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Environmental Liability For Lenders After United States V. Fleet Factors, Corp.: Deep Pockets Or Deep Problems?

ENVIRONMENTAL LIABILITY FOR LENDERS AFTER *UNITED STATES V. FLEET FACTORS, CORP.*: DEEP POCKETS OR DEEP PROBLEMS?

In 1978 the reality of America's hazardous waste problem came home to the country through the conduit of a small residential district in up-state New York.[1] Rocks striking the sidewalk sent off colored sparks.[2] Foul smelling chemicals seeped into basements and the drinking water did not taste or smell right.[3] The country learned that the land on which the Love Canal neighborhood stands formerly served as an industrial waste dump site.[4]

Although Love Canal focused the publics attention on hazardous waste, the problem of hazardous waste was not new to Congress. Two years before the discovery of Love Canal, Congress passed the Resource Conservation and Recovery Act of 1976 (RCRA).[5] RCRA is intended to control hazardous substances[6] from generation to ultimate disposal (so called "cradle-to-grave" protection).[7] RCRA is forward looking legislation, designed to control hazard-

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1. *See* Dower, *Hazardous Wastes*, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 151, 168 (R. Portney, ed. 1990) (describing hazardous waste damage created at Love Canal).

2. *Id.*

3. *Id.*

4. *Id.*; *see also* B. YANDLE, THE POLITICAL LIMITS OF ENVIRONMENTAL REGULATION 107, 108 (1989) (outlining political reaction to Love Canal). Until 1953, the Hooker Chemical Company owned the land on which the Love Canal neighborhood now stands. *Id.* at 109. Hooker used a sealed canal to store hazardous chemicals on the property. *Id.* In 1953, Hooker sold the land to the Niagara Falls School Board, after being threatened with surrender of the land through eminent domain. *Id.* Hooker gave public warnings as to the hazards on the property and included covenants and caveats in the deed of sale. *Id.* The School Board subsequently erected a grammar school on the site and sold the rest to developers. *Id.* The sealed canal ruptured during the laying of sewer lines, and percolation eventually brought the wastes to local homes. *Id.*

5. *See Developments in the Law-Toxic Waste Litigation*, 99 HARV. L. REV. 1459, 1470-76 (1986) (discussing hazardous waste control under RCRA and CERCLA). RCRA originated as an amendment to the Solid Waste Disposal Act. Dower, *supra* note 1, at 161.

6. *See* CERCLA § 101(14), 42 U.S.C. § 9601(14) (1988) (defining hazardous substance for purposes of Comprehensive Environmental Response, Compensation and Liability Act of 1980 [hereinafter CERCLA]). To define hazardous substance, CERCLA draws on several sources including the Clean Water Act, the Solid Waste Disposal Act, the Clean Air Act, and § 102 of CERCLA. *Id.* Section 102 of CERCLA directs the Administrator of the Environmental Protection Agency (EPA) to promulgate regulations designating hazardous substances in addition to the substances listed in CERCLA § 101(14). CERCLA § 102, 42 U.S.C. § 9602. CERCLA directs the Administrator to designate as hazardous substances any "elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment[.]" *Id. See also* Dower, *supra* note 1, at 152-53 (defining hazardous waste). A simplified definition of hazardous waste is solid and liquid waste disposed of on land rather than into the air or water and which potentially adversely affects human health and the environment. *Id.* This note uses the terms hazardous waste, toxic waste and hazardous substance interchangeably.

7. *See Developments in the Law—Toxic Waste Litigation*, *supra* note 5, at 1470-71 (describing purpose of RCRA).

ous waste generation.[8] Because RCRA focuses on controlling the present and future production of hazardous waste, RCRA could not deal with Love Canal or any of the thousands of other toxic waste dump sites created in this country prior to 1976.[9] In addition, many of the people who created these sites had abandoned them.[10]

In the wake of the public outcry over Love Canal, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 (commonly known as Superfund[11]).[12] A lame-duck Congress passed CERCLA as compromise legislation in the last hours of the Carter Administration.[13] Because of Congress' haste and a compromise atmosphere, CERCLA arrived as a complex piece of legislation, filled with vague terms and little legislative history.[14] Congress addressed some of CERCLA's shortcomings in the Superfund Amendment and Reauthorization Act (SARA) of 1986.[15] In addition, the decisions of several federal courts have filled out various other provisions of the statute.[16]

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8. *See, e.g.*, Dower, *supra* note 1, at 165-68 (stating main focus of RCRA is curbing future problems and noting RCRA's inadequacy for dealing with abandoned waste sites); Grunbaum, *Judicial Enforcement of Hazardous Waste Liability Law*, in DIMENSIONS OF HAZARDOUS WASTE POLITICS AND POLICY, 163, 164 (1988) (noting RCRA effective in upgrading some waste sites, but did not provide solution to problem of cleaning up dormant waste sites); Frank and Atkeson, *Superfund: Litigation and Cleanup*, 16 Env't Rep. Pt. II (BNA) 1 (June 28, 1985) (noting RCRA requires that EPA regulate all aspects of active hazardous waste management).

9. *See, e.g.*, *Developments in the Law—Toxic Waste Litigation*, *supra* note 5, at 1470-71 (discussing failure of RCRA to deal with hazardous waste disposal practices prior to enactment of CERCLA); Grunbaum, *supra* note 8, at 164 (discussing judicial interpretation on RCRA limiting enforcement to imminently hazardous waste sites); Dower, *supra* note 1, at 165-68 (describing forward looking nature of RCRA).

10. *See* Dower, *supra* note 1, at 169 (discussing difficulty of identifying responsible parties for abandoned dump sites).

11. *See* Frank and Atkeson, *supra* note 8, at 2 (describing creation of $1.6 billion "superfund" for hazardous waste cleanup). The name Superfund refers to the trust fund established by CERCLA to pay for part of the costs of identifying and cleaning-up hazardous waste sites. *Id.* Two funds actually exist in CERCLA: a Post-closure Liability Fund for facilities closed by following applicable CERCLA regulations, and a Hazardous Substance Superfund to cover government and private clean-up response costs. *See* CERCLA § 111(a), (j), 42 U.S.C. § 9611(a), (j) (1988) (establishing uses of fund). In the Superfund Amendments and Reauthorization Act of 1986 (SARA), Congress allocated up to $8.5 billion for the Superfund. *Id.* at § 111(a), § 9611(a).

12. Dower, *supra*, note 1, at 169.

13. *Id.*

14. *See* United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990) (discussing poor and hasty drafting of CERCLA), *cert. denied*, 111 S. Ct. 752 (1991); SECURED CREDITORS AND SUPERFUND: AVOIDING THE LIABILITY NET, 20 Env't Rep. (BNA) 609, 615 n.5 (July 28, 1989) (criticizing legislative history on definition of "operator").

15. *See infra* note 99-115 and accompanying text (discussing effects of SARA on CERCLA's liability scheme). For example, SARA refined the "innocent landowner" defense. *See* CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A) (1988) (defining contractual relationship); *see also* Jaffe and Schoolman, *Hazardous-Waste Legislation Affecting Lender Liability*, 107 BANKING L.J. 422, 426 (1990) (discussing SARA's effect on innocent landowner defense).

16. *See generally* United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988) (determining that liability under CERCLA is strict liability), *cert. denied*, 490 U.S. 1106 (1989);

Much of the filling out process undertaken by the federal courts concerned CERCLA's liability scheme.[17] CERCLA provides a liability scheme to assign responsibility for the cleanup of hazardous waste sites.[18] Congress created an exemption from liability for persons holding indicia of ownership in a vessel or facility as a security interest, so long as those persons do not get involved in management of the vessel or facility.[19] This exemption is commonly known as the secured creditor exemption.[20] Judicial application of the secured creditor exemption over the ten year history of CERCLA has been erratic.[21] No consistent meaning for the secured creditor exemption emerges from these decisions.[22]

In May 1990, the United States Court of Appeals for the Eleventh Circuit in *United States v. Fleet Factors Corp.* handed down the first federal appellate decision interpreting the secured creditor exemption.[23] The Eleventh Circuit held that a secured creditor is not exempt from CERCLA liability if the creditor participates in management of the debtor and if the creditor's participation can support an inference that the creditor could influence the debtor's

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Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988) (same); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (same); United States v. Monsanto, 858 F.2d at 171 (determining CERCLA liability to be joint and several liability); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810-11 (S.D. Ohio 1983) (stating that joint and several liability under CERCLA turns on factual determination).

17. *See supra* note 16 (citing various federal courts interpreting CERCLA's liability scheme).

18. *See* CERCLA § 107 (a), 42 U.S.C. § 9607 (a) (1988) (establishing parties liable for cleanup costs under CERCLA). The following persons are liable under CERCLA § 107:

> (1) the owner and operator of a vessel or a facility,
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> (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,
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> (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 . . ., and
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> (4) any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities, incineration vessels or sites selected by such person. . . .

Id.

19. *See* CERCLA § 101(20)(A), 42 U.S.C § 9601(20)(A) (1988) (defining owner or operator under CERCLA). CERCLA provides:

> The term "owner or operator" means . . . (ii) in the case of an on-shore facility . . . . any person owning or operating such facility . . . . Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

Id.

20. *See EPA Official Tells House Panel Of Shift In Policy Toward Lenders, CERCLA Liability*, 55 Banking Rep. (BNA) 212 (Aug. 6, 1990) (recognizing that CERCLA § 101(20)(A) is commonly referred to as secured creditor exemption).

21. *See infra* notes 122-97 and accompanying text (describing history of judicial interpretation of secured creditor exemption).

22. *Id.*

23. 901 F.2d 1550 (11th Cir.); *see also infra* notes 24-28 and accompanying text (discussing *Fleet Factors* in detail).

hazardous waste treatment policy.[24] The Eleventh Circuit interpreted the secured creditor exemption more restrictively than any previous court.[25] This restrictive interpretation created anxiety among lending institutions.[26]

A review of the statutory scheme of CERCLA, the legislative history of CERCLA, and previous judicial decisions interpreting the secured creditor exemption demonstrates that the Eleventh Circuit's holding in *Fleet Factors* is ill-conceived.[27] Because the United States Supreme Court denied *certiorari* to examine the *Fleet Factors* decision, the Eleventh Circuit's interpretation of the secured creditor exemption stands as good law, at least in the Eleventh Circuit.[28] To remedy the problem of interpreting the secured creditor exemption, Congress should revise CERCLA, making explicit those parties exempted from CERCLA liability and documenting in the legislative history the policy behind the exemption.[29]

An overview of CERCLA's operation is necessary to understand the flaws in the Eleventh Circuit's holding in *Fleet Factors*.[30] An underlying tenet of CERCLA is that the polluter should pay.[31] CERCLA gives the Environmental Protection Agency (EPA) the power to take remedial action by responding immediately to a release or a threatened release of hazardous waste by performing a cleanup of the site.[32] The EPA then may sue any of the potentially

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24. *See* United States v. Fleet Factors Corp., 901 F.2d 1550, 1557-58 (11th. Cir. 1990) (interpreting CERCLA's secured creditor exemption), *cert. denied*, 111 S. Ct. 752 (1991).

25. *See infra* notes 173-77 and accompanying text (comparing Eleventh Circuit's interpretation of secured creditor exemption in CERCLA with holdings in several other CERCLA lender liability cases).

26. *See* Boston Globe, Sept. 18, 1990, at 33 (discussing lender reaction to *Fleet Factors*). According to The Boston Globe, the chief lobbying group for lenders, the American Bankers Association, made environmental liability the Associations number one "congressional priority" in 1990. *Id.*

27. *See infra* notes 200-62 and accompanying text (marshalling evidence to challenge Eleventh Circuit's interpretation of secured creditor exemption).

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

29. *See infra* notes 276-84 and accompanying text (demonstrating need for legislative solution to resolve ambiguity in secured creditor exemption).

30. *See infra* notes 31-53 and accompanying text (describing CERCLA in operation).

31. *Fleet Factors*, 901 F.2d at 1553 (1990) (citing Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1316 (11th Cir. 1990), for proposition that underlying purpose of CERCLA is to make those responsible for chemical disposal pay for cleanup of hazardous waste); United States v. Aceto Agricultural Chemicals Corp., 872 F.2d. 1373, 1377 (8th Cir. 1989) (describing underlying tenant of CERCLA as desire to make parties responsible for pollution pay); Dedham Water Co. v. Cumberland Farms Dairy, 805 F.2d 1074, 1081 (1st Cir. 1986) (same).

