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WHEN SECURITY INTERESTS BECOME LIABILITIES: LENDERS LOOK TO LIMIT EXPOSURE FOR HAZARDOUS WASTE CLEANUP COSTS UNDER SUPERFUND

E. Deren Breast
Thomas P. Cody

A series of controversial decisions in the federal courts have steadily increased financial institution and secured creditor exposure for hazardous waste cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund").¹ Due in part to pressure from the business and financial lending community, Congress and the Environmental Protection Agency have responded with legislative and administrative proposals to reduce lender exposure for hazardous waste cleanup costs. In 1991, the federal government will face difficult decisions in redefining the scope of liability for hazardous waste cleanups.

Three bills have been introduced in Congress which would reduce sharply the potential hazardous waste cleanup liability of financial institutions. The bills force Congress to consider the effects of its hazardous waste policies enunciated in 1980 and 1986, and reconcile them with current domestic issues such as economic growth and the health of the real estate and financial lending industries. In the light of these potentially conflicting policy goals, Congress must address whether the federal courts have accurately interpreted CERCLA's mandate. If the courts have misconstrued legislative intent, or if Congress believes that its original policies are no longer tenable, significant changes in CERCLA may be imminent.

The Environmental Protection Agency has also proposed a solution in the form of a draft interpretative rule. The rule attempts to clarify the scope of lender liability under CERCLA, but would be

1. 42 U.S.C. §§ 9601-9675 (1988).

less sweeping in effect than the proposed legislative changes. If the interpretative rule clarifies lender liability under CERCLA, legislative changes may be unnecessary. On the other hand, the executive branch must consider whether an interpretative rule is necessary or appropriate in light of congressional efforts to amend CERCLA.

LIABILITY UNDER CERCLA

CERCLA authorizes the federal government to clean up hazardous waste releases and recover the costs of removal or remedial action, natural resource damage, and health effects studies from certain responsible parties.² Responsible parties include "the owner and operator of a vessel or a facility," past owners or operators of facilities if any hazardous substances were disposed during their tenure, persons involved in disposal or treatment of hazardous substances, and transporters of hazardous substances.³ Lending institutions and other creditors holding indicia of ownership to protect a security interest are generally exempted from such liability if they have not "participat[ed] in the management of a vessel or facility."⁴

CERCLA does not define, however, the extent of involvement required to trigger "participation in the management of a vessel or facility." Thus, the scope of liability as an owner or operator under CERCLA is not clear. Attempting to fulfill the intent of the legislature, the federal government has prosecuted financial institutions as "owners and operators" in a number of contexts. Not surprisingly, many financial institutions have challenged these interpretations of CERCLA liability. The federal courts have

2. 42 U.S.C. § 9607(a) (1988).

3. *Id.*

4. *Id.* § 9601(20)(A).

arguably increased financial institution exposure for hazardous waste cleanups, which has prompted an outcry for reform.

FEDERAL COURT INTERPRETATIONS OF
LENDER LIABILITY UNDER CERCLA

United States v. Mirabile

The federal courts first articulated a distinction between permissible participation in the financial management of a facility and impermissible participation in the day-to-day or operational aspects of a facility in *United States v. Mirabile*.⁵ In *Mirabile*, the United States District Court for the Eastern District of Pennsylvania granted summary judgment to the defendant creditors, who had foreclosed on contaminated property, because their participation in the affairs of the polluting facility was limited to participation in financial decisions.⁶ The court found that the "participation which is critical is participation in operational, production, or waste disposal activities. Mere financial ability to control waste disposal practices . . . is not . . . sufficient for the imposition of liability."⁷ Thus, the court in *Mirabile* distinguished financial from managerial or operational involvement in determining whether a secured creditor's involvement is significant enough to trigger liability under CERCLA.

United States v. Maryland Bank & Trust Co.

One of the most important cases before 1990 that interpreted the liability of secured creditors was *United States v. Maryland Bank & Trust Co.*⁸ The defendant, Maryland Bank & Trust ("MB & T"),

5. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20994 (E.D. Pa. Sept. 4, 1985).

6. *Id.* at 20994.

