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Don't Get Involved--How Unsuspecting Secured Creditors May Incur Liability under CERCLA by Participating in the Management of a Debtor's Facility

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Don't Get Involved!—How Unsuspecting Secured Creditors May Incur Liability under CERCLA by "Participating in the Management" of a Debtor's "Facility"

INTRODUCTION

The alarm has sounded in the wake of the Eleventh Circuit's decision in *United States v. Fleet Factors Corp.*[1] Traditionally, lending institutions made loans based primarily on the credit-worthiness of the borrower.[2] They were concerned with the borrower's type of business, or the type of enterprise the borrower proposed to start with the borrowed funds. The reason for the lender's concern, however, was based primarily on economic considerations.[3] In short, the lender wanted to know if the economic situation and the borrower's abilities in a particular area suggested that the enterprise presented a sound investment opportunity for use of the lender's financial resources. The *Fleet* decision will change the way lenders must look at every loan they make for fear of incurring substantial environmental liabilities for hazardous waste clean-up costs.[4] This Comment will examine the impact of *Fleet* on lender liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), commonly known as "Superfund."[5] The focus of this Comment is not limited to situations traditionally thought of as "Environmental Law." Rather, this Comment seeks to illustrate that a new

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1. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3481 (U.S. Jan. 14, 1990) (No. 90-504).

2. *See* Corash and Behrendt, *Lender Liability Under CERCLA: Search for a Safe Harbor*, 43 S.W. L. J. 863, 864 (1990) ("In simple terms, the customary risk taken by lenders in making a loan is a credit risk: the borrower may not have the economic resources to repay the loan.").

3. *See* Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets*, 103 BANKING L.J. 509, 510 (1986) ("Most likely, these creditors have never considered environmental liability when making loans, assisting a financially troubled debtor, or foreclosing on a defaulted debt.").

4. This exposure is evidenced by several recent cases, in addition to *Fleet*, holding lenders liable for environmental cleanup costs where the lender at least initially, simply had entered into a creditor-debtor relationship as a secured party. *See, e.g.*, Guidice v. BFG Electroplating and Mfg. Co., Inc., 732 F. Supp. 556 (W.D. Pa. 1989); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20 (E.D. Pa. 1985).

5. 42 U.S.C. §§ 9601-57 (1988).

and important variable, environmental liability, exists and must be considered each time a loan is made.

In this Comment, the meaning and importance of one key phrase found in the Superfund statute, "participating in the management of a . . . facility," will be examined.[6] The meaning of this short statutory phrase, and its interpretation by other federal courts, will determine the degree to which lenders are exposed to Superfund liability after *Fleet.* As a result of that decision, a secured creditor will have participated in the management of a facility and will thus be liable for environmental cleanup costs under Superfund when "its involvement with the management of the facility is sufficiently broad to support an inference that it could affect hazardous waste disposal decisions if it so chose."[7]

The first section of this Comment will outline briefly the Superfund statute and its provisions that are pertinent to the lender liability issue. Section II presents the facts of *Fleet,* and discusses the reasoning of the district court below.[8] Section III describes the reasoning of the court of appeals and the policy considerations it relied on in reaching its result. In Section IV, the Comment examines the implications of *Fleet* on the lender liability issue, and discusses possible alternative "participating in the management" standards. These alternatives continue to be important to understanding the entire area of secured creditor liability under Superfund since several district courts outside the Eleventh Circuit have declined to extend Superfund liability as far as the *Fleet* court's holding would suggest. Therefore, it is quite possible that a more limited view of potential secured party liability may still gain acceptance in one or more circuits as additional litigation in this area progresses.[9] Section V highlights in detail why *Fleet*

6. *Id.* § 9601(20)(A).

7. *Fleet,* 901 F.2d at 1558 (emphasis added). The *Fleet* court was the first appellate court to define specifically this statutory phrase. Note the broad, sweeping language employed by the court—"inference" and "could affect" hazardous waste disposal. See Sections IV and V of this Comment, *infra,* for a detailed discussion of the court's definition.

8. As discussed *infra,* the district court's analysis was based at least in part on *Mirabile. See supra* note 4 and accompanying text. Since only the Eleventh Circuit has passed on the precise question presented in *Fleet,* it certainly is possible that other circuits may decide to adopt a standard more akin to that adopted in Mirabile, and by the district court. See Section II.B. of this Comment, *infra,* for a discussion of the district court's reasoning.

9. For example, a recent Ninth Circuit decision indicated that if confronted with the precise issue presented in *Fleet,* the Ninth Circuit would not be willing to extend liability as far as the Eleventh Circuit did in *Fleet.* More significantly, the Ninth Circuit specifically stated that "there must be some *actual* management of the facility" before Superfund liability will be imposed. *In re* Bergsoe Metal Corp., 910 F.2d 668,

undermines a central goal of the Superfund statute: promoting safe hazardous waste practices.[10] Finally, Section VI will review briefly the reactions of the United States government, including the Environmental Protection Agency (EPA) and some members of Congress, to the *Fleet* decision.

I. THE CERCLA STATUTORY SCHEME

Superfund was enacted in 1980 in response to the perceived need to close the many statutory loopholes found in several other federal environmental laws.[11] The statute authorizes the federal government to respond to and clean up hazardous waste sites and spills.[12] In general, the federal government conducts the clean up activities following guidelines set forth in the National Contingency Plan (NCP),[13] and the government may then recover

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672 (9th Cir. 1990). This indication was pure dictum, however, since the Ninth Circuit did not specifically decide the proper meaning of "participating in the management of . . . a facility." *Id.* Despite the fact that the Ninth Circuit's language was pure dictum, the banking industry welcomed the decision. *See, e.g.*, Kleege, *Banks Welcome Court Ruling for Environmental Cleanups*, AM. BANKER, Aug. 22, 1990, at 30 ("'If I were a lender, I'd feel a whole lot better after this [the *Bergsoe*] decision,' said liability lawyer Edward F. Mannino . . . .").

10. *See infra* note 151.

11. *See* State of New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985) ("CERCLA was designed 'to bring order to the array of partly redundant, partly inadequate federal hazardous substances cleanup and compensation laws.'") (quoting F. ANDERSON, D. MANDELKER, & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984)). *See also* Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261, 1263 (1987) ("Congress enacted CERCLA . . . to close the gaps in federal hazardous waste laws.").

12. 42 U.S.C. § 9604(a)(1) (1988) provides in pertinent part:

> Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment . . . .

13. This plan, prepared pursuant to 42 U.S.C. § 9605 (1988), "governs cleanup efforts by 'establish[ing] procedures and standards for responding to releases of hazardous substances.'" State of N. Y. v. Shore Realty Corp., 759 F.2d 1032, 1041

the costs incurred through legal action against responsible parties.[14] Superfund also allows recovery by private individuals who incur response costs[15] and who otherwise comply with the requirements of the NCP.[16]

Liability is imposed under Superfund pursuant to section 9607(a),[17] which sets forth four classes of persons[18] who may incur liability.[19] As is

(2d Cir. 1985) (quoting 42 U.S.C. § 9605 (1988)).

14. *Shore Realty*, 759 F.2d at 1041. The Superfund originally was established through taxes collected over a five-year period on certain petroleum products, other chemicals, and some general revenue funds. *Id.* at 1041 n.10.

15. *See* 42 U.S.C. § 9607(a)(4)(A) (1988) (imposing liability for "response costs" incurred by the United States or a state on persons liable under 42 U.S.C. § 9607(a)); *see also Shore Realty*, 759 F.2d at 1043 ("[S]ection 9607 makes these persons [persons falling into one of the four categories in 42 U.S.C. § 9607(a)(1)-(4)] liable, if 'there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance' from the facility, for, among other things, 'all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan.'") (quoting 42 U.S.C. § 9607(a)(4)(A) (1988)).

16. *Shore Realty*, 759 F.2d at 1042.

17. See infra note 19 for the full text of the statute.

18. "The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (1988).

19. Section 9607(a) provides:

Liability

(a) Covered persons; scope . . .

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

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

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

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

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

(A) all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with evident from examining section 9607(a), liability is divided among two types of "owners" and "operators"[20] under subsections one and two, and among those who transport and dispose of hazardous wastes under subsections three and four. Any of these four classes of persons may then be held liable for any of the "response costs"[21] listed in subsection four, subdivisions A through C.[22] Section 9607(b) also sets forth the defenses available to charges of Superfund liability. An examination of the language of section 9607(b) reveals that the defenses available are very narrow, and leave those found to be "owners or operators" little room to escape liability. Section 9607(b) provides in pertinent part that potentially liable parties may escape liability if they can establish that any damages incurred under section 9607(a) were caused by "an act of God, . . . an act of war, . . . [or] an act or omission of a third party [under certain limited circumstances]." These limited defenses are the only avenues available to an owner or operator as evidenced by the language of section 9607(a), which provides in pertinent part, "and subject *only* to the defenses set forth in subsection (b) of this section."[23] Absent the protection of one of these defenses, "Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise."[24]

This Comment will focus on potential liability under sections 9607(a)(1) and (2) since those provisions were the focus of the analysis in the *Fleet* case

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> the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; or
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> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release . . . .

42 U.S.C. § 9607(a) (1988).

20. See *infra* notes 26-27 for pertinent provisions of 42 U.S.C. § 9601(20)(A) (1988) (CERCLA's owner or operator definition).

21. *See supra* note 15.

22. *See Shore Realty*, 759 F.2d at 1043 ("[S]ection 9607 makes these persons [those listed in subsections (1)-(4)] liable . . . for, among other things, 'all costs of removal or remedial action incurred . . . .'").

23. 42 U.S.C. § 9607(a) (1988) (emphasis added).

24. *Shore Realty*, 759 F.2d at 1042. The *Shore Realty* court further explained this position when it stated:

> Section 9601(32) provides that "liability" under CERCLA "shall be construed to be the standard of liability" under section 311 of the Clean Water Act, 33 U.S.C. § 1321, which courts have held to be strict liability . . . and which Congress understood to impose such liability . . . ."

