

# Tulsa Law Review

---

Volume 26 | Number 1

---

Fall 1990

## Limiting Liability of the Passive Lender under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

Michael F. Smith

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Michael F. Smith, *Limiting Liability of the Passive Lender under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 26 Tulsa L. J. 75 (1990).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol26/iss1/3>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

# NOTES AND COMMENTS

## LIMITING LIABILITY OF THE PASSIVE LENDER UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

### I. INTRODUCTION

A recently developed non-market related risk<sup>1</sup> facing lenders is the devastating liability for clean-up costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>2</sup> CERCLA is a comprehensive statute designed broadly to confront the severe hazardous waste problem in the United States.<sup>3</sup> Generally, the scope of liability under CERCLA has been broad.<sup>4</sup> In adhering to Congress' intent,<sup>5</sup> three courts have implied that CERCLA's scope of

---

1. Non-market related risks are risks of ownership such as potential tort liability and loss due to destruction by natural disaster. Malloy, *Equity Participations and Lender Liability Under CERCLA*, 15 COLUM. J. ENVTL. L. 63, 64 (1990). Compare non-market related risks with market related risks "such as inflation or poor targeting of a real estate project to the demographics of an area." *Id.*

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [hereinafter CERCLA], Pub. L. No. 96-510, 94 Stat. 2767 (codified in part at 42 U.S.C. § 9601-9657 (1982)) amended by Superfund Amendments and Reauthorization Act of 1986 [hereinafter SARA], Pub. L. No. 99-499, 100 Stat. 1613.

CERCLA clean-up costs can be exorbitant. See *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1553 (11th Cir. 1990) (the EPA incurred costs of almost \$400,000.00 to remove 700 fifty-five gallon drums containing toxic chemicals and forty-four loads of material (including soil) containing asbestos); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 575-76 (D. Md. 1986) (the EPA removed two hundred thirty-seven drums of chemical material and one thousand, one hundred eighty tons of contaminated soil at a cost of more than \$550,000.00); *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,992 (E.D. Pa. 1985) (cost of removing approximately five hundred, fifty drums of hazardous waste totaled almost \$250,000.00).

3. The General Accounting Office, in 1988, speculated that there may be "as many as 425,380 potential [S]uperfund hazardous waste sites" in the United States. 18 Env't Rep. (BNA) 2043 (Jan. 22, 1988). The report estimated that the EPA could clean up 2,500 of those sites at a cost of \$22.7 billion. *Id.*

4. See Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 BUS. LAW. 923, 941-47 (1990).

5. See *infra* notes 10-13 and accompanying text.

liability could be extended to passive lenders.<sup>6</sup> Although the Act expressly grants an exemption to secured creditors, court interpretations have applied the security interest exemption narrowly.<sup>7</sup> These interpretations arose due to the hurried manner in which Congress enacted CERCLA and the resulting lack of legislative history.<sup>8</sup> The only option at this juncture is for Congress to confront judicial interpretations of the security interest exemption under CERCLA and adopt amendments to clarify the inconsistent conclusions.<sup>9</sup>

## II. CERCLA: THE STATUTE

### A. *The Policies Behind CERCLA*

Congress passed CERCLA with the intention of providing "an equitable solution to the environmental and health problems created by decades of reckless and irresponsible disposal of chemical wastes."<sup>10</sup> In enacting CERCLA, Congress sought to hold those who cause chemical harm responsible for the costs associated with hazardous waste clean-up.<sup>11</sup> Legislative history indicates that Congress intended liability under CERCLA to be both strict, and joint and several, though such a provision was not explicitly provided for in the Act.<sup>12</sup> An uncompromising standard of liability, Congress believed, would create a "compelling incentive" for the responsible parties to prevent releases and thus protect

---

6. A "passive lender" as used within the context of this Comment refers to lenders who, through transitory financial arrangements, have financial and ownership interests in property contaminated with hazardous waste.

7. See *infra* notes 46-48 and accompanying text.

8. See *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22, 25 n.2 (D. Mass. 1987), and cases cited therein.

9. "A further round of amendments designed simply to clean up the discrepancies [in CERCLA] . . . would go far to saving litigants' money and courts' time as well as the statute itself from interpretations contrary to the intent of Congress." *In re Acushnet River & New Bedford Harbor Proceedings*, 716 F. Supp. 676, 681 n.6 (D. Mass. 1989).

10. H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, at 62, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6139 (statement of Albert Gore, Jr.).

11. S. REP. No. 848, 96th Cong., 2d Sess. 13 (1980). The statute "assures that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business." *Id.* See also *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1105 (N.D. Ill. 1988) ("CERCLA seeks to expedite the cleanup of hazardous waste sites and to ensure the allocation of cleanup costs among responsible parties.") (citing 126 CONG. REC. 30, 932 (1980)).

12. S. REP. No. 848, 96th Cong., 2d Sess. 13 (1980). The committee report declared that "[t]o establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the actual burden of releases, while those who conduct commerce in hazardous substances which cause such damage benefit with relative impunity." *Id.* See also notes 27-35 and accompanying text.

the general public from the threat of hazardous waste.<sup>13</sup>

### B. *The Superfund*

In addition to creating liability for hazardous waste contamination, Congress established provisions to pay for clean-up expenses prior to seeking reimbursement from responsible parties. CERCLA created the "Superfund" for the purpose of cleaning up hazardous waste sites.<sup>14</sup> Pursuant to CERCLA, the Environmental Protection Agency (EPA)<sup>15</sup> is authorized to compel the clean-up of a hazardous waste site.<sup>16</sup> Furthermore, the EPA can contract for the clean-up and then seek reimbursement for response costs<sup>17</sup> and natural resources damages<sup>18</sup> after the completion of the clean-up.<sup>19</sup>

### C. *The Plaintiff's Case*

CERCLA's liability section<sup>20</sup> clearly sets forth the elements which must be proved in order for a plaintiff to recover response costs. To prevail, the plaintiff<sup>21</sup> must establish: that the potentially responsible party (hereinafter referred to as "PRP") falls within one of the classes of liable persons;<sup>22</sup> that the contaminated site is a "facility,"<sup>23</sup> that a release or threatened release<sup>24</sup> of any hazardous substance<sup>25</sup> from the site has

---

13. S. REP. NO. 848, 96th Cong., 2d Sess. 14 (1980).

14. The Hazardous Substances Superfund, originally created under CERCLA, Pub. L. No. 96-510, § 221, 94 Stat. 2767, 2801 (1980) (codified in 42 U.S.C. § 9631 (1982)), was amended in 1986 by SARA, Pub. L. No. 99-499, § 204(a), 100 Stat. 1613, 1696 (1986). Currently, the appropriations for the "Hazardous Substance Superfund" are made pursuant to 26 U.S.C. § 9507 (1988).

15. CERCLA authorizes the President to conduct response actions. 42 U.S.C. § 9604 (1988). However, pursuant to 42 U.S.C. § 9615 (1988), the President delegated this authority to the Administrator of the E.P.A. Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (1987).

16. 42 U.S.C. § 9604 (1988).

17. The term "response" is defined in 42 U.S.C. § 9601(25) (1988) as "remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." *Id.*

18. 42 U.S.C. § 9607(a)(4)(C) (1988). For an in depth analysis of "damages" as defined under CERCLA, see *In re Acushnet River & New Bedford Harbor Proceedings*, 716 F. Supp. 676 (D. Mass. 1989).

19. 42 U.S.C. § 9604(a) (1988).

20. 42 U.S.C. § 9607 (1988).

21. See 42 U.S.C. § 9612(a) (1988). A "claimant" must first present the Superfund claim to the potentially responsible parties. If the claim has not been satisfied within sixty days, the claimant may then present the claim to Superfund for payment. *Id.* However, claims for damages for injury to natural resources may only be asserted by the President, as trustee for the natural resources, or by an Indian tribe if affected by the natural resources damages. 42 U.S.C. § 9611(b)(1) (1988).

22. 42 U.S.C. § 9607(a)(1)-(4) (1988). See *infra* note 33 and accompanying text.

23. 42 U.S.C. § 9601(9) (1988).

24. See 42 U.S.C. § 9601(22) (1988).

The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying,

occurred; and finally, that the release or threatened release caused the plaintiff to incur response costs.<sup>26</sup>

#### D. *The Standard of Liability Under CERCLA*

As determined by federal common law, the standard of liability under CERCLA is strict, joint and several, and retroactive. While a preliminary draft of CERCLA contained a provision for imposing strict liability,<sup>27</sup> the final version left the development of the standard of liability to the courts.<sup>28</sup> Judicial creation of federal common law has imposed strict,<sup>29</sup> joint and several,<sup>30</sup> and retroactive liability<sup>31</sup> upon responsible

---

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

*Id.* (citations omitted).

