Easing the Credit Crunch: A “Functional” Approach to Lender Control Liability Under CERCLA

Patricia A. Shackelford
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I. INTRODUCTION

Dry cleaners, gas stations, pharmacies, and wallpapering businesses are finding it difficult to obtain operational financing. At first glance, their plight seems inexplicable. All four types of business appear to be benign commercial undertakings. Beneath their innocent appearances, however, lies the potential for environmental liabilities. They all use hazardous materials in either their processes or their products. The use and eventual disposal of hazardous materials may invoke a hazardous waste liability law known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Moreover, CERCLA's reach is not limited to the owner or operator of a business. Commercial lenders

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2 136 Cong. Rec. E1023 (daily ed. Apr. 4, 1990) (statement of Rep. LaFalce); Lending Squeeze, supra note 1, at 52; Real Estate Lawyers, supra note 1, at 1250.


4 Id. § 9607(a).
also face the prospect of CERCLA liability. This development and its repercussions have been labeled the lender liability crisis. Although the United States Environmental Protection Agency (EPA) has pursued only eight lenders under CERCLA, a far greater number of lenders have been the object of private party suits. Even so, environmental groups argue that, when one compares these lenders to the thousands of parties held responsible for cleanup costs at Superfund sites, the magnitude of the lender liability crisis is overstated. What the environmental groups do not understand is that the crisis stems not from the numbers of lenders that courts have held liable but rather from the lending community’s fear of potential liability. Fear of liability translates into increased risk. If the risk associated with a loan becomes too great, as is often the case with environmental risks, a lender will not make the loan. Thus, the real crisis is the lack of available credit—the current “chill in lending”. This environmentally driven “credit crunch” has created significant problems for many segments of the economy, especially small businesses.

5 See id. §§ 9601(20)(A), 9607(a). In fact, the state of Pennsylvania has sued a lender of a wallpapering business under CERCLA. See Lending Squeeze, supra note 1, at 52. The Small Business Administration (SBA), a federal lending institution, loaned money to a small wallpapering business in Pennsylvania. The business contaminated its property with glue. Id. The SBA foreclosed on the business and the state government has sued the SBA for cleanup costs associated with the contaminated property. Id.
7 Id. at 1159. As of December 1990, the EPA had notified over 90 lenders of their potential CERCLA liability. U.S. Asks Supreme Court Not to Review Fleet Factors Ruling on CERCLA Liability, 21 [Current Developments] Env’t Rep. (BNA) 1583, 1588 (Dec. 21, 1990) [hereinafter U.S. Asks Supreme Court]. At that point in time, the lending community faced a potential liability exceeding $100 billion. Id.
8 See U.S. Asks Supreme Court, supra note 7, at 1583 (by end of 1990, lenders had been party to approximately 36 suits under CERCLA). For a discussion of the increased potential for private party actions against lenders, see Lender Liability Issues Attract Attention at Annual American Bar Association Meeting, 22 [Current Developments] Env’t Rep. (BNA) 1148, 1148–49 (Aug. 23, 1991) [hereinafter American Bar Association Meeting].
9 Sweetheart Deal, supra note 6, at 1159.
10 Id. at 1160.
12 Id.; see also Fleet Factors Complains to Supreme Court that CERCLA Ruling Disrupts Commercial Lending, 21 [Current Developments] Env’t Rep. (BNA) 1116, 1117 (Oct. 5, 1990); Lending Squeeze, supra note 1, at 52.
CERCLA contains language protecting lenders from liability so long as they do not participate in the management of a debtor's facility.\textsuperscript{14} This provision is known as the "security interest exemption".\textsuperscript{15} Judicial and administrative attempts to interpret the exemption's language have been erratic. Federal courts applying the exemption have not been able to reach a consensus as to the parameters of acceptable lender participation.\textsuperscript{16} The EPA's proposed rule on the issue of lender liability articulates a clear, workable standard of liability.\textsuperscript{17} Because the EPA only recently proposed its rule, however,\textsuperscript{18} the lack of guidance from the courts has left lenders uncertain of hidden liabilities, thereby inhibiting their willingness to extend credit.\textsuperscript{19}

The security interest exemption stems in part from a theory of lender control liability.\textsuperscript{20} Both the courts and the EPA recognize that control is a necessary element to lender liability.\textsuperscript{21} The federal courts, however, have adopted a generic approach\textsuperscript{22} toward the concept of control.\textsuperscript{23} Some even have drawn their control analyses from other legal doctrines to create a general theory of lender control liability.\textsuperscript{24} When formulating these general theories, the courts have neglected to address CERCLA's objective—to deter improper disposal of haz-

\textsuperscript{16} See infra notes 155–295 and accompanying text.
\textsuperscript{17} See infra notes 296–322 and accompanying text.
\textsuperscript{18} EPA Proposes Lender Liability Rule, supra note 12, at 299 (EPA rule proposed on June 5, 1991).
\textsuperscript{19} See Amy D. Marcus & Ellen J. Pollock, EPA Plans Rule to Curb Liability on Loans to Owners of Waste Sites, WALL ST. J., Feb. 14, 1991, at B4, col. 4 (fear of liability prompts lenders to refuse credit to high risk industries, such as manufacturing with significant real estate assets); Eleventh Circuit Expands CERCLA Liability to Cover Secured Creditor's Interest in Firm, 21 [Current Developments] Env't Rep. (BNA) 307, 308 (June 8, 1990) (recent case law transforms lenders into "environmental police"); Lending Squeeze, supra note 1, at 52 (lenders fear judicial interpretations of Superfund language).
\textsuperscript{20} See infra notes 130–35 and accompanying text.
\textsuperscript{21} National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA; Proposed Rule and Request for Comment, 56 Fed. Reg. 28,788, 28,803, 28,809 (1991) (to be codified at 40 C.F.R. pt. 300) (proposed June 5, 1991) (rule imposes liability on lenders who exercise decisionmaking control, or control at the management level, over hazardous substances present at facility) [hereinafter Proposed Rule]; see infra note 166 and accompanying text.
\textsuperscript{22} See infra notes 68–71 and accompanying text.
\textsuperscript{23} See infra notes 155–295 and accompanying text.
\textsuperscript{24} See infra notes 178–83, 215 and accompanying text.
The results of this generic approach are standards of lender liability that are not focused to meet CERCLA’s goals. The generic approach also leaves lenders unclear about which indicia of control will trigger liability.

This Comment argues that the courts should follow the lead of the EPA and apply a functional approach to the concept of lender control as it exists under CERCLA’s security interest exemption. A functional analysis would involve identifying the objective that operates as the basis for CERCLA liability and analyzing indicia of lender control for their relevance to that objective. This functional approach would ensure that applications of the security interest exemption would achieve CERCLA’s goals. Moreover, because the approach would provide lenders with fixed boundaries of acceptable lender conduct under CERCLA, a functional analysis would re-inject certainty into financing transactions, thereby easing the credit crunch.

Section II of this Comment describes the debtor-creditor relationship and, in particular, the indicia of control inherent in that relationship. Section III presents the concept of lender control liability. This section examines CERCLA’s security interest exemption and the exemption’s reliance on a theory of lender control liability. Section III also discusses the generic and functional approaches to the concept of lender control. Section IV addresses the construction of the exemption by the federal courts and the EPA. Section V critiques the judicial formulations of the exemption for their reliance on the generic concept of control. This section also commends the EPA’s proposed rule on lender liability under CERCLA for its functional approach to lender control liability. Finally, section VI concludes that courts should take a functional approach toward CERCLA’s theory of lender control liability. This section finds that such a functional analysis not only will further CERCLA’s goals of holding only responsible parties liable for cleanup costs but also will return certainty to financing transactions.

II. THE PRESENCE OF LENDER CONTROL IN THE DEBTOR-CREDITOR RELATIONSHIP

It is inherent in debtor-creditor relationships that lenders exert some degree of control over their debtors. In a typical credit trans-

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25 See infra notes 165–295 and accompanying text.
26 See infra notes 72–77 and accompanying text.
27 See William H. Lawrence, Lender Control Liability: An Analytical Model Illustrated
action, a creditor extends value—such as money, services, goods, or land—to a debtor.\(^{28}\) In return, the debtor promises to reimburse the creditor for the value extended by incurring a debt.\(^{29}\) A creditor therefore exerts control over a debtor to the extent that an obligation is due.\(^{30}\) A secured financing transaction, however, involves an even greater degree of lender control.\(^{31}\) In this type of credit transaction, in addition to a promise to repay a debt, a debtor grants an interest in property to a creditor to secure its obligation to the creditor.\(^{32}\) A lender in this type of transaction is known as a secured creditor,\(^{33}\) and its interest in the debtor's property is labeled a security interest.\(^{34}\) Examples of property that can be subject to a creditor's security interest are personal property, such as equipment, inventory, and accounts receivable,\(^{35}\) and real estate.\(^{36}\) Property that is subject to a security interest is referred to as collateral.\(^{37}\)

A security interest safeguards the lender's ability to collect its debt; if the debtor fails to repay the debt—that is, defaults—the lender may proceed against the collateral to satisfy the debt.\(^{38}\) This means that the lender may take possession of and sell the collateral

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\(^{29}\) See id. at 3.

\(^{30}\) See Lawrence, supra note 27, at 188.

\(^{31}\) Id.


\(^{34}\) See id. § 9-201(37). Security interests and secured creditors usually are associated with transactions under the UCC. Transactions involving real estate typically involve a mortgagee as lender and a mortgagor as debtor. Michael T. Madison & Robert M. Zinman, Modern Real Estate Financing 285 (1991). An interest in real estate securing payment of a debt is referred to as a mortgage. Id. at 293. This Comment, however, uses the term "security interest" to identify interests created under both the UCC and real estate law. Likewise, this Comment will use the term "secured creditor" in reference to both mortgagors and creditors under the UCC.


\(^{36}\) Madison & Zinman, supra note 34, at 285.

\(^{37}\) Id. § 9-501(1)(c). The UCC refers to all forms of personal property and fixtures jointly as collateral. See id.

\(^{38}\) Id. § 9-503.
without judicial process.\textsuperscript{39} The lender then may apply the proceeds from the sale of the collateral to the satisfaction of the indebtedness secured by the collateral.\textsuperscript{40} Thus, a secured creditor's control over its debtor stems from the lender's interest in the debtor's property and a strong leveraging position in the case of default.

In order to protect its security interest in a debtor's property, a lender in a secured financing transaction typically exhibits various indicia of lender control.\textsuperscript{41} Control devices are readily identifiable in the loan documentation accompanying a secured financing or mortgage agreement.\textsuperscript{42} Loan documents often provide for lender control of not only the collateral or real estate but also the debtor's future financing, general business operations, and policy decisions.\textsuperscript{43} For instance, an agreement may include covenants to ensure frequent and regular communications between a debtor and a creditor.\textsuperscript{44} These covenants may require the debtor to keep the creditor informed as to the present location of the business and to submit operational and financial reports regularly to the creditor.\textsuperscript{45}

The loan agreement may also include covenants that restrict debtor activity.\textsuperscript{46} Typical covenants, for example, forbid the acquisition or sale of significant capital assets, alterations in the nature of the debtor's business, and subsequent encumbrances of the property in which the creditor has an interest.\textsuperscript{47} Furthermore, the agreement is likely to provide a creditor with hands-on ability to monitor its debtor's business.\textsuperscript{48} Loan provisions usually permit a creditor to

\textsuperscript{39} Id. (secured creditor may take possession without judicial process if creditor can accomplish this without breach of peace); id. § 9-504 (secured creditor must dispose of collateral in a commercially reasonable manner).

\textsuperscript{40} Id. § 9-504(1)(b).

