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## Shockwave: Lender Liability Under CERCLA After *United States v. Fleet Factors Corporation*

### INTRODUCTION

Industry pollutes. Consequently, as industry continues to develop, so does the amount of hazardous wastes<sup>1</sup> it generates. Today, the United States is home to approximately 360,000 waste sites.<sup>2</sup> To facilitate the cleanup of waste sites, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act<sup>3</sup> (hereinafter "CERCLA") in 1980. CERCLA empowered the Environmental Protection Agency (hereinafter the "EPA") to clean up inactive waste sites and to recover cleanup costs from those responsible for the waste. Persons delineated by CERCLA as potentially liable<sup>4</sup> parties for cleanup costs are: 1) owners and operators of a polluted facility, 2) persons who have transported the waste, and 3) persons who have contracted for the transportation of the waste. If a site is inactive, however, the business responsible for the waste is often insolvent or bankrupt, and lacks the funds with which to reimburse the EPA. When a business cannot pay, the government attempts to collect its cleanup costs from other sources and often turns to the deep pockets of banks which gave loans to the business secured by an interest in the business facility.<sup>5</sup> CERCLA contains a "secured lender"

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1. This Comment uses the terms hazardous "waste" and "substance" interchangeably. Both signify waste materials generated by industry as by-products. See *infra* notes 25-26. For the statutory definition of hazardous substance in CERCLA, see *infra* note 46.

2. Marcotte, *Toxic Blackacre: Unprecedented Liability for Landowners*, 73 A.B.A. J. 66, 67 (Nov. 1987) (United States General Accounting Office estimate). See also Comment, *The Liability of Financial Institutions For Hazardous Waste Cleanup Costs Under CERCLA*, 1988 Wis. L. Rev. 139, 139-45.

3. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified in part as amended at 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1990)) [hereinafter CERCLA].

4. See *infra* notes 48-54 and accompanying text.

5. Banks have become hard hit by cleanup liability under CERCLA because the government views their large assets and capital reserves as easy targets for recouping cleanup costs. Alan Vollmann, an environmental attorney with the Washington D.C. firm of Lane & Edison, stated in a Washington Post article that "[u]nder [CERCLA], the government goes after the deep pockets first. And let's face it, lenders, we all know you're the deep pocket." Swallow, *Lenders Face New Risk in Toxic-Waste Efforts; Law Gives EPA Broad Powers to Recoup Costs*, Wash. Post, Feb. 21, 1987, at E1, col. 4. For a discussion of the impact of high lender liability under CERCLA, see *infra* notes 150-52 and accompanying text.

exemption which exempts from liability those persons "who, without participating in the management of a facility, hold indicia of ownership primarily to protect a security interest."<sup>6</sup> The CERCLA secured lender exemption is at the center of the environmental lender liability controversy between the government and lending institutions. Banks typically plead exemption from liability via the secured lender exemption of CERCLA. The government usually argues that a bank is liable for cleanup costs because it has either participated in the management of the facility, or no longer holds indicia of ownership to protect a security interest in the facility. Thus, the question is simple: when can a lender be held liable for cleanup costs under CERCLA?

Whether a lender can be held liable under CERCLA will depend on the interpretation of what constitutes sufficient "participation" in management and what transforms a lender from a security holder into an actual "owner" who can be held liable. The problem of lender liability comes into sharp focus in two situations: when a lender participates in the financial management of the facility in order to protect the value of its security interest, and when a lender holds title<sup>7</sup> to the facility in order to guarantee the repayment of its debt from a borrower.

Court interpretation of the secured lender exemption produced a two-way split<sup>8</sup> between courts shielding lenders from liability and those permitting liability to attach onto lenders. Recently, the Eleventh Circuit Court of Appeals decided the case of *United States v.*

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6. "Owners and operators" of a facility where wastes have been dumped are one of the categories of persons liable for cleanup costs under CERCLA. CERCLA § 107(a)(1)-(2), (codified at 42 U.S.C.A. § 9607(1)-(2) (West 1983 & Supp. 1989)). The "secured lender exemption," as it is commonly referred to, removes persons who hold a security interest in a facility from the statutory definition of "owners and operators," thus exempting them from liability. In order to be covered by the secured lender exemption, a party: 1) must not have participated in the management of the facility, and 2) must hold indicia of ownership primarily to protect a security interest. CERCLA § 101(20)(A) (codified at 42 U.S.C.A. § 9601(20)(A) (West 1983 & Supp. 1990)).

7. "Holding title" is a generic term. Usually, lender liability problems arise when a lender ("mortgagee") forecloses on a mortgage which secures the note by the borrower ("mortgagor"). When the mortgagor defaults on his mortgage payments to the mortgagee, the mortgagee forecloses on the mortgage. A foreclosure sale usually results in which the public can bid for title to the mortgaged property. Lenders generally bid at the foreclosure sale and often obtain title to the property. Whether or not a lender may be liable for cleanup costs under CERCLA as an "owner" of a facility at this point is one of the controversies surrounding CERCLA lender liability. See *infra* notes 57-64 and accompanying text. For a detailed discussion of mortgages and real estate transaction problems, see generally, B. DUNAWAY, *THE LAW OF DISTRESSED REAL ESTATE* (6th ed. 1990).

8. The interpretation of the secured lender exemption is better characterized as a split than as a trend. Although courts have progressively attached increasingly greater liability to lenders, certain courts still find only narrow liability for lenders. See *In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990). See *infra* notes 198-209 and accompanying text.

*Fleet Factors Corporation*,<sup>9</sup> ushering in unprecedented liability for lenders. The court ruled that a lender could be held liable if it possessed the capacity to influence the waste dumping practices of the borrower, regardless of whether such capacity was exercised.<sup>10</sup> The decision broke with all precedent on the issue of lender liability and has sent waves of fear and uncertainty through the banking industry, business, and government financial institutions.

Most affected by the decision are banks. *Fleet Factors* transforms banks, many of which are in severe financial difficulty, into involuntary sureties for polluting businesses. Under *Fleet Factors*, banks, as liable lenders, must foot the bill for businesses which have dumped waste on their own premises.<sup>11</sup> As a result, many banks presently refuse to lend money to businesses which pose even a slight risk of environmental liability.<sup>12</sup> Certain banks, especially in rural areas, are so small that a single environmental cleanup bill would wipe them out.<sup>13</sup> Other banks fear liability to such an extent that they have written off outstanding debt and interest on active loans.<sup>14</sup> For example, one bank released a borrower from \$558,000 of principal debt and additional accrued interest because the bank feared potential environmental liability.<sup>15</sup>

Banks, however, are not the only sector of the economy adversely affected by liability under *Fleet Factors*. Since many private lending institutions are reluctant to make loans to businesses which utilize or might potentially utilize hazardous substances, a restriction of available credit has resulted.<sup>16</sup> Lenders still willing to loan money now charge high up-front loan fees, points, and environmental assessment fees which are often prohibitive to small businesses. The growth of small businesses, the backbone of the American economy, may be se-

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9. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, *cert. denied*, 111 S. Ct. 752 (1991).

10. *Id.* at 1560.

11. See *infra* notes 153-54 and accompanying text. Richard Miley, Esq., local counsel for the Fleet Factors Corporation in Augusta, Georgia, states that the *Fleet Factors* decision "guts the [CERCLA] secured lender exemption." *Ruling May Widen Lender Liability: Responsibility for Clean-Up May Grow*, BUS. INS., June 4, 1990, at 1. Richard Leland, Esq., counsel for the Fleet Factors Corporation at the trial court level, argues that the *Fleet Factors* rule is "an attempt to make the banks, in effect, insurers." *Id.*

12. See *infra* notes 148-52 and accompanying text.

13. See *A Lending Squeeze On Small Firms*, NATION'S BUSINESS, May 1990, at 52.

14. Jaffe, *Whose Mess is This?*, FORBES, Feb. 19, 1990, at 43.

15. *Id.*

16. See Roberts, *Sand in Economic Gears*, Wash. Times, Sept. 6, 1990, at G1, col. 5. See *infra* notes 161-71 and accompanying text.

verely restricted if *Fleet Factors* continues as viable precedent and spreads to other federal circuits.

Government financial entities also might be potential victims of the *Fleet Factors* decision.<sup>17</sup> Certain government entities hold foreclosed "savings and loan" properties for liquidation, some of which require environmental cleanup. The cleanup cost for these properties would amount to over one billion dollars for the Federal Deposit Insurance Corporation (hereinafter the "FDIC") alone. These government organizations already face great difficulties in light of present recessionary woes and the expected failure of some thirty-five banks in the near future. Their difficulties would dramatically increase under *Fleet Factors*.

While it is true that the maintenance of a healthy environment is important to society as a whole, it seems unfair for banks to bear the exorbitant costs of cleanup when banks are not at fault. Conversely, it seems equally unfair for taxpayers, via the EPA and its Superfund, to foot the bill for businesses which pollute and are the cause of high cleanup costs on a national level.<sup>18</sup>

The increased tendency of courts to place liability for cleanup costs onto lenders has sent shock waves not only through the private and public finance communities, but also through the EPA and Congress. As a direct reaction to *Fleet Factors*, the EPA has drafted an administrative rule which would indemnify both private and public lenders from CERCLA liability.<sup>19</sup> With the same goal in mind, both houses of Congress have scrambled to introduce legislation which would partially indemnify lenders from CERCLA cleanup liability.<sup>20</sup> Even though passage of lender indemnification legislation may be likely,<sup>21</sup> it will only lay to rest the problem of lender liability itself. The

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17. *Financial Institutions: FDIC, RTC Want More CERCLA Protection in Senate Bill Limiting CERCLA Exposure*, Daily Report for Executives (BNA) No. 140, at A-22 (July 20, 1990).

18. Cleanup costs have soared within the past few years. Craig Gass, a KPMG Peat Marwick expert on environmental financial management in New York, estimates that environmental cleanup costs could reach \$500 billion within the next 50 years. See Jaffe, *supra* note 15, at 43.

19. EPA Lender Liability under CERCLA, 40 C.F.R., *reprinted in* 21 ENV'T REP. (BNA) No. 24, 1162 (Oct. 12, 1990) (to be formally codified upon review of comments).

20. The legislation in the House of Representatives was introduced before *Fleet Factors*, after the decision in *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986). The desire to indemnify lenders against CERCLA liability has become even more intense once *Fleet Factors* dramatically increased the scope of liability for lenders.

21. Passage of lender indemnification legislation in the House of Representatives is more likely than in the Senate. H.R. 4494 has received 290 cosponsors out of a possible 435 House Members. S. 2827 has received only one cosponsor, Senator Nancy Kassebaum (R-KS). Telephone interview with staff member of the Senate Republican Policy Committee (Nov. 21, 1990). See *infra* notes 258-72 and accompanying text.

larger problem of fault apportionment will not be solved merely by indemnifying lenders.

The goal of this Comment is to examine the impact of the the *Fleet Factors* decision. Part II of this Comment provides the necessary overview of CERCLA, examining the imposition of cleanup liability on parties delineated by CERCLA. Part III details the development of the judicial bases for the lender liability split that developed since CERCLA's passage in 1980. Part IV of this Comment explains the facts, reasoning, and rule of the Eleventh Circuit's *Fleet Factors* decision. Part V explores the impact of *Fleet Factors*' broad lender liability rule on banks, businesses, government financial institutions, and on the environment. Part VI discusses both the EPA's and the federal judiciary's reactions to the *Fleet Factors* rule. Part VII of this Comment examines attempts by both the House of Representatives and the Senate to partially indemnify lenders from CERCLA liability. The author offers his conclusions in Part VIII.

## II. THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

The Comprehensive Environmental Response, Compensation, and Liability Act<sup>22</sup> ("CERCLA") authorizes the United States to collect cleanup costs from parties responsible for the dumping of hazardous waste. Since lender liability for environmental cleanup costs finds its basis in CERCLA, it is essential to examine the Act and its liability provisions.

### A. *General Background*

Hazardous wastes were born out of the development of synthetic products during the post-World War II expansion of American industry.<sup>23</sup> The modernization of chemical technology coupled with the increase in industrial production have generated an immense variety of new chemicals.<sup>24</sup> Many of these chemicals are lethal and must be

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22. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified in part as amended at 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1990)).

23. BUREAU OF NATIONAL AFFAIRS, UNITED STATES ENVIRONMENTAL LAWS 14 (1988).

24. Over 70,000 organic chemicals are on the market today, with 10,000 new chemicals added each year. B. NEBEL, ENVIRONMENTAL SCIENCE 316 (1981). The two most common industrial by-products are chlorinated hydrocarbons and heavy metals. *Id.* at 318-20 (table 7-1 listing common pollutants, their sources, and side effects).

stored with utmost care in order to avoid "leaching"<sup>25</sup> into ground-water supplies, lakes and rivers. Certain wastes are radioactive and thus remain harmful for thousands of years.<sup>26</sup>

Out of sight and out of mind for over three decades, hazardous wastes began to rally massive public attention in 1978 with the Love Canal disaster.<sup>27</sup> Thousands of drums filled with toxic chlorinated hydrocarbons were deposited in an abandoned canal bed in the Love Canal area near Niagara Falls, New York.<sup>28</sup> The canal bed was subsequently filled, and residential homes were built along the banks of the canal. In 1978, residents noticed a high incidence of health problems, including birth defects, miscarriages, and liver disease. Residents also noticed that black liquids would ooze out of the ground after periods of rainfall. Health officials were contacted and discovered the chemical waste drums underground.<sup>29</sup> As a response to the public outrage which ensued and the genuine need to imple-

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25. Historically, industrial by-products such as ethylene, sulfur-dioxide and carbon monoxide were present in nature and could be assimilated by the environment. However, many of today's industrial by-products do not occur naturally and cannot be assimilated by the environment. See B. NEBEL, *supra* note 24, at 316. These by-products pose a threat to the health of the population by leaching into groundwater supplies. Leaching is a phenomenon by which chemical ions in the ground are carried off by rainfall. Since rainwater eventually ends up in groundwater supplies from which people obtain water, the process of leaching often pollutes water supplies near waste sites. See *id.* at 165, 238.

The environment has a way of healing itself, and chemicals dumped into the environment are often diluted. Sometimes, however, the reverse occurs, and chemicals reappear in organisms at higher levels of concentration. This is defined as "bioaccumulation" or "biomagnification." One example of biomagnification occurred when the pesticide Dichlorodiphenyltrichloroethane or "DDT" was used in increasingly higher doses during the 1960's. Scientists believed that DDT would be diluted in the environment. To the contrary, the biomagnification of DDT in certain animals caused severe reproductive failures and deaths, especially in birds which consumed contaminated insects. The biomagnification of DDT was blamed for the near extinction of the American bald eagle. Biomagnification can also have very harmful effects on individuals consuming organisms found near sites and facilities where wastes are dumped. See *id.* at 342-43.

