Secured Creditor CERCLA Liability after United States v. Fleet Factors Corp. – Vindication of CERCLA's Private Enforcement Mechanism

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SECURED CREDITOR CERCLA LIABILITY
AFTER UNITED STATES V. FLEET
FACTORS CORP.—VINDICATION
OF CERCLA’S PRIVATE
ENFORCEMENT MECHANISM

One of the most perplexing problems facing America in the 1990s is how to allocate the massive cost of cleaning up the thousands of hazardous waste sites now littering the country. The Government Accounting Office estimates there are over 425,000 hazardous waste sites in the United States.1 The Environmental Protection Agency (EPA) has surveyed only 20,000.2 The cost of cleaning up these contaminated properties will be substantial.

1. GAO Finds 425,380 Potential Superfund Sites; Florio Hits EPA for Delays in Site Assessments, 18 Env’t Rep. (BNA) No. 39, at 2,043 (Jan. 22, 1988). The dramatic increases in the estimates of the size of the problem during the last few years demonstrate the difficulty in gauging the scope of the problem. In stark contrast to recent Government Accounting Office (GAO) estimates, only ten years ago the Environmental Protection Agency (EPA) estimated that there were approximately 30,000 to 50,000 hazardous waste sites nationwide. H.R. REP. No. 1016, 96th Cong., 2d Sess. 18 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120. Congress specifically acknowledged the difficulty of quantifying, if not comprehending, the extent of the nation’s hazardous waste problem when it reauthorized the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1986. The report prepared in connection with this reauthorization observes that:

Superfund was passed in 1980 to address what many believed was a relatively limited problem. The EPA was instructed to find 400 hazardous waste sites. Most believed that cleaning up a site was relatively inexpensive and involved removing containers or scraping a few inches of soil off the ground.... Today, five years later, our understanding of the problem.... is entirely different. The Office of Technology Assessment now estimates there may be as many as 10,000 Superfund sites across the Nation, or an average of 23 sites per Congressional district. These sites range from industrial plants to river beds to city dumps where small businesses and households have disposed of solvents, paints and cleaning fluids. We now understand that a cleanup frequently goes far beyond simple removal of barrels. It often involves years of pumping contaminated water from aquifers. The total cost of completing the Superfund program is estimated to be as much as $100 billion. The total time will be decades.


2. Ann M. Burkhart, Lender/Owners and CERCLA: Title and Liability, 25 HARV. J. ON LEGIS. 317, 319 n.4 (1988). The EPA’s National Priority List (NPL), a list of sites most in need of cleanup, now totals over 1,100. EPA Adds 106 Sites to Final NPL, Leaving 20 Sites Proposed for List, 21 Env’t Rep. (BNA) No. 18, at 846 (Aug. 31, 1990). The EPA’s progress in cleaning up NPL sites has been disappointing. Less than 4% of all NPL sites have actually been cleaned up. See Senate Budget Chief Blasts Superfund, Inside EPA’s Superfund Rep.,
The average cleanup cost of a single hazardous waste site is $25.9 million\(^3\) and total cleanup costs are projected to be several hundred billion dollars.\(^4\)

This country produces fifty-seven tons of hazardous waste annually and improperly disposes ninety percent of it.\(^5\) In 1980, after realizing that effective disposal of "hazardous substances"\(^6\) was more fiction than reality, Congress acted.\(^7\) It responded to the significant environmental and public health hazards posed by improperly disposed hazardous substances by enacting the Comprehensive Environmental Response, Compensation and Liability Act.
CERCLA authorizes the EPA to clean up hazardous waste sites and to recover the costs it incurs, in addition to other specified damages, from the parties responsible for the contamination. This mandate may be accomplished in either of two ways. First, the EPA may issue an order requiring the owner of contaminated property to clean it up, or the EPA may sue the responsible parties for injunctive relief in a federal court when there is evidence of imminent and substantial danger to public health, welfare or the environment. Second, the EPA may institute a cleanup when hazardous waste is released and then sue the responsible parties for reimbursement of the cleanup costs.

CERCLA broadly defines four classes of persons responsible for cleanup costs. Persons who own or operate contaminated property, persons who

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9. See infra note 50 and accompanying text (describing CERCLA liability scheme).


11. 42 U.S.C. § 9607(a). Costs incurred in cleanups are typically referred to as "response costs." See infra note 50 and accompanying text (discussing the scope of liability under CERCLA). The EPA is having limited success in bringing cost recovery actions against potentially responsible persons. Cost Recovery-Inspector General Cites EPA Failure to Recover Cleanup Costs, 4 Inside EPA's Superfund Rep. No. 21, at 13 (Oct. 10, 1990). The EPA has only recovered $12 million of the $86 million it has spent cleaning up 964 sites with cleanup costs of less than $200,000. Id.
owned or operated such property at the time it was contaminated, and persons who generate or transport hazardous substances are strictly liable for cleanup costs. Thus, one does not have to directly place the hazardous materials in the ground or on the site to be liable for cleanup costs. Recently, secured creditors of the persons in these first two classes (i.e., present owners or operators and former owners or operators) have been drawn into the fold of those persons who may be held liable for cleanup costs. Courts have held, for example, that a creditor may be liable under CERCLA if it forecloses on contaminated property and becomes the property "owner," or if it becomes involved in the day-to-day operation of the debtor's business.

Secured creditors are justifiably concerned about CERCLA liability for two reasons. First, the average cost of cleaning up contaminated property is substantial and therefore is likely to exceed the principal balance of the debt. Consequently, possible environmental liability significantly hampers

12. 42 U.S.C. § 9607(a). For a discussion of the scope of liability under CERCLA, see note 50 and accompanying text.

13. See infra notes 48-54 and accompanying text.

14. See, e.g., United States v. Fleet Factors Corp., 724 F. Supp. 955, 1012 (S.D. Ga. 1988), aff'd in part, rev'd in part, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991); Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556, 562 (W.D. Pa. 1989); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986); see also Risks to Lenders-EPA Lists Cases Where Lenders Risk Liability, 4 Inside EPA's Superfund Rep. No. 21, at 25-28 (Oct. 10, 1990) (listing response-cost actions involving lender liability that have settled out of court). The EPA is currently investigating a limited number of other sites for which lenders may be sued for the cleanup costs. Id. at 28. In fact, the number of sites for which lenders may be required to help pay for the cleanup has been extremely limited. Lenders account for 0.2% of all potentially responsible parties identified by the EPA thus far in its investigation of the approximately 1,200 Superfund sites nationwide. Lender Liability Measure Still Alive; Garn Says He May Attach It to Other Bill, 21 Env't Rep. (BNA) No. 25, at 1,173-74 (Oct. 19, 1990). The EPA has apparently received contributions from a total of seven lenders. Lender Liability-Banks Have No Need of Protection, Group Says, 4 Inside EPA's Superfund Rep. No. 21, at 12-13 (Oct. 10, 1990) (citing Crying Wolf: Lender Liability At Superfund Sites, Southern Finance Project). According to a recent study of the seven instances in which secured creditors contributed to EPA cleanup costs, all but two involved contributions of less than $8,100. Id. at 12.

15. See supra note 14 and accompanying text.

a secured creditor's ability to gauge the economic risks associated with a transaction and fairly reflect those risks in the transaction's terms. Second, environmental liability is not, as a practical matter, an insurable risk. Insurance policies designed to provide coverage against environmental liabilities are prohibitively expensive.

In United States v. Fleet Factors Corp., the United States Court of Appeals for the Eleventh Circuit became the first federal appellate court to address secured creditor liability under CERCLA. Fleet Factors Corporation (Fleet) loaned Swainsboro Print Works (SPW), a textile manufacturer, operating capital from 1976 to 1981. Fleet took a security interest in SPW's accounts receivable, equipment, fixtures and the land on which SPW's manufacturing facility was located to secure repayment of these loans. SPW filed for bankruptcy in August, 1979. Fleet continued to finance SPW, now a "debtor-in-possession," for an additional nine months. Fleet refused to continue financing SPW in early 1981, and SPW ceased operating and liquidated its inventory soon thereafter. Later that year, SPW was adjudged bankrupt and a trustee assumed title and control over SPW's assets. Fleet foreclosed on the inventory and equipment in May, 1982.
Fleet then hired a contractor to auction the foreclosed collateral and the majority was sold “as is” and “in place” a month later.29 A third party, also hired by Fleet, removed the remainder of SPW’s equipment in August.30 Fleet, however, never foreclosed on SPW’s plant.31 Nearly two years later, the EPA discovered approximately 700 drums of chemicals on the property and substantial amounts of asbestos in some of the plant buildings.32 The EPA disposed of the chemicals and asbestos at a cost of $400,000.33

The EPA sued Fleet under CERCLA for the cost of its cleanup. It asserted two alternative theories for Fleet’s liability under CERCLA for these costs. The EPA argued that Fleet was liable as both the current “owner and operator” of the SPW plant under CERCLA § 9607(a)(1) and as the “owner and operator” at the time of the illegal disposal of the hazardous substances under CERCLA § 9607(a)(2).34 The district court held that Fleet was not the current owner and operator of the plant.35 The court, however, denied Fleet’s motion to dismiss the action on the second asserted basis of Fleet’s liability as the “owner and operator” at the time the hazardous substances were illegally disposed.36 Both Fleet and the EPA appealed.37

The Eleventh Circuit’s decision in Fleet Factors stunned the financial community.38 The decision was viewed as significantly expanding the bases

29. Id.
30. Id.
31. Id. at 1553. The record does not explain Fleet’s failure to foreclose on the realty. Nonetheless, it is reasonable to assume that Fleet, because of the decision in United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986), was concerned with owner liability under CERCLA and concluded that the value of the collateral did not justify risking exposure for cleanup costs.
32. Id.
33. Id.
34. Id. at 1554.
35. Fleet Factors, 724 F. Supp. at 960. Cross motions for summary judgment made this question moot. Id.
36. Id. at 961-62.
37. This was the first appellate court decision testing liability of secured creditors under CERCLA. The Ninth Circuit decided a case within a month of Fleet Factors that discussed some of the issues addressed by the Eleventh Circuit in Fleet Factors and generally endorsed the Eleventh Circuit’s decision. See In re Bergsoe Metal Corp., 910 F.2d 668 (9th Cir. 1990).
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Upon which a secured creditor may be held liable under CERCLA. It suggests that creditors will subject themselves to CERCLA liability when they participate in the management of a debtor to a degree indicating a "capacity to influence" the debtor's hazardous waste disposal decisions. This view of creditor conduct triggering liability is significantly more expansive than that imposed by the other courts that have examined this issue.

The courts, Congress and the EPA have simultaneously confronted the principal issue in Fleet Factors. Each is attempting to determine the circumstances under which a secured creditor is liable for environmental contamination caused by a debtor consistent with CERCLA. This Note begins by briefly reviewing CERCLA's statutory framework. It then considers the conflicting body of law that evolved prior to Fleet Factors. The Note next analyzes Fleet Factors and evaluates criticism of the decision by members of the financial and legal communities. This Note then critiques Fleet Factors' analysis of the "secured creditor exemption" and probes the function of secured creditor liability under CERCLA: Congress's intent to create a private enforcement mechanism to aid in the accomplishment of CERCLA's broad remedial goals. This Note argues that secured creditors play the integral role in this enforcement mechanism and indeed must do so if it is to function efficiently. Finally, this Note discusses the efforts of Congress and the EPA to play a greater role in determining when secured creditors should be liable for environmental damage caused by their debtors. This Note concludes that Fleet Factors, which holds that secured creditors who engage in more than discrete participation in their debtors' financial management are liable under CERCLA, is consistent with CERCLA's broad remedial mandate and is essential to its success. Imposing liability on secured creditors creates a private enforcement mechanism that leads to the identification of contaminated property. It also creates strong economic incentives for prop-

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39. Counsel for Fleet argued that the panel's decision creates a new class of liable persons in "failing to give any significant effect to the secured creditor exemption." Petition for Certiorari, supra note 20, at 7-10.


erty owners to voluntarily clean up contaminated property and avoid future contamination.

