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Will the CERCLA Be Unbroken? Repairing the Damage After Fleet Factors

Sean P. Madden

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INTRODUCTION

In response to the increasing problems associated with abandoned and inactive hazardous waste sites in the United States, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or the "Act")1 in 1980.2 CERCLA established a $1.6 billion "Superfund"3 to finance the removal of hazardous waste from disposal sites and the remediation of such sites.4

CERCLA provides three mechanisms for effectuating the cleanup of hazardous waste sites. First, the Environmental Protection Agency ("EPA" or the "Agency")5 may order private parties to abate hazardous conditions that pose "an imminent and substantial endangerment to the public health or welfare or the environment."6 Second, the government may undertake its own remedial measures and sue "potentially responsible parties"7 to recover its expenses.8 Third, courts have held that private parties who voluntarily clean up hazardous waste sites may then sue potentially responsible parties for contribution.9

CERCLA represents a laudable attempt by the federal government to address a problem of staggering proportions.10 The Act, however, was

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3. Because of the large fund it created, CERCLA is commonly referred to as "Superfund."
7. The term "potentially responsible parties" appears in section 104(a) of CERCLA, see 42 U.S.C. § 9604(a) (1988), but is also commonly used to refer to the persons upon whom section 107 imposes liability. See id. at § 9607; Comment, The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA, 1988 Wis. L. Rev. 139, 142 n.15.
10. The problems associated with improper treatment of hazardous waste have been well documented and were a driving force behind CERCLA's passage. See, e.g., H. Rep.
hastily drafted and passed\textsuperscript{11} and is thus replete with ambiguity.\textsuperscript{12} The paucity of legislative history further hinders statutory interpretation.\textsuperscript{13} Consequently, the federal courts have had to interpret CERCLA's vague provisions with little Congressional guidance.\textsuperscript{14}

One vague provision is Section 101(20)(A), which defines "owner or operator" for the purpose of establishing parties potentially liable for hazardous waste cleanup.\textsuperscript{15} Congress specifically excluded from this definition any person "who, without participating in the management of a ... [hazardous waste] facility, holds indicia of ownership primarily to protect his security interest in the ... facility."\textsuperscript{16} While this "secured creditor exemption"\textsuperscript{17} makes plain that Congress intended to exempt secured creditors from some degree of CERCLA liability, the Act nevertheless fails to address the scope of the exemption.\textsuperscript{18} As a result, courts have promulgated inconsistent interpretations of when CERCLA sub-


\textsuperscript{12} See e.g., Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3rd Cir. 1988)("as a hastily conceived and briefly debated piece of legislation, CERCLA failed to address many important issues"), cert. denied, 488 U.S. 1029 (1989); Coastal Casting Service, Inc. v. Aron, No. H-86-4463 (S.D. Tex. Apr. 8, 1988)(WESTLAW, 1988 WL 35012, at *3)("It is well known that CERCLA was hastily drafted and adopted, with resulting ambiguities").


\textsuperscript{14} One court complained that the "courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation." NEPACCO, 579 F. Supp. at 839 n.15.


\textsuperscript{16} Id.

\textsuperscript{17} See infra notes 38-39 and accompanying text.

\textsuperscript{18} Secured creditors, like other professedly innocent parties, may invoke the so-called "innocent-landowner defense" to escape Superfund liability. See 42 U.S.C. §§ 9601(35)(A)-(B), 9607(b)(3) (1988). See generally Herbst & Cahalan, Reviewing Liability of Owners, Nat'l L.J., Sept. 17, 1990, at 15, col. 1 (discussing the innocent landowner defense). The defense is available to acquirors of property who neither know nor have reason to know of the presence of hazardous substances on their property. Although many secured creditors who foreclose on real property could presumably avail themselves of the defense, they are unlikely to be successful because it has been read so narrowly. See Comment, supra note 13, at 897-99 & nn.100-10; Herbst & Cahalan, supra, at 15, col. 1. A discussion of the innocent-landowner defense is outside the scope of this Note. For such a discussion, see Steinway, The Innocent Landowner Defense: An Emerging Doctrine, 3 Toxics L. Rep. (BNA) 486 (1989).
jects secured creditors to liability for cleaning hazardous waste sites. This has left creditors operating in a risky and uncertain environment. Consequently, financing for certain environmentally sensitive businesses threatens to become scarce.

This Note examines CERCLA’s secured-creditor exemption, with particular emphasis on the divergent rulings by the Eleventh and Ninth Circuits in United States v. Fleet Factors Corp. and In re: Bergsoe Metal Corp., respectively. Part I provides a brief overview of CERCLA and its liability scheme and discusses lower court decisions interpreting the secured creditor exemption. Part II analyzes the Fleet Factors decision. Part III examines the subsequent decision of the Ninth Circuit in Bergsoe Metal. Part IV proposes that Fleet Factors be limited to its facts, and recommends that courts adopt a more limited and certain standard for lender liability than the current “patchwork of conflicting and confused” decisions interpreting section 101(20)(A). This Note concludes that federal courts should reject the reasoning of Fleet Factors, but recognizes that Congressional action is ultimately necessary to remedy inconsistent interpretations of the secured-creditor exception.

I. BACKGROUND

A. CERCLA Overview

Congress enacted CERCLA to address the growing crisis associated with abandoned and inactive hazardous waste sites in the United States. Congress intended that the Act supplement the Resource Conservation and Recovery Act (“RCRA”) and “plug gaps in the government’s then existing anti-pollution program.”

Although Congress had considered various hazardous waste cleanup


21. 910 F.2d 668 (9th Cir. 1990).

22. This Note does not purport to provide a complete overview of CERCLA. Rather, this Note discusses only those provisions of CERCLA necessary to an understanding of the secured-creditor exemption. For more complete discussions of CERCLA, see Grad, supra note 11; Note, supra note 11, at 1263-74; Comment, supra note 7, at 145-59.


bills for several years,\textsuperscript{27} it did not actually pass one until the waning days of the Ninety-Sixth Congress. Hurriedly enacting CERCLA in the face of a new administration,\textsuperscript{28} Congress left numerous gaps and ambiguities in the statute.\textsuperscript{29} While the federal judiciary has played an important role in filling these gaps and defining CERCLA's terms,\textsuperscript{30} Congress planted the seeds for today's inconsistent judicial interpretations by leaving the statute so ambiguous.\textsuperscript{31}

1. CERCLA's Liability Scheme

While CERCLA fails to specify the nature of the liability it establishes, courts have construed the statute as establishing strict liability\textsuperscript{32} that is joint and several.\textsuperscript{33} Congress accepted these determinations in its 1986 amendments to CERCLA.\textsuperscript{34}

The Act imposes liability for cleanup costs on four groups of statutory persons or so-called potentially responsible parties:\textsuperscript{35}

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,

\textsuperscript{27} See Grad, supra note 11, at 1.

\textsuperscript{28} "CERCLA was approved by a lame-duck Congress just prior to the inauguration of a new administration. The legislation was adopted under a suspension of the rules that precluded amendments. No conference was held on the measure, and no report was issued on the statute as enacted." Note, supra note 11, at 1263 n.17; see also Grad, supra note 11, at 1 (discussing Congress' rushed effort to draft and pass CERCLA).

\textsuperscript{29} One court described CERCLA as "a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions." NEPACCO, 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984), aff'd in part, rev'd in part, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

\textsuperscript{30} See Note, supra note 11, at 1263-64. Indeed, this was a result Congress clearly contemplated: "[i]t is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law." 126 Cong. Rec. 30,932 (Nov. 24, 1980)(statement of Sen. Randolph, a sponsor of CERCLA); see also Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 528 (1947). ("Statutes . . . at times embody purposeful ambiguity or are expressed with a generality for future unfolding.").

\textsuperscript{31} Congress would have done well to heed the advice of Justice Frankfurter: "laws can measurably be improved with improvement in the mechanics of legislation, and the need for interpretation is usually in inverse ratio to the care and imagination of draftsmen." Frankfurter, supra note 30, at 528.

\textsuperscript{32} See J.V. Peters & Co. v. EPA, 767 F.2d 263, 266 (6th Cir. 1985); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985).


\textsuperscript{34} See Comment, supra note 7, at 155 & n.74. The 1986 amendment to CERCLA was called the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

\textsuperscript{35} The Act defines "person" broadly to include an "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (1988).
Because secured creditors have an interest in collateral property, they are concerned with being liable as owners or operators. The statutory definition of owner or operator, however, provides courts with little guidance in determining who may be liable as an owner or operator:37

The term 'owner or operator' means . . . in the case of an onshore facility or an offshore facility, any person owning or operating such facility . . . . Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.38

This latter clause is generally referred to as the "secured-creditor exemption."39

The paucity of legislative history on the scope of the secured-creditor exemption exacerbates the uncertainty regarding creditors' liability as owners or operators.40 Consequently, courts have had to define the exemption's parameters.

