

Absolute Liability of a Trustee: Contaminated Soil on Trust Property Case

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Absolute liability imposed on a trustee in connection with contaminated soil on and under a specific parcel of land, identified as a trust property, can be categorized into three main types: (1) strict liability of the owner of the property, (2) liability for eliminating toxic substances/articles from the contaminated soil in response to claims from the owners of neighboring properties whose land had been also contaminated, and, (3) liability for implementing measures to restore contaminated soil to its original state in accordance with the Article 7 of the Soil Contamination Countermeasures Law. As such, it is often the case in Japan that trustees are held absolutely liable for environmental obligations for unlimited damages. These liabilities arise from ownership or control of the trust property in the trustees' fiduciary capacities, even if the trustees are not personally at fault.

In the US, by contrast, under the Uniform Trust Code (Section 1010-b) a trustee is not personally responsible for compensation greater than the value of the trust property itself, even though they can be held absolutely liable for damages arising in the course of administering the trust. Therefore, in the US, a case where a trustee seeks remedy from the beneficiary of the trust because its liability has exceeded the value of the trust property would not take place. The difference in the perception of absolute liability between Japan and the US derives from the difference in the interpretation of the scope and limits of absolute liability imposed on a trustee.

In researching these issues, I have examined the practicality of the trustee filing indemnity against the trust, the beneficiary, the settlor, the party responsible for the contamination, and the property/asset managers of the trust in order to partially or wholly reduce the trustee's burden of compensation imposed under the absolute liability concept. The result was not altogether promising. Despite costly and time-consuming negotiations with all parties concerned to define the scope of liabilities that each party is to bear, such liabilities cannot be easily identified. The likelihood is that the trustee, which appropriately executes its duty to administrate the trust in its fiduciary capacity, would have to personally bear all obligations.

There is implied consent between the settlor and the trustee that the property transferred to the trustee by the settlor shall be free from any defects once a trust contract has been executed between both parties. This is true even if the contract does not refer specifically to the possibility of the occurrence of damages arising from the trust property to the trustee. Should any defects detected to exist on the trust property, the settlor is then deemed responsible for having defaulted on the contract and has the responsibility to transfer the defect-free property to the trustee.

Under a limited liability trust, the right of a third party to claim damages caused by contaminated soil occurring prior to the creation of the trust can be interpreted as a trust claim. The trust claim limits the liability of the trustee. This interpretation is based on the subsections 8 and 9, Article 21-1, of the Amendments of the Trust Law.

Environmental issues have become one of the major topics in real estate transactions in Japan. At present, trustees can be held absolutely liable for damages arising from soil contamination despite of their pu-

dence and diligence to administer the trust in their fullest capacities. In this respect, it is important to further examine the consequences of absolute liability and to define the exact extent of the responsibilities for which the trustees can be held.