I. EVOLUTION OF THE SECURED CREDITOR EXEMPTION

A. CERCLA's Statutory Mandate: "The Polluter Must Pay"

In enacting CERCLA, Congress determined that existing hazardous waste sites must be cleaned up and those who created or contributed to the hazardous waste problem must participate in this effort. CERCLA was the second step in Congress's attempt to change the way companies evaluate the cost of pollution in their business endeavors. CERCLA's predecessor, the Resource Conservation and Recovery Act (RCRA), was the first step. RCRA, enacted in 1976, was designed to control the handling of hazardous wastes from creation through disposal. CERCLA, enacted four years later, was designed to supplement RCRA by providing the EPA with the enforcement authority to locate and clean up existing hazardous waste sites. It targets four classes of "persons" who, regardless of fault, are


46. See King, supra note 8, at 245-52 (discussing general background and operation of RCRA).


48. The term "person" is defined as an "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601 (1988).

liable for contamination damage and cleanup costs: 50 (1) the current owners

50. CERCLA liability is divided into four categories: cleanup costs (including enforcement costs), natural resource damages, civil penalties, and criminal penalties. Cleanup costs are divided into two categories: "removal" costs and "remedial action" costs. 42 U.S.C. §§ 9601(23)-(24), 9607(a) (1988). "Removal" is defined as the cleanup or removal of released hazardous substances. Id. § 9601(23). Removal costs can include costs incurred in whatever emergency action the EPA deems necessary, such as erecting a security fence around the contaminated property, providing alternative water supplies, or even temporary relocation of local residents who may be affected by the release of the hazardous substance. Id. "Remedial action" refers to returning the affected land, or other contaminated property, to its pre-release condition. Id. § 9601(24). Remedial action could, therefore, include any or all of the following: storage, confinement, dredging, excavation and destruction of contaminated property or soil. Liability for damage to "natural resources" includes liability for damages beyond the remediation of the ground and water at a contaminated property. See, e.g., Idaho v. Bunker Hill Co., 635 F. Supp. 665, 673-75 (D. Idaho 1986); see also Resource Damages—Long Awaited Rules Could be Superseded by Congress, 4 Inside EPA's Superfund Rep. No. 21, at 21 (Oct. 10, 1990). The term "natural resources" includes: "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any state or local government, [or] any foreign government." 42 U.S.C. § 9601(16). Maximum liability for damage to natural resources is $50 million. Id. Punitive damages may also be imposed under CERCLA. Punitive damages are triggered where a responsible party willfully refuses to comply with EPA cleanup orders issued under the Act. Id. § 9607(c)(3). Punitive damages may treble the amount actually incurred by EPA in conducting the cleanup efforts. Civil and criminal penalties under CERCLA are equally severe. CERCLA provides for the imposition of both civil and criminal penalties for persons who fail to comply with EPA orders or regulations. Id. §§ 9603(b), 9609. The amount of civil penalties on the length of time it takes to correct the violation and the nature of the violation itself. Id. § 9609. The maximum criminal penalty under CERCLA is imprisonment for five years. Id. § 9603(b). This penalty may be imposed for violation of the CERCLA notice requirements, destruction of records and the filing of false information. Id. § 9603(b)(3). Imposing criminal penalties is becoming more common. For example, on March 14, 1990, a man was sentenced to 41 months in prison, without eligibility for parole, for conduct relating to illegally dumping 16 55-gallon drums of toxic chemicals into a small tributary in rural Mississippi. Mississippi Man Sentenced to Prison.
and operators;\(^5\) (2) the owners or operators of the property at the time a hazardous substance was improperly disposed of;\(^5\) (3) the persons who arranged for the transportation, disposal, or treatment of the hazardous substances;\(^5\) and (4) the persons who transported hazardous substances to the property.\(^5\)

The case law involving actions against secured creditors have premised CERCLA liability on conduct by the creditor falling within the first two classes. The linchpin term employed in these first two classes of liable persons is "owner and operator." CERCLA defines an "owner or operator" as a person who "own[s] or operate[s]" contaminated property. The definition concludes with the following critical caveat: "such term does not include a person who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."\(^5\) This part of the definition is commonly referred to as the "secured creditor exemption."\(^5\)

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\(^5\) "for Dumping Hazardous Waste, 20 Env't Rep. (BNA) No. 48, at 1918 (Mar. 30, 1990). SARA amended CERCLA by establishing that all cleanup costs incurred by the EPA and damages awarded by a court constitute a lien in favor of the United States. 42 U.S.C. § 9607. The lien attaches to all real property subject to, or affected by, a cleanup action. The lien does not have priority over claims of a subsequent purchaser, a holder of a perfected security interest, or a judgment creditor unless the government can show that such parties had actual or constructive notice of the costs incurred by the government in connection with the affected property. Id. § 9607(l)(3). After the government lien is perfected, it will have priority over subsequent claims against the property filed by other creditors. Id.

\(^5\) 42 U.S.C. § 9607(a)(1) (1988); see, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1042-44 (2d Cir. 1985) (holding current owner of property liable for cleanup costs even though the party had not owned or operated the site at the time of the illegal disposal).


\(^5\) Id. § 9607(a)(3). Discussion of this class of responsible persons is beyond the scope of this Note.

\(^5\) Id. § 9607(a)(4). Discussion of this class of responsible persons is beyond the scope of this Note.

\(^5\) Id. § 9601(20)(A). The term for most types of contaminated property used in CERCLA is "facility." A "facility" is

(A) any building, structure, installation, equipment, pipe or pipeline . . . , 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.

42 U.S.C. § 9601(9).

\(^5\) Id. § 9601(20)(A) (emphasis added).

\(^5\) See, e.g., Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556, 562 (W.D. Pa. 1989). The district court judge that decided Fleet Factors was himself sufficiently unsure of his construction of the term "owner or operator" that he, sua sponte, certified it to the Eleventh Circuit. See United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.2 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991). Numerous legal scholars have entered the fray offering interpretations of the exemption. See, e.g., Roslyn Tom, Interpreting the Meaning of Lender
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B. Interpretations of the Secured Creditor Exemption Before Fleet Factors—Mixed Results on the Appropriate Threshold for Secured Creditor Liability

Early decisions defining the scope of the secured creditor exemption have been inconsistent.\(^{58}\) Courts have agreed that creditors clearly may act in ways that qualify them as an “owner or operator” for the purpose of CERCLA cleanup liability.\(^{59}\) However, the courts have not yet developed a principled means of determining when a creditor becomes an “owner or operator” rather than a third-party financier.\(^{60}\) The early decisions focused on two questions central to unraveling the meaning of the secured creditor exemption. First, the courts addressed the meaning of the phrase “primarily to protect a security interest.”\(^{61}\) These courts examined whether the secured creditor exemption protects all conduct taken “primarily to protect a security interest” from liability.\(^{62}\) Some courts concluded that any conduct reasonably designed to “protect the security interest,” including foreclosure, was encompassed within the exemption and therefore would not subject the creditor to liability.\(^{63}\) Other courts disagreed and held that some actions, such as foreclosure, are not protected regardless of the creditor’s motive. For example, in United States v. Maryland Bank & Trust Co.,\(^{64}\) the court concluded that the exemption does not protect creditors who foreclose. The exemption, by its own terms, only protects a creditor who “hold[s] indicia of Management Participation Under Section 101(20)(A) of CERCLA, 98 YALE L.J. 925, 928-29 (1989); Joel R. Burcat, Environmental Liability of Creditors: Open Season on Banks, Creditors & Other Deep Pockets, 103 BANKING L.J. 509, 513-14 (1986).


61. See, e.g., Maryland Bank & Trust, 632 F. Supp. at 578-79; Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,996. The same sentence of the secured creditor exemption contains these two phrases. 42 U.S.C. § 9601(20)(A) (1988) (stating that “the term ['owner or operator'] does not include a person, who, without participating in the management of the facility, holds indicia of ownership primarily to protect his security interest in the . . . facility”) (emphasis added).


64. Maryland Bank & Trust, 632 F. Supp. at 579-80.
ownership." Foreclosure extinguishes the security interest and, therefore, renders the exemption inapplicable. The court concluded that this interpretation of the exemption made sense because the exemption was intended to ensure that mortgagees would not be treated differently under CERCLA merely by virtue of different treatment of mortgages under state law.

Second, courts, recognizing that a creditor "participating in the management of the facility" is by definition acting outside of the exemption's protection, have attempted to distinguish permissible and impermissible participation in management. The courts have adopted two alternate approaches in distinguishing between such forms of creditor participation in management. The first approach, a "high-level participatory" approach, holds that secured creditors must be allowed maximum flexibility when dealing with debtors. Under this approach, a secured creditor will only be liable for cleanup costs if it becomes involved in the "day-to-day operational affairs" of the debtor. Courts adopting this approach reason that liberal imposition of liability on secured creditors could adversely affect a creditor's investment and the accomplishment of CERCLA's goals. The second approach, a "low-level participatory" approach, applies a more literal reading

65. Id. at 579 (emphasis added).
66. Id.
67. Id. at 579-80. A majority of states treat mortgages as conveying no title to the encumbered property. Thus, a mortgage in these states only creates a right to force a sale of the mortgaged property in the event the mortgagor defaults under the terms of the mortgage. Id. In these states, called "lien-theory states," a mortgagee would not be an "owner" under CERCLA because the mortgage only conveys equitable title to the property. Id. However, in the minority of states in which mortgages are considered to convey title to property to the mortgagee for the term of the mortgage, so-called "title-theory states," a mortgagee would be liable under CERCLA as the "owner" of the property. Id. Thus, the Maryland Bank & Trust court concluded that the secured creditor exemption was designed to eliminate any discrepancy in treatment of creditors under CERCLA simply based on the difference in the treatment of mortgages in lien-theory states and in mortgage-theory states. Id.; see also infra notes 110-11.

69. See infra notes 77-78 and accompanying text.
of the phrase "participate[d] in the management of the facility." These courts hold that a creditor is not protected by the secured creditor exemption if it has provided more than "financial advice" or "isolated instances of specific management advice" to a debtor.\(^\text{72}\)

I. United States v. Mirabile: Creditors Are Exempt From Liability If They Are "Protecting" Their Security Interest

Two courts have advocated a high-level participatory construction of the secured creditor exemption.\(^\text{73}\) In the first case, *United States v. Mirabile*,\(^\text{74}\) American Bank & Trust Co. foreclosed on a paint factory owned and operated by its debtor, Turco, Inc. American Bank assigned its winning bid at foreclosure to the Mirabiles four months after the foreclosure sale.\(^\text{75}\) The Pennsylvania Department of Environmental Resources contacted the Mirabiles shortly after they acquired the property\(^\text{76}\) and ordered removal of several hundred drums containing hazardous substances from the property.\(^\text{77}\) The Mirabiles moved the drums to a warehouse on the property.\(^\text{78}\) The EPA, however, concluded that the Mirabiles’ efforts were inadequate, cleaned up the property itself, and sued the Mirabiles for the $250,000 it incurred in the cleanup.\(^\text{79}\) The Mirabiles, in turn, sued the banks, including American Bank, that had financed Turco’s paint factory operations.\(^\text{80}\)

The district court dismissed the Mirabiles’ claims against American Bank.\(^\text{81}\) The Mirabiles argued unsuccessfully that American Bank was liable for cleanup costs because it had participated in Turco’s management during the contamination, and because it was a prior owner of the property.\(^\text{82}\)

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\(^\text{72}\) See *Fleet Factors*, 724 F. Supp. at 960. The *Mirabile* court weighed the policy implications of this more restrictive view of the level of participation in management afforded by the secured creditor exemption. See *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,996 (noting that imposition of liability on secured creditors enhances the government’s chance of being reimbursed for cleanup costs and would also help ensure more responsible management of hazardous waste facilities).


\(^\text{74}\) Id. at 20,996.

\(^\text{75}\) Id. at 20,992, 20,994 (E.D. Pa. Sept. 4, 1985).

\(^\text{76}\) Id. at 20,993.

\(^\text{77}\) Id.

\(^\text{78}\) Id. Consolidating these drums in the warehouse did not increase or decrease the existing health risks posed by the chemical drums. Id.

\(^\text{79}\) Id.

\(^\text{80}\) Id. at 20,995.

\(^\text{81}\) Id. at 20,996. The court also dismissed American Bank’s third party claim against the Small Business Administration (SBA) because the SBA had not exercised managerial control over Turco. Id. at 20,997.

\(^\text{82}\) Id. at 20,996.
The court concluded that American Bank did not participate in Turco's management to the degree necessary to remove it from the protection of the secured creditor exemption. Specifically, the court found that American Bank did not become involved "in the nuts and bolts day-to-day production aspects of the business," and that "general financial participation" was an insufficient predicate to CERCLA liability. The court concluded that American Bank would have participated in Turco's management to a degree to remove it from the protection of the secured creditor exemption only if it had become responsible for "operational, production, or waste disposal activities.

The court also concluded that American Bank had not become the "owner" at foreclosure. The court accepted American Bank's argument that its foreclosure represented no more than an on-going effort to "protect its security interest." Therefore, in this court's view, the bank's conduct was consistent with the underlying purpose of the secured creditor exemption. The court did not determine, however, whether the foreclosure vested American Bank with ownership as defined by CERCLA.

The court explicitly rejected the Mirabiles' policy-based arguments in favor of including lenders that have foreclosed within the definition of an "owner and operator." The court acknowledged that "imposition of liabil-

83. Id. The court declined to address the question of whether American Bank's successful bid at foreclosure, without more, brought American Bank within the definition of an "owner" under CERCLA. Id. The court did not reach this issue because doing so was unnecessary, as it had already concluded that the creditor's conduct was within the permissible scope of participation in management protected by the secured creditor exemption. Id.

84. Id. at 20,995 ("Mere financial ability to control waste disposal practices of the sort possessed by the secured creditors in this case is not . . . sufficient for the imposition of liability.").

85. Id. The court relied on the legislative history of the definition of "operator" to support this conclusion. The district court judge quoted the following passage from the legislative history of a bill ultimately incorporated into CERCLA: "In the case of the facility an 'operator' is defined to be a person who is carrying out operational functions for the owner of the facility pursuant to an appropriate agreement." Id. at 20,996 (quoting H.R. REP. NO. 172, 96th Cong., 2d Sess. 35 (1980), reprinted in 1980 U.S.C.C.A.N. 6160, 6180). Some have argued that a person must be both an owner and an operator to incur liability under § 9607(a)(2). Other courts have uniformly rejected this proposition. See United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990) (identifying courts that have adopted this interpretation), cert. denied, 111 S. Ct. 752 (1991).

86. Id. at 20,994.

87. Id. at 20,996. Interestingly, the court acknowledged that a different rule might be appropriate where a secured creditor finances the business operation of an entity solely involved in the hazardous waste disposal business. Id. n.5.