26. Approximately two-thirds of the uranium-235 supply in nuclear power fuel pellets undergoes nuclear fission within one year. The remaining one-third, as well as the waste from the fissioned uranium, can no longer undergo fission and generates heat to make steam for the nuclear power turbines. Two problems result from these wastes. First, these radioactive wastes emit subatomic particles which harm human beings over relatively short periods of exposure. The second problem is that their radioactivity disappears very slowly, according to their individual "half-lives." A half-life is the length of time necessary for half of the radioactive atoms to decay (in mathematical terms, the decaying process progresses in a reverse logarithmic scale). The half-lives of radioactive materials can be extremely long. A common isotope obtained from uranium fission is plutonium-239. Plutonium's half-life of 24,000 years means that it must be kept out of contact with the population, the food chain, and water reserves for approximately 200,000 years before it becomes relatively harmless. See B. NEBEL, *supra* note 24, at 576-78.

27. BUREAU OF NATIONAL AFFAIRS, *supra* note 23, at 14.

28. B. NEBEL, *supra* note 24, at 346.

29. *Id.*

ment more effective rules to clean up waste sites, Congress passed CERCLA in 1980.<sup>30</sup>

Although various cleanup and compensation laws already existed at the time CERCLA was passed, these did not provide the blanket coverage necessary to properly protect the environment from modern waste threats.<sup>31</sup> CERCLA required the cleanup of hazardous substances on inactive sites and empowered the EPA to expend funds to effectuate cleanups and to later recover cleanup costs from those responsible for the dumping.<sup>32</sup> To make funds readily available to the EPA for its cleanup efforts, CERCLA established the Hazardous Substance Response Trust Fund,<sup>33</sup> better known as the "Superfund."<sup>34</sup> The Superfund derives revenue from two sources: excise taxes from industry and funds recovered by the EPA as reimbursement for cleanup costs.<sup>35</sup>

CERCLA was hastily drafted during the last days of the second session of the 96th Congress, in the last month of the Carter Presidency.<sup>36</sup> Because of the rushed drafting and the tremendous political compromise which went into the passage of CERCLA, little legislative history exists to shed light on the intent of Congress as to specific CERCLA provisions. Congress, perhaps intentionally, failed to

30. BUREAU OF NATIONAL AFFAIRS, *supra* note 23, at 14.

31. The environmental laws which were in existence before CERCLA was enacted had gaps between them and also overlapped each other. In the words of one group of commentators, CERCLA was passed in order to "make sense of various redundant and inadequate cleanup and compensation laws." F. ANDERSON, D. MANDELKER & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984).

32. CERCLA §§ 103-104, (codified at 42 U.S.C.A. §§ 9603-9604 (West 1983 & Supp. 1989)).

33. CERCLA §§ 131-133, (codified at 42 U.S.C.A. §§ 9631-9633 (West 1983 & Supp. 1986)), as amended by the Superfund Amendments and Authorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C.A. §§ 9601-9675 (West Supp. 1989)).

34. The concept of a "Superfund" was originally crafted by the large oil companies in order to fund the cleanup of spills from oil tankers. BUREAU OF NATIONAL AFFAIRS, *supra* note 23, at 14-15. In exchange for financing the fund, the oil companies wished to be released from cleanup liability. *Id.* This original "Superfund," however, never came into existence. Instead, the Superfund, as created by CERCLA, was first designed to fund the cleanup of Love Canal in the late 1970's. *Id.*

35. The Superfund was established by Section 9507 of the Internal Revenue Code, 26 I.R.C. § 9507 (1986). The initial Superfund of 1980 was funded by excise taxes imposed on chemical feedstocks, as well as on crude oil delivered to a refinery or imported into the United States. CERCLA § 131 (codified at 42 U.S.C.A. § 9631 (West 1983)) (repealed by Pub. L. 99-499, 100 Stat. 1774 (1986)). See BUREAU OF NATIONAL AFFAIRS, *supra* note 23, at 14, 20.

36. Presumably, Congress feared that then President-elect Ronald Reagan would not sign CERCLA if it were passed during his administration because of his strong pro-business stance.



state the standard of liability which should be applied under CERCLA. Courts quickly remedied this omission, however, and determined that strict liability would be the standard under CERCLA, with joint and several liability for indivisible harm.<sup>37</sup>

Because of the administrative controversies<sup>38</sup> and the overall dearth of performed cleanups, many members of Congress believed that although great powers had been bestowed upon the EPA by CERCLA, the Agency had made miserly use of its granted abilities. In an attempt to increase the number of cleanups performed, Congress passed the Superfund Amendments and Reauthorizations Act<sup>39</sup> (hereinafter "SARA") in 1986. Designed to increase the efficiency of CERCLA, SARA made certain important modifications to CERCLA. For example, SARA increased the Superfund coffer to \$8.5 billion by 1991 and set schedules for cleanup.<sup>40</sup> SARA also encouraged potentially liable parties to settle with the EPA by protecting those who settled both from contribution claims by nonsettling parties as well as from government suits via a "covenant not to sue" clause.<sup>41</sup> Further, SARA limited the liability of state and local governments for cleanup costs by excluding state and local governments from cleanup liability if they acquired ownership or control involuntarily.<sup>42</sup> A unit of state or local government, however, would remain liable if it caused the release of the hazardous substance.<sup>43</sup> Presumably because

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37. Strict liability applies to each of the four categories of persons liable under CERCLA. *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *United States v. Monsanto Co.*, 858 F.2d 160, 167 n.11 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). Each of the four categories of persons liable under CERCLA is also held jointly and severally liable. *Monsanto Co.*, 858 F.2d at 171; *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810-11 (S.D. Ohio 1983).

38. In 1983, the Congress charged EPA Administrator Anne Gorsuch Burford and other high level EPA administrators with mismanagement of funds and conflicts of interest. Congressional Democrats asserted that the EPA's administrative problems were caused by a lack of concern from the Reagan Administration. BUREAU OF NATIONAL AFFAIRS, U.S. ENVIRONMENTAL LAWS (1988). The EPA administrative controversies were heightened by the discovery of dioxin at Times Beach, Missouri which caused the relocation of 2,400 families and a government buy-out of the town. *Id.* As a result of these problems, over 20 high-level EPA managers were fired or resigned. *Id.* EPA Administrator Anne Burford was succeeded by William D. Ruckelshaus, who accelerated the cleanup of hazardous wastes. *Id.*

39. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C.A. §§ 9601-9675 (West Supp. 1989)).

40. Superfund Revenue Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613. After SARA, an additional source of funding for the Superfund was imposed, namely, an environmental tax on corporations with annual incomes greater than \$2 million. 17 ENV'T REP. (BNA) No. 26, 955 (Oct. 24, 1986).

41. CERCLA § 122, (codified as amended at 42 U.S.C.A. § 9622 (West Supp. 1989)).

42. The section reads: "The term 'owner or operator' does not include a unit or State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign." CERCLA § 101(20)(A) (codified as amended at 42 U.S.C.A. § 9601(20)(D) (West Supp. 1990)).

43. The section reads:

Congress approved of the liability scheme imposed by the courts upon CERCLA, SARA modified neither the strict liability nor joint and several liability schemes.

### *B. Liability Under CERCLA*

The aim of CERCLA was to hold liable those persons who are "responsible for problems caused by the disposal of chemical poison."<sup>44</sup> Before liability may lie under CERCLA, however, the government must first show that there has been an actual or threatened "release"<sup>45</sup> of a "hazardous substance"<sup>46</sup> at a "facility."<sup>47</sup> Once these

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The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under Section 9607 of this title.

CERCLA § 101(20)(D) (codified as amended at 42 U.S.C.A. § 9601(20)(D) (West Supp. 1990)).

44. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1553 (quoting *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1316 (11th Cir. 1990) *cert. denied*, 111 S. Ct. 752 (1991)).

45. CERCLA defines a "release" as follows:

'[R]elease' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of bands, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, by-product, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act or, for the purposes of section 9604 of this title or any other response action, any release of source by-product, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

CERCLA § 101(22) (codified at 42 U.S.C.A. § 9601(22) (West 1983 & Supp. 1990)).

46. CERCLA does not itself define a "hazardous substance," but rather gives the term meaning through its definition in other environmental statutes. The Act reads:

The term 'hazardous substance' means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a), (E) any hazardous air pollutant listed under section 112 of the Clean Air Act. The term does not include petroleum, including crude oil of any frac-

threshold facts have been established, four categories of persons may be held liable for cleanup costs:<sup>48</sup> 1) the owner and operator of a facility,<sup>49</sup> 2) any person who owned or operated a facility when the disposal of hazardous waste occurred, 3) a person who arranged for transport for disposal or treatment, and 4) a person who accepted hazardous substances for transport to the facility from which a release has occurred or is threatened. Liability for those who fit into one of these four categories will be strict, joint and several.<sup>50</sup> Those

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tion thereof which is not otherwise specifically listed or designated as a hazardous substance under the subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

CERCLA § 101(14) (codified at 42 U.S.C.A. § 9601(14) (West 1983 & Supp. 1990)).

47. Defined by CERCLA:

'[F]acility' means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

CERCLA § 101(9) (codified at 42 U.S.C.A. § 9601(9) (West 1983 & Supp. 1990)).

48. CERCLA delineates the four categories of persons liable for environmental cleanup costs as follows:

- (1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,
- (2) any person who at the time of disposal of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

CERCLA § 107(a) (codified at 42 U.S.C.A. § 9607(a) (West 1983 & Supp. 1990)).

49. An understanding of the statutory definition of "owners and operators" is crucial to the lender liability issue because lenders are generally sued for the recovery of cleanup costs as "owners and operators." The definition of "owners and operators" is additionally important because it contains the secured lender exemption (italicized below). The definition reads:

The term "owner or operator" means (1) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of any onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. *Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.*

CERCLA § 101(20)(A) (codified at 42 U.S.C.A. § 9601(20)(A) (West 1983 & Supp. 1990)) (emphasis added).

50. See *supra* note 39.

held to be liable are responsible for: 1) cleanup costs incurred by the United States, 2) damages for injury to the environment, and 3) all other necessary response costs.<sup>51</sup>

The source of lender liability under CERCLA comes from the first two categories of persons liable: 1) "owners or operators" of a facility, and 2) "owners or operators" of a facility at the time that dumping occurred.<sup>52</sup> Lenders can avoid liability by either falling into the "secured lender" exemption to the statutory definition of "owners or operators," or by asserting one of three statutory defenses listed in CERCLA.<sup>53</sup> The secured lender exemption states that liability as an owner or operator does not include one "who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."<sup>54</sup> CERCLA provides a complete defense to liability if a defendant can establish by a preponderance of the evidence that the release and its damages were: 1) caused by an act of God, or 2) caused by an act of war, or 3) caused by an act or failure to act on the part of a third party who is neither an employee nor an agent of the defendant.<sup>55</sup> This third de-

51. Liability under CERCLA will be primarily for cleanup costs incurred by the government, but can also be for other costs as well. CERCLA provides that parties shall be liable for:

- (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
- (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of asserting such injury, destruction, or loss resulting from such a release.

CERCLA § 107(a)(4) (codified at 42 U.S.C.A. § 9607(a)(4) (West 1983 & Supp. 1990)).

52. Clyde Mitchell, Esq., a partner at White & Case who specializes in banking and financial law, states that the primary CERCLA categories under which lenders are held liable are "owners and operators" of a facility, and "owners or operators" of a facility when dumping occurs. Mitchell, *Liability Under CERCLA for Indenture Trustees*, N.Y.L.J., Aug. 23, 1990, at 3.

53. See *infra* note 55 and accompanying text.

54. CERCLA § 101(20)(a) (codified as amended at 42 U.S.C.A. § 9601(20)(a) (West 1983 & Supp. 1990)). For the text of the statutory definition of "owner and operator," see *supra* note 49.

55. The three statutory defenses to liability provided by CERCLA are as follows:

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care

fense is commonly referred to as the "third party" defense. To fulfill the "third party" defense, a defendant must show: (1) that a third party caused the release, (2) that the defendant exercised due care, and (3) that the defendant took precautions against third parties' foreseeable acts or failures to act.<sup>56</sup>

When the government attempts to hold a lender liable for cleanup costs under CERCLA, the lender will commonly argue that it is exempt from liability because it falls into the "secured lender" exemption. The lender will argue that since it is one "who, without participating in the management of a facility, holds indicia of ownership primarily to protect [its] security interest," it is excepted from the definition of "owners and operators" and therefore from liability as well.<sup>57</sup> The government will argue that the lender is liable because it either became an "owner" while holding the property as security, or because it "participated" in the management of the facility.<sup>58</sup> Thus, the determination of whether or not a lender is liable under CERCLA centers upon the interpretation of the "secured lender" exemption.

Since a lender may be removed from the "secured lender" exemption by either "participation" in the management of a facility, or by the absence of indicia of ownership "to protect a security interest," the interpretation of what constitutes sufficient "participation" and "protection of a security interest" is the key to lender liability. Depending upon whether the interpretation of these elements is narrow or broad, lenders will be held more or less liable, respectively. Certain courts have accorded only narrow protection to lenders in the

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with respect to the hazardous substance concerned, taking into consideration the characteristics of such a hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

CERCLA § 107(b) (codified as amended at 42 U.S.C.A. § 9607(b) (West 1983 & Supp. 1990)).

56. See *supra* note 55 at (3).

57. See *supra* note 49 and accompanying text.

58. It is important to understand the procedural workings of the secured lender exemption. Four categories of persons are liable under CERCLA. The first two categories of persons are liable as "owners and operators" of the facility. CERCLA, however, excepts from the definition of "owners and operators" those who hold indicia of ownership to the facility if and only if 1) they have not participated in the management of the facility, and 2) they hold indicia of ownership primarily to protect a security interest. Therefore, a lender might argue that he falls under the secured lender exemption, but if he has either participated in the management of the facility, or if he holds indicia of ownership for reasons other than to protect a security interest, he will be considered an "owner and operator" and will be held liable for cleanup costs. Conceptually, this operates as an exemption to an exemption. See CERCLA § 101(20)(A) (codified as amended at 42 U.S.C.A. § 9601(20)(A) (West 1983 & Supp. 1990)); and *supra* note 48.

exemption.<sup>59</sup>

### III. PAST INTERPRETATIONS OF THE CERCLA SECURED LENDER EXEMPTION

Among the lower federal district courts the different interpretations of the secured lender exemption to "owners or operators" have crystallized into a split based on two cases: *United States v. Mirabile*<sup>60</sup> and *United States v. Maryland Bank & Trust Company*.<sup>61</sup> There are few existing cases in each branch of the dichotomy because relatively little time has elapsed since CERCLA's enactment. The *Fleet Factors* ruling is the first federal circuit court interpretation of the secured lender exemption to CERCLA liability. In order to understand the powerful significance of the novel *Fleet Factors* rule, it is essential to examine the two lines of judicial interpretation of the secured lender exemption presented by *Mirabile* and *Maryland Bank*.

