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Lender Liability: Determining the Scope of the CERCLA Secured Creditor Exemption

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LENDER LIABILITY: DETERMINING THE SCOPE OF THE CERCLA SECURED CREDITOR EXEMPTION

United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 952 (1991)

Appellee, the United States government, filed suit against appellant, Fleet Factors Corporation,[1] under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[2] Appellee sought to recover approximately $400,000 of costs that it had incurred in cleaning up hazardous waste[3] on property in which appel-

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1. United States v. Fleet Factors Corp., 724 F. Supp. 955, 959 (S.D. Ga. 1988), *aff'd* 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 952 (1991). Fleet Factors is a lender which engages in "factoring" agreements. *Id.* at 957. Under a factoring agreement, a lender agrees to advance funds to a borrower against the assignment of the borrower's accounts receivable. C. JOHNSON, W. MEIGO & A. MOSICH, INTERMEDIATE ACCOUNTING 270 (1978). The lender typically will loan only a certain percentage of the face value of the receivables, in order to protect itself in the event that some of the receivables prove to be uncollectible. *Id.* In the instant case, Fleet Factors and the borrower agreed that Fleet Factors would receive an assignment of accounts receivable; a security interest in all of the borrower's equipment, inventory, and fixtures; and a mortgage on the borrower's real property. *Fleet Factors*, 724 F. Supp. at 957.

2. 42 U.S.C. §§ 9601-9675 (1988) [hereinafter CERCLA].

3. United States v. Fleet Factors Corp., 901 F.2d 1550, 1553 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 952 (1991). This comment uses the terms "hazardous waste" and "hazardous substance" interchangeably to refer to "hazardous substance," as defined by 42 U.S.C. § 9601(14) (1988), which provides:

> The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of title 33 [the Federal Water Pollution Control Act], (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 [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 *et seq.*] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], 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, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Id.

lant held a security interest.[4] Appellant moved for summary judgment.[5] The trial court denied the motion for summary judgment, and sua sponte certified the issues for interlocutory appeal.[6] The Eleventh Circuit Court of Appeals HELD, that appellant's efforts to protect its security interest in the facility may have risen to a level of management participation sufficient to impose liability under CERCLA, therefore precluding summary judgment on the issue.[7]

Congress enacted CERCLA in 1980 in response to the growing problem of improper disposal of hazardous waste.[8] CERCLA authorizes the Environmental Protection Agency (EPA) to clean up improperly disposed hazardous wastes.[9] CERCLA also imposes liability on various parties[10] associated with the hazardous waste site in order to recover the "response" costs attributable to the clean up.[11] However,

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

5. *Id.* at 1552.

6. *Id.* at 1553.

7. *Id.* at 1552; *see also* 42 U.S.C. §§ 9601-9675 (1988) for the text of CERCLA.

8. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,995 (E.D. Pa. Sept. 4, 1985). *See* S. REP. No. 848, 96th Cong., 2d Sess. 2 (1980) (for legislative history of CERCLA).

9. *See* 42 U.S.C. §§ 9601(24), 9604 (1988); *Mirabile*, 15 Envtl. L. Rep. at 20.995.

10. The relevant portions of CERCLA provide:

> (a) Covered persons; scope; . . .
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> 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,
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> . . . .
>
> . . . shall be liable for —
>
> (A) all costs of removal or remedial action incurred by the United States Government . . . .;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

42 U.S.C. § 9607(a)(1)-(2), (4).

11. CERCLA defines "response" costs as removal and remedial action costs. 42 U.S.C. § 9601(25) (1988). A removal action is a short term action taken to minimize pollution damage. *See id.* § 9601(23). In a removal action, the EPA is authorized to act with any steps "necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." *Id.* A remedial action is a long range action, consistent with a permanent remedy, to reduce or prevent the release of hazardous substances so they do not spread to cause substantial danger to public health or welfare or the environment. *Id.* § 9601(24). The costs of cleanup are financed by the Hazardous Substance Superfund. I.R.C. § 9507 (1988). After cleanup, the Superfund is reimbursed through suits against parties connected with the hazardous waste disposal. I.R.C. § 9507(b)(2) (1988); 42 U.S.C. § 9607(a) (1988). *See also* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986) (the Hazardous Substance Response Trust Fund to

CERCLA contains an exemption for secured creditors.[12] The extent of this exemption increasingly has become the subject of litigation.[13] The litigious nature of this issue primarily is due to the potentially enormous costs of hazardous waste site cleanup.[14] Based upon the

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which the court refers was repealed effective Jan. 1, 1987. However the Superfund currently in effect is treated as a continuation of the previous trust fund; therefore, the court's analysis remains valid); Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WIS. L. REV. 139, 149-50 (discussing the procedural aspects of the Superfund).