88. Id.; see also text accompanying infra note 92.

89. Id.

ity on secured creditors or lending institutions would enhance the government's chances of recovering its cleanup costs, given the fact that owners and operators of hazardous waste sites are often elusive, defunct, or otherwise judgment proof.91 Nevertheless, the court concluded that Congress had unambiguously provided a means by which secured creditors, such as American Bank, could protect themselves from liability under CERCLA—by holding indicia of ownership to protect a security interest without participating in management activities—and that American Bank had done just that.92

Not all of Turco's former lenders fared as well as American Bank. The court refused to dismiss the complaint against Mellon Bank because it's involvement in Turco's business was more substantial than that of American Bank.93 The court observed that some of Mellon Bank's activities did not give rise to liability.94 These "non-participatory" activities included "monitoring the cash collateral accounts, ensuring that receivables went to the proper account, and establishing a reporting system between [Turco] and the bank."95 Yet, the court found that some of the bank's actions could be construed as participation in management.96 The activities giving rise to Mellon Bank's potential "participation in management" included ordering manufacturing procedure changes, weekly visits to the Turco factory, ordering certain personnel changes, and determining which supply orders would be filled.97 The court noted that because important factual issues existed regarding the scope of Mellon Bank's participation in Turco's operations, summary judgment was inappropriate.98

91. Id. This recitation of the policy justifications for imposing liability on secured creditors is incomplete. It ignores the problem that a lender can withhold foreclosing until the EPA has stepped in to clean up the property, thus ensuring the undiminished value of the collateral and allowing the creditor to reap a windfall at taxpayer expense. See United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 580 (D. Md. 1986). The court also ignores the generally accepted principle underlying CERCLA that those who profit from pollution will be liable for remedial costs. See supra note 43 and accompanying text. Perhaps most importantly, this court ignores the role of secured creditors in CERCLA's enforcement structure.

93. Id. at 20,997.
94. Id.
95. Id.
96. Id.
97. Id.
98. Id. The court was skeptical whether these activities constituted participation in the management of Turco: "[T]he reed upon which the Mirables seek to impose liability on Mellon is slender indeed; however, . . . [there are nonetheless genuine issues of fact whether Mellon Bank] engaged in the sort of participation in management which would bring a secured creditor within the scope of CERCLA liability." Id.
2. United States v. Maryland Bank & Trust Co.: Emphasizing the Negative Consequences of Creating a Safe-Harbor for Secured Creditors

In United States v. Maryland Bank & Trust Co., the secured creditor was held liable for CERCLA cleanup costs amounting to nearly four times the amount of its loan. In 1980, Maryland Bank financed the acquisition of a landfill in which hazardous wastes had been improperly dumped. The borrower defaulted on the loan and Maryland Bank foreclosed on the property in May, 1982. A year later, local environmental authorities learned about the hazardous substances on the property. The EPA, after cleaning the property, sought reimbursement from the bank for its cleanup costs.

Maryland Bank disputed its liability for the cleanup costs and refused to reimburse the EPA. The government sued and each side sought summary judgment on the issue of liability. The bank raised three arguments in support of its motion for summary judgment. First, the bank argued that the term "owner and operator" is properly read in the conjunctive and therefore only imposes liability on persons whose conduct involves both ownership and operation. The court examined CERCLA's legislative history and held that either ownership or operation was a sufficient basis upon which to impose liability. CERCLA defines "operator" as someone "who carries out operational functions for the owner of the facility." The court observed that, by definition, an "operator" could not be the same person as an "owner." Thus, the court concluded that the phrase "owner and operator" should be construed in the disjunctive.

100. Id. at 582.
101. Id. at 575.
102. Id.
103. Id.
104. The ensuing EPA cleanup cost $550,000 and necessitated the removal of 237 drums of toxic chemicals and 1,180 tons of contaminated soil. Id. at 575-76.
105. Id. at 576.
106. Id. at 577.
108. Confusion over this issue stems in large part from the fact that the statute refers to "owner or operator" in the definitional section and "owner and operator" in the section identifying who will be subject to liability. Compare 42 U.S.C. § 9601(20) with § 9607(a)(1) (emphasizes added). Construction of the term "owner and operator" used in § 9607(a)(1) in the disjunctive is now well-established. See, e.g., United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985); Artesian Water Co. v. Government of New Castle County, 659 F. Supp. 1269, 1280 (D. Del. 1987), aff'd, 851 F.2d 643 (3d Cir. 1988).
Next, Maryland Bank argued that foreclosure was undertaken solely to “protect its security interest” and was therefore protected by the secured creditor exemption. The court rejected this argument as well.

The [secured creditor] exemption covers only those persons who, at the time of the clean-up, hold indicia of ownership to protect a then-held security interest in the land. The verb tense of the exclusionary language is critical. The security interest must exist at the time of the clean-up. The mortgage held by [the bank] (the security interest) terminated at the foreclosure sale . . . , at which time it ripened into full title.109

The court reasoned that the purpose of the exemption was to protect persons holding mortgages in those states which adhere to the title-theory of mortgages.110 Therefore, the court concluded that the phrase “primarily to protect the security interest” exempted only those mortgagees who, under the law in title-theory states, were deemed to hold actual title to the property simply by virtue of their status as mortgagees.111

Finally, Maryland Bank argued that Mirabile, which allowed the secured creditor to assign its winning bid in foreclosure without incurring liability as the property owner at the time of the cleanup, should be controlling.112 The district court disagreed. The court first distinguished Mirabile by noting that American Bank assigned its title taken at foreclosure to a third party within four months of the foreclosure, whereas Maryland Bank held title to the property for over four years.113 The court then expressed its overall

110. Id. at 579. Not all commentators agree with the Maryland Bank court’s conclusion that the purpose of the secured creditor exemption is to protect secured creditors doing business in title theory states.

The . . . court’s restriction of the security interest exemption makes it a virtual nullity. Under the court’s interpretation, only mortgagees in thirteen states have some limited protection. Presumably, mortgagees in other states and secured creditors holding security other than a mortgage have no protection under CERCLA. Since a security interest is a present property interest in the collateral, pursuant to the court’s reasoning, any individual holding a mortgage in thirty-seven states and other secured creditors are potentially liable as “owners.”

Burcat, supra note 57, at 534 (footnote omitted). But see Burkart, supra note 2, at 338 (agreeing with the Maryland Bank court that the purpose of the secured creditor exemption is “to ensure that mortgage holders are treated similarly under [CERCLA] despite differing state law treatments of the interests created by a mortgage”); Note, Cleaning Up the Debris After Fleet Factors: Lender Liability and CERCLA’s Security Interest Exemption, 104 Harv. L. Rev. 1249, 1258-63 (1991).

111. Maryland Bank & Trust, 632 F. Supp. at 579 n.5, 580 (noting, but not wholly endorsing, the view that the length of time which title is held may have an effect on whether foreclosure is an act designed to protect one’s security interest).

112. Id. at 580.

113. Id. at 579 n.5.
disapproval of the result reached in Mirabile. For example, the court observed that allowing foreclosure without triggering liability would “convert CERCLA into an insurance scheme for financial institutions.” A secured creditor collateralizing a loan with contaminated property, the court reasoned, could foreclose and wait for the government to step in and clean it up, thereby ensuring no diminution in the value of its collateral. The court deemed such a result counterintuitive. Moreover, the Maryland Bank court asserted that the secured creditor exemption did not need a judicially-created foreclosure loophole to satisfy the creditor’s desire to avoid liability. Mortgagees, the court observed, could readily protect themselves from liability by investigating and discovering potential environmental problems before agreeing to make the loan in the first place.

114. Id. at 580 (“the legislative history and policies behind the Act counsel against such a generous reading of section 101(20)(A)’s exclusion”).
115. Id.
116. Id. (“CERCLA will not absolve [creditors] of their responsibility for their mistakes of judgment.”). The court explained that “[f]inancial institutions are in a position to investigate and discover potential problems in their secured properties. For many lending institutions such research is routine.” Id. This observation is accurate in only a limited sense. The term “research,” as it is used by the court, is misleading because there is no standard for “appropriateness” of that research. Discussion of the effectiveness of, and the legal effect of, conducting an environmental audit is beyond the scope of this Note. Generally, however, environmental engineers perform one of two different kinds of environmental audits: the “pure-test environmental audit” and the “phase I environmental audit.” The pure-test environmental audit involves the random drilling of test wells on a property. See Mauch, supra note 49, at 775. Engineers remove soil and groundwater samples and test them for any one of a “standard” group of contaminants. Id. The Phase I environmental audit cannot be similarly defined because “the scope of the service still varies substantially from firm to firm.” Id. Phase I “refers to a methodology according to which the investigation is conducted in multiple phases.” Id. at 745-46 & n.17. The first phase of the investigation is a broad-based investigation of available information about the history, uses, and general condition of the property, and each successive phase is a more specific investigation of conditions indicated in the earlier phases. The more specific investigation conducted in later phases is pursued until the suspect conditions are either confirmed or determined not to constitute a threat, within a given degree of certainty. Id. at 746; see also Ronald D. Miller & Mark J. Bennett, Government Records: An Essential Element of Environmental Due Diligence, 3 Toxics L. Rep. (BNA) No. 30, at 920 (Dec. 21, 1988). Both tests have been subject to criticism centering on their effectiveness for ascertaining the condition of the property. See, e.g., Mauch, supra note 49, at 775. For example, pure-test environmental audits test for only a small fraction of substances for which a purchaser could be held liable under CERCLA. Id. Moreover, according to one critic, the results are “only useful for the particular cubic yard of property from which the sample was taken.” Id.

Guidice v. BFG Electroplating & Manufacturing Co.\(^\text{117}\) stemmed from the illegal disposal of hazardous substances on a manufacturing site owned by BFG Electroplating and Manufacturing Co. (BFG).\(^\text{118}\) BFG sued current and former owners, as well as a bank that had financed the former owner's manufacturing operations on an adjacent property, after the contamination was discovered.\(^\text{119}\) The bank, National Bank of the Commonwealth (National Bank), foreclosed on the adjacent property and held title for eight months.\(^\text{120}\)

The court analyzed National Bank's potential CERCLA liability chronologically, noting that there were two relevant time periods—the period when National Bank held a mortgage on the property and the period when National Bank held title to the property—in its inquiry.\(^\text{121}\) As to the pre-foreclosure period, the court held that CERCLA exempts a lender from liability so long as it does not participate in the management or operation of the facility.\(^\text{122}\) During this period, National Bank advanced numerous lines of credit secured by the property and/or the borrower's accounts receivable,\(^\text{123}\) received periodic financial statements from the borrower,\(^\text{124}\) and met with the borrower's executives on several occasions after the borrower defaulted. During the meetings, the bank was given information on the status of the borrower's accounts, personnel changes, and raw material availability.\(^\text{125}\) In addition, National Bank officials "actively assisted" in seeking Small Business Administration (SBA) financing for the borrower and initiated contacts with local officials "in an effort to assist [the debtor] with wastewater discharge compliance."\(^\text{126}\) The bank also inspected the property and contributed half of the $20,000 cost of removing twenty drums of toxic chemicals stored on the property.\(^\text{127}\) Finally, National Bank found a lessee for the property after the debtor ceased its manufacturing operations.\(^\text{128}\)

\(^{118}\) Id. at 557.
\(^{119}\) Id.
\(^{120}\) Id. at 559.
\(^{121}\) Id. at 561-63.
\(^{122}\) Id. at 561.
\(^{123}\) Id. at 562.
\(^{124}\) Id.
\(^{125}\) Id.
\(^{126}\) Id.
\(^{127}\) Id. at 560.
\(^{128}\) Id. at 559-60.
The court concluded that the bank's pre-foreclosure activities were insufficient to constitute "participation in the management or operation of the facility."\textsuperscript{129} The court explained that there was "no evidence suggesting that the Bank controlled operational, production or waste disposal activities at the . . . [p]roperty."\textsuperscript{130} The court reasoned that a fundamental goal underlying CERCLA is promoting the "safe handling and disposal of hazardous waste."\textsuperscript{131} The court believed that setting a low threshold of what constitutes "participation in management" would have a significant negative impact; it would deter creditors from closely monitoring environmental aspects of their borrowers' operations so as to avoid potential CERCLA liability.\textsuperscript{132} The court observed that in order to "encourage banks to monitor a debtor's use of security property, a high liability threshold [was appropriate because it would] enhance the dual purposes of protecting the bank's investments and promoting CERCLA's policy goals."\textsuperscript{133}

The court, however, held that the bank became liable as the property "owner" when it foreclosed.\textsuperscript{134} The court considered the divergent precedents of \textit{Mirabile} and \textit{Maryland Bank}. \textit{Maryland Bank} held that after a lender forecloses on a property, the secured creditor exemption no longer applies.\textsuperscript{135} The \textit{Mirabile} court, however, concluded that foreclosure does not end the exemption's protection if it represents no more than a continuing effort by a lender to protect its security interest.\textsuperscript{136} The \textit{Guidice} court concluded that \textit{Maryland Bank} was more persuasively reasoned.\textsuperscript{137} The court observed that the 1986 amendments to CERCLA supported the "narrow reading" of the secured creditor exemption adopted in \textit{Maryland Bank}.\textsuperscript{138}

\textsuperscript{129} \textit{Id.} at 562.
\textsuperscript{130} \textit{Id.} This statement indicates a lack of precision in the court's analysis of this issue. The court equates the conduct that constitutes operation with the conduct that constitutes participation in the management of the facility. See United States v. Fleet Factors Corp., 901 F.2d 1550, 1556 n.6 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991). The court's construction renders CERCLA's distinction between "operators" and "owners that participate in management" superfluous.
\textsuperscript{131} \textit{Guidice}, 732 F. Supp. at 562.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.} at 562-63 (holding the secured creditor liable because "an exemption for landowning lenders would create a special class of otherwise liable landowners, and [because of] the failure of the 1986 amendments to specifically exempt mortgagees-turned-landowners").
\textsuperscript{135} \textit{Id.}
\textsuperscript{137} \textit{Guidice}, 732 F. Supp. at 563.
\textsuperscript{138} 42 U.S.C. § 9601(20)(D) (1988). Courts have noted that Congress's failure to amend the secured creditor exemption when it enacted SARA supports the conclusion that Congress intended to make lenders that foreclose on contaminated property liable for cleanup costs. \textit{Guidice}, 732 F. Supp. at 563.
The court reasoned that the fact that post-Maryland Bank amendments “did not simultaneously amend the statute to exclude from liability lenders who acquire property through foreclosure might indicate that Congress intended to hold them liable as owners.”\(^\text{139}\) The court further reasoned that failure to hold the title holder liable would “frustrate the distribution of clean-up costs achieved by CERCLA as well as reallocate the risks assumed in owning real property.”\(^\text{140}\)

The unsettled state of this important area of law provided fertile ground for the Eleventh Circuit’s decision in Fleet Factors.

