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SHAPING THE LAW OF THE ENVIRONMENT

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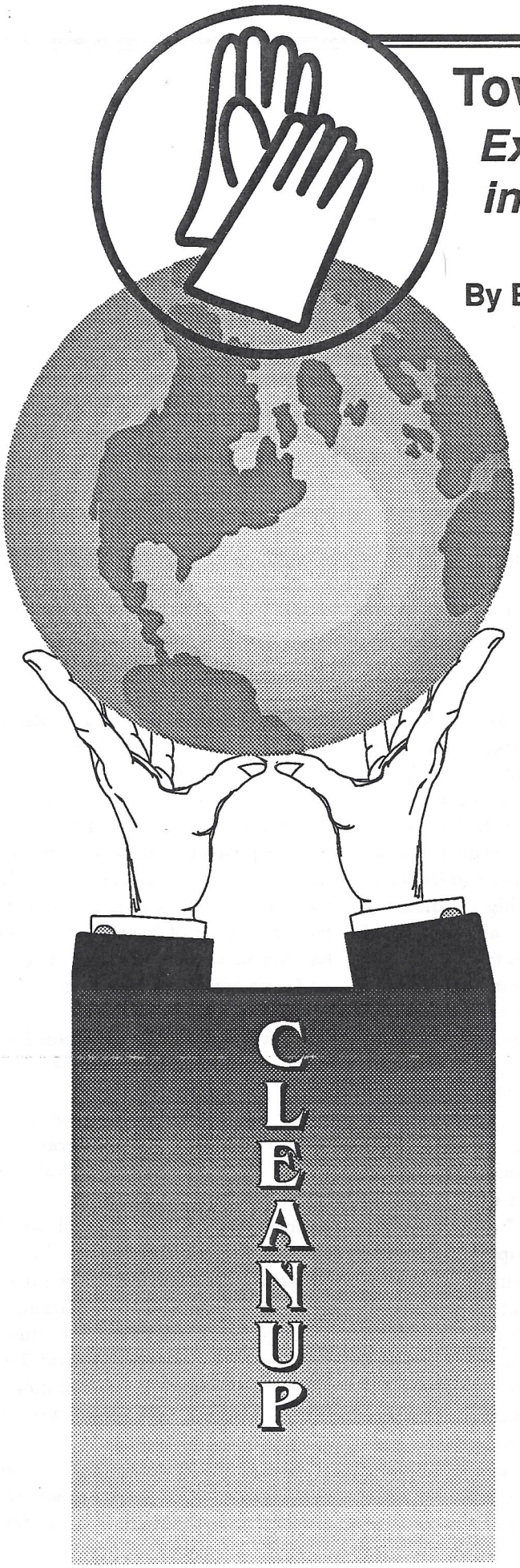
Hearsay and the Confrontation Clause



Toward a New Consensus

Expanding protections for lenders in environmental law.

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Over the past four decades, public concern about the deteriorating quality of our national environment has led to enactment of an ever-increasing number of environmental laws. Some of these laws address the staggering levels of hazardous waste generated in the United States and the problems associated with its disposal. Ostensibly based on the "polluter pays" principle, these laws often sweep far more broadly, imposing liability on "owners or operators," without regard to their involvement (or lack of it) in causing pollution.

Congress, the executive branch, and the public are now reassessing these laws. There are several causes for discontent, including the slow pace of hazardous waste clean-up and its astronomical cost projections. Other concerns include high transaction costs, unfairness to innocent parties held liable, and the lack of meaningful local community input into decisions about clean-up ("how clean is clean?") and the possible future economic uses of recycled polluted land in the community.

One issue that has generated a concerted effort for environmental law reform involves commercial bank lenders and secured creditors. They seek greater protection from liability, when their borrowers and collateral become involved with hazardous substances, as well as an enhanced role in safeguarding the quality of our environment as a matter of enlightened economic self-interest.

Outlined in in the first part of this article are the environmental laws that, inadvertently or not, affect commercial lending and the availability of credit. The second part briefly describes how court decisions after 1980 began to threaten banks and secured lenders with new environmental liability. Lenders responded by adopting multi-faceted environmental risk management policies. But their responses also dried up credit for small business and "environmentally sensitive" businesses needing funding for hazardous waste clean-up. Instead of creating a constructive role for lenders in environmental monitoring and compliance, our environmental laws encouraged lenders to withhold credit and to adopt a strict "hands-off" approach to their borrowers' environmental practices.

These marketplace realities fed other forces for environmental law reform. The third part of this article sketches the "cosmic" debate on reform of the federal Superfund statute (CERCLA), the Resource Conservation and Recovery Act (RCRA), and other laws imposing "owner or operator" liability for cleaning up spills of hazardous substances. It then describes one of the important reforms, the Environmental Protection Agency's (EPA) rule on "Lender Liability under CERCLA,"[1] as well as the cases interpreting this rule and the pending suit challenging its validity, *Kelley v. Environmental Protection Agency*.[2] Taking all these developments into account, this article advocates congressional enactment of comprehensive legislation to protect secured lenders, lease financers, and fiduciaries, such as bank trust departments, which now face the threat of "owner or operator" liability under a potpourri of federal and state environmental laws.

Overview of Environmental Laws Affecting Financers

Within the myriad federal and state environmental laws that conceivably may affect commercial banks and other financers, several broad-based laws are of special, recurring significance. These are the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund),[3] the Resource Conservation and Recovery Act (RCRA),[4] the Oil Pollution Act of 1990,[5] the Clean Water Act,[6] and state environmental laws.

These laws raise several concerns for lenders: (1) the imposition of environmental liability may undercut

a borrower's economic viability and jeopardize its ability to repay a loan; (2) property taken as security for a loan may be severely reduced in value by environmental contamination; (3) in states with environmental superlien laws, a government lien for clean-up costs will take priority over a secured lender's claims; and (4) "owner or operator" liability for clean-up costs, a common feature of many environmental laws, threatens to impose catastrophic liability on a secured creditor who forecloses or who seeks to monitor or control the borrower's affairs, even if to ensure compliance with environmental laws.

Other state and federal environmental laws, of course, may affect lenders in particular circumstances.[7] Different laws may apply, with different requirements, remedies, and costs of compliance, depending on the specific property, activities, damage or injuries, and hazardous substances involved. We focus here only on those environmental laws that repeatedly impinge on ordinary commercial lending operations.

The Comprehensive Environmental Response, Compensation, and Liability Act

Enacted in 1980 in response to the public outcry over Love Canal and other closed landfills, CERCLA is aimed at ensuring the cleanup of inactive hazardous waste sites. But it reaches much farther. The statute imposes strict, joint and several, retroactive civil liability for cleanup costs on "owners," "operators," and other statutorily-defined parties[8] for the release or threatened release of any "hazardous substance"[9] from any "facility"[10] into the environment. Only severely limited defenses are recognized in CERCLA.[11]

The statute gives EPA a choice of enforcement mechanisms. It may undertake clean-up actions itself and recover its costs from responsible parties. Or EPA may compel responsible parties to undertake clean-up actions themselves. Moreover, under CERCLA section 107(a), states and private parties that incur clean-up costs may sue other responsible parties to recover those costs.

