

1991

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Recommended Citation

Becky A. Margolin, *United States v. Fleet Fatctors Corp.: Expanding the Scope of Lender Liability*, 22 Loy. U. Chi. L. J. 1139 (1991).
Available at: <http://lawcommons.luc.edu/lucj/vol22/iss4/5>

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United States v. Fleet Factors Corp.: Expanding the Scope of Lender Liability

I. INTRODUCTION

Waste management has become a growing concern throughout the United States. To address this concern, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).¹ Through CERCLA, Congress sought to impose upon those parties responsible for creating environmental hazards liability for decontamination procedures.² CERCLA legislation holds liable those individuals or entities that are *owners or operators* of a facility at which a contamination has occurred.³

Congress, however, was aware that the language used in CERCLA could have a detrimental impact on the lending industry.⁴ Therefore, Congress included an exemption from liability for secured creditors.⁵ Specifically, the exemption precludes from liability those who hold indicia of ownership primarily to protect their security interests in a facility.⁶

Until recently, courts had no occasion to interpret the scope or meaning of the secured creditor exemption. In the few cases brought concerning this statutory exemption, courts were reluctant to hold a party liable for environmental response costs unless that party had participated in the day-to-day management of the facility⁷ or had foreclosed on the property.⁸

On May 23, 1990, the United States Court of Appeals for the Eleventh Circuit seemingly put an end to the ambiguity surrounding the scope and meaning of CERCLA liability and the secured

1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101-308, as amended, 42 U.S.C. §§ 9601-9675 (1988).

2. See *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990); H.R. REP. NO. 1016, 96th Cong., 2d Sess. 1 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119.

3. 42 U.S.C. § 9607(a)(1)-(4) (1988). See *infra* note 20 and accompanying text.

4. See *infra* note 101 and accompanying text.

5. 42 U.S.C. § 9601(20)(A) (1988).

6. *Id.*

7. See *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20994 (E.D. Pa. 1985). For a discussion of *Mirabile*, see *infra* notes 26-31 and accompanying text.

8. See, e.g., *United States v. Maryland Bank & Trust*, 632 F. Supp. 573, 579-80 (D. Md. 1986). For a discussion of *Maryland Bank*, see *infra* notes 32-36 and accompanying text.

creditor exemption. In *United States v. Fleet Factors Corp.*,⁹ the court held that a secured creditor could be held liable for decontamination costs if the creditor participated in the management of the facility to a degree indicating a "capacity to influence" waste management decisions regardless of whether the creditor actually exercised this capacity.¹⁰ The court explicitly rejected the notion that in order to incur liability, a creditor must have been involved in the day-to-day management of the facility.¹¹

This Note first discusses the goals of CERCLA, the theory behind the secured creditor exemption, and prior court applications of the exemption. Next, it details the district court's and the Eleventh Circuit's interpretations of the Superfund provisions and their applications of these laws to *Fleet Factors*. Finally, this Note analyzes the Eleventh Circuit's holding and reasoning in *Fleet Factors* and the impact of the decision on the financial community. It concludes that the standard *Fleet Factors* sets for the imposition of clean-up liability is dangerously broad.

II. BACKGROUND

A. CERCLA Liability and the Secured Creditor Exemption

Congress enacted CERCLA in response to the growing concern over the public health dangers and environmental hazards created by the improper disposal of hazardous materials.¹² CERCLA's main purpose is to place responsibility for response costs associated with decontamination procedures upon those parties responsible for the creation of environmental hazards.¹³

Under CERCLA, the federal government is empowered to enter a contaminated facility and undertake measures to clean-up the site.¹⁴ CERCLA further provides that the costs of clean-up are financed primarily by the Hazardous Substance Superfund (The Superfund).¹⁵ The statute permits the government to recover the

9. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3481 (U.S. Jan. 17, 1991) (No. 90-504).

10. *Id.* at 1557.

11. *Id.*

12. See *Maryland Bank*, 632 F. Supp. at 576; *Mirabile*, 15 *Env'tl. L. Rep.* (Env'tl. L. Inst.) at 20995; H.R. REP. NO. 1016, 96th Cong., 2d Sess. 1 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120.

13. See *Allis Chalmers*, 893 F.2d at 1317.

14. The Environmental Protection Agency (EPA) has the primary responsibility for effectuating the goals of CERCLA and for instigating decontamination procedures. Executive Order No. 12,316, § 2, 3 C.F.R. 168 (1982).

15. 26 U.S.C. § 9507(a) (1988). The Superfund has an \$8.5 billion funding level. However, on October 17, 1991, Superfund's tax provisions and funding authority expire

clean-up costs from certain categories of "responsible parties."¹⁶ Although not specifically provided for in the statute, courts have interpreted CERCLA to impose strict,¹⁷ and joint and several¹⁸ liability upon responsible parties.¹⁹ Specifically, CERCLA imposes liability on four categories of people: (1) current owners and operators of the hazardous substance facility; (2) those who owned or operated the hazardous substance facility at the time the hazardous wastes were disposed; (3) persons who arranged for the treatment or disposal of hazardous substances at the facility; and (4) persons who transported hazardous substances for treatment or disposal at the facility.²⁰

Congress explicitly created an exception to the class of persons who can be characterized as "owners or operators." This exception specifically excludes from liability a party "who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."²¹ Congress intended this exemption to shield from liability those persons who hold title to a facility primarily in an effort to protect their security interests and do not participate in the actual management of the facility.²²

and the legislation will face Congressional reauthorization. See Steinzor, *After a Decade, Superfund at Crossroads*, Legal Times, October 29, 1990, at 32.

16. 42 U.S.C. § 9607(a)(1)-(4) (1988).

17. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

18. See, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 811 (S.D. Ohio 1983).

19. Congress apparently acquiesced to the judicial construction of CERCLA's liability scheme because it did not alter this scheme when it amended CERCLA in 1986 in the Superfund Amendments and Reauthorization Act of 1986 (SARA). Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of 42 U.S.C. (1988)).

20. 42 U.S.C. § 9607(a)(1)-(4). In order for a plaintiff to establish liability under CERCLA, it must establish that: (1) the defendant falls within one or more of the classes of liable persons under 42 U.S.C. § 9607(a)(1)-(4); (2) a "release" or "threatened release" of a "hazardous substance" has occurred or is occurring; and (3) the release or threatened release has caused the United States to incur "response costs." *Shore Realty Corp.*, 759 F.2d at 1043.

21. 42 U.S.C. § 9601(20)(A).

22. See *infra* note 101. In 1986 Congress amended CERCLA. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of 42 U.S.C. (1988)). Congress amended the Superfund legislation because the threat of toxic waste contamination had not been sufficiently abated by CERCLA. Congress aimed the Superfund amendments at the private sector by placing the more of the burden for hazardous waste clean-up on the large financial resources of private parties. Congress hoped that by shifting more of the burden to the private sector and by strongly encouraging settlement through the enactment of a provision codifying the right to contribution in 42 U.S.C. § 9613(f)(1), private parties would assume the financial responsibility for clean-up prior to a determination of which party

B. *Judicial Interpretation of the Secured Creditor Exemption*

Prior to the Eleventh Circuit's consideration of the secured creditor exemption in *Fleet Factors*, the federal circuit courts had no occasion to consider the scope and meaning of the exemption. The United States district courts, however, had faced the difficult task of interpreting the statute.²³

The decisions in the lower courts basically rested upon the level of involvement between the secured creditor and the facility. The district courts found liability in two instances: when the secured creditor had foreclosed on the property,²⁴ and when the creditor had participated in the day-to-day management of the facility.²⁵ However, until the Eleventh Circuit decided *Fleet Factors*, no court had given the exemption such a narrow construction.

