Pace Environmental Law Review

Volume 12
Issue 1 *Fall 1994*

Article 14

September 1994

A Ride on the Environmental Liability Roller Coaster

Brian S. B. Lee

PACE ENVIRONMENTAL LAW REVIEW

Volume 12 Fall 1994 Number 1

COMMENT

A Ride on the Environmental Liability Roller Coaster

BRIAN S. B. LEE*

Lending institutions remain focused, as they must, on the risk of environmental liability under CERCLA arising from their borrowers' activities. They must temper their desire to protect their security interests with consideration of the very real threat of liability for environmental cleanup costs. Recent interpretations by courts and the Environmental Protection Agency, and intervention by the Federal Deposit Insurance Corporation, have further altered the equation. This comment examines CERCLA, its underlying purpose, and the impact recent events will have on secured creditors as they rattle down the tracks of the headiest of rides, the environmental liability roller coaster.[1]

* The author wishes to thank the entire Pace Environmental Law Review for all their assistance and a special thanks to Scott N. Koschwitz and his group for invaluable editing.

1. The author has adopted the effective metaphor of a roller coaster first introduced by authors Stephen L. Kass & Michael B. Gerrard in *New Worries for Banks*, N.Y. L.J., June 25, 1993, Environmental Law, at 3.

I. Introduction

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[2] to address the environmental and health dangers resulting from unfettered disposal of hazardous wastes, and to combat increasing cleanup costs. However, for secured creditors, CERCLA has become an unstable vehicle for determining environmental liability, resembling that of a roller coaster ride.[3] Today, secured creditors "continue to be shaken by the roller coaster of environmental liability."[4] In 1990, "they strapped themselves in for a high speed plunge"[5] when the United States Court of Appeals for the Eleventh Circuit in *United States v. Fleet Factors Corp.*,[6] ruled that a secured creditor could be liable for a borrower's hazardous waste even if it never foreclosed its security interest in the real property.[7] "In 1992, they breathed a sigh of relief, and loosened the straps a bit,"[8] when the United States Environmental Protection Agency (EPA) issued the National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA (Lender Liability Rule)[9] limiting secured creditors' financial liability for their borrowers' hazardous waste.[10]

On February 25, 1993, the Federal Deposit Insurance Corporation (FDIC) issued guidelines recommending that all FDIC-supervised lenders implement programs to reduce environmental risk,[11] causing creditors to again "hang on

2. Comprehensive Environmental Response Compensation and Liability Act (CERCLA) §§ 101-405, 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

3. *See* Stephen L. Kass & Michael B. Gerrard, *New Worries for Banks*, N.Y. L.J., June 25, 1993, Environmental Law, at 3 [hereinafter Kass & Gerrard, *New Worries for Banks*].

4. *Id.*

5. *Id.*

6. 901 F.2d 1550 (11th Cir. 1990) [hereinafter *Fleet Factors II*].

7. *See id.* at 1557-60.

8. Kass & Gerrard, *New Worries for Banks*, *supra* note 2, at 3.

9. 40 C.F.R. § 300 (1993).

10. *Id.* § 300.1100.

11. *See* Letter from Stanley J. Poling, Director, Federal Deposit Insurance Corporation, to Chief Executive Officers of FDIC-Supervised Banks (Feb. 25, 1993) (on file with author) [hereinafter Poling Letter].

tight."[12] Then, on February 4, 1994, the Court of Appeals for the District of Columbia (D.C. Circuit) invalidated the Lender Liability Rule, which, for a short while, had provided a safe harbor for secured creditors.[13]

These recent events have significantly altered the issue of environmental liability for secured creditors under CERCLA. To illustrate the meaning and impact of the FDIC guidelines, and the invalidation of the Lender Liability Rule, this comment provides an overview of potential environmental liability for secured creditors. It continues with Part II, which introduces CERCLA and its underlying purpose. Part III analyzes *Fleet Factors I* and *II* and their impact on environmental liability. Part IV reviews the Lender Liability Rule and its countervailing approach toward lender liability. Part V analyzes *Fleet Factors III* and *IV*, focusing on the influence of the Lender Liability Rule on the *Fleet Factors* case. Part VI examines the FDIC guidelines. Part VII examines the holding of the D.C. Circuit in *Kelly v. EPA*, which invalidated the Lender Liability Rule. Part VIII predicts how the FDIC guidelines and the invalidation of the Lender Liability Rule will affect the environmental liability for secured creditors.

II. CERCLA

Congress enacted CERCLA to address the environmental and health dangers resulting from the mishandling of hazardous waste.[14] Congress intended CERCLA to be "a comprehensive remedial plan . . . that addresses the Nation's hazardous substance environmental problems."[15] CERCLA places the ultimate responsibility for removing hazardous waste on those responsible for the hazards created by im-

12. Kass & Gerrard, *New Worries for Banks*, *supra* note 2, at 3.

13. Kelley v. EPA, 15 F.3d 1100, 1109 (D.C. Cir. 1994).

14. *Fleet Factors II*, 901 F.2d 1150, 1553 (11th Cir. 1990).

15. United States v. Fleet Factors Corp., 819 F. Supp. 1079, 1083 (S.D. Ga. 1993) [hereinafter *Fleet Factors III*].

proper disposal,[16] the potentially responsible parties (PRPs). To this end, CERCLA allows the federal government to remove and dispose of the hazardous waste and collect the resulting costs (response costs) from PRPs.[17]

Those PRPs liable for government response costs include: (1) the present owner and operator of the facility; (2) the owner or operator of the disposal facility at the time of disposal of any hazardous substance; (3) any person who arranged for the treatment or disposal of a substance at that facility; and (4) any person who transported the hazardous substances to the facility, from which there is a release, or a threatened release.[18] CERCLA defines "owner and operator . . . in the case of any facility [or] title, . . . control of which was conveyed due to . . . foreclosure . . . to a unit of State or local government, [as] any person who owned, operated or otherwise controlled activities at such facility immediately beforehand."[19] CERCLA holds such owner or operator strictly liable for government response costs.[20]

CERCLA excludes from the definition of "owner and operator" any "person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily

16. *Fleet Factors II*, 901 F.2d at 1553 (citing Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1316 (11th Cir. 1990); Dedham Water Co. v. Cumberland Farms Dairy, 805 F.2d 1074, 1081 (1st Cir. 1986)).

17. *Id. See* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 576 (D. Md. 1986). Response costs include:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under [§ 104(i)] . . . .

CERCLA § 107(a)(4)(A)-(D), 42 U.S.C. § 9607(a)(4)(A)-(D). The responsible party must also pay interest on the response costs at the rate set for the Hazardous Substance Superfund. CERCLA § 107(a), 42 U.S.C. § 9607(a).

18. CERCLA § 107(a), 42 U.S.C. § 9607(a).

19. CERCLA § 101(20)(A)(iii), 42 U.S.C. § 9601(20)(A)(iii).

20. *Fleet Factors II*, 901 F.2d at 1554.

to protect his security interest in the . . . facility."[21] This exclusion is commonly known as the Secured Creditor Exemption.

III. The Birth of *Fleet Factors*

Swainsboro Print Works, Inc. (SPW) operated a cloth printing business from 1963 through February, 1981, in Swainsboro, Georgia.[22] In 1976, SPW and Fleet Factors Corp. (Fleet) executed a factoring agreement.[23] Pursuant to this agreement, Fleet advanced funds to SPW in return for an assignment of SPW's accounts receivable.[24] SPW conveyed to Fleet a security interest in the facility in the form of a deed "to secure a debt conveying title to the realty."[25]

In August, 1979, SPW, unable to pay its outstanding debts, filed for bankruptcy.[26] Fleet continued to finance SPW, until SPW ceased operations on February 27, 1981.[27] In May, 1982, a bankruptcy court granted Fleet approval to foreclose its security interest on part of SPW's inventory and equipment.[28] Fleet hired Baldwin Industrial Liquidators, Inc. (Baldwin) to sell the inventory and equipment at public

---

21. CERCLA § 101(20)(A)(iii), 42 U.S.C. § 9601(20)(A)(iii). CERCLA excludes from liability any person who can show that the hazardous waste release was "caused solely by: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party other than an employee or agent . . . if [the party sued for response costs] establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, . . . and (b) he took precautions against foreseeable acts or omissions of any such third party . . . ." CERCLA § 107(b)(1)-(3), 42 U.S.C. § 9607(b)(1)-(3).