Ordinarily, CERCLA imposes liability for clean-up costs on the "owner" or "operator" of real property, equipment, or other personal property, contaminated by hazardous substances. But the statute's "secured creditor exemption" states that "[o]wner 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."[12] This important provision was designed to protect commercial financers from CERCLA liability.[13]

The Resource Conservation and Recovery Act

The older RCRA statute is a comprehensive, "cradle-to-grave" regulatory regime governing the generation, treatment, storage, and disposal of hazardous wastes. RCRA is a standard-setting statute aimed at the operations of ongoing businesses (as opposed to old spills or abandoned dump sites). This is a joint federal-state venture: states meeting standards set by EPA can assume responsibility for administering the RCRA program. Generators and transporters must comply with RCRA requirements for handling hazardous wastes, including licensing, recordkeeping, labeling, and reporting requirements.

Owners and operators of hazardous waste treatment, storage, and disposal (TSD) facilities are subject to the most stringent RCRA requirements.[14] They must adhere to rigorous management standards; ensure that their facilities will be closed properly after waste clean-up; and provide "financial assurances" that they have the wherewithal for clean-up of hazardous wastes and "post-closure" monitoring. As amended in 1984, the statute requires owners and operators of TSD facilities to take comprehensive "corrective action" to clean up soil and groundwater contamination on their sites.

Other RCRA provisions govern underground storage tanks (USTs) containing petroleum products and other hazardous substances,[15] and a federal demonstration program for disposal of medical wastes.[16] The only provision in RCRA that is similar to CERCLA's secured creditor exemption is contained in RCRA's provisions on USTs.[17]

Oil Pollution and Clean Water Acts

These statutes affect maritime and ship financing. Owners and operators of vessels may be liable for environmental damages, when there are oil spills or hazardous substance discharges from a vessel, under the Oil Pollution Act (oil spills) and the Clean Water Act (pollutants generally). Nothing like CERCLA's secured creditor exemption appears in these statutes.

State Environmental Laws

Traditional state common law tort actions generally provide a basis for environmental damage suits, as well as suits to recover for personal injury.[18] Several states have enacted "superlien" statutes that impose a lien upon property, in the amount of the state's clean-up costs, which takes priority over even earlier-filed liens.[19] Other states, such as New Jersey, require that industrial property containing hazardous waste be cleaned up before it can be sold or transferred.[20] There is a separate set of state criminal laws protecting the environment.[21] Moreover, most states have enacted laws that parallel CERCLA and RCRA.[22] Only within the last few years have states moved to enact statutory protections for lenders threatened with environmental liability.[23]

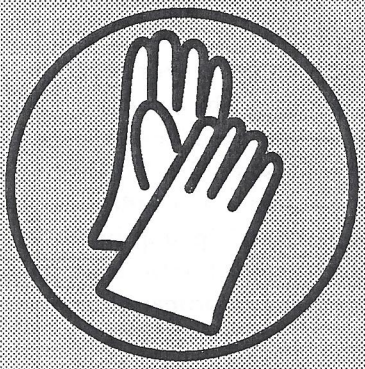
Commercial Financing Collides with Environmental Law

The single most dominant environmental law for lenders is CERCLA. It covers the most hazardous substances, and it affects the most commercial activities. Moreover, CERCLA has caused lenders the most concern about their own possible liability.

One of the first cases to signal lenders' potential liability for CERCLA clean-up costs was *United States v. Maryland Bank & Trust.*[24] There the court imposed liability for clean-up costs on a bank that foreclosed and held title to contaminated real property for nearly four years before selling it.[25] The bank's CERCLA liability exceeded the amount of its loan. Other cases interpreting CERCLA soon confirmed that lenders might be well advised to avoid foreclosure.[26]

Early CERCLA cases suggested that lenders could avoid CERCLA liability, so long as they avoided foreclosure or participation in the day-to-day management of the debtor's business. In *United States v. Mirabile,*[27] the court protected some secured lenders whose participation in the borrower's affairs was limited to financial advice. Other secured lenders were denied summary judgment by the *Mirabile* court on the ground that, in working out a problem loan, they might have become involved in the day-to-day operations of the contaminating corporation's business so as to become liable under CERCLA as "operators."[28]

Other risks for lenders soon emerged from the developing CERCLA case law. In *United States v. Fleet Factors* (*Fleet II*),[29] the Eleventh Circuit held that a lender could be held liable for clean-up costs at a borrower's facility, even if it never foreclosed, if it possessed the "capacity to influence [the borrower's] treatment of hazardous waste."[30] This standard was designed to encourage lenders to "monitor the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable treatment standards."[31] As a practical matter, however, the Eleventh Circuit's standard threatened many (if not all) lenders with liability. Loan agreements commonly require borrowers to comply with all laws, including environmental laws. They often accord lenders the power to influence their borrower's financial affairs. These common commercial loan practices, it was feared, might trigger CERCLA clean-up liability under *Fleet II*'s "capacity to influence" standard.



The spectre of environmental liability led lenders to refuse loans to develop old industrial properties or other "risky" geographic areas (with environmental risks often centered in low- and moderate-income communities), to avoid lending to certain types of businesses (*e.g.*, wastewater treatment plants, cogeneration facilities, gasoline service stations, print shops, dry cleaners, petroleum marketers, convenience stores, urban renewal projects, farm equipment), and to avoid lending at all, absent expensive environmental inspections and testing.

These court decisions had a dramatic impact on lenders' marketplace activities. Hazardous waste clean-ups often cost millions of dollars, which may be more than the value of a financing or the property taken as collateral for the loan.[32] To avoid these threatened liabilities, lenders adopted multi-faceted environmental risk management policies. They often insisted on environmental site assessments at the outset of commercial real estate loans. Warranties and representations were also required of borrowers. These commonly include representations that there are no outstanding environmental problems, promises to comply with environmental regulations, and contractual indemnifications of lenders against any environmental liability,[33] as a condition of obtaining a loan.

With new environmental liability insurance rarely available and often prohibitively expensive,[34] financers also "structured" their financings in a variety of creative ways to minimize or avoid the risk of CERCLA liability. When possible, they participated in financings as limited investment partners. Typical lease financings of facilities were structured so that the equity investors avoided ownership of the real property. Moreover, lenders tended to prefer secured loans, which seemed to provide a way to limit environmental liability by "walking away" and abandoning the collateral rather than foreclosing and becoming an "owner." Other forms of financing, such as finance leasing, were disfavored when the right to "walk away" was less clear. Lenders also experimented with splitting property and equipment like railroad rolling stock into different parts, financing only the wheels and carriage, while avoiding ownership of the tank that might be viewed as the CERCLA "facility" directly involved in chemical spills.