32. *See* CERCLA § 104 (a), 42 U.S.C. § 9604 (a) (1988) (designating response authorities). CERCLA § 104(a) authorizes the President to act in response to any release or threatened release of a hazardous substance. *Id.* CERCLA authorizes the President to take any action necessary to protect the public health or welfare or the environment that is consistent with the national contingency plan. *Id.* CERCLA § 105 mandated that the national contingency plan, developed under the Clean Water Act, be updated to include a national hazardous substance response plan. 42 U.S.C. § 9605; *see also* Frank and Atkeson, *supra* note 8, at 9-10 (June 28, 1985) (describing nature and function of national contingency plan as developed under Clean Water Act and

responsible parties (PRPs) to recover the costs of the cleanup.[33] Additionally, private citizens may take remedial actions to hazardous waste problems and recover the costs associated with their remedial action from the Superfund and from the parties responsible for the release.[34]

Once the EPA determines that a site requires remedial action, CERCLA allows the agency to proceed in one of two ways.[35] The EPA either may promote private response or undertake an agency response to effect the cleanup.[36] Pursuing private action to effect the cleanup may include a settlement agreement between the EPA, the state, and the responsible parties concerning performance of the cleanup.[37] If the PRPs and the EPA cannot agree to a settlement, the EPA can seek a court order to have the responsible parties perform the EPA mandated remedial actions.[38] Civil fines follow if the responsible parties do not perform the cleanup.[39] If the EPA chooses to undertake agency response, then the EPA performs the remedial actions and sues the potentially responsible parties to recover the government's costs.[40]

CERCLA § 105). In accordance with CERCLA § 115, the President delegated the response authority authorized under CERCLA to the EPA. *See* Exec. Order No. 12316, 46 Fed. Reg. 42237 (1981) (delegating to EPA responsibilities assigned to President under CERCLA).

33. *See* CERCLA § 112(c)(3), 42 U.S.C. § 9612(c)(3) (1988) (authorizing Attorney General to bring recovery action against PRPs for costs or damages). In addition to actual costs or damages, CERCLA authorizes punitive damages against liable persons who fail to provide removal or remedial actions without sufficient cause. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3). The amount of punitive damages awarded may vary between a minimum of the costs incurred because of the person's failure to provide remedial action and a maximum of three times those costs. *Id.*

34. *See* CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988) (establishing liability for private response). Liable persons are responsible for costs incurred by any other person consistent with the national contingency plan. *Id.* This private action impacts the usefulness of any agency rulemaking on interpretations of the CERCLA exemptions. *See infra* note 284 and accompanying text (describing proposed EPA rulemaking to clarify meaning of secured creditor exemption).

35. *See* CERCLA § 104, 42 U.S.C. § 9604 (1988) (outlining response authorities available to the EPA).

36. *See* CERCLA § 104(a), 42 U.S.C. § 9604(a) (1988) (authorizing EPA to either commence response action or allow private response action after review of proposed private response); *see also* J. ACTON, UNDERSTANDING SUPERFUND: A PROGRESS REPORT 41 (1989) (detailing division of past cleanups between private action and agency action). The EPA, after determining that the release or threatened release of hazardous material creates an imminent and substantial danger to public health, welfare or the environment, may secure orders through the local federal district court to force a private cleanup. CERCLA § 106(a), 42 U.S.C. § 9606(a). Persons who willfully violate or fail to comply with a cleanup order from the federal district court may be fined up to $25,000 a day for as long as the failure or violation persists. *Id.* § 106(b), 42 U.S.C § 9606(b).

37. *See* CERCLA § 122, 42 U.S.C. § 9622 (1988) (giving EPA authority to settle with potentially responsible parties).

38. *See* CERCLA § 106, 42 U.S.C. § 9606 (1988) (establishing procedures for abatement actions); *see also* Grunbaum, *supra* note 8, at 171-72 (discussing different methods available to EPA for forcing cleanups).

39. *See* CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1) (1988) (establishing fines for non-compliance with administrative order). A federal district court may levy a fine of up to $25,000 per day for failure to comply with administrative clean-up orders. *Id.*

40. *See* CERCLA § 104, 42 U.S.C. § 9604 (1988) (establishing response authorities); CERCLA § 113, 42 U.S.C. § 9613 (outlining procedure for civil action to recover response costs);

CERCLA defines four classes of PRPs: present owners or operators, past owners or operators, generators, and transporters.[41] Despite the premise that the polluter should pay, CERCLA assigns liability to present owners or operators without regard for the present owner's or operator's actual involvement with the generation or disposal of hazardous waste at the facility.[42] A purpose of present owner or operator liability is to prevent responsible parties from making sham transfers of land to escape liability for possible cleanup actions.[43] Because of present owner liability, prospective purchasers should discount known contaminated sites.[44] Without present owner liability, remedial action by the EPA after the property is transferred would create a windfall for the present owner as the value of the property increases after cleanup.[45]

If hazardous waste disposal occurred under previous ownership or operation, these past owners or operators are liable for any remedial actions taken under CERCLA.[46] Hazardous waste generators are liable for the costs of remedial actions taken on sites where the generator deposits hazardous wastes.[47] Transporters of hazardous waste are responsible for remedial actions taken at sites the that transporters chose for disposal or treatment of hazardous wastes.[48]

PRPs are liable for all costs of remedial action that either the government or private parties incur.[49] In addition, PRPs are liable for damages due to

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see also Grunbaum, *supra* note 8, at 171-72 (discussing different methods available to EPA for forcing clean-ups). Whenever there is a release or threatened release of a hazardous substance substantially threatening the public, or a release or threatened release of pollution or contamination posing an imminent and substantial threat to the public, the EPA may respond as outlined in the national contingency plan. CERCLA § 104, U.S.C. § 9604. After the cleanup response, the EPA can bring an action to recover the cleanup costs. CERCLA § 113, U.S.C. § 9613. Section 113 of CERCLA establishes jurisdiction, venue, statute of limitations, right to contribution and nationwide service of process. *Id.* For example, in *United States v. Maryland Bank and Trust Co.*, the EPA notified the PRP that the PRP had approximately four months to effect a cleanup of the contaminated property, but the PRP declined to take any remedial action. United States v. Maryland Bank and Trust Co., 632 F. Supp. 573, 575 (D. Md. 1986).

41. *See* CERCLA § 107(a)(1-4), 42 U.S.C. § 9607(a)(1-4) (1988) (establishing PRPs under CERCLA).

42. *See* CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (1988) (assigning liability to present owners or operators). Present owners or operators of a facility that took the facility without knowledge of past hazardous waste activity may avail themselves of the innocent landowner defense. *See* CERCLA § 107(b), 42 U.S.C. § 9607(b) (establishing defenses to CERCLA liability); CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A) (defining contractual relationship).

43. *See* H.R. REP. No. 1016, 96th Cong., 2nd Sess., pt.1 at 62-64 (1980), *reprinted in* 1980 U.S. CODE CONG & ADMIN. NEWS 6119, 6139-41, *and in* 2 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510, at 93 (1983) [hereinafter LEGISLATIVE HISTORY OF CERCLA] (critiquing of Superfund proposals by Congressman Gore).

44. *See* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 580 (D. Md. 1986) (predicting windfalls for purchasers if liability does not carry over to subsequent purchasers).

45. *See id.* (predicting such windfalls for lenders at foreclosure sales).

46. CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1988).

47. CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (1988).

48. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1988).

49. CERCLA § 107(a)(4)(A,B,D), 42 U.S.C. § 9607(a)(4)(A,B,D) (1988).

injury, destruction or loss of natural resources.[50] No cap on potential liability for cleanup costs exists, but CERCLA limits natural resource and punitive damages to $50 million.[51] The defenses to liability set out in the statute are the only possible defenses to CERCLA liability.[52] Relief from liability requires proof that the release or threatened release of hazardous material occurred only because of one of the enumerated statutory defenses: an act of God, an act of war, or the unforeseeable acts of unrelated third parties.[53]

Because of the costs associated with the cleanup on hazardous waste sites and limited defenses to liability available to PRPs, potential liability under CERCLA is staggering.[54] Lenders holding a security interest in a facility are exposed to this liability in two ways. First, lenders can become owners of the facility through foreclosure.[55] Second, lenders may be responsible for cleanup through operation of the secured creditor exemption.[56] Congress included the secured creditor exemption within the definition of owner or operator under CERCLA.[57] The definition of owner or operator provides that persons holding indicia of ownership as a security interest are not liable as owners so long as such persons do not participate in management of the site.[58] Discovering the meaning and scope of the secured creditor exemption is essential to lenders as lenders make future loans or renegotiate old loans. Any discernable meaning of the secured creditor exemption must be found in the legislative history of CERCLA and judicial interpretations of the exemption.[59]

Any interpretation of CERCLA, as with other federal environmental legislation, must be guided by considerations of fairness and efficiency.[60] Congress considered fairness and efficiency in their discussions leading to the passage of CERCLA.[61] CERCLA is compromise legislation created from four

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50. CERCLA § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C) (1988).

51. CERCLA § 107(c), 42 U.S.C. § 9607(c) (1988).

52. *See* CERCLA § 107(b), 42 U.S.C. § 9607(b) (1988) (providing defenses to CERCLA liability).

53. *Id.*

54. *See* J. ACTON, *supra* note 36, at 44 (1989) (detailing past cost recovery actions under CERCLA). The EPA reports successful cost recovery on 328 sites with an average recovery of $700,000 per site. *Id.* One hundred and thirty sites from the National Priorities List referred to the Justice Department for reimbursement action represent a value of $222 million. *Id* at 42. In 1988 alone 117 settlements for cost recovery totaled $113 million, or almost $1 million per settlement. *Id.*

55. *See* United States v. Maryland Bank & Trust Co., 632 F.Supp 573, 577 (D. Md. 1986) (holding that secured creditor became owner upon taking title at foreclosure sale).

56. *See* United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20997 (E.D. Pa. Sept 4, 1985) (holding that secured creditor may have participated in management to point of incurring liability), *cert. denied* Levine v. United States, 470 U.S. 1031 (1985).

57. *See* CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988) (defining owner or operator for purposes of CERCLA).

58. *Id.*

59. *See infra* notes 67-97, 122-97 and accompanying text (discussing legislative history and judicial decisions interpreting secured creditor exemption).

60. *See Development in the Law—Toxic Waste Litigation, supra* note 5, at 1478 (1986) (describing methods generally used to critique federal environmental programs).

61. *See infra* notes 67-69 and accompanying text (discussing Congressional intent associated with CERCLA's liability scheme).

different bills.[62] Congress simply cut and pasted together many different provisions from various bills to put together a passable bill.[63] CERCLA's legislative history reveals that Congress recognized an abandoned site hazardous waste problem in America, but Congress had no empirical evidence of the magnitude of the problem.[64] At the time Congress debated passage of CERCLA, estimates on abandoned sites that could pose a problem for human health or the environment ranged from hundreds to tens of thousands.[65] The problem of abandoned sites is much larger than the most expansive estimates originally anticipated.[66]

Two recurring themes in CERCLA's legislative history are pertinent to lender liability.[67] First, throughout CERCLA Congress expressed a keen desire to make those responsible for pollution pay.[68] Second, Congress intended to prevent unscrupulous polluters from establishing schemes to escape liability for cleanup costs.[69] Unfortunately, this second goal frequently overwhelms the first.[70] For example, in an effort to close loopholes that polluters could use to escape liability, Congress imposed liability on a present owner of a facility liable for response costs even if all incidents of hazardous waste disposal occurred before the present ownership.[71] Joint and several liability is another

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62. *See* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986) (describing legislative history and origin of CERCLA).

63. *See* 1 LEGISLATIVE HISTORY OF CERCLA, at v-vii (describing evolution of several bills pending before Congress into bill finally passed as CERCLA).

64. *See* H.R. REP. No. 1016, 96th Cong., 2nd Sess., pt.1 at 17-18 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120, *and in* 2 LEGISLATIVE HISTORY OF CERCLA at 48 (discussing background and need for hazardous waste legislation).

65. *See* H.R. REP. No. 1016, 96th Cong., 2d Sess., pt.1 at 18-71 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120-47, *and in* 2 LEGISLATIVE HISTORY OF CERCLA at 49-102 (reporting House Report on the background and need for hazardous substance legislation and citing an EPA estimate of 30,000-50,000 hazardous waste sites with 1,200-2,000 of these sites posing a serious risk to public health). Compare this with the estimate of 851 potentially hazardous sites made by Congressman Eckhardt's Subcommittee on Oversight and Investigation. *Id.* at 71. Representatives Stockman and Loeffler criticize the EPA estimates as methodologically flawed because the EPA based its estimates on an extrapolation from 232 actual cases. *Id.*

66. *See* J. ACTON, *supra* note 36, at 25 (discussing number of clean-up sites by stage in CERCLA process). There are approximately 30,000 sites identified for possible inclusion on the National Priorities List (NPL). *Id.* Of these approximately 1200 are included in the NPL. *Id.*

67. *See infra* notes 68-69 and accompanying text (describing recurrent themes of CERCLA legislative history).

