NOTE

DEFINING THE SCOPE OF LENDER LIABILITY AFTER *KELLEY v. EPA*: WHO WILL HAVE SAFE HARBOR?

I. INTRODUCTION

Prior to the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[1] lending institutions were primarily concerned with default and market or interest rate risk. The lender was able to reduce the risk of default by securing loans with collateral.[2] During the 1970s, the federal government began to enact environmental legislation which attempted to define environmental problems and determine who was responsible through monitoring and regulation.[3] In 1980, Congress enacted CERCLA in order to clean up toxic waste sites and identify broad classes of people who would be financially responsible for the clean-up efforts.[4]

One of these broad classes of responsible parties includes owners or operators of hazardous waste sites.[5] This category created enormous potential for liability risk for lenders who hold title to contaminated property as collateral. Congress created a "safe harbor" exemption from liability within the definition of owners and operators in order to protect lenders who held title merely as protection of a security interest.[6] However, this exemption failed to serve its intended purpose because of the ambiguous language contained in the provision and the conflicting judicial opinions as to its scope.

These conflicting interpretations caused a great deal of confusion for lending institutions. Although the provision originally provided comfort to lenders, the recent interpretations have exposed some institutions to potentially unlimited liability. The cost of cleaning up a hazardous waste site can sometimes exceed $25 million,[7] and lenders are being forced to weigh the risk of liability for such costs against the benefits of accepting a potentially contaminated property as collateral. An American Bankers Association

1. 42 U.S.C. §§ 9601-75 (1988 & Supp. V 1993).

2. Prior to CERCLA, "[f]inancial institutions generally protected themselves against this [default] risk by taking sufficient collateral to secure the loan. Ironically, under CERCLA, this practice may be the action which imposes liability for environmental clean-up." Roger D. Staton, *EPA's Final Rule on Lender Liability: Lenders Beware*, 49 BUS. LAW. 163, 173-74 (1993).

3. *Id.* at 164-65.

4. 42 U.S.C. § 9607(a) (1988).

5. 42 U.S.C. § 9607(a)(1)-(2) (1988).

6. 42 U.S.C. § 9607(20)(A) (1988).

7. Ethan T. James, *An American Werewolf in London: Applying the Lessons of Superfund To Great Britain*, 19 YALE J. INT'L L. 349, 391 (1994).

survey indicated that over sixty percent of the banks questioned have rejected applications because of potential exposure to environmental liability.[8] Basically, lenders are unsure of the extent to which they can involve themselves in a collateral property's operations without becoming an owner or operator under CERCLA. In addition, lenders are unsure if they can be held liable for clean-up costs after they foreclose on a property.

In response to fears of unlimited liability expressed by lending institutions and in consideration of the federal government's increasing role as a secured creditor, the Environmental Protection Agency (EPA) issued a regulation in 1992 that attempted to define clearly the scope of a lender's liability under CERCLA.[9] This rule provided the lending community with a precise standard by which to guide their actions in order to avoid incurring liability.

In *Kelley v. EPA*,[10] the EPA's regulation that attempted to clarify issues of lender liability under CERCLA was struck down by the United States Court of Appeals for the D.C. Circuit. The court held that Congress had not granted the EPA authority to promulgate regulations that would define the scope of lender liability in private party litigation.[11] It further determined that federal courts should evaluate claims in private cost recovery actions independent of the EPA's "institutional view."[12]

This note postulates that the *Kelley* decision to invalidate the rule once again exposes lenders to unlimited liability under CERCLA by leaving them to make decisions based on an ambiguous statutory provision that has been interpreted both broadly and narrowly in the past. Part II of this note begins with an overview of CERCLA that will provide a basic understanding of the mechanisms by which the EPA may undertake clean-up activities and recover their costs. It further describes liability under the statute and the exemption that may be available to lenders. Because the scope of this exemption is not clear, this section will also provide interpretations of the exemption provision that have been given by both the judiciary and by the EPA's regulation. Part III gives a general overview of an agency's authority to promulgate regulations that interpret or add to the substance of statutes. Part IV describes the reason and holding of the *Kelley* court, and Part V outlines the position of the dissent. The court's decision to invalidate the rule is analyzed in Part IV, and in conclusion, this note will look at the

8. Robert G. Boehmer, *EPA Finalizes Rule To Guide Secured Lenders Through CERCLA maze: Is It Enough?*, 97 DICK. L. REV. 1, 1 n.7 (1992).

9. 40 C.F.R. § 300.1100 (1992).

10. 15 F.3d 1100 (D.C. Cir. 1994).

11. *Id.* at 1103.

12. *Id.* at 1109 (The court concluded that Congress intended that the judiciary determine liability issues and found evidence of such intent in the creation of a private right of action under § 106 of CERCLA. According to the court, the existence of a private right of action disproves the existence of a grant of Congressional authority to the EPA to determine the scope of lender liability. It further determined that issues of liability in private cost recovery actions under CERCLA should be decided by the courts without giving consideration to the EPA's interpretation of the liability provisions. Because the EPA can be brought into a private right of action as a third party, the court decided that deference to its view in that instance would be inappropriate.)

effect of the decision on lenders in the future and a proposed solution in Congress.

II. THE CASE BACKGROUND

A. *The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)*

Congress enacted CERCLA in 1980 to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment, as well as for the clean up of hazardous waste disposal sites.[13] It creates potential liability for numerous parties where there is a "release or a threat of release" of a "hazardous substance" at a "facility or incineration vessel."[14] Under section 105 of this statute, the President is required to create a National Contingency Plan (NCP) which will stipulate procedures in response to hazardous contamination.[15] The President has delegated the majority of his authority under CERCLA to the EPA.[16]

The EPA is empowered to respond to a contamination in two ways under CERCLA. First, section 104 provides that the EPA may undertake the cleanup on its own.[17] The cleanup is funded through the Superfund, and the EPA can later bring suit against the parties who are potentially responsible for the contamination for recovery of the costs under a section 107 action.[18]

Secondly, section 106 provides that if the threat to the environment or public welfare is imminent or substantial, the EPA may order private parties to clean up a site without regard to their potential liability, and if the parties refuse, they could face a federal court action.[19] If the parties com-

---

13. Pub. L. No. 96-510, 94 Stat. 2767 (1980).

14. 42 U.S.C. §§ 9601-13 (1988 & Supp. V 1993).

15. "Within one hundred and eighty days after December 11, 1980, the President shall, after notice and comment and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances. . . ." 42 U.S.C. § 9605 (1988).