25. See 42 U.S.C. § 9601(14) (1988). In defining the term "hazardous substance," CERCLA incorporates by reference the substances designated as hazardous or toxic under the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, the Toxic Substances Act, and the Solid Waste Disposal Act, and authorizes the EPA to designate additional substances that "may present substantial danger to the public health or welfare or the environment." *Id.* See also *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 n.6 (2d Cir. 1985).

26. 42 U.S.C. § 9607(a)(4)(A) (1988).

27. "Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the [final version]." *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (referring to *Steuart Transportation Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir. 1979)). 42 U.S.C. § 9601(32) (1982) provides that CERCLA liability "shall be construed to be the standard of liability [under the Clean Water Act]." Courts have interpreted liability under the Clean Water Act to be strict liability. Congress understood that the Clean Water Act imposed strict liability. H.R. Rep. No. 1016, 96th Cong., 2d Sess., pt. 1, 33, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6136.

28. "As many courts have noted, a proposed requirement that joint and several liability be imposed in all CERCLA cases was deleted from the final version of the bill." *United States v. Monsanto Co.*, 858 F.2d 160, 171 n.23 (4th Cir. 1988) (referring to *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 806 (S.D. Ohio 1983)). Congress did not intend to reject joint and several liability; rather, Congress intended to leave the standard of liability to develop under federal common law. *Chem-Dyne Corp.*, 572 F. Supp. at 808. See also *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1253 (S.D. Ill. 1984) ("the floor debates on [CERCLA] . . . suggest that the deletion of joint and several language does not necessarily prevent imposition of a joint and several standard by the courts").

29. See *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563 (E.D. Pa. 1988); *United States v. Bliss*, 667 F. Supp. 1298 (E.D. Mo. 1987); *United States v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal. 1987); *United States v. Dickerson*, 640 F. Supp. 448 (D. Md.

parties.

### E. CERCLA's Scope of Liability

While there are four specific categories of PRP's enumerated under CERCLA, courts have interpreted those categories to include various parties.<sup>32</sup> The EPA may seek reimbursement of Superfund expenditures from four specific categories of PRPs: (1) the current owners or operators of the property; (2) the owners or operators of the property at the time of the contamination; (3) persons arranging for disposal or treatment at, or transport of hazardous substances to, the property; and (4) persons who selected sites and accepted hazardous substances for transport to those sites.<sup>33</sup> Judicial activism, supported by congressional amendment, broadened the scope of PRPs under CERCLA to explicitly include the most

1986); *United States v. Liviola*, 605 F. Supp. 96 (N.D. Ohio 1985); *United States v. Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984); *United States v. Price*, 577 F. Supp. 1103 (D.N.J. 1983); *In re T.P. Long Chem. Inc.*, 45 Bankr. 278 (Bankr. N.D. Ohio 1985). "In an effort to protect human health and the environment, two public policy goals are served by this strict liability: cleanup of property contaminated by hazardous substances and deterrence of future contamination." Frost, *Strict Liability as an Incentive for Cleanup of Contaminated Property*, 25 Hous. L. Rev. 951, 951 (1988).

30. See *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563 (E.D. Pa. 1988); *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100 (N.D. Ill. 1988); *United States v. Northernair Plating Co.*, 670 F. Supp. 742 (W.D. Mich. 1987); *United States v. Bliss*, 667 F. Supp. 1298 (E.D. Mo. 1987); *United States v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal. 1987); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985); *United States v. Shell Oil Co.*, 605 F. Supp. 1064 (D. Colo. 1985); *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249 (S.D. Ill. 1984); *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983).

31. See, e.g., *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1072-73 (D. Colo. 1985) and cases cited therein.

32. See Barr, *supra* note 4, at 941-47.

33. 42 U.S.C. § 9607(a) (1988). The liability provision states:

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

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including

previous owner or operator prior to a foreclosure by a state or local government.<sup>34</sup> Although Congress amended CERCLA to reflect this interpretation, it did not modify a related provision, the security interest exemption, nor expressly address lender liability.<sup>35</sup>

#### F. *Statutory Limitations to CERCLA Liability*

Congress provided only four limitations to response cost liability under CERCLA. The first three limitations are defenses to CERCLA liability. The fourth limitation, the security interest exemption, negates PRP status.<sup>36</sup>

---

the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

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

*Id.*

34. See CERCLA, Pub. L. No 96-510, § 101(20)(A), 94 Stat. 2767, 2769 (1980) (codified at 42 U.S.C. § 9601(20)(A) (1982)). That section provided:

"owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) 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 vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

*Id.* In 1986, SARA, Pub. L. No. 99-499, § 101(b)(2), 100 Stat. 1613, 1615 (1986) (codified at 42 U.S.C. § 9601(20)(A) (iii) (1988)) amended Section 9601(20)(A)(iii) of the 1982 version to read:

(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.

42 U.S.C. § 9601(20)(A)(iii) (1988).

35. It is clear that CERCLA, in its original form, did not explicitly intend to hold lenders liable for clean-up costs. However, the court in *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986), held that a lender could be liable for clean-up costs where the lender foreclosed on contaminated property and purchased that property at the foreclosure sale. See *infra* notes 81-96 and accompanying text. This case was decided on April 9, 1986. SARA became law on October 17, 1986. Although the committee reports do not specifically mention *Maryland Bank & Trust Co.*, by amending § 9601(20)(A)(iii) to exclude governmental agencies that acquired title through foreclosure from the definition of "owner or operator," it appears that Congress intended to exempt from liability only governmental agencies and no other foreclosure purchaser. Vollmann, *Double Jeopardy: Lender Liability Under Superfund*, 16 REAL EST. L.J. 3, 11 (1987), stipulates that:

Arguably, if a person other than a government agency acquires property by foreclosure, then such person is an owner or operator just like the person who owned the property immediately beforehand. By explicitly excluding any foreclosure purchaser that is a government agency from the definition of "owner or operator," Congress has, by implication included all other foreclosure purchasers within the scope of the definition.

*Id.*

36. 42 U.S.C. § 9601(20)(A)(iii) (1988).

## 1. The Three Statutory Defenses

Although the three statutory defenses are the exclusive defenses to CERCLA liability,<sup>37</sup> their application is limited to extreme circumstances. The first two defenses, an act of God<sup>38</sup> or an act of war,<sup>39</sup> rarely provide PRPs with protection from liability.<sup>40</sup> The third defense<sup>41</sup> is similarly limited in application in that it requires proof by a preponderance of the evidence that:

37. See *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1445-46 n.3 (W.D. Mich. 1989), and cases cited therein.

38. 42 U.S.C. § 9607(b)(1) (1988). An "act of God" is defined as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." 42 U.S.C. § 9601(1) (1988). See also H.R. Rep. No. 1016, 96th Cong. 2d Sess., pt. 1, 32, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6137.

39. 42 U.S.C. § 9607(b)(2) (1988).

40. See e.g., *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987). There, the court rejected the defendants' contention that heavy rainfall, as a natural disaster, constituted an act of God. The court noted that:

the rains were not the kind of "exceptional" natural phenomena to which the narrow act of God defense . . . applies. The rains were foreseeable based on normal climatic conditions and any harm caused by the rain could have been prevented through design of proper drainage channels. Furthermore, the rains were not the sole cause of the release.

*Id.* (emphasis in original).

41. 42 U.S.C. § 9607(b) (1988) provides that:

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

(1) . . .

(2) . . .

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

(4) any combination of the foregoing paragraphs.

*Id.* The third party defense has been appropriately termed an "ambiguous defense." Malloy, *supra* note 1, at 68. Representative Curt Weldon has recently proposed H.R. 2787 to help clarify the third party defense. This amendment would permit a defendant to establish a rebuttable presumption that it has made an "all appropriate inquiry," as required by 42 U.S.C. § 9601(35)(B) (1988), if the defendant obtained a "Phase I Environmental Audit" of the property to be purchased immediately prior to or at the time of acquisition. H.R. 2787, 101st Cong., 1st Sess. (1989). A "Phase I Environmental Audit" is an investigation conducted by environmental professionals of the recorded chain of title documents, any aerial photographs which might reflect prior uses of the property, any recorded environmental cleanup liens, any reasonably obtainable government records of sites where there has been a release of hazardous substances, and, finally, a visual inspection of the property and immediately adjacent properties. *Id.*



(1) a third party was the sole cause of the release of hazardous substances; (2) the third party was not an employee or agent of the defendant; (3) the acts or omissions of the third party did not occur in connection with a direct or indirect contractual relationship to the [defendant]; and (4) the defendant exercised due care with respect to the hazardous substances and took precautions against foreseeable [sic] acts and omissions of the third party.<sup>42</sup>

## 2. The Security Interest Exemption

Although set forth in clear and uncompromising language, the security interest exemption has been difficult for courts to interpret. Section 9601(20)(A)<sup>43</sup> sets forth the security interest exemption to CERCLA liability. The exemption negates PRP status if the PRP can show: (1) it did not participate in the management of a facility; and (2) it holds "indicia of ownership" for the purpose of protecting a security interest in that facility.<sup>44</sup> While the Act only requires satisfaction of two elements, the language has caused inconsistent judicial interpretations. The scope of liability under CERCLA, though drafted broadly, has been continuously expanded by judicial activism and congressional amendments,<sup>45</sup> leaving the security interest exemption without meaning or effect.