#### A. *The United States v. Mirabile Line of Cases*

The secured lender exemption in CERCLA removes lenders from the "owners or operators" category of persons liable under CERCLA. However, if a lender "participates" in management or no longer holds property "to protect his security interest," then the lender will no longer be protected by the secured lender exemption and will face liability. In *United States v. Mirabile*, the United States District Court for the Eastern District of Pennsylvania held that the purchase and resale of secured property by a lender is necessary to protect a lender's security interest and will not in itself make a lender liable.<sup>62</sup> The court also held that the participation of a lender in the purely financial management of a facility is insufficient to make the lender liable.<sup>63</sup> The court ruled that the only "participation" which will remove the secured lender exemption is operational or "day to day" management of the facility.<sup>64</sup>

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59. See *supra* note 8.

60. *United States v. Mirabile*, 15 *Env'tl. L. Rep.* 20, 992 (E.D. Pa. 1985).

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

62. *United States v. Mirabile*, No. 84-2280, slip. op. at 6 (E.D. Pa. Oct. 1, 1985) (WESTLAW, WL 97).

63. *Id.*

64. *Id.*

## 1. The Facts of *Mirabile*

The facts of *Mirabile* involved Turco Coatings, Incorporated (hereinafter "Turco"), a company which owned and operated a paint manufacturing plant.<sup>65</sup> American Bank and Trust Company (hereinafter "American Bank") financed Turco and held a security interest in the Turco manufacturing site.<sup>66</sup> Turco petitioned for bankruptcy, but the petition was denied. American Bank foreclosed on the Turco manufacturing site and was the highest bidder at the sheriff's sale on August 21, 1981.<sup>67</sup> Before American Bank took title to the site, it assigned its high bid to Anna and Thomas Mirabile on December 15, 1981. The Mirabiles took title to the site via a sheriff's deed.<sup>68</sup> Prior to the assignment of the bid, American Bank boarded up the windows on the site, changed the locks, inquired as to the price of cleanup for the chemical drums on the site, and showed the site to potential purchasers.<sup>69</sup> The United States determined that cleanup of the site was required and proceeded to clean the site of hazardous substances.<sup>70</sup> The United States then brought suit against the Mirabiles under CERCLA to recover the cleanup costs it had incurred.<sup>71</sup> The Mirabiles in turn sued American Bank, alleging that American Bank was liable for the cleanup costs.<sup>72</sup> American filed a summary judgment motion against the Mirabiles, asserting that American Bank was covered by the CERCLA secured lender exemption and therefore not liable.<sup>73</sup>

## 2. The Reasoning and Holding of *Mirabile*

The federal District Court for the Eastern District of Pennsylvania found that American Bank was not liable for the cleanup costs incurred by the United States and granted American Bank's summary judgment motion.<sup>74</sup> The court initially determined that the main issue was one of degree of *management*, not of ownership.<sup>75</sup> The court reasoned that regardless of whether American Bank had received

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65. *Id.* at 2.

66. Turco was also financed by the Small Business Administration ("SBA") and Mellon Bank. *Id.* Since only American Bank foreclosed on the facility, however, only American Bank's summary judgment motion is of relevance to the narrow liability interpretation of the secured lender exemption by the District Court for the Eastern District of Pennsylvania. *Id.*

67. *Id.* at 4. A sheriff's sale is essentially a foreclosure sale conducted by a sheriff. See generally G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW (2d ed. 1985).

68. *Mirabile*, slip. op. at 4.

69. *Id.* at 5.

70. *Id.* at 1.

71. *Id.*

72. *Id.* at 2.

73. *Id.* at 6.

74. *Id.* at 9.

75. *Id.* at 6.

legal title when it successfully bid at the sheriff's sale, its foreclosure efforts were undertaken to preserve its security interest, which brought American Bank within the secured lender exception to "owners or operators."<sup>76</sup> The court reasoned that the reference to the management of a "facility" in the security interest exception to "owners and operators" was critical, because it referred to the operational management of the facility rather than the purely financial management of the business.<sup>77</sup> With regard to this distinction, the court placed great stock in the intent of Congress, giving weight to a House Report which defined "operator" as one who carries out the *operational* functions of a facility.<sup>78</sup> The court reasoned that Congress had singled out secured lenders as an exception to liability, and intended to attach liability upon parties which are "responsible" and which "have profited from improper disposal practices."<sup>79</sup> The court interpreted such intent to signify that a secured lender must undertake day to day operational management of the facility in order to be liable.<sup>80</sup> Although the court noted that imposing liability upon banks might be a favorable policy because such liability would allow the government to recover its cleanup costs, the court refused to create such a policy and explicitly left the question to the policy-making power of the Congress.<sup>81</sup>

In sum, the court in *Mirabile* held that the purchase of a property at foreclosure by a lender and its subsequent resale is insufficient to hold a lender liable under CERCLA. The court also held that pure financial participation in the management of a facility does not constitute sufficient "participation" to remove a lender from the secured lender exemption of CERCLA.

*B. The United States v. Maryland Bank & Trust Company Line of Cases.*

Whereas the court in *Mirabile* cautiously backed away from imposing broad liability upon lenders because it believed such a policy decision should properly be decided by the Congress, the United States District Court of Maryland in *United States v. Maryland Bank &*

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76. *Id.*

77. *Id.* at 4.

78. *Id.* (citing H.R. REP. NO. 172, 96th Cong., 2d Sess., pt. 1 at 35 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6180).

79. *Id.* at 6.

80. *Id.*

81. *Id.*



*Trust Company*<sup>82</sup> opted for the reverse, deciding to implement a broad lender liability policy.<sup>83</sup> In *Maryland Bank*, the federal district court ruled that the secured lender exception to “owners and operators” applies only if a lender holds the property as security at the time of the cleanup.<sup>84</sup> Thus, when a lender forecloses upon a property and obtains title to it by purchasing the property at the foreclosure sale, the lender no longer holds a security interest in the property but rather becomes a full-fledged owner and, as such, is liable under the “owners and operators” category of CERCLA.<sup>85</sup>

### 1. The Facts of *Maryland Bank*

In *Maryland Bank*, the McLeods owned a 117 acre farm in the State of Maryland. The Maryland Bank and Trust Company (hereinafter “Maryland Bank”) loaned money to the McLeods for two waste disposal businesses.<sup>86</sup> The McLeods dumped hazardous wastes on the property.<sup>87</sup> Although Maryland Bank knew the McLeods were dumping garbage, it was not clear whether it knew that the McLeods were dumping hazardous wastes.<sup>88</sup>

Later, the McLeods’ son, Mark McLeod, obtained a loan from Maryland Bank in order to purchase the farm from his parents. The loan was secured by the farm. Soon after purchase, Mark McLeod defaulted on his payments to Maryland Bank and the bank foreclosed. Maryland Bank purchased the property at the foreclosure sale and obtained title to the farm.<sup>89</sup> Mark McLeod informed the

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

83. *Id.* at 580. *See infra* note 101 and accompanying text.

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

85. *Id.* The court argued that Congress created the secured lender exemption for application only in title theory states, where mortgagees (lenders) are in actual possession of title during the life of the mortgage. *Id.* In title theory states, title is surrendered to the mortgagor (borrower) only when the mortgage debt has been fulfilled. The court determined that the secured lender exemption does not bar liability for lenders who, as in lien theory states, do not have possession of title during the life of the mortgage, and only acquire title after purchasing the property at a foreclosure sale. *Id.* Presumably, the court would also bar the application of the secured lender exemption in intermediate theory states, where the mortgagor has possession of title until default, at which time title is automatically transferred to the mortgagee. It does not seem logical, however, that Congress would draft a provision in such a broad and important Act as CERCLA which would include only a small minority of states which still operate under the common law fiction of title theory. For a detailed explanation of mortgage procedure in title, intermediate, and lien theory states, see Kratovil, *Mortgages-Problems in Possession, Rents, and Mortgagee Liability*, 11 DE PAUL L. REV. 1 (1961).

86. *Maryland Bank*, 632 F. Supp. at 575.

87. *Id.* The McLeods dumped organic chemicals and heavy metals on the site. Among the organic chemicals dumped were toluene, ethylbenzene, and total xylenes. *Id.* Lead, chromium, mercury, and zinc were some of the heavy metals disposed of on the site. *Id.*

88. *Id.*

89. *Id.*

County Department of Health that hazardous substances were present on the farm, whereupon the EPA was duly notified and effectuated a cleanup of the facility, later billing Maryland Bank for the cleanup costs.<sup>90</sup> When Maryland Bank refused to pay, the EPA brought suit against the bank under CERCLA.<sup>91</sup>

## 2. The Reasoning and Holding of *Maryland Bank*

The court found that Maryland Bank was liable for the cleanup costs incurred by the EPA.<sup>92</sup> The court first analyzed the language of the "owners and operators" provision and determined that the persons covered by "owners and operators" were either owners *or* operators, reasoning that the definitions are mutually exclusive.<sup>93</sup> Since one could not be an operator and an owner simultaneously, the court determined that liability could attach to one who is *either* an owner or an operator.<sup>94</sup> Such a determination by the court opened the door to liability for Maryland Bank since the bank was definitely not an operator of the site, but could be construed as having been an owner by virtue of the foreclosure sale.

The court proceeded to examine the secured lender exemption which excludes a person who "holds indicia of ownership primarily to protect his security interest. . . ."<sup>95</sup> The court gave critical weight to the tense of the verb "to hold" reasoning that, since the verb is in the present tense (i.e., *holds*) rather than in the past tense (i.e., *held*), Congress intended the secured lender exemption to attach only if the lender holds a security interest at the time of cleanup.<sup>96</sup> Applying

90. *Id.* The EPA removed 237 drums of chemicals and 1180 tons of contaminated soil from the site. *Id.* at 575-76. The total cost of the cleanup was \$551,713.50. *Id.* at 576.

91. *Id.* at 576.

92. *Id.* at 582.

93. *Id.* at 578.

94. *Id.* The court relied on a House Report which defined an "operator" of a facility as "a person who is carrying out operational functions for the owner of the facility. . . ." H.R. REP. NO. 172, 96th Cong., 2d Sess., pt. 1, at 37 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6182. The court reasoned that an operator and an owner must, by definition, be two distinct parties. *Maryland Bank*, 632 F. Supp. at 578. The court in *Mirabile* reasoned along the same lines. *See supra* note 85 and accompanying text.

95. *Maryland Bank*, 632 F. Supp. at 577 (emphasis deleted) (quoting CERCLA § 101(20)(A) (codified at 42 U.S.C.A. § 9601(20)(A) (West 1983))).

96. *Id.* at 579. The court seems hypocritical in assigning weight to various terms. The court apparently attempted to make the statutory language of CERCLA meet its own policy goals of broad lender liability rather than allow the statutory language to determine the breadth of liability. When deciding that "owners and operators" in fact signified "owners *or* operators," the court stated that "to slavishly follow the laws of

this rationale, the court concluded that once a security interest holder forecloses upon the security and purchases it at the foreclosure sale, the lender becomes the veritable owner thereby losing the protection of the secured lender exemption.<sup>97</sup> Determining that Maryland Bank did not have merely a security interest but was, in fact, the *owner* at the time of cleanup, the court held Maryland Bank liable for the cleanup costs.<sup>98</sup>

The court also rationalized the liability of Maryland Bank on policy grounds, asserting that broad indemnity for lenders would create a windfall for mortgagees.<sup>99</sup> The court noted that banks which had acquired waste-encumbered property at a low foreclosure sale price could rely on the government, via the EPA, to incur all the cleanup costs.<sup>100</sup> Once the property had been cleaned at government expense, it would have greater market value than it had at the time of foreclosure. Banks could then sell the property at a higher price and reap a "windfall" at the expense of the government.<sup>101</sup> The court speculated that banks, unlike the government, could protect themselves against environmental liability by making "prudent loans" and by investigating the environmental conditions of properties they hold in security before problems arise.<sup>102</sup>

Although the court held Maryland Bank liable as an "owner" of the foreclosed site, it proposed that the third party defense to owners and operators "might still be available to Maryland Bank if it could show it had exercised 'due care.'" <sup>103</sup> The court did not rule on the defense, however, because such a determination would have exceeded the court's jurisdiction in the summary judgment proceeding.<sup>104</sup>

In sum, the court in *Maryland Bank* held that once a lender fore-

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grammar while interpreting acts of Congress would violate sound canons of statutory interpretation." *Id.* at 578 (quoting *Philbrook v. Glodgett*, 421 U.S. 707, 713-14 (1975)). On the other hand, when the court determined that a lender is only exempt from liability when it holds a security interest at the time of cleanup, the court placed immense importance on the statutory tense of the verb "to hold." The court asserted: "The verb tense of the exclusionary language is critical." *Id.* at 579.

97. *Id.* at 579.

98. *Id.* at 582.

99. *Id.* at 580.

100. *Id.*

101. *Id.* The problem of a "government windfall" would be disposed of effectively by passage of present Senate legislation and the final review of a current EPA administrative rule. Both would make a lender liable for the increase in value of a property after cleanup by the government. See *infra* notes 217-19 and 281 and accompanying text.

102. *Maryland Bank*, 632 F. Supp. at 580.

103. *Id.* at 581.

104. *Id.* at 581-82. A ruling on the defense would require a determination of *factual* issues. The court was proceeding on the United States' motion for summary judgment, a motion in which a court may decide purely *legal* issues. *Id.*

closes on a property and obtains title at the foreclosure sale, it becomes an "owner" and is subject to liability under CERCLA.

#### IV. UNITED STATES V. FLEET FACTORS

Whereas some courts have opted for the prudent, narrow lender liability approach of *Mirabile*, other courts follow the policy-active, broad liability rule initiated by *Maryland Bank*.<sup>105</sup> In both lines of cases, however, a lender must be either an "owner" of the facility, or must have exercised a high level of participation in facility management to be liable for cleanup costs. The court in *Fleet Factors*, however, rejected not only the caution of *Mirabile*, it went beyond even the holding in *Maryland Bank*. The Eleventh Circuit Court of Appeals in *United States v. Fleet Factors Corporation*<sup>106</sup> held that a lender is liable for cleanup costs under CERCLA where it merely had the *capacity* to influence the borrower's dumping practices,<sup>107</sup> even where the lender did not participate in the day-to-day management of the facility.<sup>108</sup> Under the *Fleet Factors* rule, it is immaterial whether the lender *exercised* the capacity.

The *Fleet Factors* ruling is even more potent because it was the first time a circuit court interpreted the secured lender exemption of CERCLA.<sup>109</sup> *Mirabile* and *Maryland Bank* were district court decisions and thus are not accorded the same weight as that of *Fleet Factors*. While *Fleet Factors* is not necessarily the "law of the land,"<sup>110</sup> it is binding law in Alabama, Florida, and Georgia as an Eleventh Circuit decision. Fortunately, other circuit courts have become aware of the harmful effects of the *Fleet Factors* decision, and the only circuit which has interpreted the secured lender exemption after *Fleet Factors* has refused to hold lenders broadly liable, even in a factual situa-

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105. See *infra* notes 205-13 and accompanying text.

106. *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991).

107. *Id.* at 1558.

108. *Id.* at 1557-58.