12. 42 U.S.C. § 9601(20)(A) (1988) provides:

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

Id.

13. *See, e.g., Fleet Factors*, 901 F.2d 1550; *Maryland Bank & Trust Co.*, 632 F. Supp. 573; *Mirabile*, 15 Envtl. L. Rep. 20,994.

14. *See* Comment, *supra* note 11, at 140. The EPA has proposed rules to interpret the secured creditor exemption as it applies to lenders and to private or governmental loan guarantors or successors-in-interest. *See E.P.A. Draft Proposal Defining Lender Liability Issues Under the Secured Creditor Exemption of CERCLA*, 21 Env't Rep. (BNA) 1162 (proposed Sept. 14, 1990). A private successor-in-interest, as defined by the proposed rule, is a "subsequent bona fide purchaser of the loan (security interest) in the secondary market." *Id.* at 1163. A governmental successor-in-interest is defined as a "governmental entity that acquired property involuntarily or by operation of statute through failure, dissolution, or other insolvency of a lending institution." *Id.*

The EPA proposed rule provides:

> Consistent with the exemption, the secured creditor may act to protect the 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. 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.
>
> Accordingly, a secured party is considered to be acting within the scope of the exemption if it regularly or periodically monitors the borrower's business, requires or conducts onsite inspections and audits, requires certification of financial information or compliance with applicable duties, laws or regulations, or requires other similar actions, provided that the borrower remains substantially in possession and control of the operations of the facility. . . .
>
> . . . .
>
> Foreclosure, purchase at foreclosure sale, acquisition or assignment of title in lieu of foreclosure, acquisition of a right to title, or other agreement in settlement of the loan obligation, or any other formal or informal manner by which the lender acquires possession for disposition of the borrower's collateral, are generally considered to be actions within the scope of the statutory exemption as necessary to protect the security interest. However, the lender's temporary acquisition must be reasonably necessary to ensure satisfaction or performance of the loan obligation.

difficulty courts have had in determining the intended scope of the secured creditor exemption, a divergence in the case law addressing this issue has emerged.[15]

One of the earliest cases addressing the extent of the secured creditor exemption is *United States v. Mirabile*.[16] In *Mirabile*, the United States filed suit under CERCLA against certain landowners to recover costs incurred in the removal of hazardous wastes from their property.[17] The landowners joined as third party defendants two financial institutions which held mortgages on the subject property.[18] The financial institutions counterclaimed against the United States, alleging that the Small Business Administration (SBA), also a secured creditor, took part in the creation of the hazardous conditions.[19] The defendant financial institutions and the SBA moved for summary judgment.[20]

Addressing the motion for summary judgment, the *Mirabile* court recognized that ruling on the motions would require it to determine the circumstances under which a secured creditor would incur CERCLA liability.[21] The court held that a secured creditor was exempt from CERCLA liability unless it actively participated in "the nuts-and-bolts, day-to-day production aspects of the business,"[22] as opposed to

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> The lender's actions in outbidding or refusing bids from parties offering fair consideration of the property are evidence that the property is no longer being held primarily to protect the security interest. To remain within the exemption after foreclosure, the foreclosing entity must be acting to preserve the assets of the facility for its subsequent sale at the earliest possible time.

Id. at 1164-65. The proposed EPA rule on its face conflicts with the instant case and with *Maryland Bank & Trust Co.*, 632 F. Supp. 573; *see infra* notes 33-39, 53-55 and accompanying text. The EPA proposed its latest draft rule to limit lender liability under CERCLA on June 5, 1991. *EPA Proposal to Limit Liability of Financial Institutions under CERCLA*, 56 BNA's BANKING REPORT 1108 (proposed June 5, 1991). This proposed rule clarifies the definition of "indicia of ownership," and discusses liability of a lender before and after foreclosure. *Id.* at 1112-13. The rule also enunciates particular actions which would constitute "participation in the management" sufficient to create lender liability. *Id.* at 1113-20. *See generally* Braff, *The Lender as Environmental Policeman: Comment of EPA's Draft Lender Liability Rules*, 56 BNA's BANKING REPORT 969 (1991) (critiquing the EPA's draft rules on lender liability).

15. Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261, 1274 (1987).

16. 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985).

17. *Id.* at 20,994.

18. *Id.* at 20,995.

19. *Id.*

20. *Id.* at 20,994-95.

21. *Id.* at 20,995.

22. *Id.* at 20,995-96. Additionally, the *Mirabile* court held that defendant ABT's acquisition of title to the property at a foreclosure sale was irrelevant because such action was clearly taken by ABT to protect its security interest in the property. *Id.* at 20,996.

only the financial aspects of management. The court reasoned that Congress intended to create secured creditor liability on the basis of operational, rather than financial, involvement.[23] On the basis of this distinction, the court granted summary judgment in favor of the SBA and one of the financial institutions.[24]

One year after the *Mirabile* decision, the United States District Court for the District of Maryland considered the same issue in *United States v. Maryland Bank & Trust Co.*[25] However, the *Maryland Bank & Trust Co.* court differed from *Mirabile* regarding the type of actions which would trigger secured creditor liability.[26] In *Maryland Bank & Trust Co.*, the defendant previously had held a mortgage on a parcel of land which the owners had used as a hazardous waste dump site.[27] After the debtor defaulted on the mortgage,[28] the defendant foreclosed on the property, ultimately purchasing it at a foreclosure sale.[29]

Approximately eighteen months later, the EPA initiated cleanup actions at the site.[30] Thereafter, the agency brought a CERCLA action against the defendant as owner and operator of the site.[31] The defendant claimed it was exempt from CERCLA liability because it was a former mortgagee of the property.[32]

In response to the defendant's claim, the *Maryland Bank & Trust Co.* court held that the secured creditor exemption covered only those parties who at the time of the EPA's response action held "indicia of ownership"[33] for the purpose of protecting a then-existing security interest.[34] The *Maryland Bank & Trust Co.* court reasoned that an

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23. *Id.* at 20,995-96.

24. *Id.* at 20,996-97. The *Mirabile* court denied Mellon Bank's motion for summary judgment based on a finding that the extent of Mellon Bank's involvement with the management of the facility was an issue of material fact. *Id.* at 20,997. The loan officer participated in an advisory board, monitored accounts, and visited the facility approximately once a week. *Id.* The court stated that a clearer picture of the officer's involvement in management was necessary to determine if his activities placed the creditor outside the secured creditor exemption. *Id.*

25. 632 F. Supp 573 (D. Md. 1986).

26. *See id.* at 578.

27. *Id.* at 575.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 576.

32. *Id.* at 577.

33. *Id.* at 578. *See also* 42 U.S.C. § 9601(20)(A) (1988).

34. *Maryland Bank & Trust Co.*, 632 F. Supp. at 579. The court found the verb tense in the phrase, "holds indicia of ownership," critical to its interpretation of the subsection. *Id.*

exemption from liability for lenders who purchased at a foreclosure sale would convert CERCLA into "an insurance scheme" for lenders.[35] Under such a rule, the court postulated that lenders could purchase polluted property cheaply at foreclosure sales, pay none of the government's cleanup cost, and sell the unpolluted property at its increased value.[36] To avoid this result, the court held that lenders who purchase property should be liable to the same extent as other purchasers at a foreclosure sale.[37] The court found the defendant was not entitled to the secured creditor exemption.[38] Therefore, the court held that the defendant was liable under CERCLA as an "owner and operator" of the facility.[39]

In *Guidice v. BFG Electroplating & Manufacturing Co.*,[40] the court adopted elements of the decisions in both *Mirabile* and *Maryland Bank & Trust Co.*[41] The *Guidice* court determined a secured creditor's liability under CERCLA by distinguishing between two time frames: one, the period prior to foreclosure and purchase of a foreclosure sale, and, two, the period after the defendant's purchase of the property at the foreclosure sale.[42] The *Guidice* court held that prior to foreclosure and purchase, the *Mirabile* standard requiring involvement in the facility's daily operations was the appropriate test of liability.[43] Under this standard, a creditor could provide financial management advice without exposing itself to CERCLA liability, provided that it was not involved in the daily operations of the facility.[44] In support of its conclusion, the court reasoned that a high liability threshold would encourage mortgagees to monitor a mortgagor's use of the property.[45]

