

# Ore. Lender Not Liable For Cleanup

BY CHRISTOPHER DAUER

The lending community was able to breathe a little easier recently when a circuit court in Oregon ruled that a lender should not be held liable for environmental cleanups on properties over which it exercises no management authority.

The 9th Circuit Court in Portland, Ore., has ruled that a lender "must exercise actual management authority before it can be

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## 9th Circuit Court Implicitly Rejects 11th Circuit Position

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held liable for action or inaction which results in the discharge of hazardous waste. Merely having the power to get involved in management, but failing to exercise it, is not enough."

The case involved the Port of St. Helens, a municipal corporation in Oregon empowered to issue revenue bonds to promote industrial development in the St. Helens, Oregon area.

The Port issued industrial development revenue bonds and pollution control revenue bonds to Bergsoe Metals, a Delaware corporation formed in 1978 for the purpose of conducting a lead recycling operation.

The East Asiatic Co. Ltd., the East Asiatic Co. Inc., and Heidelberg Eastern Inc. were owners of Bergsoe's stock.

The Bergsoe recycling plant went into bankruptcy in 1986, and the Oregon Department of Environmental Quality determined that various hazardous substances had contaminated the plant site.

The United States Bank of Oregon, which had purchased the bonds, sued Bergsoe's stockholders for the cleanup costs. The stockholders, in turn, sued the Port.

"Certainly, it's a favorable decision for lenders," said Jeffrey M. Batchelor, attorney for the Port of St. Helens.

Mr. Batchelor—of the Portland, Ore., law firm Spears, Lubersky, Bledsoe, Anderson, Young & Hilliard—did, however, question how influential the decision will be.

"The facts of the case were exceedingly strong," he said. "Port had absolutely no part in management of the facility."

But Lucy Isaki, attorney for East Asiatic Co. Inc., called the court's decision "curious."

Ms. Isaki, of the Seattle law firm of Bogle & Gates, pointed out that Port was the title holder for the property, "and one would think the title holder would have authority in this area for a cleanup."

Lawrence Schnapf, an environmental attorney at Lord Day & Lord in New York City, agreed that the decision was a good one for lenders.

"The judge is obviously familiar with how lending is handled in the marketplace," said Mr. Schnapf.

"The gasp you hear is from lenders, developers, insurance executives and

even real estate liquidators...breathing a bit more easily," he said.

In rejecting a claim of liability against the now defunct metal recycling plant, the 9th Circuit U.S. Court of Appeals implicitly rejected the position taken by the U.S. Court of Appeals for the 11th Circuit in Atlanta.

In June, the 11th Circuit court stunned many observers by ruling that Fleet Factors, a financing company in Providence, R.I., could be held liable for cleanup costs if "its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose."

The ruling "certainly indicates that the 9th circuit takes a different perspective than the 11th circuit," said Douglas Good, who represented Fleet. "I'm happy to see it," he added, "and I'm looking at it very closely."

Mr. Good maintained that the "legal facts" of the case are very similar, and the contradiction of the two decisions might be enough to warrant Supreme Court review. "Right now it's the only game in town," he said.

However, Thomas Greco, associate general counsel for the American Banking Association in Washington, D.C., maintained that while the

Bergsoe decision "is better than Fleet, it points out the problem of deciphering the language in Superfund."

He explained that while it was proper for the 9th circuit to stick to the facts of the case, its unwillingness to go further leaves the issue confused.

The Bergsoe decision is "certainly helpful," said Mr. Greco, "but it doesn't go far enough to solve any problems...or relieve any confusion in environmental liability." ◇