68. *See* H.R. REP. No. 1016, 96th Cong., 2d Sess., pt.1 at 68 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6143, *and in* 2 LEGISLATIVE HISTORY OF CERCLA, at 99 (discussing the liability scheme of H.R. 7020).

69. *See* H.R. REP. No. 1016, 96th Cong., 2d Sess., pt.1 at 62 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6139, *and in* 2 LEGISLATIVE HISTORY OF CERCLA, at 93 (critiquing of Superfund proposals by Congressman Gore).

70. *See* Dower, *supra* note 1, at 186-87 (discussing who actually pays for environmental regulation).

71. *See* CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (1988) (designating present owner or operator of vessel or facility as potentially responsible party). CERCLA § 101(32) defines liability by reference to the liability standards of the Clean Water Act (CWA). 42 U.S.C. § 101(32). Based on this reference to the CWA, courts have applied a standard of strict liability under CERCLA.

example of Congress' desire to close loopholes overwhelming any concerns about fairness.[72] Although Congress explicitly removed a provision establishing joint and several liability from the original bill because of a threatened filibuster, Congress implicitly condoned joint and several liability by reference in CERCLA's definition of liability to the Clean Water Act and federal common law.[73] Literally, the Justice Department can hold one dry cleaning operator responsible for all the government's cleanup costs when the dry cleaner dumped chemicals at a toxic waste site constituting only a negligible percentage of the total waste at the site.[74]

These two themes found in the legislative history of CERCLA, making polluters pay for cleanup costs and preventing any loopholes to escape liability, are important for lenders because these themes entice courts to construe classes of PRPs very broadly and to construe the exceptions to liability very narrowly.[75] Courts use these general themes and the deficiency of Congressional discussion

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See, e.g., United States v. Monsanto, 858 F.2d 160, 167 (4th Cir. 1988) (holding liable present landowners not involved with improper disposal of hazardous waste); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988) (same); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (same). The *Shore Realty* court discussed the legislative history of liability in CERCLA and noted that reference to the CWA was a compromise to removing explicit mention of strict, joint and several liability. *Shore Realty*, 759 F.2d at 1042. The *Shore Realty* court then imposed strict liability based on prior decisions interpreting liability under the CWA as strict liability. *Id.*

72. *See infra* note 73 and accompanying text (discussing Congress' treatment of joint and several liability in passage of CERCLA).

73. CERCLA § 101(32), 42 U.S.C. § 9601(32) (1988) (using CWA standard of liability to define liability under CERCLA); *see also* Grunbaum, *supra* note 8, at 165 (discussing joint and several liability under CERCLA). Reacting to a threatened filibuster by Senator Jesse Helms, Congress deleted references to joint and several liability in CERCLA's liability scheme. *Id.* Federal courts first applied joint and several liability under CERCLA in *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). The *Chem-Dyne* court relied on the legislative history of CERCLA and on federal common law in fashioning a joint and several liability rule under CERCLA. *Id.* at 807-08. The rule established is not absolute but follows the common law of imposing joint and several liability when two or more persons contribute to an indivisible harm. *Id.* at 810. Legislative history in the Superfund Amendments and Reauthorization Act explicitly adopts the scheme of strict, joint and several liability established by federal courts. HOUSE ENERGY AND COMMERCE COMMITTEE REPORT 99-253 TO H.R. 2817, 74, *reprinted in* 1986 U.S. CODE CONG. AND ADMIN. NEWS 2835, 2856.

74. *See supra* note 16 (discussing CERCLA's judicially created joint and several liability scheme). The provision for de minimis settlements added to CERCLA by SARA provides some protection for PRPs whose contribution to the hazardous waste problem is minimal in both amount and effect. *See* CERCLA § 122(g)(1), 42 U.S.C. § 9622(g)(1) (1988) (directing expedited settlement of de minimis claims). Section 122(g)(1) of CERCLA directs the EPA to expedite settlement with PRPs if the settlement involves a minor portion of the total response costs. *Id.* The PRP must also fit one of two categories. *Id.* One category is for the PRP whose contribution to the total hazardous substances is minimal in both amount and effect. CERCLA § 122(g)(1)(A), 42 U.S.C. § 9622(g)(1)(A). The second category is for the PRP who owns the real property where the facility is located, but did not conduct or permit generation or disposal of hazardous waste at the facility or contribute to the release or threatened release of hazardous waste at the facility. CERCLA § 122(g)(1)(B), 42 U.S.C. § 9622(g)(1)(B).

75. *See infra* notes 122-97 and accompanying text (discussing judicial interpretation of secured creditor exemption).

on creditor liability to decide lender responsibility under the secured creditor exemption.[76] Despite the lack of Congressional discussion on lender liability the legislative history of CERCLA nonetheless is useful in interpreting the secured creditor exemption.[77]

Two specific portions of CERCLA's legislative history shed light on CERCLA's exemption for lenders.[78] The first portion discusses the origin of the definitions of owner and operator.[79] Congress apparently drew the current CERCLA definitions of owner and operator from definitions found in a proposed bill that was eventually folded into CERCLA, The Comprehensive Oil and Hazardous Substance Pollution Liability and Compensation Act (Oil Act).[80] The Oil Act's definitions are helpful because CERCLA's definition of owner or operator is a tautology and CERCLA's definition is not as specific an the definition found in the Oil Act.[81] The Oil Act's definition of owner specifically explained the parties included and excluded.[82] The Oil Act specif-

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76. *Id.*

77. *See infra* notes 225-38 and accompanying text (using legislative history to cast light on meaning of secured creditor exemption).

78. *See infra* notes 89-97 and accompanying text (setting out significant aspects of legislative history).

79. *See* CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1980) (defining owner or operator of facility under CERCLA as any person owning or operating such facility). The legislative history of CERCLA does not specifically discuss the intended meaning of the definition of owner or operator under CERCLA, but one of the bills that was eventually folded into CERCLA contained a similar definition of owner or operator and CERCLA's legislative history includes discussion of the intended meaning of owner or operator under that earlier proposed bill. *See* H.R. REP. No. 172, 96th Cong., 2d Sess., pt.1 at 36 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6181, *and in* 2 LEGISLATIVE HISTORY OF CERCLA, at 546-47 (elaborating on definitions of owner or operator in proposed bill H.R. 85 § 101 (x),(y)).

80. *Compare* CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988) (defining owner and operator under CERCLA) *with* H.R. REP. No. 172, 96th Cong., 2d Sess., pt.1 at 36 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6181, *and in* 2 LEGISLATIVE HISTORY OF CERCLA, at 546-47 (describing definitions of owner and operator for H.R. 85 § 101 (x),(y)). The Committee on Merchant Marine and Fisheries favorably recommended H.R. 85 to the 96th Congress. H.R. REP. No. 172 at 1. The Oil Act bill proposed a "Superfund" and liability scheme for handling oil pollution at-sea and on-shore. *Id.* at 15-32. This bill was one of a series of bills proposed in the 1970's to address the problem of oil pollution. *Id.*

81. *See* CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988) (providing, "The term 'owner or operator' means . . . any person owning or operating such facility.") This definition of owner or operator adds meaning only in light of those persons it attempts to except, for example persons included in the secured creditor exemption. *See* United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20995 (E.D. Pa. Sept. 4, 1985) (describing CERCLA's definition of owner or operator as tautology but for secured creditor exemption), *cert. denied* Levine v. United States, 470 U.S. 1031 (1985); United States v. Maryland Bank and Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986) (analyzing poor grammatical structure of CERCLA's definition of owner or operator and characterizing CERCLA generally as patched together compromise Act). *See also infra* notes 82-83 and accompanying text (describing Oil Act definition of owner).

82. *See* H.R. REP. No. 172, 96th Cong., 2d Sess., pt.1 at 36 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6181 *and in* 2 LEGISLATIVE HISTORY OF CERCLA, at 546

ically defined operators as only those assuming the full range of operational responsibility, at least so far as vessels are concerned.[83]

The second portion of CERCLA's legislative history that is helpful in examining CERCLA's secured creditor exemption is the liability scheme of the Oil Act.[84] The Oil Act's proposed liability scheme for owners and operators was similar to the liability scheme for these same two parties in CERCLA.[85] Under the Oil Act, present owners or operators would have been strictly liable up to a statutory limit.[86] CERCLA's liability scheme for present owners and operators of a facility also is strict liability, but without a statutory maximum recovery.[87] The Committee on Public Works and Transportation recommended amending the Oil Act to exempt from liability owners who lease vessels to unaffiliated operators from liability.[88]

Legislative history of the Oil Act is significant for four reasons.[89] First, Congress apparently drew from the language of the Oil Act in drafting the

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(defining owner in Oil Act). According to the legislative history of the Oil Act,

> "Owner" is defined to include not only those persons who hold title to a vessel or facility but those who, in the absence of holding a title, possess some equivalent evidence of ownership. It 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. The definition specifically provides an example of a lender holding title and enjoying tax benefits from that title as exempt from liability under the Oil Act, so long as the lender did not participate in the management or operation of the vessel or facility. *Id.*

83. H.R. REP. No. 172, 96th Cong., 2d Sess., pt.1 at 36 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6181 *and in* 2 LEGISLATIVE HISTORY OF CERCLA, at 546. The Oil Act's definition of operator applies specifically to the operation of vessels. *Id.* The report gives the example of a ship pilot. *Id.* According to the Committee report the pilot is not an operator because the pilot "neither mans nor supplies the vessel." *Id.* at 36-37. For a facility, the Oil Act's definition is no more enlightening than CERCLA's definition of facility in that the Oil Act defines an operator as "a person who is carrying out operational functions for the owner[.]" *Id.* at 37.

84. *See infra* notes 85-88 and accompanying text (describing liability scheme of Oil Act and comparing Oil Act's liability scheme to liability scheme of CERCLA).

85. *Compare* CERCLA § 107, 42 U.S.C. § 9607 (1988) (establishing liability scheme of CERCLA) *with* H.R. REP. No. 172, 96th Cong., 2d Sess., pt.1 at 42-46 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6187-191 *and in* 2 LEGISLATIVE HISTORY OF CERCLA, at 552-56 (detailing liability scheme of Oil Act section by section).

86. *See* H.R. REP. No. 172, 96th Cong., 2d Sess., pt.1 at 42-46 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6187-191 *and in* 2 LEGISLATIVE HISTORY OF CERCLA, at 552-56 (detailing liability scheme of Oil Act section by section).

87. *See* CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (1988) (establishing owners and operators as PRPs in CERCLA liability scheme); *see also id.* § 107(c)(1)(D); 42 U.S.C. § 9607(c)(1)(D) (establishing limits on recovery under CERCLA for cleanup response at facilities).

88. *See* H.R. REP. No. 172, 96th Cong., 2d Sess., pt.2 at 2-3 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6212, 6213 *and in* 2 LEGISLATIVE HISTORY OF CERCLA, at 615 (describing recommended amendments to Oil Act).

89. *See infra* notes 90-97 and accompanying text (describing relationship between Oil Act and CERCLA).

definitions of owner and operator for CERCLA.[90] Second, unlike CERCLA, the Oil Act was not a hastily crafted compromise agreement.[91] Third, the Oil Act illustrates the definition of owner and operator at greater length.[92] The Oil Act definitions demonstrate an intent by the legislature to hold accountable those parties actually in control of property.[93] Fourth, the legislative intent found in the Oil Act is important for putting the secured creditor exemption in context.[94] One of the express purposes of the Oil Act was to impose reasonable and *insurable* limits of liability.[95] Insurance for hazardous waste liability almost is non-existent.[96] Congress's mandate for the EPA to investigate the state of the hazardous waste insurance industry in CERCLA's reauthorization act, the Superfund Amendments and Reauthorization Act (SARA), demonstrates legislative concern for the unavailability of hazardous waste liability insurance.[97]

Congress addressed some of the shortcomings in CERCLA's liability scheme in SARA.[98] The legislative history of SARA is more meticulous and complete than the legislative history of CERCLA.[99] Unfortunately for lenders, Congress did not address secured creditor liability during CERCLA's reau-

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90. *See supra* note 80 and accompanying text (establishing similarities between statutory definition of owner and operator in CERCLA and definitions of owner and operator proposed in Oil Act); *see also* United States v. Maryland Bank and Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986) (using Oil Act definitions of owner and operator found in CERCLA's legislative history to interpret CERCLA's definition of owner and operator); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20996 (E.D. Penn. Sept. 4, 1985) (using discussion of "operator" from Oil Act found in CERCLA legislative history to interpret CERCLA's definition of owner and operator), *cert. denied* Levine v. United States, 470 U.S. 1031 (1985).

91. H.R. REP. No. 172, 96th Cong., 2d Sess., pt.1 at 24 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6169, *and in* 2 LEGISLATIVE HISTORY OF CERCLA, at 528-32 (explaining evolution of Oil Act).