Other marketplace reactions by lenders included an increasing refusal to make loans when "environmental risks" were present or too expensive to identify. The spectre of environmental

liability led lenders to refuse loans to develop old industrial properties or other "risky" geographic areas (with environmental risks often centered in low- and moderate-income communities), to avoid lending to certain types of businesses (*e.g.*, wastewater treatment plants, cogeneration facilities, gasoline service stations, print shops, dry cleaners, petroleum marketers, convenience stores, urban renewal projects, farm equipment), and to avoid lending at all, absent expensive environmental inspections and testing. There were dramatic cut-backs in loans to small businesses, when the cost of an environmental inspection often might outweigh the value of the loan itself.[35] Moreover, lenders began to abandon collateral rather than risk incurring clean-up liability as a CERCLA "owner" by foreclosing.[36] These marketplace reactions created a "credit crunch" for small businesses and other industries, took properties out of private circulation, and threatened to significantly increase the number of "orphan" sites requiring taxpayer-financed clean-up.

Superfund Reform

The credit crunch and other pressures for Superfund reform have resulted in a "boomlet" of legislative activity. Earlier congressional efforts failed to enact legislation addressing the environmental lender liability issue. But the combination of the Clinton Administration's Superfund Reform Act of 1994 and other pending bills seems likely to bring legislative reform.

The "cosmic debate" on CERCLA has many interrelated parts, of which lender liability is only one. Larger disputes about CERCLA's liability scheme continue to occupy center stage.[37] Other contentious CERCLA issues involve remedy selection ("how clean is clean?"), risk assessment, innovative technologies, allocating liability among different parties, clarifying the federal-state relationship under CERCLA and RCRA, setting the proper standard for municipal liability at municipal co-disposal sites, and enhancing early and informed community involvement in the Superfund remedy selection process.

While these debates continue, EPA has issued a new rule designed to encourage banks and other lending institutions to lend money more freely without fear of incurring CERCLA liability.

EPA's Rule

The issuance of EPA's rule on lender liability under the federal Superfund statute[38] was a landmark development in environmental law. The EPA rule interprets the scope and meaning of CERCLA's secured creditor exemption. It clarifies the potential liability of secured creditors for cleanup costs if environmental problems occur at their borrowers' property.

Technically defining each statutory term in CERCLA's secured creditor exemption,[39] the EPA rule extends protection to a broad range of financial transactions.[40] Two issues in particular are clarified by the rule: (1) the scope of permissible activities that can be undertaken by a lender without "participating in management" or forfeiting the protections of the secured creditor exemption; and (2) what protections are available to lenders who foreclose.

With a more precise definition of the CERCLA statutory term "participating in management," the EPA rule delineates what is, and is not, protected. In general, the rule safeguards a broad range of commercial lending activities, both before and after foreclosure. These include making an environmental inspection, monitoring the borrower's finances, policing the security interest, requiring the borrower to comply with environmental laws or clean up the property, and undertaking various loan "workout" activities. The only time immunity is forfeited is if the lender assumes overall management responsibility for the borrower's business,[41] encompassing day-to-day decision-making with respect to either the borrower's environmental compliance or all, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise other than environmental compliance.

Winding-up operations, foreclosure, selling off assets, and "otherwise acting to recover the value of the security interest in a manner consistent with good commercial practice" are also protected by the EPA rule. To preserve the going-concern value of the borrower's business for resale, a foreclosing secured creditor may operate the borrower's business after foreclosure. But a lender may be held liable if it causes post-foreclosure spills.[42] To qualify for protection, a foreclosing lender must not have exercised manager-like control over the borrower's environmental compliance or day-to-day operations before foreclosure. Moreover, a foreclosing lender must act promptly to divest itself of the collateral.[43]

Holding the property for long-term investment purposes, or for purposes other than obtaining prompt repayment of the obligation owed to the lender, generally will forfeit the protections of the secured creditor exemption.[44] To provide a "safe harbor" for foreclosing secured creditors, the EPA rule establishes an alternative bright-line method for complying with the general test, requiring advertising and marketing of the property within twelve months after the lender forecloses or obtains marketable title to it. There is no time limit for disposing of the property after foreclosure. But rejection of "fair consideration"—defined essentially as a "make whole" amount—generally will destroy the immunity afforded by the EPA rule.[45]

Court Decisions

Several federal court decisions immediately showed that the EPA rule has teeth. The courts have applied the EPA rule to exempt lenders from environmental liability in a wide variety of settings, including suits involving only private parties, suits attempting to impose CERCLA "owner" liability on lenders that foreclosed on contami-

nated property, and suits in which the lender "influenced" the management of its borrower.

• **Post-foreclosure protection.** Three recent court decisions hold that lenders who foreclose on contaminated property, and then promptly sell it, are protected by CERCLA's secured creditor exemption. In the first decision interpreting EPA's lender liability rule, *Ashland Oil Inc. v. Sonford Products Corp.*,[46] the court rejected a land owner's claims for CERCLA "contribution" against a secured creditor that foreclosed and briefly held title before reselling the contaminated property. Even though this suit arose before the effective date of the EPA rule, the court relied on the rule to protect the foreclosing secured creditor. Here, foreclosure and resale were completed within three to four weeks. The court held that this situation fell squarely within the protections of CERCLA's secured creditor exemption, as clarified by the EPA rule.[47]

In the second case, *Waterville Industries, Inc. v. Finance Authority of Maine*,[48] the court relied on the CERCLA statute itself to deny claims by the owner of contaminated textile mill property in Maine, who sought CERCLA contribution from a secured lender/lessor that had earlier foreclosed upon the property and sold it to the owner within a year after obtaining clear title to the property. Immunity was extended to the secured lender/ lessor because

> [w]ere it otherwise, every sale and lease-back arrangement would subject the lender-lessor to the risk of sudden CERCLA liability whenever the lessee, by default or otherwise, lost its contractual rights to regain full ownership. So long as the lender-lessor makes a reasonably prompt effort to divest itself of its unwelcome ownership, we think continued coverage under the exception serves its basic policy: to protect bona fide lenders and to avoid imposing liability on "owners" who are not in fact seeking to profit from the investment opportunity normally presented by prolonged ownership.

The court of appeals held that this "safety zone" is implicit in the CERCLA statute itself.