22. United States v. Fleet Factors Corp., 724 F. Supp. 955, 957 (S.D. Ga. 1988) [hereinafter *Fleet Factors I*].

23. *Id.* A factoring agreement is an agreement whereby a financier (the factor) lends capital to a principal. In return, the factor takes a security interest in the principal's accounts receivable or other suitable security. BLACK'S LAW DICTIONARY 592 (6th ed. 1990).

24. *Fleet Factors I*, 724 F. Supp. at 957.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* Fleet never foreclosed on SPW's real property. On July 7, 1987, the real property was conveyed to Emanuel County, Georgia, at a foreclosure sale, pursuant to a tax lien established by SPW's failure to pay state and county taxes. *Id.*

auction.[29] On June 22, 1982, Baldwin auctioned the collateral "as is" and "in place," with the purchasers responsible for removal.[30] On August 31, 1982, Fleet hired Nix Riggers (Nix) to remove all sold and unsold equipment remaining after the auction, and to leave the site "broom clean."[31] Nix completed its task and left the site in December, 1983.[32]

On January 20, 1984, the EPA inspected the facility, discovered asbestos and 700 fifty-five gallon drums holding toxic chemicals, and concluded that they were "an immediate threat to public health and the environment."[33] From February 6 to 24, 1984, and from June 12 to July 11, 1984, respectively, the EPA disposed of the toxic chemicals and asbestos in an approved landfill, incurring total response costs of approximately $400,000.[34] In *United States v. Fleet Factors Corp.* (*Fleet Factors I*), the EPA, on behalf of the federal government, brought suit for reimbursement, naming Fleet as a PRP.[35]

A. *Fleet Factors I*

In *Fleet Factors I*, the Southern District Court of Georgia considered summary judgment motions from each side.[36] The EPA alleged that Fleet was liable for the response costs pursuant to section 107.[37] To prevail, the EPA had to establish that: "(1) [Fleet fell] within one or more of the classes of liable persons described in [section 107](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

29. *Fleet Factors I*, 724 F. Supp. at 958.

30. *Id.* Goods sold "as is" have no express or implied warranty; the buyer must rely on his inspection, and assume the risk of any defect. BLACK'S LAW DICTIONARY 114 (6th ed. 1990).

31. *Fleet Factors I*, 724 F. Supp. at 958.

32. *Id.*

33. *Id.* at 959.

34. *Id.*

35. *Id.*

36. *Fleet Factors I*, 724 F. Supp. at 959.

37. *Id.*

release has caused the United States to incur 'response costs.' "[38]

Fleet claimed that the first of these three elements, which required the EPA to demonstrate that Fleet was one of the classes of liable persons, could not be met.[39] The EPA rebutted that Fleet fell within the class of persons described as "the owner and operator of the facility," under section 107(a)(1).[40] The court agreed with Fleet, concluding that "Fleet did not own, operate, or otherwise control activities at the facility immediately before the tax foreclosure," since Fleet had never foreclosed on its security interest in the real property.[41]

The EPA alternatively argued that Fleet was liable under section 107(a)(2), which imposes liability on " '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 . . . .' "[42] Invoking the Secured Creditor Exemption,[43] the court noted that the phrases " 'participating in the management of a . . . facility' and 'primarily to protect his security interest,' [permitted] secured creditors to provide financial assistance and . . . management advice to its debtors without risking CERCLA liability if the secured creditor[s] [do] not participate in . . . day-to-day management . . . ."[44]

---

38. *Id.* *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1043-48 (2d Cir. 1985).

39. *Fleet Factors I*, 724 F. Supp. at 960.

40. *Id.*

41. *Id.*

42. *Id.*

43. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A). *See supra* note 20.

44. *Fleet Factors I*, 724 F. Supp. at 960. *Cf.* United States v. Mirabile, 1985 Envtl. L. Rep. 10,944, 10,995 (E.D. Pa. 1985) (holding that a secured creditor's exclusion from CERCLA liability applies if the secured creditor "does not become overly entangled in the affairs of the actual owner or operator of a facility"). *But see* Michael I. Greenberg and David M. Shaw, Note, *To Lend or Not to Lend — That Should Not Be the Question: The Uncertainties of Lender Liability Under CERCLA*, 41 DUKE L.J. 1211, 1224-38 (1992) (discussing the different approaches used by the court to categorize "participation in management of a facility" and "primarily to protect his security interest").

The court found that Fleet's participation at the facility did not warrant the imposition of liability "before Baldwin entered the facility to prepare for, and conduct, the auction."[45] However, Fleet's activities at the facility between the time that Baldwin entered the facility to prepare for the auction on June 22, 1982, and the time that Nix finally left the facility in or around December, 1983,[46] presented a genuine issue of material fact[47] as to Fleet's liability; thus, the court denied both summary judgment motions.[48]

B. *Fleet Factors II*

Less than two years later, in *United States v. Fleet Factors Corp.* (*Fleet Factors II*), the Eleventh Circuit Court of Appeals reaffirmed the district court's holding on the issue of Fleet's liability under section 107(a)(1),[49] concluding that "the plain meaning of the phrase 'immediately beforehand' means without intervening ownership, operation, and control."[50] Fleet could not be held liable because it did not own, operate, or control SPW immediately prior to Emanuel County's acquisition through the tax lien foreclosure.[51] The court noted that "[t]o reach back to Fleet's involvement with the facility prior to December 1983 in order to impose liability would torture the plain statutory meaning of 'immediately beforehand.' "[52]

The court then addressed whether Fleet was liable under section 107(a)(2),[53] focusing on whether the Secured Creditor Exemption excluded Fleet from the definition of a liable per-

45. *Fleet Factors I*, 724 F. Supp. at 960.

46. *Fleet Factors II*, 901 F.2d 1550, 1559-60 (11th Cir. 1990).

47. FED. R. CIV. P. 56(c). *See* Adickes v. S.H. Kress, 398 U.S. 144, 153 (1970); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

48. *Fleet Factors I*, 724 F. Supp. at 961. Fleet then brought an interlocutory appeal against the district court's denial of its motion for summary judgment. *Fleet Factors II*, 901 F.2d at 1552.

49. *Fleet Factors II*, 901 F.2d at 1552.

50. *Id.* at 1555.

51. *Id. See supra* text accompanying note 40.

52. *Fleet Factors II*, 901 F.2d at 1555.

53. *Id.*

son.[54] The court noted that Fleet maintained a security interest in the facility by holding "an 'indicia of ownership' in the facility through its deed of trust to SPW."[55] The issue of whether Fleet participated in the management sufficiently to incur liability, however, required a more critical review.

The court rejected the district court's "day-to-day operational test,"[56] and reasoned that the "construction of the statutory exemption [was] too permissive towards secured creditors who are involved with toxic waste facilities."[57] "In order to achieve the 'overwhelming remedial' goal of the CERCLA statutory scheme, ambiguous terms should be construed to favor liability for [government response costs]."[58] Accordingly, the court adopted a standard where the secured creditor need neither involve itself in day-to-day operations nor participate in management decisions regarding hazardous waste.[59] Under this standard, "a secured creditor may incur section [107](a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."[60] Hence, a lender "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."[61]

---

54. The construction of the Secured Creditor Exemption was an issue of first impression in the appellate courts. *Id.* at 1556.

55. *Id.*

56. *See supra* note 43 and accompanying text. *See also* Geoffrey K. Beach, Note, *Secured Creditor CERCLA Liability After* United States v. Fleet Factors Corp. — *Vindication of CERCLA's Private Enforcement Mechanism*, 41 CATH. U. L. REV. 211, 235 (1991).

57. *Fleet Factors II*, 901 F.2d at 1557.

58. *Id. See* Florida Power & Light Co. v. Allis Chalmers Corp. 893 F.2d 1313, 1317 (11th Cir. 1990).

59. *Fleet Factors II*, 901 F.2d at 1557-58.

60. *Id.* at 1557 (citation omitted).