Id. at 1042. *See also Fleet*, 901 F.2d at 1554 (CERCLA imposes strict liability on owners or operators).

and because subsections one and two are most relevant to the Superfund lender liability issue presented in *Fleet*.[25] Another important provision, for purposes of this Comment's analysis, is section 9601(20)(A),[26] defining the term "owner or operator" and setting forth Superfund's "secured creditor exemption."[27]

II. FACTS OF THE FLEET FACTORS CASE

A. General Background

The United States filed suit against Fleet Factors Corp.[28] (Fleet) seeking to impose liability on Fleet under Superfund. The United States sought to recover the "response costs"[29] incurred by the Environmental Protection

25. *See infra* Sections II and III of this Comment.

26. Section 9601(20)(A) states in pertinent part: "The term 'owner or operator' means . . . (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility . . . ." 42 U.S.C. § 9601(20)(A) (1988). The terms "owner and "operator" are used inconsistently in parts of the CERCLA statutory scheme. The Court of Appeals in Fleet clarified any potential inconsistency by stating:

> Although the "owner and operator" language of § 9607(a)(1) is in the conjunctive, we construe this language in the disjunctive in accordance with the legislative history of CERCLA and the persuasive interpretations of other federal courts. . . . Additionally, we note that § 9607(a)(2) is phrased in the disjunctive. We can perceive no rational explanation, other than careless statutory drafting, for imposing liability upon "owners *or* operators" under one section but only holding "owners *and* operators" liable under another section . . . . Our construction of both statutory provisions in the disjunctive is further supported by the fact that the definitional section of the statute only refers to the phrase "owner or operator."

Fleet, 901 F.2d at 1554 n.3 (citations omitted). *See also* Guidice v. BFG Electroplating and Mfg. Co., Inc., 732 F. Supp. 556, 561 (W.D. Pa. 1989); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577-78 (D. Md. 1986).

27. Section 9601(20)(A) also sets forth the "secured creditor exemption, which provides: "Such term [the definition of owner or operator] *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." 42 U.S.C. § 9601(20)(A) (1988) (emphasis added). The term "secured lender exemption" or the "security interest exemption" is used to describe this statutory provision. *See Fleet*, 724 F. Supp. at 962; *Guidice*, 732 F. Supp. at 562. For the purposes of this Comment, this provision will be referred to as the "secured creditor exemption," the term used by the *Fleet* court.

28. 724 F. Supp. 955 (S.D. Ga. 1988).

29. *See supra* note 15.

Agency (EPA) in cleaning up the hazardous waste[30] site. The United States claimed that Fleet was liable as an "owner or operator"[31] of a "facility"[32] by participating in the management of the facility despite its status as a secured creditor to the facility's legal owner.[33]

Fleet's possible exposure to liability arose in 1976 when Fleet entered into a "factoring"[34] agreement with Swainsboro Paint Works, Inc. (SPW).[35] The factoring agreement involved several financial transactions, including the

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30. 42 U.S.C. § 9601(14) (1988) defines the term "hazardous substance" as

> (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 112 of the Clean Air Act, . . . and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

There was no dispute in this litigation over whether the chemicals in question here fell within the definition of a hazardous substance.

31. *See supra* notes 26-27.

32. 42 U.S.C. § 9601(9) (1988) defines the term facility as

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

33. *Fleet*, 724 F. Supp. at 960. See *supra* notes 26-27 for the text of the secured creditor exemption.

34. Factoring is defined as the "[s]ale of accounts receivable of a firm to a factor at a discounted price. The purchase of accounts receivable from a business by a factor who thereby assumes the risk of loss in return for some agreed discount." BLACK'S LAW DICTIONARY 532 (5th ed. 1979).

35. *Fleet*, 724 F. Supp. at 957. SPW was owned wholly by Clifford Horowitz and Murray Newton who were also named as defendant's in this action. SPW had been, and was at the time the factoring agreement was executed, operating a cloth printing facility. *Id.*

main part of the agreement where Fleet advanced funds to SPW in exchange for an assignment of SPW's accounts receivable.[36] "Fleet also obtained a security interest in all of SPW's equipment, inventory and fixtures" as collateral for the cash advances.[37] In addition, SPW granted Fleet a security interest in the SPW plant.[38]

The factoring agreement continued until August 1979, when SPW filed for bankruptcy under Chapter 11.[39] Fleet's relationship with SPW continued, however, as Fleet advanced further funds to SPW under a court-approved factoring agreement after the Chapter 11 filing.[40] In late 1980 or early 1981, Fleet notified SPW that it would no longer advance any funds under the factoring agreement because SPW's account balance exceeded Fleet's estimate of the worth of SPW's accounts receivable.[41] As a result, SPW ceased operations in February 1981.[42] After the Chapter 11 proceeding was converted to Chapter 7, SPW was adjudicated a bankrupt under Chapter 7[43] of the bankruptcy code in December 1981.[44]

During the Chapter 11 reorganization, Fleet continued to conduct dealings with SPW. Fleet continued collecting the assigned accounts receivable and conducted credit checks of SPW customers before SPW shipped any remaining goods.[45] After SPW entered Chapter 7 proceedings, Fleet obtained court approval and in May 1982, foreclosed its security interest in some of SPW's inventory and equipment and contracted with Baldwin Industrial Liquidator's, Inc. (Baldwin) to conduct an auction to dispose of the inventory and equipment.[46] On June 22, 1982, Baldwin sold some of this equipment at a public auction "as is," leaving the removal of the purchased items up to the purchasers.[47]

36. *Id.*

37. *Id.*

38. *Id.*

39. 11 U.S.C. §§ 1101-1174 (1988).

40. *Fleet*, 724 F. Supp. at 957.

41. *Id.* at 958.

42. *Id.* at 957-58.

43. 11 U.S.C. §§ 701-766 (1988).

44. A trustee was appointed to take title to SPW's property and to supervise the liquidation of SPW's assets. *Fleet*, 724 F. Supp. at 958.

45. *Id.* SPW continued to operate after entering Chapter 11 as it wound up its affairs and disposed of the twenty to twenty-five million yards of cloth left at the facility. As discussed *infra* in Section III, *infra*, the government alleged even greater involvement on Fleet's part during this time period.

46. Fleet did not foreclose on its security interest in SPW's real property. *Id.* at 957.

47. *Id.* at 958.

Approximately two months after the auction, on August 31, 1982, Fleet contracted with Nix Riggers (Nix).[48] Nix, an industrial liquidator, was hired to remove the residual equipment and inventory and agreed to "leave the premises in 'broom clean' condition."[49] Nix finished its work in December of 1983.[50] Subsequently, on July 7, 1987, a tax foreclosure sale was held and the property was conveyed to Emanuel County, Georgia.[51]

Fleet's legal problems began when the United States filed suit against it on July 9, 1987.[52] The United States did not dispute any of the foregoing facts.[53] It did dispute, however, the events surrounding Baldwin's auction and claimed that Baldwin moved over four hundred rotting and leaking drums containing chemicals and dyes away from the auction floor before the sale.[54] The United States further contended that when Nix was cleaning out the remaining equipment, it disturbed asbestos-containing pipe insulation attached to the machines and released hazardous asbestos fibers into the air.[55] On January 20, 1984, the EPA inspected the SPW facility and found seven hundred fifty-five gallon drums containing toxic chemicals.[56] In February 1984 the EPA initiated a response to clean up these chemicals after finding that an immediate threat to the public health and environment was posed.[57] The EPA took further action after determining that the asbestos problem posed a serious environmental threat by conducting additional cleanup activities in June 1984.[58] The total cost of these cleanup operations was alleged to be nearly $400,000.[59]

The United States argued that Fleet, while not an "owner" in terms of holding legal title to the SPW facility, nevertheless conducted activities at the facility which rose to the level of "participating in the management of" the

48. *Id.*

49. *Id.* Nix's contract called for them to complete the job in up to 180 days with a provision in the contract for extending the time period by subsequent agreement.

50. *Id.*

51. *Id.* at 957. The sale resulted from SPW's failure to pay its state and local property taxes.

52. *Id.* at 960.

53. *Id.* at 958.

54. *Id.*

55. *Id.*

56. *Id.* at 959.

57. *Id.* The EPA has promulgated regulations governing such response activities. These regulations are codified at EPA Hazardous Substances Response Guidelines, 40 C.F.R. §§ 300.61-.71 (1989).

58. Fleet, 724 F. Supp. at 958

59. *Id.*

facility sufficient to impose Superfund liability.[60] Thus, the United States contended, Fleet was not entitled to rely on Superfund's secured creditor exemption as a basis for exculpating itself from Superfund liability.[61]

Fleet contended that it simply was involved in this situation by virtue of its security interests in SPW's equipment, inventory and facility and thus fell within Superfund's statutory secured creditor exemption.[62] Fleet also disputed the United States' allegations that Baldwin moved any drums, and further challenged the United States about the asbestos release, claiming that the United States had no evidence that the insulation around the pipes contained asbestos.[63] Fleet further contended that even if the EPA did incur costs in disposing of hazardous wastes, the disposal of such wastes took place before Fleet foreclosed on SPW's equipment and inventory.[64] Therefore, Fleet argued, it could not be liable as an owner or operator of a facility *at the time of disposal* of any hazardous wastes,[65] nor could it be liable as an owner or operator of the facility immediately before the tax foreclosure conveyed title to the county.[66]

B. The District Court's Opinion[67]

The district court, after reviewing the Superfund statute and relevant case law, first found that three elements must be established by the plaintiff to prevail under Superfund: the plaintiff must show that "(1) [d]efendant falls within one or more of the classes of liable persons described in 42 U.S.C. 9607(a)(1)-(4) . . . ; (2) [a] 'release' or 'threatened release' of a 'hazardous substance' has occurred or is occurring; and (3) [t]he release or threatened release has caused the United States to incur 'response costs.'"[68] The court

60. *Id.* at 960.

61. *Id.*

62. United States v. Fleet Factors Corp., 901 F.2d 1550, 1560 (11th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3481 (U.S. Jan. 14, 1991) (No. 90-504). See *supra* notes 25-26 for the full text of the secured creditor exemption.