### III. JUDICIAL INTERPRETATIONS: JUDICIAL ACTIVISM AND LENDER LIABILITY.

Courts confronted with the issue of lender liability under CERCLA have interpreted the security interest exemption inconsistently. As a result, there are varying degrees of protection for lenders depending upon the jurisdiction. Three courts have specifically dealt with potential lender liability; one court<sup>46</sup> focused on current ownership while the two

42. *United States v. Marisol, Inc.*, 725 F. Supp. 833, 838 (M.D. Pa. 1989) (citing *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439 (W.D. Mich. 1989)).

43. 42 U.S.C. § 9601(20)(A) (1988) defines the term "owner or operator," but further provides that "[s]uch term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." *Id.*

44. 42 U.S.C. § 9601(20)(A) (1988).

45. As a remedial statute, CERCLA "must be liberally interpreted in order to effectuate its purposes." *United States v. Moore*, 698 F. Supp. 622, 626 (E.D. Va. 1988). *See also* *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) ("CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment. We are therefore obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes.") (referring to *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985) (*rev'd on other grounds*, 889 F.2d 1146 (1st Cir. 1989))).

46. *See United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986) *supra* notes 81-96 and accompanying text.

remaining courts concentrated on the lenders' involvement in the debtors' business.<sup>47</sup> In all three situations, the debtor, as owner of the land at the time of the contamination, was liable under CERCLA.<sup>48</sup> The courts diverge when dealing with potential CERCLA liability of lending institutions.

#### A. United States v. Mirabile

The first court to address lender liability under CERCLA concentrated on the lender's involvement in the debtor's business. In *United States v. Mirabile*,<sup>49</sup> the United States District Court for the Eastern District of Pennsylvania confronted the lender<sup>50</sup> liability issue under CERCLA involving three different lenders. The court granted summary judgment motions in favor of two defendants because their activities were related to protecting financial interests.<sup>51</sup> However, the court denied summary judgment as to the third lender, placing great emphasis on the question of whether the activities of the lender's officers constituted day-to-day participation in the debtor's business.<sup>52</sup>

##### 1. American Bank

American Bank loaned money to the owner-operator of a paint manufacturing facility which later required CERCLA clean-up funds for hazardous waste contamination. The loan was secured by a mortgage on the manufacturer's real estate and equipment.<sup>53</sup> Following the debtor's default, American Bank foreclosed on the property and thereafter placed the high bid at the foreclosure sale.<sup>54</sup> Four months later, the bank assigned the high bid to Anna and Thomas Mirabile.<sup>55</sup> After the Mirabiles acquired title to the property, the EPA designated the facility as a hazardous waste site.<sup>56</sup> The EPA removed the hazardous contamination

---

47. See *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *infra* notes 97-126 and accompanying text; *United States v. Mirabile*, 15 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,994 (Sept. 4, 1985), *infra* notes 49-80 and accompanying text.

48. This result was clearly intended by Congress and is not disputed in this Comment.

49. 15 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,992 (Sept. 4, 1985).

50. The court noted that its ruling was "limited to financial institutions which provide funds to entities which dispose of hazardous wastes as a result of their business operations. It may be that a different test would be appropriate for financiers [sic] of entities whose sole business is that of hazardous waste disposal." *Id.* at 20,996 n.5.

51. *Id.* at 20,996-97.

52. *Id.* at 20,997.

53. *Id.* at 20,996.

54. *Id.*

55. *Id.*

56. *Id.*

and then filed suit to recover response costs.<sup>57</sup> The Mirabiles, as owners of the property, were the original defendants named in the petition by the United States.<sup>58</sup> The Mirabiles joined American Bank and other lenders as third-party defendants.<sup>59</sup>

The court granted American Bank's motion for summary judgment on the basis of the security interest exemption.<sup>60</sup> The court noted that the security interest exemption "plainly suggests that provided a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be held liable for cleanup costs."<sup>61</sup> American Bank's contention that it was not an "owner" under CERCLA because the successful bid at the foreclosure sale gave "only equitable title to the property which never evolved into legal title"<sup>62</sup> was not addressed by the court because "[r]egardless of the nature of the title received by [American Bank], its actions with respect to the foreclosure were plainly undertaken in an effort to protect its security interest in the property."<sup>63</sup> In ruling on American Bank's motion, the court stated:

[t]he actions undertaken by [American Bank] with respect to the site simply cannot be deemed to constitute participation in the management of the site. . . . [I]n enacting CERCLA[,] Congress manifested its intent to impose liability upon those who were responsible for and profited from improper disposal practices. Thus, it would appear 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.<sup>64</sup>

The court concluded that American Bank's actions after foreclosure<sup>65</sup> were merely "prudent and routine steps to secure the property against further depreciation,"<sup>66</sup> and, therefore granted American Bank's motion for summary judgment.<sup>67</sup>

---

57. *Id.* at 20,993.

58. *Id.*

59. *Id.* at 20,995.

60. *Id.* at 20,996.

61. *Id.* at 20,995.

62. *Id.* at 20,996.

63. *Id.*

64. *Id.*

65. The court was referring to the fact that American Bank changed the locks, secured the windows, showed the property to potential purchasers and inquired into clean-up costs. *Id.*

66. *Id.*

67. *Id.*

## 2. The Small Business Administration

The court also granted summary judgment in favor of the second lender, the Small Business Administration (SBA), on the basis of the security interest exemption, but without express reference to the exemption language. The SBA loaned money to the same paint manufacturer, taking as security a pledge of stock and junior security interests in various items of collateral, including real property.<sup>68</sup> American Bank and the third lender attempted to join the SBA as a third-party defendant on the basis of the SBA's loan provisions which contemplated managerial involvement.<sup>69</sup> Notwithstanding the contract provisions, the court concluded that the SBA had not, in fact, provided managerial assistance to the debtor.<sup>70</sup> Despite the court's determination, the defendants alternatively argued that the SBA was liable because the SBA's loan restrictions could have prevented the debtor from disposing of the hazardous substances.<sup>71</sup> The court rejected this contention, finding that nothing in CERCLA required lenders to ensure that loan proceeds were applied to clean up hazardous wastes.<sup>72</sup>

In granting the SBA's motion for summary judgment on the issue of liability, the court stated that a lender's participation in "purely financial aspects of operation[s]"<sup>73</sup> is not sufficient to result in CERCLA liability.<sup>74</sup> Although the court's final determination was not expressly couched in terms of the security interest exemption, the court negated the lender's PRP status by the fact that the lender's involvement was purely financial.<sup>75</sup>

## 3. Mellon Bank

In denying the third lender's motion for summary judgment, the court, without referring to the security interest exemption, focused on the fact that the lender had participated in the paint manufacturer's business through the activities of two loan officers. One loan officer served on the

---

68. *Id.* It is important to note that the SBA never held legal or equitable title to the property. *Id.* at 20,997. Therefore, any determinations by the court regarding the lender's liability were based on the lender's involvement in the debtor's business and not on the basis of current or past ownership.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

debtor's advisory board and another loan officer controlled the debtor's post-bankruptcy activities.<sup>76</sup> The court was concerned with the activities of the loan officer who controlled the debtor's post-bankruptcy activities.<sup>77</sup> This officer participated in the debtor's business by "monitoring the cash collateral accounts, ensuring that receivables went to the proper account, and establishing a reporting system between the company and the bank." Furthermore, the officer visited the manufacturing plant almost weekly, determined the priority of filling orders, "and insisted on certain manufacturing changes and reassignment of personnel."<sup>78</sup>

The court determined that Mellon Bank's active participation presented "a genuine issue of [material] fact as to whether Mellon Bank . . . engaged in the sort of participation in management which would bring a secured creditor within the scope of CERCLA liability," and denied Mellon Bank's motion for summary judgment without reference to the security interest exemption.<sup>79</sup> Remaining unanswered by the *Mirabile* decision is the degree to which a lender may participate in a debtor's business "primarily to protect"<sup>80</sup> a security interest without incurring CERCLA liability.

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

An occasion to settle the question left unanswered by *Mirabile* was later presented to a different court. However, the court in *United States v. Maryland Bank & Trust Co.*<sup>81</sup> bypassed the opportunity and denied the lender's summary judgment motion on the basis of current ownership. In so ruling, the court completely skirted the question regarding the degree of participation permitted under CERCLA and enabled the lender liability issue to proceed to trial on the basis of "current ownership" alone.