61. *Id.* at 1558. Under this test, a secured creditor can continue to monitor any facet of a borrower's operation and involve itself in "occasional and discrete financial decisions" to protect its security interest without risking liability. *Id.* The court stated that fears that its interpretation would create "disincentives for lenders to extend financial assistance to businesses with potential hazardous waste problems and encourag[e] secured creditors to distance themselves from management actions" of borrowers were baseless. *Id.* The court intended

The court found that the Secured Creditor Exemption protected Fleet from liability in its involvement with SPW from 1976 until SPW ceased operations in February, 1991.[62] However, Fleet's involvement increased substantially after the cessation of operations. For instance, Fleet required that SPW obtain its approval before shipping its goods to customers, dictated the nature and time of the shipment, supervised activities at the site, and contracted with Baldwin to dispose of the inventory and equipment.[63] The court determined that these facts, if proven, would be sufficient to remove Fleet from protection under the Secured Creditor Exemption. In addition, the court found Fleet's involvement in the financial and operational management of the facility sufficient to impose liability.[64] Furthermore, "Fleet's involvement at the facility from the time it contracted with Baldwin in May 1982 until Nix left the facility in December 1983 . . . [fell] outside"[65] the Secured Creditor Exemption. The court remanded the case for further proceedings, due to the district court's error in construing the Secured Creditor Exemption "to insulate Fleet from CERCLA liability for its conduct prior to June 22, 1982," and disputed issues of material fact which remained regarding liability under section 107(a)(2) for subsequent activities.[66]

IV. The Lender Liability Rule

In *Fleet Factors II*, the Eleventh Circuit broadened the scope of lender liability to include secured creditors who did

---

its ruling to spur secured creditors to thoroughly investigate potential borrowers' hazardous waste policies and means of treatment, and to apprise borrowers that inadequate waste treatment and disposal would endanger current and future financing. *Id.* "Once a secured creditor's involvement with a facility becomes sufficiently broad that it can anticipate losing its exemption from CERCLA liability, it will have a strong incentive to address hazardous waste problems at the facility rather than studiously avoiding the investigation and amelioration of the hazard." *Id.* *See* Greenberg & Shaw, *supra* note 43, at 1212.

62. *Fleet Factors II*, 901 F.2d at 1559.
63. *Id.*
64. *Id.*
65. *Id.* at 1559-60.
66. *Id.* at 1560.

not foreclose their security interests, fashioning a standard of environmental liability that "stirred the financial community."[67] The new standard meant that prudent secured creditors had to take preliminary measures, such as investigations of prospective borrowers, before lending.[68] No longer were creditors liable only if they influenced day-to-day operations;[69] a lender who participated in financial management to a degree indicating a capacity to influence the treatment of hazardous waste was liable by law.[70] The court determined that despite the "clear risk that innocent borrowers will find it difficult to obtain credit because of the nature of their business," such a narrow construction of the Secured Creditor Exemption was justified because Congress intended to spread cleanup costs over the entire industry.[71]

The Lender Liability Rule was the EPA's response to *Fleet II*'s failure to specify the degree of participation sufficient to support the inference that a secured creditor could influence a borrower's treatment of hazardous waste. The EPA issued the Lender Liability Rule to merely "define the meaning of certain statutory elements" of CERCLA.[72] The EPA stressed that its interpretation should be construed not as an attempt to administratively overrule *Fleet Factors II*, but rather as an extension of the opinion.[73]

The Lender Liability Rule provided that "[a] person who maintains indicia of ownership primarily to protect a security interest in a . . . facility, and who does not participate in the management of the . . . facility, is not an 'owner or operator' of such facility under CERCLA §§ [107](a)(1) or [107](a)(2)."[74]

---

67. *Fleet Factors III*, 819 F. Supp. 1079, 1082 (S.D. Ga. 1993).

68. *Fleet Factors II*, 901 F.2d at 1558.

69. *Id.* at 1557.

70. *Id. See also supra* note 60 and accompanying text.

71. *Id.* at 1558 n.12 (citing Scott Wilsdon, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 809, 817-20 (1992) (arguing that *Fleet Factors* standard is consistent with principles of CERCLA)).

72. National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (1992) [hereinafter Preamble].

73. *See* Preamble, *supra* note 71, at 18,369.

74. 40 C.F.R. § 300.1100.

More importantly, the Lender Liability Rule defined "participation in management," the provision of section 107 left unaddressed by *Fleet II*.[75] The EPA announced that, for the purpose of the Secured Creditor Exemption, "participation in the management of a . . . facility," meant the creditor's "actual participation in the management or operational affairs"[76] of the borrower. The term did not encompass the creditor's "mere capacity to influence, or ability to influence, or the unexercised right to control facility operations."[77] The Lender Liability Rule explained that a creditor participates in management, only if the creditor:

> (i) Exercises decisionmaking control over the borrower's environmental compliance, such that the holder has undertaken responsibility for the borrower's hazardous substance handling or disposal practices *or* (ii) [e]xercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with respect to: (A) [e]nvironmental compliance or (B) [a]ll, or substantially all, of the operational (as opposed to financial or administrative) aspect of the enterprise other than environmental compliance. (emphasis added) (General Test).[78]

---

75. *Id.* § 300.1100(c). In addition to the Eleventh Circuit, other jurisdictions have established different meanings of "participation in management" without establishing a uniform standard. *See, e.g.*, United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986); United States v. Mirabile, 15 Envt'l. L. Rep. 20,994 (E.D. Pa. 1985); Guidice v. BFG Electroplating & Manufacturing Co., 732 F. Supp. 556 (W.D. Pa. 1989); United States v. Nicolet, 29 Envtl. Rep. Cas. 1851 (E.D. Pa. 1989).

76. 40 C.F.R. § 300.1100(c)(1).

77. *Id.*

78. *Id.* § 300.1100(c)(1)(i)-(ii). "Operational aspects of the enterprise include functions . . . of the facility or plant manager, operations manager, chief operating officer, or chief executive officer. Financial or administrative aspects include functions such as that of credit manager, accounts payable/receivable manager, personnel manager, controller, chief financial officer, or similar functions." *Id.* § 300.1100(c)(1)(ii)(B). A holder "maintains indicia of ownership . . . primarily to protect a security interest . . . [and] includes the initial holder . . . , any subsequent holder . . . , a guarantor of an obligation, surety, or any other

The Lender Liability Rule identified a range of specific activities a secured creditor could conduct without incurring liability, subdividing them into four categories: (1) actions at the inception of the loan or other transaction;[79] (2) policing the security interest or loan;[80] (3) work out activities;[81] and

---

person who holds ownership indicia primarily to protect a security interest . . . ." *Id.* § 300.1100(a)(1).

79. *Id.* § 300.1100(c)(2)(i). This section further provides in part:
> A prospective holder who undertakes or requires an environmental inspection of the . . . facility in which indicia of ownership are to be held, or requires a prospective borrower to clean up a . . . facility or to comply . . . with any applicable law or regulation, is not by such action considered to be participating . . . in the facility's management.

Id.

80. *Id.* § 300.1100(c)(2)(ii)(A). This section further provides in part:
> A holder who engages in policing activities prior to foreclosure will remain within the exemption provided that the holder does not by such actions participate in the management of the . . . facility. . . . Such actions include, but are not limited to, requiring the borrower to clean up the . . . facility during the term of the security interest; requiring the borrower to comply with . . . applicable federal, state, and local environmental and other laws, rules and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the . . . facility . . . in which indicia of ownership are maintained, or the borrower's business or financial condition during the term of the security interest; or taking other actions to adequately police the loan or security interest. . . .

Id. The courts, however, have failed to clarify whether a lender can pursue this policing function without incurring liability.

81. 40 C.F.R. § 300.1100(c)(2)(ii)(B). This section further provides:
> A holder who engages in work out activities prior to foreclosure and its equivalents will remain within the exemption provided that the holder does not by such action participate in the management of the . . . facility. '[W]ork out' refers to those actions by which a holder, at any time prior to foreclosure and its equivalents, seeks to prevent, cure, or mitigate a default by the borrower or obligor; or to preserve, or prevent the diminution of, the value of the security. Work out activities include, but are not limited to, restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring and exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties,

(4) foreclosure or post-foreclosure activities.[82] The General Test applied only to the first three categories. To avail itself of the foreclosure provisions under the fourth category, a creditor must not have participated in management, as defined by the General Test, prior to foreclosure.

The Lender Liability Rule clearly reduced a secured creditor's risk of liability absent clear participation in management, in direct contrast with the EPA's prior policy of imposing stringent lender liability.[83] Moreover, the EPA once again embraced the "day-to-day" analysis rejected by the *Fleet II* court. Further, the Lender Liability Rule reinforced the Secured Creditor Exemption, furthering CERCLA's purpose of protecting creditors against hazardous waste disposal liability.[84] In response to the promulgation of the Lender Liability Rule, both parties, in *United States v. Fleet Factors Corp.* (*Fleet Factors III*), again filed motions for summary judgment.[85]

V. Return to *Fleet Factors*

A. *Fleet Factors III*

Resolution of the motions required a "meshing of the *Fleet Factors II* decision and the EPA's . . . Lender Liability Rule [regarding] CERCLA's Secured Creditor Exemption."[86]

---

covenants, conditions, representations or promises from the borrower.

