
THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2166 Session of
1993

INTRODUCED BY HASAY, RYAN AND PERZEL, OCTOBER 13, 1993

REFERRED TO COMMITTEE ON BUSINESS AND ECONOMIC DEVELOPMENT,
OCTOBER 13, 1993

AN ACT

1 Providing a safe harbor from liability for certain lenders and
2 fiduciaries for environmental liability and remediation
3 relating to releases which were not caused by such entities.

4 The General Assembly of the Commonwealth of Pennsylvania
5 hereby enacts as follows:

6 Section 1. Short title.

7 This act shall be known and may be cited as the Lenders and
8 Fiduciaries Liability Protection Act.

9 Section 2. Declaration of policy.

10 The General Assembly finds and declares as follows:

11 (1) The risk of unjustified liability for response
12 actions under existing environmental laws has increased the
13 reluctance of lenders to lend and fiduciaries to act in such
14 fiduciary capacities.

15 (2) Uncertainty regarding environmental liability has
16 produced tight credit, unnecessary costs and the denial of
17 credit for certain types of borrowers.

18 (3) Lenders, guarantors, mortgage and title insurers,

1 secondary market players and fiduciaries are wary of
2 undertaking secured arrangements that involve property that
3 has or may easily incur any environmental contamination.

4 (4) Uncertainty as to environmental liability affects
5 compliance with environmental laws and efforts to clean up
6 the environment by making it more difficult for borrowers to
7 obtain loans to buy equipment to meet and comply with
8 environmental requirements.

9 Section 3. Definitions.

10 The following words and phrases when used in this act shall
11 have the meanings given to them in this section unless the
12 context clearly indicates otherwise:

13 "Borrower," "debtor" or "obligor." A person whose property
14 is encumbered by a security interest and includes a lessee under
15 a lease financing transaction.

16 "Department." The Department of Environmental Resources of
17 the Commonwealth.

18 "Environmental acts." Collectively and separately, the act
19 of June 22, 1937 (P.L.1987, No.394), known as The Clean Streams
20 Law, the act of January 8, 1960 (1959 P.L.2119, No.787), known
21 as the Air Pollution Control Act, the act of July 7, 1980
22 (P.L.380, No.97), known as the Solid Waste Management Act, the
23 act of July 13, 1988 (P.L.525, No.93), referred to as the
24 Infectious and Chemotherapeutic Waste Law, the act of October
25 18, 1988 (P.L.756, No.108), known as the Hazardous Sites Cleanup
26 Act, and the act of July 6, 1989 (P.L.169, No.32), known as the
27 Storage Tank and Spill Prevention Act.

28 "Fiduciary." Any person which is considered a fiduciary
29 under section 3(21) of the Employee Retirement Income Security
30 Act of 1974 (Public Law 93-406, 29 U.S.C. § 1001 et seq.) or who

1 is acting as trustee, executor, administrator, custodian,
2 guardian of estates, conservator, committee of estates of
3 disabled persons, personal representative, receiver, agent,
4 nominee, registrar of stocks and bonds, assignee or in any other
5 capacity for the benefit of another person.

6 "Guarantor." The term includes guarantors and sureties of
7 security interests, securities and other obligations, issuers of
8 letters of credit and other credit enhancements, title insurers
9 and entities which directly or indirectly acquire indicia of
10 ownership in the course of protecting a security interest or
11 acting as such guarantors, sureties, issuers of letters of
12 credit or other credit enhancements or title insurers. The term
13 includes guaranties, surety bonds, title insurance policies,
14 letters of credit and other credit enhancements, and other
15 agreements with a guarantor relating to the obligations
16 described in this definition. The term directly or indirectly
17 includes any interest in property, security interest, indicia of
18 ownership title or right to title held or acquired by a
19 fiduciary or similar entity for the benefit of a holder of a
20 security interest.