The first case to deal with the issue of secured lender liability under CERCLA focused on whether the defendant was entitled to invoke the secured creditor exemption.²⁶ In *United States v. Mirabile*, a bank loaned a sum of money to a manufacturer and secured the loan with a mortgage on the property. Seven years later, the manufacturer went bankrupt and the bank foreclosed on

caused the hazard. See H.R. REP. NO. 253, 99th Cong., 1st Sess. 100, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835-41.

23. The language used in CERCLA is ambiguous. There are several points of inconsistency throughout the statute. One court refers to the statute as a "hastily patched together compromise Act" that is "not a model of statutory clarity." *Maryland Bank*, 632 F. Supp. at 578. The court notes, for example, that the language in § 9607(a)(1) imposing liability upon "the owners and operators" is unclear; it is difficult to ascertain whether Congress intends to hold liable both owners and operators or only parties who are both owners and operators. *Id.*

Although sparse, the legislative history concerning CERCLA may provide courts with some indication of Congress' intent. The legislative history states that the term "owner" does not include "persons possessing indicia of ownership . . . who, without participating in the management or operation of a vessel or facility, hold title in order to secure a loan. . . [A] financial institution which held title primarily to secure a loan but also received tax benefits as the result of holding title would not be an 'owner' as long as it did not participate in the management or operation of the vessel or facility." H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt.1, at 36, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6181. The legislative history also states that an "operator" is defined as "a person who is carrying out operational functions for the owner of a facility pursuant to an appropriate agreement." *Id.* at 6182. Therefore, based on the language used and the rules of grammar, an owner and operator can not be the same person. However, as the court in *Maryland Bank* stated, "by no means does Congress always follow the rules of grammar when enacting the laws of this nation. In fact, to slavishly follow the laws of grammar while interpreting acts of Congress would violate sound canons of statutory interpretation." *Maryland Bank*, 632 F. Supp. at 578.

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

25. *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20994 (E.D. Pa. 1985).

26. *Mirabile*, 15 Env'tl. L. Rep. at 20994-95.

the property.²⁷ An EPA examination uncovered the fact that the property was contaminated by hazardous waste.²⁸ In a suit by the government to recover the waste removal expenses, the United States District Court for the Eastern District of Pennsylvania held on motion for summary judgment that the bank was not liable.²⁹ The court determined that for a secured creditor to be held liable, "it must, at a minimum, participate in the day-to-day operational aspects of the site."³⁰ Ultimately, the court concluded that the bank's actions did not rise to the level of "day-to-day" participation and that its actions were undertaken merely to protect its security interest in the property. Therefore, the court allowed the bank to invoke the exception.³¹

27. *Id.* at 20996. The bank then transferred this property to another party so at the time of the lawsuit the Mirabile's, not the bank were the owners. *Id.* Therefore, the bank was being sued as a past "owner or operator" under 42 U.S.C. § 9607(a)(2). *See supra* note 20 and accompanying text.

28. *Mirabile*, 15 *Envntl. L. Rep.* (Envntl. L. Inst.) at 20994.

29. *Id.* at 20996. In determining whether the level of control the bank had exercised over the manufacturer gave rise to CERCLA liability, the court analyzed the few cases that discussed whether individual hazardous waste site owners could invoke the corporate veil theory to escape liability. These cases held that those who were shareholders and actively participated in the waste management of the corporation were liable for decontamination expenses. *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985); *United States v. Carolawn Co.*, 14 *Envntl. L. Rep.* (Envntl. L. Inst.) 20699-700 (D.S.C. June 15, 1984); *United States v. Northeastern Pharmaceutical and Chem. Co., Inc. (NEPACCO)*, 579 F. Supp. 823 (W.D. Mo. 1984), *modified*, 810 F.2d 726, 743 (8th Cir. 1986). The *Mirabile* court noted, however, a critical distinction between those cases and the one before it; *NEPACCO*, *Shore*, and *Carolawn* each involved corporate officer and shareholder participation in the day-to-day operation of the corporation while the case before the court involved a secured creditor's participation solely in its debtor's financial affairs. *Mirabile*, 15 *Envntl. L. Rep.* at 20997. *See Comment, The Liability of Financial Institutions for Hazardous Waste Clean-up Costs Under CERCLA*, 1988 *Wis. L. REV.* 139, 173, n.193 (1988).

30. *Mirabile*, 15 *Envntl. L. Rep.* (Envntl. L. Inst.) at 20996. The court stated that the secured creditor exemption is available to secured creditors that do not participate in the management of a facility. *Id.* at 20997. The court defined "participation which is critical" as management over the debtor's "operational, production, or waste disposal activities." *Id.* at 20995. *See also* *Guidice v. BFG Electroplating & Mfg. Co., Inc.*, 732 F. Supp. 556, 562 (W.D. Pa. 1989) (holding that a bank was entitled to the protection of the secured creditor exemption because its activities were aimed at protecting its security interest rather than controlling the facility's "operational, production, or waste disposal activities").

The court also stated that mere financial ability to control waste management is not sufficient to impose liability. *Mirabile*, 15 *Envntl. L. Rep.* (Envntl. L. Inst.) at 20997. In determining whether the bank had participated in the waste management of the property, the court considered the following factors: the bank secured the building against vandalism after the company ceased operations; the bank investigated the cost of removing various drums located on the property; and the bank's loan officer showed the property to prospective buyers. The court found these facts insufficient to remove the bank from the shield of the secured creditor exemption. *Id.* at 20995.

31. *Mirabile*, 15 *Envntl. L. Rep.* (Envntl. L. Inst.) at 20996.

The second principal case to address the applicability of the secured creditor exemption was *United States v. Maryland Bank & Trust*.³² There, a bank loaned money to the owner of a piece of property. When the owner defaulted on his loan payments, the bank foreclosed on the property and then obtained title at the foreclosure sale. Nearly four years later, the EPA found toxic waste at the site and removed it at a cost of approximately \$550,000. Thereafter, the government sued the bank as the current owner³³ to recover the cost of the clean-up.³⁴ Maryland Bank argued that the secured creditor exemption shielded the bank from liability. The court interpreted the secured creditor exemption by balancing the creditor's interest in securing its investment against the government's competing interest in eliminating hazardous waste and recovering the clean-up cost. The court found that the bank purchased the property at the foreclosure sale to protect its original investment (the loan), not to protect its security interest.³⁵ Therefore, the court held the bank liable and stated that, when a mortgagee forecloses on a piece of property and becomes its owner, the secured creditor exemption is lost.³⁶

Both the *Mirabile* and *Maryland Bank* courts suggest a broad reading of the secured creditor exemption and a fact-based ap-

32. 632 F. Supp. 573 (D. Md. 1986).

33. 42 U.S.C. § 9607(a)(1) (1988).