B. Pre-Fleet Factors Construction of the Exemption

Prior to Fleet Factors, few lower courts had considered the scope of the 
secured-creditor exemption. Nevertheless, there appeared to be a consensus emerging: banks would not be liable under CERCLA if they neither had foreclosed upon contaminated property, nor intimately involved themselves in the daily operations of their debtors’ businesses. Nevertheless, there appeared to be a consensus emerging: banks would not be liable under CERCLA if they neither had foreclosed upon contaminated property, nor intimately involved themselves in the daily operations of their debtors’ businesses.41 Although the liability of creditors who foreclosed upon contaminated collateral was more uncertain, there was a discernible trend to find those creditors liable.42

The first case43 to consider the scope of the secured-creditor exemption was United States v. Mirabile.44 In Mirabile, the creditor-defendants moved for summary judgment, asserting the security-interest exemption. The court granted the motions of those creditors not involved in the operational management of the debtor’s business, declaring that “the exemption plainly suggests that provided 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 held liable for cleanup costs.”45 The Mirabile court found the distinction between operational and financial involvement by the creditor in its debtor’s business to be “critical”46 and distinguished cases like NEPACCO47 and New York v. Shore Realty Corp.,48 which involved the liability of corporate officers and shareholders. In distinguishing these cases, the court found significant the share-

41. “[E]xisting case law suggests that a mortgagee can be held liable under CERCLA only if the mortgagee participated in the managerial and operational aspects of the facility in question.” United States v. Nicolet, Inc., 712 F. Supp. 1193, 1205 (E.D. Pa. 1989).
42. See infra notes 67-68 and accompanying text.
43. Before Mirabile, a bankruptcy court had stated in dictum that “even if [the creditor] had repossessed its collateral pursuant to its security agreement it would not be an ‘owner or operator’ as defined under CERCLA.” In re T.P. Long Chem., Inc., 45 Bankr. 278, 288 (Bankr. N.D. Ohio 1985); see also Comment, supra note 7, at 161-64 (discussing T.P. Long case).
44. 15 Envtl. L. Rep. (Envtl. L. Inst.) 20994 (E.D. Pa. 1985). For more detailed examinations of Mirabile, see Burcat, supra note 40, at 515-20; Note, supra note 11, at 1275-80; Comment, supra note 7, at 165-70.
In Mirabile, the EPA sued Anna and Thomas Mirabile, the current owners of property that had been cleaned by the EPA, to recover costs incurred in the clean-up. The land previously had been owned by Turco Coatings, a defunct paint manufacturer. See Mirabile, 15 Envtl. L. Rep. at 20995. The Mirabiles asserted a third-party complaint against American Bank & Trust (“ABT”) and Mellon Bank, both of whom had financed Turco when the hazardous condition was allegedly created. ABT and Mellon counterclaimed against the United States, which had loaned money to Turco through the Small Business Administration. See id.
45. Id. at 20995. The court denied Mellon’s summary judgment motion because its predecessor-in-interest was allegedly an active participant in certain operational aspects of Turco’s management. See id. at 20997.
46. Id. at 20995. The Mirabile case has come to be known for this distinction between permissible financial involvement and impermissible operational involvement with debtors. The court supported its decision by noting that the “reference [in the statute] to management of the ‘facility’ as opposed to management of the affairs of the actual owner or operator of the facility, suggests once again that the participation which is critical is participation in operational, production, or waste disposal activities.” Id.
48. 759 F.2d 1032 (2d Cir. 1985).
holders' influence in the "nuts-and-bolts, day-to-day production aspects of the [polluters'] business[es]," and concluded that the "mere financial ability to control waste disposal practices" was insufficient for the imposition of liability.

The next case to consider the exemption was *United States v. Maryland Bank & Trust Company*, in which the EPA sued Maryland Bank & Trust ("MBT") to recover approximately $550,000 it had spent to remove waste from a hazardous waste site. MBT had foreclosed on the site and subsequently held title for almost four years.

In examining the secured-creditor exemption, the court found the stat-

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50. Id.; accord *Hill v. East Asiatic Co.*, (In re Bergsoe Metal Corp.), 910 F.2d 668, 672 (9th Cir. 1990); United States v. New Castle County, 727 F. Supp. 854, 866 (D. Del. 1989); Rockwell Intl Corp. v. IU Intl Corp., 702 F. Supp. 1384, 1390 (N.D. Ill. 1988). *But see* United States v. Fleet Factors Corp., 901 F.2d 1550, 1557-58 (11th Cir. 1990) (capacity to influence hazardous waste disposal decisions sufficient to impose liability), *petition for cert. filed*, 59 U.S.L.W. 3728 (U.S. Sept. 21, 1990) (No. 90-504). It is clear from the court's analysis that the issue of lender liability under CERCLA is a fact-specific one. This is true of most decisions construing the security-interest exemption. *See* Mays, *Secured Creditors and Superfund: Avoiding the Liability Net*, 20 Env't Rep. (BNA) 609, 610 (1989); *see also* EPA Draft Proposal Defining Lender Liability Issues Under the Secured Creditor Exemption of CERCLA (Sept. 14, 1990) [hereinafter EPA Draft Proposal], reprinted in 5 Toxics L. Rep. (BNA) 668, 671 (1990) (draft of EPA rule clarifying lender liability establishes a fact-specific inquiry). The EPA draft is currently undergoing interagency review and has not been made public officially; so-called "bootleg" copies of the proposed rule, however, have been disseminated. *See infra* note 202.


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


52. *See Maryland Bank*, 632 F. Supp. at 575-76. The 117-acre site was owned by the McLeod family, which had operated a trash disposal business on the site. During the 1970s, MBT had loaned money to Herschel McLeod for this business, during which time McLeod permitted certain hazardous wastes to be dumped at the site.
ute's use of the present tense\textsuperscript{53} significant because it seemed to indicate that "[t]he security interest must exist at the time of the clean-up" for the exemption to apply.\textsuperscript{54} Thus, because MBT had full title to the hazardous waste site during the cleanup, the exemption's protection did not extend to it. Moreover, the court found that MBT bought the property to protect its investment, rather than its security interest, as required by the statutory exception.\textsuperscript{55}

The court distinguished \textit{Mirabile} because the foreclosing creditor in \textit{Mirabile} had promptly assigned its interest in the property after the foreclosure sale.\textsuperscript{56} The \textit{Maryland Bank} court called \textit{Mirabile}'s reading of the exemption "generous," declaring that "[t]o the extent to which [\textit{Mirabile}] suggests a rule of broader application [of the exemption], this Court respectfully disagrees."\textsuperscript{57}

In stark contrast to \textit{Mirabile}, the \textit{Maryland Bank} court relied substantially on public-policy concerns in its decision.\textsuperscript{58} The court stated: "Under the scenario put forward by the bank, the federal government alone would shoulder the cost of cleaning up the site, while the former mortgagee-turned-owner, would benefit from the . . . now unpolluted land."\textsuperscript{59} Because of its disagreement with \textit{Mirabile}, \textit{Maryland Bank & Trust} cast considerable doubt on banks' ability to foreclose upon collateral property without exposing themselves to potential CERCLA liability if the property was in fact contaminated.

The last relevant district court decision\textsuperscript{60} prior to \textit{Fleet Factors} was

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\item[54.] \textit{Maryland Bank}, 632 F. Supp. at 579.
\item[55.] See id. at 579-80. This is an unrealistic and unduly narrow conception of the necessities of secured lending. Lenders often have no choice but to bid for collateral at foreclosure sales. See EPA Draft Proposal, supra note 50, at 670; Tupi, Guidice v. BFG Electroplating: \textit{Expanded CERCLA Liability for Foreclosing Lenders}, 4 Toxics L. Rep. (BNA) 844, 846 & n.28 (1989).
\item[56.] \textit{Maryland Bank}, 632 F. Supp. at 579 & n.5. In \textit{Mirabile}, the creditor foreclosed on the contaminated property and was the high bidder at a subsequent sheriff's sale, but held the property for only four months until it assigned its bid. See \textit{United States v. Mirabile}, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20994, 20996 (E.D. Pa. 1985).
\item[57.] \textit{Maryland Bank}, 632 F. Supp. at 580.
\item[58.] See id. at 579-80.
\item[59.] Id. at 580. This fear may be misplaced. Even with an EPA-financed cleanup of collateral property, "it is more likely that the bank will actually lose money on the site." Burcat, \textit{Foreclosure and United States v. Maryland Bank & Trust Co.: Paying the Piper or Learning to Dance to a New Tune?}, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10098, 10100 (1987). After legal expenses, administrative costs, forgone interest, and the diminution in value of once-contaminated property, it is not likely that a bank could do any better than break even. See id.
\item[60.] \textit{Coastal Casting Service v. Aron}, No. H-86-4463 (S.D. Tex. Apr. 8, 1988)(WESTLAW, 1988 WL 35012), had also considered the secured-creditor exemption. Citing \textit{Mirabile} favorably and construing the exemption broadly, the court declared that secured creditors are liable only "when active participation and exercise of control over essential operations of the site's facility bring that party within the statutory definition of owner or operator." Id. at *4.
\end{itemize}
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Guidice v. BFG Electroplating & Manufacturing Co.\textsuperscript{61}

In considering the liability of a creditor that had foreclosed upon contaminated collateral, the Guidice court segmented its analysis into two time frames: the period before the bank purchased the property at the foreclosure sale and the period when the bank held title to the site. As to the former, the court adopted the financial-operational distinction promulgated by Mirabile.\textsuperscript{62} Although the bank had carefully monitored its debtor and exercised some financial influence over the company, the court found "no evidence suggesting that the Bank controlled operational, production, or waste disposal activities at the [debtor's] property."\textsuperscript{63} In fact, the Guidice court viewed the actions of the bank prior to foreclosure as "prudent measures undertaken to protect its security interest."\textsuperscript{64} The court justified imposition of "a high liability

(b)(6). For the purposes of a 12(b)(6) motion, the court must accept as true the plaintiff's allegations, see C. Wright & A. Miller, Federal Practice and Procedure 2d, § 1357, at 304 (1990), and not surprisingly, the plaintiff had alleged that the defendant bank had exercised operational control over its debtor. See Coastal Casting Corp. v. Aron, No. H-86-4463 (S.D. Tex. Apr. 8, 1988)(WESTLAW, 1988 WL 35012, at *4). The court's discussion of the parameters of the statutory exemption was, therefore, quite limited. Second, the case was not published and consequently has not enjoyed wide readership.

61. 732 F. Supp. 556 (W.D. Pa. 1989). The facts of the case are as follows: during the 1970s, Berlin Metal Polishing, owned and managed by the Runco family, operated a metal-polishing business in Pennsylvania ("Berlin site"). See id. at 558. Beginning in 1971, the National Bank of the Commonwealth (the "Bank") financed Berlin Metal. In September 1975, the Bank approved a loan to the company to construct a new treatment facility to satisfy certain environmental requirements of the Pennsylvania Department of Environmental Resources ("PaDER"). See id. The loan was secured by a mortgage on the Berlin site. Berlin Metal defaulted on this loan in early 1980. In June 1981, the Bank foreclosed on its mortgage and in April 1982 the Bank was the high bidder for the property at the sheriff's sale, and held title to the site until January 1983 when it conveyed the property to a trust created by the former owners. See id. at 558-59.