The *Guidice* court held that the *Maryland Bank & Trust Co.* rule should apply during the second time frame, which the *Guidice* court

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35. *Id.* at 580.
36. *Id.*
37. *Id.* at 579.
38. *Id.*
39. *Id.*; *see* 42 U.S.C. § 9607(a) (1988).
40. 732 F. Supp. 556 (W.D. Pa. 1989).
41. *Id.* at 562-63.
42. *Id.* at 561.
43. *Id.* at 561-62.
44. *Id.*
45. *Id.* at 562. Implicitly, the court reasoned that the lender would not fear exposing itself to liability through this type of involvement. *See id.* Banks would be protecting their investments and CERCLA goals would be advanced. *Id.* Conversely, the court believed a low threshold of liability would discourage involvement by lenders, and would eliminate a valuable monitoring tool. *Id.*

designated as the period after a creditor's purchase of property at a foreclosure sale.[46] The *Guidice* court found that Congress did not intend to exempt creditors who acquired property through foreclosure.[47] Therefore, the *Guidice* court followed *Maryland Bank & Trust Co.* holding that a lender who purchased property at a foreclosure sale should be liable to the same extent as any other potential purchaser at the sale.[48]

The instant case involved the first appellate interpretation[49] of the CERCLA secured creditor exemption.[50] The instant court explicitly rejected[51] the lower court's acceptance of the *Mirabile* court's interpretation of the exemption.[52] Rather, the instant court stated that it would not require a secured creditor to be involved in a facility's daily operations to be liable under CERCLA.[53] Instead, the court augmented the CERCLA liability analysis to include consideration of the lender's degree of involvement with the property's financial management.[54] Under this test, a secured creditor is liable if its involvement with the facility's financial management is sufficient to support the inference that the creditor could influence decisions relating to hazardous waste disposal.[55]

In fashioning its own test for secured creditor liability, the instant court found the *Mirabile* standard too lenient toward creditors with loans secured by hazardous waste sites.[56] The instant court stated that under such a broad interpretation of the exemption a creditor only would be exposed to CERCLA liability if it was involved with a facility's daily operations.[57] This requirement, according to the instant

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46. *Id.* at 563. The *Guidice* court specifically rejected the *Mirabile* court's holding that foreclosure and repurchase are only attempts to protect the creditor's investment and therefore do not remove the creditor from the scope of the exemption. *Id.*

47. *Id.*

48. *Id. See supra* text accompanying notes 37-39.

49. *Fleet Factors*, 901 F.2d at 1556.

50. 42 U.S.C. § 9601(20)(A) (1988). *See supra* note 12 for the text of this statute.

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

52. *Fleet Factors*, 724 F. Supp. at 960.

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

54. *Id.* at 1558.

55. *Id.* In *In re* Bergsoe Metal Corp., 910 F.2d 668 (9th Cir. 1990), the Ninth Circuit declined the opportunity to establish a rule on the issue of how much control over a facility a secured creditor can exert before it will be liable for cleanup. *Id.* at 672. The court found that there had been no actual management of the facility by the creditor, and therefore declined to rule on the issue unnecessarily. *Id.*

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

57. *Id.*

court, was contrary to the plain meaning of the exemption.[58] The instant court emphasized that the statutory language demonstrated that Congress intended to impose liability on secured creditors if they participated in management.[59] The instant court also found support for its narrow construction of the exemption in the legislative history of CERCLA.[60] Therefore, based upon its interpretation of CERCLA and its history, the instant court concluded that a stricter standard was more congruent with congressional intent than was the *Mirabile* standard.[61]

Because the issue was not presented on appeal, the instant court specifically did not address whether a creditor's purchase of property at a foreclosure sale automatically would remove the creditor from the scope of the exemption.[62] However, the instant court cited without disagreement the lower court's holding that because appellant had not foreclosed on its security interest, it could not be held liable under CERCLA section 9607(a)(1) as an owner of the facility.[63]

The instant court affirmed that its ruling would "give lenders some latitude in their dealings with debtors without exposing themselves to potential liability."[64] The instant court explained that its holding would not create disincentives for creditors to lend to businesses which could be involved with hazardous substances.[65] Rather, the instant court stated that its decision would encourage lenders to thoroughly investigate the waste management and disposal practices of potential borrowers.[66] The instant court reasoned that if CERCLA liability ap-

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58. *Id.*

59. *Id. See* 42 U.S.C. § 9601(20)(A)(ii).

