Lender Liability Rule Doesn't Help Trustees

MARCIA CHAMBERS suggests that the U.S. Environmental Protection Agency has taken banks, in their capacity as lenders, "off the hook" of environmental liability under CERCLA through its lender liability rule (the "EPA rule") issued in April 1992, but that banks, as trustees of estates, still may face significant environmental liabilities as owner/operators of contaminated sites. (Sua Sponte, NLJ, April 12.) While the first cases to interpret the EPA rule have indicated that lenders are not completely off the hook for environmental liability, a recent decision by the U.S. District Court for the District of Arizona emphasizes Ms. Chamber's latter point, that banks acting as trustees may face significant environmental exposure.

In *City of Phoenix v. Garbage Services Co.*, C89-1709 SC (D. Ariz. Jan. 19, 1993), Valley National Bank was appointed executor of an estate. The estate held the option to repurchase a landfill from the individuals to whom the decedent had sold the property just a year before he died in 1965.

In 1966, the bank exercised the repurchase option, and the warranty deed conveyed the property to the bank as the property's "trustee." At the time of the conveyance, the landfill was leased to and operated by Garbage Services Inc. The bank continued this arrangement, paid property taxes and obtained liability insurance for the landfill.

After the landfill ceased operations, Phoenix commenced a proceeding under CERCLA to recover the cost of cleaning up the landfill from the bank. But the bank moved for summary judgment on the ground that it was neither an owner nor an operator of the landfill.

The court agreed that VNB was not an operator of the property because the bank was not involved in the day-to-day administration of the landfill. It ruled, however, that VNB *was* the owner of the landfill. It stated that Congress had intended the term "owner" under CERCLA to have the broadest possible meaning and that under trust law, a trustee holding legal title could be liable as an owner of the land for obligations flowing from the land. Thus, the court ruled, an owner under CERCLA could include a trustee who held legal title.

The bank argued that the lender liability rule insulated it from liability, but the court said that the rule only applied to lenders acting in their role as secured creditors and was not controlling when a bank simply held title as a trustee.

To buttress its holding further, the court pointed to letters from PRPs, or potentially responsible parties, that the EPA had sent to trustees in other CERCLA actions, as evidence that the EPA agreed that trustees could be held liable as owners of contaminated properties. The court rationalized that it had to give deference to the EPA's interpretation of the statute.

This case demonstrates the limited protection the lender liability rule may provide for trustees. The estates that trustees administer may contain real estate that could be contaminated with hazardous substances from prior operations. Often, a bank trust department may not be advised of its appointment as trustee until just before the offering of the will for probate, and therefore the trustee may not have sufficient time to undertake the appropriate inquiry required to raise the innocent purchaser defense.

While the bank may be able to renounce its appointment as trustee after learning of an environmental problem, such action would not abrogate any potential liability it may already have incurred as an owner or operator of the estate's contaminated property.

It remains to be seen whether *City of Phoenix* will have the same effect as *Fleet Factors*, 901 F.2d 1550 (11th Cir. 1990), and serve as a rallying point around which lenders may be able to apply pressure on the EPA or Congress to extend the cloak of protection afforded under the EPA lender liability rule to lenders acting in a fiduciary capacity.

Larry Schnapf
Lord Day & Lord, Barrett Smith
New York

Editor's note: Mr. Schnapf is a member of the editorial advisory board of Loan Officer's Legal Alert.