\textsuperscript{41} Proposed Rule, 54 Fed. Reg. 28,798, 28,803–06, 28,809 (1991) (to be codified at 40 C.F.R. pt. 300) (secured creditors engage in ordinary and customary loan practices to protect their security interests); Lawrence, supra note 27, at 188; Hass, supra note 27, at 1323. "Undeniably a lender has a clear right to impose proper conditions [on the debtor] in order to enhance its security and increase the probability that it will be repaid: that is the essence of the lending business." Hass, supra note 27, at 1323 (citing James P. Koch, Bankruptcy Planning for the Secured Lender, 99 BANKING L.J. 788, 799 (1982)).


\textsuperscript{43} Lawrence, supra note 27, at 188.

\textsuperscript{44} Hass, supra note 27, at 1326–27.

\textsuperscript{45} Id.

\textsuperscript{46} Id. at 1326.

\textsuperscript{47} Id. at 1328.

\textsuperscript{48} Nassberg, supra note 42, at 851.
inspect all financial and operational records, and grant access to the business premises.49

In addition to loan documentation, loan administration customarily provides indicia of lender control.50 Typically, lenders will exert control over their debtors during the life of a loan.51 While policing a loan, a lender may make recommendations to a debtor regarding its operations, accounting methods, or hiring practices.52 Moreover, lenders often criticize debtors' business practices and require debtors to review or alter their procedures.53 In addition to policing a loan, lenders exert substantial control during loan workouts54 and foreclosure proceedings.55 Common lender activities during a workout period include restructuring the terms of a loan obligation and providing financial or operational advice, counseling, and guidance.56 An even greater degree of lender control occurs during a foreclosure.57 For instance, a lender may "wind up" the debtor's business affairs, take possession of its collateral, secure the collateral from vandalism or theft, and prepare the collateral for sale.58

49 Id.; Proposed Rule, 54 Fed. Reg. 28,798, 28,804 (1991) (to be codified at 40 C.F.R. pt. 300); 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.3, at 1191 (1965). "A standard clause in any well-drafted security agreement—particularly when the security includes such volatile collateral as [accounts] receivables and inventory—will specify with particularity the secured party's right to examine the debtor's books and accounts at any time during the loan period." 2 GILMORE, supra, § 43.3, at 1191.


53 See Hass, supra note 27, at 1328.

54 When a debtor becomes unable to meet payment obligations under a loan, the creditor may offer to renegotiate the terms of the loan. This is known as a workout. MADISON & ZINMAN, supra note 34, at 966.

55 See 2 GILMORE, supra note 49, § 44 (foreclosure proceedings); MADISON & ZINMAN, supra note 34, at 965–80 (loan workouts).


Whether a security interest, loan documentation, loan administration, or the mere creation of a debt evidences lender control, secured creditors undoubtedly exhibit indicia of lender control. Many of these instances of lender control are commonplace in a debtor-creditor relationship and are accepted commercial practices. Regardless of the frequency or general acceptance of various secured lending practices, any indicia of lender control may play into the equation of lender liability.

III. LENDER CONTROL LIABILITY

A. The Generic and Functional Approaches to the Concept of Control

As discussed in section II, most credit transactions impose some degree of control on a debtor. It is not easy therefore to use control as a measure of liability in the debtor-creditor relationship, because it is difficult to discern which indicia of lender control are objectionable.

Divorced from a cause of action, control is not conduct deserving of punishment. Control only takes on legal significance when it is invoked by a particular legal theory. For instance, various legal doctrines, such as the common law claim of tortious interference, recognize that entities often abuse their positions of control. Liability may be premised on a need to check this excessive or abusive use of control. Under other doctrines, such as the legal theories governing controlling shareholders of a corporation, an entity who assumes control may be required by law to take on added responsibilities. For instance, under corporate law, a controlling shareholder cannot sell its block of shares without first investigating the potential buyer to ensure that the buyer does not intend to "loot" the corporation. Liability then provides the basis for legal intervention to

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59 See, e.g., supra note 49 and accompanying text (creditor access to debtor’s records).
60 Lawrence, supra note 27, at 188.
61 Id.
tie these additional duties to the assumption of control.\textsuperscript{64} In either scenario, the legal principle advanced determines the extent and nature of the legal intervention.\textsuperscript{65} Divorced from its legal principle and applied in the abstract, control by itself is an untenable basis for liability.\textsuperscript{66}

One commentator has identified two distinct approaches to the control analysis—the generic and functional approaches.\textsuperscript{67} Rather than analyze the concept of control as it relates to a particular legal principle, a common approach is to treat control as a generic concept.\textsuperscript{68} Courts and commentators alike often view control as a single concept with a fixed definition that they can apply across the spectrum of theories that invoke a control analysis.\textsuperscript{69} They seize a control analysis from one area of law, such as corporate law, and apply the analysis to other contexts without accommodating for the particular objectives and policies of these other areas of law.\textsuperscript{70} In fact, instead of treating lender control as one of the necessary elements in a liability analysis, the tendency is to treat lender control itself as a basis for liability.\textsuperscript{71}

A functional approach, in comparison, seeks to understand the underlying purposes that theories of liability intend to serve.\textsuperscript{72} All doctrines of liability, whether set forth by statute or common law, have the objective of promoting or inhibiting certain conduct.\textsuperscript{73} The functional analysis requires identification of this objective.\textsuperscript{74} Once a court determines the objective that is the basis for liability under a particular theory, the court then must analyze the indicia of control

\textsuperscript{64} Id.; see also Lawrence, supra note 27, at 188.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 187, 188–93.
\textsuperscript{68} Id. at 186.
\textsuperscript{70} Tyler, supra note 69, at 431–38; infra notes 96–106 and accompanying text.
\textsuperscript{71} Lawrence, supra note 27, at 186.
\textsuperscript{72} Id. at 190; see also Raymond A. Enstam & Harry P. Kamen, Control and the Institutional Investor, 23 Bus. Law. 289, 307 (1968).
\textsuperscript{73} Lawrence, supra note 27, at 187.
\textsuperscript{74} Id. at 191.
in light of that objective. In other words, under the functional analysis the court must inquire whether certain instances of control have led to the occurrence of the event that a particular theory of liability was intended to prevent. Thus, control for the purposes of one statute, for example, may not be control under another statute.

The objectionable aspects of lender control under a particular statute or principle of common law become apparent when courts recognize the functional differences among the various theories of lender control liability. Application of the functional analysis therefore limits the imposition of liability to the extent necessary to realize the legal theory advanced.

Judicial analyses of lender control under the agency law theory of liability provide examples of both the functional and generic approaches to control. Under the common law doctrine of agency, lenders may be liable for the obligations of their debtors under a theory of lender control liability. Agency is a fiduciary relation between two entities—a principal and an agent—in which the agent acts on the principal's behalf and subject to the principal's control. The principal is held liable for acts that the agent does on its account and that are an integral part of or are incidental to a transaction the principal has authorized the agent to perform. Section 140 of the Restatement (Second) of Agency applies this doctrine to the debtor-creditor relationship. According to section 140, if a creditor assumes control of its debtor's business, the creditor may be deemed a principal, with liability for the acts and transactions of its debtor's operations.

Comment a to section 140 stresses that a creditor will not become a principal unless it exercises "de facto control" over the conduct of its debtor. For instance, a secured creditor who prevents the purchase or sale of goods by the debtor through an exercise of its veto power over the debtor's business activities has not exerted sufficient control to be considered a principal. According to the comment, however, a creditor does become a principal when it takes over the

75 Id.
76 See Enstam & Kamen, supra note 72, at 307.
77 Id.
78 RESTATEMENT (SECOND) OF AGENCY § 140 (1958).
79 Id. § 1.
80 Id. § 161.
81 Id. § 140.
82 Id. § 140 cmt. a.
83 Id.
management of the debtor's business and makes contractual decisions for the debtor.\textsuperscript{84}

Although a creditor may attain principal status, it is not necessarily liable for all of its debtor's obligations. Agency law liability is transaction-specific.\textsuperscript{85} A creditor may exert control over the debtor's business but direct only some of the debtor's contracts. Agency law governs only those transactions that fall within the scope of the directed activity.\textsuperscript{86} Thus, in order for liability to attach to a creditor as a principal, there must be a nexus between a specific debtor transaction and the direction and control of that transaction by the creditor. Whether the creditor exerts general control over the debtor's business is not the appropriate inquiry under agency law.

In \textit{Buck v. Nash-Finch Co.},\textsuperscript{87} the Supreme Court of South Dakota adopted a functional approach to the agency law analysis of lender control liability.\textsuperscript{88} The Nash-Finch Company, a grocery wholesaler, lent money to a retail supermarket.\textsuperscript{89} Certain creditors of the supermarket sold and delivered merchandise to the market but were never paid.\textsuperscript{90} These creditors brought suit against the Nash-Finch Company, as a principal of the market, to recover damages.\textsuperscript{91}

Recognizing that the basis for liability under agency law is lender control of the specific transactions in the case at bar, the \textit{Buck} court limited its inquiry to whether the Nash-Finch Company assumed control over the buying of merchandise for the market.\textsuperscript{92} Because it was applying a functional approach, the court then scrutinized the indicia of lender control for their relevance to the transactions at issue in the case at bar.\textsuperscript{93}

The \textit{Buck} court found that the evidence revealed an assumption of control by the Nash-Finch Company and a corresponding yielding of and acting under such control by the market in certain areas of its business.\textsuperscript{94} The court, however, did not find evidence of control sufficiently comprehensive in scope to include the market's buying

\textsuperscript{84} Id.
\textsuperscript{85} Lawrence, supra note 27, at 220; see also \textit{Restatement (Second) of Agency} § 161 cmt. a (1958).
\textsuperscript{86} Lawrence, supra note 27, at 220.
\textsuperscript{87} 102 N.W.2d 84 (S.D. 1960).
\textsuperscript{88} Id. at 90–92.
\textsuperscript{89} Id. at 85.
\textsuperscript{90} Id. at 84.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 90.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 89–90.
activities. The court concluded that, because there was insufficient evidence of lender control over the market’s merchandising transactions, the Nash-Finch Company could not be liable as a principal under agency law for the claims of the market’s unpaid creditors.95

In contrast to the Buck court, the Supreme Court of Minnesota adopted the generic approach to the concept of control when it faced the issue of lender liability under an agency law analysis. In Gay Jenson Farms Co. v. Cargill, Inc.,96 Warren Grain & Seed Company, a grain elevator, had purchased and stored grain from local farmers.97 Warren defaulted on contracts it had made with the farmers for the sale of grain, and the farmers brought suit to recover their losses.98 The farmers also sued Cargill, Warren’s sole creditor.99 The Jenson Farms court upheld a jury finding that Cargill was Warren’s principal and therefore jointly liable on the transactions with the farmers.100

The Jenson Farms court premised Cargill’s liability on factors that indicated de facto control of the debtor’s operations.101 The court, however, did not identify any factors that would suggest lender control over the specific transactions upon which the farmers had sued. According to the court, there were nine factors that indicated Cargill’s control over Warren: Cargill’s constant recommendations to Warren;102 Cargill’s right of first refusal on sales of Warren’s grain; Warren’s inability to mortgage property, purchase stock, or pay dividends without Cargill’s consent; Cargill’s right of entry onto Warren’s premises for purposes of inspection; Cargill’s criticism of its debtor’s finances, officer’s salaries, and inventory; Cargill’s comment that Warren needed “strong paternal guidance”; provision to Warren of forms with Cargill’s letterhead; Cargill’s financing of all Warren’s grain purchases and operating expenses; and Cargill’s power to cease financing.103 None of these factors supported the court’s conclusion that Cargill directed Warren’s grain transactions with the farmers. In fact, as the court itself noted, many of these indicia of control were typical of a debtor-creditor relationship, such

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95 Id. at 90–91.
97 Id. at 298.
98 Id. at 287–88.
99 Id.
100 Id. at 293.
101 Id. at 291.
102 Id. at 289 n.4 (debtor never implemented recommendations).
103 Id. at 291.
as the lender's power to cease financing, and its right of entry onto the debtor's property.\textsuperscript{104}

