



AMERICAN BANKER
NEW YORK, NY

D. 24,834

IN 12 1990

Liability Lawyers Call Fleet Ruling Dubious

By STEPHEN KLEEGER

A controversial federal appeals court decision last month that heightened bankers' fears of environmental liability claims is unlikely to hold up on further appeal, according to some environmental liability lawyers.

"The decision was an abomination," said Edward F. Mannino, partner in Baskin Flaherty Elliott & Mannino, Philadelphia, and author of "Lender Liability and Banking Litigation."

If the court's decision is upheld, Mr. Mannino and other lawyers said, current proposals by Rep. John LaFalce, D-N.Y., and Sen. Jake Garn, R-Utah, to ease lender liability may be obsolete even before they are acted on. Their bills focus on lender liability in a foreclosure. But the decision makes a lender's actions before foreclosure the more important issue.

Misinterpretation Alleged

Mr. Mannino said the opinion by two judges of the 11th U.S. Circuit Court of Appeals in Atlanta, in a case involving a subsidiary of Fleet/Norstar Financial Group, Providence, R.I., misinterpreted a provision in the so-called Superfund law, which gives lenders an exemption from liability.

"They took what was an exclusion from liability and held it as an alternative basis of liability," Mr. Mannino said.

Paul W.A. Courtnell of Gunster, Yoakley, Criser & Stewart, Miami, said he, too, is optimistic the court decision will be reversed. "It seems to go well beyond the plain language of the statute," he said.

'Participation' Is Key

Congress intended to exempt lenders that foreclose on real estate from liability, provided they did not participate in managing the property, Mr. Mannino said. The appeals judges held in the Fleet case that a lender could be held liable if it participates in management "to a degree indicating capacity to influence the corporation's treatment of hazardous waste."

Fleet/Norstar said it expects to petition the court today for a new hearing by a panel of all 10 circuit judges.

Current congressional efforts to clear up the confusion for banks appear to be stalled in committee despite heavy lobbying by banking groups.

Lawrence P. Schnapf, environmental specialist with Lord Day & Lord, Barrett Smith, New York, said Congress should look to a Pennsylvania law for language that distinguishes between financial and operational management. A Colorado law also could be helpful because it spells out what due diligence steps a lender can take before the loan to avoid a later claim. □