21 "Hazardous substance." Any element, compound or material
22 which is subject to regulation under the laws of this
23 Commonwealth and the environmental acts, including, but not
24 limited to, those defined as a "hazardous substance" under the
25 act of October 18, 1988 (P.L.756, No.108), known as the
26 Hazardous Sites Cleanup Act, or defined as "air pollution" under
27 the act of January 8, 1960 (1959 P.L.2119, No.787), known as the
28 Air Pollution Control Act, or defined as "pollution," "water
29 pollution" or "condition" under the act of June 22, 1937
30 (P.L.1987, No.394), known as The Clean Streams Law, or defined

1 as "hazardous waste," "residual waste" or "municipal waste"
2 under the act of July 7, 1980 (P.L.380, No.97), known as the
3 Solid Waste Management Act, or "regulated substance" under the
4 act of July 6, 1989 (P.L.169, No.32), known as the Storage Tank
5 and Spill Prevention Act, or "infectious waste,"
6 "chemotherapeutic waste" or "waste" under the act of July 13,
7 1988 (P.L.525, No.93), referred to as the Infectious and
8 Chemotherapeutic Waste Law.

9 "Holder of a security interest." A person who holds indicia
10 of ownership in property primarily to protect a security
11 interest. The term includes the following:

12 (1) The initial holder, such as a loan originator, and
13 any subsequent holder, such as a successor-in-interest or
14 subsequent purchaser of the security interest on the
15 secondary market.

16 (2) Guarantor, least financier or any successor where
17 the lessor does not initially select or ordinarily control
18 the daily operation or maintenance of the property.

19 (3) Any person who holds indicia or ownership primarily
20 to protect a security interest.

21 (4) A receiver or other person who acts on behalf or for
22 the benefit of a holder of a security interest.

23 "Indicia of ownership." Any legal or equitable interest in
24 property acquired directly or indirectly:

25 (1) for the purpose of securing payment of a loan or
26 indebtedness, a right of reimbursement or subrogation under a
27 guaranty or the performance of another obligation;

28 (2) evidencing ownership under a least financing
29 transaction where the lessor does not initially select or
30 ordinarily control the daily operation or maintenance of the

1 property; or

2 (3) in the course of creating or protecting a security
3 interest or right of reimbursement or subrogation under a
4 guaranty. The term includes evidence of interest in
5 mortgages, deeds of trust, liens, surety bonds, guaranties,
6 lease financing transactions where the lessor does not
7 initially select or ordinarily control the daily operation or
8 maintenance of the property, other forms of encumbrances
9 against property recognized under applicable law as vesting
10 the holder of the security interest with some indicia of
11 title, legal or equitable title obtained at or in lieu of
12 foreclosure and their equivalents. A person may, but is not
13 required to, hold title in property in order to hold indicia
14 of ownership in that property.

15 "Lender." Any person regulated or supervised by any Federal
16 or State regulatory agency and any of its affiliates or
17 subsidiaries, successors or assigns, and any Federal or State
18 banking or lending agency, including, but not limited to,
19 Resolution Trust Corporation, Federal Deposit Insurance
20 Corporation, Federal Reserve Bank, Board of Governors of the
21 Federal Reserve System, Federal Home Loan Bank, National Credit
22 Union Administrator Board, Office of the Comptroller of the
23 Currency, Office of Thrift Supervision, Farm Credit
24 Administration and Small Business Administration. The term also
25 includes any redevelopment or industrial development agency,
26 area loan organization, or industrial and commercial development
27 authority organized pursuant to any act or law, including the
28 following acts: the act of May 24, 1945 (P.L.991, No.385), known
29 as the Urban Redevelopment Law, the act of May 17, 1956 (1955
30 P.L.1609, No.537), known as the Pennsylvania Industrial

1 Development Authority Act, the act of August 23, 1967 (P.L.251,
2 No.102), known as the Industrial and Commercial Development
3 Authority Law, and the act of July 2, 1984 (P.L.545, No.109),
4 known as the Capital Loan Fund Act.