Nonetheless, the \textit{Jenson Farms} court found that the totality of circumstances surrounding Cargill's financing of Warren suggested a general control of the debtor's operations.\textsuperscript{105} The court did not rest Cargill's liability on a finding of lender control over the specific transactions upon which the liability was based—the appropriate inquiry under agency law. Instead, the court based liability on Cargill's general control as a lender. In other words, the court did not tie the concept of control to the underlying theory of agency law liability and thus premised liability on a generic understanding of control.\textsuperscript{106}

\textbf{B. A Statutory Basis for Lender Control Liability: CERCLA and the Security Interest Exemption}

A number of theories premise liability, in part, on lenders' control of their debtors. Versions of the concept of lender control liability exist among the common law doctrines of agency law,\textsuperscript{107} corporate law,\textsuperscript{108} equity,\textsuperscript{109} and torts.\textsuperscript{110} Lenders may incur control liability under a variety of federal statutes as well. For instance, judicial interpretations of federal securities laws\textsuperscript{111} and the Internal Revenue Code\textsuperscript{112} pose substantial control issues for lenders. Statutes regulat-

\begin{itemize}
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id.
\item \textsuperscript{106} Id. at 290–93; see also Plymouth Rock Fuel Corp. v. Leucadia, Inc., 474 N.Y.S.2d 79, 80–81 (N.Y. App. Div. 1984) (court found lender to be principal of debtor and thus liable for fuel deliveries to debtor because lender exerted extensive control over debtor's operations).
\item \textsuperscript{107} See infra notes 78–86 and accompanying text. Under agency law, a lender who assumes control over a debtor's conduct or business may be held liable for the obligations of the debtor. \textit{Restatement (Second) of Agency} § 140 (1958).
\item \textsuperscript{108} See, e.g., Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1104–07 (5th Cir. 1973) (under instrumentality rule, lending corporation may be held liable if it dominates or controls subservient corporation to extent that subservient corporation manifests no separate corporate existence and functions solely to achieve purposes of lending corporation).
\item \textsuperscript{109} See, e.g., \textit{In re Clark Pipe & Supply Co.}, 893 F.2d 693, 699–703 (5th Cir. 1990) (to justify application of doctrine of equitable subordination, lender's control over debtor's affairs must rise to level of unconscionable conduct).
\item \textsuperscript{110} See \textit{Lawrence}, supra note 27, at 185–86 n.1 & n.3.
\end{itemize}
ing certain communications and transportation industries also allow for lender liability suits.\textsuperscript{113} As a result of CERCLA, environmental law too now furnishes a statutory basis for the imposition of control liability on lenders.\textsuperscript{114}

CERCLA created a mechanism for responding to the potential and actual environmental and public health hazards that releases of hazardous substances into the environment pose.\textsuperscript{115} CERCLA generally is recognized as providing the statutory authority for federal cleanups of hazardous waste disposal sites.\textsuperscript{116} Both the EPA and potentially responsible parties (PRPs) carry out these response activities,\textsuperscript{117} which are defined as those actions that are necessary to remove or remedy a release or threatened release of a hazardous substance.\textsuperscript{118}

The United States will spend an estimated $500 billion over the next fifty years to remediate hazardous waste sites.\textsuperscript{119} The Hazardous Substance Response Trust Fund,\textsuperscript{120} also known as the Superfund, will finance a large percentage of these response actions. Government actions to recover response costs from PRPs replenish the Superfund.\textsuperscript{121} CERCLA designates four categories of persons who are strictly liable for response costs.\textsuperscript{122} It imposes liability on trans-

\textsuperscript{114} 42 U.S.C § 9607(a) (1988). But see id. § 9601(20)(A) (security interest exemption).
\textsuperscript{120} 26 U.S.C. § 9507(a) (1988); see also 42 U.S.C. § 9611(a)–(b) (1988).
\textsuperscript{121} 42 U.S.C. § 9607(a) (1988).
porters and generators of hazardous wastes, as well as on current owners and operators of a facility or vessel. In addition, past owners and operators of a facility who owned or operated the facility at the time of disposal may be liable under CERCLA. The statute's definition of the term "owner or operator", however, contains an exemption providing that "[s]uch term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." Both commentators and courts commonly


123 Id. § 9607(a)(3)-(4).

124 CERCLA originally defined the term "owner or operator" to mean (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment.


In addition, SARA amended the definition of "owner or operator" by explicitly exempting from liability both state and local governments that acquire ownership, title, or control involuntarily, for example through bankruptcy or abandonment, and by virtue of their function as a sovereign. Id. § 9601(20)(D). Senator Robert Stafford offered the amendment to change the definition of "owner or operator" in recognition of the "unique status of governments in terms of their obligation to protect the public, health, welfare and safety, during the course of which they acquire ownership or control . . . ." 131 CONG. REC. S11,619 (daily ed. Sept. 17, 1985) (statement by Sen. Stafford). For general discussions of the legislative history of SARA, see SUPERFUND: THE 1986 AMENDMENTS (PLI Litig. & Admin. Practice Course Handbook Series No. 315, 1986); Timothy B. Atkeson et al., An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA), 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,360, 10,360-419 (1986).

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


126 The term "vessel", as used in CERCLA, means "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Id. § 9601(28).

127 Id. § 9607(a)(1)-(2).

128 Id. § 9601(20)(A); see also District of Columbia v. Franklin Inv. Co., 404 A.2d 536, 540
refer to the above quoted language as the "security interest exemption".\(^{129}\)

Inherent in CERCLA's security interest exemption is the issue of lender control liability. Although the term "control" is absent from the statutory language and recorded legislative history,\(^{130}\) the exemption provision necessarily relies on a theory of lender control. As explained in section II of this Comment, instances of involvement and participation by a lender, and even the presence of a security interest, are all indicia of lender control.\(^{131}\) The provision exempts from liability those lenders who hold a security interest but do not participate in the management of a debtor's facility or vessel.\(^{132}\) Thus, the statute explicitly states that the mere existence of a security interest does not constitute an indicia of control sufficient to impose liability on a lender.\(^{133}\)

CERCLA, however, is less specific with respect to the potential for liability associated with all other indicia of lender control. The phrase "participating in the management of a vessel or facility" is broad and ambiguous, and the statute leaves it undefined.\(^{134}\) At most, the phrase instructs courts to analyze a lender's involvement in its debtor's business activities and, in particular, in those activities associated with the vessel or facility securing the loan.\(^{135}\) Therefore, the basic problem with the security interest exemption is that, notwithstanding security interests, it does not identify specifically which indicia of lender control will trigger CERCLA liability.

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\(^{129}\) See supra note 15 and accompanying text.

\(^{130}\) See infra notes 136–62 and accompanying text.

\(^{131}\) See supra notes 31–40 and accompanying text.


\(^{134}\) See In re Bergssoe Metal Corp., 910 F.2d 668, 672 (9th Cir. 1990).

The statute's legislative history is sparse and offers only limited assistance in the interpretation of the exemption.136 A bipartisan leadership group of senators hastily assembled the bill that became CERCLA and, despite opposition from members of the House,137 passed the bill in the closing days of an outgoing Congress.138 Congress considered and passed CERCLA with little time for debate139 or substantive remarks.140

Although the bill that emerged as CERCLA, House bill 7020,141 generated little legislative history, lawmakers considered several other hazardous waste cleanup bills—an examination of these bills, such as House bill 85142 and Senate bill 1480,143 offers insight into CERCLA's workings. Unfortunately, during consideration of these bills, there were few comments regarding the exemption and even fewer focusing on the phrase “participating in the management”.144 House bill 85—the Oil Pollution Liability and Compensation Act—was the source of CERCLA's security interest exemption.145 The relevant phrase of the provision reads as follows: “without participating in the management or operation of a vessel or facility.”146 The report that accompanied House bill 85 out of the House Committee on Merchant Marine and Fisheries instructed that as long as a financing institution does not participate in the management or operation of a facility, it will not be held liable as an owner under the

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137 126 CONG. REC. H11,790–92 (daily ed. Dec. 3, 1980). Representative James Broyhill opposed passage of the pending legislation. He expressed concern at the bill's numerous defects and technical errors, which were due in great part to inadequate drafting. 1 CERCLA LEGISLATIVE HISTORY, supra note 116, at 785; see also Grad, supra note 136, at 33–34.

138 Grad, supra note 136, at 1.

139 Id.

140 See id. at 14–18, 29–35.


144 See 1 SUPERFUND: A LEGISLATIVE HISTORY, supra note 122, at 26–36.

145 See id. at 35–36. House bill 85, as introduced and reported out of the House Committee on Merchant Marine and Fisheries in May 1979, contained a security interest exemption to the term “owner” that is virtually identical to the exemption now present in CERCLA. Id. at 35. The exemption in House bill 85 provided that the term “owner ... does not include a person who, without participating in the management or operation of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility ... .” Id.

146 Id. Following the term management with the phrase “or operation” suggests that if the two terms were not interchangeable, then either activity would be sufficient to void the exemption. See id.
In comparison, House bill 7020—the Hazardous Waste Containment Act—as introduced, reported out of all committees, and passed by the House on September 23, 1980, did not contain any provision comparable to the exemption language found in either House bill 85 or CERCLA.

The Senate counterpart to House bills 85 and 7020, Senate bill 1480—the Environmental Energy Response Act—was introduced in July 1979. The original version of the bill lacked any mention of a security interest exemption. As a compromise, Senator Robert Stafford submitted an amendment proposing a security interest exemption that would incorporate elements of all three bills. Amendment No. 2622, the Stafford-Randolph Substitute, contains exemption language identical to that found in CERCLA and similar to the language in the House Merchant Marine Committee's version of House bill 85. The Senate passed the amendment on November 24, 1980, and included the security interest exemption in the language of Senate bill 1480.

Because revenue legislation must originate in the House of Representatives, the Senate turned to House bill 7020. The Senate substituted the text of Senate bill 1480 for that of House bill 7020.

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147 H.R. REP. No. 172, 96th Cong., 1st Sess., pt. 1, at 36, reprinted in 1 SUPERFUND: A LEGISLATIVE HISTORY, supra note 122, at 35. House bill 85 was referred jointly to the House Merchant Marine Committee and the House Committee on Public Works and Transportation. Grad, supra note 136, at 3. The bill, as reported out of the House Public Works Committee in May 1980, also contained a security interest exemption to the term “owner”. 1 SUPERFUND: A LEGISLATIVE HISTORY, supra note 122, at 34. This version of the bill provided that the term "owner does not include a person who (either directly or through a trust or singly or in combination with others) holds title to or any indicia of ownership of a vessel or facility and without participating in the management or operation of such vessel or facility, leases or charters to any other person (with whom such person is not otherwise affiliated), or holds indicia of ownership primarily to protect his security interest in the vessel or facility . . . ."

Id. The final version of House bill 85 adopted the exemption language that the House Public Works Committee proposed. The House passed the bill on September 19, 1980. Id. at 31.

148 Id. at 30; see also Grad, supra note 136, at 14–18.

149 Grad, supra note 136, at 6.

150 1 SUPERFUND: A LEGISLATIVE HISTORY, supra note 122, at 30. Senate bill 1480 collapsed the definitions of the terms “owner” and “operator” into one definition, unlike House bill 85, which defined each term separately. See id.

151 Id. at 26–27.


153 1 SUPERFUND: A LEGISLATIVE HISTORY, supra note 122, at 26.

154 Grad, supra note 136, at 29.
retaining only the bill number and the enacting clause.\textsuperscript{155} House bill 7020 was passed by the Senate on November 24, 1980, by the House on December 3, 1980,\textsuperscript{156} and signed by President Carter on December 11, 1980.\textsuperscript{157} The final version of the act was in reality Senate bill 1480, the bill whose security interest exemption language paralleled that of the original version of House bill 85.