63. *Fleet*, 901 F.2d at 1560 n.14.

64. *Id.*

65. See *supra* note 19 for the text of § 9607(a)(2) which imposes liability on the owner or operator at the time of the hazardous waste disposal.

66. See *infra* note 79 and accompanying text for a discussion of the liability of the owner or operator of the facility immediately before the lawsuit is commenced where the facility has, at the time of suit, been acquired by a governmental body.

67. This opinion involves the district court's disposition of the United States' motion for partial summary judgment on the issue of liability against Fleet, Horowitz and Newton. *Fleet*, 724 F. Supp. at 957.

68. *Id.* at 959 (citing *Shore Realty*, 759 F.2d at 1043-48).

then noted that the real dispute in this case was not whether a release or threatened release of a hazardous substance occurred, or whether the United States incurred response costs.[69] Thus, elements (2) and (3) were not truly at issue.[70] The issue was whether Fleet was an "owner and operator" and thus liable for the costs of cleaning up such a release under Superfund.[71]

The district court divided its analysis into three parts based upon three analytically distinct time frames.[72] The time frames involved were first, the period "immediately before" the tax foreclosure when the property was conveyed to Emanuel County, Georgia (Period I).[73] The second time period began in 1976 when Fleet and SPW entered into the factoring agreement and lasted until just before Fleet foreclosed its security interest in some of SPW's inventory and equipment and hired Baldwin to hold the auction (Period II).[74] Finally, the district court examined the time period beginning when Baldwin entered the premises to prepare for the June 1982 auction until Nix left the premises in December 1983 (Period III).[75] The United States sought to impose liability under Period I based upon Fleet's alleged status as an "owner and operator of a . . . facility" under section 9607(a)(1).[76] The United States asserted basis for liability during Periods II and III was found in section 9607(a)(2), imposing liability on "any person who *at the time of disposal* . . . owned or operated any facility."[77]

The district court had little trouble exculpating Fleet from liability for their involvement during Period I. The court reached this conclusion because Fleet did not own or operate the facility *immediately before* the tax foreclosure.[78] The district court specifically found that the "immediately before-

69. *Fleet*, 724 F. Supp. at 960.

70. *Id.*

71. *Id.*

72. *Id.* at 960-62.

73. *Id.* at 960. This period roughly runs from December 1983 until July 9, 1987, when the United States filed suit against Fleet. The time periods used in this Comment are identified as "Period I," etc., for ease in analysis. Neither the district court nor the court of appeals expressly divided their analyses in this manner. Both courts, however, examined each of these three discrete time periods separately in light of §§ 9607(a)(1)-(2). See *infra* notes 78-81 and accompanying text for a discussion of the significance of the activity during Period I.

74. *Id.* This period runs from 1976 until roughly June 1982, when Baldwin conducted the auction.

75. *Id.*

76. *Id.* *See supra* note 19.

77. *Id.* (emphasis added). *See supra* note 19.

78. Since title was conveyed to a county government, the following provision in 42 U.S.C. 9601(20)(A)(iii) (1988) becomes pertinent to the facts of this case. This provision states in pertinent part, "In the case of any facility, title or control of which

hand" language refers to an owner or operator under section 9607(a)(1) just before the lawsuit is commenced.[79] The district court noted that Fleet's last involvement with the facility was in December 1983 when Nix completed its cleanup, which was over three and one-half years prior to the inception of the lawsuit.[80] Therefore, the court reasoned, the phrase "immediately beforehand" literally refers to the time period immediately prior to the commencement of the action. Since Fleet had *no* participation in any management during this period, Fleet was not, as a matter of law, liable under section 9607(a)(1).[81]

The district court then examined Fleet's activities during Period II and the liability provision of section 9607(a)(2). The court, with little analysis, concluded as a matter of law that Fleet had not participated in the management of the facility to a degree sufficient to incur Superfund liability during Period II.[82] The district court based this conclusion on its finding that a secured creditor is protected by the secured creditor exemption when the secured creditor's activities consist merely of

> provid[ing] financial assistance and general, and even isolated instances of specific, management advice to its debtors . . . if the secured creditor does not participate *in the day-to-day management* of the business or facility either before or after the business ceases operation.[83]

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was conveyed due to . . . foreclosure, tax delinquency . . . to a unit of State of local government, . . . [the owner or operator is] any person who owned, operated or otherwise controlled the activities at such facility immediately beforehand." *Id.*

79. *Fleet,* 724 F. Supp. at 960. The Eleventh Circuit agreed with the district court that owner or operator under § 9607(a)(1) is to be measured at the time the action is commenced, or where the title is conveyed to a state or local government immediately before the action is commenced. *Fleet,* 901 F.2d at 1555.

80. *Fleet,* 724 F. Supp. at 960.

81. *Id.*

82. *Id.* The Eleventh Circuit disagreed with the district court and held that there were genuine issues of material fact which preclude summary judgment in favor of Fleet based on Fleet's level of activity during this "second" time period. *Fleet,* 901 F.2d at 1555. A detailed discussion of the court of appeals reasoning is presented *infra* in Section III of this Comment.

83. *Fleet,* 724 F. Supp. at 960 (emphasis added). The court cited, by way of comparison, United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,995 (E.D. Pa. Sept. 4, 1985) (a secured party does not participate in the management of a facility and is therefore entitled to rely on the secured creditor exemption so long as it "does not become overly entangled in the affairs of the actual owner or operator of a facility").

The district court, however, denied Fleet's motion for summary judgment based upon its finding that genuine issues of material fact remained with regard to Fleet's activities during Period III.[84] The allegations of activity on the part of Fleet contained in the district court opinion indicated that the level of Fleet's involvement with the facility during this period, if the allegations were true, certainly increased as evidenced by its foreclosure on some of SPW's equipment and subsequent sale by Baldwin, Fleet's agent.[85] Further, Fleet hired Nix to clean up the premises during this period.[86] The district court, finding that Fleet and the United States disputed the events surrounding the existence of the handling of the barrels of chemicals and the alleged asbestos hazard, denied both motions for summary judgment.[87]

The issue in the case thus became whether Fleet, as a secured creditor, in fact participated in the management of SPW's facility during Period III. If so, Fleet lacked the protection of the secured creditor exemption, and therefore would have been exposed to liability under Superfund. The district court, finding that no appellate court had addressed the disputed issues involving Superfund liability,[88] certified an order for interlocutory appeal under 28 U.S.C. section 1292.[89] The order certified the following questions which are relevant to this Comment: (1) Whether the district court's construction of the definition of "owner and operator" was correct, and what the proper construction of the "secured creditor exemption," including the

84. *Fleet*, 724 F. Supp. at 961.

85. *Id.* at 961-62.

86. *Id.* at 958.

87. *Id.* The court then ruled on the government's summary judgment motions against Horowitz and Newton, granting the government's motions with respect to their liability for the cleanup of the chemicals in the fifty-five gallon drums, but denying the government's motion with respect to the asbestos cleanup costs. *Id.* at 962.

88. *Id.* at 962.

89. Section 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (1988) (emphasis added).

proper "participation in the management" standard is under Superfund?; and (2) What is the proper construction of the Superfund liability provisions as they apply to various classes of persons?[90]

III. THE ELEVENTH CIRCUIT'S CONSTRUCTION OF THE SECURED CREDITOR EXEMPTION

The court of appeals agreed to hear the interlocutory appeal upon Fleet's motion.[91] The court affirmed the district judge's denial of Fleet's motion for summary judgment based on its finding that genuine issues of material fact existed as to Fleet's activities from the time SPW ceased operations in February 1981 until Nix left the facility in December 1983.[92] Therefore, the court found Fleet could be liable under section 9607(a)(2)[93] if it failed to establish the protection of the secured creditor exemption.[94] The central issue came down to whether Fleet's activities had, from February 1981 until December 1983, "rise[n] to the level of participation in management sufficient to impose liability under [Superfund] . . . despite the statutory exemption from liability for holders of a security interest."[95]

The court of appeals held that a secured creditor will be unable to establish statutory protection under the secured creditor exemption, and thus will have participated in the management of the facility, when "its involvement with the management of the facility is sufficiently broad to support the *inference* that it *could* affect hazardous waste disposal decisions *if it so chose.*"[96]

The court of appeals divided its analysis between potential liability under section 9607(a)(1) and liability under section 9607(a)(2).[97] Like the district

90. *Fleet*, 724 F. Supp. at 962. The district court also stayed further proceedings in the case until either the court of appeals disposed of the interlocutory appeal applied for by the parties or denied to hear the interlocutory appeal. *Id.* at 963.

91. *Fleet*, 901 F.2d at 1552.

92. *Id.* Note that the appellate court has changed the period within which Fleet may be liable. As discussed *supra* in Section II, the district court found that Fleet could be liable if certain disputed material facts were proved during Period III (the period from June 1982 to December 1983). The court of appeals essentially has redefined Period III to begin in February 1981 running until December 1983. All further references to Period III in this Comment will adopt the modified court of appeals time frame.

93. *See supra* note 19.

94. *Fleet*, 901 F.2d at 1560.

95. *Id.* at 1552.

96. *Id.* at 1558 (emphasis added).

97. See *supra* note 19 and accompanying text for a discussion of the Superfund liability provisions.

court, the Eleventh Circuit examined Fleet's activities according to Periods I, II and III.[98] The court agreed with the district judge's resolution of the summary judgment motions, but disagreed on the standard that should be applied in resolving Fleet's potential liability under the statute.[99]

A. Liability under Section 9607(a)(1)

The court made the initial determination that section 9607(a)(1) is directed toward owners and operators of facilities where hazardous wastes are found *at the time the lawsuit is commenced by filing the complaint.*[100] Therefore, the court of appeals affirmed the district court's grant of summary judgment to Fleet on the issue of its liability during Period I.[101] The court noted that the only true dispute on liability during Period I was the meaning of the term "immediately beforehand" in section 9601(20)(A)(iii).[102] The United States contended that the owner immediately beforehand was whoever had last controlled the facility, regardless of how long ago that control may have been exercised.[103] The court pointed out that such an interpretation would require the court to ignore the effective abandonment of the site by the trustee in bankruptcy.[104] In addition, the court found that no one disputed Fleet's lack of connection with the facility during Period I.[105] Therefore, it was a "torture [of] the plain statutory meaning of 'immediately beforehand'" to impose liability on Fleet for its involvement during Period I.[106] As a

98. *See supra* note 92 (highlighting the appellate court's modification of the Period III time frame).