II. **FLEET FACTORS—THE ELEVENTH CIRCUIT’S APPROACH TO SECURED CREDITOR LIABILITY UNDER CERCLA**

The Eleventh Circuit suggested that to determine Fleet’s liability under CERCLA it must assess whether Fleet was the current “owner or operator” of the SPW facility within the meaning of CERCLA § 9607(a)(1),\(^\text{141}\) and

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140. Id. But see In re Bergsoe Metal Corp., 910 F.2d 668, 671 (9th Cir. 1990) (holding that a current owner is not liable for cleanup costs when it only held title to the property to secure performance of its debtor’s obligations). A local government authority owned the property at issue in Bergsoe. Id. at 669-70. The government agreed to sell the property to Bergsoe Metal and support the company’s attempt to finance a lead recycling operation on the property by issuing industrial revenue bonds. Id. at 670. The transaction involved a sale-leaseback of the property to the government. Id. The facts amply demonstrate that the local authority was not involved in the project other than in facilitating the original bond financing. Id. at 671-72. The court construed the decision in Fleet Factors as requiring a secured creditor to participate in some way in the management of the facility before a secured creditor is removed from the protection of the exemption. Id. at 672. The Ninth Circuit refused to hold the local government liable for cleanup costs because the court agreed that some level of participation in the management of a facility must exist before liability as an owner arises. Id. at 672-73 (“What is critical is not what rights the Port had, but what it did. The CERCLA security interest exception uses the active ‘participating in management.’ Regardless of what rights the Port may have had, it cannot have participated in management if it never exercised them.”); see also Holding Indicia of Ownership in Facility Does Not Establish CERCLA Liability, Court Says, 21 Env’t Rep. (BNA) No. 16, at 788 (Aug. 17, 1990) (discussing Bergsoe Metal holding).
141. See 42 U.S.C. § 9607(a)(1) (1988). The district court rejected the government’s claim that Fleet was liable as the present owner of the facility. United States v. Fleet Factors Corp., 724 F. Supp. 955, 960 (S.D. Ga. 1988), aff’d in part, rev’d in part, 901 F.2d. 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991). The circuit court agreed. Fleet Factors, 901 F.2d at 1554-55. Detailed discussion of the law under this provision of CERCLA is beyond the scope of this Note. The circuit court construed this section of CERCLA to target the owner of the facility at the time that the cost recovery action is filed by the government. Id. at 1554. On the date that the government filed this action the facility was owned by the county government. Id. at 1553. CERCLA provides, however, that in the event the property is acquired by a governmental entity due to foreclosure, abandonment, tax delinquency or bankruptcy, then “any person who owned, operated or otherwise controlled activities at the facility immediately beforehand” will be liable as the current owner for the purposes of § 9607(a)(1). 42 U.S.C. § 9601(20)(A)(iii). The circuit court noted that the facility was in fact “owned” by the
whether Fleet was the “owner or operator” at the time the hazardous substances were disposed of within the meaning of CERCLA § 9607(a)(2). An affirmative response to either question would be sufficient to hold Fleet liable for the EPA’s full costs for cleaning up the SPW property. The district court, on cross motions for summary judgment, held that Fleet was not the current “owner or operator” of the facility. The district court, however, refused to grant Fleet summary judgment on its liability as an “owner” at the time of the disposal of the hazardous substances by SPW. The trial court concluded that disputed factual issues regarding Fleet’s participation in SPW’s management had to be resolved in order to determine whether Fleet stepped outside of the protection of the secured creditor exemption. Both parties appealed.

A. Fleet’s Liability as the “Current Owner” of the SPW Facility

Section 9607(a)(1) of CERCLA imposes liability for cleanup costs on persons “owning or operating [the contaminated] facility.” The circuit court, affirming the district court, held that the individual who owns or oper-

deptor’s trustee in bankruptcy prior to the county’s acquisition of the property and therefore that Fleet did not fall within the reach of CERCLA’s use of the term “current owner and operator.” Fleet Factors, 901 F.2d at 1555.

144. Fleet Factors, 724 F. Supp. at 960. The district court adopted a somewhat more restrictive view of the level of participation in a debtor’s affairs than Mirabile or Guidice in reaching the conclusion that Fleet had not participated in the management of the SPW facility. See supra notes 96-100. The court summarized its construction of the conduct permitted under the secured creditor exemption as follows: [the phrase ‘participation in management’] permit[s] secured creditors to provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation.

Id. at 960 (citing 42 U.S.C. § 9601(20)(A) (1988)).
145. Id. at 961.
146. Fleet Factors, 901 F.2d at 1554.
147. Id. (quoting 42 U.S.C. § 9601(20)(A)(ii)); see also supra note 55 (defining “facility”)). Fleet unsuccessfully argued that the issue of its liability under this section of CERCLA had not been appealed by the government and therefore was not properly before the circuit court. Id. at 1554 n.2. The court dismissed this argument based on the lower court’s certification of its order. Id. The court noted that the Supreme Court has held that the effect of an interlocutory appeal is to bring the entire lower court order before the appellate court, not merely the specific question certified. Id. (citing United States v. Stanley, 483 U.S. 669, 676-77 (1987)). Moreover, the circuit court, reprinting the lower court’s certification, concluded that Fleet’s liability under this section was one of the issues specifically certified for its review. Id.
ates a contaminated property on the date the government files a complaint to recover cleanup costs is liable under this section of CERCLA. The county government, not Fleet, owned the SPW plant on the date the government filed its complaint. The county government, however, was exempt from CERCLA liability under a special exclusion applicable to governmental entities that "involuntarily" acquire contaminated property. The special exclusion shifts liability to the "person who owned, operated or otherwise controlled activities at [the] facility immediately beforehand." The SPW trustee-in-bankruptcy held title to the SPW facility prior to the county. Fleet was not involved in the facility from the time the trustee acquired title until the county foreclosed. The Eleventh Circuit interpreted the words "immediately beforehand" to mean "without intervening ownership, operation, and control." The circuit court, affirming the district court, held that Fleet could not be held liable as the "current owner" as a result of the trustee's intervening ownership.

B. Fleet's Liability as the Owner of the SPW Facility at the Time of the Disposal of Hazardous Substances

Section 9607(a)(2) of CERCLA imposes liability on a secured creditor if he is the "owner" or "operator" of the property when hazardous substances are improperly disposed. The circuit court concluded that Fleet's conduct, as alleged by the government, was sufficient to hold Fleet liable as an "owner." First, the court determined that Fleet was in fact an "owner" of

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148. Id. at 1554.
149. Id. at 1555. The county acquired title to the property two days earlier at a foreclosure sale resulting from SPW's failure to pay state and county taxes. Id. at 1553.
150. Id. at 1555 n.4. Involuntary means that "title or control of . . . [a facility is] conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government." 42 U.S.C. § 9601(20)(A)(iii).
151. Fleet Factors, 901 F.2d at 1555 (quoting 42 U.S.C. § 9601(20)(A)(iii)).
152. Id.
153. Id.
154. Id.
155. Id. The court reasoned that even though trustee may not have controlled the facility during this intervening three-year period, the trustee could not now delegate to Fleet its responsibility under CERCLA simply because of its lack of involvement at the property. Id. The court further justified its narrow construction of the words "immediately beforehand" in part on the fact that this construction neither "tortured" the plain statutory meaning of the words nor created a loophole by which responsible parties could evade liability. Id. at 1555 n.5.
156. Id. at 1554, 1556 n.6. Liability extends to conduct in two time frames: the present (i.e., when the cost recovery action is filed) and the past (i.e., when the illegal disposal occurred). See 42 U.S.C. § 9607(a).
157. Fleet Factors, 901 F.2d at 1556 n.6. The court concluded that Fleet could also be held liable as an "operator," but that any discussion of this basis of liability would be omitted as an
the contaminated SPW plant. Next, the court concluded that the secured creditor exemption did not shield Fleet from cleanup liability.

The Eleventh Circuit endorsed the government's argument that Fleet was liable under § 9607(a)(2). The government argued, in part, that Fleet was liable because it "owned" the property (i.e., it held indicia of ownership in the property and managed it to an extent rendering the secured creditor exemption inapplicable). The court concluded that the government alleged facts sufficient to hold Fleet liable on this basis. The court found that Fleet qualified as an "owner" because it undisputedly held "indicia of ownership," in the form of its deed of trust on the SPW plant, when hazardous substances were improperly disposed. The court then examined the scope of the secured creditor exemption; that is, it defined the range of conduct that constitutes "participation in the management." The EPA and Fleet argued for drastically different constructions of the phrase "participate in the management." The government urged a strict interpretation of the phrase and argued that a creditor may not engage in the management of a facility in any way and still remain within the exemption's protection. Fleet, on the other hand, argued for a more liberal construction, one that distinguished between permissible and impermissible types of participatory conduct. Fleet suggested that, under the exemption, participation in the financial management of a facility should be permissible, but that participation in the day-to-day or operational affairs should be impermissible. The court rejected both proffered constructions. It explained that the government's formulation would "largely eviscerate the exemption Congress intended to afford to secured creditors." Similarly, the construction advanced by Fleet, based on the decision in United States v. 

overly repetitive discussion of Fleet's ownership-based liability. The court, however, was not willing to hold that an allegation of facts sufficient to establish liability as an "owner" will universally also establish a party's liability as an "operator." Id.

158. Id. at 1556 n.6.
159. Id. The court thus laid the groundwork early in its opinion for a holding that the scope of activities encompassed within the term "operate" and those encompassed within the phrase "participate in the management" are not coextensive. The court noted that the facts establishing participation in management can, but will not always, be different from those indicating operation. Id.
160. Id.
161. See infra text accompanying note 175.
162. Fleet Factors, 901 F.2d at 1556.
163. Id.
164. Id.
165. Id.
166. Id.
Secured Creditor CERCLA Liability

Mirabile, was too permissive and undermined CERCLA's broad remedial goals.\textsuperscript{167}

1. The Eleventh Circuit's Analysis of the Parties' Arguments and Rejection of the Mirabile Holding

The Eleventh Circuit examined and rejected the construction of the secured creditor exemption adopted in Mirabile.\textsuperscript{168} The Mirabile court concluded that "before a secured creditor . . . may be held liable, it must, at a minimum, participate in the day-to-day operational aspects of the site."\textsuperscript{169} The Eleventh Circuit found this construction too permissive in light of the "overwhelmingly remedial" goal of the CERCLA statutory scheme.\textsuperscript{170} The circuit court reasoned that CERCLA's remedial design, applying traditional rules of statutory construction, mandated a narrow reading of the statute's ambiguous terms and therefore required a reversal of the district court's equally permissive construction of the exemption.\textsuperscript{171} The district court's reading of the exemption, according to the Eleventh Circuit, "essentially required a secured creditor to be involved in the operations of a facility in order to incur liability."\textsuperscript{172} The circuit court rejected this interpretation of the exemption because it erroneously assumed that "operation" and "participate in the management" encompass the same types of participatory con-

\begin{itemize}
  \item \textsuperscript{167} \textit{Id.} at 1556-57. This formulation was adopted below by the district court. \textit{Id.} at 1557.
  \item \textsuperscript{168} \textit{Id.} at 1556.
  \item \textsuperscript{169} \textit{Id.} (omission in original) (quoting United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,996 (E.D. Pa. Sept. 4, 1985)). The circuit court noted that the construction of the secured creditor exemption adopted by the Mirabile court had the effect of permitting a secured creditor to foreclose on the property and take prudent and routine steps to secure the property against depreciation. \textit{Id.} Specifically, the Mirabile court would allow a creditor to engage in the following activities without removing itself from the protection of the secured creditor exemption: secure the property against vandalism, inquire into the cost of removing drums of hazardous chemicals, monitor the debtor's cash collateral accounts, ensure proper accounting of the debtor's receivables, and establish a reporting system between the bank and debtor. \textit{Id.} at 1556 n.7. The circuit court summarized the Mirabile court's list of potentially impermissible activities as including determining which customers would receive their orders, requiring additional production from the debtor's facility, supervising facility operations, or requiring changes in the manufacturing process or plant personnel. \textit{Id.}
  \item \textsuperscript{170} \textit{Id.} at 1557 (citing Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986), \textit{cert. denied}, 484 U.S. 848 (1987)). The circuit court explicitly rejected the Mirabile court's formulation of the secured creditor exemption later in its opinion. \textit{See Fleet Factors}, 901 F.2d at 1558.
  \item \textsuperscript{171} \textit{Id.} at 1557. The Eleventh Circuit affirmed the result, a refusal to dismiss the government action against Fleet, but not the reasoning employed by the district court in reaching it. \textit{Id.} at 1557, 1559.
  \item \textsuperscript{172} \textit{Id.} at 1557.
\end{itemize}
The court explained that CERCLA explicitly imposes liability on persons engaged in operational activities, as distinct from the imposition of liability on owners. Owners, as a distinct class, instead are "liable if they participate in the management of a facility." The circuit court concluded that it was counterintuitive, as well as contrary to the plain meaning of "owner," to conclude that Congress intended both terms to encompass the same range of conduct.