In October 1986, residents of the Borough of Punxsutawney commenced an action against BFG Electroplating and Manufacturing Company, alleging that the company had contaminated the environment and caused certain personal injuries. The residents also asserted a claim for response costs under CERCLA to clean certain contaminated property. BFG in turn asserted a third-party complaint against current and past owners of the Berlin site (which was adjacent to BFG's property), seeking indemnification, contribution and response costs. The Bank moved for summary judgment. See id. at 558.

The case is rather ironic insofar as the Bank might incur liability arising out of a loan originally extended to facilitate compliance with environmental regulations. See generally Statement of the American Bankers Association on the Lender Liability Act of 1990 before the Committee on Banking, Housing, and Urban Affairs, United States Senate, July 19, 1990 (on file with the Fordham Law Review) [hereinafter ABA Statement], at 1-2 (reluctance to lend "will reduce the capital available to businesses which want to protect or restore the condition of the environment"). For a more extended discussion of Guidice, see Tupi, supra note 55.


63. Id. at 562. The court's language is identical to that used in Mirabile: "The reference [in the statute] to management of the 'facility,' . . . suggests once again that the participation which is critical is participation in operational, production, or waste disposal activities." United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20994, 20995 (E.D. Pa. 1985)(emphasis added).

threshold” on policy grounds, believing that a higher threshold would encourage creditors to monitor their debtors’ use of collateral carefully, and thereby “enhance the dual purposes of protection of the banks' investments and promoting CERCLA's policy goals.”

In analyzing the bank's liability for activities after it foreclosed and took title to the facility, however, the Guidice court noted the divergence between Mirabile and Maryland Bank & Trust. The court found support for Maryland Bank & Trust's narrow reading of the exemption in the enactment of the Superfund Amendments and Reauthorization Act (“SARA”). The court also found persuasive “the concern expressed in Maryland Bank & Trust, that an exemption for landowning lenders would create a special class of otherwise liable landowners.”

In sum, Guidice strengthened the view first advanced in Mirabile that creditors could involve themselves in their debtors' financial decisions without exposing themselves to CERCLA liability. This approach seemed consistent with the exemption's language referring to participation in the management of a facility, as opposed to management of the debtor. Nonetheless, by embracing Maryland Bank's analysis of post-foreclosure liability, Guidice also cast considerable doubt on creditors' ability to foreclose on collateral property without exposing themselves to cleanup liability.

II. UNITED STATES v. FLEET FACTORS CORP.

A. Facts of the Case

Swainesboro Print Works ("SPW") operated a cloth-printing facility

65. Id. at 562 & n.1.
66. Id. at 562.
67. See id. at 563. SARA amended CERCLA to exclude from liability state and local governments that acquire title to properties involuntarily, as when the property is abandoned or acquired because of tax delinquency. See id. According to the court, the fact that Congress did not also amend CERCLA to exclude from liability lenders that acquire property through foreclosure supports the inference that Congress intended to hold lenders liable as owners. See id.

This reasoning is unsound. If Congress believed it had already exempted lenders from such liability, then it would be unnecessary to amend CERCLA. Thus, the court's interpretation begs the question of what Congress meant when it included an exemption for secured creditors in CERCLA. It should also be noted that the Maryland Bank & Trust decision, which indeed might have given Congress reason to exempt landowning lenders specifically, was decided after the substantive markup of SARA had been completed. See Note, supra note 11, at 1293 n.176.

68. Guidice, 732 F. Supp. at 563. One critical distinction between Guidice and Maryland Bank & Trust may make the court's reliance on the latter misplaced. See Tupi, supra note 55, at 845-46. In Maryland Bank & Trust, the court was concerned about the creditor reaping a windfall at the government’s expense by waiting for the government to clean-up the foreclosed-upon property and then sell it at a profit. See United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 580 (D. Md. 1986). The Bank in Guidice, however, had sold the Berlin property at a loss more than two years before the EPA began remedial efforts at the site. See Tupi, supra note 55, at 846.
in Georgia from 1963 to February 1981, when it ceased operations. SPW and Fleet Factors, a factoring subsidiary of Fleet/Norstar Financial Group, entered into an agreement in 1976, pursuant to which Fleet lent money to SPW and SPW assigned its accounts receivable to Fleet. In consideration for extending credit to SPW, Fleet Factors also took a security interest in SPW's property, plant, equipment, fixtures and inventory. In February 1981, SPW ceased operating and in December 1981 was adjudicated a bankrupt under chapter 7 of the Bankruptcy Code. The bankruptcy court subsequently appointed a trustee to liquidate SPW's estate.

Fleet foreclosed on its security interest in certain inventory and equipment in May 1982. It did not, however, foreclose on its security interest in the plant or real property. Between June 1982 and December 1983, Fleet contracted with third parties to auction and remove the equipment from SPW's facilities. In so doing, these third parties allegedly disturbed asbestos that had been sprayed on pipes connected to the equipment.

The EPA subsequently inspected the site in January 1984, discovering approximately 700 fifty-five-gallon drums that contained hazardous substances. After concluding that asbestos at the site endangered the public health and the environment, the EPA removed forty-four truckloads of asbestos-containing material, as well as the drums containing toxic substances. On July 7, 1987, title to the facility passed to Emanuel County, Georgia at a foreclosure sale resulting from SPW's tax delinquency. Two days later, the EPA brought an action against Fleet Factors to recover approximately $400,000 spent for the cleanup of the SPW facility. Both parties moved for summary judgment on the issue of Fleet's liability.

Following the precedent established in Mirabile, the district court:

interpret[ed] the phrases 'participating in the management of a . . . facility' and 'primarily to protect his security interest,' to permit secured creditors to provide financial assistance and general, and even

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70. Factoring is a "type of financial service whereby a firm sells or transfers title to its accounts receivable to a factoring company, which then acts as principal, not as agent. The receivables are sold without recourse, meaning that the factor cannot turn to the seller in the event accounts prove uncollectible." J. Downes & J. Goodman, Dictionary of Finance and Investment Terms 122 (1985).

71. SPW had originally filed under chapter 11 of the Bankruptcy Code but subsequently converted the case to a chapter 7 liquidation. See 11 U.S.C. § 1112 (1988).

72. See Fleet Factors, 724 F. Supp. at 938.

73. See id. at 959.

74. See id. at 957-59. The EPA could not bring an action against Emanuel County because SARA amended CERCLA to exempt from liability states and their political subdivisions that acquire title to contaminated property pursuant to foreclosure for nonpayment of taxes. See 42 U.S.C. § 9601(20)(A)(iii) (1988).
isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation.\textsuperscript{75}

Applying this standard to the period of time before Fleet's representative auctioned the foreclosed-upon equipment, the court held that Fleet's limited participation in the management of the facility would entitle it to claim the secured-creditor exemption.

As to the period of time from the auction until Fleet ceased to have any contact with the SPW property, however, the court found that there were material disputed facts regarding "the condition of the chemicals and asbestos in the facility."\textsuperscript{76} It therefore denied this part of Fleet's summary judgment motion. In addition, Judge Cowen certified an interlocutory appeal to the Eleventh Circuit sua sponte, noting that there existed "substantial doubt" about the proper construction of CERCLA's definition of "owner and operator" and of the secured-creditor exemption.\textsuperscript{77}

Overall, the court's decision was well received by commentators\textsuperscript{78} and construed as consistent with \textit{Mirabile} and other lower court decisions that had preceded it.\textsuperscript{79}

\textbf{B. \textit{The Eleventh Circuit Rules: A Lender's Nightmare}}

After discussing CERCLA's liability scheme, the circuit panel\textsuperscript{80} discussed Fleet's liability under section 9607(a)(2).\textsuperscript{81} The court ostensibly

\textsuperscript{76.} 724 F. Supp. at 961.
\textsuperscript{77.} See id. at 962. One might wonder how businessmen are to conduct their affairs so as to minimize their potential CERCLA liability when judges, whose function it is to interpret statutes, cannot make sense of certain crucial statutory provisions. \textit{See generally} Dizard, Toxic Loans, Corp. Fin., Sept. 1990, at 43, 36-43 (discussing uncertainties caused by the "huge, unquantifiable, and expanding cost of environmental liabilities").
\textsuperscript{78.} See, e.g., Mays, supra note 50, at 612 (calling the case "helpful").
\textsuperscript{79.} In United States v. Nicolet, Inc., 712 F. Supp. 1193, 1205 (E.D. Pa. 1989), a case decided five months after \textit{Fleet Factors}, Judge Broderick declared that "existing case law suggests that a mortgagee can be held liable under CERCLA only if the mortgagee participated in the managerial and operational aspects of the facility in question."
\textsuperscript{80.} The case was heard by Judges Vance and Kravitch of the Eleventh Circuit and Judge Lynne, a Senior District Judge sitting by designation. See United States v. Fleet Factors Corp., 901 F.2d 1550, 1552 (11th Cir. 1990), \textit{petition for cert. filed}, 59 U.S.L.W. 3278 (U.S. Sept. 21, 1990)(No. 90-504). Judge Vance did not participate in the decision due to his death in December 1989, so the case was decided by a quorum consisting of only one member of the Eleventh Circuit. One commentator has suggested that these "[p]ractical circumstances . . . could affect the strength of the holding." O'Brien, \textit{The 'Fleet Factors' Decision: Its Effect on Secured Lending}, 5 Toxics L. Rep. (BNA) 23, 25 n.1 (1990).
\textsuperscript{81.} See 42 U.S.C. § 9607(a)(2) (1988). Before commencing a discussion of Fleet's liability under 42 U.S.C. section 9607(a)(2), the court affirmed the district court's holding that Fleet could not be liable under section 9607(a)(1), which imposes liability on current owners or operators. 901 F.2d at 1553. This section is modified by section 9601(20)(A)(iii), which defines owner or operator to mean "any person who owned, operated, or otherwise controlled activities at such facility
framed the issue as other courts had, stating that "[t]he critical issue is whether Fleet participated in management sufficiently to incur liability under the statute." Fleet Factors's similarity to other courts' decisions, however, ended at this point.

In essence, the court recognized a new class of liable parties under CERCLA. It stated:

[there are] two distinct, but related, means of finding Fleet liable under § 9607(a)(2). First, Fleet is liable under the statute if it operated the facility within the meaning of the statute. Alternatively, Fleet can be held liable if it had an indicia of ownership in SPW and managed the facility to the extent necessary to remove it from the secured creditor liability exemption. . . . In order to avoid repetition, and because this case fits more snugly under a secured creditor analysis, we will forgo an analysis of Fleet's liability as an operator.