7. *Id.*

8. 632 F. Supp. 573 (D. Md. 1986).

had held a mortgage on a parcel of land and later purchased the land at a foreclosure sale. After MB & T declined to clean up hazardous waste on the property, the Environmental Protection Agency conducted a removal action under the authority of CERCLA. The federal government then brought an action against the bank to recover the cleanup costs.⁹

The United States District Court for the District of Maryland held that MB & T was required to reimburse the United States for the cleanup costs.¹⁰ The court imposed liability even though the illegal waste disposal occurred prior to the bank's purchase of the property. The court stated that "[f]inancial institutions are in a position to investigate and discover potential problems in their secured properties. . . . CERCLA will not absolve them from responsibility for their mistakes of judgment."¹¹

The court in *Maryland Bank* distinguished full title owners from persons holding indicia of ownership merely to protect a security interest in land.¹² MB & T's liability was founded upon their full ownership of the property for four years following purchase at the foreclosure sale, rather than any participation in the management or operations of the facility. The court distinguished *Mirabile*, stating that there, the mortgagee's purchase of the land at the foreclosure was "plainly undertaken in an effort to protect its security interest in the property" since the property was assigned four months later.¹³ The court expressed the concern that exemption from liability under CERCLA would enable the bank to collect a windfall from the

9. *Id.* at 576.

10. *Id.* at 578.

11. *Id.* at 580.

12. *Id.* at 579.

13. *Id.* at 580.

increased value of the property following the government's cleanup.¹⁴

Guidice v. BFG Electroplating & Manufacturing Co.

The interpretation of financial institution exposure for hazardous waste cleanup costs announced in *Maryland Bank* was expanded in *Guidice v. BFG Electroplating & Manufacturing Co.*¹⁵ *BFG Electroplating* involved a mortgagee bank which purchased the mortgaged property at a sheriff's sale and held the property for approximately eight months. The court held that "[w]hen a lender is the successful purchaser at a foreclosure sale, the lender should be liable to the same extent as any other bidder at the sale would have been."¹⁶ The court in *BFG Electroplating* refused to apply the section 9601(20)(A) exemption from response cost liability for security interest holders. Instead, the court was persuaded by the concern expressed in *Maryland Bank* that an exemption for landowning lenders would create a special class of otherwise liable landowners.¹⁷ The court also noted that Congress did not add any specific exemptions for mortgagees-turned-landowners when it amended and reauthorized CERCLA in 1986.¹⁸ Arguably, *BFG Electroplating* expanded the *Maryland Bank* interpretation of liability because the bank in *BFG Electroplating* had owned the contaminated property for only eight months, compared to four years in *Maryland Bank*.

United States v. Fleet Factors Corp.

14. *Id.*

15. 732 F. Supp. 556 (W.D. Pa. 1989).

16. *Id.* at 563.

17. *Id.*

18. *Id.*

results on financial institutions, secured lenders might have believed in early 1990 that CERCLA offered them some protection, provided they retained only security interests in contaminated property and they did not participate actively in the production or management of hazardous waste. Any sense of certainty ended abruptly on May 23, 1990, when the United States Court of Appeals for the Eleventh Circuit decided *United States v. Fleet Factors Corp.*¹⁹

In *Fleet Factors*, the court held that a secured creditor may incur liability as a past owner or operator of a facility where hazardous substances were disposed of, "by participating in the financial management of a facility to a degree indicating a *capacity to influence* the corporation's treatment of hazardous wastes."²⁰ The court in *Fleet Factors* rejected the rule set forth in *Mirabile* that "mere financial ability to control waste disposal practices . . . is not . . . sufficient for the imposition of liability."²¹

It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous

19. 901 F.2d 1550 (11th Cir.), *reh'g denied*, 911 F.2d 742 (11th Cir.1990)(en banc).

20. *Id.* at 1557 (emphasis added). The court of appeals held that the district court had correctly denied secured lender Fleet's motion for summary judgment. Material issues of fact existed concerning the extent of Fleet's involvement in the management of a textile facility where hazardous waste was produced and stored since Fleet held a security interest on the property. Although Fleet never foreclosed on the property, it held "indicia of ownership" pursuant to its security interest in the form of a deed of trust.

21. *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20994, 20995 (E.D. Pa. Sept. 4, 1985).

waste disposal decisions if it so chose.²²

The decision to invoke lender liability thus did not rest on whether the creditor owned the facility, but whether the secured creditor exercised sufficient control over the business actions of the debtor facility.

