

# WHERE WILL IT END? INCREASED RISKS TO LENDERS UNDER CERCLA SECURED CREDITOR EXEMPTION LAW

## I. INTRODUCTION

The nation's interest in environmental protection and clean-up is at an all-time high.<sup>1</sup> In response to concern over abandoned and inoperative hazardous waste sites, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>2</sup>

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1. See generally Rich, *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA 107*, 13 B.C. ENVTL. AFF. L. REV. 643 (1986) (inactive hazardous waste sites are severely threatening the environment).

2. 42 U.S.C. §§ 9601-9657 (1988). CERCLA provides two methods to induce cleanup of hazardous waste sites. First, the President can order "potentially responsible parties" (PRPs) to take remedial measures at the site. Second, as discussed in this Recent Development, the government may take immediate action and later sue PRPs for expenses. 42 U.S.C. § 9607(a) (1988). This section of the statute provides:

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

- (1) the owner and operator of a vessel or a facility,
  - (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
  - (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity and containing such hazardous substances, and
  - (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable-
- (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

To finance the government clean-up efforts under CERCLA, Congress created a "Superfund,"<sup>3</sup> which the government can reimburse by holding responsible parties liable for the clean-up costs.<sup>4</sup> The "potentially responsible parties"<sup>5</sup> include "owners and operators" of the facility.<sup>6</sup> Specifically excluded from liability for clean-up costs are parties who, without participating in the management of a site, "hold indicia of ownership" primarily to protect a security interest.<sup>7</sup> This provision allows secured creditors - usually lending institutions - to protect their financial interest in a business without risking the enormous task of financing hazardous waste clean-up.<sup>8</sup>

Recently, however, courts have broadened CERCLA liability by

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

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

*Id.* Prior to CERCLA's enactment, the existing law regulated hazardous waste management. H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120. Neither state nor federal law, however, dealt with treatment of previously contaminated waste disposal sites. Note, *Environmental Law - Joint and Several Liability Under CERCLA - United States v. Chem-Dyne Corp.*, 57 TEMP. L.Q. 885 (1984) (discussing joint and several liability under CERCLA).

3. 42 U.S.C. § 9631 (1988). The initial monies in Superfund were provided by a special tax on chemical and petroleum producers and general tax revenues. 26 U.S.C. §§ 4611-4612, 4661-4662 (1982).

4. The EPA has been delegated primary responsibility to seek reimbursement. Exec. Order No. 12,316, § (1)(c), 3 C.F.R. 168, 169 (1982). To recover costs from the responsible parties, the government must show that the site is a facility from which a release or threatened release of a hazardous substance occurred and therefore caused the government to incur response costs. 42 U.S.C. § 9607(a)(1)-(4) (1988).

5. See *supra* note 2 for the CERCLA definition of "potentially responsible parties."

6. Courts have construed CERCLA to impose strict, joint and several, and retroactive liability on responsible parties. Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925 (1989) (proposes that courts applying CERCLA look to guidelines developed under analogous doctrines of lender liability). See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

7. 42 U.S.C. § 9601(20)(A) (1988).

8. The party asserting the exemption has the burden of proving that it is entitled to the exemption. See *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361 (1967); *Federal Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37 (1948); *SEC v. American Int'l Sav. & Loan Assoc.*, 199 F. Supp. 341 (1961). See Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1273 (1987) (discussing Congress' policy behind exempting secured creditors from CERCLA liability).

holding secured creditors liable in situations ostensibly insulated by the secured creditor exemption.<sup>9</sup> This trend, illustrated in *United States v. Fleet Factors Corp.*<sup>10</sup> and *In re Bergsoe Metal Corp.*,<sup>11</sup> has shocked the lending community.

## II. HISTORY

### A. *In re T.P. Long Chemical, Co.*

The issue of lender liability for environmental clean-up in a bankruptcy proceeding first arose in *In re T.P. Long Chemical, Co.*<sup>12</sup> In *T.P. Long*, the Environmental Protection Agency (EPA), in accordance with CERCLA section 107(a), sought reimbursement from both T.P. Long Chemical Company's estate and its secured creditor, BancOhio,<sup>13</sup> for costs incurred from removing hazardous chemicals found on the property of the estate.<sup>14</sup>

Pursuant to a petition for dissolution, the bankruptcy trustee conducted an auction selling all of the property of T.P. Long Chemical Company's estate.<sup>15</sup> The sale, however, did not include undiscovered drums of hazardous substances which were subject to BancOhio's security interest.<sup>16</sup> A person professionally associated with the buyer of the property, either directly or indirectly, caused a release of a hazardous substance by opening a valve on one tank.<sup>17</sup> The EPA later determined that a release of the hazardous substance had occurred, warranting immediate action.<sup>18</sup>

After reviewing the facts, the bankruptcy court did not find

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9. See *infra* notes 54-98 and accompanying text discussing *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) and *In re Bergsoe Metals*, 910 F.2d 668 (9th Cir. 1990).

10. 901 F.2d 1550 (11th Cir. 1990).

11. 910 F.2d 668 (9th Cir. 1990).

12. 45 Bankr. 278 (Bankr. N.D. Ohio 1985).