5 "Participating in the management of property." Actual
6 participation in the management or operational affairs of the
7 property by the holder. The term does not include the right to
8 approve or disapprove a borrower's decisions, the mere capacity
9 to influence, the ability to influence, or the unexercised right
10 to control facility operations. A holder is participating in
11 management while the borrower is still in possession of the
12 property encumbered by the security interest, only if the holder
13 either:

14 (1) exercises decision making control over the
15 borrower's environmental compliance such that the holder has
16 undertaken responsibility for the borrower's hazardous
17 substance, solid waste handling or disposal practices; or

18 (2) exercises control at a level comparable to that of a
19 manager of the borrower's enterprise such that the holder has
20 assumed or manifested responsibility for the overall
21 management of the enterprise encompassing the day-to-day
22 decision making of the enterprise with respect to:

23 (i) environmental compliance; and

24 (ii) all or substantially all of the operational, as
25 opposed to financial or administrative, aspects of the
26 enterprise other than environmental compliance.

27 Operational aspects of the enterprise include functions
28 such as that of facility or plant manager, operations
29 manager, chief operating officer or chief executive
30 officer. Financial or administrative aspects include

1 functions such as that of credit manager, personnel
2 manager, controller, chief financial officer or similar
3 functions.

4 "Person." An individual, corporation, business trust, estate
5 trust, partnership, association, governmental, administrative or
6 regulatory agency, institution or any other type of legal entity
7 whatsoever.

8 "Primarily to protect a security interest." The term
9 includes indicia of ownership acquired as a consequence of
10 having or exercising rights as a holder of a security interest
11 where the same is necessary or appropriate to protect the
12 security interest, to provide for compliance with laws, to
13 preserve the value of the property or benefits therefrom or to
14 recover a loan, indebtedness or right of reimbursement or
15 subrogation under a guaranty or to redress any other obligation
16 secured by such interest or to recover property subject to a
17 finance lease. A holder of a security interest who directly or
18 indirectly acquires full title or a right to title or possession
19 of such property upon default under the security interest or at,
20 or in lieu of, foreclosure, or, in the case of a finance lease,
21 upon expiration, cancellation or termination of such lease,
22 shall continue to hold indicia of ownership primarily to protect
23 a security interest as long as such holder is diligently
24 proceeding to sell or convey title or the right to title or to
25 release such property on commercially reasonable terms at the
26 earliest possible time, while preserving the property in the
27 interim.

28 "Property." All types of real and personal property and
29 includes, among others, sites, facilities, tanks, equipment,
30 vessels, vehicles and other modes of transportation whether by

1 air, land or sea.

2 "Release." Any spill, rupture, emission, discharge, other
3 action, occurrence or any other term operative under the
4 environmental acts or the laws of this Commonwealth.

5 "Response action." An action, including, but not limited to,
6 an action under the environmental acts or the laws of this
7 Commonwealth, such as testing, inspections, sampling,
8 installations, corrective action, removals, closure, response
9 costs, assessments, claims, damages, actions, fines and
10 penalties.

11 "Security interest." An interest in property created or
12 established for the purpose of securing a loan, right of
13 reimbursement or subrogation under a guaranty, or other
14 obligation or constituting a lease financing transaction. The
15 term includes mortgages, deeds of trust, liens, lease financing
16 transactions in which the lessor does not initially select or
17 ordinarily control the daily operation or maintenance of the
18 property, trust receipt transactions and their equivalents.
19 Security interest may also arise from transactions such as sales
20 and leasebacks, conditional sales, installment sales, certain
21 assignments, factoring agreements, accounts receivable,
22 financing arrangements and consignments, if the transaction
23 creates or established an interest in property for the purpose
24 of securing a loan, right of reimbursement or subrogation under
25 a guaranty or other obligation. The term also includes a
26 confession of judgment or money judgment whereby a lender
27 commences an execution on such judgments with a writ of
28 execution and thereby causing property to be levied and
29 attached.

30 Section 4. Limitation of environmental liability.

1 (a) Liability.--A lender shall not be liable under the
2 environmental acts or otherwise to the department or to any
3 other person by virtue of the fact that such lender, without
4 participating in the management of property, holds indicia of
5 ownership primarily to protect his security interest in the
6 property.