99. *Fleet,* 901 F.2d at 1558.

100. *Id.* at 1554. This finding is in agreement with the district court's finding to the same effect. *Fleet,* 724 F. Supp. at 960.

101. *Fleet,* 901 F.2d at 1554.

102. See *supra* note 78 and accompanying text for the text of § 9601(20)(A)(iii) and reasoning behind the district court's analysis.

103. *Fleet,* 901 F.2d at 1555.

104. *Id.* The court noted that "[a]lthough a trustee can obviously abdicate its control over a bankrupt estate, it cannot in such a manner unilaterally delegate its responsibility to a previous controlling entity." *Id.*

105. *Id.*

106. *Id.* The court concluded their analysis with a footnote to support its interpretation of the immediately beforehand language. The court stated:

> This interpretation of § 9607(a)(1) is particularly appropriate in the context of the entire statutory scheme. While § 9607(a)(1) targets present owners and operators of toxic waste facilities, § 9607(a)(2) focuses on the entities that owned or operated the facility at the time the wastes were disposed. A narrow reading of this section would not, therefore, create an unintended loophole for individuals or entities to escape liability for

result, the court affirmed the district court's grant of Fleet's summary judgment motion under section 9607(a)(1).[107]

B. Liability Under Section 9607(a)(2)

Since the appellate court concluded that Fleet could not be liable for their activities during Period I, Fleet's exposure to liability, if any, occurred by virtue of its activities during Periods II or III. The district court had found, as a matter of law, that Fleet's participation in SPW's management was purely financial during Period II, and as such, could not give rise to liability under Superfund.[108] It is at this point in the analysis that the district court and the court of appeals disagreed on the interpretation of the secured creditor exemption.[109]

The court first noted that Fleet, the secured creditor, had the burden to establish that it was entitled to rely upon the secured creditor exemption.[110] More significantly, the court found that Fleet's indicia of ownership were "held primarily to protect its security interest in the facility."[111] This finding by the court of appeals is very significant, since one of the two most important cases that had construed the secured creditor exemption before the *Fleet* decision had found the purpose for which the secured party participates in a facility's management an important factor in determining whether the lender had acted "primarily to protect its security interest," thereby falling within the secured creditor exemption.[112] Based upon these findings, and after noting that no appellate court previously had construed the secured creditor exemption under Superfund, the court of appeals briefly summarized

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improperly disposing hazardous waste.

Id. n.5.

107. *Fleet*, 901 F.2d at 1560.

108. See Section II, *supra*, for a discussion of the district court's reasoning.

109. *See supra* notes 26-27.

110. *Fleet*, 901 F.2d at 1555-56 (citing United States v. First City Nat'l Bank, 386 U.S. 361, 366 (1967); *Maryland Bank & Trust*, 632 F. Supp. at 578) (stating that "where one claims the benefits of an exception to the prohibition of a statute", that party carries the burden of proof to establish that the exception applies).

111. *Fleet*, 901 F.2d at 1556.

112. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,996. The *Mirabile* court noted that it was irrelevant if the bank involved in that case actually owned the facility by virtue of its purchase at a foreclosure sale. The court nevertheless found the bank fell within the secured creditor exemption since "its actions with respect to the foreclosure were undertaken plainly in an effort to protect its security interest in the property." *Id.* The *Mirabile* case is discussed in greater detail in Section IV, *infra*.

the positions of each party on the issue and proceeded to analyze the issues presented in light of these positions.[113]

The United States contended that the proper construction of the exemption would hold every secured creditor liable for response costs under Superfund if the secured creditor "participates in *any* manner in the management of a facility."[114] The court declined to adopt such a broad construction, noting that lenders often have some involvement in their debtor's businesses to insure that their interests are protected, and that such a broad construction would impose Superfund liability on lenders for engaging in their "normal course" of business.[115]

The court also declined to adopt Fleet's proposed construction of the exemption. Fleet suggested that the standard for participating in the management of a facility, and thus removing the secured creditor from the secured creditor exemption, should be that which was adopted by the court in *United States v. Mirabile*.[116] The *Mirabile* court's standard requires the secured lender to, "at a minimum, participate in the *day-to-day* operational aspects of the site" before liability will ensue.[117] The court of appeals, in discussing the *Mirabile* standard, described it as one which distinguishes between permissible participation in the *financial management* of the facility versus impermissible participation in the day-to-day *operations* of the facility.[118] After noting that the district court essentially had adopted the *Mirabile* standard, the court concluded that this construction of the secured creditor exemption was "too permissive towards secured creditors who are involved with toxic waste facilities."[119]

As a result, the court of appeals held that Fleet might have been liable not only for its activities during Period III,[120] as found by the district court,

113. *Fleet*, 901 F.2d at 1556.

114. *Id.* (emphasis added).

115. *Id.*

116. *See supra* note 83.

117. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,996 (emphasis added).

118. *Fleet*, 901 F.2d at 1556 (emphasis added). The court noted that at least four other district courts had followed the *Mirabile* court's requirement that the secured creditor participate in the day-to-day operational aspects of the facility before it will deny itself the protection of the secured creditor exemption. *See* United States v. New Castle County, 727 F. Supp. 854, 866 (D. Del. 1989); United States v. Nicolet, Inc., 712 F. Supp. 1193, 1204-05 (E.D. Pa. 1989); Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1390 (N.D. Ill. 1988); and Coastal Casing Serv. v. Aron, No. H-86-4463 (S.D. Tex. Apr. 8, 1988).

119. *Fleet*, 901 F.2d at 1557.

120. As discussed in Section II, this period includes the time during which Baldwin prepared for and conducted its auction, in June 1982, until Nix left the premises in December of 1983.

but also for its activities during a portion of Period II.[121] The court's first reason for narrowing the availability of the secured creditor exemption stemmed from its view of the policy considerations underlying Superfund. The court noted that Superfund has an "overwhelmingly remedial"[122] goal, and further expressed its view that ambiguous statutory terms are to be construed to favor liability in order to carry out this remedial purpose.[123]

The court then criticized the district court's test because, in its view, the district court's construction would render meaningless the secured creditor exemption.[124] The court looked to the overall liability scheme under section 9607(a) coupled with the language of the exemption found in section 9601(20)(A). It noted that "[i]ndividuals and entities involved in the operations of a facility are *already liable as operators* under the express language of section 9607(a)(2)."[125] Thus, the court reasoned that whenever a secured creditor participates in the day-to-day management of the facility, they are acting as operators and are therefore already liable under Superfund.[126] Based on this premise, the court reasoned that if the district court's construction of the exemption were correct, there is no reason for its existence.[127]

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121. *Fleet*, 901 F.2d at 1560. As discussed under Section II, Period II, as defined by the district court, encompassed the period from the time Fleet first acquired its security interest until Baldwin entered the facility to conduct the auction of the equipment foreclosed upon by Fleet. The time frame covered by Period III was expanded by the court of appeals. *See supra* note 92.

122. Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1316-17 (11th Cir. 1990); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

123. *Fleet*, 901 F.2d at 1557.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* Yet that fact makes the district court's standard, first adopted by the *Mirabile* court, all the more sensible. There is little disagreement that one whose participation has risen to the level of an operator can be liable no matter how their relationship with the facility began. It appears to be a more fair reading of the secured creditor exemption that it was not designed to protect *de facto* operators, but was instead designed to protect secured parties who either have "title" to the facility by virtue of holding a mortgage on the property (in the so-called "title theory" jurisdictions, where the mortgagee holds legal "title" to the mortgaged property until the underlying obligation is satisfied), or who obtain title to the facility upon foreclosure of their security interests and subsequent purchase at the foreclosure sale. Under this reading, the secured creditor exemption still has great importance under the Mirabile standard. It still will protect secured parties who do not participate in the day-to-day activities, but who are "owners" in some fashion by virtue of the mortgage they hold,

Based on this view, the court adopted its definition of participating in the management of a facility. It held that a secured creditor will have participated in the management of the facility, thus denying itself the protection of the secured creditor exemption, when it

> participat[es] in the financial management of a facility to a degree indicating a *capacity to influence* the corporation's treatment of hazardous wastes. It is *not necessary* for the secured creditor to actually involve itself in the day-to-day operations of the facility in order to be liable—although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous wastes. Rather, *a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.*[128]

In an apparent effort to ameliorate the harshness of the announced standard, the court outlined some general parameters within which a secured creditor could still operate and avoid liability. For example, it noted that a secured creditor could still safely monitor any aspect of the debtor's business.[129] Further, a secured creditor could still involve itself in "occa-

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or once held and have now foreclosed upon. *See* G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW 142-49 (2d ed. 1985) (discussing the title and lien theory of mortgages).

128. *Fleet*, 901 F.2d at 1557-58 (emphasis added). In a footnote, the court cited provisions from the legislative history of CERCLA that the court viewed as supporting its narrow construction of the secured creditor exemption. *Id.* at 1558 n.11. The court noted that the original version of CERCLA had no secured creditor exemption at all. *Id.* (citation omitted). The court also reprinted the remarks of Representative Harsha, who introduced the secured creditor exemption to the bill that became CERCLA. Representative Harsha stated:

> This change is necessary because the original definition inadvertently subjected those who hold title to a . . . facility, but do not participate in the management or operation *and are not otherwise affiliated* with the person leasing or operating the . . . facility, to the liability provisions of the bill.

2 *Senate Comm. on Environmental and Public Works*, 97th Cong., 2d Sess. 2 *A Legislative History of the CERCLA* 945 (Comm. Print 1983) (emphasis in original).

The Court relied on the "not otherwise affiliated" language to conclude that the secured creditor exemption is to be narrowly construed, and that a standard allowing participation up to day-to-day operational participation is inconsistent with the history behind the exemption. *Fleet*, 901 F.2d at 1558 n.11.