---

76. *Id.* Deposition testimony revealed that loan officer Brett Sauers gave general financial advice but did not discuss production or waste disposal. *Id.* Further testimony concerning the actions of Mellon Bank's predecessor in interest, Girard Bank, indicated that the paint manufacturer "would have to accept the day-to-day supervision" provided by Girard if the manufacturer "wanted to continue operations with Girard funds." *Id.* Using the actions of Mellon Bank's predecessor in interest as a basis for liability raises the issue of secondary secondary liability. Such extended liability may hinder the transferability of notes secured by real property in the secondary mortgage market. Comment, *The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment*, 41 U. MIAMI L. REV. 879, 901 (1987).

77. 15 Env'tl. L. Rep. at 20,997.

78. *Id.*

79. *Id.*

80. 42 U.S.C. § 9601(20)(A) (1988).

81. 632 F. Supp. 573 (D. Md. 1986).

In *Maryland Bank & Trust Co.*, the lender acquired title to contaminated property through a lending transaction whereby the bank had loaned money to finance the purchase of property on which a garbage business operated.<sup>82</sup> While the record revealed that the bank knew a trash and garbage business operated on the property, no evidence established when the bank became aware of this fact.<sup>83</sup> After the debtor defaulted, Maryland Bank foreclosed on its security interest and purchased the property at the foreclosure sale.<sup>84</sup> Approximately one year later, the debtor notified the county Director of Environmental Hygiene of the hazardous contamination on the property.<sup>85</sup> The EPA instigated clean-up procedures and then sued the bank to recover its response costs.<sup>86</sup>

The court denied the Bank's motion for summary judgment based on a narrow interpretation of the security interest exemption. Maryland Bank argued that it should be entitled to the benefit of the security interest exemption because the bank acquired ownership of the hazardous waste site through foreclosure on its security interest.<sup>87</sup> Interpreting the exemption narrowly, the court stated that the exemption applies only to "those persons who, at the time of the clean-up, hold indicia of ownership to protect a *then-held security interest* in the land."<sup>88</sup> The court determined that Maryland Bank "purchased the property at the foreclosure sale not to protect its security interest, but to protect its investment."<sup>89</sup> Making a distinction between common law title theory mortgage and lien theory mortgage jurisdictions,<sup>90</sup> the court concluded that "Congress intended by this exception to exclude [only] these common law title mortgagees from the definition of 'owner' since title was in

---

82. *Id.* at 573. It was not clear if the hazardous wastes were located near the landfill so as to provide notice to the bank.

83. *Id.* at 575.

84. *Id.* Nothing in the court's opinion attempted to explain why Maryland Bank purchased the property for \$381,500 when the mortgage was for \$335,000. Likewise, there was no indication as to why the bank held title to the property for an extended amount of time.

85. *Id.*

86. *Id.* at 575-76.

87. *Id.* at 579.

88. *Id.* (emphasis added).

89. *Id.* When a lender forecloses on a security interest, it is protecting a security interest and an investment; that is the business of lenders.

90. *Id.* In a title theory jurisdiction, as in Maryland, upon "executing a mortgage, the mortgagor passes title to the property to the mortgagee." When the mortgagor completes payments, title to the property reverts back to the mortgagor. I. WEICH, *REAL ESTATE* 103 (1967). However, in a lien theory jurisdiction, the mortgage placed on the property constitutes a lien in favor of the mortgagee, but title to the property remains with the mortgagor. *Id.* at 104.

their hands only by operation of the common law."<sup>91</sup> The court supported its interpretation by discussing weak portions of the Act's legislative history, focusing mainly on sections referring to ownership requirements.<sup>92</sup>

In granting the government's motion for partial summary judgment on the issue of liability against the lender, the court focused on current ownership alone and in so doing essentially rewrote CERCLA. The court noted that any dispute over the term "operator" as used in CERCLA was irrelevant because "current ownership of a facility alone" would support holding the lender liable.<sup>93</sup> The court maintained that because Maryland Bank had held title to the property for an extended duration, the court did not need to consider whether a lender that purchased the property at a foreclosure sale and then "*promptly resold*" that property, would be liable as an "owner or operator" under CERCLA.<sup>94</sup> By focusing on the length of time that the lender held the property, the court essentially rewrote CERCLA to provide a non-specific time limitation upon which a secured party may hold title to foreclosed,

---

91. 632 F. Supp. at 579. In rejecting a broader interpretation of the security interest exemption, the court expressly disagreed with the court in *United States v. Mirabile*, see *supra* notes 49-80 and accompanying text. *Id.* at 580.

92. The court referred to the language of the first draft of the Comprehensive Oil Pollution Liability and Compensation Act, H.R. 85, which was "one of the four major bills out of which CERCLA emerged." *Id.* at 579. Part of that act defined "owner." Although the definition of owner is not at all like the definition provided by CERCLA as enacted, the definition has a substantially similar security interest exemption. *Id.* The court also referred to House Report 96-172, which accompanied H.R. 85, which provided that:

[The term "owner"] does not include certain persons possessing indicia of ownership (such as a financial institution) who, without participating in the management or operation of a vessel or facility, hold title either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rules or regulations.

*Id.* at 579-80 (quoting House Report 96-172) (emphasis by court). The court concluded, therefore, that "Congress intended to protect banks that hold mortgages in jurisdictions governed by the common law of mortgages, and not all mortgagees who later acquire title." *Id.* at 580. However, Congress did not intend such a narrow reading of the security interest exemption. Congress could have expressly limited the scope of the security interest exemption but, either as a result of shoddy drafting or mere oversight, Congress failed to do so. If Congress truly intended to permit application of the security interest exemption only to lenders in title theory jurisdictions, then Congress must explicitly provide such a limitation. A broader security interest exemption is more realistic considering the normal course of business activities of lenders.

93. *Id.* at 577. Implicit in the court's action of summarily dismissing the dispute over the definition of the term "operator" is the holding that once "current ownership" is established, consideration need not be given to degrees of management, participation, or control.

94. *Id.* at 579 n.5 (emphasis added). Lenders may be deterred from foreclosing to protect their interest because the length of time it takes to resell property is uncertain. If the property is known to be contaminated then the length of time may be even greater.

contaminated property and still be exempted from liability under the security interest exemption.<sup>95</sup> In so ruling, the court declined to address the *degree* of participation required for CERCLA liability thereby increasing the uncertainty facing lenders.<sup>96</sup> The court in *Maryland Bank & Trust Co.* left more questions unanswered than it resolved.

### C. United States v. Fleet Factors Corp.

In *United States v. Fleet Factors Corp.*,<sup>97</sup> the lender faced potential CERCLA liability, not because it foreclosed on real property, but rather because the lender allegedly participated in the management and control of the facility. The lender entered into an agreement<sup>98</sup> in which it advanced funds to the debtor, a cloth printing facility, against the assignment of the debtor's accounts receivable.<sup>99</sup> The agreement between the lender and the debtor continued until shortly before the debtor ceased operations,<sup>100</sup> after which time the lender began attempts to liquidate its security interest.<sup>101</sup> Following the debtor's default, the lender foreclosed on part of the debtor's equipment and inventory, but never foreclosed on the real property.<sup>102</sup> The lender contracted with an auctioneer to conduct a public auction to sell the manufacturer's remaining inventory and equipment.<sup>103</sup> Removal of the inventory and equipment purchased at the auction was the responsibility of the purchasers.<sup>104</sup> After the auction, the lender contracted with a third party to remove the remaining equipment with instructions to leave the premises "broom clean."<sup>105</sup> After the EPA determined the property to be a hazardous waste site, the EPA cleaned up the site and then filed suit against Fleet and several other

---

95. When drafting the security interest exemption, Congress undoubtedly knew the standard practice employed by lending institutions in foreclosing on security interests "primarily for the purpose of protecting" those interests.

96. This left lenders asking how long a lender is permitted to hold title and still be deemed to have "promptly resold" the property.

97. 901 F.2d 1550 (11th Cir. 1990).

98. This agreement permitted Fleet to check the credit of the debtor's customers before the debtor was allowed to ship the goods to its customers. *United States v. Fleet Factors Corp.*, 724 F. Supp. 955, 958 (S.D. Ga. 1988).

99. *Fleet*, 901 F.2d at 1552. As further collateral, Fleet received a security interest in the debtors "textile facility and all of its equipment, inventory, and fixtures." *Id.*

100. *Id.* The debtor filed for Chapter 11 bankruptcy before Fleet cancelled the agreement, but the court approved the agreement between the creditor and the debtor. *Id.*

101. *Id.*

102. *Id.* In fact, the property was conveyed to Emanuel County, Georgia at a foreclosure sale due to the debtor's failure to pay taxes. *Id.* at 1553.

103. *Id.* at 1552.

104. *Id.* at 1552-53.