Thus, rather than limit its analysis to operator liability, for which authority exists and pursuant to which Fleet would admittedly be liable, the court enunciated a radical new standard for determining lender liability under CERCLA.

The government had urged the court to find the secured-creditor exception inapplicable if the creditor "participates in any manner in the management of the facility." Fleet, in contrast, suggested that the immediately before it is involuntarily acquired by a state or political subdivision thereof. 42 U.S.C. § 9601(20)(A)(iii) (1988). In Fleet Factors, the government had urged the court to construe this section "to refer liability 'back to the last time that someone controlled the facility, however long ago.'" Fleet Factors, 901 F.2d at 1555 (quoting Appellee's Brief at 23). In this way, the EPA had hoped that the court would ignore the bankruptcy trustee's ownership of the facility after Fleet ceased to have any contact with the property and before Emanuel County foreclosed. The extremity of this position makes all the more remarkable the EPA's sudden policy change in August 1990 when it bowed to Congressional pressure and agreed to promulgate a rule to exempt secured creditors from CERCLA liability explicitly. For a discussion of EPA's reversal on the issue of lender liability, see infra note 202.

82. 901 F.2d at 1556 (footnote omitted). While subtle, the court's syntax unmasks its approach to the issue. The court viewed the question as whether participation in management was sufficient to impose liability. More precisely, the issue is whether Fleet's participation in management was sufficient to remove it from the exception to liability. See, e.g., Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556, 562 (W.D. Pa. 1989)(holding certain "activities prior to foreclosure insufficient to void the security interest exemption") (emphasis added). The court extended this syntactical error to its logical extreme by using the exception to carve out a new class of potentially responsible parties under CERCLA. See infra notes 132-36 and accompanying text.

83. See Koegel, Bank Power Draws Superfund Liability, N.Y.L.J., July 9, 1990, at 1, col. 1; O'Brien, supra note 80, at 24.
84. 901 F.2d at 1556 n.6 (citation omitted, emphasis added).
85. The court admitted that Fleet would be liable as an operator but nevertheless eschewed an analysis of operator liability. See id.
86. See, e.g., Connolly, Superfund Whacks the Banks, Wall St. J., Aug. 28, 1990, at A11, col. 3 ("ruling drastically expands 'lender liability' under [CERCLA]"); Dizard, supra note 77, at 40, col. 1 (calling Fleet Factors the "antitank mine of open-ended environmental liability"); Koegel, supra note 83, at 1, col. 1 (court "created a fifth category of responsible parties under CERCLA").
87. Fleet Factors, 901 F.2d at 1556; see also Brief for United States as Appellee at 40-
court adopt "the distinction delineated by some district courts between permissible participation in the financial management of the facility and impermissible participation in the day-to-day or operational management of a facility." After reviewing the district court decisions adopting the latter approach (including that of the court below), the court rejected both in favor of what it viewed as an intermediate approach.

The court attempted to give meaning to its new standard:

Under the standard we adopt today, a secured creditor may incur section 9607(a)(2) liability . . . by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable . . . . Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.

The court rejected contentions that this standard might lead to perverse incentives for lenders, such as inducing them to monitor their borrowers less carefully. Instead, it believed that the opposite result would ensue, and justified its ruling as "encourag[ing] [lenders] to monitor the hazardous waste treatment systems and policies of their debtors and insist[ing] upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support." The court construed its holding as providing "a strong incentive [to creditors] to address hazardous waste problems at the facility rather than studiously avoiding the investigation and amelioration of the hazard."

C. Fleet Factors: Statutory Construction Gone Wrong

The reaction to Fleet Factors was swift and overwhelmingly negative.

43. Fleet Factors (No. 89-8094)(urging court to interpret exemption as unavailable when creditor participates in any manner in management of a facility).
88. 901 F.2d at 1556.
89. See id. at 1556-58. The court's approach is only intermediate when juxtaposed with the government's untenably narrow construction of the exception and the various lower courts' more reasonable construction of the exception. In absolute terms, the court's interpretation of the exemption is quite narrow, thereby expanding liability more than any previous construction. See Connolly, supra note 86, at A11, col. 3; Leland, Lender Liability in Cleanups Presents Workout Dilemma, Am. Banker, June 20, 1990, at 4, col. 1; Wojcik & Adler, Ruling May Widen Lenders' Liability, Bus. Ins., June 4, 1990, at 1.
91. Id. at 1558 (citations omitted).
92. Id. at 1559.
93. See Berz & Gillon, Lender Liability Under CERCLA: In Search of a New Deep Pocket, 108 Banking L.J. 4 (1991); see also, Brodsky, Lender Liability for Environmental Cleanup, N.Y.L.J., July 11, 1990, at 3, col. 1 (decision "counterproductive"); Connolly, supra note 86, at A11, cols. 3-5 (calling the court "naive" and the standard it establishes an "absurdity"); Freeman, Recent Case Law May Expand Lenders' Risks Under
Commentators criticized the decision on numerous grounds: it was not supported by the statute or precedent; it created a new class of potentially responsible parties, thereby turning the exception on its head; and, insofar as the decision purported to be policy-oriented, its policy formulation was misguided, shortsighted and counterproductive. These criticisms are considered in turn.  

1. Statutory and Precedential Support  

The Fleet Factors court did not explicitly identify the nature of its analysis, although it did suggest that it examined Fleet's liability as an "owner." Whether the court considered its analysis as one of ownership liability or secured-creditor liability is unimportant, however, because the standard it applies was unprecedented regardless of its label.

Despite the liberal construction afforded CERCLA's liability provisions, the plain meaning of the word "owner" counsels against its definitional extension to an independent third party whose only indicium of ownership in the polluter is a security interest. Indeed, Judge Easterbrook, cautioning against "pursu[ing] [CERCLA's and SARA's] ends to their logical limits," has urged that the statutes' terms be accorded their ordinary meanings:

Superfund, Nat'l L.J., Sept. 17, 1990, at 19, cols. 1-2 ("ironic" ruling has "troubling aspects"); Koegel, supra note 83, at 1, col. 1 (criticizing decision); Leland, supra note 89, at 4, cols. 2-3 ("portentous" decision that "improperly expanded the circumstances under which a lender that does not foreclose can be found [liable]"); O'Brien, supra note 80, at 25 (decision "out of the mainstream of the law"); Speakers Discuss Environmental Liabilities Faced in Making Corporate, Real Estate Deals, 5 Toxics L. Rep. (BNA) 111, 112 (Fleet Factors "raised the alarm to almost a fever pitch among the lending community") (quoting an environmental attorney).

94. Fleet Factors makes many of these same arguments in its petition for certiorari. See generally Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Fleet Factors Corp. v. United States, 59 U.S.L.W. 3278 (U.S. Sept. 21, 1990)(No. 90-504)[hereinafter Fleet Certiorari Petition](expanding liability would disrupt commercial practices and cause concern for lending and business community).

95. The court expressly resisted analyzing Fleet's liability as an operator, although the government had alleged facts sufficient to give rise to such liability. See 901 F.2d at 1556 n.6. Nevertheless, the court's language in various parts of the opinion indicates that its analysis is one of ownership liability. See, e.g., id. at 1557 ("Had Congress intended to absolve secured creditors from ownership liability, it would have done so.")(emphasis added). Unfortunately, however, the court's linguistic imprecision is confusing in this regard. See, e.g., id. at 1556 n.6 (calling its examination of Fleet's liability "a secured creditor analysis") (emphasis added).

96. See id. at 1556 n.6 (calling its inquiry "a secured creditor analysis").

97. See Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988); see also Frankfurter, supra note 30, at 536 ("we assume that Congress uses common words in their popular meaning, as used in the common speech of men").

98. Quite distinguishable from the creditor that does not foreclose upon its security interest in a facility—Fleet Factors, for example—is the creditor that not only forecloses but also purchases the property at the foreclosure sale and holds it for almost four years. This creditor is plainly an "owner" within the ordinary meaning of the term. See United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986).

99. Hines Lumber, 861 F.2d at 156.
§ 9601(20)(A)(ii) informs us that "[t]he term . . . ‘owner or operator’ means . . . in the case of an onshore facility or an offshore facility, any person owning or operating such facility". This is circular, although it does imply that if [a person] is neither "onshore" nor "offshore"—perhaps because in outer space?—then an owner or operator is not a statutory "owner or operator". The definition of "owner or operator" for purposes of earthbound sites must come from a source other than the text. The circularity strongly implies, however, that the statutory terms have their ordinary meanings rather than unusual or technical meanings.100

Clearly, as was the case in Fleet Factors, a secured creditor holding an unforeclosed-upon lien on a facility101 is not an "owner" of the facility within the ordinary meaning of that term.

Nor has such a creditor been construed an owner under section 9607(a)(2).102 In fact, most cases under section 9607(a)(2) have only construed the term "operator," probably because its meaning is ambiguous. The few cases holding owners liable involve either a parent corporation's liability for its subsidiary or a stockholder's liability for corporate waste-disposal practices.103 These cases are distinguishable from Fleet Factors and other lender liability cases.104

Not finding any textual support for its position, then, the Fleet Factors court supported its novel construction of the secured creditor exception with three sources: (1) the "'overwhelmingly remedial' goal of the CERCLA statutory scheme;"105 (2) United States v. Kayser-Roth Corp.,106 and (3) remarks made by Representative Harsha upon "introduc[ing] the exemption to the bill that was finally passed [as CERCLA]."107 For the reasons enunciated below, the court's reliance on these sources for support is misplaced.

100. Id. at 156 (quoting 42 U.S.C. § 9601(20)(A)(ii) (1988)).


102. A thorough review of the cases and the literature has failed to identify any case holding a secured creditor who had not foreclosed upon its lien on a facility liable as an owner. For a discussion of earlier decisions examining lender liability under CERCLA, see supra notes 44-68 and accompanying text.


104. See Freeman, supra note 93, at 19, col. 1.; see also infra notes 112-124 and accompanying text (discussing Kayser-Roth).