129. *Fleet*, 901 F.2d at 1558.

sional and discrete financial decisions relating to the protection of its security interest without incurring liability."[130]

Further, the Eleventh Circuit challenged those who might contend that its construction of the exemption would deter financial institutions from dealing with businesses with potential hazardous waste problems.[131] The court instead felt that its ruling would cause lenders to be more thorough in their pre-loan investigations of potential debtors, and if potential hazardous waste problems exist, the lender would simply figure such risks into the terms of its loan agreements, thus realizing exactly what they bargained for when making the loan.[132] In addition, it reasoned, lenders would insist that their borrowers be environmentally responsible as a condition to present and future financial support.[133] The court felt that such insistence would promote early action to resolve hazardous waste problems by forcing borrowers to clean up or prevent the existence of such sites in order to obtain adequate financing to operate their businesses.[134]

Applying its newly announced standard to the facts of the case, the court found that Fleet could be liable for its participation in Fleet's affairs during Period III.[135] In conducting its analysis, the court focused on several areas where Fleet required SPW to get its approval before SPW could take any action. The court listed the alleged liability exposing activities as follows:

> Fleet required SPW to seek its approval before shipping its goods to customers, established the price for excess inventory, dictated when and to whom the finished goods should be shipped, determined when employees should be laid off, supervised the activity of the office administrator at the site, received and processed SPW's employment and tax forms, controlled access to the facility, and contracted with Baldwin to dispose of the fixtures and equipment at SPW.[136]

These activities were described by the court as "pervasive, if not complete."[137] Finally, the court again noted that it is irrelevant to its

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130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 1558-59.

135. *Id.* at 1559.

136. *Id.*

137. *Id.* The court stated in a footnote:

> Generally, the lender's capacity to influence a debtor facility's treatment of hazardous waste will be inferred from the extent of its involvement in the facility's financial management. Here, that inference is not even necessary because there was evidence before the district court that Fleet actively

analysis that all of these activities, and the actions taken by Fleet to hire Baldwin and Nix, may have been taken primarily in an effort by Fleet to protect its security interest.[138] The court of appeals then remanded the case for consideration of the disputed facts in light of the newly announced "participation in the management" standard after finding that Fleet could be liable under section 9607(a)(2).

IV. LEGAL ANALYSIS

A. *Current Judicially Recognized Participation Standards*

The *Fleet* court is the only circuit court to enunciate a participation in the management standard for Superfund's secured creditor exemption.[139] Further, while lender liability under Superfund has been confronted by several district courts,[140] only the courts in *United States v. Mirabile* and the *Fleet* court have addressed specifically the question presented in this case: What constitutes participation in the management of a facility such that a lender, who holds a security interest in a debtor's real property or equipment, inventory and other property (the debtor's facility), will incur Superfund liability as an owner or operator of the facility?[141] A brief review of the *Mirabile* standard, and the standard announced by the *Fleet* court follows. Since one circuit has already indicated in dictum that it may be unwilling to

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> asserted its control over the disposal of hazardous wastes at the site by prohibiting SPW from selling several barrels of chemicals to potential buyers. As a result, the barrels remained at the facility unattended until the EPA acted to remove the contaminants.

Id. n.13.

138. *Id.* at 1560. *See supra* note 112, discussing another court's view that the purpose behind taking such actions is relevant to the analysis of determining whether the secured creditor exemption applies.

139. *Fleet*, 901 F.2d at 1556.

140. See *supra* note 118 for a listing of cases cited by the *Fleet* court which have discussed the participation standard. *See also* Guidice v. BFG Electroplating and Mfg. Co., Inc., 732 F. Supp. 556, 561 (W.D. Pa. 1989) (citing *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,995 (E.D. Pa. 1985); *Nicolet*, 712 F. Supp. at 1204 and *Fleet*, 724 F. Supp. at 960, as authority for the current judicial definition of "participating in the management of a facility"); *In re* T.P. Long Chemical, Inc. 45 B.R. 278, 289 (Bankr. N.D. Ohio 1985).

141. The court in *Nicolet*, 712 F. Supp. at 1204-05, reached this issue, but completely relied upon *Mirabile* and *Fleet* in concluding that "only if a mortgagee participated in the operational aspects of the facility" can it be liable as an owner or operator due to its participation.

follow the *Fleet* test,[142] it is important to understand both the *Fleet* test, and the *Mirabile* standard, which has received considerable support among other district courts.

Under the *Mirabile* standard, a secured party will have participated in the management of a facility only when it has "participate[d] in the day-to-day operational aspects of the site."[143] Application of this standard broadens the statutory secured creditor exemption by allowing secured parties to engage in considerable financial participation with the facility's management without incurring Superfund liability.[144] For example, in *Mirabile*, the court noted that the lender had secured the property against vandalism by actually boarding up windows and changing locks.[145] Further, the lender's loan officer inquired about the cost of disposal of drums containing hazardous wastes, and visited the site several times to show the property to prospective purchasers.[146] In describing the lender's activities, the *Mirabile* court noted that the steps taken by the lender were "plainly undertaken in an effort to protect its security interest in the property."[147] The *Mirabile* court suggested that some limit does exist on the secured party's ability to involve itself in the borrower's management. Specifically, a secured creditor may not "become overly entangled in the affairs" of the facility.[148] Therefore, a fair reading of the *Mirabile* court's interpretation of the secured creditor exemption indicates that so long as lenders take commonly practiced steps to enable them to minimize their losses resulting from the default or potential default of the debtor, Superfund liability will not be incurred.

The court of appeals in *Fleet*, on the other hand, considerably narrowed the availability of the secured creditor exemption. After *Fleet*, a secured creditor only has to be involved to the extent that a trier of fact could "infer[] that [the secured creditor] could affect hazardous waste disposal decisions if it so chose."[149] As discussed *supra* in Section III of this Comment, the *Fleet* court did indicate that a secured creditor may still engage in at least two

142. *See supra* note 9.

143. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,996.

144. *Id.* at 20,995 (distinguising between day-to-day operational management and limited participation in financial decisions is critical).

145. *Id.* at 20,996.

146. *Id.*

147. *Id.*

148. *Id.* at 20,995. The district court in *Fleet* essentially announced the same standard when it stated that secured creditors may "provide financial assistance and general, and even isolated instances of specific management advice to its debtors . . . if the secured creditor does not participate in the day-to-day management of . . . the facility." *Fleet*, 724 F. Supp. at 960.

149. *Fleet*, 901 F.2d at 1558.

basic activities: (1) it may monitor the debtor's business; and (2) it may "become involved in *occasional* and *discrete financial* decisions *relating to the protection of its security interest.*"[150]

There are two basic situations which recur and which have been examined by the courts where a secured creditor may find itself exposed to Superfund liability. The first situation is illustrated by the *Fleet* decision. In this *pre-foreclosure* context, the secured party still holds its security interest in the facility. Nonetheless, the secured creditor may still incur liability if it has participated in the management of the facility to a degree sufficient to remove itself from the protection of the secured creditor exemption. The second, or *post-foreclosure* situation, occurs when the secured party forecloses on its security interest and, in turn, purchases the facility at the foreclosure sale. At that point, the security interest ceases to exist, and the secured party becomes the titled owner of the facility.[151] The question in the latter situation is whether the secured creditor automatically removes itself from the protection of the secured creditor exemption when it purchases the facility outright, or whether it may still find protection in the exemption if the foreclosure and purchase is done "primarily to protect his security interest."[152] *Fleet* was a pre-foreclosure case, and as will be illustrated by the remainder of this Comment, the *Fleet* court's reliance on policy considerations from cases involving post-foreclosure Superfund liability is misplaced.

B. The Pre-Foreclosure - Post-Foreclosure Distinction and Its Importance in Determining Superfund Liability for Lenders

The *Fleet* court has narrowed the availability of the secured creditor exemption in a manner that likely will result in increased environmental liabilities for secured creditors who hold mortgages on property which is contaminated or holds the potential for contamination from hazardous wastes. As discussed *infra,* this apparent narrowing of the exemption was both unwise

150. *Id.* (emphasis added). For a detailed discussion of the *Fleet* holding, see Section III of this Comment.

151. 55 AM. JUR. 2D *Mortgages* § 785 (1971).

152. See 42 U.S.C. § 9601(A)(20) (1988) and *supra* notes 26-27 for the text of the secured creditor exemption. See also Section IV(B) for a detailed discussion of Superfund liability in both the pre-foreclosure and post-foreclosure settings under Superfund. See Section V of this Comment for a discussion of the EPA's proposed regulation that would provide some relief to mortgagees who foreclose their security interests in contaminated properties if the foreclosure is done primarily to protect their security interest.

and was probably unnecessary based on the facts of the case before the court.[153] If the *Fleet* court's newly announced reading of the secured creditor exemption is adopted as the standard for secured creditor liability under Superfund, such an extension of liability to lenders who hold mortgages on the contaminated facility, but who merely act to protect their positions as secured parties, likely will produce the undesirable effect of impeding, rather than promoting, the underlying goals of the Superfund statute.[154]

Further, the *Fleet* court erred when it asserted that a day-to-day operational standard would render the secured creditor exemption a nullity.[155] In fact, the exemption still accomplishes its original purpose-ensuring that a secured lender will not incur liability as an owner or operator simply because it holds a security interest in the facility so long as the secured party does not participate in the facility's management. The exemption accomplishes this, since a secured creditor, under a "day-to-day activity" standard as was employed by the *Mirabile*[156] court, can hold indicia of ownership "primarily to protect his security interest"[157] without operating the facility, and still avoid Superfund liability. Under the *Fleet* court's interpretation of the exemption, a class of liable individuals who are neither owners nor operators has been created.[158] If such a result had been intended, Congress would not

153. This is not to say the *Fleet* court reached the wrong disposition on the summary judgment motions. If the facts alleged by the United States are true, Fleet's involvement with the SPW facility was indeed very great, and may have well risen to the level of participation in the day-to-day activities of the facility sufficient to incur liability under a standard such as the one announced in *Mirabile.* The problem is that the court of appeals very possibly reached the right result, but for reasons which are not grounded in sound policy or in the plain structure of the statute. See *supra* note 136 and accompanying text for the facts alleged by the United States which indicate Fleet's participation.