Throughout the drafting of the three bills, legislators commented on the role that common law would play in CERCLA’s operation. During a hearing before the House Committee on Public Works and Transportation on House bill 85, Swep Davis, an EPA assistant administrator, testified as to the role common law should play with respect to the liability of financing institutions.\textsuperscript{158} Representative James Oberstar noted during the hearing that lenders had testified before the committee seeking a specific legislative exemption from liability.\textsuperscript{159} According to Representative Oberstar, the lenders had claimed that the common law historically had protected creditors from their debtors’ liabilities. In order to emphasize their immunity from liability, these same lenders had requested that the legislation expressly exempt them from liability.\textsuperscript{160} Mr. Davis noted, and Representative Oberstar agreed, that common law principles already sufficiently addressed the issue of lender liability, and that the matter therefore should be left to existing doctrine.\textsuperscript{161} On the Senate side, Senator Jennings Randolph stated on November 24, 1980, the date CERCLA passed the Senate, that “[i]t is intended that issues

\textsuperscript{155} Id.
\textsuperscript{156} 1 SUPERFUND: A LEGISLATIVE HISTORY, supra note 122, at 26.
\textsuperscript{157} Grad, supra note 136, at 35.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id. Moreover, Mr. Davis remarked that a bank burdened with a heavily mortgaged debtor would not hesitate to tell its debtor how to run its business. He felt that “the people who are the financial owners still have the ability to influence the operation and to insure that that equipment is operated, in fact, in a responsible manner.” Id. He concluded this thought with the following statement:

So while there is some argument that they [lenders] may not have the same kind of responsibility that you have if you are the actual onsite operator of the equipment, they certainly have a role in it, and they certainly have some obligation to ensure the equipment is operated properly and that the proper insurance or financial responsibility is obtained by the operators.

\textit{Id.}
of liability not resolved by this act, if any, shall be governed by
traditional and evolving principles of common law."\textsuperscript{162}

In the end, Congress did not remain silent on the issue of lender
liability—CERCLA contains a security interest exemption.\textsuperscript{163} The
exemption, however, does not resolve the issue of lender liability. It
only raises the question of which control activities a lender may
engage in without exposing itself to CERCLA liability. Congress
thus left the courts with the task of devising a control analysis
through which to determine the liability of lenders under CER-
CLA.\textsuperscript{164}

IV. JUDICIAL AND ADMINISTRATIVE ATTEMPTS TO FORMULATE A
STANDARD OF LENDER CONTROL LIABILITY UNDER CERCLA

A. The Courts’ Response to CERCLA’s Security Interest
Exemption

Several federal courts have examined CERCLA’s security interest
exemption.\textsuperscript{165} These courts struggled in interpreting the exemption
language regarding a lender’s participation in the management of a
vessel or facility. They all, however, acknowledged the need to rely
on the notion of lender control, either expressly or through language
synonymous with the term “control”.\textsuperscript{166} The legal theory, as these
courts have applied it, involves two steps. First, a court scrutinizes
all indicia of lender control over a debtor.\textsuperscript{167} Second, the court de-
termines whether the evidence of control is sufficient to impose
liability.\textsuperscript{168} At present, the courts disagree over the degree of control
that is necessary to incur liability. The division breaks cleanly be-
tween a high and low threshold of liability premised on lender con-
trol.\textsuperscript{169}

\textsuperscript{162} 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph, Chairman
of Committee on Envtl. and Public Works), reprinted in 1 CERCLA LEGISLATIVE HISTORY,
supra note 116, at 686.


\textsuperscript{164} See \textit{infra} notes 165–295 and accompanying text.

\textsuperscript{165} See, e.g., United States \textit{v.} Fleet Factors Corp., 901 F.2d 1550, 1550–60 (11th Cir.), \textit{reh’g denied},

\textsuperscript{166} See, e.g., \textit{id.} at 1557–60 (lender involvement); Guidice \textit{v.} BFG Electroplating & Mfg.


\textsuperscript{168} See, e.g., \textit{id.} at 20,996–97.

\textsuperscript{169} See \textit{infra} notes 170–295 and accompanying text.
The courts adhering to a high threshold of liability hold that the participation that takes a lender outside the exemption is participation in the debtor's operational, production, or waste disposal activities.\(^{170}\) The United States District Court for the Eastern District of Pennsylvania in *United States v. Mirabile*\(^{171}\) was the first to articulate this standard.\(^{172}\) In *Mirabile*, the issue before the court was how far a secured creditor can go in protecting its financial interests before the creditor may be characterized as an owner or operator under the statute.\(^{173}\) Focusing primarily on the exemption's reference to participation in management, the court distinguished between management of the day-to-day operations of a debtor's facility and management of the debtor's financial affairs.\(^{174}\) The court concluded that the security interest exemption permits secured creditors to participate actively in the financial aspects of management because, according to the court, mere financial ability to control hazardous waste disposal practices is not sufficient to impose liability.\(^{175}\) In order to fall outside the exemption, a creditor must achieve a greater degree of control.\(^{176}\) The court held that a creditor incurs liability when it asserts control over the production or operational aspects of the debtor's business.\(^{177}\)

In formulating its standard of lender liability, the *Mirabile* court adopted a theory of control liability set forth in CERCLA cases decided under principles of corporate law.\(^{178}\) The court cited to three decisions that examined the issue of whether an individual involved in the management of a corporate disposer of hazardous wastes may use the "corporate shield" as protection against liability.\(^{179}\) Each of

\(^{170}\) Guidice, 732 F. Supp. at 562; *Mirabile*, 15 Envtl. L. Rep. at 20,995, 20,996; see also *In re Bergsoe Metal Corp.*, 910 F.2d 668, 672–73 (9th Cir. 1990).


\(^{172}\) Id. at 20,995.

\(^{173}\) Id.

\(^{174}\) Id.

\(^{175}\) Id.

\(^{176}\) See id. at 20,995–96.

\(^{177}\) Id. at 20,995. As the court noted, "[t]he [exemption's] reference to management of the ‘facility,’ as opposed to management of the affairs of the actual owner or operator of the facility, suggests . . . that the participation which is critical is participation in operational, production, or waste disposal activities." *Id.* Other courts have adopted this standard. See, e.g., *Coastal Casting Serv., Inc. v. Aron*, No. H-86-4463, 1988 WL 35012, at *9–*10 (S.D. Tex. 1988). In *Aron*, for example, the United States District Court for the Southern District of Texas relied on *Mirabile* for the proposition that a secured creditor must exercise control over essential operations of the debtor's facility in order to be held liable under CERCLA. *Id.*

\(^{178}\) See *Mirabile*, 15 Envtl. L. Rep. at 20,995.

\(^{179}\) *Id.* (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); United States
these decisions imposed personal liability on corporate officers and shareholders who exerted control over both the corporation's financial and production activities. The Mirabile court, unable to find legal precedent regarding lender control liability under CERCLA, seized upon this definition of control and extended the application of the control concept from the corporate to the secured financing context. The court reasoned that a secured creditor, by the nature of its relationship with a debtor, automatically asserts the requisite financial control. Hence, the court found that once a creditor asserts operational control over a facility, the creditor loses the exemption's protection.

In light of this control standard, the Mirabile court reviewed the activities of three lending institutions to whom the debtor owed money: the American Bank and Trust Company (ABT), Mellon Bank National Association (Mellon), and the Small Business Administration (SBA). These three entities brought the issue of lender liability before the court on motions for summary judgment. With respect to ABT, the court concluded that a secured creditor may pursue foreclosure, as well as those activities associated with foreclosure, and still remain within the exemption so long as the sole purpose of the lending institution's efforts is to protect its security interest. ABT foreclosed on the debtor's property after the debtor's operations had ceased, and made no effort to continue the debtor's operations. It protected the property against vandalism and showed the property to prospective purchasers.


ISO See Shore Realty, 759 F.2d at 1052–53; Carolawn, 14 Envtl. L. Rep. at 20,700; N.E. Pharmaceutical & Chem Co., 579 F. Supp. at 847–49. The United States Court of Appeals for the Eighth Circuit noted in United States v. N.E. Pharmaceutical & Chem Co., 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987), that although the corporate officer disregarded corporate formalities, the personal liability imposed on the officer was “distinct from the derivative liability that results from ‘piercing the corporate veil.’” Id. at 744. Using what would be labeled a functional approach, the court noted that “[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme.” Id. at 743. Hence, the court held the officer liable because he participated in conduct that violates CERCLA. Id. at 744.

180 See Shore Realty, 759 F.2d at 1052–53; Carolawn, 14 Envtl. L. Rep. at 20,700; N.E. Pharmaceutical & Chem Co., 579 F. Supp. at 847–49. The United States Court of Appeals for the Eighth Circuit noted in United States v. N.E. Pharmaceutical & Chem Co., 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987), that although the corporate officer disregarded corporate formalities, the personal liability imposed on the officer was “distinct from the derivative liability that results from ‘piercing the corporate veil.’” Id. at 744. Using what would be labeled a functional approach, the court noted that “[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme.” Id. at 743. Hence, the court held the officer liable because he participated in conduct that violates CERCLA. Id. at 744.


182 See id.

183 Id. The Mirabile court implied that its interpretation of the exemption would further CERCLA's goals because application of its analysis would impose liability on lenders who were responsible for or profited from improper disposal practices. Id. at 20,996.
court, ABT's activities at the property following foreclosure were limited to those steps necessary to protect its security interest and did not constitute participation in the operational management of the facility.\textsuperscript{188} The court thus held that ABT was entitled to the protection of the security interest exemption.\textsuperscript{189}

Likewise, the \textit{Mirabile} court held that the SBA did not participate in the management of the facility in such a way as to incur liability.\textsuperscript{190} Unlike ABT, the SBA did not move to foreclose on its security interest. The SBA's loan agreement contemplated participation by the lender in the day-to-day management of the debtor's business, but the SBA did not exercise this authority.\textsuperscript{191} The \textit{Mirabile} court implied that the mere existence of creditor authority to assert control over management practices is not alone sufficient to hold the lender liable.\textsuperscript{192} To be held liable, the court suggested, a lender must act on its authority and actually participate in the facility's management.\textsuperscript{193}

The loan agreement also provided for restrictions on the debtor's use of the loan proceeds.\textsuperscript{194} Although the SBA imposed these restrictions, the court found that this conduct was merely evidence of lender participation of a purely financial nature.\textsuperscript{195} Moreover, the court noted that although the restrictions limited the flow of money to the debtor's principals, the restrictions did not affect the funding of disposal activities.\textsuperscript{196} As noted above, under the \textit{Mirabile} standard, participation in the debtor's financial activities does not necessarily take the creditor outside of the security interest exemption.\textsuperscript{197}

The court did not grant summary judgment with respect to Mellon.\textsuperscript{198} The court believed that Mellon's predecessor-in-interest, the Girard Bank, might have been involved deeply in the day-to-day

\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.} at 20,997.
\textsuperscript{191} \textit{Id.}
\textsuperscript{192} See \textit{id.}
\textsuperscript{193} See \textit{id.; accord In re Bergsoe Metal Corp., 910 F.2d 668, 672 (9th Cir. 1990) (court explicitly noted that "there must be \textit{some} actual management of the facility before a secured creditor" is no longer eligible for exemption).}
\textsuperscript{194} \textit{Mirabile, 15 Envtl. L. Rep. at 20,997.}
\textsuperscript{195} \textit{Id. In Guidice v. BFG Electroplating & Mfg. Co., the United States District Court for the Western District of Pennsylvania expanded upon the notion of a "safe harbor" for lenders from CERCLA liability. 732 F. Supp. 556, 562 (W.D. Pa. 1989); see also Bergsoe, 910 F.2d at 672 (lenders must be permitted to act to protect security interests without triggering CERCLA liability; without safe harbor, security interest exemption ceases to have meaning).}
\textsuperscript{196} \textit{Mirabile, 15 Envtl. L. Rep. at 20,997.}
\textsuperscript{197} \textit{Id. at 20,996.}
\textsuperscript{198} \textit{Id. at 20,997.}
operations of the debtor. A deposition of the debtor's management consultant noted the following activities of the secured creditor: frequent visits to the site, requests for manufacturing changes and reassignment of personnel, demands for additional sales efforts, and a statement informing the debtor that it must accept the day-to-day supervision of a representative of the Girard Bank if it wished to continue to operate with Girard funds. According to the Mirabile court, this level of lender involvement in the operational management of the business created the possibility that Mellon would not be able to benefit from the security interest exemption.