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

35. *Id.* at 579. Under Maryland law, a mortgagee holds title to mortgaged property while the mortgage is in force. *Id.* See 59 C.J.S. *Mortgages* § 1, at 23-28. Accordingly, the *Maryland Bank* court found that the bank could have held "indicia of ownership primarily to protect its security interest in the land" only during the life of the mortgage. *Maryland Bank*, 632 F. Supp. at 575. Therefore, because the bank was a former mortgagee when it purchased the property, it could not have purchased it to protect its security interest, and must have purchased it to protect its interest in recovering its original loan.

36. *Maryland Bank*, 632 F. Supp. at 575. The court asserted that one purpose underlying the secured creditor exemption was to protect secured creditors in those states where the mortgagee holds legal title to the property until the mortgagor satisfies the loan. Allowing the bank to use the exemption would interfere with the goal of CERCLA: clean-up costs would be misallocated and the risks associated with the ownership of property would vary from case to case. *Id.* The court also found that if the bank were permitted to assert the exemption, the government would bear the burden of the clean-up cost and the bank then would benefit without expense by the increased value of the property and by the potential profit upon sale. *Id.* at 580.

See generally Vollmann, *Double Jeopardy: Lender Liability Under Superfund*, 16 REAL. EST. L. J. 3, 11 (1987) (noting that when Congress amended CERCLA, it excluded from liability state or local governments that acquired ownership or control involuntarily through bankruptcy, tax delinquency, or abandonment in 42 U.S.C. 9601(20)(D). The fact that Congress did not exclude lenders who acquire property through foreclosure suggests that Congress intended to hold such parties liable as owners).

proach to the determination of CERCLA liability. Although the two courts failed to provide a precise standard of conduct that will give rise to CERCLA liability, they required actual involvement between the secured creditor and the contaminated facility. It is clear that a creditor who forecloses on its interest in its debtor's property or participates in the day-to-day management of its debtor's facility has achieved an actual and substantial level of involvement and may be subject to CERCLA liability. Although these cases gave broad definition to the scope of lender liability under CERCLA, they did so in a manner consistent with Congressional intent and with the goals of CERCLA.

III. *UNITED STATES V. FLEET FACTORS CORP.*³⁷

A. *Facts*

In 1976, the defendant, Fleet Factors Corp. (Fleet), entered into a factoring agreement³⁸ with Swainsboro Print Works (SPW), a textile company, under which Fleet advanced funds to SPW against SPW's accounts receivable.³⁹ As additional collateral for the advance, Fleet obtained a security interest in SPW's facility, equipment, inventory, and fixtures.⁴⁰

In 1979, SPW filed for chapter 11 bankruptcy.⁴¹ Fleet, however, continued to finance SPW as debtor-in-possession.⁴² Between 1979 and 1981, SPW began winding down operations.⁴³ In February, 1981, SPW ceased operations and attempted to liquidate its remaining inventory. During the liquidation period, Fleet continued to collect SPW's accounts receivable and also conducted credit checks on SPW's customers before SPW shipped goods to them.⁴⁴ Also, the United States, as plaintiff, alleged that after SPW ceased operations, Fleet required SPW to seek its approval before ship-

37. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3481 (U.S. Jan. 17, 1991) (No. 90-504).

38. A factoring agreement is an agreement by one party to advance funds to another in exchange for an assignment of the accounts receivable of the company receiving the funds. The party advancing the funds is the creditor. The party assigning over the accounts receivable is the debtor. BLACK'S LAW DICTIONARY 592 (6th ed. 1990).

39. *United States v. Fleet Factors, Corp.*, 724 F. Supp. 955, 957 (S.D.Ga. 1988), *aff'd* 901 F.2d 1550 (1990), *cert. denied*, 59 U.S.L.W. 3481 (U.S. Jan 17, 1991) (No. 90-504).

40. *Id.* Fleet's security interest in SPW's facility consisted of a "deed to secure a debt conveying title to the facility." *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 957-58.

44. *Id.* The district court noted that these activities were part of Fleet's normal practices as a secured lender. *Id.*

ping goods, established the prices for excess inventory, dictated when and to whom goods were to be sent, determined when employees should be laid off, supervised the activities of the office administrator at the SPW facility, received and processed SPW's tax and employment forms, and controlled access to the facility.⁴⁵

In December 1981, SPW was adjudicated a bankrupt under chapter 7 of the bankruptcy code,⁴⁶ and in May 1982, Fleet foreclosed on its security interest in some of SPW's equipment and inventory.⁴⁷ Fleet, however, never foreclosed on the real property.⁴⁸ In June, 1982, some of the equipment was sold by a liquidator hired by Fleet at a public auction conducted at the facility; the remainder was removed by a contractor hired by Fleet.⁴⁹ The United States alleged that the liquidator moved drums containing hazardous waste and that the removal of equipment by purchasers and by Fleet's contractor dislodged friable⁵⁰ asbestos at the facility.⁵¹

In early 1984, the EPA inspected SPW's premises and found 700 drums of toxic chemicals and forty-four truckloads of asbestos material.⁵² The government removed these substances at a cost of almost \$400,000.⁵³ In July, 1987, the facility was conveyed to Emanuel County, Georgia at a foreclosure sale as a result of SPW's failure to pay taxes.⁵⁴ The United States sued Fleet to recover the cost of waste removal.⁵⁵

B. *The District Court Decision*

The district court denied both the United States' motion for partial summary judgment on the issue of liability and Fleet's cross

45. *Fleet Factors*, 901 F.2d at 1559. In addition, the evidence showed that Fleet prohibited SPW from selling several barrels of chemicals to potential buyers. Those barrels remained at SPW's facility until the EPA removed them in 1984. *Id.* at 1559, n.13.

46. *Fleet Factors*, 724 F. Supp. at 958. When SPW was declared a bankrupt a trustee assumed title and control of the facility. *Id.*

47. *Id.* The court's opinion does not say why the bankruptcy court converted the chapter 11 reorganization into a chapter 7 liquidation.

48. *Id.* at 957.

49. *Id.* at 958.

50. Friable asbestos is any asbestos material which can be crumbled, pulverized, or reduced to powder when dry, by hand pressure. *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir. 1988). It is this form of asbestos that has been found to cause cancer when inhaled.

51. *Fleet Factors*, 724 F. Supp. at 958.

52. *Fleet Factors*, 901 F.2d at 1553.

53. *Id.*

54. *Id.*

55. *Fleet Factors*, 724 F. Supp. at 959.

motion for summary judgment.⁵⁶ In order to analyze Fleet's involvement with the SPW facility, the court separated Fleet's activities into two time periods: the time prior to June, 1982 when Fleet's liquidator entered the facility, and the time after June, 1982. The court held that prior to the June, 1982 public auction of SPW's remaining inventory and equipment, Fleet's activities "did not rise to the level of participation in management" of SPW sufficient to impose liability under CERCLA.⁵⁷ The court, however, did find that Fleet's activities after this time were such that, if proven, might remove Fleet from the protection of the statutory exemption.⁵⁸ Because Fleet disputed the facts alleged by the government, the district court found that genuine issues of material fact existed, and therefore denied the cross motions for summary judgment.