154. These goals include "facilitat[ing] cleanups when hazardous substances are released into the environment or when a release is threatened . . . and . . . hold[ing] responsible parties liable for the costs of these cleanups." Comment, *The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment,* 41 U. MIAMI L. REV. 879, 882-83 (1987) (citing H.R. REP. NO. 253, 99th Cong., 1st Sess. 15 (1985), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038).

155. See *supra* note 127 for an initial criticism of the court's conclusion.

156. *See supra* note 83.

157. See *supra* notes 26-27 for the full text of the secured creditor exemption.

158. The *Fleet* court, citing CERCLA's legislative history, stated that "the threshold at which a secured creditor becomes liable clearly indicates a more peripheral degree of involvement with the affairs of a facility than is necessary to be held liable as an operator." *Fleet,* 901 F.2d at 1558 n.11. If this is true, then why do the provisions of § 9607 which impose liability refer to "owners or operators"? See *supra,*

have placed the secured creditor exemption as an exception in section 9601(20)(A), Superfund's definition of owner or operator. The language of the statute states that "[s]uch person [owner or operator] does not include . . . [secured creditors who don't participate]."[159]

The *Fleet* court, in an effort to preemptively address those who would criticize its policy grounds for reaching its decision, stated that "[t]hese concerns [that Superfund's promotion of proper hazardous waste disposal practices would be impeded by the *Fleet* decision] are unfounded."[160] An examination of these concerns, as set forth by the *Fleet* court itself, reveals that many commentators disagree that these concerns are "unfounded." Further, and of critical importance, the *Fleet* court looked at these policy considerations as they have been examined in *post*-foreclosure contexts, rather than the *pre*-foreclosure situation presented by the facts in *Fleet.*

The *Fleet* court recognized the concerns of those who would oppose its narrow construction of the exemption when it stated:

> Our interpretation of the exemption may be challenged as [1] creating disincentives for lenders to extend financial assistance to businesses with potential hazardous waste problems and [2] encouraging secured creditors to distance themselves from the management actions, particularly those related to hazardous wastes, of their debtors. . . . As a result the improper treatment of hazardous wastes could be perpetuated rather than resolved.[161]

In rejecting these concerns, the court extensively cited two law review articles and *United States v. Maryland Bank & Trust Co.,*[162] both of which the court contended supported its narrower construction of the secured creditor exemption, and its resultant broader Superfund liability.[163] It is true that

note 128 for the full text of the footnote in the *Fleet* decision setting forth the passage of legislative history relied on by the court in reaching its conclusion.

159. *See supra* note 9 (discussing the *In re Bergsoe* case from the Ninth Circuit, suggesting that it is clear that at least some actual participation, not some nebulous power to affect, is required before a secured party can incur CERCLA liability without actually becoming an operator). In addition, under the *Fleet* standard, the plain statutory language of the exemption is stretched beyond its limit, as the court has interpreted the present tense "participating" to mean that a future, *potential* power to participate if the lender so chooses, is equivalent to participating in the facility's management.

160. *Fleet,* 901 F.2d at 1558.

161. *Id.* (citation omitted).

162. 632 F. Supp. 573 (D. Md. 1986).

163. Wilsdon, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup,* 38 HASTINGS L.J. 1261, 1294 (1987); Comment, *The*

Wilsdon (one of the two articles upon which the court relied) rejected the *Mirabile* standard *as it applied to post-foreclosure* activities of the secured party.[164] Wilsdon stated that "the rule offered by *Mirabile* should be rejected as inadequate."[165] Yet, the *Fleet* court's reliance on the analysis found in Wilsdon, the *Liability of Financial Institutions* article, and in the *Maryland Bank and Trust* case is misplaced entirely. The *Mirabile* court, and Wilsdon in analyzing *Mirabile*, both examined fact situations where the secured lender foreclosed on its security interest in real property and took title to the facility. Wilsdon clearly was rejecting the *Mirabile* standard in the post-foreclosure context, and did not even consider the pre-foreclosure setting when he stated, "A careful analysis of CERCLA's express and implied objectives reveals that Congress intended to exempt security interest holders *only while the security instrument is in force.*"[166]

Likewise, the *Maryland Bank & Trust* court faced a post-foreclosure Superfund liability situation where a lender who bought the property at the foreclosure sale held it for four years![167] No consideration at all was given to liability premised on participation in the facility's management. Instead, liability was imposed on this lender because once the lender foreclosed and took title, it no longer held a security interest, but now was *the owner* of the facility in all respects. Wilsdon specifically endorsed the *Maryland Bank & Trust* liability standard.[168] This standard, however, had nothing to do with defining when a secured party will participate in the management of a facility

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Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA, 1988 WIS. L. REV. 139, 185 (1988).

164. Wilsdon, *supra* note 163, at 1296.

165. *Id.*

166. *Id.* The only discussion of pre-foreclosure liability under CERCLA in the Wilsdon article centered around a secured party who may have in fact participated in the day-to-day operations of the facility. The *Mirabile* court denied this lender's motion for summary judgment, finding that even though it had not foreclosed and taken title to the property, it may nevertheless have participated in the management of the facility to the point of removing itself from the protection of the secured creditor exemption. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,997. The lender who did not foreclose, but who could still have been subject to liability for its pre-foreclosure participation, settled with the EPA before a trial on its liability was held. Wilsdon, *supra* note 163, at 1279 n.111. Note that despite the *Fleet* court's protestations to the contrary, the *Mirabile* standard does not render meaningless the secured creditor exemption. The lender just discussed still was exposed potentially to CERCLA liability through its role as a secured creditor because it may have participated in the management of the facility and thus became an operator.

167. United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986).

168. Wilsdon, *supra* note 163, at 1286.

to a degree which removes it from the secured creditor exemption protection. The *Maryland Bank & Trust* standard simply states that "[t]he security interest must exist at the time of the clean-up."[169] The decision does not address what would happen if the lender had still held its security interest. In fact, the court specifically noted that the "mortgagees also have the options of not foreclosing and not bidding at the foreclosure sale. Both steps would *apparently insulate the mortgagee from liability.*"[170]

It is not at all clear, however, that just because a mortgagee forecloses that *automatic* liability should follow. The author of the *Liability of Financial Institutions* article purports to reject *Mirabile* as the proper standard of liability in the post-foreclosure setting by stating, "It seems probable that the *Mirabile* court did not consider the public policy implications of its decision [to allow a mortgagee to foreclose and still fall within the secured creditor exemption]."[171] In that same article, however, the author explicitly recognizes that "[i]t is debatable . . . whether the lender's foreclosure of a mortgage . . . compels the assumption that the lender has become an owner or operator of a hazardous waste site and therefore liable for cleanup costs. Foreclosure on a bad debt can be a logical step for a lender to take."[172] The purported reasons given most often for automatically imposing liability on a foreclosing mortgagee are illustrated by the facts of the *Maryland Bank and Trust* case. Cases such as *Mirabile,* however, point out that the fears expressed by the *Maryland Bank and Trust* court are not always present. A "day-to-day" participation standard like the one applied in *Fleet* and in *Mirabile* can advance the public policy of insuring cleanup costs will be borne by responsible parties without allowing windfalls to foreclosing mortgagees.[173] It is nonsensical to compare the *Mirabile* case, and the activities taken by the lender to board up the windows to the facility to protect against vandalism, to the *Maryland Bank and Trust* case where the foreclosing mortgagee held the property for four years after foreclosure.[174] It is not even a fair reading of *Maryland Bank and Trust* to say that the court there would impose *automatic* liability due to foreclosure. The court stated that "[t]he exclusion (the secured creditor exemption) does not apply to former mortgagees currently holding title after purchasing the property at a foreclosure sale, *at least when, as here,*

169. *Maryland Bank & Trust,* 632 F. Supp. at 579.

170. *Id.* at 580 n.6.

171. Comment, *supra* note 163, at 176.

172. *Id* at 160.

173. See *supra* notes 143-48 and accompanying text for a review of the mortgagees post-foreclosure activities which were taken primarily to protect its security interest.

174. *Maryland Bank and Trust,* 632 F. Supp. at 579.

the former mortgagee has held title for nearly four years."[175] The *Maryland Bank and Trust* court, in a footnote to the just-quoted passage further stated:

> Because MB & T has held the property for such an extended period of time, this Court need not consider the issue of whether a secured party which purchased the property at a foreclosure sale *and then promptly resold it* would be precluded from asserting the section 101(20)(A) exemption. The United States District Court for the Eastern District of Pennsylvania recently held that a former mortgagee that purchased the property at a foreclosure sale and assigned it four months later was exempt from liability.[176]

Further, the *Maryland Bank and Trust* court did *not* reject *Mirabile*, but simply stated that it would not apply it to the facts of the case before it since the mortgagee held the property for such an extended time. This reading of *Maryland Bank and Trust* is clear when one examines the following statement of the court: "[*Mirabile*] pertained to a situation in which the mortgagee-turned-owner *promptly assigned the property.* To the extent to which that opinion suggests a rule of *broader* application, this court respectfully disagrees."[177] Finally, as discussed *infra* in Section V of this Comment, even the EPA's proposed regulations do not impose automatically Superfund liability on a foreclosing mortgagee, an apparent recognition by the EPA that to do so would radically alter the process by which secured lenders administer notes secured by mortgages which are in default.

The *Fleet* court's extensive reliance on policy considerations enunciated by commentators such as Wilsdon and the author of the *Liability of Financial Institutions* article, and the *Maryland Bank & Trust* court, even if arguably persuasive in *certain post*-foreclosure settings, have no applicability in the pre-foreclosure context of the *Fleet* case. Thus, the *Fleet* court's foundation on which it supported its narrow construction of the secured creditor exemption is questionable at best. The inapplicability to the facts of the *Fleet* case of reasoning and policy considerations such as those relied upon in *Maryland Bank & Trust* is evident from a closer examination of the facts of *Maryland Bank & Trust* itself.