13. *Id.* at 281. The secured creditor held a perfected security interest in the debtor's accounts receivable, equipment, fixtures, inventory, and other personal property of the debtor. *Id.*

14. *Id.*

15. *Id.* Apparently, T.P. Long knew of the existence of approximately 90 drums containing hazardous substances. *Id.* The property was purchased by the Tompkins Corporation, or Leonard Tompkins, or both. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* Initially, the EPA ordered clean-up because of the tank release. It was not until the cleanup effort that the EPA discovered all of the drums. *Id.*

BancOhio liable under CERCLA section 107(a).<sup>19</sup> In reaching its conclusion, the court stated that even if BancOhio had foreclosed on its security interest, BancOhio would not be an "owner or operator" as defined by CERCLA.<sup>20</sup> Furthermore, BancOhio was not an "operator" because it did not participate in the management of the facility.<sup>21</sup> Rather, as a secured creditor, BancOhio fell under the secured creditor exemption. The only "indicia of ownership" that could be attributed to BancOhio was the protection of its security interest.<sup>22</sup> Consequently, CERCLA's secured creditor exemption shielded BancOhio from incurring liability.

### B. *United States v. Mirabile*

Soon after the *T.P. Long* decision, a Pennsylvania district court reexamined the secured creditor exemption issue in *United States v. Mirabile*.<sup>23</sup> In *Mirabile*, the court considered circumstances in which the EPA could impose CERCLA liability upon parties that have financed an "owner or operator" of a hazardous waste site.<sup>24</sup>

The EPA sought to recover clean-up costs incurred at an inoperative paint manufacturing business (Turco). One of the secured creditors, American Bank and Trust (ABT), loaned money to the paint company, secured by a mortgage on the property.<sup>25</sup> The other secured creditor, Mellon Bank<sup>26</sup> (Mellon), advanced working capital to Turco in that

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19. *Id.* at 288. Additionally, the court held that BancOhio, as a secured creditor, had received no benefit from the EPA clean-up and was therefore not liable. *Id.* The court found the debtor's estate liable under CERCLA because the estate had an ownership interest in the drums containing hazardous waste. *Id.* at 284. The drums themselves fell within CERCLA's definition of a facility. 42 U.S.C. § 9601(a) (1988). Therefore, as owner of the "facility," the court found the estate liable under 42 U.S.C. § 9607(a) (1988). The court rejected the trustee's argument that the drums were "abandoned" under the trustee's power to abandon. 45 Bankr. at 284.

20. 42 U.S.C. § 9607(a) (1988).

21. In re *T.P. Long*, 45 Bankr. at 289.

22. *Id.*

23. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992 (E.D. Pa. Sept. 4, 1985).

24. *Id.* at 20,993. The secured creditors were American Bank and Trust Company and Mellon Bank National Association. *Id.* at 20,992. The two creditors joined the Small Business Administration to share the cost in the event of lender liability. *Id.*

25. ABT initially loaned money to Arthur C. Mangels Industries, Inc., but Turco—the site involved in this dispute—later acquired Mangels. *Id.* at 20,994.

26. Originally Gerard Bank advanced the money, but Gerard was the predecessor in interest to Mellon. *Id.* at 20,995.

same year. In 1980, Turco filed for Chapter 11 bankruptcy.<sup>27</sup> In 1981, the court dismissed Turco's bankruptcy action, resulting in ABT foreclosing on its security interest.<sup>28</sup> ABT bid on the property at a sheriff's sale, and four months later, assigned its bid to the Mirabiles.<sup>29</sup>

After the EPA cleaned up the site, it sought contribution from the Mirabiles for costs incurred.<sup>30</sup> The Mirabiles joined ABT and Mellon, alleging that the banks were "responsible parties" in accordance with CERCLA section 107(a).<sup>31</sup> In support of its motion for summary judgment, ABT argued that it was not an "owner" of the property because it never held legal title.<sup>32</sup> ABT also claimed that its actions involving Turco were "merely to protect its security interest."<sup>33</sup> The court granted ABT's motion, maintaining that passage of title bore no relevance to the applicability of the security interest exemption.<sup>34</sup> Moreover, the court reasoned that ABT's foreclosure was "plainly undertaken in an effort to protect its security interest in the property."<sup>35</sup> Holding secured creditors liable, including lending institutions, the court conceded, would enhance the government's chances of recovering clean-up costs, and would help insure more responsible management of such sites.<sup>36</sup> The court explained, however, that the decision to impose liability is a legislative one, which necessarily should lie with Congress in the first instance.<sup>37</sup>

The court then opined that in order to hold a secured creditor such as ABT liable, the creditor must at a minimum participate in the "day-to-day" operational activities at the site.<sup>38</sup> The court determined that ABT's activities did not rise to a level sufficient to hold ABT liable pursuant to CERCLA section 101(20)(A).<sup>39</sup>

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27. *Id.*

28. *Id.*

29. *Id.* at 20,993. The Mirabiles accepted a sheriff's deed to the property. *Id.*

30. *Id.* at 20,992.

31. *Id.*

32. *Id.* at 20,995-96. Mellon also filed for summary judgment. *Id.* at 20,995.

33. *Id.* at 20,996.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 20,997.

39. ABT's activities consisted of securing the building against vandalism, making inquiries as to the cost of disposal of various drums located on the property, and visiting the property to show it to prospective purchasers. *Id.* at 20,996. The activities oc-

In contrast, the court denied Mellon's motion for summary judgment due to Mellon's increased level of participation at the site. When financial troubles plagued Turco, Mellon became extensively involved in Turco's business.<sup>40</sup> At one point, Mellon made weekly visits and gave instructions concerning manufacturing and personnel.<sup>41</sup> These activities presented a genuine issue as to whether Mellon participated in management to an extent sufficient to impose CERCLA liability. In sum, although Mellon, as a lending institution, should have technically fallen within the scope of CERCLA's secured creditor exemption, the *Mirabile* court glossed over that exception, and instead, examined the facts keeping both eyes focused on CERCLA's "owner and operator" provision.