Id.

82. *Id.* § 300.1100(d). This subsection provides in part:
A holder, who did not participate in the management prior to foreclosure and its equivalents, may sell, re-lease property held pursuant to a lease financing transaction, . . . liquidate, maintain business activities, wind up operations, undertake any response action under § 107(d)(1) of CERCLA or under the direction of an on-scene coordinator, and take measures to preserve, protect or prepare the secured asset prior to sale or other disposition.
Id. § 300.1100(d)(2).

83. Greenberg & Shaw, *supra* note 43, at 1239 ("Bowing to political pressures from both lenders and advocates for federal agencies, . . . the EPA . . . proposed a ruling that reversed its hard-line position.").

84. 40 C.F.R. § 300.1100.

85. *Fleet Factors III*, 819 F. Supp. 1079, 1082 (S.D. Ga. 1993).

86. *Id.* at 1085.

The Southern District Court of Georgia recognized that it must defer to the EPA's reasonable interpretation of CERCLA.[87] Since the EPA administers CERCLA and the scope of the Secured Creditor Exemption was ambiguous,[88] the court noted that deference to the EPA's interpretation of the Lender Liability Rule was warranted.[89] However, since the court need only rule on Fleet's motion for summary judgment, and not establish a comprehensive test for resolving all Secured Creditor Exemption issues, the court recognized its duty to follow the direction of the Court of Appeals concerning a statute silent on or ambiguous about a particular issue.[90] Unwilling to upset the balance, the court, rather summarily, determined that subjecting the theories of lender liability established under *Fleet Factors II*, which imposed "liability when the secured creditor either (1) acts as a day-to-day manager, or (2) without acting as day-to-day manager, otherwise 'directly affects or controls the facility's hazardous substance handling or disposal practices,' "[91] was consistent with the General Test of the Lender Liability Rule.[92]

Having concluded that the Lender Liability Rule is a consistent extension of *Fleet Factors II*, the court applied the Rule to decide whether Fleet was protected by the Secured Creditor Exemption. The court addressed Fleet's activities in two parts: "(1) the period after SPW ceased operations (February 1981 to May 1982) and (2) the period after Fleet foreclosed on SPW's inventory, equipment, and machinery (May 1982 to December 1983)."[93]

The General Test required actual participation and not mere capacity to influence.[94] "A secured creditor is within

87. *Id.*

88. *See* Greenberg & Shaw, *supra* note 43, at 1212.

89. *Fleet Factors III*, 819 F. Supp. at 1085.

90. *Id.* at 1088.

91. *Id. See* Preamble, *supra* note 71, at 18,359.

92. *See Fleet Factors III*, 819 F. Supp. at 1088. *Cf.* Greenberg & Shaw, *supra* note 43, at 1242 (the EPA's proposed rule, which was codified as the General Test, explicitly "rejects the *Fleet Factors II* 'capacity to influence' language . . . .").

93. *Fleet Factors III*, 819 F. Supp. at 1089.

94. *Id. See supra* text accompanying note 76.

[this] definition if it exercises decision making control . . . at the level comparable to that of a general manager"[95] as specified by the General Test.[96] The court acknowledged that the parties did not dispute Fleet's involvement with SPW operations during the pre-foreclosure period.[97] The issue was whether Fleet's actions rose to a level that warrants liability as defined in the General Test.[98]

The EPA and the Court of Appeals recognized that Congress intended the Secured Creditor Exemption to protect secured creditors normally conducting business.[99] Thus, the court considered "whether a reasonable factor facing Fleet's circumstances" would have conducted itself as Fleet had.[100] Such analysis was "not intend[ed] to abrogate the provisions of the [R]ule; instead, the reasonableness of Fleet's actions [was] included to ensure that . . . the Secured Creditor Exemption protects secured creditors involved in the normal course of their business."[101]

Applying the General Test to Fleet's production and personnel activities,[102] the court determined that Fleet's exemption hinged on whether Fleet extended its control beyond the mere financial and administrative aspects of SPW's operations. The court denied the EPA's summary judgment motion, concluding that Fleet did not participate in the management of SPW as contemplated by the Lender Liability Rule.[103] However, the court found that many unanswered

95. *Fleet Factors III*, 819 F. Supp. at 1089.

96. 40 C.F.R. § 300.1100(c)(1)(i). *See supra* text accompanying note 77 (the General Test in full).

97. *Fleet Factors III*, 819 F. Supp. at 1089.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Fleet Factors III*, 819 F. Supp. at 1090. Fleet's production and personnel activities included: wiring of funds to SPW's payroll account; making all decisions concerning credit and price terms and the terms of the shipment for all finished goods and for certain overage goods; pre-approving all shipments of goods; approving sale of overage goods and chemical waste drums, and empty drums; and deciding when to terminate the crew of SPW employees. *Id.*

103. *Id.*

questions remained regarding Fleet's presence during the pre-foreclosure period, and denied Fleet's motion as well.[104]

Section 300.1100(d) of the Lender Liability Rule addressed a secured creditor's post-foreclosure activities.[105] Under that subsection, a secured creditor may, with "considerable leeway," wind-up[106] a borrower's operations and "dispose of the foreclosed-upon assets" and still remain protected by the Secured Creditor Exemption.[107] Yet, this protection would be available only if Fleet promptly removed itself from both the property and any management control of the facility.[108] Since the issue of whether Fleet participated in the management of the facility at SPW before foreclosure remained unresolved, the court concluded the foreclosure provision must also await resolution at trial.[109]

The EPA contended that Fleet's failure to foreclose on the real property precluded application of the foreclosure component of the Lender Liability Rule.[110] The court held that the foreclosure component applied because Fleet foreclosed on the inventory, equipment, and machinery,[111] reasoning that although "it is true that the [R]ule does not specifically embrace the foreclosure of inventory, equipment, and machinery, . . . it is equally true that the [R]ule does not restrict itself to real property."[112] Accordingly, the court denied the summary judgment motions of both parties.[113]

However, the EPA raised a new claim, contending that Fleet was liable for having arranged for disposal of a hazard-

104. *Id.*

105. 40 C.F.R. § 300.1100(d).

106. Post-foreclosure "winding-up" includes actions necessary to "close down a facility's operations, secure the site, and otherwise protect the value of the foreclosed assets for subsequent sale or liquidation." Preamble, *supra* note 71, at 18,379.

107. *Fleet Factors III*, 819 F. Supp. at 1091. *See* 40 C.F.R. § 300.1100(d)(1)-(2) for allowable activities by lenders after foreclosure. *See also supra* note 81.

108. *Fleet Factors III*, 819 F. Supp. at 1091. *See* 40 C.F.R. § 301.1100(d)(2).

109. *Fleet Factors III*, 819 F. Supp. at 1091.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

ous substance.[114] Despite the untimely assertion, the court found that Fleet would not be unduly prejudiced, since the factual analysis would be similar under section 107(a)(2) and (3), and permitted the claim.[115] Moreover, the court felt the EPA's strategy adjustment was understandable, since the "promulgation of the Lender Liability Rule significantly changed the character of [the] case."[116] To resolve Fleet's participation prior to the foreclosure and address the new governmental claim, the case was remanded.[117]

B. *Fleet Factors IV*

Finally, in *United States v. Fleet Factors Corp.* (*Fleet Factors IV*),[118] the Southern District Court of Georgia addressed Fleet's liability under CERCLA for the last time. The court considered whether Fleet was liable as an owner or operator at the time of hazardous waste disposal under section 107(a)(2), or for having arranged for disposal of a hazardous substance under section 107(a)(3). The court also considered whether the Secured Creditor Exemption protected Fleet's actions. Under the Lender Liability Rule, "a secured creditor forfeits the Exemption's protection by either holding ownership indicia other than primarily to protect security interest or by participating in management."[119] The court found that Fleet obtained indicia of ownership primarily to protect its security interest, and thus addressed whether Fleet's participation rose to levels sufficient to impose liability.[120] The court divided its analysis into three areas: "(1) the activities of Fleet at SPW before the arrival of Baldwin [before June 22, 1987]; (2) the activities of Baldwin (Fleet's agent [from May through June, 1982]); and (3) the activities of Nix (another of

114. *Fleet Factors III*, 819 F. Supp. at 1092. *See* CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3).