Fleet Factors should not be read to impose unconditional liability on the secured creditors of businesses involved with hazardous waste. The court in *Fleet Factors* stated that the decision did not preclude secured creditors from "monitoring any aspect of a debtor's business" or "becom[ing] involved in occasional and discrete financial decisions relating to the protection of its security interest without incurring liability."²³ The court stated that the nature and extent of the creditor's involvement with the facility, and not its motive in protecting a security interest, is relevant to the extent of protection provided by CERCLA's secured creditor exemption.²⁴

In Re Bergsoe Metal Corp.

On August 9, 1990, the United States Court of Appeals for the Ninth Circuit decided *In Re Bergsoe Metal Corp.*²⁵ In *Bergsoe*, the Port of St. Helens, Oregon ("Port"), entered into a complex agreement with Bergsoe Metal Corporation and the United States National Bank of Oregon ("Bank") to finance the construction of a lead recycling plant.²⁶ Under the agreement, the Port held title to the plant property, leased it back to Bergsoe, and issued revenue bonds to finance Bergsoe's construction of the plant. The Bank held

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

23. *Id.* at 1558.

24. *Id.* at 1560.

25. 910 F.2d 668 (9th Cir. 1990).

26. *Id.* at 669-70.

the mortgage to the plant property, collected rent directly from Bergsoe, and applied the rent toward the bonds. Upon retirement of the bonds, Bergsoe could then exercise an option to purchase the property for a nominal sum. Bergsoe defaulted on the leases, however, and was placed in involuntary bankruptcy. When the Bank sought liability for cleanup of hazardous wastes on the site, Bergsoe counterclaimed that the Port was liable under CERCLA as an "owner" of the plant.

The court held that the Port was not liable as an "owner" under CERCLA, even though it held the deed to the underlying property, because the Port fell within the scope of the secured creditors exemption.²⁷ The Port successfully argued that it held indicia of ownership primarily to protect its security interest in the plant and it did not participate in the management of Bergsoe's operations.

In *Bergsoe*, the Ninth Circuit acknowledged the Eleventh Circuit's analysis in *Fleet Factors*, but held that "there must be some actual management of the facility before a secured creditor will fall outside the exception."²⁸ The court thus refused to impose liability for having the mere "capacity to influence" the management of hazardous waste, as the Eleventh Circuit had held in *Fleet Factors*. Although in theory *Bergsoe* may not be inconsistent with *Fleet Factors*, *Bergsoe* effectively narrowed the *Fleet Factors* holding and leaves the two cases difficult to reconcile from a practical standpoint.²⁹

Effects of the Cases

Many business and government leaders believe that the federal

27. *Id.* at 671-73.

28. *Id.* at 672.

29. Alder, *Courts Split Over Liability of Lenders for Site Cleanup*, BUS. INS., Sept. 3, 1990, at 8.

courts have exposed financial institutions to liability that is neither intended nor just.³⁰ Several specific concerns have been expressed. First, the cases have blurred the distinction between a lender's financial involvement in the affairs of a facility for the purposes of monitoring a security interest, and involvement in actual hazardous waste production or management. Thus, necessary oversight of a debtor's financial health may be discouraged. Second, uncertain liability has discouraged extension of credit to businesses involved with hazardous waste. This may indiscriminately discourage loans to all handlers of hazardous waste, including those businesses which responsibly handle hazardous waste. Third, increased lender exposure for hazardous waste removal has increased the cost of credit to all businesses and industries, and hurt small businesses in particular. Finally, the specter of liability for the cost of hazardous waste removal has complicated the bailout of the savings and loan industry, since many properties held by the Resolution Trust Corporation may be contaminated.³¹

As a result of these concerns, many business and government leaders are seeking to limit financial institution exposure for hazardous waste cleanups under CERCLA. Organizations such as the Small Business Administration and the American Bankers Association have testified at congressional committee hearings that increased exposure for hazardous waste cleanups increases the cost of extending credit to borrowers, hampers business initiatives, and has a negative

30. See *Legislation To Restore Small Business Financing In Areas Of Possible Hazardous Waste Contamination*, 136 CONG. REC. E1023 (remarks of Rep. John LaFalce).