Similarly, in *United States v. McLamb*,[49] the court invoked CERCLA itself (rather than the EPA rule) to reject claims by a land owner who sought CERCLA "contribution" from a bank that earlier sold it the oil-spill-contaminated land. The bank had been a secured creditor that acquired title to the property at a foreclosure sale, at which (as is common) it was the only bidder. The bank promptly placed the property on the market, without attempting to develop or manage it, and resold it to the current owner seven months later. Relying on *In re Bergsoe Metal Corp.*,[50] the court examined why the foreclosing bank took title, and concluded that it was "[p]rimarily, indeed exclusively, to protect its security interest." Though the bank was an interim owner, it could not be held liable as a CERCLA "owner" because it qualified for protection under CERCLA's secured creditor exemption.

• **Secured creditor's permissible "influence" over the borrower's business.** Three other recent cases address the extent to which a secured creditor can "influence" its borrower's business activities without forfeiting the protections of CERCLA's secured creditor exemption. Extensive lender involvement was permitted by the court in *Kelley v. Tiscornia*.[51] Though the secured creditor closely monitored the borrower's financial health, consulted with it regularly, suggested new management for the borrower, had significant influence over a turnaround specialist hired for the borrower, and even had bank officers sitting on the borrower's board of directors, these actions were all protected by EPA's new rule. Even if the lender had authority to make administrative and personnel decisions (hiring and firing the borrower's employees), the court said this might be protected by the EPA rule.

In *Silresim Site Trust v. State Street Bank*,[52] the court confirmed that a lender's mere capacity to affect the borrower's operations is irrelevant, and that a lender can take a wide range of financial actions, while still remaining immune from CERCLA damages. So long as the secured creditor avoids taking over day-to-day operation of the borrower's business, or its environmental compliance, it enjoys the protection of CERCLA's secured creditor exemption.

All these recent court decisions, mirroring the EPA rule, reject a broad reading of the Eleventh Circuit's notorious opinion in *United States v. Fleet Factors*.[53]

Meanwhile, after remand and a full trial, the United States district court ruled in the *Fleet Factors* case that secured lender/factor Fleet was liable as an "owner or operator" under CERCLA. Fleet forfeited the protections of CERCLA's secured creditor exemption, the court ruled, because its agents (an auctioneer and a salvager) caused chemical spills while handling large quantities of hazardous substances during post-foreclosure liquidation and salvage operations at the borrower's premises.[54] The EPA rule protects a broad range of activities by a secured lender. And a foreclosing creditor may become involved with hazardous substances in maintaining the borrower's operations for resale after foreclosure.[55]

But the court held that mishandling large quantities of clearly-marked hazardous substances was not protected by the EPA rule. The opinion explained that "[t]he more the handled substances resemble an environmental hazard (as opposed to, for example, hazardous substances being used as part of an on-going operation), the more likely they may be handled only in accordance with 42 U.S.C. § 9607(d)(1)," which generally requires handling in accordance with the National Contingency Plan (NCP) or at the direction of an NCP on-site coordinator.

Those standards were not met in *Fleet IV*. The court found that significant chemical spills occurred when the auctioneer "disposed" of drums of chemicals in out-of-the-way places

within the plant building,[56] and the salvager "[u]ndertook its task with all the finesse of a Viking raiding party." CERCLA "owner" liability was imposed on the secured creditor whose agents mishandled hundreds of corroded, leaking drums of hazardous substances in this fashion after foreclosure.[57]

Limitations of the EPA Rule

The scope of the EPA rule is confined to CERCLA. It does not affect liability under state law, judge-made common law, or other federal laws, such as RCRA, which governs underground storage tanks and solid waste activities. Within the field of CERCLA law, the EPA rule affects only "owner or operator" liability under CERCLA, not CERCLA liability for transporters, generators, or others who arrange for the disposal of hazardous substances. Outside the protections of the EPA rule are lenders who act to control their borrower's day-to-day operations or environmental compliance. Similarly, as the *Fleet Factors* court held, the EPA rule may not exempt a lender from liability for spills it causes after foreclosure. Moreover, the EPA rule protects only secured creditors from CERCLA liability, not unsecured creditors or banks acting in other capacities, such as a bank trust department acting as trustee under a testimentary trust.[58]

Court Challenge

The Court of Appeals for the D.C. Circuit, in a split two-to-one decision, struck down EPA's lender liability rule on February 4, 1994. In *Kelley v. EPA*,[59] the majority ruled that EPA lacks statutory authority to issue "legislative" rules defining the "liability" sections of CERCLA in a way that would cut off private rights of action.

The majority opinion in *Kelley* largely tracks the claims of the two parties challenging the EPA rule: the State of Michigan and the Chemical Manufacturers Association (CMA) They claimed that CERCLA's 107 liability sections authorize states and other affected parties to act as "private attorneys general" to enforce CERCLA. They argued that the CERCLA statute does not give EPA authority to issue rules that cut off the rights of other parties to sue and recover.[60]

To this, the court of appeals' majority added a distinction between CERCLA "liability" and CERCLA "remedies," crediting EPA with rulemaking authority only to define "the nature of actions parties must take in response to contamination—not their ultimate liability for the contamination set forth in section 107" of CERCLA.[61] Chief Judge Mikva dissented in an opinion that will be published separately.[62]

After ruling that Congress designated "the courts and not EPA as the adjudicator of the scope of CERCLA liability,"[63] the *Kelley* majority turned to whether the EPA rule might be sustained as an "interpretive" rule or policy statement. But if the EPA rule were viewed as a mere interpretative rule or policy statement, binding only on the federal government, its effects would be *de minimis*. Whenever the federal government brought suit under CERCLA, the original defendants could turn around and sue lenders in the same case. Nor would an interpretative rule or EPA policy statement protect lenders against private-party suits. The *Kelley* majority recognized this.

> [I]f the regulation were to affect only EPA's enforcement proceedings, lenders would still face potentially staggering liability because of the generality of the statutory language and the prospect of private suits. That potential liability would force lenders to behave cautiously even if EPA were to adhere to the regulation as its policy. Given our uncertainty as to EPA's wishes, we think the proper course is to vacate the rule and leave EPA free to take whatever steps it thinks appropriate.[64]

Overlooked by the majority opinion are some important features of CERCLA's statutory language and structure. CERCLA is not a statute in which "private attorney generals" stand on an equal footing with EPA, or in which EPA is merely "one of many potential plaintiffs." Throughout its course, the statute makes it clear that EPA is the dominant interpreter and enforcer of the statute.

CERCLA sections 105 and 115 give rulemaking authority to EPA, and to EPA alone, to fill in the gaps in the statute. The sweeping rulemaking authority given to EPA is not limited by the statute to "remedy selection," as opposed to CERCLA "liability" issues. EPA interprets CERCLA's 107 liability sections every day, as part of its enforcement responsibilities. It is clearly within EPA's jurisdiction to do so. Moreover, CERCLA's provisions for judicial review explicitly contemplate that EPA rules will have binding legislative effect that may limit or cut off private rights of action by states, like Michigan, and private parties, like CMA. The statute states that, if an EPA rule is not attacked immediately by suit in the D.C. Circuit, it cannot be attacked later by a private party or anyone else "[i]n any civil . . . proceeding . . . to obtain damages or recovery of response costs."[65]

The implication is that EPA legislative rules (as opposed to adjudicatory EPA reimbursement decisions under CERCLA section 106) may cut off private rights of action. In this respect, CERCLA is different from other statutes under which private parties are free to bring direct court actions to test the meaning of a statute free from the shadow of agency views.