115. *Fleet Factors III*, 819 F. Supp. at 1092.

116. *Id.*

117. *Id.* at 1093.

118. 821 F. Supp. 707 (S.D. Ga. 1993) [hereinafter *Fleet Factors IV*].

119. *Id.* at 714.

120. *Id.*

Fleet's agents [from August, 1982 through December, 1983])."[121]

1. Section 107(a)(2) Owner and Operator Liability

a. Secured Creditor Exemption

i. Pre-Baldwin Period

Although Fleet's presence increased noticeably between the cessation of SPW operations and Baldwin's arrival, the court held that it did not rise to the level of participation in management.[122] In its attempt to show a violation of the first prong, the EPA claimed Fleet blocked the sale of SPW chemicals and allowed those chemicals to remain on-site and continue leaking.[123] However, the court found that the aborted sale resulted from miscommunicated requests for permissions to sell between Fleet and the then-executive officers of SPW.[124] Fleet's actions did not demonstrate that they took responsibility for handling or disposing of hazardous substances even under the narrow construction of the Lender Liability Rule.[125] Therefore, Fleet's action during that period did not satisfy the first prong of the General Test.[126]

The court also concluded that Fleet did not satisfy the General Test's second prong.[127] The court explained that

121. *Id.*

122. *Id.*

123. *Fleet Factors IV*, 821 F. Supp. at 714.

124. *Id.*

125. *Id.*

126. Under the first prong, a lender participates in management only if it "exercises decisionmaking control over the borrower's environmental compliance, such that the lender has undertaken responsibility for the borrower's hazardous substance handling or disposal practices." 40 C.F.R. § 300.1100(c)(1)(i). *See supra* note 77 and accompanying text.

127. *Fleet Factors IV*, 821 F. Supp. at 716. Under the second prong a lender participates in management only if it

> exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the [lender] has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with respect to . . . environmental compliance or . . . all, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise other than environmental compliance. 40 C.F.R. § 300.1100(c)(1)(ii)(A)-(B).

when analyzing a secured creditor's action under this provision, it must consider "whether the potentially liable secured creditor exercised control over the facility in furtherance of its normal course of business, [and] . . . whether a reasonably and similarly-situated secured creditor would have engaged in those actions."[128] Applying these standards, the court found that Fleet's efforts to ship and sell goods and cloth remaining at SPW and to collect on the accounts receivable for those goods did not constitute the required level of control contemplated under the second prong of the General Test.[129] Thus, Fleet fell outside the General Test because its actions were "tailored" to removing the remaining cloth, a reasonable course of action for a similarly situated secured creditor.[130]

ii. Post-foreclosure: Baldwin and Nix

The Lender Liability Rule included two standards by which secured creditors' actions are measured - the General Test and the foreclosure provisions, which apply to foreclosure and its equivalents.[131] Baldwin's entry onto the SPW facility fell within the definition of foreclosure and its equivalents because Fleet essentially took possession of SPW's assets for liquidation.[132]

Baldwin tidied up and grouped and moved hazardous waste drums in preparation for the liquidation auction.[133] Such actions, the court noted, fell within the meaning of the foreclosure provision, but were still not protected.[134] Under the Lender Liability Rule, removal of hazardous waste must be done as directed by the National Contingency Plan (NCP)

See supra note 77 and accompanying text.

128. *Fleet Factors IV*, 821 F. Supp. at 715. The Secured Creditor Exemption and the Lender Liability Rule expressly require such consideration to "ensure consistency between Congress' intent in creating the Exemption and its application of the Exemption." *Id.*

129. *Id.* at 716.

130. *Id.*

131. *Id.* at 717.

132. *Id.*

133. *Fleet Factors IV*, 821 F. Supp. at 718.

134. *Id.*

or by an NCP on-site coordinator.[135] Baldwin removed "several hundred damaged, corroded, leaking drums" without NCP approval or supervision, and thus, lost protection of the foreclosure provisions.[136] The court stated that "when hazardous substances are readily identifiable as such, are present in significant quantities, and are in such a condition that the environmental threat they pose is apparent, the handling of those substances indicates impermissible participation in management unless it is done in accordance with [the foreclosure provisions]."[137] Baldwin's handling of the drums constituted such impermissible participation because the threat to the environment posed by the handling was "apparent and serious."[138] "Those several hundred drums posed precisely the type [of] threat CERCLA is designed to alleviate, and Baldwin's handling falls far short of the incidental handling that must be tolerated to ensure the foreclosure provisions serve their intended function."[139]

Nix also voided Fleet's protection under the Secured Creditor Exemption by: (1) impermissibly handling a hazardous substance; (2) seriously aggravating a conspicuous environmental hazard; and (3) failing to complete its salvage operation in a reasonably expeditious manner.[140] Having contracted to salvage any equipment and machinery remaining after the liquidation auction in exchange for leaving the site broom-clean, Nix "undertook its task with all the finesse of a Viking raiding party."[141] Nix carelessly deposited drums of chemicals around the site, and permitted asbestos-laden insulation and garbage to collect on the floor.[142] This haphazard activity constituted the same impermissible activity as Baldwin's handling.[143]

---

135. Preamble, *supra* note 71, at 18,379.
136. *Fleet Factors IV*, 821 F. Supp. at 718.
137. *Id.* at 719.
138. *Id.*
139. *Id.* at 720.
140. *Id.*
141. *Fleet Factors IV*, 821 F. Supp. at 720.
142. *Id.*
143. *Id.*

Nix's blatant aggravation of existing environmental problems at the site provided the second basis for voiding Fleet's protection under the Secured Creditor Exemption. "Like handling hazardous substances . . . , aggravating a site's environmental problem should void the Exemption only if it indicates participation in management . . . ."[144] Nix must have known that its harsh treatment of the corroding drums and the haphazard care of the asbestos-laden insulation would compound the environmental risk at the SPW plant. Thus, the court concluded that Nix had consciously decided to proceed despite the known danger, and thereby participated in management.[145]

Nix's failure to complete its contractual agreements in a reasonable time was the third reason for voiding Fleet's protection.[146] The court explained that when real property is not foreclosed, "the real property must be vacated in a reasonably expeditious manner."[147] Nix remained at the site for more than eighteen months after Baldwin's liquidation auction, thereby outstaying any reasonable departure date.[148] Nix's presence constituted an exercise of post-foreclosure control over the facility and a participation in management sufficient to void Fleet's exemption.[149]

b. Disposal

The court next addressed whether Fleet disposed of hazardous substances while Fleet owned or operated SPW.[150] Section 101(29) of CERCLA defines "disposal" by incorporating the meaning provided in the Solid Waste Disposal Act.[151]

144. *Id.*
145. *Id.* at 721.
146. *Fleet Factors IV*, 821 F. Supp. at 721.
147. *Id.* (quoting *Fleet Factors III*, 819 F. Supp. 1079, 1091 (S.D. Ga. 1993)).
148. *Id.*
149. *Id.*
150. *Id.*
151. CERCLA § 101(29), 42 U.S.C. § 9601(29).
> The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment

The court held that Baldwin disposed of a hazardous substance when it moved drums of chemical waste and spilled the contents of one drum.[152] Similarly, Nix disposed of a hazardous substance when it spilled chemical waste and left asbestos insulation around the site.[153] Therefore, Fleet did not qualify for the Secured Creditor Exemption since Fleet's agents, Baldwin and Nix, disposed of a hazardous substance at the SPW site.[154] Accordingly, Fleet was liable under section 107(a)(2) for hazardous waste response costs incurred by the government.[155]

2. Section 107(a)(3) Disposal Liability

Section 107(a)(3) imposes liability on any person who arranges for the disposal or treatment of a hazardous substance at any facility owned or operated by another.[156] Courts have liberally interpreted the words "arranged for" to achieve CERCLA's remedial goals,[157] and to "give effect to Congressional intent that all who participate in the generation and disposal of hazardous wastes should share in cleaning up the harm from their activity."[158] The phrase, however, does require a sufficient connection between the PRP and waste in order to impose liability.[159] This connection may be proven by showing a decision or an obligation to control the hazardous substance.[160]

---

or be emitted into the air or discharged into any waters, including ground waters.

Solid Waste Disposal Act §§ 1002-11012, 1004(3), 42 U.S.C. §§ 6901-6992(k), 6903(3) (1988 & Supp. V 1993).

152. *Fleet Factors IV*, 821 F. Supp. at 721.

153. *Id.*

154. *Id.* at 723-24.

155. *Id.* at 724.