### C. *United States v. Maryland Bank & Trust Co.*

In 1986, *United States v. Maryland Bank & Trust Co.*<sup>42</sup> presented the courts with another opportunity to define the parameters of secured creditor liability for CERCLA response costs.

In *Maryland Bank*, the bank foreclosed against a hazardous waste site when the debtor failed to make payments on its loan.<sup>43</sup> The bank purchased the property at the foreclosure sale<sup>44</sup> and continued to hold title as of the date of trial.<sup>45</sup> One year after the bank's acquisition of title, the EPA discovered hazardous wastes at the site and proceeded to

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currred in the four-month period between the sale and the assignment of the bid to the Mirabiles. *Id.*

40. *Id.* at 20,997.

41. *Id.* The court stated that Mellon's earlier activities; monitoring of cases and collateral accounts, ensuring that receivables went into the proper account, and establishing a reporting system between the company and the bank, were not sufficient to establish CERCLA liability. *Id.* The court noted that:

[T]he reed upon which the Mirabiles seek to impose liability on Mellon is slender indeed; however, bearing in mind that all doubts are to be resolved in favor of that party opposing summary judgment, I conclude that, taken as a whole . . . [it] presents a genuine issue of fact as to whether Mellon Bank . . . engaged in the sort of participation in management which would bring a secured creditor within the scope of CERCLA liability.

*Id.* For a view that *Mirabile* was a "bittersweet victory" for the lending community, see Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1279, 1261-96 (1987).

42. 632 F. Supp. 573 (D. Md. 1986).

43. *Id.* at 575.

44. *Id.*

45. *Id.* The trial was held four years after the foreclosure sale. *Id.*

clean up the area.<sup>46</sup> The EPA sought reimbursement from the bank, claiming that the bank should be held liable as an “owner or operator” pursuant to CERCLA section 107(a).<sup>47</sup> By acquiring ownership of the site through foreclosure on a security interest in the property and purchasing the land at the foreclosure sale, however, the bank maintained that it should be entitled to the secured creditor exemption.<sup>48</sup> The Maryland court rejected the bank’s position, stressing the critical nature of the verb tense in the exclusionary clause.<sup>49</sup> Further, the court stated that the security interest must exist at the time of the clean-up.<sup>50</sup> The court explained that the bank’s mortgage terminated at the foreclosure sale, at which time it “ripened” into full title.<sup>51</sup>

Although the finding appeared to reject the holding in *Mirabile*, in reality it did not do so. The court emphasized the fact that the bank held title for four years, and declined to consider whether a secured party who purchased the property at a foreclosure sale and then promptly resold it would be unable to assert the secured creditor exemption.<sup>52</sup> Therefore, the holding in *Maryland Bank* proved to be fact specific.<sup>53</sup>

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46. *Id.* EPA initially requested the bank to initiate corrective measures at the site, but the bank declined. *Id.* The EPA removed 237 drums of chemical material and 1180 tons of contaminated soil. *Id.* at 575-76.

47. *See supra* note 2 for text of statute.

48. *Maryland Bank*, 632 F. Supp. at 577.

49. The court stated that the exemption covers “only those persons who, at the time of the clean-up, hold indicia of ownership to protect a then-held security interest in the land.” *Id.* at 579 (emphasis added).

50. *Id.*

51. *Id.*

52. *Id.* at 579 n.5. In an expeditious foreclosure and resale, the secured creditor could have a stronger argument that its actions were solely to protect the value of the security interest.

53. For additional examples of court holdings supporting the trend in narrow readings of the secured creditor exemption, see *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (affirming denial of motion to dismiss an action brought by homeowner involving subdivision upon which toxic waste had accumulated prior to development — defendants included a bank which loaned money to a subdivision developer); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193 (E.D. Pa. 1989) (granting Government’s request for leave to file a second amended complaint which alleged that mortgagee who participated in management was directly liable under CERCLA; the mortgagee had stock interest in owner of contaminated property); *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556 (E.D. Pa. 1989) (denying motion for summary judgment in a suit by BFG for contribution toward clean-up costs where the bank bid for contaminated property at a foreclosure sale).

### III. RECENT DEVELOPMENTS CONCERNING THE SECURED CREDITOR EXEMPTION

#### A. *United States v. Fleet Factors Corp.*

The lending community suffered a severe blow by the recent decision in *United States v. Fleet Factors Corp.*<sup>54</sup> In *Fleet Factors*, the secured creditor (Fleet) foreclosed on its security interest in a cloth printing facility (SPW).<sup>55</sup> Fleet contracted with professional liquidators to auction off the inventory and equipment.<sup>56</sup> Thereafter, Fleet contracted with an individual to remove the remaining equipment.<sup>57</sup> Later, the EPA inspected the facility<sup>58</sup> and discovered drums holding hazardous substances, as well as truckloads of materials containing asbestos.<sup>59</sup> After discovery of the contaminated substances, the federal government cleaned the area.<sup>60</sup>

The Government sued several parties,<sup>61</sup> including *Fleet*, to recover response costs.<sup>62</sup> The Government argued that pursuant to CERCLA section 107(a), Fleet was liable for clean-up costs as an "owner or operator"<sup>63</sup> of the facility at the time wastes were disposed.<sup>64</sup>

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54. 901 F.2d 1550 (11th Cir. 1990).