EPA promulgated its rule as a legislative rule under the informal agency rulemaking procedures of notice-and-comment in 5. U.S.C. § 553. Thoroughness is evident in the opinion accompanying EPA's final rule, which carefully assesses hundreds of comments. Relying on "traditional and evolving principles of common law,"[66] as illuminated by court decisions, EPA crafted a much-needed clarification of CERCLA's muddy liability rules for lenders.[67] The statutory provisions of CERCLA seem to make EPA legislative rules binding on private parties in later suits. Ordinary principles of administrative law suggest that, in these circumstances, full

force and effect should be given to EPA's lender liability rule.[68] Given the importance of the EPA rule, there may be petitions seeking rehearing, or rehearing *en banc,* from the court of appeals in *Kelley.*

Legislative Proposals

Whatever the final outcome of the litigation in *Kelley,* the court of appeals' panel decision will inevitably fuel continuing efforts to obtain congressional clarification of lenders' rights and obligations under environmental law.

Two major pending bills in the 103rd Congress—H.R. 2462, introduced by Rep. LaFalce, and S. 1124, introduced by Senator D'Amato[69]—would essentially put the EPA rule into statutory law. While the bills are different,[70] both would protect secured creditors and institutional fiduciaries, such as bank trust departments, threatened with environmental liability under CERCLA or RCRA.

The major galvanizing event on Superfund reform may be the Clinton Administration's CERCLA reauthorization bill. Two major reform plans—one from an interagency workgroup, the other from the privately-sponsored National Commission on Superfund—were melded together by the administration. The outcome, the Superfund Reform Act of 1994 (H.R. 3800), represents a salutary attempt to bring real reform to this troubled area of the law.

The Clinton Administration's bill would streamline CERCLA administration and encourage settlements. While preserving "the polluter pays" principle, the bill would modify CERCLA to reduce wasteful litigation. To cut down on legal wrangling, the bill would set up an efficient system for allocating liability among potentially responsible parties (PRPs). CERCLA's old joint-and-several liability standard would be modified by establishing a settlement system that allocates clean-up costs to settling parties based on their "fair share" of the costs, leaving an "orphan share" of the clean-up costs to be financed by the government. Another part of the bill would create the new Environmental Insurance Resolution Fund to settle insurance claims that are related to waste that was disposed of before 1986. This fund would be financed by fees and assessments on insurance companies. To receive money from the fund, PRPs would have to waive their rights to sue their insurance carriers for their remaining clean-up costs.

Tumultuous political battles have raged within the administration over CERCLA remedy selection principles. Under the bill, Superfund remedies would be tailored more closely to the reasonably expected future uses of polluted land. The bill specifies a menu of standard remedies and clean-up methods for different situations. "For example, if the community decides that a contaminated site is going to be used for an industrial plant, we might not need to clean it up to the same level as we would for a school or recreation center."[71] Otherwise, the bill seems largely to adopt the national commission's approach to remedy selection, particularly in its preference for clean-up of "hot spots."[72]

Though further changes may be made by Congress,[73] the administration apparently is proposing a non-binding allocation process, in which responsible parties' liabilities would be determined by a neutral third party.[74] A cap on municipal liability under CERCLA is proposed.[75] Those with very small waste contributions, so-called *de micromis* parties, may be exempted from CERCLA liability.[76] Drawing on studies by Clean Sites and other environmental groups, the bill also encourages community involvement at an earlier stage of the CERCLA remedy selection process.

The administration's CERCLA reauthorization bill apparently will reconfirm, retroactively, EPA's authority to promulgate its rule on "Lender Liability under CERCLA" as a binding "legislative" rule.[77] This would moot the *Kelley* case, but it would not expand the protections of the EPA rule. Left open for Congress to address in other legislation are the concerns of secured lenders about the full range of federal and state environmental laws imposing owner or operator liability.

Conclusion

The overall policy objective of the financial community for environmental law might be to obtain federal pre-emptive legislation applying a secured creditor exemption (a single national standard) to most, if not all, environmental liability laws imposing owner or operator liability. There has been widespread congressional and judicial approval of the policies underlying CERCLA's secured creditor exemption. But these policy considerations apply well beyond CERCLA to other settings—such as the current round of ship financing that is stifled by the overbroad terms of the Oil Pollution Act and the Clean Water Act—when financers seek to make investments beneficial to our economy but are deterred from doing so by the threat of owner or operator liability in environmental laws.

The only product of financers is money. Unlike some other industries, the commercial business of financers does not inevitably involve dealing with hazardous substances. If the risks of financing are too high for environmentally sensitive industries, then the cost of capital formation will be higher for these industries, or financers will simply invest their money elsewhere. This will impede the flow of financing for a wide range of socially beneficial activities, from new, double-hulled oil tankers to environmentally beneficial projects like wastewater treatment plants, and it will cut back the availability of credit needed for waste clean-up itself.

Our national economy must be revitalized while protecting America's land, water, and air against further environmental degradation. Lenders, business borrowers, and environmentalists all have a common stake in this enterprise. One part of our ongoing attempt to strike a balance between environmental protection and capital formation concerns would be for Congress to enact an expanded secured creditor exemption.

[1]57 Fed. Reg. 18344 (Apr. 29, 1992).

[2]Nos. 92-1312, 92-1314 (D.C.Cir.).

[3]42 U.S.C. § 9601 *et seq.* (1993).

[4]42 U.S.C. § 6921 *et seq.* (1993).

[5]33 U.S.C. § 2701 *et seq.* (1993).

[6]33 U.S.C. §§ 1251-1376 (1993).

[7]Other major federal environmental statutes are directed at specialized situations that ordinarily arise only infrequently for most lenders. *See, e.g.*, Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq.* (1993) (statute authorizes government suits to compel cleanup of "imminently hazardous chemical substances" such as PCBs; fines and penalties specified for failure to comply with TSCA reporting and regulatory requirements); Title III of Superfund Amendments of 1986 SARA), 42 U.S.C. § 11001 *et seq.* (1993) (statute imposes civil and criminal penalties for failure to comply with comprehensive scheme, directed primarily at manufacturers, requiring reporting of chemical stocks and emissions); the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (1993) (prohibits the discharge of hazardous air pollutants in excess of emissions standards); Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653 (1993) (oil spill liability). *See also* Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 ENVT'L L. REP. 10,065, 10,069-71 (listing criminal sanctions available under various federal pollution control statutes).