105. *Id.* at 1553.



defendants.<sup>106</sup> The District Court for the Southern District of Georgia denied Fleet's motion for summary judgment on grounds that there were issues of material fact regarding Fleet's involvement in the management of the facility.<sup>107</sup> Insecure with its interpretation of CERCLA, the district court certified its decision as appropriate for interlocutory appeal.<sup>108</sup>

On appeal, the Eleventh Circuit Court of Appeals denied Fleet's motion for summary judgment and attempted to clarify the ambiguous security interest exemption.<sup>109</sup> In interpreting the security interest exemption, the court of appeals rejected the government's proposed "narrow and strictly literal interpretation."<sup>110</sup> Likewise, the court rejected the interpretation of the security interest exemption adopted by the court in *United States v. Mirabile*<sup>111</sup> because that interpretation was deemed "too permissive."<sup>112</sup>

Rather, the court of appeals ruled that a secured creditor incurs CERCLA liability "by participating in the financial management of a facility to a *degree* indicating a capacity to influence the corporation's

106. *Id.* at 1553. It cost the EPA over \$400,000 to remove 700 fifty-five gallon drums of toxic chemicals and forty-four truck loads of asbestos contaminated material. *Id.*

107. *United States v. Fleet Factors Corp.*, 724 F. Supp. 955, 958 (S.D. Ga. 1988).

108. *Id.* at 962. The reasons given for granting the certification were:

[T]his order disposes of controlling questions of law concerning which there is *substantial doubt* including, but not limited to, [the] construction of CERCLA's definition of "owner and operator" and the secured lender exemption contained in that definition; [the] construction of the CERCLA provisions describing the classes of liable persons; and [the] construction of the scope of the third-party defense to CERCLA liability.

*Id.* at 962 (emphasis added).

109. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1552 (11th Cir. 1990).

110. *Id.* at 1556. The court declined to accept

the government's suggestion because it would largely eviscerate the exemption Congress intended to afford to secured creditors. Secured lenders frequently have some involvement in the financial affairs of their debtors in order to insure that their interests are being adequately protected. To adopt the government's interpretation of the secured creditor exemption could expose all such lenders to CERCLA liability for engaging in their normal course of business.

*Id.* This statement is clearly within the general rule of statutory construction that a court should interpret a statute to give effect to all of its provisions. Unfortunately, the court, in its ultimate holding, essentially provides an interpretation which destroys all possible application of the security interest exemption.

111. 15 *Env't'l L. Rep.* (Env't'l L. Inst.) 20,992 (Sept. 4, 1985). See also notes 60-64 and accompanying text.

112. *Fleet*, 901 F.2d at 1558. The Court ruled that ambiguous terms within CERCLA "should be construed to favor liability" since CERCLA has an overwhelming remedial goal. *Id.* at 1557 (citing *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990).

treatment of hazardous wastes.”<sup>113</sup> However, the court failed to adequately delineate the boundaries of the “degree” of participation permitted.<sup>114</sup> Interpreting the security interest narrowly, the court determined that a lender would be liable if its participation in the management of a facility was broad enough to support an inference that the lender “could affect hazardous waste disposal decisions if it so chose.”<sup>115</sup> The court theorized that this interpretation would give creditors latitude to deal with debtors up to the point of permitting a lender to monitor all aspects of the debtor’s business if necessary, without being exposed to potential liability.<sup>116</sup> Finally, the court stated that a lender could “become involved in occasional and discrete financial decisions” in order to protect its security interest without incurring CERCLA liability.<sup>117</sup> Unfortunately, the court failed to explain the phrase “occasional and discrete financial decisions.” Without clarification, lenders have no way of ascertaining which of their normal course of business activities are permissible and which will result in CERCLA liability.

The court defended its ruling by noting that its interpretation would encourage lenders to investigate waste treatment practices of potential debtors, which would, in turn, persuade debtors to practice more responsible disposal practices.<sup>118</sup> The court believed its judgment would induce lenders to weigh the risks of CERCLA liability into the terms of loan agreements, thereby “incur[ing] no greater risk[s] than they bargained for.”<sup>119</sup> Changes in loan agreements would in turn persuade debtors “to improve their handling of hazardous wastes.”<sup>120</sup> While these are desirable results, they are not the express nor implied objectives of CERCLA.<sup>121</sup> The court’s interpretation of the security interest exemption amounts to nothing more than pure judicial activism. More specifically,

---

113. *Id.* (emphasis added).

114. *Id.* The Court briefly attempted to define that degree by noting that:

It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable—although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste.

*Id.* at 1557-58.

115. *Id.* at 1558. This language further demonstrates the confusion that has resulted from judicial attempts at interpreting the ambiguous CERCLA.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. See *supra* notes 10-13 and accompanying text.

the court rewrote CERCLA and in so doing acted as a legislator.<sup>122</sup>

The court denied Fleet's motion for summary judgment because of Fleet's pervasive involvement with the debtor's business.<sup>123</sup> Fleet exerted control over the debtor in a number of ways:

Fleet required [the debtor] to seek 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 [the debtor's] employment tax forms, controlled access to the facility, and contracted with [the auctioneer] to dispose of the fixtures and equipment at [the facility].<sup>124</sup>

It was these facts that, if proved, would be "sufficient to remove" the lender from the protection of the security interest exemption,<sup>125</sup> because the lender's participation in the management of the debtor's business would be deemed "pervasive."<sup>126</sup>

#### D. *May Lenders Rely on the Security Interest Exemption?*

Following the judicial interpretations of the security interest exemption, it is unclear whether lenders have any protection under CERCLA.

122. The court concluded that the increased awareness of CERCLA liability would encourage creditors to "monitor hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable treatment standards." *Id.* The court in *Fleet* rewrote CERCLA so as to convert lenders into environmental inspectors. If this were Congress' intent, surely Congress would have more clearly reflected that goal in CERCLA.

123. *Id.* at 1559. The court refused to grant the defendant's motion for summary judgment because it was unsure whether Fleet's activities constituted "operating" under 42 U.S.C. § 9601(20)(A)(i) (1988), which defines an "owner or operator," in part, as "any person owning, operating, or chartering by demise." *Id.* (emphasis added). Obviously, Fleet's actions do not constitute "participation in the management." Fleet engaged in these actions in an effort to liquidate the remaining assets of the facility. Liability should not be imposed under these circumstances. However, Fleet should have a duty to select responsible parties in requesting normal clean-up services. It appears that "participation in the management of the facility" would include some form of management of the facility *while* operating as a business and *not* while liquidating its assets.

124. *Fleet*, 901 F.2d at 1559.

125. *Id.*

126. *Id.* The court noted that:

[g]enerally, the lender's capacity to influence a debtor facility's treatment of hazardous waste will be inferred from the extent of its involvement in the facility's financial management. Here, that inference is not even necessary because there was evidence before the district court that Fleet actively asserted its control over the disposal of hazardous wastes at the site by prohibiting [the debtor] 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 the contaminants.

*Id.*

Courts have placed varying interpretations on the security interest exemption,<sup>127</sup> leading to inconsistent conclusions and uncertainties concerning the exemption's availability. Although the court in *Mirabile* read the security interest exemption broadly, suggesting that a lender should only be liable if it participates in the day-to-day management of the debtor's business,<sup>128</sup> the court failed to provide lenders with adequate guidance. On the other hand, the court in *Maryland Bank & Trust Co.* construed the exemption so narrowly that it would apply only where the lender holds indicia of ownership to protect a "then-held security interest,"<sup>129</sup> thereby making the exemption inapplicable when a lender has foreclosed on property to protect a security interest. In so doing, the *Maryland Bank & Trust Co.* court misinterpreted Congressional intent<sup>130</sup> by preventing foreclosing lenders from ever claiming the security interest exemption. Finally, the court in *Fleet* not only failed to adequately delineate the boundaries of its narrow interpretation but, in so doing, made the security interest exemption in CERCLA mere excess language. This clearly violates the well known maxim of statutory construction "that all words and provisions of statutes are intended to have meaning and are to be given effect, and words of a statute are not to be construed as surplusage."<sup>131</sup>

#### IV. THE NEED FOR REEXAMINATION OF LENDER LIABILITY

Analysis of the case law reveals that courts have developed a gloss on a vague and poorly drafted statute.<sup>132</sup> All three courts engaged in an

---

127. See *supra* notes 46-48 and accompanying text.

128. See *United States v. Mirabile*, 15 *Env'tl. L. Rep.* at 20,995 (the "exemption plainly suggests that provided a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be held liable for cleanup costs."). See *supra* notes 49-80 and accompanying text.

129. 632 *F. Supp.* at 579 (emphasis added). The exemption would apply only in jurisdictions which follow the title theory of mortgages. See *supra* note 92. A majority of states have overridden the title theory of mortgages through statutory enactment. G. Osborne, G. Nelson & D. Whitman, *Real Estate Finance Law* § 4.2 (1979). At the time of the *Maryland Bank & Trust Co.* decision, there were only thirteen jurisdictions which still followed the title theory. 632 *F. Supp.* at 579. Therefore, the exemption would apply only to a minority of jurisdictions.

130. In enacting CERCLA, Congress intended to hold liable those who were responsible for the contamination and those who benefited from the industry which caused the hazardous waste problem. See *supra* notes 10-13 and accompanying text.