55. *Id.* at 1552. Under the agreement between Fleet and SPW, Fleet agreed to advance funds against the assignment of SPW's accounts receivable. *Id.* Fleet obtained a security interest in SPW's textile facility, equipment, inventory, and fixtures as collateral for the advances. *Id.* Fleet eventually ceased advancing funds once SPW's debt to Fleet exceeded the estimated value of SPW's accounts receivable. *Id.* Eventually SPW filed Chapter 7 bankruptcy. *Id.*

56. *Id.* Fleet's liquidators sold the items "as is" and "in place." *Id.* The removal became the responsibility of the purchasers. *Id.* at 1553-54.

57. This individual was Nix Riggers. Riggers testified that Fleet instructed him to leave the premises "broom clean." *Id.* at 1553. He believed that he was given a "free hand" to take any necessary steps to remove the items. *Id.*

58. Riggers had left the facility by the end of December, 1983. *Id.* The EPA inspected the facility on January 20, 1984. *Id.*

59. *Id.*

60. The Government spent nearly \$400,000 in cleaning the SPW area. *Id.*

61. The Government sued the two principal officers and stockholders of SPW as well. *Id.*

62. *Id.* The district court granted the Government's summary judgment motion against the officers for liability with respect to removing the drums. *Id.* The district court denied the motion with respect to the officers' liability for the asbestos clean-up, as well as Fleet's motion with respect to any liability. *Id.* Fleet's appeal to the denial of summary judgment is the subject matter of the present case.

63. See *supra* note 2 for the CERCLA class of "potentially responsible parties," which includes past and present owners and operators.



Fleet claimed that CERCLA's secured creditor exemption protected it from liability.<sup>65</sup> The Eleventh Circuit Court of Appeals announced that there was no question that Fleet held an "indicia of ownership" in the facility through its deed of trust to SPW, and that Fleet held the interest primarily to protect its security interest.<sup>66</sup> The court emphasized that the key issue was whether Fleet's level of participation in SPW's management was sufficient to expose Fleet to CERCLA liability.<sup>67</sup>

The Government urged the court to adopt a narrow and strictly lit-

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64. The court dismissed the Government's first argument that Fleet was liable under 42 U.S.C. § 9607(a)(1) as a "present owner or operator" of the facility. *Fleet Factors*, 901 F.2d at 1554. The court construed "present owner or operator" to mean an "individual or entity owning or operating the facility at the time the plaintiff initiated the lawsuit by filing a complaint." *Id.* Under this method, the present owner of the facility was Emanuel County, Georgia. *Id.* at 1555. The county obtained the facility at a foreclosure sale on July 7, 1987, when SPW failed to pay state and county taxes. *Id.* at 1553. The court found that the Government could not hold the county liable under 42 U.S.C. § 9601(20)(D), which provides that a state or local government which has involuntarily acquired title to a facility is not generally liable as the owner or operator. *Id.* at 1555 n.4. 42 U.S.C. § 9601(20)(D) states:

The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

42 U.S.C. § 9601(20)(D) (1988).

Instead, if the government acquires title due to foreclosure, tax delinquency, abandonment, etc., the owner or operator is any person who operated or otherwise controlled activities at such facility immediately before government acquisition. *Fleet Factors*, 901 F.2d at 1555. The court determined that the meaning of "immediately beforehand" means without intervening ownership, operation, and control. *Id.* Since Fleet never owned, operated, or controlled SPW before the county's acquisition, the court could not find Fleet liable under 42 U.S.C. § 9607(a)(1). *Id.*

65. *Id.* Fleet had the burden of establishing its entitlement to the exemption. *Id.* at 1555-56.

66. *Id.* at 1555.

67. *Id.* at 1556 n.6. The court explained that this involved two "distinct, but related" ways of imposing liability upon Fleet. *Id.* First, Fleet could be held liable as an "operator" of the facility as defined under the statute. *Id.* Second, Fleet could be liable if it held indicia of ownership in SPW and managed the facility to the "extent necessary to remove it from the secured creditor liability exemption." *Id.* (emphasis added). Although this case did not present facts which showed participation in management

eral interpretation of the secured creditor exemption and exclude from protection any secured creditor that participates in "any manner" in the facility's management.<sup>68</sup> Fleet, alternatively, urged the court to hold a secured creditor liable only if it participated in the "day-to-day" management of the facility.<sup>69</sup> The court of appeals rejected both of these tests and adopted a moderate approach.<sup>70</sup> The court's rule holds a secured creditor who is not an operator liable under CERCLA section 107(a)(2) if the creditor participates in the financial management of the facility to a degree indicating a "capacity to influence"<sup>71</sup> the facility's hazardous waste treatment.<sup>72</sup> The secured creditor need not participate in decisions concerning waste treatment.<sup>73</sup> Nor does the creditor need to participate in day-to-day operations.<sup>74</sup> As long as the secured creditor's involvement with the facility supports the "inference

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differing from those indicating operation, the court stated that this could occur in some circumstances. *Id.*

68. *Id.* at 1556.

69. *Id.* This was the approach adopted in *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992 (E.D. Pa., Sept. 4, 1985) (district court granted summary judgment to defendant creditors because their participation in the facility was limited to participation in financial decisions). *Accord* *United States v. New Castle County*, 727 F. Supp. 854 (D. Del. 1989); *Rockwell Int'l v. IU Int'l Corp.*, 702 F. Supp. 1384 (N.D. Ill. 1988); *see supra* notes 23-41 and accompanying text for a discussion of this case. The lower court in *Fleet Factors* agreed with the *Mirabile* approach. *United States v. Fleet Factors Corp.*, 724 F. Supp. 955 (S.D. Ga. 1988). *Accord* *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556 (W.D. Pa. 1989); *United States v. Nicolet Inc.*, 712 F. Supp. 1193 (E.D. Pa. 1989).

