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## Banks Welcome Court Ruling on Cleanup Liability

By STEPHEN KLEEGER

**A** new ruling from an appeals court in Portland, Ore., implicitly rejects a controversial ruling made earlier this year in Atlanta that alarmed bankers by lowering the standard for lender liability in environmental cleanup, according to liability lawyers.

Lenders could breathe a small sigh of relief, lawyers said.

"If I were a lender, I'd feel a whole lot better after this decision," said liability lawyer Edward F. Mannino of Edward F. Mannino & Associates, Philadelphia.

Although the U.S. Court of Appeals for the 9th Circuit in Portland sidestepped making its own ruling on the issue raised by the U.S. Court of Appeals for the 11th Circuit in the important Fleet Factors Case, its reasoning appeared consistent with lower court rulings that required active participation in management by the lender as a precondition to liability, lawyers said.

The 11th Circuit astonished many observers by asserting the unit of Fleet/Norstar Financial Group, Providence, R.I., could be held liable merely because it was in a position to influence the management of a plant it had financed in Georgia.

"This court has looked at the reality of banking practices and said 'this is the way lenders do business, and there's no reason they should be held liable,'" Lawrence Schnapf, of Lord Day & Lord, Barrett Smith, said of the latest case. "I hope it's going to serve as a model for future decisions."

In rejecting a claim of liability against the Port of St. Helens, which issued bonds to finance a now defunct metal recycling plant, the 9th Circuit noted the earlier 11th Circuit decision, but said, "We leave for another day the establishment of a Ninth Circuit Rule on this issue."

More significantly, the court added, "It is clear from the statute that, whatever the precise parameters of 'participation' there must be some actual management of the facility before a secured lender will fall outside the exception."

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The court also rejected the argument that the the Port's input in the planning of the facility constituted participation in management. "Creditors do not give their money blindly," the court said.

At issue in the court cases is the interpretation of the Comprehensive Environmental Response, Compensation and Liability Act, known as the Superfund law. The law provides that a property owner is liable for environmental cleanup, but exempts lenders who hold indicia of ownership to protect a security interest.

The outcry over the Fleet Factors decision eventually prompted the Environmental Protection Agency to say it would amend its rules to clarify lender liability. At the same time, bankers stepped up their lobbying for new legislation to limit their exposure to the claims.

They argue that the uncertainties surrounding lender liability has discouraged lending on certain kinds of businesses. Particularly affected are local companies, once considered routine credit risks, among them dry cleaners and gasoline stations.

Fleet has said it would petition the U.S. Supreme Court to hear its appeal of the 11th Circuit ruling.

Mr. Mannino said the new decision in the 9th Circuit, while significant, will not improve Fleet's chances of being heard by the highest court, because the the 9th Circuit stopped shy of issuing a ruling that contradicted the other circuit court. ■