131. *Wilderness Society v. Morton*, 479 *F.2d* 842, 856 (D.C. Cir. 1973) (citing *McDonald v. Thompson*, 305 *U.S.* 263, 266 (1938)).

132. Blame must also be placed upon Congress. See *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 *F.2d* 1568, 1572 (5th Cir. 1988) ("Although [CERCLA] was enacted in the waning hours of the 96th Congress, and as the product of apparent legislative compromise [it] is not a model of clarity. . ."); *Artesian Water Co. v. Government of New Castle County*, 659 *F. Supp.* 1269, 1277 (D. Del. 1987) ("Because CERCLA as finally enacted was the product of an unusually

extensive exchange of adjectives with no supporting analysis when confronted with the issues of whether a lender is an "owner or operator" as defined in CERCLA and the degree to which a lender may actively participate in management and control to protect its security interest but still fall within the ambit of the security interest exemption. The courts, in their attempts to resolve the issues, generate more questions than they answer.

Imposing liability on lenders-turned-owners creates problems and economic ramifications that do not arise when other landowners are held liable.<sup>133</sup> For example, "[w]hen an increase in the cost of capital results in a decline in the demand for capital, economic growth may be stymied by the subsequent decline in investment."<sup>134</sup> This, in turn, generally leads to a reduction in the construction industries, a reduction in new economic growth, a decrease in employment, and a decline in consumer spending.<sup>135</sup> Although an increase in transaction costs alone will not lead to a recession, its economic consequences affect all levels of society.<sup>136</sup>

Faced with potential CERCLA liability, lenders have begun to take additional precautionary measures designed to lead to the discovery of hazardous waste including conducting environmental audits, policing debtors' current usage, and investigating the history of usage of the facility.<sup>137</sup> As a result, lenders pass the costs of precautionary measures on to debtors in the form of increased interest rates and transaction costs.<sup>138</sup> In the future, lenders may go so far as to abandon security interests to avoid CERCLA liability.<sup>139</sup> Lenders may also be unwilling to collateralize land as they become leery of potential liability. Considering the ripple effects<sup>140</sup> lender liability may have on the banking community and the

---

arduous process of political compromise, it is hardly a model of concise legislative draftsmanship.") (footnote omitted); *United States v. Price*, 577 F. Supp. 1103, 1109 (D.N.J. 1983) ("[CERCLA] was hastily, and, therefore, inadequately drafted. . . . Because of the haste with which CERCLA was enacted, Congress was not able to provide a clarifying committee report, thereby making it extremely difficult to pinpoint the intended scope of the legislation.").

133. Comment, *supra* note 76, at 899-900.

134. Comment, *supra* note 76, at 900.

135. Comment, *supra* note 76, at 900.

136. Comment, *supra* note 76, at 900.

137. Comment, *supra* note 76, at 899.

138. Comment, *supra* note 76, at 900.

139. This appears to have been the situation in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *see supra* notes 97-126 and accompanying text, wherein the lender, although it had a security interest in the property, foreclosed only on security interests relating to equipment.

140. "Like most legislative remedies, CERCLA is not a perfect solution to the hazardous waste problem. The Act has created as many problems as it has resolved. In an effort to protect the

entire economy, Congress needs to respond promptly.

The uncertainties that have been cast upon lenders by judicial interpretations of the security interest exemption create a need for Congress to adopt legislation which *specifically* confronts and clarifies the questions raised by judicial attempts at interpreting CERCLA, the security interest exemption, and lender liability.

#### A. *A Recent Attempt at Reform: H.R. 2085*

Representative John J. LaFalce recently attempted to clarify the ambiguities created by the courts by proposing an amendment to exempt lenders from CERCLA liability. LaFalce's amendment,<sup>141</sup> now before the Committee on Energy and Commerce, provides a blanket exemption from CERCLA liability for *any* "commercial lending institution which acquires ownership or control of a property to realize on a security interest held by the person in that property."<sup>142</sup>

While LaFalce's amendment attempts to correct the inconsistent judicial interpretations, it is inadequate in many respects. Not only does it fail to make important distinctions between situations where liability should and should not arise, it is not in accordance with the policies of CERCLA.<sup>143</sup> In enacting CERCLA, Congress intended to hold liable those parties who benefit from hazardous waste contamination. A lender enters into a loan transaction to make money. Generally, hazardous waste contamination is neither a direct nor an indirect result of a loan

---

[Superfund] from depletion, the EPA's enforcement of CERCLA has deleteriously affected real estate and commercial transactions." Glass, *Superfund and SARA: Are There Any Defenses Left?*, 12 HARV. ENVTL. L. REV. 385, 386 (1988). CERCLA liability has also reached shareholders and parent corporations. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) (The owner and stockholder of the defendant corporation was held "liable as an 'operator' under CERCLA for the State's response costs.") (citation omitted). See also *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988).

141. H.R. 2085, 101st Cong. 1st Sess. (1989). The EPA is currently considering a proposal which absolves lenders of CERCLA liability provided the lender sells the contaminated property within six months. Wall Street J., Oct. 10, 1990, at B6, col. 1.

142. H.R. 2085, 101st Cong. 1st Sess. § 1(a)(1)(A)(i) (1989). This bill was introduced and referred to the Committee on Energy and Commerce on April 25, 1989. No further action has taken place on this bill as of yet. Another bill, H.R. 2787, introduced by Representative Curt Weldon, attempts to define the parameters of an "all appropriate inquiry," as required under 42 U.S.C. § 9601(35)(B) (1988), in order to qualify for the 'innocent landowner' defense. H.R. 2787, 101st Cong. 1st Sess. (1989).

143. The purpose behind CERCLA was to assure "that those who benefit[ed] financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business." S. Rep. No. 848, 96th Cong., 2d Sess., 13 (1980). See *supra* notes 10-13 and accompanying text. Overall, the legislation was designed to provide funding for the clean-up costs. While there are certain instances where lending institutions should not be held liable, there are, likewise, circumstances where CERCLA liability should be imposed on lenders.

transaction, but rather, is due to careless disposal practices by debtors. However, situations may arise where the lender's activities directly cause the hazardous waste contamination. A blanket exemption fails to distinguish between situations where a lender should and should not be held liable.

Congress must strike a balance taking into account CERCLA policies, economic realities, and human health and welfare concerns. There are certain costs and risks that a lender expects to assume when engaging in lending practices which are similar to property management activities. Completely absolving lending institutions from CERCLA liability permits careless practices by a commercial community which must take responsibility to deter the continued degradation of the environment. Conversely, the adverse effects created by holding lenders liable without exception are similarly devastating.<sup>144</sup> Accordingly, the security interest exemption must provide protection so as to avoid the deputization of lenders as environmental monitors.<sup>145</sup> Adopting legislation which balances the numerous interests will further the interests of all parties involved.

#### B. *A Proposed Solution*

Congress needs to amend CERCLA to redefine the scope of the security interest exemption, to confront the inconsistent judicial interpretations of CERCLA, and to detail obligations and responsibilities of lenders. To afford lenders adequate protection, provisions are needed which permit lenders to foreclose on security interests, specify pre-lending duties, set out the duties of lenders regarding discoveries of hazardous waste, and allow lenders to give financial assistance. In order to permit lending institutions to protect security interests through reasonable measures and not face the extreme costs of clean-up, an amendment to CERCLA must contain provisions that:

- redefine the scope of the security interest exemption to permit foreclosures, regardless of the mortgage theory of that particular jurisdiction;
- permit the lender to foreclose on contaminated property and have a "controller" appointed to properly liquidate the debtor's assets;<sup>146</sup>

---

144. Such carefree lending practices include willful blindness of environmental problems, which is clearly undesirable in all respects.

145. Comment, *supra* note 76, at 901.

146. "Controller," as used here, is intended to be analogous to a "receiver" appointed pursuant

- specify a duty on lenders to report discoveries of potential or actual contamination;
- specify pre-lending duties of lenders;
- permit a lender to provide managerial assistance without risking exorbitant liability unless the assistance rises to the level of day-to-day participation or directly causes the hazardous waste contamination; and
- permit lenders to hold title to foreclosed property for a reasonable amount of time, determined by considerations of the economics of the locality and the condition of the property.

### 1. Lenders Should be Allowed to Continue the Practice of Foreclosing on Security Interests

Due to the courts' vague and inconsistent interpretations, legislation is necessary to specifically grant secured creditors the right to foreclose on security interests without incurring CERCLA liability and without a need to consider the mortgage theory of the appropriate jurisdiction. The financial community must know its rights in order to effectively deal with debtors. Broadening the scope of the security interest exemption to apply to lenders who foreclose on contaminated property will enable lenders to properly maintain their security interests while avoiding the ripple effects caused by lender liability.<sup>147</sup>

### 2. Appointment of a "Controller" to Protect the Environmental Interest

Provisions permitting a lender to foreclose on a facility and appoint a "controller" to conduct expedient liquidation operations will protect the environment and enable lenders to protect security interests. This action is particularly necessary where the debtor is deliberately squandering the assets of the business.<sup>148</sup> The "controller" concept could be explicitly set forth in the mortgage or security agreement, or could arise

---

to state corporation statutes when the corporation is operated to the detriment of shareholders or creditors. *See* DEL. CODE ANN. tit. 8, § 226(a)(2) (1983). Of course, this should be limited to extreme situations. It may be appropriate, for example, where the debtor is deliberately squandering the business' assets. Liquidation would have to begin immediately after the "controller" is appointed so as to prevent unscrupulous lenders who would have a "controller" run a business for an extended amount of time under the guise of preparing to liquidate.