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

157. *Fleet Factors IV*, 821 F. Supp. at 724 (citing Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318 (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)).

158. *Id.* (quoting CPC Int'l, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269, 1277 (W.D. Mich. 1991)).

159. *Id.* (citing General Electric Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 286 (2d Cir. 1992)).

160. *Id.* (citing *General Electric Co.*, 962 F.2d at 286).

The court found that Fleet arranged for disposal because its agreements with Baldwin and Nix specifically involved the disposal of hazardous wastes.[161] When Fleet hired Baldwin to prepare for and conduct an auction, Fleet was aware that such activities would involve cleaning the site and removing the remaining chemical drums, and thus Fleet should have been aware that Baldwin would be handling a hazardous substance.[162] Fleet's contact with Baldwin was the type of arrangement for disposal defined in section 107(a)(3).[163] Also, where Fleet ordered Nix to leave the premises in a "broom-clean" condition, knowing that the site contained hazardous waste, Fleet basically told Nix to dispose of the hazardous waste at SPW.[164] In engaging Nix, Fleet specifically chose to dispose of a hazardous substance, and thus "arranged for" disposal.[165]

The court concluded, however, that under the Secured Creditor Exemption's definition of "owner," Fleet could not be liable under section 107(a)(2) and (3).[166] Having determined that the actions of Baldwin and Nix voided Fleet's protection under the Secured Creditor Exemption, the court noted that Fleet was liable under CERCLA as the owner and operator of the facility, rather than as a person who "arranged for" disposal of a hazardous substance.[167]

VI. FDIC GUIDELINES

On February 25, 1993, before the *Fleet IV* ruling, Stanley J. Poling, Director of the FDIC, sent a letter containing guidelines to the chief executive officers of all FDIC-supervised banks and lending institutions.[168] Mr. Poling's purpose for writing the letter was to provide the lenders with "information and recommendations about implementing an envi-

161. *Id.*
162. *Fleet Factors IV*, 821 F. Supp. at 725.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Fleet Factors IV*, 821 F. Supp. at 724.
168. Poling Letter, *supra* note 10.

ronmental risk program that can be tailored to the needs of the lending institution."[169] The letter also included procedures that would help limit environmental liability associated with real property held as collateral.[170]

These guidelines, in accordance with CERCLA, warned that a secured creditor may incur direct liability for the cost of removing hazardous waste from real property held as collateral.[171] In addition, the guidelines cautioned that a loan may be adversely affected even where real property is neither foreclosed nor taken for collateral.[172] The letter further warned that a secured creditor may be liable for cleanup costs that may far exceed the amount of the loan made to the borrower.[173]

The FDIC guidelines declared that "as part of the institution's overall decision-making process, the environmental risk program should establish procedures for identifying and evaluating potential environmental concerns associated with lending practices and other actions relating to real property."[174] The guidelines advised eight methods to avoid potential environmental liability: (1) train the staff to identify potential environmental hazards; (2) set environmental policy, guidelines and procedures; (3) require environmental review or analysis during the application process; (4) establish structured environmental risk assessment for loan applications raising environmental concerns; (5) set standards for documentation of loan requirements for environmental law compliance; (6) monitor borrowers' activities; (7) avoid participating in the management of the borrowers' operations; and (8) carefully assess liability risk before foreclosure.[175]

To ensure the proper implementation of the environmental risk program, the FDIC recommended training sufficient to enable the secured creditor's staffs to recognize and evalu-

169. *Id.* at 1.
170. *Id.*
171. *Id.*
172. *Id.*
173. Poling Letter, *supra* note 10, at 1.
174. *Id.* at 2.
175. *Id.* at 2-4.

ate potential environmental concerns that may expose the institution to liability.[176] The FDIC also recommended secured creditors provide borrowers with loan policies, manuals, and written procedures when appropriate, and conduct an environmental risk assessment during the loan application process.[177] In addition, where a possible environmental concern exists, the FDIC recommended that a more detailed and structured assessment by a qualified individual be performed.[178]

The FDIC recommended that secured creditors carefully draft their loan documentation to safeguard the institution against potential environmental liability.[179] The environmental risk assessment was to continue for the duration of the loan by monitoring the borrower and the real property for potential environmental concerns.[180] The secured creditor may then claim an exemption from liability as the holder of a security interest, but may lose the exemption if its actions constitute participation in management.[181] In addition, the FDIC cautioned that exposure to environmental liability would significantly increase if the secured creditor took title to the real property through foreclosure.[182]

VII. The Lender Liability Rule Invalidated

On February 4, 1994, the D.C. Circuit Court of Appeals invalidated the Lender Liability Rule. In *Kelley v. EPA*, the State of Michigan and the Chemical Manufacturers Association (CMA) challenged the Lender Liability Rule, claiming it provided an unauthorized safe harbor for secured creditors, thereby denying Michigan and the CMA the opportunity to recover response costs from secured creditors.[183] Michigan and the CMA "argued that EPA lack[ed] statutory authority

176. *Id.* at 3.
177. *Id.*
178. Poling Letter, *supra* note 10, at 3.
179. *Id.* at 4.
180. *Id.*
181. *Id. See* Preamble, *supra* note 8.
182. Poling Letter, *supra* note 10, at 4.
183. *Kelley*, 15 F.3d at 1104.

to define, through its regulations, the scope of lender liability under section 107, an issue only federal courts may adjudicate."[184]

The court recognized that the President had broadly delegated his statutory powers to the EPA, the "administering agency" of CERCLA.[185] However, with respect to specific regulations, the EPA must show "either explicit or implicit evidence of congressional intent to delegate interpretative authority."[186] Absent such congressional intent, the EPA's authority to promulgate the Lender Liability Rule could not be upheld.

The EPA, in its strongest argument,[187] asserted that section 106(b)(2) impliedly authorized it to define "liability" under CERCLA. Under that section, a party that has incurred cleanup costs may petition the EPA for reimbursement of reasonable costs.[188] If the EPA denies the request, the party may appeal to a district court, which can order the reimbursement if the party is not liable.[189] The court may also order reimbursement to a liable party, if the party can demonstrate that the EPA arbitrarily, capriciously, and unlawfully ordered the cleanup.[190] The EPA argued that because it determines whether to reimburse, it must also determine the extent of a party's liability.[191]

---

184. *Id.* at 1104-05.

185. *Id.* (citing Wagner Seed Co. v. Bush, 946 F.2d 918, 920 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992)). *See* 42 U.S.C.A. § 9615 (1993).

186. *Kelley*, 15 F.3d at 1105 (citing Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1303 (D.C. Cir. 1991)). *See* Adams Fruit Co. v. Barret, 494 U.S. 638 (1990) (holding that an agency may not issue a regulation covering "an area in which it has no jurisdiction.").

187. The EPA also argued that under § 105, it was authorized to promulgate the national contingency plan (NCP) setting forth the actions and procedures to be taken in response to contamination. The Court of Appeals refuted the claim, noting that although § 105 "provide[s] the EPA with broad rulemaking authority to craft the NCP, it is hardly a specific delegation of authority . . . to interpret section [107]." *Kelley*, 15 F.3d at 1105 (citing Ohio v. EPA, 838 F.2d 1325, 1331 (D.C. Cir. 1988)).

188. *Id.*

189. *Id.* at 1107.

190. *Id.* at 1106.

191. *Id.*

The court responded that under section 106(b)(2), the EPA does not finally determine liability since the party denied reimbursement may bring action in district court under section 106(b)(2)(B).[192] If the party establishes by a preponderance of the evidence that it is not liable, it prevails under section 106(b)(2)(C). Moreover, a liable party may challenge the reasonableness of the EPA's response order under section 106(b)(2)(D).[193] Therefore, the district court decides the issue of ultimate liability. "Although EPA may well enjoy authority to issue regulations interpreting or implementing subparagraph [106](b)(2)(D), it does not seem that Congress intended the same authority with respect to subparagraphs [106](b)(2)(B) and (C)."[194]

Since the private parties can put questions of liability at issue in district court without government involvement, the EPA cannot argue that Congress intended it to define liability for a class of potential defendants.[195] "Congress, by providing for a private right of action under section 107, had designated the courts, and not the EPA, as the adjudicator of the scope of CERCLA liability."[196]

The court then addressed whether the Lender Liability Rule could be sustained as an interpretive rule. An interpretive rule is based on specific statutory provisions,[197] represents an agency's interpretation of a statute, and is entitled to substantial judicial deference.[198]

The court found that the Lender Liability Rule bore little resemblance to the traditional meaning of "interpretive

192. *Kelley*, 15 F.3d at 1106-07.