60. *Fleet Factors*, 901 F.2d at 1558 n.11 (citing 2 SENATE COMM. ON ENV'T AND PUBLIC WORKS, 97th Congress, 2d Sess., 2 A LEGISLATIVE HISTORY OF THE CERCLA 945 (Comm. Print 1983) (remarks of Rep. Harsha)). The court found that the original version of CERCLA proposed by the Senate did not contain an exemption for secured creditors. *Id.* After revision of CERCLA, the exemption was introduced because Congress believed it was necessary to protect "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." *Id.* The court stated that, in using the word "affiliated" to describe the relationship between the secured creditor and the operator of the facility, Congress intended to require a lesser degree of involvement to establish secured creditor liability than the involvement necessary to establish operator liability. *Id.*

61. *Id.*

62. *See id.* at 1552-53, 1555.

63. *Id.* at 1555.

64. *Id.* at 1558.

65. *Id.*

66. *Id.*

peared likely, lenders would factor this added risk into the terms of the loan agreement.[67] Therefore, the court suggested its ruling would provide lenders incentive to monitor their debtors.[68]

In addition to encouraging lenders to investigate, the instant court asserted that its test also encouraged lenders to insist on one, debtor compliance with acceptable waste treatment standards, and two, submission to periodic environmental audits, as conditions of a continued financial relationship.[69] Finally, the court acknowledged that its standard may impede the innocent borrower's ability to obtain financing.[70] However, the court concluded that this risk was consistent with what it found to be the CERCLA goal of spreading the costs of hazardous waste disposal throughout the industry.[71]

The instant court was faced with a choice between three existing interpretations of the secured creditor exemption. Under the *Mirabile* interpretation, a secured creditor cannot be held liable under CERCLA unless it was involved in the daily operations of a debtor business.[72] Therefore, the creditor's purchase of the property at a foreclosure sale does not by itself remove the creditor from the scope of the exemption and automatically establish liability.[73] Under the *Maryland Bank & Trust Co.* interpretation of the exemption, the creditor's purchase of the property at a foreclosure sale definitely removes a creditor from the scope of the exemption.[74] However, the type of conduct which would create liability prior to the creditor's purchase of the property in a foreclosure sale is unclear.

Finally, under the *Guidice* interpretation, a creditor who did not foreclose and purchase the property is not liable unless it participated in the daily operations of the business.[75] However, under this interpretation a creditor that purchased the property during foreclosure is undoubtedly liable.[76] The instant court chose to adopt a narrower standard than any of these prior decisions. The instant court held that financial involvement alone, without operational involvement, could

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67. *Id.* The court also quoted a suggestion that lenders obtain warranties from borrowers against CERCLA liability. *Id.* at 1559 n.12 (quoting Note, *supra* note 15, at 1294).
68. *Fleet Factors*, 901 F.2d at 1558.
69. *Id.*
70. *Id.* at 1559 n.12.
71. *Id.*
72. *Mirabile*, 15 Envtl. L. Rep. at 20,996.
73. *See id.*
74. *Maryland Bank & Trust Co.*, 632 F. Supp. at 579.
75. *Guidice*, 732 F. Supp. at 561.
76. *Id.* at 563.

remove a lender from the secured creditor exemption.[77] In addition, the instant court implied that the purchase of the property at foreclosure would automatically create secured creditor liability.[78]

By adopting a narrow interpretation of the secured creditor exemption, the instant court in essence has rendered the exemption meaningless. Under the rules of the instant court, a lender's mere financial involvement to protect its interests may create lender liability for clean up costs far in excess of the mortgage's balance. In addition, the instant court's decision actually may thwart the policy objectives the instant court purported to further.[79] Instead of increasing the monitoring of hazardous waste facilities by creditors, the instant decision may prompt lenders to distance themselves from businesses involving hazardous substances.[80] Lenders may fear creating the inference that they could influence waste disposal practices, thereby becoming liable under CERCLA.[81] Thus, the valuable policing of hazardous waste facilities by lenders, which would exist under a broader interpretation of the exemption, is lost under the instant court's narrow interpretation.[82]