70. *Fleet Factors*, 901 F.2d at 1557. The court found the district court's test "too permissive towards secured creditors who are involved with toxic waste facilities." *Id.* The court stressed that in order to achieve the "overwhelming remedial" goal of CERCLA, "ambiguous statutory terms should be construed to favor liability for the costs incurred by the government in responding to the hazards at such facilities." *Id.*

71. *Id.* This test is similar to the "authority to control" test that some courts have discussed regarding attempts to "pierce the corporate veil" and hold individual officers liable for environmental cleanup. Freeman, *Recent Case Law May Expand Lenders' Risks Under Superfund*, Nat'l L.J., Sept. 17, 1990, at 19, col. 1. For an example of a court which was receptive to such arguments, see *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). The "authority to control" test also may come into play when someone wishes to hold parent corporations vicariously liable for the acts of subsidiaries. *See generally*, Freeman, *Two Recent Decisions Restrict Superfund Vicarious Liability*, Nat'l L.J., April 16, 1990, at 24.

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

73. *Id.* at 1558.

74. *Id.* at 1557.

that it could affect” hazardous waste decisions, it may be held liable.<sup>75</sup>

Under the new rule, the court found sufficient facts to hold Fleet liable pursuant to CERCLA section 107(a)(2).<sup>76</sup> Although Fleet’s initial activities with SPW fell within the secured creditor exemption,<sup>77</sup> Fleet’s activity increased substantially after SPW ceased operations, causing it to fall outside the exemption.<sup>78</sup> In particular, the court found that Fleet’s requirements that: (1) SPW seek approval before shipping goods to customers; (2) SPW establish price for excess inven-

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75. *Id.* at 1558. The court stated that legislative history supported its conclusion: “The Senate version of CERCLA initially lacked an exemption for secured creditors in its definition of “owner or operator.” Representative Harsha introduced the exemption to the bill that was finally passed stating:

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

The use of the word “affiliated” to describe the threshold at which a secured creditor becomes liable clearly indicates a more peripheral degree of involvement with the affairs of a facility than that necessary to be held liable as an operator. It also suggests that the interpretation of the exemption by Congress is more consistent with the level of secured creditor involvement described in our opinion than with the management of day-to-day operations standard set forth in *Mirabile*.

*Id.* at 1558 n.11 (citing S. 1480, 97th Cong., 2d Sess. reprinted in 2 SENATE COMM. ON ENVIRONMENTAL AND PUBLIC WORKS, 97TH CONG., 2D SESS., 1A LEGISLATIVE HISTORY OF CERCLA 470 (Comm. Print 1983); Remarks of Rep. Harsha, reprinted in 2 SENATE COMM. ON ENVIRONMENTAL AND PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF CERCLA 945 (Comm. Print 1983)).

Additionally, the court emphasized the desired effect upon secured creditors:

Our ruling today should encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential debtors. If the treatment systems seem inadequate, the risk of CERCLA liability will be weighed into the terms of the loan agreement. Creditors, therefore, will incur no greater risk than they bargained for and debtors, aware that inadequate hazardous waste treatment will have a significant adverse impact on their loan terms, will have powerful incentives to improve their handling of hazardous wastes.

Similarly, creditors’ awareness that they are potentially liable under CERCLA will encourage them 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.

*Id.* at 1558.

76. *Id.* at 1559.

77. *Id.* From 1976 until SPW ceased operation, Fleet’s activities consisted of advancing funds to SPW against the assignment of SPW’s accounts receivable, paying and arranging for security deposits for SPW’s utilities, and informing SPW it would not advance further funds when Fleet determined that the loan outstanding exceeded the value of its accounts receivable. *Id.*

78. *Id.*

tory; and (3) Fleet determined to whom and when finished goods should be shipped, failed to satisfy the secured creditor exemption.<sup>79</sup> Furthermore, Fleet made layoff decisions, supervised the office administrator's activities, controlled access to the facility, and contracted to dispose of the SPW fixtures and equipment.<sup>80</sup> Consequently, Fleet's involvement in the actual decisions concerning hazardous waste disposal made a determination of its capacity to influence hazardous waste treatment derived by its involvement in the facility's financial management unnecessary.<sup>81</sup>

### B. *In re Bergsoe Metal Corp.*

*In re Bergsoe Metal Corp.*<sup>82</sup> is a recent post-*Fleet Factors* decision considering the secured creditor exemption. In *Bergsoe*, the Port of St. Helens (the Port), a municipal corporation, issued industrial development revenue bonds<sup>83</sup> to provide funds for the acquisition of land and the construction of a lead recycling facility.<sup>84</sup> The Port sold the acquired land to Bergsoe, who in return gave the Port a promissory note and a mortgage on the property.<sup>85</sup> The Port, the United States Bank of Oregon, and Bergsoe entered into a complicated financing arrangement.<sup>86</sup>

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79. *Id.*

80. *Id.* The court found these activities to be "pervasive, if not complete" participation in SPW's financial management. *Id.*

81. *Id.* at 1559 n.13. Fleet had apparently prohibited SPW from selling barrels of chemicals to potential buyers. *Id.*

82. 910 F.2d 668 (9th Cir. 1990).

83. *Id.* at 669. The Port issued pollution control revenue bonds as well. *Id.*

84. *Id.*

85. *Id.* at 670.