193. *Id.* at 1107.

194. *Id.*

195. *Id.*

196. *Id.*

197. United Technologies Corp. v. EPA, 821 F.2d 714, 719 (D.C. Cir. 1987).

198. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). *Chevron* "sets forth the reigning rationale for judicial deference to agency interpretation of statutes, . . . premised on the notion that Congress implicitly delegated to the agency the authority to reconcile reasonably statutory ambiguities." *Kelley*, 15 F.3d at 1108. Thus, a logical precondition is that Congress delegate specific administrative authority. Adams Fruit Co. v. Barret, 494 U.S. 638, 649 (1990).

rule."[199] The "EPA does not really define specific statutory terms, but rather takes off from those terms and devises a comprehensive regulatory regimen to address the liability problems facing secured creditors."[200] Moreover, the same logic "that prevents the [EPA] from issuing the rule as a substantive regulation precludes judicial deference to [its] offered 'interpretation.' "[201] Where Congress meant the judiciary, not the EPA, to determine liability issues, the EPA's interpretation of liability may not be given deference.[202] Because Congress does not give the EPA authority to interpret a statute, "and gives the agency authority only to bring the question to a federal court as the 'prosecutor,' deference to the agency's interpretation is inappropriate."[203] In addition, "even if the EPA enjoys authority to determine" the liability issues administratively, "deference is withheld if a party can bring the issue independently to federal court under a private right of action."[204] Since the EPA has no authority to determine liability, the court therefore held the Lender Liability Rule invalid.[205]

VIII. Discussion

Until a few years ago, the EPA seemed almost invincible in its interpretation of CERCLA.[206] Even in the face of the *Fleet Factors II* decision, the EPA was able to provide a "safe harbor" for lenders within its Lender Liability Rule.[207] With

199. *Kelley*, 15 F.3d at 1108.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id. See* United States v. Western Electric Co., 900 F.2d 283, 297 (D.C. Cir. 1990).
204. *Kelley*, 15 F.3d at 1108. *See* Litton Financial Printing Div. v. NLRB, 111 S. Ct. 2215 (1991).
205. *Kelley*, 15 F.3d at 1109.
206. Stephen L. Kass & Michael B. Gerrard, *The Taming of the EPA*, N.Y. L.J., April 23, 1993, at 3 [hereinafter Kass & Gerrard, *The Taming of the EPA*].
207. *Hearing on Lender Liability Issues Under Superfund Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 37 (1990) (statement of James M. Strock, EPA Assistant Administrator for Enforcement, promising agency interpretive rule to provide "safe harbor" for lenders). *See* Randall J. Burke, *Much Ado*

the invalidation of the Lender Liability Rule by the D.C. Circuit, the reign of EPA's dominance over the interpretation of CERCLA appears to have come to an end. The loss of the Lender Liability Rule's safe harbor calls into question the value of the FDIC guidelines which served as a map to the safe harbor. Again lost at sea are the secured creditors.[208] The following sections discuss the implications of the FDIC's guidelines and the effect that the invalidation of the Lender Liability Rule will have on secured creditors in terms of environmental liability.

A. Impact of the FDIC Guidelines on Lending Institutions and Environmental Liability

Because of the FDIC guidelines, "environmental precautions for banks have moved from being prudent to being mandatory."[209] Lenders that fail to adopt sufficient precautions and fail to comply with the guidelines risk being censure by the FDIC and possible shareholder derivative actions.[210] Lenders must now concern themselves with implementing environmental risk programs to avoid additional liability.

According to a FDIC representative, the guidelines were designed to provide some security for FDIC-supervised lending institutions against environmental liability.[211] The guidelines were presented to banks to facilitate FDIC's determination of which banks and lending institutions were in an "unsafe and unsound" condition.[212] In fact, the guidelines are not regulations and were never intended to act as such.[213] To date, the representative added, the FDIC has neither sanc-

---

About Lending: Continuing Vitality of the Fleet Factors Decision, 80 GEO. L.J. 809, 811 (1992); Patricia T. Bayermer, *New EPA Lender Rule: Safe Harbor or Shoals?*, N.J. L.J., October 5, 1992, at 7.

208. *Cf.* Beach, *supra* note 55, at 250 (CERCLA "has created a very effective private enforcement mechanism in which the lender play a commanding and . . . constructive role.").

209. Kass & Gerrard, *New Worries for Banks*, *supra* note 2, at 4.

210. *Id.*

211. Telephone Interview with a FDIC Representative (Oct. 17, 1994).

212. *Id.*

213. *Id.*

tioned nor withdrawn the insurance of any lender.[214] The FDIC's primary concern is the stability of FDIC-insured banks rather than sanctioning or censoring banks who fail to comply with the guidelines.[215]

The guidelines seek to assist secured creditors in avoiding CERCLA liability at the outset. Full compliance with the FDIC guidelines help assure that secured creditors maintain their FDIC status,[216] and also helps protect lending institutions from incurring environmental liability. The risk assessment programs help protect the secured creditor by encouraging them to explore the potential environmental risk of the borrower before incurring lender liability.

From the perspective of the secured creditor, the FDIC guidelines are old news.[217] By the time the FDIC issued the guidelines, most lending institutions had already developed environmental risk assessment programs.[218] The broad and reasonable nature of the guidelines caused secured creditors to make only insignificant revisions to their risk analysis scheme.[219] Although Stanley J. Poling's letter may have been a "wake-up call" for small to medium sized lending institutions, Evan Henry, Manager of Environmental Services at Bank of America, stated that the guidelines created no new concerns for the larger lending institutions because most of them had already implemented risk assessment programs that complied with the guidelines.[220]

In most instances, Evan Henry added, the costs required to implement these programs are passed on to the borrowers, as part of the loan application process.[221] Lending institutions nowadays will generally require borrowers to incur the cost of examining the borrower's assets and conducting an en-

214. *Id.*
215. *Id.*
216. *See* Kass & Gerrard, *New Worries for Banks*, *supra* note 2, at 3.
217. Telephone Interview with Evan Henry, Manager of Environmental Services, Bank of America (Nov. 16, 1994).
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*

vironmental risk assessment before loans are secured.[222] Few lending institutions actually incur the costs as overhead.[223] For these reasons, the FDIC guidelines have not proven to be as deleterious to the lending institutions as predicted by environmental lawyers when they were first issued.

B. The Defeat of the Lender Liability Rule

When the EPA issued the Lender Liability Rule, over 350 entities responded, some expressing their approval while others opposing the Rule.[224] Those who hoped that the Lender Liability Rule would limit environmental liability for secured creditors were heavily disappointed by the decision of *Fleet Factors IV*. All hope appeared to have been lost when the D.C. Circuit struck down the Lender Liability Rule in *Kelley*.

With the invalidation of the Lender Liability Rule, the *Fleet Factors* cases pose a significant hurdle for secured creditors. The "safe harbor" that the EPA once provided for lenders had disappeared. However, the essence of the Lender Liability Rule has reappeared in recent judicial decisions.[225] In those cases, the courts have employed an analysis similar to the Lender Liability Rule.[226] Moreover, no cases to date have applied the *Fleet Factors* "capacity to influence" standard. As one commentator noted, "[t]he evolving judicial consensus on the parameters of the Secured Creditor Exemption resembles the invalidated EPA rule more than the *Fleet Factors* standard that created such apprehension among lenders."[227] Thus, the fear that the courts would immediately adopt the *Fleet Factors* standard has remained unrealized.[228]

222. Telephone Interview with Evan Henry, Manager of Environmental Services, Bank of America (Nov. 16, 1994).

223. *Id.*

224. Bayermer, *supra* note 206, at 7.

225. Jean M. McCarroll, *CERCLA Spreads Its Traps to Snare Lenders, Contractors*, N.Y. L.J., June 13, 1994, at S2.

226. *See* Northeast Doran Inc. v. Key Bank of Maine, 15 F.3d 1 (1st Cir. 1994); United States v. McLamb, 5 F.3d 69 (4th Cir. 1993); Waterville Industries Inc. v. Finance Authority of Maine, 984 F.2d 549 (1st Cir. 1993).