Maryland Bank and Trust (MB & T) accepted a mortgage on the property of Herschel McLeod, Sr. and Nellie McLeod who operated two garbage disposal businesses on the land.[178] The McLeods then conveyed the property to their son, Mark, who obtained a loan from MB & T and took the

175. *Id.*

176. *Id.* (emphasis added) (citation omitted).

177. *Id.* at 580 (emphasis added).

178. *Id.* at 575.

property subject to the mortgage.[179] Mark soon defaulted, and MB & T foreclosed and took title to the property.[180] Before this foreclosure, hazardous wastes were dumped on the site.[181] After being notified by Mark that the site contained hazardous wastes,[182] the County Department of Health notified the EPA of the problem.[183] The EPA then notified MB & T and gave it approximately four months to clean up the site, or else the EPA would use its own funds to complete the cleanup.[184] MB & T refused to clean up the site, so the EPA completed the cleanup and sued to recover its costs after MB & T refused to pay.[185]

The primary reason the *Maryland Bank & Trust* court concluded that a lender who forecloses and takes title to the property cannot rely on the secured creditor exemption was stated by the court as follows:

> Under the scenario put forward by the bank, the federal government alone would shoulder the cost of cleaning up the site, while the former mortgagee-turned-owner, would benefit from the clean-up by the increased value of the now unpolluted land. At the foreclosure sale, the mortgagee could acquire the property cheaply. All other prospective purchasers would be faced with potential CERCLA liability, and would shy away from the sale. Yet once the property had been cleared at the taxpayer's expense and becomes marketable, the mortgagee-turned-owner would be in a position to sell the site at a profit.[186]

The concerns of the *Maryland Bank & Trust* court are well founded, but do not exist similarly in a pre-foreclosure setting as existed in *Fleet.* As long as the lender holds his security interest, it is the owner/mortgagor of the property, and not the lender, who benefits from a cleanup of the site. If the borrower still defaults, the increase in property value still directly accrues to the owner, not the lender. If the lender forecloses at this point, it will presumably have to pay an increased price for the land since it is now more valuable as a result of the cleanup. The increased price may also relieve the debtor from all or part of any potential liability for a deficiency judgment.

It is true that the security itself, the property, is enhanced by the cleanup, thus leaving the lender with a better opportunity if he does foreclose to recover the outstanding indebtedness since the security is now worth more.

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179. *Id.*
180. *Id.*
181. *Id.*
182. This notification was not given until after MB & T had purchased the site.
183. *Id.*
184. *Id.*
185. *Id.* at 576-77.
186. *Id.* at 580.

A lender often will, however, loan working capital in a manner similar to the factoring arrangement in *Fleet* in exchange for a security interest in receivables, equipment and the real property. In many of these cases, the receivables and equipment alone have sufficient value to cover the outstanding indebtedness. Apparently, Fleet Factors Corporation did recover its loan from SPW since Fleet could have, but never did, foreclose on its security interest in the plant had SPW still owed Fleet Factors Corp. on the debt.[187] In such a case, it would not matter to the lender if the land value is increased by the cleanup activities or not, since the indebtedness is already satisfied without regard to the real property value. Even if the lender could benefit from the enhanced value of the real property, the *Fleet* court's "inference" that the lender "could" affect hazardous waste disposal practices will send lenders to their lawyers before making any loans which may lead to Superfund liability. Undoubtedly, prudent lenders' attorneys will advise the lender to stay away from such loans when the standard for liability is defined so nebulously as to provide lenders with little guidance in conducting their lending activities with borrowers who present such environmental risks.

C. Policy Considerations Do Not Support the Fleet Court's Standard in the Pre-Foreclosure Context

The *Fleet* court cited two main policy considerations which purported to support its newly announced participation standard. The first of these was the policy of encouraging lenders "to investigate thoroughly the waste treatment systems and policies of potential debtors."[188] The court felt that the lender could simply investigate the potential risk of Superfund liability and factor those risks into its loan terms.[189] In turn, the second consideration would be advanced; borrowers would be given incentives to properly handle their hazardous wastes since such borrowers will be unable to obtain needed funds if lenders face high potential environmental liabilities.[190] The court's argument makes two critical assumptions, neither of which consider the realities of the commercial lending industry.

First, the court assumes that lenders will continue to loan to borrowers who present a risk of Superfund liability. Second, even if lenders do continue

187. It is unlikely that Fleet intentionally chose not to foreclose on its security interest in the plant for fear of CERCLA liability because cases such as *Mirabile* and *Maryland Bank & Trust* were not decided until 1985-86. Recall that Fleet's last involvement with the SPW facility was in 1983. Research revealed no cases imposing liability on lenders under CERCLA during that period.

188. *Fleet*, 901 F.2d at 1558.

189. *Id.*

190. *Id.*

to loan money in these instances, the borrower may be unable to afford the cost of funds the bank must charge to cover its potential Superfund liability.

There is little question that lenders could play a positive role in effectuating hazardous waste cleanup, but that role can only be carried out effectively if the lender is free to assist the debtor in solving its hazardous waste problems. For example, one commentator points out that lenders could, and in fact already do, require environmental audits and safer hazardous waste disposal practices as a condition to lending money to borrowers who engage in such activities.[191] While acknowledging such lender involvement, however, the author warns that "if lenders are unable to predict the scope of potential liability they may incur as constructive operators of the site, they will refrain from aiding borrowers; moreover, they may simply choose not to lend."[192]

Those lenders who commonly have imposed such requirements on their borrowers do so for reasons that are not entirely dependent on the potential for lender liability under Superfund. As one commentator stated, "Banks and other creditors must have both an incentive and security when loaning money. The incentive is the *ability to make a profit from the loan or extension of credit.* The security is the collateral. Without incentive, loans will not be made and credit will not be extended."[193]

When loans are made and liens are created on property to secure those loans, the lender will only remain secured if the property value remains sufficient to cover the outstanding balance of the loan. Without a doubt, properties found to be contaminated with hazardous wastes drop dramatically in value, resulting in increased loan-to-value ratios. Lenders who once had a relatively "safe" loan now face greatly increased risks of losses *on the loan.* Thus, lenders have tried to use environmental audits and the like to insure that waste contamination does not occur. If such problems are prevented, the lender remains secured *and* the threat to society from hazardous waste sites is lessened.

However, the nebulous and indefinable standard of the *Fleet* court will actually hinder rather than promote such preemptive hazardous waste management and disposal. The huge potential environmental liabilities will often reduce the profit potential of making loans to such a degree that lenders simply will choose not to lend. The *Fleet* court states that "such environmental issues can be weighed into the terms of the loan agreement."[194] Yet, this statement is true only if loan agreements exist in the first instance. When

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191. Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 927 (1989).

192. *Id.* at 927-28. (citation omitted).

193. Burcat, *supra* note 3, at 536 (emphasis added).

194. *Fleet*, 901 F.2d at 1558.

such loans are not made for fear of Superfund liability, the *Fleet* court's second goal—that sound waste practices will be promoted—also fails to materialize. As the author of *Lender Management Participation* states: "Without capital, business cannot afford to implement the waste reduction practices necessary to protect the public health and the environment."[195] If one doubts that lenders may in fact stop lending money in such situations, one need only look to the recent commentary on the *Fleet* decision to note that lenders are taking this decision very seriously.[196] One commentator, the head of a New York firm's environmental law group, commented that

> until the law is further clarified, financial institutions will shrink from lending to companies with identified or potential hazardous-waste exposures. If this development in fact occurs, it will undercut a key goal of Superfund—that private parties conduct clean-ups themselves to the maximum extent possible.[197]

Therefore, the *Fleet* court's hopes that lenders will encourage and monitor hazardous waste practices will not be realized where loans are never made. Such a result is undesirable because it is well recognized that there is value in encouraging lenders to become "monitors" of the hazardous waste disposal practices of their debtors.[198] To do this, however, banks must first be willing to extend loans to these debtors. *Fleet* narrows the availability of the secured creditor exemption to such a degree that a very low level of participation may render a lender liable for vast environmental liabilities. The result is not difficult to surmise. Lenders faced with high-risk investments (loans to companies with potential environmental liabilities) instead will opt for more conservative investments. Even those lenders who are willing to lend in such situations will not do so for free. Borrowers will pay whatever risk premium[199] the lender perceives is necessary to cover these uncertain

195. *Id.* at 908 (citing U.S. GEN. ACCOUNTING OFFICE, HAZARDOUS WASTE: ISSUES SURROUNDING INSURANCE AVAILABILITY 31 (Oct. 1987)).

196. Freeman, *Recent Case Law May Expand Lender's Risks Under Superfund*, 13 NAT'L L. J. 18 (Sept. 17, 1990) ("The broad language of the decision suggest that there may be virtually no 'safe harbor' for lenders who desire to avoid Superfund liability . . . .").

197. *Id.* at 20. It certainly is instructive to note that commentators, such as Mr. Freeman who predict that the *Fleet* decision will cause lenders to withdraw from lending in these areas, are attorneys who are practicing in the field and will be advising lenders. If the practitioners in the field view the *Fleet* decision as setting a low threshold of liability, they certainly can be expected to tell their lenders to steer clear of such loans.

198. Note, *supra* note 191, at 931.

199. The "risk premium" is defined as "extra interest paid to a lender, over

potential environmental liabilities. Many debtors may not, however, be able to afford the increased rates they will have to pay to receive financing. The result of this narrowing of the secured creditor exemption, and its effect on the lending practices and borrowing options for borrowers was summarized well by a commentator who stated:

> Under a low liability threshold [like the standard announced in *Fleet*], the lender would quickly sever its relationship with a financially distressed debtor, accelerate loan payments, and try to recover the debt. Under such a scenario, *all parties are worse off*: the debtor cannot afford to dispose of the wastes properly, the lender may not fully recover the loan, and the environment will suffer until the government shoulders the cleanup costs.[200]

As a result of the vague standard set down by the *Fleet* court, lenders now face a catch-22 situation. On the one hand, if lenders do choose to make these loans, they could do so only after conducting extensive pre-loan environmental audits, contractually requiring borrowers to conduct safe waste practices, and requiring indemnification agreements.[201] The knowledge gained from the audit, and the influence gained from the power to enforce the covenants gives the government and other plaintiffs a sword to use against the lender in imposing Superfund liability. To make sure such covenants are not being violated, the lender will have to monitor further the borrower's activities. Their "monitoring" activities may be sufficient to support an inference that they could affect hazardous waste disposal decisions, thus exposing themselves to massive environmental liabilities.[202] By imposing these requirements on their borrowers, the lender is in effect supporting an inference that they could influence the borrower's hazardous waste disposal activities.