In addition, the instant decision has potentially extensive ramifications in the financial services industry. While it would be impossible for a lender to avoid contact with every type of business which generates hazardous substances, under the instant court's rule most lenders probably will eliminate many industries as potential borrowers.[83] The potential lender liability is so great that no reasonable increase in the interest rate of a loan could compensate for the risk of lending to borrowers involved with hazardous wastes. Additionally, the costs of all new commercial mortgages will rise, regardless of the industry of the borrower, due to the necessity of environmental audits to discover any past contamination of the mortgaged property.[84] Finally, while creditors may be able to avoid lending to risky industries in the future, many lenders already have outstanding loans to such facilities.[85]

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

78. *Id.* at 1555-56.

79. The instant court stated that its ruling should "encourage [creditors] to monitor the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support." *Id.* at 1558.

80. *See id.*

81. *Id.*

82. *See* Note, *supra* note 15, at 1295.

83. *See* Comment, *supra* note 11, at 178-79.

84. *See id.* at 182-83.

85. *Id.* at 179.

A lender inadvertently may have exposed itself to CERCLA liability by past financial involvement. If applied, the instant decision may create enormous liability for lenders who merely attempted to monitor diligently the financial situation of their borrowers.

The instant court manufactured an opportunity to establish a new test for lender liability under CERCLA. The court admitted that it need not even apply its new "financial management" test to determine that the appellant in the instant case was liable.[86] Thus, the instant court could have decided the issues before it purely on the facts.[87] However, the court instead chose to use this opportunity to create a new rule of law.

The instant court recognized that Congress intended to exempt from CERCLA liability, creditors who hold proof of ownership of a facility merely to protect their security interest.[88] However, the court construed the exemption narrowly, thereby limiting the type of actions that a lender can pursue to protect its interest without incurring cleanup liability.[89] Actions which traditionally have been aspects of a lender's role in maintaining the financial health of a debtor firm can now constitute sufficient management participation to create lender liability. The instant court's decision, based on a questionable interpretation of legislative intent, could be financially devastating to many lenders.[90]

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86. *Fleet Factors*, 901 F.2d at 1559 n.13.

87. *Id.* The court noted that evidence showed Fleet controlled disposal of hazardous wastes at the site. *Id.*

88. *Id.* at 1555.

89. *See id.* at 1558 n.11.

90. On October 1, 1990, in the 1st Session of the 101st Congress, a bill entitled the "Innocent Lender Liability Relief Act of 1990" was introduced in the House of Representatives by Representatives McDade and Lafalce. H.R. 5764, 101st Cong., 2d Sess. (1990). The bill provided in pertinent part:

> Sec. 2. EXEMPTION FROM LIABILITY UNDER CERTAIN ENVIRONMENTAL LAWS.
>
> (a) BUSINESS LOANS.-Section 7(a) of the Small Business Act (15 U.S.C. 636(a)) is amended by adding at the end the following new paragraph:
>
> (21)(A) Except as provided in subparagraph (B), in any case in which title or control of property is acquired by the [Small Business] Administration or by a financial institution participating with the Administration pursuant to a loan made or guaranteed under this subsection for a pollution control facility (as such term is defined in regulations promulgated pursuant to paragraph (12)), neither the Administration nor the financial institution shall be liable for a violation of any of the following environmental laws with respect to such property:

> (i) The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.), including liability under section 107 [42 U.S.C. 9607] of that Act.
> * * *
> (B) The exemption from liability provided under subparagraph (A) shall not apply to the Administration or a financial institution with respect to property described in subparagraph (A) if the Administration or financial institution, by any act or omission, caused or contributed to a release or threatened release at such property of a hazardous substance (in the case of a violation of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980). . . .

Id.

Author's Note: H.R. 5764, 101st Cong., 2d Sess. died in session. However, it was reintroduced as H.R. 1450 in the next session of Congress. At the time this Comment went to publication, no hearings had yet been held on this bill.