7 (b) Participating in the management of property.--Actions
8 taken by a holder of a security interest to:

9 (1) foreclose, sell, liquidate, release or otherwise
10 divest or cause the transfer of property subject to a
11 security interest;

12 (2) preserve or protect the value of such property or
13 otherwise to exercise rights of a holder of a security
14 interest;

15 (3) assist the borrower, debtor, obligor or lessee in
16 winding down its operations or activities related to such
17 property;

18 (4) abandon or release the property prior to foreclosure
19 or its equivalents; or

20 (5) require or conduct response action on or relating to
21 the property;

22 shall not be deemed participating in the management of property
23 within the meaning of this act or within the environmental acts
24 amended. Completion of an environmental inspection or evaluation
25 consistent with good commercial or customary practice by or for
26 the use of a holder of a security interest is probative evidence
27 that a holder of a security interest is acting to preserve and
28 protect the property during the time the holder of a security
29 interest may have possession or control of such property, except
30 that this act does not require a holder of a security interest

1 to conduct nor does it require any environmental inspection or
2 evaluation to qualify for this exemption.

3 (c) Release liability.--A holder of a security interest who,
4 in taking action referred to in subsection (b) respecting
5 property, actively and directly causes or exacerbates a release
6 of a hazardous substance for the department determines that
7 response action is necessary shall be liable for the cost of
8 such response action to the extent only that the release is
9 directly attributable to such holder's activities, except that
10 such a holder shall not be liable for response action costs
11 arising from a release which commences before and continues
12 after such holder takes any action referred to in subsection
13 (b).

14 (d) Fiduciaries.--

15 (1) A fiduciary shall not be liable under the
16 environmental acts or otherwise to the department or to any
17 other person by virtue of the fact that such fiduciary
18 acquires ownership or control of property without having
19 owned, operated or participated in the management of that
20 property prior to assuming ownership or control as fiduciary,
21 other than for the benefit of a holder of a security interest
22 shall not be an owner or operator under this act.

23 (2) A fiduciary who willfully, knowingly or recklessly
24 causes, in a direct and active manner, a release of a
25 hazardous substance for which the department determines that
26 response action is necessary shall be liable for the cost of
27 such response action to the extent only that release is
28 directly attributable to the fiduciary's activities, except
29 that such a fiduciary shall not be liable for response action
30 costs arising from a release which commences before and

continues after such fiduciary acquires ownership or control of the property.

(3) Nothing in this subsection shall prevent claims against the assets that constitute the estate held by the fiduciary or the filing of actions against the fiduciary in its representative capacity.

Section 5. Savings clause.

Nothing in this act shall affect the rights, immunities or other defenses that are available under other applicable law to a lender or fiduciary. Nothing in this act shall be construed to create any liability for, or create a private right of action against, any lender or fiduciary.

Section 6. Apportionment of liability.

Notwithstanding anything to the contrary, if two or more persons acting independently cause distinct harm or a single harm for which there is a reasonable basis for division according to the contribution of each, a lender or fiduciary shall be subject to liability only for the portion of the total liability that is directly attributable to the lender or fiduciary. The burden of proof shall be upon the person seeking to have a lender or fiduciary liable for a response action.

Section 7. Repeals.

To the extent that the environmental acts or laws and regulations of this Commonwealth are inconsistent with this act, such laws are deemed repealed or amended in part as the case may be, so that the provisions of this act may be enforced.

Section 8. Applicability.

The provisions of this act shall apply to the following:

(1) All indicia of ownership acquired prior to the date of enactment that are held primarily to protect a security

1 interest in the property.

2 (2) Each fiduciary with respect to any property acquired
3 by the fiduciary prior to the date of enactment.

4 (3) All administrative actions, actions, suits or claims
5 against lenders or fiduciaries not yet finally resolved by
6 the department or any court or administrative hearing board
7 having any action, suit or claim pending before it or an
8 appeal from a lower court regardless of when the release or
9 interest in the property occurred.

10 Section 9. Effective date.

11 This act shall take effect immediately.