92. *See* H.R. REP. No. 172, 96th Cong., 2d Sess., pt.1 at 36 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6181 *and in* 2 LEGISLATIVE HISTORY OF CERCLA, at 546 (defining owner and operator under Oil Act).

93. *See supra* note 91 and accompanying text (describing legislative history of Oil Act).

94. *See infra* notes 89-96 and accompanying text (relating legislative intent of Oil Act to CERCLA).

95. *See* H.R. REP. No. 172, 96th Cong., 2d Sess., pt.1 at 23 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6168 *and in* 2 LEGISLATIVE HISTORY OF CERCLA, at 552 (describing purposes of Oil Act).

96. *See* Dower, *supra* note 1, at 183-85 (discussing lack of available insurance to cover hazardous waste liability).

97. *See* CERCLA § 301(b), 42 U.S.C. § 9651(b) (1988) (mandating study into availability of private hazardous waste liability and competition in that industry); *see also* H.R. REP. No. 253(I), 99th Cong., 2d Sess. 109 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2891 (discussing insurability study).

98. *See infra* notes 99-115 and accompanying text (describing liability issues addressed by Congress during reauthorization of CERCLA).

99. *Compare* 1980 U.S. CODE CONG. & ADMIN. NEWS, 96th Cong., 2d Sess. 6199-241 (1980) (compiling legislative history of CERCLA) *with* 1986 U.S. CODE CONG. & ADMIN. NEWS, 99th Cong., 2d. Sess. 2835-3441 (1986) (compiling legislative history of SARA). The compiled legislative history of SARA is approximately 5 times larger than the compiled legislative history of CERCLA. *Id.*

thorization.[100] Some inferences about CERCLA's liability scheme can be made from the liability issues Congress addressed in SARA.[101] In SARA Congress expressly adopted the scheme of retroactive, strict, joint, and several liability developed in the federal courts in the first six years of CERCLA.[102] Congress also directly addressed the issue of liability for municipal governments stemming from response actions or escheat of land.[103] Consequently, SARA specifically adopted the judicial gloss added to CERCLA in its first six years and the amendments clarified an ambiguity about certain liable parties.[104] On the other hand, SARA did not confront directly secured creditor liability.[105] Because SARA did not address the secured creditor exemption or lender liability generally, some commentators have inferred that Congress accepted the then current judicial theories on lender liability.[106] This proposition seems unlikely because the judicial decisions available for Congress to consider were federal district court and bankruptcy court opinions, and those decisions did not present a unified formula for lender liability.[107] Another explanation for why Congress did not address lender liability in CERCLA is that because no lender liability cases rose to the United States Courts of Appeals before the passage of SARA, Congress did not realize a lender liability problem existed.

The one amendment in SARA that possibly affects lender liability is Congress' creation of the so-called "innocent landowner" defense.[108] To create the "innocent landowner" defense, Congress modified the third party defense originally provided in CERCLA.[109] The third party defense provides in part that persons otherwise liable under CERCLA are not liable when a third party, not under contractual relationship with the potentially responsible party,

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100. *See* 1986 U.S. CODE CONG. & ADMIN. NEWS, 99th Cong., 2d. Sess. 2835-3441 (1986) (compiling legislative history of SARA).

101. *See infra* notes 102-15 and accompanying text (using legislative history of SARA to interpret CERCLA secured creditor exemption).

102. *See* H.R. REP. No. 253(I), 99th Cong., 2d Sess. 74 (1986), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2835, 2856 (adopting retroactive, joint and several liability for CERCLA).

103. *See* H.R. REP. No. 253(I), 99th Cong., 2d Sess. 73 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2855 (discussing changes to definition of owner and operator in CERCLA § 101(20)(D) and state responsibility for response actions under CERCLA § 107(d)(2)).

104. *Id.*

105. *Id.*

106. *See* Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 926 n.14 (1989) (putting forth proposition that Congress's silence on lender liability in SARA is significant); *see also*, Guidice v. BFG Electroplating and Mfg. Co., 732 F. Supp. 556, 563 (W.D. Pa. 1989) (opining that lenders are included in CERCLA's liability scheme because Congress did not specifically address lender liability in SARA).

107. *See infra* notes 122-97 and accompanying text (describing judicial decisions interpreting CERCLA's secured creditor exemption).

108. *See* H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 186 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3279 (introducing innocent landowner defense).

109. *See* CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A) (1988) (defining contractual relationship as applied in CERCLA § 107 to exclude from liability persons taking possession of property after conclusion of all hazardous substance disposal or placement if party taking possession did not know or should not have reasonably known of hazardous substance disposal or placement on property).

causes the release or threatened release of hazardous materials.[110] Congress altered the definition of "contractual relationship" to provide a defense for landowners who unknowingly purchase contaminated land.[111] Prospective purchasers, however, must exercise due diligence in investigating possible environmental problems before purchase and reasonable care in handling any discovered toxic substances.[112] For example, the innocent landowner defense may apply to lenders when they acquire property through foreclosure if the lender exercises due diligence before assuming ownership of the property.[113] Congress's creation of the innocent landowner defense mutes CERCLA's harsh scheme of strict, joint and several liability with an element of concern for the culpability of the parties involved.[114] As a well documented part of the legislative history of CERCLA's liability scheme, Congress' demonstrated concern for fairness and equity in creating the innocent landowner defense can be used in interpreting the secured creditor exemption.[115]

Creditors holding a security interest in either the real property or equipment of a business may become liable for the hazardous waste disposal practices of the business as either an owner or an operator of the business.[116] In the definition of owner or operator, CERCLA exempts persons holding indicia of ownership primarily to protect a security interest, if the person refrains from participating in the management of the facility.[117] When the lender forecloses, thereby becoming the actual owner of the foreclosed property, the innocent landowner defense nonetheless may protect the lender from liability.[118]

CERCLA treats a lender taking possession of property in which the lender previously held a security interest no differently than any other purchaser of property.[119] The issue of liability becomes less clear cut for lenders holding a security interest who have not foreclosed.[120] Very few cases addressing the secured creditor exemption emerged in the first ten years of CERCLA enforcement actions and the decided cases did not present a unified approach to lender liability.[121]

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110. *See* CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1988) (describing third party defense to CERCLA liability).

111. CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A) (1988).

112. CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B) (1988).

113. *See* CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1988) (describing requirements for asserting innocent landowner defense).

114. *See supra* note 109 (describing Congress' intent in establishing innocent landowner defense).

115. *Id.*

116. *See* CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (1988) (describing owners and operators as PRPs); *Id.* § 101(20)(A), 42 U.S.C. § 9601(20)(A) (defining owner and operator under CERCLA).

117. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988).

118. *See* CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A) (1988) (defining contractual relationship under CERCLA).

119. *See* United States v. Maryland Bank and Trust Co., 632 F. Supp. 573, 579-80 (D. Md. 1986) (holding foreclosing lender liable as present owner).

120. *See infra* notes 122-97 and accompanying text (describing various judicial interpretations given secured creditor exemption).

121. *Id.*

The United States Bankruptcy Court for the Northern District of Ohio first confronted the problem of interpreting the secured creditor exemption.[122] In *In re T.P. Long Chemical, Inc.*[123], a vandal released hazardous chemicals on the property of the bankrupt T.P. Long Chemical Company, Inc.[124] The EPA determined the release warranted immediate action and performed a cleanup.[125] During the cleanup the agency discovered drums of hazardous chemicals, unknown to anyone except Mr. Long, buried at the rear of the Long Company's property.[126] BancOhio held a perfected security interest in the accounts receivable, equipment, fixtures, inventory, and other personal property of T.P. Long Chemical Co.[127] The Bankruptcy court found as a matter of fact that BancOhio's security interest included these drums.[128] In the EPA's reimbursement claim for administrative expenses before the Bankruptcy court, the agency argued that BancOhio received a benefit when the cleanup removed the drums, implying that BancOhio's security interest in the drums made BancOhio an owner or operator of a facility under the CERCLA definitions.[129] The court considered the secured creditor exemption of CERCLA and declared that BancOhio was not an owner or operator as defined by the statute.[130] The court reasoned that merely because a creditor possesses a security interest in the debtor's property the secured creditor does not necessarily have to take possession of the property.[131] If secured property becomes a liability

122. *See In re* T.P. Long Chemical, Inc., 45 Bankr. 278, 282-83 (Bankr. N.D. Ohio 1985) (addressing meaning of secured creditor exemption).

123. 45 Bankr. 278 (Bankr. N.D. Ohio 1985).

124. *In re* T.P. Long Chemical, Inc., 45 Bankr. 278, 279 (Bankr. N.D. Ohio 1985). The T.P. Long Chemical Company operated a rubber recycling plant at the vandalized site. *Id.* at 280. At the time the vandalism occurred a trustee was administering the estate of T.P. Long Chemical Company under Chapter 7 of the Bankruptcy Code. *Id.* at 281. Following a sale of personal property from the Long Company's estate by BancOhio (a secured creditor), an acquaintance of the purchaser opened the valve on a tank containing sulfur monochloride, a hazardous substance as defined by CERCLA § 101(14). *Id.*

125. *Id.* at 281. The EPA first requested the bankruptcy trustee to take action. *Id.* After the trustee refused to comply with the EPA's cleanup request, the agency initiated a cleanup of the Long Company site. *Id.* During the cleanup, the agency discovered approximately 90 drums of hazardous material buried on the Long Company's property. *Id.*

126. *Id.* at 281. Mr. Long owned all corporate stock of T.P. Long Chemical Co. and served as the company's operating officer. *Id.* at 280.

127. *Id.* at 280.

128. *See id.* at 281 (detailing court's findings of fact). In *T.P. Long*, the court held as a matter of fact that BancOhio held a perfected security interest in the accounts receivable, equipment, fixtures, inventory, and other personal property of the T.P. Long Chemical Co. and that the estate of T.P. Long Chemical Company included the drums buried on the Long site. *Id.* at 280. The court did not explain why the buried drums, which were discovered after the bankruptcy trustee's auction, were part of BancOhio's perfected security interest. *See id.* at 280-81 (detailing court's findings of fact).

129. *In re* T.P. Long Chemical, Inc., 45 Bankr. 278, 288 (Bankr. N.D. Ohio 1985).

130. *Id.*

131. *Id.* The EPA argued that BancOhio should not be allowed to sell part of its collateral for a benefit while abandoning that part of the collateral which was a liability. *Id.* The court disagreed with the EPA, holding that creditors are not insurers, responsible for collateral that poses a public risk. *Id.*

or becomes worthless to the creditor, the creditor can abandon the property.[132] The creditor's only risk is that the value of the secured loan will not be covered when the debtor defaults.[133] The court went so far as to find that even if BancOhio had repossessed the property, the repossession would not subject BancOhio to CERCLA liability because BancOhio did not participate in the management of the Long facility and repossession would be an act to protect the bank's security interest.[134]

The United States District Court for the Eastern District of Pennsylvania in *United States v. Mirabile*,[135] was the next court to address the secured creditor exemption.[136] Application of the secured creditor exemption in *Mirabile* involved two banks, American Bank and Trust Company of Pennsylvania (ABT) and Mellon Bank National Association (Mellon), and one government agency, the Small Business Administration (SBA).[137] ABT, Mellon and the SBA each independently provided financing for a paint manufacturing business known as Turco Coatings, Inc. (Turco).[138] ABT held a mortgage on the Turco site, Mellon held a security interest in the inventory and assets of Turco, and the SBA held second liens on Turco's inventory, equipment, and accounts receivable, as well as a second mortgage on Turco's real property.[139]

After reviewing the secured creditor exemption in CERCLA's definition of owner and operator, the *Mirabile* court established involvement by the secured creditor in the day-to-day operation of the debtor as the requisite test for determining application of the CERCLA secured creditor exemption.[140] Based on this test the *Mirabile* court determined as a matter of law that ABT's actions did not constitute participation in the management of Turco, despite ABT's foreclosure and subsequent purchase of the Turco site at a

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132. *Id.*

133. *Id.* at 288.

134. *See In re* T.P. Long Chemical, Inc., 45 Bankr. 278, 288-89 (Bankr. N.D. Ohio 1985) (discussing BancOhio's status as an owner or operator of the facility as defined by CERCLA and specifically applying secured creditor exemption).

135. 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992 (E.D. Pa. Sept. 4, 1985).

136. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20994 (E.D. Pa. Sept. 4, 1985).

137. *Id.* at 20994.

138. *Id.* at 20995. In *Mirabile*, the EPA sued the Mirabile's as present owners of the Turco site to recover costs of a cleanup performed at the site. *Id.* at 20994. The Mirabiles joined ABT and Mellon as third party defendants. *Id.* at 20995. ABT and Mellon impleaded the SBA on a claim that procedures associated with the SBA financing of Turco contributed to the hazardous waste problem. *Id.*

139. *Id.* at 20996.

