

OPINION:

A weekly commentary on legal issues of serious interest to banks.

Lawyer Says EPA Showing New Flexibility In Negotiating Lender Liability Settlements

The following is excerpted from a conversation with Lord, Day, Lord, Barrett and Smith attorney and author Larry Schnapf, who responded to questions about the Environmental Protection Agency's recent consent agreement with Seattle First National Bank. The EPA's deal frees Seattle First and any future property owners from lender/owner liability under CERCLA (the Comprehensive Environmental Response, Compensation & Liability Act, also known as Superfund.)

Q: What is the background to this type of agreement?

A: Basically, the matter involved a property that was placed on the list of federal Superfund sites contaminated with hazardous wastes. The EPA had named the bank as a potentially responsible party who could be liable for the site cleanup. The bank said it should be exempt from liability under the secured creditor's agreement. The bank cut a deal with EPA

in which the bank agreed to pay over \$300,000 for a limited cleanup of the site, to remove hazardous wastes, and to turn over certain data it had collected about the site conditions. In exchange, EPA agreed to issue a covenant not to sue in favor of the bank, which would allow the bank to foreclose on the property without incurring liability for further cleanup. EPA expressly agreed that the covenant not to sue would extend to any third parties who purchase the property from the bank.

Q: What's new about this agreement?

A: In the past, EPA has structured agreements directly with potential purchasers of contaminated property in which the purchasers agree to fund cleanups in exchange for a release from liability, but this is the first time that a bank executed such an agreement with the EPA.

"EPA is getting a lot of pressure from banks—the agency has to recognize that there are a lot of properties just sitting there that have been taken out of the stream of commerce. So this may be a chink of light for banks."

—Lawrence P. Schnapf
Lord, Day, Lord, Barrett and Smith
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Q: What does EPA's action signify for other banks?

A: The EPA has been coming under extreme pressure from the banking community, Congress and the White House on lender liability issues. The EPA has been able to convince courts to narrowly construe the lender exemption. As a result, several bills were introduced last year in Congress that would restore the exemption. To stave this off, EPA promised to draft lender liability regulations. The draft rules have undergone two interagency reviews, but the Treasury Department and the office of Management and Budget believe the draft rules don't adequately protect lenders.

The Vice-President's Council on Competitiveness is trying to resolve this stalemate, but the EPA is remaining firm on not relaxing its proposed rules any further.

Q: What is it they want EPA to do?

A: There are a number of issues that EPA is

addressing, but the most important one to the banking community, OMB, and Treasury is that they want EPA to broaden the circumstances under which a lender may take actions such as foreclosure on contaminated property, without incurring liability for the site cleanup.

Q: Do you think we'll see a lot more consent agreements for financial institutions out of EPA now?

A: There are a lot of properties with bankrupt owners across this country. These properties are staying out of the stream of commerce because banks are afraid to foreclose on them or will not extend financing to prospective purchasers because of the potential liability. Until recently, EPA has been steadfast on not cutting deals with lenders, so this agreement might be the first sign that EPA has reconsidered its position. ■

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