107. Id. at 1558 n.11.
a. CERCLA's Ends to Defeat Its Terms

While a statute's overall objective necessarily colors its interpretation and is a valid starting point for construction, it is not an end to be slavishly pursued by courts regardless of the actual terms of the statute:

To the point that courts could achieve "more" of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits. Born of compromise, laws such as CERCLA and SARA do not pursue their ends to their logical limits. A court's job is to find and enforce stopping points no less than to implement other legislative choices. Thus, recognizing CERCLA's remedial goal does not mean that any available deep pocket—here a secured lender—was intended to shoulder liability for someone else's environmental misdeeds. In short, CERCLA's "'overwhelmingly remedial' goal" does not support the sweeping extension of liability that the Fleet Factors court imposed.

b. Shareholder Liability Cases: Misplaced Support

The Fleet Factors court also cited United States v. Kayser-Roth Corp. to support its contention that secured lenders are liable under CERCLA when they hold a security interest and participate in management to some lesser degree than is necessary for imposing operator liability. Kayser-Roth's facts, however, are simply too different to provide a precedent for the court's construction of the secured-creditor exception. First, Kayser-Roth did not consider CERCLA's security-interest exception. The case dealt with the liability of a parent corporation for its wholly...
owned subsidiary.114 Furthermore, the *Kayser-Roth* court examined the parent's liability as an operator115 and as an owner,116 but not under the novel "secured creditor analysis" advanced by the *Fleet Factors* court.117 Consequently, *Kayser-Roth* cannot provide support for such a theory. Finally, the parent corporation in *Kayser-Roth* had "exerted practical total influence and control over [the subsidiary's] operations."118 Such pervasive control, however, is not necessary to impose liability under the *Fleet Factors* standard.119

In addition, the language in *Kayser-Roth* that allegedly supports *Fleet Factors*' narrow construction of the exemption is inapposite. This language appears in a discussion of "two slightly different approaches" taken by the federal courts to finding that a "parent corporation was a de facto operator of [its] subsidiary."120 The first approach focuses on stockholder's control of the polluter when determining liability. The other focuses on ownership plus participation in management. *Kayser-Roth* derives support for the latter approach from section 101(20)(A), "[r]easoning that this exception implies that a person who holds indicia of a corporation's ownership and who participates in its management can be an owner or operator."121

*Kayser-Roth*'s reference to this line of cases, however, is of little precedential value to the *Fleet Factors* court. First, the line of cases to which *Kayser-Roth* refers are analyzed under an operator theory of liability, not the lower threshold of liability proposed in *Fleet Factors*.122 Second, the

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114. See *Kayser-Roth*, 724 F. Supp. at 17. The parent-subsidiary relationship is generally much closer than that of lender and borrower. Indeed, *Kayser-Roth* had exercised total control over its subsidiary. See id. at 18.

115. See id. at 22.

116. See id. at 23. The *Kayser-Roth* court's analysis of ownership liability is substantially influenced by the parent corporation's "overwhelming pervasive control" over its subsidiary. Id. at 24. The case was more properly considered under an analysis of operator liability as demonstrated by the First Circuit's affirming opinion. See United States v. Kayser-Roth Corp., 910 F.2d 24, 25, 28 (1st Cir. 1990)(affirming on the grounds that the parent corporation was liable as an operator), *petition for cert. filed*, 59 U.S.L.W. 3407 (U.S. Nov. 23, 1990) (No. 90-816). The appellate court, therefore, did not reach the issue of *Kayser-Roth*'s liability as an owner. See id. at 28 n.11.


119. See *Fleet Factors*, 901 F.2d at 1557-58.


121. Id. at 20. This reasoning may be valid in the context of disregarding the corporate form in order to impose liability upon shareholders that control polluters. The exemption is intended "to prevent the establishment of 'dummy' corporations, with few assets, which would be the responsible party for the purpose of the act." 2 Senate Comm. on Environmental and Public Works, 97th Cong., 2d Sess., *reprinted in* 2 A Legislative History of the CERCLA of 1980 945 (Comm. Print 1983)(remarks of Representative Harsha upon introducing the exemption); see also infra notes 125-131 and accompanying text (discussing Representative Harsha's comments and the purpose of the exemption).

parties in these cases are equity owners, not secured creditors who could plausibly have asserted the secured-creditor exemption. Finally, Kayser-Roth did not apply this line of analysis to the case before it. The language cited by Fleet Factors, therefore, is merely dictum.

c. Reading the Legislative History Out of Context

In support of its admittedly narrow construction of the secured-creditor exemption, the Fleet Factors court quoted comments by Representative Harsha, who had introduced the exemption:

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 court interpreted Representative Harsha's "use of the word 'affiliated' to describe the threshold at which a secured creditor becomes liable as clearly indicating a more peripheral degree of involvement with the affairs of a facility than that necessary to be held liable as an operator." The court exaggerates the significance of Representative Harsha's comments, however. First, the comments were made in the context of introducing an exception to liability, not establishing a new class of liable parties. Moreover, when considered in the context of his entire statement, it is clear that Representative Harsha's comments did not contemplate lender liability. Rather, he addressed the tension cre-

123. See id. at 20 (citing New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985) and NEPACCO, 579 F. Supp. 823, 848-49 (W.D. Mo. 1984), aff'd in part, rev'd in part, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987)); see, e.g., NEPACCO, 810 F.2d at 744 (individual shareholder liable as operator); Shore Realty, 759 F.2d at 1052 (same)).
126. Id.
127. See United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1111-12 (D. Minn. 1982); see also Frankfurter, supra note 30, at 543 ("It is a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage.") (quoting Pine Hill Coal Co. v. United States, 259 U.S. 191, 196 (1922) (Holmes, J.)).
128. For a discussion of the analytical problems of the court's use of the exception to create a new class of liable parties, see infra notes 132-136 and accompanying text.
129. Had the Fleet Factors court continued the language they quote, the passage would read more accurately, while providing less support:

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

While the Merchant Marine Committee report indicated this situation was
ated by providing an exemption from liability for innocent lessors and charterers while not allowing corporate form to shield polluters from liability. 130

Second, it is not clear that this ambiguous comment has any real significance. One commentator took the court to task for placing such weight on this obscure part of CERCLA's legislative history:

But what does "otherwise affiliated" mean in this context? It seems more likely that the phrase is really a few "throw away" words by a congressman who did not expect to be cited for statutory construction. Such an obscure expression provides flimsy support for turning an exemption for secured creditors into a liability more pervasive than that facing operators. 131

In conclusion, Fleet Factors should have offered more credible statutory and precedential support for its radical departure from existing case law.

2. The Exception Swallowing the Rule

Perhaps the most serious flaw in the court's opinion is its manipulation of the language of the secured-creditor exemption to create what constitutes a new class of liable parties. The secured-creditor exception is just

not intended the statutory language is unclear. Therefore, I offered clarifying language to truly exempt those who hold title but do not participate in the operation or management activities. My amendment also requires that those that hold title cannot be affiliated in any way with those who lease or charter the vessel or facility. This was done to prevent the establishment of "dummy" corporations, with few assets, which would be the responsible party for the purpose of the act.

2 Senate Comm. on Environmental and Public Works, 97th Cong., 2d Sess., reprinted in 2 A Legislative History of the CERCLA of 1980 945 (Comm. Print 1983)(remarks of Representative Harsha)(emphasis added). The italicized language reveals that Representative Harsha's comments were directed toward the tension created by an exemption that attempts to exempt bona fide third parties unaffiliated with the polluter, while disregarding the corporate form to establish CERCLA liability.


131. Koegel, supra note 83, at 1, col. 1. It is indeed a bit ironic that the court deemphasized CERCLA's actual language because of its hasty passage and poor drafting. see United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3728 (U.S. Sept. 21, 1990)(No. 90-504), while according great weight to the use of a particular word like "affiliated" in the legislative history. See id. at 1558 n.11.
that, an exception\textsuperscript{132} to liability. Fleet Factors' analysis\textsuperscript{133} would not only eviscerate the exception,\textsuperscript{134} but would also establish an independent, substantive basis for imposing CERCLA liability.\textsuperscript{135}

Essentially, the court has inverted the exception, seizing on its language to justify the creation of a new class of liable parties—a class that is not contemplated by the statutory sections that enumerate and define the universe of potentially responsible parties. The result of this distortion is as ironic as it is perverse:\textsuperscript{136} Congress affirmatively excepted secured creditors from some degree of CERCLA liability, but the Fleet Factors court has used Congress' implementing language to justify expanding lender liability.

3. Policy Considerations: A Narrow Approach

Aside from obvious shortcomings in statutory construction, the Fleet Factors decision does a poor job of fashioning policy. The court was motivated by a desire to make lenders behave as environmental police.\textsuperscript{137} In establishing such a vague standard for liability, however, the court has created a situation that could paralyze secured lending to certain businesses.\textsuperscript{138} Moreover, the court's standard will not only fail to achieve its own policy goals,\textsuperscript{139} but will frustrate other legitimate public policies should it become the rule.


Congress' desire to encourage and foster small business\textsuperscript{140} will be particularly undercut. Fleet Factors creates an amorphous liability stan-

\textsuperscript{132} Exception is variously defined as "an excluding, as from . . . a description; . . . that which is . . . separated from others in a general description; . . . a case to which a rule, general principle, etc. does not apply." Webster's New Twentieth Century Dictionary 636 (2d ed. 1968).

\textsuperscript{133} "Fleet can be held liable if it had an indicia of ownership in SPW and managed the facility to the extent necessary to remove it from the secured creditor liability exemption." Fleet Factors, 901 F.2d at 1556 n.6 (citation omitted).

\textsuperscript{134} See Connolly, supra note 86, at A11, cols. 3-5; Wojcik & Adler, supra note 89, at 1; infra note 151 and accompanying text.

\textsuperscript{135} See Koegel, supra note 83, at 1, col. 1; O'Brien, supra note 80, at 25. The court even seems to acknowledge that it is creating a "secured creditor analysis" for establishing CERCLA liability. See Fleet Factors, 901 F.2d at 1556 n.6. Yet CERCLA only imposes liability under section 107(a)(2) upon "any person who . . . owned or operated any facility . . . ." See 42 U.S.C. § 9607(a)(2) (1988). The reference to liability for owners or operators appears in other sections of CERCLA as well, including, significantly, the definitional section of the statute. See id. at § 9601(20)(A); id. at § 9607(a)(1).