227. McCarroll, *supra* note 224, at S4.

228. *See* Burke, *supra* note 206, at 809-10. Mr. Burke argues that

In addition, lending institutions consider the *Fleet Factors* decision an "aberration."[229] According to Evan Henry, despite the *Fleet Factors* cases and the invalidation of the Lender Liability Rule, most lending institutions have not changed their environmental policy on lending.[230]

The calm which presently exists, however, may end after the courts completes their digestion of the Lender Liability Rule. The courts may adopt the *Fleet Factors* "capacity to influence" standard in place of its current-trend analysis. Although courts to date have been lenient in their application of the rigid standard expounded in *Fleet Factors II*, they have unimpeded authority to change the standard if they so please.

When the EPA sought congressional relief it was rebuffed.[231] As suggested in *Kelley v. EPA*, the only way to protect the lender from the court's strict interpretation of the Secured Creditor Exemption may be by congressional intervention. Whether the EPA can succeed in getting a bill through Congress which can withstand the scrutiny of the court remains to be seen.

C. Continuing the Ride on the Roller Coaster

The FDIC guidelines and the invalidation of the Lender Liability Rule are concerns for lenders and may impact their policies toward borrowers. The FDIC guidelines place lending institutions in a difficult position in which they now must implement procedures to avoid environmental liability as well as shareholder action. The FDIC guidelines appear to impose a duty upon the lender to avoid environmental liabil-

---

> [d]espite the proliferation of negative commentary which greeted the *Fleet Factors* opinion, the decision has resulted not in a credit crunch or disruption of the commercial economy, as many a cassandra was quick to prophesize, but rather the decision has led to positive reevaluation of the role of the lender in ensuring compliance with environmental regulations . . . .

Id.

229. Telephone Interview with Evan Henry, Manager of Environmental Services, Bank of America (Nov. 16, 1994).

230. *Id.*

231. *See Kelley*, 15 F.3d at 1109.

ity, regardless of the borrower's actions or omissions.[232] The guidelines administer the *Fleet Factors* holding by requiring the secured creditor's to implement the environmental risk assessment programs. Unlike *Fleet Factors*, however, not only will lending institutions incur liability under federal law, they may also incur additional liability from shareholders suits and sanctions from the FDIC.

The imposition of liability on "secured creditors for low-level participatory conduct will reduce lending to businesses, prevent secured creditors from conducting effective loan workout activities, and destroy any incentive for secured creditors to assist in resolving a debtor's environmental problems."[233] Those in the financial community stunned by *Fleet Factors II* will have even greater difficulty accepting the new guidelines. Lending institutions, who already considered securing debt to corporations a risky investment, now must decide whether allocating capital to such potentially liable investments is worth the risk.

Even businesses that operate to eradicate environmental hazards will suffer as secured creditors shy away from environmentally risky loans. "Ironically, this [institutional shyness] does not differentiate between financings that would benefit the environment and those that would 'price out' environmentally risky enterprises, and ignores that financially impaired firms may be more likely to evade environmental laws."[234]

Although in theory the FDIC guidelines appear highly intrusive to lending institutions in their policy toward borrowers, response by the lending institutions themselves creates a different picture. For lenders, the FDIC guidelines were a very reasonable reaction to the increase in environmental liability among secured creditors.[235] Most lending institutions already had an environmental risk assessment program that is as stringent as, if not more so than the FDIC

232. *See* Kass & Gerrard, *New Worries for Banks*, *supra* note 2, at 3.

233. Beach, *supra* note 55, at 250.

234. Greenberg & Shaw, *supra* note 43, at 1213.

235. Telephone Interview with Evan Henry, Manager of Environmental Services, Bank of America (Nov. 16, 1994).

guidelines.[236] That, coupled with the purpose of the FDIC guidelines: to prevent liability of FDIC-insured banks and to determine which banks are "unsafe and unsound,"[237] makes the FDIC guidelines innocuous in terms of its impact on lending institutions and environmental liability.

The invalidation of the Lender Liability Rule altogether eliminated the "safe harbor" the lenders temporarily enjoyed. With no relief in sight, the *Fleet Factors* cases suddenly become an even greater obstacle for lending institutions. The reason the *Fleet Factors* court narrowed the liability of lenders under CERCLA was because of EPA's timely intervention. But with the invalidation of the Lender Liability Rule, the courts appear to have unfettered discretion to apply the *Fleet Factors* standard.

Early indications, as noted previously, show that despite the invalidation, remnants of the Lender Liability Rule's principles are still lingering. Lenders do not anticipate the return of *Fleet Factors* but the court's next move is uncertain. This impairs lending institutions from making a decision regarding its own environmental ramifications. As a result, it appears that the roller coaster of environmental liability continues on.

IX. Conclusion

The roller coaster of lender liability which started with the enactment of CERCLA continues. Secured creditors clung to their seats as Congress, the judiciary, and the administrative agencies sent them tumbling down the tracks. They experienced their first plunge when the Eleventh Circuit in *Fleet Factors II* ruled that lenders may be liable for the cost of cleanup under CERCLA even where they had not foreclosed on the facility. In response to the stringent ruling, EPA enacted the Lender Liability Rule which promised a "safe harbor" for secured creditors and attempted to stabilize the ride. Yet, despite the introduction of the Lender Liability Rule, the district court in *Fleet Factors III* found Fleet liable.

236. *Id.*
237. Telephone Interview with FDIC Representative (Oct. 17, 1994).

In 1993, while the *Fleet Factors* cases were pending, the FDIC issued guidelines suggesting that banks and lending institutions implement environmental risk assessment programs to avoid environmental liability and imposition of sanctions. Most of the impact of the guidelines was absorbed because lending institutions had already adopted effective risk assessment programs before the issuance of the guidelines. The D.C. Circuit's invalidation of the Lender Liability Rule in *Kelly*, however, may have a serious impact on lenders and their environmental liability. Absent further efforts from the EPA, it appears that the lending institutions will be puppeted by the courts. The FDIC guidelines may have been intended to smooth the roller coaster ride but the invalidation of the Lender Liability Rule may cause lenders to plummet again in the environmental lender liability roller coaster.

PACE ENVIRONMENTAL LAW REVIEW

CUMULATIVE ARTICLES INDEX
Fall 1994

Pace University School of Law
White Plains, New York

CUMULATIVE ARTICLES INDEX

AUTHORS INDEX

TABLE OF BOOK REVIEWS

TABLE OF CASENOTES

TOPICS INDEX

PUBLIC TRUST DOCTRINE

RESEARCH GUIDES

RESOURCE CONSERVATION AND RECOVERY ACT

TABLE OF PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION PUBLICATIONS

First Annual Pace National Environmental Law Moot Court Competition, 1988-1989

a. Introduction, Jeffrey G. Miller, Vol. 6, No. 2, p. 325;
b. Winning Briefs, Vol. 6, No. 2.
    1. Appellant, Hastings College of the Law, University of California, Vol. 6, No. 2, p. 355;
    2. Appellee, Arizona State University College of Law, Vol. 6, No. 2, p. 393; and
    3. Intervenor, Arizona State University College of Law, Vol. 6, No. 2, p. 423;
c. Judges' Memorandum, Vol. 6, No. 2, p. 343;
d. Order, Vol. 6, No. 2, p. 333; and
e. List of Judges and Participants, Vol. 6, No. 2, p. 329.

Second Annual Pace National Environmental Law Moot Court Competition, 1989-1990

a. Winning Briefs, Vol. 7, No. 2,
    1. Appellant, Southern Illinois University School of Law, Vol. 7, No. 2, p. 433;
    2. Appellee, Santa Clara University School of Law, Vol. 7, No. 2, p. 471; and
    3. Intervenor, Vermont Law School, Vol. 7, No. 2, p. 509;
b. Judges' Memorandum, Vol. 7, No. 2, p. 411;
c. Background Order, Vol. 7, No. 2, p. 543; and
d. List of Judges and Participants, Vol. 7, No. 2, p. 405.

Third Annual Pace National Environmental Law Moot Court Competition, 1990-1991

a. Winning Briefs, Vol. 8, No. 2,
    1. Appellant, Western New England College School of Law, Vol. 8, No. 2, p. 475;

Sixth Annual Pace National Environmental Law Moot Court Competition, 1993-1994

a. Winning Briefs, Vol. 11, No. 2,
    1. Appellant, Detroit College of Law, Vol. 11, No. 2, p. 725.
    2. Appellant, University of Baltimore School of Law, Vol. 11, No. 2, p. 759.
    3. Appellee, Brooklyn Law School, Vol. 11, No. 2, p. 787.

b. Confidential Judges' Bench Brief, Vol. 11, No. 2, p. 683.

c. List of Judges and Participants, Vol. 11, No. 2, p. 675.