Like the Mirabile court, the United States District Court for the Western District of Pennsylvania in Guidice v. BFG Electroplating & Manufacturing Co. adopted a control standard that requires a strong showing of lender participation in the operational aspects of the debtor's business. In Guidice, the residents of the Borough of Punxsutawney, a Pennsylvania community, brought suit against the BFG Electroplating and Manufacturing Company (BFG) alleging that the defendant had contaminated the borough's sewage treatment plant with discharges of cyanide and heavy metal particles in excess of borough ordinance limits. The plaintiffs demanded reimbursement for CERCLA response costs. BFG, in turn, sought indemnification, contribution, and response costs from current and past owners of a property adjacent to its facility. The adjacent property was the site of a metal polishing company known as the Berlin Metal Polishers. Samples taken at the Berlin Metal facility revealed that its operations had contributed to the discharge of hazardous materials. The National Bank of the Commonwealth was a former mortgagee of the adjacent property, as well as a past record title owner of the property. Therefore, BFG filed a third-party complaint against the bank, among others.

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199 Id.
200 Id.
201 Id.
203 Id. at 562.
204 The Borough of Punxsutawney is the home of the famous groundhog who, if it sees its shadow, will return to its den, indicating that more winter weather is sure to follow.
206 Id. at 557.
207 Id.
208 Id. at 558.
209 Id. at 558–59.
210 Id. at 557–59.
211 Id. at 557.
Being a secured creditor of the Berlin Metal facility, the bank attempted to invoke the protection of the CERCLA security interest exemption.\textsuperscript{212} The \textit{Guidice} court bifurcated its analysis of the bank’s activities between the time period prior to the bank’s foreclosure and purchase of the facility at the foreclosure sale, and that time during which the bank was record owner of the property.\textsuperscript{213} The court focused on the issue of the lender’s participation in the defendant’s management only in the first segment of its analysis.\textsuperscript{214} The court followed the \textit{Mirabile} court’s high liability threshold requiring day-to-day control of the facility and likewise found support for its liability standard in a corporate law control analysis.\textsuperscript{215} The \textit{Guidice} court, however, broadened the range of acceptable creditor activities from mere financial involvement to those measures that the court characterized as “prudent” in light of the need to protect a security interest.\textsuperscript{216} The \textit{Guidice} court’s analysis suggested that a secured creditor may participate in the financial management of a debtor’s business and even become involved tangentially in the management of the debtor’s operations without falling outside of the exemption.\textsuperscript{217}

Prior to default, the bank in \textit{Guidice} had extended additional funds to Berlin Metal and received periodic financial statements.\textsuperscript{218} After default, the bank met with the debtor to learn of the status of its accounts, personnel changes, and the presence of raw materials.\textsuperscript{219} In addition, the bank actively assisted Berlin Metal in its pursuit of a loan from the SBA and initiated communications with the borough in order to bring the debtor into compliance with the discharge

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{212} \textit{Id.} at 561.
  \item \textsuperscript{213} \textit{Id.} Because the latter segment of the court’s analysis only addressed the issue of liability premised on the bank’s status as title holder, discussion of this portion of the analysis is not within the scope of this Comment. \textit{See id.} at 562–63.
  \item \textsuperscript{214} \textit{Id.} at 561–62.
  \item \textsuperscript{215} \textit{See id.} at 562. The \textit{Guidice} court noted the standard of liability set forth in \textit{Mirabile}. \textit{Id.} at 561. Moreover, like the \textit{Mirabile} court, the court in \textit{Guidice} referred to a corporate law case in which a court relied on the concept of control in order to impose CERCLA liability. \textit{Id.} at 562 (discussing Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986)). In \textit{Bunker Hill}, the United States District Court for the District of Idaho held a parent corporation liable for the cleanup costs associated with its subsidiary. 635 F. Supp. at 672. The court found that the parent controlled the management and operations of its subsidiary and therefore was an owner or operator under the statute. \textit{Id.} The court took care to recognize that certain activities of a parent with respect to its subsidiary are normal and should not automatically incur liability. \textit{Id.} The court, however, refused to cloak these activities with immunity on the grounds that to do so might frustrate CERCLA’s purposes. \textit{Id.}
  \item \textsuperscript{216} \textit{See Guidice}, 732 F. Supp. at 562.
  \item \textsuperscript{217} \textit{See id.}
  \item \textsuperscript{218} \textit{Id.}
  \item \textsuperscript{219} \textit{Id.}
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ordinance. The Guidice court found these activities to be insufficient to cause the lender to lose the protection of the security interest exemption. The court labeled the bank’s actions as necessary to protect its security interest in the property. Furthermore, the court found no evidence to suggest that the bank controlled the debtor’s operational, production, or waste disposal activities.

In *In re Bergsoe Metal Corp.*, the United States Court of Appeals for the Ninth Circuit confronted the security interest exemption but declined to establish a rule on the statutory language regarding lender participation in management. Nevertheless, the court’s decision provides insight into the exemption’s parameters. Like the *Mirabile* and *Guidice* courts, the court in *Bergsoe* embraced a high liability threshold. It held that a lender must actually exercise control over management of a facility before it can be held liable under CERCLA. Thus, the court determined that mere authority to exercise control is not sufficient to incur liability. Indeed, the court stated that the exemption does not equate management with a secured creditor’s power to manage or to become involved in management.

In *Bergsoe*, the debtor, a lead recycling plant, owed money on bonds issued by the Port of St. Helens, a municipal corporation empowered to issue revenue bonds. The Port had provided the debtor with funds, acquired through the sale of the bonds, to purchase land and build its facility. To secure the debt, the Port and the debtor entered into sale-and-lease-back agreements that trans-

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220 *Id.*
221 *Id.*
222 *Id.*
223 *Id.*
224 910 F.2d 668 (9th Cir. 1990).
225 *Id.* at 672.
226 *Id.* at 672–73.
227 *Id.*
228 *Id.* at 673 n.3.
229 *Id.* at 669–70.
ferred title to the debtor’s real property and facility to the Port.\footnote{230} The Port acquired certain rights under the leases, such as the right to inspect the premises and to reenter the premises in order to take possession of its property.\footnote{231} The Port never exercised these rights.\footnote{232} The Bergsoe court held that because it is not the existence but the exercise of such rights that raises the issue of participation under CERCLA, the Port did not participate in management and therefore was entitled to the protection of CERCLA’s security interest exemption.\footnote{233}

Furthermore, as in Guidice, the court in Bergsoe acknowledged that certain indicia of control are necessary to protect a lender’s interests and, moreover, are common to most credit transactions.\footnote{234} In addition to the rights under the leases, the Port encouraged the creation of the Bergsoe facility.\footnote{235} The court concluded that the Port’s rights under the leases and its involvement during the initial stages of the project were reasonable to ensure repayment of its bonds.\footnote{236} Thus, according to the Bergsoe court, standard lender participation that is necessary to protect a security interest and is typical to the debtor-creditor relationship cannot be characterized as management and does not itself violate the exemption.\footnote{237}

Unlike Mirabile and Guidice, the United States Court of Appeals for the Eleventh Circuit established a low liability threshold for

\footnote{230 Id. Under a sale-and-lease-back arrangement, the debtor sells property to a lender, thereby transferring the fee simple title to the lender. Sidney A. Keyles, Sale-Leaseback Financing, in 2 MODERN REAL ESTATE TRANSACTIONS 755, 757, 758 (ALI-ABA Comm. on Continuing Professional Education ed., 1983). The lender in turn leases the property back to the debtor who retains title to the improvements on the leasehold interest. Id. at 757. The debtor enjoys use and possession of the property while making payments under the lease. See id. The court in Bergsoe acknowledged that the sale-and-lease-back agreement was not the typical security transaction, and noted the absence of a security agreement. See 910 F.2d at 671. The court, however, recognized that the sole purpose of the arrangement was to provide financing for the facility. Id. Indeed, the “rent” payments were equal to the principal and interest payments on the bonds, and the lease expired when the bonds were paid off. Id. In addition, the lease transferred traditional indicia of ownership to the debtor, such as the duty to pay taxes, maintain insurance, and absorb the risk of loss from damage. Id. Thus, the court concluded that the Port held title for no other reason than to protect a security interest in the facility, and that, therefore, the arrangement was in the nature of a secured financing transaction. Id. at 671-72.}

\footnote{231 910 F.2d at 672.}

\footnote{232 Id. at 673.}

\footnote{233 Id. at 672-73.}

\footnote{234 Id.}

\footnote{235 Id. at 672.}

\footnote{236 Id. at 672-73.}

\footnote{237 See id.}
lenders in *United States v. Fleet Factors Corp.* The *Fleet Factors* court expressly rejected the *Mirabile* standard and held that a lender who exerts control over either the operational or the financial management of the facility to an extent indicating a capacity to affect hazardous waste disposal practices may be held liable under CERCLA.

In *Fleet Factors*, the EPA brought an action against a bankrupt debtor's officers and the Fleet Factors Corporation, the debtor's creditor, to recover costs for the removal of hazardous chemicals and asbestos from the debtor's facility. The debtor, Swainsboro Print Works, Inc. (SPW), operated a cloth printing facility on its premises from 1963 until February 1981. In 1976, Fleet and SPW entered into a factoring agreement whereby Fleet agreed to advance funds against the assignment of SPW's accounts receivable. The financing arrangement continued until early 1981, when Fleet advised SPW that its account was over-extended, and that Fleet no longer would finance SPW's operations. On February 27, 1981, SPW ceased operations at its facility.

In May 1982, Fleet foreclosed on SPW's inventory and equipment. Fleet hired Baldwin Industrial Liquidators, Inc. to conduct an auction and sale of Fleet's collateral. Some of the collateral was sold at public auction and removed from SPW's premises by the

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238 901 F.2d 1550 (11th Cir.), reh'g denied, 911 F.2d 742 (11th Cir. 1990) (en banc), cert. denied, 111 S. Ct. 752 (1991).
239 Id. at 1557--58.
240 Id. at 1562--53.
242 A factoring agreement is regarded as a financing arrangement although, in form, the transaction is an outright sale of the "debtor's" accounts receivables to the "lender" without recourse against the debtor. 1 GILMORE, supra note 49, § 5.1, at 128 n.3. In a typical textile factoring agreement, the lender exercises considerable control over the debtor's affairs. Id. § 5.4, at 136.
243 Fleet Factors, 724 F. Supp. at 957.
244 Id.
245 In August 1979, SPW filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Id. Fleet, however, with court approval, continued to finance SPW on similar terms. Id. In December 1981, the bankruptcy court entered an order converting the debtor's Chapter 11 reorganization proceeding to a liquidation proceeding under Chapter 7. Id. at 958.
246 Id. at 958.
247 Id. at 957.
248 Id. at 968. Fleet foreclosed on the security interests in some of its collateral, but only after obtaining bankruptcy court approval. Id.
purchasers. After the auction, Fleet contracted with Nix Riggers to remove the remaining equipment from SPW's facility and leave SPW's premises in "broom clean" condition. Nix left the facility in December 1983.