31. Roberts, *Get Ready for Recession by Strangulation*, BUS. WK., Sept. 24, 1990, at 22; but see Collins, *Lenders Disputed on Contention That Cleanup Laws Will Ruin Industry*, L.A. Times, Oct. 7, 1990, at 2, col. 1.

effect on the economy.³² Congress has also heard testimony from industries such as electric platers, drycleaners, wood product manufacturers and metal finishers that use hazardous wastes and which have been affected adversely by lender reluctance to extend credit to businesses involved with hazardous waste.³³

LEGISLATIVE AND ADMINISTRATIVE PROPOSALS

Concern for the decision in *Maryland Bank* and *BFG Electroplating* prompted the introduction of a House bill in 1989 to amend CERCLA.³⁴ After that bill failed to escape committee, three more bills were introduced in March, April, and October of 1990.³⁵ Furthermore, the EPA proposed a draft interpretative rule concerning lender liability under CERCLA in September of 1990.³⁶

House Bill 4494

On April 4, 1990, Representative John LaFalce (D-N.Y.) introduced House Bill 4494, an amended version of his 1989 House Bill 2085.³⁷ House Bill 4494 would amend CERCLA to limit the liability of lending institutions acquiring facilities through foreclosure or similar means and corporate fiduciaries administering estates or trusts. The bill addresses the issue of financial institution liability under CERCLA by proposing a more narrow definition of "owner or

32. E.g., *Legislation To Restore Small Business Financing In Areas Of Possible Hazardous Waste Contamination*, 136 CONG. REC. E1023 (remarks of Rep. John LaFalce).

33. *Id.*

34. H.R. 2085, 101st Cong., 1st Sess. (1989).

35. H.R. 4494, H.R. 5764, S. 2319, 101st Cong., 2d Sess. (1990).

36. EPA Draft Proposal Defining Lender Liability Issues Under the Secured Creditor Exemption of CERCLA, 21 Env't Rep. (BNA) 1162 (Oct. 12, 1990).

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

operator" in section 101(20)(D) of the Act. This would be accomplished by adding five classes of individuals and institutions to those entities currently exempted from the definition of "owner or operator."³⁸ Additionally, the bill defines "designated lending institution" and makes minor conforming amendments to section 101(20)(A) of the Act.³⁹

Senate Bill 2319

On March 22, 1990, Senator Jake Garn (R-UT) introduced Senate Bill 2319.⁴⁰ The bill would amend the Federal Deposit

38. (i) Any *designated lending institution* which acquires ownership or control of the facility pursuant to the terms of a security interest held by the person in that facility.

(ii) Any *corporate fiduciary* which -

(I) has legal title to any facility for purposes of administering an estate or trust of which such facility is a part; or

(II) does not have legal title to the facility but operates or manages the facility pursuant to the terms of any estate or trust of which such facility is a part.

(iii) Any individual or institution or successor thereto that serves as an *indenture trustee for outstanding debt securities* or any certificates of interest or participation in any such debt securities and acquires ownership or control of a facility as a result of an event of default pursuant to the terms of an indenture agreement or similar financing document between such trustee and the issuing entity.

(iv) Any *individual fiduciary* who has legal title to any facility for purposes of *administering an estate or trust* of which such facility is a part.

(v) Any *designated lending institution* which acquires ownership of any facility in connection with a lease *subject to regulation* by applicable Federal or State banking authorities.

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

39. *Id.*

40. S. 2319, 101st Cong., 2d Sess. (1990).

Insurance Act⁴¹ and the Federal Credit Union Act⁴² by specifying conditions under which depository institutions, mortgage lenders, and insured credit unions would not be liable under CERCLA for property acquired either through foreclosure⁴³ or in a fiduciary capacity.⁴⁴ Furthermore, the bill would confer immunity from CERCLA liability on regulatory agencies and the National Credit Union Administration Board for properties acquired by the exercise of receivership or conservatorship authority and the provision of loans or other financial assistance.⁴⁵ The bill does not address financial

41. 12 U.S.C. § 1811-1832 (1988).

42. 12 U.S.C. § 1751-1795 (1988).

43. S. 2319, 101st Cong., 2d Sess. (1990). "Property acquired through foreclosure" is defined as "property acquired by a depository institution or mortgage lender (A) through purchase at sales under judgment or decree, power of sale, or from a trustee, if such property was security for a debt previously contracted; or (B) through conveyance pursuant to a debt previously contracted. "Mortgage lender" is defined as "a person engaged in the business of making loans secured, in whole or in part, by real property." "Fiduciary capacity" is defined as "acting as trustee, executor, administrator, custodian, guardian of estates, receiver, conservator, committee of estates of lunatics, or any other fiduciary capacity for the benefit of another." *Id.*

44. The exemption does not apply to "any person that has caused the release or threatened release into the environment of a hazardous substance from property acquired through foreclosure or from property held in a fiduciary capacity" or to "any person that has benefited from removal, remedial, or other response action, to the extent of the actual benefit conferred by such action." S. 2319.