16. Exec. Order No. 12,580, 3 C.F.R. 193 (1988), *reprinted in* 42 U.S.C. § 9615 (1988 & Supp. V 1993).

17. According to § 104:

> Whenever . . . a hazardous substance is released or there is substantial threat of such a release into the environment, or there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time . . . or take any other response measure . . . which the President deems necessary to protect the public health or welfare or the environment.

42 U.S.C. § 9604(a)(1) (1988).

18. 26 U.S.C. § 9607 (1988). Under § 107, four categories of potentially responsible parties are liable for "all costs of removal or any remedial action incurred by the United States Government . . . ." 42 U.S.C. § 9607(a)(4)(A) (1988).

19. Section 106(a) provides that when "the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance . . . the President may . . . [issue] orders as may be necessary to protect the public health and welfare and the environment." 42 U.S.C. § 9606(a) (1988).

ply or have complied with the order, they may petition the EPA for reimbursement of reasonable costs and, if denied, petition a United States District Court.[20] In order to receive reimbursement, the party must establish by a preponderance-of-the-evidence that it is not liable for the reasonable costs or that the EPA's order was arbitrary and capricious.[21]

Both private parties and the EPA may bring a civil action under section 107 against responsible persons in order to recover the costs they incurred in cleaning up a site.[22] Further, the EPA is authorized to determine civil penalties associated with noncompliance and may bring an action in federal court to recover the penalties.[23]

CERCLA holds all past and present owners strictly liable for the costs associated with the clean-up of hazardous waste sites.[24] Congress intended

---

Section 106(b)(1) further provides that "[a]ny person who, without sufficient cause, willfully violates, or fails to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States [D]istrict [C]ourt to enforce such an order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues." 42 U.S.C. § 9606(b)(1) (1988).

20. Section 106(b)(2) states that "[a]ny person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement . . . ." 42 U.S.C. § 9606(b)(2) (1988). Section 106(b)(2)(B) provides that "if the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States [D]istrict [C]ourt seeking reimbursement from the Fund. 42 U.S.C. § 9606(b)(2)(B) (1988).

21. Subsections 106(b)(2)(C) and (D) create two burdens that the petitioner must meet in order to obtain reimbursement. Part (C) provides that "the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order." 42 U.S.C. § 9606(b)(2)(C) (1988). In the alternative, part (D) provides that "a petitioner who is liable for response costs under section 9607 (a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious." 42 U.S.C. § 9606(b)(2)(D) (1988).

22. 42 U.S.C. § 9607(a) (1988).

23. Section 109(a) provides that a "civil penalty of not more than $25,000 per violation may be assessed by the President. . . ." 42 U.S.C. § 9606(a)(1) (1988). The person who has been penalized has thirty days within which to file an appeal in the appropriate district court and, if that person fails to do so, the penalty will become a final and unappealable order of the court. The section further states that "if any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order or after the appropriate court has entered final judgement in favor of the United States, the President may request the Attorney General of the United States to institute a civil action in an appropriate district court of the United States to collect the penalty. . . ." 42 U.S.C. § 9609(a)(1)-(4) (1988).

24. Section 107 imposes strict liability for clean-up of hazardous waste sites upon all past and present "owners and operators of a vessel or facility." 42 U.S.C. § 9607(a) (1988). The owners and operators will be held liable for:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.

to exempt secured creditors from liability by creating a "safe harbor" provision in the definition of owners and operators. This provision states that the terms owners and operators do 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."[25]

B. *Pre-EPA Rule Decisions on Liability Issues Under CERCLA*

CERCLA's safe harbor provision created a great deal of chaos in the lending community as courts rendered vastly different interpretations of its scope. While some courts interpreted the exemption broadly, others drastically limited the protection afforded by the provision and extended liability to parties who had merely foreclosed on a property or participated in the financial management of the collateral property.[26]

An early decision on this issue was made by the U.S. District Court for the Eastern District of Pennsylvania. That court interpreted the exemption broadly, holding that a secured creditor must "at a minimum, participate in the day-to-day operational aspects of the site" in order to be held liable under CERCLA.[27] This standard would apply to activities before and after foreclosure and would have the effect of allowing a holder of a security to foreclose on a property, without forfeiting the exemption, as long as the holder did not "become overly entangled in the affairs of the actual owner or operator of the site."[28]

In contrast, the district court in *United States v. Maryland Bank & Trust*,[29] narrowly interpreted the exemption by holding that a lender can incur liability under CERCLA by foreclosing on a contaminated property prior to clean-up of the site. The court stated that, in order to be protected

---

25. The "safe harbor" provision is contained within the definition of "owners and operators" in § 101 of CERCLA. That section provides:

> The term "owner or operator" means (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 owing or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility beforehand. Such term does *not* include a person, who *without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest* in the vessel or facility.

42 U.S.C. § 9601(20)(A) (1988) (emphasis added).

26. *See* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578-80 (D. Md. 1986); United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990).

27. United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992 (E.D. Pa. 1985). In *Mirabile*, the bank foreclosed on a mortgage and then purchased the property at the sheriff's auction; the bank held the property for only four months before selling it to a third party. *Id.*

28. William D. Evans, Jr., Ashland Oil, Inc. v. Sonford Products Corp., Kelly v. Tiscornia, *and* United States v. Fleet Factors Corp.: *Upholding the EPA's Lender Liability Rule*, 29 TORT & INS. L.J. 141, 145 (1993).

29. 632 F. Supp. 573, 574 (D. Md. 1986). In *Maryland Bank & Trust*, the bank purchased the property at foreclosure and held the title for nearly four years. *Id.*

by the exemption, "the security interest in the property must exist *at the time of the clean up*."[30]

This strict interpretation was taken further by the Eleventh Circuit Court of Appeals in *United States v. Fleet Factors Corp.* (*Fleet Factors*).[31] That court developed a standard for evaluating when a secured creditor has sufficiently participated in the management of a facility to incur liability. If the creditor participated in the "financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes," or "if its involvement was sufficiently broad to support the inference that it could affect hazardous waste disposal decisions," the creditor would be held liable, regardless of whether actions took place before or after foreclosure.[32] This narrow interpretation of the "safe harbor" provision would hold a lender liable for clean-up costs even if it did not involve itself in the day-to-day activities of a facility. Mere capacity to control the facility would be enough to take the lender outside of the exemption.

C. *The EPA's Final Rule on Lender Liability Under CERCLA*

After attempts to amend the statute failed, the EPA instituted a rulemaking proceeding in response to the problems that were arising out of these conflicting interpretations. The final rule was issued on April 29, 1992, as an addition to the NCP.[33] It attempted to clarify the protections given to secured creditors by defining the phrase "participation in management" and setting out precise guidelines for when the creditors would be held liable under CERCLA. Under this rule, a lender who merely had the capacity or ability to influence or control the operations of a facility would not have participated in management to the extent necessary to incur liability. In contrast, a lender not in possession of a facility who exercised decisionmaking control with respect to environmental compliance or substantially all of the operational aspects of the company would have sufficiently participated.[34]

---

30. *Id.* at 579 (emphasis added).