The EPA subsequently sued Fleet, and each party moved for summary judgment on the issue of Fleet's entitlement to the protection of the CERCLA security interest exemption. The EPA contended that the removal of equipment by the purchasers at the auction and Nix caused friable asbestos to come loose from pipes attached to the equipment. Moreover, the EPA asserted that in preparation for the auction, Baldwin moved leaking and rusting drums containing hazardous dyes and chemicals and therefore contributed to the release of environmental contaminants.

The United States District Court for the Southern District of Georgia found that Fleet's activities prior to Baldwin's auction preparations did not rise to a level of participation in the management of the SPW facility sufficient to impose liability on Fleet. The court adhered to the Mirabile standard, under which a secured creditor may become involved in the financial management of a debtor without incurring CERCLA liability. The district court's interpretation of the Mirabile standard even allowed isolated instances of lender control provided the creditor did not participate in day-to-day management of the facility either before or after the business ceased operations. The district court found, however, that Fleet's activities during the period of Baldwin's and Nix's involvement potentially could bring the lender outside of the exemption. The court therefore denied both parties' motions for summary judgment.

Fleet brought an interlocutory appeal from the district court's denial of its summary judgment motion. The United States Court...
of Appeals for the Eleventh Circuit agreed with the district court that material questions of fact remained regarding the extent of Fleet's participation in the management of the SPW facility, and affirmed the district court's denial of Fleet's summary judgment motion.261 The court of appeals noted, however, that the district court's construction of the security interest exemption was too broad and proceeded to formulate its own standard of lender liability.262

The court of appeals in Fleet Factors rejected a literal interpretation of the CERCLA security interest exemption that would deny protection to secured creditors who in any way or manner participated in the management of their debtors' facilities.263 According to the court, this standard fails to acknowledge the normal course of dealing between secured creditors and debtors, which necessarily includes some involvement by creditors in their debtors' financial affairs.264

The court of appeals in Fleet Factors also rejected the broad construction of the phrase "participating in the management" that the Mirabile court had formulated.265 The Fleet Factors court found that the Mirabile court's interpretation of the exemption essentially requires a secured lender to become an operator of a facility in order for liability to attach to the lender.266 The court noted that such a construction would be repetitious in that persons who operate facilities already are potentially liable as operators under the express language of CERCLA section 107(a)(2).267 The court therefore rejected an interpretation of the exemption that would equate lenders with operators.268

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261 Id.
262 See id. at 1557. The court of appeals set forth a new interpretation of the exemption under which, nevertheless, issues of fact remained as to whether Fleet's level of participation in the management of the facility was sufficient to incur liability under CERCLA. Id. at 1557-60.
263 Id. at 1556.
264 Id.
265 Id. at 1558; see supra notes 171-83 and accompanying text.
266 Fleet Factors, 901 F.2d at 1557-58.
267 Id. at 1557; see also 42 U.S.C. § 9607(a)(2)(1988) (operator liability under CERCLA).
268 Id. at 1557-58. The court found additional support for its rejection of a broad construction of the exemption in Representative William Harsha's comments to Congress regarding the security interest exemption. Id. at 1558 n.11. Representative Harsha noted that the exemption was "necessary because the original definition of 'owner' inadvertently subjected those who hold title to a vessel or facility, but do not participate in the management or operation and are not otherwise affiliated with the person leasing or operating the vessel or facility, to the liability provisions of the bill." 2 CERCLA LEGISLATIVE HISTORY, supra note 116, at 945. The Fleet Factors court reasoned that the term "affiliated" indicates a more peripheral involvement with the debtor's facility than that which an operator would undertake. 901 F.2d
Moreover, the Fleet Factors court reasoned that the Mirabile standard was too lenient toward creditors.\textsuperscript{269} Noting the remedial nature of CERCLA, the court construed the exemption so as to favor liability.\textsuperscript{270} The court formulated a low liability threshold whereby a lender, without exerting hands-on control over its debtor’s operations, would incur CERCLA liability by participating in the financial management of the debtor to an extent suggesting a degree of control over the facility’s disposal practices.\textsuperscript{271} Unlike the Mirabile standard, participation in the day-to-day operations of a facility or in management decisions relating to the treatment of hazardous wastes would not be prerequisites for a court to impose liability.\textsuperscript{272} The court in Fleet Factors concluded that the increased potential for liability would cause creditors to monitor their debtors’ activities for compliance with disposal standards and thereby further Congress’s goal of encouraging safer hazardous waste disposal procedures.\textsuperscript{273}

The court of appeals in Fleet Factors agreed with the district court that Fleet was entitled to claim the CERCLA security interest exemption for the period prior to the date when SPW ceased its operations.\textsuperscript{274} During this period, Fleet advanced funds to SPW, paid and arranged for utility services to the facility, and denied financing when SPW overextended its account.\textsuperscript{275} With respect to the period after SPW ceased printing operations and before Fleet contracted with Baldwin, the court of appeals noted that Fleet’s participation at 1558 n.11. The court concluded that the liability threshold for a secured creditor must be lower than the liability threshold of an operator, thereby further justifying its narrow construction of the security interest exemption. Id.

The Fleet Factors court’s reasoning, however, ignores the remainder of Representative Harsha’s comments. The congressman noted that the purpose of the exemption was “to truly exempt those who hold title but do not participate in the operation or management activities.” 2 CERCLA LEGISLATIVE HISTORY, supra note 116, at 945. Congress did not intend the phrase “affiliated with” to refer to secured creditors, but to those who lease or charter a vessel or facility. This language was included in the exemption “to prevent the establishment of ‘dummy’ corporations, with few assets, which would be the responsible party for the purpose of the act.” Id. The Fleet Factors court’s reliance on the phrase “affiliated with” therefore was misplaced.

\textsuperscript{269} Fleet Factors, 901 F.2d at 1557.

\textsuperscript{270} Id.

\textsuperscript{271} Id. The court provided that “[a] secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.” Id. at 1558.

\textsuperscript{272} Id. at 1557–58.

\textsuperscript{273} See id. at 1558.

\textsuperscript{274} Id. at 1559.

\textsuperscript{275} Id.
in the management of the facility may have been sufficient to cause
the lender to lose the exemption’s protection.276 The court listed a
number of activities that could trigger liability. Fleet, for example,
required SPW to seek Fleet’s approval before shipping goods to
customers, and determined when and to whom finished goods would
be shipped.277 In addition, Fleet set the price for excess inventory,
determined when SPW should let employees go, received and pro­
cessed the debtor’s employment and tax forms, and controlled access
to the facility.278 During the post-default period, Fleet exercised
nearly complete control over the financial management of the facility
and exerted some control over operations. The court concluded that,
under its construction of the exemption, the EPA demonstrated facts
sufficient to support the inference that Fleet could have influenced
waste disposal decisions.279

Lastly, both the district court and the court of appeals agreed that
Fleet’s involvement with the facility from the time Baldwin was
hired until Nix left the premises could be sufficient to impose liabil­
ity.280 Fleet argued that it merely engaged in a foreclosure and sale
of the debtor’s inventory and equipment.281 The court of appeals
rejected this argument and found that it was unimportant that Fleet
might have taken these steps to protect its security interest.282
According to the court of appeals, the relevant inquiry under the
security interest exemption is not a creditor’s intent or motive but
the nature and extent of the creditor’s involvement with the facili­
ity.283

A summary of the federal judicial holdings on the issue of partic­
ipation in management reveals two discrete approaches to lender
liability. The Mirabile standard permits lender control of a debtor’s
financial management but imposes liability on lenders who exercise
control over the day-to-day operations of a debtor’s facility.284 The

276 Id. Using the Mirabile standard, the district court arrived at the opposite conclusion—
a finding that the court of appeals described as erroneous. Id.
277 Id.
278 Id.
279 Id.
280 Id. at 1559–60.
281 Id. at 1560.
282 Id.
283 Id. In fact, the court of appeals regarded Fleet’s activities during this third time period
as sufficient not only to void the exemption but to incur liability as an operator of the facility.
Id.
Fleet Factors standard disregards the distinction between operational and financial management and imposes liability on a lender whose general involvement with a debtor's facility enables the lender to control waste disposal decisions should it so choose. Two other decisions refined the lender control analyses set forth in Mirabile and Fleet Factors. The Guidice court adopted the Mirabile standard but expanded the gamut of acceptable lender activities to allow particular instances of lender involvement in the debtor's operations. The Guidice court limited this involvement to that degree necessary to protect a lender's interests. The Bergsoe court declined to formulate a rule on the issue of lender control liability under CERCLA but nevertheless modified both the Mirabile and Fleet Factors standards. The Bergsoe standard requires indicia of actual control, not just mere authority to exercise control, in order for a lender to fall outside of the exemption. Moreover, Bergsoe reinforced the Guidice extension of acceptable lender activity to include lender involvement that is both necessary to protect a security interest and common to secured financing transactions.

A potential for conflict exists between the Ninth and Eleventh Circuits. As noted above, the Fleet Factors rule does not distinguish between operational and financial management of a facility. Moreover, Fleet Factors' low liability threshold does not protect any indicia of lender involvement. On the other hand, the court in Bergsoe acknowledged that because lenders must protect their interests, a certain degree of control and involvement is present in all debtor-creditor relationships. The Bergsoe court refused to characterize these indicia of control as management. It provided the protection of the security interest exemption to what it determined were necessary lender activities, thereby establishing a higher

285 901 F.2d at 1557 (court of appeals' standard of lender liability).
287 Id.
288 In re Bergsoe Metal Corp., 910 F.2d 668, 672 (9th Cir. 1990).
289 Id. at 673 n.3.
290 See id. at 672–73.
291 United States v. Fleet Factor Corp., 901 F.2d 1550, 1557 (11th Cir.), reh'g denied, 911 F.2d 742 (11th Cir. 1990) (en banc), cert. denied, 111 S. Ct. 752 (1991); see supra notes 288–39, 271–72 and accompanying text.
292 See Fleet Factors, 901 F.2d at 1557–58. The court recognized that a lender will exhibit some degree of involvement with its debtor due to the nature of a credit transaction. The court's final analysis, however, does not protect this degree of lender participation. Id.
293 See 910 F.2d 668, 672 (9th Cir. 1990).
294 See id.
threshold of liability than that set forth in Fleet Factors. Hence, once the Ninth Circuit establishes a rule on lender liability under CERCLA, it appears that there will be disagreement among the federal courts of appeals on their formulations of the CERCLA security interest exemption.295

B. The EPA's Proposed Interpretive Rule on the CERCLA Security Interest Exemption

In response to the courts' varied interpretations of the CERCLA security interest exemption296 and the legitimate concerns of both private and federal lending institutions,297 the EPA proposed a rule interpreting the exemption.298 The proposed rule acknowledges the

295 In its brief to the Supreme Court requesting a grant of certiorari, Fleet noted a different conflict between the two courts' approaches. Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit at 5–8, United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) (No. 90-504). Fleet asserted that the Fleet Factors court's language regarding capacity to control waste disposal decisions does not require the exercise of that control. Id. at 6. Thus, Fleet argued that the result in Fleet Factors is inconsistent with the Bergsoe rule requiring the lender to actually exercise its authority to participate in management. Id. These comments misread the cases. Both Bergsoe and Fleet Factors required actual lender involvement in the management of the facility. Bergsoe, 910 F.2d at 672; Fleet Factors, 901 F.2d at 1558. The language in Fleet Factors regarding an authority to control refers only to the treatment of hazardous wastes, not to general management practices. 901 F.2d at 1558. Both Bergsoe and Fleet Factors suggest that once a plaintiff shows that a lender exercised actual control over management, the lender's involvement may be sufficient to establish that the lender had the ability to affect disposal decisions. Id.; Bergsoe, 910 F.2d at 673 n.3. Regardless of whether a lender acts pursuant to this authority, both courts hold that this capacity to control waste disposal decisions is sufficient to incur liability.