86. *Id.* At the "heart" of the arrangement were the previously issued revenue bonds. *Id.* The Port, Bergsoe and the United States Bank of Oregon entered into a series of interlocking transactions. *Id.* The first transaction was a sale and lease-back arrangement between Bergsoe and the Port. *Id.* Bergsoe conveyed to the Port by warranty deed 50 acres and the not yet constructed recycling plant. *Id.* Bergsoe and the Port then entered into two leases covering the plant and the property. *Id.* Bergsoe agreed to construct the plant and pay rent directly to the Bank. *Id.* The rent equalled the principal and interest to come due on the bonds. *Id.* The leases gave Bergsoe the option of purchasing the entire facility for \$100 once the bonds had been paid in full. *Id.*

The second transaction involved two mortgage and indentures of trust between the Port and the Bank. *Id.* at 670. The mortgage and indentures corresponded to the leases. *Id.* The Port agreed to issue the revenue bonds, then mortgaged the property and recycling plant to the Bank — as trustee for the bondholders. *Id.* In addition, the

The facility failed, soon after opening, and the bank forced the owner into bankruptcy.<sup>87</sup> By this time, the Department of Environmental Quality had discovered contamination at the plant site.<sup>88</sup> The bank and the trustee in bankruptcy filed suit against the stockholders<sup>89</sup> for the clean-up costs.<sup>90</sup> The owners counterclaimed against the Port, claiming that the Port was liable for the CERCLA clean-up costs.<sup>91</sup> Although the Port did not participate in any management of the facility, the owners claimed that the Port was liable due to its involvement in the planning stages of the facility,<sup>92</sup> its rights under certain leases,<sup>93</sup> and its right to direct that the company properly store hazardous wastes.<sup>94</sup> The Ninth Circuit Court of Appeals rejected all of the owner's arguments,<sup>95</sup> explaining that the Port's mere authority to manage the facility was not sufficient to defeat the exemption. The court reasoned that a secured creditor must "actually exercise" its management authority to be held liable under CERCLA.<sup>96</sup> The *Bergsoe* court

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Port assigned its rights under the leases and the revenues generated from the leases to the Bank. *Id.* The Bank agreed to hold the amounts generated from bond sales in a construction fund to be paid to Bergsoe. *Id.* The indentures obligated the Bank to collect rent under the leases and apply the rent in retirement of the bonds. *Id.* Additionally, the Bank purchased the bonds. *Id.* The Port then signed an agreement whereby the Port subordinated all its rights under the prior \$400,000 obligation to the Bank's rights under the leases. *Id.*

The Port also placed the warranty deeds, bill of sale and UCC release statements in escrow with the Bank. *Id.* The Port instructed the Bank to deliver the documents to Bergsoe when the company exercised its option to purchase the facility. *Id.*

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

88. *Id.*

89. *Id.* The stockholders were the East Asiatic Company and Heidelberg Eastern, Inc. collectively. *Id.* These companies own Bergsoe's stock. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 672. The court explained that if it adopted this position, the secured creditor exemption would cease to have any meaning. Most creditors lend only after gathering information and providing input in the planning stages of a project. *Id.*

93. *Id.* See *supra* note 86 discussing the lease arrangement. The leases included a right to inspect the premises and to reenter and take possession upon foreclosure. *Bergsoe*, 910 F.2d at 672.

94. *Id.* at 673 n.3.

95. *Id.* at 672-73. The court also determined that the legal title held by the Port did not make it an owner because the Port held this title merely to protect its security interest. *Id.* at 671.

96. *Id.* at 672.

thus rejected *Fleet Factors*' "capacity to influence" test,<sup>97</sup> opting for proof of actual management. Although the court did not address exactly what forms of participation in management will cause a creditor to fall outside the secured creditor protection, *Bergsoe* definitely represents a shift back toward secured creditor protection.<sup>98</sup>

### C. Proposed Environmental Protection Agency Rule<sup>99</sup>

The EPA conceded that the secured creditor exemption issue generated a great deal of confusion in the lending community.<sup>100</sup> In response to that confusion, the EPA proposed a rule to clarify secured creditor exemption law.<sup>101</sup> Under the EPA proposal,<sup>102</sup> CERCLA will continue to protect a secured creditor acting to protect its security interest so long as the creditor acts consistently with the statute's purpose.<sup>103</sup> This proposal places an affirmative obligation on creditors to inspect or audit the collateral securing the loan to minimize environmental liability.<sup>104</sup>

In addition to placing affirmative obligations on secured creditors to inspect, the proposed rule focuses on defining three previously undefined terms in CERCLA section 101(20)(A).<sup>105</sup> These terms are: (1)

97. See *supra* notes 71-81 and accompanying text for the discussion of the "capacity to influence" test.

98. For a discussion that this shift is not of much aid to secured creditors, see Freeman, *Recent Case Law May Expand Lenders' Risks Under Superfund*, Nat'l L.J., Sept. 17, 1990, at 19, col. 4, explaining that the *Bergsoe* court did not have to engage in line drawing since the Port did not participate in any aspect of the management. The case does not help secured creditors who do have some limited involvement.

99. *EPA Draft Proposal Defining Lender Liability Issues Under the Secured Creditor Exemption of CERCLA*, 21 Env't Rep. (BNA) 1162-67 (Oct. 12, 1990). [hereinafter *Draft Proposal*].

100. *Id.* at 1162.

101. *Id.*

102. The proposed rule will become effective upon publication in the Federal Register. *Id.* This procedure is in accordance with subsections 553(b) and (d) of the Administrative Procedure Act. Administrative Procedure Act, 5 U.S.C. § 553(b), (d) (1988). The sections allow the EPA to issue interpretive rules without providing notice and opportunity to comment. *Id.* Because of the important nature of the secured creditor issue, the EPA allowed public comment for a 60-day period. *Draft Proposal, supra* note 99, at 1162.

103. *Id.* at 1164.

104. *Id.* at 1167 n.3.

