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LIABILITY FOR TOXIC WASTE CLEAN-UP

— by Neil E. Harl*

A late 1994 U.S. District Court case in California[1] has raised a serious question about the liability of executors, administrators and other fiduciaries for the costs of toxic waste clean-up while the fiduciary had responsibility for the property in question. The potential liability of secured lenders for toxic waste clean-up has been a matter of concern for several years,[2] but the liability of fiduciaries has only recently been raised and litigated.[3]

Castlerock Estates

In the California case, *Castlerock Estates, Inc. v. Estate of Markham*,[4] the environmental contamination was caused by cattle dipping on a ranch over a lengthy period. Apparently, the chemical dip spilled and contaminated a 12-acre tract on the ranch.

The action was brought by the current owner of the ranch, Castlerock Estates, Inc., in seeking to recover the clean-up costs from Wells Fargo Bank. Wells Fargo had acquired Crocker Bank, which had served as conservator (from 1969 to 1977) and then as executor (from 1977 to 1979) for one of the prior owners of the ranch who was disabled by illness.[5] The case was before the court on a motion for summary judgment by Wells Fargo Bank.[6]

Wells Fargo Bank argued that it had never been an owner or operator of the ranch and, therefore, should not be liable under CERCLA (the Comprehensive Environmental Response, Compensation, and Liability Act or Super Fund).[7] There was evidence that the cattle dipping ended between 1959 and 1964 but other evidence indicated that the dipping continued into the 1970s.[8] In any event, the current owner of the ranch was obligated to pay the clean-up costs under CERCLA.[9]

The court noted that, to establish liability under CERCLA, it was necessary for the plaintiffs to show — (1) that the defendants either owned or operated the property and (2) that the defendants owned or operated the property during the period in which the contamination occurred.[10] The court indicated that it would be necessary to hold a trial as to the question of when the dipping ceased in light of the fact that there was a conflict in testimony on that point.

As to whether a conservator or executor can be held liable as an owner under CERCLA, the court noted that bare legal title by the fiduciary would not be sufficient for liability but if other "indicia of ownership" was held by the fiduciary, liability could attach.[11] The court indicated that the additional "indicia of ownership" could come from involvement in leasing the ranch (which was the case for a three-year period),[12] from the granting of additional powers to the fiduciary,[13] or participation in the operation of the ranch.[14] The court concluded that adequate evidence had been offered to raise issues as to the fiduciary's liability.

The court also addressed the question of whether the fiduciary's liability should be limited to the available estate or whether the fiduciary would be personally liable.[15] The court concluded that it could not decide that issue on the basis of the facts before it.

City of Phoenix

A 1993 case, *City of Phoenix v. Garbage Services Co.*,[16] had involved the question of whether the City of Phoenix could recover from the trustee of a trust owning a landfill the costs in cleaning up a contaminated site.

The court determined that the trustee was not liable as an operator of the landfill under CERCLA but was an "owner" for purposes of liability under CERCLA even though only holding bare legal title.[17]

Section 17 of CERCLA imposes liability on ". . . the owner and operator of a vessel or facility . . ." for the costs of clean-up.[18] The courts have repeatedly noted that there is no test of culpability under CERCLA.[19]

Conclusion

Certainly anyone serving as executor, administrator, conservator or trustee, whether as a corporate fiduciary or as an individual, should conduct environmental inspections before agreeing to serve as fiduciary. Although the scope of the California case is not entirely clear at this point, the liability of fiduciaries will likely depend upon the extent of involvement of the fiduciary in management and operations involving the property. It is important to note that, in the California case, the bank as fiduciary was granted greater

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powers under the state's probate law than most fiduciaries would hold.[20]