140. *Id.* at 20996. In *Mirabile*, the court noted that absent the secured creditor exemption, CERCLA's definition of owner and operator is a hopeless tautology. *Id.* at 20995. According to the court, the plain meaning of the exemption must be that so long as secured creditors do not become overly entangled in the affairs of the actual owners or operators, the creditors are not liable under CERCLA. *Id.* From this proposition the day-to-day operations test emerged. *Id.* at 20996. The *Mirabile* court recognized that the problem posed is how far a secured creditor may go in interacting with the business before the creditor becomes an owner or operator. *Id.* at 20995.

sheriff's sale.[141] In addition, the *Mirabile* court held that ABT's foreclosure did not make ABT an owner as defined by CERCLA because ABT foreclosed solely to protect a security interest.[142] The SBA's loan documents put restrictions on Turco's finances and allowed for significant involvement by the SBA in the management of Turco.[143] The court held that a creditor's financial restrictions on a debtor did not constitute participation in management under CERCLA.[144] Finally, the court refused to rule as a matter of law on application of the secured creditor exemption to Mellon because the Mirabiles presented some evidence of Mellon's involvement in managing Turco's business.[145]

The United States District Court for Maryland in *United States v. Maryland Bank and Trust Company,*[146] the next case requiring interpretation of the secured creditor exemption, refused to follow the *Mirabile* decision's day-

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141. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20996 (E.D. Pa. Sept. 4, 1985). ABT's interaction with Turco was exceptionally circumscribed. *Id.* ABT foreclosed on Turco's real property and was subsequently the highest bidder at the sheriff's auction. *Id.* ABT never actually took the sheriff's deed to the land. *Id.* Instead ABT found a purchaser (the Mirabiles) and assigned the bid to them. *Id.* In the three months between the sheriff's auction and assignment to the Mirabiles, ABT limited its actions at the Turco site to: 1) securing the property against vandalism, 2) getting estimates on the cost of disposal of various drums on the property, and 3) showing the property to prospective buyers. *Id.* All of these actions took place after Turco completed operations. *Id.* As a defense to CERCLA liability, ABT claimed the sheriff's sale gave ABT equitable title but not legal title. *Id.* Reasoning from this lack of legal title, ABT disclaimed ownership of the Turco site. *Id.* The court held the distinction moot because ABT acted solely to protect a security interest. *Id.* Later courts have criticized and refused to follow the reasoning concerning ABT's ownership in *Mirabile. See* United States v. Maryland Bank and Trust Co., 632 F. Supp. 573, 580 (D. Md. 1986) (disagreeing with reasoning in *Mirabile*); United States v. Fleet Factors Corp., 901 F.2d 1550, 1556-57 (11th Cir. 1990) (discussing and rejecting reasoning of day-to-day operations test in *Mirabile*), *cert. denied*, 111 S. Ct. 752 (1991).

142. *See Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20996 (E.D. Pa. Sept. 4, 1985) (discussing court's reasons for granting summary judgement to ABT).

143. *Id.* In *Mirabile*, the loan agreement between Turco and the SBA gave the SBA broad power to control Turco's operations. *Id.* The agreement put restrictions on Turco's financial dealings, gave the SBA a right to veto any contracts for management consultants, and required the SBA to provide management assistance to Turco. *Id.* The court held these provisions did not make the SBA liable because no evidence was presented to show the SBA exercised any of the powers over Turco. *Id.* at 20996-97.

144. *See id.* at 20997 (discussing liability of SBA under secured creditor exemption of CERCLA). The court in *Mirabile* noted that the language in the SBA's loan agreement giving the SBA power to participate in the management of Turco did not create liability under CERCLA because the Mirabiles did not offer any proof that the SBA ever exercised any of the powers to participate allowed in the loan agreement. *Id.*

145. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20997 (E.D. Pa. Sept. 4, 1985). Mellon's possible liability stems from the actions of Mellon's predecessor-in-interest, Girard Bank. *Id.* at 20996. After establishing a financing agreement with Turco, Girard placed one of the bank's loan officers on the Advisory Board established to oversee Turco's operations *Id.* Witnesses testified that bank representatives were always on the Turco site, making demands for increased sales and insisting on particular manufacturing changes as well as personnel reassignments. *Id.* at 20997. Even in light of this testimony, the court characterized the Mirabile's case for holding Mellon liable as a slender reed. *Id.*

146. 632 F. Supp. 573 (D. Md. 1986).

to-day operations test.[147] The EPA filed suit against Maryland Bank and Trust (MBT) as the present owner of property on which EPA performed a hazardous waste cleanup.[148] MBT became the owner of the site after foreclosing on a mortgage of the property.[149] MBT took title to the property (known as the California Maryland Drum site or CMD site) over a year before the EPA initiated cleanup of the site and remained the owner several years later when the EPA filed suit.[150]

MBT argued that the reasoning applied to exempt ABT from liability in *Mirabile* should apply to MBT's situation because MBT foreclosed to protect a security interest.[151] The *Maryland Bank and Trust* court rejected this argument, reasoning that to fall within the exemption the security interest must exist at the time of the cleanup.[152] According to the court, the length of time MBT held the property after foreclosure precluded application of the *Mirabile* court's reasoning used to exempt ABT.[153] The *Maryland Bank and Trust* court distinguished *Mirabile* because of the difference in time of possession, then

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147. United States v. Maryland Bank and Trust Co., 632 F. Supp. 573, 580 (D. Md. 1986) (refusing to follow *Mirabile*).

148. *Id.* at 575-76.

149. *Id.* at 575. In *Maryland Bank*, MBT had a business relationship with the previous two owners of the CMD site dating back to at least some time in the 1970's. *Id.* Hershel and Nelle McLeod owned the property from 1944 until their son purchased the property from them in 1980. *Id.* MBT knew that the senior McLeod's used the property as a trash and garbage dump site. *Id.* There was no proof that MBT knew of the McLeod's use of the site for hazardous wastes. *Id.* The son, Mark McLeod, purchased the site with a loan from MBT. *Id.* He soon defaulted and MBT foreclosed, eventually becoming the owner of the property. *Id.* Approximately a year after the foreclosure sale, Mark McLeod reported the existence of hazardous waste site to local health authorities. *Id.*

150. *Id.* at 575. In *Maryland Bank*, the EPA requested that MBT perform the cleanup before the EPA took any remedial action. *Id.* The EPA performed the cleanup only after MBT refused to act. *Id.*

151. *See id.* at 578 (outlining MBT's argument); *supra* notes 141-42 and accompanying text (establishing *Mirabile* court's reasoning in absolving ABT from liability).

152. United States v. Maryland Bank and Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986). While the holding in *Maryland Bank and Trust* adds little to the meaning of CERCLA's secured creditor exemption, the court's discussion of the exemption points out the poor drafting of CERCLA's liability scheme and some ambiguities in the statute. *See id.* at 577-80 (parsing CERCLA's secured creditor exemption). The *Maryland Bank* court starts by asking whether one must be an owner, an operator, or both owner and operator. *Id.* at 577. The ambiguity arises because CERCLA is inconsistent in linking the words owner and operator. *Id.* at 577-78. CERCLA § 107(a)(1) holds "the owner and operator" of a facility liable. 42 U.S.C. § 9607(a)(1) (1988). Correct grammar requires the article "the" before operator to read the phrase in the disjunctive. *Maryland Bank and Trust Co.*, 632 F. Supp. at 578. The court looks to the legislative history to clear up this ambiguity. *See id.* at 578 (discussing legislative history of definition of operator). The court refers to CERCLA as a "hastily patched together compromise" and to the legislative history as "sparse." *Id.* at 578. Additionally, the court resolves the issue of MBT's liability by using a strained verb tense analysis of CERCLA § 101(20)(A) (the secured creditor exemption). *See id.* at 579 (discussing verb tense of exemption). This is a classic case of the court choking on a gnat while swallowing a camel, considering that MBT owned the property for over a year before the EPA took remedial action and the fact that MBT paid $46,500 more than the loan value of the property at the foreclosure sale. *See id.* at 575 (describing MBT's purchase).

153. *Maryland Bank and Trust Co.*, 632 F. Supp. at 579 n.5.

went on in dicta to disagree with the *Mirabile* court's interpretation of CERCLA's secured creditor exemption.[154] The court's reasoning behind finding MBT an owner directly contradicts the holding of *Mirabile*, but the *Maryland Bank and Trust* opinion has qualifying language about the relatively long length of time MBT held the property as owner.[155] After labeling MBT an owner the court turned to application of the third party defense, known as the innocent landowner defense after the passage of SARA.[156] The court denied the government's summary judgement motion as to the third party defense because of unresolved issues of material fact concerning MBT's relationship with former owners of the site and the bank's use of reasonable care at the site since purchase of the property.[157]

Ultimately, the *Maryland Bank and Trust* case does not fit easily into the secured creditor scheme because of the court's qualifying language. Although the decisions interpreting the secured creditor exemption prior to and including *Maryland Bank and Trust* do not draw a bright line for creditors, the decisions do provide a common-sense approach for holding lenders liable.[158] In *Maryland Bank and Trust*, MBT foreclosed on contaminated property and held it for four years.[159] MBT, therefore, became an owner of the property just as any other purchaser at a foreclosure sale.[160] On the opposite end of the spectrum is *Mirabile*, where the lender, ABT, foreclosed but was not held liable because the lender took a hands-off approach to the property and limited its activity to that necessary to realize on its security interest.[161] The two federal district courts that have ruled on the secured creditor exemption since *Maryland Bank and Trust* have drawn from the holdings in both *Mirabile* and *Maryland Bank and Trust*.[162]

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154. *See id.* at 580 (disagreeing with holding in *Mirabile* that secured creditor may foreclose in some instances without incurring liability as owner under CERCLA).

155. *Id.* at 579.

156. United States v. Maryland Bank and Trust Co. 632 F. Supp. 573, 581 (D. Ma. 1986).

157. *Id.* In *Maryland Bank*, the United States District Court for the District of Maryland held that the record was not developed enough to rule on issues concerning the contractual relationship between MBT and Hershel McLeod, Sr., the owner of the property during the time that hazardous waste was deposited on the property. *Id.* at 581. The court also held that questions remained as to the reasonableness of MBT's conduct concerning the bank's relationship with the senior McLeod and concerning the reasonableness of MBT's conduct with respect to the site. *Id.* These unresolved questions prevented the court from granting the government's summary judgement motion challenging MBT's use of the innocent landowner defense. *Id.*

158. *See supra* notes 122-57 and accompanying text (analyzing judicial use of secured creditor exemption prior to *Maryland Bank*).

159. *See* United States v. Maryland Bank and Trust Co., 632 F. Supp. 573, 575 (D. Md. 1986) (describing MBT's purchase of CMD site).

160. *See id.* at 577 (discussing MBT as an owner).

161. *See* United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20996 (E.D. Pa. Sept. 4, 1985) (discussing ABT's relationship to Turco property).

162. *See* Guidice v. BFG Electroplating and Mfg. Co., 732 F. Supp. 556, 561-63 (W.D. Pa. 1989) (adopting the *Mirabile* test for pre-foreclosure and the *Maryland Bank and Trust* test for post-foreclosure); United States v. Fleet Factors Corp., 724 F. Supp. 955, 960 (S.D. Ga. 1988) (adopting the *Mirabile* test), *aff'd on other grounds*, 901 F.2d 1550 (11th Cir. 1990), *cert denied*,

The problem of interpreting the secured creditor exemption reached the federal appellate level in 1990 when the United States Court of Appeals for the Eleventh Circuit addressed the secured creditor exemption in *United States v. Fleet Factors Corp.*[163] In *Fleet Factors*, Fleet Factors Corporation (Fleet) held security interests in the accounts receivable, the plant and equipment and the real property of Swainsboro Paint Works (SPW).[164] After SPW became bankrupt, Fleet foreclosed on some of SPW's inventory and equipment and contracted for an auction.[165] Fleet allegedly contracted with a third party, Nix, to remove the unsold equipment in consideration for cleaning up the site after the removal.[166] Approximately eighteen months after the auction, but only one month after Nix left the site for the last time, the EPA discovered hazardous materials on the site.[167] Fleet never foreclosed on the real property.[168] At a foreclosure sale caused by SPW's failure to pay state and county taxes, the county took possession the SPW facility.[169]

The United States District Court for the Southern District of Georgia originally heard the *Fleet Factors* case.[170] Drawing from the holding in *Mirabile*, the district court applied a day-to-day operations test to determine Fleet's liability as a secured creditor.[171] Recognizing the considerable doubt surround-

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111 S. Ct. 752 (1991). *Guidice* involved a private enforcement action by borough residents against a local electroplating company (BFG). *Guidice*, 732 F. Supp. at 557. BFG joined National Bank of the Commonwealth (the Bank) as a third-party defendant on the theory that the Bank was a previous owner of adjacent property that contributed to the hazardous waste problem. *Id.* The Bank had a long-standing financial relationship with Berlin Metal Polishers (Berlin), the previous owners of the property adjacent to BFG's property. *Id.* at 558. In the early 1980's the Bank increasingly became involved with Berlin's business because of Berlin's financial difficulties. *Id.* at 558-59. In addition to providing assistance with Berlin's financial management, the Bank became involved with getting Berlin a permit to discharge into the local sewer system. *Id.* When workout efforts failed, the Bank foreclosed on the Berlin property and subsequently purchased the property at the sheriffs sale. *Id.* at 559. The Bank held title to the property for approximately nine months. *Id.* In ruling on the Bank's liability for cleanup costs, the court used the day-to-day operations test from *Mirabile* to determine the Bank's liability prior to foreclosure. *Id.* at 561. The court, following the reasoning of *Maryland Bank and Trust*, held the Bank liable as an owner after the Bank foreclosed on the Berlin property. *Id.* at 563.