45. Neither the Corporation, the Resolution Trust Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, any Federal Reserve bank, or any Federal Home Loan Bank, in any capacity, shall be liable under [CERCLA] with respect to property acquired

(A) in connection with the exercise of receivership or conservatorship authority, or

(B) in connection with the provision of loans, discounts, advances, or other financial assistance.

S. 2319, 101st Cong., 2d Sess. (1990). This immunity "shall not apply if the Corporation, agency involved, Federal Reserve bank, or Federal Home Loan Bank has caused the release, or threatened release, into the environment of a hazardous

institution liability for hazardous waste cleanups through an amendment of CERCLA. The bill also proposes to amend the Federal Credit Union Act with substantially identical language.

The EPA's Draft Interpretative Rule

On September 14, 1990, the EPA issued a "Draft Proposal Defining Lender Liability Issues under the Secured Creditor Exemption of CERCLA."⁴⁶ In the draft interpretative rule, EPA interprets the secured creditor exemption in CERCLA so that "private and governmental lending institutions and successors-in-interest that hold a security interest in a facility may undertake a variety of activities related to a borrower's facility in the course of protecting the security interest, without voiding the exemption."⁴⁷ The rule clarifies the secured creditor exemption provisions of section 101(20)(A): "[The] EPA recognizes that lenders typically have revenue interests in the loan transaction. However, when the lender holds its indicia of ownership in the property for investment purposes, as opposed to assuring repayment of the loan, the secured creditor exemption will not apply."⁴⁸

The EPA draft rule includes actual examples of what actions secured creditors may take to safeguard their investment without destroying the exemption. "[T]he secured creditor may act to protect the interest by policing the loan, by undertaking financial workout

substance." *Id.*

46. 21 Env't Rep. (BNA) 1162 (Oct. 12, 1990). The rule is intended "to define the meaning of certain statutory elements in CERCLA which pertain to the liability of both financial institutions that lend money to facilities and governmental loan guarantors or entities that acquire ownership, or some indicia thereof, of contaminated facilities." *Id.* at 1162.

47. *Id.*

48. 21 Env't Rep. (BNA) at 1163. This parallels the holding in *Maryland Bank & Trust*, *supra* notes 9-15 and accompanying text.

with a borrower where the security interest is threatened, and by foreclosing and expeditiously liquidating the assets securing the loan."⁴⁹

The draft rule also addresses the issue of what is a "reasonable" length of time that a secured creditor may hold property once they have foreclosed on the loan without removing themselves from the section 101(20)(A) exemption.⁵⁰ The draft rule shifts the burden of proof at six months following foreclosure.⁵¹ Under this bright-line test, the secured creditor may hold the property in question for six months before it bears the burden of showing that it continues to hold the property primarily to protect its security interest.

Finally, the draft rule repudiates the Eleventh Circuit's holding in *Fleet Factors* by requiring *actual* participation in the management of the company before liability will be invoked, and not the mere "capacity to influence" the corporation's treatment of hazardous waste. The proposed rule states: "[p]articipation in management sufficient to void the exemption means actual operational participation by the lender, and does not include the mere capacity or ability to influence

49. *Id.* at 1164.

50. This issue was first addressed by the United States District Court for the District of Maryland in *Maryland Bank & Trust*, *supra* note 9. A major factor in the court's decision to forego the section 101(20)(A) exemption was based upon the lender's subsequent ownership of the property for four years following its purchase at the foreclosure sale. The court in *Maryland Bank* distinguished *Mirabile*, *supra* note 6, stating that there the mortgagee's purchase of the land at the foreclosure sale was "plainly undertaken in an effort to protect its security interest in the property" since the property was assigned four months later. *Maryland Bank*, 632 F. Supp. at 580. Thus, secured creditors can only guess when, between four months and four years, liability will be imposed for holding the property too long.