31. 901 F.2d 1550 (11th Cir. 1990).

32. *Id.* at 1557-58.

33. 40 C.F.R. § 300.1100 (1992).

34. Section (c)(1) defines "participation in management" as meaning that the holder of the security interest "is engaging in acts of facility or vessel management . . . ." *Id.* § 300.1100(c)(1). The section goes on to list specific actions that constitute participation in management as "actual participation in the management or operational affairs of the vessel or facility by the holder, and does not include the mere capacity to influence, or ability to influence, or the unexercised right to control operations." *Id.* Specific actions that constitute such participation include (1) the exercise of "decisionmaking control over the borrower's environmental compliance, such that the holder has undertaken responsibility for the borrower's hazardous substance handling or disposal practices;" or, (2) the exercise of "control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with respect to: (A) Environmental compliance or (B) All, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise . . . includ[ing]" acting as "facility or plant manager, operations

A prospective lender will not incur liability if it undertakes an environmental inspection, requires the owner to comply with any regulation, or monitors the facility or the borrower's business obligations.[35] Prior to foreclosure, a lender will be allowed to engage in loan policing[36] and work out negotiations undertaken in order to prevent a default by the borrower or a decrease in value of the property without incurring liability.[37] The rule further states that if title is acquired by a secured creditor through foreclosure, the secured creditor will continue to be exempted from liability as long as the holder attempts to "divest itself of the property in a reasonably expedient manner."[38] Even if a lender meets the above criteria, the lender may still incur liability under CERCLA sections 107(a)(3) and (4) by either arranging for disposal or treatment of a hazardous substance at the facility,

---

manager, chief operating officer, or chief executive officer." *Id.* This definition applies to a situation in which the borrower is still in possession of the facility. *Id.*

35. A prospective holder of a security interest who "undertakes or requires an environmental inspection of the vessel or facility in which indicia of ownership are to be held, or requires a prospective borrower to clean up a vessel or facility or to comply or come into compliance . . . with any applicable law or regulation, is not by such action considered to be participating in the vessel or facility's management." 40 C.F.R. § 300.1100(c)(2)(i) (1992).

36. If a security interest holder engages in loan policing activities prior to foreclosure, the holder will remain within the § 101 exemption from CERCLA liability. Loan policing activities:

> [I]nclude, but are not limited to, requiring the borrower to clean up the vessel or facility during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, state, and local government laws, rules, and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the vessel or facility (including on-site inspections) in which the indicia of ownership are maintained, or the borrower's business or financial condition during the term of the security interest (such as requiring a borrower to comply with any warranties, covenants, conditions, representations or promises from the borrower).

40 C.F.R. § 300.1100(c)(2)(ii)(A) (1992).

37. If a holder engages in work out activities prior to foreclosure, the holder will also remain within the § 101 exemption from CERCLA liability, "provided that the holder does not by such action participate in the management of the vessel or facility." 40 C.F.R. § 300.1100(c)(2)(ii)(B) (1992). Work out activities are actions taken by the holder of the security interest, prior to foreclosure, which "seek to prevent, cure, or mitigate a default by the borrower or obligor; or to preserve the diminution of the value of the security." *Id.* The section specifically lists activities that constitute work out activities including: restructuring or renegotiating the terms of the security interest; requiring rent or interest; exercising forbearance requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations, or promises from the borrower. *Id.*

38. The security interest holder will remain within the § 101 exemption under CERCLA, and the interest will "continue to be maintained primarily as protection for a security interest" if, after foreclosure, the holder:

> [U]ndertakes to sell, re-lease property held pursuant to a lease financing transaction . . . or otherwise divest[s] itself of the property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the vessel or facility, taking all facts and circumstances into consideration, and provided that the holder did not participate in management . . . prior to foreclosure and its equivalents.

40 C.F.R. § 300.1100(d) (1994). This can be established by listing the vessel or facility with a "broker, dealer, or agent who deals with the type of property in question," within twelve months after foreclosure or by advertising the vessel or facility on a monthly basis in a real estate publication, trade or other suitable publication, or a newspaper of general circulation. *Id.*

or by accepting for transportation and disposing of a hazardous substance at a facility chosen by the lender.[39]

III. Overview of Agency Authority to Interpret and Promulgate Regulations

A. Legislative and Interpretive Regulations

Because the EPA was concerned with the effects of the conflicting judicial decisions on the lending community, it promulgated a rule that attempted to create clear, well-defined guidelines by which lenders could judge their activities in order to determine whether they would fall within the exemption. However, the agency was unsure whether Congress had granted it the authority to define the exemption because the definition would affect determinations of liability and potentially prevent certain private rights of action. In the preamble to the EPA's final rule on lender liability, the EPA attempted to avert any problems that might arise if the rule was challenged in the D.C. Circuit Court of Appeals by claiming that the rule was legislative or, in the alternative, interpretive. The preamble stated, in part:

> This rule is not merely an Agency interpretation of section 101(20)(A), but is a "legislative" or "substantive" rule that has undergone notice and comment pursuant to the Administrative Procedure Act. As such, it defines the liability of holders for CERCLA response costs in both the United States' and private party litigation. Furthermore, the EPA disagrees that even if this rule were a "mere" interpretation of section 101(20)(A), it would have no effect in litigation: EPA guidance and interpretations of laws administered by the agency are given substantial deference by the courts.[40]

The EPA's effort to prevent the court from vacating the rule forced the court to address whether the rule could either be sustained as a legislative rule or treated as an agency interpretation. A fundamental understanding of the differences between the two types of rules is essential to understanding the courts reasoning and its decision.

Precisely defining the distinction between legislative and interpretive regulations has been particularly difficult for the judiciary.[41] The distinction becomes important when a court attempts to review an agency rule or regulation. Basically, a legislative rule creates new individual rights and duties. Legislative rules are the administrative equivalent of a statute and

---

39. Even if a holder who is in possession of a vessel or facility meets the requirements of the previously listed sections, it can still incur liability under CERCLA after foreclosure by conducting activities at the facility or vessel, but "only by arranging for disposal or treatment of a hazardous substance, as provided by CERCLA section 107(a)(3), or by accepting for transportation and disposing of hazardous substances at a facility selected by the holder, as provided by CERCLA section 107(a)(4)." 40 C.F.R. § 300.1100(d)(3) (1994).