\textsuperscript{136} See Freeman, supra note 93, at 19, cols. 1-2; Dizard, supra note 77, at 36, 41.

\textsuperscript{137} See Fleet Factors, 901 F.2d at 1558-59 & n.12.

\textsuperscript{138} See Dizard, supra note 77, at 36; Hamilton, Passing the Buck on Toxic Cleanup, Wash. Post, July 6, 1990, at C1, col. 1.

\textsuperscript{139} For example, lenders are likely to be less involved with their borrowers. See Brodsky, supra note 93, at 5, col. 2; Connolly, supra note 86, at A11, cols. 4-5; Freeman, supra note 93, at 20, cols. 2-3.

\textsuperscript{140} See infra note 162 and accompanying text.
that is triggered by an "inference that [the creditor] could affect hazardous waste disposal decisions if it so chose." Not only does this standard fail to inform creditors of the extent to which they can protect their security interests, but it bases liability upon conjecture. The vagueness of the Fleet Factors test is exacerbated by its reliance on hypothetical inquiry. Now, rather than asking themselves "Have I influenced the operational management of the polluter?"—a question lenders should presumably be able to answer with some degree of certainty—bankers must ask themselves "Have I involved myself in management to the extent that I could influence hazardous waste decisions, even though I have never attempted to exercise such influence?" The latter inquiry is fraught with uncertainty.

The court's efforts to clarify its nebulous standard are unavailing. In an apparent attempt to mollify creditors, the court declared that "a secured creditor can become involved in occasional and discrete financial decisions relating to the protection of its security interest without incurring liability." Nevertheless, the court failed to explain how often, to what extent, and in what kinds of occasional and discreet financial transactions creditors may involve themselves without incurring liability. The unfairness of such a vague standard is manifest, but the inequity is in fact much more acute because of the dilemma it creates for secured creditors. The court believed its construction of the secured-creditor exemption would "encourage [lenders] to . . . insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support." Whether this insistence should be in general or

141. See Connolly, supra note 86, at A11, cols. 3-5; Koegel, supra note 83, at 1, col. 1; Pollard & Greco, Congress Must Correct Superfund Law, Am. Banker, July 25, 1990, at 4, col. 1.


143. See Herbst & Cahalan, supra note 18, at 17.


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

146. Id. (citations omitted). As a matter of fact, such insistence, at least in the abstract, is something that prudent lenders would undertake regardless of their own liability. See, e.g., H. Chaitman, The Law of Lender Liability ¶ 9.02(7)(b) (1990)(urging that lenders insist upon representations and warranties from borrowers that it will comply with environmental regulations); J. Moskowitz, Environmental Liability and Real Property Transactions 92 (1989)(same). To the extent that its debtors increase the likelihood of incurring their own liability for inadequate treatment of hazardous wastes, the creditor's risk increases. See H. Chaitman, supra, at ¶ 9.02(6)(a)-(c). Therefore, lenders would likely insist that debtors covenant to comply with applicable environmental regulations, and thus the court's standard of liability is probably unnecessary.
specific terms is not clear. For example, if "acceptable treatment standards" are unclear or numerous, must or should a lender involve itself in making the decision as to how waste should be disposed? If so, has the lender "affect[ed] hazardous waste disposal decisions," and thereby exposed itself to liability under the Fleet Factors analysis?

The creditors' Hobson's choice is apparent: under Fleet Factors, it will likely be liable for its borrowers' environmental misdeeds, so it should take a more active role in assuring that such misdeeds do not occur. Yet if the creditor becomes so involved with its debtors, it will likely be deemed to have participated in management sufficiently to incur CERCLA liability if pollution in fact occurs.

The court seems to believe that lenders can and should prevent all hazardous waste problems that their debtors cause. Because this result is clearly unobtainable, the court's standard makes secured creditors virtual insurers for their debtors insofar as hazardous waste liability is concerned. Finally, Fleet Factors' amorphous standard of liability promises to produce even more litigation, despite the fact that administrative and legal expenses already account for as much as sixty percent of all monies spent on environmental matters. The large percentage of funds expended for litigation is at least partly attributable to the statute's ambiguity and its perceived unfairness. To the extent that Fleet Factors exacerbates this situation, it will only engender more litigation.

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

148. Id.


150. Lenders, however, simply "do not now have the organizational or technical resources to police borrowers." Dizard, supra note 77, at 41; see also Comment, supra note 13, at 902 (same). But see Note, supra note 11, at 1294 (lenders are well-equipped to police borrowers).

151. See Leland, supra note 89, at 10, col. 1; see also Fleet Certiorari Petition at 8 ("under this vague standard secured lenders, as a practical matter, always will be liable for CERCLA clean-up costs").


153. This result is partly attributable to the statute's ambiguity and perceived unfairness. Indeed, in a review of litigation under CERCLA in the 1980s, commentators noted that the statute was "badly drafted and, to the glee of lawyers, silent on many important issues." Jones & McSlarrow, But Were Afraid to Ask: Superfund Case Law, 1981-1989, 19 Envl. L. Rep. (Envl. L. Inst.) 10430, 10430 (1989).

154. To the extent that Fleet Factors adds to this ambiguity, it will only engender more litigation. Cf. Davis, Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court, 71 Minn. L. Rev. 1, 2-3 (1986)(uncertain legal standards engender litigation); Note, supra note 40, at 929-30 & n.27 (uncertain standard for lender liability results in increased litigation); Burcat, supra note 59, at 10100 ("by attempting to trap a creditor into paying for such cleanups, the government and creditor will become inexorably entangled in needless and expensive litigation").
b. Fleet Factors' Effect on Small Business

Perhaps the Fleet Factors court construed the exemption so narrowly because of its restrictive conception of what constitutes public policy.155 In ignoring policy concerns outside CERCLA, however, the court has adopted a standard that impinges upon other policy considerations, particularly those involving small business and banking.156

The Fleet Factors decision, if followed by other courts, creates a risk that certain environmentally sensitive businesses, particularly small businesses, will be denied access to credit.157 The risks of lending to such businesses are open-ended and, under the Fleet Factors analysis, virtually unquantifiable.

Risk that is quantifiable, even if imprecisely, is manageable. Uncertainty, however, can paralyze creditors' decision-making abilities158 and cripple the market for credit to certain businesses.159 As discussed

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155. "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes, or in the known temper of legislative opinion." Frankfurter, supra note 30, at 539.

156. A thorough discussion of the conflict between the policies embodied in CERCLA and other important public policies is beyond the scope of this Note. For an extended discussion of the conflict between bankruptcy law and environmental law, see Rosenbaum, Bankruptcy and Environmental Regulation: An Emerging Conflict, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10099 (1983); ABA Meeting Offers Advice to Attorneys on Clash of Bankruptcy, Environmental Laws, 5 Toxics L. Rep. (BNA) 26 (1990).


158. Basic economics teaches that in a world full of risk and uncertainty, it is difficult to know exactly what profit maximization means, since the firm cannot be sure that a certain level of profit will result from a certain action. Instead, the best the firm can do is to estimate that a certain probability distribution of profit levels will result from a certain action. Under the circumstances, the firm may choose less risky actions, even though they have a lower expectation of profit than other actions. In a world where ruin is ruinous, this may be perfectly rational policy. E. Mansfield, Economics 136 (4th ed. 1983)(introductory economics textbook)(emphasis added); see also Kupin, New Alterations of the Lender Liability Landscape: CERCLA After the Fleet Factors Decision, 19 Real Est. L.J. 191, 211 (1991) (Fleet Factors "ignores the extreme difficulty of estimating environmental clean-up costs"); Connolly, supra note 86, at A11, col. 4 ("the open-ended nature of environmental claims makes adequate pricing and reserving into a guessing game"). Given the potentially ruinous nature of CERCLA liability, it is not surprising that commentators have predicted that creditors would indeed cease lending to certain environmentally risky businesses. See, e.g., Dizard, supra note 77, at 36 (lenders will cease funding certain businesses); Freeman, supra note 93, at 20, col. 3 (same); Pollard & Greco, supra note 141, at 4, col. 1 (same).

159. The credit markets may become unavailable to certain businesses because of the risks and uncertainties created by the threat of lenders' environmental liability. There are
above, the Fleet Factors standard creates enormous uncertainty about a creditor’s potential exposure vis-a-vis certain borrowers. If banks cannot measure—and therefore manage—the risk of lending to borrowers in environmentally sensitive businesses, they will not extend credit to these borrowers. Small businesses will be particularly affected, a result that is inconsistent with the federal government’s longstanding policy of “improving and stimulating the national economy in general and the small-business segment thereof in particular.” In closing, had the Fleet Factors court not limited its analysis of public-policy considerations

especially two components to a bank’s analysis of a borrower’s appropriate loan rate premium. See Flannery, A Portfolio View of Loan Selection and Pricing in Handbook for Banking Strategy 457, 459-60 (R. Aspinwall & R. Eisenbeis eds. 1985). First, the default premium accounts for the lender’s expected loss on the loan, which is generally computed with reference to that type of borrowers’ default rate. See id. at 460. Second, the bank computes a risk premium that “compensates the lender for uncertainty about how much of the loan will be repaid.” Id. Both of these components are affected by the open-ended nature of environmental liability. First, the default premiums for certain industries will be higher. This result exists independent of lender liability and is beneficial insofar as it allocates the cost of pollution to those industries that tend to pollute. See S. Rep. No. 73, 99th Cong., 1st Sess. 13 (1985); Burkhart, Lender/Owners and CERCLA: Title and Liability, 25 Harv. J. on Legis. 317, 336-37 (1988); Comment, supra note 13, at 903-04; Unterberger, Lender Liability Under Superfund: What the Congress Meant to Say Was . . . , 5 Toxics L. Rep. (BNA) 541, 542 (1990)(Part I of a two-part series)[hereinafter Unterberger I].

