that if Congress intended to include courts or the state's judiciary and its agents (i.e., receivers) to be included in the definition as a "person," Congress would have specifically done so.³⁰³ In addition, CERCLA does not make clear in unequivocal language that a state's immunity from suit for its judicial activities is waived.³⁰⁴ Thus, the *Sundance* court held that CERCLA's lack of a clear waiver of a state's judicial immunity combined with the ambiguous definition of "person" means that a state's judiciary acting in its official capacity is not a "person" within the terms of CERCLA.³⁰⁵ Further, the *Sundance* court held that a state's judiciary is not an "owner or operator" under CERCLA,³⁰⁶ and thus is not liable under section 9607 of CERCLA.³⁰⁷ The *Sundance* court also held that state judicial immunity protects its judicial function and the court's officers such as a receiver acting under the authority of judicial orders.³⁰⁸

Applying the foregoing reasoning to *Sundance*, the *Sundance* court concluded that judicial immunity and derivative judicial immunity survive under CERCLA as long as the judge and officer of the court were performing judicial functions.³⁰⁹ The orders authorized and approved by the state court and bankruptcy court were judicial in nature. Thus, they fell within the mantle of judicial immunity and derivative judicial immunity for SPM in its roles as state court receiver and bankruptcy custodian.³¹⁰ SPM's personal liability must be determined by common law rules, which found that SPM's activities were within the scope of its authority and were

297. *Id.* at 655; see 42 U.S.C. § 9601(20) (1988); *id.* § 9607.

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

299. *Sundance*, 149 B.R. at 655.

300. *Id.*; see 42 U.S.C. §§ 9601(20)(A),(D) (1988); *id.* § 9601(21).

301. 42 U.S.C. §§ 9601(20)(A)(iii), (D) (1988).

302. *Sundance*, 149 B.R. at 657-58.

303. *Id.* at 658.

304. *Id.*

305. *Id.*; see 42 U.S.C. § 9601(21) (1988). The *Sundance* court went through a lengthy analysis to reach this conclusion which is not included in this comment. See *Sundance*, 149 B.R. at 655-58.

306. See 42 U.S.C. §§ 9601(20)(A),(D) (1988).

307. *Sundance*, 149 B.R. at 658; see 42 U.S.C. § 9607 (1988).

308. *Sundance*, 149 B.R. at 658.

309. *Id.* at 661.

310. *Id.*

neither willful deliberate wrongs nor negligent acts.³¹¹ The Sundance court held that receivers are not personally liable for violations of CERCLA when acting within the scope of their authority and pursuant to court order.³¹²

Based on the foregoing analysis on receiver's potential CERCLA liability under the EPA's security interest exemption and the theory of judicial immunity, it seems that receivers can take some relief in that generally they won't be liable for the hazardous waste cleanup. As long as receivers act within their judicial capacity and pursuant to court order, they should not be held liable. Because the *Sundance* court held that a state's judiciary is not a "person" nor an "owner or operator" under CERCLA, a receiver acting in its judicial function should not be held liable. However, as an extra precaution, receivers should try to refrain from participating in management of a facility as much as possible to meet the requirements of the EPA's security interest exemption. If receivers find it necessary to participate in management, they should still be protected under derivative judicial immunity. Yet, receivers must make reasonable and well thought-out business decisions when dealing with abnormally dangerous activities. Moreover, receivers must inform the courts of their actions, the potential risks involved, and any possible alternatives. Receivers must act within their authority, without deliberate wrongs or negligence. If receivers meet these elements, they should be free from liability under CERCLA for hazardous waste cleanup.

V. Conclusion

The EPA's Lender Liability Rule was a way to diminish some of the fear in lenders and receivers regarding their potential liability under CERCLA. Many of the uncertainties prior to this new rule have been clarified and elaborated by the EPA's Lender Liability Rule. The rule was meant shed new light on the seemingly unattractive area of securing an interest in a facility that has a potential for a hazardous waste release. Thus, this rule should be reinstated by the appropriate parties or persons to make it effective. Until this occurs, the courts should continue to look the Lender Liability Rule for the EPA's interpretation of what constitutes receiver and lender liability. If this is done, instead of abandoning facilities for fear of liability, lenders and receivers have new motivation to mitigate or use preventative measures that are environmentally responsible to help preserve and protect their security interests.

If the Lender Liability Rule is followed, lenders and receivers should be able to avoid CERCLA liability under the EPA's new Lender Liability Rule if they abide by the EPA's interpretations of the security interest exemption. Secured creditors need to be wary of the activities in which they engage. As long as lenders and receivers do not participate in management of the facility, they should be protected by the security interest exemption. There are circumstances in which limited participation in management is permissible in order to maintain the property; however, strict

311. *Id.* at 661, 664.

312. *Id.* at 664.

compliance to CERCLA and the EPA's rule should be followed in order to maintain protection under the security interest exemption. This final rule was intended to protect lenders from exposure to CERCLA liability for engaging in their normal course of business, and it should be reinstated for that purpose.³¹³ As long as lenders and receivers do not become involved in the business's operational management or in the operations themselves, they should be within the boundaries of the EPA's Lender Liability Rule, and therefore, should not be liable.

Taking receiver liability a step further, if court-appointed receivers need to engage in a business's operations, they should be protected by judicial immunity. However, to be awarded this protection, the receiver must use reasonable care and business judgment in performing the activities that are within the facility's operations and must act only within the receiver's judicial capacity. Also, the receiver must fully inform the court of its actions and any possible results. If the receiver strictly abides by these guidelines, the receiver should be free from personal liability under judicial immunity.

Lenders and receivers cannot be one hundred percent confident that they will avoid liability despite the EPA's Lender Liability Rule and the case law holding in favor of the secured creditors. This new rule indicates a fresh area of law which is still subject to ambiguities and uncertainties. This is evident in the fact that the rule was vacated on jurisdictional grounds. Receivers and lenders can hope that the courts will look to the Lender Liability Rule as a guideline to determine liability. This will give the receivers and lenders a general idea of permitted activity on the facilities they maintain. While there is no guaranty what the courts will do, the best protection for secured creditors is to abide by the guidelines offered in the EPA's Lender Liability Rule and prior case law. If lenders and receivers follow these guidelines and, without participating in management, "maintain indicia of ownership primarily to protect a security interest,"³¹⁴ they may be able to avoid CERCLA liability for hazardous waste cleanup.

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313. EPA Lender Liability Rule, 57 Fed. Reg. at 18,376.

314. See 42 U.S.C. § 9601(20)(A) (1988); Lender Liability Under CERCLA, 40 C.F.R. §§ 300.1100, 300.1105 (1994).