105. *Id.* at 1163-65. Additionally, the EPA defined the terms of CERCLA § 9601(35)(a)(ii) so that the Resolution Trust Corporation (RTC) and the Federal Deposit Insurance Corporation (FDIC), which may obtain a security interest or ownership

“indicia of ownership;” (2) “primarily to protect a security interest;”

of a contaminated facility as the result of actions mandated under the Federal Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, fall within the scope of the innocent landowner defense. 42 U.S.C. §§ 9607(b)(3), 9601(35) (1988). The innocent landowner defense states in § 9607(b):

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . .

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

42 U.S.C. § 9607(b) (3) (1988). The rest of the innocent landowner defense is referred to in § 9601(35)(A)-(B), which states:

(35)(A) The term “contractual relationship”, for the purpose of section 9607(b)(3) of this title includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by a preponderance of the evidence:

- (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.
- (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
- (iii) the defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.

(B) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

42 U.S.C. § 9601(35)(A)-(B) (1988).

and (3) "participating in the management of a . . . facility."<sup>106</sup>

The EPA defines "indicia of ownership" as interests in real or personal property held as security or collateral for a loan.<sup>107</sup> Examples of such indicia may include, but are not limited to a mortgage, deed of trust, or legal title obtained in a foreclosure.<sup>108</sup>

The EPA spent much more energy defining the term "primarily to protect the security interest,"<sup>109</sup> and gave secured creditors wide latitude in protecting their security interests.<sup>110</sup> Under the proposed rule, a secured creditor may attempt to protect its interest by policing the loan,<sup>111</sup> undertaking financial "work out" with a borrower where the

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106. 42 U.S.C. § 9601(20)(A) (1988). The EPA stressed that although the secured creditor exemption provides lenders with potential exemption from CERCLA liability, the section does not otherwise protect secured creditors from the risk that the collateral's market value may not be sufficient to cover the borrower's debt. *Draft Proposal, supra* note 99, at 1163. The EPA stated, "[t]he CERCLA secured creditor exemption is not a loan guarantee for lending institutions and does not shift to the Superfund the cost of poor loan decisions, but serves only as a shield from CERCLA liability." *Id.* This policy is exemplified in the proposed rule when the EPA explains that any enhancement of the value of the collateral, during the time the secured creditor is holding its indicia of ownership, which the secured creditor realizes at foreclosure sale over the value while contaminated, must be given to the EPA. *Id.* at 1165. The EPA justifies this as "equitable reimbursement." *Id.* However, a creditor may have a strong argument that the EPA is unjustly enriched if the agency recovers response costs as well as reimbursement from a secured creditor's sale.

107. *Id.* at 1163. This includes real or personal property acquired in the course of protecting the security interest. *Id.* The EPA also acknowledged that the nature of the ownership interest may vary under different state laws and by the type of the secured loan transaction. *Id.* Irrespective of these differences, the interest must be for the purpose of securing the loan to come within the exception. *Id.* The EPA explained that under CERCLA, the secured holder's ownership interest is "not the facility itself but the extent to which the facility or inventory represents a guarantee for the debtor's unpaid obligation." *Id.*

108. *Draft Proposal, supra* note 99, at 1163.

109. *Id.* at 1163-64.

110. The EPA stressed that the creditors' actions must relate to only "true security interests." *Id.* at 1163. Therefore, if a secured creditor holds interest in property for investment purposes, the lenders' actions are not exempted. *Id.* Although lenders usually make loans to generate revenue, such an interest does not equate with "investment" according to the EPA. *Id.*

111. "Policing the loan" includes actions such as requiring environmental audits before the loan is approved, cleanup of the property prior to or during the life of the loan, allowing the lender to regularly inspect both the property used for collateral and the borrower's financial condition, and requiring the borrower to assure the lender that the borrower is complying with federal, state, and local environmental rules. *Id.* at 1164. The EPA explains that "such requirements may be contained in lender imposed requirements for financial, environmental, and other warranties, covenants, and repre-



security interest is threatened,<sup>112</sup> and foreclosing and “expeditiously liquidating”<sup>113</sup> the assets securing the loan.<sup>114</sup> Accordingly, if the secured creditor takes these actions to protect its interest, the EPA will not consider the actions “participation in the management” of a facility.<sup>115</sup>

Whether a lender’s participation in the management of a facility meets the EPA definition depends upon various considerations. The EPA will consider the “nature of the borrowers’ business, the areas in which the lender becomes involved, whether the facility is in possession of the borrower or lender (after foreclosure), the actual control exercised by the lender . . . and whether the lender has caused or contributed to environmental harm.”<sup>116</sup> The EPA directly refuted *Fleet Factors’* holding<sup>117</sup> that mere “capacity to influence” facility operations voids the exemption, explaining that a lender has participated in management to such an extent to fall outside the secured creditor exemption protection if the borrower remains in possession, and the lender has materially divested the borrower of its decision making power over the facility operations.<sup>118</sup>

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sentations or promises from the borrower, as conditions for the loan and included in the loan documents. *Id.* These requirements do not make the lender a guarantor of environmental safety at the facility. *Id.*

112. A loan “work out” occurs when a lender needs to protect collateral from loss — usually when the loan is either in or near default. *Id.* Such actions may include “restructuring or renegotiation of the terms of the loan obligation, payment of additional interest, extension of the payment period, [or] specific financial or operational advice.” *Id.* Other actions taken by the secured creditor may also fall within the exemption. The key to retaining the exemption is that the borrower must remain the “ultimate decision maker” for the facility operation. *Id.*

113. The creditor must hold the property for no longer than six months, or else the burden of proof will shift to the lender to show that it continues to hold the property primarily to protect its security interest. *Id.* at 1165.