109. The Eleventh Circuit did not decide the entire case, but ruled only on the summary judgments motions of the government and Fleet, which were controlling questions of law brought before the court on interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

110. The Supreme Court denied *certiorari* in *Fleet Factors* on January 14, 1991. *Fleet Factors*, No. 90-504 (U.S. Jan. 14, 1991). Denial of *certiorari* was unjustified because a final interpretation of the secured lender exemption in CERCLA would have avoided the confusion generated by contradictory legislation, administrative law, and split application of the federal statute among the circuits.

tion which might have allowed for broad lender liability.<sup>111</sup>

A. *The Facts of United States v. Fleet Factors*

*Fleet Factors* involved Swainsboro Print Works (hereinafter "Swainsboro"), a cloth printing business, which obtained loans from the Fleet Factors Corporation (hereinafter "Fleet") in exchange for the assignment of its accounts receivable.<sup>112</sup> To secure the loans, Fleet obtained a security interest in the Swainsboro facility and in its equipment, inventory and fixtures. When Swainsboro went bankrupt, Fleet foreclosed on the equipment, inventory and fixtures, but did not foreclose on the facility itself.<sup>113</sup> Fleet contracted to have the foreclosed security sold at auction. After the auction, Fleet contracted to have all of the unsold secured items removed from the facility.<sup>114</sup> After removal of the remaining items, the EPA inspected the facility, determined that hazardous substances had been dumped on the premises, and required environmental cleanup.<sup>115</sup> The EPA proceeded to clean the facility at great cost.<sup>116</sup> Title to the facility was transferred to the county at a foreclosure sale after Swainsboro failed to pay state and county taxes.<sup>117</sup> Fleet never foreclosed on the facility and never obtained legal title to it.<sup>118</sup> Empowered by CERCLA, the United States brought suit against Fleet to recover the cleanup costs the EPA had incurred.<sup>119</sup> Fleet filed a motion for summary judgment, asserting that it was exempt from liability as a matter of law under the secured lender exemption of CERCLA.<sup>120</sup>

B. *The Rule and Reasoning of Fleet Factors*

The *Fleet Factors* court considered two categories of CERCLA under which Fleet might be held liable: section 9607(a)(1)<sup>121</sup> as an "owner and operator" of a facility, and section 9607(a)(2)<sup>122</sup> as an

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111. See *infra* notes 205-13 and accompanying text.

112. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1552 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

113. *Id.* at 1552-53.

114. *Id.* at 1553.

115. *Id.* Fleet prevented Swainsboro from selling certain barrels of toxic waste which, as a result, remained on the facility. *Id.* at 1559 n.13.

116. *Id.* at 1553. The EPA discovered and removed 700 55-gallon toxic chemical drums and 44 truckloads of substances containing asbestos from the facility. As a result, the EPA incurred approximately \$400,000 in cleanup costs. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* The United States also brought suit against Horowitz and Nelson, the two principal shareholders of Swainsboro Print Works. That action, however, was not relevant to the *Fleet Factors* "capacity to influence" lender liability rule.

120. *Id.*

121. See *supra* note 49 and accompanying text.

122. See *supra* note 49 and accompanying text.

“owner or operator” of the facility at the time hazardous wastes were dumped.<sup>123</sup>

1. Liability as an “Owner *and* Operator” of the Facility: Section 9607(a)(1)

The court first considered Fleet’s liability under CERCLA section 9607(a)(1).<sup>124</sup> The court followed the *Maryland Bank* holding that although the term “owners and operators” is phrased in the conjunctive by Congress, the statutory meaning is actually disjunctive.<sup>125</sup> The court interpreted an “owner” as the owner of the facility on the date the suit was filed.<sup>126</sup> The owner on the date the suit was filed was Emanuel County, Georgia. However, SARA amended CERCLA to exempt units of state and local government which involuntarily acquire title to property due to tax delinquency.<sup>127</sup> Therefore, Emanuel County could not be held liable.<sup>128</sup> The court noted that when a unit of state or local government is the title owner of a facility, liability statutorily shifts to the person who “owned, operated or otherwise controlled activities at such facility immediately beforehand.”<sup>129</sup> Since Swainsboro owned the facility immediately before Emanuel County, Fleet could not be found liable under section 9607(a)(1).

2. Liability as an “Owner *or* Operator” of the Facility When Dumping Occurred: Section 9607(a)(2)

After determining that Fleet was not liable as a previous “owner or operator” of the facility, the court next turned to section 9607(a)(2)

123. *Fleet Factors*, 901 F.2d at 1554-60.

124. *Id.* at 1554 (citing CERCLA § 107(a)(1) (codified as amended at 42 U.S.C.A. § 9607(a)(1) (West 1983 & Supp. 1990))).

125. See *supra* notes 94-96 and accompanying text. Curiously, although each Court’s final determination as to the breadth of lender liability varied from very narrow to very broad, the courts in *Mirabile*, *Maryland Bank* and *Fleet Factors* each interpreted “owners and operators” in the disjunctive rather than the conjunctive.

126. *Fleet Factors*, 901 F.2d at 1554.

127. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 § 101, 100 Stat. 1613, 1615 (codified at 42 U.S.C. § 9601(20)(A)(iii)(1988)). SARA exempts units of state and local government from liability if they acquire title involuntarily pursuant to their authority as sovereign, such as in situations of tax delinquency as in the *Fleet Factors* abandonment and bankruptcy. See *supra* note 42 and accompanying text.

128. *Fleet Factors*, 901 F.2d at 1555.

129. *Id.* (citing CERCLA § 101(20)(A)(iii) (codified at 42 U.S.C.A. § 9601(20)(A)(iii) (West 1983 & Supp. 1990))). This statutory shift in liability occurs only if the unit of state or local government has not itself caused the release or threatened release of the hazardous substance. See *supra* note 58.

to determine whether Fleet could be held liable as an "owner or operator" of the facility *at the time* the hazardous substances were dumped.<sup>130</sup> The court noted that the secured lender exemption excludes from the "owners or operators" definition any "persons who, without participating in the management of a . . . facility holds indicia of ownership primarily to protect his security interest. . . ."<sup>131</sup> The court determined that although Fleet held indicia of ownership to protect its security interest, Fleet could still be liable if it had "participated" in managing the facility.<sup>132</sup> The court pointed with disapproval to the lower court's reliance upon *Mirabile*, which stated that the financial participation of a lender in the management of a facility is insufficient to hold a lender liable.<sup>133</sup> The circuit court found the construction of the secured lender exemption in *Mirabile* "too permissive towards secured creditors who are involved with toxic waste facilities."<sup>134</sup> The court concluded that such an interpretation is meaningless since it would attach liability only to lenders who participated in the operational management of a facility.<sup>135</sup> The court reasoned that if Congress had intended for lenders to be liable only if they participated in the operational management of a facility, it would have so stated in CERCLA.<sup>136</sup> Because Congress did not state this explicitly, because the exemption would be meaningless without a narrow construction, and because the terms "participating in the management" and "operator" are not "congruent,"<sup>137</sup> the court held that a "secured creditor may incur . . . liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the [borrower's] treatment of hazardous wastes."<sup>138</sup> The court explicitly stated that actual participation in management decisions which relate to hazardous wastes is unnecessary, as long as the capacity to influence the waste prac-

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130. *Fleet Factors*, 901 F.2d 1555-60 (citing CERCLA § 107(a)(2) (codified 42 U.S.C.A. § 9607(a)(2) (West 1983 and Supp. 1989))).

131. *Fleet Factors*, 901 F.2d at 1555.

132. *Id.* at 1556. The court also stated that Fleet bore the burden of showing that it did not participate in managing the facility. *Id.* at 1555-56 (citing *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578 (D. Md. 1986)).

133. *Id.* at 1557-58.

134. *Id.* at 1557.

135. *Id.*

136. *Id.*

137. *Id.* The court stated that "participation in management" and "operator" are not "congruent" terms but offered neither an explanation nor a citation to explain its reasoning. The adjective "congruent" is defined as "in agreement, corresponding; and harmonious." WEBSTER'S NEW WORLD DICTIONARY 300 (2d ed. 1984).

138. *Fleet Factors*, 901 F.2d at 1557 (footnote omitted). O. Kirby Colson III, Esq., a corporate attorney, argues that it was not necessary for the Eleventh Circuit to fashion such a broad rule. Adler, *Liberal Rulings Extend Cleanup Liability*, *Bus. Ins.*, Oct. 8, 1990, at 27. Mr. Colson stated that "[t]he court simply could have pinned liability by finding that the bank was an operator of the waste site, since waste site owners and operators are jointly and severally liable." *Id.*

tices of the borrower exists.<sup>139</sup>

The court used a fair amount of policy to justify its expansion of lender liability. The court underlined the *Maryland Bank* court's concern that allowing only narrow liability for lenders would constitute an "insurance scheme" for lenders.<sup>140</sup> Under such a scheme, a lender who benefitted from governmentally financed cleanup efforts would own property with a higher market value after cleanup (as compared to the property's value at the foreclosure sale), but would be free from liability based on a broad reading of the secured lender exemption. This "insurance scheme" or windfall for banks<sup>141</sup> might have been entirely legitimate if a lender acquired title to the facility. But since Fleet never acquired title to the Swainsboro facility, the court's rationale was misplaced and seems to undermine enforcement liability against Fleet.

The court addressed the concerns of lenders and stated that "secured creditor[s] can become involved in occasional and discrete financial decisions relating to the protection of its security interest without incurring liability."<sup>142</sup> However, the court failed to define what constitutes either "occasional" or "discrete" financial decisions which will not give rise to liability. Furthermore, the court failed to define the requisite "capacity" to influence the dumping practices of a borrower.<sup>143</sup>

139. *Fleet Factors*, 901 F.2d at 1558. Edward Brodsky, Esq., (hereinafter Brodsky) an attorney with the firm of Spenglor, Carlson, Gubar, Brodsky & Frischling, argues that since Fleet did, in fact, participate in the management of the facility, it could have been held liable as such. Brodsky, *Lender Liability for Environmental Cleanup*, N.Y.L.J., July 11, 1990, at 3. Brodsky states:

Note that the lender in *Fleet* actually did make certain decisions concerning the hazardous waste disposal at the facility, and the case could have been decided against the lender on that narrow ground. The court, however, went further and said that liability could be based on the right to influence rather than the actual influencing of environmental policy.

*Id.* (footnote omitted). Indeed, Fleet had prevented Swainsboro from selling certain toxic chemicals which, as a result, remained on the site. *Id.* at n.4 (citation omitted).

140. *Fleet Factors*, 901 F.2d at 1559 (citing *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 580 (D. Md. 1986)). See *supra* note 101.

141. *Maryland Bank*, 632 F. Supp. at 580.

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

143. *Id.* This lack of guidance has caused much uncertainty in the lending community. See *infra* notes 163-65 and accompanying text. Indeed, experts in business law have pointed to the difficulties a lender has in avoiding liability under the *Fleet Factors* standard, especially since banks generally are contractually permitted to give instructions to their borrowers concerning hazardous waste management. *Lender Liability Tightened*, Financial Times Ltd., World Insurance Report, July 6, 1990. Joseph H. Levie, Esq., of the firm Rogers & Wells wrote that the rule that a lender "can become involved in occasional and discrete financial decisions relating to the protection of its



Anticipating the negative reaction of lenders to its rule, the court stated that while its interpretation of the secured lender exemption "may be challenged as creating disincentives for lenders to extend financial assistance to businesses with potential hazardous waste problems, . . . [t]hese concerns are unfounded."<sup>144</sup> The court adopted an optimistic stance, reasoning that its holding would "encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential debtors."<sup>145</sup> In other words, caution and prudence in the lending practices of banks would effectively counter the potential for lender liability under CERCLA according to the Eleventh Circuit. In sum, the Eleventh Circuit in *Fleet Factors* held that a lender will be liable for environmental cleanup costs if it has the capacity to influence the borrower's dumping practices.

## V. THE IMPACT OF *UNITED STATES V. FLEET FACTORS*

Private lenders, businesses, and government financial institutions have been adversely affected by the broad liability of the *Fleet Factors* decision. Although the decision of *Maryland Bank* made lenders more liable than they had been under *Mirabile*, the *Fleet Factors*' apportionment of lenders' liability is so broad that it has created uncertainty among members of the financial community.<sup>146</sup> In *Fleet Factors*, the Eleventh Circuit predicted that the impact of its holding would not be as negative as some expected, but rather would encourage prudence in the lending practices of banks.<sup>147</sup> Unfortunately, the optimism of the Eleventh Circuit has proven itself to be unfounded. The *Fleet Factors* decision created uncertainty not only among banks but also among businesses and government financial institutions. The following subsections discuss the negative impact that the *Fleet Factors* decision has had upon 1) private lenders, 2) business, and 3) government financial institutions.

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security interest without incurring liability' . . . is so unsubstantial that it will be cold comfort." Levie, *Environmental Cleanup; Partnership Interests as Collateral*, N.Y.L.J., July 5, 1990, at 5.

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

145. *Id.* Attorney Brodsky argues that the *Fleet Factors* decision might be counterproductive in its attempts to encourage lenders to monitor and push for safe disposal of wastes by borrowers. The monitoring and advice of lenders might themselves be sufficient "capacity to influence" the dumping practices of a facility, and therefore might be sufficient to make the lender liable. Brodsky, *Lender Liability for Environmental Cleanup*, N.Y.L.J., July 11, 1990, at 3.

146. *Id.* Mitchell states that "*Fleet Factors* has sent shock waves through the banking industry; an industry that has watched with growing concern as the so-called secured creditor exemption to CERCLA has been progressively narrowed by the federal courts." *Id.*

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

### A. *Impact on Private Lenders*

In the wake of *Fleet Factors*, banks have severely restricted their loans to businesses.<sup>148</sup> Banks, like all other businesses, operate for profit. When loans are transformed from sources of profit into sources of liability, it is unreasonable for banks to continue to lend. Due to the new standard for liability announced in *Fleet Factors*, certain loans which had been sources of honest profit in the past are now considered by banks to be sources of enormous liability.<sup>149</sup> Indeed, since environmental cleanup costs can easily total two or three times the value of the property held in security by a lender, banks do not face merely a loss equivalent to the value of their security interest, but a far more negative loss which cuts into their assets and money reserves.<sup>150</sup> As a result, banks have slashed the number of loans they now make compared to those they previously made.<sup>151</sup> The banking industry, which has been plagued by financial disasters such as junk bonds, failed real estate loans, and Third World debt, now has to add the present disaster of environmental liability to its list of profit-cutting and capital-reducing difficulties.<sup>152</sup>

The *Fleet Factors* rule holding lenders liable once they possess the capacity to influence the dumping practices of a borrower is unreasonable in its practical application. A bank holds the borrower's facility in security in order to insure repayment of the debt via foreclosure. The secured facility or "security interest" must be kept valuable if it is to remain an adequate guarantee of repayment.<sup>153</sup> To

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148. 136 CONG. REC. E-1023 (April 4, 1990) (statement of Rep. John J. LaFalce).