The risk premium, however, is particularly affected by lender liability. Lenders already have to consider the very real possibility that, because of environmental misdeeds and resultant liability, their borrowers will be unable to repay any of their principle. Under the Fleet Factors standard, lenders also have to consider—and factor into their pricing—the probability that they will have affirmative obligations to clean up their borrowers’ facilities, an obligation that frequently far exceeds the value of the loan to the polluting borrower. See 136 Cong. Rec. E1023 (daily ed. Apr. 4, 1990)(remarks of Representative LaFalce); Burkhart, supra, at 344-49; Connolly, supra note 86, at A11, col. 4; see, e.g., United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 575-76 (D. Md. 1986)(cleanup costs approximately 170% of loan’s value); see also ABA Statement, supra note 61, at 2-3 (the breadth of the Fleet Factors decision “calls into question the traditional relationship between secured lenders and their borrowers”). Consequently, many firms in environmentally sensitive businesses will be unable to afford credit or will have credit unavailable at any price. See Unterberger, Lender Liability Under Superfund: What the Congress Meant to Say Was . . . , 5 Toxics L. Rep. (BNA) 569, 571-72 (1990)(Part II of a two-part series)[hereinafter Unterberger II]; see also Kupin, supra note 158, at 215 (lenders “will restrict credit generally and particularly to businesses dealing with hazardous substances”).

160. See supra notes 138-154 and accompanying text; Unterberger II, supra note 159, at 571-72.

161. See Note, supra note 40, at 934 & n.52.

to those expressed in CERCLA, it may have struck a different balance than it did.

III. HILL v. EAST ASIATIC CO. (In re BERGSOE METAL CORP.)

A. The Facts: A Nominal Owner

In Hill v. East Asiatic Co. (In re Bergsoe Metal), 163 Bergsoe Metals Corporation ("BMC" or the "Company") operated a lead-recycling business in St. Helens, Oregon. 164 In December 1978, the Port of St. Helens (the "Port"), a municipal corporation organized under Oregon law, agreed to issue industrial development revenue bonds ("IDBs") and pollution control bonds for BMC. 165 While the Port held "paper title" to the property on which the plant was constructed, its "ownership was merely part of the financing arrangement." 166 Essentially, the Port acted as an intermediary between the investors who bought the IDBs and the Company. That the amount of the Company's "lease" 167 equalled the principal and interest due on the bonds is indicative of the Port's nominal role. Moreover, "the leases [gave] to Bergsoe all other traditional indicia of ownership, such as responsibility for the payment of taxes and for the purchase of insurance; significantly, the leases assign[ed] to Bergsoe the risk of loss from destruction or damage to the property." 168

BMC began to operate the newly constructed plant in 1982. Shortly thereafter, the Company began experiencing financial difficulties and by 1983 was in default of the leases. 169 The Port, the Company and the bondholders' indenture trustee subsequently agreed to an arrangement pursuant to which a third party would manage the facility. Nevertheless, the facility continued to perform poorly and in October 1986 the inden-

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163. 910 F.2d 668 (9th Cir. 1990).
164. For a recitation of the facts of the case, see id. at 669-70.
165. An industrial development revenue bond ("IDB") is a bond issued by a state or local government to finance plants and facilities that are then leased to private businesses. The purpose of IDBs is to attract industry as part of local economic development efforts. Their appeal to investors is mainly that they are tax-exempt . . . . Properties financed by IDBs are nominally owned by the issuing government, but the bonds are the credit responsibility of the firms that lease the facilities.

166. Bergsoe Metal, 910 F.2d at 671.
167. The Bergsoe court made plain that the Port was the owner of the facility in name only:

Bergsoe's "rent" was equal to the principal and interest due under the bonds. The money was to be paid directly to the Bank as trustee for the bondholders. The leases expired not on a specific date, but when the money owed under the bonds was paid off. And, when the bonds were paid off, Bergsoe could purchase full title to the property for the nominal sum of $100.

Id.
168. Id.
169. See id. at 670.
ture trustee placed BMC into involuntary bankruptcy proceedings.\textsuperscript{170}

Subsequent to the initiation of bankruptcy proceedings and the appointment of a trustee in bankruptcy, the Oregon Department of Environmental Quality discovered that the plant site was contaminated by various hazardous substances. BMC's trustee in bankruptcy then filed suit against the Company's shareholders to compel them to clean the property.\textsuperscript{171} The shareholders asserted a third-party complaint against the Port and the indenture trustee, alleging that they were responsible for the costs associated with cleaning up the property. The Port moved for summary judgment on the ground that it was not an "owner" for purposes of establishing liability under CERCLA. The district court granted the Port's motion.\textsuperscript{172}

\section*{B. The Ninth Circuit's Limited Ruling}

In an opinion by Judge Kozinski, a panel of the Ninth Circuit Court of Appeals affirmed the district court. In order to assert the secured-creditor exception successfully, the Port would have to "demonstrate both that [it] holds indicia of ownership primarily to protect its security interest in the Bergsoe plant and that it did not participate in the management of the plant."\textsuperscript{173}

The Bergsoe court began its analysis by examining why "the Port holds paper title to the Bergsoe plant."\textsuperscript{174} The court concluded that the Port's "indicia of ownership," in the form of paper title to the plant, constituted a security interest in the property.\textsuperscript{175} It also concluded that there was no material issue of fact concerning whether the Port held its indicia of ownership primarily to protect its security interest.

The court then proceeded to analyze whether the Port "participat[ed] in the management of the Bergsoe recycling plant,"\textsuperscript{176} in which case it would not be entitled to assert the protection afforded by the secured-creditor exemption. The court discussed the \textit{Fleet Factors} decision, and at least nominally embraced it: "As did the Eleventh Circuit in \textit{Fleet Factors}, we hold that a creditor must, as a threshold matter, exercise actual management authority before it can be held liable for action or

\begin{footnotesize}
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\item \textsuperscript{170} See \textit{id.} A company's creditors may force it into bankruptcy proceedings. See 11 U.S.C. § 303(b) (1988).
\item \textsuperscript{171} Hill v. East Asiatic Co. (\textit{In re Bergsoe Metal}), 910 F.2d 668, 670 (9th Cir. 1990).
\item \textsuperscript{172} There is no district court opinion. The bankruptcy court made certain findings of fact and conclusions of law regarding the motions that were accepted by the district court, which then granted the summary judgment motion. See Hill v. East Asiatic Co. (\textit{In re Bergsoe Metal}), No. 386-05671 (D. Or. May 2, 1989)(order granting defendant's motion for summary judgment).
\item \textsuperscript{173} 910 F.2d at 671.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Id. at 673 (construing 42 U.S.C. § 9601(20)(A) (Supp. 1987)). The court noted at the outset of its inquiry regarding the Port's participation in management that, "[u]nfortunately, CERCLA . . . provides little guidance as to how much control over a facility a secured creditor can exert before it will be liable for cleanup."\textsuperscript{177} Id. at 672.
\end{itemize}
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inaction which results in the discharge of hazardous wastes." In fact, Judge Kozinski was being gracious, because the Bergsoe Metal decision is at odds with Fleet Factors.

Eschewing the "establishment of a Ninth Circuit rule on this difficult issue," the Bergsoe Metal court circumscribed its opinion to the facts before it. The court declared that "whatever the precise parameters of 'participation,' there must be some actual management of the facility before a secured creditor will fall outside the exception." The panel's refusal to "engage in [unnecessary] line drawing" stands in marked contrast to the sweeping language of the Fleet Factors decision.

The court examined the allegations that the Port participated in the management of the Bergsoe plant. In doing so, it had little difficulty disposing of the allegation that the Port "'negotiated and encouraged' the building of the Bergsoe plant" and therefore participated in management: "A secured creditor will always have some input at the planning stages of any large-scale project and, by the extension of financing, will perforce encourage those projects it feels will be successful. If this were 'management,' no secured creditor would ever be protected."

The court next considered whether the Port's rights under the leases constituted participation in management sufficient to deprive the Port of protection under the secured-creditor exemption. The court acknowledged the reality of secured lending that "nearly all secured creditors have [certain] rights." What is critical, it declared, "is not what rights the Port had, but what it did. The CERCLA security interest exception uses the active 'participating in management.' Regardless of what rights

177. Id. at 673 n.3.
178. Cf. Court Decisions, 5 Toxics L. Rep. (BNA) 408, 409 (1990)(Judge Kozinski "interpreted Fleet Factors . . . in such a way as to . . . give lenders the benefit of the doubt").

179. Several commentators have so construed the two cases. See, e.g., Berz & Gillon, supra note 93, at 8 ("Although the decision purports to agree with Fleet Factors, the Ninth Circuit expressly rejected the 'capacity to control' test"); Freeman, supra note 93, at 18, col. 1 (Bergsoe Metal "rejected [the Fleet Factors] standard, at least in its most extreme form"); Kleege, Banks Welcome Court Ruling on Liability for Environmental Cleanups, Am. Banker, Aug. 22, 1990, at 30, col. 1 (Bergsoe Metal "implicitly rejects" Fleet Factors); Wall St. J., Aug. 24, 1990, at B6, col. 1 (Bergsoe decision "appears to conflict with [Fleet Factors]"). But see Mitchell, Liability Under CERCLA for Indenture Trustees, N.Y.L.J., Aug. 23, 1990, at 3, col. 2 ("Bergsoe Metals appears to reinforce and perhaps clarify the Eleventh Circuit's decision in Fleet Factors.").

180. Bergsoe Metal, 910 F.2d at 672.
181. Id.
182. Id.
183. Compare United States v. Fleet Factors Corp., 901 F.2d 1550, 1558 (11th Cir. 1990)("secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose"), petition for cert. filed, 59 U.S.L.W. 3278 (U.S. Sept. 21, 1990)(No. 90-504).

184. Hill v. East Asiatic Co. (In re Bergsoe Metal Corp.), 910 F.2d 668, 672 (9th Cir. 1990)(citing Brief for Appellant at 19).
185. Id. (footnote omitted).
186. Id.
the Port may have had, it cannot have participated in management if it never exercised them."\(^{187}\)

While commentators generally reacted favorably to *Bergsoe Metal*, their enthusiasm was tempered by the admittedly narrow scope of the court's opinion.\(^{188}\) Because the opinion is limited to its facts, some commentators believe that "its utility to many secured creditors is likely to be limited" as well.\(^{189}\) This criticism, however, fails to account for the potential impact Judge Kozinski's narrow interpretation of *Fleet Factors* will have on other courts.