40. 57 Fed. Reg. 18,344, 18,368 (1992) (to be codified at 40 C.F.R. pt. 300).

41. Courts may sometimes use the words "substantive" and "legislative" interchangeably. Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 Admin. L.J. Am. U. 1 (1992).

have the "binding force of law."[42] An interpretive rule is an expression of the agency's understanding of a statute or regulation that is not binding but may be entitled to substantial judicial deference if it is a reasonable construction of the statute.[43]

The court in *American Mining Congress v. Mine Safety & Health Administration* (*American Mining Congress*)[44] established a clear distinction between the two types of rules stating, "[T]he legislative or interpretive status of the agency rules turns . . . on the prior existence or nonexistence of legal duties and rights."[45] If the rule is based on specific statutory provisions that establish rights and duties, the agency's rule will be interpretive, whereas if the rule is based on a broad statutory mandate and such rights and duties do not exist, the rule will be legislative.[46]

According to the Administrative Procedure Act, a legislative rule must undergo notice and comment in order to be binding since it will potentially affect private parties.[47] Further, the agency must have been granted "quasi-legislative authority" by Congress in order to promulgate such a rule.[48] An agency does not usually have the authority to promulgate a legislative rule interpreting liability issues where the final determination of a party's liability is made by the courts and the agency merely acts in the role of a prosecutor.[49]

In contrast, an interpretive rule does not have to undergo notice and comment,[50] and, although it is not binding upon the court, it does "constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance."[51] Courts must defer to an agency's interpretation of a statute under *Chevron, U.S.A., Inc. v. NRDC* (*Chevron*),[52] when the statute is "ambiguous or silent" concerning an issue, so long as the interpretation is reasonable.[53] However, the D.C. Circuit has indicated that deference is not appropriate where a statute allows "de novo review" of an agency's decision regarding liability issues.[54] Finally, a court will not defer to an interpretive rule where the agency only has the authority to act as a prosecutor and cannot interpret a statute in the first instance.[55]

---

42. American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993).

43. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

44. 995 F.2d 1106 (D.C. Cir. 1993).

45. *Id.* at 1110.

46. *See id.*; *see also* United Technologies Corp. v. EPA, 821 F.2d 714, 719-20 (D.C. Cir. 1987).

47. Anthony, *supra* note 41, at 13, 22-23.

48. Chrysler Corp. v. Brown, 441 U.S. 281, 302-03 (1979).

49. *See, e.g.*, Skidmore v. Swift, 323 U.S. 134, 137-38 (1944); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991).

50. Line Master Switch Corp. v. EPA, 938 F.2d 1299, 1303 (D.C. Cir. 1991).

51. *Skidmore*, 323 U.S. at 141.

52. 467 U.S. 837 (1984).

53. *Chevron*, 467 U.S. at 843-44.

54. Wagner Seed Co. v. Bush, 946 F.2d 918, 922 (D.C. Cir. 1991).

55. United States v. Western Elec. Co., 900 F.2d 283, 297 (D.C. Cir. 1990).

B. *Regulations Affecting Rights of Private Parties*

The EPA's rule had the potential to affect private cost recovery actions under CERCLA because it attempted to define whether certain parties would be exempt from liability under the statute's "safe harbor" provision. Section 107 of CERCLA allows a state or any other person to bring an action in federal court against a party who is liable under the statute.[56] The phrase "any other person" has been interpreted to include private parties who seek to recover their costs in cleaning up hazardous waste sites.[57] Judicial deference to agency interpretations has been withheld in situations where a private right of action exists under a statute. The court in *Adams Fruit Co. v. Barrett* (*Adams Fruit*)[58] held that when the judiciary has been established by Congress as the adjudicator of private rights of action, it is not necessary to defer to an agency's view.[59] Many courts have considered agency interpretations when the administrative agency has the primary responsibility of enforcing a statutory mandate, but where a party has a private right of action in federal court, deference should not be given to the agency's interpretation of the issue.[60]

IV. THE *KELLEY* DECISION

A. *The Facts*

In *Kelley*, the state of Michigan and the Chemical Manufacturers Association (CMA) challenged the EPA's newly promulgated rule as an abuse of the agency's authority under CERCLA. They feared that the rule would prevent them from filing suit against lenders in future litigation.[61] The D.C. Circuit has exclusive jurisdiction to review any regulation promulgated under the statute upon application by any interested party.[62]

Michigan and the CMA claimed that Congress had given the courts, and not the EPA, the statutory authority to determine the scope of lender liability under section 107. They further asserted that the substance of the rule contradicted the plain meaning of the statute.[63] In response, the EPA stated that the rule had been through the notice and comment procedures required for a legislative rule and would apply in cases where the United States was a party and also to actions involving private parties.[64]

The agency claimed that Congress had granted it specific authority to promulgate the rule by giving it broad rulemaking authority to craft the

---

56. 42 U.S.C. § 9607(a)(1)-(4) (1988).

57. Stevens Creek Ass'n v. Barclays Bank, 915 F.2d 1355 (9th Cir. 1990).

58. 494 U.S. 638 (1990).

59. *Adams*, 494 U.S. at 649-50.

60. *See* Electrical Workers Local Union 1395 v. NLRB, 797 F.2d 1027, 1030 (D.C. Cir. 1986); Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 202-03 (1991).

61. Kelley v. EPA, 15 F.3d 1100, 1104 (D.C. Cir. 1994).

62. "Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia." 42 U.S.C. § 9613(a) (1988).

63. *Kelley*, 15 F.3d at 1104.

64. *Id.*

NCP and by allowing it to prescribe the "appropriate roles and responsibilities [of] nongovernmental . . . entities in effectuating the plan."[65] They further claimed that the enforcement provisions grant such authority because they must first decide if a party is liable before bringing a cost recovery action or granting reimbursement.[66] Finally, the EPA claimed that the court should give substantial deference to the rule because the preamble to the regulation stated that it should be sustained as an interpretive rule in the alternative.[67]

In a 2-1 decision, the D.C. Circuit Court of Appeals vacated the EPA's rule and held that the judiciary has been designated to determine the scope of liability under CERCLA.[68] The court determined that, because Congress did not delegate the necessary administrative authority to the agency, the EPA could not promulgate legislative rules, and that any interpretive rules created by the agency were not entitled to judicial deference.[69]