51. 21 Env't Rep. (BNA) at 1167.

facility operations."⁵²

House Bill 5764

On October 1, 1990, Representatives McDade and LaFalce introduced House Bill 5764.⁵³ The bill proposes to amend sections 7(a) and 7(b) of the Small Business Act⁵⁴ to exempt the Small Business Administration ("SBA") and financial and lending institutions from liability under CERCLA and the Solid Waste Disposal Act ("SWDA").⁵⁵ Specifically, the bill provides that neither the SBA nor any financial institution participating with the SBA pursuant to a loan for a pollution control facility shall be liable for any violations of CERCLA or SWDA.⁵⁶ The bill further provides that in any case in which title or control of property is acquired by the SBA or a lending institution participating with the SBA, neither the SBA nor the lending institution shall be liable for a violation of CERCLA or SWDA.⁵⁷ The Act is prospective in effect from the date of enactment.⁵⁸

52. *Id.* at 1165.

53. H.R. 5764, 101st Cong., 2d Sess. (1990). The Short Title of the Act is the "Innocent Lender Liability Relief Act of 1990."

54. 15 U.S.C. §§ 631-650 (1988).

55. 42 U.S.C. §§ 6901-6992k (1988).

56. H.R. 5764 101st Cong., 2d Sess. (1990). The bill also provides that the exemption from liability shall not apply to the SBA or a financial institution which "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 CERCLA) or a regulated substance (in the case of a violation of SWDA)." *Id.*

57. *Id.* The bill also states that the exemption from liability shall not apply where the SBA or a lending 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 CERCLA) or a regulated substance (in the case of a violation of subtitle I of SWDA)." *Id.*

58. *Id.*

ANALYSIS OF THE PROPOSED
LEGISLATIVE AND ADMINISTRATIVE CHANGES

The secured creditor exemption of CERCLA section 9601(20)(A)⁵⁹ has been the focus of much debate, since the federal courts have not interpreted the provision consistently.⁶⁰ The courts in *Mirabile*⁶¹ and *Bergsoe*,⁶² for example, found that the defendant creditors fell within the exemption and thus were not liable for cleanup costs. The courts in *Maryland Bank*,⁶³ *BFG Electroplating*,⁶⁴ and *Fleet Factors*,⁶⁵ however, found that the defendants were liable because they fell outside the exemption. The holdings are not easily reconciled on the basis of their facts.⁶⁶ House Bill 4494 proposes a significant change in CERCLA, and deserves close analysis.

Practical Effects of House Bill 4494

House Bill 4494 would narrow the definition of "owner or operator" in section 9601(20)(D) by excluding, *inter alia*, any

59. "[Owner or operator] does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. § 9601(20)(A) (1988).

60. See, e.g., Bolstein & Reznick, *Lender Liability After Fleet Factors*, ENVTL. L. vol. 10, no. 3, at 1 (1990); Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261 (1987).

61. *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20992, 20996 (E.D. Pa. Sept 4, 1985).

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

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

64. *Guidice v. BFG Electroplating Mfg. Co.*, 732 F. Supp. 556, 563 (W.D. Pa. 1989).

65. *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir.), *reh'g denied*, 911 F.2d 742 (11th Cir. 1990) (en banc).

66. See *supra* text accompanying notes 9-25.

designated lending institution which "acquires ownership or control of the facility pursuant to the terms of a security interest."⁶⁷ The amendment would virtually eliminate exposure for hazardous waste cleanup costs incurred by lending institutions that *foreclose* on contaminated property held pursuant to a security interest. Thus, under this restricted definition of owner or operator, the defendants in *Maryland Bank* and *BFG Electroplating* probably would have escaped liability.⁶⁸

The bill fails to address, however, the more difficult question posed by "participation in the management of a vessel or facility." The bill does not clarify whether a lender is liable for cleanup costs in the absence of actual foreclosure on the property; it merely excludes any designated lending institution "which acquires ownership or control of the facility." The bill thus does not confront the issue presented in *Fleet Factors*, because it fails to address the definition of "participation in the management of a vessel or facility." Under such a rule, when faced with a situation in which a lender did not foreclose on contaminated property but participated in the management to some degree, a court would remain free to find that some degree of participation is necessary to invoke liability,⁶⁹ or that mere capacity to influence is sufficient,⁷⁰ or that some other as yet

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

68. In *Maryland Bank* and *BFG Electroplating*, the defendants foreclosed on the property held as a security interest. Thus, lending institutions in similar situations would qualify for the bill's exclusion from the definition of owner or operator for any acquisition of ownership or control "pursuant to the terms of a security interest . . . in that facility." H.R. 4494. The question remains, however, whether this new provision would forever exempt property obtained pursuant to the terms of a security interest.