IV. HARMONIZING THE APPARENT CONFLICT: HOW SHOULD COURTS NOW RULE?

A. Follow Judge Kozinski's Lead

The commentators' tentative response to Judge Kozinski's opinion in *Bergsoe Metal* results from a superficial and unimaginative reading of the case. While the opinion is undoubtedly limited to its facts, eschewing the establishment of a definitive interpretation of the exemption, it is nonetheless significant.\(^{190}\) Had Judge Kozinski written an opinion that explicitly differed with *Fleet Factors*, the state of this already-confusing area of law would have been further muddled than it had been in the wake of *Fleet Factors*.

Commentators had suggested that the language in *Fleet Factors* was considerably broader than its holding.\(^{191}\) Indeed, "Fleet's involvement in the financial management of the facility was pervasive, if not complete. . . . Fleet was also involved in the operational management of the facility."\(^{192}\) Moreover, "Fleet actively asserted its control over the disposal of hazardous wastes at the site."\(^{193}\) Accordingly, the court's discussion of capacity to control is irrelevant inasmuch as Fleet actually controlled hazardous waste disposal decisions. The most expansive and
troubling language in Fleet Factors, therefore, is merely dictum.9

Because the Bergsoe Metal opinion was limited to its facts, it is generally viewed as only implicitly conflicting with Fleet Factors.195 In fact, some commentators do not recognize a conflict at all.196 Nevertheless, the utility of the Bergsoe decision is that it buttresses and lends credibility to a narrow interpretation of Fleet Factors. By construing the Fleet Factors decision strictly in accordance with its facts, Judge Kozinski provides excellent authority for limiting Fleet Factors. Under Bergsoe's interpretation of Fleet Factors, even district courts in the Eleventh Circuit are not bound to equate capacity to control with lender liability under CERCLA;197 these courts may reasonably and justifiably regard Fleet Factors as only slightly broader than Mirabile.198 Had the Bergsoe court construed Fleet Factors broadly—even if simultaneously criticizing it—it would have strengthened the view that Fleet Factors dramatically expands liability. Instead, Bergsoe Metal substantially diffuses the influence of Fleet Factors. Other courts should follow Judge Kozinski's lead.199

Nonetheless, there is no doubt that the Fleet Factors court intended to lay down a broad rule of liability. Therefore, Fleet Factors strong language may be difficult for other courts to ignore.200 While Bergsoe Metal is reassuring, it is probably not enough to resolve the uncertainties currently confronting secured creditors.201 Legislative action is necessary and, largely because of Fleet Factors, likely forthcoming.

B. Necessity of Congressional Action

The Fleet Factors decision provided additional impetus to a Congressional movement202 to exempt secured creditors and federal agencies

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194. See EPA Draft Proposal, supra note 50, at 668; Freeman, supra note 93, at 20 & n.27; O'Brien, supra note 80, at 25; Redick, supra note 149, at S38, col. 4.
196. See, e.g., Mitchell, supra note 179, at 3, col. 2 (“Bergsoe Metals appears to reinforce and perhaps clarify ... Fleet Factors.”).
197. See Redick, supra note 149, at S38, col. 4.
199. Indeed, even the EPA has reversed itself and rejected Fleet Factors. See infra note 202.
200. See Redick, supra note 149, at S38, col. 4.
202. See Redick, supra note 149, at S40, cols. 2-3. This Congressional sentiment has clearly had a residual impact on the EPA as evidenced rather dramatically in the EPA's position on the issue of lender liability. The EPA had urged the Fleet Factors court "to adopt a narrow and strictly literal interpretation of the exemption that excludes from its
from CERCLA liability explicitly.\textsuperscript{203} Several bills are currently pending

\textsuperscript{203} See Bailey, \textit{Banks Seek Another Kind of Bailout}, Boston Globe, Sept. 18, 1990, at 39, col. 1; \textit{Unterberger I, supra} note 159, at 541, 544. Just last year, legislative action to amend CERCLA to clarify the secured-creditor exemption seemed “unlikely.” See Note, \textit{supra} note 40, at 937. \textit{Fleet Factors} and its ramifications for the federal government’s environmental liability, however, have dramatically changed the situation. See \textit{Unterberger I, supra} note 159, at 541; 21 \textit{Env’t Rep.} (BNA) 907, 907 (1990).

in Congress that would effectively reverse *Fleet Factors* and restore the secured-creditor exemption.\(^{204}\) While none of these bills is likely to be enacted in the near future, they have received considerably more attention since *Fleet Factors*.

Congressional Record S3087-88 (daily ed. Mar. 22, 1990). For a discussion of this and other legislative initiatives, see *infra* note 204.

204. Representative LaFalce has introduced a bill that proposes to amend CERCLA's definition of owner or operator to exclude "[a]ny designated lending institution which acquires ownership or control of the facility pursuant to the terms of a security interest held by the person in that facility." H.R. 4494, 101st Cong., 2d Sess., 136 Cong. Rec. H1505 (daily ed. Apr. 4, 1990). The bill defines "designated lending institution" to include "any agency, department, or other unit of the United States Government... which makes loans on the security of any facility, including economic and industrial development agencies." *Id.*


The Garn bill does not provide the exemption to persons who, "with actual knowledge that a hazardous substance or similar material is used, stored, or located on property described in subsection (b), failed to take all reasonable actions necessary to prevent the release or disposal of such substance." S. 2827, 101st Cong., 2d Sess.

Finally, the Garn bill accounts for the possibility that creditors could profit from EPA-financed cleanups of their collateral; the exemption would not apply to the extent of the benefit conferred on creditors by such EPA action. *See Unterberger I, supra* note 159, at 545. However, valuing the benefit conferred by an EPA cleanup may not be easy: "For example, quantifying the benefit will be difficult if attempted in the context of an EPA action enforcing a cleanup order against a group of responsible parties well before the precise value of the restored property is known." *Id.* at 545 n.20.

There are other legislative initiatives that could relieve secured creditors of liability. For example, Representative McDade, like Representative LaFalce a member of the House Small Business Committee, introduced a bill to "amend the Small Business Act to exempt the U.S. Small Business Administration and SBA lenders from liability for the cleanup of contaminated sites... when title or control of a property is conveyed to the SBA or the lender as a result of foreclosure." 136 Cong. Rec. E3070 (daily ed. Oct. 1, 1990)(remarks of Representative McDade); *see* H.R. 5764, 101st Cong., 2d Sess. This bill is narrower than the Garn and LaFalce bills because it only exempts the SBA and SBA lenders, as opposed to all secured creditors. *See* Letter from Representative McDade to Members of the House of Representatives, (Oct. 5, 1990)(on file with the *Fordham Law Review*). Representative Luken, also a member of the House Small Business Committee, is apparently contemplating a bill of his own. *See Toman, supra* note 157, at B2, col. 4.


These proposals are neither complete nor entirely satisfactory in their current form; other provisions are needed to amend CERCLA's secured-creditor exemption satisfactorily. Congressional reaffirmation of the secured creditor exemption is relatively straightforward: it entails only a gesture explicitly demonstrating Congressional intent to exempt creditors from environmental liability. Nonetheless, in order to assure an effective and consistent application of any amended exemption, Congress should address the scope and effect of any legislation it passes. There are several fundamental issues that any amendment should resolve.

- First, Congress must address which statute to amend and how to amend it. Simply amending CERCLA may not be entirely sufficient if secured creditors may still be potentially liable for their borrowers' environmental misdeeds under other federal statutes. Furthermore, any amendment should explicitly address its impact upon state laws that impose cleanup liability. Amending CERCLA may be a pointless exercise if the specter of lender liability under state environmental statutes remains.

- Second, Congress must establish some affirmative obligations that will be required of secured creditors. For example, there should be a prospective requirement that in order to invoke the secured-creditor exemption, lenders must perform some due diligence of collateral property. Some standards should be established for what constitutes an appropriate degree of inquiry, however. Moreover, lenders should not be able to assert the exemption if they have affirmatively caused or contributed to a release of hazardous substances.

- Third, if the government cleans contaminated property, it should obtain a priority lien on the property to the extent of its cleanup expenses. While innocent creditors should not be forced to assume lia-


208. Presumably, prudent lenders have already incorporated such safeguards into their credit-review procedures. See supra note 146.

bility for their borrowers' environmental misdeeds, neither should creditors profit at the expense of the federal government. Consideration should also be given to the practical problem of placing a value on such a lien.

- Fourth, government agencies' immunity from liability should transfer to entities that purchase property from such agencies. If immunity is not transferable, agencies like the RTC and FDIC will be unable to sell contaminated properties despite changes in the law.

These are but a few of many different concerns that any sensible CERCLA amendment must address, and while the secured-creditor exemption must be clarified, this alteration must proceed carefully and prudently. In correcting its own mistakes and those of aggressive courts like Fleet Factors, Congress must be thorough and precise to avoid a recurrence of the situation it created in 1980 when CERCLA was hurriedly enacted.

CONCLUSION

The federal courts have inconsistently interpreted CERCLA's secured-creditor exemption. The decision of the Eleventh Circuit in United States v. Fleet Factors Corp. exacerbated a difficult situation for creditors by establishing a nebulous standard of liability that virtually eviscerates the exemption. Consequently, secured lending to certain businesses, particularly small businesses, threatens to grind to a halt. The subsequent decision of the Ninth Circuit in Bergsoe Metal, while limited, is significant because it provides a narrow interpretation of Fleet Factors. Other courts should follow Bergsoe Metal by limiting Fleet Factors to its facts.

Despite the Bergsoe Metal decision, secured creditors still face considerable uncertainty regarding the scope of the secured-creditor exemption. While an EPA rule on the issue will be a significant step in the right direction, Congress must amend CERCLA to explicitly restore the secured-creditor exemption. The bills currently pending in Congress are useful starting points that merit additional discussion.

Sean P. Madden


211. See Unterberger I, supra note 159, at 573.

212. For an extended discussion of legislative initiatives and the policy concerns they raise, see Unterberger I, supra note 159; Unterberger II, supra note 159.