B. Agency Authority to Issue the Regulation as a Legislative Rule

The *Kelley* court rejected both Michigan's and the CMA's claim that the EPA lacked the authority to promulgate rules under CERCLA because that issue was firmly decided in *Wagner Seed Co. v. Bush* (*Wagner*).[70] However, in denying the EPA's contention that *Wagner* had recognized the agency's power to issue rules that were "reasonably related to the purposes of the enabling legislation," the court stated that the decision only gave the agency the "authority to interpret certain language in CERCLA."[71] It was further noted that the court's decision in *Wagner* was based on the fact that the EPA had interpreted language in section 106 "that did not bear directly on liability issues," and in this case the agency was attempting to define and limit a party's liability under section 107.[72]

1. Authority to Determine Lender Liability Under Section 105

The EPA first contented that certain provisions of section 105 gave the agency the specific authority required to promulgate a legislative rule

65. CERCLA § 105 authorizes the president, who delegated his authority to the EPA, to establish a National Contingency Plan (NCP). 42 U.S.C. § 9605(a) (1988). The NCP must include a section designated the national hazardous substance response plan which "establishes procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants . . . ." *Id.* Section 105 requires that the plan include, among other provisions, a statement of the "appropriate roles and responsibilities for the Federal, State, and local governments for interstate and nongovernmental agencies in effectuating the plan." *Id.*

66. *Kelley*, 15 F.3d at 1108.

67. *Id.* at 1104.

68. *Id.* at 1107-08.

69. *Kelley*, 15 F.3d at 1108.

70. 946 F.2d 918, 920 (D.C. Cir. 1991) (finding that the President had broadly delegated his statutory power to the EPA and that it is the "administering agency" for the statute, so the EPA had authority to interpret certain language in § 106 of CERCLA).

71. Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1973).

72. *Kelley*, 15 F.3d at 1105 (stating that dicta in *Wagner* indicated that when an agency provides for *de novo* review of an agency decision on liability, deference as to that issue would be inappropriate).

defining section 107 liability.[73] Section 105 grants the agency the authority to create the NCP and details certain procedures and standards that the NCP must include.[74] Specifically, section 105(a)(4) requires that the agency include in the NCP the "appropriate roles and responsibilities for the Federal, State, and local governments and for interstate and nongovernmental entities in effectuating the plan."[75] Section 105(a)(3) further requires that the agency include "methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by [CERCLA]."[76] The EPA is given the authority to "reflect and effectuate the responsibilities and powers created by this chapter" under this section.[77]

The EPA argued that defining section 107 liability was a "responsibility and power" under section 105(a). In denying this contention, the court reasoned that the broad delegation of power to craft a NCP does not necessarily empower the agency to define liability.[78] The court further determined that defining liability under section 107 was not one of "the responsibilities and powers" delegated to the EPA in any other CERCLA provision.[79]

As a basis for denying that the provisions of section 105 gave the agency the authority needed to promulgate the regulation, the court pointed out that neither section 105(a)(3) nor (a)(4) addressed liability issues.[80] In addition, the court noted that although section 105(a)(4) allows the agency to prescribe "appropriate roles" for entities, Congress could not have intended secured creditors' liability to be a "role" determined by the agency because they created a separate section addressing this issue.[81]

2. Authority to Determine Lender Liability Under Section 107's Cost Recovery Provision and Section 106's Clean-up Provision

Under section 107, the EPA can clean up a contaminated site and then bring an action in federal court against a potentially responsible party to recover its costs.[82] In addition, section 106 allows the agency to order a private party to clean up a contaminated site if there is an imminent and substantial danger of harm and then bring an action in federal court if the party refuses to comply.[83] A party who has complied with a section 106

73. *Id.*
74. 42 U.S.C. § 9605(a) (1988).
75. 42 U.S.C. § 9605(a)(4) (1988).
76. 42 U.S.C. § 9605(a)(3) (1988).
77. 42 U.S.C. § 9605(a) (1988).
78. *Kelley v. EPA*, 15 F.3d 1100, 1105 (D.C. Cir. 1994).
79. *Id.* at 1105-07.
80. CERCLA § 105 directly addresses the EPA's authority to create the NCP and outlines numerous provisions that are required to be included in the plan. Liability issues are addressed directly in § 107 and indirectly in §§ 101, 103, 104, and 106 of CERCLA. 42 U.S.C. § 9605(a)(3)-(4) (1988).
81. *Kelley*, 15 F.3d at 1106.
82. 42 U.S.C. § 9607(a)(4)(A) (1988).
83. 42 U.S.C. § 9606(a)-(b)(1) (1988).

order may petition the court for reimbursement after the clean-up is completed.[84]

The EPA argued that the agency must determine liability issues before bringing an action to recover costs under section 107 or before issuing a clean-up order under section 106, because they first must determine who is an owner or operator of a facility. The court rejected this argument because all issues of liability in these instances were determined by the court, and the EPA made only an initial determination.[85] Section 107 merely allows the EPA to bring the issues before a federal court,[86] and in this situation, the agency "typically lacks authority to issue substantive regulations . . . establishing liability."[87] Once the EPA has issued a clean-up order under section 106, a party must comply without regard to liability, and issues of liability are determined in federal court when a party refuses to comply or seeks reimbursement. Therefore, the EPA makes no determination of liability in these instances.[88]

3. Authority to Determine Lender Liability Under the Reimbursement Provisions of Section 106

According to section 106(b)(2), a party who has complied with an EPA clean-up order may petition the agency for reimbursement of its costs in cleaning up a contaminated site, and if the EPA refuses, the party may petition a federal court for reimbursement of its reasonable costs.[89] The party will be reimbursed if the party establishes by a preponderance-of-the-evidence that it is not liable for the clean-up costs or, even if liable, it can be shown that the actions it was ordered to take were arbitrary and capricious.[90]

The EPA argued that it has implied authority to determine liability issues where a party seeks reimbursement under section 106. This argument failed to persuade the court because Congress appeared to "distinguish between [the] EPA's role in determining the appropriate clean up action . . . [and] the agency's position on liability when a party disputes claims" in this section.[91] The court characterized the agency as a mere "defendant" where a party seeks reimbursement because, although a party must petition the EPA originally, that party can bring an action in federal court against the EPA if the agency refuses to grant reimbursement under section 106(b)(2)(B).[92]

In a section 106 action, a court will not consider the agency's ruling on issues of liability, in part because the EPA may grant reimbursement

84. 42 U.S.C. § 9606(b)(2) (1988).
85. *Id.*
86. 42 U.S.C. § 9607(a)(4)(A) (1988).
87. Kelley v. EPA, 15 F.3d 1100, 1106 (D.C. Cir. 1994).
88. *Id.*
89. 42 U.S.C. § 9606(b)(2)(C)-(D) (1988).
90. *Id.*
91. *Id.*
92. *Id.*

regardless of a party's liability.[93] Instead, a preponderance-of-the-evidence standard will be applied to the issue of liability as required by section 106(b)(2)(C). The court in *Kelley* held that both sections 106(b)(2)(B) and (C) address liability issues which Congress intended to be decided by the judiciary.[94] In contrast, the court found that Congress intended for the EPA to have authority to promulgate regulations under section 106(b)(2)(D), which provides for reimbursement where the order was arbitrary and capricious, because that provision allows for consideration of the reasonableness of the EPA's clean up orders and requires consideration of the administrative record.[95]