The district court first addressed the government's contention that Fleet was liable as "the owner and operator" pursuant to 42 U.S.C. § 9607(a)(1).⁵⁹ The court stated that in order for Fleet to be within this category, Fleet must have "owned, operated, or . . . controlled activities at such facility immediately beforehand."⁶⁰ The court determined that Fleet's contractor left the facility in 1983, that Fleet never foreclosed on its security interest in the facility, and that Emanuel County, Georgia, received title to the property at the tax foreclosure sale in 1987.⁶¹ The court held that Fleet did not own, operate, or control the facility immediately prior to the tax foreclosure sale and therefore could not be held liable as a current owner or operator.⁶²

The court next addressed the government's alternative assertion that Fleet should be liable as a past "owner or operator."⁶³ Fleet asserted that the secured creditor exemption excluded it from potential CERCLA liability.⁶⁴ The court relied upon *Mirabile* and interpreted the exemption to allow a secured creditor to provide financial assistance and, in "isolated instances," specific management advice to its debtor as long as the secured creditor does not participate in the day-to-day management of the facility either

56. *Id.* at 961.

57. *Id.* at 960.

58. *Id.* at 961.

59. *Id.* at 959-60.

60. *Id.* at 960 (citing 42 U.S.C. § 9601(20)(A)). "Immediately beforehand" refers to the time prior to the tax foreclosure sale. *Id.*

61. *Id.* at 957, 960.

62. *Id.* at 960.

63. 42 U.S.C. § 9607(a)(2); *Fleet Factors*, 724 F. Supp. at 960.

64. *Fleet Factors*, 724 F. Supp. at 959-60.

before or after the business ceases operations.⁶⁵

The court then applied its interpretation of the exemption to the specific facts and determined that Fleet's activities between 1976 when it entered into its relationship with SPW and shortly before June 22, 1982, when Fleet's liquidator entered the facility, were insufficient to rise to the requisite level of "participation in management" activities to impose CERCLA liability.⁶⁶ In contrast, the court found that Fleet's activities from the time the liquidator entered the facility on June 22, 1982, to the time that the removal company left in December 1983, raised material questions of fact as to Fleet's ability to assert the secured creditor exemption. Therefore, the court denied the cross motions for summary judgment.⁶⁷ The trial judge further determined that no federal appellate court previously had interpreted the secured creditor exemption or CERCLA's definition of "owner or operator" in the context then present before the court.⁶⁸ The judge, therefore, certified the issues for interlocutory appeal.⁶⁹

C. *The Appellate Court Decision*⁷⁰

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision.⁷¹ The appellate court agreed with the district court's conclusion that Fleet could not be liable as the current owner or operator under § 9607(a)(1) because the bankrupt estate and trustee, not Fleet, owned the property "immediately beforehand."⁷² The court stated that " 'immediately beforehand' means without intervening ownership, operation, and control."⁷³ From the time SPW was adjudicated a bankrupt to the 1987 foreclosure sale, the bankrupt estate and the trustee owned

65. *Id.* at 960.

66. *Id.*

67. *Id.* at 961. The allegations which the court determined raised questions of material fact were the government's assertion that the liquidator moved the barrels containing hazardous substances prior to conducting the auction, that the liquidator permitted purchasers to remove their purchases from the facility, that Fleet hired a company to remove the unsold machinery and allowed it access to the facility for 180 days, and that due to these activities friable asbestos was knocked loose by the purchasers or removers. *Id.*

68. *Id.* at 962.

69. *Id.*

70. The case was decided by a two-judge panel due to the death of the third justice after oral argument, but before the decision was rendered. *United States v. Fleet Factors, Corp.*, 901 F.2d 1550, 1552 (11th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3481 (U.S. Jan. 17, 1991) (No. 90-504).

71. *Fleet Factors*, 901 F.2d at 1552.

72. *Id.* at 1555.

73. *Id.*

the facility.⁷⁴ Furthermore, Fleet terminated its relationship with SPW three years before Emanuel County took ownership of the facility at the foreclosure sale.⁷⁵ Therefore, Fleet could not be an owner or operator pursuant to § 9607(a)(1).⁷⁶

The Eleventh Circuit also affirmed the district court's holding that the government had alleged facts sufficient to withstand a motion for summary judgment and potentially to impose liability on Fleet pursuant to § 9607(a)(2) as the owner or operator of SPW's facility at the time the hazardous wastes were disseminated.⁷⁷ The Eleventh Circuit established a broad standard under which a secured lender could incur liability for response costs associated with the removal of hazardous wastes.⁷⁸ The court held that a secured creditor may incur Superfund liability "by participating in the financial management of a facility to a degree indicating a *capacity to influence* the corporation's treatment of hazardous wastes."⁷⁹ The court further held that actual participation in management is not necessary; all that is required is "involvement with the management of the facility . . . sufficiently broad to support the inference that [the secured creditor] could affect hazardous waste disposal decisions if it so chose."⁸⁰

In reaching this broad standard, the appellate court addressed the district court's reliance upon *Mirabile*.⁸¹ The court of appeals found that a standard which required a creditor to participate in the day-to-day management of a facility before incurring liability

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1557.

78. The United States urged the court to adopt a standard which would hold a secured creditor liable if it had participated in any managerial aspect of its debtor's operations. *Id.* at 1556. Fleet argued that the court should adopt the standard set by the *Mirabile* court requiring day-to-day participation before losing the secured creditor exemption. *Id.* Ultimately, the court adopted what it considered to be a middle ground. *Id.* at 1557. However, this "middle ground" actually more closely resembles the standard suggested by the government. Most creditors will have the capacity to influence their debtors' managerial decisions in some way after the debtor has defaulted. Therefore, the practical effect of the court's standard will be that virtually all secured creditors will fall outside the protection of the exemption. *But see infra* note 113 and accompanying text.

79. *Fleet Factors*, 901 F.2d at 1557 (emphasis added).

80. *Id.* at 1558.

81. Fleet asserted, as did the bank in *Mirabile*, that its activities after the foreclosure sale were within the ambit of the secured creditor exemption because it simply was protecting its security interest in the facility. *Id.* The court rejected this argument by stating that what is relevant is the extent of the creditor's involvement, not the motive behind the involvement. *Id.* at 1560.

was overly permissive and undermined CERCLA's goals.⁸² The Eleventh Circuit found the district court's adoption of the *Mirabile* standard impermissible because it "would essentially require a secured creditor to be involved in the operations of a facility in order to incur liability."⁸³ The court believed that the statutory language did not permit a broad reading of the exemption.⁸⁴ Therefore, the court rejected *Mirabile* and expressly stated that to incur CERCLA liability, a secured creditor need not involve itself in the day-to-day management of a facility at which hazardous waste has been or may be disseminated.⁸⁵

After determining that a secured creditor may incur CERCLA liability by possessing a "capacity to influence" waste management decisions, the Eleventh Circuit applied this standard to the facts alleged in *Fleet Factors*.⁸⁶ The appellate court agreed with the dis-

82. *Id.* at 1557.

83. *Id.*

84. The Eleventh Circuit focused its attention on the plain language of the secured creditor exemption in developing its "capacity to influence" standard. The court found the language ambiguous with respect to a standard of liability, but believed that all ambiguities should be resolved in favor of the government's recovery of response costs because CERCLA forced the government to clean-up contaminated sites and thereby incur these expenses. *Id.*

85. *Id.* The Eleventh Circuit also stated that courts generally will infer a secured creditor's capacity to influence its debtor's waste management decisions from the extent of its involvement in its debtor's financial affairs. *Id.* at 1559, n.13.

