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Legal Corner by Jay Goldstein

New Lender and Fiduciary Protection Aids Brownfield Redevelopment

CERCLA (Conprehensive Environmental Response, Compensation and Liability Act)and the Washington state counterpart MTCA (Model Toxics Control Act) have long imposed far reaching environmental cleanup liability on any and all persons directly or remotely related to contaminated property. The U.S. Congress, in order to promote redevelopment of "Brownfields", amended CERCLA in 1996 to provide new protection for lenders and fiduciaries. The amendment applies to any claim not finally resolved prior to enactment (September 30, 1996). The Washington state legislature is also considering recommendations to enact similar amendments to the MCTA.

Defenses listed in CERCLA are exclusive and narrowly construed. The most common defense lenders and fiduciaries traditionally invoked was the "innocent owner" defense. 42 USCA 9607(b)(3). However, this defense provided unpredictable protection at best. The largest obstacle to overcome is the first element requiring the release to be caused solely by a third party other than an agent, employee or one whose act or omission occurs in connection with a contractual relationship with the defendant.

It has generally been held that a "contractual relationship" is established by any instrument transferring title or possession, so that any owner, mortgage holder, subsequent purchaser or beneficiary could be held liable. This broad reading or contractual relationship has stifled redevelopment of "Brownfields" that have potential worth beyond the environmental cleanup costs.

If the court found a contractual relationship, the defendant could still avoid liability if he can establish that the facility was acquired after the disposal or placement of the waste and the defendant did not know or had no reason to know of the waste. 42 USCA 9601(35). Usually, however, this exemption is equally unhelpful because a redevelopment lender generally knows of the waste.

The new federal amendments specifically provide an exclusion from the definition of owner or operator for "lenders not participants in management" who hold security interests in property. Thus, a lender may foreclose on property and will have no liability as long as it seeks to divest itself of the property on "commercially reasonable terms, taking into account market conditions and legal and regulatory requirements." Washington's counterpart may be somewhat more narrow in that it provides for disposition of the property within five years to avoid a presumption of "owner" status.

However, the defense will still be construed narrowly. A lender may still be liable if it exercises managerial authority, takes control over environmental compliance, or provides for disposal of hazardous waste. The amendments, similar to EPA lender liability protection, specifies the actions a lender may take without incurring liability.

Further, the amendments provide protection from personal liability to fiduciaries, which is defined very broadly. A fiduciary's liability will not exceed the assets held in a fiduciary capacity. A fiduciary is also allowed to administer trust assets that were contaminated prior to the fiduciary relationship without incurring liability.

However, a fiduciary can still become liable if its negligence caused or contributed to the release of waste or if the fiduciary who is also a beneficiary of the trust receives more than

normal fiduciary compensation. Moreover, if the trust is established primarily to carry on a trade or business for profit or with the "objective purpose" of avoiding liability under CERCLA, then a fiduciary will not be protected. Washington does not yet have a counterpart to this fiduciary protection.