163. 901 F.2d 1550 (11th Cir. 1990).

164. *See* United States v. Fleet Factors Corp., 901 F.2d 1550, 1552 (11th Cir. 1990) (discussing Fleet's various security agreements), *cert. denied*, 111 S. Ct. 752 (1991). According to the agreement, Fleet advanced funds to SPW against the assignment of SPW's accounts receivable in a factoring agreement. *Id.* The relationship between Fleet and SPW continued with court approval after SPW filed for Chapter 11 bankruptcy. *Id.*

165. *Id.* at 1552.

166. *Id.* at 1553.

167. *Id.* at 1553. The EPA found 700 fifty-five gallon drums of toxic chemicals and forty-four truckloads of asbestos-laden material at the SPW site. *Id.* Response costs approached $400,000. *Id.*

168. *Id.* at 1553.

169. United States v. Fleet Factors Corp., 901 F.2d 1550, 1553 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

170. United States v. Fleet Factors Corp., 724 F. Supp. 955 (S.D. Ga. 1988), *aff'd on other grounds*, 901 F.2d. 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

171. *Id.* at 960. Using the day-to-day operations test from *Mirabile*, the District Court ruled

ing interpretation of the secured creditor exemption, the district court certified the case to the United States Court of Appeals for the Eleventh Circuit on interlocutory appeal.[172]

The Eleventh Circuit flatly refused to adopt the day-to-day management test.[173] Instead, the court announced that secured creditors incur liability under CERCLA when the creditor's involvement with the business supports an inference that the lender could influence the debtor's hazardous waste disposal decisions.[174] The Eleventh Circuit claimed support for its interpretation from the legislative history of CERCLA and from the overall remedial goals of CERCLA.[175] According to the Eleventh Circuit, the government alleged sufficient facts to hold Fleet accountable as an operator after Fleet's foreclosure on SPW's property.[176] Because the court could have held Fleet liable as an operator without interpreting the secured creditor exemption, the most controversial aspects of the holding in *Fleet Factors* are dicta.[177]

A difficulty with the Eleventh Circuit's "inference" rule established in *Fleet Factors* is in determining what lender activity gives rise to CERCLA liability.[178] According to the Eleventh Circuit, monitoring of any aspect of the debtor's business should not expose the creditor to CERCLA liability.[179] Additionally, involvement in discrete and occasional financial decisions of the debtor should not create CERCLA liability for the creditor if the decisions involve protection of the creditor's security interest.[180] These examples do not

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that Fleet was not an operator from the time of its original involvement until the time of the auction. *Id.* The court would not rule as a matter of law on Fleet's status from the auction to the time Nix left. *Id.* at 961. The court recognized the questions surrounding the court's interpretation of the secured creditor exemption and certified these questions for interlocutory appeal before the case preceded. *Id.* at 962.

172. *Id.* at 962.

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

174. *Id.* at 1558.

175. *Id.* at 1557-58. The Eleventh Circuit cites comments made by Representative Harsha when the Representative introduced the secured creditor exemption to the Senate version of the bill. *Id.* at 1558 n.11. According to the Eleventh Circuit, Representative Harsha felt the exemption was necessary to remove liability from those holding title but not participating in operation or management or otherwise affiliated with the operators. *Id.* The court held that a person may be affiliated with a much more peripheral involvement than being an operator requires. *See id.* (discussing court's interpretation of Representative Harsha's remarks in legislative history). Additionally, the Eleventh Circuit made plain its belief that increased involvement by secured creditors in the affairs of debtors is a goal of CERCLA and that the court's narrow interpretation of the secured creditor exemption accomplishes that goal. *See id.* at 1558 (describing Eleventh Circuit's interpretation of public policy behind passage of CERCLA). Representative Harsha's remarks are discussed earlier in this note along with other salient points from the legislative history. *See supra* notes 61-115 and accompanying text (discussing legislative history of CERCLA and SARA).

176. United States v. Fleet Factors Corp., 901 F.2d 1550, 1559 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

177. *See id.* at 1559 (discussing facts alleged by government in *Fleet Factors*).

178. *See id.* at 1558 (discussing application of the *Fleet Factors* court's "inference" test).

179. *Id.*

180. *See* United States v. Fleet Factors, 901 F.2d 1550, 1558 (11th Cir. 1990) (discussing application of the *Fleet Factors* court's "inference" test), *cert. denied*, 111 S. Ct. 752 (1991).

tell the secured creditor what actions will result in liability under the secured creditor exemption of CERCLA.[181] The effect of the *Fleet Factors* decision is to create a separate class of liable parties that are neither owners nor operators, but are secured creditors unfortunate enough to have participated in the debtor's business to a level that supports an inference that the creditor could influence hazardous waste disposal decisions.[182]

The United States Court of Appeals for the Ninth Circuit in *In re Bergsoe Metal Corp.*,[183] decided the most recent case interpreting the secured creditor exemption.[184] The Port of St. Helens, an Oregon municipal corporation, issued revenue bonds to support development of a lead recycling plant in St. Helens, Oregon.[185] Through a series of transactions, the municipality acquired title to the recycling center's building and land.[186] The plant experienced financial difficulties soon after commencing operation and eventually ended up in involuntary Chapter 11 bankruptcy.[187] Prior to the filing of the involuntary bankruptcy petition, the Oregon Department of Environmental Quality discovered hazardous waste contamination in the plant.[188] The bank holding the revenue bonds sued the parent company of the lead recycler (EAC).[189] The plaintiff's suit included a request for a declaration that EAC was liable for environmental cleanup costs.[190] Bergsoe's parent company filed a third-party complaint against the Port and the bank, alleging that the Port and the bank were owners as defined by CERCLA.[191]

The Ninth Circuit found the Port was not an owner or operator under CERCLA.[192] First, the Ninth Circuit reasoned that although the Port held title, the lease back to the lead recycling company (Bergsoe) gave Bergsoe all traditional indicia of ownership.[193] The Port merely held title as security on the bonds.[194] Second, the court found that the Port did not participate at all in the management of the lead recycling plant.[195] The Ninth Circuit specifically

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181. *See id.* (discussing *Fleet Factors* court's "inference" test).

182. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit at 7, United States v. Fleet Factors Corp., 111 S. Ct. 752 (1991) (arguing that Eleventh Circuit's decision in *Fleet Factors* creates a new class of liable party not intended by Congress), *denying cert. to*, 901 F.2d. 1550 (11th Cir. 1990).

183. 910 F.2d 668 (9th Cir. 1990).

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

185. *Id.* at 669.

186. *Id.* at 669-70. The Port sold Bergsoe 50 acres of land on which to construct the recycling plant in consideration of a promissory note and a mortgage on the property. *Id* at 669. Bergsoe conveyed a warranty deed on the property and facilities to the Port in exchange for leases on the property and facilities. *Id.* at 670.

187. *Id.* at 670.

188. *Id.*

189. In re Bergsoe Metal Corp., 910 F.2d 668, 670 (9th Cir. 1990).

190. *Id.*

191. *Id.*

192. *Id.* at 673.

193. *Id.* at 671.

194. In re Bergsoe Metal Corp., 910 F.2d 668, 671 (9th Cir. 1990).

195. *Id.* at 672-73.

reserved the question of how much a secured creditor must participate in management of the debtor before triggering CERCLA liability.[196] Instead, the Ninth Circuit proclaimed accord with the *Fleet Factors* decision by finding no participation in management by the Port.[197]

The *Fleet Factors* case currently stands as the only appellate case interpreting the nature and extent of the secured creditor exemption under CERCLA.[198] As the *Fleet Factors* decision disposes of and generally ignores all previous attempts to define the secured creditor exemption, the decision deserves careful scrutiny to determine whether it correctly applies the exemption.[199]

Any attempt to reconcile the *Fleet Factors* decision with the CERCLA statute must start with an examination of the wording of the secured creditor exemption.[200] The language of CERCLA indicates that Congress intended the exemption to have some meaning.[201] This intended meaning applies to the definitions of liable parties as a whole, not just to the words of the exemption.[202] The secured creditor exemption can be divided into three distinct parts.[203] Part one requires that the creditor must hold indicia of ownership.[204] Part two requires that the creditor must hold the indicia primarily to protect his security interest.[205] Part three requires that the lender must hold the indicia without participating in the management of the facility.[206] The problem with these three parts is that they have no plain meaning when read out of context with the entire liability scheme.[207] Putting the words back into an overall context of owner and operator liability only magnifies the ambiguity, especially as to what constitutes participation in management.[208] Past and present owners are liable.[209] Likewise, past and present operators are liable.[210] The secured

196. *Id.* at 672.

197. *Id.*

198. *See supra* notes 122-97 and accompanying text (discussing court decisions involving CERCLA's secured creditor exemption).

199. *See infra* notes 200-38 and accompanying text (discussing *Fleet Factors* in light of CERCLA's legislative history and statutory construction of CERCLA).

200. *See infra* notes 201-11 and accompanying text (discussing plain meaning of CERCLA's secured creditor exemption).

201. *See* United States v. Maryland Bank and Trust, 632 F. Supp. 573, 578 (D. Md. 1986) (rejecting particular construction of definition of owner and operator that renders CERCLA § 9607(a)(1) useless).

202. *See infra* notes 203-11 and accompanying text (discussing plain meaning of statute).

203. *See* CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988) (defining owner, operator and secured creditor exemption).

204. *Id.*

205. *Id.*

206. *Id.*

207. *See supra* notes 122-97 and accompanying texts (describing various courts attempts to give meaning to secured creditor exemption).

208. *See id.* (describing various courts attempts to give meaning to secured creditor exemption).

209. CERCLA § 107(a)-(b); 42 U.S.C. § 9607(a)-(b) (1988).

210. *Id.*

creditor exemption is a hybrid, dealing with aspects of both operation (*ie.* management) and ownership (*ie.* indicia).[211]

In *Mirabile*, the United States District Court for the Eastern District of Pennsylvania resolved the ambiguity in CERCLA's definition of owner or operator by defining the issue as whether a secured creditor's actions rise to those of an owner or operator.[212] The Eleventh Circuit in *Fleet Factors* rejected this analysis on the ground that the day-to-day participation in management test violated the plain meaning of the statute.[213] Instead, the Eleventh Circuit framed the issue to be whether the lender participated in management of the facility enough to support the inference that the lender could influence hazardous waste disposal decisions.[214]

The *Fleet Factors* rule is one of inclusion vice exclusion.[215] The holding in *Fleet Factors* demonstrates that secured creditors are better off without the secured creditor exemption.[216] Without the secured creditor exemption, the lender's involvement must rise to the level of an owner or operator as defined by CERCLA.[217] The court in *Fleet Factors* specifically held that during the period of the debtor SPW's bankruptcy and before Fleet's foreclosure, Fleet was not an owner or an operator of the facility despite holding indicia of ownership.[218] The Eleventh Circuit in *Fleet Factors* also adopted the lower court's ruling that Fleet was not liable for response costs because of participation in management before the bankruptcy even though the trial court analyzed this period using the day-to-day participation test used in *Mirabile*.[219] The effect of the Eleventh Circuit's holdings is that the secured creditor, Fleet, did not fit the definition of either an owner or an operator and, therefore, either some additional category of liability must exist on which to premise Fleet's liability or Fleet must have become an owner or operator after foreclosure.[220] According to the Eleventh Circuit, the secured creditor exemption creates this additional category of liability.[221]

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211. *See* CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (establishing secured creditor exemption).

212. *See* United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20992, 20996 (E.D. Pa. Sept. 4, 1985) (establishing day-to-day operation test).

213. *See* United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990) (discussing and rejecting day-to-day operations test from *Mirabile*), *cert. denied*, 111 S. Ct. 752 (1991).

214. *See id.* at 1558 (establishing "inference" test for secured creditor exemption).

215. *See supra* note 182 and accompanying text (describing effect of holding in *Fleet Factors*).