Recently, the Ninth Circuit seemingly rejected the broad standard set by the *Fleet Factors* court. In *In re Bergsoe Metals Corp.*, 910 F.2d 668 (9th Cir. 1990), the court held that a municipal creditor that held title to its debtor's contaminated facility under a complex financing arrangement and that did not participate in its debtor's affairs was not liable for the cost of waste removal. *Id.* at 673. The court found that in order for a secured creditor to incur Superfund liability, it must engage in "some actual management" of its debtor's facility; merely having the power to participate is insufficient. *Id.* at 672.

Although the Ninth Circuit's decision appears to relax the strict standard set by the *Fleet Factors* court, in reality the holding may be of little use to secured creditors. In *Bergsoe*, the court found that the creditor did not participate at all in its debtor's management. *Id.* at 672. Therefore, the court was not forced to define the extent of the "actual participation" standard it set. Therefore, it is still unclear what level of involvement will lead a secured creditor to Superfund liability.

86. According to CERCLA, a secured creditor may be liable for response costs if it is an owner, an operator, or if it holds indicia of ownership and participates in its debtor's management. 42 U.S.C. § 9607(a)(1)-(4). The Eleventh Circuit first agreed with the district court that *Fleet* was not an owner under 42 U.S.C. § 9607(a)(1). *Fleet Factors*, 901 F.2d at 1555. The appellate court next stated that if the government's allegations were true, *Fleet* could be liable as either an operator or as a secured creditor holding indicia of ownership and participating in debtor management. *Id.* at 1556, n.6. However, the Eleventh Circuit felt that the facts "fit more snugly" into a secured creditor analysis and chose to analyze *Fleet's* liability under the secured creditor exception. *Id.* The court found that *Fleet's* deed of trust to SPW's facility represented an indicia of ownership held to protect a security interest. *Id.* at 1556. The court then identified the critical issue as

strict court's conclusion that Fleet's activities prior to February, 1981, when SPW ceased operations, entitled Fleet to secured creditor protection.⁸⁷ However, it disagreed with the district court's finding that only after Fleet's liquidator entered the facility did Fleet's activities rise to the level sufficient to remove it from the secured creditor exemption.⁸⁸ Rather, the Eleventh Circuit found that Fleet's activities from the time immediately following SPW's cessation of operations through the time Fleet's liquidator left the facility in 1983 indicated potential CERCLA liability under the "capacity to influence" test. The court found that Fleet's involvement in SPW's financial decisions was "pervasive, if not complete."⁸⁹ Fleet determined when and to whom SPW could ship inventory, required SPW to seek its approval before shipping, determined the prices for excess inventory, instructed SPW as to when employees should be laid off, supervised the activities of the office administrator, received and processed SPW's employment and tax forms, and, for a time, controlled access to the facility.⁹⁰ Applying these allegations to its newly created "capacity to influence" standard, the court held that if the government's allegations were proven at trial, Fleet could incur CERCLA liability as a matter of law.⁹¹ The Eleventh Circuit, therefore, affirmed the district court's denial of the cross motions for summary judgment and remanded the case back to the district court for further proceedings.⁹²

In dicta, the court acknowledged that its holding should not discourage a secured creditor from monitoring any aspect of its debtor's business.⁹³ Rather, the court asserted that a secured creditor will not incur liability for "becom[ing] involved in occasional

whether Fleet participated in SPW's management to a degree sufficient to remove Fleet from the secured creditor exemption. *Id.*

87. *Fleet Factors*, 901 F.2d at 1559. During this period Fleet advanced funds to SPW pursuant to the factoring agreement, "paid and arranged for security deposits for SPW's Georgia utility services, and informed SPW that it would no longer advance" funds to it when the funds advanced exceeded SPW's accounts receivables. *Id.*

88. *Id.* See *supra* notes 49-51 and accompanying text.

89. *Fleet Factors*, 901 F.2d at 1559.

90. *Id.*

91. *Id.*

92. *Id.* at 1560. Fleet filed a motion for a rehearing by the Eleventh Circuit, *en banc*. This motion was denied. *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir.) *reh'g denied*, 911 F.2d 742 (1990). Fleet then petitioned the United States Supreme Court for a writ of certiorari. *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) *cert. denied*, 59 U.S.L.W. 3481 (U.S. Jan. 17, 1991) (No. 90-504).

93. *Fleet Factors*, 901 F.2d at 1558. The holding will have precisely the effect that the court states its decision will not create. See *infra* note 109 and accompanying text.

and discrete financial decisions" made to protect its security interest.⁹⁴ The court noted that its holding would provide an incentive to lenders to investigate potential debtors more carefully and take steps to prevent waste problems.⁹⁵

IV. ANALYSIS

The Eleventh Circuit's holding in *Fleet Factors* is far too broad. As waste management became a growing concern in the United States, Congress sought to impose liability for the clean-up of environmental hazards upon those parties responsible for creating the hazards. However, in pursuit of this objective, Congress specifically exempted from liability secured creditors who hold indicia of ownership primarily to protect their security interests and do not participate in the management of their debtors' facilities.⁹⁶ The court's imposition of liability upon a secured creditor that has the "capacity to influence" waste management decisions ignores Congressional intent, imposes liability upon a secured creditor on the basis of a vague theoretical ability to control its debtors' managerial decisions, and virtually turns the secured creditor exemption into an independent basis for liability.⁹⁷

The "capacity to influence" standard set by the Eleventh Circuit is inconsistent with CERCLA's plain statutory language. CERCLA specifically exempts from liability any person who holds indicia of ownership primarily to protect his security interest in a facility "without *participating* in the management of a . . . facility."⁹⁸ Congress's omission of any words modifying the word "participation" indicates that Congress intended the culpable level of secured creditor participation in debtor management to be actual participation. The statute does not admit any construction that includes a latent capacity to manage or participate. Despite the plain language of the exemption, the Eleventh Circuit found the district court's reading of the exemption far too broad, stating

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

95. *Id.* Rather, the standard set by the Eleventh Circuit puts lenders into a catch-22 situation. See *infra* text accompanying note 118.

96. 42 U.S.C. § 9601(20)(A).

97. See Freeman, *Recent Case Law May Expand Lender's Risks Under Superfund: Environmental Risks May Grow for Lender*, THE NAT. L.J., September 17, 1990, at 18, col. 1. ("A 'capacity to influence' test may well make all secured creditors vulnerable on the grounds of some inherent power to affect their borrowers' behavior"). *Id.* at 19, col. 2. See also Koegel, *Bank Power Draws Superfund Liability*, N.Y.L.J., July 9, 1990, at 1. ("In effect, the . . . court created a fifth category of responsible parties under CERCLA: secured creditors who participate in facility management").