69. *E.g.*, *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20994 (E.D. Pa. Sept. 4, 1985).

70. *E.g.*, *United States v. Fleet Factors*, 901 F.2d 1550 (11th Cir.), *reh'g denied*, 911 F.2d 742 (11th Cir. 1990) (en banc).

undefined standard is appropriate.

Policy Questions Raised by House Bill 4494

CERCLA creates three main classes of potentially responsible parties: past and present owners and operators of vessels or facilities, transporters, and disposers of hazardous waste.⁷¹ The definition of owner or operator does not now exclude persons who participate in the management of a vessel or facility, *despite the fact that they may hold indicia of ownership primarily to protect a security interest in the vessel or facility*. Rather, the statute's scheme of liability clearly considers the possibility that a party holding title merely pursuant to a security interest may be liable, if it has "participated in the management" of a vessel or facility. Liability thus turns on case-by-case factual determinations of involvement in the affairs of the debtor, and not on any bright-line rules.

House Bill 4494, however, proposes such a bright-line rule. The bill would exempt "any designated lending institution which acquires ownership or control of the facility pursuant to the terms of a security interest" regardless of the level of "participation in the management" of the vessel or facility. On the one hand, factual determinations of participation would no longer be relevant, since lending institutions which hold title pursuant to a security interest would never be liable for hazardous waste removal costs as long as they do not actually "cause or contribute to the release or threatened release of hazardous substances."⁷² On the other hand, the bright line rule is inadequate because it fails to address the *Fleet Factors* scenario where the lender does not acquire title, and participation in management is thus relevant to determine liability.

71. 42 U.S.C. § 9607(a) (1988).

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

Increased Reliance on the Superfund

By carving out a large exception to owner or operator liability, House Bill 4494 reduces the commitment to identifying responsible parties. As fewer private parties incur responsibility for hazardous waste removal, Superfund will increasingly become the only source of money available. Unless support for the Superfund is increased, total hazardous waste removal will decrease. This would be a significant shift in hazardous waste policy and warrants a more comprehensive review of CERCLA.

Reduced Incentive to Monitor Hazardous Waste Activities

House Bill 4494 would effect another troubling shift in hazardous waste policy. CERCLA now encourages diligence by those involved in hazardous waste creation, transport, or disposal, since the scheme of strict, joint, and several liability is severe. This liability creates a long term incentive for all potentially responsible parties to reduce hazardous waste generation and comply with removal laws and regulations. As CERCLA is now drafted, lending institutions are also encouraged to be diligent by monitoring the activities of their debtors, since the lenders themselves may ultimately be held liable.⁷³ Under House Bill 4494, lender diligence would not be encouraged, since lenders would be exempt from liability in all situations in which they acquire ownership or control.

"Cradle to Grave" Liability Scheme Altered

House Bill 4494 also upsets the internal fairness of CERCLA, which created an equally strict scheme of liability across the spectrum of hazardous waste handlers. Piecemeal amendments and incremental

73. Even the court in *Fleet Factors* stated that "[n]othing . . . should preclude a secured creditor from monitoring any aspect of a debtor's business. Likewise, a secured creditor can become involved in occasional and discrete financial decisions relating to the protection of its security interest without incurring liability." *Fleet Factors*, 901 F.2d at 1558.

exceptions to the list of potentially responsible parties destroys the equity of the "cradle to grave" scheme of liability and reduces the overall effectiveness of CERCLA as a remedial statute. Congress should first examine CERCLA in its entirety and then consider specific changes.

Lender Immunity and Unjust Enrichment

Finally, Congress should consider whether lenders are unjustly enriched by immunity from hazardous waste cleanup liability. The court in *Maryland Bank* expressed the concern that exemption from liability under CERCLA would enable banks to collect a windfall profit from the increased value of the property following the federal government's cleanup.⁷⁴ Although the Environmental Protection Agency has a lien power under CERCLA to secure reimbursements for the costs of hazardous waste cleanups, the lien only takes priority from the time it is filed of record.⁷⁵

At least six states have enacted "superlien" statutes which elevate the priority level of environmental claims in bankruptcy proceedings.⁷⁶ The superlien statutes give the government's environmental claim, which is a general unsecured claim, priority over perfected secured interests. Several of the statutes extend the lien further to encompass all of the debtor's property even if that property is not related to the environmental violation. Furthermore, these statutes generally do not establish time periods of limitation in

74. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 580 (D. Md. 1986).