[8]CERCLA imposes liability on: (1) the owner or operator of a vessel or "facility;" (2) owners or operators at the time hazardous substances were released; (3) generators of hazardous substances and others who arranged for disposal or treatment of hazardous substances; and (4) transporters of hazardous substances to a site from which there is a release or threatened release triggering costs. 42 U.S.C. § 9607(a) (1993). Persons and entities who may be liable include: (1) the federal government, see 42 U.S.C. §§ 9601(21), 9607(g) and 9620 (1993); (2) state and local governments, see Pennsylvania v. Union Gas, 491 U.S. 1 (1989); (3) parent corporations, see United States v. Kayser-Roth, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); (4) corporate officers, employees and stockholders, *see, e.g.*, State of New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); and (5) even manufacturers of useful products or others if they own hazardous substances and/or arrange for their disposal, compare United States v. Aceto, 872 F.2d 1373 (8th Cir. 1989) with Florida Power & Light v. Allis Chalmers Corp., 893 F.2d 1313 (11th Cir. 1990).

[9]Toxic, ignitable, reactive, or corrosive substances (*e.g.*, pesticides, chemical solvents, asbestos) generally fall within the scope of CERCLA "hazardous substances." *See* 42 U.S.C. § 9601(14) (1993) (multi-part definition of CERCLA "hazardous substance"); 40 C.F.R. pt. 302 (1993) (substances covered by CERCLA). All RCRA hazardous wastes are included. *Id.* Oil and petroleum products are generally *outside* the scope of CERCLA, as is gas fuel. *See* 42 U.S.C. §§ 9601(14), 9614(c) (1993). *See generally* United States v. Conservation Chemical, 619 F. Supp. 162, 239-240 (W.D. Mo. 1985) (overview of hazardous substances covered by CERCLA). *Compare* 40 C.F.R. §§ 261.30- .35 (1992) (narrower category of hazardous wastes covered by RCRA).

[10]The sweeping CERCLA definition of "facility" includes: "(A) any building, structure, installation, equipment, . . . storage container, motor vehicle, rolling stock, or aircraft; or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." 42 U.S.C. § 9601(9) (1993).

[11]The statute recognizes a defense to liability when a release of hazardous substances is caused solely by an act of God, an act of war, or the act or omission of a contractually unrelated third party. 42 U.S.C. 9607(b). *See also* 42 U.S.C. § 9601(20)(A) (1993) (secured creditor exemption); 42 U.S.C. § 9601(35) (1993) (innocent purchaser defense); 42 U.S.C. § 9622 (g),(f) (1993) (EPA authorized to enter into *de minimis* settlements and covenants not to sue, in certain circumstances).

[12]42 U.S.C. § 9601(20)(A) (1993).

[13]*See* H.R. REP. No. 96-172, pt. 1, 96th Cong., 1st Sess. at 36 (May 15, 1979) *reprinted in* 5 U.S. CODE, CONG. & ADMIN. NEWS 6181 (1980).

[14]*See* 42 U.S.C. § 6924 (1993).

[15]*See* 42 U.S.C. § 6991 *et seq.* (1993); 40 C.F.R. pt. 280 (1992).

[16]*See* 42 U.S.C. § 6992 *et seq.* (1993); 40 C.F.R. pt. 259 (1993).

[17]*See* 42 U.S.C. § 6991b(h)(9) (1993).

[18]The importance of old fashioned state tort law for environmental damage suits is illustrated by the multi-billion dollar civil litigation over the Exxon Valdez oil tanker spill in Alaska. *In re Exxon Valdez* (Alaska Superior Ct., Civil No.3AN-89-2533) (USDC, D. Alaska, Civil #A89-095) (appeal pending, 9th Cir. No. 93-35274) (suits for civil damages by private party plaintiffs claiming maritime negligence by Exxon; state court action seeks recovery of significant additional damages, including economic losses to tourist and logging industries, under theories of strict liability in Alaska Environmental Conservation Act (A.S. 46.03.822), state tort theories of strict liability for ultra-hazardous activity, and negligence).

[19]*See* Marcotte, *Toxic Blackacre*, 73 A.B.A. J. 69 (Nov. 1, 1987).

[20]*See, e.g.*, New Jersey's Environmental Cleanup and Responsibility Act, N.J. Stat. Ann. 13:1K-13 (West Supp. 1987).

[21]*See generally, Symposium on Criminal Enforcement of Environmental Laws*, 22 ENVT'L LAW 1315 *et seq.* (1992).

[22]*See* Marcotte, *supra* note 19, at 68 (listing forty-four states with state Superfund laws).

[23]Twenty-six states have enacted statutes that provide some form of protection for lenders from state law liability for spills of hazardous substances: Arizona, California, Colorado, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Oregon, Pennsylvania, South Dakota, Vermont, and Washington. *See generally*, BILLAUER & HATHAWAY, THE LENDER'S GUIDE TO ENVIRONMENTAL LAW: RISK AND LIABILITY Appendix 5-1 (1993) (fifty-state survey of state hazardous substance cleanup statutes).

[24]632 F. Supp. 573 (D. Md. 1986).

[25]The court in *Maryland Bank & Trust* did not decide whether CERCLA's "secured creditor exemption" would protect a secured party that purchased polluted property at a foreclosure sale and then "promptly resold it." 632 F. Supp. at 579 n.5.

[26]*See, e.g.*, Guidice v. BFG Electroplating & Mfg., 732 F. Supp. 556 (W.D. Pa. 1989) (once lender forecloses and acquires title, the protections of CERCLA's "secured creditor exemption" may evaporate).

[27]5 Envt'l. L. Rep. 20992, 1985 WESTLAW 97 (E.D. Pa.1989).

[28]*Id. See also* United States v. Nicolet, Inc., 712 F. Supp. 1193, 1204-05 (E.D. Pa. 1989).

[29]901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991) .

[30]*Id.* at 1557-58.

[31]*Id.* at 1558.

[32]EPA estimates that the average cleanup cost per site, at each of more than 30,000 hazardous waste sites around the country, is $25 million or more. *See, e.g.*, Geltman, *Rule 10b-5 and RICO: Alter-*

native Remedies for Environmental Liabilities Acquired by Stock Purchase of a Closely Held Corporation, 26 HOUS. L.REV. 455, 457 n.8 (1989). Under CERCLA's standard of joint and several liability, any liable person is potentially liable for the entire cost of cleanup at a site.