149. See Jaffe, *Whose Mess is This?*, FORBES, Feb. 19, 1990, at 43. Workmen's Bancorp recently released a borrower from \$558,000 of principal debt and accrued interest, because Workmen's believed that the loan represented a potential environmental liability. *Id.* Workmen's wrote off the debt even though the real estate security had previously received a "clean bill of health" by an environmental survey. *Id.*

150. Previously, the principal amount due was the total possible loss on a loan. Hankin, *Home Industry Acting to Curb Hazard Liability*, Wash. Post, Oct. 1, 1988, at E1, col. 1. Because cleanup costs are so high, they can easily surpass the value of the property which secures the loan. Thus, a lender who is held liable under CERCLA sometimes faces liability three or four times the value of the property held in security. For example, the FDIC holds \$350 million worth of property for liquidation which require cleanup under CERCLA. The cleanup costs, however, will be greater than \$1 billion. See *FDIC, RTC Want More CERCLA Protection in Senate Bill Limiting CERCLA Exposure*, Daily Report for Executives (BNA) No. 140, at A-22 (July 20, 1990).

151. 136 CONG. REC. E-1023 (daily ed. Apr. 4, 1990) (statement of Rep. John J. LaFalce (D-NY)).

152. Statement of Craig Gass, senior manager at KPMG Peat Marwick, New York. See also Jaffe, *Whose Mess is This?*, FORBES, Feb. 19, 1990, at 43.

153. A recent EPA Draft Rule on the interpretation of the secured lender exemp-

ensure that security interests remain valuable, lenders participate in the financial management of the facility. However, the Eleventh Circuit's application of the maxim "he who holds the purse strings controls the purse," to the lender liability scenario seems to include the capacity to influence the dumping practices of a lender as part of financial management.<sup>154</sup> For example, a bank could require a borrower to modernize the facility in order to make it as competitive as other facilities, and, therefore, maintain its value. Suppose that any modernization whatsoever would threaten the release of heavy metals on the facility. In such a situation, the lender would be financially participating in the management of the facility and also influencing the dumping practices of a lender. Once a bank makes such a demand, it immediately becomes liable under *Fleet Factors* because it has influenced the dumping practices of a lender. However, *Fleet Factors* liability comes into play not only when there has been an actual influence of dumping practices, but also whenever there exists a mere "capacity" to influence dumping practices. Since a lender cannot participate in the financial management of a facility without also possessing the "capacity to influence" dumping practices of a borrower, the *Fleet Factors* rule forces banks to give free rein to their borrowers and to take the risk of security interest devaluation in order to avoid liability.<sup>155</sup>

The *Fleet Factors* rule is also unreasonable because it does not provide necessary guidelines which inform lenders when they actually have the capacity to influence the dumping practices of a borrower. Because of the absence of guidelines in the opinion and interpretation of broad liability for lenders, lenders have adopted the ultimate caution: they have ceased making loans to environmentally risky

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tion notes that the lender's interest is not the facility itself, but rather the "extent to which the facility . . . represents a guarantee for the debtor's unpaid obligation." EPA Lender Liability under CERCLA, 40 C.F.R., reprinted in 21 ENV'T. REP. (BNA) No. 24, 1163 (Oct. 12, 1990) (to be formally codified upon review of comments).

154. Robert B. Koegel, Esq. (hereinafter Koegel), an attorney of counsel to Ernstrom & Estes in New York, argues that almost anything can be construed as the capacity to influence the dumping practices of a facility. Koegel, *Bank Power Draws Superfund Liability*, N.Y.L.J., July 9, 1990, at 1. Koegel states: "[a]rguably, every secured creditor has the 'capacity to influence' its debtor's hazardous waste disposal decisions, or any other debtor decision, simply because of its security interest." *Id.*

Diane Smith, Esq., an environmental attorney with the firm of Jones, Day, Reavis & Pogue, states that "merely by checking into the borrower's operations the lender acquires the ability to influence [dumping] operations and is therefore liable . . ." Fine, *Appellate Ruling Trims Baules' Cleanup Exemption*, ORANGE COUNTY BUS. J., July 16, 1990, at 9.

155. Janet W. Lamkin, a lobbyist for the California Bankers Association, asserts that banks' supervision of borrowers is essential to protect the banks' security interest. Lamkin states: "[i]f a bank is uncertain about how a business is running, it needs to have some oversight" into the debtor's business. *A Lending Squeeze on Small Firms*, NATION'S BUSINESS, May 1990, at 52.

businesses.<sup>156</sup> The complete lack of guidelines further exacerbates the banks' fears by injecting uncertainty into the lending process.<sup>157</sup> *Fleet Factors* would continue to adversely affect banks even if its opinion provided liability guidelines, simply because of the enormous breadth of the "capacity to influence" rule. Had the court provided liability guidelines, however, banks could exercise increased prudence, perhaps avoiding liability altogether. But the lack of guidance in the *Fleet Factors* decision forces banks to opt for safety instead of potential liability. This restricts the availability of credit even further as banks refuse to make loans to environmentally risky businesses.<sup>158</sup> Some banks are so uncertain about the potential for litigation and so fearful of environmental liability that they simply write off the outstanding debt owed to them by a liability-prone debtor.<sup>159</sup> Such a practice denies a bank its profit and part of its working capital.

Small banks are even more adversely affected by a large environmental cleanup bill than are large banks because small banks possess smaller total assets and comparatively smaller working capital than do larger lenders. While a large cleanup bill would decrease the total profits of a large bank, certain banks are so small that a single environmental cleanup bill could effectively wipe them out.<sup>160</sup>

### B. Impact on Business

Due to the decrease in loans made to businesses after *Fleet Factors*, businesses presently suffer from restricted credit availability.<sup>161</sup>

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156. Clyde Mitchell, Esq. (hereinafter Mitchell), a finance and banking law attorney with White & Case, states that "businesses that produce or deal in hazardous waste will find it increasingly difficult to obtain financing." Mitchell, *Liability Under CERCLA for Indenture Trustees*, N.Y.L.J., Aug. 23, 1990, at 3.

157. See EPA Lender Liability under CERCLA, 40 C.F.R., reprinted in 21 ENV'T. REP. No. 24, 1162 (Oct. 12, 1990) (to be formally codified upon review of comments).

158. See *FDIC, RTC Want More CERCLA Protection in Senate Bill Limiting CERCLA Exposure*, Daily Reports for Executives (BNA) No. 140, at A-22 (July 20, 1990).

159. See Jaffe, *Whose Mess is This?*, FORBES, Feb. 19, 1990, at 43.

160. Patrick A. Wick, President of The Bank of Turtle Lake, in Turtle Lake, Wisconsin, states that "out in the country where we deal with small companies, one [environmental cleanup] bill like that would be devastating to us." *A Lending Squeeze on Small Firms*, NATION'S BUSINESS, May, 1990, at 52.

161. Representative John J. LaFalce stated that broad lender liability under CERCLA results in a "squeeze on credit." 136 CONG. REC. E-1023 (daily ed. Apr. 4, 1990) (statement of John J. LaFalce). See also Daily Report for Executives (BNA) No. 140, at A-22 (July 20, 1990) (remarking that lenders will avoid making litigation-prone loans).

Businesses require constant infusions of capital in order to function smoothly and profitably. For example, businesses routinely require loans to purchase inventories, to modernize their facilities, and to finance their debts. By restricting the availability of loans, therefore, *Fleet Factors* has made it difficult for businesses to function effectively.<sup>162</sup>

Businesses which are perceived by lenders as high environmental risks are more affected by the *Fleet Factors* decision than are "low risk" businesses. Dry cleaners, gasoline stations, and metal electroplaters are examples of businesses which require storage of chemicals on their premises for use in daily business activities.<sup>163</sup> Since such businesses are commonly known to store chemicals on their premises, banks often summarily refuse to lend to these businesses.<sup>164</sup>

Small and startup businesses are also more negatively impacted by the restriction of credit than are large businesses. Whereas large businesses can give bonds, shares of stock and large inventories and accounts receivable as collateral for loans, real property is often the only source of collateral with which small and startup businesses can secure loans.<sup>165</sup> Because lender liability under CERCLA often results from the ownership<sup>166</sup> or operation of a facility upon which wastes have been dumped, banks are more likely to reject small and startup businesses rather than large businesses as potential loan recipients. The consequence of *Fleet Factors* is unfortunate, since small and startup businesses create many new jobs and generate capital in an economy which desperately needs both.

Businesses do not suffer only because of *Fleet Factors*' restriction of available capital. Indeed, although banks extend fewer loans to business, they still extend financing to certain businesses. Banks view these loan recipients as lower environmental risks. However, to

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162. See Daily Report for Executives (BNA) No. 140, at A-22 (July 20, 1990).

163. Other examples of such businesses include transshippers, wood product manufacturers and metal finishers. 136 CONG. REC. E-1023 (daily ed. Apr. 4, 1990) (statement of John J. LaFalce).

164. John Bowers, Executive Vice President of the Maryland Bankers Association, states that "[f]or some types of businesses, like gasoline stations, dry cleaners or businesses that involve underground tank storage of chemicals, the risks are high enough to shut them off from borrowing altogether." Hamilton, *Passing the Buck on Toxic Cleanup; Lenders Increasingly Held Liable for Hazards on Foreclosed Sites*, Wash. Post, July 6, 1990, at C1, col. 1.

165. Bradley S. Tupi, Esq., an attorney who has represented lenders in previous lender liability cases, states that the *Fleet Factors* decision broadens Superfund liability and will cause a "squeeze on credit for small businesses." He asserts that "[i]f you're a small business owner and the only thing you have to secure a loan is a piece of property, a bank is going to be extremely wary about extending credit." *A Lending Squeeze on Small Firms*, NATION'S BUSINESS, May 1990, at 52.

166. The *Fleet Factors* Corporation was liable but did not own the property. *Fleet Factors*, 901 F.2d at 1553.

determine which businesses are low-risk ventures, banks must make environmental surveys.<sup>167</sup> The costs of these surveys are high and typically passed on to the loan recipient.<sup>168</sup> In addition to the costs of environmental surveys, banks attempt to protect themselves by charging higher loan fees<sup>169</sup> and "points."<sup>170</sup> Although the sum of these costs hurt larger businesses, they have a greater impact on small and startup businesses. In fact, to some small businesses, these costs are prohibitive,<sup>171</sup> fully restricting the availability of startup and operating capital.

### C. *Impact on Government Financial Institutions*

Private lenders and businesses are not the only sectors of the economy which are adversely affected by the *Fleet Factors* decision. Government financial institutions have also come within the scope of *Fleet Factors* liability.<sup>172</sup> The FDIC and the Resolution Trust Corporation (hereinafter "RTC"), which hold properties for failed lending institutions prior to liquidation,<sup>173</sup> also face CERCLA cleanup liabil-

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167. The opinions in both the *Maryland Bank* and *Fleet Factors* decisions encouraged lenders to undertake environmental audits of properties before accepting them as security for loans. These encouragements, however, were made under the assumption that hazardous wastes are identifiable, and that they are present at the time that the loan is made. Koegel points out that contamination by hazardous substances is often difficult to detect. Koegel, *Bank Power Draws Superfund Liability*, N.Y.L.J., July 9, 1990, at 1.

168. James P. O'Brien, Esq., an attorney with Chapman & Cutler in Chicago, who testified at a Superfund liability hearing, stated that the average cost of an environmental audit is approximately \$4,500. He also estimated that over \$418 million would be spent on such audits within the next decade. Hamilton, *Passing the Buck on Cleanup; Lenders Increasingly Held Liable for Hazards on Foreclosed Sites*, Wash. Post, July 6, 1990, at C1, col. 1.

169. Some fees commonly charged by lenders are beneficiary and/or trustee fees for assumptions, modifications, substitutions, extensions, renewals, subordinations, rescissions, changes of owners, recordation of maps, plat or record of surveys, grants of easements, and full and partial reconveyance fees. Deed of Trust, Great Western Bank (California), provision 19. (Copy available at the offices of the Pepperdine Law Review).

170. A point is a percentage of the principal mortgage debt which is paid to the lender up front.

171. 136 CONG. REC. E-1023 (daily ed. Apr. 4, 1990) (statement of Rep. John J. LaFalce).

172. See generally Labaton, *Pollution Raises Cost of Bailout*, N.Y. Times, July 20, 1990, at C1, col. 6.

173. When the savings and loan institutions collapsed in the late 1980's, the FDIC and RTC took over their assets in order to sell them off and satisfy creditors. The RTC was created by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (hereinafter "FIRREA") in order to facilitate the asset liquidation of failed savings and loans institutions. FIRREA is an over-

ity under *Fleet Factors*. Many of the properties held by the FDIC and RTC require hazardous waste cleanup.<sup>174</sup> Cleanup costs for the FDIC properties alone would exceed \$1 billion, although the properties themselves are worth only approximately \$350 million.<sup>175</sup> While the concept of governmental entities suing one another for the recovery of funds might seem a blatant waste of taxpayer money and an unproductive use of the judiciary, the repercussions go further than the simple transfer of funds from one government organ to another. The General Accounting Office currently estimates that thirty-five banks will fail within the next year.<sup>176</sup> The cost of these bailouts could exceed \$6 billion, which would place the FDIC's insurance fund in a "paper thin margin" of operation.<sup>177</sup> It will be difficult enough for the FDIC to bail out these thirty-five banks without the added environmental liability ushered in by *Fleet Factors*.<sup>178</sup>

The FDIC and RTC also face the difficulty of selling assets they

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whelmingly complex piece of legislation which is over 350 pages long and amends 246 statutes.

174. According to Steven A. Seelig, Director of the FDIC's liquidation division, the FDIC presently holds 400 properties which require cleanup under CERCLA. Labaton, *supra* note 172, at D1, col. 6.

175. Jim Davis, a Senior Asset Specialist for the RTC states that the agency had found 300 environmentally problematic properties in its list of assets, and expects to find 200 to 300 more. *Id.* Davis points out that the cleanup costs for the properties mentioned would be significant even if only one to two percent of the assets required cleanup. *Id.*

176. Rosenblatt, *Shaky Banks Could Create 2nd Nightmare*, L.A. Times, Sept. 17, 1990, at A12, col. 1. Charles A. Bowsher, Comptroller General of the United States, blamed bad loans and low real estate prices for the expected bank failures. *Id.* He stated, however, that none of the twenty largest American banks were expected to fold. *Id.* The FDIC estimates that

in a mild recession 180 banks with total assets of \$65 billion will fail this year and 160 with assets of \$30 billion will fail in 1992. If the recession is worse . . . 230 banks with assets of \$90 billion will fail this year, followed by 210 failures with assets of \$70 billion in 1992.

Bacon, *Seidman Says the Bank Insurance Fund Needs Fast Infusion of up to \$10 Billion*, Wall St. J., Feb. 1, 1991, at A2, col. 2.