75. 42 U.S.C. § 9607(1)(3) (1988).

76. *E.g.*, ARK. STAT. ANN. §§ 82-4708, 4720 (Supp. 1985); CONN. GEN. STAT. ANN. § 22a-452a (West 1985), *amended by*, Act of July 3, 1985, 1985 Conn. Acts 443, 1985 Conn. Legis. Serv. 468 (West 1985); MASS. ANN. LAWS ch. 21E, § 13 (Michie/Law Co-op. Supp. 1984); N.H. REV. STAT. ANN. § 147-B:10 (Supp. 1983); N.J. STAT. ANN. § 58:10-23.11f(f) (West Supp. 1985), *amended by*, Act of Jan. 22, 1985, 1985 N.J. Sess. Law Serv. 47 (West 1985); TENN. CODE ANN. § 68-46-209 (Supp. 1985).

which the government liens must be filed, so that at any time after the pollution is discovered the property may be subject to a lien.⁷⁷ These liens also "ride through" the confirmation of the debtor's plan and may be filed against successive land owners.⁷⁸ Notably, New Jersey's superlien statute has survived constitutional challenge.⁷⁹ As part of a comprehensive review of hazardous waste policies, Congress should consider whether a comparable superlien provision should be added to CERCLA.

Practical Effects of the Draft Interpretative Rule

Although the draft interpretative rule is less sweeping in effect than the three congressional bills that have been introduced, it was viewed by the EPA as a major concession and compromise.⁸⁰ The proposed rule indicates that the EPA is willing to exempt a secured creditor liable if it is merely acting to protect a security interest. To this end, a wide range of activities are expressly allowed by the rule.⁸¹

77. Epling, *Environmental Liens in Bankruptcy*, 44 BUS. LAW. 85, 87 (1988).

78. *Id.* at 87-88.

79. *Kessler v. Tarrats*, 194 N.J. Super. 136, 476 A.2d 326 (1984). The court held that the statute was a permissible exercise of the State's police power. The lien provisions of the Spill Compensation and Control Act served a legitimate public purpose, imposed reasonable terms and conditions, and did not constitute a taking without just compensation or an impermissible impairment of contract. *Id.*

80. Cope, *EPA To Revise Rules On Lender Liability In Toxic Cleanups*, AM. BANKER, Aug. 6, 1990, at 1.

81. "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 on-site 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." Draft Proposal Defining Lender Liability Issues Under The Secured Creditor Exemption Of CERCLA, 21 Env't Rep. (BNA) at 1162, 1164 (Oct. 12, 1990).

The proposed rule is a workable and fair compromise to the question of lender liability for hazardous waste cleanup costs. The rule would give lenders specific parameters to guide their conduct with debtors involved with hazardous waste. At the same time, the rule is not a blanket exemption from CERCLA liability which would compromise the policy goals enunciated by Congress in 1980 and 1986.

CONCLUSION

The federal courts have interpreted the scope of lender liability for hazardous waste cleanups under CERCLA in an inconsistent manner. Many people believe that the courts have increased lender exposure for hazardous waste cleanups beyond what was intended when CERCLA was drafted. In response to this issue, Congress has introduced three bills and the EPA has proposed a draft interpretative rule. All of these would limit lender liability under CERCLA to some degree.

The legislative proposals are inadequate solutions. House Bill 4494 is particularly disturbing because it would exempt lenders from liability for hazardous waste cleanup costs incurred on property acquired pursuant to a security interest. Such a drastic, yet fragmented approach to hazardous waste policymaking is inappropriate given the complexity of the interests affected by CERCLA.

The draft interpretative rule is a sound compromise at this time. It would help clarify lender liability without granting a broad exemption to financial institutions that acquire contaminated property through foreclosure. The rule also gives lenders specific guidelines with which to govern their debtors' activities. If more radical changes to CERCLA are desired, they should be pursued in the context of a comprehensive review of hazardous waste policies.