[33]Most courts hold that indemnity agreements are effective to shift CERCLA liability between private parties, up to the practical limit set by the indemnifier's ability to pay. *See, e.g.*, Mardan Corp. v. CGS Music, 804 F.2d 1454, 1458-60 (9th Cir. 1986); *contra* CPC International, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269, 1282-83 (W.D. Mich. 1991). But an indemnity agreement does not eliminate CERCLA liability. A responsible party under CERCLA always remains primarily liable to the government. *See, e.g.*, Kaufman & Broad-South Bay v. Unisys Corp., 822 F. Supp. 1468, 1472 (N.D. Cal. 1993) (collecting cases).

[34]*See, e.g., Developments in the Law- Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1576 (1986); BILLAUER & HATHAWAY, *supra* note 23, at 14.05, 17.04. There has been a vast amount of litigation over whether old comprehensive general liability insurance (CGL) policies cover environmental law liabilities. Typical insurance coverage disputes, turning on state law, involve: (1) are waste cleanup costs "damages" covered by the insurance contract, or merely a form of "equitable restitution" that is not covered? (2) when a CGL policy contains a standard "pollution exclusion" clause—which often states that "sudden or accidental" events remain covered by insurance—are environmental cleanup costs covered? *See, e.g.*, Morton Int'l v. General Accident Ins., 134 N.J. 1, 629 A.2d 831 (N.J. 1993). Wasteful litigation over insurance coverage issues is a major cause of excessive "transaction costs" incurred for lawyers and consultants (not cleanup) at hazardous waste sites. *See* ACTON & DIXON, SUPERFUND AND TRANSACTION COSTS (1992) (study of over 13,000 claims against national insurance carriers, for cleanup or bodily injury and property damage at hazardous waste sites, showed transaction costs running at a phenomenal 88% of total expenditures).

[35]According to a 1990 poll by the American Bankers Association, canvassing banks with assets of $250 million or less, "43 percent of respondents have already stopped making loans altogether to certain types of small businesses, those that [are] most frequently associated with environmental problems, and another 11 percent plan to do so shortly." Hearings before Senate Banking Committee on S. 2827, Tr. 65-66 (July 19, 1990) (statement of Charles M. Mitschow).

[36]See surveys of effect of CERCLA on banking and lending activities, Joint Brief of Intervenors in *Kelley v. EPA*, Appendix I (D.C.Cir. Nos. 92-1312, 92-1314) (Aug. 1993), and in INDEPENDENT BANKER 28 (Nov.1991).

[37]Within the Clinton Administration, Treasury Department officials recommended that CERCLA and RCRA should be modified: (1) to pre-empt state law; (2) to impose strict liability predicated on behavior, not on status or merely occupying a relationship to the contaminated property (as is true in the case of owners, lenders, and fiduciaries who had no role in causing the pollution); (3) to apportion liability based on a liable party's contribution to contamination at a site; and (4) to eliminate retroactive liability for actions that were lawful at the time they took place. EPA and Justice tended to favor more modest modifications of CERCLA to facilitate settlements. Others advocated a "public works" approach involving public funding for CERCLA cleanups, at least for hazardous substances disposed of before CERCLA was enacted. The administration is hammering out its position as this article goes to press. The outcome in Congress has yet to be determined.

[38]57 Fed. Reg. 18344 (Apr. 29, 1992), 40 C.F.R. § 300.1100 (1993).

[39]42 U.S.C. § 9601(20)(A) (1993).

[40]EPA's final rule makes it clear, for example, that protection extends to "lease financing transactions" in which the lessor does not initially select the leased property. Owner/lessors in these lease financing transactions will not be subject to CERCLA liability for cleanup costs when the lessee causes a spill of chemicals or hazardous substances. 40 C.F.R. §§ 300.1100(a), (b)(1), (d)(1),-(2) (1993). In describing the kinds of lease transactions that qualify for immunity, the explanation accompanying the rule says: "further, during the initial lease or any re-lease, the lessor does not control the daily operation and maintenance of the property (a lessor who conducts such activities may participate in management, as provided in this rule). Typical kinds of these transactions include national bank lease financing, leveraged leases, and single-investor leases. In these transactions, the lessor is entitled to certain tax benefits. While the lessor will have tax benefits and may have some equity residual as secondary interests in the property, the primary reason it holds indicia of ownership in the property is to protect its security interest in the event that the debtor/-lessee fails to pay off its obligation to the lessor. If a debtor/lessee defaults, a lessor may acquire the property through a variety of mechanisms, and is still considered to hold indicia of ownership under [the protections of CERCLA] Section 101(20)(A) provided that it complies with other provisions of the rule" [see *Foreclosure, infra.*]. 57 Fed. Reg. at 18352 (1992). Throughout the final EPA rule, references to the term "lenders" encompass finance lessors while "borrowers" include lessees.

[41]One commentator believes that EPA's use of the word "overall" to modify "management" (see 57 Fed. Reg. at 18383 (1992)) means "that the security holder must have assumed primary (if not nearly all) management with regard to the specified areas. Thus, a lender is not likely to trigger liability by an isolated act and presumably may make occasional recommendations to the borrower about environmental and operations matters." BILLAUER & HATHAWAY, *supra* note 23, at 2.09[2][b].

[42]*See* 57 Fed. Reg. at 18357 (1992).

[43]*See* 40 C.F.R. § 300.1100(d) (1992); 57 Fed.Reg. at 18363 (1992).

[44]*See* 57 Fed. Reg. at 18363 (1992).

[45]Two other features of the EPA rule deserve brief mention. *First*, the final rule rejects any requirement that a secured creditor conduct an environmental inspection to qualify for CERCLA's secured creditor exemption. *See* 40 C.F.R. § 300.1100(c)(2) (1992). *Second*, in issuing its rule on lender liability under CERCLA, EPA promised to issue a similar rule on the meaning of the "secured creditor exemption" to RCRA "owner" liability for underground storage tanks, 42 U.S.C. § 6991b(h)(9) (1993). *See* 57 Fed. Reg. at 18349 (Apr. 29, 1992). No such EPA rule under RCRA has yet been issued, however.

[46]810 F. Supp. 1057 (D. Minn. 1993).

[47]Nor was the secured creditor liable as a CERCLA "arranger," the court held. There was no evidence that the secured creditor sold the assets after foreclosure at a heavily discounted price reflecting an implicit agreement to dispose of hazardous substances. *Cf.* Florida Power & Light Co. v. Allis Chalmers, 893 F.2d 1313, 1317-19 (11th Cir. 1990).

[48]984 F.2d 549 (1st Cir. 1993).

[49]5 F.3d 69 (4th Cir. 1993).

[50]910 F.2d 668 (9th Cir. 1990).

[51]810 F. Supp. 901 (W.D. Mich. 1993).

[52]1992 U.S. Dist. LEXIS 20610 (D. Mass. Nov.24, 1992).

[53]901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

[54]United States v. Fleet Factors, 819 F. Supp. 1079 (S.D. Ga. 1993) (*Fleet III*); 821 F. Supp. 707 (S.D. Ga. 1993) (*Fleet IV*).