114. *Id.* at 1164. This exemption also covers any other formal or informal process through which the lender acquires possession of the borrowers’ collateral for disposition. The EPA notes that the lender’s actions “in outbidding or refusing bids from parties offering fair consideration for the property are evidence that the property is no longer being held primarily to protect the security interest.” *Id.*

115. *Id.* The EPA also requires that any action the lender takes does not “cause or contribute by act or omission” to the environmental harm at the site. *Id.*

116. *Id.* at 1165.

117. See *supra* notes 54-81 and accompanying text for a discussion of the *Fleet Factors* case.

118. *Draft Proposal, supra* note 99, at 1165. The EPA noted that the lender is in an even worse position if the lender divested the borrower of decision making control over hazardous waste disposal and treatment. The EPA allows a secured creditor to remain

#### IV. ANALYSIS OF THE TREND IN SECURED CREDITOR EXEMPTION LAW

CERCLA's goal of cleaning up abandoned and inactive hazardous waste sites is admirable and necessary. The problem, however, lies with the recurring question involved in environmental legislation—who is going to pay for the environmental benefit? The current trend of narrowing the secured creditor exemption and holding lenders liable for vast environmental clean-up goes too far.

Under the *Fleet Factors* "capacity to influence" test,<sup>119</sup> almost any secured creditor would be liable for environmental response costs. Because *Fleet Factors* focused on "capacity or power," and not actual exercise of power, all influential creditors run the risk of financial ruin when lending to businesses. The *Fleet Factors* test is unacceptable and unwise, for it discourages secured creditors from lending to potentially productive businesses in our financially strapped economy.

Although the *Bergsoe* analysis<sup>120</sup> provides some hope that a "capacity to influence" test will not long survive, *Bergsoe's* usefulness to secured creditors is limited.<sup>121</sup> *Bergsoe* did not define the acceptable extent of management participation by creditors. Consequently, secured creditors are left with no indication of appropriate conduct. A secured creditor's safest route may be to deny loans to companies, fearing possible environmental complications until the courts or Congress develop a clear rule for the creditors to follow.

Assuming that the proposed EPA rule becomes final,<sup>122</sup> secured creditors are still unreasonably burdened. The heavy "policing" duties that the proposed rule requires<sup>123</sup> obliges lending institutions to become "environmental experts" before extending a loan. Such a duty would impose a financial burden to banks, which in turn would pass

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within the exemption's protection if the lender acts primarily to protect its security interest. *Id.* The EPA stressed that a secured creditor's actions that are environmentally beneficial are not considered to be participation in management. *Id.*

119. See *supra* notes 71-81 and accompanying text for a discussion of the *Fleet Factors* test.

120. See *supra* notes 82-98 and accompanying text for a discussion of the *Bergsoe* opinion.

121. Freeman, *Recent Case Law May Expand Lenders' Risks Under Superfund*, Nat'l L.J., Sept. 17, 1990, at 19, col. 4.

122. See *supra* notes 99-118 and accompanying text for a discussion of the proposed EPA rule.

123. See *supra* notes 103-15 discussing requirements of the proposed EPA rule.

the burdens on to customers.<sup>124</sup> This result flies in the face of CERCLA's goal to force responsible parties to pay the cost of the environmental clean-up.<sup>125</sup>

The only realistic solution to the confusion presented by this issue is for Congress to directly address the secured creditor exemption when it amends CERCLA in 1995. The secured creditor exemption is vital to the lending community, and clarification of its reach is crucial. Although the courts and the EPA have attempted to elucidate the issue, a long-standing protection of this magnitude demands direct congressional attention.

## V. CONCLUSION

Secured creditors have traditionally found safety against CERCLA response costs under the secured creditor exemption.<sup>126</sup> Recently, courts have narrowed the scope of the exemption's protection by holding secured creditors liable for environmental clean-up costs.<sup>127</sup> This trend has caused an uproar in the lending community.<sup>128</sup> The EPA responded to this reaction by proposing a rule to clarify the coverage of the secured creditor exemption.<sup>129</sup>

The court decisions, and even the proposed EPA rule, represent unacceptable burdens on the lending community. The recent development in the case law sends a signal to secured creditors to discontinue or significantly reduce loans to businesses, while awaiting a final rule. The EPA rule provides no relief because its extensive policing duties require secured creditors to become virtual environmental experts to

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124. See Brief of Appellant Fleet Factors Corp. at 31, *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990). Such an increase would be reflected in higher interest rates, higher costs of doing business, and increased prices for the general public. *Id.*

125. The essential policy underlying CERCLA is to place the ultimate responsibility for clean-up on those responsible for the problem. *United States v. Aceto Agricultural Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (1st Cir. 1986).

126. See *supra* notes 7-8 and accompanying text discussing the statute.

127. See *supra* notes 54-99 and accompanying text discussing *Fleet Factors* and *Bergsoe*.

128. See generally Freeman, *Recent Case Law May Expand Lenders' Risks Under SuperFund*, Nat'l L.J., Sept. 17, 1990, at 19, col. 1 (discussing the impact on the lending community).

129. See *supra* notes 100-18 and accompanying text discussing the proposed rule.

avoid CERCLA liability.<sup>130</sup> These problems translate into increased costs to the general public through higher interest rates and costs of doing business. Such a result directly contradicts CERCLA's central purpose—to hold responsible parties liable for clean-up costs.

*M. Joan Cobb\**

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130. *See supra* notes 123-25 and accompanying text discussing the burdens on the lending community.

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