216. *See supra* notes 163-82 and accompanying text (outlining holding of Eleventh Circuit in *Fleet Factors*).

217. *See supra* note 182 and accompanying text (reasoning that Fleet does on fit under CERCLA definitions of either owner or operator); *see also* CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (defining owner or operator for purposes of CERCLA liability).

218. United States v. Fleet Factors Corp, 901 F.2d 1550, 1555 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

219. *Id.* at 1557.

220. *See supra* notes 163-82 and accompanying text (outlining reasoning behind *Fleet Factors* court's decision).

221. *Id.*

The rule in *Fleet Factors*, that secured creditors involved in management enough to support an inference of influencing hazardous waste disposal are liable for cleanup costs, is beyond the plain meaning of the statute because the statute purports to provide an exclusion from liability.[222] This rule creates a new class of liable parties that are neither owners nor operators.[223] Phrased as an exception, the plain meaning of the statute does not support the rule in *Fleet Factors*.[224]

Likewise, CERCLA's scant legislative history does not support the *Fleet Factors* rule.[225] The Eleventh Circuit anchored its rule with a passage from Representative Harsha's introduction of the secured creditor exemption.[226] Support for the rule turns on Representative Harsha's use of the word "affiliated," which the Eleventh Circuit in *Fleet Factors* claimed allows liability to attach to creditors based on a more attenuated connection than participation in the day-to-day decision making of a debtor.[227] Another interpretation is that Representative Harsha picked up the word "affiliated" from a proposed amendment to the Oil Act.[228] The House introduced the proposed Oil Act amendment containing the word "affiliated" to deal with shipping fleet arrangements.[229] According to the legislative history of CERCLA concerning the proposed Oil Act, the proposed amendment defined "affiliated" to mean a relationship in which a person owns, is owned by, or is under common control with another person.[230] Therefore, the word affiliated as used in CERCLA's legislative history demonstrates a very strong degree of connection between parties, exactly the opposite of the meaning assigned to "affiliated" by the Eleventh Circuit.[231]

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222. *See supra* notes 215-21 and accompanying text (discussing problems with logic of *Fleet Factors* holding).

223. *See supra* notes 173-87 and accompanying text (discussing logic of *Fleet Factors* "inference" test).

224. *See supra* notes 178-82 and accompanying text (discussing that plain meaning of statute does not support rule in *Fleet Factors*).

225. *See supra* notes 67-96 and accompanying text (discussing legislative history of CERCLA).

226. United States v. Fleet Factors Corp., 901 F.2d 1550, 1558 n.11 (11th Cir 1990), *cert. denied*, 111 S. Ct. 752 (1991).

227. *Id.* at 1558.

228. *See supra* notes 79-83 and accompanying text (discussing legislative history of definition of owner or operator in CERCLA).

229. *See* H.R. REP. No. 172, 96th Cong., 2d Sess., pt. 2, at 2-3, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6212, 6213, *and in* 2 LEGISLATIVE HISTORY OF CERCLA, at 615 (describing proposed amendments to definition of owner in Oil Act).

230. *See id.* (describing proposed amendments to definition of owner in Oil Act). The Committee on Public Works and Transportation recommended amending the Oil Acts definition of owner to exclude from liability an owner/lessor constructing a vessel to the specifications of a lessee, if the owner/lessor did not exercise control over the operation or maintenance of the vessel and was not an affiliate of the lessee. *Id.*

231. *See* United States v. Fleet Factors Corp., 901 F.2d 1550, 1558 n.11 (11th Cir. 1990) (citing CERCLA's legislative history for proposition that "affiliated" clearly indicates more peripheral degree of involvement with affairs of facility than that necessary to be held liable as operator.), *cert. denied*, 111 S. Ct. 752 (1991).

The interpretation of CERCLA's legislative history in the *Maryland Bank and Trust* decision is more plausible than that of the Eleventh Circuit's interpretation in *Fleet Factors*.[232] According to the United States District Court for Maryland, Congress created the secured creditor exemption to avoid holding mortgagees liable under the common law theory of mortgages.[233] Under the law of thirteen title theory states, the mortgagee holds actual title to property so long as the mortgage is in force.[234]

Using the logic from the legislative history discussed in *Maryland Bank and Trust*, construction of the secured creditor exemption is as follows: mortgagees are nominal owners in title theory states; title holders are owners and are liable under CERCLA's definition of owner or operator; Congress added the secured creditor exemption to the definition of owner or operator to prevent including nominal owners such as mortgagees in CERCLA's liability scheme, provided that the mortgagee did no more than hold a title as a security interest.[235] The above construction of the secured creditor exemption gives a plain meaning to the statute and supports the exemption as an exclusion from liability for a particular class of persons who might otherwise fit the CERCLA definition of owner.[236] The above construction also supports a Congressional intent to exclude lenders generally, except those lenders participating in the management of the facility.[237] The "inference" rule from *Fleet Factors* operates from the opposite assumption, holding that CERCLA's liability scheme generally includes lenders and exempts only lenders who can prove an absence of participation in management of the facility.[238]

The plain meaning of the statute and the legislative history of CERCLA are not the only tools available to give meaning to the secured creditor

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232. *See infra* notes 233-36 and accompanying text (comparing holding in *Maryland Bank and Trust* with legislative history of CERCLA).

233. *See* United States v. Maryland Bank and Trust, 632 F. Supp. 573, 579 (D. Md. 1986) (discussing legislative history of CERCLA); *see also* J. MOSKOWITZ, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS 79-80 (1989) (discussing Congressional intent in creating secured creditor exemption as being intended to exempt common law mortgagees). At common law a mortgage vests ownership in the mortgagee subject to an equity of redemption in the mortgagor. *Id.* at 79. The EPA asserted in a brief filed in *United States v. Nicolet, Inc.* that foreclosure merely eliminates the mortgagor's equity of redemption. *Id.* Moskowitz contends that the secured creditor exemption is designed to exclude common law mortgagees from CERCLA liability and foreclose assertions such as the one presented by the EPA in *Nicolet*. *Id.*

234. *See Maryland Bank and Trust*, 632 F. Supp. at 579 (discussing application of secured creditor exemption to common law mortgagees).

235. *See id.* (determining Congressional intent in drafting secured creditor exemption from legislative history).

236. *See supra* text accompanying note 235 (using construction in *Maryland Bank and Trust* to interpret secured creditor exemption).

237. *See supra* text accompanying note 235 (extrapolating from reading of legislative history of CERCLA in *Maryland Bank and Trust* holding).

238. *See* Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261, 1285-86 (1987) (stating premise that while all persons holding indicia of ownership are potentially liable, Congress excepted only few).

exemption.[239] Another method of interpreting the secured creditor exemption language of CERCLA is to compare the exemption with other portions of the statute and with other environmental legislation.[240] The outcome of this comparison is a demonstration that secured creditors as a class are not similar enough to other liable classes that they should carry the burden of hazardous waste cleanup.[241]

The comparison involves two steps in analyzing the meaning of the secured creditor exemption.[242] The first step is to look at CERCLA's internal liability scheme.[243] CERCLA section 9607 defines the classes of potentially responsible parties (PRPs).[244] PRPs include generators, transporters, owners and operators.[245] To effectuate the overwhelming remedial goals of CERCLA,[246] courts have construed liability as strict, joint, several, and retroactive.[247] Based on this liability scheme, persons contributing hazardous waste at a site may have to answer in full for the cleanup of the site, no matter how remote in time, minimal in percentage contribution, and free of negligence the party might be.[248]

Based on CERCLA's scheme of strict, joint, several and retroactive liability, fairness plays no part in defining the limits of CERCLA's liability scheme.[249] Instead, the overarching goal of CERCLA is to clean up hazardous

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239. *See infra* notes 240-62 and accompanying text (discussing additional methods of providing meaning to secured creditor exemption).

240. *See infra* notes 253-58 and accompanying text (using complete CERCLA scheme and scheme of other environmental regulation to add meaning to secured creditor exemption).

241. *See id.* (using complete CERCLA scheme and scheme of other environmental regulation to add meaning to secured creditor exemption).

242. *See infra* notes 243-62 and accompanying text (describing two step analysis for analyze secured creditor exemption.

243. *See infra* notes 253-58 and accompanying text (using complete CERCLA scheme and scheme of other environmental regulation to add meaning to secured creditor exemption).

244. CERCLA § 107, 42 U.S.C. § 9607 (1988).

245. *Id.*

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

247. *See supra* note 16 (discussing strict, joint and several liability under CERCLA). Liability is retroactive because past owners and operators of facilities are liable if disposal took place during their tenure. CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1988). Past owners with actual knowledge of release or threatened release of hazardous waste on the property cannot escape liability by selling the property unless they disclose this knowledge to prospective buyers. *Id.* § 101(35)(C), 42 U.S.C. § 9601(35)(C). Consequently, in effect then the previous owner is liable unless the information necessary to discount the property for the possible liability is disclosed.

248. *See supra* note 16 (discussing strict, joint and several liability under CERCLA). Of course, the PRP faced with a judgement for response costs has a common law right of contribution from other liable parties. *See* CERCLA § 107(e)(2); 42 U.S.C. § 9607(e)(2) (1988) (stating that CERCLA does not preclude any cause of action an owner or operator might otherwise have). CERCLA § 107(e)(1) prevents the contractual transfers of liability for the release or threatened release of hazardous waste. 42 U.S.C. § 9607(e)(1). CERCLA § 107(e)(2) makes explicit that claims by subrogation or otherwise are not effected by this section. 42 U.S.C. § 9607(e)(2).

249. *See* Dower, *supra* note 1, at 186-7 (discussing the inequities involved in CERCLA's statutory scheme of taxation and liability). In addition Dower claims the CERCLA sends mixed incentive signals to hazardous waste producers. *Id.*

waste sites.[250] Using this analysis, holding secured creditors liable for hazardous waste clean up is arguably no more extreme than holding transporters or generators of hazardous wastes liable for cleanup costs. Secured creditors of hazardous waste site owners have as much, if not more, power to influence proper waste disposal than a generator sending waste to a dump-site for disposal.[251] Following this line of reasoning, the holding in *Fleet Factors* would be consistent with CERCLA's liability scheme.[252]

The second step in the comparison of CERCLA's secured creditor exemption to other environmental legislation is to consider how secured creditor liability, and more generally CERCLA liability, fits into a complete program of environmental legislation.[253] CERCLA is the second and most recent part of a two-part program dealing with hazardous waste disposal.[254] The Resource Conservation and Recovery Act (RCRA) is the other part of the scheme.[255] RCRA governs present and future hazardous waste disposal practices by mandating the process for control of hazardous wastes from creation to ultimate disposal.[256] Under RCRA, the EPA developed a manifest system to track hazardous wastes at all points in the cycle.[257] The manifest's purpose is to determine when and where any transgression in the handling of hazardous waste occurs.[258]

Congress passed RCRA to control the present and future treatment of hazardous waste.[259] CERCLA's purpose is to deal with past hazardous waste disposal problems.[260] The decision in *Fleet Factors* runs afoul of CERCLA's primarily backward-looking goal. The decision in *Fleet Factors* rests, at least in part, on a policy of increasing lender involvement in the current waste disposal practices of their debtors.[261] However, the policy goals announced in

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250. *Id.*

251. *See generally* R. TIGHE, STRUCTURING COMMERCIAL LOAN AGREEMENTS (1984) (describing in detail various loan provisions available to lenders and effects of these provisions). Lending institutions may vary their degree of control over debtors by inclusion of various loan covenants ranging from the definition of payment terms to agreements by the debtor to forebear particular actions or to affirmatively act in accordance with the terms of a loan agreement. *Id.*

252. *See supra* notes 163-82 and accompanying text (discussing holding of court in *Fleet Factors*).

253. *See infra* notes 254-58 and accompanying text (discussing other environmental legislation).

254. *See* Frank and Atkeson, *supra* note 32, at 1 (describing legislative program preceding passage of CERCLA). The passage of CERCLA followed a spate of environmental legislation by Congress during the 1970s designed to control air and water pollution, groundwater contamination, chemical manufacturing, solid waste, and hazardous substance and waste. *Id.* at 1-2.

255. *See id.* (describing legislative program preceding passage of CERCLA).

256. *See* Dower, *supra* note 1, at 161-68 (describing RCRA and 1984 Amendments to RCRA).

257. *Id.* at 163.

258. *Id.* Unfortunately, as Dower describes, most hazardous waste never leaves its point of origin and therefore does not enter the manifest tracking system. *Id.*

259. *See* Frank and Atkeson, *supra* note 32, at 1 (describing legislative program preceding passage of CERCLA).

260. *See id.* at 1-2 (describing purpose for enacting CERCLA).