Because issues of liability can be brought to federal court by private parties without government intervention,[96] the court held that the judiciary was to define the scope of liability under CERCLA.[97] The court reasoned that Congress could not have intended to give the EPA, "a potential plaintiff," the authority to promulgate regulations that would "define liability for a class of potential defendants."[98] In reaching this decision, the court considered a Supreme Court case that failed to give deference to an agency regulation where Congress had established a "direct recourse to federal courts."[99] The *Adams* court held that no deference could be given to the regulation because "Congress had expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute."[100] The court found further evidence of Congressional intent to so designate the federal courts in the legislative history of the statute where it was stated that liability issues were to be resolved by "traditional and evolving principals of common law."[101]

C. *Judicial Deference to the Regulation as an Interpretive Rule*

In addition, the court dismissed the EPA's contention that in the alternative, the rule could be sustained as an interpretive rule, thus finding that it would not be entitled to judicial deference.[102] In order for an agency regulation to be entitled to deference under *Chevron*, there must have been a "Congressional delegation of authority" which arises implicitly where a statute is ambiguous.[103] The court found that no such delegation occurred

93. The EPA may grant reimbursement to a party who is liable, because they can enter into an agreement with any party to clean up a hazardous waste site, including an owner or operator to agree in advance to reimburse that party. 42 U.S.C. § 9622(a)-(b)(1) (1988).

94. Kelley v. EPA, 15 F.3d 1100, 1107 (D.C. Cir. 1994).

95. *Id.*

96. 42 U.S.C. § 9607(a)(1)-(4) (1988); Stevens Creek Ass'n v. Barclays Bank, 915 F.2d 1355, 1357 (9th Cir. 1990).

97. *Kelley*, 15 F.3d at 1107.

98. *Id.*

99. Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990). The court vacated a Department of Labor regulation where Congress had established and private right of action in the statute.

100. *Id.* at 649.

101. *Kelley*, 15 F.3d at 1108 (citing 126 CONG. REC. 30,932 (1980) (Statement of Senator Randolph)).

102. *Kelley,* 15 F.3d at 1108.

103. Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990).

because the EPA, like the agency in *United States v. Western Electric Co. (Western Electric)*,[104] could not actually determine liability questions, but could only bring them to federal court for final determination under section 107(a).[105] Further, even if the EPA could decide issues of liability administratively under section 105,[106] the court held that deference would not be given to the rule because private parties can bring suit "independently" under section 107.[107]

The court indicated that it would have sustained the rule as a policy statement had the EPA not failed to request that option. However, the court was not convinced that a statement of policy would succeed in making lenders more secure. This is because a statement of policy will only affect agency decisions regarding liability, and it will not have any effect on private party litigation. Considering the likelihood that a private action will be filed, a lender will not be able to rely on the agency's policy regarding liability issues as a guarantee that it will not become liable for the clean-up costs associated with a particular property.[108]

V. THE DISSENT

In his dissent, Chief Judge Mikva asserted that Congress delegated the necessary authority to "interpret who falls within the scope of CERCLA's regulatory scheme" to the EPA.[109] For this reason, he would have upheld the regulation as a rule that is entitled to judicial deference under *Chevron*.[110] He contended that the majority reached its decision without proper inquiry into the language, structure, and legislative history of CERCLA.[111]

Using the reasoning of *Wagner*,[112] Mikva argued that Congress had "implicitly delegated" to the EPA the authority necessary to determine lender liability under CERCLA by forcing the agency to construe the terms "owner or operator" under several sections of CERCLA in order to carry out their administrative responsibilities.[113] He further contended that the structure of CERCLA indicated that Congress intended to give the

104. United States v. Western Elec. Co., 900 F.2d 283, 297 (D.C. Cir. 1990) (holding that agencies' legal views are deferred to only when they make a determination that has independent legal significance, as opposed to when they act in a prosecutorial role).

105. *Kelley*, 15 F.3d at 1108.

106. 42 U.S.C. § 9605 (1988).

107. *Kelley*, 15 F.3d at 1108-09 (citing Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 202-03 (1991)) (denying deference to interpretation of NLRB where independent right of action existed).

108. *Kelley*, 15 F.3d at 1109.

109. *Id.* at 1110 (Mikva, C.J., dissenting).

110. *Id.* at 1109.

111. *Id.* at 1109.

112. Wagner Seed Co. v. Bush, 946 F.2d 918, 923 (D.C. Cir. 1991). "Because the EPA is obliged, however, to rule upon the meaning of the terms of § 106 (b)(2)(A) in response to a petition for reimbursement and in doing so, must resolve the policy issue raised by the petitioner, it can hardly be rebuffed, when it later asserts its claim in court to deference, for trying to bootstrap itself into an area in which it has no jurisdiction." *Id.*

113. *Kelley*, 15 F.3d at 1110.

agency such authority because it had left the definition of "owners or operators" undifferentiated in section 101.[114]

He asserted that Congress "creates definitional sections to frame an agency's delegated authority to interpret ambiguous statutory language," and that if this was not the case here, the court would be unable to defer to the agency's definition of any other terms in this section.[115] For these reasons, Mikva would have granted *Chevron* deference to the agency's interpretation of "owner or operator" and upheld the EPA's rule on lender liability under CERCLA.[116]

Mikva discounted the argument that the preponderance-of-the-evidence standard in section 106[117] evidences Congressional intent to reserve all issues relating to CERCLA liability to the federal courts.[118] He contended that because the legislative history of that section does not address preventing the EPA from making determinations as to which parties are within the scope of CERCLA, Congress only intended to address reimbursement issues and included the standard as a reiteration of the section 107 standard.[119]

Chief Judge Mikva further suggested that the standard, as embodied in sections 106 and 107,[120] was inserted by Congress to insure that "traditional rules of foreseeability, causation, and certainty" were applied to "ultimate" determinations of liability.[121] In his view, the legislative history of section 107 indicates that the preponderance-of-the-evidence standard applies only to causation issues, and the insertion of the standard in section 106 does not preclude the EPA from making any other determinations, "including who falls within the scope of CERCLA's statutory coverage."[122]

As to the majority's contention that the private right of action in CERCLA establishes the federal courts as the "adjudicator" of liability issues under the statute, Mikva contended that they misread *Adams Fruit* as standing for the proposition that the "mere presence of a private right of action" gives the court "exclusive authority to define the scope" of CERCLA liability.[123] He argued, to the contrary, that in *Adams Fruit* the agency was attempting to "construe private rights of action per se" by interpreting the "preemptive scope" of the action.[124] According to him, in this case the EPA must define the terms "owner or operator" in order to

---

114. *Id.*

115. *Id.*

116. *Kelley*, 15 F.3d at 1110.