147. *See supra* notes 133-140 and accompanying text.

148. A debtor may squander the business assets upon discovery of potential CERCLA liability. Because hazardous waste clean-up costs can be exorbitant, *see supra* note 2, the debtor would desire to liquidate the assets prior to any action by the United States.



from equitable principles of common law or pursuant to statutory provisions. Likewise, the provision must enable the lender to contribute management advice and instruction where the debtor, due to lack of capital or revenues, is unable to meet its financial obligations. So long as any advice provided does not rise to day-to-day participation or directly cause the contamination, the lender should be exempted from liability.

### 3. Lenders' Duties to Report Discoveries

New legislation must govern actions of a lending institution which has foreclosed on property and thereafter discovered that the property contains hazardous waste. For example, a lender must be required to report immediately the discovery to the EPA, but at the same time be permitted to file a lien on the property. If the government designates the site as a Superfund site, any lien filed by the lender would still be subordinate to the federal lien in favor of the United States.<sup>149</sup> The lender's lien would then permit the lender to recoup any losses after the government has been compensated. In the end the lender, if an innocent and passive bystander, would not incur CERCLA clean-up costs.

### 4. Specific Pre-Lending Duties

Provisions that delineate specific duties of lending institutions prior to accepting security interests in real property will help clarify the ambiguities caused by the inconsistent judicial interpretations. Requirements could include environmental audits, soil sampling, site inspections, and historical reviews.<sup>150</sup> Of course, Congress must not transform lenders into EPA deputies. The exemption must, however, be negated where a lender accepts a security interest in property and knew or should have

---

149. 42 U.S.C. § 9607(l)(1) (1988) provides in pertinent part that "[a]ll costs and damages for which a person is liable to the United States under [CERCLA] . . . shall constitute a lien in favor of the United States upon all real property and rights to such property which — (A) belong to such person; and (B) are subject to or affected by a removal or remedial action." *Id.* The language creates a lien:

in favor of the United States for the value of improvements to real property resulting from a response action. Response actions may cause substantial increases in the value of the land on which these actions are taken. Thus, the purpose of these liens is to ensure that the owners of the property where a clean-up has occurred will not receive a windfall profit as a result of the clean-up.

H.R. REP. NO. 253, 99th Cong., 2d Sess., pt. 3, at 17, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3040. For the duration and enforceability of this federal lien, see 42 U.S.C. § 9607(l)(2)-(4) (1988).

150. *See supra* note 41.

known that the debtor either handled hazardous wastes or was likely to handle hazardous wastes as an integral part of the debtor's business.

### 5. Managerial Assistance

Congress needs to specify the degree to which lenders are permitted to participate in a debtor's business without facing CERCLA liability. Legislation delineating which activities would result in liability and which activities would not is needed to stabilize the inconsistencies created by the divergent judicial interpretations. Only then will lenders have the option to focus on lending activities without the constant concern of CERCLA liability.

### 6. Holding Title to Foreclosed Property

New legislation should contain a provision which enables lenders to hold title to foreclosed property for a reasonable amount of time. The duration should depend upon the economics of the geographic area and the condition of the property. For example, property which is severely contaminated would clearly require additional time for the lender to find a willing buyer. Such a provision would enable lenders to foreclose on property without fear of facing automatic CERCLA liability on the basis of current ownership alone.<sup>151</sup>

### C. *A Call for Congressional Action*

Congress must enact legislation which deals equitably and specifically with lender liability under CERCLA. Any legislation enacted cannot, like LaFalce's amendment, completely exonerate lenders from liability without inquiring into potential causation. Lenders should be responsible for response costs when the lender's participation in the debtor's business causes the hazardous contamination. However, when the lender's relation to the contaminated property is transitory, no liability should follow.

## V. TESTING THE PROPOSED SOLUTION AND LAFALCE'S SOLUTION

Testing each proposed solution demonstrates the inadequacies of LaFalce's amendment and further demonstrates the need for Congressional clarification. Each hypothetical below assumes that the lender has

---

151. See *supra* notes 93-96 and accompanying text.

a security interest in real property which either has or will become subject to CERCLA clean-up proceedings by the EPA. LaFalce's amendment, which provides a blanket exemption, would produce exactly the same result under each hypothetical. Congress, however, did not intend to completely absolve lenders from liability.<sup>152</sup> There are instances, as shown below, where holding a lender liable under CERCLA furthers the purposes of the Act without completely ambushing the financial community.

#### A. *The Lender as an "Owner" under CERCLA*

##### 1. Hypothetical One

A transitory relationship with contaminated property should not be a basis for lender liability under CERCLA. Hypothetical one involves a situation where a lender forecloses on a security interest, purchases the property at the foreclosure sale, and thereafter resells that property.<sup>153</sup> Under these circumstances, the author's proposal and LaFalce's amendment produce identical results. The transitory relationship of the lender would not lead to liability. Generally, this is the desired result as lenders should not be responsible for contamination they did not create. Failing to hold a lender liable on the basis of a transitory relationship to a hazardous waste site will further the interests of all parties involved. Lenders' interests are furthered because they can execute on a security agreement without risking exorbitant liability. Accordingly, lenders will not be discouraged from providing loans and accepting security interests in real estate thereby furthering the interests of property owners as well.

To protect a security interest, a lender is likely to either clean up a hazardous waste site before selling the property or sell the property, discounted proportionately to reflect clean-up costs.<sup>154</sup> Therefore, the

---

152. See *supra* notes 10-13 and accompanying text.

153. This is a fairly common scenario. It is the common procedure utilized by lending institutions when dealing with secured interests where the debtor defaults. This hypothetical is based upon American Bank's situation presented to the court in *Mirabile*. See *supra* notes 49-80 and accompanying text.

154. The lender, or any other potentially responsible party, will be liable if it fails to disclose information regarding hazardous waste to potential buyers. See 42 U.S.C. § 9601(35)(C) (1988).

[I]f the defendant [in a response action] obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

*Id.*

lender will have already suffered a loss due to the contamination. Holding a lender additionally liable under these circumstances will cause unreasonable economic ramifications including deterred lending, increased lending costs, and inhibited economic growth.<sup>155</sup>

## 2. Hypothetical Two

The author's proposal and LaFalce's amendment produce different results where a lender is unable to resell property after foreclosing on a hazardous waste site. Hypothetical two assumes that a lender foreclosed on a security interest held in contaminated property, purchased it, and has held title to the real estate for an extended length of time when the EPA begins CERCLA clean-up.<sup>156</sup> The blanket exemption of LaFalce's Amendment expunges the lender of liability; therefore, no inquiry is necessary regarding the reasons for the lender's delay in not immediately reselling the property. The author's proposal, on the other hand, requires an examination into the lender's reasons for currently holding title to the property.

As current ownership alone is not a viable basis for lender liability under CERCLA, courts need to examine the reasons the lender still holds title to the real estate to determine if the lender is benefitting from a contaminated facility. Lenders not in the property management business ordinarily attempt to resell foreclosed property to realize on their security interest. If the lender opts to resell, but is unable to do so because the property is contaminated with hazardous waste, the lender should not be liable as a current owner because extended ownership is a direct result of market forces and the existence of the hazardous waste contamination. In this situation the lender, though acting prudently, is not holding the property indefinitely but rather is unable to resell the property and therefore should not be held liable under CERCLA. On the other hand, if the lender opts to hold title to the real estate for reasons other than the inability to resell, such as for investment purposes, then the lender should clearly be liable as a current owner because the lender is in effect acting as a property manager. The lender's actions in

---

155. See *supra* notes 133-140 and accompanying text.

156. An extended length of time would be beyond that length of time necessary to resell the property considering such factors as the economic climate where the property is situated and whether or not the property was known to be contaminated with hazardous waste at the time the property was placed on the market. This hypothetical is based on the situation presented to the court in *Maryland Bank & Trust Co.* See *supra* notes 81-96 and accompanying text.

holding title to foreclosed property clearly go beyond an attempt to protect or realize on a security interest. The lender who opts to hold title to foreclosed property, for reasons other than the inability to resell due to hazardous waste contamination, is not acting to protect its security interest and therefore the security interest exemption to liability would not apply. It is clear that a lender's reasons for holding title to contaminated property for an extended period of time must be established to determine whether the lender is benefitting from a contaminated facility.<sup>157</sup>