98. 42 U.S.C. § 9601(20)(A).

that the day-to-day participation standard “would essentially require a secured creditor to be involved in the operations of a facility in order to incur liability.”⁹⁹ However, actual participation in the operation of a facility is exactly what the plain language of the statute requires, and the “capacity to influence” standard set by the Eleventh Circuit ignores this plain language.¹⁰⁰

The Eleventh Circuit’s holding is also inconsistent with CERCLA’s legislative history. Because CERCLA is often inconsistent and ambiguous, courts have been forced to interpret the statute’s meaning from its sparse legislative history.¹⁰¹ Yet, both the legislative history and the statutory language unambiguously demonstrate Congress’ intent to protect secured creditors.¹⁰²

The Eleventh Circuit supported its “capacity to influence” test by pointing to a statement made by a Congressman while introducing the exemption to the bill that eventually became CERCLA.¹⁰³ In his statement, Congressman Harsha said that the secured creditor exemption is necessary because without it the statute would impose liability upon “those who hold title to a . . . facility, but do not participate in the management or operation *and are not otherwise affiliated* with the person leasing or operating the . . . facility.”¹⁰⁴ The Eleventh Circuit construed the use of the word

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

100. The Eleventh Circuit discussed the statutory language and specifically stated that the statute holds secured creditors liable if they “participate in the management of a facility.” *Id.* In making this statement, the court seemed to acknowledge the necessary element of actual participation, but then developed a standard that virtually ignores this requirement. By acknowledging and then ignoring CERCLA’s participation requirement, the Eleventh Circuit evidenced its confusion over the statute’s requirements and thereby weakened support for the court’s interpretation. As a result, the Eleventh Circuit created a standard which imposes liability for a theoretical ability to influence waste management decisions that is illogical and inconsistent with the statute’s express requirement of actual participation.

101. The legislative history surrounding the enactment of CERCLA is sparse. The original Senate version of CERCLA did not contain an exemption for secured creditors. The exemption was added to the bill that was finally passed because “the original definition inadvertently subjected those who hold title to a . . . facility, but do not participate in the management or operation and are not otherwise affiliated with the person leasing or operating the . . . facility, to the liability provisions of the bill.” Remark by Representative Harsha reprinted in 2 Senate Comm. on Envtl. and Pub. Works, 97th Cong., 2d Sess., 2 *A Legislative History of the CERCLA of 1980* 945 (Comm. Print 1983). See generally, *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1039-40 (2d Cir. 1985) (“The version [of CERCLA] passed by both houses . . . was an eleventh hour compromise . . . we are without the benefit of committee reports concerning this compromise.”).

102. Indeed, the very fact that Congress created the exemption at all suggests its desire to protect secured creditors.

103. *Fleet Factors*, 901 F.2d at 1558, n.11.

104. *Id.* (quoting Remarks of Rep. Harsha, reprinted in 2 Senate Comm. on Environ-

"affiliated" as the threshold of secured creditor liability.¹⁰⁵ However, if Congress had intended to impose liability upon a secured creditor who is "affiliated" with a facility it would have expressed such a desire in the statute's language. Rather, Congress chose the words "participating in the management" which require actual participation.¹⁰⁶ Therefore, the court's reliance on the word "affiliated," used by a Congressman in the course of debate, is not only a weak source of support for such a far-reaching standard, but also is plainly inconsistent with the language ultimately chosen by Congress.

Not only is the Eleventh Circuit's reasoning inconsistent with the statutory language and legislative history, but the facts presented to the district court were sufficient to withstand Fleet's motion for summary judgment under the narrower day-to-day participation standard. The government's factual allegations indicate actual participation by Fleet in SPW's financial management and in some of SPW's operational decisions.¹⁰⁷ One of the government's allegations asserted that Fleet actually had participated in a waste management decision with respect to the SPW facility when Fleet prohibited SPW from selling several barrels of toxic chemicals to potential buyers during SPW's attempt to liquidate.¹⁰⁸ Therefore, the Eleventh Circuit's broad-sweeping creation of the "capacity to influence" standard was completely unnecessary in light of the facts before the court.

V. IMPACT

The Eleventh Circuit severely miscalculated the policy ramifications of its decision. The court believed that its decision would serve to encourage lenders to become involved in the elimination of environmental problems by carefully investigating the waste management policies of potential debtors.¹⁰⁹ The court also believed that its holding would cause lenders to continue to monitor their debtors throughout the life of the loan.¹¹⁰ The decision will have

mental and Public Works, 97th Cong., 2d Sess., 2 *A Legislative History of the CERCLA of 1980* 945 (Comm. Print 1983) (emphasis added). See *supra* note 101.

105. *Fleet Factors*, 901 F.2d at 1558, n.11.

106. In fact, in using the word "affiliated," Representative Harsha was probably excluding from the exemption entities with indirect ownership interests in a facility such as is present in a parent-subsidiary relationship.

107. *Fleet Factors*, 901 F.2d at 1559.

108. *Id.* at 1559, n.13.

109. *Id.* at 1558.

110. *Id.* at 1558-59. A lender already has incentive to examine collateral property for possible environmental hazards because in the event of default by a borrower, the lender

opposite effects. Lenders will not subject themselves to the increased burdens associated with constantly overseeing their debtors' properties.¹¹¹ In many instances lenders simply will decide not to lend rather than expose themselves to potential CERCLA liability or become policemen over their debtors' property.¹¹²

Moreover, the "capacity to influence" standard set by the court actually increases a secured creditor's exposure to environmental response cost liability rather than provide it the safe harbor intended by Congress. Prudent lenders often will assume a security interest a debtor's property and then engage in certain activities to protect that interest. For example, it is common for loan documentation to provide that in case of default, a creditor may exert specified levels of control over its debtor's operations in order to protect its interest. Virtually all lenders, therefore, will have at least some capacity to influence their borrower's managerial decisions.¹¹³ However, after *Fleet Factors*, simply by acting pursuant to reasonable loan documentation and prudent loan administration, a secured creditor's activities will indicate a capacity to influence its debtor's waste management decisions and thereby divest the creditor of the intended protection afforded by the secured creditor exemption.

Furthermore, the Eleventh Circuit's creation of a standard that imposes liability based upon a "capacity to influence" creates uncertainty in the financial markets. This standard leaves lending institutions uncertain regarding which circumstances may lead to liability. Additional uncertainty will arise from the court's failure to provide lending institutions with any concrete guidelines to which they can conform their behavior.¹¹⁴ As a result of the

does not want to be stuck with a worthless security. See Bailey, *Banks Seek Another Kind of Bailout; Lawmakers Back Bill to Block Toxic Clean-up Liability*, Boston Globe, September 18, 1990, at 33. col. .

Also, if the lender thinks that the property is a potential environmental hazard it will not make the loan. Therefore, the court's notion that lenders will monitor their debtors throughout the life of the loan will never materialize because the lenders simply will refuse to lend. In addition, lenders will not monitor their debtor's property as the court believed precisely because of the court's holding. Pursuant to the "capacity to influence" standard set by the Eleventh Circuit, it is exactly that type of monitoring activity suggested by the court that could lead a lender to CERCLA liability.

111. See *infra* notes 114-116 and accompanying text.

112. See Adler, *Liberal Rulings Extend Clean-up Liability*, CRAIN COMMUNICATIONS, October 8, 1990, at 27.

113. The Eleventh Circuit's holding seemingly imposes liability upon a secured creditor simply because he is a secured lender, and as such, has certain abilities to influence its debtor. This effectively makes secured lenders act as insurance companies. See Bailey, *supra* note 110, at 33. See also *supra* note 22 and accompanying text.