FOOTNOTES

1 Castlerock Estates, Inc. v. Estate of Markham, 871 F. Supp. 360 (N.D. Calif. 1994).
2 E.g., United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) (absolute liability imposed on secured creditor).
3 City of Phoenix v. Garbage Services Co., 816 F. Supp. 564 (D. Ariz. 1993) (trustee); Castlerock Estates, Inc. v. Estate of Markham, 871 F. Supp. 360 (N.D. Calif. 1994) (conservator and executor).
4 *Id*.
5 871 F. Supp. 360, 362 (N.D. Calif. 1994).
6 *Id*. at 361.
7 42 U.S.C. § 9607 *et seq*.
8 871 F. Supp. 360, 363 (N.D. Calif. 1994).
9 *Id*.
10 *Id*.
11 *Id*.
12 *Id*. at 367.
13 *Id*.
14 *Id*. at 368.
15 *Id*. at 369.
16 816 F. Supp. 564 (D. Ariz. 1993).
17 *Id*. at 568.
18 42 U.S.C.A. § 9607.
19 See, e.g., Nurad, Inc. v. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir. 1992); United States v. Monsanto, 858 F. 2d 160, 168 (4th Cir. 1989), *cert. denied,* 490 U.S. 1106 (1989).
20 Castlerock Estates, Inc. v. Estate of Markham, 871 F. Supp. 360, 367 (N.D. Calif. 1994).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

EXEMPTIONS

DISABILITY BENEFITS. The debtor was involved in an automobile accident and received benefits from an accidental death and dismemberment insurance policy for the loss of an eye. The payment was received pre-petition and deposited in the debtor's bank account. The debtor claimed the proceeds as an exempt disability payment under 11 U.S.C. § 522(d)(10)(C). The court held that the proceeds were not eligible for the exemption because the exemption was limited to the debtor's right to receive a disability benefit and the debtor no longer had a right to receive the benefit since the benefit was already paid. ***In re* Chapman, 177 B.R. 161 (Bankr. D. Conn. 1994)**.

INVOLUNTARY PETITION. Under a divorce judgment, the debtor was required to pay the former spouse $500 per week in alimony and $500 per week as child support for the couple's three minor children. The former spouse filed an involuntary petition against the debtor on the former spouse's behalf and on behalf of the three children. The debtor argued that the petition was insufficient in that at least three creditors did not sign the petition. The court held that the three children each qualified as a claimant sufficient to support the filing of an involuntary petition. ***In re* Hopkins, 177 B.R. 1 (Bankr. D. Me. 1995)**.

SUBORDINATION. The debtor was a closely-held corporation which operated several egg and chick production facilities. When the debtor began experiencing financial difficulties, several shareholders who were also officers made loans or advances to the debtor. Only two of the loans were documented on the corporation's books and officially approved by the directors. The shareholders filed unsecured claims for the amounts loaned to the debtor. Another unsecured creditor objected to the claims and sought denial of the claims or at least subordination of the claims to the other unsecured claims. The creditor alleged that the loans were inequitable conduct in that the loans were made when the debtor was undercapitalized and allowed the debtor to favor some creditors while harming other creditors who continued to provide credit. The court held that the creditor failed to demonstrate that the debtor was undercapitalized when the advances were made or that the advances were other than bona fide attempts to keep the debtor in business. Absent any showing of inequitable conduct, the court held that the claims of the shareholders could not be subordinated to other unsecured creditors. ***In re* Colonial Poultry Farms, 177 B.R. 291 (Bankr. W.D. Mo. 1995)**.

CHAPTER 12-*ALM* § 13.03[8].*

TRUSTEE FEES. The Chapter 12 debtor's plan provided for direct payments of all secured claims, real estate tax claims and attorney's fees. Because unsecured creditors would receive payments only if the debtor had disposable income, the trustee would not receive any fee unless disposable income was earned by the debtor. The court held that the secured claims could be paid directly to the creditors without the trustee fee but that the real estate taxes and attorney's fees were to be paid through the trustee. The court left open the question of whether the trustee would receive adequate compensation under the plan and allowed the trustee to petition for additional fees. ***In re* Beard, 45 F.3d 113 (6th Cir. 1995), *aff'g*, 177 B.R. 74 (S.D. Ohio 1993), *aff'g*, 134 B.R. 239 (Bankr. S.D. Ohio 1991)**. **Note**: An article by Dr. Harl is scheduled to appear in the May 5, 1995 *Agricultural Law Digest* on payment of trustee's fees in Chapter 12 bankruptcy.

FEDERAL TAXATION-*ALM* § 13.03[7].*

CLAIMS. The debtors had filed a Chapter 11 case which was closed in November 1989. The IRS had filed a