177. Rosenblatt, *supra* note 176, at A12, col. 1. The FDIC insurance fund has already diminished from \$18 billion to \$13 billion in the past two years, and FDIC Chairman L. William Seidman foresees that the fund will shrink by another \$2 billion by the close of 1991. Because the bailout of the banks which are expected to fold within the next year could be as high as \$6.3 billion, Comptroller General Bowsher believes that the FDIC insurance fund is only a recession away from being wiped out. *Id.* at A1, col. 3. Senator Donald W. Riegle, Jr. (D-MI), chairman of the Senate Committee on Banking, is even more skeptical, and believes that the FDIC insurance fund might actually be empty and become bankrupt without the knowledge of regulators. *Id.* at A12, col. 1. Senator Riegle states: "[w]e're down to a paper thin margin." *Id.* On February 1, 1991, Seidman informed the banking community that the FDIC's bank insurance fund required a "quick infusion of \$5 billion to \$10 billion." Bacon, *supra* note 176, at A2, col. 1.

178. Steven A. Seelig, Director of the FDIC's liquidation division comments that "[t]he greatest risk of such claims is that they may divert deposit insurance funds and taxpayers' money allocated to resolve the savings and loan crisis from their intended purpose." Labaton, *supra* note 176, at D1, col. 6.

hold for liquidation.<sup>179</sup> One of the principal functions of the FDIC and RTC is the liquidation of properties "owned" by failed banks in order to satisfy the debts of their creditors. Because *Fleet Factors* might attach liability to purchasers of the assets held for liquidation by the FDIC and RTC, many prospective purchasers fear liability under *Fleet Factors* and will fail to purchase the properties. Bank creditors will suffer because of the extended time it will take to satisfy their debts. Asset purchaser liability will hinder the functioning of both the FDIC and the RTC as both deposit insurers and asset liquidators.<sup>180</sup>

The Small Business Administration (hereinafter "SBA"), a government financial institution which makes special government loans to small businesses, is also a target of the broad liability ushered in by *Fleet Factors*.<sup>181</sup> In one case, the State of Pennsylvania brought suit against the SBA because the SBA foreclosed on a wallpaper company which had contaminated its facility with glue.<sup>182</sup> Holding the SBA liable for cleanup costs harms small businesses in the same way broad liability for private lending institutions does: it restricts the availability of sorely needed credit to small businesses during a time of economic illness.<sup>183</sup>

#### *D. Impact on the Environment*

While banks, private lenders and government financial institutions have been adversely affected by the *Fleet Factors* decision, it might seem logical to believe that such broad lender liability would benefit

179. Senator Jake Garn (R-UT) has stated that "[t]hese looming [environmental] liabilities already are affecting the RTC's ability to market failed institutions and their assets, and they are threatening to sidetrack funds earmarked to resolve the [savings and loan] crisis." Collins, *Washington; Lenders Seek Exemption From Law on Cleanup of Toxic Wastes*, L.A. Times, May 6, 1990, at D2, col. 1.

180. The FDIC and RTC are attempting to strengthen the indemnification language in S. 2827, a Senate bill which would partially indemnify lenders from CERCLA liability (commonly referred to, in part, as the Lender Liability Act of 1990). *Financial Institutions: FDIC, RTC Want More CERCLA Protection in Senate Bill Limiting CERCLA Exposure*, Daily Report for Executives, (BNA) No. 140, at A-22 (July 20, 1990). See *infra* notes 258-81 and accompanying text.

181. Sally B. Narey, Esq., General Counsel for the SBA, states that broad lender liability threatens the SBA. *A Lending Squeeze on Small Firms*, NATION'S BUSINESS, May 1990 at 52.

182. *Id.* (statement of Sally B. Narey, Esq., General Counsel for the SBA).

183. Representative LaFalce has stated that *Fleet Factors* has contributed to a "credit crunch" and that the SBA has decided against making loans to businesses which might be environmentally risky. *FDIC, RTC Want More CERCLA Protection in Senate Bill Limiting CERCLA Exposure*, Daily Report for Executives (BNA) No. 140, at A22, (July 20, 1990) (statement of Rep. LaFalce).



the environment by increasing monies available to effectuate cleanups of hazardous wastes. Strangely enough, broad lender liability will not, in the long run, increase such needed environmental cleanups.

Most people would agree that a clean and healthy environment must be maintained. To achieve this laudable goal, there must be a disbursement of funds for cleanup efforts. Under *Fleet Factors*, three groups finance environmental cleanup efforts: 1) the EPA, because it is empowered by CERCLA to do so; 2) the parties who generate, dump or transport hazardous wastes, because they are at fault; and 3) lenders, who have deep pockets.<sup>184</sup>

The central issue in *Fleet Factors* and CERCLA liability in general is not how much money will be spent for cleanup, but where the money will come from. One might logically deduce that the liability of banks will provide a plentiful source of funds from which to finance cleanups. Yet, as stated in this Comment, banks are ceasing to make loans to environmentally risky, liability-prone businesses.<sup>185</sup> Although it may take some time before *all* lenders realize the potential for environmental liability in their industry, surely lenders will soon unanimously acknowledge this major problem and restrict loans to only environmentally low-risk borrowers. In other words, banks will intentionally sew up their presently deep pockets to prevent their funds from being touched by *Fleet Factors* liability. As a result, the EPA will lose a source of funds with which to finance cleanup efforts. Because of the liability-avoidance tactics of lenders, instead of having an increased amount of cleanup funds at its disposal, the EPA will, in the long run, continue to have the same amount of funds available as before *Fleet Factors*. After all, nothing forces lenders to lend money to particularly high-risk debtors. Hence, funding for cleanup of the environment might only increase for a short period, but once banks realize their potential liability, they are likely to react in unison and restrict loans to avoid liability.

## VI. REACTION TO *FLEET FACTORS* AND BROAD LENDER LIABILITY

### A. *Reaction to Broad Lender Liability by Other Federal Circuit Courts after Fleet Factors*

Only one circuit court has had the opportunity to interpret the secured lender exemption after the Eleventh Circuit's decision in *Fleet Factors*. In *In re Bergsoe Metal Corporation*,<sup>186</sup> the Ninth Circuit ruled that a party which held title to an environmentally polluted fa-

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184. See *supra* note 5.

185. See *supra* notes 143-52 and accompanying text.

186. *In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990).

cility was not liable for cleanup costs under CERCLA because it held title only to protect its security interest.<sup>187</sup> Unfortunately, since the party which held title to the facility never managed the facility, the Ninth Circuit did not have the occasion to decide whether to adopt or reject the *Fleet Factors* rule for lenders who participate in the management of a facility.

1. The Facts of *In re Bergsoe Metal*

*In re Bergsoe Metal* involved the Port of St. Helens, Oregon (hereinafter the "Port"), the Bergsoe Metal Corporation (hereinafter "Bergsoe") and the United States National Bank of Oregon (hereinafter the "Bank"). The Port, a municipal corporation, sold Bergsoe 50 acres of land to build a lead recycling plant.<sup>188</sup> To finance the purchase, Bergsoe gave the Port a mortgage on the land and a promissory note. To finance the construction of the recycling plant, the Port issued revenue bonds<sup>189</sup> which the Bank held in trust. The revenue from the sale of the bonds went to Bergsoe who, in turn, was to pay the money owed on the bonds to the Bank.<sup>190</sup> Bergsoe deeded the land to the Port, and in exchange, the Port gave Bergsoe two leases: one for the land and one for the recycling facility which Bergsoe promised to construct.<sup>191</sup> The rents for the two leases were to be paid to the Bank and were equal to the principal and interest on the bonds. Bergsoe retained the option to repurchase the land after the obligations on the bonds were fulfilled.<sup>192</sup>

Bergsoe constructed the lead recycling facility, which soon experienced financial difficulties. As a result, Bergsoe defaulted on its payments to the Bank. Bergsoe brought in a third party, Front Street Management, to take over the management of the facility, in exchange for a promise by the Bank not to foreclose.<sup>193</sup> This scheme failed to result in financial success for Bergsoe. The Bank placed Bergsoe in involuntary bankruptcy after the facility was shut down.<sup>194</sup> By that time, the Oregon Department of Environmental Quality determined that hazardous wastes present on the site re-

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187. *Id.* at 673.

188. *Id.* at 669-70.

189. *Id.* at 670. The Port could therefore be considered a lender within the context of lender liability.

190. *Id.*

191. *Id.* In real property parlance, this is called a "sale-and-leaseback" transaction.

192. *Id.*

193. *Id.*

194. *Id.*

quired cleanup.<sup>195</sup> The Bank and the trustee in bankruptcy sued the owners of Bergsoe ("EAC") and sought, inter alia, to obtain a declaration that EAC was liable for the cleanup. EAC counterclaimed, alleging that both the Port and Bank were liable for the cleanup costs under CERCLA.<sup>196</sup> The Port filed a summary judgment motion alleging that since the Port was not an "owner" of the facility under CERCLA, it was exempt from liability.<sup>197</sup> The Ninth Circuit decided this summary judgment motion in *In re Bergsoe Metal*.

## 2. The Ninth Circuit's Reasoning in *In re Bergsoe Metal*

The Ninth Circuit ruled that merely holding paper title (i.e., the deed) to the facility was insufficient to make the Port liable as an "owner" under CERCLA.<sup>198</sup> The court determined that the Port could not be held liable if it were covered by the secured lender exemption, which exempts from liability those "who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect [a] security interest . . . ."<sup>199</sup> In order for the Port to remain exempt from liability by means of the secured lender exemption, the Port must demonstrate that 1) it held indicia of ownership primarily to protect its security interest, and 2) that it did not "participate" in the management of the facility.<sup>200</sup>

The court first considered whether the Port held indicia of ownership.<sup>201</sup> The court determined that the Port held the deed to the facility in order to guarantee that Bergsoe would meet its lease obligations.<sup>202</sup> The guarantee of Bergsoe's obligations under the leases in turn guaranteed the obligations of the Port under the bonds.<sup>203</sup> Since the Port held title to the facility in order to protect its ability to pay its indebtedness under the bonds, the court determined that the Port held the deed to protect a security interest and, thus, was not liable.<sup>204</sup>

In ruling this way, the Ninth Circuit seems to have followed *Mirabile* and rejected *Maryland Bank*.<sup>205</sup> *Mirabile* ruled that a

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195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 671.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 671-72.

205. Before *In re Bergsoe Metal* was even decided, Joseph H. Levie, Esq. of Rogers & Wells wrote that the *Fleet Factors* decision was "important but we must wait for further decisions before we can be sure of the trend." Levie, *Environmental Cleanup, Partnership Interests as Collateral*, N.Y.L.J., July 5, 1990, at 5. These were words of wisdom, for a little over a month later, the Ninth Circuit in *In Re Bergsoe Metal* ruled

lender who purchases at foreclosure and later resells does so in order to protect his security interest and does not thereby become liable.<sup>206</sup> The reasoning in *Mirabile* was that a lender can be exempt from liability even if he holds title to a property, so long as title is held to protect his security interest.<sup>207</sup> *Maryland Bank* on the other hand ruled that a party is liable for cleanup as soon as it obtains title to a facility.<sup>208</sup> Under the *Maryland Bank* rule, therefore, the Port's action of holding the deed would create immediate liability. Under *Mirabile*, however, since the Port held title to the facility to protect its security interest, liability would not attach.<sup>209</sup> Although the Ninth Circuit cited neither *Mirabile* nor *Maryland Bank*, its reasoning appears to parallel *Mirabile's* and to counter *Maryland Bank's*.

Although the court decided that the Port could not be held liable merely by holding title to the facility in order to protect its security interest, the court noted that the Port could still be liable if it "participated" in the management of the facility.<sup>210</sup> The Port, however, never participated in the management of the facility in the slightest. For this reason, and because the Port held title in order to protect its security interest, the Ninth Circuit found the Port not liable as a matter of law, and granted the Port's summary judgment motion.<sup>211</sup>

### 3. The Impact of *Bergsoe Metal* on *Fleet Factors*

Because the Port never played a participatory role in the management of the facility, the Ninth Circuit did not rule on the validity of *Fleet Factors* in the Ninth Circuit. *Fleet Factors* held that a lender is liable if it participates in the management of a facility to the extent that it possesses the capacity to influence the dumping practices of the borrower.<sup>212</sup> Absent any evidence of participation, the *Fleet Fac-*

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in favor of narrow lender liability. See *supra* note 186. The fact that the circuit court in *In re Bergsoe Metal* tended to follow *Mirabile*, and consequently adopted a narrow lender liability standard for the Ninth Circuit, shows that lender liability is not an increasing trend, but rather a split of authority. In the past, the split was between districts; today the split is between circuits. Such a split emphasizes the need for the Supreme Court to rule with finality on the issue of lender liability. See *infra* note 221 and accompanying text.

206. See *supra* note 85 and accompanying text.

207. See *supra* note 85 and accompanying text.

208. See *supra* note 85 and accompanying text.

209. See *supra* notes 94-96 and accompanying text.

210. *In re Bergsoe Metal*, 910 F.2d at 672.

211. *Id.* at 673.

212. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991).

tors rule cannot be applied.

Although the Ninth Circuit expressly stated that it neither followed nor rejected the *Fleet Factors* rule,<sup>213</sup> *Bergsoe*, nevertheless, stands for a rule of narrow lender liability due to its implied reliance on *Mirabile* and implied rejection of *Maryland Bank*. The Ninth Circuit indirectly rejected the *Fleet Factors* rule, stating that "[r]egardless of what rights the Port may have had, it cannot have participated in management if it never exercised them."<sup>214</sup> The Ninth Circuit's language seems to signify that a mere *capacity* to influence the borrower's actions is insufficient and that an actual exercise of management is necessary to hold a lender liable.

The Ninth Circuit's decision in *Bergsoe* is important in one other respect. Commentators perceive the stream of cases involving lender liability under CERCLA as a continuous trend toward broad liability for lenders.<sup>215</sup> By choosing the path of narrow liability for lenders, however, the Ninth Circuit has broken this trend, causing a split among the circuits.

The Supreme Court recently denied *certiorari* to the Fleet Factors Corporation in *United States v. Fleet Factors Corporation*,<sup>216</sup> perhaps because it half-heartedly agreed with the *Fleet Factors* rule but, nevertheless, wished to see Congress pass indemnification legislation to rectify the present breadth of liability. In the opinion of this writer, the Supreme Court should have granted *certiorari* to *Fleet Factors* in order to clarify the issue of CERCLA lender liability, while preserving the Congress' ability to pass lender indemnity legislation.

#### B. The EPA's Reaction to the Broad Lender Liability under Fleet Factors

The EPA itself has opposed the broad lender liability ushered in by *Fleet Factors* and has attempted to narrow it by drafting an administrative rule which interprets the secured lender exemption of CERCLA.<sup>217</sup> The EPA, which some might expect to welcome the *Fleet Factors* decision with open arms by virtue of its pro-environment purpose, does not approve of the broad standard of liability cre-

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213. *In re Bergsoe Metal*, 910 F.2d at 672. The Ninth Circuit stated: "[w]e leave for another day the establishment of a Ninth Circuit rule on this difficult issue . . . . Here there was [no participation], and we therefore need not engage in line drawing." *Id.*

214. *Id.* at 673.