296 See supra notes 165–295 and accompanying text.

297 See U.S. Asks Supreme Court, supra note 7, at 1583.


The EPA has received over 350 comments on the proposed rule. Lender Liability Singled Out for Fast Track, Not Delay, Under 90-Day Rule-Making Moratorium, 22 [Current Developments] Env't Rep. (BNA) 2330, 2330 (Feb. 7, 1992) [hereinafter Fast Track]. The rule's critics contend the following: that the rule does not clarify, but instead expands, the exemption; that the rule grants almost absolute immunity to foreclosure and liquidation activities; that the rule exempts those lenders who actually cause or contribute to the release of a hazardous substance; that the rule no longer requires lenders to conduct environmental audits before making loans; and that the rule improperly shifts the burden of proof to the plaintiff in cases where the defendant invokes the security interest exemption. Sweetheart Deal, supra note 6, at 1159. Supporters of the rule have commented that the EPA should provide retroactive relief to lenders; that the rule should exempt trustees and other fiduciaries; that the rule does
needs of secured creditors to manage, oversee, or otherwise act to protect a security interest. It also, however, recognizes the EPA's duty to recover public funds spent in cleaning up hazardous waste sites. The EPA's administrative solution seeks to reconcile these two competing interests.

Lenders assert certain contractual rights and engage in certain activities in the normal course of dealing with a debtor. Secured creditors must undertake these activities in order to protect their security interests and manage properly their loan portfolios. Reflecting the concerns of the Guidice and Bergsoe courts, the proposed rule seeks to protect such activities under the security interest exemption. The rule identifies a broad range of permiss-
sible lender activities, including actions taken at the inception of a loan or other transaction giving rise to a security interest, actions to police the loan or security interest, loan workout, and actions during foreclosure and liquidation.\footnote{Id. at 28,800, 28,802–05, 28,808–09.} The rule does not treat these types of lender involvement—ordinary and customary loan management practices—as evidence of participation in the management.\footnote{Id. at 28,803.}

The proposed EPA rule instructs that a lender falls outside the scope of the exemption if it actually participates in the management or operations of the debtor’s facility.\footnote{Id. at 28,802–03, 28,809.} The rule requires, however, that there be a nexus between lender control over facility operations and lender control over the hazardous substances present at the facility.\footnote{See id. at 28,803, 28,809.} The rule provides that a secured creditor will be deemed to have participated in the management of a facility if it either:

1. exercises decisionmaking control over the borrower’s environmental compliance, such that the security holder has undertaken responsibility for the borrower’s waste disposal or hazardous substance handling practices which results in a release or threatened release; or
2. exercises control at a management level encompassing the borrower’s environmental compliance responsibilities, comparable to that of a manager of the borrower’s enterprise, such that the security holder has assumed or manifested responsibility for the management of the enterprise by establishing, implementing, or maintaining the policies and procedures encompassing the day-to-day environmental compliance decisionmaking of the enterprise.\footnote{Id. at 28,809.}

Lenders, however, may conduct environmental inspections, request assurances of compliance with environmental laws, and even require debtors to clean up their facilities without losing the exemption’s protection.\footnote{Id. at 28,800, 28,803–04. In addition, liability cannot be premised on the inclusion of environmental warranties and covenants in the loan documents. \textit{Id.} at 28,804.} The proposed rule notes that activities such as these may be necessary to determine the risk associated with a loan

During a foreclosure and liquidation, a lender may take steps to prevent or minimize the risk of a release of hazardous substances. \textit{See id.} at 28,805. The rule recognizes that the lender is taking such mitigative or preventative measures to preserve the value of its collateral and thus to protect its security interest. \textit{Id.} The rule therefore does not treat these activities as participation in the management. \textit{Id.}; see also 42 U.S.C. § 9607(d) (1988) (CERCLA precludes liability “for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice”).
or adequately to police a loan.\textsuperscript{313} Thus, the rule’s characterization of these activities as permissible is consistent with the EPA’s desire to shield lending activities that are basic to protecting a security interest.\textsuperscript{314} Nonetheless, the rule cautions that although a lender may not have participated in the management of a facility under the standard set forth in the rule, a lender still may be held independently liable if it is itself responsible for the release of a hazardous substance.\textsuperscript{315}

Application of the security interest exemption requires courts to conduct a fact-sensitive inquiry to determine whether a secured creditor has participated in the management of a facility sufficiently to "void the exemption."\textsuperscript{316} The EPA proposed its interpretive rule to provide courts with a workable definition of certain statutory elements in CERCLA’s security interest exemption, such as the phrase “participating in the management”.\textsuperscript{317} Once finalized, the rule most likely will govern EPA suits against lenders.\textsuperscript{318} At present, however, the proposed rule is silent with regard to private party actions.\textsuperscript{319} Thus, it is unclear whether courts will apply the rule when a private litigant is suing a secured creditor or, instead, substitute their own interpretations of the exemption for that of the agency.\textsuperscript{320}

\textsuperscript{314} See id.
\textsuperscript{315} Id. at 28,804.
\textsuperscript{316} Id. at 28,802.
\textsuperscript{317} Id. at 28,798; 28,799.
\textsuperscript{320} Rules to Ease Burden, supra note 318, at 4; Sweetheart Deal, supra note 6, at 1162. The American Bar Association (ABA) has suggested that perhaps the EPA included the proposed rule under the National Contingency Plan (NCP) "to try to make the regulation applicable to private cost recovery litigation." Sweetheart Deal, supra note 6, at 1162. The ABA is uncertain, however, whether inclusion in the NCP will be sufficient to broaden application of the rule to private party actions against lenders. There exist two additional reasons to doubt the utility of the rule in private party suits. First, the EPA’s rule would amount to an about-face for the agency on the interpretation of the security interest exemption. Rules to Ease Burden, supra note 318, at 4. A majority of courts have held that deference will depend on the consistency with which the EPA has adhered to the position set forth in the regulation that is currently under scrutiny. See, e.g., INS v. Cardoza-Fonesca, 480 U.S. 421, 446 & n.30 (1987) (court rejected Board of Immigration Appeals’s (BIA) interpretation of two statutory provisions because BIA on three previous
This uncertainty concerns lenders, especially because commentators now warn that if the rule impairs the government's ability to recover costs from lenders, then lenders will be subject to an increased number of third-party actions by parties that the government targets for recovery of its costs.

V. CRITICISMS AND COMMENTS ON THE PRESENT STATE OF LENDER CONTROL LIABILITY UNDER CERCLA

To varying degrees, both the courts and the EPA take note of CERCLA's regulatory objective—to deter the improper treatment and disposal of hazardous substances. Only the EPA's proposed rule on lender liability, however, embodies the functional approach, focusing attention on the legal principle advanced under the statute—the imposition of liability on those persons responsible for improper disposal of hazardous wastes. Because the agency has adopted the functional approach in its proposed rule, the outcomes under the rule are more likely to achieve CERCLA's objectives than the judicially devised standards of lender control liability.

Because they adopt the generic definition of control, the Mirabile and Guidice courts put forth inaccurate standards of lender liability under CERCLA. In neither case did the court focus on CERCLA's objectives as the principal rationale upon which to support a theory of lender control liability. Instead, both courts premised liability on a general assertion of control by the lender over the debtor's business.

occasions had answered question of relationship between two provisions in three different ways).

Second, the courts have considered the issue of lender liability and have established strong judicial precedent in this area of law. See, e.g., Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556, 561 (W.D. Pa. 1989) (secured creditor liable if it participates in day-to-day management of debtor's business or facility). Thus, it is questionable whether courts will abandon their interpretations and adopt the EPA rule in the case of third-party suits. Rules to Ease Burden, supra note 318, at 4.

321 See Sweetheart Deal, supra note 6, at 1162; id. at 1159 (comments from financial interests indicate concern that rule does not apply to private party lawsuits).

322 American Bar Association Meeting, supra note 8, at 1148-49.


325 The courts only address CERCLA's goals in a conclusory or passing manner. See Guidice, 732 F. Supp. at 562; Mirabile, 15 Envtl. L. Rep. at 20,996; see also supra note 183.

In addition, and within the context of a generic approach, both the Mirabile and the Guidice opinions turn to the concept of control as it exists under corporate law and apply this standard in a secured financing context.327 Relying on a corporate control standard, the two courts based liability solely on the lenders' operational management of the facilities.328 The corporate control standard, however, is inappropriate to the determination of the CERCLA liability of a secured creditor. Control in the corporate context is extensive operational control of a corporation by a corporate officer, for example, such that the two entities merge and no longer maintain separate corporate identities.329 In the case of a secured creditor, however, the relevant control is the lender's control of the debtor's hazardous waste disposal activities. The danger of applying a corporate control standard to a lender with the potential for CERCLA liability is that a court may not allow for a safe harbor to protect necessary lending activities. Moreover, the court's sweeping inquiry into the lender's operational control may fail to target the lender conduct that CERCLA deems to be reprehensible. Mirabile, and to a greater extent Guidice, recognized that lenders engage in certain conduct to protect their security interests, and that the exemption protects these indicia of control.330 The Mirabile and Guidice standards are flawed, however, because they focus too broadly on indicia of operational control. The courts' standards fail to require that a lender exert control over a debtor's waste disposal activities before there is a finding of liability.331

Under the standards that the Guidice and Mirabile courts articulated, some lenders may escape punishment. Because the standards prohibit scrutiny of indicia of financial control, courts may overlook evidence revealing lender control of waste disposal decisions. On the other hand, some lenders may be unfairly subjected to CERCLA

331 Courts that have determined CERCLA liability in the corporate law context, however, also have considered whether the parent corporation or corporate officer had authority to control the subservient corporation's handling and disposal of hazardous substances. See, e.g., United States v. N.E. Pharmaceutical & Chem. Co., 810 F.2d 726, 743–44 (8th Cir. 1986); Bunker Hill, 635 F. Supp. at 672. The Mirabile and Guidice courts did not adopt this aspect of the corporate law analysis.
liability. Although a lender may exert substantial control over a debtor's business operations, the lender may not have participated specifically in or controlled the debtor's treatment of hazardous wastes. The generic approach therefore does not target successfully those who are responsible for the release of hazardous substances.

The Fleet Factors decision has been the subject of an enormous amount of criticism and debate.\(^{332}\) Although some of these comments are well founded, the decision is not entirely without merit because the reasoning that the court of appeals adopted in Fleet Factors perhaps most closely resembles the reasoning that the functional analysis requires. The court focused, at least initially, on the interaction between the lender's conduct and the disposal of hazardous wastes.\(^{333}\) The scope of the Fleet Factors court's rule, however, is far too broad. The court expressly stated that, to find lender liability, its standard does not require a lender to be involved in the decisions regarding the treatment of hazardous wastes.\(^{334}\) It is sufficient under the Fleet Factors standard to show that general indicia of lender control lead to the inference that a lender may have had the capacity to control these decisions.\(^{335}\)

In the end, therefore, the Fleet Factors court embraced the generic concept of control. Because it requires no specific evidence of control of the waste disposal practices, the Fleet Factors standard imposes liability on lenders who exert control over their debtors regardless of whether they exert control over the debtor practices that CERCLA deems reprehensible. In other words, the standard allows courts to premise liability on evidence of lender control that is wholly unrelated to improper waste disposal activities. Moreover, the court of appeals decision in Fleet Factors provides no protection

\(^{332}\) See Eleventh Circuit Expands CERCLA Liability to Cover Secured Creditor's Interest in Firm, 21 [Current Developments] Env't Rep. (BNA) 307, 308 (June 8, 1990) ("decision transforms lenders into 'environmental police'"); Fleet Factors Complains to Supreme Court that CERCLA Ruling Disrupts Commercial Lending, 21 [Current Developments] Env't Rep. (BNA) 1116, 1117 (Oct. 5, 1990) (ruling will make banking industry increasingly reluctant to lend and therefore will result in more bankruptcies); Legislative Changes Necessary After Fleet Factors Case, Lawyer Says, 21 [Current Developments] Env't Rep. 907, 907 (Sept. 14, 1990) ("court's pronouncement tagged lenders as deep pockets to fund the costs of cleaning up the environment"); Lender Liability Under Superfund Law Will Not Be Reviewed by Supreme Court, 21 [Current Developments] Env't Rep. (BNA) 1675, 1675 (Jan. 18, 1991) (decision has left banking and lending community anxious about liability).