114. The court's failure to provide lenders with concrete guidelines will result in in-

court's failure to articulate the circumstances which will give rise to a culpable "capacity to influence," lenders will be unfairly burdened with the increased cost of defending themselves against CERCLA suits and with the cost of environmental clean-ups.¹¹⁵ Quite often a lender will be accused of liability simply because it has deep pockets.¹¹⁶ Because most of the nation's business depends upon the use of borrowed funds, the uncertainty created by the court's "capacity to influence" test combined with the uncertainty created by the court's failure to define the standard, may significantly impede central sectors of the economy.¹¹⁷

In sum, the standard set by the court places lenders in a catch-22 situation.¹¹⁸ After *Fleet Factors*, lenders are torn between two competing interests and conflicting courses of action. A lender either can put its investment at risk by ignoring its security interest or can take active involvement in protecting its security interest

creased litigation on the issue of what activities amount to management control. Additionally, the "capacity to influence test" leaves attorneys unable to advise clients on what precautions to take to avoid Superfund liability because the practical effect of the court's holding seems to impose liability on all secured creditors.

115. The potential liability appears limitless. Based upon the court's holding, there is no reason why lender liability could not extend to toxic torts. If lenders are responsible for the cost of cleaning up hazardous waste, what is to prevent the court from extending this liability to the personal injuries resulting therefrom?

116. See Wall St. J., Aug. 28, 1990, at 10, col. 3.

117. The court's holding will have a particularly devastating effect on the Federal Deposit Insurance Corporation (FDIC) and the Resolution Trust Company (RTC). The RTC is a federal agency created in August of 1989 to take over and dispose of the assets of failed thrifts. It is estimated that 70% of the properties presently held by the RTC contain environmental risks. Paton, *Toxic Cloud Hangs Over Bailout Plan*, 14 DALLAS BUS. J., § 1, at 1 (Sept. 7, 1990). The FDIC is a federal agency created to insure troubled banks and currently holds contaminated assets with a book value of approximately \$365 million. *Id.* Clean-up of these sites may run as high as three times their market value. *Id.* These organizations do not select their properties, but rather, by operation of law they take possession of them from failed financial institutions. Although Superfund exempts from liability governmental entities that receive contaminated properties through involuntary transfer or acquisition, courts have not yet interpreted this exemption. 42 U.S.C. § 9601(20)(A)(iii) (1988). Therefore, the *Fleet Factors* court's holding has especially worried the FDIC and RTC. The court's holding has caused lenders to become nervous to extend new lines of credit and to foreclose on old ones. This fear could result in several banks becoming insolvent which may exacerbate the savings and loan crisis by forcing potentially hazardous properties on the FDIC or RTC and making them foot the clean-up bill. Additionally, the FDIC and RTC could be forced to sell potentially contaminated properties at huge discounts to compensate buyers for the clean-up cost they are purchasing. The decrease in the amount of money the government recovers from the savings and loan bailout will result in losses to the taxpayer as the cost of clean-up is passed on to them.

118. See Singer & Zawitoski, *Ruling: New Risks for Commercial Lenders*, Legal Times, July 2, 1990, at 13, col. 1.

but risk exposure to an infinite amount of potential CERCLA liability.

This dilemma may impede severely the banking industry and, as a result, disrupt the economy.¹¹⁹ The broad and uncertain standard set by the Eleventh Circuit may induce lenders to withdraw from their central involvement in the economy. The court's holding has injected fear into the already nervous banking industry. Before committing funds, lenders are seeking added protection.¹²⁰ The price of this added protection has been an increase in transaction costs and a restriction in the amount of available credit.

The court's decision will also strain relations between lender and borrower. Financial institutions will be discouraged from making loans to businesses with potential environmental hazards.¹²¹ In addition, lenders will distance themselves from the management decisions of their debtors because the act of giving advice to a debtor may be sufficient to impose liability upon a secured creditor.¹²² Therefore, until the conduct giving rise to CERCLA liability is more precisely defined, lenders will either choose not to lend or will avoid any involvement in their debtor's affairs in the event they do lend.

Those institutions that continue to make loans will do so only at an increased cost. Therefore, interest rates may rise to insure the

119. The *Fleet Factors* decision comes at an especially bad time. The real estate market and the economy as a whole are in a state of decline. Severe restrictions have been placed on government spending which has created a fierce competition for resources.

There are several precautionary measures a lender may take before committing its funds and exposing itself to potential liability aside from engaging in costly environmental audits. A prudent lender could obtain environmental hazard insurance before making a loan, avoid loans to notoriously risky businesses such as landfills, and abstain from involving itself in the managerial aspects of its debtor's business operations in the event of default. See EDWARD F. MANNINO, *LENDER LIABILITY AND BANKING LITIGATION* (1989). However, while providing some protection to creditors, each of these measures will adversely affect the economy by increasing the cost of obtaining financing or by denying financing to needy, but potentially hazardous industries.

120. For example, some lenders are demanding that environmental surveys and engineer's audits costing upwards of \$20,000 be conducted before they enter into financial arrangements that could lead to environmental liability.

121. The court's broad holding will be especially detrimental to small businesses. Small businesses typically do not seek to borrow large amounts of money. However, small businesses can lead to the same magnitude of environmental clean-up costs as large businesses. Therefore, banks often may deny small businesses requested funds simply because it would not be cost effective for the bank to engage in the necessary environmental audits or to expose itself to potential liability.

122. This could be one of the most devastating effects because, quite often, a debtor who may be in financial or environmental trouble will rely upon the experience of its lender to provide practical managerial guidance. Without the benefit of the lenders' expertise, debtors may have to turn to less informed sources for help.

additional risk. As the cost of borrowing increases, many potential borrowers will drop out of the market rather than endure the added costs. In addition, the notion that higher interest rates alone could compensate for the increase in potential CERCLA liability is unrealistic. Thousand dollar loans can lead to million dollar liabilities. There is no way to predict how high a creditor's liability may extend. Therefore, standing alone, increased interest rates would not serve to compensate lenders for the added risk and, more likely, would make borrowing cost-prohibitive for some businesses.

Also, the court's broad holding may result in an increased number of bankruptcies.¹²³ In an already depressed economy, an increasing number of troubled debtors are seeking the advice of creditors. However, due to the Eleventh Circuit's holding, many creditors may be reluctant risk exposure to CERCLA liability by engaging in work-outs. Therefore, in order to avoid the appearance of having any "capacity to influence" waste management decisions, lenders may refuse to aid borrowers in restructuring their debt.

Furthermore, the risk of CERCLA liability may thwart the implementation of widely-used creative financing schemes. Because CERCLA imposes joint and several liability, the standard set by the Eleventh Circuit may discourage entities that have deep pockets from entering into partnerships and other various joint ventures with parties that are not as financially able to contribute. Otherwise, in the event of a contamination, the deep-pocket entity will have to fund the entire clean-up.

Finally, the increase in potential liability also will cause the cost of insurance to increase.¹²⁴ Insurance premiums will rise for two principal reasons. First, as more and more lenders seek to avoid

123. In addition, although an increased number of bankruptcies will have an adverse impact on the economy, secured creditors may choose not to foreclose on their debtors and instead prefer that their debtors petition for bankruptcy. When a debtor files for bankruptcy, the debtor's property can be placed under the control of a trustee. If the trustee has control over the property, the secured creditor can not be held liable as an owner or operator and, therefore, may avoid Superfund liability. However, under the standard set by the Eleventh Circuit, a lender may still incur Superfund liability because the lender may have a "capacity to influence" waste management decisions while a trustee has control of the property. *Fleet Factors*, 901 F.2d at 1557 (emphasis added). Secured creditors also may choose not to foreclose on a contaminated site if the clean-up costs exceed the value of the collateral. Although the creditor will lose the value of its investment, it will avoid liability. The creditor also may foreclose after the EPA has cleaned-up the facility, but a federal lien for reimbursement will encumber the property. 42 U.S.C. § 9607(l) (1988).