215. See Comment, *supra* note 2; Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261 (1987).

216. See *Fleet Factors Corp. v. United States*, 111 S. Ct. 752 (1991) (denying petition for *certiorari*).

217. EPA Lender Liability under CERCLA, 40 C.F.R. *reprinted in* 21 ENV'T REP. (BNA) No. 24, 1162 (Oct. 12, 1990) (to be formally codified upon review of comments). The Rule was drafted on September 14, 1990.

ated by the Eleventh Circuit.<sup>218</sup> The EPA's opposition to *Fleet Factors* extends beyond mere congressional testimony, however. The EPA has drafted an administrative rule<sup>219</sup> which specifies how the secured lender exemption to "owners or operators" in CERCLA should be interpreted.<sup>220</sup>

The EPA administrative rule (hereinafter the "Rule") is a dream come true for lenders, even going so far as to describe the *Fleet Factors*' "capacity to influence" rule as *dicta*.<sup>221</sup> The EPA issued the Rule as a "final interpretative rule" meant to specify "what actions they may take and still remain within the bounds of . . . the secured [lender] exemption . . ." <sup>222</sup> The Rule reconciles the lenders' needs to protect their security interest with those of the EPA to clean up hazardous wastes.<sup>223</sup> Although the EPA's Rule is favorable to lend-

218. EPA Administrator William K. Reilly testified that the EPA had not intended for banks "to get stuck with the costs, and we haven't adequately addressed this." Hamilton, *Passing the Buck on Toxic Cleanup; Lenders Increasingly Held Liable for Hazards on Foreclosed Sites*, Wash. Post, July 6, 1990, at C1, col. 1. Reilly also indicated that the EPA and the Department of Justice were attempting to resolve the lender liability issue. *Id.* The Rule states: "this rule seeks to reconcile the lender's need to manage loans with EPA's duty to clean up waste sites and recover public funds spent in remediating these sites." 21 ENV'T REP. (BNA) at 1163.

219. The Rule states:

EPA is promulgating this rule as a final interpretative rule which is effective upon publication in the Federal Register in accordance with the provisions of section 553(b) and (d) of the Administrative Procedure Act (APA). These sections of the APA authorize the Agency to issue interpretative rules without providing notice and opportunity to comment and to make today's rule immediately effective rather than wait for the expiration of a 30-day period. Because of the important issues that are raised by this interpretative rule, however, the Agency is accepting public comment for a sixty-day period. Upon review of the comments, EPA will formally codify the rule in 40 C.F.R. Part [].

EPA: Lender Liability under CERCLA, 21 ENV'T REP. (BNA) at 1162. As of the writing of this Comment, the EPA Rule was still on review at the White House Office of Management and Budget ("OMB").

220. According to James Strock, EPA Assistant Administrator for Enforcement, the procedural goal of the Rule is to "hold off legislation pending in the House and Senate that would tinker with CERCLA's liability language." *EPA Says Lenders May Influence Decisions in Draft Proposal Defining Lender Liability Issues*, 21 ENV'T REP. (BNA) 1139, 1140 (Oct. 12, 1990).

221. The EPA Rule seems so radically opposed to the *Fleet Factors* decision that it considers the "capacity to influence" rule "*dicta*." 21 ENV'T REP. (BNA) at 1162. The EPA does not explain why it believes the *Fleet Factors* rule to be *dicta*. Ostensibly, the EPA might consider the "capacity to influence" rule as *dicta* because Fleet could have been held liable as an operator or an actual participant in the facility and therefore, the court was not obliged to fashion a new and broad lender liability rule in order to hold Fleet liable. See *supra* notes 137-39.

222. 21 ENV'T REP. (BNA) at 1162.

223. *Id.* at 1163.

ers, some may argue it does not go far enough. The Rule merely interprets the secured lender exemption already in CERCLA, but does not modify the actual language of CERCLA. Lenders would prefer additional federal legislation indemnifying them from CERCLA cleanup liability altogether. Although doubtlessly the Rule would be accorded great weight in court and would be binding upon the EPA, if the language of CERCLA remains unchanged, courts may continue to differ on the interpretation of the secured lender exemption.<sup>224</sup> If legislation were passed which expressly indemnified lenders from CERCLA cleanup liability, however, courts would have no choice but to narrow the scope of liability for lenders.

Nevertheless, the Rule is significant because it originates from the agency which expends funds and efforts for waste cleanup, yet interprets CERCLA lender liability narrowly. The Rule interprets the lender exemption to permit a "broad range of lender activity."<sup>225</sup> Such an interpretation accomplishes three things: 1) it allows lenders to foreclose and resell property without being held liable for cleanup costs; 2) it allows lenders to participate in the financial management of a facility without incurring liability; and 3) it protects the FDIC and RTC from liability in their duties as conservators, receivers and liquidators of ailing and failed banks. The Rule, however, does not release from liability lenders who caused the release of hazardous waste.<sup>226</sup>

#### 1. Foreclosure and Resale of Property Held in Security

The EPA's Rule asserts that a lender may obtain title at a foreclosure sale and resell a property held in security while maintaining its exempt status under CERCLA.<sup>227</sup> There are two requirements which a lender must meet in order to avoid liability in this context. First, the EPA requires that the "temporary acquisition must be rea-

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224. Alan P. Vollman, Esq., a partner at Morrison & Foerster in Washington, D.C., argues that while the EPA interprets the secured lender exemption favorably, it cannot be as definitive on the issue of lender liability as actual legislation. *Environment: Legislation Said Needed to Undo Fleet Factors Lender Liability Decision*, Daily Report for Executives (BNA) No. 177 at A15 (Sept. 12, 1990). Vollman states that "legislation reform is preferable to the administrative solution proposed by the EPA because 'rule-making can't change what the statute says.'" *Id.*

225. 21 ENV'T REP. (BNA) at 1163.

226. *Id.* at 1162. The Rule discusses only the Agency's final interpretation of the secured lender exemption in CERCLA. The Rule does not mention the liability of lenders who cause the release or threaten release of hazardous substances. Since lenders who cause the release of hazardous substances are not covered by the secured lender exemption in CERCLA, and since the EPA Rule makes no specific mention of such provision, it can be inferred that the EPA did not wish to modify the liability of lenders who cause the release of hazardous substances.

227. *Id.* at 1164. This assertion directly counters the rule of *Maryland Bank* that once a lender acquires title to the property, it is liable. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986).

sonably necessary to ensure satisfaction or performance of the loan obligation."<sup>228</sup> The Rule shifts the burden of proof based on the length of time the lender holds the property. The Rule presumes that a lender who keeps property for six months or less prior to resale holds it for the purpose of protecting a security interest.<sup>229</sup> However, if a lender holds property for more than six months, the lender must show that it holds the property merely to protect a security interest.<sup>230</sup> The second requirement mandates disposal of the foreclosed property "as expeditiously as possible."<sup>231</sup> Evidence of the lender's attempts to expedite disposal of assets includes advertising, auctioning, and listing the property for sale with a sales agent.<sup>232</sup>

The Rule addresses the policy concerns voiced in *Maryland Bank* and *Fleet Factors* that banks obtain a windfall from governmental cleanup costs which leave properties with a higher market value.<sup>233</sup> The Rule provides for "equitable reimbursement . . . of the amount by which the lender has been enriched or has benefitted as a result of the EPA cleanup."<sup>234</sup> Thus, if the facility owned by a lender increases in value due to governmentally financed cleanup efforts, the lender will be liable for the amount of the increase.

## 2. Participation in the Financial Management of the Facility

Under the EPA's Rule, the participation of a lender in the financial management of a facility in order to protect the security interest is in itself insufficient to make a lender liable.<sup>235</sup> The Rule dictates that in order for a lender to become liable, he must participate in the operational management of the facility.<sup>236</sup> As a direct counter to the *Fleet Factors* rule that a lender may be held liable if he has the capacity to influence the waste dumping practices of the business,<sup>237</sup> the EPA's Rule asserts that "[p]articipation in the management' sufficient to void the [secured lender] exemption . . . does not include

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228. 21 ENV'T REP. (BNA) at 1164. This is synonymous with the requirement that the lender must hold indicia of ownership primarily to protect his security interest.

229. *Id.*

230. *Id.* at 1165.

231. *Id.*

232. *Id.*

233. See *supra* note 94 and accompanying text.

234. 21 ENV'T REP. (BNA) at 1165. S. 2827 in the Senate would also accomplish this purpose. See *infra* notes 281-82 and accompanying text.

235. 21 ENV'T REP. (BNA) at 1164-65.

236. *Id.* at 1164.

237. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir. 1990) *cert. denied*. 111 S. Ct. 752 (1991).



the mere capacity or ability to influence facility operations.”<sup>238</sup> The Rule’s interpretation of the secured lender exemption reaffirms the *Mirabile* rule — financial management is insufficient to make a lender liable — only participation in the operational management of a facility may result in lender liability.<sup>239</sup> Thus, under the Rule, a lender has not sufficiently participated in the management of a facility unless he has “divested the borrower of decision-making control over facility operations, particularly with respect to the hazardous substance present at the facility.”<sup>240</sup>

### 3. Exemption of FDIC and RTC from Lender Liability when Action is under FIRREA

As noted in this Comment, uncertainties have arisen concerning the liability of the FDIC and RTC acting as receivers and conservators of failed lending institutions.<sup>241</sup> The EPA’s Rule greatly limits the liability of the FDIC and RTC under CERCLA. First, the Rule interprets ownership of property for liquidation by the FDIC and RTC as part of the “involuntary acquisition” defense of CERCLA.<sup>242</sup> Second, the Rule suggests that the third party or “innocent landowner” defense might be available to the FDIC and RTC as an additional bar to liability, provided that the other requirements of the defense are met.<sup>243</sup>

After the EPA reviewed interagency comments on the Rule, the Agency issued a “revised rule” on January 24, 1991.<sup>244</sup> Although the revised rule still embodies the statements made in the original Rule, certain important changes have been made. Procedurally, the revised rule is no longer a “final interpretative rule,” but rather a “legislative rule.”<sup>245</sup> This is an important procedural modification because, while a legislative rule allows public comment, an interpretative rule does not.<sup>246</sup>

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238. *Id.* at 1165.

239. *United States v. Mirabile*, No. 84-2280, slip op. at 3-4 (E.D. Pa. 1985) (WESTLAW, WL 97).

240. *Id.*

241. That is, governmental entities such as the FDIC and RTC acting under the scope of their powers pursuant to the Federal Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), Pub. L. No. 101-73, 103 Stat 183. *See supra* note 177.

242. 21 ENV’T REP. (BNA) at 1166 (construing CERCLA § 101(35)(A)(iii), 42 U.S.C.A. § 9601(20)(D) (West Supp. 1990)).

243. *Id.* at 1165-66 (construing CERCLA § 107(b)(3), 42 U.S.C.A. § 9607(b) (West 1983)).

244. *See* 21 ENV’T REP. (BNA) 1908 (Feb. 22, 1991) (letter from EPA to Office of Management and Budget) and 21 ENV’T REP. (BNA) 1909-22 (Feb 22, 1991) (text of revised rule).

245. *See* Real Estate Finance Today, Feb. 18, 1991, at 3.

246. *Id.* Margaret V. Hathaway, director of commercial real estate finance at the Mortgage Bankers Association of America (hereinafter Hathaway), states that because

Second, while the prior Rule established a presumption of nonliability in favor of a lender if it had undertaken an environmental survey before granting a loan, the revised Rule eliminates that presumption.<sup>247</sup> Although the EPA continues to attach the status of probative evidence to environmental surveys, the agency made it clear in its revised rule that such surveys are neither required, nor do they constitute evidence that a lender has participated in management.<sup>248</sup>

Third, in the original draft of the Rule, the EPA named the FDIC and the RTC as government financial organizations which could be held liable for acquisitions of polluted inactive sites in their function as conservators and receivers for failed lending institutions.<sup>249</sup> The revised Rule dispensed with the names of government financial institutions, instead shifting to a nonexclusive indemnification of government institutions in general.<sup>250</sup> Consequently, *any* governmental institution which acquires property involuntarily in response to its statutory duties as conservator or receiver will be considered free from liability.<sup>251</sup>

Fourth, the revised Rule grants a "safe harbor" to lenders. The revised rule allows lenders to refuse foreclosure and walk away from security interests without incurring liability.<sup>252</sup> The original Rule attached liability onto lenders who either did not foreclose or delayed foreclosure, thus giving no opportunity for lenders to escape liability.

Although lenders are generally pleased with the revised Rule, some believe that the revised provisions are insufficient.<sup>253</sup> For example, the revised Rule still requires that private lenders liquidate polluted facilities within six months after foreclosure in order to show that they have acted expeditiously in selling off their security interests. After six months, however, the burden of proof shifts back to the lender who must prove that he acted expeditiously. Some lenders have noted that it is unreasonable to assume that a lender

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the prior rule was an interpretative rule, it "would not have given the public and the commercial real estate industry any opportunity to comment before the rule became effective." *Id.*

247. 21 ENV'T REP. (BNA) 1908 (Feb. 22, 1991). The EPA eliminated the presumption after research and concluded that it was "not workable." *Id.*

248. *Id.*

249. See 21 ENV'T REP. (BNA) at 1166.

250. 21 ENV'T REP. (BNA) at 1908 (Feb. 22, 1991).

251. *Id.*

252. Real Estate Finance Today, Feb. 18, 1991, at 3.

253. *Id.* Hathaway believes that "the new EPA draft still has many provisions that should cause the industry concern." *Id.*

can, in today's economic climate, successfully sell a polluted facility within six months.<sup>254</sup>

## VII. LEGISLATIVE ATTEMPTS TO PARTIALLY INDEMNIFY LENDERS FROM LIABILITY UNDER CERCLA

At present, the House of Representatives and the Senate are each considering legislation that would severely limit the liability of lenders under CERCLA. The legislation has received wide bipartisan cosponsorship.<sup>255</sup> The two bills differ on one major point. Whereas the Senate bill would indemnify both private lenders and government financial institutions,<sup>256</sup> the House bill seems to focus solely on the indemnification of private lenders.<sup>257</sup> For this reason, while some government financial institutions prefer the Senate bill, others prefer the House version, believing that the Senate bill is too all-encompassing and would therefore receive narrow judicial interpretation.<sup>258</sup>

### A. Legislation in the United States House of Representatives

To counter the recent tide of broad lender liability under CERCLA, Representative John J. LaFalce,<sup>259</sup> Chairman of the Committee on Small Business, introduced House Report 4494 (hereinafter "H.R. 4494") on April 4, 1990.<sup>260</sup> The purpose of H.R. 4494 is to expand CERCLA's definition of "owners or operators" to explicitly exempt lenders from liability if they "acquire . . . ownership or control

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254. *Id.* Hathaway states: "It is difficult to dispose of even a clean property in today's market within a six-month period, much less a property that may bear the stigma of past contamination and the threat of liability for clean-up costs." *Id.* at 3, 14. Hathaway additionally believes that it is unfair for the EPA to impose a six-month limit on the private lender presumption without imposing a similar limit on government financial institutions. *Id.* at 14.

