



Trustee and Beneficiary

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by *Laurel Adcock*

The baby boomer generation and their offspring are the first generations of trustors, trustees, and beneficiaries to deal with the complex web of environmental liability issues in the bequest of “environmentally challenged” property, and many of the questions are in the evolving area of the interface between estates, trusts, and environmental law. This environmental liability can arise from statutes such as the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) or from traditional tort theories, such as negligence, nuisance, and trespass. In determining the potential liabilities of trustees and beneficiaries, there are many important questions to consider.

Liability for Contaminated Property

Did Any Business Owned by the Estate, Trust, or Trustor Dispose of Hazardous Wastes?

CERCLA imposes strict personal liability on current and prior owners and operators for response costs related to investigating and remediating hazardous substances. 42 USC §9601, *et seq.* Prior owners and operators are liable under CERCLA if disposal of a hazardous substance occurred during their ownership or operation of a facility.

Prior operators, including estates, trusts, or trustors, are liable under CERCLA if disposal of a hazardous substance occurred during the time that party owned or operated a facility. If a

deceased trustor was an owner or operator who was personally liable under CERCLA for cleanup of contaminated property, the liability may follow the trust property into the hands of trustees and beneficiaries under the “trust fund” theory. The trust fund theory holds that a beneficiary or trustee holds assets received from a trust estate in constructive trust to satisfy the estate’s environmental liabilities.

Does the Trust Own Contaminated Property in the Name of the Trustee?

A trustee who holds title to property is likely to be considered an “owner” for purposes of assessing liability under CERCLA. However, unlike other owners, a trustee’s liability for a release or threatened release of hazardous substances on trust property generally may not exceed the value of the trust estate. This exemption from unlimited personal liability does not apply if any of the following circumstances exist: 1) The trustee’s negligence caused or contributed to the contamination; 2) The trustee is independently liable; 3) The trustee acts outside of the fiduciary or beneficiary capacity and directly or indirectly benefits from a trust or fiduciary relationship; or 4) If the trustee is also a beneficiary and receives benefits that exceed customary or reasonable compensation and incidental benefits.

A trustee owner may also be liable for neg-

ligent acts that cause contamination-related damages to third parties during their period of ownership or for migration of contamination from property held by the trustee. Trustees have personal liability to third persons for torts committed in the course of the administration of a trust to the same extent that they would be liable if they held the property free of trust, regardless of whether the trustee committed the tort in violation of his duties as trustee, intentionally, negligently, or without fault.

Does the Trust Document Specify the Trustee's Duties with Respect to Contaminated Property?

Trust documents are increasingly being drafted with an eye towards potential environmental liabilities and may impose duties upon the trustee to take specific actions regarding contaminated property. CERCLA explicitly states that trustees do not subject themselves to unlimited personal liability by any of the following acts: 1) Undertaking cleanup; 2) Responding to agency orders; 3) Terminating the fiduciary relationship; 4) Incorporating environmental provisions; 5) Including indemnification of the trustee, into the trust; 6) Inspecting trust property; 7) Modifying the trust; 8) Administering trust property that was contaminated before the fiduciary relationship began; 9) Providing financial advice to beneficiaries; or 10) Declining to take any of the above actions.

Does the Trust Specify That Title to Contaminated Property must Pass to the Beneficiaries?

CERCLA provides a defense to beneficiaries who become owners of contaminated property by inheritance or bequest. In order to qualify for this defense, beneficiaries must show all of the following: 1) The release or threatened release of the hazardous substance was caused solely by the acts or omissions of a third party; 2) The property was acquired after the disposal or placement of the hazardous substances; 3) The property was acquired by inheritance or bequest; 4) The beneficiary has exercised due care with respect to the hazardous substances; 5) The beneficiary took precautions against foreseeable acts or omissions and consequences thereof from the party that in fact disposed of the hazardous

substances on site; and 6) The beneficiary took precautions against the foreseeable consequences of the acts or omissions of the third party that in fact disposed of the hazardous substances on site.

Are There Adequate Assets Available in the Trust to Cover Potential Environmental Liabilities?

If a trustee, in the course of the administration of a trust, incurs a liability in tort to third parties, these third parties may be allowed to reach the trust estate based on equitable theories, regardless of whether the trustee was personally at fault in incurring the liability. Third parties could also attempt to reach distributed assets under a reverse piercing theory or under fraudulent transfer laws. California and Federal Fraudulent Transfer laws provide remedies to creditors where debtors attempt to become "judgment proof" by fraudulently transferring interest in property to third parties without receiving "fair value." The reverse piercing theory allows creditors of a business entity to seek judgment satisfaction from shareholders. Reverse piercing has been expanded beyond the corporate realm and used to reach distributed assets in jurisdictions outside California.

Has a Trust Claims Procedure Been Initiated?

Completion of trust claims procedures generally cuts off trustee and beneficiary liability based solely on personal liability of the trustor one year following notification of the trust claims process. There is no limit on the period of time in which trustees can initiate the trust claims procedure after the death of the trustor. However, whether the CERCLA limitations periods preempt and override the one year statute of limitations for trust claims has not yet been decided in California, and decisions from other jurisdictions are split.

Do Any Insurance Policies Exist That Could Provide Coverage?

Several types of insurance policies, including some older general liability policies, provide coverage for environmental contamination. Such policies can significantly reduce the costs of environmental liability for contaminated property.

How Can Environmental Liability Be Limited Through Estate Planning?

The law regarding trustee and beneficiary liability continues to evolve, as contaminated property is increasingly passed across generations. It is essential for trustees and beneficiaries to consider all aspects of potential environmental liability in planning for the administration and distribution of assets, including maximizing insurance coverage, considering liability protection in entity selection for any businesses connected to the estate, and drafting wills and trusts to address appropriate action in the event that the estate's property or businesses become liable for the cleanup of contaminated property.



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