124. See Lavelle, *A Question of Waste Liability; Banks and Superfund Bill; Banks Balk at Paying Waste Tab*, *The Nat. L.J.*, September 3, 1990, at 3.

liability by refusing to loan money, businesses will turn to insurance companies for protection. However, because the cost of an environmental clean-up can be staggering, insurance companies will only agree to insure potentially contaminated properties at high premiums to account for the added risk. Second, lenders who may take or already may have taken a security interest in environmentally risky properties will seek insurance to cover the risk of a contamination. Again, the potential liability is extremely high, so insurance companies will charge lenders high premiums. Lenders, in turn, will pass these added premiums on to borrowers which will increase the cost of borrowing and, in some instances, may make borrowing cost-prohibitive.¹²⁵

VI. PROPOSAL

There are several means of remedying the court's potentially devastating holding. The simplest way would be via a Supreme Court holding overruling the Eleventh Circuit's decision. In setting a new standard under which a secured creditor may incur liability for environmental response costs, the Supreme Court should reconsider Congress' intent in creating the exemption. The Court should interpret CERCLA in a way that will not discourage lenders from becoming involved in their debtors' affairs and will maintain CERCLA's objective of safe and efficient hazardous waste disposal. When Congress mandated that a secured creditor would not be held liable unless it participated in the management of a facility, Congress did not intend to impose near-blanket liability upon secured creditors.¹²⁶

A more appropriate standard would be one that imposed liability upon secured creditors only upon a showing of a creditor's actual participation in the management of its debtor's facility. CERCLA imposes strict liability on "owners or operators" of a contaminated facility.¹²⁷ In the case of an owner or operator, there is generally some element of *actual* involvement between the owner or operator and the management of the facility. However, to hold

125. The American Insurance Group (AIG) has developed a proposal that would shift liability away from industry. See Steinzor, *supra* note 15, at 32. The proposal suggests the establishment of a trust fund financed by surcharges on commercial and industrial insurance premiums. AIG hopes to establish a funding level of \$40 billion over the next five years which would be used to pay the cost of decontamination procedures. The proposal also suggests repeal of Superfund liability for sites where disposal ceased prior to 1984. See Lavelle, *supra* note 124, at 3.

126. See *supra* note 101 and accompanying text.

127. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

secured creditors strictly liable without a showing of actual participation, would subject the secured creditor to an even higher standard than that imposed on owners or operators. Such an imposition of liability is patently unfair and contrary to congressional intent because Congress specifically exempted secured creditors from CERCLA liability in order to protect them.

Congress also has proposed two bills which will eliminate the ambiguity surrounding the language in the secured creditor exemption.¹²⁸ The LaFalce bill protects parties that hold an interest in property to secure a debt by exempting lenders from liability for cleaning up environmental hazards they played no part in creating.¹²⁹ The LaFalce bill also extends protection to trustees and fiduciaries. The Garn bill extends the LaFalce bill to government entities as well as to private lenders by providing limitations on the federal and state clean-up liability of depository institutions and mortgage lenders that hold property in a fiduciary capacity.¹³⁰ The Garn bill provides liability protection only when lenders did not contribute to the contamination or have knowledge of it.¹³¹

Additionally, the EPA has drafted a proposal which would preserve the liability shield originally created by the secured creditor exemption. The proposal is aimed at reconciling a lender's interest in managing its loans with the EPA's interest in eliminating hazardous waste sites and recovering the public funds spent on decontamination. The draft proposal states that participation in the management of a facility does not include the mere "capacity to influence" its debtor's operational decisions. It provides several

128. The very fact that Congress is creating legislation to clarify the secured creditor exemption supports the assertion that the Eleventh Circuit erroneously interpreted Congress' intent in creating the exemption.

129. HR 4494, 101st Cong., 2d Sess. (1990) (Sponsored by Small Business Committee Chairman Representative John LaFalce (D-NY)). The LaFalce bill already has the support of 276 members of the House; this is more than the majority needed to pass the legislation. See Steinzor, *supra* note 15, at 32.

130. S. 2319, 101st Cong., 2d Sess. (1990) (bill introduced by Senator Jake Garn (R-Utah)).

131. *Id.* Although both bills offer protection to the lending industry and alleviate the harsh consequences of the *Fleet Factors*' decision, they are not without drawbacks. The provisions may allow creditors to acquire contaminated properties at low prices and then receive a windfall by selling them at a profit after they have been cleaned up at the taxpayers' expense. In addition, environmentalists fear that because the Garn bill states that lenders will not incur responsibility for activities at the contaminated property which they did not know about, there will be an incentive for lenders to omit careful examination of their collateral. *But cf.* note 110 (Lenders already have an incentive to investigate because in the event of a default a lender does not want to be stuck with a worthless security.). Finally, the Garn bill will not directly amend CERCLA, but will amend the FDIC Act and the Credit Union Act.

rules which would greatly reduce the scope of secured lender liability from that resulting from the *Fleet Factors* decision.¹³² Although the proposal attempts to restore the safe harbor once enjoyed by secured creditors prior to *Fleet Factors*, its actual effect may be limited. Because the EPA proposal simply would be an administrative rule, it would provide guidance to the courts, but the courts will not be bound by it. In addition, if either of the two bills proposed in Congress are enacted, they will have priority over the EPA rule. In that event, the EPA rule may only serve as a guideline to the courts and to Congress.

Regardless of whether the Supreme Court, Congress, or the EPA undertakes the task of defining which activities expose a secured creditor to Superfund liability, relief must be provided to the lending industry. Unless and until some guidelines are set, the lending industry will be in a state of confusion and the economy will be threatened with further decline.

VII. CONCLUSION

The *Fleet Factors* court set a dangerously broad standard under which a secured creditor may incur Superfund liability. Congress enacted CERCLA with the intention of placing clean-up cost liability upon those parties responsible for creating environmental hazards. Congress, however, sought to specifically exclude from liability those secured creditors which hold indicia of ownership merely to protect their security interest. The Eleventh Circuit's "capacity to influence" standard virtually erased the exemption and turned it into an independent basis for liability.

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132. First, the EPA rule requires a lender to undertake an environmental inspection of the proposed collateral. This rule goes beyond the language in the Superfund legislation; the statute does not require a secured creditor to conduct environmental inspections prior to advancing funds. Second, the rule allows lenders to take certain steps to police their loans, to help a troubled borrower in a work-out situation where the underlying security is threatened, and to foreclose on and expeditiously liquidate the collateral securing the loan in the event of default. By permitting a lender to foreclose on debtor's property in the event of default without exposing itself to liability, overrules the holding in *Maryland Bank*. Third, if the EPA cleans-up a contaminated property and the lender later chooses to sell the property, the lender must pay to the EPA the difference in value of the property as contaminated and as cleaned up. Fourth, the proposed rule will only apply to collateral used to secure repayment of a loan and not to property held for investment purposes or where the lending institutions act as trustees or managers of a property or business. See Marcus & Pollock, *EPA Plans Rule to Curb Liability on Loans to Owners of Waste Sites*, Wall St. J., Feb. 14, 1991, at 4, col. 5.