[55]The "general test" of the EPA rule, said the court, is "whether a particular secured creditor's actions were in the normal course of its business." This standard protected Fleet's pre-foreclosure activities, such as selling collateral and making decisions at the plant after it shut down. Immunity also attached to "auction preparation activities" by Fleet's auctioneer, including repossessing the borrower's assets, "straightening up" the site, and "mere incidental handling of hazardous substances." All these actions were consistent with those of "a reasonable, similarly situated secured creditor."

[56]The court based its finding of "disposal" on the auctioneer's actions in discarding several hundred "damaged, corroded, leaking drums," clearly marked as containing hazardous substances, in "secluded areas" within the borrower's plant building, where they "likely would remain into the indefinite future." This constituted a CERCLA "disposal" as much as "placing them in any waste dump would have been," the court held. This ruling made it unnecessary for the court to take sides in the recent controversy over whether passive leaking qualifies as "disposal" under CERCLA. *Compare* Nurad v. William E. Hooper & Sons, 966 F.2d 837 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992) (disposal includes passive action), *with* United States v. Peterson Sand and Gravel, 806 F. Supp. 1346 (N.D. Ill. 1992) (disposal does not include passive action).

[57]The opinion of the court suggested that, if Fleet had succeeded in invoking the "secured creditor exemption" so that it could not be viewed as a CERCLA "owner," then the court would have held Fleet liable under CERCLA as a person who "arranged" for the disposal of hazardous substances at a facility owned by another. 821 F. Supp. at 724-26.

[58]*See, e.g.*, City of Phoenix v. Garbage Services Company, 816 F. Supp. 564 (D. Ariz. 1993).

[59]Nos. 92-1312, 92-1314 (consolidated) (D.C. Cir.).

[60]Taking their cue from the dissenting opinion in Wagner Seed Co. v. Bush, 946 F.2d 918 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992) (upholding EPA regulations on CERCLA § 106 reimbursement provisions), CMA and Michigan argue that while CERCLA delegates *some* rulemaking authority to EPA, the statute reserves to the Judiciary (not EPA) the primary task of interpreting the scope and meaning of CERCLA's § 107 liability provisions, including the secured creditor exemption in 42 U.S.C. § 9601(20)(A) (1993). *See also* Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990) (court rejects agency interpretation of statute creating private rights of action, as overstepping agency's jurisdiction, when agency had no occasion to invoke or sue upon that statutory provision and nothing in the statute gave agency power to cut off private rights of action); Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (criminal statutes are authoritatively interpreted only by the courts, not agencies).

[61]Kelley v. EPA, slip op. at 9 (D.C. Cir., Feb. 4, 1994).

[62]Other claims raised by Michigan and CMA challenged the EPA rule's construction of CERCLA's secured creditor exemption on important questions, such as providing lenders with some post-foreclosure protection, and defining "participating in management" (42 U.S.C. § 9601(20)(A) (1993)) to safeguard a wide range of activities commonly undertaken by commercial lenders "in the normal course of [their] business." *Fleet IV*, 821 F. Supp. at 715. The court of appeals did not reach those issues.

[63]*Kelley*, slip op. at 13.

[64]*Id.* at 15.

[65]42 U.S.C. § 9613 (1993).

[66]*See* 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph) ("It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law.").

[67]EPA promulgated its lender liability rules as part of the National Contingency Plan (NCP). The right of states and private parties to recover clean-up costs under CERCLA's 107(a) liability sections has always been contingent on compliance with the NCP, which has long been interpreted by EPA to impose obligations —such as community involvement in remedy selection—that may cut back private rights of action. *See* 40 C.F.R. § 300.700 (1993).

[68]*See, e.g.*, EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1235 (1991); Skidmore v. Swift & Co., 323 U.S. 134, 137-38 (1944).

[69]Other pending congressional bills also would assist lenders. For example, Rep. Weldon's bill (H.R. 570, 103rd Cong.) attempts to clarify the meaning of CERCLA's "innocent purchaser defense." Theoretically, this defense is available to a new owner or operator, who makes "all appropriate inquiry" into the property's earlier ownership and uses, who has "no reason to know" that hazardous substances were disposed of there, and who exercises due care with respect to any hazardous substance later discovered. 42 U.S.C. § 9601(35)(A)-(B) (1993). H.R. 570 sets out detailed standards in an attempt to clarify what constitutes "all appropriate inquiry."

[70]H.R. 2462, 103d Cong., 1st Sess. (1993) is a straight-forward statutory restatement of the EPA Rule. No environmental inspections are required by this bill, which safeguards secured creditors and institutional fiduciaries against liability under both CERCLA and RCRA.

The Senate bill, S.1124, 103d Cong. 1st Sess. (1993), is more complex. Title II of the bill, which addresses the environmental liability of lenders, sets up a multi-tier system. One tier preserves all the protections current CERCLA law. Another tier limits CERCLA and RCRA liability for a lender that forecloses or holds property in a fiduciary capacity, or leases or financially controls property pursuant to an "extension of credit." On top of that are "safe harbor" protections for a variety of specifically-listed ordinary lending activities by secured creditors who conduct an environmental inspection of the property before making a loan. While the House bill treats non-bank creditors the same as bank creditors, the Senate bill treats them differently, imposing different penalties for failure to conduct an environmental inspection. (When a bank fails to conduct an inspection, it is deemed a violation of the Federal Deposit Insurance Act. When a non-bank creditor fails to conduct an inspection, it is disqualified for the second layer of protections in the Senate bill.)

[71]Statement of Carol M. Browner, Administrator, U.S. Environmental Protection Agency, on Clinton Administration Superfund Proposal (Feb. 3, 1994).

[72]*Id.*; NATIONAL COMMISSION ON SUPERFUND, FINAL CONSENSUS REPORT at 4-15 (Dec. 21, 1993).

[73]*See* H.R. 3624, 103d Cong., 1st Sess. (1993) (proposing binding allocation system for allocating CERCLA cleanup costs among responsible parties); BNA DAILY ENVIRONMENT REP. at A4-5 (Dec. 17, 1993) (Chemical Manufacturers Association argues no constitutional due process barriers to properly-crafted binding allocation system); BNA DAILY ENVIRONMENT REP. at A4 (Dec. 22, 1993) (National Commission on Superfund supports binding CERCLA liability-allocation system).

[74]*See* BNA DAILY TAX REP. at G4 (Dec. 23, 1993); BNA DAILY ENVIRONMENT REP. at A6 (Dec. 15, 1993); INSIDE EPA at 7-8 (Jan. 28, 1994).

[75]*Id.* at A6.

[76]*Id.*

[77]*See Inside EPAÆs Superfund Report* at 5-6 (Jan. 14, 1994). The administration bill also apparently will empower EPA to issue a similar legislative rule on trustee liability under CERCLA. *Id.*