2. The Secured Creditor Exemption: Imposing Liability for Low-Level Participatory Conduct

Having rejected the district court's attempt to equate "operation" and "participation in the management," the circuit court advanced its own construction of these key terms. The court held that a secured creditor would incur liability under § 9607(a)(2) "without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the [debtor's] treatment of hazardous wastes." The court explained that a creditor's "capacity to influence" its debtor's hazardous waste treatment activities should be "inferred from the extent of [the creditor's] involvement in the facility's financial management." Thus, to be held liable for cleanup costs, a creditor need not go as far as to engage in activities that could also give rise to liability as an "operator." Nor does a creditor have to "participate in management decisions relating to hazardous waste" to be liable. Instead, "a secured creditor will be held liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose."

173. Id.
174. Id.
175. Id. (emphasis added).
176. Id.
178. Fleet Factors, 901 F.2d at 1559 n.13. This explanation was offered by the court in the context of a discussion of Fleet's actual involvement in the financial management of the SPW facility. Id. at 1559.
179. Id. at 1557. The court did add, however, that such conduct would lead to loss of the protection of the secured creditor exemption. Id. at 1557-58.
180. Id. at 1558.
181. Id.
The Eleventh Circuit turned to CERCLA's legislative history in support of its narrow construction of the secured creditor exemption. The court concluded that the exemption was added to the legislation to avoid imposition of liability on persons holding title to contaminated property who had not participated in the "management or operation and were not otherwise affiliated with the person leasing or operating the . . . facility." The court reasoned that use of the word "affiliated" explained "the threshold at which a secured creditor becomes liable" and concluded that this language "clearly indicate[d]" Congress's intent to impose liability on owners for "a more peripheral degree of involvement with the affairs of a facility than that necessary to be held liable as an operator."

3. The Eleventh Circuit's Policy-based Justifications for Its Construction of the Secured Creditor Exemption

The Eleventh Circuit also supported its narrow construction of the secured creditor exemption on three policy-based grounds. First, the court noted that its decision would not unduly hinder commercial lending practices because it allowed creditors to engage in traditional activities vis a vis their debtors. For example, the court suggested that its construction of the secured creditor exemption allows a creditor to "monitor" any aspect of the debtor's business and become involved in "occasional and discrete financial decisions relating to the protection of its security interest." In this regard, the court believed it had adopted a construction of the exemption that was a compromise between the equally inappropriate constructions urged by the EPA and by Fleet.

Second, the court concluded that its construction of the secured creditor exemption would encourage creditors to fully investigate the hazardous waste treatment policies and practices of prospective debtors. The court envisioned two benefits flowing from encouraging investigation into these matters. First, the circuit court emphasized that secured creditors, knowing the potential risks of a given transaction, would be able to reflect those risks in the terms of the transaction (e.g., by altering the interest rate or collateral requirements). Thus, in the court's view, its holding would not subject cred-

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182. Id. at 1558 n.11 (quoting remarks of Rep. Harsha).
183. Id.
184. Id.
185. Id. at 1558.
186. See id.
187. Id.
itors to a greater risk of CERCLA liability than they had bargained for.\textsuperscript{188}
Second, the court emphasized that debtors would, in turn, be given an incentive to employ safe hazardous waste disposal practices because failure to do so would adversely affect their loan terms.\textsuperscript{189}

Third, the court asserted that its construction of the secured creditor exemption would facilitate the cleanup process mandated by CERCLA. According to the court, its decision would encourage creditors to monitor their debtors’ hazardous waste disposal activities and “insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support.”\textsuperscript{190} Moreover, the court reasoned, creditors who became excessively involved in the management of a hazardous waste facility would have a strong incentive to remedy, rather than ignore, existing hazardous conditions.\textsuperscript{191} The court anticipated and rejected criticism that its construction of the secured creditor exemption would hinder, rather than facilitate, cleanup activities.\textsuperscript{192} For example, some critics have complained that creditors fearing CERCLA liability will simply not participate in transactions involving contaminated, or potentially contaminated, collateral.\textsuperscript{193} Without financing, these critics suggest, polluted land cannot be cleaned up. The court discounted the likelihood of such a result. It responded that, because creditors can weigh the risk of liability into the terms of the transaction, its construction of the exemption would not impede transactions involving potential cleanup liability.\textsuperscript{194}

4. The Eleventh Circuit’s Analysis of Fleet’s Participation in the Management of the SPW Facility

The Eleventh Circuit held that the government alleged conduct sufficient to remove Fleet from the protection of the secured creditor exemption. The

\textsuperscript{188} Id. The court was in full agreement with the observation made in United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986), that the implications of construing the secured creditor exemption to create an unqualified exemption for creditors was unnecessary. \textit{Id.} at 1559 (stating that the exemption was not designed to create “an insurance scheme for financial institutions, protecting them against possible losses due to the security for loans with polluted properties. Mortgagees [have] the means to protect themselves, by making prudent loans”) (quoting Maryland Bank, 632 F. Supp. at 580).


\textsuperscript{190} \textit{Fleet Factors}, 901 F.2d at 1558.

\textsuperscript{191} \textit{Id.} at 1558-59.

\textsuperscript{192} \textit{Id.} at 1558.


\textsuperscript{194} \textit{Id.}
The court arrived at this conclusion after it examined Fleet's interaction with SPW during three time periods: (1) from 1976 (when Fleet began making loans to SPW) to February, 1981 (when SPW ceased operations); (2) from February, 1981 (when SPW ceased operations) to June, 1982 (the date of Fleet's foreclosure on its security interest in SPW's inventory and equipment); and (3) from June, 1982 (the date of Fleet's foreclosure) to December, 1983 (the time when Fleet's contractors responsible for the removal of leftover equipment left the SPW facility).

The court found that Fleet's conduct during the first period did not subject it to liability under § 9607(a)(2). Fleet merely advanced to SPW funds collateralized by assignments of SPW's accounts receivable, paid SPW's utilities, and later informed SPW that it would not continue to advance additional funds because of the declining value of SPW's collateral. The secured creditor exemption protects these types of involvement in the debtors' affairs.

The court found that Fleet's conduct during the second period, after SPW ceased operations but prior to its foreclosure on its security interest, did constitute "participation in the management" and thus triggered liability. During this period, Fleet required SPW to obtain its approval before shipping its goods to customers; established the price for excess inventory; dictated when and to whom the finished goods should be shipped; determined when employees should be laid off; supervised the activity of the office administrator at the site; received and processed SPW's employment and tax forms; controlled access to the SPW facility; and contracted with a third party to dispose of fixtures and equipment at the SPW facility. The court concluded Fleet had "pervasive, if not complete" involvement in the financial management of the SPW facility during this period.

The court also found that Fleet's conduct during the third period, the period after it foreclosed on the equipment and inventory, constituted at least "participation in the management," if not, "operation." Fleet contended that auctioning SPW's inventory, equipment and fixtures was con-

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195. Id. at 1559.
196. Id.
197. Id.
198. Id.
199. Id. The court also briefly addressed the government's allegation that Fleet was involved in the operational management of the facility. Id. The court held that either the allegation of Fleet's involvement in the financial management of SPW, or the allegation of Fleet's involvement in the operational management of SPW, were sufficient as a matter of law to withstand Fleet's motion for summary judgment. Id.
200. Id. at 1559-60 & n.15.
duct designed to protect its security interest.\textsuperscript{201} The court disagreed and observed that "[t]he scope of the secured creditor exemption is not determined by whether the creditor's activity was taken to protect its security interest."\textsuperscript{202} Thus, courts deciding whether a secured creditor's conduct falls within the ambit of the secured creditor exemption must focus on the extent of the secured creditor's participation in the management of the property, not the creditor's motive for doing so. To this end, the court commented that "[t]o hold otherwise would enable secured creditors to take indifferent and irresponsible actions toward their debtors' hazardous wastes with impunity by incanting that they were protecting their security interests."\textsuperscript{203}

III. \textit{Fleet Factors—Vindication or Evisceration of the Secured Creditor Exemption?}

The key task confronting the Eleventh Circuit was to untangle and give meaning to CERCLA's circular definition of the term "owner or operator."\textsuperscript{204} The court recognized that its construction of the secured creditor exemption must support the "'overwhelmingly remedial' goal of CER-


\textsuperscript{202} Fleet Factors, 901 F.2d at 1560 (emphasis added). The court was correcting a common misinterpretation of the phrase "primarily to protect his security interest." The secured creditor exemption is easily misstated by equating the level of participation in management tolerated under the definition of "owner or operator" as being circumscribed by conduct designed to protect the security interest. \textit{See, e.g.}, Quentel, supra note 3, at 161 ("it is for a court to determine when a lender is protecting its security interest and when it has crossed the line into managing the facility"). The statute defines "owner" as excluding those persons who hold indicia of ownership solely to protect security interest. 42 U.S.C. § 9601(20)(A)(iii) (1988). Therefore, the phrase "primarily to protect his security interest" is no more than a limitation on which holders of indicia of ownership will be protected by the secured creditor exemption. A person who holds indicia of ownership for some reason other than protecting a security interest is not entitled to the exemption's protection.

\textsuperscript{203} Fleet Factors, 901 F.2d at 1560.

\textsuperscript{204} \textit{See, e.g.}, Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 156 (7th Cir. 1988) (holding that the circularity of the definition of "owner and operator" strongly implies that the words should be given their ordinary, non-technical meanings); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1280 (D. Del. 1987) (describing the use of circular definitions in CERCLA generally), \textit{aff'd}, 851 F.2d 643 (3d Cir. 1988); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992, 20,995 (E.D. Pa. Sept. 4, 1985) (describing the definition of "owner or operator." absent the secured creditor exemption, as a "hopeless tautology").
CLA's statutory scheme" without simultaneously "eviscerat[ing] the exemption." The opinion advances the case law on the secured creditor exemption in three important respects. First, the opinion clarifies the relationship between the phrase "indicia of ownership" and the term "owner" in the exemption. Next, the opinion advances a reasonable construction of the phrase "participate in the management," a construction that balances the competing interests of the government and secured creditors and clarifies which activities the exemption encompasses. Finally, the opinion reinforces the private enforcement mechanism Congress created when it chose not to provide creditors with a blanket exemption from cleanup liability.

A. The Amorphous Relationship Between "Indicia of Ownership" and "Owner" in Fleet Factors

The Eleventh Circuit held that Fleet was the "owner" of SPW's plant with a nonchalance that belies the significance of this finding. Fleet never foreclosed on the SPW plant. Rather, Fleet held equitable title by virtue of being the beneficiary under a deed of trust to the property. The property interest in SPW's plant granted pursuant to the deed of trust was "indicia of ownership." The court simply stated, in a footnote, that "Fleet can be held liable [as an owner] if it had an indicia of ownership... and managed the facility to the extent necessary to remove it from the secured creditor liability exemption." The critical conclusion

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205. Fleet Factors, 901 F.2d at 1557; see also United States v. New Castle County, 727 F. Supp. 854, 859 (D. Del. 1989) (collecting cases in which CERCLA has been construed broadly "to achieve its remedial purposes").

206. Fleet Factors, 901 F.2d at 1556.


208. Fleet did foreclose on the equipment and other personal property securing SPW's debt. Fleet Factors, 901 F.2d at 1560 n.14. The court concluded that Fleet's conduct with respect to the auctioning of this equipment was sufficient to remove Fleet from the protection of the secured creditor exemption. Id. However, the court does not support this conclusion based on the act of foreclosure; rather, it was based on the level of its involvement in the facility in conducting the auction and other activities engaged in by Fleet after SPW ceased operations. Id. at 1559-60. A security interest, within the meaning of the Uniform Commercial Code, is "an interest in personal property or fixtures which secures payment or performance of an obligation." U.C.C. § 1-201(37) (1978). "A security interest is a property interest that is more than a mere contractual right to payment of the debt secured. The security interest is, in fact, a present property interest in the collateral." Burcat, supra note 57, at 524-25 (footnote omitted).

209. Fleet Factors, 901 F.2d at 1556.

210. Id.

211. Id. at 1556 n.6. The Eleventh Circuit cited United States v. Kayser-Roth Corp., 724 F. Supp. 15, 20-21 (D.R.I. 1989), aff'd, 910 F.2d 24 (1st Cir. 1990), cert. denied, 111 S. Ct. 957 (1991), in support of this proposition. Id. Kayser-Roth involved an action against the
implicit in this finding is that, according to the Eleventh Circuit, *indicia of ownership* constitutes *ownership* when determining who comprises the class of persons who are "owners" of a facility. The court refused to hold that foreclosure is a prerequisite to incurring liability by reason of being an "owner."

This conclusion conflicts with the holdings in *Mirabile* and *Maryland Bank*. In *Mirabile*, the court held that title might not constitute ownership if the creditor took title in foreclosure "to protect its security interest."

The *Maryland Bank* court reached the opposite conclusion, holding instead that foreclosure transformed a secured creditor into an "owner" irrespective of whether the secured creditor's motive for foreclosing was "primarily to protect [its] security interest."