\(^{334}\) Id. at 1558.

\(^{335}\) Id.
for the typical and customary indicia of lender control.\textsuperscript{336} The end result under the \textit{Fleet Factors} standard is that far too many lenders will be unfairly subject to CERCLA liability.\textsuperscript{337}

Application of a pure functional approach, on the other hand, to the facts in \textit{Fleet Factors} would have achieved CERCLA’s goals. The functional approach would not have allowed the court to premise liability on instances of lender control that were unrelated to the disposal of hazardous wastes, such as the lender’s setting the price for the debtor’s excess inventory and processing the debtor’s tax forms.\textsuperscript{338} For example, the court of appeals in \textit{Fleet Factors} would have been precluded from finding liability during the post-default period because the government did not present any evidence of lender control that was even remotely connected to the disposal of hazardous wastes. To find liability under a functional approach, therefore, the court would have been forced to require evidence of actual lender control over the debtor’s waste disposal activities rather than a mere inference of control.

In addition, the court of appeals in \textit{Fleet Factors} should have taken into account the lender’s need to protect its interests in the debtor’s property, especially during the foreclosure period.\textsuperscript{339} Although a safe harbor could not have protected Fleet from responsibility for any environmental damage that it might have caused by moving drums that were filled with hazardous chemicals, a safe harbor would have allowed Fleet to engage in an environmentally cautious foreclosure and sale of the debtor’s property without triggering CERCLA liability.

The EPA’s proposed rule wholeheartedly embraces the functional approach. The rule requires evidence of lender control over a debtor’s improper disposal of hazardous wastes.\textsuperscript{340} As a result, the rule targets only the behavior that falls within the purview of CERCLA. The rule produces accurate outcomes because it achieves CERCLA’s goals of punishing lenders who exert control over their debtors’

\textsuperscript{336} See \textit{id.} at 1557–58. Although the court alluded to the normal course of dealing between debtors and creditors, \textit{id.} at 1556, the standard that it articulated provides no recognition for those control activities that are necessary to protect lenders’ interests, \textit{see id.} at 1557–58. In fact, the court dismissed the distinction between financial and operational management and permitted scrutiny of both. \textit{Id.} at 1557.


\textsuperscript{338} See \textit{id.} at 1559.

\textsuperscript{339} See \textit{id.} at 1559–60.

waste disposal activities, not their debtors' employment practices or tax forms. In addition, the rule recognizes that the security interest exemption is meaningless unless lenders can engage in the customary loan management practices that ordinarily accompany a security interest. Thus, the proposed rule provides a safe harbor so that lenders can undertake those activities that are typically associated with the protection of a security interest without the fear of CERCLA liability.

VI. APPLICATION OF THE FUNCTIONAL ANALYSIS TO CERCLA'S SECURITY INTEREST EXEMPTION

Financial transactions depend upon certainty and predictability. Lender liability under CERCLA, however, is nothing but unpredictable. Lenders are unclear about the parameters of management within which they may operate and avoid liability. Judicial interpretations of the CERCLA security interest exemption do not provide any additional guidance to lenders. Because debtor-creditor relationships typically entail various degrees of lender control, lenders fear that their normal involvement with debtors may be sufficient to incur the potentially huge liabilities associated with CERCLA cleanup activities. In fact, eighty-eight percent of the banks surveyed by the American Bankers Association have changed their credit practices in an attempt to avoid environmental liability. These changes in lending procedures have led to a reduction of available credit for those businesses that present environmental risks. Therefore, neither the lending nor the borrowing community

341 Id. at 28,803-06.
343 See supra notes 165-295 and accompanying text.
344 See Fleet Factors Complains to Supreme Court that CERCLA Ruling Disrupts Commercial Lending, 21 [Current Developments] 1116, 1116 (Oct. 5, 1990). For example, there is a Superfund site in the western United States with cleanup costs that are estimated to be between $7 and $10 million. 136 CONG. REC. E1023 (daily ed. April 4, 1990) (statement of Rep. LaFalce).
345 See Sweetheart Deal, supra note 6, at 1160; see also John M. Campbell, Jr., Lender Liability Under Superfund: Deep Pockets Don't Always Yield Free Goods, ENVTL. FORUM, Jan.–Feb. 1989, at 5, 5-7. Examples of modified lending practices include requiring environmental audits as a precondition to financing, factoring cleanup costs into loans, setting more stringent cash flow requirements, and requiring cleanup as a condition of financing. Campbell, supra, at 7.
346 See Sweetheart Deal, supra note 6, at 1160.
will be able to function effectively until the courts, Congress, or the EPA establishes a clear standard of lender liability.

The insufficient and nonuniform judicial interpretations of the security interest exemption that have plagued the lending community with uncertainty and chaos are the result of a generic approach to the concept of lender control liability. Under a generic analysis, any indicia of lender control may trigger CERCLA liability. Although the generic approach facilitates easy analysis, it is inadequate for a number of reasons. First, the approach misconceives and ignores the underlying purposes or rationales distinct to each theory of lender liability.347 If a court does not identify the underlying premise for liability in a lender liability case, it will not be able legitimately to distinguish acceptable from unacceptable indicia of lender control. Second, a generic view of control encourages inaccurate references to other theories of lender liability, thereby diluting the distinct nature of each theory.348 The result is an overemphasis on control and too little emphasis on the actual theory of liability propounded.349 Lastly, whether control is evidenced by loan documentation or administration, all lenders seeking to protect their financial interests will exert some form of control over their debtors.350 Therefore, it is not enough to apply a generic concept of control under a theory of lender liability. The generic approach allows courts to ignore the necessity of certain control techniques that enable a lender to increase the likelihood that it will recover its funds.

In order to reduce uncertainty under the exemption and thereby begin to ease the credit crunch, courts should adopt a functional approach to the concept of lender control under CERCLA. The functional approach would require identification of the indicia of lender control that are relevant to CERCLA's theory of liability, and would foster recognition of the lender's inherent position of control.

In interpreting a statute under the functional approach, courts must identify the statute's theory of liability. CERCLA seeks to impose liability on those who are responsible for the improper disposal of hazardous substances.351 If a person—which CERCLA defines to include both individuals and corporations—generates, trans-

347 Lawrence, supra note 27, at 186.
348 Id. at 186–87.
349 See id. at 187.
350 See supra notes 27–58 and accompanying text.
ports, or arranges for the treatment or disposal of hazardous substances in a manner that contaminates the environment, then that person has engaged in wrongful conduct under the statutory scheme. 352 CERCLA therefore imposes liability on those who exert control over the handling and disposal of hazardous wastes. 353 In light of this objective, courts must examine the indicia of lender control in a particular case and determine whether there is sufficient evidence to demonstrate that the lender asserted control over its debtor’s waste disposal decisions. Under this analysis, the lender will not “void the exemption” unless it has exerted control over the debtor’s improper disposal of wastes.

The functional approach therefore provides fixed parameters to the security interest exemption. Under the approach, lenders would be able to rely on the fact that they could avoid liability by not participating in decisions regarding the disposal and treatment of hazardous wastes. Thus, lender liability under CERCLA no longer would be the wild card in a deck of credit risks.

For guidance on application of the functional approach, courts should turn to the EPA’s proposed rule on lender liability under CERCLA. The rule premises liability on lenders’ control of their debtors’ waste disposal activities. 354 In addition, the rule creates a safe harbor in which the lending community can pursue its normal course of business. 355 The rule effectively achieves CERCLA’s goals by targeting only those lenders who are responsible for the improper disposal of hazardous wastes. Although, at present, the rule only applies to EPA suits, courts also should consider using the rule in the context of private party suits.

Some would argue that this Comment puts forth a construction of the CERCLA security interest exemption that conflicts with a long-standing legal maxim—that in order to achieve the goals of a remedial statute, such as CERCLA, courts should construe ambiguous statutory terms broadly so as to favor liability. 356 In fact, some critics of the EPA’s proposed rule believe that the rule does not clarify the exemption but instead expands it. 357 These critics do not understand

353 See id. at 743.
355 Id. at 28,803–06.
357 See Sweetheart Deal, supra note 6, at 1159.
the structure of CERCLA’s liability provisions. Although CERCLA imposes strict liability on, among others, owners and operators of a facility, the statute also provides an exemption from the strict liability standard for secured creditors. The security interest exemption therefore creates another category of PRPs—secured creditors. Lenders are not owners, because they possess only a security interest. Lenders who void the exemption cannot be liable as operators, because operator liability is provided for elsewhere in the statute—to hold otherwise would render the exemption mere surplusage.

The purpose of the security interest exemption is not to increase lenders’ exposure to liability, as suggested by the Fleet Factors court, but rather to distinguish lenders from other PRPs. Lenders not only hold a unique interest in property but also develop intimate business relations with their debtors. As the Bergsoe court noted, the exemption is meaningless unless lenders are allowed to engage in certain activities that are common to lending relationships and necessary to protect security interests. Therefore, rather than impose strict liability on lenders, the security interest exemption instructs courts to apply a lender control analysis to determine liability. Although the lender liability analysis differs from that which is applied to owners and operators, lenders are not subject to any lesser standard of care. If a lender, as a result of its control activities, is responsible for a release of hazardous substances, then a court will hold that lender jointly and severally liable for all response costs.

Lenders, however, are not environmental watchdogs. The purpose of lending institutions is to finance investments and businesses, not to ensure that debtors comply with environmental laws and regulations. As the EPA’s proposed rule explains, “a security holder is not expected to be an insurer or guarantor of environmental safety at a facility in which it has a security interest.” Lenders are liable

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359 See supra notes 34, 133 and accompanying text.
361 See Fleet Factors, 901 F.2d at 1558 n.11.
362 See supra notes 27–59 and accompanying text.
363 In re Bergsoe Metal Corp., 910 F.2d 668, 672 (9th Cir. 1990); see also Eleventh Circuit Rejects Request, supra note 342, at 536.
364 But see Fleet Factors, 901 F.2d at 1558–59.
only for certain of their actions—their exertions of decisionmaking or management control over their debtor's hazardous waste disposal decisions. Lenders are not liable for inaction—they have no duty to force a debtor to manage its facility in an environmentally sound manner.

In reality, however, because environmental liabilities often cause debtors to become insolvent and default on loans, many lenders now insist upon cleanup and continued compliance as conditions of financing in order to reduce the credit risk associated with debtors whose activities may cause harm to the environment. Although some lenders may act out of a sincere concern for the environment, most impose compliance requirements in order to protect their security interests. The decision to act therefore is within the discretion of the lender. Congress did not design CERCLA to create a federal squadron of environmental police consisting of secured creditors.

VII. CONCLUSION

Application of a functional analysis to CERCLA's security interest exemption will allow the courts to ferret out those lenders who have assumed control over their debtors' waste disposal activities. Courts then will be able to assign liability for cleanup costs to those lenders who have increased the burdens on an already severely contaminated environment. Moreover, the functional analysis will fix the parameters of the security interest exemption. Lenders will be able to plan their involvement with debtors so as to avoid liability. By reducing the uncertainty and risk of lender liability, capital should begin to flow more freely and eventually ease the CERCLA-driven credit crunch.

366 See Campbell, supra note 345, at 7.