117. 42 U.S.C. § 9606(b)(2)(c) (1988) ("[T]o obtain reimbursement, petition shall establish by a preponderance-of-the-evidence that it is not liable for response costs . . . .").

118. *Kelley*, 15 F.3d at 1110.

119. *Id.* at 1111.

120. Under § 107 of CERCLA, "there shall be no liability for a person otherwise liable who can establish by a preponderance-of-the-evidence . . . ." 42 U.S.C. § 9607(b) (1988).

121. *Kelley*, 15 F.3d at 1111 (citing H.R. No. 99-253(I), 99 Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2865).

122. *Kelley*, 15 F.3d at 1111.

123. *Id.* at 1112.

124. *Id.*

fulfill its administrative responsibilities and is, therefore, not attempting to directly affect private rights of action.[125] Under this reading, he contended that "there is every reason to hold that Congress created the private right of action to facilitate enforcement of CERCLA's statutory scheme within the parameters of lender liability, which the EPA, as the administering agency, would define.[126] For these reasons, Chief Judge Mikva would uphold the EPA rule and grant it *Chevron* deference because the secured creditor exemption is ambiguous and the agency's construction is not unreasonable.[127]

VI. ANALYSIS

The question of whether the EPA had the authority to promulgate the regulation interpreting the secured creditor exemption under CERCLA was complicated by the court's discussion of legislative and interpretive rules.[128] The distinction between the two types of administrative rules has always been a source of confusion for the judiciary,[129] and the court's distinction in this case is significantly less clear than in its previous decision in *American Mining Congress.*[130] In the preamble to the regulation, the EPA stated that it was a legislative rule that had been promulgated according to APA requirements and would affect questions of liability in private party litigation.[131] In the alternative, the EPA claimed that, if the regulation were sustained as an interpretive rule, it would be entitled to judicial deference.[132] Because the decision was not based on the substance of the rule, but on the agency's authority,[133] the court should have made clear exactly what is required to have the authority to promulgate these types of rules.

A legislative rule requires statutory law-making authority and must be promulgated according to statutory law making procedure.[134] A legislative rule can only have the force of law "where Congress has delegated legislative power to the agency and if the agency has intended to exercise the power in promulgating the regulation."[135] Congress can delegate this authority either "explicitly or implicitly" in a statute.[136] In contrast, an interpretive rule does not "create rights or duties" and lacks the force of law, but may be entitled to *Chevron* deference where the statutory lan-

125. *Id.*
126. *Id.*
127. *Kelley*, 15 F.3d at 1111.
128. *Id.* at 1105, 1108.
129. Anthony, *supra* note 41, at 13, 22.
130. 995 F.2d 1106, 1109 (D.C. Cir. 1993).
131. 57 Fed. Reg. 18,344, 18,368 (1992).
132. *Id.*
133. *Kelley*, 15 F.3d at 1103.
134. Anthony, *supra* note 41, at 13, 32.
135. *American Mining Congress*, 995 F.2d at 1106.
136. Kevin W. Saunders, *Interpretative Rules With Legislative Effect: An Analysis and A Proposal For Public Participation*, 1986 DUKE L.J. 346, 354 (1986).

guage is ambiguous and the agency's construction is reasonable.[137] The reasoning of the court would have been clarified had these distinctions been made.

The circuit court failed to find that Congress delegated to the EPA the authority to promulgate a legislative regulation that defined the liability of private parties under CERCLA.[138] The provisions that the EPA pointed to in order to establish the delegation as a "responsibility and power" were not sufficient to evidence Congressional intent to grant the agency statutory law making authority.[139] Sections 105(a)(3) and (4) never directly address liability issues. Rather, those sections allow the agency to carry out its function in effectuating clean-up efforts.[140] Further, the EPA could merely bring an action to federal court to ultimately determine liability issues under sections 107(a)(4)(A) and 106(b)(1).[141]

The majority finds further evidence of the absence of a Congressional delegation of authority by referencing the preponderance-of-the-evidence standard in section 106.[142] Because the EPA must determine liability where a party seeks reimbursement under that section, the agency claimed that Congress delegated to them the authority to define the scope of CERCLA liability.[143] In his dissent, Chief Judge Mikva argued that the presence of the standard in section 106 only applies to issues of causation, as does the same standard in section 107, and does not prevent the EPA from determining the scope of liability.[144] Although Congress has indicated that the principals of common law should govern the issue of causation,[145] it is clear that the EPA may only decide whether a party can receive reimbursement under section 106, and there is no indication that they must base this decision on a party's liability.[146] In certain instances, the agency may make an initial determination of liability, but the final determination will rest with the court because a party who is denied by the EPA can always petition the federal courts.[147] CERCLA does not require the court to consider any EPA findings when it determines liability, so it is evident that Congress did not delegate the necessary authority to the EPA to make final determinations of liability.

This interpretation of Congressional intent is strengthened by the existence of a private right of action under section 107.[148] The majority and the dissent disagree as to the effect of *Adams Fruit* regarding the effect of a

137. *See* Chevron, U.S.A., Inc. v NRDC, 467 U.S. 837, 843-44 (1984); Skidmore v. Swift, 323 U.S. 134, 138 (1944); Alcarez v. Block, 746 F.2d 593 (9th Cir. 1984).

138. *Kelley*, 15 F.3d at 1105.

139. *Id.* at 1105-07.

140. 42 U.S.C. §§ 9605(a)(3)-(4) (1988).

141. 42 U.S.C. § 9607(a)(4)(A) (1988); 42 U.S.C. § 9606(b)(1) (1988).

142. *Kelley*, 15 F.3d at 1107.

143. *Id.* at 1106.

144. *Id.* at 1111.

145. *Kelley*, 15 F.3d at 1107 n.5.

146. *Id.*

147. 42 U.S.C. § 9606(b)(2)(C) (1988).