*Maryland Bank* also conflicts with *Fleet Factors*. Applying the Eleventh Circuit's reasoning, the *Maryland Bank* court should have concluded that foreclosure was not a prerequisite to ownership-based liability. The structure of the secured creditor exemption mandates the interpretation adopted by the Eleventh Circuit. Congress intended persons who hold "indicia of ownership" to be encompassed within the meaning of the term "owners." If Congress had not so intended, it could have simply modified the definition of "owner or operator" to provide that

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212. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992, 20,996 (E.D. Pa. Sept. 4, 1985). The court concluded that it need not decide whether the secured creditor's successful bid for the property in foreclosure vested it with "ownership" under CERCLA. The rationale articulated by the *Mirabile* court demonstrates a significantly different understanding of the secured creditor exemption:

> Regardless of the nature of title received by [the bank], its actions with respect to the foreclosure were plainly undertaken in an effort to protect its security interest in the property. [The bank] made no effort to continue [its debtor's] operations on the property, and indeed foreclosed some eight months after all operations ceased . . .

> . . . The actions undertaken by [the bank] with respect to the site simply cannot be deemed to constitute participation in the management of the site.

*Id.*

213. United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986). The court reasoned that the bank "purchased the property at the foreclosure sale not to protect its security interest, but to protect its investment. Only during the life of the mortgage did [the bank] hold indicia of ownership primarily to protect its interest in the land." *Id.*

214. The Eleventh Circuit did not address the implications of its decision on the holding in *Maryland Bank & Trust*.

215. CERCLA's definition of "owner or operator" provides:
persons who hold "indicia of ownership" are not encompassed within the term "owner or operator." Instead, Congress chose to expressly limit the class of persons exempted from liability. This narrow class contains only those persons who hold indicia of ownership primarily to protect a security interest who have not participated in the management of the facility. Thus, the plain words of the statute dictated the result arrived at by the Eleventh Circuit.

"owner or operator" means . . . in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and . . . in the case of any [abandoned] facility, . . . any person who owned, operated, or otherwise controlled activities at such facility immediately [prior to such abandonment]. Such term does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.
In sum, to properly apply Fleet Factors, a court must engage in the following analysis to determine whether the secured creditor exemption is applicable to a creditor claiming its protection. First, a court must determine whether the defendant is an “owner.” This inquiry requires a determination of whether the defendant holds either title to, or indicia of ownership in, the contaminated property. Actual title clearly suffices because the statute holds the current owner strictly liable for cleanup costs.\textsuperscript{219} Indicia of ownership should suffice as well. The definition of “owner” encompasses persons who hold indicia of ownership because it only exempts a limited subgroup of persons holding indicia of ownership from liability (i.e., those who hold indicia of ownership primarily to protect a security interest and who have not participated in the management of the facility). Second, if the court determines that the defendant is an “owner,” it then must decide whether the secured creditor exemption applies. In this regard, the basis of ownership, whether

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the scope of the meaning of “owner or operator” occurred within the context of the circumstances in which stock ownership, as opposed to a security interest, triggers ownership-based liability for improper disposal of hazardous substances by the issuing corporation. See Kayser-Roth, 724 F. Supp. at 20-21. The two cases cited for this proposition involved liability of an individual stockholder for CERCLA response costs. See also United States v. Nicolet, Inc., 712 F. Supp. 1193, 1202 (E.D. Pa. 1989) (liability of parent corporation); Vermont v. Staco, Inc., 684 F. Supp. 822, 831 (D. Vt. 1988) (liability of sister corporation); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 671-72 (D. Idaho 1986) (liability of parent corporation). See generally Note, Liability of Parent Corporations for Hazardous Waste Cleanup and Damages, 99 Harv. L. Rev. 986 (1986). The district court in Mirabile expressly denied the direct applicability of case law involving stock ownership-based liability as an “owner” under CERCLA. See United States v. Mirabile, 15 Env't L. Rep. (Env't L. Inst.) 20,994, 20,995 (E.D. Pa. Sept. 4, 1985). Moreover, the portion of the Kayser-Roth decision relied on by the Eleventh Circuit was only a recitation of alternate theories of stockholder liability under CERCLA and, therefore, was not particularly firm ground upon which to base this critical component of the court's holding. Kayser-Roth, 724 F. Supp. at 20-21. Firmer ground is provided in the legislative history to one of the bills ultimately incorporated into CERCLA. The House report on H.R. 85, the Comprehensive Oil Pollution Liability and Compensation Act, defines the term “owner” as including:

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[A]ny person holding title to, or in the absence of title, any other indicia of ownership of, a vessel or facility, but does not include a person who, without participating in the management or operation of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.\textsuperscript{219}

H.R. Rep. No. 172, 96th Cong., 2d Sess. 2 (1980), reprinted in 1980 U.S.C.C.A.N. 6212, 6213 (emphasis added). This language supports the conclusion that Congress viewed title and indicia of ownership as identical for the purpose of the secured creditor exemption. There is some guidance in the legislative history directly addressing the implications of the secured creditor exemption on financial institutions. The committee report on H.R. 85 fails to attach significance to the distinction between indicia of ownership and title when it describes the secured creditor exemption as providing that “a financial institution which held title primarily to secure a loan . . . would not be an ‘owner’ as long as it did not participate in the management or operation of the vessel or facility.” Id.

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by title or indicia of ownership, is critical. If the basis of ownership is actual title, then the defendant is liable as the current owner of the property. The exemption is not available. If the basis of ownership is indicia of ownership, then the statute exempts the defendant from liability if the defendant holds indicia of ownership "primarily to protect its security interest" and has not "participat[ed] in the management of the facility."

B. Assessing the Level of Participation in the Management of the Facility

The Eleventh Circuit's construction of the phrase "participat[e] in the management of the facility" recognizes that some level of participation must be tolerated to enable secured creditors "to insure that their interests are being adequately protected."\(^{220}\) The court noted that the exemption protects participatory conduct in "the normal course of [a secured creditor's] business."\(^{221}\) Agreeing with the Maryland Bank court, however, the Eleventh Circuit refused to construe the secured creditor exemption so broadly as to "absolve [secured creditors] of their responsibility for their mistakes of judgment."\(^{222}\)

220. United States v. Fleet Factors Corp., 901 F.2d 1550, 1556 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991). The court rejected adoption of a standard that would impose liability on secured creditors "that participate[ ] in any manner in the management of a facility." \(^{11}\) No court has discussed, much less adopted, such a stringent standard. The government's argument does evidence, however, the hard line that it is prepared to take in seeking out responsible parties. EPA Administrator William Reilly sent the financial community mixed signals regarding the government's stance on this issue in remarks he made shortly after the Fleet Factors decision was announced. He said that it was not the government's intention to hold secured creditors liable for cleanup costs "even if they own property contaminated with hazardous waste. However, [he] did not say that the government would change its policy of doing so." Justice Department Reviewing Liability Issues; Lender Liability Cases Not 'Intended,' Reilly Says, 21 Env't Rep. (BNA) No. 8, at 358 (June 22, 1990); see also Tom, supra note 57, at 927-28; Burcat, supra note 57, at 526-31.

221. Fleet Factors, 901 F.2d at 1556.

222. Id. at 1557. The court rejected the approach of permitting unrestricted participation in the financial management of the facility, but shunning participation in "the day-to-day or operational management of a facility," because it would render the secured creditor exemption meaningless. \(^{11}\) at 1556. This construction was adopted by the Mirabile court. See Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,996. The lower court in Fleet Factors followed this lead by construing the secured creditor exemption to permit "financial assistance and general, and even isolated instances of specific, management advice." Fleet Factors, 724 F. Supp. at 960. This interpretation erroneously ignores the canon of statutory construction applicable to remedial statutes, like CERCLA, that "ambiguous statutory terms should be construed to favor liability." Fleet Factors, 901 F.2d at 1557. Moreover, this construction would render the secured creditor exemption meaningless because a broad interpretation of the exemption would essentially require a secured creditor to be involved in the operations of a facility in order to incur liability. . . . Individuals and entities involved in the operations of a facility are already liable as operators
The court's interpretation of the secured creditor exemption makes sense. The phrase "participating in the management," although part of the definition of "owner or operator," only identifies the circumstances under which a person who holds indicia of ownership may be liable under CERCLA as an "owner." The phrase logically modifies only that portion of the definition of "owner or operator" that pertains to ownership-related liability. Significantly, there is no evidence that Congress intended the types of conduct constituting "participat[ion] in the management" and "operat[ion]" to be the same. The court properly drew on the available legislative history in concluding that "a more peripheral degree of involvement with the affairs of a facility than that necessary to be held liable as an operator" is sufficient to establish liability for participation in management.

under the express language of section 9607(a)(2). Had Congress intended to absolve secured creditors from ownership liability, it would have done so. Instead, the statutory language chosen by Congress explicitly holds secured creditors liable if they participate in the management of a facility.

Id. (emphasis added).

223. It would indeed be difficult to conceive of circumstances under which an operator does not, at a minimum, participate in the management of the facility. This is the bread and butter of CERCLA's enforcement structure. Imposition of liability for no less than participation in the debtor's day-to-day business would destroy any incentive for a creditor to monitor its debtor for compliance with applicable environmental laws. But see Tom, supra note 57, at 935-36. The author argues that the security interest exemption only makes sense if management participation encompasses at a minimum activities that would lead to operator liability under the general liability scheme. To interpret the term as something less than those actions that would lead to liability as an operator would be illogical, since banks would be more susceptible to liability under the carved-out exemption than under the general liability scheme.

Id.

224. CERCLA's legislative history provides minimal guidance by employing circular terminology in its explanation of the term "operator." "[A]n 'operator' is defined to be a person who is carrying out the operational functions for the owner of the facility pursuant to an appropriate agreement." H.R. REP. No. 172, 96th Cong., 2d Sess., pt. 2, 36-37 (1980), reprinted in 1980 U.S.C.C.A.N. at 6160, 6182 (emphasis added). The regulations implementing CERCLA's sister-statute, RCRA, define "operator" as "the person responsible for the overall operation of a facility." See 40 C.F.R. § 260.10 (1991). There is only limited guidance elsewhere in CERCLA's legislative history concerning the meaning of the term "operator."

Operators of vessels do not include those individuals who are not totally responsible for the operation of a vessel. To fall within the definition, the individual must have assumed the full range of operational responsibility. For example, a pilot might be in charge of navigation of a vessel for a short duration, yet he does not meet the definition of "operator," since he neither mans nor supplies the vessel. In the case of a facility, an "operator" is defined to be a person who is carrying out operational functions for the owner of the facility pursuant to an appropriate agreement.


225. Fleet Factors, 901 F.2d at 1558 n.11. The court's reading is plausible, but not wholly persuasive, unless read in the context of the entire legislative scheme. The court's reading of
The Eleventh Circuit, in broadly construing the phrase "participat[e] in the management," concluded that future courts could distinguish permissible from impermissible secured creditor conduct by determining whether the creditor's involvement in the management of the facility is "sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." The court explained that a court can infer a secured creditor's "capacity to influence" a debtor's hazardous waste disposal decisions "from the extent of [the creditor's] involvement in the facility's financial management." Thus, the court's construction of the phrase "participat[e] in the management" does require some actual involvement in the debtor's affairs at the facility. Liability cannot be premised solely upon an unrealized "capacity to influence" a debtor's hazardous waste disposal decisions. If a creditor does not participate in the "financial management" of the facility, there is no basis for an "inference" that the creditor has the "capacity to influence" the debtor's hazardous waste disposal activities. Thus, the court's construction of the phrase "participat[e] in the

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the legislative history also may be inaccurate. The Congressman's remarks seem to reflect concern that owners or operators will attempt to avoid liability through use of corporate subsidiaries and, therefore, his remarks are not necessarily addressing the issue the court in Fleet Factors cites them for. Earlier remarks of Congressman Harsha, however, do support the court's conclusion. In 1980, speaking on the same issue, he said: "My amendment also requires that those that hold title cannot be affiliated [sic] in any way with those who [operate] the facility. This was done to prevent the establishment of 'dummy' corporations, with few assets, which would be the responsible party for the purpose of the act." 126 CONG. REC. 26,210-12 (1980), quoted in Burkhart, supra note 2, at 333 n.54.

226. Fleet Factors, 901 F.2d at 1557-58. Fleet, in its petition for certiorari, complained that this construction triggers liability based on the thin reed of "purely hypothetical facts and inferences. . . . [and thus] virtually [encompasses] all instances [where a secured creditor has become involved in its debtor's affairs]." Petition for Certiorari, supra note 20, at 9. Nonetheless, even critics of a narrow construction of the secured creditor exemption acknowledge that such a construction is "consistent with the expansive interpretations generally given to CERLCA's liability provisions." Tom, supra note 57, at 928.

227. Fleet Factors, 901 F.2d at 1559 n.13 (emphasis added). It is interesting that, in the court's words, most likely crafted to track the statute's language, the basis for this inference is the creditor's "involvement in the facility's financial management." Id. (emphasis added). The court appears to leave room for a defense that participation involving the debtor's financial management does not necessarily support a corresponding inference of involvement at the facility. Id. The court noted that facts creating such an "inference" need not be considered in the case at bar.

228. Id. at 1559 n.13; see also infra note 232 (discussing the recent Ninth Circuit decision construing the holding in Fleet Factors as requiring some level of actual involvement in the management of a facility to incur ownership-based liability under CERCLA).