## B. *The Lender as an "Operator" under CERCLA*

### 1. Hypothetical One

The two proposals could produce different results where a lender provides managerial assistance to a debtor. This hypothetical presumes that the lending agreement enables the lender to provide managerial assistance to the debtor, and the lender does in fact provide assistance.<sup>158</sup> A court confronted with these circumstances, under current judicial interpretations of CERCLA, would hold the lender liable as an "operator."<sup>159</sup> This result is contrary to ordinary lending practices which permit lenders to insist that the debtor accept management assistance in order to protect its security interest. For example, a debtor plagued with incapable management personnel requires managerial assistance. If no assistance is provided, then CERCLA liability does not arise under either proposed solution. Furthermore, if the lender contributes management assistance neither LaFalce's amendment nor the author's proposal result in the lender being liable for clean-up costs. However, LaFalce's amendment absolves the lender without regard to whether the lender's actions contributed to the hazardous waste contamination. The author's proposal, on the other hand, only absolves the lender of liability as long as the assistance provided to the debtor does not rise to the level of day-to-day operations nor directly cause, or contribute to, the contamination.<sup>160</sup>

Permitting lenders to provide managerial assistance furthers environmental interests in that lenders are not discouraged from monitoring debtors' waste management activities, thus leading to early detection of

---

157. LaFalce's amendment, quite simply, fails to make these important distinctions and therefore does not satisfy the need presented by inconsistent judicial interpretations.

158. This hypothetical is based upon the situation presented when the court in *Mirabile* was confronted with the liability of the Small Business Administration. See *supra* notes 68-75 and accompanying text.

159. 42 U.S.C. § 9601(20)(A) (1988).

160. LaFalce's Amendment fails again to make these essential distinctions.

contaminated facilities. Presumably, lenders desire to supervise debtors' activities throughout the life of mortgages to protect their security interests.<sup>161</sup> Although the underlying purpose of CERCLA is to promote safe hazardous waste handling and disposal practices,<sup>162</sup> current court interpretations of the security interest exemption discourage lenders from becoming involved in the debtor's disposal practices for fear that the lender's actions might be deemed "participation in the debtor's day-to-day activities."<sup>163</sup> While CERCLA's primary purpose is to provide a solution to the hazardous waste problem, a supplemental objective is holding liable only those who cause and benefit from hazardous waste contamination.<sup>164</sup> Therefore, absolving the lender of liability where the lender *properly* provides managerial assistance is in accordance with the objectives of CERCLA.

## 2. Hypothetical Two

The author's solution and LaFalce's amendment could potentially result in divergent conclusions where lending institutions provide "day-to-day" managerial assistance to the debtor. Hypothetical two assumes that a lender's officials engage in management activities, similar to the concept of "participation in the management" of the facility.<sup>165</sup> Such was the situation in *Mirabile* where bank officials gave general financial advice, monitored cash collateral accounts, ensured that receivables went to proper accounts, determined priority of filling orders, and established a reporting system between the lender and the debtor.<sup>166</sup> A lending institution should be permitted to control debtors' operations in this manner because these actions are taken primarily to protect the lender's security interest.

When the actions rise to the level of day-to-day management participation or when the participation is the direct cause of the contamination,

---

161. This presumption extends, not only from the fear of potential CERCLA liability, but also from the fundamental nature of the transaction. A lender should want to ensure that the value of its security interest is not being decreased by any deteriorative action, whether that action is hazardous waste contamination or strip mining or any other similar action.

162. H.R. REP. NO. 1016, 96th Cong. 2d Sess., pt. 1, 62, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6139.

163. See Tom, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 931 (1989).

164. See *supra* notes 10-13 and accompanying text.

165. This hypothetical is based upon the fact pattern presented in *Mirabile*, when the court was dealing with the liability of Mellon Bank. See *supra* notes 76-80 and accompanying text.

166. *United States v. Mirabile*, 15 Env't'l L. Rep. (Env't'l L. Inst.) 20,992, 20,996 (Sept. 4, 1985).

liability under CERCLA clearly follows.<sup>167</sup> The bank officials in *Mirabile* went beyond what should be permitted in that they insisted on manufacturing changes, reassigned personnel, and even intimated that if the debtor wanted further financing, the debtor had to accept the lender's day-to-day supervision.<sup>168</sup> Participation such as this extends beyond actions designed to protect security interests; rather, these actions amount to involvement in the day-to-day operations. Likewise, if an official of the lender is acting as an officer of the debtor, CERCLA liability follows because this participation corresponds with day-to-day operations. However, if a lender's official serves on the board of directors of the debtor's business, then no CERCLA liability need be imposed unless it is shown that the official's actions as a director led to the reckless hazardous contamination. Acting as a director is conducive to providing financial advice, thus protecting the security interest, and ordinarily does not rise to participation in the day-to-day operations. While the author's proposal recognizes these distinctions, LaFalce's amendment fails to distinguish between lenders who participate in the debtor's business to protect the security interest and lenders who, through their participation, directly cause the hazardous contamination.

Additionally, the frequency of visits, without considering the content of those visits, is not a valid determinative factor for CERCLA liability purposes. The court in *Mirabile* commented that, in some instances, the loan officers visited the facility almost weekly.<sup>169</sup> Lending officials must be permitted to call on the debtor as often as necessary; that determination being at their discretion. It is the *content* of the visits which must be scrutinized to determine if the participation is connected to the contamination.<sup>170</sup> If an official orders certain actions which lead to contamination, liability should clearly follow. However, if the official visits only to check documents such as financial statements and production schedules, no liability should arise.<sup>171</sup>

---

167. The court in *Mirabile* would likely agree with this statement. The very reason that the court refused to grant the lender's motion for summary judgment was the fact that the loan officer was involved in the day-to-day activities of the debtor.

168. Here, an examination into the content of that "day-to-day supervision" is necessary because determination of liability should be based on actual involvement.

169. See *supra* note 78 and accompanying text.

170. Liability determinations are more properly made on the basis of the content of the activities that the lender engaged in during the visits rather than the mere fact that the officials visited the facility.

171. LaFalce's amendment fails again to make these essential distinctions.

### 3. Hypothetical Three

Post-default activities do not rise to the level of participation necessary to impose liability under CERCLA if such activities are limited to contracting with auctioneers or cleaners and permitting auction purchasers to remove purchased equipment.<sup>172</sup> These activities are clearly related to liquidation of the facility and its assets and are undoubtedly taken primarily to facilitate the realization on the lender's security interest.<sup>173</sup>

On the other hand, if removal actions actually cause the hazardous contamination, liability must be imposed upon the lender and the party conducting the removal actions. In *Mirabile*, the EPA alleged that the actions of removing the equipment caused the hazardous waste contamination. If this were in fact true,<sup>174</sup> and is a common occurrence, then a specific provision must be created to deal with this problem. Upon discovery of potential contamination, the lender should have a duty to ensure the safe and responsible removal of the equipment. Requiring lenders to conduct environmental audits,<sup>175</sup> or take other steps calculated to discover the potential for actual contamination protects the environment without placing an unequal burden on lenders. This scenario demonstrates, again, the failure of LaFalce's amendment to make distinctions between conduct which should and should not result in liability since LaFalce's amendment would exonerate all lenders without consideration of the true cause of the hazardous contamination.

## VI. CONCLUSION

The only viable solution at this juncture is legislation designed to confront the judicial glosses and resulting inconsistent interpretations of CERCLA's security interest exemption. While there is good reason to absolve lenders from liability, a blanket exemption is not the answer.

---

172. This fact pattern is based upon the scenario dealt with by the court in *Fleet Factors Corp.* See *supra* notes 97-126 and accompanying text.

173. This assumes that the contamination did not result from the actual removal of the equipment purchased. If the contamination arises because of the removal actions, then CERCLA liability should follow.

174. The *Mirabile* court remanded this case to determine, among other things, if the removal activities resulted in the asbestos contamination.

175. The Nat'l L.J., Feb. 5 1990, at S10, col. 1. "[I]t is essential to conduct an assessment of environmental conditions at entities to be acquired before a transaction is closed." *Id.* at S13, col. 1. It is presumed that an environmental audit would consist of elements similar to the "Phase I Environmental Audit" expressed in Representative Curt Weldon's proposed amendment to CERCLA. See *supra* note 41. See also Warchall & Reis, *Environmental Auditing in Corporate Transactions*, 35 Fed. B. News & J. 445 (Dec. 1988).



Distinctions must be made between those actions which will cause the lender to incur liability and those which are acceptable under CERCLA. LaFalce's amendment fails to make essential distinctions when dealing with potential lender liability and provides ample opportunity for further inconsistent judicial interpretations. Holding lending institutions liable under CERCLA certainly augments the government's chance of recovering clean-up costs. However, the view that holds a lender liable whose relationship is merely transitory insofar as the production and disposal of hazardous substances is concerned is not in accordance with the purposes and objectives of CERCLA. Congress must examine the confusion surrounding lender liability and the security interest exemption.

*Michael F. Smith*