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amounts usually considered normal, in return for their undertaking to engage in activities [or make loans for such activities] more risky than normal." BLACK'S LAW DICTIONARY 1193 (5th ed. 1979).

200. Note, *supra* note 191, at 93; *see also* Leland, *Lender Liability in Cleanups Presents Workout Dilemma*, AM. BANKER, June 20, 1990, at 4.

201. Burcat, *supra* note 3, at 540-41.

202. Backers of a standard such as the one enunciated in *Fleet* might counter by saying that the bank could still recover from the borrower by virtue of the loan covenants and indemnification agreements. Yet how many of these borrowers faced with these environmental liabilities are going to have any money to indemnify the lenders? *Fleet* is a perfect example. Clearly, the owners of the SPW facility are liable for the cleanup costs. The problem is that SPW is now bankrupt and has no money. As a result, the EPA went after Fleet Factors Corp.

The other option is equally undesirable for the lender. If the lender does not take these steps, it blindly will be making loans at a greatly increased risk of encountering unexpected environmental liabilities. In either case, if the lender was even willing to make the loan in the first place, the lender may simply walk away from the entire situation and write off the debt, rather than face huge environmental liabilities.[203] If lenders do this, their expert advice and further financial support in financing cleanups will be lost. Of course, as discussed earlier, the uncertainty created by the *Fleet* standard may just prompt lenders to stay out of this area of lending altogether. Even commentators who reject the narrower standard set forth in *Mirabile* recognize that too broad a sweep of liability for lenders will have an adverse impact on the goals underlying Superfund.[204] The *Liability of Financial Institutions* author noted:

> [T]he very lenders who could conceivably encourage borrowers to engage in safer handling and disposal practices could also be dissuaded from offering hazardous waste disposal advice for fear of later being held liable for cleanup costs. On the other hand, if courts give a narrower reading to the term "management," [and thus broaden the availability of the secured creditor exemption] then lenders can have some influence over. their borrowers' hazardous waste activities, a result which is more beneficial to the lender, the borrower, and society.[205]

Thus, while this author may have believed that the *Mirabile* standard was inappropriate when a lender actually takes title to the facility, a standard that sweeps liability as broadly as that enunciated by the *Fleet* court equally is undesirable in the pre-foreclosure setting. The *Fleet* court relied on authorities which it interpreted as suggesting that a narrow reading of the exemption would encourage safer and more effective hazardous waste disposal activities. In fact, the authorities lend little support to the court's theory, since they dealt with the entirely different post-foreclosure setting. The evidence, discerned from those who will decide whether or not to lend, the lenders themselves and their attorneys, is clear. Not only will the *Fleet* standard be "challenged as creating disincentives for lenders . . . result[ing] [in] the improper treatment of hazardous wastes . . . ,"[206] but the uncertainty created by the decision will, in fact, create such disincentives. Lenders who could promote safe hazardous waste practices will decline to do so now because of the magnitude of the potential environmental liability.

203. *See* Comment, *supra* note 163, at 179.

204. *Id.*

205. *Id.* at 180.

206. *Fleet*, 901 F.2d at 1558.

V. FLEET'S AFTERMATH: A CALL FOR REFORM IN CONGRESS

To no one's surprise, the lending community reacted to the *Fleet* decision with near unanimous condemnation and, undoubtedly, a great deal of concern. Shortly after the decision was announced, the condemnation began.[207] *Amicus curiae* briefs filed by several lenders groups contain warnings from the lenders that loan money will dry up for businesses that pose environmental risks unless the breadth of *Fleet* is reduced.[208]

The EPA, in an effort to clarify the potential scope of liability under Superfund, has proposed a new set of regulations which interpret the secured creditor exemption somewhat more broadly than *Fleet* would suggest.[209] The EPA, recognizing the uncertainty and concern created by the *Fleet* decision,[210] stated that "the mere capacity or ability to influence facility operations" is not sufficient to rise to the level of participation in the management of a facility.[211] Mr. Strock summarized the heart of the proposed draft rule when he stated:

> In general, a lender is considered to be participating in management within the meaning of the exemption if, while the borrower is still in possession, the lender has *materially divested the borrower of decisionmaking control* over facility operations, particularly with respect to the hazardous substances present at the facility.[212]

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207. *See, e.g., U.S. Asks Supreme Court Not To Review Fleet Factors Ruling on CERCLA liability*, BANKING REP. (BNA) Vol. 55, No. 25, at 1036 (Dec. 24, 1990). *See also* Becker, *Environmental Exposure*, THE MAG. OF BANK MGMT., Aug. 1990, at 34 ([*Fleet*] may slow the wheels of progress [for lessening Superfund lender liability] . . . ."); Freeman, *Recent Case Law May Expand Lender's Risks Under Superfund*, THE NAT'L L. J., Sept. 17, 1990, at 18.

208. *Widespread Havoc Predicted by ABA, Others Supporting Fleet Factors Review*, BANKING REP. (BNA) Vol. 55, No. 19, at 791 (Nov. 12, 1990) (discussing briefs filed by the American Bankers Association, the California Bankers Association and the American College of Real Estate Lawyers).

209. *EPA Draft Lays Out Lender Liability for Site Cleanup*, 59 U.S.L.W. 2225 (Oct. 16, 1990) (discussing a draft of the regulation that the EPA intends to propose which is currently under review at the Office of Management and Budget (OMB)). The EPA has said that after the OMB review is complete, it will accept public comment on the rule for sixty days. *Id.*

210. *Id.*

211. *Id.* (comments of James Strock, EPA's Assistant Administrator for Enforcement).

212. *Id.*

This apparently does not mean that the lender cannot engage in normal workout activities and may even foreclose in some circumstances.

> [A] lender may take actions to protect its interest by policing the loan, by undertaking financial workout with a borrower *where the security interest is threatened*, and by *foreclosing* and *expeditiously* liquidating the assets securing the loan, EPA said. In general, such actions are not considered to be participation in the management of a facility *provided that the actions taken are necessary* to protect the security interest.[213]

While lenders welcome the proposed rule in some respects, some still foresee serious problems until further action is taken.[214] As evidenced by Ms. Corash's remarks, the main problem the rule would not solve is how the lender who forecloses is supposed to "expeditiously" liquidate the property, if any potential buyer would immediately be subject to owner liability under Superfund. Further, it is not even certain that the proposed rule will be adopted at all, or if it is to be adopted, when.

Soon after *Fleet*, bills were introduced in both the House and Senate which would reduce lenders' exposure to Superfund liability. Neither bill was passed during the 101st Congress.[215] Congressman Lefalce's bill has as its express purpose "to limit the liability under [Superfund] of lending institutions acquiring facilities through foreclosure or similar means."[216] The bill would exclude specifically from Superfund's definition of owner or operator "[a]ny designated lending institution which acquires ownership or control of the facility pursuant to the terms of a security interest held by the person in that facility."[217] Senator Garn's bill would amend the Federal Deposit Insurance Act to remove strict liability exposure for lenders and specifically would require lenders to have had

> actual knowledge that a hazardous substance or similar material is used, stored, of located on property . . . [and] failed to take all reasonable actions necessary to prevent the release or disposal of such substance; or . . . has

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213. *Id.* (emphasis added).

214. Michele Corash, a partner with Morrison & Foerster in San Francisco, and the general counsel at the EPA during the Carter administration stated that "[the draft rule] improves the situation, but it does not solve the problem." Wall Street Journal, October 11, 1990, at 12, col. 6. Ms. Corash noted that "the regulatory relief that would be granted lenders who foreclose on a hazardous waste site wouldn't be extended to entities that buy such sites from the lenders." *Id.*

215. H.R. 4494, 101st Cong., 2d Sess.(1990); S. 2827, 101st Cong., 2d Sess. § 1101 (1990).

216. H.R. 4494, 101st Cong., 2d Sess. (1990).

217. *Id.*

benefitted from removal, remedial or other response action, but only to the extent of the actual benefit conferred by such action on that person.[218]

Both of these bills would broaden considerably the protection given secured lenders from Superfund liability. It is quite uncertain, however, just how likely it is that these bills will be adopted by the Congress in substantially their present forms, if at all. Legislative activity such as this apparently provided, however, at least in part, the catalyst for the EPA's proposal of new Superfund regulations.[219]

VI. CONCLUSION

Fleet injects a high level of uncertainty and apparently sets the liability threshold for lenders so low that lenders may now be unwilling to make loans to companies with potential environmental liabilities. Even if lenders do make such loans, the *Fleet* "participation in the management" standard prohibits lenders from taking the necessary steps to insure both the security for the loan and to protect themselves from environmental liability. If the lender does not involve itself with the borrower at all, it risks making loans without full information and with little control. Thus, the probability of default and losses is high. If the lender does involve itself in trying to help the debtor succeed, which in turn insures that the debtor can pay its obligation, the lender faces the real possibility that a court will infer that it could have influenced the debtor's hazardous waste practices.

This catch-22 situation leaves the lender in an uncertain and risky position which will almost certainly cause financing in this area to dry up. This in turn leaves borrowers who need funds with no place to obtain them. Further, it leaves society with an environmental mess and high government costs, since the expertise and financing lenders could provide to clean up hazardous waste sites will no longer be available.

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218. S. 2827, 101st Cong., 2d Sess. § 1101 (1990).

219. "In an effort to hold off legislation pending in the House and Senate that would tinker with CERCLA's liability language [the EPA proposed the new regulations] . . . ." 59 U.S.L.W. 2225 (1990).