229. Fleet Factors, 901 F.2d at 1559 n.13. The court held that there was no need to draw such an "inference" in this case because there was direct evidence that "Fleet actively asserted its control over the disposal of hazardous wastes at the site by prohibiting SPW from selling several barrels of chemicals to potential buyers. As a result, the barrels remained at the facility unattended until the EPA acted to remove [them]." Id.; see also infra text at note 233 (defin-
management of the facility” permits limited types of participatory conduct that will facilitate the critical economic incentives for both creditors and debtors to comply with applicable environmental laws but will not result in liability.

Critics have complained that the broad construction of “participate in the management” adopted in Fleet Factors “discourage[s] secured creditors from taking an active role in helping to resolve problems that may arise after the loan is made.” The court anticipated and properly dismissed this criticism as unfounded. Secured creditors are concerned that, by insisting that their debtors comply with environmental laws, they will expose themselves to liability because this conduct would indicate a “capacity to influence” a debtor’s hazardous waste activities. However, interpreting Fleet Factors as imposing liability under such circumstances is inappropriate. As

But see Petition for Certiorari, supra note 20, at 9-10 (arguing that standard loan agreement covenants obligating a borrower to comply with existing laws, without more, could trigger liability under the Eleventh Circuit’s construction of the secured creditor exemption).

230. Parenteau & Johnson, supra note 38, at 381; see also Note, Cleaning Up the Debris After Fleet Factors: Lender Liability and CERCLA’s Security Interest Exemption, 104 Harv. L. Rev. 1249, 1257 (1991). This argument proves too much. It is not axiomatic that discouraging lenders from helping borrowers resolve environmental problems that may arise after the loan is made is undesirable. Banks are hardly equipped to make cleanup decisions. Banks lack sufficient technical expertise and the requisite disinterestedness in the costs reasonably required to do the job properly.

231. Fleet Factors, 901 F.2d at 1558; see also supra notes 190-94 and accompanying text.

232. See Petition for Certiorari, supra note 20, at 8. Secured creditors are not wholly unjustified in voicing this concern. The Eleventh Circuit opinion employs language that, at least when read alone, is both ambiguous and expansive. Fleet Factors, 901 F.2d at 1557-58 (using phrases such as “indicating a capacity to influence” and “support the inference that [the creditor] could affect hazardous waste disposal decisions if it so chose” to describe the threshold of conduct giving rise to liability). This language must, however, be read in conjunction with the limiting phrases employed in the opinion. See supra notes 228-31 and accompanying text. This is precisely how this language was interpreted by the Ninth Circuit when it concluded that the Fleet Factors decision held that a secured creditor must participate in some fashion in the management of the facility before it can be removed from the protection of the secured creditor exemption. See In re Bergsoe Metal Corp., 910 F.2d 668 (9th Cir. 1990). Moreover, the language employed by the Eleventh Circuit in Fleet Factors was not inconsistent with other court decisions construing, for example, the scope of “operator” liability under CERCLA. See United States v. New Castle County, 727 F. Supp. 854, 864 (D. Del. 1989). The court in New Castle County noted that liability has been imposed where “an individual has control or authority over the activities of a facility from which hazardous substances are released or participates in the management of such a facility.” Id. (quoting United States v. Carolawn Co., 21 Env’t Rep. Cas. (BNA) 2124, 2131 (D.S.C. 1984) (emphasis removed)); see also United States v. Nicolet, Inc., 712 F. Supp. 1193, 1204 (E.D. Pa. 1989) (stating that parent corporation’s “capacity to control [hazardous substance] disposal and resultant release” supports finding of liability); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986) (finding that “capacity to control [hazardous substance] disposal and resultant release” supports finding of liability). But see Rockwell Int’l Corp. v. IU Int’l Corp., 702 F. Supp. 1384, 1390 (N.D. Ill.
the court explained, "Nothing in our discussion should preclude a secured creditor from monitoring any aspect of a debtor's business. Likewise, a secured creditor can become involved in "occasional and discrete financial decisions relating to the protection of its security interest without incurring liability." Fleet's conduct with respect to SPW clearly fell outside the permitted range of permissible participation. For example, Fleet refused to allow SPW to spend funds to remove drums of hazardous chemicals from the property. Fleet's conduct at the facility most likely prompted the court to conclude that secured creditors can and will assert significant influence over what happens to hazardous substances. In this regard, the decision is both pragmatic and fair.

Courts and legislators examining Fleet Factors will measure the Eleventh Circuit's construction of the phrase "participat[e] in the management" by the yardstick of its impact on the effectuation of CERCLA's "broad remedial goals." Critics have charged, for example, that the decision will drastically limit the ability of companies to borrow funds when they have environmental problems. Assuming for the sake of argument that this is true, it is not at all clear that such a result is undesirable. CERCLA, after all, was designed in large part to force companies that profit in some way from their use or creation of hazardous substances to internalize the costs of the hazardous waste's disposal.

1988) (holding that "[m]ere ability to exercise control as the result of a financial relationship of the parties is insufficient for liability to attach").


234. United States v. Fleet Factors Corp., 724 F. Supp. 955, 961 (S.D. Ga. 1988), aff'd in part, rev'd in part, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991). In addition, Fleet's agents handling the sale and removal of equipment located at the SPW facility left it in a condition that "constituted an immediate risk to public health and the environment." Id. Drums of hazardous waste were moved to facilitate the equipment sale and friable asbestos was released when the equipment that was sold was disconnected. Id. at 960-61.

235. Parenteau & Johnson, supra note 38, at 381.

236. The legislative history of CERCLA is replete with admonitions from members of Congress that the legislation stands for the principle that the polluter must pay. See Burkhart, supra note 2, at 326 n.20. The phrase "the polluter must pay" was not meant, however, to imply a limited number of persons who would be liable for cleanup costs. Senator Lautenberg, speaking in connection with consideration of SARA, remarked that the enormous expense of cleaning up hazardous waste sites "will require a financial contribution from a range of parties, some of whom may not have contributed directly [but] have benefited from the products produced by the [polluting] industries." Id. at 325 n.19. Congress's imposition of strict liability is additional support for the conclusion that Congress wanted polluters to internalize the various costs associated with resulting from activities that create hazardous substances: "strict liability . . . assures that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the cost of doing business." New Castle County, 727 F. Supp. at 858 (quoting S. REP. No. 848, 96th Cong., 2d Sess, at 13 (1980)).
will suffer this plight because either they, or their market, could not with-
stand to internalize the costs associated with the creation or use of hazard-
ous substances.

C. Secured Creditor Liability: CERCLA's Private Enforcement
Mechanism Lurking in the Shadows of Fleet Factors

The Fleet Factors decision has been roundly criticized. The criticisms
primarily focus on the perceived far-reaching implications this decision will
have on commercial lending practices and, ultimately, on the financial health
of this nation's businesses. Critics assert that, at a minimum, imposing
liability on secured creditors for low-level participatory conduct will reduce
lending to businesses, prevent secured creditors from conducting effective
loan workout activities, and destroy any incentive for secured creditors to
assist in resolving a debtor's environmental problems. Critics of Fleet Fac-
tors, however, acknowledge the effectiveness of CERCLA's liability scheme,
a scheme which "has created a very effective 'private enforcement' mecha-
nism in which lenders play a commanding and . . . constructive role." 239

237. See, e.g., Parenteau & Johnson, supra note 38, at 381 (acknowl-
edging that the decision may cause lenders to be "even more cognizant of environmental concerns," but concluding
that any tangible benefits will be marginal and are more than offset by the negative implications of the opinion).

238. See, e.g., Bradley S. Tupi & William R. Nicholson, Legislation to Restore CERCLA's
5, at 161 (July 3, 1991) [hereinafter Legislation to Restore CERCLA's Security Interest]; see also
Petition for Certiorari, supra note 20, at 5-7. The lead argument in Fleet's petition for certio-
rari is that the Eleventh Circuit's construction of the secured creditor exemption disrupts
"normal and prudent" commercial practices. Id. at 5.

239. See supra note 238.

240. Parenteau & Johnson, supra note 38, at 381; see also Sherman Braff, The Lender as
Environmental Policeman: Comment on EPA's Draft Lender Liability Rules, 5 Toxics L. Rep.
(BNA) No. 44, at 1428 (Apr. 10, 1991) (noting that secured creditors are "uniquely positioned
to serve an 'environmentally beneficial' function by virtue of their influence over their
customers and their natural incentive to monitor their collateral," but arguing that the threat
of liability is not the most efficient manner in which to capitalize on these incentives). See
Sept. 4, 1985) (acknowledging the argument that imposing "liability [on secured creditors]
would help to ensure more responsible management of [hazardous waste] sites"); Glenn
Unterberger, Lender Liability Under Superfund: What the Congress Meant to Say Was . . . , 5
Toxics L. Rep. (BNA) No. 17, at 571 (Sept. 26, 1990). Mr. Unterberger writes that the real
benefit underlying this private enforcement mechanism is that it will alter conduct that leads to
the problems CERCLA was intended to remediate: the illegal disposal of hazardous
substances.

To the extent businesses that depend on credit understand, for example, that lend-
ers will not extend credit until they have conducted appropriate inquiry into and/or
obtained indemnification for any contamination on property serving as security, busi-
nesses presumably will place much greater priority on avoiding or remediating any
such contamination. Similar incentives will result from loan agreements establishing
The effectiveness of the private enforcement mechanism is a direct result of the threat of liability on secured creditors.\textsuperscript{241} The question implicitly confronting the Eleventh Circuit was simple: Absent the threat of liability, will the diligence of secured creditors in investigating, and thereby identifying, environmental contamination, among other things, persist? The court concluded that it would not.\textsuperscript{242} A bank that demands a costly environmental audit is clearly at a competitive disadvantage as compared to a bank offering financing without similar preconditions. Removing the threat of liability eliminates the key incentive for secured creditors to thoroughly investigate property offered as collateral and the corresponding incentive for borrowers to clean up contaminated property. Thus, removing secured creditor liability would vitiate an effective private enforcement mechanism that plays a "commanding" role in CERCLA.\textsuperscript{243}

The debate over the propriety of the interpretation of the secured creditor exemption in \textit{Fleet Factors} is in reality little more than a disagreement as to the chosen threshold of participatory conduct triggering liability. The Eleventh Circuit's decision reflects the social policy underpinnings of CERCLA. The decision is consistent with the policy choices made by Congress when it enacted, and later reauthorized, CERCLA. For example, Congress explicitly weighed the costs and benefits of imposing liability on secured creditors in 1986 when it reauthorized CERCLA.\textsuperscript{244} Five years of experience taught Congress that the problems posed by the improper disposal of hazardous

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\textsuperscript{241} For example, one critic of \textit{Fleet Factors} decision observed that the imposition of liability on secured creditors makes sense from an enforcement standpoint. Lenders have both the incentive and the leverage to insist that hazardous waste problems be identified and resolved as a condition of financing transactions; and, that borrowers covenant to continuous monitoring and strict compliance throughout the loan period. Lenders routinely insist on rigorous site investigations, compliance audits and remedial actions as a part of business transactions involving real property. Parenteau \& Johnson, \textit{supra} note 38, at 381. The EPA has implicitly acknowledged that it lacks sufficient resources, for example, to locate persons potentially liable for response costs. \textit{See Advertising for PRPs-EPA Plans National Hotline for PRP Informers}, 4 Inside EPA's Superfund Rep. No. 19, at 8-9 (Sept. 12, 1990). For example, the agency has resorted to solicitation of information regarding the identity of potentially responsible parties through advertisements in local newspapers in the vicinity of superfund sites. \textit{Id.}

\textsuperscript{242} United States v. \textit{Fleet Factors Corp.}, 901 F.2d 1550, 1558 (11th Cir. 1990) ("creditors' awareness that they are potentially liable under CERCLA will encourage them to monitor the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support"), cert. denied, 111 S. Ct. 752 (1991).

\textsuperscript{243} Parenteau \& Johnson, \textit{supra} note 38, at 381.

\textsuperscript{244} \textit{See supra} note 1.
substances were far greater than originally envisioned.\textsuperscript{245} The legislative history of SARA clearly demonstrates Congress's intent to create enforcement mechanisms designed to aid the EPA in carrying out CERCLA's seemingly overwhelming statutory mission.\textsuperscript{246} The \textit{Fleet Factors}-court was doing its job by giving effect to Congress's intent to impose "tough legal enforcement standards" in the uphill battle to remedy a serious national environmental crisis.\textsuperscript{247} The Eleventh Circuit's decision, having expressly recognized the impact of imposing liability on secured creditors,\textsuperscript{248} properly refused to gut this enforcement mechanism. Future courts may judge \textit{Fleet Factors} as having gone too far, but this seems unlikely. The Eleventh Circuit properly recognized that the threat of liability alters conduct and that in 1980 Congress wanted to do precisely that when it enacted CERCLA. The court rebuffed Fleet's demand for special treatment under CERCLA by establishing "safe harbors" for unlimited activities in the name of "protecting a security interest." In fact, Fleet's own irresponsible conduct mandated this result.

IV. \textsc{The Legislative and Executive Branches Enter the Hunt for the Elusive Threshold to Secured Creditor Liability}

\textbf{A. The EPA's Solution—Establish a Rule that Interprets "Participate in Management" to Permit Reasonable Loan Workouts and Foreclosure}

The EPA is promulgating a rule to clarify the circumstances under which a secured creditor will be liable under CERCLA.\textsuperscript{249} The goal of this

\textsuperscript{245} Id.


\textit{... It is clear from accumulating data on waste sites that [the] EPA will never have adequate monies or manpower to address the problem itself. As a result, an underlying principle of [SARA] is that Congress must facilitate cleanups of hazardous substances by the responsible parties while assuring a strong EPA oversight role with a set of tough legal enforcement standards.}

\textsuperscript{248} United States v. Fleet Factors Corp., 901 F.2d 1550, 1558 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991).