255. The two pieces of legislation are S. 2827, 101st Cong., 2d Sess. (1990) in the Senate, and H.R. 4494, 101st Cong., 2d Sess. (1990) in the House of Representatives. The United States' banking community is undertaking intensive lobbying efforts to ensure passage of lender indemnification legislation. *EPA to Define Lender Liability*, *The Financial Times*, *World Ins. Rep.*, August 31, 1990.

256. S. 2827, 101st Cong., 2d Sess. (1990).

257. H.R. 4494, 101st Cong., 2d Sess. (1990), reprinted in 136 CONG. REC. E-1024 (Apr. 4, 1990).

258. See *Financial Institutions: FDIC, RTC Want More CERCLA Protection in Senate Bill Limiting CERCLA Exposure*, *Daily Report for Executives (BNA)* No. 140, at A-22 (July 20, 1990).

259. United States Representative John J. LaFalce is a Democrat who represents the population of the 32d Congressional District in the State of New York. He was first elected in 1974.

260. 136 CONG. REC. E-1023-24 (daily ed. April 4, 1990) (statement of Rep. John J. LaFalce). Rep. LaFalce introduced H.R. 4494 one month before *Fleet Factors* was decided. Once *Fleet Factors* was decided, he redoubled his criticisms of broad liability for lenders under the new rule. *Id.* LaFalce stated: "This has turned into the shotgun theory — sue everyone in sight." *Financial Institutions: FDIC, RTC Want More CERCLA Protection in Senate Bill Limiting CERCLA Exposure*, *supra* note 258, at A-22.

of the facility pursuant to the terms of a security interest . . . ."<sup>261</sup> The bill would also exempt lenders from liability if they acquired ownership pursuant to a lease agreement or while serving as indentured trustees for outstanding debt securities.<sup>262</sup> H.R. 4494, however, would indemnify only those lenders whose loans were secured by real property.<sup>263</sup> Since the FDIC and RTC rarely make loans secured by real property, therefore, H.R. 4494 probably would only protect private lending institutions and the SBA, not the FDIC or the RTC.<sup>264</sup>

It is important to note that while H.R. 4494 would widely eliminate lender liability under CERCLA, lenders that cause the release or threatened release of hazardous wastes would remain liable.<sup>265</sup> This reinforces the underlying scheme of CERCLA that cleanup liability should attach to those who are responsible for dumping hazardous wastes.

It is ironic that the Eleventh Circuit decided *Fleet Factors* after H.R. 4494 had already been introduced in the House of Representatives and received wide cosponsorship. The court based part of its decision on the belief that Congress would have expressly indemnified lenders who participated in the financial management of a facility

261. See 136 CONG. REC. E-1024 (daily ed. Apr. 4, 1990).

262. Amending the definition of "owners and operators," H.R. 4494 excludes the following:

(i) Any 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 . . . .

(iii) Any individual or institution or successor thereto that serves as an indenture trustee for outstanding debt securities or any certificates of interest or participation in any such debt securities and acquires ownership or control of a facility as a result of an event of default pursuant to the terms of an indenture agreement or similar financing document between such trustee and the issuing entity . . . .

(v) Any designated lending institution which acquires ownership of any facility in connection with a lease subject to regulation by applicable federal or state banking authorities.

H.R. 4494, 101st Cong., 2d Sess. (1990), reprinted in 136 CONG. REC. E-1024 (April 4, 1990).

263. *Id.*

264. *Financial Institutions: FDIC, RTC Want More CERCLA Protection in Senate Bill Limiting CERCLA Exposure*, supra note 258, at A-22 (statement of Steven A. Seelig, Director of FDIC's liquidation division).

265. Rep. LaFalce has stated that "if H.R. 4494 is enacted, a lender would still be liable if it caused or contributed to hazardous waste contamination, or if it became involved in management of the borrower's facility." Letter from Rep. LaFalce to members of Congress (August 3, 1990) (copy on file at the offices of the Pepperdine Law Review).

had Congress so intended.<sup>266</sup> At the same time that the court crafted this rationale, H.R. 4494 had already gathered many cosponsors. Thus, either the reasoning of the Eleventh Circuit as to congressional intent was erroneous, or Congress has, in the ten years since the passage of CERCLA, diametrically changed its intent as to the liability of lenders who participate in the financial management of a facility.

### B. Legislation in the United States Senate

After Representative LaFalce introduced H.R. 4494 in the House, Senator Edwin Jacob "Jake" Garn, ranking minority member of the Committee on Banking, Housing, and Urban Affairs introduced a similar piece of legislation known as S. 2827<sup>267</sup> on June 28, 1990.<sup>268</sup> S. 2827 would indemnify both private lenders and government financial institutions. The purpose of S. 2827 is to "improve the administration of the Federal Deposit Insurance Corporation and to make technical amendments to the Federal Deposit Insurance Act."<sup>269</sup> Part of S. 2827 is the Lender Liability Act of 1990, which would indemnify lenders from the liability of environmental cleanup costs.<sup>270</sup> Whereas H.R. 4494 would indemnify only private lenders, thereby excluding government financial institutions,<sup>271</sup> S. 2827 explicitly indemnifies both governmental financial institutions and private lenders.<sup>272</sup> S. 2827 would indemnify an "insured depository institution or mortgage lender" against liability for the "release, threatened release, storage or disposal of a hazardous substance . . . from property" which is "(1) acquired through foreclosure; . . . (2) held in a fiduciary capacity; or (3) held, controlled or managed pursuant to the terms of an extension of credit."<sup>273</sup>

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266. U.S. v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

267. S. 2827, 101st Cong., 2d Sess. (1990).

268. United States Senator Jake Garn is a Republican who represents the State of Utah. He was first elected in 1974.

269. S. 2827, 101st Cong., 2d Sess. \*1 (1990).

270. S. 2827, 101st Cong., 2d Sess. \*8-12 (1990).

271. *Financial Institutions: FDIC, RTC Want More CERCLA Protection in Senate Bill Limiting CERCLA Exposure*, *supra* note 258, at A-22 (statement of Steven A. Seelig, FDIC).

272. S. 2827, 101st Cong. 2d Sess. \*9 (1990). S. 2827 would also indemnify "the board of Governors of the Federal Reserve System, and any Federal Reserve Bank, the Federal Housing Finance Board and any Federal Home Loan Bank, the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration, . . . [and] the Farm Credit Administration." *Id.* at \*10.

273. *Id.* S. 2827 defines "property acquired through foreclosure" as:

Property acquired by a depository institution or mortgage lender —

(A) through purchase at sales under judgment or decree, power of sale, or from a trustee, if such property was security for an extension of credit previously contracted; or (B) through conveyance pursuant to an extension of credit previously contracted.

*Id.*

Like H.R. 4494, S. 2827 would not uniformly exempt lenders from liability. Lenders remain liable if they: 1) have "caused the release or threatened release" of hazardous waste; 2) had "actual knowledge" that hazardous waste was stored on the property and failed to take reasonable actions to prevent the release or threatened release; or 3) have benefited from the cleanup of the waste.<sup>274</sup> Thus, under S. 2827, a private lender who has benefited from the cleanup of waste from the property will be liable for the increase in value of the property from which he has benefited.<sup>275</sup>

S. 2827 would indemnify government financial agencies<sup>276</sup> against liability for:

the release, threatened release, use, storage, or disposal of hazardous substance . . . from property acquired — (1) in connection with the exercise of receivership or conservatorship authority or the liquidation or winding up of the affairs of an insured depository institution; (2) in connection with the provision of loans . . . ; (3) . . . in connection with any criminal, enforcement, or other civil proceeding, whether by settlement [or] order.<sup>277</sup>

Under S. 2827, government financial institutions would nevertheless be liable if they "caused the release" or had "actual knowledge" that the property contained waste but "failed to take all reasonable actions necessary to prevent the release of such substance."<sup>278</sup> Furthermore, S. 2827 requires that governmental financial institutions "take necessary actions to assure that depository institutions develop and implement adequate procedures to evaluate potential environmental risks that may arise from or at property or operations subject to their lending and fiduciary activities."<sup>279</sup>

The broad language of S. 2827 has troubled certain members of the financial community. These individuals believe that the wide breadth of S. 2827 might encourage narrow judicial interpretation of the indemnification language.<sup>280</sup> Nevertheless, while the financial

274. S. 2827 provides:

The exemptions provided . . . shall not apply to any person —

- (1) that has caused the release
- (2) with actual knowledge that a hazardous substance or similar material is used, stored, or located on property . . . ; or
- (3) that has benefitted from removal, remedial or other response action, but only to the extent of the actual benefit conferred by such action on that person.

*Id.* at \*10.

275. *See supra* notes 153-56 and 255-58 and accompanying text.

276. *See supra* notes 274-75 and accompanying text.

277. S. 2827, 101st Cong., 2d Sess. \*10-11 (1990).

278. *Id.* at \*11.

279. *Id.* at \*11-12.

280. *Financial Institutions: FDIC, RTC Want More CERCLA Protection in Senate*

community approves of both the House and Senate bills, financial institutions prefer S. 2827 because the Senate bill explicitly covers these government institutions as well as private lenders.

The introduction of H.R. 4494 and S. 2827, as well as the fact that a majority of Congress supports such legislation,<sup>281</sup> should clarify the intent of Congress with respect to lender liability for environmental cleanup costs. Even if the language agreed upon by a House and Senate conference committee is not as strong as that in the current Senate bill, the final version of the legislation may force the courts to recognize banks as exempt entities under CERCLA.

## VIII. CONCLUSION

By ruling that lenders are liable for cleanup costs under CERCLA if they possess the capacity to influence the dumping practices of borrowers, *Fleet Factors* has expanded the breadth of CERCLA lender liability to an unprecedented level. The *Fleet Factors* decision has adversely affected banks, businesses and government financial entities such as the FDIC and RTC.<sup>282</sup> Stricken with fear, banks have severely limited the availability of credit to businesses, both large and small. The restriction of available capital to small and large busi-

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*Bill Limiting CERCLA Exposure, supra* note 258, at A-22 (statement of Steven A. Seeig, Director of FDIC's Liquidation Division).

281. As of the writing of this Comment, H.R. 4494 has received 290 bipartisan cosponsors, whereas S. 2827 has received only one cosponsor: Senator Nancy Kassebaum (R-KS). Telephone interview with staff member of the Republican Policy Study Committee (Nov. 21, 1990). Presumably, the dearth of cosponsors for S. 2827 is due to the fact that only part of S. 2827 deals with CERCLA lender liability. Most of S. 2827 deals with FDIC reform. Thus, a Senator willing to cosponsor the lender liability provisions of S. 2827 without cosponsoring the FDIC reform provisions would be unable to do so. This explanation seems to be even more likely when cosponsorship of S. 2827 is compared to H.R. 4494. Although the indemnification language of S. 2827 is stronger than the language in H.R. 4494, there should nevertheless be a percentage of the Senate comparable to that in the House, adjusted for the stronger language of S. 2827. Regardless of S. 2827 cosponsorship, however, 290 cosponsors seems a sufficiently strong majority in the House to effectuate passage in that chamber. The Senate would probably follow, perhaps by the introduction of lender indemnification legislation as a separate bill.

282. The Southern Finance Project ("SFP"), a liberal research group in Charlotte, North Carolina, has criticized the strong position of lenders against broad lender liability. Collins, *Washington/Catherine Collins; Lenders Disputed on Contentions that Cleanup Laws Will Ruin Industries*, L.A. Times, October 7, 1990, at D2, col. 1. The SFP researched EPA files, which identified 17,095 parties as "potentially responsible" for CERCLA cleanup costs, and ascertained that only forty out of the 17,095 named parties were lenders. *Id.* The SFP also noted that by October, 1990, only seven lenders had paid cleanup costs, totalling \$653,000. *Id.* The fatal flaw in the SFP's reasoning is that, although lenders have perhaps not yet overwhelmingly been held liable for cleanup costs, the *Fleet Factors* decision makes the fear and uncertainty of lenders entirely legitimate since *Fleet Factors* makes broad lender liability the law in three states. While "the only thing we have to fear is fear itself," as Franklin Delano Roosevelt so aptly stated, lenders have something quite real to fear: the law. ROBERT ANDREWS, *THE CONCISE COLUMBIA DICTIONARY OF QUOTATIONS* 96 (1987).

nesses<sup>283</sup> is an undesirable result of broad lender liability. Businesses have suffered from this dearth of available credit. Finally, the FDIC and RTC have each suffered from broad lender liability due to the depletion of the depositor insurance fund and the inability to sell the assets of failed banks they hold for liquidation, respectively. Courts should not foster such broad liability, as it curtails economic growth at a time when growth is essential to overcome America's economic ills.

The EPA administrative Rule, H.R. 4494 and S. 2827 rectify the broad lender liability dilemma recently exacerbated by *Fleet Factors*. However, the end of broad lender liability will not, in itself, cure the continuing problem of environmental pollution. Concern for the environment has mounted dramatically within the past few years. Nevertheless, the question remains: who should be liable for cleanup costs? Of course, when the party responsible for waste dumping is solvent, the answer to this question is self-evident: the party responsible for the waste will reimburse the government for cleanup costs pursuant to CERCLA. This is logically fair. When the responsible party is insolvent or bankrupt, however, the problem becomes a political issue. The question then becomes: who should be liable, the taxpayer or a deep-pocket target who is not responsible for the waste?

This question may not have an answer. In the opinion of this writer, the present Superfund should be replaced by a fund created in the image of the original superfund idea.<sup>284</sup> The idea of the Superfund was originated by oil companies.<sup>285</sup> Beset by cleanup costs for oil spills, the companies were willing to contribute a certain sum to a fund which would be used to pay for cleanup expenses.<sup>286</sup> In exchange for their contributions, the oil companies wished to be exempt from liability.<sup>287</sup> The idea never came to fruition. Such an apportionment of liability, however, might be the correct path to follow with the Superfund. Perhaps industries which cause waste should be forced to contribute, based on need, a market share amount to a fund which would be drawn upon in the event that the

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283. Charles M. Mischow, regional president of Marine Midland Bank in Buffalo, New York, testified that "increased lender liability under CERCLA will affect not only lenders, but other sectors of the economy, such as businesses, farmers, and homeowners." Banking Report (BNA) 133 (July 23, 1990).

284. See *supra* note 33.

285. BNA U.S. ENVIRONMENTAL LAWS 14 (1988).

286. *Id.*

287. *Id.*



party responsible for waste is insolvent. The current strict liability scheme would no longer be necessary and companies that currently pollute would inevitably be pressured into environmental compliance by their companions in the fund. The present-day Superfund follows a scheme along these lines, but apportions contributions from excise taxes, mainly on petroleum and chemical feedstocks, and from taxes on corporations with annual incomes in excess of \$2 million.<sup>288</sup> Such a scheme would ease legal uncertainty and judicial delay. Most importantly, however, such a scheme would be fair: it would apportion liability according to fault either directly, through suits against responsible parties that can afford cleanup costs, or indirectly, through contribution from industries which pollute as a matter of fact.

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288. *See supra* note 34.