148. 42 U.S.C. § 9607(a)(1)-(4) (1988).

private right of action in a statute on agency authority.[149] In *Adams Fruit*, the issue was whether the court had to defer to a Department of Labor (DOL) regulation that established a state law remedy as the exclusive remedy for loss under a federal statute, thereby destroying a private right of action.[150] The court held that because "Congress had expressly designated the Judiciary, and not the Department of Labor, as the adjudicator of private rights of action under the statute," the court did not have to defer to the agency's interpretation of the statute.[151]

The dissent argues that this case is distinguishable because, in *Adams Fruit*, the agency was attempting to construe the private right of action per se when they had not been directed to administer the action in any way, whereas, the EPA had to determine liability "in the first instance" in order to carry out its administrative responsibilities.[152] The majority stated that a factor in the *Adams Fruit* decision was that a "potential plaintiff" would be determining the liability "for a class of potential defendants" in this situation.[153] Although this argument is unclear because the DOL would not be a potential plaintiff under the statute, the *Kelley* court's interpretation of the decision is consistent with the Supreme Court's holding in *Adams Fruit*. In that case, the relevant factor was not that the DOL had construed the private right of action "per se," but that "Congress had established an enforcement scheme . . . with direct recourse to the federal courts."[154] The *Kelley* court properly applied the reasoning of *Adams Fruit* because Congress established a private right of action under CERCLA and, therefore, correctly decided that the judiciary has exclusive authority to determine the scope of liability under the statute.

The circuit court also failed to sustain if as an interpretive rule.[155] Under *Chevron*, a court will not defer to an agency interpretation unless Congress has delegated administrative authority to the agency.[156] As established above, the court was designated by Congress to define the scope of liability under CERCLA, thereby, precluding any delegation of such authority.[157] The majority held that "where Congress does not give an agency authority to determine . . . the interpretation of a statute in the first instance and instead gives the agency the authority only to bring the question to a federal court as a "prosecutor," deference to the agency's interpretation is inappropriate."[158] Mikva countered that the EPA does have the authority to interpret the issue "in the first instance" because the

149. *Kelley*, 15 F.3d at 1107, 1112.
150. Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990).
151. *Id.* at 639.
152. *Kelley*, 15 F.3d at 1107.
153. *Id.*
154. *Adams*, 494 U.S. at 650.
155. *Kelley*, 15 F.3d at 1108.
156. *Adams*, 494 U.S. at 649.
157. *Kelley*, 15 F.3d at 1108.
158. *Id.*

agency must construe "owners or operators" under sections 103, 104, and 106.[159]

Although the EPA must construe these terms in the administration of the statute, according to *Litton Financial Printing Division v. NLRB* (*Litton*),[160] deference is inappropriate if a private party can bring an action independently to a federal court.[161] The fact that an agency has the authority to determine a "legal issue administratively" will not require the judiciary to defer to its interpretation.[162] Although many courts have considered agency interpretations when the administrative agency has the primary responsibility of enforcing a statutory mandate, where a party has a private right of action if federal court, deference should not be given to the agency's interpretation.

VII. CONCLUSION

As the circuit court noted,[163] the decision to strike down the rule will leave lenders, once again, unsure of their potential liability under CERCLA. Considering the fact that the courts have failed to render consistent judgments on the scope of the "safe harbor" exemption, lenders will have to wait until a federal court rules on this issue. It is possible that the courts will return to the interpretation given by the *Fleet Factors* court, which indicated "an expansion in the scope" of lender liability.[164] The court in that case indicated that its policy was for lenders to assure borrowers were complying with environmental laws and, by holding the lenders potentially liable for clean-up costs on collateral property, the lender would be acting as a self-insurer who could spread the expense of clean-up by passing the costs on to other customers.[165] If the courts follow this decision, lenders will potentially be subject to staggering liability for clean-up costs, but lenders will also be forced to be more conscious of environmental problems. If lenders are faced with the threat of liability on collateral property, the lenders will probably require that borrowers comply with environmental laws.

However, the *Kelley* court did not consider the substance of the rule, so it is possible that other courts may follow the EPA's lead and interpret the statute in a manner similar to the agency's rule. Other courts have applied the EPA rule, and one court in particular considered the rule to be "consistent with the statutory language of CERCLA and the majority of leading cases which have considered the question of lender liability."[166]

159. *Id.* at 1110.

160. 501 U.S. 190 (1991).

161. *Litton*, 501 U.S. at 203.

162. Electrical Workers Local Union 1395 v. NLRB, 797 F.2d 1027, 1030 (D.C. Cir. 1986).

163. *Kelley*, 15 F.3d at 1109.

164. *Id.* at 1104.

165. Staton, *supra* note 2.

166. Ashland Oil v. Sonford Prods. Corp., 801 F. Supp. 1057 (D. Minn. 1993).

For this reason, there is some indication that courts will continue to follow the EPA rule.[167]

Because the court determined that the EPA does not have the authority to define the scope of the secured creditor exemption,[168] the EPA will be unable to solve the problems that have been created by this ambiguous provision. However, a bill was introduced in Congress last year, as part of the Superfund Reform Act, that would have addressed the problems illuminated by this decision.[169] The proposed legislation would have granted the EPA the authority to promulgate regulations "to define the terms of the Act" and would have revoked the judiciary's authority to review a final rule issued under CERCLA.[170] Although there was no guarantee that the bill would have been approved by Congress, it was unanimously approved by the House Commerce Subcommittee on Transportation and Hazardous Waste.[171]

A similar bill is being introduced in Congress this session. According to Representative Oxley, Chairman of the House Commerce Subcommittee on Commerce, Trade, and Hazardous Materials, the legislation "his subcommittee will consider on the solid waste issues is likely to resemble versions before the 103rd Congress."[172] He further stated that he is determined to pass a comprehensive reform bill that included efforts to exempt lenders from superfund liability.[173] On January 4, 1995, a bill which would limit the liability of lenders was jointly referred to both the House Commerce and Transportation and Infrastructure committees.[174] The bill is similar to the provisions limiting liability in the superfund legislation considered last year and will probably be received favorably by the subcommittee.

Kelly S. Hunter

167. Jeffery M. Gaba, *The Once and Future Lender Regulations: Limiting Lender Liability For The Clean Up of Hazardous Waste*, 47 CONSUMER FIN. L.Q. REP. 355 (1993).

168. *Kelley*, 15 F.3d at 1101-09.

169. S. 1834, 103d Cong., 2d Sess. 5 (1994); H.R. 3800, 103d Cong., 2d Sess. 407 (1994).

170. John N. Ames, *Superfund Reform and Lender Liability In Congress-Dredging the Safe Harbor*, 13 J. AM. BANKR. INST. 8 (1994).

171. *Id.*

172. *Congress: Risk Assessment, Solid Waste Issues, Superfund Top House Subcommittee Agenda*, 10 Env't Rep. (BNA), at D-4 (Jan. 17, 1995).

173. *Id.*

174. *Id.*