\textsuperscript{249} 56 Fed. Reg. 28,798 (1991) (to be codified at 40 C.F.R. § 300) (proposed June 24, 1991); see also Braff, supra note 240, at 1424, \textit{EPA Draft Proposal Defining Lender Liability Issues Under the Secured Creditor Exemption of CERCLA}, 21 Env't Rep. (BNA) No. 24, at 1162-67 (Oct. 12, 1990) [hereinafter \textit{EPA Draft Proposal}] (reprinting text of earlier draft of the rule). This rule was delayed for several months while pending review at the White House
rule is to clarify the scope of the secured creditor exemption in a manner that reconcile[s] a security holder's need to manage, oversee, or to otherwise protect a security interest, with EPA's duty to clean up waste sites and recover public funds spent in remediating these

Office of Management and Budget. See, e.g., OMB Staff Argue EPA Superfund Rule Fails to Protect Banks From Unfair Costs, 12 Inside EPA Weekly Rep. No. 12, at 1 (Mar. 22, 1991). It has been suggested that the delay is attributable to the executive branch's hope that this would prompt congressional action, an alternative preferred by members of the banking industry. See, e.g., Defining Superfund Liability Limits, 11 Inside EPA Weekly Rep. No. 4, at 1, 6-7 (Oct. 12, 1990).

250. The authority for and circumstances under which an agency may issue interpretative rules is governed by the Administrative Procedure Act. 5 U.S.C. § 553(b), (d) (1988). Interpretative rules may be issued by an agency without public comment. Id. § 553(b). The EPA provided a 30-day comment period for this proposed interpretative rule, however, due to "the important issues" raised. See EPA Draft Proposal, supra note 249, at 1162. The EPA has taken the position that this rulemaking is subject only to review by the District of Columbia Circuit Court of Appeals in accordance with CERCLA's provisions regarding regulations promulgated under the statute. Id. at 1163 (referring to 42 U.S.C. § 553(b)). Discussion of the legal effect of "interpretative" rules is beyond the scope of this Note. Generally, an "interpretative" rule is a "statement[] made by an agency to give guidance to its staff and affected parties as to how the agency intends to administer a statute or regulation." New Jersey v. Department of Health & Human Servs., 670 F.2d 1262, 1281-82 (3d Cir. 1981) (alteration in original) (quoting Daughters of Miriam Ctr. For the Aged v. Mathews, 590 F.2d 1250, 1258 (3d Cir. 1978)); see also Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n, 874 F.2d 205, 207-08 (4th Cir. 1989); Alcaraz v. Block, 746 F.2d 593 (9th Cir. 1984). Interpretative rules are commonly distinguished by the courts from "legislative" rules. "A legislative rule, rather than merely setting forth an agency's own interpretation of the meaning of a statute it administers, actually implements that statute and, in doing so, 'creates' new law 'affecting individual rights and obligations.'" New Jersey, 670 F.2d at 1282 (quoting Morton v. Ruiz, 415 U.S. 199, 232 (1974)); see also Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Batterton v. Francis, 432 U.S. 416, 424-26 (1977); National Latino Media Coalition v. Federal Communications Comm'n, 816 F.2d 785, 788 (D.C. Cir. 1987); National Treasury Employees Union v. Reagan, 685 F. Supp. 1346, 1356 (E.D. La. 1988), aff'd, 891 F.2d 99 (5th Cir. 1989). The legal effect of "interpretative" rules varies from that of "legislative" rules. "Interpretative rules are 'not controlling upon the courts . . . inasmuch as they are not promulgated pursuant to a delegation by Congress of authority to legislate.'" New Jersey, 670 F.2d at 1282 (quoting United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 674 (1973)); see also Skidmore v. Swift & Co., 323 U.S. 134, 164 (1944) (stating that the deference due interpretative rulings "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"). The Supreme Court, however, has held that courts must accord "great deference" to agency rules because they represent an "interpretation given [a] statute by the officers or agency charged with its administration." New Jersey, 670 F.2d at 1282 (alteration in original) (quoting Udall v. Tallman, 380 U.S. 1, 16 (1965)). The standard of reasonableness limits this deference to an agency's interpretation. Thus, courts evaluating the EPA interpretative rule need not find that [the agency's] construction is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings. . . . All that is needed to support the [agency's] interpretation is that it has "warrant in the record" and a "reasonable basis in law."
sites from those responsible or otherwise involved in the facility's operations, either through their participation in management . . . or through their own activities at the facility.²⁵¹

The rule interprets the secured creditor exemption as permitting a broad range of lender activity as long as the creditor intends the activity to "primarily protect a security interest."²⁵²

The EPA rule accomplishes this task by defining three key phrases in the secured creditor exemption: "indicia of ownership," "primarily to protect the security interest," and "participat[e] in . . . management."²⁵³ The rule defines "indicia of ownership" as encompassing "interests in real or personal property held as security or collateral for a loan or other obligation, including full title to real or personal property acquired incident to foreclosure and

²⁵¹. Id. at 1283 (alterations in original) (quoting Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153-54 (1946); see also Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1153 n.24 (D.C. Cir. 1977).

²⁵². 56 Fed. Reg. 28,800 (1991). The EPA clearly sees an important commercial mandate for this rule. "CERCLA liability needs to be as certain and predictable as possible, and should not inhibit financial transactions unnecessarily." EPA Promises Clarifying Rule to Protect Lenders, Won't Oppose Legislation, 4 Inside EPA's Superfund Rep., No. 17, at 6 (Aug. 15, 1990) (quoting prepared testimony of James Strock, Asst. Administrator for Enforcement, EPA, before the Transportation and Hazardous Materials Subcommittee, Energy and Commerce Committee, House of Representatives). There are certainly other significant motives for this rule. The EPA previously expressed its belief that such a rule would be beneficial to government lenders, guarantors, and receivers because it limits their exposure to CERCLA liability. See, e.g., Federal Lenders Line Up for Protection From Superfund Liability, 5 Inside EPA's Superfund Rep. No. 1, at 1 (Jan. 2, 1991); EPA Says New Lender Rule Will Be Written to Clarify Activity Triggering Superfund Law, 5 Toxics L. Rep. (BNA) No. 10, at 353 (Aug. 8, 1990). The EPA is particularly concerned that foreclosures occurring in the wake of the savings and loan crisis will contribute significantly to the cost of the S&L bailout. EPA Promises to Exempt Banks From Superfund Costs on Foreclosed Land, 11 Inside EPA Weekly Rep. No. 32, at 12 (Aug. 10, 1990). Specifically, the agency has publicly expressed concern that money allocated to the bailout will unnecessarily be diverted to the payment of cleanup and litigation costs. Id. at 12.

its equivalents." This definition is consistent with the limited attention it has received by the courts.

The EPA rule broadly interprets the phrase "primarily to protect the security interest" and allows creditors to protect their interest by policing the loan, by undertaking a financial workout with a borrower where the security interest is threatened, and by foreclosing and expeditiously liquidating the assets securing the loan. This portion of the rule conflicts with *Maryland Bank*, which held that foreclosure terminates the protection of the secured creditor exemption. Under the EPA rule, foreclosure will not trigger liability unless the secured creditor causes or contributes to the environmental contamination. Moreover, the rule specifically permits secured creditors to engage in mitigative or preventive measures without incurring liability.

Finally, the EPA rule defines "participat[ion] in the management." The rule acknowledges that the question of whether a secured creditor has in fact participated in the management of the facility, thereby removing it from the protection of the secured creditor exemption, requires the court to conduct a fact-sensitive inquiry. The EPA rule, deliberately contradicting the language employed by the Eleventh Circuit to determine whether a secured creditor has impermissibly participated in management of a facility, provides that "participation in the management" does not include the mere capacity or ability to influence facility operations.

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254. *Id.* at 28,809. Some examples given are "a mortgage, deeds of trust, or legal title obtained pursuant to foreclosure, or an assignment, lien, pledge, or other right to or other form of encumbrance against the property." *Id.* The rule interprets the exemption to only reach those encumbrances granted for the purpose of security for a loan. *Id.* The rule explicitly provides that the term does not encompass "an interest in the nature of an investment" in contaminated property. *Id.*

255. *Id.*

256. *Id.* at 28,808-09. The rule further reaffirms the position taken by the Eleventh Circuit that the secured creditor exemption also allows a secured creditor to monitor the debtor's business, conduct site inspections, and require certification of compliance with applicable laws without risking "owner" liability under CERCLA. *Id.*

257. *Id.*

258. *Id.* at 28,809. The rule provides that such activities will not be construed to be "participation in the management" of the facility. *Id.*

259. *Id.*

260. *Id.* The rule offers the following interpretation of the phrase "participation in the management:"

A security holder is considered to be participating in management if, while the borrower is still in possession, the security holder is either:

(i) exercising decisionmaking control over the borrower's environmental compliance, such that the security holder has undertaken responsibility for the borrower's waste disposal or hazardous substance handling practices which results in a release or a threatened release; or
B. The Congressional Solution—Amend the Secured Creditor Exemption in the Name of “Original Intent”

Several bills pending in both the House and Senate are designed to respond to the issue of the liability of secured creditors under CERCLA.261 No bills made it out of the 101st Congress despite last minute efforts to agree upon compromise language.262 The two key bills, however, have been reintroduced this Congress.263 The principal House bill, introduced by Congressman LaFalce, essentially codifies an earlier version of the EPA rule.264 The Senate's principal bill, introduced by Senator Garn, is less generous to lenders than that proposed in the House and would not eliminate the possibility of liability, only limit it to “the actual benefit conferred . . . by a removal, remedial or other response action.”265 Both bills have received ringing endorsements from the banking industry, the Federal Deposit Insur-

(ii) exercising control at a management level encompassing the borrower’s environmental compliance responsibilities, comparable to that of a manager of the borrower’s enterprise, such that the security holder has assumed or manifested responsibility for the management of the enterprise by establishing, implementing, or maintaining the policies or procedures encompassing the day-to-day environmental compliance decisionmaking of the enterprise.

Id. The EPA’s interpretation of the phrase “participation in the management” should be well-received by the banking community. Most activities, including those that would have previously subjected a secured creditor to liability as an operator, will be permitted without fear of ownership-based CERCLA liability.


264. See LaFalce Plans to Adopt EPA Draft Rule in New Lender Liability Bill, 12 Inside EPA Weekly Rep. No. 9, at 16 (Mar. 1, 1991) (stating that this bill satisfies members of the banking lobby because it will extend to RCRA and will also protect lenders from third party suits, unlike the current EPA rule).

265. S. 651 § 36(b). For a critique of Senator Garn’s bill, see Legislation to Restore CERCLA’s Security Interest, supra note 261, at 161-64.
Secured Creditor CERCLA Liability

Environmentalists and members of the chemical industry are less supportive. Regardless of the participants' motives for their efforts in this legislative process, the debate their actions have engendered hopefully will focus on how a liability statute can and should function. Although CERCLA is a bitter pill by design, the EPA and congressional response to Fleet Factors demonstrates a coordinated effort to reassess the impact of using secured creditors as a private enforcement mechanism in CERCLA.

V. Conclusion

CERCLA is a cornerstone of Congress's attempt to stem the tide of harm resulting from decades of care-free hazardous substance pollution. The statute is designed to alter the way companies incorporate the costs of polluting into their business transactions. Congress concluded that imposition of liability for improper disposal of hazardous waste is the most effective tool available to force parties who contribute to the hazardous waste problem to internalize the cleanup costs stemming from the use and improper disposal of such substances and to begin using safer disposal methods. The EPA alone is not equipped to ensure that this crucial mandate is accomplished. Congress deliberately created a private enforcement mechanism to aid the EPA in this massive undertaking. By guaranteeing their cooperation under threat of liability, CERCLA makes secured creditors a crucial component in the statute's enforcement mechanism. The Eleventh Circuit's decision in Fleet Factors represents no more than an implementation of this scheme. It stands for the proposition that removing the threat of liability will encourage

266. FDIC, Resolution Trust Corp. Seek Protection in Senate Bill Limiting Exposure Under CERCLA, 21 Env't Rep. (BNA) No. 13, at 533-34 (July 27, 1990) [hereinafter FDIC Seeks Protection]. The agency estimates the cost of cleaning up these properties to be three times their $365 million book value. Id.; Superfund Lender Liability Explored During Senate Hearings, Pesticide & Toxic Chem. News (FCNI) at 19-20 (July 27, 1990) ("We believe it is extremely important that we do not divert deposit insurance monies from their primary purpose, no matter how laudable the other goal." (quoting the testimony of S. Seelig, Director, Division of Liquidation, FDIC)). If the FDIC had its druthers, the Senate bill would be modified to extend the exemption from liability to persons who purchase contaminated assets from the FDIC. FDIC Seeks Protection, supra, at 534.

267. The chemical industry has assailed the legislation as discriminatory and unwise. Environmental groups assert that the rationale for the amendment, a belief that liability is creating a credit squeeze on small business, has not been substantiated by the lending community. See Supporters and Detractors, supra note 263, at 19 (quoting the testimony by the Environmental Defense Fund as asserting that the Senate bill "encourages lenders to take a see-no-evil, hear-no-evil approach to environmental risks. . . . As the current S&L scandal has proved, lenders need more incentives to carefully review their loans, not less.").

268. Unterberger, supra note 240, at 573.
conduct inimicable to the success of CERCLA's private enforcement mechanism, and thereby, to the statute itself.

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