261. *See* United States v. Fleet Factors Corp., 901 F.2d. 1550, 1558 (discussing Eleventh Circuit's interpretation of CERCLA's underlying policy goals regarding liability of secured creditors), *cert. denied*, 111 S. Ct. 752 (1991).

Fleet Factors exceed the purpose of CERCLA, which is to identify parties responsible for and financially able to clean up past hazardous waste disposal.[262]

Sources outside the judiciary are aware of the ambiguities manifest in CERCLA's secured creditor exemption and are taking action.[263] At least in part because of concern over lender liability, two Congressmen introduced bills in the 101st Congress to address ambiguities in CERCLA.[264] A bill introduced by Congressman LaFalce proposes to change the wording of the secured creditor exemption to include any lending institution that acquires ownership or control of contaminated property pursuant to the terms of a security interest.[265] Congressman LaFalce's bill expands the secured creditor exemption to cover lenders who acquire ownership because of a lease governed by federal or state banking authorities.[266] Congressman LaFalce's bill ends the indefiniteness of the secured creditor exemption over which courts have struggled.[267]

Unfortunately, the proposed bill creates a windfall for lenders in situations factually similar to *Maryland Bank and Trust*.[268] LaFalce's bill puts secured creditors that foreclose in a better position than any other bidder at the foreclosure sale because any other new owner would be liable for releases or threatened releases of hazardous waste while the secured creditor would not.[269] Congressman LaFalce's bill creates an exempt class of owners.[270]

In addition to Congressman LaFalce's bill, Congressman Weldon introduced an amendment to the innocent landowner defense created by SARA.[271] The purpose of the amendment is to establish some definiteness in the due diligence requirements of the current innocent landowner defense.[272] The amendment creates a rebuttable presumption of due diligence if the prospective purchaser performs a Phase I Environmental audit as defined in the bill.[273] Congressman Weldon's bill does not help answer the problem of interpreting the secured creditor exemption, but the bill would provide a method for

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262. *See id.* (describing increased monitoring of debtors by secured creditors as a policy goal of CERCLA).

263. *See infra* notes 264-74 and accompanying text (describing attempts from several sources to correct CERCLA's shortcomings).

264. *See* H.R. 4494, 101st Cong., 2d Sess. (1990) (addressing specifically lender liability); *see also* H.R. 2787, 101st Cong., 1st. Sess. (1989) (addressing innocent landowner defense).

265. H.R. 4494, 101st Cong., 2d Sess. § (a)(1)(A)(i) (1990).

266. *Id.* at § (a)(1)(A)(v).

267. *See supra* notes 263-66 and accompanying text (discussing Congressman LaFalce's bill).

268. *See supra* notes 146-50 and accompanying text (describing the facts of *Maryland Bank and Trust*).

269. *See* H.R. 4494, 101st Cong., 2d Sess. § (a)(1)(A)(i)-(v) (1990) (changing definition of owner or operator in CERCLA to exclude from liability lenders acquiring ownership through a security agreement).

270. *Id.*

271. H.R. 2787, 101st Cong., 1st. Sess. (1989).

272. *See* Testimony of Congressman Curt Weldon, before the Subcommittee on Transportation and Hazardous Waste Materials (August 2, 1990) (describing problems with administering innocent landowner defense).

273. *Id.* at § (C)(i).

foreclosing lenders to protect themselves because it clearly establishes the requirements that a lender must meet to satisfy the innocent landowner defense.[274]

The actions described above illustrate that lender liability under CERCLA is a complex problem with which each of the three branches of our government is attempting to deal.[275] For several reasons, the legislature is the preferred branch to correct the problem of assigning liability to secured creditors under CERCLA.[276] One reason is that the legislative history of CERCLA is too scanty to allow for a judicial resolution.[277] Also, because no true split of authority exists between the Eleventh Circuit and Ninth Circuit Courts of Appeals on the meaning of the secured creditor exemption exists, it is unlikely that the Supreme Court will decide the boundaries of the secured creditor exemption.[278] The Supreme Court already declined to hear the *Fleet Factors* petition presented to it in October 1990.[279]

Another reason mandating a legislative solution is that the question of when to hold secured creditors liable is a question of policy, and policy is ultimately a legislative issue.[280] Lastly, the EPA cannot fix a lender liability

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274. *See* H.R. 2787, 101st Cong., 1st. Sess. § 2 (1989) (proposing amendment to CERCLA § 101(35) to provide rebuttable presumption of due diligence if Phase I Environmental Audit performed). *See also* Testimony, *supra* note 272 (describing effect of Congressman Weldon's proposed bill on secured creditors).

275. *See* Freeman, *Recent Case Law May Expand Lenders' Risks Under Superfund*, Nat'l. L.J., Sept. 17, 1990, at 18, col. 1. (hypothesizing how each branch of government might react to *Fleet Factors*). Soon after the Eleventh Circuit's decision in *Fleet Factors*, the House Subcommittee on Transportation and Hazardous Material held a hearing to take comment on alternatives for addressing lender liability. *See* Testimony of John J. LaFalce, Chairman of the House Small Business Committee, before the Energy and Commerce Subcommittee on Transportation and Hazardous Materials, 1 (August 2, 1990). Both Congressman LaFalce and Congressman Weldon spoke on how their respective bills can help solve the problem of lender liability under CERCLA. *See id.* (describing purpose of Congressman LaFalce's bill); Testimony, *supra* note 272 (describing purpose of Congressman Weldon's bill). More significantly, EPA Assistant Administrator for Enforcement James Strock announced that the EPA would propose a rulemaking to interpret the secured creditor exemption. Freeman, *supra*, at 20 n.29.

276. *See infra* notes 277-84 and accompanying text (outlining reasons supporting legislative solution).

277. *See supra* notes 122-97 and accompanying text (describing several courts attempts to interpret secured creditor exemption).

278. *See supra* notes 196-97 and accompanying text (discussing interpretations of secured creditor exemption by Ninth and Eleventh Circuit Courts of Appeals).

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

280. *See* W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 240-335 (1988) (describing various theories of creation of public policy through legislative process). The Constitution grants to Congress all legislative powers. U.S. CONST. art. 1, § 1. Both the classical common law view and the classical civil law view of the role of the legislature in making law require that judges look to the legislature to begin any interpretation of a statute. W. ESKRIDGE, *supra*, at 243. Differing legal philosophies give varying weights to the primacy of statutes, especially those statutes in derogation of the common law. *Id.* at 241. Both legal process scholars and law and economics scholars recognize statutes as the statement of public policy. *Id.*

problem that the EPA helped to create.[281] Because the agency did not hesitate to join lenders as PRPs in past suits, an agency rule broadening exemptions for lenders would send mixed signals to the judiciary.[282] The agency could control lender liability to some extent by not joining the lenders in future recovery actions.[283] However, the private right of action and the right of contributing parties to seek recovery from other unnamed PRPs limits the effectiveness of an EPA rulemaking interpreting the secured creditor exemption.[284]

Any proposed change to CERCLA should address several issues.[285] First, Congress must decide as a matter of policy whether creditors that lend money to industry should be liable as a class for their debtor's environmental damage.[286] As discussed above, CERCLA's liability scheme does not rely on causation or fairness.[287] If Congress intends to extend CERCLA liability to secured lenders, then Congress should amend CERCLA to reflect this policy. Alternatively, Congress can send a clear policy signal both to lenders and to the judiciary by adopting a concrete test for secured creditor liability, such as the day-to-day operations test first established in *Mirabile*.[288] Second, any exemption for lenders should prevent a windfall for the foreclosing creditor.[289]

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281. *See supra* notes 31-53 and accompanying text (describing EPA's role in enforcement actions).

282. *See* United States v. Fleet Factors Corp., 724 F. Supp. 955, 959 (S.D. Ga. 1988) (joining of secured creditor by EPA in suit for recovery of response costs associated with hazardous waste cleanup); United States v. Maryland Bank and Trust Co., 632 F. Supp. 573, 575 (D.Md. 1986) (same); *In re* T.P. Long Chemical Inc., 45 Bankr. 278, 287 (Bankr. N.D. Ohio 1985) (seeking recovery by EPA from secured creditor implead by original defendant).

283. *See supra* notes 31-53 and accompanying text (describing EPA's role in CERCLA enforcement actions).

284. *See supra* notes 35-40 and accompanying text (describing avenues of enforcement in CERCLA statute). In response to uncertainties created by judicial decisions interpreting the secured creditor exemption, the EPA promulgated a proposed interpretive rule. *See* EPA Draft Proposal, 21 Env't Rep. (BNA) 1162 (Oct. 12, 1990) (establishing purpose of proposed interpretive rule). The proposed rule sets out the agencies interpretation of "indicia of ownership" and "primarily to protect the security interest." *Id.* at 1163. The proposed EPA rule allows secured creditors to police loans, undertake loan workouts and foreclose on and hold secured property for up to six months without jeopardizing the lender's secured creditor exemption. *Id.* at 1164-65. The EPA interpretive rule may provide guidance for lenders and for courts, an interpretive rule does not have the force of law. *See* SCHWARTZ, ADMINISTRATIVE LAW 158-60 (2d ed. 1984) (comparing relative effects of substantive and interpretive rules in administrative law).

285. *See infra* notes 286-92 and accompanying text (describing issues that any change to CERCLA should address).

286. *See supra* notes 174-76 and accompanying text (discussing policy as interpreted by Eleventh Circuit in *Fleet Factors*).

287. *See supra* notes 249-51 and accompanying text (discussing CERCLA's liability scheme).

288. *See* United States v. Fleet Factors Corp., 901 F.2d 1550, 1558 (11th Cir. 1990) (establishing Eleventh Circuit's interpretation of proper policy goals of CERCLA with respect to secured creditors), *cert. denied*, 111 S. Ct. 752 (1991). The Eleventh Circuit decided that the day-to-day operations from the holding in *Mirabile* did not conform to the language or the legislative policy of CERCLA. *Id.* at 1556-58.

289. *See supra* notes 268-70 and accompanying text (discussing possible windfall for creditors under Congressman LaFalce's bill).

Creditors who retain the title to property should be treated as any other owner.[290] Lenders can protect themselves from owner liability by meeting the requirements of the innocent landowner defense.[291]

Finally, the secured creditor exemption should consider the role of lenders in the daily functioning of industry.[292] Lenders have significant expertise in work-outs and salvaging of businesses.[293] A secured creditor exemption should encourage lender involvement with ailing businesses rather than create a hands-off situation where the lender forecloses on the security interest or writes off the loan before attempting any remediation of the business.[294] When lenders can estimate the risks of liability for hazardous waste cleanup, the market for secured loans can adjust through such mechanisms as interest rates and altered loan procedures.[295] Consequently, any decision on holding secured creditors liable under CERCLA is an economic decision based on the distribution of costs.[296]

In the wake of the decision in *Fleet Factors*, lenders would be better off without the secured creditor exemption.[297] Without the secured creditor exemption, lender involvement must rise to that of an owner or operator.[298] Because of the inconsistency of past judicial decisions interpreting the secured creditor exemption, any legislative attempt to refine the exemption requires plain wording and extensive legislative history for support.[299]

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290. *See* United States v. Maryland Bank and Trust Co., 632 F. Supp. 573, 580 (D. Md. 1986) (predicting windfalls for foreclosing secured lenders if secured lenders are exempt from owner liability under CERCLA).

291. *See supra* notes 108-15 and accompanying text (describing innocent landowner defense).

292. *See supra* notes 179-82 and accompanying text (describing Eleventh Circuit's vision of lender involvement).

293. *See* R. NASSBERG, THE LENDER'S HANDBOOK, 61-68 (1986) (describing lender involvement in loan workouts and salvaging failing businesses). Nassberg describes typical lender reactions to a failing business including the close monitoring of the debtor's expenditures, appointment of a lender representative to the debtor's board of directors and the selective enforcement or forbearance of rights under the loan agreement. *Id.* at 66-68.

294. *See* United States v. Fleet Factors Corp., 901 F.2d 1550, 1558 (11th Cir. 1990) (discussing increased lender involvement as appropriate policy goal of CERCLA), *cert. denied*, 111 S. Ct. 752 (1991).

295. *See* P. SAMUELSON, ECONOMICS, 599-600 (9th ed. 1973) (describing relationship between risk and interest rates); *see also* Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit at 6, United States v. Fleet Factors Corp., 111 S. Ct. 752 (1991) (describing disruption of normal lending practices created by Eleventh Circuit's holding in *Fleet Factors*), *denying cert. to*, 901 F.2d 1550 (11th Cir. 1990).

296. *See supra* note 295 and accompanying text (describing forces that will allocate costs).

297. *See supra* note 215 and accompanying text (describing secured creditor exemption after *Fleet Factors* as a rule of inclusion vice exclusion).

298. *Id.*

299. *See supra* notes 122-97 and accompanying text (describing varying judicial interpretations of legislative history of CERCLA and meaning of secured creditor exemption).